

JERSEY / JUDGMENT

JT (Jersey) Limited -v- Wood

[2016] JCA 183 (10 October 2016)

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Court of Appeal 10 October 2016 Before : Jonathan Crow, Q. C., President George Bompas, Q. C.; and David Perry, Q. C. Between JT (Jersey) Limited Appellant And Mark Wood Respondent Advocate E. B. Drummond for the Appellant. Advocate H. J. Heath for the Respondent.

judgment

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Introduction

This is the judgment of the Court. 1. The Respondent, Mr Mark Wood, started working for the Appellant, JT (Jersey) Ltd ("JT"), in 1979. Over the following years he held various different positions there. Then, on 15 November 2013, his employment was terminated by JT with immediate effect by a letter of that date written by Ms Jilly Tostevin, JT's Head of HR Operations. The letter was headed "Re: Notice of Termination of Employment on the Grounds of Capability". It did not give any further explanation of the reason for Mr Wood's dismissal. However, the reference to "capability" was intended to be a reference to what could be, as a matter of the Employment (Jersey) Law (the "2003 Law"), a reason supporting a fair dismissal, namely a reason relating to Mr Wood's "capability ... for performing work of the kind which he was employed by [JT] to do" (see Article 64(1) and 64(2)(a) in Part 7 of the 2003 Law). 2. Mr Wood, whose job title at the time of his dismissal was "Transmission and Access Engineer", then made a claim before the Jersey Employment and Discrimination Tribunal: his case was that he was a transmission engineer, that JT's requirement for employees to carry on the type of work done by transmission engineers had been and was expected to continue to be diminishing, and that in truth his dismissal had been for redundancy and was unfair so that he was entitled to a remedy under Part 7 of the 2003 Law for unfair dismissal. 3. The Tribunal, in a judgment given on 23 February 2015 following a hearing over three days in September and November 2014, rejected Mr Wood's claim and found Mr Wood's dismissal not to have been unfair, the reason for his dismissal being found to be one relating to his capability. 4. Mr Wood appealed to the Royal Court. The Royal Court (the Bailiff, Mr W. J. Bailhache, QC) heard his appeal in August 2015, this being (by Article 94(1) of the 2003 Law) an appeal on a question of law only. In its judgment handed down on 26 April 2016 (Wood-v-JT (Jersey) Limited

[2016] JRC 089B) the Royal Court allowed Mr Wood's appeal and remitted his case to the Tribunal for a rehearing. The Royal Court found there to have been three of errors of law in the Tribunal's

judgment.

- (i) First, it was held that the Tribunal had misdirected itself on what constituted redundancy.
- (ii) Second, it was held that the Tribunal had misapplied the principles in *Polkey v AE Dayton Services Ltd*

[1988] AC 344 which would be relevant where performance procedures are in train in relation to an employee when the employee is dismissed for capability. (iii) Third, the Royal Court found the Tribunal's decision to have been "perverse"; that is to say, a decision which no reasonable tribunal, directing itself properly on the law, could have reached. 5. A ground of appeal before the Royal Court which it rejected concerned the adequacy of the Tribunal's reasons. In rejecting that ground of appeal the Royal Court concluded as follows: "In my judgment, the Tribunal in the present case gave a perfectly adequate explanation of its reasoning. I did not find it difficult to follow, even if from time to time the contentions of one of the parties were elided with the views of the Tribunal. ... As indicated later, I think it would have been helpful if other matters were addressed." 6. Mr Wood has not sought to reopen that ground of appeal, and we need say no more about it, save to draw attention to the last sentence just quoted. It is not easy to discern from the Tribunal's judgment how much of each party's factual case was accepted, or why. Essentially the material part of the judgment was brief and conclusory. This left the Royal Court, and on the appeal to us this Court, in a position where it is sometimes difficult to see why the Tribunal considered certain conclusions to be appropriate. 7. In this appeal we are called upon to review the decision of the Royal Court, there being eight grounds advanced by JT in support of its contention that the Royal Court's decision should be reversed. The first five are directed at the Royal Court's conclusions concerning redundancy; the sixth challenges the Royal Court's conclusions in relation to the principles in the *Polkey* case; the final two are concerned with the Royal Court's conclusions as to perversity. 8. This appeal therefore requires us to decide whether or not the Royal Court was correct in its identification of errors of law made by the Tribunal. However, as one of the errors of law identified by the Royal Court was that the Tribunal's judgment was perverse, we have also to consider for ourselves the evidence which was before the Tribunal to see whether it could within reason have supported the Tribunal's judgment on those issues on which the Royal Court held that it could not. 9. The evidence before the Tribunal, it is convenient to mention, included various contemporaneous documents, several of which we refer to in this judgment. There were witness statements made by Mr Wood and four witnesses called by him, namely Mr Timothy Langlois (a representative of Mr Wood's trade union) and Mr Bruce Clark, Mr Sean Brennan and Mr Gary O'Brien (all JT engineers). All these individuals also gave oral evidence. JT had witness statements from Ms Tostevin, Mr Marcus Irwin (at the material time Head of

Design and Innovation/Chief Engineer and Acting Chief Operations & Technical Officer), and Mr Richard Summerfield (JT's Group HR Director). Ms Tostevin and Mr Irwin gave oral evidence. Mr Summerfield's unsigned witness statement was admitted as his evidence without his being cross-examined. 10. In relation to Mr Wood's dismissal two individuals played a central role. They were his immediate line manager, Mr Darren Bray, and Mr Bray's immediate superior, Mr Ronald Van de Ven. They were not called by JT to give evidence. This was a fact commented upon by the Royal Court in its judgment. 11.

Assuming that we dismiss JT's appeal there is a further question. The Order made by the Royal Court and now under appeal has provided, so far as material, simply for the "the matter" to be "remitted to the Tribunal for reconsideration". However the Royal Court's judgment supplemented this by inviting the Tribunal to consider the following questions, namely:- "(i) Whether the nature of the job of an IP engineer was sufficiently different from that of a transmission engineer in the skills required and/or in the terms and conditions of work that it would be unreasonable for the Respondent to require the Appellant to retrain from the latter to the former. (ii) Whether, having regard to (i) above, all evidence adduced and this judgment, whether the Appellant was unfairly dismissed because the Respondent did not have reasonable grounds to consider the Appellant's employment should be terminated on capability grounds. (iii) Whether, even if the answer to sub-paragraph (ii) above is answered affirmatively, the Appellant's employment, on a proper analysis of the evidence and having regard to the answer to sub-paragraph (i) above and this judgment, was terminated on the ground of redundancy. (iv) Whether having regard to the answers to the questions raised by sub-paragraphs (i) to (iii) above, the contents of this judgment generally and the true application of the Polkey test, the Appellant was unfairly dismissed.

- (v) If the question in sub-paragraph (iv) is answered affirmatively, the amount of compensation payable to the Appellant having regard to the basis on which the unfair dismissal has been found to be established." 12. This has given rise to an application on Mr Wood's behalf to vary in one respect the Order made by the Royal Court. On his behalf, Advocate Heath submitted in written contentions that this Court should determine that Mr Wood was made redundant. In her oral address to us, however, she modified this and submitted that this Court should determine that when he was dismissed there was a "redundancy situation" within JT as regards the type of work done by transmission engineers (that is, a state of affairs meeting the description in paragraph (b) of Article 2(1) of the 2003 Law, discussed below). 13. In recent years, with the rapid evolution of technology, the landscape for communications and telecommunications has been transformed. JT's business is as a provider of communications services. As to this the Tribunal recorded Mr Wood's case as being as follows:- "9. The Applicant had been employed by the Respondent since 1979 and as a Transmission Engineer from 2001 until his dismissal in 2013. That role had initially been entitled Core Network Engineer, then Transmission and Access Engineer before Transmission Engineer. The role involved managing the operation and maintenance of the transmission networks and services used to transfer voice data, SMS data and internet data.

On a day-to-day basis a Transmission Engineer would work on the Respondent's submarine cables, microwave systems, SDH Transmission Networks and the digital phone network, all of which have been updated over recent years by the introduction of Internet Protocol Technology ("IP Technology").

10. It was the Applicant's position that in time all of the Respondent's Transmission Technology would be replaced by IP Technology, with legacy equipment being recovered and sold for scrap. As a consequence Transmission Engineers would no longer be required as the network would rely only on IP Engineers. The Applicant's position had therefore been rendered redundant." 14. The Tribunal also recorded that JT "accepted that IP Technology was a disruptive innovation in that it had the effect of displacing an earlier technology...". But, so the Tribunal recorded, JT's case was that this disruption and displacement " did not have the effect of rendering [Mr Wood's] position redundant" , that it was for Mr Wood to prove otherwise, and that JT " had only to show that it had reasonable grounds to support its honest belief in the incapability of" Mr Wood. 15. The importance of a determination that redundancy was the reason for Mr Wood's dismissal is that Mr Wood may be entitled to a sum in the region of £74,000 by way of a contractual claim for redundancy (not a claim made before the Tribunal or in these proceedings, but contemplated in possible future proceedings before the Royal Court). If however, he was dismissed unfairly, whatever the reason for his dismissal, but could not establish a contractual claim for wrongful dismissal, he would only be entitled to his compensation for unfair dismissal under Part 7 of the 2003 Law, this being we are told just over £21,000. 16. JT was alive to this consideration when dismissing Mr Wood. JT clearly contemplated that dismissing him unfairly, and being ordered to pay him compensation for having done so, was an acceptable outcome provided that his dismissal was not found to be for redundancy. The evidence of Mr Summerfield, JT's Group HR Director who (as he says in his witness statement) took the final decision, was that he was willing for a severance payment of £20,000 to be offered to Mr Wood (indeed for "his full unfair dismissal compensation monies (just over £21,000) [to be] granted"), but also had "resolved to terminate his employment anyway, and pay any compensation arising out of any subsequent litigation regarding his dismissal for incapability". 17. JT opposes the making of any such variation to the Royal Court's Order, assuming that its appeal has been rejected. Rather its position is that the directions made in the Judgment of the Royal Court which we have quoted above were incorrect and that any order remitting the case to the Tribunal should leave undisturbed the finding that the reason for Mr Wood's dismissal had been shown by JT, for the purposes of Article 64(1) of the 2003 Law, to be one related to capability and not that he was redundant. 18. Another application made by Mr Wood is for the Order made by the Royal Court to be varied by including a direction for the hearing of Mr Wood's remitted case to be before a tribunal made up of a completely new panel. As matters stand the hearing is fixed for a date in November 2016, there having been between the making of the Royal Court's Order and the present time further steps taken before the originally constituted Tribunal in preparation for the hearing. But, as we have been told, one member has recently retired, so that inevitably there must be some change to the panel.

This, it is argued for Mr Wood, should lead this Court to interfere with the Royal Court's Order. Applicable law 19. It is convenient at this stage to summarise the relevant law which the Tribunal had to apply in considering Mr Wood's application, and also the law applicable to the appeal to the Royal Court. 20. The starting point is the 2003 Law. The provisions of the 2003 Law relevant for the present application were based upon corresponding ones in the Employment Rights Act 1996 applicable in the United Kingdom. As a result decisions of courts of the UK on those corresponding provisions provide guidance when it falls to courts of the Island to interpret and apply the 2003 Law. Appeal from the Tribunal 21. Mr Wood's right of appeal from the decision of the Tribunal arose under Article 94 of the 2003 Law, a provision which gives a right of appeal only on a question of law. The description of what is a question of law was given by the Royal Court (Sir Michael Birt, then Deputy Bailiff) in *Voisin v Brown*

