Appeal No. UKEAT/0081/16/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 October 2016

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MRS B TYKOCKI APPELLANT

ROYAL BOURNEMOUTH AND CHRISTCHURCH HOSPITALS NHS FOUNDATION TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS SARAH CLARKE (of Counsel) Instructed by: Forest Edge Solicitors New House Market Place Ringwood Hampshire BH24 1ER
For the Respondent	MR NATHANIEL CAIDEN (of Counsel) Instructed by: DAC Beachcroft LLP Portwall Place Portwall Lane Bristol BS1 9HS

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

Unfair dismissal - fairness of decision to dismiss - section 98(4) ***Employment Rights Act 1996***

The Claimant was a long-serving Healthcare Assistant who had been the subject of allegations by a patient, relating to a particular night-shift, when it was said she - and at least one of the nurses on duty - had acted in an uncaring and cruel way and had, individually, been abusive and had effectively assaulted the patient. The Respondent - after a disciplinary and appeal process - determined that the Claimant should be dismissed summarily due to this gross misconduct. The ET considered that various procedural failings in the disciplinary process had been made good at the appeal stage and, ultimately, the dismissal had been fair. The Claimant appealed.

Held: *allowing the appeal*

Given the seriousness of the allegations for the Claimant, it was accepted this was a case where - applying the band of reasonable responses test - more would be required of the Respondent's investigation and process (see **ILEA v Gravett** [1988] IRLR 497 EAT, **A v B** [2003] IRLR 405 EAT and **Salford Royal NHS Foundation Trust v Roldan** [2010] IRLR 721 CA). Although the ET had considered various failings by the Respondent - in particular, to obtain/provide statements from the nurses on duty and to investigate new allegations made by the patient at the appeal stage - it had done so in a way limited to the question of individual allegation of abuse made against the Claimant. The reasoning did not show it had considered whether those failings impacted upon the fairness of the investigation and process in terms of credibility more broadly (those matters might, in turn, have impacted upon whether the Respondent had reasonably accepted the truth of the more specific allegation made against the Claimant alone). The ET's conclusion on the Claimant's unfair dismissal complaint was rendered unsafe and its decision would be set aside and the matter remitted to the same ET for further consideration.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and Respondent as below. This is the Full Hearing of the Claimant's appeal from a Judgment of the Southampton Employment Tribunal (Employment Judge Salter sitting alone, on 9 and 10 July 2015; "the ET"), sent to the parties on 10 August 2015. Representation before the ET was as it has been before me on this appeal.

2. By its Judgment the ET rejected the Claimant's claim of unfair dismissal. She appeals, contending the ET failed to apply the correct test, laid down in the cases of **ILEA v Gravett** [1988] IRLR 497 EAT, **A v B** [2003] IRLR 405 EAT and **Salford Royal NHS Foundation Trust v Roldan** [2010] IRLR 721 CA, or, alternatively, reached a perverse conclusion. The Respondent resists the appeal, essentially relying on the ET's findings and reasoning.

The Relevant Background

3. The Claimant was employed by the Respondent as a Healthcare Assistant ("HCA") from 11 August 1989 until her summary dismissal on 15 September 2014. Her dismissal related to an incident occurring on her shift overnight on 3-4 February 2014, when a patient complained that the Claimant had been abusive to her and effectively assaulted her when she had asked for a morphine top-up for her pain. The initial complaint was taken by the ward sister, the patient in question having been observed to be very tearful by a doctor on shift during 4 February 2014. It is recorded in a manuscript statement made by the patient as follows:

> **"I … feel I have to put this complaint in about a member of staff … The staff [member's] name is Barbara. I think she is Polish, with blondish curlyish hair. …"**

4. Having described how a doctor had earlier advised that she should ask for bonus morphine for her pain, the patient related what had taken place on 3-4 February 2014:

