Appeal No. UKEAT/0439/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 August 2014
Handed down on 14 November 14

Before

HER HONOUR JUDGE EADY Q.C.

(SITTING ALONE)

MR CLIVE BURDETT — APPELLANT

AVIVA EMPLOYMENT SERVICES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS JANE MCNEILL QC MR PAUL STRELITZ (of Counsel) Leathes Prior Solicitors 74 The Close Norwich NR1 4DR
For the Respondent	MS TALIA BARSAM, COUNSEL (of Counsel) Aviva Employment Service Ltd PO Box 89 Surrey Street Norwich Norfolk NR1 3DR

Summary

UNFAIR DISMISSAL – Conduct – Section 98(2)(b) Employment Rights Act 1996

In a case where the Claimant had committed (admitted) assaults in the workplace because of his disability (he suffers from a paranoid schizophrenic illness), the ET found that the Respondent had dismissed him because of his having committed acts of gross misconduct and that it had reasonable grounds for its belief in this regard given the Claimant's admission. The admission was, however, limited to the acts in question; not to actual culpability. The ET's reasons did not demonstrate engagement with the issue of blameworthiness on the Claimant's part; whether he had in fact wilfully or grossly negligently engaged in the conduct in question (**Sandwell & West Birmingham Hospitals NHS Trust v Westwood** UKEAT/0032/09/LA) and, in the circumstances of this case, that amounted to an error of law (**Eastland Homes Partnership Ltd v Cunningham** UKEAT/0272/13/MC).

Further, the ET's reasons suggested that it had fallen into the error identified by the EAT (Langstaff P presiding) in **Brito-Babapulle v Ealing NHS Trust** UKEAT0358/12/1406; apparently assuming that dismissal will necessarily fall within the range of reasonable responses in a gross misconduct case. There was no indication that the ET had found that this was such a heinous case as to allow of no explanation or mitigation. That being so, it was the ET's function to consider whether there were mitigating circumstances that might take dismissal in this case outside the range of reasonable responses. Its apparent failure to do so rendered its conclusion unsafe.

Discrimination Arising from Disability - Section 15 Equality Act 2010

Having identified the legitimate aim as being adherence to appropriate standards of conduct in the workplace, the ET failed to demonstrate that it had properly scrutinised the means chosen

by the Respondent to achieve that aim (i.e. the dismissal of the Claimant), **Hardys and Hansons plc v Lax** [2005] IRLR 726, CA. There was only limited consideration of the impact upon the Claimant and no critical evaluation of the possible alternative means apparently open to the Respondent (in particular, home-working). Furthermore, the justification identified by the ET (which was retributive rather than preventative) did not seem to engage with the Respondent's legitimate aim and, to the extent that it found that there was a risk of relapse even if the Claimant continued on his medication, its finding as to future risk lacked evidential basis. In the circumstances, the ET's conclusion on the discrimination arising from disability claim could not be upheld.

Outcome

Appeal allowed. Parties afforded the opportunity to make further representations as to disposal.

HER HONOUR JUDGE EADY Q.C.

Introduction

1. In this Judgment, I refer to the parties as the Claimant and the Respondent, as they were before the Tribunal below. The appeal is that of the Claimant, from a reserved Judgment of the Norwich Employment Tribunal ("the ET") (under the Chairmanship of Employment Judge Postle sitting with members on 8-9 April 2013, with further day for discussion on 10 April 2013), sent out to the parties with the ET's reasons on 11 June 2013. Before the ET, the Claimant was represented by Mr Strelitz, of Counsel, who is now led by Ms McNeill QC. The Respondent was represented before the ET, as on the appeal, by Ms Barsam, of Counsel.

2. The ET dismissed the Claimant's claims of unfair dismissal and of direct disability discrimination, discrimination arising from disability and discrimination as a result of failure to make reasonable adjustments. The appeal is in respect of the claims of unfair dismissal and discrimination arising from disability.

The background facts

3. The Respondent is a provider of life insurance and pension products, employing some 54,000 employees worldwide, some 20,000 in the UK.

4. The Claimant is a disabled person within the meaning of section 6(1) Equality Act 2010 ("EqA"). Since 2007, he has suffered from a mental impairment. He has been diagnosed as suffering from a paranoid schizophrenic illness.

5. The Claimant started his employment with the Respondent on 6 February 2006. At the material time, he was employed as a senior approval specialist, ensuring advertising and insurance policy documentation complied with relevant regulatory standards.

6. In July 2007, the Claimant took sick leave, due to stress and depression apparently triggered by the breakdown of a long-term relationship and his mother's cancer diagnosis. In September, he was admitted to hospital for a month and was prescribed antidepressants and antipsychotic medication. In November 2007, the Claimant was referred to the Respondent's Occupational Health team; it was confirmed that he suffered from a depressive illness and was on medication. In consultation with the Claimant's GP, a graduated return to work was provided.

7. In or about April/May 2008, on medical advice, the Claimant discontinued the antidepressants and antipsychotic mediation. On 25 September 2008, however, he was re-admitted to hospital after experiencing auditory hallucinations and sexually assaulting members of public. The Respondent was not told why the Claimant was admitted to hospital, other than he was suffering recurring mental health problems. The Claimant did not himself disclose the sexual assaults or the police caution that he received as a result.

8. In February 2009, a further graduated return to work was provided for the Claimant, initially working part-time but gradually increasing to full-time working.

9. During the summer of 2010, on medical advice, the Claimant again discontinued his antipsychotic medication. Sometime thereafter he decided to discontinue his antidepressants, albeit without first seeking medical advice.

10. In October 2010, the Claimant's mother died. This seems to have set him on a downward path. By early 2011, he had begun to suffer auditory hallucinations once more. At this time he was not taking any medication for his illness.

