Neutral Citation Number: [2024] EAT 159

Case No: EA-2022-000007-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 October 2024

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

UNIVERSITY OF EXETER **Appellant**

- and –

DR ANNETTE PLAUT **Respondent**

- -
- -

REBECCA TUCK KC and RACHEL OWUSU- AGYEI (instructed by University of Exeter) for the **Appellant**
STUART ROBERTS (instructed by DAS Law) for the **Respondent**

Hearing date: 17 July 2024

- -

JUDGMENT

SUMMARY

VICTIMISATION, HARASSMENT AND UNFAIR DISMISSAL

The Employment Tribunal erred in law in upholding complaints of harassment and victimisation because it conflated the separate tests to be applied to the complaints. The Employment Tribunal did not err in law in upholding the complaint of unfair dismissal because the Employment Tribunal permissibly held that dismissal fell outside the band of reasonable responses. The Employment Tribunal failed adequately to analyse the claim for an ACAS uplift.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of an Employment Tribunal after a hearing held at Exeter on 15, 18-22, 25 and 26 October 2021; Employment Judge Housego sitting with members. The Judgment was sent to the parties on 23 November 2021 (an amended version was sent to the parties on 17 January 2022).

2. The Employment Tribunal gave the following Judgment:

> 1. The Claimant was unfairly dismissed by the Respondent.
>
> 2. Compensation for unfair dismissal is enhanced by 25% for breach of the Acas Code of Practice on dismissals, but that figure will then reduced by 25% by reason of contributory conduct (so that the compensation to be awarded is 93.25% of attributable loss).
>
> 3. The claims of victimisation and harassment in respect of the suspension on 11 April 2019 succeed.
>
> 4. The remaining claims of race and discrimination are dismissed.

Factual outline

3. I take the findings of fact from the Judgment of the Employment Tribunal.

4. The claimant is a physicist. The claimant joined the respondent on 1 October 1990. The claimant became a Senior Lecturer in the Physics and Astronomy department on 30 November 2006.

5. Some students have found the claimant to be overbearing and excessively loud. The claimant had been subject of investigation prior to the events that resulted in her claim to the Employment Tribunal.

6. On 2 August 2018, Professor Timothy Harries took over as head of the Physics and Astronomy department. In a handover meeting he was informed that a student, referred to by the Employment Tribunal as Student 1, had made a complaint about the claimant. It was alleged that the claimant had held Student 1 by the neck and shone a light into her eyes. The Employment Tribunal noted that the allegation was historic having occurred on 2 November 2017.

7. Geoffrey Williams of HR commenced an investigation. The claimant was suspended on 7

January 2019 ("the first suspension"). Professor Harries signed a letter dated 4 February 2019 calling the claimant to a disciplinary hearing. It was incorrectly asserted that the claimant shone a laser into the student's eyes. A disciplinary hearing was held on 15 February 2019. The claimant was issued with a final written warning on 12 March 2019, lasting 18 months.

8. The claimant attended a return to work meeting with Professor Harries on 3 April 2019. The Employment Tribunal held that the meeting "did not go well". The Employment Tribunal referred to the claimant making a comment about Professor Harris "not being open to criticism about equality diversity and inclusion". In the claimant's witness statement, she describes the exchange:

> Geoff Williams, HR Business Partner for the College of Engineering, Mathematics and Physical Sciences (CEMPS), interjected at this point to say "*No-one can criticise Tim on his inclusivity*." To which I replied, with feeling, that "*I criticise him*."

9. Mr Williams considered the comment "was "not actionable" but was unnecessarily provocative, and there would have to be some follow up if it occurred again. Notwithstanding this view a decision was taken to continue the suspension of the claimant because of the comment she had made about Professor Harris which was said to have resulted in an "irretrievable breakdown in working relationships". The claimant was formally suspended again on 12 April 2019 ("the second suspension").

10. Another student, referred to as Student 2, was interviewed on two occasions, 30 April 2019 and 2 May 2019, while the claimant was suspended. Student 2 complained about the claimant's treatment as a supervisor. The treatment must have predated the first suspension. The claimant had first been suspended on 7 January 2019 and had not returned to work since then. The treatment Student 2 complained about predated the issue of the written warning on 12 March 2019.

11. The investigation was delayed because of a grievance raised by the claimant. After the dismissal of the claimant's grievance and grievance appeal, Tracey Aggett, Management Accountant, College of Humanities was appointed as a new investigation officer. Ms Aggett drew up a report dated 25 October 2019. Ms Aggett proposed that the parties should hold formal mediation meetings to resolve their differences.

