Appeal No. UKEAT/0293/14/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 30 April & 1 May 2015

Before

HER HONOUR JUDGE EADY QC

MR D G SMITH

MS P TATLOW

MISS T O ADESHINA — APPELLANT

ST GEORGE'S UNIVERSITY HOSPITALS NHS FOUNDATION TRUST & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES LADDIE QC (One of Her Majesty's Counsel) Instructed by: Thomas Mansfield LLP Unit 2 Ground Floor Christopher Wren Yard 119 High Street Croydon CR0 1QG
For the Respondents	MR BEN COOPER (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St George's Road Wimbledon London SW19 4DR

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

CONTRACT OF EMPLOYMENT - Wrongful dismissal

RACE DISCRIMINATION - Burden of proof

Unfair dismissal

(1) Whether the ET had erred in the approach to the question of fairness, having regard to the whole process, including the appeal.

Held: When looking at the question of fairness, the ET was bound to consider the process overall (**Taylor v OCS Group Ltd** [2006] EWCA Civ 702). It did so. Having made its findings as to the unfairness that tainted Ms Ashworth's decision, it did not consider the flaws found to be such as to mean that the position could not be remedied. That was a view it was entitled to reach. When considering the process as a whole, the ET did that which it should: it had regard to the nature and extent of the flaws at the earlier stage/s, specifically going through those points when assessing the appeal process; it had in mind the seriousness of the flaws it had found at the earlier (dismissal decision) stage; its findings on the appeal process were not made in a vacuum but took into account the findings it had made as to the original decision.

As for the question whether the appeal stage was itself flawed such as to mean that it could not rectify the position because of the composition of appeal panel:

(a) The ET made a finding of fact as to Ms Ludlam's earlier involvement in matters relevant to the case, she was not sitting in judgment on her own prior decision or involvement in the case; at most the Claimant had raised a question as to Ms Ludlam's management role more generally (which included her role as mentor to Ms Leegood), which she was suggesting gave rise to an appearance of bias.

(b) The approach to apparent bias was not the same as that in judicial proceedings. Even if it was, the fair-minded informed observer would not consider any risk arose.

(c) As for Mr James, the Claimant objects that he was junior and reported to the dismissing manager, Ms Ashworth, albeit she did not make this point at the time. Accepting the **ACAS Guidance**, this case could be distinguished as it involved a panel, which included two directors senior to the original decision-taker.

(d) Further, the ET was entitled to look at substance not just form, to take into account the actual appeal process and decision taking; all matters going into the mix.

The ET took into account all factors and reached a conclusion properly open to it.

(2) Whether the ET had erred/reached a perverse conclusion in holding that the reasons relied on by the Respondent justified the dismissal. Specifically, whether Allegation 1 (hostile comment made at meeting) was sufficiently serious; and/or, whether Allegation 2 (failure to cooperate and lead on operational policy change) could amount to a conduct matter at all.

Held: This was a perversity challenge; the Claimant had not done sufficient to make good the appeal.

On allegation (2) the EAT considered this was properly to be described as a matter of conduct and, looking at the substance of the case, it was apparent that is how the First Respondent (and the Claimant) had seen it, certainly when it "looked back over events as a whole through "the prism of the final alleged escalation of behaviour" ".

Similarly, when considering events of 20 July, the Respondent was entitled to have regard to what the meeting was about and see the Claimant's conduct in the light of that background, as. the Respondent did when characterising the behaviour as breaching the Code of Conduct.

Wrongful dismissal

(3) Whether the ET erred in law, alternatively reached a perverse conclusion in its consideration of the wrongful dismissal claim; alternatively failed to give proper reasons in this respect.

Held: The ET heard the evidence of the Claimant and a number of other witnesses over period of time. It reached its own views. In part, its reasoning was set out in its findings on the unfair dismissal claim, but its descriptions of the Claimant's conduct (e.g. at paragraph 200: "palpable resistance", "deliberate reluctance") were expressions of its own views on the evidence. Given the finding as to what was required of the Claimant as part of her job (see e.g. paragraph 199), it was entitled to find there was a wilful breach of the Claimant's contract (to do that which was reasonably required of her) and, taken overall, the conclusions were sufficiently reasoned.

Race discrimination

(4) Whether the ET erred in law in its consideration whether Ms Ashworth (Fifth Respondent), who took the decision to dismiss the Claimant, thereby discriminated against the Claimant because of her race; in particular in failing to have proper regard to the complete picture.

Held: This was not a case where the ET had found matters tipped beyond what might be described as "mere unreasonableness". In any event, the ET had considered the Respondent's explanation and had found as fact Ms Ashworth's decision-making was not tainted by race discrimination. She had made genuine mistakes but genuinely believed in the Claimant's misconduct and her decision-making was not informed - consciously or subconsciously - by the Claimant's race. That was a sufficient answer.