- [2007] JLR 141 by reference to a passage in Harvey on "Industrial Relations and Employment Law". This reads as follows:- "... the [Court] will have no power to interfere with a tribunal's decision unless it can be shown: (a) that the tribunal misdirected itself in law or misunderstood the law or misapplied the law; or (b) that there was no evidence to support a particular conclusion or finding of fact; or (c) that the decision was either perverse in that it was one which no reasonable tribunal, directing itself properly on the law, could have reached, or alternatively was one which was obviously wrong." 22. In *Voisin v Brown* it was left open for future consideration whether what is set out in paragraph (c) in the quoted text above is, in effect, two alternative requirements or only one requirement expressed in slightly different ways. However, in *Voisins Department Store Ltd v Soares*
- [2014] JRC 004 the Royal Court (Mr J Clyde-Smith, Commissioner) commented that this point concerning the precise scope and application of paragraph (c) above was settled by the judgment of the Royal Court (Sir Michael Birt, Bailiff, with Jurats) in *Luxicabs Ltd v Baal*
- [2011] JLR 208 : an appeal would lie, as an appeal on a question of law, on the ground in paragraph (c), only where the Tribunal's decision could be shown to be so unreasonable that no reasonable Tribunal could have made it. 23. In other words, the Royal Court has concluded that an appeal from the Tribunal does not lie as an appeal on a point of law where all that is said is that the decision of the Tribunal is obviously wrong unless it can also be said that the decision was perverse. That was the test which the Royal Court applied in the present case. 24. Before us there has been no challenge made to this high threshold. It is understandable that the threshold should be high, as an appeal to the Royal Court is not a rehearing of the case presented to the Tribunal (albeit without the benefit of hearing the live evidence as it was heard by the Tribunal), and further the Tribunal will include non-legal members appointed for their practical experience and judgment. The Tribunal is the fact-finding industrial jury. Redundancy 25. Article 2 of the 2003 Law makes provision in the following terms as regards redundancy:- (1) For the purposes of this Law an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to - (a) the fact that his or her employer has

ceased or intends to cease- (i) to carry on the business for the purposes of which the employee was employed by the employer, or (ii) to carry on that business in the place where the employee was so employed; or (b) the fact that the requirements of that business - (i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish. (2) For the purposes of paragraph (1) the business of the employer together with the business or businesses of his or her associated employers shall be treated as one (unless either of the conditions specified in sub-paragraphs (a) and (b) of that paragraph would be satisfied without so treating them). (3) In paragraph (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason. (4) In paragraph (1) the reference to an employee who is dismissed shall be taken to refer to an employee who is dismissed by his or her employer in accordance with Article 62." 26. By paragraph (1) of Article 2 an employee's dismissal is to be taken, for the purposes of the 2003 Law, to "by reason of redundancy" where both of the two conditions in that paragraph are met. (i) First, there must be a relevant state of affairs; that is a state of affairs meeting the description in one or other of sub-paragraphs (a) and (b) in paragraph (1). These concern the employer's business and intentions, and the requirements of the employer's business for workers to carry out work of a particular kind. (ii) Second, the employee's dismissal must be wholly or mainly attributable to the relevant state of affairs. 27. Where the conditions are met, so that an employee's dismissal is taken to be "by reason of redundancy", the employee may be entitled to a redundancy payment: by Article 60A in Part 6A of the 2003 Act an employer is, subject to other provisions in that Part, to pay an employee a redundancy payment if the employer dismisses the employee "by reason of redundancy". 28. Article 2 does not in terms give any definition for the word " redundancy ", neither does it refer to a "redundancy situation". Often this last expression is used, as we have used it earlier in this judgment, as convenient short-hand for a state of affairs within one or other of sub-paragraphs (a) and

- (b) of Article 2(1). However in any case where there is a question whether for the purposes of the 2003 Law a dismissal is by reason of redundancy the Tribunal or Court should keep in mind all the words used in Article 2(1). 29. In the present case the words of sub-paragraph
- (b) of Article 2(1) are relevant: there was an issue before the Tribunal directed at the existence or otherwise of a " redundancy situation" (using that short-hand) within JT at the time of Mr Wood's dismissal. This concerned the question whether the work done by transmission engineers was of a particular kind distinct from the work done by IP engineers (as Mr Wood contended), or whether the work was the same albeit carried out with different methods (as JT contended). This question is referred to again a little later in his judgment. Unfair dismissal 30. Article 64 of the 2003 Law is contained in Part 7 of the 2003 Law. This Part is concerned with "Unfair Dismissal". In this Part, Chapter 1 (which includes Article 64) provides for the "right not to be unfairly dismissed" (the right given expressly by Article 61), while Chapter 2 is concerned with remedies. Article 64 itself is a section of Chapter 1 headed

"fairness". As appears, it provides various tests for a dismissal to be fair or unfair. 31. Article 64(1) is in the following terms:- "(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it shall be for the employer to show - (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within paragraph (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held." 32. For a dismissal not to be unfair the employer must show what in fact was the reason (or principal reason) for the dismissal, and also that that reason qualifies as a permissible one within Article 64(1)(b) of the 2003 Law. Further, the reason (or principal reason) for the purposes of Article 64(1) will be the considerations within the mind of the employer when deciding to dismiss the employee. As to this Advocate Drummond, on behalf of JT, directed our attention to the comment of Cairns LJ in *Abernethy v Mott, Hay and Anderson*

[1974] ICR 323 (CA) at 330:- "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee." 33. Therefore JT, to avoid a conclusion that Mr Wood's dismissal was unfair had to show that the facts believed and acted upon by it as its reason for dismissing the employee qualified as a permissible reason as identified in Article 64(1)(b). As the point was put by Mummery LJ in *Foley v Post Office*

[2000] ICR 1283 at 1290 when applying the test in that case:- "the reason for the dismissal [of the employee] related to his conduct ... i.e. unauthorised absence ... That was the reason for dismissal in the accepted sense that it was a set of facts known to the [employer], or a set of beliefs held by it, which caused it to dismiss [the employee]." 34. However, in the *Abernethy* case the point was also made by Lord Denning MR at 329 (and also by Cairns LJ at 330) that what matters is not labels but facts. In that case the employer, in giving its reason for the dismissal, labelled the reason "redundancy"; on the facts believed by the employer which informed the dismissal decision the actual reason for the dismissal was a different albeit permissible one, namely one relating to the employee's "capability". 35. This gives rise to a question of law. This is whether the employer can establish that he had a permissible reason for a dismissal within Article 64(1) if his beliefs on the basis of which he has dismissed the employee, although genuinely held, were nevertheless unreasonably held. We return to this below. 36. Further, what the quoted text from the *Abernethy* case does not help with in terms is the approach which the Tribunal should take where the dismissal decision is one made by a corporation. On normal principles of attribution in the case of corporations, it will usually be necessary to identify the individual (or individuals) within the corporation whose state of mind was relevant to the dismissal decision, and who can be taken to represent the state of mind of the corporation. 37. In the present case JT put forward Mr Summerfield as being the relevant individual; and it has been accepted on behalf of Mr Wood that what is material is what Mr Summerfield believed. It was, indeed, because JT was relying on Mr Summerfield as "the dismissing officer" that JT did not tender any evidence from Messrs Bray and Mr Van de Ven, their beliefs being treated as immaterial in establishing for the purposes of Article 64(1) the

reason or principal reason for Mr Wood's dismissal. 38. We have referred above to "capability" as one of the specific reasons referred to in Article 64(1)(b): this is provided for in Article 64(2)(a), and further expanded upon in Article 64(3). A further reason, in Article 64(2)(c), is that the employee was redundant. Article 64(2) provides as follows:- "(2) A reason shall fall within this paragraph if it - (a) relates to the capability or qualifications of the employee for performing work of the kind which the employee was employed by the employer to do; (b) relates to the conduct of the employee; (c) is that the employee was redundant; or (d) is that the employee could not continue to work in the position which the employee held without contravention, (either on the employee's part or on that of the employer) of a duty or restriction imposed by or under an enactment." 39. Article 64(2)(a) refers to two separate matters, "capability" and "qualifications", only the first of which has been relied upon by JT in the present case. Article 64(3), explains further sub-paragraph (a) of Article 64(2):- "(3) In paragraph 2(a) - (a) 'capability', in relation to an employee, means the employee's capability assessed by reference to skill, aptitude, health or any other physical or mental quality; and (b) 'qualifications', in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which the employee held. " 40. A matter extensively explored before the Tribunal concerned the qualifications which Mr Wood had for the job that he was doing and the qualifications which he did not have but might need. This issue was related to that which we referred to above in connection with Article 2(1)(b) of the 2003 Law. However we would stress that there has never been any case made by JT, whether before the Tribunal or before the Royal Court, that JT's actual reason for dismissing Mr Wood was that he did not have a relevant qualification within Article 64(3)(b) of the 2003 Law. Thus in the course of oral argument before the Royal Court Advocate Austin-Vautier for JT submitted that: "My learned friend has referred to locations, environments and tools, but actually if you look at the capability notes, five months worth of capability notes and the dismissal letter, they all refer to issues about capability that do not relate to qualification and experience. It is actually about aspects of Mr Wood's job description that he just was not coming up to speed with, which related to relationships, communication, team-building, being involved. He was dismissed not because technology was evolving." 41. We return to this point later, in view of a submission made to us by Advocate Drummond on behalf of JT. We also record that before us Advocate Drummond submitted that Advocate Austin-Vautier was mistaken in his submission when disclaiming evolving technology, and hence any failure or inability of Mr Wood to adapt, as a capability related reason for Mr Wood's dismissal. 42. The Tribunal in its judgment made the following observation, when explaining the law:- " There is an implied term in any contract of employment that the employee must adapt to changes in working methods - *Cresswell v Board of Inland Revenue* (1984) IRLR 190." 43. In *Cresswell v Board of Inland Revenue* it was held that tax officer employees of the Revenue whose job it was to maintain and provide PAYE codes, and who had been carrying out the necessary calculations manually and with pocket calculators and maintaining them on a physical card system, could be required to provide the codes by making into a computer entries of the data previously used for the manual

calculations, this data being held on the computer. The Judge (Walton J) considered that the employees' jobs had remained unchanged, although there was a change in the working method. As the Judge explained (at para 52): "It appears to me that each of the ... jobs ... will be the same jobs as they were, though in part done in a different way...". This was his finding on the facts, after he had said (at para 38): "... there really can be no doubt as to the fact that an employee is expected to adapt himself to new methods and techniques introduced in the course of his employment ... Of course, in a proper case the employer must provide any necessary training or retraining". 44. In the course of his judgment Walton J referred to *North Riding Garages Ltd v Butterwick*

[1967] 2 QB 56 as establishing the proposition just quoted. In that case it was said also, by Widgery J in giving the judgment of the Court of Appeal, that for the purposes of the Redundancy Payments Act 1965 :- "... an employee who remains in the same kind of work is expected to adapt himself to new methods and techniques and cannot complain if his employer insists on higher standards of efficiency than those previously required; but if new methods alter the nature of the work required to be done it may follow that no requirement remains for employees to do work of the particular kind which has been superseded and that they are truly redundant. Thus, if a motor manufacturer decides to use plastics instead of wood in the bodywork of his cars and dismisses his woodworkers, they may well be entitled to redundancy payments on the footing that their dismissal is attributable to a cessation of the requirement of the business for employees to carry out work of a particular kind, namely woodworking." 45. The *Cresswell* and the *Butterwick* cases are relevant to the question which we have already referred to in connection with Article 2(1) of the 2003 Law, namely the question whether the work done by transmission engineers is work of a particular kind different from work of the kind done by IP engineers, or the same work but carried out with different methods. This question was also relevant when considering whether the "capability" reason for Mr Wood's dismissal had been made out, as "capability" is defined by reference to "work of the kind which the employee was employed to do". The Tribunal made no findings about this question. 46. For Mr Wood's dismissal not to have been unfair, once JT had shown a permissible reason for the dismissal within Article 64(1) of the 2003 Law, there was a further stage for consideration by the Tribunal. This is set out in Article 64(4) as follows:- "(4) Where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) shall- (a) 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 (b) be determined in accordance with equity and the substantial merits of the case." 47. At this further stage there is no burden of proof on either party, in the sense that it is neither for the employer nor for the employee to show the reasonableness or unreasonableness of the employer's act of treating its reason for the dismissal as sufficient, or to show where the equity and substantial merits of the case lie. The Tribunal has to direct itself, as the

starting point, by reference to Article 64(4) when deciding on the fairness or unfairness of the dismissal for the reason which the Tribunal has found to be the employer's reason. 48. Sub-paragraph (a) in Article 64(4) requires the Tribunal to consider the reasonableness of the employer's actions "in the circumstances" (which circumstances include the employer's size and resources) in treating the employer's reason for the dismissal as sufficient. But in this the Tribunal is not simply to substitute its own view as to what actions were or would have been appropriate in the circumstances. The question for the Tribunal is, rather, whether in the particular circumstances what the employer did was within the range of what could have been done by a reasonable employer who was acting reasonably. Could, in other words, such an employer placed as the actual employer was have dismissed the employee and still been acting reasonably? Or would the dismissal have been outside the range of reasonable responses to the reasons for the dismissal? 49. What we have just described is a summary of the applicable law as expounded at greater length in the judgments of the Royal Court in the cases of *Voisin v Brown* and *Voisins Department Store Ltd v Soares*. Both parties to this appeal accept, as do we, that those judgments have helpfully described the approach which Article 64(4) requires the Tribunal to take. 50. It will be noticed that Article 64(4)(b) stands separately from Article 64(4)(a) and does not refer to any question of reasonableness of action. As a matter of language it is a direction to the Tribunal, instructing the Tribunal to make its determination as to the fairness or unfairness of the dismissal (having regards to the reason for the dismissal shown by the employer) "in accordance with equity and the substantial merits of the case". We have been told that there is no authority which deals in terms with the significance of this direction; and it is not suggested that any conclusion we might reach as to this direction will affect the outcome of this appeal. Nevertheless we read the direction as a reminder to a Tribunal, when determining the fairness or unfairness question under Article 64(4), to keep in mind the object of doing substantial justice between the parties. 51. There are certain matters which require further elaboration. Specifically there is the possibility of confusion as to the stage in the enquiry required by Article 64 at which it may be necessary to consider the reasonableness of any beliefs which lead to an employer dismissing an employee. Second, in relation to the question of reasonableness which Article 64(4)(a) imports, as well as the reference to equity and substantial merits mandated by Article 64(4)(b), there is a question as to the fairness of the procedures adopted by the employer in relation to the dismissal. 52. In the much cited case of *British Home Stores Ltd v Burchell*

