

**EMPLOYMENT APPEAL TRIBUNAL**  
52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal  
On 11 February 2014

**Before**

**THE HONOURABLE LADY STACEY**

**(SITTING ALONE)**

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PERTH & KINROSS COUNCIL

APPELLANT

MRS VALERIE GAULD

RESPONDENT

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JUDGMENT

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## **APPEARANCES**

For the Appellant

MR J MacMILLAN  
(Solicitor)  
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For the Respondent

MS A STOBART  
(Advocate)  
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## **SUMMARY**

### **DISABILITY DISCRIMINATION**

The Employment Tribunal found that the Appellant had dismissed the Respondent unfairly. The Appellant argued that the ET had substituted its own view for that of the Appellant **Held:** the ET had reached a view that it was entitled to reach, having directed itself correctly on the law. It made no error of law. Appeal dismissed.

## **THE HONOURABLE LADY STACEY**

1. This is an appeal against a finding of unfair dismissal in a decision sent to the parties on 22 January 2013, following a hearing held on several days between 12 December 2011 and 11 December 2012. The written reasons were the subject of a request for review, which resulted in written reasons being sent to parties 29 May 2013 setting out the ET's decision, and a certificate of correction being sent on 24 June 2013. The corrections were of typing errors and infelicities of expression and the sense of the judgment did not alter following review.

2. I will refer to the parties as the Claimant and Respondent as they were in the ET. The unanimous decision of the ET was as follows: –

**“(1) that the Claimant’s application for findings of direct disability discrimination, failure on the part of the Respondents to make reasonable adjustments and victimisation do not succeed and are dismissed.**

**(2) That the Claimant’s application for a finding that she was unfairly dismissed from her employment by the Respondents succeeds and the matter will proceed to a hearing on remedy.”**

3. No appeal was taken by the Claimant in connection with her application in respect of disability discrimination, lack of reasonable adjustments and victimisation. Therefore the matter before the EAT was solely that of the Respondent’s appeal against the finding of unfair dismissal. At the ET Mr Glass, solicitor represented the Claimant. Ms Stobart, advocate, represented the Claimant at the EAT. Mr Macmillan, solicitor, represented the Respondent both at the ET and at the EAT.

4. The basic story in this case may be stated shortly. The Claimant was diagnosed as having cancer in autumn 2008. She was off work for treatment during December 2008 and a part of January 2009. When she returned to work adjustments were made to enable her to have a

phased return with shorter working hours. She began to attend the Maggie's Centre for psychological counselling towards the end of 2009. In the summer of 2010 the Claimant's line manager, Mrs Linda Whiteford found that she had to speak to the Claimant about some work that she had done which had resulted in a query from another department of the Respondent. Shortly afterwards the Claimant went off sick and never returned to work for the Respondent.

5. The reason for the Claimant being absent was work-related stress. The Claimant said that Mrs Whiteford had treated her in such a way as to make her ill. That claim was investigated and was held to be ill founded. The Respondent then brought disciplinary proceedings against the Claimant for making those allegations against Mrs Whiteford. Those proceedings resulted in the Claimant being dismissed, which was upheld on appeal.

6. The Employment Tribunal (ET) found the dismissal unfair. The Respondents argued that the ET had substituted its own view for that of the employer. Thus the case before the EAT concerned whether or not there had been an error of law by the Tribunal in substituting its own view for that of the respondent. After considering all of the submissions made to me I have come to the view that the ET did not err in that fashion.

7. The Claimant is a solicitor and that the Respondent is a local authority. The Claimant joined the Respondent in March 2008. In the autumn of 2008 she was diagnosed with cancer and had various periods of sickness absence related to that condition and her treatment for it. She was off work between 1 October 2008 and 9 January 2009. When she returned to work in January 2009, as a result of occupational health advice, she had a phased return. That included working between the hours of 0930 and 1500. Towards the end of January, further modifications were suggested to her hours including home-working and the provision of time for hospital appointments. In September 2009 the Claimant started a 4 to 5 week course of

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transition sessions at Maggie's Centre, a facility which provides psychological support for those who have suffered from cancer. She was treated by Ms Lesley Howells, lead consultant clinical psychologist.

8. In May 2010 the Claimant was involved in carrying out work for a lease which the Respondent wished to grant to a company to provide for a bungee jump facility. The Claimant's manager, Mrs Whiteford, raised issues with the Claimant about her work, a query having come from the client, that is another department within the local authority. On 28 June 2010 the Claimant went off work sick and did not return to work thereafter. She advised Mrs Whiteford, by phone, on 29 June 2010 that she was off work with work related stress. When Mrs Whiteford discovered from the medical certificates supplied for the Claimant that she was off work with "work-related stress" Mrs Whiteford took advice from HR Department, and telephoned the Claimant and asked what the cause of the stress was. The Claimant told her that she, Mrs Whiteford, was the cause. Mrs Whiteford was taken aback by this and could not think of anything she had done to elicit such a reaction. The Respondent arranged to have a sickness review meeting on 20 July 2010 in order to identify the source of stress. The Claimant did not want to attend the meeting and told Mrs Nicholl, of the HR Department that she did not feel up to it. She said that she had taken to heart a number of comments and actions of Mrs Whiteford which she regarded as insensitive. She was reassured by her trade union representative, Mr Taylor, that the meeting would be short and that it would be normal to have a stress action plan put into operation to assist her to get back to work. The ET found, at paragraphs 52 and 53 that the following took place at the meeting.

