Appeal No. UKEAT/0430/14/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 April 2015
Judgment handed down on 15 July 2015

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

LEEDS TEACHING HOSPITAL NHS TRUST APPELLANT

MRS K BLAKE RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR NICHOLAS SIDDALL (of Counsel) Instructed by: Hill Dickinson LLP 50 Fountain Street Manchester M2 2AS
For the Respondent	MR BRUCE FREW (of Counsel) Instructed by: Consilia Legal LLP Park House Park Square West Leeds West Yorkshire LS1 2PW

SUMMARY

VICTIMISATION DISCRIMINATION - Other forms of victimisation

UNFAIR DISMISSAL - Reasonableness of dismissal

The Respondent dismissed the Claimant, who was subject to a final written warning, ostensibly on the ground that she had taken holiday without permission and in disobedience to instructions from the Respondent's management. The Employment Tribunal found that conduct was not the Respondent's true reason for dismissal; that the Respondent had victimised the Claimant because of protected acts; and that even if conduct were the true reason for dismissal the dismissal was unfair. Appeal allowed. (1) The Employment Tribunal had not given sufficient reasons for its decision on the question of victimisation and had not recognised the distinction between unlawful treatment distinction between unreasonable conduct and conduct which is because of a protected act: **Law Society v Bahl** [2004] IRLR 799. (2) The Employment Tribunal had not approached the question of unfair dismissal in accordance with section 98(4) of the **Employment Rights Act 1996**.

HIS HONOUR JUDGE DAVID RICHARDSON

1. By a Judgment dated 4 August 2014 the Employment Tribunal sitting in Leeds (Employment Judge Grazin presiding) upheld claims of victimisation and unfair dismissal brought by Mrs Karen Blake ("the Claimant") against Leeds Teaching Hospital NHS Trust ("the Respondent"). The Respondent appeals against that Judgment.

2. The appeal was argued before me on 9 April 2015. Mr Nicholas Siddall appeared for the Respondent; Mr Bruce Frew for the Claimant. There was some discussion during the hearing of the Employment Appeal Tribunal's decision in **Reynolds v CFLIS (UK) Ltd** [2014] ICR 907. Shortly after the hearing the Court of Appeal allowed an appeal against that decision - [2015] EWCA Civ 439 (30 April 2015). With my permission and by agreement Mr Siddall and Mr Frew lodged further written submissions.

The Background Facts

3. The Claimant was employed by the Respondent at the Leeds General Infirmary. Her employment commenced on 8 June 1987. She was a Portering Supervisor until 2012. With effect from 22 March 2013 she was made subject to a final written warning for a period of 12 months and moved to work as a Security Officer in the hospital's facilities unit. It was common ground that she had committed protected acts for the purposes of the **Equality Act 2010**: she had alleged that the Respondent had subjected her to sex discrimination during disciplinary proceedings in 2012 and she had assisted a colleague in a disability discrimination claim.

4. At the start of her employment as a Security Officer the Claimant had a substantial amount of leave to take from the previous year. The Claimant's line manager was Ms Diane

Saunders. On 12 May the Claimant sent an email to Ms Saunders, asking to take leave between 12 and 15 June, seeking a reply the same day. Ms Saunders replied the following day. The email is important. The Employment Tribunal set it out in full:

> **"Dear Karen**
>
> **There is a procedure to follow with regards to the issuing of annual leave which Dave Salter went through with you and this does not include emailing me with a date that you want an emailed confirmation by. [Your] leave is authorised once I have signed and returned the application for leave, you have not completed the form correctly as you have removed the carbonated copy and I am therefore unable to process this form.**
>
> **I have checked the dates you have requested and they are currently available. However, I note you have included the 15th which you are not rostered to work your shifts are 11th - 14th. I have taken you off the rota for 12th 13th and 14th. If you can get a correctly completed form to me asap I would be obliged.**
>
> **You enquired how long you had to use your leave from last year and HR have advised that it needs to be taken as soon as possible and as you do not currently have body armour we would suggest taking the leave now during this period. Please submit forms to use up the leave asap."**

5. In a subsequent telephone call on 13 May the Claimant asked for other leave dates: 27-30 May, 4-7 June and 20-23 June. She then made formal applications for leave. Ms Saunders authorised each of these applications on 13 or 14 May - but the Claimant did not receive the forms until early July 2013 after she had taken the leave.

6. On 31 May 2013 the Claimant booked and paid for a cruise with her daughter. In order to take this cruise she needed leave between 22 and 25 July 2013. She submitted a form dated 31 May for the attention of Ms Saunders, seeking leave for those dates. She submitted it on 1 June by placing it under Ms Saunders' door. On 26 June Ms Saunders told her that leave could not be granted as two officers were already on leave.

7. The Claimant sought to raise the matter with three higher levels of management. She said the delay in informing her was unacceptable (but of course she had booked and paid for the cruise before submitting the form). She did not at this stage suggest that she had already asked Ms Saunders for permission. She asked for, but was not granted, a meeting.

