Appeal No. UKEAT/0333/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 April 2015 & 3 November 2016

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

(SITTING ALONE)

MRS S J JARRETT APPELLANT

BIRMINGHAM CITY COUNCIL RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

At the April 2015 Hearing

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At the November 2016 Hearing

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For the Respondent

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SUMMARY

UNFAIR DISMISSAL

PRACTICE AND PROCEDURE

PRACTICE AND PROCEDURE - Amendment

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

The Appellant succeeded on one ground of appeal at an earlier hearing before the EAT: that the ET had not considered her application to amend her claim to include allegations of indirect race discrimination (direct discrimination already being asserted). As a result, the remaining six grounds were adjourned pending a decision of the ET which might affect their resolution. The ET having rejected her application, the appeal resumed before the EAT. The Appellant sought at the outset to amend her Notice of Appeal. This was refused, applying the principles set out in **Khudados v Leggate** [2005] ICR 1013, and stressing the importance of finality.

The grounds of appeal were separately considered and rejected. However, the Court had raised at an earlier hearing whether the ET was wrong in law in concluding that the dismissal (which was for misconduct by claiming to be off sick, but working in another job at the time) was fair when it had concluded that the employer's investigation into the allegations had been seriously flawed, on the basis that in the light of information which had come to light since the dismissal the flaws made no difference. This looked very like a misapplication of section 98(4) for the reasons given in **Polkey** (especially by Lord Bridge). However, despite this point being ventilated by the EAT at the earlier hearing (after which the case had been remitted to the ET) there had been no application to amend the Notice of Appeal, nor was any such application made at the resumed hearing of the appeals (despite there being an application to amend on other grounds), and the original Notice of Appeal could not sensibly be read so as to raise the point. Consistent with its approach to the application to amend which had been made and

dismissed, recognising that there may have been forensic reasons for not pursuing the point and applying the principle that it is not for a court to make arguments for a party but to adjudicate on the dispute the parties wish to have resolved, rather than some other one, the EAT concluded it was not properly open to it to resolve the appeal on this basis. No ground to that effect was before it: no application to amend to include it had been made.

The appeal was dismissed.

THE HONOURABLE MR JUSTICE LANGSTAFF

Introduction

1. On 24 April 2015 I allowed an appeal by the current Appellant against a decision of an Employment Tribunal at Birmingham - Employment Judge Kearsley, Mr Wilcox and Mrs Howard - Reasons for whose Decision had been given on 6 May 2014. In that Decision the Tribunal effectively dismissed the claims that the Claimant had made in two separate originating applications, the first made while she remained in employment; the date of which is material to what follows, 20 February 2012. The reason that the appeal was allowed in part was because the Employment Tribunal had simply failed to deal with an application made by the Claimant before it to amend her claims to include a claim that she had been indirectly discriminated against on the grounds of her race. There was already a claim for direct discrimination. The application to amend and any consequent hearing was remitted to the Employment Tribunal for decision. If the amendment were to be allowed, the decision made on the hearing that would follow was highly likely to affect the arguments on the remaining grounds of appeal, which in consequence were adjourned.

2. It proved impossible to reconvene the same Employment Tribunal due to the retirement in the intervening period of the Employment Judge. On 24 August 2015 the remitted matter came before Employment Judge Dimbylow, sitting on his own. In a careful and thorough decision he refused the application to amend. That left the outstanding grounds of appeal as they had been before this Tribunal. They were originally fixed to be heard before me in April of this year, but due to the serious ill-health of the Claimant had to be postponed for hearing until today.

3. Before Employment Judge Kearsley and his Tribunal, and before this Tribunal on the previous occasion, but not before Employment Judge Dimbylow nor at the outset of the Kearsley Tribunal but during it, the Claimant had been represented by a solicitor, a Mr Brown. Acting for herself, having dispensed with the services of Mr Brown, she applied to Employment Judge Dimbylow not only to determine the remitted matters in her favour but also two additional claims, for breach of contract and victimisation. One claim for breach of contract had already been raised initially by her but had not been proceeded with at an earlier stage. Employment Judge Dimbylow refused to entertain those applications for amendment. I mention this because she now wishes before me substantially to amend the grounds of appeal against the Decision of the Kearsley Tribunal.

The Facts

4. To put that application and the remaining grounds of appeal in context, I should set out, if briefly, the underlying facts. They are drawn from the Decision of the Kearsley Tribunal. The Claimant is a British Black African Caribbean. She was employed by the Respondent, whom I shall call "the Council", for some 24 years prior to her dismissal on 22 January 2013. By 2009 she had become a Performance Review Adviser in the Adult Social Care Division of the Adult and Communities Directorate. The Directorate sponsored her to take an Open University degree, the aim being that she would qualify as a Social Worker. This involved her undertaking two 100-day placements and working reduced weekly hours as an Adviser, though she continued to fulfil that role. At the time, she also had some casual work, also for the Council and in broadly the same field.

