Neutral Citation Number: [2023] EAT 169

Case No: EA-2022-001179-OO

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 October 2023

Before:

HIS HONOUR JUDGE JAMES TAYLER
MR DESMOND SMITH
MR STEVEN TORRANCE

- -

Between:

MS R SANDHU

Appellant

- and -

ENTERPRISE RENT-A-CAR LTD

Respondent

- -
- -

MR T PERRY (instructed by **Astute Law**) for the **Appellant**
MS H SLARKS (instructed by **Taylor Wessing LLP**) for the **Respondent**

Hearing date: 19 October 2023

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL, DISABILITY DISCRIMINATION

The Employment Tribunal did not err in law in rejecting the claims of unfair dismissal, direct disability discrimination and harassment. The Employment Tribunal considered the relevant issues and provided proper reasons for its conclusions. The determinations of the Employment Tribunal were not perverse.

HIS HONOUR JUDGE JAMES TAYLER:

1. This is an appeal against a judgment of the Employment Tribunal, Employment Judge Quill sitting with lay members, after a hearing that took place on 27, 28, 30 June and 1 July 2022 with a day in chambers on 3 August 2022. The judgment was sent to the parties on 4 October 2022.

2. The claim primarily concerned the dismissal of the claimant. The Employment Tribunal found that she had been dismissed for some other substantial reason relating to her refusal to report to her line manager. The Employment Tribunal dismissed claims of direct disability discrimination and disability-related harassment in relation to matters leading up to the dismissal and a claim of direct disability discrimination in respect of the dismissal. The claimant relied on the disability of her father.

3. The tribunal, after a brief introduction, set out the claims and issues. So far as is relevant to this judgment in considering the claim of unfair dismissal the claimant complained of a failure to consider sanctions less than dismissal and a failure to follow incremental disciplinary sanctions. Those are slightly different ways of looking at the same point, namely a decision to move to dismissal without there having been an express warning in respect of the refusal of the claimant to report to her assigned line manager prior to the dismissal.

4. In respect of the claims of direct disability discrimination and harassment, a number of specific acts were set out that were asserted to be direct discrimination or harassment in the period leading up to the dismissal and it was also asserted that the dismissal itself was an act of direct disability discrimination in relation to the claimant's father's disability.

5. The Employment Tribunal made detailed findings of fact. The tribunal recorded that the respondent is a car rental company (paragraph 17). The claimant commenced employment with the respondent in June 1999 as an Accounting Assistant (paragraph 18). The level of responsibility increased over time (paragraph 19). About two years after joining the respondent, the claimant became Payroll Accounting Assistant (paragraph 20).

6. In about 2009 the claimant's departmental duties increased. By that time the payroll department was dealing with some 1,000-1,200 employees; compared to about 100 when the claimant began work (paragraph 21).

7. The claimant was considered to be hard working and met deadlines in the early period of her employment (paragraph 22). In about 2010 the claimant was promoted to the role of Payroll Supervisor.

8. The claimant's line manager when she was first appointed as Payroll Supervisor was Ceri Miles who was managed by Steve Young, the Financial Controller. The claimant began to report directly to Mr Young when Ms Miles was on maternity leave. The arrangement continued after Ms Miles' return (paragraph 23). It appears that the claimant had found it difficult to report to Ms Miles because of personality issues.

9. In about January 2016 the respondent appointed a Payroll Manager who was subordinate to Mr Young and to whom the claimant should have reported. However, the claimant objected to doing because of problems that she had in reporting to Ms Miles. The claimant said that she preferred to report to Mr Young. She was permitted to continue reporting to Mr Young for a period (paragraph 35).

10. In July 2016 a new Payroll Manager, Mark Astill, was appointed. The claimant told Mr Young that she did not wish to report to Mr Astill. The claimant was told that she could continue temporarily to report to Mr Young (paragraph 36).

11. From about this time the claimant's performance deteriorated. For three performance appraisal cycles she received marks of "requiring improvement". Under the respondent's policies usually two such ratings result in formal action being taken. In the claimant's case, it was only after the third such rating that action was taken.

12. In about November or December 2017, the claimant discovered that her father was seriously ill. He had stage 4 cancer. The claimant told Mr Young shortly after but did not tell her other colleagues.