11. On 26 April 2011, whilst at work, the Claimant sexually assaulted two female fellow employees. When challenged, he threatened to assault a security guard. On leaving the work premises, he assaulted a female member of the public and attempted to assault a further woman (an independent contractor of the Respondent) before being arrested and later detained under the Mental Health Act. The Claimant was admitted to a psychiatric intensive care unit, where he remained until 23 May 2011 when he was transferred to an open ward. He also faced criminal charges in respect of the assaults.

12. The Respondent suspended the Claimant pending investigation into these events. The investigation report set out what had happened on 26 April 2011, which was not in dispute. Before commencing disciplinary proceedings, the Respondent obtained a medical report from Occupational Health and from the Claimant's treating specialist. From the latter, the Respondent first learnt of the earlier incident in 2008.

13. Having received the medical reports, the Respondent proceeded with the disciplinary process. The Claimant did not dispute the allegations against him but explained the context, in particular that:

> **'[…] the incidents on 26 April occurred solely because, "I made a serious error of judgment, I thought I was best placed to decide the level of antidepressant medication I took, put simply I sought to reduce my reliance on my medication without any medical assistance as I was starting to feel better, I was wrong."' (see ET paragraph 5.25)**

14. A further report was also provided from the Claimant's treating specialist, which confirmed the Claimant's acceptance that he would need to continue with his mediation indefinitely. The Respondent's Occupational Health adviser was also asked what guarantee there could be that the Claimant would take his medication in future. He was unable to guarantee that, stating:

> **"[…] [the Claimant] will act in accordance with the principals [sic] of self-determination that is he may legitimately decide to cease taking mediation if he wishes to do so. Clearly I would advise that he should only do so in liaison with his treating medical team and I am sure that [he] is aware of this." (ET paragraph 5.28)**

15. The disciplinary hearing commenced on 26 January 2012 but was adjourned for further medical information and to investigate what the Respondent had known about the earlier (2008) assault.

16. On 2 April 2012, the Claimant attended Norwich Crown Court for sentencing relating to the assaults of 26 April 2011 (having pleaded guilty to all charges). He was made the subject of a mental health treatment requirement for three years, under which he would have to submit to treatment as and when required and could be brought back for re-sentencing if in breach. That ran alongside a supervision requirement and the Claimant was also placed on the sex offenders' register for five years. A care plan was drawn up, under which the Claimant would receive monthly injections of his antipsychotic medication and would be supervised daily in terms of taking his antidepressants.

17. On 11 May 2012, the disciplinary hearing resumed. The Respondent now had the further medical and other information and was aware of the Crown Court sentence. The Claimant was asked why he had not told the Respondent of the earlier (2008) assault. The ET records that he said that he had only received a police caution and had not considered he

needed to pass that on as it was not a registered offence. The Claimant's witness statement observes that he was embarrassed by those events and had attempted to put that behind him when returning to work. In any event, the disciplining manager, Mr Ward, agreed the Claimant had not been legally obliged to pass on the details, although he remained very concerned about this; the effect having been that the Respondent knew nothing save that the Claimant had suffered a relapse of his mental condition in 2008.

18. At the outset of the resumed disciplinary meeting, Mr Ward observed that incidents such as those of 26 April 2011 would "normally result in dismissal for gross misconduct" (paragraph 5.44); "his role was now to determine the appropriate sanction" (5.45) and he concluded "the only sanction given the gross misconduct admitted was dismissal" (5.49). He had "concluded that the medical regime could not provide 100% guarantee that the Claimant would not commit further inappropriate actions towards colleagues, a risk [he] was not prepared to take" (5.49). This risk was assessed in the light of the fact that "the Claimant had come off his medication of his own volition in 2011 or 2010 and even if the antipsychotic medication was administered by way of an injection, there was still a chance he could chose not to take his antidepressant medication …" (5.50).

19. The Claimant appealed against that decision but was unsuccessful.

The ET's reasoning

20. The ET found that the reason for the dismissal was gross misconduct. The Claimant had admitted the gross misconduct, as he had admitted the sexual assaults. He had also admitted a "serious error of judgment in discontinuing his medication without medical advice". As the Claimant had "openly admitted his misconduct", very little investigation had

been called for; clearly the Respondent had reasonable grounds for its belief. Dismissal was within the range of reasonable responses available to the Respondent: "Quite clearly, any Respondent, given the nature of the misconduct, would have invoked a sanction of dismissal." The ET thus found that the dismissal was "quite clearly fair".

21. As for the claim of discrimination arising from disability, the Respondent having conceded the dismissal had been unfavourable treatment "because of something arising in consequence" of the Claimant's disability, the question for the ET was "whether in dismissing the Claimant that was a proportionate means of achieving a legitimate aim?"

22. In looking at the question of justification, the ET observed:

> **"7.3.4 Clearly the test of justification is an objective test. The employer does not have to demonstrate that no other proposal was possible. The use of the word reasonably does not permit a margin of discretion or range of reasonable responses. It is true that the Respondent is not required to prove that the decision was the only correct approach, only that it was a reasonable decision. The … principle of proportionality requires us as a Tribunal to take into account the reasonable needs of the business. It also has to make its own judgment upon a fair and detailed analysis of the working practices and business considerations involved as to whether the proposal was reasonably necessary."**