5. On 10 and 11 March 2010 she worked in that casual capacity. It subsequently became a matter of concern that at the same time the employer thought that she had been claiming sick

leave from her regular job as a Performance Review Adviser. There was a return-to-work interview on 18 March 2010, which was a Thursday. The following year, in 2011, the Claimant went off sick. She began her sickness absence on 10 October. Although the Tribunal found at one point that she was off sick until 24 October, the date that features more frequently in the documentation is 19 October. However, on the night of 15/16 October (Saturday-to-Sunday night) she worked again in her casual capacity at a time when she was thought to have been certified off sick.

6. In November 2011 she was, so the Tribunal found, based for her work purposes at the Shakti Day Centre. There was an issue as to whether she had been told that she was to manage the Centre as a Service Manager or whether, as the Council's case was, she should work on a project, given that there was a limited period of time before she had to begin her next 100-day placement in her Open University course. In any event, on 21 November 2011 she moved from Shakti to Sycamore House. She has subsequently complained about the conditions under which she was asked to work at Sycamore House. A little while later, but presumably before she began her next placement with the Open University, she moved from Sycamore to Marsh Lane, where, again, she had similar complaints about the inadequacy of the facilities for the work she had to do and the way in which she had been treated. She has complained that at this time not only was she given poor facilities with which to work but her immediate supervisor, Mr Choudhery, had abdicated his management responsibilities towards her.

7. On 20 February 2012, after a period of some illness, which she attributed to the conditions and to Mr Choudhery's behaviour towards her, she made a claim, which was the first ET1 in these proceedings. That claim asserted that her treatment was unfair and discriminatory,

and she blamed Mr Choudhery. She said in the course of her description at paragraph 5 that Mr Choudhery had:

> **"… tried to use the disciplinary procedures on a number of occasions to intimidate me acquiescing [sic] to discriminatory treatment of me."**

8. The way in which the Open University course was financed gave rise to some questions internally within the Council, and they conducted an investigation. It was during that investigation that it came to light that the Claimant might have been working in her casual capacity whilst claiming to be sick in her regular job. If so, if she did so deliberately, then, as she acknowledged in the course of proceedings, she would be committing such misconduct as would justify her dismissal. Effectively, she would be behaving dishonestly towards her employer. It is well recognised in employment practice that employees who work for money whilst claiming sick pay from their employer are the equivalent of employees who have their hand in the till.

9. The allegation that she had been behaving in this way was investigated by a Mrs Davis. The investigation began in October 2012. The Tribunal said that in an interview with the investigating officer in December 2012 the Claimant confirmed that she had worked two shifts in her casual work on the night of 15/16 October 2011 and did not dispute the records. Her explanation for working whilst off sick was that she thought she had been paid to work Monday to Friday so the weekends were hers and that she understood that a sick note covered her from Monday to Friday but not for seven days a week, but then maintained that she was not sick but on annual leave. As for the earlier registered sickness absence, which was recorded in the Council's computerised records as having been from 1-15 March 2010, she initially confirmed that she was off. The Tribunal records that which is set out in a document that gives the detail of what she actually said during the course of the investigation, though it is not a verbatim

record. It is plain that she did not find it easy to remember what she had been doing in March 2010 when asked to recollect it in December 2012.

10. She had been told the purpose of the meeting beforehand. At one moment she acknowledged that she had been off sick but at another almost immediately thereafter said she thought she was sure that she had returned to work.

11. In January 2013 the matter went to a disciplinary hearing, since the investigating officer thought there was a case to answer. This came before a Ms Sabouri. Ms Sabouri concluded that there was no evidence that annual leave on 10/11 March 2010 or 15/16 October 2010 had been authorised. There were records of sick leave covering those dates. Furthermore, the Claimant had confirmed in three emails to her line manager that she was off sick during the period of 15/16 October, referring to GP's sick notes. There was no supporting evidence, such as leave cards or supervision notes, to challenge the management case. Therefore Ms Sabouri found the allegations proven.