8. On 3 July 2013 the Respondent decided to take a formal approach. Mr Salter wrote to the Claimant restating the Respondent's policy and saying that the leave was unauthorised. As the Employment Tribunal found, the position on both sides had hardened. The Claimant was determined to take the time she had asked for. She was told on 17 July that she was required to attend work on the disputed dates and that her failure to attend would be regarded as unauthorised absence. In her response the Claimant said:

> **"I rang Deborah to ask if it was okay for me to book my holidays and she told me over the phone that this was okay. I followed a manager's instructions."**

9. The Claimant went on the cruise. She was disciplined. The allegations against her were: taking leave without proper authorisation; unauthorised absence; and failure to follow a reasonable management instruction.

10. There were investigation meetings with her on 12 August 2012 and 9 September 2012. There was a disciplinary hearing on 6 November 2012 at which she was summarily dismissed for gross misconduct, the reasons being set out in a letter dated 8 November. The decision to dismiss was taken by Mr Young, a manager who had not had previous dealings with the Claimant.

11. There was an appeal hearing on 11 February 2013. A panel chaired by Ms Green, the Respondent's Director of Human Resources, took the appeal decision. The panel included a staff-side representative, Mr Cohen. By letter dated 26 February 2014 the outcome of the appeal was notified with reasons. The Claimant was regarded as having committed serious rather than gross misconduct; the dismissal was upheld having regard to the extant written warning; but she received notice pay.

12. The Claimant's case during the disciplinary process may be summarised as follows:

(1) She asked Ms Saunders orally for the July dates on 13 May and was told the dates were OK.

(2) She did not put in a form at that time because she had to ensure her daughter was available for the cruise.

(3) As far as she was concerned she did not need to have a signed form before she was entitled to take leave. She pointed out that she had not received other signed forms until after she returned from leave. She said that in the facilities department it was not uncommon for there to be a long gap between the submission of a form and its return.

(4) In any event it was unreasonable not to authorise her leave. Although it was true that the policy was only to authorise two people to have leave at any time, this policy ought not to have applied to her because she was only a supernumerary in July. She did not yet have the training and equipment to be part of the core three-person security team.

13. The Respondent's position may be summarised as follows:

(1) The Claimant had not asked Ms Saunders orally for the July dates. Ms Saunders was interviewed during the investigation and at the disciplinary hearing. As the Employment Tribunal noted, her answers were not the same. At the initial interview she did not recall any conversation about dates whereas at the disciplinary hearing she recalled a conversation about dates in June whilst still not accepting that the July dates were mentioned.

(2) The email dated 13 May spoke for itself: there was a procedure to follow, and the Claimant had in any event been told this at her induction into the Security Officer's job.

(3) The system of booking and authorising leave in the Security Department could be more timely and systematic, but this did not justify the taking of unauthorised leave. The Claimant knew that if permission were refused, she had no right to take leave.

(4) The policy to allow only two Security Officers to have leave at the same time did not depend on whether the officers were able to be part of the core three-person security team.

The Employment Tribunal's Reasons

14. The Employment Tribunal hearing took place on 23 and 24 June 2014. Both parties were legally represented. The Employment Tribunal reserved judgment.

15. The Employment Tribunal had agreed with the parties that the only issues it would decide at the hearing related to liability for unfair dismissal and victimisation. It would not decide whether there was any element of contribution or whether there should be a "**Polkey**" reduction. It said:

> **"2.5. … Accordingly, although we heard the evidence of the Claimant on the detailed events in May/June 2013, we told the parties (and they agreed) that we would not necessarily make findings of fact as to what the Claimant did or did not say during those periods. In the event, we have not made any such findings of facts in relation to disputed elements of the Claimant's discussions with the Respondent over this period. Notwithstanding those caveats, certain issues are clear from the undisputed correspondence and the undisputed oral evidence of both parties."**

16. In the section of its reasons entitled "Findings of Fact" the Employment Tribunal set out undisputed facts on which I have already drawn. It did not set out any finding of fact on the

question whether the Claimant really asked Ms Saunders for the July dates. But it did set out some findings of its own which were not agreed. I will return to these later in this judgment.

17. Following its review of the facts the Employment Tribunal included a short section entitled "The Law". On the question of refusal to obey an instruction it referred to **UCATT v Brain** [1981] ICR 542, quoting from the Judgment of Donaldson LJ as follows:

> **"But where the conduct complained of is, as in this case, a refusal to obey an instruction given to the employee by the employer, it seems to me that the primary factor which falls to be considered by the reasonable employer deciding whether or not to dismiss the recalcitrant employee is the question, "Is the employee acting reasonably or could he be acting reasonably in refusing to obey my instruction?" As I see it, what the Tribunal did in this case was to put itself notionally in the position of the reasonable employer. Sitting in that position, albeit notionally, it was musing aloud as to whether the employee had acted reasonably or, as I say, could have been considered to have been acting reasonably and it reached a wholly clear conclusion about it. I cannot see any error in that approach. Indeed, this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "would a reasonable employer in those circumstances dismiss?" seems to me a very sensible approach - subject to one qualification alone, that they must not fall into the error of asking themselves the question "would we dismiss?" because you sometimes have a situation in which one reasonable employer would and one would not."**

18. The Employment Tribunal did not include any aspect of the law relating to victimisation in this section.

19. In its summary of submissions the Employment Tribunal recorded the submission of Mr Frew that the real reason for dismissal was not the Claimant's conduct but the protected act. It recorded his reliance on the burden of proof provisions within the **Equality Act 2010** (section 136). There was no further reference to victimisation.