> **"Late evening on 3rd February 2014 my morphine ran out again, I told two nurses one small, with dark hair, and one called Barbara, with blonde curlish [sic] hair. I was yet again crying in agony. Both nurses chose to ignore me and ignored my requests of needing pain relief urgently, due to how [severe] the pain was. They chose to do things, that were not urgent, and also started doing tasks, like getting a drink, for other patients who asked after and whilst I was crying in pain asking for pain relief.**
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> **They chose to do things instead of deal with my pain. The dark haired nurse came to me after an hour, and told me I had to say please, if I wanted pain [relief], and how she could not just get it and how she would have to go to another ward to get it. I said to her the Doctor promised that [this] would be on stand by and that I would not suffer like I had earlier that day. She said to me "what am I supposed to do about it" I said it was unacceptable, her whole attitude was she [couldn't] care, and was not bothered about me and the pain I was in. After an hour of crying and begging for pain relief, the woman (female) nurs [sic] Barbara came through my curtains that had been pulled around my bed, she moved the side table by my bed, put her hand to my face to cover my mouth and told me to shut up! I said to her I was not going to shut up, and I needed pain relief, and told her the Doctor had promised this would not happen again. Her face she [leant] right up to my face. I told her I would report this, and she said "report it"!**
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> **Later on the brown haired nurse came in, finally gave me the morphine. Then she argued with me about the pain [I] said I was in. By this time I was shocked, exhausted and feeling threatened. Not long after the brown haired nurse came and apologised. [Too] little [too] late. Barbara was cold + threatening."**

5. Following this complaint, the Claimant was suspended pending an investigation and gave her own response, essentially denying the allegations. There was an investigation meeting with the Claimant in May 2014 and a report produced that referred to her previous employment history and recent other complaints, but did not suggest that any previous disciplinary finding had been made. The report also referenced the patient's other allegations, said to be being dealt with separately. In detailing the investigatory steps undertaken it was stated:

> **"A statement has been taken from the patient, the other nurses on duty and Barbara [the Claimant].**
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> **The other nurses on duty that night knew nothing of this incident. The patient hadn't brought it to their attention, although they were aware that the patient had been in some pain, had been in some discomfort and was dissatisfied with the delay in providing pain relief."**

6. Under the heading "Findings and Evaluation", the report continued:

> **"It has not been possible to cross reference the patient's allegations with any of the other statements.**
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> **Taking into account Barbara's previous employment history, which includes two similar complaints from patients, it is probable that this event occurred as described by patient X."**

7. Thus it was that disciplinary proceedings were recommended. A disciplinary hearing duly took place on 12 August 2014, conducted by Ms Bull (the Respondent's Deputy Director of Nursing and Midwifery), at which the Claimant was represented by her trade union representative and at which she, continuing to deny the allegations made, suggested that the patient might have been hallucinating. The hearing was adjourned pending further investigations, to include contact with the patient, as well as seeking information concerning opiates and hallucinations. On 28 August 2014 the patient was contacted by telephone and apparently asked whether she was aware whether or not the staff on duty were trained nurses or HCAs, to which she confirmed her understanding that they were all nurses. The disciplinary hearing then reconvened on 3 September 2014, but no decision was reached at that point. Further contact was then made with the patient, this time by Ms Bull herself. It was said that the patient apparently confirmed her earlier statement. No record of that conversation was made, but it was referenced in a subsequent email, in which Ms Bull stated that she had then determined that the Claimant should be dismissed. That decision was communicated to the Claimant by letter of 15 September 2014.

8. The Claimant appealed against the decision, again represented by her trade union. There was an appeal hearing on 11 November 2014, conducted by a Ms Shobbrook (the Respondent's Director of Nursing), and subsequently a further meeting held with the patient, this time in the presence of the Claimant's trade union representative, who was permitted to ask questions on the Claimant's behalf. The Claimant points out that at this stage the patient added to her complaint, specifically now saying that the Claimant - not just the "brown haired nurse" - had told her she would have to say "please" and also alleging:

> **"… I also saw something terrible that evening. An old lady was sat on a commode for about 4 hours. It was terrible and the same nurses especially the blonde and dark haired ones ignored her."**

9. The Claimant observes that these new allegations were not investigated and the appeal hearing was not resumed so she could point out the new discrepancies or seek further investigation. Her appeal was subsequently dismissed by letter of 24 November 2014.

The ET's Decision and Reasoning

10. The ET was satisfied that the incident of 3-4 February 2014 formed the factual basis for the Claimant's dismissal and the decision thus related to her conduct and was capable of being fair, for the purposes of section 98(1)(b) of the **Employment Rights Act 1996** ("ERA").