Appeal dismissed.

HER HONOUR JUDGE EADY QC

Introduction

1. We refer to the parties as the Claimant and the Respondents as they were below, save as is necessary to distinguish between the Respondents, in which we case we do so by name. The appeal is that of the Claimant against a Judgment of the London (South) ET (Employment Judge Freer sitting with members over 14 days in November and December 2013, with four additional days in chambers) ("the ET"). That Judgment was sent to the parties on 14 April 2014. It comprises some 353 paragraphs, 52 pages. Before the ET, there were four lever arch files of documents comprising 1,535 pages, plus a supplementary bundle and further documents added during the course of the hearing. The ET heard from the Claimant and seven witnesses called on her behalf and received in evidence two further witness statements in support of her case. It heard from each of the Third to Fifth individual Respondents plus five witnesses called by the First and two witnesses called by the Second Respondent.

2. Before the ET, the Claimant was represented by her solicitor advocate, Mr Gray-Jones; before us, by Mr Laddie QC. The First and Third to Fifth Respondents were represented by Mr Cooper of counsel, both below and here. The Second Respondent was represented by Mr Purnell of counsel but has been discharged from the appeal which only challenges the ET's conclusions relevant to the findings against the First and Fifth Respondents.

3. The Claimant's ET claims were of race discrimination, victimisation, automatic protected disclosure and conventional unfair dismissal, and wrongful dismissal. All were dismissed by the ET. The proposed grounds of appeal were considered on the papers by HHJ Richardson, who directed that the grounds relating to unfair and wrongful dismissal should

proceed to a Full Hearing but the race discrimination challenge should not. The Claimant's subsequent application under Rule 3(10) of the **EAT Rules** came before me, and I was persuaded that the challenge against the race discrimination findings should also be permitted to proceed. We are thus concerned with the following grounds of appeal:

(1) Unfair dismissal: the ET erred in holding that the dismissal process as a whole, including appeal, fell within the range of reasonable responses.

(2) The ET further erred in law, reached a perverse conclusion, in holding that the two allegations relied on could justify a decision to dismiss.

(3) Wrongful dismissal: the ET erred in law, alternatively reached a perverse conclusion, alternatively failed to give adequate reasons in this respect.

(4) Race discrimination: the ET erred in its consideration of Ms Ashworth's decision to dismiss; in particular, in failing to have proper regard to the complete picture.

4. In listing this matter for a Full Hearing, HHJ Richardson directed it should be heard by a full panel, observing that the input of the lay members, in particular, would add value both on HR practice in terms of the composition of the appeal panel and more generally on the case of unfair dismissal. That has indeed proved to be the case.

The Background Facts and the ET's Findings

5. The Claimant is British, of Nigerian origin and black African ethnicity. She commenced employment in 2002 and at all material times was employed as a Principal Pharmacist in the Prison Service; latterly as member of the senior management team within the Pharmacy Department of HMP Wandsworth. Her employment had been transferred on a number of occasions but she was employed by the First Respondent at the time of her dismissal.

6. Funding for the institution of a Central Pharmacy Unit ("CPU") in HMP Wandsworth had been secured in or around January 2011. This was intended to alter the way in which prison pharmacy services were provided to more closely replicate the public service in the community. The Claimant had principal involvement in leading the project, and this formed the context to her later dismissal, in particular, as to what was found to be her resistance to, or obstruction of, that project and her conduct at a meeting on 20 July 2011.

7. Following an investigation, Ms Caulfield-Stoker (the Fourth Respondent and former chair of the Community Services division of the First Respondent) concluded the matter warranted referral for a disciplinary hearing. The Claimant faced three disciplinary allegations, as set out in the letter of 14 October 2011 inviting her to a disciplinary hearing before Ms Ashworth. First, that she had behaved unprofessionally during a senior management meeting on 20 July 2011; specifically she conducted a telephone conversation (apparently during a break in that meeting), which seemed to suggest she would decline to do what others at the meeting wanted. When informed by Ms Leegood that her conversation was inappropriate she responded in a hostile manner, saying "*Shut your mouth and ears, you should not be listening*" (Allegation 1). Second, that she had "failed to co-operate, support and lead" the major service change in the Pharmacy Department (Allegation 2). Third, that she had misconducted herself towards a Pharmacy technician, Sam Osborne, on 1 June 2011 (Allegation 3).