12. Notwithstanding Ms Aggett's recommendation, Imelda Rogers, Director of People Services decided that the matter should proceed to a formal disciplinary hearing. The allegation about the comment in the meeting on 3 April 2019 was not pursued. The claimant faced two allegations. The first concerned her interactions with Student 2 which were asserted to have caused her anxiety and depression. The second allegation was that the claimant's conduct had caused a breakdown in the relationship of trust and confidence with her colleagues.

13. A disciplinary hearing was held by Professor Tim Quine, Deputy Vice-Chancellor (Education), on 19 December 2019. By letter dated 30 January 2020 the claimant was dismissed. The reasoning was summarised:

> After careful consideration the panel have concluded that your behaviour towards a student during your supervision meetings with him was an act of misconduct.
>
> As you have previously been given a final written warning via letter on 12 March 2019 about your conduct, to remain live for 18 months from 15 February 2019, and which is therefore still live, then the decision of the Panel following the hearing on 19 December 2019 is that you are dismissed with notice.
>
> The fact that the incidents concerning the student in this instance took place before the final written warning was issued to you has been considered by the panel when considering what the outcome should be. However, it was clear that these concerns were only brought to the attention of the University in late April 2019 as a result of the student having been informed that you would be returning as their first supervisor. The Panel also concluded that your actions towards the student on this occasion demonstrated a series of a clear acts of misconduct which the panel would not expect of a senior lecturer of your experience, and could not find any mitigating factors to justify any lesser sanction.

14. The claimant appealed against her dismissal on 12 February 2020. The appeal was not determined until it was dismissed on 10 June 2021.

The return to work interview on 3 April 2019 and the second suspension

15. The Employment Tribunal analysed the complaints about this meeting:

> 127. Turning to the claim for harassment, there were five things claimed to be protected acts:
>
> > 127.1. 21 April 2016, Dr Plaut's arranging of and contribution to an unconscious bias workshop for Physics and Astronomy: this was years

before, and while it has a connection to protected characteristics no link between it and anything which occurred later has been established, or even posited other than as part of the narrative history.

127.2. 15 September 2017: a meeting with KJ at which Dr Plaut requested the presence of a Dignity and Respect adviser. This was not made a protected act by reason of the presence of an adviser, or under any policy. It was also 2 years before hand.

127.3. 21 December 2017: a report of historical sexual harassment made to the human resources department (57-58): Dr Plaut expressly stated that she did not expect anything to be done about it, and nothing was done. There is no reason to think this had anything to do with later matters, and it was years before.

127.4. **Comment made at the return to work meeting of 03 April 2019: Dr Plaut was critical of Professor Harries' approach to equality and diversity.** This was unparticularised, but **to say that the person in charge of equality diversity and inclusion at the University did not fully espouse the spirit of such a policy and to say that there was consequential detriment is plainly within the harassment provisions of the Equality Act 2010. It was much later that there was a dismissal, but since the one led to the other it would not be just and equitable not to extend time for that to be considered a protected act for the claim of victimisation. It is a protected act** – Dr Plaut made an observation firmly within the definition above.

127.5. 01 May 2019 – the grievance against KJ. This was also firmly within the definition of a protected act – it was a complaint that a solicitor and human resources caseworker was discriminating against her. Since this was within the process leading to her dismissal again it would be just and equitable to extend time.

128. The **detriments alleged are the extended suspension and the process leading to dismissal, and the claimed unfairness of that dismissal**.

129. The Tribunal finds that the harassment claim in respect of the grievance against KJ does not succeed. This is because the course of action leading to the dismissal started before this grievance. The detriment alleged is a continuum which started before the grievance was lodged and so the grievance cannot have been the cause of a course of action the start of which pre-dated it.

130. **The victimisation and harassment claims arising from the comment at the return to work meeting are logically more complex**. **The comment was the reason Dr Plaut was again suspended, on 11 April 2019**. It is not that Dr Plaut did so in an angry or belligerent sort of way, as TH and GW made clear. **The criticism was generic – a single comment that Dr Plaut disagreed with the statement of another that TH was not open to criticism about his implementation of best practice in matters of equality diversity and inclusion.** It did not directly relate to any relevant protected

characteristic. **The Tribunal decided that it was not fair to subject Dr Plaut to the detriment of suspension for making such a criticism. It may be argued that the comment related to all protected characteristics, but that the conduct did not relate to any protected characteristic,** and so does not fall within S26 or S27 of the Equality Act 2010. It is, however, clear from all the evidence (the grievance particularly) that **Dr Plaut has always maintained that she, a Jewish woman, was discriminated against, consciously or unconsciously, because of her inherent characteristics, and that was why she was having to have a return to work meeting.** Whether the claims for sex discrimination or race discrimination succeed or not, **if someone raises such claims and is, as a result of doing so, subjected to detriment (suspension for a conduct matter for a senior academic will, at the least, be humiliating) that is within the definition of harassment and is victimisation**. It does not alter that conclusion that it was Professor KE, Provost JK and Imelda Rogers, Director of Human Resources who effected that suspension, and not Professor Tim Harries or Kirsty Johnson. [emphasis added]