20. The Employment Tribunal began its conclusions in the following way:

> **"6.1. We deal firstly with the victimisation claim because, as Mr Frew accepted, if we find that the reason for the dismissal was that the Claimant had committed a protected act, i.e. she was victimised, it must follow that she was not dismissed for an admissible reason within Section 98 of the 1996 Act."**

21. It then set out its reasoning on victimisation. It is necessary to set this passage out in full:

> **"6.2. We do find that there are here facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has contravened the relevant provision, namely Section 27 of the 2010 Act, dealing with victimisation. We rely upon the whole of the circumstances which we have set out above in detail. We simply cannot see why, in these circumstances and in the notional absence of a protected act, this employer was so adamant that this employee should face disciplinary proceedings for taking a period of four days annual leave. So as to explain that, we rely upon the following factors: -**
>
> > **6.2.1. The clear evidence, in the Respondent's own email, that it wished the Claimant to take all of the outstanding leave as soon as possible.**
> >
> > **6.2.2. The Claimant's compliance with that request.**
> >
> > **6.2.3. The undisputed fact that the Claimant sought and obtained approval for the June leave periods verbally from Ms Saunders on 13 May 2013.**
> >
> > **6.2.4. The fact that the Claimant was non-operational and that her absence in July did not effect the Respondent's rota arrangements at all.**
> >
> > **6.2.5. The two officers-off policy was operated without any reference to the real position, namely that set out at point 6.2.4 above.**
> >
> > **6.2.6. The admitted delay on the part of the Respondent in returning the forms to the Claimant and the lack of any system for ensuring that such forms were returned within a reasonable period.**
> >
> > **6.2.7. The acceptance by Mr Young, and subsequently by the appeal panel, of the evidence of Ms Saunders, notwithstanding the substantial issues that must have arisen as to its accuracy.**
> >
> > **6.2.8. The failure of Mr Young and the appeal panel to accept that, at the very least, that this was a matter of confusion on the part of the Claimant, rather than a deliberate attempt to flout the authority of her manager.**
>
> **6.3. In our Judgment, those factors, taken together, amount to facts from which the Tribunal could conclude that the Respondent committed the contravention of the relevant provision. We are the required to consider whether the Respondent has shown that it did not contravene the provision. The burden of proof, as indicated above, passes to the Respondent. The various explanations we have received from the Respondent have not convinced us. In particular, when challenged on why a particular policy was applied, the Respondent's standard answer was that that was the policy. There was no attempt to apply the policies reasonably or rationally. We would describe the Respondent's approach to this matter as "a brick wall" approach. It mattered not what the Claimant said and why she said it. The various line managers had to be supported and were supported at each level. No attempt was made to assist the Claimant or to consider alternative approaches to this issue. In all of those circumstances and, we accept, unusually, we have come to the conclusion that the real reason for the Respondent's gross overreaction to the Claimant's conduct in this matter was that the Claimant was, as Mr Frew submitted, regarded as a troublemaker. Whether Mr Young was directly involved or otherwise in the earlier proceedings, he accepted that he knew that they had occurred. He did not know what was meant by a "protected act", but that does not, in our judgment, mean that he did not act by reason of it.**
>
> **6.4. As to Ms Green, she had clear knowledge of the earlier matters. She took into account the earlier decision as part of her decision-making process. Insofar as she applied the final written warning to the serious misconduct which she found, the consequence to the Claimant remained exactly the same. But this was a matter of semantics only. The notice pay provided to the Claimant does not affect our decision on victimisation or unfair dismissal. We were not referred by either representative to the detailed guidance in *Igen v Wong* [2005] EWCA Civ 142, but we have ourselves considered that guidance and have applied it accordingly.**

22. In case it was found to be in error in this conclusion the Employment Tribunal said it would deal with "the reasonableness of the Respondent's decision pursuant to section 98(4) of the 1996 Act", doing so "on the basis that conduct is the principal reason for dismissal".