8. The Claimant's disciplinary was not concluded until May 2012, when Ms Ashworth decided that the Claimant should be dismissed for gross misconduct. On Allegation 1, she accepted the Claimant had behaved as had been alleged on 20 July 2011, a conclusion the ET considered open to her on the evidence. She also, however, took into account matters relating to a continuation of the meeting on 21 July 2011, which had not been put to the Claimant

during the disciplinary process and which the ET concluded was unfair and meant Ms Ashworth could not have held a reasonable belief in the Claimant's misconduct on that day or that it justified a finding of a pattern of behaviour on the Claimant's part. On Allegation 2, it was accepted that the Claimant had principal involvement in the pharmacy project, and the ET found the Respondent had been entitled to conclude she had been slow to engage with the operational policy in that respect, albeit that it noted the supporting evidence was comparatively weak. Ms Ashworth (the ET found) did not reach an overall conclusion with regard to all the constituent parts of this allegation and (as the ET further found) certain of the matters she relied on gave rise to issues of unfairness and did not themselves provide reasonable grounds for a finding adverse to the Claimant. As for Allegation 3, the Claimant had previously apologised to Mr Osborne, who had considered the matter closed, as did Ms Ashworth save to the extent that it corroborated the account of other witnesses as to what had happened on 20 July; an approach the ET found fell within the range of reasonable responses.

9. The decision to dismiss was communicated to the Claimant by letter of 15 June 2012, in which Ms Ashworth also referred to "other factors" to which she had had regard. The ET found this was unfair: the Claimant had not been given advance notice of these matters. Even if used only for "contextual background purposes" - and the ET did not accept that was the only way Ms Ashworth had relied on these - the unfair nature of this part of the process meant Ms Ashworth could not have held a reasonable belief in these additional points. The ET thus found the dismissal was procedurally flawed in many respects, and this meant that the belief held by Ms Ashworth fell outside the range of reasonable responses.

10. The Claimant appealed. The appeal hearing was conducted by a panel chaired by Mr Deans, the First Respondent's Joint Director of Facilities and Estates. It took place over 12

days between October 2012 and June 2013; the Claimant was legally represented. Mr Deans sat with Ms Ludlam, the First Respondent's Divisional Director of Nursing and Mr James, a General Manager at the First Respondent. Additionally, the Chief Pharmacist from Kingston Hospital, was appointed independent advisor. Although initially intended to be a review, matters before the appeal panel broadened out - not least as the Claimant now raised allegations of race discrimination and detriment due to protected disclosures; it became a re-hearing.

11. During the period of adjournment after the first day of the appeal hearing, the Claimant wrote objecting to Ms Ludlam's participation. The Respondent replied rejecting the Claimant's concerns; nothing arose that might not be expected where a senior manager with relevant experience in the organisation participated in the appeal process. No further objection was taken. As for Mr James, it was accepted that he was subordinate and reported to Ms Ashworth and it would have been possible to substitute him with another general manager at the appeal. That said, no issue had been raised on the Claimant's behalf about Mr James' involvement.

12. The appeal panel concluded it should uphold the decision to dismiss, as confirmed by letter to the Claimant of 31 October 2013. In so doing, it did not have regard to Allegation 3 and, in respect of Allegation 1, it limited its considerations to the events of 20 July 2011. The ET found the appeal panel had been entitled to reach the conclusions that it did. These were adverse to the Claimant on Allegations 1 and 2. It had carried out a fair process, given proper consideration to all the evidence and reached conclusions that fell within the range of reasonable responses. It considered the matters found against the Claimant to be serious and, given her apparent lack of insight, had concluded that a final written warning and/or training would not be appropriate sanction and that it should uphold the decision to dismiss.

13. The ET concluded the appeal process was fair and had the effect of curing the deficiencies at the dismissal stage. Taken overall, the Claimant's dismissal was fair. The ET also concluded that the Claimant had committed a repudiatory breach of her contract of employment and her wrongful dismissal claim therefore failed.

14. As for the race discrimination case in respect of Ms Ashworth's original dismissal decision, the ET's reasoning is set out at paragraphs 215 to 217 and 219 to 220 of its decision:

> **"215. As shown above, Ms Ashworth made the decision to dismiss the Claimant. The Tribunal concludes quite comfortably that the Claimant has not made out facts from which the Tribunal could conclude, even by inference, that the Claimant was less favourably treated by Ms Ashworth because of the Claimant's colour.**
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> **216. The Tribunal has found that some procedural and consequential belief matters fell outside the range of reasonable responses with regard to Ms Ashworth's decision to dismiss the Claimant. However, the Tribunal repeats the now trite law that a detriment and membership of a protected class is not enough to found a successful race discrimination claim. There needs to be something more. Otherwise, for example, a finding of unfair dismissal of anyone falling within a protected class would lead to an automatic finding of direct discrimination.**
>
> **217. The Tribunal is entirely satisfied that those unfair dismissal matters that the Tribunal concludes on balance fell outside the range of reasonable responses were genuine mistakes made by Ms Ashworth unrelated to race.**
>
> **…**
>
> **219. In any event, the Claimant has not produced that something more. Ms Ashworth was independent from the mass of background evidence and allegations relied upon by the Claimant. There was no evidence reasonably proffered to demonstrate any collusion with others, particularly Ms Leegood who has been singled out by the Claimant for particular criticism. There was no evidence to show collusion with Ms Caulfield-Stoker. Any discrimination would be a stand-alone act by Ms Ashworth.**
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> **220. Having regard to all the evidence as a whole, the Tribunal concludes that the decisions made by Ms Ashworth during the disciplinary process were genuinely made by her in an effort to discharge her responsibility of determining the disciplinary matter with which she was entrusted. In parts the Tribunal concludes that decision making was flawed, but the Tribunal comfortably arrives at the unanimous conclusion that there is no inference of discrimination to be drawn. Those matters were genuine mistakes arising from Ms Ashworth attempting to determine the disciplinary allegations. Adopting a *Shamoon* approach (which in essence addresses step two of the burden of proof provisions), the reason why the Claimant was dismissed was because Ms Ashworth genuinely considered the Claimant was culpable of gross misconduct, as later reasonably concluded by Mr Deans and the appeal panel. Any mistakes in the process arose because of genuine errors that were not consciously or subconsciously tainted by race discrimination."**

Relevant Legal Principles

15. The parties largely agree as to the relevant legal principles, as follows.

16. When considering an unfair dismissal claim, an ET should have regard to the overall process, including any appeal, together with the reason for the dismissal, see **Taylor v OCS Group Ltd** [2006] ICR 1602 CA, per Smith LJ at paragraphs 47 to 48:

> **"47. … employment tribunals [must] realise that their task is to apply the statutory test. In doing that, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.**
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> **48. In saying this, it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that section 98(4) of the Employment Rights Act 1996 requires the employment tribunal to approach its task broadly as an industrial jury. That means that it should consider the procedural issues together with the reason for the dismissal, as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss. So for example, where the misconduct which founds the reason for the dismissal is serious, an employment tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the employment tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee. …"**

17. As for the standards to be applied to internal disciplinary processes, the following principles (as helpfully summarised by Mr Cooper) can be derived from the case-law:

(1) The strict rules regarding apparent bias applicable to judicial processes are not applicable to internal disciplinary proceedings (**Christou & Anr v London Borough of Haringey** [2013] ICR 1007 CA, per Elias LJ at paragraphs 48 to 50, and the case of **Mattu v University Hospitals Coventry and Warwickshire NHS Trust** [2013] ICR 270 cited therein; also see **McMillan v Airedale NHS Foundation Trust** [2014] IRLR 803 CA per Floyd LJ at paragraphs 51 to 52 and Underhill LJ at paragraph 74).

(2) That said, actual bias giving rise to a breach of natural justice could be fundamental to the question of fairness (per Lady Smith in **Watson v University of Strathclyde** [2011] IRLR 458 EAT(S), paragraphs 29 to 31 and 44).

(3) In any event, whether there is an appearance of bias may be a relevant factor in an unfair dismissal case; it will be something that will go into the mix for the ET to consider as part of fairness as a whole, as will the question whether the panel did in fact carry out the job before it fairly and properly, see **Rowe v Radio Rentals Ltd** [1982] IRLR 177 EAT, per Browne-Wilkinson J (as he then was), at paragraphs 11 to14, citing Lord Denning in **Ward v Bradford Corporation** [1971] 70 LGR 27 at page 35:

> **"We must not force these disciplinary bodies to become entrammeled in the nets of legal procedure. So long as they act fairly and justly, their decision should be supported."**

See also per Kilner Brown J in **Haddow v ILEA** [1979] ICR 202 EAT, at 209 G-H,:

> **"… the only thing that really matters is whether the disciplinary tribunal acted fairly and justly. …"**

(4) Provided the ET has taken all matters into account, its decision cannot be overturned on appeal unless it is perverse.

18. When assessing standards of fairness for unfair dismissal purposes it is relevant to have regard to the **ACAS Code of Practice on Disciplinary and Grievance Procedures** ("the Code"), which provides (paragraph 27) that where an employee appeals a disciplinary decision:

> **"The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case."**

19. We also note the non-statutory **ACAS Guidance**, which advises, in relation to internal appeal procedures (page 34), that employers should:

> **"… wherever possible provide for the appeal to be heard by someone senior in authority to the person who took the disciplinary decision and, if possible, someone who was not involved in the original meeting or decision."**

20. On a claim of wrongful dismissal, the ET itself has to determine whether the matters relied on amounted to a repudiatory breach of contract by the employee; that is, wilful or

deliberate contravention of an essential term of the contract or gross negligence, see **Sandwell & West Birmingham Hospitals NHS Trust v Westwood** [2009] UKEAT/0032/09/LA.