The appeal

16. The claimant asserts:

> Ground 1: Harassment and victimisation findings fail to apply the law and breach rule 62(5) ET Rules

The relevant law

17. Harassment is provided for by section 26 **Equality Act** 2010 ("**EQA**"):

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

18. To analyse a complaint of harassment it is important to adopt a structured approach, such as:

    18.1. Did A engage in unwanted conduct

    18.2. Was it related to a relevant protected characteristic

    18.3. Did it have the purpose of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B – of so harassment is made out

    18.4. If the conduct did not have that purpose but did that that effect the Employment Tribunal must take into account the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect in deciding whether the claim of harassment is made out

19. Victimisation is provided for by section 27 **EQA**:

> 27 Victimisation
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.

20. A structured approach should also be taken to a claim of victimisation, such as asking:

    20.1. Has B done a protected act (falling within section 27(2) **EQA**) or does A believe B has done, or may do, a protected act

    20.2. If so, did A subject B to a detriment because B had done the protected act (or A

believed B has done, or may do, a protected act)

Analysis

21. Unfortunately, the Employment Tribunal did not follow the list of issues in a Case Management Order of 25 January 2021, that set out the above questions, albeit in a slightly different order. While the Employment Tribunal correctly noted it is not always necessary to "stick slavishly to a list of issues", generally there should be a good reason for departing from a list of issues that has been carefully formulated during case management.

22. The Judgment of the Employment Tribunal at paragraphs 127 to 130 dealt with harassment and victimisation together and conflated the relevant components; treating elements of victimisation as if they were elements of harassment; and vice versa.

23. The analysis of the harassment complaint, at paragraph 127 starts by considering whether there were protected acts, which is an element of a complaint of victimisation. At paragraph 127.4 the Employment Tribunal concluded that it was just and equitable to extend time in respect of a protected act done at the return to work meeting on 3 April 2019 when the claimant suggested that she criticised Professor Harries "on his inclusivity," although the exchange was differently paraphrased by the Employment Tribunal in this section. The analysis in the subparagraph involved a misapprehension as time runs from the detriment not the protected act in a claim of victimisation; and this passage occurs in a section of the Judgment about harassment. At paragraph 130 the Employment Tribunal returns to the meeting of 3 April 2019 apparently considering victimisation and harassment in combination. It is suggested that the comment made by the claimant might relate to all protected characteristics or none; which might possibly be relevant to a claim of harassment. However, it is hard to see how the only conduct of Mr Williams in that meeting, stating "No-one can criticise Tim on his inclusivity." could possibly have the purpose or effect of violating the claimant's dignity. There is a suggestion that the claimant had "always maintained that she, a Jewish woman, was discriminated against" but that was not something said in the meeting. The Employment Tribunal possibly concluded that a protected act was done in the meeting on 3 April 2019, when the claimant

said "I criticise him" in response to the suggestion “No-one can criticise Tim on his inclusivity." That appears to have been the comment that the Employment Tribunal concluded resulted in the claimant’s suspension. However, there was no analysis of how the claimant’s vague comment was a protected act falling within section 27(2) **EQA**.

24. Overall, the findings of victimisation and harassment are totally unsafe because the elements of the tests for harassment and victimisation were conflated. The findings of harassment and victimisation are set aside.

Unfair Dismissal

25. The Employment Tribunal upheld the complaint of unfair dismissal holding that:

> 131. The procedure concerning the dismissal was unfair:
>
> > 131.1. The first hearing ended with a final written warning, but the suspension was not lifted. Dr Plaut had to ask what was happening.
> >
> > 131.2. The suspension was not reviewed at four weekly intervals, or at all.
> >
> > 131.3. Dr Plaut was left without support as she was barred from speaking to any colleague, when the University had previously accepted the recommendation of occupational health that she had no other support mechanism and should always be allowed contact with some colleagues.
> >
> > 131.4. The “factual investigation” by KJ was inappropriate.
> >
> > 131.5. Student 2 was not told that he was giving a statement for use in disciplinary proceedings. (There was no notetaker there as policy required either.)
> >
> > 131.6. He was induced to complain by PV on the basis that this would help him change supervisers, when it was not necessary – Student 1 had changed supervisers without complaining.
> >
> > 131.7. **The attempts by Professor Quine to deal with matters fairly were subverted by human resources**, and to conduct interviews to buttress the case, by people who were not openminded, and to keep them secret from Dr Plaut (other than telling her in the letter of dismissal that was what had happened) is self-evidently unfair.
> >
> > 131.8. The email from PV and the way it was treated on the advice of human resources is an extraordinary failure to act fairly by what is supposed to be a substantial professional human resources department.