23. The Employment Tribunal found the investigation by the Respondent to have been unreasonable. It said the following:

> **"6.5. In the light of that finding as to the reason of the dismissal, we do not strictly require [sic] to deal with the reasonableness of the Respondent's decision, pursuant to Section 98(4) of the 1996 Act. We do however, make findings on the point in case we should be held to be in error on the victimisation issue. On the basis that conduct is the principal reason for the dismissal, we consider that the Respondent did not act reasonably in treating that reason for the dismissal as a sufficient reason, in all of the [circumstances]. We take Mr Frew's point as to the failure to carry out a reasonable investigation. Apart from the issue of inconsistency, the Respondent entirely failed to consider the position of the Claimant vis-à-vis her daughter. Had that enquiry been made, the Respondent might well have concluded that the reason why four forms were submitted on 13 May 2013 and the fifth form submitted on 31 May 2013, was, indeed, that the Claimant was awaiting information from her daughter. Having obtained that information, the Respondent might well have concluded that the Claimant was indeed telling the truth on that specific issue. We emphasise we make no such finding ourselves. We simply comment on the failure of the Respondent properly to look at that issue. It was a crucial issue in the fact-finding exercise which this Respondent should have carried out.**
>
> **6.6. The Respondent also failed to note the pattern of activity which this Claimant followed. It was undisputed that the Claimant had sought an indication as to whether four particular dates were available, during the conversation on 13 May 2013. It was only when she obtained that information that she submitted the first four forms. The Respondent should have considered whether that pointed to a person who was more likely to have adopted the two-stage approach, i.e. discussion with Ms Saunders, followed by submission of the forms, rather than simply submitting the fifth form unilaterally, as the Respondent contended. If the Claimant discussed the May and June dates with Ms Saunders, it should reasonably have considered whether she had also discussed the July dates, the only distinction being was that the form was submitted some eighteen days later. It was common ground that there was no other discussion between the Claimant and Ms Saunders over that eighteen day period."**

24. It also found that the Respondent entirely failed to consider whether the Claimant was acting reasonably, saying "That simply was not a factor that it took into account at all" (paragraph 6.7).

25. The Employment Tribunal continued as follows:

> **"6.8. In this case, it is clear that Ms Saunders (and subsequent managers) applied that policy to the Claimant notwithstanding the fact that she was, on any basis, supernumerary on each occasion when she was a subject of the rota to attend work. In our judgment, whatever the strict policy, it mattered not to any reasonable employer whether or not the Claimant was at work. The "two officers" policy was not in any real terms offended by the Claimant's presence or absence in any given date.**

6.9. So far as sanction is concerned, the [Respondent] failed to give any weight to various mitigating factors, notwithstanding that they were set out in Mr Young's decision letter. At the very least, there was confusion.

6.10. Further, the Respondent's own processes were entirely unfair and unreasonable. In the real world, an employee who wishes to take up a particular offer of a package holiday, will prior to making a definite booking, and whilst the offer remains available, seek to speak to his or her line manager to seek to obtain immediate confirmation that such leave could be taken. Any process which allows, as here, very nearly four weeks to elapse before a document is returned is, simply, impracticable and unreasonable. The period of very nearly four weeks relates to the delay between 31 May and 26 June, in refusing the Claimant's application for the later July dates. That, of itself, was entirely unreasonable conduct by the Respondent in considering this matter.

6.11. Taking all of these factors into account, and observing that we should not, of course, substitute our own decision for that of the employer, we consider that no reasonable employer, of this size and with these administrative resources and, taking into account, as we do, the substantial merits of the case, and applying equity, would have reached the conclusion that this Respondent did. We have noted Ms Green's evidence that it was the Claimant's conduct, after applying the terms of the final written warning, which led to the dismissal. We accept, as Mr Frew conceded, that, if the Respondent was entitled to find that there had here been misconduct, then dismissal was appropriate, because this was a second offence within the period of the final written warning. So as to clarify the position, we do not consider that a reasonable employer would have found that there had here been any misconduct, let alone sufficiently serious misconduct as to justify dismissal, whether with or without the terms of the final written warning."

The letter dated 22 March 2013

26. The Employment Tribunal made virtually no findings concerning the protected acts. In discussing this point with Mr Frew I asked whether any evidence relating to the protected acts was before the Employment Tribunal. I was shown a letter dated 22 March 2013 by Ms Green, the very person who chaired the appeal in the Claimant's case. Mr Frew told me that this letter was the subject of cross-examination. It records the "earlier decision" to which the Employment Tribunal referred in paragraph 6.4 of its reasons. I will summarise the contents of the letter - not because it is my place to make any findings about it but because it provides context to the Employment Tribunal's reasons.

27. The Claimant had been found guilty of forwarding confidential and personal sickness data relating to her colleagues to her personal email account. At the disciplinary hearing she had been offered, as an alternative to dismissal, a final written warning coupled with a transfer to a different department. She had refused the offer and she had been dismissed.

28. Ms Green's letter recorded that by the time of her appeal against that dismissal the Claimant had raised various allegations of sex discrimination. The panel, of which Ms Green was part, rejected those allegations. This bears out the Employment Tribunal's finding that Ms Green was well aware of protected acts.

29. However, Ms Green's panel also heard and made findings about other behaviour of the Claimant which (Ms Green said) "reflected on your general credibility". These were: repeated claims to be a shop steward when she was not a shop steward; claiming she had not signed documents when she was constrained to admit at the appeal stage that she had; and making a claim not supported by a witness she herself called at the hearing. These, coupled with the subject matter of the disciplinary charge itself, bear out the Employment Tribunal's finding that the Claimant was regarded as a troublemaker. But these matters are not "protected acts" for the purposes of the Equality Act 2010.