13. On or about 29 January 2018, the claimant was handed a letter inviting her to a formal hearing on 6 February 2018 in respect of her performance reviews (paragraph 63). The letter calling her to the meeting did not specifically raise the issue of her failing to report to the person who should be her line manager in the respondent's structure. A meeting was held on 6 February 2018 at which the claimant was given an oral warning (paragraph 65). During the performance meeting the claimant did not raise the issue of her father's cancer or any requirement for her to have time off to assist in supporting him. The claimant did not appeal against the verbal warning (paragraph 71).

14. A number of incidents occurred in early 2018. It was alleged that a Ms Johal commented "good afternoon" to the claimant when she arrived at work a little later than usual (paragraph 76).

15. On 27 March 2018, the claimant provided a binder to Mr Astill late. The reason was an issue the claimant had in providing medication to her father. The Employment Tribunal

found that Mr Astill did not know about his condition or that this was the reason for the delay. Mr Astill reported the delay to Mr Young. Mr Young took no action (paragraph 77).

16. The situation continued to deteriorate which resulted in a discussion on 28 March 2018 that included consideration of the possibility that the claimant would leave under agreed terms with the respondent. The claimant did not return to work after that conversation. Mr Young told the claimant that she could take some time off to spend with her family (see paragraph 87.4). No agreement was reached.

17. On 3 May 2018, while at a family gathering, the claimant was informed that a letter had been sent to her calling her to a formal disciplinary meeting. The meeting was to determine whether disciplinary action should be taken, which could include a number of outcomes ranging from verbal warning to dismissal. The letter included two headings "insubordination" and "capability".

18. Under the first heading allegations were listed of refusing to report to two payroll managers since 2016, breakdown of trust between the claimant and Mr Young (including requests to report to Mr Young's managers rather than to him) breakdown of relationships between the claimant and her team's internal clients, unwillingness to work within the new management structure, and alleged responsibility for high staff turnover, including Mr Porter's departure.

19. Under the second heading allegations were listed of poor email management and communication, reluctance to engage with training, failure to heed management instructions and guidance, and poor development and support for the employees on her team.

20. The disciplinary meeting was fixed for 8 May 2018 which, as a result of a bank holiday, meant the claimant had only a little over one working day to prepare for the meeting.

21. The Employment Tribunal found in respect of the meeting:

> "101. The claimant … did not specifically say that her performance generally over the last few weeks since the oral warning (or prior to that) had been affected by her father's ill-health or the time she had devoted to caring for him and supporting him. She did say that there had been an interaction between her and Mr Astill on the day of her father' fall; she said this was the context of her having said, about Mr Astill: I don't respect Mark and I don't like Mark to him.
>
> 102. In relation to her delays in supplying the plan to Mr Young, and the updates to that plan that he had asked for following receipt, she said that this occurred during what had been a tough time because of personal issues; we accept that may have been an indirect reference to her father's illness, but she did not expressly say so.
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> 103. In the meeting, the claimant suggested that her performance had been reasonable. Her explanation for at least some of the issues that Mr Young was highlighting were that these were problems created by Mr Astill.
>
> 104. She accepted during the meeting that she had been unwilling to have Mr Astill as her line manager. She reiterated that her reason for that was a fear caused by poor experience from having the way should be managed by Ms Miles previously.
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> 105. The meeting ended without the claimant being given an outcome, but being told that the standard process was the outcome to be delivered within five working days. She asked for it to be sent by email to her Hotmail account, rather than by post to her home address.
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> 106. The outcome letter (pages 436 to 440) was dated 15 May 2018 and had the effect (as decided at an earlier hearing) of terminating her employment with effect from 15 May 2018.
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> 107. We accept that the letter contains Mr Young's genuine opinions and beliefs.
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> 108. The second paragraph stated:
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>> The hearing was held to consider the points outlined in the invitation letter dated 3rd May concerning insubordination and your capability to perform the role. Whilst the points which were considered are set out in the letter, as explicitly discussed in the hearing, the primary reasons were your refusal to report into the level III payroll manager position dating back to January 2016 and covering two separate payroll managers and the breakdown in trust and relations between us and also your payroll business partners.