131.9. The length of time to the dismissal appeal (allowing fully for the effect of the pandemic) at almost 1½ years is unconscionable.

132. The Tribunal finds dismissal substantively unfair for the following reasons:

132.1. **The Respondent did not want Dr Plaut back**. That is apparent from the failure to implement any of the matters said by RS to be mandatory. That decision was 12 March 2019, and the return to work meeting was not until 03 April 2019 but no one had done anything to progress equality training or voice coaching. TH said that he found it hard to see how Dr Plaut could return to supervision. Dr Plaut asked for mediation to improve relationships in the department (a positive forward looking request) and the University refused, without any cogent reason.

132.2. **The second suspension was ordered by senior staff, over the comment that GW thought not actionable, and about which TH did not request any action**. Senior management wanted Dr Plaut disciplined, knowing that she had just had a final written warning. The Tribunal finds this was a pretext to get Dr Plaut dismissed if at all possible.

132.3. Tracey Aggett's recommendation was overruled. Imelda Rogers was entitled to do so, and her point that the effect on the student could not be overcome by the academics working at improving their relationships is a sustainable reason. However, she maintained the charge about the comment which was then dropped. The breakdown of working relationships was not sustainable because only two people were named. Dr Plaut did not have a working relationship with Professor Ken Evans. He was Professor Harries' line manager and did not interact with Dr Plaut in any substantial way. Professor Harries had not wanted to take any action over the comment although he found it hurtful. When coupled with Dr Plaut actively asking for mediation to work on relationships it is impossible to see that this was ever a genuinely held view by those involved.

132.4. **Professor Quine was in a position analogous to the manager in *Royal Mail Group Ltd v Jhuti*** [2019] UKSC 55, paragraph 62:

> "if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason."

He sought to be fair, but his attempts to be so were thwarted by others. It would have been hoped that he would have insisted that his instructions were followed, but perhaps understandably he deferred to senior people in the human resources department. That department mixed human resources advice with casework, acting as decision makers about process.

> It is noteworthy that the same individuals dealt with the initial suspension and with PV's email, and by doing so in the way they did undermining the independence of TQ and RB.
>
> 132.5. The secret post hearing email from PV was welcomed, and the generic slurs it contained about Dr Plaut were not known to her to be able to comment. Nor did they form part of any allegation. While judges frequently have to exclude some evidence from their assessment of facts or motivation, it is unrealistic to expect the decision makers in a disciplinary hearing not to be influenced by such a communication.

133. **The matter involving Student 1 was unacceptable conduct by Dr Plaut, as she recognises. It warranted disciplinary action**, as is made clear in the facts section of this judgment. It was in early 2017. The Student 2 matter was in late 2018. Plainly Dr Plaut had not breached her final written warning, which was not imposed until 12 March 2019. There is a big gap in time.

134. When dealing with the matter of Student 1, Dr Plaut had referred to Student 2 as an example of a student who was happy with her supervision of him. While that might be said to be a massive misjudgment by Dr Plaut and evidence of lack of insight, it is far more likely to be the case that Student 2 was not helping by concealing his experimental data from his superviser, that she got cross about it (understandably) then she explained and resolved the position, such that by December 2019 the position was much improved. It is also Student 2's own view that he was unhappy with the project per se.

135. **This Student 2 issue was never a sacking matter, whether alone, or on top of an existing final written warning for a later matter. The Tribunal is very well aware that employers always view such a judgment as substituting the Tribunal's own view for that of the employer. It is not. It is the assessment the Tribunal is required to make in applying S98(4) of the Employment Rights Act 1996.** This is a very large organisation, of very high reputation, and high professional standards in dealing with the careers of its academics are to be expected. This obligation is the greater when dealing with someone who has spent 30 years working for them.