11. Turning to the question whether the dismissal of the Claimant for that reason was fair, the ET considered first whether the Respondent had carried out a reasonable investigation. It concluded that no witnesses had been identified to the Respondent during the disciplinary hearing who were likely to be able to provide relevant evidence such that a reasonable employer, faced with the Claimant's position that the incident simply did not occur, could have adopted the Respondent's approach: not obtaining additional statements from the doctor, nurses or other patients on the ward at the time (see paragraphs 72 and 73). To the extent that written notes had been taken from investigatory discussions with other nurses and not supplied to the Claimant, that had been an innocent error by the Respondent and did not take the process outside the range of reasonable responses (see paragraph 75). As for the evidence from the patient, the ET considered that the Respondent had three documents setting out the complaint: the original statement; the email record of the telephone conversation; and the notes of the further meeting with the patient at the appeal stage, at which point the Claimant's union representative had the opportunity to ask questions (see paragraph 76). Although the patient had been spoken to after the disciplinary hearing and without putting that further conversation to the Claimant before the decision to dismiss was made, that did not render the decision unfair

as: (1) the patient had simply confirmed her earlier account; and (2) that conversation was not taken into account at the appeal stage, at which point the Claimant's trade union representative had the opportunity to ask the patient questions (paragraph 77). The ET was satisfied that the Respondent had investigated the Claimant's suggestion that the patient had been hallucinating, of which there was no evidence, and had regard to the relevant material both before taking the decision to dismiss and at the appeal stage (paragraph 79). Overall, the ET concluded that the Respondent had carried out a reasonable investigation (see paragraph 87).

12. The ET then turned to the question whether the Respondent had reasonable grounds for its belief in the Claimant's misconduct, which included its own investigations and the fact that there were inconsistencies in the Claimant's account. It concluded that it had (see paragraphs 90, 93 and 94). Given the conclusion reached by the Respondent, the ET was further satisfied that the decision to dismiss the Claimant fell within the band of reasonable responses of a reasonable employer in the relevant circumstances.

Submissions

The Claimant's Case

13. The Claimant submits it was apparent the ET had not had regard to the cases of **ILEA**, **A v B** and **Roldan**; certainly, it failed to apply the test laid down in those cases and/or reached perverse conclusions given the particular circumstances of this case. Specifically, the fact the nurses' statements were not disclosed to the Claimant impacted upon the fairness of the decision (see **A v B** at paragraph 83), not least as the evidence in question might have indicated whether the nurses overheard any interaction between the patient and the Claimant and/or might have had some relevance to establishing credibility in terms of the patient and her account. Related to that issue of credit, the ET had failed to have regard to the entirety of the original

A complaint - which had included allegations against others, not just the Claimant - and to the Respondent's failure to investigate the allegations against the other, brown haired, nurse. In similar vein, the ET had failed to give weight to the Respondent's failure to obtain statements from the doctor and other patients on the ward (see **A v B** at paragraph 79).

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14. Further, the ET failed to give weight to the Respondent's failure to carry out a proper interview with the patient before the original decision to dismiss and to obtain notes of the post-disciplinary hearing telephone conversation with her and/or disclose those to the Claimant. In addition, there was a failure to properly test the patient's evidence at the appeal hearing; specifically, there was a failure to investigate her new allegations made at that stage.

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15. Lastly, the ET erred at paragraph 92 of its reasoning in permitting that it was within the range of reasonable responses for the Respondent to place reliance on the Claimant's conduct at hearings within the disciplinary and appeal processes when the ET, itself having heard extracts from the recordings of the hearings in question, did not make a finding of conduct going so far as to show that the Claimant was "*capable of assaulting and threatening a patient*".

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The Respondent's Case

16. The Respondent contends the ET made an entirely permissible decision; the appeal represents an attempt to reargue the case below. The ET's self direction on the law was flawless. The failure to refer to specific case law relied on by the Claimant did not give rise to an error of law of itself. Most importantly, the ET kept sight of that which was central, namely the statutory test laid down by section 98(4) (see **Anandarajah v Lord Chancellor's Department** [1984] IRLR 131 EAT). In any event, the ET referred to receiving the case law at the outset of the hearing (see paragraph 20) and could be taken to have had it in mind.

