Appeal No. UKEAT/0265/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 January 2014

Before

HER HONOUR JUDGE EADY QC

MR D JENKINS OBE

MS N SUTCLIFFE

THAMES HONDA LTD — APPELLANT

MS D PURKIS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR BEYZADE BEYZADE (Solicitor) Astute HR Ltd 1 Quality Court Chancery Lane London WC2A 1HR
For the Respondent	MS ALISON GURDEN (of Counsel) Instructed by: Lansbury Worthington Solicitors 5 King Street Cloisters Clifton Walk King Street London W6 0GY

SUMMARY

UNFAIR DISMISSAL - Reason for the Dismissal

Employment Tribunal erred in making a finding on this question when the issue had been conceded by the Claimant and no opportunity given to the parties to address the possibility of a revision to the list of issues.

The ET having made findings on fairness in the alternative, however, the point was not fatal to the decision on unfair dismissal.

Fairness

The ET's approach to the question of fairness upheld. It was entitled to have regard to the Respondent's own procedures and to the ACAS Code. Its conclusions were not perverse.

HARASSMENT

SEX DISCRIMINATION - Burden of proof

Harassment related to sex: whether the ET erred in the application of the burden of proof in finding that the unwarranted conduct in question "related to" the Claimant's sex. Either insufficient reasoning provided to explain the ET's conclusion or there had been a misapplication of the burden of proof in this case. Appeal allowed on this ground only and point remitted to same ET.

"Unwanted"; "Course of employment"; "Reasonable steps" defence

ET's findings on these issues disclosed no error of law, were not perverse and were adequately explained. All other grounds of appeal dismissed.

HER HONOUR JUDGE EADY QC

Introduction

1. This is a unanimous Judgment of this court, in which we refer to the parties as the Claimant and the Respondent, as they were in the Tribunal below.

2. It is an appeal by the Respondent from a reserved Judgment of an Employment Tribunal chaired by Employment Judge Manley, sitting with members, at Watford Employment Tribunal on 15-17 April 2013. The Judgment was sent to the parties with Reasons on 26 April 2013.

3. The Claimant was represented before the Employment Tribunal by Miss Bonsu of counsel and is today represented before us by Ms Gurden of counsel. The Respondent was represented before the ET by Mr Maratos, a consultant, and is today represented by a solicitor, Mr Beyzade.

The Employment Tribunal hearing

4. The Claimant had made claims of:

4.1 Unfair dismissal. In particular, she contested that no procedure was adopted before her dismissal and that, although there was an appeal, that was also conducted unfairly so could not cure any earlier defects. Moreover, she contested that the dismissal was outside the range of reasonable responses.

4.2 Sex discrimination by way of harassment, namely a series of assaults by Mr Jagdev Khokhar, an employee of the Respondent with whom the Claimant had had a personal relationship, and a barrage of crude sexual comments on the part of Mr Kyri Orphanides, another employee of the Respondent and the Claimant's ultimate manager.

5. The Respondent, for its part, contended that the Claimant was dismissed for a fair reason, namely a reason relating to her conduct, and that the dismissal was fair in all the circumstances of the case. As for the sexual harassment claims, the Respondent did not accept the Claimant's account of events and in any event contended that the Claimant had joined in such sexual banter that might have taken place.

6. The claims and issues had been defined at an earlier case management discussion in September 2012, and are set out within paragraph 1 of the Employment Tribunal's Judgment as follows:

> **"1. By a claim form presented on 9 July 2012 the claimant brought complaints of unfair dismissal and sex discrimination. At a case management discussion in September 2012 those claims and issues were identified as follows:**
>
> **Unfair dismissal**
>
> **1.1 It is not disputed that the reason for the claimant's dismissal was a statutorily permissible reason, namely her conduct.**
>
> **1.2 The claimant disputes the fairness of her dismissal on the following bases:**
>
> **1.2.1 She was dismissed without any procedure having been undertaken:**
>
> **1.2.2 Although she was permitted to appeal against her dismissal (and did so) she asserts that the appeal process was itself conducted unfairly, such that any defects in the original dismissal procedure cannot be said to have been 'cured' by the appeal.**
>
> **1.2.3 Even if a fair procedure had been adopted, dismissal was outside the band of reasonable responses**
>
> **Sex Discrimination**
>
> **1.3 It is not alleged that the dismissal was an act of discrimination.**
>
> **1.4 The claim is one of harassment alone; the claimant does not make allegations of direct discrimination arising out of the same facts.**
>
> **1.5 The unwanted conduct of a sexual nature and/or unwanted conduct related to the protected characteristic of sex is as follows:**
>
> **1.5.1 Mr Jagdev Khokhar (an employee of the respondent) subjected the claimant to a series of physical assaults during 2011 and 2012 and, in particular, on 23 December 2011, 3 March 2012, 2 and 3 and 26 April 2012.**
>
> **1.5.2 The assaults took place in the context of a personal relationship between the claimant and Mr Khokhar and some or all of them were undertaken in the context of attempts by Mr Khokhar to force the claimant to continue with the relationship and were accompanied by threats regarding her job security should she not do so.**