23. Turning to the facts of this case, the ET concluded:

> **"7.3.5 … the Respondents [sic] in dismissing the Claimant needed to do so in order to achieve a very real and legitimate aim of adhering to appropriate standards of conduct in the workplace. It is self evident that the appropriate standards of conduct are necessary to ensure the safety of the Respondents employees and represent and real and objective consideration.**
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> **7.3.6 In relation to the question of proportionality, it quite clearly was necessary for the Respondent to dismiss the Claimant. The Claimant had, and one cannot get away from this fact, sexually assaulted his colleagues after stopping medication of his own volition, without seeking medical advice. The Claimant's sexual assault of his colleagues is amongst the most serious violation of the Respondent's standard of conduct imaginable. Any sanction short of dismissal would surely undermine the seriousness of the misconduct and the impact of those staff involved. It is true, not only was there no guarantee that the Claimant would continue taking his medication in future, there remained a continuing risk that the Claimant would suffer further relapse as he had in the past in any event.**
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> **7.3.7 It is accepted that the discriminatory effect of the Respondent's approach is significant. However, given the serious violations committed by the Claimant and the ongoing risk of further misconduct, it would and is, plainly proportionate for the Respondent to dismiss the Claimant."**

Appeal

Unfair Dismissal

24. The Grounds of Appeal can be summarised as follows:

(1) The ET erred in assuming the Claimant's actions amounted to gross misconduct, without any regard to his mental state (his *mens rea*).

(2) The ET further erroneously assumed that a finding that the Claimant had committed the acts in question (the sexual assaults) would automatically lead to a conclusion that dismissal was within the range of reasonable responses of the reasonable employer in these circumstances.

(3) It was perverse for the ET to have found that the Respondent had concluded that "there was still a chance [the Claimant] could choose not to take his antidepressant medication …" (paragraph 5.50), when the evidence of the dismissing manager had been that "There was [a] good as you can get guarantee" that the Claimant would continue to take his medication in the future.

(4) It was also perverse of the ET to have concluded that "the Claimant admitted the gross misconduct in question" when the admission was limited to the commission of acts that were serious; he had not accepted that he was culpable.

Discrimination Arising from Disability

25. The error of law identified was the ET's failure to apply the correct test when assessing whether the Respondent had demonstrated its treatment of the Claimant (the dismissal) was a proportionate means of achieving a legitimate aim. The ET failed to carry out the required balancing exercise and took no account of the effect upon the Claimant.

26. The Grounds of Appeal were considered by His Honour Judge Birtles at a Preliminary Hearing and were permitted to proceed, with a direction that the Employment Judge provide his notes of the cross-examination of Mr Ward. EJ Postle has since done so.

The relevant legal principles

27. The relevant legal principles are largely common ground.

28. In a claim of **unfair dismissal**, the starting point is section 98 of the **Employment Rights Act 1996**. Relevantly, at section 98(2)(b), a dismissal is capable of being fair if for a reason which "relates to the conduct of the employee". The reference to conduct is in general terms. The conduct in question does not have to amount to gross misconduct, although that is how the ET characterised the nature of the conduct in this case.

29. What is meant by "*gross misconduct*" – a concept in some ways more important in the context of a wrongful dismissal claim – has been considered in a number of cases. Most recently, the Supreme Court in **Chhabra v West London Mental Health NHS Trust** [2014] ICR 194 reiterated that it should be conduct which would involve a repudiatory breach of contract (that is, conduct undermining the trust and confidence which is inherent in the particular contract of employment such that the employer should no longer be required to retain the employee in his employment, see **Wilson v Racher** [1974] ICR 428, CA and **Neary v Dean of Westminster** [1999] IRLR 288, approved by the Court of Appeal in **Dunn v AAH Ltd** [2010] IRLR 709, CA). In **Chhabra**, it was found that the conduct would need to be so serious as to potentially make any further relationship and trust between the employer and employee impossible. It is common ground before me that the conduct in issue would

need to amount to either deliberate wrongdoing or gross negligence (see **Sandwell & West Birmingham Hospitals NHS Trust v Westwood** UKEAT/0032/09/LA).

30. The characterisation of an act as "gross misconduct" is thus not simply a matter of choice for the employer. Without falling into the substitution mindset warned against by Mummery LJ in **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220, it will be for the Employment Tribunal to assess whether the conduct in question was such as to be capable of amounting to gross misconduct (see **Eastland Homes Partnership Ltd v Cunningham** UKEAT/0272/13/MC per HHJ Hand QC at paragraph 37). Failure to do so can give rise to an error of law: the Employment Tribunal will have failed to determine whether it was within the range of reasonable responses to treat the conduct as sufficient reason for dismissing the employee summarily.

31. The reason for a dismissal will be determined subjectively: what was in the mind of the employer at the time the decision was taken. Whether the dismissal for that reason was fair, however, imports a degree of objectivity, albeit to be tested against the standard of the reasonable employer and allowing that there is a margin of appreciation – a range of reasonable responses – rather than any absolute standard. So if an employer dismisses for a reason characterised as gross misconduct, the Employment Tribunal will need to determine whether there were reasonable grounds for the belief that the employee was indeed guilty of the conduct in question and that such conduct was capable of amounting to gross misconduct (implying an element of culpability on the part of the employee). Assuming reasonable grounds for the belief that the employee committed the act in issue, the Tribunal will thus still need to consider whether there were reasonable grounds for concluding that she had done so wilfully or in a grossly negligent way.