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A Similarly, it expressly referenced the parties' submissions, which included citations from those cases. Moreover, the language used by the ET reflected that of the case law relied on by the Claimant; specifically, see its appreciation of **Roldan** at paragraphs 66 to 70 and 99 of its reasoning. If an ET has given itself a correct self direction as to the test it must apply, the EAT should be very slow to assume that it has then failed to apply that test. Ultimately, this was a perversity challenge, and the test that the Claimant had to overcome was a high one (see, for example, Lord Donaldson MR in **Piggott Brothers & Co Ltd v Jackson** [1991] IRLR 309 CA and **Yeboah v Crofton** [2002] EWCA Civ 794).

17. As for the failure to provide the Claimant with copies of the nurses' statements, the EAT must be mindful of the dangers of re-trying the case (see **Retarded Children's Aid Society Ltd v Day** [1978] IRLR 128 CA, specifically paragraphs 15 and 17; **Jackson**; and **Yeboah**). The Claimant was failing to read the ET's Judgment in the round and to have regard to the unchallenged factual findings, specifically, that the Claimant and the patient were shielded from the rest of the ward behind a curtain and/or that no other staff were present on the ward; and also that the patient had given the name and physical description of the Claimant and neither the patient nor the Claimant suggested that there was anybody else present at the time, something that the Claimant's trade union representative had accepted (see paragraph 72). Further, when the ET made its finding that the failure to provide the nurses' statements to the Claimant did not render the dismissal unfair it can be taken to be making that point broadly, addressing the inconsistencies or credibility point as much as the specific incident involving the Claimant. The ET had seen those statements and had not considered there was any unfairness. In any event, there was no hard and fast rule that statements must be provided (see **A v B** at paragraph 83). Ultimately, the ET was entitled to conclude that the failure to provide tangential statements was not outside the range of reasonable responses (see paragraph 75 of its reasoning)

A and in this respect the case was distinguishable from **Roldan**, where the issue was whether the witness could have seen the incident in question and the failure to investigate that point went to the heart of the allegation. Here, the most that the Claimant could say was that the additional evidence from the nurses might be of peripheral relevance. Moreover, and again in contrast to **Roldan**, the Claimant's case had shifted. At the disciplinary hearing she suggested that the patient might have been hallucinating; she might not have had the nurses' statements, but she had the patient's statement and could have said the nurses needed to be questioned. Ultimately, the Respondent had been entitled to conclude their evidence would add nothing: if they denied the patient's account, that would still not answer the complaint made against the Claimant.

D 18. Next the Claimant complained that the ET failed to have regard to the entirety of the original complaint, which included allegations against others, not just the Claimant, and/or to the Respondent's failure to investigate allegations against the other nurse and to the complaint that the ET failed to give weight to the Respondent's failure to obtain statements from the doctor and other patients. First, there was nothing to suggest that the ET did not consider the entirety of the complaint; the mere fact that it did not expressly mention certain parts did not mean to say it did not have them in mind (see **Day**, paragraph 16). Indeed, it could be said that all of these points on credibility and consistency were addressed by the ET in its reasoning as to the reasonableness of the Respondent's belief (see paragraphs 88 to 95 of its reasoning). Second, it would be wrong to refer to the patient's statement as a complaint against three people when in truth it was a complaint against the Claimant: "*I have to put this complaint in about a member of staff … Barbara*". Third, the Claimant had to be able to show any alleged omission had led to a consequential error of law or incorrect finding of fact (see **Chief Constable of Thames Valley Police v Kellaway** [2000] IRLR 170 EAT, paragraph 48); this was wholly absent. Ultimately, the Claimant was complaining about the weight to be attached to parts of

A the evidence, but that was for the ET, not the EAT (**Eclipse Blinds Ltd v Wright** [1992] IRLR 133 CS at paragraph 14; and **Chiu v British Aerospace plc** [1982] IRLR 56 EAT at paragraphs 16 and 17). In reality, these complaints amounted to attempts to challenge permissible findings by the ET (see its finding that there were no witnesses to the incident involving the Claimant, B paragraphs 72 and 73). There was no overwhelming case of perversity.