[1980] ICR 303 *Arnold J* expounded (at 304G) a three-fold test for the Tribunal when considering the fairness of dismissals for a reason relating to the conduct of an employee. This test is as follows:- "First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into

the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further." 53. In *W. Weddel & Co Ltd v Pepper*

[1980] ICR 286 this formulation was approved by the English Court of Appeal. But in that case the Court was invited to decide whether an unreasonably held belief in the existence of a permissible ground for a fair dismissal could qualify as a "reason" for the dismissal within the equivalent provision to Article 64(1) of the 2003 Law. This invitation the Court declined to accept, Stephenson LJ (and indeed the other members of the Court, Waller and Cumming-Bruce LJ) suggesting that the Burchell test would normally be sufficient for the tribunal to direct itself by. Stephenson LJ said that the employer (interposing the relevant legislation for our purposes into the quotation):- "must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably. The two things, of course, run together and [Article 64(4) of the 2003 Law] is there to reinforce [Article 64(1)(b)]. It does not seem to me to matter whether, by failing to do that, they are failing to fulfil the requirements of [Article 64(1)(b)] or failing to fulfil the requirements of [Article 64(4)]." 54. Bearing in mind that there is an express onus of proof in Article 64(1) which is not provided for in Article 64(4), and bearing in mind the principle that Article 64(4)(a) allows an employer a margin within which his action in treating a reason as sufficient for dismissing an employer may be reasonable, the question dismissed by Stephenson LJ in the last sentence just quoted as being of little matter may need to be answered in some cases. On this point Advocate Drummond has submitted that the judgment of Mummery LJ (with which Nourse and Rix LLJ agreed) in the *Foley* case shows that reasonableness is only relevant in relation to Article 64(4)(a), so that an unreasonably held belief may provide a "reason" within Article 64(1) which may potentially lead to a fair dismissal. What Mummery LJ said was that the tripartite Burchell test above, as approved in the *Weddel* case, remains binding. He then went on to say:- "Any departure from that approach ... (for example by suggesting that reasonable grounds for belief in an employee's misconduct and the carrying out of a reasonable investigation into the matter relate to establishing the reason for dismissal rather than the reasonableness of the dismissal) is inconsistent with binding authority." 55. On behalf of Mr Wood Advocate Heath took no issue with Advocate Drummond's submission; and we accept that in principle JT's reason for dismissing Mr Wood may have been one falling within the permissible ones in Article 64(1) for a dismissal to be fair, even if the belief which founded that reason was unreasonably held. However, the reasonableness or otherwise of the employer's belief is unquestionably one of the circumstances to which ordinarily a Tribunal should have regard at the Article 64(4) stage. This is apparent from the formulation of the test suggested in *Burchell* I, and is clearly what Stephenson LJ had in mind in his comment, quoted above, in the *Weddel* case. There may be cases where a belief is unreasonably held, with dismissal nevertheless

being fair by reference to the belief. But such cases will not be commonplace. 56. Unsurprisingly therefore, in the present case there was considerable time spent on the part of JT before the Tribunal in seeking to demonstrate that Mr Wood was indeed incapable, so that any beliefs about his want of capability would be reasonable, this being relevant only at the Article 64(4) stage. Before the Tribunal JT pleaded a case in relation to Mr Wood which set out in vigorous terms numerous claims as to his failings. The difficulty which Mr Wood had in responding before the Tribunal was that in large measure the claims were based on hearsay, without the makers of the hearsay statements being called. It was this which led the Royal Court to say:- "... in the context of his application for a decision from the Tribunal that he had been unfairly dismissed, he was, as it were, boxing with shadows. He was faced with criticisms of his performance which were second or third hand, and with which it was almost impossible to deal. In my judgment an approach of that kind by an employer ought not to have been supported." 57. The second matter referred to above as being of relevance in relation to Article 64(4) arises where the employer has a procedure for addressing the particular matter which founds the dismissal reason. As to this, where there is such a procedure there is a possibility that a Tribunal may be led into error if it guides itself simply by the Burchell test without keeping in mind the wording of the Article 64(4)(a) (and, for that matter Article 64(4)(b)), so that the Tribunal fails to consider whether the employer's response was within or without the range of reasonable responses open to the employer in the light of its (that is the employer's) own procedures. 58. The case of *Polkey v AE Dayton Services Ltd*, referred to above, was concerned with the relevance of compliance with procedures. This case was discussed in the Royal Court's judgment in *Voisin v Brown*. It is perhaps convenient to repeat what was said there about the case:- "25 In *Polkey v. AE Dayton Services Ltd*, the House of Lords emphasized the importance of procedural safeguards when considering questions of unfair dismissal. Lord Bridge of Harwich summarized the position very concisely ([1988] A. C. at 364): "Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by section 57(2)(a), (b) and (c) of the Employment Protection (Consolidation) Act 1978. These, put shortly, are: (a) that the employee could not do his job properly; (b) that he had been guilty of misconduct; (c) that he was redundant. But an employer having *prima facie* grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as 'procedural,' which are necessary in the circumstances of the case to justify that course of action. Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation; in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to

select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation." ... However, it is very important to note that Lord Bridge was not stating that any failure to follow the procedural requirements which he had summarized would, of necessity, result in a finding of unfair dismissal. On the contrary, he was careful to use the word "normally" in every case and he went on to explain the position more fully in the passage which immediately follows that quoted above ([1988] A. C. at 364): "If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Industrial Tribunal is not permitted to ask in applying the test of reasonableness posed by section 57(3) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of section 57(3) this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section 57(3) may be satisfied." [Emphasis supplied.] Lord Mackay of Clashfern, L. C. was of a similar view (ibid., at 355): "If the employer could reasonably have concluded in the light of the circumstances known to him at the time of dismissal that consultation or warning would be utterly useless he might well act reasonably even if he did not observe the provisions of the code. Failure to observe the requirement of the code relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the industrial tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee." From this it follows that the decision as to whether a dismissal is unfair does not depend on whether all the boxes can be ticked in respect of the procedural requirements. The tribunal must consider the equity and substantial merits of the case. To summarize, therefore, where, say, an employer declares an employee redundant and fails to warn or consult him in accordance with the procedural requirements summarized by Lord Bridge ... , it is not open to the tribunal to hold without more ado that, as a result of such failure, the dismissal was unfair. Nor is it permissible for the members of the tribunal to ask themselves whether they consider that the failure to warn or consult in the particular circumstances was wrong and to conclude therefore that the dismissal was unfair. To hold a dismissal to be unfair on such a basis is to fail to adopt the band of reasonableness test and would be an error of law. It is only if the members of the tribunal consider not merely that the failure of the employer in the particular circumstances was wrong but that it went beyond the decision that a reasonable employer might reasonably have taken that the tribunal is entitled to hold that the dismissal is unfair. To repeat what was said by Lord Bridge, a dismissal is not unfair if the employer acted reasonably (i.e. within the band of reasonable decisions) in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and could therefore be dispensed with. The tribunal must

therefore concentrate not on whether the employer's decision or the procedure adopted by him was wrong but on whether it was so wrong as to fall outside the band of reasonable actions on the part of a reasonable employer." 59. We describe later JT's own capability dismissal process as laid out in Section 8 of its Employee Handbook, a process involving four stages taking place over several months. But in the present case JT's decision, taken by Mr Summerfield, was to terminate the procedure before it had advanced beyond the second stage and to dismiss Mr Wood. The Tribunal's judgment on this was in the following terms:- "52. It was accepted that the Respondent brought the capability process to a conclusion early. The evidence of [Mr Summerfield] on this issue was of great assistance and, of course, was not challenged. He stated that there was little to suggest that the required competence would be achieved and that the process would be played out "painfully and slowly" with the inevitable consequence being the Applicant's dismissal. The process was having an "incredibly negative impact" on the team and [Mr Summerfield] determined to bring the Applicant's employment to a conclusion either by way of severance package or termination. No agreement was reached on severance and so the Applicant was dismissed. The tribunal finds that the Respondent has shown on the balance of probabilities that continuing the capability process would have been futile and that bringing it to an early conclusion did not render the dismissal unfair." 60. We return to these findings when considering the question whether the Tribunal's decision was perverse. But we note that Mr Summerfield did not say in his evidence that the inevitable consequence of the process was that Mr Wood would be dismissed, or that he believed that that was the inevitable outcome. Indeed he did not use the word "inevitable" which the Tribunal attributed to him. The highest which could fairly be said about his evidence as to his expectations concerning the future outcome of the capability process was that he saw a prospect, it may well have been a good or even a very good prospect, that at the end of the process Mr Wood would be dismissed.

Background

61. A JT document dated 18 April 2001 describes Mr Wood as having a job title of "Core Network Engineer". A later document, of 23 November 2005, setting out his specific terms of engagement again records his job title as "Core Network Engineer". A document of 30 March 2009 gives his job title as "Transmission Networks Engineer". Finally, a document dated 11 April 2011 records his "Role title" as being "Transmission & Access Network Engineer". 62. In evidence was a structure chart showing the organisation of JT's sections before and after "merger". The "before" position comprised six sections, of which three were "IP Nets" headed by Mr Van de Ven, "Core Nets" and "Transmission & Access". The "after" position comprised five sections: the box on the chart for the "IP Nets" section showed "Teams inc: Power, Core Nets, and Transmission". The Core Nets and Transmission & Access boxes had been replaced on the chart with a new box, headed "GBJ (5 year fibre project)" with the legend "Teams inc: Infrastructure Access". 63. This document was explained by Ms Tostevin, being dated to a further JT reorganisation of 2012. At the time of this reorganisation, which Ms Tostevin

explained as being driven by the introduction of the GBJ project, the "Transmission team" (as she says) "was subsumed into Internet Protocol Networks ... headed up by Ronald Van der Ven..", while the Access team "went into GBJ". Mr Wood's work was as part of the Transmission team headed by Mr Bray. 64. Also before the Tribunal was a further JT document, a structure chart showing, under the heading "Network", a line of command from Mr Van de Ven as "Head of Networks " down to Mr Bray as "Networks Engineering Manager" and below him various personnel listed under different headings. Relevantly there were headings for five "IP Engineers" of whom Mr O'Brien was one, for one "Transmission Engineer" (namely Mr Clark), and for one "Networks Apprentice". 65. The 2012 reorganisation was said by Ms Tostevin in her evidence to have no bearing on the case. According to her it involved no change in the role of Mr Wood. It was simply, she said, to prepare for the "Gigabit Jersey" project which was concerned with "replacing the old existing copper network throughout the island with more sustainable, reliable, faster fibre optic network which is more aligned with current and projected consumer needs." 66. Before the Tribunal Mr Wood's case was that from 2001 onwards he had been a transmission engineer, the nature of his work being essentially unchanged although the equipment he worked on was changed as new technology was developed and old technology replaced. His evidence was that despite the changing job title he was throughout a transmission engineer. Also on his case, there was a category of engineers used by JT which was quite different, namely IP engineers. The skills required to be an IP engineer were said to be different from those of a transmission engineer, and it was said that the tasks that were required by each, and the equipment worked on and with, were quite different. Finally, his case was that while JT has a continuing requirement for IP engineers, with the dramatic developments in equipment and technology over recent years there is, and is in prospect, a significant decline in the requirement for transmission engineers; that is, for employees to carry out work of a particular kind, the kind for which transmission engineers are qualified. And he says that his dismissal was attributable, wholly or mainly, to that diminution. 67. Against this JT's pleaded case before the Tribunal was that "The Transmission role was being subsumed into a 'sister' engineering team. This affected 4 engineers who had all been transferred to the new group", this being "... part of a reorganisation of the Operations Division". It was said that "Technologies become obsolete over a period of time, those people working in technical roles are regularly retrained to take up new technologies, which is why the teams were merged", and "... The 3 other engineers who transferred at the same time are working effectively and have assimilated into the evolving role". 68. As the case progressed, however, the argument advanced on this point by JT when cross-examining Mr Wood was that in 2011, or it may be 2010, but at all events before the 2012 reorganisation, Mr Wood was engaged to be something different from what he had been before that time: he was, it was said, not a mere transmission engineer as he contended, but something more. That something more required him to have or obtain skills to develop as an IP engineer. Thus, during her cross-examination of Mr Wood before the Tribunal JT's representative, Mrs Peacock, said as follows: "let's go on to ... the questions ... what if an employee is genuinely unable to comply with that one new requirement on top of your job description here to adapt as an IP