32. Even if the Employment Tribunal has concluded that the employer was entitled to regard an employee as having committed an act of gross misconduct (i.e. a reasonable investigation having been carried out, there were reasonable grounds for that belief), that will not be determinative of the question of fairness. The Tribunal will still need to consider whether it was within the range of reasonable responses to dismiss that employee for that conduct. The answer in most cases might be that it was, but that cannot simply be assumed. The Tribunal's task in this regard was considered by a different division of this Court (Langstaff P presiding) in **Brito-Babapulle v Ealing NHS Trust** UKEAT0358/12/1406, as follows:

> **"38. The logical jump from gross misconduct to the proposition that dismissal must then inevitably fall within the range of reasonable responses gives no room for considering whether, though the misconduct is gross and dismissal almost inevitable, mitigating factors may be such that dismissal is not reasonable. […]**
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> **39. […] What is set out at paragraph 13 ["Once gross misconduct is found, dismissal must always fall within the range of reasonable responses …"] is set out as a stark proposition of law. It is an argument of cause and consequence which admits of no exception. It rather suggests that gross misconduct, often a contractual test, is determinative of the question whether a dismissal is unfair, which is not a contractual test but is dependent upon the separate consideration which is called for under s.98 of the Employment Rights Act 1996.**
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> **40. It is not sufficient to point to the fact that the employer considered the mitigation and rejected it […], because a tribunal cannot abdicate its function to that of the employer. It is the Tribunal's task to assess whether the employer's behaviour is reasonable or unreasonable having regard to the reason for dismissal. It is the whole of the circumstances that it must consider with regard to equity and the substantial merits of the case. But this general assessment necessarily includes a consideration of those matters that might mitigate. […]"**

33. The protection against **discrimination arising from disability** is provided by section 15 **Equality Act 2010**, (relevantly) as follows:

> **"(1) A person (A) discriminates against a disabled person (B) if-**
>
> > **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> >
> > **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."**

34. In this case, the ET was concerned with the possibility of an objective justification of the unfavourable treatment (dismissal) of the Claimant, under section 15(1)(b). In this regard, both parties relied on the guidance laid down in the Judgment of Pill LJ (with whom Thomas and Gage LJJ agreed) in **Hardys and Hansons plc v Lax** [2005] IRLR 726, CA, as follows:

> **"32. … The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal … is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.**
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> **33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in Allonby and in Cadman, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in Allonby and in Cadman, the respect due to the conclusions of the fact finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.**
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> **34. The power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a power and duty in the appellate courts to scrutinise carefully the manner in which its decision has been reached. The risk of superficiality is revealed in the cases cited and, in this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions."**

35. As the use of the term "objective" makes plain, whether or not a measure is justified in this sense will not depend upon the subjective belief of the employer. Thus the test is not whether the employer considered other alternatives at the time of implementing the measure in question, see **Cadman v HSE** [2005] ICR 1546, CA, at paragraph 28. Neither will an objective justification be undermined because the employer's consideration of the issue was inadequate or procedurally flawed, see per Underhill J (as he then was) in **HM Prison service v Johnson** [2007] IRLR 951; although, of course, that might – as a matter of fact –

have meant that the employer failed to appreciate that there were other, less discriminatory, alternatives available.

36. In its guidance as to "What is proportionate", the Equality and Human Rights Commission's Code of Practice on Employment (2011) (relevantly) states:

> **"3.40 … EU law views treatment as proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. But 'necessary' does not mean that the provision, criteria or practice is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."**

37. The task of Employment Tribunals in determining objective justification was considered by the Supreme Court (in the context of age discrimination) in **Chief Constable of West Yorkshire Police and anor v Homer** [2012] ICR 704, where Baroness Hale cited with approval the approach laid down by Mummery LJ (at paragraph 151) in **R (Elias) v Secretary of State for Defence** [2006] 1 WLR 3213:

> **"the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group. … [adopting a three-stage test derived from the case of de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing [1999] 1 AC 69, 80] … First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"**

38. In **Homer** the question of justification was remitted for fresh consideration because the Supreme Court considered that:

> **"the employment tribunal did not approach the question of justification in a suitably structured way, and ask itself all the right questions …".**

Submissions

The Claimant's case

Unfair Dismissal

39. Ms McNeill QC divided her submissions in this respect into two parts: (1) as to the finding that there were reasonable grounds for the Respondent's belief that the Claimant was guilty of gross misconduct; (2) relating to the finding that dismissal was within the range of reasonable responses.

40. On the question of the grounds for the Respondent's belief, she submitted that the ET erred in three respects. First, in the move from the conclusion that the Claimant committed the acts in question to a finding that this was gross misconduct. Second, in interpreting the Claimant's admission as to the facts as conceding gross misconduct. Third, in endorsing the Respondent's view that the Claimant's state of mind was relevant only to possible mitigation and not to the characterisation of the conduct.

41. There were also issues as to the ET's findings. The ET could be certain of the Crown Court sentence (it did not simply "appear" to be as set out at paragraph 5.39). More substantively, the ET should have made a clear finding as to when the Respondent made the decision that the Claimant was guilty of gross misconduct; only then could it properly determine if there were reasonable grounds for that view. The Claimant's case had been that the decision had been made before the resumed disciplinary hearing. At the resumed hearing, Mr Ward made clear that he saw his role as simply determining sanction.

42. Expanding on the substantive arguments, Ms McNeill QC observed that gross misconduct requires that the employee acted in repudiatory breach of contract (**Wilson v**

Racher); the conduct has to amount to deliberate wrongdoing or gross negligence (**Sandwell & West Birmingham Hospitals NHS Trust v Westwood**). The behaviour in question could be intentional – in terms of the intention to commit the act - without it being gross misconduct (**Chhabra**). The role of the Employment Tribunal in such cases was explored by His Honour Judge Hand QC in **Eastland Homes**, who held that a failure to set out what constitutes gross misconduct amounted to an error of law.

43. There was no finding by the ET as to when the decision was taken. It seemed to have assumed that it did not need to scrutinize the Respondent's decision-making because the Claimant had admitted gross misconduct but that was not the case. He had admitted the events in question, not that he had acted wilfully or deliberately; he had no way of knowing coming off anti-depressant medication would cause him to behave in this way. In any event, (a) the charge against him related only to the assaults, not to a failure to take his medication, and (b) an admission of "serious error of judgment" was not sufficient.