136. **The procedural matters are of such a fundamental nature that the Tribunal rejects the bold submissions of Counsel for the Respondent that the dismissal was both procedurally fair and that even if not had a fair procedure been followed the likelihood of a (fair) dismissal was 100%. On the contrary this dismissal was 100% unfair.** Had a fair procedure been followed it is not conceivable that Dr Plaut would have been fairly dismissed. The band of responses of the employer is not infinitely wide. Senior management had decided that Dr Plaut would not be tolerated further. The good things she had done over the years were given no weight. The Tribunal does not doubt but for some people Dr Plaut's approach to life was highly uncomfortable, but that fails to appreciate that this is a façade behind which the evidence is of a long serving dedicated and caring academic. **If there was to be a fair dismissal, it would have had to have followed a performance improvement plan following the Student 1 matter. It will not wash to say that had the first (RS panel) known of Student 2 they would or could**

fairly have dismissed her. That is to construct an alternative narrative to attempt to justify what cannot be justified.

137. **An appeal can cure previous defects. This appeal was so long delayed that it was only ever going to have one outcome.** In December 2020 MC was asked to deal with it on the papers, yet nothing happened until MC met his fellow panellist on 05 March 2021. The outcome was not until 10 June 2021. That is 6 months after the appeal was to be on the papers, and 18 months after the dismissal on 30 January 2019. This was not fair.

138. At paragraph 21 MC observes that he was confident that the warning was in place at the time the University was made aware of the allegations of Student 2. That is so, but why it is relevant is not explained. MC also said that it wasn't a matter of volume, but how you behaved with people. That is so, but the issue with this dismissal is that that if Dr Plaut was to be dismissed for people's perceptions that she was shouting at them, then after 30 years of being herself and doing a lot of good work on the way, she had to be given help and opportunity to change her approach with the clear indication that if not she would leave. This did not happen, and senior management seized on the comment made at the return to work meeting on 03 April 2019 to suspend her before she returned to work and then substituted the allegation about Student 2 when that came up – and only because TH had to speak to Student 2 who had very little supervision since 07 January 2019 (the first suspension) and was going to have a further period without his superviser.

The unfair dismissal appeal

26. The unfair dismissal finding is challenged on the following grounds:

Ground 2 – Tribunal has placed reliance on an uncited authority

Ground 3 – Tribunal has substituted its own view

Ground 4 – Tribunal failed to apply the Burchell test

The relevant law

27. Section 98 of the **Employment Rights Act** 1996 ("**ERA**") provides:

98.— General.

(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— …

> (b) relates to the conduct of the employee,
>
> (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.

28. A claim of unfair dismissal generally requires the Employment Tribunal to decide:

28.1. Has the respondent established the reason, or principal reason, for the dismissal

28.2. If so, is the reason, or principal reason, a potentially fair reason

28.3. If so, was the dismissal fair or unfair on an application of the provisions of section 98(4) **ERA**

29. The first question involves asking why the employer dismissed the employee. The words "it is for the employer to show" mean that it is for the employer to establish in evidence the reason, or principal reason, for dismissal.

30. In **Croydon Health Services NHS Trust v Beatt** [2017] EWCA Civ 401, [2017] I.C.R. 1240, Underhill LJ consider the reason for dismissal by reference to the classic exposition in **Abernethy v Mott, Hay and Anderson** [1974] ICR 323:

> 30. What tends to be treated as **the classic expression** of the approach to identifying the "reason" for the dismissal of an employee for the purpose of section 98 and its various predecessors is the statement by Cairns LJ in *Abernethy* …, that**: "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."** As I observed in *Manchester College v Hazel* [2014] ICR 989 , para 23, Cairns LJ's precise wording was directed to the particular issue before the court, and it may not be perfectly apt in every case; **but the essential point is that the "reason" for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision—or, as it is sometimes put, what "motivates" them to do so**: see also *Co-operative Group Ltd v Baddeley* [2014] EWCA Civ 658 at [41]. [emphasis added]

31. The Employment Tribunal must first consider whether the respondent has established what,

as a matter of fact, was the reason, or principal reason, for the dismissal. In a misconduct case, at this stage the respondent must establish what the employee did that resulted in dismissal. If an employee is dismissed for stealing money from a till, the reason for the dismissal is the theft of the money. The Tribunal then considers whether the reason established is one of the potentially fair reasons for dismissal. Dismissal for theft of money is potentially fair because it is a reason that relates to the conduct of the employee.