30. In the result Ms Green's letter dismissed the appeal but offered the Claimant once more the option of a final written warning and transfer. This is how the Claimant came to start work as a Security Officer.

Statutory Provisions

31. It is unlawful for an employer to victimise an employee by dismissing her: see section 39(4) of the **Equality Act 2010**. The definition of victimisation is found in section 27(1):

> **"A person (A) victimises another person (B) if A subjects B to a detriment because -**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act."**

32. The statutory provisions relating to unfair dismissal are found in Part X of the **Employment Rights Act 1996**. Section 98(1) provides that it is for the employer to establish the principal reason for dismissal and that is of a kind specified in section 98(2) (or some other substantial reason). Section 98(2) specifies conduct as such a reason. Section 98(4) provides that, where the employer has fulfilled the requirements of section 98(1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, 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. The question is to be determined in accordance with equity and the substantial merits of the case.

Submissions

33. On the question of victimisation, Mr Siddall submitted that the Employment Tribunal made errors of legal approach and failed to give proper reasons for its decision. He pointed out the lack of any direction of law within the Employment Tribunal's reasons concerning important aspects of the law of victimisation.

34. Firstly, he submitted that the Employment Tribunal lost sight of the distinction between unreasonable conduct and conduct which is because of a protected act. It does not follow that conduct which is unreasonable is because of a protected act. This proposition he illustrates by cases concerned with "less favourable treatment": **Law Society v Bahl** [2004] IRLR 799 at paragraph 98 and **Khan & Anr v Home Office** [2008] EWCA Civ 578 at paragraph 26.

35. Secondly, he submitted that the Employment Tribunal, while mentioning **Igen Ltd v Wong** [2005] IRLR 258 in its reasons, did not apply the burden of proof provisions properly,

failing to make findings of primary fact and relying on the burden of proof when it should have been in a position to make such findings. He referred to and relied upon **IPC Media Ltd v Millar** [2013] IRLR 707 at paragraph 31 and **Hewage v Grampian Health Board** [2012] IRLR 870 at paragraph 32. He drew attention to authorities which emphasise the importance of adequate fact finding before a conclusion is drawn that a person has been motivated by an improper consideration: see **Tameside NHS v Mylott** [2010] UKEAT/0352/09/DM, UKEAT/0399/10/DM (Underhill P) at paragraph 103, **Serco Ltd v Dahou** [2015] IRLR 30 (paragraph 65) and **Cooperative Society v Baddeley** [2014] EWCA Civ 658 (paragraph 58).

36. Developing these submissions, he argued that the Employment Tribunal (1) failed to set out any primary facts of significance relating to the protected acts ; (2) failed to address its own finding that the decision on appeal was taken by a panel of three - there are no findings at all as to whether other panel members knew of the protected acts or were motivated by them; (3) conflated the question whether the decision to dismiss was unreasonable with the question whether it was by reason of the protected act; (4) failed to address whether the beliefs of those involved in the decision to dismiss were honestly held - a vital first step in determining whether the decision to dismiss was "because of" protected acts: he pointed here to a tension between 6.2.7 and 6.2.8 of the Reasons and the Employment Tribunal's earlier apparent finding that the Respondent was entitled to accept the evidence of Ms Saunders. (5) insofar as it found that Mr Young and Ms Green were motivated by the protected acts, it failed to provide adequate reasons.

37. Mr Siddall argued that these submissions were reinforced by the reasoning of the Court of Appeal in **Reynolds**. The Court of Appeal reaffirmed the fundamental requirement of the **Equality Act 2010** that, before an employer could be liable, an individual employee

responsible for the decision in issue must be motivated by the protected characteristic or act. The burden of proof did not pass until a prima facie case had been established against such an individual.

38. On the question of unfair dismissal Mr Siddall submitted that the Employment Tribunal can be seen to have applied its own view of the actions of the Respondent without assessing them against the "range of reasonable responses" test.

39. Mr Siddall pointed to areas where the Employment Tribunal stated findings of its own on matters in issue, whereas its task was to establish the findings made by the employer and review whether the employer acted reasonably. Thus it reached its own conclusion as to whether the Claimant understood the absence procedure (paragraph 2.1), its own conclusion that the Claimant "always" had the intention of going on a cruise with her daughter in July 2013 (paragraph 2.11), its own finding as to what a senior manager had said to her (paragraph 2.19). He also pointed to areas where the Employment Tribunal applied a standard so high that it appeared to lose sight of the "reasonable range of responses". Thus it criticised the Respondent for failing to pursue a quite detailed point of evidence concerning the Claimant's daughter (paragraphs 2.12, 2.29 to 33 and 6.5), and for failing to follow through a particular discrepancy in Ms Saunders' evidence (paragraph 6.6).