engineer". 69. It will be appreciated that this cross-examination reveals a tension in JT's case. JT's first line of argument pursued in this cross-examination was disclaimed by JT in the passage from the submissions on behalf of JT made to the Royal Court which we have quoted above. This was the line of argument that Mr Wood's job required him to "adapt as an IP engineer", so that his dismissal for capability reasons could be shown not to have been unfair if the reason for dismissal was that he had indeed failed or refused to qualify as an IP engineer. From JT's perspective the danger of that line of argument was that if Mr Wood's employment were, in the event, found not to be for doing work of the kind performed by IP engineers, and if his dismissal had been because the requirements of JT's business for employees to do work of the kind (namely that of transmission engineers) which he was employed to do were decreasing, the reason for his dismissal would not have been a permissible capability one, and instead he would have a case that he was dismissed by reason of redundancy. 70. Before us Advocate Drummond has accepted that there was not in fact any requirement for Mr Wood to qualify as an IP engineer, and in particular that the provision in Mr Wood's job description relied upon by Mrs Peacock did not impose any such requirement. 71. In about 2009 JT introduced an annual "Performance Review and Appraisal Process" (referred to as a "PRA process"). The PRA process was to involve the specifying of targets for employees, these being set out in a document available on computer for each employee. The document allowed the employee to input information, for comments to be added by their manager, and for there finally to be an assessment and grading of the employee's performance. The grading scale was from 1 to 5, 1 being the lowest and being said to be appropriate for an employee where "output rarely meets set targets/objectives, performance/behaviour unacceptable, contribution clearly unsatisfactory, requires development in a number of areas". 72. It was accepted before the Tribunal that in 2010 Mr Wood had been given a score of 2 at the end of the year's PRA process. For 2011 the score was 1, as it was in 2012. 73. Before the Tribunal there were two versions of each of the PRA forms for 2011 and 2012. The first version was that which Mr Wood said that he had completed during the relevant year; the second version was that which had been commented on by Mr Bray at the year's end. Mr Wood was cross-examined extensively on these forms. 74. In the first half of 2013 Mr Wood applied for an internal job transfer within JT. This application was unsuccessful. 75. Also in the first half of 2013, as Mr Wood had been awarded a 1 score for his 2012 PRA, Ms Tostevin spoke with both Mr Bray and Mr Van de Ven about Mr Wood's PRA. In her witness statement Ms Tostevin described what she had been told, and explained that after she had spoken with Mr Wood (as she did in about April 2013) "The Company (ie Mark's line managers and I) determined to invoke the Company's formal capability/disciplinary procedures in accordance with its policies". Although initially it appears that the process was intended to be run by Mr Bray, as Ms Tostevin explained in her oral evidence, it was from the outset run by Mr Van de Ven. 76. Thus, there was a series of meetings, each meeting said to be of approximately 45 minutes or an hour, between Mr Wood, accompanied by Mr Langlois (to ensure due procedure), and Mr Van de Ven and Ms Tostevin. Ms Tostevin took notes from which she prepared a brief summary for each meeting. The notes were not comprehensive, much less verbatim. They were in each case a

précis of the salient points, which the parties accepted before the Tribunal as being a fair précis. There was considerable cross-examination of each of Mr Wood, Mr Langlois and Ms Tostevin on the content of the notes and as to what transpired at each meeting. 77. On 16 May 2013 Ms Tostevin sent to Mr Wood a letter requesting him to "attend a formal Capability/Disciplinary hearing" the following day "to discuss on-going performance issues as outlined briefly below". These issues were listed as being "General attitude and competency issues which have resulted in a pra score of 1 for 2012", "Comments to [Mr Bray] during your pra review around not wanting to remain part of the team, not wanting to increase/change knowledge and skill", and "Concerns re you being able to achieve the required level of competence in the Network Support role". 78. This letter was the initiation of the capability process in respect of Mr Wood. JT's Handbook explained that its aim was "to endeavour to ensure that employees achieve and maintain a high standard of performance in their work". The process was part of the system by which this aim was to be furthered. 79. Once the formal process was initiated it was to have four stages. The first would be reached if there had been insufficient improvement, "normally after a period of up to 2 months", after there had been informal discussion. According to the Handbook "a log should be held by the Line Manager of all informal discussions". If there was a log of any such discussions Mr Bray may have had with Mr Wood about the latter's capability before May 2013, it was not put before the Tribunal. 80. The first stage, Stage 1, was to involve discussion in which the cause of poor capability should be identified, and remedial action decided upon; and it was to be explained clearly to the employee what shortfall there was between the employee's performance and the required standard. The outcome of the interview was to be recorded "by the Manager", with a copy being given to the employee. There was then to be a review period of up to three months. One outcome, if there had been some improvement but not the required improvement, was for an extension of the review period for up to a further three months. Another outcome at the end of the three months if there had been little or no significant improvement was to move to Stage 2. 81. The significance of Stage 2 of the process is that, while in some respects a repeat of Stage 1, there was now to be "consideration ... given to whether there are alternative vacancies that the employee would be competent to fill". Also, of course, the employee was moving towards Stage 4 at the end of which dismissal was a possible outcome. 82. Stage 2 could be terminated, continued, or progressed to Stage 3, in much the same way as Stage 1. Again, Stage 3 would involve a similar interview to that at the previous stages. Again there was to be consideration given to alternative employment, but now with the possibility of there being a three month probation period. Again there was to be a review period. This time, however at the end of the review period was to be Stage 4. There would then be an interview and "if performance is still unsatisfactory dismissal will result". 83. Finally it is to be noted that at all stages of the process there was to be a right of appeal using JT's Appeals Process. 84. There were, in the event, four capability process meetings which Mr Wood attended before his dismissal, these being on 17 May, 17 June, 22 July and 24 September 2013. The first was an initial, introductory, one. The written evidence of Ms Tostevin is that each of the meetings after the initial, introductory meeting was a "capability review meeting applicable at Stage 1", the 24

September 2013 meeting being the third and final one. Following that meeting a letter was sent by Ms Tostevin headed "Re Capability Meeting Outcome, Stage 2", in which she explained that "Following our meeting on Tuesday 24 September I confirm that the JT Capability Process will be extended to Stage 2 for 3 months to provide focus and support for improving those areas of development as discussed and outlined below." The letter indicated that there would be monthly reviews of Mr Wood's progress and that "The expectation is that you will demonstrate a significant and sustained improvement over the next three months." It was therefore at or immediately after the conclusion of the 24 September 2013 meeting that JT decided to continue the process to Stage 2. There were in the event no further capability review meetings. 85. In his written submissions to this Court Advocate Drummond put forward a contention that a meeting of 14 November 2013 which took place with Mr Wood was part of the capability process. However that was contrary to Ms Tostevin's evidence, and we see no basis for the submission: it was a meeting concerned with the price which Mr Wood would accept for leaving JT, the decision that he would leave having already been taken. 86. Very shortly before the second meeting, that on 17 June 2013, according to Ms Tostevin's evidence to the Tribunal, she invited Mr Wood to meet with her and at that meeting suggested to him that one possibility would be for him to leave JT with a severance payment; and on his expressing interest in knowing more she indicated a total of approximately £23,000 including 16 weeks' pay in lieu of notice. Mr Wood's response was that he would expect a figure commensurate with redundancy "considering ... my role is no longer needed". To this Ms Tostevin replied "The reality is that someone will be required to fill the changing role going forward, so it cannot be construed as a redundancy situation". Mr Wood's evidence to the Tribunal about this was that it led him to know that "if they were offering me money before the actual capability process had started officially then they wanted me to leave the firm". It might also be added that Ms Tostevin's reference to a requirement for someone to fill the changing role did not, for reasons explained by the Royal Court (to which we refer later), mean that redundancy could not be in prospect: it could very well be in prospect, if the changing role was for work of a kind for which Mr Wood was not employed as a transmission engineer. 87. As it is relevant to the questions before the Tribunal, as well as before the Royal Court and this Court, concerning the reasons for Mr Wood's dismissal, we would draw attention to certain of the comments in the notes of the capability review meetings. (i) The note of the 17 June 2013 meeting contains an indication, quoted later in this judgment, that Mr Wood was engaging with IP technology. (ii) The meeting of 22 July 2013 is shown to have commenced with Mr Van de Ven commenting, as to Mr Wood's diary of activities, "The list of actions was positive but the discussion was 'flat'". The note records Mr Wood commenting that he is "unsure how to respond to 'flat'", and Mr Langlois asking for clarification as to what was meant by the expression "flat"; but the note of the meeting does not record any further explanation or guidance. There was no note recording criticism of Mr Wood's work, or suggesting failure to engage with changing technology. (iii) The meeting of 24 September 2013 is shown as having involved considerable criticism being directed at Mr Wood in relation to communication. Mr Van de Ven is recorded as summarising his criticism as "This is now about you changing and being an

active, communicative part of the team and its activity". Mr Wood is recorded as having responded to the effect "I am unaware that you have had a complaint from anyone in the team over the three months of the process - except in these meetings". This was met with an assertion "This is about establishing effective 2 way communication". Again, there was no criticism of Mr Wood's engagement with technology or change. 88. In its judgment the Tribunal recorded that "The Tribunal could not help but feel sympathy for the Applicant" . In this the Tribunal was referring to its view that Mr Wood "did not want to move with the times" . However, as we explain below, the capability review meeting notes, and the evidence given to the Tribunal about these meetings, provide no basis for a conclusion that Mr Wood did not want to move with the times as regards changing technology. As regards the criticism of his communications with others, a criticism which features prominently in the notes, an obvious point is that there is no clearly articulated statement as to the specific respect in which Mr Wood's communications were defective or as to what he was supposed to do to remedy the defect. 89. In August 2013 Mr Langlois wrote to Ms Tostevin asking to have Mr Van de Ven replaced as the manager conducting the capability process. In cross-examination Mr Langlois explained this request as being because he did not feel that Mr Wood was being treated fairly this being because of Mr Van de Ven's "attitude, the way he behaved, the way he just, he just wasn't going to move from his position that Mr Wood was going to go no matter what happened and I picked that vibe up". 90. On 4 November 2013 Mr Summerfield sent to the Jersey Advisory and Conciliation Service an email in the following terms:- "I would be grateful if you could draft a JACS1 for Mark Wood. Lump sum £12k (tax free), plus 16 weeks notice (taxable), termination date of Friday 15th November, Address: Mr M Wood ... Jersey ... Jilly is having a 'without prejudice' conversation with Mark at 4pm on Thursday

- 2 years of consistent underperformance and management fatigue/team disruption is the main background. If he won't accept the compromise, we will terminate on the grounds of capability on 15th November anyway - at which point, we would expect a probable claim lodged for unfair dismissal, which we are happy to contest. Mark is on 42k so could claim a maximum of 21k for unfair dismissal which we know, and accept the risk. Privately, I could probably be pushed up a couple of thousand but that's our walk away position (14k) ... would be very grateful for your mediation skills as always!" 91. As appears from this email, by early November 2013 JT had determined to terminate Mr Wood's employment, but was contemplating an attempt to have conciliation about the terms of the termination. Meanwhile Mr Wood made approaches to JT for redeployment to work for which, according to his evidence, he was suited and qualified. He was then called to a meeting on 7 November 2013 at JT's Human Resources and was told he was to be dismissed and offered a severance payment. 92. On 8 November 2013 Mr Wood wrote to Mr Summerfield saying that he had an appointment with JACS, and he asked for, among other matters, "personal or confidential records including e-mails regarding myself in the last few months". Whatever he may have received, before the Tribunal there were no contemporaneous documents communicating or recording reports about himself and his performance during the capability process, or

which might have made by Mr Bray or Mr Van de Ven and have led Mr Summerfield to take the decision to dismiss Mr Wood and to write as he had on 4 November 2013. 93. There was a further meeting on 14 November 2013 attended by Mr Langlois with Mr Wood, at which Mr Wood was offered by JT a severance payment, which he refused. The next day he was sent the letter which we have already described. 94. Mr Wood's proceedings before the Tribunal were started on 19 December 2013 when his application form alleged that "JT purported to dismiss Mr Wood on the ground of capability. In doing so JT wholly failed to follow its capability procedure ... In fact this was a redundancy situation and JT's dismissal on the ground of Mr Wood's capability was a sham ... Mr Wood's dismissal was unfair." The document indicated that Mr Wood was claiming a redundancy payment. The response given by JT was that Mr Wood was dismissed on the grounds of capability, following the initiation of a capability process, it being said (emphasis added): "Little progress/improvement was demonstrated and management took the decision to terminate ... rather than pursue through further stages. This is not a redundancy which appears to be the substance of the claim." 95. When Mr Wood's claim was particularised, in May 2014, his claim no longer included a claim for a redundancy payment; but it still included a claim for unfair dismissal, it being alleged under the heading "Unfair Redundancy" that "it is Mr Wood's case that this was a redundancy situation", and that "If the Tribunal is satisfied that Mr Wood was made redundant, it must consider whether such a redundancy was fair or unfair as redundancy is potentially a fair reason for dismissal ...". Mr Wood's Particulars reserved for proceedings before the Royal Court a claim for wrongful dismissal. Mr Wood's Particulars were in substance repeated in a document of June 2013 setting out his legal

submissions.