32. Because the analysis is of what Underhill LJ described in **Beatt** as the "factor or factors operating on the mind of the decision-maker" it is necessary to decide which person or persons decided to dismiss the claimant. Generally, this is unproblematic, but not always. In **University of North Tees & Hartlepool NHS Foundation Trust v Fairhall** UKEAT015020VP, I considered some of the possibilities:

> Reasons and decision makers
>
> 33. Most people are employed by an employer that is a legal person, such as a company, rather than by a natural person. In this case the claimant was employed by a NHS Foundation Trust. Dismissal involves the termination of the contract between the employer and the employee. The decision to terminate the employment contract, to dismiss the employee, must be taken by a natural person, or persons; the decision maker or makers. In many cases there will be no difficulty in identifying the decision maker or makers. Just as Mummery LJ warned against an excessive fixation on the burden of proof, it is important not to get tied up in knots about reasoning processes if it is clear who took the decision to dismiss and why they did so.
>
> 34. The paradigm is a hearing at which one person, acting independently, takes the decision to dismiss, so there is only that person's reasoning process to be considered. A disciplinary hearing may be before a panel, in which case it may be necessary to consider the reasoning process of the panel, although often only the chair of the panel gives evidence, the employer presumably accepting the reasoning process of the chair properly evidences that of the panel.
>
> 35.There may be circumstances in which people other than the decision maker are involved in the decision making process. Such other people might advise, or even be instrumental in persuading the decision maker to take the decision.

33. In limited circumstances the reason of another person may be attributed to the decision maker. Lord Willson held in **Royal Mail Group Ltd v Jhuti** [2020] ICR 731 at paragraph 60:

> In searching for the reason for a dismissal for the purposes of section 103A of the Act, and indeed of other sections in Part X, courts need generally look no further than at the reasons given by the appointed decision-maker. Unlike Ms Jhuti, most employees will contribute to the decision-maker's inquiry. The employer will advance a reason for the potential dismissal. The employee may well dispute it and may also suggest another reason for the employer's stance. The decision-maker will generally address all rival versions of what has prompted the employer to seek to dismiss the employee and, if reaching a decision to do so, will identify the reason for it. In the present case, however, the reason for the dismissal given in good faith by Ms Vickers turns out to have been bogus. **If a person in the hierarchy of responsibility above the employee** (here Mr Widmer as Ms Jhuti's line manager) **determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts** (here inadequate performance), **it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination**. **If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker.** [emphasis added]

34. In **Fairhall** I suggested that such cases are probably relatively rare:

> 37. The situation in *Royal Mail Group Ltd v Jhuti* [2020] ICR 731, where the decision maker is unaware of the machinations of those motivated by the prohibited reason, is probably quite rare. It is only in such cases that it is necessary to attribute a reason to the decision maker that was not, in fact, the reason operating in his or her mind when the decision to dismiss was taken. …
>
> 38. Thus, it is only in cases where the decision maker is acting in good faith, but has been manipulated by another, that it is necessary to rely on the attribution of the reason of the manipulator to the decision maker.

35. If the employer does not establish the reason for dismissal the claim will succeed. If the employer does establish the reason the Employment Tribunal will go on to consider whether the employer has also established that it was one of the potentially fair types of reason for dismissal set out in section 98(2) and 98(1)(b) **ERA**.

36. This general approach applies to all claims of unfair dismissal. An Employment Tribunal will rarely fall into error by applying the wording of the statute. The particularities of dismissals for misconduct are such that an Employment Tribunal is often assisted by applying the guidance given in **British Homes Stores Ltd. v. Burchell** [1978] IRLR 379:

> What the tribunal have to decide every time is, broadly expressed, whether

> the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. 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."

37. It should be noted that **Burchell** was decided before the burden was expressly placed on the respondent to establish the reason for dismissal. **Burchell** is nonetheless helpful and emphasises that in deciding whether there were reasonable grounds for the employer's belief in the misconduct and whether the belief was formed after a reasonable investigation, the Employment Tribunal must not substitute its view for that of the employer. The Employment Tribunal is limited to determining whether the employer acted within the band of reasonableness.

38. The concept of a band of reasonable responses prevents the Employment Tribunal from substituting its view for that of the employer. It does not preclude the Employment Tribunal from holding that the employer has acted unreasonably if no reasonable employer would have dismissed. The band of reasonable responses is not so elastic that no employer can ever break it. As Bean LJ observed in **Newbound v Thames Water Utilities Ltd** [2015] EWCA Civ 677, [2015] IRLR 734 at paragraph 61:

> The 'band of reasonable responses' has been a stock phrase in employment law for over thirty years, but the band is not infinitely wide. It is important not to overlook s.98(4)(b) of the 1996 Act, which directs employment tribunals to decide the question of whether the employer has acted reasonably or unreasonably in deciding to dismiss 'in accordance with equity and the substantial merits of the case'. This provision, originally contained in s.24(6) of the Industrial Relations Act 1971, indicates that in creating the statutory cause of action of unfair dismissal Parliament did not intend the tribunal's consideration of a case of this kind to be a matter of procedural box-ticking. As EJ Bedeau noted, an employment tribunal is entitled to find that dismissal was outside the band of reasonable responses without being accused of placing itself in the position of the employer.