44. It could be inferred that the Respondent had concluded that the facts were sufficient for a finding of gross misconduct without any consideration of the Claimant's state of mind: Mr Ward perceived his role as being solely to determine the appropriate sanction. The letter of dismissal made clear that the Respondent had relied on the fact of the assaults; something also apparent from the Employment Judge's notes of Mr Ward's evidence. The Respondent's reliance on the Claimant's admission of a "serious error of judgment", in discontinuing his medication without medical advice, did not meet the requisite test.

45. Turning to the finding on sanction, Ms McNeill QC submitted that the ET's erroneous approach in this case was compounded by its conclusion that the nature of the conduct in

question meant that dismissal must inevitably be within the range of reasonable responses (see paragraph 7.1.5). The assumption made allowed no room for mitigation and thus amounted to an error of law (**Brito-Bapabulle**). Moreover, the ET failed to consider the size and administrative resources of this Respondent. This was of relevance given the positive case put on the Claimant's behalf (during the cross-examination of Mr Ward) that home working could have been considered as an alternative to dismissal. Mr Ward's response made clear that no such alternative was considered. It was also relevant to note (as per the third Ground of appeal) that the Respondent had accepted the Crown Court sentence meant that there was an "as good as you can get guarantee" that the Claimant would take his medication in the future. That evidence was relevant to determining whether dismissal fell within the range of reasonable responses in this case.

Discrimination arising from Disability

46. The issue here was proportionality. The legitimate aim was the need to adhere "to appropriate standards of conduct in the workplace". The ET's approach, however, excluded any consideration of the Claimant's disability. It failed to carry out the critical evaluation and balancing exercise required by section 15(1)(b) (**Hardys and Hansons plc v Lax**). Further, there was an obvious alternative to dismissal in this case, that was home-working. That was simply not considered by the ET (or the Respondent).

47. The ET had conflated legitimate aim with proportionality; with no consideration as to whether the legitimate aim might have been met by some other measure short of dismissal (such as home working). It further simply failed to analyse the evidence as to risk.

48. Further the ET failed to carry out any proper balancing of effect on the Claimant. Simply stating that it accepted that the "discriminatory effect of the Respondent's approach is significant" (paragraph 7.3.7) was insufficient given the particular stigma faced by the Claimant on the open labour market and the fact of his continuing mental health issues. By ignoring the consequences of the unfavourable treatment upon this particular Claimant – with his particular disability – the ET was failing to afford the Claimant the protection he was entitled to under the Equality Act.

The Respondent's case

Unfair Dismissal

49. Ms Barsam submitted that it was necessary to start by understanding what had been found to have been the conduct for which the Claimant was dismissed: the sexual assaults occasioned by his failure to take his medication. The Claimant was seeking to argue that only the assaults themselves had been taken into account but that was not how the Respondent had run its case before the ET and the ET found that the reason for dismissal had been Claimant's conduct (the assaults) but in the context of his having discontinued his medication without medical advice. Hence the use of the word "So" at the beginning of paragraph 7.1.3, referring back to both the assaults (7.1.1) *and* the discontinuation of the medication that had caused the Claimant to commit those assaults (7.1.2).

50. It was also clear that the Respondent had taken into account the requisite mental element. The Claimant's decision to stop taking his medication was not simply considered as potential mitigation. It would be artificial to separate out consideration of the Claimant's conduct and consideration of sanction and the ET was not required to so do.

51. As for when the decision was taken, there could be no dispute on the ET's findings (paragraph 5.49) that this was at the end of the resumed hearing. Even if that was not correct and it was held that the decision that the Claimant's conduct had amounted to gross misconduct had been taken at the end of the first disciplinary hearing, it made no difference. By that stage, Mr Ward already had the evidence before him as to the Claimant's admitted error of judgment in ceasing to take his medication.

52. Accepting that gross misconduct required either deliberate wrongdoing or gross negligence, Ms Barsam conceded that the ET had not expressly referred to these standards but submitted that this was not, of itself, an error of law; the EAT should take care to avoid concluding that an experienced Tribunal had overlooked a point simply because it did not expressly refer to it (**Retarded Childrens Aid society Ltd v Day** [1978] ICR 437, at paragraph 44). This ET had obviously taken account of the Claimant's admitted error of judgment in discontinuing his medication, which he accepted "showed a lack of care on his part" (paragraph 5.8).

53. Ultimately this was a perversity challenge. The Claimant had admitted a serious error of judgment in discontinuing his medication. The ET was entitled to conclude that the Respondent had reasonable grounds for believing he had been guilty of gross misconduct.

54. As for the criticism that the ET had wrongly assumed that a finding of gross misconduct meant that dismissal was necessarily within the range of reasonable responses, that would be a misreading of the ET's reasons. The conclusion reached was not that dismissal was automatically within the range but that any employer - having found that an employee had sexually assaulted colleagues as a result of the employee's "serious error of

judgment" - would dismiss. This ET did not fall into the error identified in **Brito-Babapulle**. Here, the ET was recording its finding of fact, not a statement of law. It was a finding that this was one of those cases, envisaged in **Polkey v Dayton Ltd** [1988] ICR 142, HL, where the offence was so heinous and the facts so manifestly clear that a reasonable employer, could, on the facts known at the time of the dismissal, take the view that no explanation or mitigation could alter the decision to dismiss.

55. This was, further, in the context of the ET's conclusion that there was a continuing risk of relapse and no guarantee that the Claimant would continue taking his medication (paragraph 7.3.6). That conclusion was based on the medical evidence and the Crown Court sentence did not undermine that. Evidence that the sentence provided an "as good as you can get guarantee" fell short of an acceptance by Mr Ward that it *was* a guarantee.