40. On the question of victimisation Mr Frew on behalf of the Claimant submitted that the Employment Tribunal applied the law correctly. It gave specific consideration to individual decision makers as required by **Reynolds**: it was sufficient if the motivation of anyone involved in the decision was tainted by the proscribed reason (see paragraph 32 in the Judgment of Underhill LJ). It applied the leading authority on the burden of proof provisions (**Igen**). It

made adequate findings of fact concerning the protected acts, given that it was uncontroversial that Ms Green was aware of them and that Mr Young had accepted in cross-examination that he knew of the letter dated 22 March 2013.

41. On the question of unfair dismissal Mr Frew submitted that the Employment Tribunal gave itself a proper self-direction on the importance of applying the "reasonable responses" test and it framed its conclusions in reliance on that test. The criticisms which it set out in paragraph 6.3 of its reasons show that it did not seriously stray from the correct test. Proper respect should be paid to the Employment Tribunal's decision (see **JJ Food Services v Kefil** UKEAT/0320/12 at paragraph 17).

42. Mr Frew rightly reminded me of principles governing the approach of an appellate Tribunal to an appeal on a question of law, referring me to **Brent London Borough Council v Fuller** [2011] ICR 806 for the proposition that an Employment Tribunal's Reasons should be read in the round without being hypercritical or pernickety and to Rule 62(5) of the **Employment Tribunal Rules** and **Meek v City of Birmingham DC** [1987] IRLR 250 for the limits of the duty of an Employment Tribunal to give reasons.

Discussion and Conclusions

43. I will begin with the question of victimisation. It is well established that an Employment Tribunal, when deciding whether treatment is because of a protected act, must focus on the mental processes of the putative discriminator and decide whether the protected act was a significant influence on the decision taken, whether consciously or unconsciously: see **Nagarajan v London Regional Transport** [1999] IRLR 572 at 576. Where two or more persons are responsible for the decision, it will be sufficient if the mental processes of any

individual are tainted in this way: see **Reynolds** (Court of Appeal) at paragraph 32, per Underhill LJ.

44. It would therefore have been sufficient for a finding of liability if the Employment Tribunal had found that the Respondent's principal reason for dismissal was the Claimant's misconduct but that its decision was to a significant extent influenced, consciously or unconsciously, by the fact that the Claimant had done protected acts. But the reasoning of the Employment Tribunal in this case was much more fundamental. It found that the principal reason for dismissal was that the Claimant had committed a protected act. This is plain from a reading of paragraphs 6.1, 6.2 and 6.3 of its reasons.

45. I would add that the Employment Tribunal appears to have concluded that this was the only reason for disciplining the Claimant at all: see the third sentence of paragraph 6.2 (at any rate this appears to be the logic of paragraphs 6.2 and 6.3). But the decision to take disciplinary proceedings was the consequence of investigation meetings prior to any decision either by Mr Young or Ms Green.

46. Although the Employment Tribunal appears to have reached its conclusion on the question of victimisation by application of the burden of proof provisions, it must always be recalled that such a conclusion is still a real finding of fact (see **Millar** at paragraph 31). Moreover it was a very serious finding to make in this case, especially since it applied to a Director of Human Resources, who might be expected to have a full understanding of the implications of the law in this field. The Employment Tribunal did not expressly find that Mr Young and Ms Green acted in bad faith or were dishonest in their evidence; but the

Employment Tribunal's findings are of a kind which require careful explanation - see, in a case which is broadly though not exactly analogous, paragraph 58 of **Baddeley**.

47. I have reached the conclusion that Mr Siddall's main criticisms of the Employment Tribunal's reasoning are well founded.

48. In the first place, there is no clear finding in the Employment Tribunal's reasons (either as a matter or primary fact or, for that matter, by reference to the burden of proof) as to whether Mr Young and Ms Green actually believed that the Claimant was guilty of misconduct as charged.

49. On the one hand, if they did not believe that she was guilty of misconduct, this would feed into a finding that the real reason was victimisation: but, as I have said, it is difficult to escape the conclusion that if this was the case their actions were in bad faith and their evidence duplicitous.

50. On the other hand, if they did believe that she was guilty of misconduct, this would support a finding that the real reason for dismissal was, contrary to the Employment Tribunal's view, indeed the Claimant's conduct. A finding that Mr Young and Ms Green believed the Claimant to be guilty of misconduct would not necessarily rule out a finding that the reason for dismissal was victimisation. The Employment Tribunal could have found that although they really believed the Claimant's misconduct they did not dismiss for that reason at all: see **Aslef v Brady** [2006] IRLR 576 at paragraphs 78 to 79, approved by the Court of Appeal in **Baddeley** at paragraph 43. However, there is no clear indication that this was the Employment Tribunal's approach. It would involve the Employment Tribunal in making a careful distinction between

Mr Young and Ms Green taking a welcome opportunity to dismiss for misconduct on the one hand and dismissing because of antipathy to the employee's protected acts on the other. As Underhill LJ said in **Baddeley** (paragraph 43) this will often require careful consideration of the decision maker's mental processes.