Analysis

39. Unfortunately, the reasoning of the Employment Tribunal in determining the unfair dismissal complaint is rather garbled. There is considerable force in the contention that the Employment Tribunal failed to apply the **Burchell** test (Ground 4) and placed reliance on an uncited authority (Ground 2). The Employment Tribunal did not make a clear finding as to which person, or persons, made the decision to dismiss. There is a suggestion that it was made, or influenced, by senior managers and HR staff, rather than being an independent decision of Professor Quine. This appears to be the basis for the reliance on **Jhuti**, an authority that had not been relied upon in argument or about which the parties were given an opportunity to make submissions. There was no identification of a person or persons "in the hierarchy of responsibility above" Professor Quine who manipulated him into dismissing for a reason of which he was unaware. There is no explicit finding that the claimant was dismissed for a reason other than that set out in the dismissal letter, which focused primarily on the treatment of Student 2 in the context of the final warning notwithstanding the fact that the asserted misconduct with student 2 occurred before the final warning had been issued.

40. However, I consider that on a fair reading of the Judgment as a whole it is clear that the Employment Tribunal concluded that if the dismissal was for the reason asserted by the respondent it fell outside the band of reasonable responses. The Employment Tribunal concluded that the conduct in relation to Student 2, even in the context of the final warning, was not sufficient for any reasonable employer to dismiss. I consider that is what the Employment Tribunal meant by saying that the "Student 2 issue was never a sacking matter, whether alone, or on top of an existing final written warning for a later matter". It was not substituting its view for that of the respondent, but slightly clumsily holding that no reasonable employer would dismiss this long-standing employee for the conduct relied upon by the respondent. The Employment Tribunal was, in effect, holding that the respondent had stretched the band of reasonable responses to breaking point, that it had reached a conclusion that was not open to a reasonable employer, as is demonstrated by the statement:

> The Tribunal is very well aware that employers always view such a judgment as substituting the Tribunal's own view for that of the employer. It is not. It is the assessment the Tribunal is required to make in applying S98(4) of the Employment Rights Act 1996.

41. The Employment Tribunal had specifically directed itself that:

> It is not for the Tribunal to substitute its own view of what should have happened, for it is judging whether the actions of the employer were fair, and not deciding what it would have done. Dismissal must be within the range of responses of the reasonable employer. That range is not infinitely wide.

42. That direction as to the law is correct and in such circumstances, I should be slow to conclude that the correct self-direction has not been applied; **DPP Law Ltd v Greenberg** [2021] IRLR 1016, per Popplewell LJ:

> 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 different principle has been applied to the facts found.

43. While Grounds 2 and 4 are made out, Ground 3 is not, and the finding of unfair dismissal stands.

ACAS uplift

44. The Employment Tribunal dealt tersely with the Acas uplift:

> The breaches of the Acas code are such that it would be inappropriate to increase the awards for unfair dismissal by less than the 25% maximum, and the Tribunal so decided.

The ACAS uplift appeal

45. The respondent asserts:

> Ground 5 – Tribunal has failed to give adequate reasons for its decision that the Acas code has been breached

The relevant law

46. Section 207A of the **Trade Union and Labour Relations (Consolidation) Act** 1992 provides:

> "207A Effect of failure to comply with Code: adjustment of awards
>
> (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.
>
> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
>
> (b) the employer has failed to comply with that Code in relation to that matter, and
>
> (c) that failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%. …
>
> (4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes."

47. Section 207A TULR(C)A applies to section 111 of the Employment Rights Act 1996, pursuant to which claims of unfair dismissal are brought.

48. The relevant Acas Code of Practice is the Code of Practice on Disciplinary and Grievance Procedures published on 11 March 2015.

49. The approach to be adopted to the Acas uplift was considered in **Rentplus UK Ltd v Coulson** [2022] EAT 81 in which I noted:

> 19. Section 207A TULR(C)A can be broken down into a number of components, although there is, no doubt, some degree of overlap between them, and it is always important to consider a statutory provision as a whole:
>
> 19.1 Is the claim one which raises a matter to which the Acas Code applies?
>
> 19.2 Has there been a failure to comply with the Acas Code in relation to that matter?
>
> 19.3 Was the failure to comply with the Acas Code unreasonable?
>
> 19.4 Is it just and equitable to award an uplift because of the failure to comply with the Acas Code and, if so, by what percentage, up to 25%?