> **1.5.3 Mr Kyri Orphanides (an employee of the respondent and the claimant's ultimate manager) throughout her employment subjected her to a frequent barrage of crude sexual comments and innuendo."**

7. At the full merits hearing, the Employment Tribunal summarised the issues before it as follows (paragraph 2):

> **"In essence the matter is one of unfair dismissal and harassment under s.26 Equality Act 2010. For the unfair dismissal complaint the respondent must satisfy the tribunal that it had one of the potentially fair reasons for dismissal. If the tribunal is so satisfied, we then consider whether the dismissal was fair or unfair. If the reason was conduct we must ask whether the respondent had a genuine belief in the misconduct founded on a fair and reasonable investigation and whether a fair process was followed. Finally, we need to decide whether dismissal fell with the range of reasonable responses. For the harassment claims, there must be unwanted conduct related to sex that had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. That must be judged on an objective and subjective basis."**

The facts

8. The findings of fact made by the Employment Tribunal are set out at paragraphs 7 to 44 of its Reasons, and what follows is simply a summary.

9. The Respondent is (or, at least, was at the time), a five-branch Honda dealership, employing 120 employees overall. The Claimant was employed by the Respondent, initially as an apprentice but then she moved to the position of General Parts and Admin Assistant. After a few months the Respondent decided that that role was not working and moved her again to a position of Sales and Marketing Assistant, reporting to Mr Kyri Orphanides, the Site Manager at Southall Honda, one of the Respondent's smaller branches, employing around 16 employees.

10. At about the end of 2010, early 2011, the Claimant began a personal sexual relationship with another colleague, a Sales Consultant called Mr Jagdev Khokhar. He was, the Tribunal found at paragraph 17 of its Judgment:

> **"...relatively senior, having been [at the Respondent] for about 10 years, being over 10 years older than the claimant and he was a sales consultant. Mr Khokhar denied giving the**

claimant and work related instructions but we find that she did consider him to be in a more senior position and more influential than her."

11. The Tribunal found as a fact that Mr Khokhar had, at the time when the relationship petered out, committed various acts of violence towards the Claimant, both in and out of work. Expressly, the Tribunal found that Mr Khokhar had physically assaulted the Claimant at work, and in particular we refer to the Tribunal's findings at paragraphs 18.5 and 18.8.

12. The Claimant also complained of sexual banter during her employment on the part of Mr Orphanides. The Tribunal, at paragraph 24, set out the various comments made and made findings about the sexist culture within the workplace. The Tribunal, recording Mr Orphanides' apparent denial of those comments (although his evidence seemed to be that he could not actually remember precisely whether he had used that language), found as a fact:

"29. Balancing all the evidence before us, considering the consistency of the claimant's complaints, we find that those matters quoted were said by Mr Orphanides to the claimant."

13. After what the Claimant alleged to have been an assault on the part of Mr Khokhar at work, she absented herself from work. She initially telephoned in to say that she was ill, but subsequently the Respondent was told by her mother that she had been a victim of an assault by her boyfriend, though her mother had not said that this occurred at work nor identified the assailant by name.

14. Having received this information from the Claimant's mother, Mr Orphanides discussed the situation with Mr Forbes, the Managing Director of the Respondent, and the decision was taken to summarily dismiss the Claimant, as communicated to her by letter of 26 April 2012, the text of which is set out in the Tribunal's Reasons at paragraph 20.

15. On receiving that letter, the Claimant appealed against her dismissal. On 3 May 2012, she wrote to the Respondent setting out particulars of her grounds of appeal and her grievances, which included allegations that she had been assaulted at work by Mr Khokhar, and that was why she had absented herself from work. She also made allegations of assaults outside the workplace by Mr Khokhar and allegations as to a barrage of sexual comments and innuendo that she said she had received from Mr Orphanides.

16. Following this, Mr Forbes conducted a meeting with the Claimant and received certain evidence from her in support of her grounds of appeal and her grievances but declined to listen to a recording of a conversation with Mr Khokhar, which she said corroborated her account that she had been assaulted by him. Mr Forbes subsequently investigated matters further by taking statements from other employees, but did not return to the Claimant with the results of his investigation for her comments. Ultimately, Mr Forbes decided to dismiss her appeal against dismissal and also her grievances and he wrote to the Claimant on 25 May 2012 to that effect.