109. The fourth included the passage:

> The hearing was held to consider the points outlined in the invitation letter dated 3rd May concerning insubordination and your capability to perform the role. Whilst the points which were considered are set out in the letter, as explicitly discussed at the hearing, the primary reasons were your refusal to report into the level III payroll manager position dating back to January 2016 and covering two separate payroll managers and the breakdown in trust and relations between us and also your payroll business partners.

110. In terms of reporting to Mr Astill, the letter mentioned that the latest date for this had been set as April, and that, in the 8 May hearing, the claimant had said that she could not do this straight away, as she could first need to attend an external course to help her come to terms with this. The letter noted that she had started but been able to complete this external course on two previous occasions, and that she was unable to recall the name of the course. The letter implied that Mr Young was not persuaded that the claimant was either (a) providing a specific date for completion of the course, or (b) stating that she was sure she would be able to report to Mr Astill once she had completed it. The letter also said that Mr Young's reasons opinions for thinking that the claimant was not yet prepared to report to Mr Astill included his opinions about how she had acted since the verbal warning; he said that she had been negative since the meeting (to the training manager) and had not completed the records he had instructed her to keep. He acknowledged that she had not been in the business for the full period since 14 February onwards 'through personal issues', which we take to be an acknowledgment that he was aware that the claimant had been providing support to her father, even though the claimant had not expressly mentioned that in the meeting. He did not expressly mention that she had been absent since 28 March 2018 at the respondent's suggestion that she take time to consider a severance agreement.

111. The letter as a whole makes clear that – while performance issues are being taken into account – the main issue, according to Mr Young was the claimant's refusal to accept what he said were the reporting structures established in 2016, namely that she should report to payroll manager, not to him, Mr Young, directly."

22. The tribunal concluded that the main reason given for dismissing the claimant was her refusal to abide by reporting structures that had been established in 2016. It is important to note that at paragraph 104 the Employment Tribunal held that during the disciplinary meeting the claimant accepted that she had been unwilling to have Mr Astill as her line manager. She said that this was because of poor experiences working with Ms Miles. At paragraph 101 the

tribunal recorded that the claimant had said that she did not respect Mr Astill and did not like him.

23. The claimant appealed against her dismissal. The appeal was heard by Mr Bateh, Vice President of Finance for Europe. His decision is set out at paragraphs 117 to 119 of the decision of the Employment Tribunal:

> "117. During the appeal hearing, Mr Bateh asked the claimant a number of questions which he considered relevant and gave her the opportunity to expand on what she said in her grounds of appeal. He instructed Mr Taylor to conduct some further enquiries to assist him.
>
> 118. His appeal outcome letter dated 24 August 2018, at page 494 of the bundle, contains his genuine opinions. He approached the matter with an open mind and considered whether reinstatement (overturning the dismissal decision) was appropriate. In particular, having considered the evidence, he formed the opinions:
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> … during our meeting you showed no indication that you would accept reporting to a payroll manager without further issues and continuing poor performance. I am unconvinced that based on what I have seen you could work in a harmonious manner within the existing structure. I believe that this would only cause further unrest and turmoil for you, the team and the wider business.
>
> It is my opinion that many of the performance issues you raised at the appeal were not only caused as a direct result of your unwillingness to accept the reporting line, but also arise from your continued poor demonstration of communication, leadership and time management. These have been a regular area of focus in your three performance reviews in November 2016, June 2017 and November 2017 as well as the previous disciplinary hearings on 6th February 2018 and 8th May 2018.
>
> 119. He rejected her argument that the dismissal was because of (or connected to) her father's diagnosis. He said that his enquiries satisfied him that the employer had been extremely flexible in relation to her working time. He rejected her argument that her offer to consider attending mediation meetings with Mark Astill meant that it was wrong for the employer to decide that she was refusing to report to him, or unable/unwilling to work harmoniously with him."

24. The Employment Tribunal set out its conclusions in respect of the allegations of harassment that are of particular relevance to this appeal at paragraphs 170 to 179:

"170. One possibility is that there was simply confusion or misunderstanding between Mr Astill and the claimant about the availability of the information in the binder. One possibility is that Mr Astill disliked the claimant and seized on a chance to report her. One possibility is that, knowing the claimant had had a warning for poor performance, Mr Astill saw it as his duty to report any perceived failings to Mr Young.