51. This careful consideration is absent from the Employment Tribunal's reasons. The Employment Tribunal appears to have found that Mr Young and Ms Green genuinely accepted the evidence of Ms Saunders in preference to that of the Claimant: see paragraphs 2.29, 2.30 and 2.32 of the Employment Tribunal's reasons. If so, it is difficult to see why the Employment Tribunal thought that misconduct was not the real reason for dismissal. If Ms Saunders' evidence was correct, the Claimant had booked holiday without obtaining permission in advance and had taken the holiday despite repeated instructions not to do so when she was subject to a final warning. Why, if this was the genuine view of Mr Young and Ms Green, would the Respondent not dismiss for misconduct?

52. The Employment Tribunal criticised Mr Young and Ms Green (and the rest of the appeal panel) for failing to accept "at the very least" that the Claimant's behaviour was "a matter of confusion" rather than a deliberate attempt to flout the authority of her manager. This is a criticism which must be looked at with great care if it is to be used in support of a finding that the true reason for dismissal was the protected acts rather than the misconduct. If they were honest in their evidence, Mr Young and Ms Green did not accept that there was any matter of confusion on the part of the Claimant. They proceeded on the basis that the Claimant had booked the holiday first, slipped the application under Ms Saunders' door and then refused to abide by her decision.

53. Against this background, and looking at the Employment Tribunal's reasons in paragraph 6.2, I accept Mr Siddall's criticism that the Employment Tribunal has not given itself what was, in the circumstances of this case, an essential self-direction: it does not follow merely because treatment is unreasonable that it is for a proscribed reason. Unreasonable behaviour does not necessarily lead to an inference of discrimination or victimisation. Thus in **Bahl v Law Society** [2004] IRLR 799 at paragraph 101 the Court of Appeal approved a passage in the Judgment of Elias J at first instance (paragraph 97).

> **"The inference may also be rebutted - and indeed this will, we suspect, be far more common - by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made. …"**

54. This passage shows the importance of a clear finding on the question whether Mr Young and Ms Green genuinely believed in the Claimant's misconduct. There is no such finding in the Employment Tribunal's reasons.

55. I also accept Mr Siddall's submission that there is a lack of finding and reasoning in the Employment Tribunal's reasons concerning the "protected acts" and the knowledge and beliefs of Mr Young and Ms Green concerning them. The contents of the letter dated 22 March 2013 demonstrate that careful findings on the part of the Employment Tribunal were required. Dismissing an employee for the reason that she is a "troublemaker" is unattractive but it is not the same as dismissing an employee for the reason that she has done a protected act. The letter dated 22 March 2013 did refer to and dismiss allegations made by the Claimant of sex discrimination, but it also made positive findings as to her own misconduct (for which she was given a final written warning) and as to other factors relating to her credibility which had nothing to do with protected acts. There is no recognition of this question in the Employment Tribunal's reasons. Mr Young's knowledge that the earlier proceedings had occurred does not

necessarily mean that the allegations of sex discrimination influenced him, especially when the proceedings concerned abuse of confidential information for which the Claimant was given a final warning.

56. For these reasons I conclude that the Employment Tribunal's finding of victimisation cannot stand. I turn to the finding of unfair dismissal.

57. It is important to keep in mind the different roles of the Employment Tribunal and the Employment Appeal Tribunal. It is the task of the Employment Tribunal to apply section 98(4). It must apply the objective standard of the reasonable employer to all aspects of the dismissal: investigation, process, fact-finding and sanction. It must recognise that in many, though not necessarily all, cases, there may be a band or range of ways in which a reasonable employer may act.

58. There is an appeal to the Employment Appeal Tribunal only on a question of law. In the context of appeals concerning section 98(4) the Employment Appeal Tribunal must itself be cautious of substituting its own opinion for that of the Employment Tribunal. The Court of Appeal has emphasised this latter point in a number of cases. In **Fuller** Mummery LJ summarised the position as follows:

> **"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.**
>
> **29. Other danger zones are present in most appeals against tribunal decisions. As an appeal lies only on a question of law, the difference between legal questions and findings of fact and inferences is crucial. Appellate bodies learn more from experience than from precept or instruction how to spot the difference between a real question of law and a challenge to primary findings of fact dressed up as law.**
>
> **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."**

(See also **JJ Food Service Ltd v Kefil** [2013] IRLR 850 at paragraph 17).

59. It follows that the Employment Appeal Tribunal will not find that an Employment Tribunal's reasoning is vitiated by a "substitutionary mindset" on the basis of its own assessment of the merits, still less because of the strength with which the Employment Tribunal has expressed its conclusions - for the more unreasonable a decision to dismiss, the more likely the Employment Tribunal will express its conclusions strongly. The Employment Appeal Tribunal will do so only if, on a careful reading of its reasons, it can be seen that the Employment Tribunal did not apply the law.

60. What is involved in this careful reading? There tend, in my experience, to be two features which may contribute to a conclusion that the Employment Tribunal has not applied the section 98(4) test. Firstly, there may be signs which indicate that the Employment Tribunal has in effect made and proceeded from its own findings of fact when it should have started with the employer's findings and asked whether those findings were reasonable. Secondly, there may be signs that the Employment Tribunal's criticisms of an employer apply an extremely high standard without recognising that there is a range of acceptable ways of investigating and deciding a disciplinary matter. Even if these signs appear to be present, the decision must still be read in the round in order to decide whether it is really vitiated by error.