The Employment Tribunal's decision

17. The Employment Tribunal decided:

(1) That the Respondent had not shown a potentially fair reason for dismissal. Even if it had shown such a reason, the dismissal was not procedurally or substantively fair. The Claimant was unfairly dismissed.

(2) The Claimant was harassed because of sex when she was subjected to violence at work by a work colleague, Mr Khokhar, under section 26 of the **Equality Act 2010**, for which conduct the Respondent was liable.

(3) The Claimant was harassed because of sex under section 26 of the **Equality Act 2010** when she was subjected to offensive language at work by a work colleague, Mr Orphanides, for which the Respondent was again liable.

18. The Respondent appeals against the Employment Tribunal's Judgment in each respect.

19. The Tribunal's reasoning in respect of the finding of unfair dismissal is set out at paragraphs 53-55 of its written Reasons:

> **"53. We turn first to the unfair dismissal. The first question is whether the respondent has shown that it had a potentially fair reason to dismiss. It relies on conduct. We find that the respondent has not discharged the burden in this case. It has not indicated any conduct, which on any reasonable consideration, could amount to misconduct. The reason the claimant gave, through her mother, to Mr Orphanides was that she had been hit by her boyfriend and did not feel safe. That cannot be said to be a lie bearing in mind our findings that Mr Khohkar did hit the claimant on that occasion. Adequate investigation by the respondent would have found that that was what the claimant was saying, and Mr Forbes agreed that if that was genuine, it could not be misconduct. The respondent's late alternative argument that the dismissal related to the claimant's unreliability about which she had been given a warning is simply not made out on the evidence. There is no misconduct that the respondent can point to which would be a reason for dismissal.**
>
> **54. However, if we are wrong about that we think it is wise to carry on and consider if the respondent has satisfied us of a potentially fair reason, whether the dismissal was otherwise fair or unfair. Here, of course, the burden is neutral and, as with our findings above, is on the balance of probabilities.**
>
> **55. It is absolutely clear to us that this was an unfair dismissal for a number of reasons:**
>
> > **55.1 Starting at the beginning of the process on 26 April, there is an obligation within the respondent's own procedure, and within the ACAS Code of Practice, that the claimant should receive information, in writing, as to the alleged misconduct.**
> >
> > **55.2 Secondly, again within the respondent's own procedure and the ACAS Code, she could be invited to a meeting. This was not done.**
> >
> > **55.3 Thirdly, the respondent now attempts to rely on a document which they said amounted to a written warning, when it was clearly not such a document. It has not been able to show a document which points out to the claimant that leaving work might lead to her dismissal.**
> >
> > **55.4 Fourthly, we do find that the appeal process was flawed:**
> >
> > > **55.4.1 First, there is a failure by Mr Forbes to consider the evidence that the claimant wanted to show him with respect to substantiating her allegation of being hit by Mr Khokhar.**
> > >
> > > **55.4.2 Secondly, he also failed to put to her what other people had said to him after he had investigated matters.**
> > >
> > > **55.4.3 Thirdly, we say that his previous involvement in discussions around how to deal with the claimant meant that he was not unbiased and had formed, to some extent at least, a pre-judgment on what the outcome should be. There was very little discussion at the appeal meeting about the unfair dismissal itself and**

certainly Mr Forbes' apparently honest evidence was that he was much more concerned with the allegations of harassment.

55.5 The investigation carried out at the appeal appears to us to be incomplete, particularly in view of the fact that we have had very few specifics on what people said in response to the allegations save that nobody had seen any violence at work. There is no doubt in our minds, nor do we genuinely believe in the respondent's and its representative, that this dismissal is plainly and unmistakably an unfair dismissal."

20. As for the harassment claims, the Employment Tribunal's conclusions and reasoning are set out at paragraphs 57-62:

"57. Turning then to the harassment allegations: we deal first with those with respect to Mr Khokhar. Our findings of fact make it clear that we have found that Mr Khokhar did hit or cause injury to the claimant on one occasion outside work and on four occasions within work. We therefore ask whether that was unwanted conduct related to sex. It seems to us that this is undoubtedly the case. It is clearly unwanted conduct and we have not had any evidence to suggest that Mr Khokhar might have hit anyone that was not a woman.

58. We also have no difficulty with stating that this had the purpose or effect of violating the claimant's dignity and of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. There is considerable evidence that that was the case. As far as considering whether it was reasonable for her to have that view we have no doubt that that is a reasonable view both objectively and subjectively. We were asked to consider that this occurred outside Mr Khokhar's course of employment, as set out in s.109 EqA. We do not agree with that proposition. If we concentrate on the injuries caused whilst at work, that clearly takes place in the work environment. Although we accept that Mr Khokhar was not the claimant's line manger, we entirely accept that her perception that he was somebody more senior, in terms of age, his time with the company, and his status, that she believed entirely reasonably that she had more weight at work and would, and could, have some influence on her job security. We do not find that Mr Khokhar said directly to her that he would influence that, but we do believe that she had a genuine belief that he might be able to do that.