171. In any event, he did not know about the claimant's father's cancer, and that did not motivate him to make the report to Mr Young.

172. His report to Mr Young was unwanted conduct. In a 'but for' sense, there was some connection between the claimant's father's disability, in that, but for her attending to her father, she would have been in work prior to 11am and able to hand the item to Mr Astill and but for her failure to do so, he would not have made the report to Mr Young. However, even assuming, for the sake of discussion, that this was sufficient to justify a decision that the unwanted conduct was 'related to' the claimant's father's disability, we do not think that it would be reasonable for the conduct to be treated as having the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The matter was reported to Mr Young but there was no action taken by him. Had she wished to, or had it been necessary for her to do so, the claimant could have explained the circumstances to Mr Young. It would be cheapening the meaning of the words in section 26 to treat the factually accurate report of Mr Astill to Mr Young as amounting to harassment.

173. In terms of the allegation that the claimant was treated less favourably when compared to Ms Keely, we are not persuaded that Ms Keely was a valid actual comparator, as – on the facts – the situations appear different. Asking for, and being granted, an extension, is not the same as being reported for missing a deadline when no extension has been (requested or) given.

174. These allegations of direct discrimination and harassment fail.

5.3.8 In the last week of March 2018 Sinita Johal was rude to the claimant about her arriving late from having been to the hospital:

175. As discussed in the findings of fact, we are satisfied the remark was made (regardless of whether Ms Johal intended to be rude or funny). However, Ms Johal was not aware of the claimant's father's situation or of the reasons for the timing of the claimant's arrival at work.

176. The claimant's father's cancer did not motivate Ms Johal to make the remark.

177. The remark was unwanted conduct. In a 'but for' sense, there was some connection between the claimant's father's disability, in that,

> but for her attending to her father, she would have been at work earlier, and there would have been no reason for Ms Johal to comment.
>
> 178. However, even assuming, for the sake of discussion, that this was sufficient to justify a decision that the unwanted conduct was 'related to' the claimant's father's disability, we do not think that it would be reasonable for the conduct to be treated as having the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. It would be cheapening the meaning of the words in section 26 to treat a one off remark of 'good afternoon' in these circumstances as amounting to harassment; whether it might have been different had Ms Johal been aware of the true facts is a matter we do not need to address, because she was not aware of the true facts.
>
> 179. These allegations of direct discrimination and harassment fail."

25. The Employment Tribunal dealt with the claimant's dismissal from paragraphs 192 to 207:

> "192. We were not shown evidence of the claimant having been formally warned prior to the 3 May letter, that the respondent was contemplating dismissing her if she did not agree to report to the payroll manager (Mr Astill at the time). As discussed in the findings of fact, Mr Young informed Mr Scales that she had been told she had to do it by 1 April 2018, but she was away from work from 28 March 2018 onwards.
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> 193. The lack of evidence of this particular matter having been raised formally earlier is significant taking account of (a) the prominence of this issue in the dismissal reasons and (b) the short amount of time to prepare for the hearing. That being said, this was not one of the grounds on which the claimant sought a postponement, and she did have the full opportunity to put her points across to Mr Young (and again to Mr Bateh). Her argument was not that the respondent's position was a surprise to her, but rather that there were good reasons that she should not have to report to (a) any payroll manager at all and/or (b) Mr Astill.
>
> 194. The dismissal reasons are as stated in the dismissal letter. Lack of ability to report to Mr Astill is discussed in the middle paragraphs on 437, as well as the summary. Notwithstanding the fact on the first page of the dismissal letter (and in the invitation letter) refer to 'insubordination', we are satisfied that, as stated, Mr Young regarded this situation about reporting structure as falling into the 'some other substantial reason' category, rather than 'misconduct'.
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> 195. Based on the wording of the letter, the principal reason for the dismissal was the lack of willingness to change and work with a

payroll manager or adapt to new processes. There was a close connection between the latter, and the performance process which had been ongoing. Some of the evidence for the latter was the failure (in the respondent's opinion) for the claimant to adopt changes which she had been clearly instructed to adopt in her performance reviews, and the 6 February meeting.