12. There was an appeal internally, which was not heard until as late as 5 December 2013. At that appeal hearing the Claimant, who had told Ms Sabouri that she had hunted for documents but was still trying to find them at the time of the disciplinary hearing, produced an attendance record. The attendance record indicated, if accurately compiled, that in respect of the absence in March 2010 the Claimant had been sick for the three days at the start of the week ending on 7 March 2010 and in the subsequent week, which ended 14 March, had on 10 March been taking time off in lieu (the entry was "TOIL"). The sub-committee hearing the appeal nonetheless concluded that having regard to all of the evidence and on the balance of probabilities the appeal should not be upheld:

> **"… The Sub Committee felt that on the basis of the evidence available to management at the time of the Hearing the decision was both fair and reasonable."**

13. It might be thought that by using the expression "available to management at the time of the Hearing" the appeal body did not take into account the attendance record that recorded "TOIL".

The Tribunal Decision

14. The Tribunal decided claims in respect of: discrimination on the ground of the Claimant's race; victimisation (the protected act being the issuing of the first claim on 20 February 2012); and unfair dismissal. As to the decision in respect of direct discrimination, the Tribunal concluded that the fact that the Claimant was Black African/Caribbean played no part in influencing the decisions about which she complained. It focussed, in deciding that, on her complaint that she had been allocated project work, and been taken away from, not offered or not given the job of managing the Shakti Centre (see paragraph 105). It considered an issue that it had set out for its decision at the start of the hearing. The issues had been prepared by the Respondent. The Claimant was at that stage acting for herself. At a later stage, during the hearing, Mr Brown came in to represent her. However, the Tribunal noted in determining the issues, that the parties had not departed from them (paragraph 15) in the course of the hearing. It is thus plain that although the Claimant did not herself expressly adopt the issues at the outset of the case at no time did she or, later, Mr Brown argue that there were other issues that should have been dealt with. Mr Brown's closing submissions, a summary of which is included in the Judgment, did not appear to suggest that there were aspects of the case that had not been determined.

15. Of course, I have already concluded, and it was indeed accepted by the parties, that the Tribunal had been asked to deal with a matter of indirect discrimination, or at least an amendment to raise it, and had simply failed not only to deal with it but also to mention it at all in the Decision and indeed to suggest the contrary, wrongly. Accordingly, I am cautious about placing too much weight upon the inferences one might normally draw from an Employment Tribunal Decision.

16. The conclusion that the Tribunal reached in respect of race was that it had nothing to do with the reasons for appointing the Claimant as a Project Manager rather than as a Service Manager. It added at paragraphs 108 and 109 as follows:

> **"108. It is apparent from the correspondence that communication between the Claimant and Mr Choudhery deteriorated and each found difficulty in communicating with the other after the claimant had moved her base from Shakti [on 21 November 2011]. However, the Tribunal cannot infer from that deterioration that Mr Choudhery was influenced by the Claimant's race in appointing her to projects and finding her different Centres from which to complete her operations.**
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> **109. To the extent the Tribunal has heard complaints about the Claimant's working conditions, there is nothing to connect those complaints to the Claimant's race. Mr Choudhery found the Claimant difficult to manage in the later stages of their relationship and ceased to manage once he had been made the subject of complaint. It was entirely appropriate for the Respondent to remove Mr Choudhery from direct line management once claims had been made that he had discriminated against her in her first claim form. She was provided with a new Line Manager. She sustained no detriment in having Mr Choudhery removed. It was a proper management decision to make in the light of the complaints."**

17. The dismissal was the subject of the second claim. As to unfair dismissal itself, the Tribunal was considering an allegation of misconduct. It had to ask whether the employer had a genuine belief that the Claimant had been guilty of the misconduct alleged. It concluded that Ms Sabouri had one. It had to ask whether that decision was reached on reasonable grounds after a reasonable investigation. It did not separately deal with the question of whether there were reasonable grounds for the belief, but it is to be implied that that was its conclusion. As to carrying out an investigation which fell within the range of a reasonable investigation, it said this:

> **"113. The Tribunal has concluded that the failure by Mrs Davis to speak to Mr Hagans, the Claimant's Line Manager at the time of the first alleged offence, was a significant flaw. The Tribunal acknowledge that investigating officers are not expected to adopt a forensic approach but the Claimant was asserting that she had returned to work in her principal role when she worked her night shift at Trinity Road. Because Mrs Davis failed to interview Mr Hagans, she did not have the advantage, which the Tribunal has had, of the supervision notes and e mails which were in his possession. The Tribunal acknowledged that the Claimant was asked to produce any further information upon which she relied and failed to do so, but there must remain a primary obligation on the investigating officer to see whether any material can be found which may either assist the Claimant or Respondent, particularly when she had been alerted to the possibility of such material existing.**
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> **114. In the event the documents which the Tribunal has seen do not assist the Claimant's case in that it is clear from the e mail on page 550 that the Claimant was off sick still on 12 March (a Friday) and was not expected to return to work until 15 March (a Monday). In the event she returned to work on 16 March and had her return to work interview on 18 March. That e mail rebuts the assertion that the Claimant had returned to work by 10 March, the date upon which she worked at Trinity. The Claimant places much reliance on her e mail exchange with Mr Hagans at 839 and 348 and the record of her supervision notes at 843. None of these demonstrate [sic] that she remained at work or was at work on 10 March. *Accordingly* [my emphasis], the Tribunal can conclude that the failure to interview Mr Hagans made no difference to the eventual outcome in that the documents would have strengthened rather than weakened the case against her."**