61. I have reached the conclusion that there are indeed features in the Employment Tribunal's reasons of both these kinds.

62. Firstly, there are occasions when the Employment Tribunal appears to have proceeded from its own view of the facts without asking what the employer's view was and whether that view was reasonable.

63. In paragraph 2.1 the Employment Tribunal dealt with the Claimant's induction into the Security Department. It was the Respondent's case that the procedure relating to annual leave and absence was explained to her. The Employment Tribunal made its own finding, saying that "from the evidence and our own industrial experience" it was likely that the detail of the process and its importance was not clarified to the Claimant. That was not the view of Mr Young: see page 1 of the letter dated 8 November 2013 concerning dismissal. The task of the Employment Tribunal was not to reach its own finding but to consider Mr Young's finding and decide whether it was reasonable.

64. Secondly, the Employment Tribunal criticised, at paragraph 6.2.8, the failure of Mr Young and the appeal panel to accept that at the very least "this was a matter of confusion on the part of the Claimant". But it was not the position either of the Respondent or the Claimant that she was confused. On the Claimant's account she had asked for and been given permission: on the Respondent's account she had not. The question for the Employment Tribunal was whether the Respondent's approach was reasonable. The notion that there was "a matter of confusion on the part of the Claimant" appears to be the Employment Tribunal's own construct, perhaps in reliance upon its own finding as to the induction process, which I have already mentioned. It carried through this view into paragraph 6.9 of its reasons, holding that "at the very least there was confusion".

65. Thirdly, although the Employment Tribunal apparently held that the Respondent was entitled to accept the evidence of Ms Saunders against the evidence of the Claimant (see paragraph 2.30), it did not follow this through into its conclusion in paragraph 6.11. The Employment Tribunal did not explain why, if the Respondent accepted the evidence of Ms Saunders, it was unreasonable to find that the Claimant was guilty of misconduct at all. It may be that the Employment Tribunal was acting on its view that the Claimant was merely confused; but if so the true question was whether the Respondent acting reasonably was entitled to reach a different conclusion.

66. Fourthly, the Employment Tribunal set out its own findings concerning the Respondent's policy that no more than two officers should take leave at the same time. It found this policy to be "obviously sensible" in normal circumstances: see paragraph 2.15 of its Reasons. It said that one of the "real issues in this matter is whether these were normal circumstances". It reached its own conclusion that these were not "normal circumstances" because the Claimant could not be one of the three-person team that dealt with security incidents. But attending to such incidents was not the only task of Security Officers and it was not the Respondent's view that an exception should be made for the Claimant merely because she could not attend security incidents. I would expect the Employment Tribunal to identify the Respondent's reasons, discuss them, and say whether they were reasonable. This process is absent from the Employment Tribunal's reasons.

67. I therefore conclude that on key issues in the case the Employment Tribunal appears to have adopted its own view without identifying the Respondent's reasons and asking whether they were reasonable.

68. I further consider that there are instances where the Employment Tribunal has mandated an extremely high standard of investigation without recognising that there is a range of reasonable responses for an employer.

69. In paragraph 6.5 the Employment Tribunal said that the Respondent "entirely failed to consider the position of the Claimant vis-à-vis her daughter", evidently considering that some further enquiry should have been made. The notes of the two investigation meetings show that this matter was explored with the Claimant: see the fourth page of the notes for 12 August 2013 and the second and third pages of the notes of 9 September 2013, where the Claimant set out her account on this matter. It is difficult to see what further inquiry the Employment Tribunal envisaged: I think it must have been an inquiry of the daughter or the daughter's employer. But this is to apply a very high standard, without any recognition of a "range of reasonable responses" test.

70. Paragraph 6.6 contains a criticism that the Respondent "failed to note the pattern of activity which this Claimant followed". If this is intended as a criticism of the investigation, I do not understand it. The two investigation meetings plainly considered the Claimant's pattern of activity. If the Employment Tribunal intended to criticise the Respondent for accepting the evidence of Ms Saunders over against the Claimant, it is inconsistent with its earlier finding that it was reasonable for the Respondent to accept Ms Saunders' evidence. It would appear that in paragraph 6.6 the Employment Tribunal has moved away from its conclusion that it was reasonable for the Respondent to accept Ms Saunders' evidence and is relying upon its own finding that a different conclusion should have been reached by reason of the "pattern of activity" which the Claimant followed.

71. The features to which I have referred form a substantial part of the Employment Tribunal's reasoning in support of the unfair dismissal claim. I conclude that the Employment Tribunal has, in this case, slipped into a "substitution mindset" even though it has stated the correct legal test.

72. It follows that the appeal will be allowed. The claims of victimisation and unfair dismissal will be remitted: it is no part of the function of the Employment Appeal Tribunal to reach its conclusions on these issues. Given my reasons, it is plainly right that the matter should be remitted to a freshly constituted Tribunal.