196. However, Mr Young's opinion was that, regardless of the specific reasons that the claimant was not adopting changes to her working practices, or accepting the 2016 structure which required her to report to the payroll manager, the state of affairs which existed was such that the respondent could no longer accept the situation that the claimant carried on not doing these things. That was his dismissal reason, and we accept that it is potentially a fair reason: i.e. it is potentially a substantial reason of a kind such as to justify the dismissal of a payroll supervisor.

197. The appeal outcome letter represents Mr Bateh's honest opinion. The appeal process was fair in terms of allowing the claimant the opportunity to have a hearing before the appeal decision maker.

198. We do not accept that Mr Bateh had a closed mind going into the process. He was willing to listen to what the claimant had to say and his focus was on and what had been given as the reasons for the dismissal by Mr Young and deciding whether the claimant was able to satisfy him that he should overturn that decision. He did not itemise and address all of the points in the appeal letter and individually. However, he did address the challenge to the dismissal as a whole, and the points that insufficient consideration had been given to her father's situation (or, the alternative, that the father's situation was the true motivation for the dismissal).

199. Mr Bateh's reason for rejecting the appeal was that he agreed with Mr Young. On the appeal, the categorisation of the dismissal reason did not change from SOSR to anything else.

200. Our opinion is that it was not reasonable to refuse to postpone the hearing of 8 May 2018, taking into account the claimant's bereavement and taking into account the short notice, and taking into account the lack of a specific reason put forward by the respondent as to why a hearing a few days later was not workable.

201. The actual dismissal decision itself was not outside the band of the reasonable responses. The decision is not whether the employment tribunal panel would have dismissed at this stage, or whether we think all employers would have done so but whether we consider that no reasonable employer would have dismissed. Our view is that some reasonable employers would have dismissed for these reasons in these circumstances, including that the claimant was making clear that she would not be willing to start reporting to Mr Astill in the immediate future if she came back to work.

> 202. In terms of the performance issues, the claimant had been given various opportunities to improve after the performance plans.
>
> 203. On the evidence, Mr Young (and later Mr Bateh) did not have a fixed opinion that the claimant had to be dismissed regardless of what she said in the respective meetings. The fact that she was given a severance offer, for example, does not persuade us of that. Questions were asked, and the claimant had the opportunity to speak, and her comments were addressed in the respective outcome letters.
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> 204. Taking into account the fact that the claimant did not push the postponement point further and she did say that she was willing to go ahead and taking into account the fact that there was a thorough and fair appeal process, we do not consider that the defect in procedure (pressing ahead on 8 May without offering the claimant a few more days to brief a companion) was such as to render the dismissal as a whole unfair.
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> 205. The unfair dismissal complaint therefore fails.
>
> 206. There are no facts from which we could conclude that the dismissal was because of her father's disability, or related to it. As discussed already, the information given to the claimant about perceived performance issues long pre-dated the disability. We have taken into account that the respondent seems to have changed tack to some extent, and rather than continuing down the pure performance management path, it changed to a process in which the issue that payroll supervisors were supposed to report to the payroll manager became the main focus of attention. That being said, as discussed above, this was not a brand new factor. The requirement for her to do this had been discussed with the claimant previously (albeit not, as far as we know, in the bald terms 'we will dismiss you otherwise').
>
> 207. The complaints that the dismissal was an act of discrimination or harassment fail."

26. The primary challenges to the judgment of the Employment Tribunal relate to its reasoning and asserts perversity. It includes one challenge to its approach to the underlying legal principles.

27. As the perversity and reasons grounds are overarching, we shall start by considering the relevant law about reasons and perversity before going on to consider relevant aspects of the substantive law when dealing with the specific grounds.

28. This appeal requires consideration of what might be described as the yin and yang authorities about the reasons of an Employment Tribunal. There is the well-known passage in **Brent London Borough Council v Fuller** [2011] ICR 806, at paragraph 30:

> "The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision ready in the round: those are all appellate weaknesses to avoid."

29. Then there is **Anya v University of Oxford & Anor** [2001] ICR 847 at paragraph 26:

> "There is at least one further obstacle to Mr Underhill's stalwart defense of the Industrial Tribunal's decision. The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues."