18. There is no overall evaluation other than in those paragraphs of whether the investigation that was carried out was reasonable. The Tribunal continued, reaching a conclusion that, given a reasonable investigation and given belief in guilt which it thought genuine, the decision to dismiss was within the range of reasonable responses.

19. As to the appeal part of the process, the Tribunal said at paragraphs 120 and 121 as follows:

> **"120. The appeal took a significant time to be heard but no criticism has been made about that apparent delay. The criticism is that the appeal panel failed to set aside the decision to dismiss when presented with the attendance record.**
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> **121. This is a document which was in the Claimant's power to produce at the disciplinary hearing. It was looked at at the appeal. This Tribunal has examined it. It does not demonstrate or support the Claimants [sic] contention that she had returned to work. Accordingly, the failure of the appeal panel to be influenced by that document to the extent of overturning the decision to dismiss does not taint the process. The attendance record did not provide compelling evidence that the Claimant had returned to work, as she claimed."**

20. The Tribunal then considered the question of whether or not the dismissal was an act of race discrimination and concluded that there was no evidence that that was the case. It accepted Ms Sabouri's denial of it. It considered whether dismissal was an act of victimisation and

accepted Ms Sabouri's evidence that she was unaware of the first Tribunal claim when making her decision to dismiss, and therefore the case for victimisation simply failed on that basis.

The Appeal

21. The outstanding grounds of appeal are six in number but essentially focus on two central matters. First, the failure by the investigating officer to speak to Mr Hagans, it being asserted that that was a flaw in the investigation. That is dealt with at paragraph 3 of the grounds of appeal. It is said that the Tribunal relied in reaching its conclusion that the failure made no difference by impermissibly reading an email of 12 March 2010 as showing that the Claimant was still off sick on that date and not expected to return to work until 15 March, the Monday following. The email reads:

> **"Dear Jackie [the Claimant],**
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> **I hope you are feeling better and would be greatful [sic] if we could meet at some point on Monday to complete your return to work interview. Many Thanks John"**

22. Ground 4 was that the email referred to the Claimant and line manager *completing* a return-to-work interview, which demonstrated that the interview had begun - it must have been, therefore, before 12 March - and had been postponed until the following week and did not lead to the conclusion, therefore, that the Claimant did not return to work until 15 March and did not therefore support a case that she had been absent on 10/11 March.

23. The next ground, allied to that and in respect of the dismissal, was that the conclusion at paragraph 117 dismissing the Claimant's attendance record was perverse. That record showed that the Claimant was back at work at the relevant time. It was said that the dismissing officer, Ms Sabouri, had accepted in cross-examination that the evidence indicated that the Claimant was not on sick leave during the week in question and that if the evidence had been produced at

A the disciplinary the outcome would have been different. There has been a dispute before me as to whether that is precisely what was said, and the furthest that this Appeal Tribunal could go is to say, since there has been no request for Notes of Evidence, that there is a recognition in the Tribunal Judgment itself that (paragraph 117) Ms Sabouri acknowledged that she might have investigated further the Claimant's situation if the Claimant had chosen to produce the attendance record that she produced on appeal.

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C 24. The sixth ground was:

> **"The tribunal considered whether the appellant's dismissal was an act of victimisation at paragraph 125 of its judgment but did not consider whether the host of other acts of unfavourable treatment alleged by the appellant also amounted to victimisation."**

D 25. Ground 7 as originally stood was the ground upon which the Claimant earlier succeeded.

E 26. There is no ground in that Notice of Appeal that seeks to revisit the conclusion that the Tribunal had reached in respect of the first ET1, and the conclusion that there was no discrimination in the way in which the Council behaved towards the Claimant in the matters

F covered by that originating application. The Claimant submitted an application that she had drawn up herself to seek permission to amend the original appeal submission, which was received on 25 October 2015. That was supported by a subsequent document, which it appeared counsel had not seen on either side until today.