96. We have set out above certain of the material statements contained in JT's response document, which submitted among other matters that several of Mr Wood's colleagues "had been assimilated into the evolving role" following the subsuming of "the Transmission role ... into a 'sister' engineering team". 97. Finally, in the last stages before the hearing before the Tribunal, the Skeleton Argument on behalf of Mr Wood claimed that he had been unfairly dismissed. It was alleged that JT did not have a fair reason to dismiss him on the "capability" ground (referring to this at paragraph 27 of the Skeleton), that he was in fact made redundant, and that there was no redundancy process. 98. JT's Skeleton Argument for the hearing before the Tribunal squarely put forward the case that Mr Wood had been dismissed for capability, not for redundancy, and indeed that there was no redundancy situation within JT. 99. In the light of this background to the hearing before the Tribunal it can be seen that there was possibly a relevant question for the Tribunal in relation to redundancy. The Tribunal had to decide, when considering Mr Wood's unfair dismissal case under Article 64 of the 2003 Law, what was the reason (or, if more than one, the principal reason) for Mr Wood's dismissal, the main candidates for this reason being capability or redundancy. It was for JT to show that the only reason it relied upon, capability, was in fact the reason (or principal reason). If JT failed on this, however, it was not necessary for the

Tribunal to decide what was after all the reason: the dismissal would be unfair, as JT was not seeking to rely on any permissible reason other than capability to support its dismissal of Mr Wood as fair. 100. This last fact is important for the disposal of this appeal, and deserves emphasising. Ultimately what was in issue before the Tribunal was only Mr Wood's claim for unfair dismissal; and as to this the relevant questions were only those under Article 64. By the time of the hearing before the Tribunal Mr Wood was not pursuing any claim before the Tribunal that he was to be found to be entitled to a redundancy payment. The question was ultimately, therefore, not whether he had been dismissed "by reason of redundancy", and was entitled to a payment for that reason, but only whether or not he had been unfairly dismissed. It was for JT, the employer, to establish that in fact its reason for dismissing Mr Wood was a "permissible" one for the dismissal not to be unfair. But before us, as also before the Royal Court, Mr Wood accepted that capability was JT's honestly held reason for his dismissal, and that as to this the Tribunal's finding was not to be challenged. 101. There may on occasion be a fine line between the capability and redundancy reasons. This is illustrated by the *Abernathy* case: in that case an employee refused to take on certain work, and while the employer first explained its reason for dismissing the employee as redundancy it was held that in fact the reason was capability. In the present case if Mr Wood was dismissed because JT believed him to be incapable of doing work of a kind for which JT did have a requirement for employees, although capable of doing a different kind of work for which JT's requirement for employees was diminishing, and if his obligation to "adapt" did not extend to fitting himself for the continuing work, then the "incapability" dismissal would in fact be a "redundancy" dismissal. It is possible to see how in the present case redundancy, not capability, might have been found to be the real reason for Mr Wood's dismissal, if the reason for his dismissal had been his inability to do or become able to do the work of an IP engineer. But, for reasons we explain, the Tribunal's finding that the reason for Mr Wood's dismissal was capability, was inevitable and is, rightly, not challenged. 102. We should also add that JT has not been wholly consistent in its case so far as concerns Mr Wood. Before the Tribunal Mr Wood was said to be incapable as regards his failure to adapt as an IP engineer. Before the Royal Court JT, by Advocate Austin-Vautier, disclaimed as a reason for dismissal Mr Wood's failure to adapt to evolving technology. Before this Court JT's submission by Advocate Drummond has been that Mr Wood's failure to adapt was the more limited failure to adapt to evolving technology in some unspecified respect, but not a failure to adapt as an IP engineer as there was no requirement to adapt in this respect. We explain below the relevance of this lack of consistency. Ground 1 103. The first ground of appeal is that the Royal Court wrongly rejected the Tribunal's finding that the real reason for Mr Wood's dismissal was JT's genuine belief relating to Mr Wood's capability. The challenge also involved a challenge to the conclusion, in para 25 of the Royal Court's judgment, that the Tribunal had failed to consider whether Mr Wood's dismissal was at least in part due to redundancy. 104. The material findings of the Tribunal for present purposes are in paragraphs 46 to 49 of its judgment. These, which are as follows, were quoted by the Royal Court in its judgment:- "46. The Tribunal finds as a matter of fact that the reason for the dismissal in this case was the Respondent's belief that the [Appellant] was incapable. The

Respondent honestly believed that the [Appellant] was intransigent and inflexible and that his attitude had been, and would continue to be, damaging to its business in the sense that it gave rise to disharmony. There was also evidence that the Respondent considered the resources devoted to the issue to be disproportionate. It had reasonable grounds upon which to base its belief on capability, as was evidenced by the PRAs and the meetings that took place during the capability process.

47. It was alleged on behalf of the [Appellant] that the Respondent acted in bad faith and created a sham capability process so as to save itself the cost of paying the [Appellant] a substantial redundancy payment. The Tribunal saw no evidence of such bad faith and considered that the Respondent behaved as a reasonable employer throughout. The Tribunal found the evidence of [Mrs Tostevin] to be credible and she firmly rejected any suggestion of such behaviour. The Tribunal also had the unchallenged evidence of [Mr Summerfield], which was consistent with that of this colleague.
48. It follows that the Tribunal finds that the reason for the dismissal in this case was not redundancy. There is no need in the circumstances to examine the issue of redundancy in any great detail notwithstanding the fact that it listened carefully to all the evidence adduced and the submissions made in that regard.
49. For there to have been a redundancy in accordance with Article 2(1) of the Law, the dismissal would have to have been wholly or mainly attributed to a cessation of business or a reduction in the Respondent's requirements for employees to carry out work as set out above at paragraph 43. Rather than being wholly or mainly attributable to such matters, the Tribunal finds that this dismissal was not attributable to such matters at all." 105. The evidence before the Tribunal given on behalf of JT concerning its reasons for dismissing Mr Wood was that of Mr Summerfield. Essentially he explained this by reference to his belief that Mr Wood "was struggling to meet the required competence", together with a belief that the operation of JT's competence procedure was "having an incredibly negative impact resonating throughout [Mr Van de Ven's] team". He had explained at paragraphs 6 and 7 of his witness statement, when setting out his "First dealings with " Mr Wood, how Mr Wood had had "a failing PRA grade of '1'" and had "been discussed in the Company executives' end of year meeting convened to explore internal employee capability issues". He then said "I was aware that there were ongoing issues with Mark's performance and that these were predominantly behavioural and attitudinal, in that it was felt that he was not prepared to learn new skills or technologies demanded by his role as a Transmission and Access Engineer especially in comparison to his peers." Then, at paragraph 8 of his statement he explains how from discussions he was aware that Mr Wood's behaviour was felt to be having "a damaging and even destructive effect on the IP Network division, and had reached an intolerable level". 106. Mr Summerfield then went on, under the heading "Capability proceedings commence and falter", to explain what he understood about the start and progress of the capability proceedings in relation to Mr Wood. What he said at paragraphs 10 to 16 is set out below in full, as this is his explanation of his decision to have Mr Wood

dismissed:- "10. In or around the later stages of the capability process (i.e. in or around the end of September 2013), I understood from Ronald that he felt that Mark was not making the required progress needed to achieve 'competence' in his role. He felt Mark was not accepting his observations and conclusions, and therefore not making the changes and improvements required, and that matters had reached a stalemate which was seriously slowing down the IP Network division's ability to deliver its objectives. Proposal to broker a mutual termination.

11. The Company's ethos is to have high performing and highly engaged staff, and at a minimum requires an acceptable level of performance, competence and engagement. Our preference is to actively manage poor performers back up into competence both in terms of output and behaviour, rather than exit. We cannot, however, 'carry' underperformers that show little/no sign of improvement and, where there are funds to do so, it is always an option to attempt to broker a modest termination which is acceptable to both employer and employee, rather than persist in unpromising capability proceedings.
12. Around this same time, (the Company's last financial quarter), the Company was ahead of budget, and I took the view that there was a 'window of opportunity' (i.e. before the financial year end) to explore a possible severance package with Mark.
13. In deciding this, I was of the opinion that Mark was currently struggling to meet the required competence. There was little to suggest there was a good chance that he would reach the required competence. Accordingly, I could see the capability proceedings playing out -painfully and slowly -with Mark, a long-term employee, being dismissed without any termination payment above his strict contractual entitlement, in which case, everyone loses out, there are no 'winners'.
14. Further, the capability process was having an incredibly negative impact resonating throughout Ronald's team. It was also taking up a lot of IP and HR resource. It was deemed by Ronald that the exit of Mark would have a disproportionately positive effect on all aspects of the team he was in. and would release both Ronald and Jilly to focus on other matters relating to driving productivity in the business.
15. Accordingly, I took the decision to offer Mark the opportunity to leave sooner with severance monies and a full payment in lieu of notice, which bearing in mind the circumstances, I believed was a generous offer that could work for all parties.
16. if Mark was not minded to accept the severance, I further resolved to terminate his employment anyway, and pay any compensation arising out of any subsequent litigation regarding his dismissal for incapability." 107. It is also appropriate to record the following part of Mr Summerfield's evidence, as this is relevant to Mr Wood's case that redundancy was the reason for his dismissal. Under the heading "Applicant declines proposed severance" Mr Summerfield explained:- "24. On 7 November 2013, I received an email from Mark declining the proposed severance and seeking £50,000 ...

25. Had Mark sought his full unfair dismissal compensation monies (just over £21,000), I would have granted them after negotiation, but his response showed me just how polarised our financial positions were.
26. As Mark contended he was being made redundant, I spoke to Jilly and Ronald to double-check whether any of Mark's work had fallen away as he was alleging.
27. Both confirmed no work had fallen away or was about to fall away. The Company had (and still has) a need for a Transmission team and Transmission and Access Engineers. The form those duties take were incrementally changing over time but there was no underlying redundancy of Mark's role
28. Accordingly, I did not make any intervention on the proposed strategy agreed, although I understand Jilly made one further enhanced severance offer which was also declined, up to £18, 000 after an initial offer of £12,000." 108. Mr Summerfield's evidence was unchallenged before the Tribunal, as we have explained. His witness statement sets out his, and therefore JT's, reasons for Mr Wood's dismissal in November 2013. 109. As we have pointed out, on behalf of Mr Wood it is accepted that JT's reason within Article 64(1) for Mr Wood's dismissal, the reason founded upon Mr Summerfield's beliefs, related to Mr Wood's capability. Specifically, it is accepted that JT's dismissal decision was Mr Summerfield's decision, that his decision was founded on his (and thus JT's) belief relating to Mr Wood's capability (that is, capability for performing work of the kind for which he was employed), and that the belief was honestly held. It was therefore not the contention, at any rate not now the contention, of Mr Wood that for the purposes of Article 64(1) the reason (or principal reason) for his dismissal was some reason other than one relating to Mr Wood's capability. 110. As it is relevant for JT's challenge to the Royal Court's decisions in relation to Article 64(4) of the 2003 Law and as to the perversity of the Tribunal's judgment, we draw attention at this stage to an important feature of Mr Summerfield's evidence. He did not in terms use the expression "capability" in describing his reasons for having Mr Wood dismissed. He referred to "performance" and "competence". However, as we have already explained, what matters in relation to Article 64(1) when identifying reasons is facts and not labels. From Mr Summerfield's statement Mr Wood's inadequacy as to performance and competence was, in Mr Summerfield's belief, that specified in paragraph 7, where Mr Summerfield had given the particulars as being "predominantly behavioural and attitudinal, in that it was felt that Mr Wood was not prepared to learn the relevant new skills or technologies". 111. The passages in the Royal Court's judgment which JT seeks to challenge are in paragraphs 22 to 25. They are in the following terms:- "22 The findings of the Tribunal in this respect are in at least one sense surprising. There is no doubt that the business of the Respondent was moving away from the employment of transmission engineers and towards IP engineers. There is equally no doubt on the evidence that once the Appellant had been dismissed, his job was filled by a former apprentice on the basis that the new employee would spend part of his time on transmission work and the rest on IP work. The Respondent did not see this as a redundancy because on a headcount basis, the apprentice did not figure

in the previous jobs count because he was an apprentice, and therefore the overall headcount did not drop as a consequence of the Appellant's dismissal. He was replaced, ergo there could be no redundancy. However, this was not the reasoning of the Tribunal. Before it, Advocate Heath had argued that the Respondent acted in bad faith in relation to the capability review