56. As for the alternatives to dismissal, including home-working, that had been put as part of the Claimant's case relevant to disability discrimination and the ET could not be criticised for not referring to it under the heading of unfair dismissal. The ET had directed itself to the express wording of section 98(4) ERA 1996 and could be taken to have had regard to the size and administrative resources of the Respondent.

Discrimination arising from Disability

57. The test of proportionality was an objective one (**Hardys & Handsons plc v Lax**). It is for an ET to make its own assessment as to whether the reasonable needs of the employer outweighed the discriminatory effect of the measure. In so doing, the ET was required to carry out a critical evaluation but the extent of that evaluation would depend on the facts of the case and it might be sufficient for the employer to be able to rely on rational judgment

and the application of common sense. Many cases would not involve a complex evaluation of the employer's business needs.

58. Whether the Respondent had expressly considered alternatives or followed any particular procedure would not be determinative of the issue of justification. What mattered was the practical outcome, not the decision-making process that led to it (see **Crime Reduction Initiatives v Lawrence** UKEAT/0319/13/DA and 0321/13/DA, at paragraph 13, citing the approach approved by Lord Mance in **Belfast City Council v Miss Behavin' Ltd** [2007] 1 WLR 1420, HL).

59. The facts of the present case were simple and that explained the depth of the ET's evaluation. There was no confusion of the two stages: paragraph 7.3.5 was directed at the first limb of objective justification, the identification of the legitimate aim; paragraphs 7.3.6-7 considered proportionality. The discriminatory impact was expressly referred to at paragraph 7.3.7. The brevity of the ET's reasoning simply reflected the fact that this was not in dispute. As for alternatives, the ET expressly rejected the possibility that the legitimate aim would be met by any sanction short of dismissal (7.3.6) and that could be taken to incorporate home-working. The ET's statement at the end of paragraph 7.3.6, relating to the risk of relapse must have been referring to the possibility of the Claimant ceasing to take his medicine; it was accepted that there was no evidence before the ET of such a risk otherwise.

60. Taken as a whole, the ET had done sufficient in carrying out the balancing exercise required of it.

Discussion and conclusions

Unfair Dismissal

61. In respect of the unfair dismissal claim, I agree with Ms Barsam that the starting point has to be to understand what was found to have been in the Respondent's mind as the reason for the dismissal. That is not a matter of simply looking at the label attached but of determining the set of facts that the Respondent had in mind.

62. Given the importance of this point – the issue was, after all, whether the Respondent acted reasonably in treating the reason it had in mind as sufficient reason for dismissing the Claimant – it is unfortunate (to put it neutrally) that the answer is not readily apparent from the ET's Reasons. The relevant paragraphs are as follows:

> **"7.1.1 It is clear in this case that the reason for the dismissal is gross misconduct. Indeed, the Claimant admitted the gross misconduct in question, namely the touching of female breasts at his place of employment and outside his place of employment.**
>
> **7.1.2 In the course of the investigations the Claimant admitted his own serious error of judgment in discontinuing his medication without medical advice.**
>
> **7.1.3So from a procedural view, there was very little investigation that the Respondents [sic] had to carry out, given the fact that the Claimant openly admitted his conduct.**
>
> **7.1.4 When one has the situation where the Claimant admits the gross misconduct, then clearly the Respondents will have reasonable grounds for their belief that the Claimant committed the gross misconduct.**
>
> **7.1.5 Given the nature of the conduct, was the dismissal within the band of a reasonable response that was available to the Respondents? Quite clearly, any Respondent, given the nature of the misconduct, would have invoked a sanction of dismissal. In those circumstances the dismissal was quite clearly fair."**

63. On one reading of these paragraphs, the ET has concluded that the gross misconduct was simply the carrying out of the sexual assaults. That is certainly what paragraph 7.1.1 suggests.

64. I am, however, persuaded by Ms Barsam that this would be an overly technical reading of the reasons; I should take on board the conclusion at paragraph 7.1.2, and allow that the

ET found the Respondent's reasons included the Claimant's admitted error of judgment in discontinuing his medication. That was part of the context in the Respondent's mind when it formed the belief that the Claimant had been guilty of gross misconduct.

65. Having thus identified the reason found to be in the Respondent's mind, the ET was required to consider whether there were reasonable grounds for the Respondent's belief that the Claimant had thereby been guilty of gross misconduct. In saying this, I do not seek to suggest that section 98(2)(b) **ERA 1996** requires all conduct dismissals to involve gross misconduct. It does not. In this case, however, the Respondent put its case on the basis that the Claimant had committed an act of gross misconduct and that is what the ET found to have been the reason for his dismissal. It is, therefore, that which is in issue in this case and that, as is common ground, required culpability on the Claimant's part. He had admitted the sexual assaults and, in the normal course, this would plainly be sufficient to amount to gross misconduct (and, quite possibly, to the kind of obviously heinous offence envisaged by the House of Lords in **Polkey**).

66. This case, however, was very different. The evidence was that the Claimant had only committed these assaults because of his mental impairment. His admission that he had carried out the assaults was not an admission that he had thereby *wilfully* misconducted himself. On the unusual facts of this case, the ET needed to do more than simply consider whether there were reasonable grounds for concluding that the Claimant had performed the act in question; it also had to ask whether there were reasonable grounds for concluding that he had done so wilfully or in a grossly negligent way.

67. I am not satisfied that the ET in this case carried out this assessment. It seems to have taken the view that the Claimant's admission that he carried out the acts in issue was sufficient in itself to amount to an admission that he committed an act of gross misconduct. On the facts of this case, it was not.