59. Giving the words their ordinary meaning, and considering all relevant factors, we find that it was clearly in the course of his employment. Indeed, the fact that this violence did take place at work when we understand the claimant and Mr Khokhar did meet outside work emphasises that it was in the course of employment.

60. Finally, the suggestion that this respondent took steps to prevent this is a completely hopeless argument. We heard absolutely no evidence of any training or reference to any handbook. We were not even taken to the personal harassment policy contained therein. The respondent clearly cannot make out that defence.

61. Turning then to the issue of Mr Orphanides' crude sexual comments, we have found as a fact that these things were said. There is little doubt that at least some of those could amount to unwanted conduct, both under s.26(1)(a) and s.26(2)(a). We are also firmly of the view that that had the purpose or effect of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment. We have rejected the suggestion and very limited evidence on what it is alleged the claimant did which in some way 'went along with' these discussions. The claimant made the point clearly in the grievance letter, and we accept that it had that effect. What is more, considering s.26(4) we note that it was clearly her perception and that perception is entirely reasonable. This employer allowed an environment to develop where people may well have joined in joking around and horseplay and it is clear from the evidence that we have heard that that occasionally got out of hand. It may well be that on occasion the claimant joined in and it may well be that from time to time she caused some irritation to the sales executives and to the technicians. That does not allow or condone the sorts of phrases we have found were used by Mr Orphanides.

62. Turning then to s.109, again there is no question that this was in the course of Mr Orphanides' employment. He was the claimant's line manager and it is clearly in the course of his employment without any question. Finally we say for completeness that we cannot accept that the Respondent can rely on the defence in s.109(4). They have taken no

reasonable steps to prevent Mr Orphanides or anyone else from using this sort of language. Although this is of limited use to us, it does appear from both the partial admission by Mr Orphanides and by the witness statement of Ms Green that this was a common occurrence in the workplace."

21. For completeness, we note that the Respondent has at various times lodged other appeals in this matter, but only one other remains extant at this time and that is an appeal against the Employment Tribunal's subsequent Judgment on remedy. That appeal has been stayed in part pending the outcome of this appeal.

The appeal

22. Returning then to the liability appeal with which we are concerned, the Respondent's grounds of appeal can be summarised as follows.

23. On the unfair dismissal claim, first, whether the Employment Tribunal erred in considering the question whether the Respondent had established a potentially fair reason for dismissal when that was not a matter in issue before it. Second, even if the issue of the reason for dismissal was before the Employment Tribunal, did the ET err in law in requiring the Respondent to do more in terms of its investigation than required by the **Burchell** guidelines, in particular to conduct a complete investigation? Third, did the Employment Tribunal reach a conclusion that was perverse/effectively amounted to a substitution of its view for that of the employer, in concluding that the decision to dismiss was not for a conduct-related reason and/or was outside the range of reasonable responses?

24. On the sexual harassment claim, the fourth ground of appeal can be summarised as follows: did the ET apply the wrong test/reach a perverse view in determining that the matters complained of occurred in the course of employment? Fifth, did the ET err in considering the statutory defence in respect of the allegations relating to Mr Khokhar and Mr Orphanides

together, thus failing to separate these matters out? Sixth, was the ET's conclusion that Mr Khokhar's conduct related to the Claimant's sex perverse and/or did the ET err in its application of the burden of proof in this regard? Seventh, did the ET err in finding that the allegations relating to Mr Orphanides were made out when such a finding would have been perverse and/or is inadequately explained, in particular in respect of the application of the burden of proof?

The law

25. In respect of unfair dismissal, the relevant provisions are contained in section 98 of the **Employment Rights Act**, in particular subsections (1), (2)(b) and 4:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **2 A reason falls within this Section if it –**
>
> **...**
>
> **(b) relates to the conduct of the employee,**
>
> **...**
>
> **4. In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

26. As for the guideline authority, that remains the case of **BHS v Burchell** [1980] ICR 303 EAT and the well-known passage which is set out at page 304, paragraphs C-F:

> **"We have had cited to us, we believe, really all the cases which deal with this particular aspect in the recent history of this Tribunal over the three or four years; and the conclusions to be drawn from the cases we think are quite plain. What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the**

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

27. We have also, of course, had regard to the other well-known authority in this area, the **Royal Society for the Protection of birds v Croucher** [1984] ICR 604, which reminds tribunals that, in that case, where the employee had admitted the dishonest conduct in question, there need not always be scope for an investigation and an Employment Tribunal can place too much emphasis on the requirements laid down in **Burchell**. We accept that regard must always be had to the touchstone of the relevant statutory provision, which is now section 98(4).