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27. The Claimant set out concerns about her previous representation and wished to raise a number of matters. They have been summarised in an admirably expressed and well-focused

H skeleton argument submitted by Ms Gumbs on the Claimant's behalf, albeit that she did not have much time before this hearing in which to do it, which makes the product all the more

impressive. She argues that the grounds that the Claimant had expressed for herself could be grouped under three heads. She was seeking an amendment on the basis that the Tribunal had failed to consider all of the evidence including evidence from which discrimination could be inferred. In effect, the Tribunal had not taken the proper approach to evaluating the evidence of discrimination. She complains that it had not considered the harassment that she had particularised in her statement as a separate head of claim in the Judgment. That was a summary of grounds 1, 2 and 6.

28. Ground 7 was a failure on the part of the Tribunal to deal with the Claimant's applications to amend her claims to add further claims. These were matters that related to dismissal from her other casual work and her training contract at the Open University, which were dismissed in the Employment Tribunal on 2 January 2014. She argued that she had been unable to examine a key witness because Mr Brown did not complete the cross-examination of Mr Choudhery, who had to be out of the country, and that although Mr Brown had acquiesced in that position before the Tribunal this was an error of law, and that there was a failure to deal with a freestanding human rights claim in addition.

29. Permission to amend the grounds of appeal so as to raise those matters was sought at the outset of this hearing by Ms Gumbs. I considered them, and, after hearing Mr Mundy's response for the Council, indicated that I refused the applications and would give my reasons as part of this Judgment.

30. The question of when and the principles by which an amendment may be made to a Notice of Appeal before this Tribunal were considered by the Appeal Tribunal, chaired by HHJ Serota QC, in **Khudados v Leggate** [2005] ICR 1013. He set out the principles at paragraph

86. I have had regard to each of them. The first is whether the applicant is in breach of the **Rules** or **Practice Directions**. Here, HHJ Serota QC emphasised the requirement in paragraph 2(6) of the **Practice Direction** that an application for permission to amend a Notice of Appeal be made as soon as the need for amendment is known, which he said was of considerable importance.

31. Here, in my view, there was ample time prior to the hearing before this Tribunal on 24 April 2015 for the Claimant to seek permission to amend the Notice of Appeal. She had the assistance of Mr Brown. She knew the matters of which she complained. She was upset by the decision of the Kearsley Tribunal. In my view, the application to amend was made very late in the day; indeed, made after the matter had already come to this Tribunal, without any such application being made, and after the matter had been remitted by this Tribunal to and determined by the Employment Tribunal before Employment Judge Dimbylow. Secondly, however, and in addition, even though the Claimant was a litigant in person, the grounds are not focused in any way that could possibly come close to compliance with the recent **Practice Statement** as to the way in which Notices of Appeal should be prepared.

32. The second matter to which HHJ Serota QC drew attention was that an extension of time is an indulgence and the Tribunal is entitled to a full, honest and acceptable explanation for any delay or failure to comply with the **Rules** or **Practice Direction**. I have had no explanation why the application is made so late and why the matters in contention were not considered as part and parcel of the first Notice of Appeal. There may be some explanation, in that in the second document that the Claimant produced prior to this hearing - the one which neither counsel had seen until today - there were screenshots of the views expressed to the Claimant by Mr Brown. It is plain that he took the view that it was sensible forensically to

A focus on one or two points rather than a number. He was plainly seeking to dissuade the Claimant from raising more claims than she did in that original Notice of Appeal. If so, however, the explanation would be to secure a tactical or forensic advantage, real or perceived, and it is not a proper basis, in my view, for exercising my discretion to allow for an amendment at this time.

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C 33. The third point raised by HHJ Serota QC was whether there would be any delay. Here, the point Mr Mundy makes is a bit subtler but, in my view, entirely justified. If the amendment had been made earlier and had had force, then the matters raised could have been considered at the time when the remission was made to the Employment Tribunal. This is a case in which not only has there been a substantial period of time passed since the dismissal and indeed since the acts that founded the first claim in 2012 but there have been two hearings before differently constituted Employment Tribunals and one appeal before this Tribunal itself on this very same appeal.

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34. HHJ Serota QC then raises the question of prejudice. I am satisfied here that there is some prejudice, though not perhaps as great as Mr Mundy would suggest, in dealing with matters that are discursive, that tend to traverse old ground and might, as it seems to me, require the determination or at least identification of fresh facts.

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G 35. Finally, as to merits, which are relevant, I am not persuaded that the points sought to be raised have in truth any significant merit. That is, I have to say, very much an overview and summary reaction to them. That is all that there can be at this stage, because by definition if I do not allow the amendment I am in no position to consider the appeal fully, but they are not the obvious knockout points that sometimes may be missed first-time round by a Claimant but

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even then may give that Claimant some hard work to do if late in the day an application to amend is made in order to raise those points.