C 19. As for what was said to be the Respondent's failure to carry out a proper interview with the patient before the original decision to dismiss. That was not in the list of issues before the ET, but in fact the complainant was interviewed and procedural failings were found by the ET to have been rectified on appeal (paragraph 76). The same was true in respect of the complaint D as to the Respondent's failure to obtain notes of the post-disciplinary hearing telephone conversation with the patient and/or to disclose those to the Claimant (see **Taylor v OCS Group Ltd** [2006] EWCA Civ 702). The Claimant also complained there had been a failure to E properly test the patient's evidence at the appeal hearing, but that had (1) not been put as an issue before the ET and (2) in any event the ET had regard to all of the evidence and reached a permissible view. The Claimant further contended that the ET failed to have regard to the Respondent's failure to investigate new allegations made by the patient at the appeal hearing, F but the suggestion that the Claimant had instructed the patient to say "please" *was* addressed when the Claimant's trade union representative had the opportunity to ask questions, and whilst the allegation involving another patient, the elderly lady, was new it was not highlighted as G such a major issue before the ET, and, in any event, the reasoning could be taken to have addressed this in the round: it had regard to the inconsistencies in the Claimant's own evidence and to the evidence against her and concluded it was reasonable for the Respondent to accept H the patient's account (see paragraphs 93 and 94). Lastly, the complaint about the Respondent's reliance on the Claimant's conduct at hearings could go nowhere: the ET heard evidence from

A the Respondent's witnesses, tested under cross-examination, and, at the Claimant's instigation, tested that further against hearing the recordings and had reached a permissible view.

B **The Relevant Legal Principles**

20. The starting point is section 98(4) **ERA**, which relevantly provides as follows:

> **"(4) … the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -**
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> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
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> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

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D 21. In a misconduct dismissal case the standards laid down by Arnold J, giving judgment for the EAT in the seminal case of **British Home Stores Ltd v Burchell** [1980] ICR 303 (suitably amended to allow for the subsequent change in the burden of proof), provide useful guidance for all ETs when determining such an unfair dismissal claim (see page 304C-F):

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> **"… What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employers had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure", as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt." The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."**

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22. The touchstone thus is reasonableness but that will inevitably mean that the standard of inquiry required will depend upon the state of the case against the employee: see per Wood J, giving the judgment of the EAT in **ILEA**:

> **"15. … at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation, including questioning of the employee, which may be required is likely to increase. …"**

23. In **A v B** the EAT, Elias J (as he then was) presiding, noted that the relevant circumstances for section 98(4) purposes will include the gravity of the charge and the potential effect upon the employee (see paragraph 58). Thus:

> **"60. Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.**
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> **61. This is particularly the case where … the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field … In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable …"**

24. A similar approach was adopted by the Court of Appeal in **Roldan**, in which Elias LJ emphasised:

> **"13. … it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where … the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite. …"**

25. Further, where there is an allegation of misconduct and the evidence consists of diametrically conflicting accounts of an alleged incident with no, or very little, evidence to provide corroboration one way or the other, Elias LJ observed that an employer is not obliged to simply believe one account and to disbelieve the other. In that case, the ET had been entitled

A to find the dismissal unfair, where the employer had failed to test the evidence of the accuser where it had been possible to do so:

> **"57. It is common experience that if part of a story begins to unravel, other aspects may do so also. Doubts begin to emerge, and the interpretation of actions changes. …"**

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26. That said, in **Roldan** the Court of Appeal further observed that where it was not disputed that the ET had properly directed itself in accordance with the **Burchell** principles, as explained in **A v B**, unless there was a proper basis for saying that the ET had simply failed to follow its own self direction the EAT should not interfere with the decision unless there was no proper evidential basis for it or unless the conclusion was perverse, a very high hurdle (see **Yeboah**) and one that has to allow that different ETs might reach different conclusions on the same facts (see paragraphs 7 and 8 of **Jackson**). Certainly, it is not for the EAT to substitute its view for that of the ET, and I bear in mind the observations of Mummery LJ in **Brent London Borough Council v Fuller** [2011] ICR 806 CA:

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> **"28. The appellate body, whether the Employment Appeal Tribunal or this court, must be on its guard against making the very same legal error as the tribunal stands accused of making. An error will occur if the appellate body substitutes its own subjective response to the employee's conduct. The appellate body will slip into a similar sort of error if it substitutes its own view of the reasonable employer's response for the view formed by the tribunal without committing error of law or reaching a perverse decision on that point.**
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> **…**
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> **30. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the tribunal, but then overlooked or misapplied at the point of decision. The tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

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See, to similar effect, per Lord Donaldson MR in **Jackson** at paragraph 29: specifically, the weight to be attached to particular aspects of the evidence must be very much a matter for the ET as the Tribunal of fact (see **Wright** at paragraph 14 and **Chiu** at paragraphs 16 and 17).

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Discussion and Conclusions

27. It is common ground in this appeal (as I believe it was below) that this was a **Roldan** / **A v B** case: the allegations made by the patient were very serious, the stakes were very high for the Claimant. The fact that the ET did not expressly reference those cases in its reasoning does not, however, - as Ms Clarke has accepted before me - mean that it erred in law. The question is one of substance: did the ET apply the correct test?

28. Certainly, as a matter of pure self direction on the law, I would not fault the ET. It correctly kept in mind section 98(4) **ERA**, the guidance laid down in **Burchell** and the range of reasonable responses test it was bound to apply. It also reminded itself that it was to judge the overall fairness of the dismissal by reference to the end-to-end process, including the appeal stage (see **Taylor** *supra*). That last point is, I think, an answer to the objections taken on appeal to the issues relating to the Respondent's apparent failures to take a proper statement from the patient and/or give the Claimant the opportunity to test the patient's statement before the decision made on the disciplinary hearing: those failings were rectified on the appeal when the Claimant's trade union representative had the opportunity to ask questions of the patient, being present when the Respondent checked her evidence as against her original complaint. Further on that point, I do not accept that the ET erred in finding that sufficient had been done by the end of the appeal hearing to test the patient's evidence in terms of asking questions of her. Ms Clarke says that the questions were not as probing as those asked of the Claimant at the disciplinary hearing, but that is not a fair criticism and not the test I have to apply. Having been taken to the notes of the meeting with the patient, I am satisfied the ET reached a permissible conclusion; there was no unfairness in terms of taking of evidence from the patient.

29. That does, however, lead on to what I consider to be the real issue raised by this appeal: whether the ET's decision properly took into account all relevant circumstances, including the degree of investigation required into the broader question of credit, given the gravity of the charges made against the Claimant. This is a point that goes to the issues of consistency and the question of obtaining other evidence, notably evidence from the nurses on duty at the relevant time. As the investigation report indicated, the nurses could add little to the evidence of the actual incident said to have involved the Claimant: no one else would have seen anything of that. The Claimant was entitled, however, to question whether their evidence might have been seen to add something to the broader picture: whether it was likely that events had taken place over the evening and night of 3-4 February as the patient had alleged. Their evidence taken in that broader sense might have been seen as exculpatory of the Claimant and thus relevant to determining the truth of the more specific allegation made against her.

30. Much the same can be said of the new allegations made by the patient at the appeal stage, specifically the allegation relating to the other patient, the elderly lady. That allegation was detailed and serious but apparently new. If investigated and found to be entirely false, that might have cast a different light on the credibility of the patient's account more generally. I am not saying that it would or that the Respondent would have been bound to take that view; it was, however, an issue that I consider the ET was obliged to take into account as part of the relevant circumstances.

31. In saying this, I see Mr Caiden's point: these issues might not be on all fours with the failure found in **Roldan** but cases will always be fact-specific. Here the complaint against the Claimant was broader than just one alleged incident of abuse and assault; it was of an uncaring and cruel response over a period of time in which it was said that others - specifically, a

particular nurse - had also been engaged. I do not say the ET was obliged to find the Respondent had to undertake a particular course in its investigation but it was required to be satisfied that the appropriate level of investigation had been undertaken given the seriousness of the charge in issue, and I am unable to be sure it properly engaged with that issue, taking account of what might have been broader evidence exculpatory of the Claimant. I have sought, as Mr Caiden has reminded me that I must, to see signs - taking the reasoning as a whole - that the ET had indeed had those matters in mind, but such references as there are to the other evidence, to inconsistencies and to the failure to investigate new allegations, do not address those issues as going to credit or to the broader picture of what had taken place on the shift in issue; the ET apparently saw them purely in terms of the very specific allegation made against the Claimant, untested against what might have been a very different picture of the context.