68. Ms Barsam urges me to see the ET's reasoning in the round – taking into account the references to the Claimant's admission regarding the decision to discontinue his medication as part of the assessment of gross misconduct. Having already given the ET the benefit of my doubt in respect of its finding as to the reasons in the Respondent's mind, I do not consider I can do so again in terms of its finding as to "reasonable grounds". Allowing that an ET should not be assumed to have failed to have applied the correct test simply because it has not expressly set it out in its reasons, I do consider that this ET fell into error by failing to remind itself as to what is required for a belief in gross misconduct. The statement of the ET's conclusion at paragraph 7.1.1 is unequivocal in its terms: the Claimant admitted gross misconduct by admitting he had carried out the assaults. On the particular facts of this case, that is simply wrong. I recognise that the ET then goes on to refer to the Claimant's admission of a serious error of judgment in respect of his medication (7.1.2), but there is no indication that the ET considered whether this was an admission of culpability such as to amount to gross misconduct. When the ET ultimately concludes that the Respondent had reasonable grounds for its belief that the Claimant "committed the gross misconduct" (7.1.4), a natural reading of this statement is that it is referring back to the erroneous conclusion that he had admitted gross misconduct simply by admitting he had carried out the assaults (7.1.1).

69. Even if I was wrong about that, I am not persuaded that the ET did reach a conclusion that the Claimant's (admitted) "serious error of judgment" in discontinuing his anti-

depressant medication met the required level of wilfulness (or was grossly negligent) such as to itself amount to an act of gross misconduct (even taken together with the assaults that then resulted). The Claimant's evidence (taken from his witness statement) on this point was as follows:

> **"19. Over the summer of 2010, I was gradually taken off […] the anti-psychotic drug […]. I was feeling much better and I hadn't been experiencing any symptoms of my illness for many months.**
>
> **20. The last time I had been taken off both types of medication under the doctor's instructions and I didn't see any reason why I shouldn't come off the anti-depressant medication having already been taken off the anti-psychotic by the experts.**
>
> **21. I had no idea that if I came off the anti-depressants my psychosis could return; that had never been explained to me. I was under the impression that it was the anti-psychotic medication which controlled the voices I had previously experienced and that the anti-depressant medication related solely to my mood."**

70. In the light of what subsequently occurred, the Claimant indeed made a serious error of judgment in this regard. Whether that should properly be characterised as wilful or grossly negligent seems to me to be rather more open to question. It is a question that was properly for the ET but, on the reasons provided, I am not satisfied that it reached any conclusion on this point.

71. I therefore allow the Claimant's appeal against the rejection of his unfair dismissal claim on this basis. For completeness, however, I have also considered the other part of his appeal in respect of this claim; that is, the challenge to the conclusion on sanction.

72. There is no dispute between the parties: what the ET was required to do was to consider whether the sanction of dismissal on (in this particular case) the basis of the finding of gross misconduct fell within the range of reasonable responses of the reasonable employer. It was not permitted to simply assume that it would - or to conclude that there were no

relevant mitigating circumstances, which might mean dismissal was not within the range - simply because the employer had so concluded (see per Langstaff P in **Brito-Bapabulle**).

73. The ET's statement that "any Respondent, given the nature of the misconduct, would have invoked a sanction of dismissal" (7.1.5) does seem to import such an assumption, that dismissal must automatically follow from a finding of gross misconduct. Ms Barsam urges that I should not read this as constituting a statement of the applicable law but as a finding of fact: that this was one of those cases where the offence was so heinous and the facts so manifestly clear that dismissal plainly fell within the range of reasonable responses regardless of explanation or mitigation. I am not persuaded that this is so. The type of case to which Ms Barsam alludes was indeed allowed as a possibility by the House of Lords in **Polkey**, but if that is what the ET was so finding then it would be reasonable to expect that this would have been stated. It is not.

74. Indeed, it would be hard to see how the present case would fall to be characterised as falling within the kind of case envisaged as an exception in **Polkey**. It is true that the sexual assaults would usually constitute a heinous offence but here there was a very relevant explanation and/or mitigation. Ms Barsam has not sought to argue that the act of carrying out the assaults was, by itself, necessarily gross misconduct; she accepts that there would also need to have been an element of culpability on the Claimant's part, hence her reliance on his admission that he had erred in discontinuing his anti-depressant medication. In my judgment, recognising that means recognising that it would not be possible to simply categorise this case as one in which dismissal was plainly within the range of reasonable responses regardless of explanation or mitigation. The question obviously arose as to why the Claimant had stopped taking the anti-depressant medication and as to the degree of his culpability in

that regard. It might be that, asking that question, the ET would still conclude that dismissal fell within the range of reasonable responses. I am, however, not satisfied that it determined that question. If it did, it is not apparent from the reasons provided. A natural reading of paragraph 7.1.5 is that the ET concluded that it was bound to move straight from a finding that the Claimant had committed an act of gross misconduct (which it seemed to think was made out by his admission that he had committed the sexual assaults) to finding that dismissal was within the range, without any regard to the mitigating circumstances in this case.

Discrimination arising from disability

75. The ET's reasoning in respect of this claim is fuller. Furthermore, it evinces a staged approach to the questions raised by the requirement that the Respondent demonstrate "a proportionate means of achieving a legitimate aim". The aim in this case was held to be adherence to appropriate standards of conduct in the workplace. The ET concluded that this was legitimate because "appropriate standards of conduct are necessary to ensure the safety of the Respondent's employees …" (paragraph 7.3.5).

76. The aim, of itself, takes no account of the Claimant's protected characteristic – the factor that had caused him to fail to adhere to the "appropriate standards of conduct". That would not, however, prevent it being a legitimate aim. The relevance of the Claimant's protected characteristic in this case came into play when considering the means chosen to achieve that aim; whether it was no more than was necessary.