36. In summary, finality is an important principle in dealing with justice. Ms Gumbs recognises this, indeed, expressly in her own submissions. In particular, it is part of the general principle by which the courts operate that parties should bring forward the matters about which they are concerned all at the same time and at as early a stage as possible. To seek to amend a Notice of Appeal after it has already come for determination, been considered, resulted in a remission and had matters adjourned for further determination suggests that it is simply far too late. I accept it is not impossible that that may happen in a proper case. It will, however, be unlikely that such a case will often arise, and I am quite certain that this is not one of them. In short, I do not, for all the reasons set out in paragraphs 30-36 above, grant permission to advance the amended Notice of Appeal.

37. This leads on to a further difficulty that arises and that has given me some reflection. At the earlier hearing before me I mentioned that the conclusion that the Tribunal had reached in respect of the reasonableness of the investigation might be questionable. That might be so because, as it seemed to me, the House of Lords in the case of **Polkey v A E Dayton Services Ltd** [1988] ICR 142 made clear that the focus in a hearing in respect of unfair dismissal has to be upon the behaviour of the employer. The fairness of a dismissal is not judged by the view of the Tribunal as to what it would have done, or thinks most employers may have done, or by asking in retrospect whether as between the parties the Tribunal thinks it to have been fair. A Tribunal judges, rather, the fairness of what the employer did at the time in making the dismissal. That requires a focus upon what the employer knew at the time and what that employer did in the light of what the employer knew at the time. It is irrelevant that it may later

transpire that the employer was simply wrong in reaching the conclusion it did, or for that matter was entirely right in reaching the conclusion it did if, as it may be, the employer had simply not adopted a proper procedure at the time. These points are far better put by Lord Bridge of Harwich than by me. At page 163A-C in his speech in **Polkey** he said this:

> **"… If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is *not* permitted to ask in applying the test of reasonableness posed by section [98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of section [98(4)] this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness … may be satisfied."**

38. The approach taken in this case in paragraphs 113 and 114 of the Kearsley Tribunal is open to the objection that when the Tribunal determined that the investigation was not unfair it appears to have done so by reference not to what was known at the time to the employer, but by what it knew at the time of the Tribunal hearing would have been the outcome if the employer had taken the steps it thought proper. If the Notice of Appeal had raised that point, it would, in my view, have been difficult to refute it. It might, however, have been that it would have reduced very considerably (if not extinguished) the possibility of any compensation for what had occurred.

39. The problem for the Claimant in this appeal is identifying that this ground has actually been part of the Notice of Appeal. The Notice of Appeal's paragraph 3 is one that I have already quoted. I had wondered whether that in itself might be a sufficient reference to dissatisfaction with the approach of the Tribunal in its conclusion about the fairness of the investigation to raise the argument to which I have just referred. However, a number of matters have persuaded me that that is not the proper way to read this ground of appeal. First, it is clear from the skeleton arguments first of Mr Brown, as it was for the original hearing, and that of

A Ms Gumbs, as it is for this, that neither wished to focus upon the **Polkey** point; rather, the point to be made was that the Tribunal could not come to the conclusion that "it would have made no difference" because the material that the Tribunal thought supported management's case on analysis did not do so, and this viewpoint was a perverse one.

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40. Secondly, the matter having been raised was one that it was open to the Claimant to seek to amend to raise. That was not done. I accept that it may not have been entirely easy for the Claimant herself to have understood the point, but Mr Brown was representing her before this Tribunal at the time that it was raised. I have said already what I have to say about proposed amendments to the Notice of Appeal: it sits ill against that to permit an argument that has never been formulated in writing, never been advanced before, the need for which might have been said to have been indicated at an earlier stage and which could have been raised at the outset, when the argument sought to make a rather different point with different financial consequences (a point that Mr Mundy made). Mr Mundy submitted that if indeed this point had been raised before the matter came before this Tribunal on the last occasion it could and should have gone back to the Tribunal for determination at that stage. There is thus a very real demonstration of the importance in this very case itself of ensuring that amendments are made in good time if they are to be pursued.

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41. Ms Gumbs raised the argument, without objection, in part because the advocates were reminded of **Polkey** at the outset of this hearing. She submits that it would be fair to permit the matter to be heard. She submits that the Notice of Appeal may possibly be wide enough to contain it. In conclusion, I regret having to remind myself that the principle is that a court sits to determine the dispute between the parties. The dispute is not to be one of the court's own making. The court has no right to construct an argument for either party. Thus it may be that in

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reading a decision it might appear to a court that a point of law arises that could be raised by either party. It is not incumbent upon the court to raise it with the parties still less to make a determination upon it and still less to do so when there has been, as there has been here, no formal application to amend the grounds of appeal.