32. For completeness, I return to a different point raised by the Claimant in respect of the ET's acceptance that the Respondent was entitled to have regard to her conduct at the disciplinary and appeal hearings and, from that, to form the view that it was more likely than not that the Claimant was someone who might have acted as the patient had alleged. On this point I agree with the Respondent: the ET heard the relevant witnesses - their evidence tested under cross-examination - and, at the Claimant's request, listened to recordings of relevant hearings. It reached a view that was open to it on that material and it is simply not open to me to go behind. Criticism on that point can go nowhere.

33. Finally, I stand back and ask whether the criticism that I have found to be made out on this appeal undermines the ET's final conclusion, notwithstanding the other points, which have not persuaded me. Ultimately I find that it does: I simply cannot be sure that the ET applied the test of reasonableness to the full circumstances, that it properly asked whether there had been a

fair investigation - applying the standard of the reasonable employer and allowing for a band of reasonable responses - given the errors that the Respondent made, in particular the failure to provide the nurses' statements to the Claimant and to allow for her input on those before reaching a decision, and the failure to similarly allow for her submissions, and for the possibility of further investigation, given the new allegation raised by the patient on appeal. That being so, on that basis, I allow this appeal.

Disposal

34. Having given my judgment, the parties addressed me further on the question of disposal. As my judgment allows for the possibility of more than one outcome, it is accepted by both parties that this matter has to be remitted. The Claimant says that should be to a different ET; the Respondent says it should be to the same. I bear in mind the guidance laid down in **Sinclair Roche & Temperley v Heard and Anor** [2004] IRLR 763 EAT. My judgment in this case has not suggested a wholly flawed approach on the part of the ET but has resulted in a fairly contained criticism of its approach, specifically in terms of addressing evidence of consistencies and other issues relating to the reasonableness of the Respondent's investigation, in particular as related to the matters outlined in my Judgment. There is no suggestion of any potential lack of professionalism of this ET. There have been extensive findings of fact and conclusions reached on other aspects of this case that have either not formed the subject of any appeal or criticism of which I have not upheld. It seems to me that it is proportionate for this matter to be remitted to the same ET, to the extent that it is still possible, and for the ET to reconsider its decision in the light of the Judgment I have given today.

A

Costs

35. The Claimant has applied for her costs, in terms of her fees in pursuing this appeal in the sum of £1,600; that application being made under Rule 34A(2)(a) of the **Employment Appeal Tribunal Rules 1993**, as amended, the Claimant having succeeded in her appeal, at least in part. The Respondent resists the application. First, because if the Claimant had limited her appeal to the basis on which she has succeeded then the EAT might have adopted the procedure allowed in **Burns v Royal Mail Group plc** [2004] ICR 1103 EAT / **Barke v SEETEC Business Technology Centre Ltd** [2005] EWCA Civ 578, thus avoiding the need for this hearing. Second, because the Claimant has only been partly successful and it is open to the EAT to in those circumstances either make no award or only part of the award sought.

36. The Claimant having been successful at least in part on her appeal, my costs jurisdiction under Rule 34A(2)(a) is engaged and I have a broad discretion as to whether it is appropriate to make an order for costs and, if so, as to the amount. Here, the Claimant's success was limited and there is at least a possibility that, if the appeal had been more focussed at an earlier stage, the EAT might have undertaken the **Burns**/**Barke** procedure and, thus, the Full Hearing might have been avoided. The Claimant would still have had to incur the lodgement fee of £400, and so I can see no basis for not awarding that. I also allow 50 % of the hearing fee - so, that is £600 - given the Claimant has been at least partially successful, but also allowing for the fact that there were grounds pursued on which she has not succeeded and/or for the possibility of the **Burns**/**Barke** procedure having been adopted if the appeal had been more limited at the outset. So, I order £1,000 costs under Rule 34A(2)(a).