- in other words this was a sham process whose only object was to ease the Appellant out of his job without leaving the Respondent exposed to a claim for unfair dismissal. Before me, Advocate Heath abandoned the bad faith argument, but the Tribunal heard it and rejected it. The Tribunal then held (at paragraph 48) that it followed the reason for dismissal was not redundancy. It seems to me this was a non sequitur and in argument Advocate Austin-Vautier conceded as much. The reason the Tribunal's reasoning fails is that the bad faith argument went to process and not necessarily to the reason for the dismissal. It was logically open to the Tribunal to have concluded that the Respondent acted in good faith despite closing down the capability review early, and yet also that the real motivation for the dismissal was that the previous job - that of a transmission engineer
- was substantially not one to be maintained. Such a conclusion would be consistent with Article 2(1)(b) of the Law:- "...an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind ... have ceased or diminished or are expected to cease or diminish ." [emphasis added] Although questions of capability and of redundancy are quite separate, the Tribunal's approach seems to have been to treat them as different sides of the same coin. In other words, the Tribunal found that because the Appellant was dismissed for lack of capability, it followed that his position was not being made redundant. In my view it does not follow at all. Very capable people may be made redundant if the business no longer has a demand for their skills. Furthermore, if one inverted the proposition, it may well be the case that somebody is dismissed because they are neither being made redundant nor found to be lacking in capability, but are simply unfairly dismissed. Similarly, it is entirely possible that a person who has a lack of capability to do the job he is actually doing is dismissed because the employer recognises his lack of capability and wishes to take the opportunity of making the job redundant. The two things are capable of being quite separate. In the evidence before the Tribunal, it seems clear that the Respondent's view was that there was no redundancy because the headcount did not reduce. This is demonstrated by the evidence of Mrs Tostevin at pages 71/72 of her evidence while being cross-examined by Advocate Heath:- "Advocate Heath: ... and then, just finally, I think, just, Mrs Tostevin, the fact is that the day that ... the day after Mr Wood left, the whole of his work was distributed between other members of the team wasn't it? Witness 1: Again I have no knowledge of it. I would, I would think that a fair assumption. Advocate Heath: And, Mr Wood's position was never advertised internally or externally was it? Witness 1: Again, no. Advocate Heath: And it was never replaced? Witness 1: Yes it was replaced. Advocate Heath: It was, you say it was replaced by an apprentice, but that apprentice is an IP engineer isn't he? Witness 1: He ... that is

misleading. Not that the title, itself is misleading, but it's misleading to think of tasks as being the same as headcount. Now from Mr Wood's own submissions, evidence, witness statement, he implies that we were trying to reduce the headcount and in JT terms that is what we mean by redundancy, that we drop headcount. In fact we can't call somebody leaving a redundancy if there is no drop in headcount. Now that's just background but in this instance, Mark leaving meant that we replaced with a person. The fact that that person is not called 'Transmission Engineer' is neither here nor there in the company's view, because it is still sharing that work and the work that Mark did on the day he left and prior to the day he left as ongoing and is being done by colleagues. Advocate Heath: The fact is that individual was working at JT at the same time as Mr Wood wasn't he? Witness 1: Yes he was. Advocate Heath: And he is, it's this new appointment, so that of IP engineer, is not the same as that of a transmission engineer? Witness 1: The role title is not the same I agree and he was working as an apprentice which is not part of headcount. So, apprentices do not ... because they are effectively not guaranteed employment at the end of their apprenticeship they do not count as a permanent member of staff ... Advocate Heath: And a transmission engineer is a particular type of work isn't it? Witness 1: It is. Advocate Heath: And an IP engineer is a particular type of work isn't it? Witness 1: It is. Advocate Heath: And the work and the requirement for work of transmission engineers had decreased over the years hasn't it? Witness 1: It is decreasing yes. Advocate Heath: And it continues to decrease doesn't it? Witness 1: It will continue to decrease, yes. Advocate Heath: Such that there was, as of the date of Mr Wood's dismissal, the day after, the rest of the team were able to pick up the whole of Mr Wood's work weren't they? Witness 1: Yes because they were previously and materially still transmission engineers. So that skill set is still with them in the same way that it was with Mark and they were part of the team that was called transmission and access before the merge. Advocate Heath: So the remaining transmission engineers in Mr Wood's team took up his work the day after he left? Witness 1: Yes." In my judgment this extract makes it plain that the Respondent's approach to redundancy was driven by its own internal methodology for calculating headcount. The Respondent's view was that there was no redundancy because the headcount did not reduce. To agree that that is conclusive would in my judgment be wrong. The fact that there has been no reduction in headcount may well be relevant to a conclusion that there has been no redundancy, but it is one factor only. The true assessment depends on the nature of the job which the dismissed employee did, and whether anyone was recruited to do it. If no one was recruited, then the dismissed employee has been made redundant applying the definition in Article 2(1) of the Law. The problem arises where the recruited employee is doing some of the same job, but is also doing another job as is the position here. Having reviewed the evidence given before the Tribunal, but especially the evidence of Mrs Tostevin set out above, I think that there is no doubt that the job of the Appellant had already diminished in scope and was expected to diminish further. That is why the Respondent was anxious that the Appellant should retrain as an IP engineer, a job he did not want. Accordingly, subject to the assessment of capability, the natural conclusion on the evidence might well be that the Appellant was in fact dismissed by reason of redundancy - on the basis that his dismissal was at least in part attributable to the fact

that the requirements of the business to carry out work of a particular kind had ceased or diminished, or were expected to cease or diminish. The only relevance of the capability assessment in this respect seems to me to arise if it goes to the question of whether the Appellant showed such a lack of capability that he would not have retained his job even if the job had continued to exist in its previous form

- in other words, was the dismissal "wholly or mainly" down to capability or redundancy. The Tribunal misdirected itself in not considering this question." 112. One observation made by the Royal Court, when considering the Tribunal's reasoning as to redundancy, was to point out that in the present case questions of capability and of redundancy are not simply different sides of the same coin. On behalf of JT Advocate Drummond accepted this. Given this, the Royal Court considered the Tribunal to have been in error in not asking itself, by reference to the language of Article 2(1), whether there was a redundancy situation and whether Mr Wood's dismissal might not have been in part attributable to that situation. This, in summary, is the Royal Court's conclusion in paragraph 25 of its judgment. In effect the Tribunal was mistaken, so the Royal Court found, in taking a short cut and not giving sufficient attention to, and then failing to make adequate findings about, redundancy. 113. We have sympathy with the Royal Court's

conclusion.

Nevertheless, the question is whether in the present case the Tribunal was wrong in law to find that the (principal) reason for Mr Wood's dismissal had been shown by JT to relate to his capability and having done so to reject Mr Wood's case that JT's (principal) reason was his redundancy. Differing on this point from the Royal Court, we do not see any error of law on the part of the Tribunal in this particular case. This is because the issue for the Tribunal, and thus the only issue on which findings were required, was (as we have pointed out above) whether JT had shown the permissible reason for dismissal within Article 64(1) relied upon by JT, and if so whether then the dismissal was fair or unfair by reference to that reason. While in many cases, no doubt, the question whether an employer has made out its claim that its (principal) reason for a dismissal was the permissible one relied upon for the purposes of Article 64(1) will require consideration of some other possible reason which is said by the employee to have been the (principal) reason, in our judgment such consideration was not necessary in this case. 114. As we see it, the beginning and the end of the search for JT's reason, within Article 64(1), for Mr Wood's dismissal is to be found in Mr Summerfield's witness statement. His unchallenged evidence, as it is accepted, showed as his, and so JT's, reason (or principal reason) a reason relating to Mr Wood's capability. It may perhaps be said that he had a second reason for his decision, namely the adverse impact on JT which he believed Mr Wood's capability process to be having. And it may therefore be said that what he understood about Mr Wood's capability was not the sole reason for his decision. But before us Mr Wood has not contended that this alternative reason was the principal reason for the dismissal, or that the Tribunal was perverse to find that for the purposes of Article 64(1) the reason or principal reason was not, after all, one relating to capability. It is therefore irrelevant to speculate as to whether or not what Mr Summerfield in fact

had in mind concerning Mr Wood's capability, Mr Wood's not being "prepared to learn new skills or technologies demanded by his role as a Transmission and Access Engineer especially in comparison to his peers", might after all have been directed at incapability for performing work which was not of the kind he was employed to do, being the work of IP engineers. 115. Accordingly, we do not see why the Tribunal was in error in concluding that redundancy was not the reason (or principal reason), or in expressing its conclusion that there was no need "in the circumstances to examine the issue of redundancy in any great detail". 116. The Royal Court was troubled by the statement in paragraph 48 of the Tribunal's judgment, "It follows that the Tribunal finds that the reason for the dismissal in this case was not redundancy". That statement came immediately after the Tribunal's rejection of Mr Wood's argument that the capability process had been a sham, conducted in bad faith, in order to dress up a redundancy reason for Mr Wood's dismissal as a capability one. Read literally the quoted words used by the Tribunal could be said to explain the Tribunal's conclusion as to redundancy as being based on a premise (namely, that the capability process was not a sham) which would not necessarily imply that redundancy was not after all the principal reason for the dismissal. 117. We are satisfied, however, that the words "It follows" were directed at a different point. The rejection of redundancy as the reason (or principal reason) for the dismissal for the purposes of Article 64(1) followed from the finding that the reason (or principal reason) was in fact capability, not from the concession as to bona fides or behaviour in the capability process. And the finding as to capability was inevitable in view of the fact that Mr Summerfield's evidence was unchallenged. 118. The Royal Court drew attention to an error in the understanding of witnesses on behalf of the Respondent as to what qualified as redundancy. The evidence of Ms Tostevin, an extensive quotation from which was set out in the Royal Court's Judgement, described a state of affairs, a "redundancy situation", which could quite possibly have qualified as falling within Article 2(1) of the 2003 Law, if Mr Wood's dismissal was wholly or mainly attributable to it. The Royal Court also considered, we think correctly, that her view, that "there was no redundancy because the headcount did not reduce", takes an altogether too narrow approach to what qualifies as redundancy. We agree that reduction in headcount may be a hallmark of redundancy. However, it is not decisive. In *Packman v Fauchon*