21. As to race discrimination, section 136 of the **Equality Act 2010** lays down how the burden of proof is to be approached in discrimination cases: a claimant must prove facts from which an ET could properly conclude that the Respondent (a) treated her less favourably than an actual or hypothetical comparator; and (b) did so because of race; see, e.g., **Igen Ltd v Wong** [2005] ICR 931 CA, and **Madarassy v Nomura International plc** [2007] ICR 867 CA.

22. As to whether less favourable treatment can be inferred, the case-law (much predating the introduction of the shifting burden of proof) makes clear that unreasonable treatment plus the possession of a protected characteristic, *without more,* will not suffice to support an inference of less favourable treatment (see, e.g., **Glasgow City Council v Zafar** [1998] ICR 120 HL and **Laing v Manchester City Council** [2006] ICR 1519 EAT per Elias J (as he then was)). Where there is a comparator, the 'something more' might be established in circumstances where there is no explanation for the unreasonable treatment of the complainant as compared to that comparator; see per Sedley LJ in **Anya v University of Oxford** [2001] ICR 847 CA, and the discussion of that dicta in **Bahl v the Law Society** [2004] IRLR 799 CA, per Maurice Kay LJ, observing (paragraph 101) that the inference of discrimination would not then arise from the unreasonable treatment but from the absence of explanation.

The Parties' Submissions

The Claimant's Case

23. First, as to the ET's approach to procedural fairness (unfair dismissal), the original dismissal decision was (as the ET found) flawed in such a serious and multifaceted way, (i) it

could not be remedied on appeal; alternatively, (ii) only a perfect appeal process could remedy it. The ET erred in law in failing to look at the totality of the process, failing to weigh the gravity of the flaws at stage 1 with the flaws at stage 2. Mr Laddie QC laid stress on the statement in **Taylor** (paragraph 47) that it was for an ET to examine with "particular care" any subsequent proceedings in a disciplinary process found to be flawed at an earlier stage. That would be all the more so where the decision to dismiss was of itself "nearer to the borderline" (**Taylor** at paragraph 48). Earlier case-law cited in **Taylor** (paragraph 33) expressly recognised there might be cases where the defect was so severe it could not be remedied.

24. As to the fairness of the appeal, Mr Laddie QC raised issues regarding the composition of the panel. Ms Ludlam was (1) a mentor to Ms Leegood; and (2) had been involved to some extent in an operational policy document, which was part of the case against the Claimant. As regards Mr James, he was junior to the dismissing manager, Ms Ashworth, and reported to her. The composition of the appeal panel was thus in breach of the standards laid down by the **Code** as supplemented by the **ACAS Guidance** and there were alternatives this employer could have adopted. The obligation was on the Respondent; it was not for the Claimant to have to keep raising the point. It was of particular importance given the panel was considering live evidence and (by then) allegations of race discrimination and protected disclosure detriment. The ET failed to perform the task before it. It merely asked (paragraph 178) whether defects from the stage 1 continued into stage 2; it failed to have regard to the process as a whole.

25. As for the second ground of appeal, the Respondent itself saw Allegation 1 as a misconduct - not gross misconduct - issue. Allegation 2 could not reasonably be characterised as misconduct at all; if anything, it was capability. See the description used in the investigation and dismissal process; it was only characterised as wilful at the appeal stage.

26. On the third ground, the ET erred in law, alternatively reached a perverse conclusion and/or failed to give adequate reasons in respect of the wrongful dismissal claim. The ET would have needed to have found that the Claimant had acted in repudiatory breach of contract, and that entailed either a wilful or deliberate contravention of an essential term of the contract or gross negligence (**Sandwell & West Birmingham Hospitals NHS Trust v Westwood**). Accepting that the conclusions had to be viewed in the light of earlier findings on unfair dismissal, that did not assist: those findings had been in the Claimant's favour.

27. On the fourth ground, relating to the race discrimination claim, this raised an important question as to how an ET should deal with discrimination in the context of findings of unfair dismissal. The Claimant's claim of race discrimination as against Ms Ashworth was that she had treated the Claimant so unfairly, it raised an inference of race discrimination. The ET's conclusions gave insufficient recognition to what it had found on unfair dismissal. Was it really the case that - no matter how blatantly unreasonably the employer has treated an employee - unfairness, without more, cannot give rise to an inference of discrimination? In this case, the ET erred in failing to have proper regard to the complete picture. Doing so, gave rise to something more than mere unreasonableness; there was an absence of explanation. Accepting the ET purported to consider the question of explanation, finding there had been genuine mistakes which arose because of genuine errors; that was tautologous. A proper application of the burden of proof in these circumstances ought to have resulted in a finding of discrimination.