30. More recently consideration has been given as to what may be expected of the reasoning of an Employment Tribunal in **DPP Law v Greenberg**, [2021] IRLR 1016:

> "57. The following principles, which I take to be well established by the authorities, govern the approach of an appellate tribunal or court to the reasons given by an employment tribunal:
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> 1. The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. In *Brent v Fuller* [2011] ICR 806, Mummery LJ said at p.813: …
>
> This reflects a similar approach to arbitration awards under challenge: see the cases summarized by Teare J in *Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The "PACE")* [2010] 1 Lloyds' Reports 183 at paragraph 15, including the oft-cited dictum of Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery repairs Ltd* [1985] 2 EGLR 14 that the courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration". This

approach has been referred to as the benevolent ready of awards, and applies equally to the benevolent reading of employment tribunal decisions.

2. A tribunal is not required to identify all the evidence relied on in reaching its conclusion of fact. To impose such a requirement would put an intolerable burden on any fact finder. Nor is it required to express every step of its reasoning in any greater degree of detail that that necessary to be *Meek* compliant (*Meek v Birmingham City Council* [1987] IRLR 250). Expression of the findings and reasoning in terms which are as simple, clear, and concise as possible is to be encourage. In *Meek*, Bingham LJ quoted with approval what Donaldson LJ had said in *UCATT V. Brain* [1981] I.C.R. 542 at 551:

> 'Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law …their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given.'

3. It follows from (2) that it is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind. As Waite J expressed it in *RSPB V Croucher* [1984] ICR 604 at 609-610:

> 'We have to remind ourselves also of the important principle that decisions are not to be scrutinized closely word by word, line by line, and that for clarity's and brevity's sake industrial tribunals are not to be expected to set out every factor and every piece of evidence that has weighed with them before reaching their decision; and it is for us to recall that what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. It is our duty to assumed in an industrial tribunal's favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not; and that has been well-established by the decisions of the Court of Appeal in *Retarded Children's Aid Society Ltd v. Day* [1978] I. C. R. 437 and in the recent decision in *Varndell v. Kearney & Trecker Marwin Ltd* [1983] I. C. R. 683.'

58. Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a

> difference principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload."

31. As for assertions of perversity, the parties agree that the correct approach is that set out in **Yeboah v Crofton** [2002] IRLR 634, see particularly paragraph 93:

> "Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision that no reasonable tribunal, on a proper application of the evidence and the law, would have reached. Even in cases where the appeal tribunal has 'grave doubts' about the decision of the employment tribunal, it must proceed with 'great care', *British Telecommunications PLC v Sheridan* [1990] IRLR 27 at para 34."

32. The claimant made a number of assertions of harassment. The statutory test for harassment is set out in section 26 of the **Equality Act 2010** ("**EQA**"):

> "26(1) A person (A) harasses another (B) if—
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> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
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> (b) the conduct has the purpose or effect of—
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> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> 26(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
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> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect."

33. The Employment Tribunal has to consider whether there is, so far as is relevant to this appeal, unwanted conduct related to the relevant protected characteristic which has the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Where it has that purpose, harassment will be established. Where it has that effect but not that purpose, the tribunal will have to take into account the perception of the alleged harassee, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

34. In this appeal the claimant contends that the Employment Tribunal looked at each of the individual asserted acts of harassment and failed to stand back and look at them overall to consider whether the conduct as a whole suggested that harassment had occurred, possibly by application of the burden of proof provision within section 136 **EQA**.

35. In support of that contention, the claimant relies upon the decision of Mummery J, as he then was, in **Qureshi v Victoria University of Manchester** [2001] ICR 863, in particular what was said at page 872C to 876B.

36. **Qureshi** was quoted with approval in **Anya** and has thereafter been referred to in other decisions of the Court of Appeal with approval such as **Rihal v London Borough of Ealing** [2004] IRLR 642 and in **X v Y** [2013] UKEAT/0322/12.

37. **Qureshi** is one of a number of landmark decisions of Mummery LJ, as he later became, which emphasise the subtlety of the approach that should be adopted when determining discrimination claims. It is important that a mechanistic approach is not adopted. In **Qureshi** one of the key errors was an excessive consideration of factual issues, many of which could not assist in determining whether an inference of discrimination could be drawn. In determining discrimination claims, it is always important to separate the wheat from the chaff - but also to look at the matter in totality to decide whether an overall

assessment may result in a different conclusion from a microscopic examination of each individual incident in isolation.