**"52. At the outset of the meeting Mrs Whiteford wanted her to set out the causes of her stress. Mrs Whiteford had decided that she wanted to address these issues in the hope of bringing matters to a conclusion. She hoped to persuade the Claimant that she had no basis to suggest that she was responsible for her stress. Mrs Whiteford could not accept that any of her actions could be the cause of the Claimant's stress. She was not prepared to accept that she was in any way to blame for the Claimant's stress and responded to the suggestions being made by the Claimant in detail justifying her own position. In particular she did not recall**

telling the Claimant that she should put her illness behind her. The meeting lasted about 2 hours. The Claimant found the meeting very stressful.

53. At the end of the meeting Mrs Whiteford hoped that the Claimant would quickly return to work after having aired these issues.”

9. On 22 July 2010 Mrs Whiteford wrote to the Claimant following that meeting. On 30 July 2010 a report was issued by a nurse in the occupational health providers instructed by the Respondent on the Claimant, which stated that she was signed off work due to the fact that *“she has concerns about the way in which she has been treated by her line manager. She feels that she has been treated “insensitively”...”*. On 4 August 2010 the Claimant wrote to the Respondent. She stated that she did not agree with the record Mrs Whiteford had sent her on 22 July 2010 of the meeting and she made a number of allegations against Mrs Whiteford concerning the way that the Claimant perceived Mrs Whiteford had treated her. She suggested that Mrs Whiteford had not been supportive of her when she was ill and during her return to work. She said that she had been unsupported and that Mrs Whiteford had discussed her with another department, which was not productive to her professional integrity. She said that she had been the recipient of “grievous words” from Mrs Whiteford, which had triggered her absence. She said that the words should be treated as an accident at work and recorded as such. She stated that she felt that Mrs Whiteford was trying to undermine her. She felt she had a lack of development opportunities and despite wanting to increase her work portfolio had been constantly overlooked and had been given undemanding work. Mrs Whiteford was taken aback at the language used in the letter and discussed matters with her line manager, Mr Innes, head of the legal department of the Respondent. He asked her to write to him and in the document which she drew up she said that the allegations made against her should either be withdrawn or the Claimant should produce evidence to substantiate them.

10. Mrs Nicholl wrote to the Claimant asking her to attend a meeting to discuss sickness absence and told her that the meeting would be chaired by Mrs Whiteford. She asked the

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Claimant if she would find Mrs Whiteford's attendance detrimental. The Claimant said she did not want to meet Mrs Whiteford and asked for the meeting to be with Mrs Nicholl's Department alone. Thus the conduct of the meeting was passed to Mr Henderson.

11. The Claimant attended a meeting on 18 August 2010 with her union representative, Mr Coupar. Before the meeting, Mr Coupar had his own doubts about the difficulties that the Claimant perceived she had with Mrs Whiteford and he wondered if she was putting things into proper perspective. He advised her to withdraw her letter. She accepted his advice and she indicated at the meeting that she did not want to lodge a formal grievance about the matter. At the meeting Mr Coupar confirmed on her behalf that it was understood that the Respondent did not accept the validity of the criticisms levelled at Mrs Whiteford. He repeated that if the Respondent agreed to a stress action plan it would not mean that the Respondent accepted that the Claimant had any foundation for her criticisms. The Claimant's union representative withdrew the allegations contained in that letter.

12. Mrs Whiteford was not satisfied with the outcome of the meeting. She did not accept that the Claimant had any cause to blame her for her stress and she wanted to clear her name. She did not regard the withdrawal of the letter as being sufficient. She spoke to Mr Innes and he agreed with her, deciding that irrespective of any other action the allegations in the letter should be investigated. The Respondent arranged an investigation into Mrs Whiteford's conduct. Mr Henderson wrote to the Claimant telling her that as the letter of 4 August made serious allegations, they had to be investigated. He said that Mrs Nicholl would be in touch with the Claimant in relation to a stress action plan. Mrs Nicholl met with the Claimant and told her that she should draft a plan for her return and should stick to general council policies rather than specific matters. On 18 August the Claimant emailed Mrs Nicholl with what she called a rough outline of her thoughts. This document is quoted by the ET at paragraph 72 thus: –



**“If you find my suggestions workable, perhaps we could work on the appropriate wording together. I look forward to receiving your feedback on the following points: The right to be treated at all times in a dignified and professional manner; The right to “reasonable adjustments” under the DDA and as highlighted by the recent report by Occupational Health. Consideration for on-going time off for hospital visits including further treatment. Consideration for reasonable requests regarding work/life balance issues. Any concerns relating to workplace issues – these to be brought to my attention in a professional manner with a view to planning a satisfactory way forward for both parties. The right to be given development opportunities. Any reasonable concerns I may have regarding treatment (and other issues) in the workplace to be discussed/taken up with a view to resolving any issues to the satisfaction of both parties.”**