The Respondent's Case

28. On the first ground, Mr Cooper did not accept that the ET's findings of unfairness at the dismissal stage meant this could not be remedied on appeal. The ET did not put its conclusions any higher than that the decision fell outside the range of reasonable responses (see paragraph

159). It was not saying that it was fundamentally flawed or that the flaws were irremediable. It was also wrong to say there was any requirement that the appeal process itself be without fault. The highest the matter could be put was as set out in **Taylor**, i.e. the more serious the flaws, the greater the scrutiny that might be required. The ET had directed itself that it must assess the fairness of the procedure as a whole and then it did just that. It was not simply stating what would be required in a re-hearing, but properly assessed what had taken place at the appeal stage as against what had gone wrong before.

29. As for the composition of the appeal panel, the parties agreed the test was not the same as for a judicial process but these points may still be relevant to fairness. Whilst someone who was part of the original decision making below should not then determine the appeal (that would give rise to fundamental bias), presence at an earlier stage might or might not raise a question of bias depending on the facts. Matters had to be seen in the context of the workplace (see **Taylor v OCS** and the citation from **UCATT v Brain** [1981] IRLR 234 at paragraph 48). Here, the ET had regard to all relevant factors and reached a conclusion open to it. This could only be a case of apparent bias; the balancing exercise was a matter of weight for the ET.

30. There could be no requirement that all members of a disciplinary or appeal panel had had no prior or dealings (even close dealings) with the individuals involved in the events in question. That would be impractical where, as here, the allegations concerned a member of the senior management team and witnesses included other senior managers. The correct approach was to consider, in the round, the composition of the appeal panel and the way it went about its business; to assess whether the overall process was within the range of reasonable responses. That the panel had examined the facts dispassionately, at great length and with scrupulous fairness, and did in fact act fairly and justly and demonstrated actual impartiality was highly

material to the assessment. It was for the ET and only susceptible to challenge on appeal if it thereby failed to apply the correct test or reached a perverse conclusion.

31. It was also relevant to see how the Claimant had put matters below. Before the appeal panel, an issue regarding Ms Ludlam had been raised in correspondence but not then pursued, notwithstanding the Claimant was legally represented. Before the ET, the point had been pursued with a different emphasis. The **ACAS Code** and **Guidance** did not address the case of a panel rather than a single manager. So whilst Mr James' subordinate role (albeit he was still a very senior manager and there was no evidence than that he had done other than participate in an impartial and dispassionate manner) might not be ideal, the question was whether it gave rise to a fundamental breach of natural justice and it had not. It was simply a matter to go into the overall mix and it would only be if the ET's approach failed to take account of that or was perverse that it could be challenged on appeal. Here, the ET had carried out its task impeccably. It had taken into account relevant points and reached conclusions open to it.

32. The second ground of appeal was really a perversity challenge. The first allegation was accepted to be a conduct issue; the documents showed it had been viewed by the Respondent as a serious misconduct matter (see its reference to this being a breach of the Code of Conduct). Far from the Claimant's conduct at the 20 July meeting not being overly serious, the meeting was specifically due the problems with the CPU and her 'phoning a colleague and saying she would not be doing what other managers had directed, then responding to Ms Leegood in a hostile manner set the context for how it was viewed by the Respondent.

33. As for the second allegation, this had always been that the Claimant had failed to be cooperative: i.e. she was being uncooperative. That was capable of being a conduct issue, as

the letters from the Respondent had made clear when speaking about her unhelpful attitude. The real issue became apparent to the Respondent over the course of the investigation and to the ET over the course of the hearing. It was not easy to put into one paragraph but it was clearly a matter of conduct and that was how it was understood by the Claimant.

34. On the third ground, the wrongful dismissal claim: the ET had evidence from the witnesses and was entitled to reach its own conclusions. It heard the Claimant and others in respect of the 20 July incident and saw this as a serious incident. It made its own finding as to the blameworthy aspect of the Claimant's conduct in respect of the operational policy change; it found palpable resistance and deliberate reluctance (wilful conduct). Given its findings as to the requirements of the Claimant's job, there was sufficient explanation for its conclusion.

35. Lastly, on the race discrimination appeal, whatever further clarification might be helpful on the point, what was clear was that mere unfairness plus a protected characteristic was not sufficient (see **Zafar**). Here, (unlike **Anya)** there was no actual comparator and the ET's finding was of nothing more than mere unfairness. In any event, the discussion ultimately went nowhere because the ET had approached this as if the burden of proof had shifted and the Respondent was obliged to provide an explanation. The ET concluded there was a genuine error in the attempt to follow the process and Ms Ashworth's decision taking had been absent race discrimination. Moreover, it was important to keep in mind what the explanation had to be for. Here it was the dismissal of the Claimant, and it was plain (see paragraph 56) that the ET had made a finding that Ms Ashworth had a genuine belief in the Claimant's misconduct.