[2012] ICR 1362 the English Employment Appeal Tribunal has explained that there can be a redundancy situation both where the needs of the employer's business are for fewer employees to do the same amount of work and where the amount of work for the same number of employees was reduced. In every case it is necessary to keep in mind the words: that is all the words set out in sub-paragraphs (a) and (b) of Article 2(1) of the 2003 Law. 119. However, in our judgment the Royal Court did not give sufficient weight to Mr Summerfield's unchallenged evidence about what he was told, and therefore what he believed, on making an enquiry about redundancy: Ms Tostevin's evidence was beside the point when considering TJ's actual reasons for Mr Wood's dismissal. What Mr Summerfield had in mind as to the possibility of redundancy in connection with Mr Wood's dismissal was not linked to headcount. In particular, he was told that "no work had fallen away or was about to fall away"; and this, although stated shortly and in somewhat

elliptical fashion in his unchallenged statement as negating a redundancy situation, cannot found any case that in fact he believed or intended, when deciding to dismiss Mr Wood, that Mr Wood's dismissal was in any way to address a redundancy situation and not, as he says, in order to dismiss an incapable employee (that is incapable for doing work of the kind for which he was employed). Further, it could not be appropriate to read anything of significance which might assist Mr Wood into Mr Summerfield's statement that "The form those duties [of Transmission and Access Engineers] take were incrementally changing over time, but there was no underlying redundancy of Mark's role", as the force of the words is obscure and Mr Summerfield was not cross-examined. 120. In view of this conclusion it is strictly speaking unnecessary to consider further JT's second to fifth grounds of appeal. For completeness, however, we address these shortly. Ground 2 121. The argument is that in the present case the Royal Court wrongly concluded that a belief could only qualify as a permissible reason, within Article 64(1) of the 2003 Law if it is reasonably held, when properly the question of the reasonableness of a belief is only applicable once a Tribunal is considering matters described in Article 64(4). 122. This ground of appeal must fail, in our judgment, as we have been unable to detect any indication in the Royal Court's judgment that it conflated (a) the question whether there was a belief (that is to say, a genuine or honest one, a belief which was in fact held) which provided the reason for a dismissal with (b) the different question, relevant to the reasonableness of the employer's action in dismissing as it has for that reason, whether the belief was reasonably held. Ground 3 123. The third criticism of the Royal Court's judgment is that it subjected the Tribunal's judgment to an unrealistically detailed scrutiny so as to find artificial defects which were not in fact there or were immaterial. 124. We reject this criticism. While we accept the principle that the Royal Court was not to look for or rely on immaterial errors in the Tribunal's judgment, and also that the Royal Court was not to substitute its judgment for that of the body charged with finding the facts, in the present case the Royal Court has not fallen into such an error. 125. There are two particular instances put forward by JT in support of its criticism of the Royal Court's judgment in this respect. The first concerns the Royal Court's conclusion concerning the force of the words used by the Tribunal in paragraph 48 of its judgment, discussed above. As to this, while we disagree with the Royal Court's conclusion, we have had the benefit of full argument concerning the appropriate approach to be taken by the Tribunal in the circumstances of the present case, where the only claim as regards redundancy is one put forward by the employee and is directed to the reasons for dismissal within Article 64(1) of the 2003 Law, the evidence of the relevant individual whose beliefs informed the dismissal decision taken by him having gone unchallenged. 126. The second instance put forward by JT was that the Royal Court erroneously held that the Tribunal had found there to be "no underlying redundancy situation". However the Tribunal did make just such a finding in paragraph 50 of its judgment, saying "The Tribunal could not help but feel sympathy for the Applicant but the evolution of the business within which he worked did not amount to a redundancy situation. It was an implied term of his contract that he should adapt to changes in working methods". 127. We have serious misgivings about this finding of the

Tribunal, unexplained as it is, concerning the existence or otherwise of a redundancy situation and the scope of the implied term in Mr Wood's contract. This is because the finding was made in relation to a case which was disclaimed by JT before the Royal Court and which, as explained to us, was not that put to the Tribunal. Before us the failure of Mr Wood to adapt, and the term in his contract of employment relied upon by JT in that regard as requiring him to adapt, was not a failure to adapt as an IP engineer: in other words JT was not seeking to support the case for which the contractual term as to adapting was said to be relevant, namely that his work included work of the type performed by IP engineers the requirement for which continued undiminished. Before us Mr Wood's failure, it is contended, was only a failure to adapt in a more general way by keeping abreast of developments in his field of work as a transmission engineer. 128. But as this finding of the Tribunal is irrelevant to its decision as to the reason for Mr Wood's dismissal for the purposes of Article 64(1) of the 2003 Law, it is unnecessary to say more about it other than to observe that the finding was not sought to be supported before us in terms of the case actually made before the Tribunal. Ground 4 129. JT's contention is that in its judgment the Royal Court itself misdescribed what amounted to a redundancy situation, and that this was an error of law on its part. 130. In its judgment the Tribunal had set out the part of Article 2 of the 2003 Law which describes what constitutes a redundancy situation, this being a state of affairs within the descriptions in sub-paragraphs (a) and (b) of Article 2(1). The Royal Court in its judgment at paragraph 22 also set out, and therefore had in mind, the immediately relevant part of Article 2(1). We reject any suggestion that the Royal Court then either misunderstood or misapplied the statutory definition. In particular, what the Royal Court had done was to set out a passage from the evidence of Ms Tostevin in which she effectively agreed to the existence of facts fitting the statutory definition. In substance this was that Mr Wood was a transmission engineer; that transmission engineers are different from IP engineers, doing different work; that the work carried out by transmission engineers is a particular type of work; and that JT's requirement for engineers to carry out that work has and continues to diminish. In addition, Mr Irwin, called by JT, gave evidence that the need for transmission engineers was reducing and that on Mr Wood's departure his work was shared out among members of his department. 131. The attack on the Royal Court's criticism of the Tribunal's judgment is, we think, based on an unfairly narrow reading of the Royal Court's judgment, suggesting that the Royal Court considered the test for the existence of a redundancy situation to be simply whether or not anyone else was recruited to do the job the dismissed employee was employed to do. In fact in the same paragraph in which the Royal Court referred to that indicator of a redundancy situation, the Royal Court also referred expressly to the question whether the dismissal was attributable to the diminishing requirements of the business for employees to carry out work of a particular kind. Ground 5 132. Ground 5 concerns the direction made by the Royal Court, at the end of its judgment, concerning questions for decision by the Tribunal on the remitted hearing of Mr Wood's application. 133. The Tribunal had found that when dismissing Mr Wood JT had an honest belief that Mr Wood was incapable. The Royal Court in its judgment stated that

there was evidence before the Tribunal on which it could conclude that JT's belief as to incapability was honestly held and acted upon. The argument made before us is that the formulation of the questions, taken with the direction to the Tribunal on the remitted hearing to determine whether on a proper analysis of the evidence Mr Wood's employment was terminated on the grounds of redundancy, showed that the Royal Court had been in error in holding the Tribunal to have misdirected itself as to redundancy. Further, it is submitted that the Tribunal should not be directed in the terms set out in the Royal Court's judgment. 134. In the introduction to this judgment we have explained how, in response to JT's fifth ground of appeal, Mr Wood by his Advocate has sought to have this Court make a finding that Mr Wood "was made redundant on the basis that that is the inevitable conclusion of correctly applying the law to the evidence before the Tribunal". When explored in the course of oral submissions it emerged that what was being sought was not a finding from this Court that within Article 64(1) JT's reason for dismissing Mr Wood was redundancy. What actually was being asked of us was a determination only that on the facts there was a redundancy situation within Article 2(1) of the 2003 Law at the time when Mr Wood was dismissed. 135. In supplemental written contentions JT opposed this: for his part Advocate Drummond, on behalf of JT, made further extensive reference to the evidence before the Tribunal. In the light of those references he submitted that this Court is not in a position to substitute its decision as to Mr Wood not having been dismissed for redundancy for that of the Tribunal. 136. We agree with Advocate Drummond that the positive finding made by the Tribunal as to what was, for the purposes of Article 64(1), the (principal) reason for Mr Wood's dismissal means that this Court cannot find that in fact the (principal) reason was redundancy. In our judgment it is unnecessary and inappropriate to go further and make findings about facts which can only be relevant (if at all) to possible future proceedings which are not before us. In particular we are not in a position to find as a fact, that there was indeed a redundancy situation when Mr Wood was dismissed. 137. Advocate Heath has submitted that the question whether or not there was a redundancy situation would be relevant to the considerations which the Tribunal is required by Article 64(4) of the 2003 Law to have in mind when determining the fairness of Mr Wood's dismissal. We disagree. In our judgment the required determination is to be directed at the actions of the employer as a response to the reason (or principal reason) shown for dismissing the employee. This follows from the words, "having regard to the reason shown by the employer", used in Article 64(4): those words refer to the Article 64(1) reason. In the present case, therefore, those words focus attention on the capability reason which has been established by JT. The fact that there may have been a redundancy situation at the time of Mr Wood's dismissal is beside the point if (as has been established) that fact did not provide the dismissal reason. Ground 6 138. The sixth ground of appeal concerns the Royal Court's conclusion that the Tribunal erred as regards its treatment of the abandonment of the capability process. The argument is that the Tribunal directed itself correctly as regards this abandonment and its impact on the questions to be resolved under Article 64(4) of the 2003 Law, and that it is the Royal Court which has failed to apply correctly what is

established by the Polkey case as applied in Jersey. 139. The Royal Court was not satisfied with the Tribunal's treatment of the failure of JT to comply with its capability process. The Royal Court's conclusion as to this was expressed as follows:- "... the Tribunal did approach the capability review question from the wrong perspective. The issue was not whether the Appellant would have improved sufficiently to have kept his job. The issue was whether he showed such lack of capability that he could not keep his job, and he was entitled to a fair crack at that question. Polkey accepts that the failure to keep to the established procedures does not necessarily mean the dismissal was unfair, but the test is too greatly watered down if formulated as the Tribunal did." 140. We have set out earlier in this judgment the material findings of the Tribunal, those in paragraphs 52 and 53 of its

judgment.

By way of introduction to the sixth ground of appeal we note that the finding in paragraph 53 of the Tribunal's judgment does not explain why the continuation of the process would have been futile. A finding that the continuation would in fact have been futile conveys, rather, that dismissal was "inevitable" (that being the Tribunal's word), leaving it open as to why Mr Wood's dismissal was inevitable (there being no finding made on that point). The Tribunal's finding therefore was not a finding that in some relevant but unspecified respect Mr Wood lacked capability appropriate for his job, nor was it a finding that before the capability process had been started he already lacked capability in that respect and never could have shown himself capable. 141. The other point to notice about JT's capability process is that such a process by its nature was likely to affect those directly involved as well as their colleagues, and to do so negatively. This, one would expect, was a consideration which JT must have been alive to when adopting the process. It is not immediately apparent, therefore, why the negative impact of the process should have provided a reason for Mr Wood's dismissal which could reasonably have been believed by JT to be sufficiently exceptional to support an abandonment of the capability process in his case. 142. Yet further, the capability process included at two stages (Stage 2 and Stage 3) a requirement for JT to give consideration to the possibility of the employee taking a different job within JT that he might be competent to fill. So far as can be discerned, this part of the capability process was never activated. It is simply speculation as to whether following the process through could not possibly have resulted in Mr Wood being re-deployed. 143. Before us Advocate Heath has argued that the Royal Court was correct in deciding that the Tribunal had misdirected itself as to the relevant questions mandated by the Polkey case. In our judgment the Royal Court was indeed correct. The finding of the Tribunal, in paragraph 53 of its judgment, was directed at precisely the question which, in his speech in the Polkey case (in the passage quoted at paragraph 27 of *Voisin v Brown* set out earlier in this judgment), Lord Bridge explained was irrelevant, one that the Tribunal is not permitted to ask: the Tribunal asked itself whether the continuation of the capability process would have made any difference to the outcome. This had followed the Tribunal's direction to itself, at paragraph 43 of its judgment, that "It is for the employer to show on the balance of probabilities that the employee would not have improved sufficiently to have kept his or her job even if given more time" . 144. The correct question for the Tribunal under

Article 64(4) of the 2003 Law should have been whether JT acted within the range of reasonable actions open to a reasonable employer in, among other matters, taking and acting upon the view (to borrow Lord Bridge's words) that the continuation of the process would have been futile, could not have altered the decision to dismiss, and therefore could be dispensed with. That question the Tribunal did not ask itself. There was therefore no finding as to whether, at the time of the dismissal, JT acted within the range of reasonable responses open to it when it abandoned the capability process and dismissed Mr Wood. On the other hand the finding at paragraph 53 was irrelevant to the question of the reasonableness of JT's actions. 145. The effect of this error on the part of the Tribunal is that it reached a flawed conclusion when deciding that Mr Wood's dismissal was to be considered fair within Article 64(4). We consider below what in our judgment are the consequences. But, for reasons which we explain in connection with the next ground of appeal considered below, the error made by the Tribunal is material so that the Tribunal's conclusion has to be set aside. Ground 7 146. We have explained above the threshold which must be reached if the Tribunal's decision is to be set aside as "perverse". Unless that threshold is reached the Royal Court has no power to interfere (absent the identification of some error of law) no matter how uncomfortable it might feel about the Tribunal's decision and whether or not the decision is one which left to itself the Royal Court would have arrived at. 147. It is said on behalf of JT that the Royal Court failed to direct itself correctly as to the relevant test and applied too low a threshold. However in her Skeleton Argument in support of the appeal to the Royal Court Advocate Heath had drawn attention to, and cited from, the case of *Yeboah v Crofton*