28. As for the claims of sexual harassment, we reminded ourselves of the legislative provisions in section 26 of the **Equality Act 2010**:

"26. A person (A) harasses another person (B) if --

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation."

29. In considering the harassment claims, we also had regard to the guidance provided by the EAT, (the former President, then Underhill J, presiding) in **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336.

30. As for the requirement, for the purposes of vicarious responsibility, that conduct be "in the course of employment", we had regard to the leading decision of the Court of Appeal in **Jones v Tower Boot Company Ltd** [1997] ICR 254.

31. As we understand the guidance, the correct test is whether - interpreting the words "in the course of employment" as they would be interpreted in everyday speech - the conduct in question falls within the meaning of the phrase.

32. On the burden of proof, we have been guided by the well-known authorities **Igen Ltd &Ors v Wong** [2005] ICR 931, **Madarassy v Nomura International plc** [2007]

ICR 867 and **Hewage v Grampian Health Board** [2012] UKSC 37, in particular paragraphs 25, and 30-32:

> **"25. …, in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts: … the purpose of that assumption is to shift the burden of proof at the second stage. It does not diminish in any way the burden of proof at the first stage, when the tribunal is looking at the primary facts that must be established. … the first stage requires the complainant to *prove* the facts from which the tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant.**
>
> **....**
>
> **30. Nevertheless Mummery LJ went on in paras 56 and following of his judgment in *Madarassy* to offer his own comments as to how the guidance in *Igen v Wong* ought to be interpreted, which I would respectfully endorse. In para 70, having re-stated what the tribunal should and should not do at each stage in the two stage process, he pointed out that from a practical point of view, although the statute involved a two-stage analysis, the tribunal does not in practice hear the evidence and the argument in two stages:**
>
> > **'The employment tribunal will have heard all the evidence in the case before it embarks on the two-stage analysis in order to decide, first, whether the burden of proof has moved to the respondent and, if so, secondly, whether the respondent has discharged the burden of proof.'**
>
> **31. In para 77, … he said:**
>
> > **'In my judgment, it is unhelpful to introduce words like '*presume*' into the first stage of establishing a prima facie case. Section 63A(2) makes no mention of any presumption. In the relevant passage in *Igen Ltd v Wong* … the court explained why the court does not, at the first stage, consider the absence of an adequate explanation. The tribunal is told by the section to assume the absence of an adequate explanation. The absence of an adequate explanation only becomes relevant to the burden of proof at the second stage when the respondent has to prove that he did not commit an unlawful act of discrimination.'**
>
> **The assumption at that stage, in other words, is simply that there is no adequate explanation. There is no assumption as to whether or not a prima facie case has been established. The wording of sections 63A(2) and 54A(2) is quite explicit on this point. The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be *proved*, and it is for the claimant to discharge that burden.**
>
> **32. … Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other….."**

Oral submissions

33. Before us the Respondent made its submission on its grounds of appeal in a slightly different order to those set out in the original Notice of Appeal, and we follow the order as presented to us in oral argument in this Judgment.

34. On the reason for dismissal point, the Respondent argued that this was not a matter for the Employment Tribunal. The reason for dismissal had been clearly set out in the dismissal letter and was not disputed before the Employment Tribunal. The fact that the Tribunal used the word "misconduct" suggested an element of blameworthiness that was not in the language of the statute.

35. In any event, turning to the next ground of appeal, the Respondent submitted that the Employment Tribunal had erred in applying the three-stage test in **Burchell**. Looking at the Tribunal's findings at paragraph 55 of the written Reasons, the Respondent submitted that the Employment Tribunal had effectively substituted its view for that of the reasonable employer and should not have applied the ACAS Code or the Respondent's own procedure as if it were a knockout blow that the Respondent had failed to comply with them. In this case, it would be unreasonable to expect the Respondent to go through its own procedure. Furthermore the absence of a meeting before the dismissal took effect did not necessarily make it unfair. The procedure needed to be looked at a whole, taking into account the appeal as well. Although the Tribunal had looked at the appeal and made findings adverse to the Respondent on that, the Respondent argued that those decisions were also examples of the Tribunal substituting its own view for that of the employer, applying a test other than the range of reasonable responses and making findings which were, in the circumstances of this case, perverse.

36. More generally, on the range of reasonable responses test, the Respondent submitted that the Tribunal had stepped in and usurped the employer both in terms of process and generally in its finding that this was not a conduct dismissal.