The Claimant in Reply

36. On ground 1, what distinguished this case was, first, Mr Deans' concession that, had he known of the circumstances relied on, that may have made a difference such that Ms Ludlam would not have sat on the panel. And, second, the appeal panel was concerned with the veracity of the witnesses, this being a re-hearing. Ms Ludlam had mentored Ms Leegood, and Mr Smith reported into Ms Ashworth. In some cases these facts would not undermine the fairness, but this was fact-sensitive and where, as here, the credit of witnesses was an essential factor, it undermined the fairness of the appeal process.

37. On ground 2, it would not have been difficult to express Allegation 2 as a conduct issue, if, indeed, that is what it was; that is not how the Respondent chose to put it.

38. On wrongful dismissal, ground 3, although the Respondent's written submissions before the ET had stressed the need to differentiate between unfair and wrongful dismissal, the parties were still left having to trawl through the unfair dismissal findings to get any reasoning relevant to the wrongful dismissal conclusion; even then, it was insufficient.

39. On ground 4, on the facts of this case, this was not mere unreasonableness. The ET did not consider whether its findings on fairness provided sufficient material. As for the explanation, the findings asserted that Ms Ashworth had made mistakes; that was not an explanation. The issue was why she made those mistakes.

Discussion and Conclusions

40. We start with the appeal against the ET's rejection of the unfair dismissal case. When looking at the question of fairness, the ET was bound to consider the process overall (**Taylor**).

It did so. Having made its findings as to the unfairness that it concluded tainted Ms Ashworth's decision, the ET did not consider the flaws it had found were such as to mean that the position could not be remedied. We have had careful regard to the ET's findings in respect of Ms Ashworth's decision making and then to the findings made on the appeal process. It is clear that the ET did that which Mr Laddie QC says that it must: it had regard to the nature and the extent of the flaws at the earlier stage, specifically going through these points when assessing the appeal process (see paragraphs 179 to 194). We reject the assertion that this was a case where the initial unfairness was such that the position could not be remedied or could only be remedied by an entirely perfect appeal process or by an appeal process that gave the Claimant a yet further hearing or review thereafter. The process was to be considered in the round. We do not accept that the ET missed the point regarding the seriousness of the flaws at the first stage; it very much had those in mind. Its findings on the appeal do not sit in a vacuum; it also took into account the findings it had made on the original decision to dismiss.

41. We turn to the question whether the appeal stage was itself flawed, such that it could not rectify the position, because of the composition of the appeal panel. We note the ET made a finding of fact as to Ms Ludlam's earlier involvement in matters relevant to the case: it was no more than a minor involvement some year and a half earlier which she had, unsurprisingly, forgotten. No issue can be taken with that and there could thus be no question of Ms Ludlam sitting in judgment on her own prior decision or involvement in the case. At most, the Claimant had raised a question as to Ms Ludlam's management role more generally, which included her role as mentor to Ms Leegood, suggesting this gave rise to an appearance of bias.

42. The assessment of that question, in the context of an internal disciplinary process, is not to be approached as it would in judicial proceedings and for good reason (see the references in

the case-law we have cited above). Even if it was, however, we are satisfied that the fair-minded, informed observer would not consider that there was any appearance of bias in these circumstances. The informed observer would bring to bear on the assessment the kind of industrial experience that the EAT lay members have been able to do in this case. She would, therefore, be aware that very senior managers, such as Ms Ludlam, will mentor and have involvement in the management of a number of employees and may well also sit on disciplinary and appeal panels in which those employees might be involved. She would understand that to require an employer to avoid any such link would be both unrealistic and undesirable: employers are entitled to want to utilise the knowledge and experience of relevant members of the senior management team in this way; it does not, without more, render the process unfair. Here there was nothing more suggested by the mentor role Ms Ludlam had carried out. The fact that the Claimant's legal representative did not pursue the point after receiving the Respondent's response was a further significant fact the ET was entitled to take into account.