38. In a claim of harassment, there are a number of respects in which stepping back and looking at matters in the round might result in a different conclusion from a focus on individual issues. There could be circumstances in which unwanted conduct could be split into numerous incidents or treated as one overall incident of unwanted conduct such as a series of comments made over a short period of time. One might take a different approach when considering such comments together as to whether the conduct was unwanted, whether it was related to a protected characteristic and whether it had the purpose or effect of violating dignity etc. Analysis of a number of comments might show that a person had the purpose of violating dignity etc. It depends very much on the circumstances of the individual case.

39. In this appeal, it is contended that there was a failure to stand back and look at the three principal allegations of harassment together. The first was the incident on 27 March 2018 when Mr Astill extended a deadline for one employee but told Mr Young that the claimant was late providing a folder. The tribunal concluded that Mr Astill did not know that the claimant's father had cancer, he reported the matter to Mr Young because the claimant was late and Mr Young took no action upon it. We have set out the reasoning of the Employment Tribunal that resulted in the conclusion that the definition of harassment was not made out.

40. The next issue was related to an incident in the last week in March 2018 when a different employee, Ms Johal, said "good afternoon" when the claimant arrived late at work. Again, she was found not to have known that the claimant's father had cancer and the

Employment Tribunal clearly set out why it concluded that her comment did not meet the definition of harassment.

41. Finally, there was the reference by Mr Young, who did know that the claimant's father had cancer, to her spending some time at home with her family during the period of her suspension. Again, the tribunal set out clearly why it considered the definition of harassment was not made out.

42. When considering the law at paragraph 151, the Employment Tribunal set out the approach it adopted to the claim of harassment and the necessity on occasions to step back and look at the overview. There was a proper self-direction as to the law and in accordance with **Greenberg** we should be slow to determine that the proper direction as to the law was not applied. In respect of each of the individual allegations, the tribunal considered whether there was any evidence that could result in a shift in the burden of proof and concluded that there was not.

43. We do not consider that the Employment Tribunal lost sight of the necessity of an overall assessment in appropriate circumstances. It is not surprising that the Employment Tribunal said little about an overall assessment because there was little more on the facts of this case that an overall assessment could achieve. The three incidents involved three different employees, two of whom did not know that the claimant's father had cancer, all of which were relatively minor. The Employment Tribunal firmly concluded that harassment had not been established in respect of any of the complaints. There was nothing more than an overall assessment of the conduct could reasonably add that could result in a different determination.

44. The decision of an Employment Tribunal essentially sets out the conclusions that were reached. It would be unrealistic to expect an Employment Tribunal to go through each

and every stage of the reasoning that led it to its final conclusions. The analysis is necessarily an iterative process in which facts are considered, weighed against each other, and may have to be reassessed in the context of later findings of fact. We consider that there is nothing that suggests an error of law in the approach that the Employment Tribunal adopted to the harassment claim. We do not consider that the Employment Tribunal can be said to have been perverse in rejecting the claim of harassment. The determination that the claimant had not been subject to harassment was one that was clearly open to the Employment Tribunal. Ground 1 of the appeal fails.

45. The next criticisms are about the dismissal of the unfair dismissal claim. Here, it is asserted that the Employment Tribunal gave insufficient reasoning or failed to apply the law appropriately in failing to consider whether the respondent should have applied a sanction less than dismissal, or that there should have been a stepwise disciplinary process in which warnings were given about the claimant's refusal to report to Mr Astill. Alternatively, it is asserted the rejection of the claim of unfair dismissal is perverse.

46. Section 98 Employment Rights Act 1996 provides:

> "98(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,

> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

47. In many cases a dismissal may be rendered unfair because an employee has not been given prior warning that their actions may result in dismissal. In this case the Employment Tribunal concluded that there had been an ongoing problem because the claimant refused to accept the respondent's revised management structures as the department increased in size and it became necessary to put in a line of management between Mr Young and the claimant.