42. Accordingly, in the absence of that, bearing in mind there may be forensic considerations that play upon the way in which the appeal has been and is presented, and bearing in mind the history of this case, I have concluded that what I should do is determine the grounds of appeal as they are put in the grounds and not by reference to some other point, however compelling it may at least at first blush appear to me. It may be that this is a reminder to parties of the importance of carefully considering what their real complaint is about a Judgment, and knowing that it is that complaint that a court will sit to determine and not one in which the court itself will act in any capacity as a legal reviewer or adviser. It cannot, after all, act as a particular friend to one party by raising an argument for her she has not made herself when its role is to be impartial as between the parties.

43. Dealing then with the grounds of appeal as put, the focus is entirely upon what the Tribunal was entitled to make of the material about whether the Claimant returned to work. As to the email "Dear Jackie … John" quoted above, it seems to me that though it is not entirely obvious the email is more consistent with the management case than it is with the Claimant's. It is not a judgment for me, however; what I have to ask is whether the Tribunal was entitled on the material before it to come to the conclusion that the employer was itself entitled to form a belief that the Claimant was guilty of the offence charged. As to that, what it had to be satisfied of was that there was sufficient material for the employer to form the view that the Claimant had indeed been absent from work claiming to be on sick whilst working in her other job.

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44. As to that, once it is accepted, as it was not in contention, that the Claimant had done some work other than in her regular job on the night of 10/11 March, the focus for the Tribunal naturally was whether she had returned to work after what was agreed to be an earlier sickness absence. The email is consistent, as it seems to me, more with a situation in which the author thinks or understands that the addressee, the Claimant, was recovering rather than recovered. The words, "I hope you are feeling better", suggest that the Claimant has not become better; they do not conclusively establish it. The emphasis that was placed by Mr Brown in his submissions upon the need to "complete" the return-to-work interview (ground 4), is, in my view, answered by Mr Mundy's submissions pointing out that when they talk about completing a form without suggesting that the form was begun on one day and completed on another it would be highly unusual, as an Employment Tribunal would well know, for a return-to-work interview to be adjourned, as it were, part-heard on one day to be resumed on another. The word "complete", therefore, does not do the job that the Claimant seeks to argue that it should have done.

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45. I have to put this in the context of whether there was sufficient evidence to support the employer's decision or whether the Tribunal was simply perverse in coming to that conclusion. The material that the Tribunal had in respect of the October 2011 absence is not the subject of the Notice of Appeal. The focus of that Notice of Appeal is upon the March period. No doubt the argument would be that if successful in respect of the March period there might well be reasons to suppose that an employee who had provided such valued service for so many years for the Council would not have been dismissed, and there is some hint towards that in the latter paragraphs of the Kearsley Tribunal.

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46. The evidence, in short, was not all one way. It was that in the computer records of the Council the Claimant was shown to be off sick across the relevant period. Secondly, in the evidence of Ms Sabouri, at paragraph 54 of her witness statement, she referred to replacement sick notes that covered her sickness for two weeks from 3 March 2010. She noted that the Claimant had accepted that the allegation was true, that being a reference to the hearing before her. Thus there were computer records supported by sick notes covering the entire period. As against that, there was only the document that surfaced later which could show that the Claimant was actually at work. The email, as I have indicated, was consistent more with the Claimant being absent than it was with her having already returned to work before 10/11 March.

47. The document that goes the other way, it might be thought, was the attendance record. That recorded the Claimant as being absent on TOIL on the relevant date. It is thus common ground at any rate that she was absent, but the issue was whether she had returned to work as at that day. There is considerable force, in my view, in thinking that where someone claims TOIL then because they are surrendering the benefit of time already accrued, which may give them paid holiday later, they are unlikely to do so if otherwise they are on sick leave. However, the decision that Ms Sabouri made was not dependent upon this document, which was not before her. This document is relevant only to the overall fairness of the decision to dismiss in respect of the way in which the appeal part of that process was handled.

48. At paragraph 121, quoted above, the Tribunal say a number of things. The conclusion was that it did not provide compelling evidence that the Claimant had returned to work. The important words there perhaps are "returned to work". The question was whether having admittedly been off sick at an earlier time she had returned to work. The submission was

recorded by the Tribunal at an earlier stage, made by Mr Mundy, that TOIL could have been overtaken by sickness absence in any event. There is no record before me of any evidence as to the way in which TOIL was booked or pre-booked, as it might well be. The Tribunal said in the fourth sentence of paragraph 121:

> **"It does not demonstrate or support the Claimants [sic] contention that she had returned to work."**

49. I have concluded that the Tribunal there is focusing upon the need for the Claimant to show that she had returned to work. This was in the face of evidence of the computer records and sick notes, and indeed what she herself had said at one stage to the investigating officer, albeit at a time when it would not have been entirely easy for her to recall what she had been doing some several months beforehand, coupled with her behaviour in respect to the period in October 2011, which was quite clear by comparison. The employer had produced evidence that she was off. She had no documentary evidence apart from the attendance record to show that she may have returned: the attendance record might invite explanation as to how TOIL came to be recorded upon it. It is, to my mind, some, and indeed considerable, evidence to put in the balance on the Claimant's side. The question is whether the Tribunal's approach to it is wrong.