[2002] IRLR 634 . Indeed her citation was the same as that which features in Advocate Drummond's on this appeal, and is to the effect that a case that there has been an error of law in that a decision is perverse "ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached" . 148. When the Royal Court used the word "perverse" it was being used, in our judgment, to convey (as it would as an ordinary word of English language) just such a threshold. The real question is whether, having identified that threshold, the Royal Court correctly assessed the Tribunal's judgment in the light of the evidence and law. 149. The material conclusions of the Tribunal which were considered by the Royal Court to be perverse were those in paragraphs 50, 51 and 53 of the Tribunal's judgment. We have commented above on paragraph 53. Paragraphs 50 and 51 were in the following terms:- "50 It was the view of the Tribunal that the Applicant did not want to move with the times and that he perhaps regretted not having taken the opportunity to take an earlier redundancy offer. The Tribunal could not help but feel sympathy for the Applicant but the evolution of the business within which he worked did not amount to a redundancy situation. It was an implied term of his contract that he should adapt to changes in working methods. His failure to communicate at work was highlighted but the Respondent also placed great significance on what it considered to be a defiant attitude that was encapsulated in his statement that "IP was not what I want to do with my life". The Respondent wanted the Applicant to change the way he did his work and the way in which he interacted with

colleagues. The Tribunal finds that the Respondent was reasonable in regarding the Applicant's failure to change adequately or at all combined with issues regarding communication with colleagues as sufficient to render him incapable. The Tribunal finds that the Respondent carried out a proper investigation in order to identify the Applicant's problem and warned him of the consequence of a failure to improve his performance, giving him ample time to improve his performance." 150. In summary paragraph 50 involves a conclusion that JTs' belief as to Mr Wood's incapability was a reasonably held one, this being by reference to a reasonably held belief as to his "failure to change adequately or at all", and as to "issues regarding communications with colleagues". 151. The Royal Court's reasoning was that, on the evidence, JT could not properly have been found by the Tribunal to hold on reasonable grounds a belief as to Mr Wood's incapability sufficient to support a fair dismissal without giving him a fair chance to justify himself (paragraphs 38 and 39 of the Royal Court's judgment). Further, the Royal Court found that the evidence as to the capability process could not properly have supported a conclusion that on reasonable grounds JT held a belief as to Mr Wood's incapability sufficient to support a fair dismissal (paragraphs 34 to 38 of the Royal Court's judgment). In reaching these conclusions the Royal Court reminded itself that it had not seen the witnesses, and was therefore to be careful in assessing what lay within the range of conclusions open to the Tribunal without being perverse. 152. In challenging the reasoning of the Royal Court and its conclusion as to the perversity of the Tribunal's decision, JT submits that the Royal Court has fallen into the error of approaching the case as involving a requirement for JT to show that the dismissal was reasonable in all the circumstances when the burden of proof is neutral. 153. We reject this submission. There is no indication that the Royal Court treated JT as having to assume any onus of proof. On the contrary, the Royal Court tested the conclusions reached by the Tribunal as to the reasonableness of JT's beliefs and action by reference to the evidence before it. The Royal Court's decision was that the conclusions could not be supported by the evidence. In our judgment the Royal Court's decision was correct. 154. We consider that the position can be explained very shortly. The evidence as to Mr Summerfield's belief as to Mr Wood's want of capability, and therefore JT's reason for dismissing Mr Wood, was a belief that Mr Wood "was not prepared to learn new skills or technologies demanded by his role as a Transmission and Access Engineer": those are the words used by Mr Summerfield when explaining the particular respects in which Mr Wood was wanting. In the light of Ms Tostevin's evidence, above, the belief was a mistaken one by the time the capability process was abandoned: by then Mr Wood's want of capability lay in a different direction, namely his alleged failure as regards communication. Ms Tostevin was the only representative of JT directly involved in the capability process to give evidence about it. What she said is important when considering what were the reasons stated by Mr Summerfield as his (and thus JT's) reasons for curtailing the capability process and dismissing Mr Wood, and when deciding upon the reasonableness of JT's actions in that regard. "Advocate Heath: "And ultimately the only criticism that was made of Mr Wood was this poor, alleged poor communication, alleged by Mr Bray and Mr Van de Ven neither of whom have given evidence, that's the case isn't

it?" [Ms Tostevin]: "Yes" 155. In our judgment it cannot have been within the range of reasonable actions open to JT for Mr Summerfield to have decided in November 2013 to dismiss Mr Wood as incapable by reason of his not being prepared to learn new skills or technologies, when in the capability process that was no longer the complaint against him. And in our judgment it was perverse for the Tribunal to hold that dismissal was a reasonable response, when (a) Mr Summerfield did not have in mind the correct objection to Mr Wood's capability at the time of his decision to abandon the capability process and dismiss Mr Wood, the process itself being designed to allow employees to establish their capability, and (b) Mr Summerfield (as we have pointed out above) had not concluded that continuing with the capability process would have been futile (and, it is worth repeating, had not used the word "inevitable" attributed to him by the Tribunal). What Mr Summerfield said that had in mind was that JT might, by curtailing the capability process, induce Mr Wood to leave with an agreed severance having accepted what Mr Summerfield referred to as a "generous offer which could work for all parties", the alternative being litigation with JT being willing "to pay any compensation arising out of any subsequent litigation regarding his dismissal for incapability". 156. The Royal Court drew attention to what was said by Mr Summerfield as regards the capability process. He said that in his belief the process was having a negative impact on the IP Networks Team, and was taking up time and resources. Whatever weight these considerations should reasonably have been given by JT, bearing in mind that the process was of JT's own adoption, it cannot have been reasonable for JT to abandon the capability process when there was believed by JT to be some chance that the process would result in Mr Wood being found to have "the required competence", as Mr Summerfield put it. This is further underlined, as the process had in fact (according to Ms Tostevin's evidence) resolved the particular capability issue which Mr Summerfield had had in mind, namely Mr Wood's not being prepared to learn new skills or technologies. But Mr Summerfield did not refer to this in his evidence as to his reason for arriving at the decision to dismiss Mr Wood, or to the indication that in the capability process there was a criticism being made concerning Mr Wood's communications. 157. In our judgment, therefore, the Royal Court was correct to hold the Tribunal to have arrived at a perverse decision when holding that Mr Wood's dismissal was in the circumstances fair. JT's seventh ground of appeal fails. Ground 8 158. The eighth challenge to the Royal Court's judgment is that it approached the case by considering the assessment which the Tribunal should have made if it were itself Mr Wood's employer, rather than by considering whether on the evidence it was open to the Tribunal to find that a reasonable employer placed as JT was and acting reasonably could have done what JT did. It was submitted by Advocate Drummond on behalf of JT that this approach required the Tribunal impermissibly to substitute its own opinion for that of JT. 159. Two passages in the Royal Court's judgment are relied upon by Advocate Drummond as demonstrating this error. These are passages, in paragraphs 38 and 39 of the judgment, in which the Royal Court pointed out that there was no direct evidence from either Mr Bray or Mr Van de Ven to support the statements in the PRA forms and to contradict Mr Wood's evidence. It is submitted by Advocate Drummond that cross-examination of these

individuals would have been pointless as their views would be irrelevant to the question whether the employer "acting through the dismissing officer at the time of the dismissal could reasonably take the view that it had sufficient grounds to conclude that Mr Wood was incapable". 160. We reject this submission: in our judgment the Royal Court has not fallen into the suggested error. The Royal Court in terms referred, correctly, to the fact that "the Tribunal ... had to make an evaluation or judgment on the reasonableness of the Respondent's decision", and pointed out that this evaluation fell to be made in the light of the evidence before the Tribunal. While Mr Summerfield, the individual referred to in JT's arguments as "the dismissing officer", was found to have believed honestly that Mr Wood was incapable, the reasonableness of JT's actions in abandoning the capability process and dismissing Mr Wood was not concluded by that finding. Mr Summerfield's belief was founded on what he had been told. Consideration of the reasonableness of his decision in the context of consideration of JT's actions in dismissing Mr Wood, would require attention to be given to the accuracy and fairness of what Mr Summerfield had been told and was relying upon when the decision was taken to abandon the capability process and dismiss Mr Wood. 161. As it happens, Mr Summerfield's own evidence reveals, as pointed out by the Royal Court, that his resolution to dismiss Mr Wood as he did "was taken in the overall interests of the employer without regard to [Mr Wood's rights] - the employer had money in the budget to pay compensation if ordered but not agreed".

Disposition

162. Our conclusion is that the Tribunal correctly identified capability as the reason (for the purposes of Article 64(1) of the 2003 Law) for Mr Wood's dismissal. 163. On the other hand we consider that dismissing Mr Wood as JT did in November 2013 was outside the range of responses reasonably open to an employer placed as JT was, and that not only did the Tribunal misdirect itself in this regard but also that its decision was perverse. In this respect we uphold the Royal Court's judgment and dismiss the appeal. 164. We have considered carefully what should be the disposition of the case in the light of these conclusions. In principle it is for the Tribunal, and not the Royal Court (or for that matter this Court), to determine as a factual conclusion whether or not a particular dismissal is unfair. This was pointed out by Sir Michael Birt in his judgment in *Voisin v Brown*, at paragraph 61, after he had referred to English authority on the point. We have also been referred to the case of *Jafri v Lincoln College*

[2014] EWCA Civ 449, [EWCA] IRLR 544 for a further articulation of the same principle as applied in England and Wales. 165. On the other hand Sir Michael Birt said also that it would be permissible for the Royal Court to make its own determination of the question of the unfairness or otherwise of a dismissal if there were in law only one proper answer to the question, so that an answer to the opposite effect would be perverse. We agree with this approach. 166. In our judgment the present is a case in which, unusually and perhaps exceptionally, this Court is in a position, not only to set aside the Tribunal's determination that the employee's dismissal was not unfair, but also itself to find that the only

determination which would not be perverse would be one that the dismissal was unfair. We reach this conclusion for the reasons we have given in relation to Ground 7 above. On the basis of Mr Summerfield's witness statement (Mr Summerfield having been put forward by JT as being, in relation to Mr Wood's dismissal, JT's directing mind), there is no basis on which the Tribunal could properly find that JT had formed those opinions, in relation to the futility of continuing its capability process, which could reasonably support the abandonment of its process and its dismissal of Mr Wood for the reason believed by Mr Summerfield. 167. Accordingly, we order that the matter remitted should be limited to the question of the amount of any compensation payable to Mr Wood for unfair dismissal, his dismissal on the ground of capability having been unfair. Same or different Tribunal 168. We have now been asked by Advocate Heath to order an amendment the Royal Court's order by remitting the case to a differently constituted Tribunal. In support of this application Advocate Heath has told us that one of the original three members of the Tribunal has now retired, so that inevitably there will be some change in the Tribunal. She also submits that this is a case where in any event it would be appropriate for there to be a newly constituted Tribunal, as the original Tribunal's decision was totally flawed and there may be a perception of "pre-judgment bias". In this regard she referred us to the English case of *Sinclair Roche & Temperley v Heard*

[2004] IRLR 763 in which the Employment Appeal Tribunal listed out various considerations which it would be appropriate to keep in mind: proportionality, passage of time, bias or partiality, totally flawed decision, second bite, and tribunal professionalism. 169. JT has not argued that the way in which Mr Wood's application has been brought before this Court, being brought in particular without any Respondent's Notice or formal application, should lead us to refuse to consider the application. Rather, JT has resisted the application on its merits and argues that the Tribunal should itself be left to deal with its own composition. 170. In light of the fact that the circumstances have changed since the Royal Court made its decision, we consider that the interests of justice now demand that this Court should exercise its own discretion afresh. In doing so we consider that the better course is to direct that a differently constituted Tribunal should hear the matter from now on. This is no reflection on the ability or independence of the members of the previous Tribunal: it is simply a pragmatic and just response to the fact that a tribunal constituted of some members who have, and one who has not, previously heard evidence and made decisions in this case would not be an appropriate and balanced decision-making body. Costs 171. In the absence of agreement between the parties, we direct the mutual exchange of written submissions on costs within 14 days of the date on which this judgment is handed down and mutual exchange of written replies on costs within 14 days thereafter. We will determine the appropriate costs order on the basis of those written submissions, unless either of the parties wishes to try persuading us to convene a further oral hearing. Any request for such an oral costs hearing should be made in the written submissions within the timeframe set out above. *Authorities Employment (Jersey) Law 2003. Wood-v-JT (Jersey) Limited*

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- [2016] JRC 089B . Polkey v AE Drayton Services Ltd
- [1988] AC 344 . Employment Rights Act 1996. Voisin v Brown
- [2007] JLR 141 . Voisins Department Store Ltd v Soares
- [2014] JRC 004. Luxicabs Ltd v Baal
- [2011] JLR 208 . Abernethy v Mott, Hay and Anderson
- [1974] ICR 323 (CA). Foley v Post Office
- [2000] ICR 1283 . Cresswell v Board of Inland Revenue
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- [1967] 2 QB 56. Redundancy Payments Act 1965. British Home Stores Ltd v Burchell
- [1980] ICR 303 . W. Weddel & Co Ltd v Tepper
- [1980] ICR 286. Packman v Fauchon
- [2012] ICR 1362 . Yeboah v Crofton
- [2002] IRLR 634 . Jafri v Lincoln College
- [2014] EWCA Civ 449 , [EWCA] IRLR 544. Sinclair Roche & Temperley v Heard
- [2004] IRLR 763 . Page Last Updated: 11 Oct 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII
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