48. While the Employment Tribunal did not expressly refer to any sanctions short of dismissal or incremental disciplinary action, the Employment Tribunal clearly did have the point in mind. It was identified in the list of issues and the respondent's closing submissions. It was raised in witness evidence and, more importantly, in paragraph 192 when dealing primarily with the issue of whether the claimant had been given sufficient notice of the disciplinary hearing, the tribunal recorded:

> "We were not shown evidence of the claimant having been formally warned prior to the 3 May letter, that the respondent was contemplating dismissing her if she did not agree to report to the payroll manager."

49. It was noted at paragraph 193 that when this matter was discussed at the meeting, the claimant did not suggest that she was surprised, perhaps not understandably because the issue

was specifically referred to in the letter calling her to the meeting.

50. The Employment Tribunal in its findings of fact recorded at paragraph 104 that the claimant accepted that she had been unwilling to report to Mr Astill. She said she did not respect or like him. During the appeal the claimant still did not accept the line management structure. The Employment Tribunal found that was the genuine conclusion reached by Mr Bateh who concluded that the claimant would not work for Mr Astill in a harmonious manner. This had led to a breakdown in relations that the Employment Tribunal accepted amounted to some other substantial reason for dismissal.

51. Warning can be an important element of fairness. Where an employee is challenged about their actions at a formal hearing and agrees to change and abide by the employer's policies, it can be argued that dismissal would be inappropriate and that the employee should receive a warning not to act in the same way in the future. If an employee is told that they must act differently in the future but is not prepared to do so, warning is less likely to achieve an effective resolution of the problem.

52. We consider that the Employment Tribunal did stand back and take an overview of the unfair dismissal claim, concluding that once the disciplinary hearing and appeal hearing are taken into consideration the employer had legitimately reached a conclusion that the claimant was not prepared to abide by its reporting structures and that that was not going to change irrespective of any action that it took and, accordingly, dismissal fell within the band of reasonable responses. We do not consider that the tribunal lost sight of the fact that there was no prior warning or that this was a dismissal without going through incremental disciplinary sanctions. We do not consider that there was any misdirection in law or failure to provide sufficient reasons. Ground 2 of the appeal fails.

53. We do not consider that the decision in respect of the unfair dismissal claim could be said to be perverse. The Employment Tribunal was entitled to conclude that the reason for dismissal was some other substantial reason through the claimant's refusal to accept reporting lines. Whereas capability issues had been raised in the letter calling her to the disciplinary hearing, so had insubordination, which could be analysed in terms of capability, but also permissibly was analysed by the respondent as amounting to some other substantial reason through the breakdown in relations resulting from the fact that the claimant was not prepared to accept the reporting lines required by the respondent.

54. We do not consider that it was perverse for the Employment Tribunal to find that the dismissal was fair notwithstanding the fact that there was no specific reference by the tribunal to consideration of sanctions less than dismissal or incremental warnings. The underlying findings suggest that the employer carefully considered all of its options before deciding to dismiss the claimant. We do not consider that it was perverse for the Employment Tribunal to conclude that the dismissal fell within the band of reasonable responses and to reject the suggestion that the dismissal was predetermined. The Employment Tribunal made express findings of fact to the contrary. Ground 3 of the appeal fails.

55. The final ground asserts perversity in respect of the decision that the dismissal was not discriminatory but that ground is said to stand or fall with the other grounds of appeal and as they fail, that ground falls away and, for the avoidance of doubt, we do not consider there is merit in the argument that the Employment Tribunal was perverse to conclude that the dismissal was not discriminatory. Ground 4 of the appeal fails.

56. Finally we note that in the response to the appeal, the respondent raised the possibility of use of the Burns/Barke procedure. That was reiterated in the respondent's skeleton argument. The respondent's notice was not referred to a judge at the stage of its receipt as is

the normal process in the EAT where there is no cross appeal. One of the changes introduced by the EAT Practice Direction 2023 is specific provision for the Burns/Barke process at paragraph 8.11 which requires that an application be made on the application form at Annex 2 to the PD.

57. The new PD came into force very shortly before the skeleton was submitted and we do not criticise the respondent for not using the new procedure but in the future we hope that one of the benefits of the use of the application form is that it will be clear that an application is being made and the application can be determined in good time before a hearing where appropriate.