37. As for the case of sexual harassment, the Respondent submitted that the Employment Tribunal had erred in law in its application of section 26. As a matter of law, the conduct had to be "related to" the Claimant's sex. Here, the Employment Tribunal at paragraph 57 asked itself the right question to that extent – "We therefore ask whether that was unwanted conduct related to sex" – but erred in its conclusion. The Tribunal went to say:

> **"It seems to us that this is undoubtedly the case. It is clearly unwanted conduct and we have not had any evidence that Mr Khokhar might have hit anyone who was not a woman."**

38. The Respondent complains that the Tribunal was shifting the burden of proof without showing that they were satisfied that the Claimant had established sufficient facts on which the Employment Tribunal could conclude that this amounted to sexual harassment. In any event, it would be perverse for the Tribunal to have made such a conclusion as no reasonable Tribunal could conclude that being hit at work after being in a sexual relationship could be related to sex.

39. On the other grounds under the sexual harassment appeal, the Respondent claims that it was perverse of the Employment Tribunal to find the conduct in question was unwanted in respect of the comments made by Mr Orphanides, given its finding that:

> **"61....It may well be that on occasion the claimant joined in and it may well be that from time to time she caused some irritation to the sales executives and to the technicians."**

Given that finding, the Respondent says it was perverse to find that Mr Orphanides' comments were unwanted.

40. The Respondent also argued that the finding that Mr Khokhar had acted in the course of his employment was a perverse conclusion given that, although the Tribunal had found that he had carried out assaults in the workplace environment, there was a background of a personal relationship which took such behaviour outside the course of employment. There was a failure,

the Respondent argued, on the part of the Employment Tribunal to properly analyse what had taken place.

41. Finally, in relation to what is called in shorthand "the statutory defence point" – that is, the reasonable steps defence provided by section 109(4) of the **Equality Act** - the Respondent complained that the Employment Tribunal had elided the conduct of Mr Khokhar and Mr Orphanides and should have separated out its consideration of this point in respect of each. Furthermore, it was perverse of the Tribunal to conclude adverse to the Respondent's case on this as the Claimant had failed to make earlier complaints on these matters.

42. For the Claimant, on the unfair dismissal argument, it was accepted that the list of issues which arose from the case management discussion had included an acceptance by the Claimant that she had been given a reason for her dismissal and that this was not raised as an issue for the Tribunal to determine. On the other hand, it was observed that Mr Forbes, when giving evidence to the Tribunal, had added an addendum to his statement, which suggested that, even if it was the case that she had been having an affair, then that kind of conduct could have constituted an alternative reason for her dismissal in any event.

43. Given Mr Forbes' addendum to his statement, it was submitted that that confused matters before the Employment Tribunal and the Employment Tribunal was entitled to go on to make a finding on the reason for dismissal, which was other than that contended by the Respondent.

44. As for the other arguments and grounds relating to the unfair dismissal claim, this was an attempt to re-argue the case on these points, which was impermissible at the appeal stage. As for the criticisms made of the standards applied by the Employment Tribunal to this employer, it was submitted it had to be borne in mind that the size and administrative resources of this

Respondent included procedures laid down to some extent by Honda, i.e. a much larger organisation lay behind this employer.

45. The Claimant reminded us that the test of perversity, as laid down in the seminal case of **Yeboah v Crofton** [2002] IRLR 634 (CA) was a very high one. Both parties had been represented before the Employment Tribunal and it was not for the Employment Tribunal to have to search around for additional points for the Respondent.

46. On the harassment appeal, the Claimant submitted that, on the burden of proof point, the Claimant's witness statement had put forward evidence and material before the Tribunal from which it could properly conclude that there had been conduct related to her sex for section 26 purposes and therefore the Tribunal was entitled to look to the Respondent for an explanation. As for the course of employment, again, the Claimant submitted that the Employment Tribunal reached conclusions which were open to it on the facts and its reasons for so doing are adequately set out.

47. As to the statutory defence, the Claimant observed that the Tribunal had set out its reasoning separately in respect of the matters relating to Mr Khokhar and those relating to Mr Orphanides and contended that if the Respondent had failed to take the Employment Tribunal to its handbook to justify its reasonable steps defence the Employment Tribunal could not be blamed for its conclusion in that regard.

Discussion and conclusions

48. Turning then to our conclusions. On the first point raised to us, it was of some concern to us that the Employment Tribunal went on to make a finding on the question of reason for the dismissal when it had expressly set out the issues as agreed by the parties at the case

management discussion, which apparently demonstrated that was not an issue before this Tribunal. We see the point that the addendum to Mr Forbes' statement, which was dealing with the possibility of an alternative case (i.e. pre-empting a possible **Polkey** argument), might have confused matters. That, in part, might explain how the Tribunal puts its finding at paragraph 53. It does not, however, fully explain why the Employment Tribunal should have made a finding on a point that it had expressly stated was not before it.

49. If the Employment Tribunal had felt that the evidence had changed matters - and we have some sympathy with a Tribunal that is concerned that it is fettered by a list of issues when it has heard apparently contradictory evidence - then the proper course would have been to have raised its concern with the parties, giving them the opportunity to make representations on the point and it should have made subsequent change to the list of issues clear in its reasoning.