50. I suggested that in considering whether the has been a failure to comply with the Acas Code the ET should take account of the following factors:

> 32. The employment tribunal has to consider whether there has been a breach of the Acas Code and, if so, to what extent. This will nearly always involve consideration of which provisions of the Acas Code have been breached and which, if any, have been complied with. This is an objective question, and a

> matter of substance. A similar approach will generally be appropriate to that adopted under the previous uplift provisions set out in section 31(3) of the Employment Act 2002; see the approach of Underhill J (President) in *Lawless v Print Plus (unreported)* 27 April 2010:
>
> > 4. The circumstances which will be relevant will inevitably vary from case to case and cannot be itemised, but they will certainly include: (a) whether the procedures were ignored altogether or applied to some extent (see *Virgin Media Ltd v Seddington* UKEAT/539/08 (unreported) 31 March 2009 , at para 20); (b) whether the failure to comply with the procedures was deliberate or inadvertent; and (c) whether there are circumstances which may mitigate the blameworthiness of the failure. Those factors are sometimes embraced under the labels of the 'culpability' or 'seriousness' of the failure.
> >
> > 5. Provided a tribunal has directed itself appropriately, this tribunal will be very slow to interfere with its exercise of discretion: *Cex Ltd v Lewis* UKEAT/13/07 (unreported) 5 June 2007.

51. I also noted that it is necessary to consider whether the failure was unreasonable:

> 37. It is not sufficient for section 207A TULR(C)A to apply that there has been a failure to comply with the Acas Code. It is also necessary that the failure was unreasonable. In *Kuehne and Nagel Ltd v Cosgrove* (unreported) 17 July 2014, Judge Eady QC stated, albeit obiter:
>
> > 52. Equally, I do not need to say anything about the Acas uplift point, save that I would add that I would have found an error of law here in the employment judge's failure to correctly direct himself that a breach would need to be unreasonable.

Analysis

52. The Employment Tribunal failed to conduct the required analysis of the Acas uplift. There was no reasoning of any substance. Ground 5 is Upheld.

Perversity

53. By grounds 6 and 7 the claimant asserts that there were some factual errors in the Judgment and certain findings were perverse. While there are some minor factual errors as asserted in Ground 6, particularly in relation to the wrong initials having been used for employees of the respondent, I am not persuaded that they are of any significance to the final determination of the complaints. I am not persuaded that the respondent has made out the overwhelming case necessary to establish that the factual findings referred to in Ground 7 were perverse. Nor do I consider that the findings are of any real significance to the claims of victimisation or harassment on remission or to the unfair dismissal

finding that is upheld on the basis that dismissal for the misconduct asserted by the respondent fell outside the band of reasonable responses. Insofar as the respondent may assert that any factual findings require revisiting when the ACAS uplift is redetermined it will be open to the respondent to seek that the finding be reconsidered.

Disposal

54. The claimant does not seek remission of the complaint of harassment. The respondent seeks remission of the complaint of victimisation of the following basis:

> 3. The Claimant seeks the claim of victimisation at 5.1.4 of the CMO/paragraph 127.4 to be remitted to the Tribunal.
>
> 4. The precise protected act relied upon is the complaint raised by the Claimant at the return to work meeting on 3 April 2019, about unconscious bias on the part of Professor Tim Harries, which is set out at paragraph 13 of the Claimant's witness statement:
>
> 'Geoff Williams, HR Business Partner for the College of Engineering, Mathematics and Physical Sciences (CEMPS), interjected at this point to say "No-one can criticise Tim on his inclusivity." To which I replied, with feeling, that "I criticise him."'
>
> 5. It is claimed that making this comment in the return to work meeting was a protected act within the meaning of Section 27 of the Equality Act 2010:
>
> > 27 (c) doing any other thing for the purposes of or in connection with this Act;
> >
> > 27 (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> 6. The said comment amounts to a clear criticism of Prof Harries and by implication amounts to the making of a complaint against Prof Harries, albeit not an express complaint – in particular a complaint of unconscious bias.
>
> 7. The detriments relied upon were the subsequent suspension of the Claimant and the continuation of that suspension until her dismissal, and the initiation and continuation of the disciplinary procedure against the Claimant, which led to her dismissal.

55. I accept that the asserted complaint of victimisation, while far from straightforward, is just sufficiently arguable to be worthy of remissions, together with the assessment of the Acas uplift. I have directed myself by reference to the approach to remissions set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. The errors made by the Employment Tribunal in dealing with

these aspects of the claim were fundamental. I consider that the remission is of limited issues that can properly be considered by a different Employment Tribunal. I consider that the respondent would have legitimate concerns that the Employment Tribunal had made up its mind and would be reluctant to consider the matter afresh, particularly because of the very limited engagement with the reconsideration application. Case management of the remitted matters will be for the Employment Tribunal.