50. I have concluded, not without some hesitation, that the Tribunal's conclusion is strictly correct. The document does not show that the Claimant returned to work. The evidence that she had returned to work is not necessarily compelling. The judgment the Tribunal reached was that the failure of the appeal panel to be influenced did not taint the process. A Tribunal must have regard to the overall disciplinary process. That point was made clear, if it needed to be, by the decision in **Taylor v OCS Group Ltd** [2006] EWCA Civ 702, but Mr Mundy argues, and I think correctly, that in saying in paragraph 121 that the failure of the appeal panel to be influenced by the document to the extent of overturning the decision to dismiss did not taint the

process is equivalent to the Tribunal saying that it considered that it did not make the decision to dismiss unfair. The burden of proof is neutral as to unfairness. The Tribunal thus here were saying, I infer, that the employer's process was not outside the range of reasonable responses and it did not therefore make the dismissal necessarily unfair.

51. In the remarks I have made thus far I have run together to some extent grounds 4 and 5; ground 5 relating as it does to the question of whether it was perverse to dismiss the Claimant's attendance record as it is said the Tribunal or for that matter the employer did.

52. I turn finally to ground 6. I have set out ground 6 above. The victimisation was asserted before Employment Judge Tucker at a hearing on 2 January 2014. The Claimant said that she would identify the treatment that she alleged amounted to victimisation in her witness statement. Her witness statement does not specifically identify particular acts, as it were, by bullet point. It does, however, make some complaints. It is plain that some of them, but not necessarily all, were actually pursued before the Tribunal. The Tribunal said what it did at paragraph 109 in respect of working conditions and in respect of the line management of Mr Choudhery.

53. In her skeleton argument Ms Gumbs argued that the Tribunal had at paragraphs 94 and 95 identified poor working conditions at the Sycamore Centre and in a footnote says that was believed to be the Marsh Lane Centre - as the Claimant moved to Marsh Lane after her ET1 of 20 February 2012, and withdrawal of line management support. The poor working conditions at the Sycamore Centre could found no complaint of victimisation, because they pre-dated the protected act that it is necessary to identify as being the cause of the victimisation, nor, for that matter, could any similar defect in the conditions at Shakti House Day Centre have that effect.

54. In reply, she emphasised what was said in the footnote: that there was here a complaint about the way in which there had been poor conditions at Marsh Lane and that this was a consequence of her having raised complaints in her ET1 of 20 October. As to that, it seems to me that the Tribunal cannot be expected to read through a witness statement to identify complaints, though it can be expected to deal with complaints that, if made in that way - as these were with the authority of the case management hearing before Employment Judge Tucker - they are argued before it in the course of the hearing. There is nothing to suggest to me that the conditions at Marsh Lane formed any part of the submissions of Mr Brown on the Claimant's behalf. The Tribunal, though I have to be careful in this particular case of thinking that it has included everything that was argued before it of any substance, for the reasons I have given, makes no reference to any complaint about the Marsh Lane Centre as an issue before it. It was not one of the issues in the issues list. The issues list was not the subject of any adverse comment by either the Claimant herself or by her representative when he later joined the fray during the course of the Tribunal. Nor did the absence of those matters form any clear part of the Notice of Appeal. It is not at all helpful to have a reference to "the host of other acts of unfavourable treatment alleged by the Appellant" without at least specifying which complaints ought to have been dealt with by the Tribunal and were not.

55. Again, it seems that this particular ground will founder more on procedural issues than it does on substance, but I am unable to say on the basis of what has been put before me that there is significant substance in the suggestion. The general tenor of the Judgment is that there is no reason to think that the Claimant was treated as she was because she raised her first claim. After all, her complaints of the conditions at Marsh Lane seem very similar, on the face of them, to conditions at Sycamore and Shakti that pre-dated those, both of which could have had

A no causative link to a claim that had not by then been issued. Accordingly, in my view, there is no proper ground of appeal here either.

B 56. The consequence of these rulings is that, despite the best efforts of Ms Gumbs (I pay tribute again to the way in which at short notice she has mastered the detail of what is quite a complicated case) the appeal is dismissed.

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