50. Having made that criticism, we do not however conclude that this error, as we see it, is fatal to the Employment Tribunal's decision. The Employment Tribunal expressly went on to consider the alternative possibility, i.e. if the Respondent had demonstrated that the dismissal was for a statutory permissible reason, was the dismissal fair or unfair? See paragraph 54 of the Employment Tribunal's Reasons:

> **"However, if we are wrong about that we think it is wise to carry on and consider if the respondent had satisfied us of a potentially fair reason, whether the dismissal was otherwise fair or unfair. Here, of course, the burden is neutral and, as with our findings above, is on the balance of probabilities."**

51. We then turn to the arguments and the grounds of appeal relating to the Tribunal's findings on fairness. We see nothing in these points. The Employment Tribunal, at paragraph 55, goes through the factors which were obviously relevant. To be frank, the more we heard from the Respondent's representative in this regard, the more relevant those matters

seemed to us to be. We do not, however, need to go that far, because they were plainly relevant for the Employment Tribunal to take into account. The Employment Tribunal was entitled to look at the Respondent's own procedure and the ACAS Code of Practice, and it was entitled to form a view as to the fairness or otherwise of the process carried out by the Respondent. It was required to take account of the entirety of the disciplinary process and it obviously did. It expressly looked at the appeal stage, and it considered, on the evidence before it, that there were defects at the appeal which meant that the earlier unfairness was not remedied. Those were all matters for the Employment Tribunal's Judgment and disclose no error of law.

52. The Employment Tribunal was entitled to take the view that the investigation was inadequate, on the facts of this case. This was not a case such as that in **RSPB v Croucher**. The Claimant had not admitted misconduct. She was putting forward an explanation for her conduct, which gave a very different perspective on events and which cried out for investigation. That is apparent to this court, but - more relevantly - was plainly apparent to the Employment Tribunal.

53. Given our view as to the Tribunal's finding on reason, it seems to us that in fact paragraph 53 cannot stand as a finding on the reason for the dismissal. We do not, however, consider that that impacts at all on the primary findings of fact that the Tribunal made. The fact that the list of issues might have conceded that the Respondent genuinely thought it was dismissing for a reason relating to the Claimant's conduct does not stop the Employment Tribunal having found, applying an objective test as to what took place, that the Respondent was in fact mistaken.

54. So, as we have said before, our criticism of the Employment Tribunal's decision in this regard does not undermine its finding on unfair dismissal and we do not uphold the appeal in this regard.

55. Turning then to the harassment points. In our judgment, looking first at the question of the application of section 26 **Equality Act 2010**, and whether the Employment Tribunal was correct in its approach to the question whether the conduct was related to the Claimant's sex, we consider that the attempt to argue that the Tribunal's conclusion was perverse goes nowhere. The better argument, indeed the only argument, is that the Tribunal's Reasons might disclose an incorrect application of the burden of proof. We say "might" because it occurs to us that it might just be inadequacy of reasons rather than actual misapplication of the burden of proof provision. The crucial paragraph is paragraph 57, where the Tribunal says:

> **"Our findings of fact make it clear that we have found that Mr Khokhar did hit or cause injury to the claimant on one occasion outside work and on four occasions within work. We therefore ask whether that was unwanted conduct related to sex. It seems to us that this is undoubtedly the case. It is clearly unwanted conduct and we have not had any evidence to suggest that Mr Khokhar might have hit anyone that was not a woman."**

56. We can see, on the basis of the Tribunal's primary findings of fact, that it is possible that the Tribunal had in mind various factors on which basis it might have drawn the conclusion that the Claimant had discharged the primary burden of proof. However, we cannot be fully satisfied of that. As we have said, it may just be an inadequacy of reasoning or it may be that the Employment Tribunal wrongly imposed a burden of proof on the Respondent before it had satisfied itself that the burden had actually shifted. To that limited extent, we would allow this appeal.

57. We go on to address the other points submitted to us in relation to the sexual harassment grounds of appeal. In relation to the suggestion that the Tribunal reached a perverse conclusion

as to whether or not the conduct of Mr Orphanides was unwanted, we consider the answer is provided if one to reads paragraph 61 of the Employment Tribunal's Reasons in its entirety:

> **"Turning then to the issue of Mr Orphanides' crude sexual comments, we have found as a fact that these things were said. There is little doubt that at least some of those could amount to unwanted conduct, both under s.26(1)(a) and s.26(2)(a). We are also firmly of the view that that had the purpose or effect of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment. We have rejected the suggestion and very limited evidence on what it is alleged the claimant did which in some way 'went along with' these discussions. The claimant made the point clearly in the grievance letter, and we accept that it had that effect. What is more, considering s.26(4)we note that it was clearly her perception and that perception is entirely reasonable. This employer allowed an environment to develop where people may well have joined in joking around and horseplay and it is clear from the evidence that we have heard that that occasionally got out of hand. It may well be that on occasion the claimant joined in and it may well be that from time to time she caused some irritation to the sales executives and to the technicians. That does not allow or condone the sorts of phrases we have found were used by Mr Orphanides."**

58. The Tribunal's conclusions, therefore, specifically address this point. The Tribunal rejected the suggestion that the Claimant in some way went along with these discussions. The phrase "these discussions" plainly refers back to Mr Orphanides' crude sexual comments, and, to the limited extent that the Tribunal had found the Claimant had joined in some degree of joking around and horseplay, that is not the same as saying that she was joining in with Mr Orphanides' crude sexual comments. Moreover, the Tribunal expressly found "That does not allow or condone the sorts of phrases we have found were used by Mr Orphanides".

59. We see nothing perverse in the Tribunal reaching the finding that it did, that Mr Orphanides' comments were unwanted. There is no inconsistency in the Tribunal's findings.

60. As for the Tribunal's conclusion on the phrase "in the course of employment", this is a fact-sensitive matter and that the Tribunal rightly distinguished between such conduct as took place outside the workplace and that conduct which took place at work. At work, Mr Khokhar, who was in a senior position to the Claimant and plainly seen in that way (as the Tribunal so found), called her into his office and then physically assaulted her. As the Tribunal saw the

matter, when he instructed her to come to his office, he did so as someone in a position of seniority to her at work. Whether we would have reached the same conclusion is not the relevant point. This was a matter for the Tribunal and it reached a finding of fact which was open to it on the evidence it had heard.

61. As for the reasonable steps defence point, we do not agree that the Tribunal elided the matters relating to Mr Khokhar and Mr Orphanides. The reasoning of the Tribunal was very clearly set out. It is apparent that paragraph 60 sets out the Tribunal's consideration of this point in relation to Mr Khokhar's behaviour. Paragraph 62, on the other hand, sets out the Tribunal's consideration of this point in relation to Mr Orphanides. The two cases have not been confused but have expressly been given separate consideration.

62. As for whether the Tribunal's conclusions should be seen as perverse, the submissions that we have heard from the Respondent do not begin to mount the difficult climb they would have to undertake to meet the **Crofton v Yeboah** test. The Tribunal were entitled to reach the conclusions they did on the evidence before them.

63. Save to the limited extent that we have stated, we dismiss this appeal.

Disposal

64. Having given our Judgment in this matter, we invited the parties to make representations to us as to the appropriate disposal of the appeal.

65. For the Claimant it was submitted that it was appropriate for this matter to be sent back to the same Employment Tribunal to deal with the point in question, applying any case

management directions it saw fit. The Claimant noted that the matter was due to return to the Employment Tribunal on the following Monday in any event.

66. For the Respondent it was argued that this was not an appropriate case to be remitted back to the same Employment Tribunal. The point in question was a short one and could be heard afresh by an entirely new Employment Tribunal, perhaps within a day. Reliance was placed on the case of **SSWP (Jobcentre Plus) v Higgins** UKEAT/0579/12/DM, in which it was felt, applying the criteria set out in **Sinclair Roche Temperley v Heard & Anr** [2004] IRLR 763, that the most satisfactory course was that that case should be heard afresh.

67. We apply the test laid down in **Sinclair Roche Temperley v Heard & Anr**. We take into account the question of proportionality in this case, the passage of time, the possibility of bias (not argued) or partiality. This was a case heard in April of last year. The same Tribunal heard the issues in relation to remedy in June of last year, and is about to deal with a review application on the question of the remedies judgement. In terms of the passage of time, we see no reason why this matter should not be sent back to the same Tribunal. We have no concern about bias or partiality; neither of those points have been raised before us, nor any suggestion of that nature made. Furthermore, in our judgment, as we have made clear, this is a Tribunal that carried out its task in a careful and conscientious fashion and, apart from the two points which we raised in our Judgement, we give credit to it for its written Reasons and Judgment in this case. This is not a situation where the Tribunal carried out a wholly flawed hearing. In the circumstances, it seems to us that the overwhelmingly proportionate and correct response is to remit this matter to the same Employment Tribunal.

68. We do not envisage that any further evidence would be needed. The Employment Tribunal has already made its findings in relation to the evidence. A different Employment

Tribunal would of course have to consider all the evidence again, and we fear it might need to take more than a day to set it in context. We envisage that this Employment Tribunal might wish to have further submissions on the specific issue remitted to it but whether those should be made orally or in writing must be a matter for it.

69. The parties should make any written submissions to me on costs within 14 days.