43. As for Mr James, the Claimant objects that he was junior and reported to the dismissing manager, Ms Ashworth, albeit that was not a point made by her at the time of the appeal itself. We accept and endorse the general advice given by ACAS to the effect that the person hearing an appeal should be senior to the original decision taker. That will generally be right given that the person hearing the appeal has to be able to overturn the decision taken below. More than that, there may be a concern that a subordinate might be unduly influenced if considering a decision taken by a manager to whom they report. On the other hand, we have to see this in context (as did the ET). As the Respondent points out, Mr James, who was himself a general manager of some seniority, was one of a panel of three. The panel was chaired by a director and included another director, both senior to Ms Ashworth, and received independent advice from a senior pharmacy professional. Those matters took this case outside the circumstances

specifically considered by the **ACAS Code** and the non-statutory guidance. Moreover, whilst we can see that the involvement of a more junior employee (albeit in this case someone of seniority, whose reporting line to Ms Ashworth may not have been in the same form as employees at a lower level) might not have been ideal, the ET was entitled to look at the substance not merely the form. These matters, along with Ms Ludlam's management and mentor role, all went into the mix. The ET took all those matters into account and reached a conclusion open to it on the evidence. That view was informed by the conclusion as to what had actually taken place at the appeal, both as to the hearing but also in terms of the panel's decision making. The ET was entitled to have regard to all those matters in assessing the question of fairness. It reached a view properly open to it. It is not for us to interfere.

44. We turn then to the second ground of appeal: the characterisation of the disciplinary charges and findings. Ultimately we consider this comes down to a perversity challenge, and we do not find the Claimant has met the high standard she must to make good such an appeal.

45. We start with the Allegation 2. Contrary to Mr Laddie QC's assertions, we do not find it in any way difficult to see why this was characterised as a conduct rather than a capability issue. The EAT lay members, in particular, consider that where an employee - in a senior management role and leading on an operational change of this nature - has been found to lack commitment and to have failed to cooperate, support and lead, that can properly be described as a conduct issue. On any fair reading of the dismissal letter, it is apparent that Ms Ashworth was finding that the Claimant was hostile to the policy and that is why she had delayed and failed to lead. The whole purpose of the CPU was to move to a pharmacy- not nurse-led service. Yet the Claimant's contributions showed her continually seeking to cast this as a nurse-led service. It is clear that Ms Ashworth found that the Claimant was motivated by her disagreement with

the policy; that made her conduct wilful. We do not consider that any of this is undermined by the fact that the Respondent might not initially have seen the issue so clearly. It was something that became increasingly apparent over time, as the ET found here. In part, it is something that crystallised with the events at the meeting on 20 July. We can see why the ET described the Respondent as having come to its view having "*looked back over events as a whole through "the prism of the final alleged escalation of behaviour" "* (paragraph 186).

46. As for Allegation 1, what took place on 20 July did not stand in a vacuum; the Respondent was entitled to have regard to the nature of the meeting and to see the Claimant's conduct in context, hence its characterisation of this as breaching the Code of Conduct.

47. As for how matters were labelled in the investigation and dismissal letters, we look to the substance not just the labels or form. We have no difficulty in thus seeing how the Respondent saw these matters as serious issues and we do not consider that the Claimant had such a difficulty either. We can accept that the appeal outcome letter was a rather better drafted document than the earlier correspondence emanating from the Respondent. But the substance remained the same. Most relevantly, the ET was entitled to conclude - as we are satisfied that it did - that the Respondent had a reasonable belief that the Claimant was deliberately resistant and obstructive and saw her conduct on 20 July as both part of that and illuminative of it.

48. As to ground 3, we note that the ET heard the Claimant's evidence along with that of a number of other witnesses over a period of time and clearly reached its own view. In part its reasoning is set out in its unfair dismissal findings. But its descriptions of the Claimant's conduct as demonstrating palpable resistance and deliberate reluctance (see paragraph 200, for example) are expressions of its own views on the evidence before it. That was sufficient to

permit a characterisation of the Claimant's conduct as wilful. Further, given its clear findings as to what was required of the Claimant as part of her job (see paragraph 199, for example) the ET was entitled to find that she had acted in breach of the contractual obligation to do that which was reasonably required of her. Reading from both the findings under the heading of unfair dismissal and wrongful dismissal, the ET's conclusions are adequately explained.

49. As for race discrimination, I permitted this part of the appeal to proceed to a Full Hearing because of a concern that there might be something in the point that the ET had not given sufficient regard to the weight of its findings as to the unfairness of Ms Ashworth's decision making. Having had the opportunity to more fully consider the question of unfairness as part of the unfair dismissal appeal, I and my colleagues are satisfied that any such concern has been laid to rest. This was not a case where the ET had found matters tipped beyond what might be described as mere unfairness. There may be cases that do give rise to more difficulty of analysis. This is not one of those cases.

50. Even if we were wrong on that, we are, in any event, satisfied that the ET considered the explanation provided by the Respondent and found as a fact that it was not tainted by race discrimination. Ms Ashworth made genuine mistakes because of the errors in her approach. Whatever the reason for her mistakes - and, allowing for human error, there may be nothing more to add to that - the ET was satisfied that she genuinely believed in the Claimant's misconduct and that she was not informed, consciously or subconsciously, by the Claimant's race. That is a sufficient answer. This ground of appeal fails along with the others.