77. Here, the means chosen by the Respondent was the dismissal of the Claimant. To the extent that the Claimant had acted in a way that breached appropriate standards of conduct in

the workplace and might do so again, that was clearly one way of achieving the Respondent's aim. On the other hand, it was a means that was devastating for the Claimant, particularly given the nature of his disability.

78. The task of the ET was to scrutinise the means chosen by the Respondent as against such other alternatives that (on the evidence) might have been available to achieve the aim in question. In so doing, it was required to weigh in the balance the discriminatory impact of the measure chosen against such other alternatives open to the employer.

79. Here the only reference to the impact of the discriminatory impact of this measure is in the sentence: "It is accepted that the discriminatory effect of the Respondent's approach is significant." (paragraph 7.3.7). Given the Claimant's evidence as to the effect of the dismissal on him (which included a suicide attempt), this might be seen as a somewhat perfunctory balancing exercise. Ms Barsam, however, urges that this does no more than reflect the fact that the effect on the Claimant was not in dispute. The ET did not need to say anymore; it was obvious.

80. Even if that is correct, I have a real difficulty in seeing how the ET has then carried out any critical evaluation of the possible alternative means. This was certainly part of the Claimant's case before the ET; as put to Mr Ward and as emphasised in closing submissions. In particular, it was the Claimant's case that he could have performed his job from home, thus avoiding the need for him to come on to work premises and thereby removing the risk of any future breach of appropriate standards. The Respondent suggests that the ET plainly rejected that as a plausible alternative when it stated "Any sanction short of dismissal would surely undermine the seriousness of the misconduct and the impact of those staff involved"

(paragraph 7.3.6). The question for me is whether that amounted to a proper understanding and application of the evidence and a fair assessment of the Respondent's attempts at justification.

81. My first difficulty in this regard is that I am not at all sure that the ET's reasons actually engage with the Respondent's stated legitimate aim. As recorded by the ET (see paragraph 7.3.5) that was addressing the need to ensure the safety of its employees for the future (which is what I understand to be the underlying aim of seeking adherence to appropriate standards in the workplace). If so, the question was whether home-working would remove the risk identified. The ET's focus, however, appears to have been on a rather different need; that being the Respondent's need to demonstrate that it was taking a serious approach to the Claimant's conduct and the impact that had had on other members of staff (so, retributive rather than protective). I can accept that this might still amount to a legitimate aim in some cases but (1) it does not appear to have been how the ET had understood the Respondent's aim in this case; and (2) had that been the Respondent's aim, then the ET would have needed to carry out some form of assessment as to whether a perceived need for retribution was sufficiently important to justify limiting a fundamental right (i.e. the protection to which the Claimant was entitled due to his disability).

82. It is right that the ET then goes on (in paragraph 7.3.6) to refer to the future risk posed but the reasons (1) are flawed in their reference to the evidence; and (2) fail to engage with the possible alternative options open to the Respondent. On the first point, whilst the ET might have been entitled to conclude that there was "no guarantee that the Claimant would continue in taking his medication in the future" (Mr Ward's concession being limited to there being "as good as you can get guarantee"; I allow that it might have been open to the ET to

find that this was not a complete guarantee) there was no evidential basis for concluding that there was a risk of relapse even if the Claimant continued taking his medication – which is what the last sentence of that paragraph suggests.

83. On the second question, I am unable to discern any engagement by the ET with the question of future risk in the context of some alternative option, such as home-working. I can see that this might not have entirely removed the risk but there is simply no indication that the ET grappled with this question. Notwithstanding the fact that the Respondent did not consider the issue at the time, would it have been possible for the Claimant to carry out his duties from home? Would there still have been some need for him to come in to the workplace and would it be impossible to manage that to avoid future risk? Did the Respondent have a reasonable concern that this would send out the wrong message and/or in some way fail to address the concerns of those who had previously been assaulted by the Claimant? All these seem to me to be the kind of questions that the ET would have needed to consider (there may be more). If it did, however, the reasons do not evidence this and wholly fail to explain what, if any, conclusion it reached and for what reason.

84. The balancing exercise was for the ET; it required careful scrutiny of the evidence and the case before it. The role of this Court is, in turn, to scrutinise the reasoning of the ET to see whether it has carried out that function. In this case, I cannot find that it did and, in those circumstances, I do not consider that the conclusion reached can be upheld as safe. I therefore also allow the appeal against the dismissal of the claim of discrimination arising from disability.

Concluding Remarks

85. This was a difficult case for all involved. The Claimant has plainly suffered a series of life events and a serious illness that have been catastrophic for him. For its part, the Respondent was faced with an unusual set of circumstances which required a sensitive balancing exercise between its obligations of fairness to the Claimant and its duty of care to its employees more generally. In such cases, it can be all the more important that Tribunals take care to fully set out the reasons that have led to their conclusions. It is trite law that parties are entitled to understand how a Tribunal has reached its Judgment (why they have won or lost). Where the balancing exercise raises issues of particular complexity and sensitivity, it is especially important that the reasons provided are clear, so that parties are not left trying to piece together an explanation for the Judgment or second guess whether the Tribunal has had regard to a particular point. In this case, I am not satisfied that this has been done, both as regards the unfair dismissal or the discrimination arising from disability claims.

86. Having allowed the appeal under both these heads, it remains open to the parties to make further representations as to the disposal of this matter at this stage. It may be that this can be done on paper; most obviously so if the parties are agreed as to the proper way forward. A further hearing can, however, be listed should that prove necessary. At this stage, I direct that the parties are, within 7 days of the handing down of this Judgment, to lodge with the EAT (and exchange with each other) written representations as to the proper disposal of this matter.