13. Mr Innes and Mrs Whiteford read the Claimant’s email and decided that the Claimant had not departed from allegations despite her letter of 4 August having been withdrawn by her trade union representative. They were both of the view that she had been treated properly by the Respondent in relation to her illness, and had been offered opportunities to develop her career. Correspondence between Mrs Nicholl and Mrs Whiteford ensued. Mrs Nicholl was trying to progress the stress management plan for the Claimant and told Mrs Whiteford that the plan did not imply that the Respondent agreed that Mrs Whiteford had done anything wrong. It was a matter rather of the Respondent acknowledging that the Claimant had explained what her “perceived stressors” were. Mrs Whiteford’s reply to that was that a perceived stressor “would be something that is actually happening”. Mrs Whiteford emailed Mrs Nicholl stating that she could not agree to participate in an action plan based on unsubstantiated allegations.

14. Mr Coupar, the Claimant’s trade union representative was concerned about her health as he thought that she was reacting oddly to Mrs Whiteford’s letter. He was also concerned that she was not getting back to work. He suggested to her that she should get a report from Mrs Howells who had been treating her at the centre. He asked Mrs Nicholl why the Claimant was being prevented from returning to work as she had been certified by her general practitioner as fit for work. Mrs Howells produced a report which was sent to Mrs Nicholl who sent it to Mr Innes who in turn discussed it with Mrs Whiteford. Both Mr Innes and Mrs Whiteford were angry that Mrs Howells appeared to attribute the Claimant’s stress to

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Mrs Whiteford. Mr Innes asked two senior personnel officers, Mr Baird and Ms Bett to carry out a management-led investigation into the allegations made by the Claimant on 4 August and into the terms of Mrs Howells' report.

15. Mrs Howells' report became a matter of importance in the proceedings of the Respondent and in the ET. The first report by Mrs Howells is undated and was produced in or around September 2010. I will quote it in full:-

**“This report provides a brief summary of Mrs Gauld's current psychological functioning and the support she receives from Maggie's Cancer Centre, Ninewells Hospital, Dundee. A more detailed report may be provided if required.**

**Maggie's is a psychological support provision for families affected by cancer.**

#### **Psychological Functioning**

**An assessment undertaken in July 2010 and reviewed through additional consultations in August indicates that Mrs Gauld has significant clinical anxiety and stress related to her work environment.**

**Mrs Gauld's psychological adjustment to her cancer diagnosis treatment and long term medical management was optimal during 2009 despite having to cope with a particularly distressing period when she was investigated to ensure her cancer had not returned. She utilised various workshops at Maggie's in particular workshops designed to assist a person's adaptation to life following cancer; helping them fine tune their skills in dealing with the typical psychological, social, work and lifestyle changes they encounter.**

**Since January 2010 she has been experiencing escalating anxiety in the work setting. In discussion with her GP she has taken sick leave to recuperate and identify and ameliorate work place stressors.**

**In the course of the psychological assessment it became apparent that the style of management adopted by Mrs Gauld's line manager is the most significant but also potentially most solvable source of Mrs Gauld's work place stress.**

**Mrs Gauld's work is an important source of self-esteem and certainty. In early summer 2010 she was appraised as performing her work tasks at a satisfactory and expected level. It appears she thrives best in the context of an open consultative management style.**

#### **Recommendations**

**It is recommended that Mrs Gauld makes a graded return to work with guidance from her GP about the pace of return. Her current work role expectations and the methods by which she is managed have to be openly discussed and agreed prior to her return. In addition though she manages her expected levels of past cancer fatigue reasonably effectively it is a struggle for her. A weekly arrangement of at least one day home working is a typical coping strategy used by employers to optimise work performance of employees post cancer and it is recommended that regular home working be incorporated into Mrs Gauld's conditions of work.**

**Lesley Howells**

**Lead Consultant Clinical Psychologist and Research Lead (Maggie's UK)**

**Centre Head, Maggie's Dundee.”**

16. The Claimant was suspended at this stage. Correspondence between the Claimant and Mrs Nicholl continued during September and the Claimant wrote as follows: –

**“I cannot rewrite events, nor am I responsible for another’s action. Neither do I understand why Perth & Kinross Council cannot accept that there is any kind of foundation for my concerns. I was asked to put forward suggestions for my return to work. What I cannot do is look at it in a vacuum. I am recovering from a serious illness and all that this entails for me. What I have been seeking all along is that reasonable allowances and adjustments be made by Perth & Kinross Council to take this into account...”**

17. On 1 October the Respondent advised the Claimant that they had no alternative but to suspend her on medical grounds given that there had been no changes to her perceived stressors in the workplace. The Claimant was referred once again to occupational health who reported on 13 October. In the report, the nurse who wrote the report stated that the Claimant’s stress condition was not related to her previous medical condition. She reported that the Claimant stated that it was anxiety created by work related factors that had resulted in the current absence.

18. In the meantime Mr Baird and Ms Bett carried out an investigation. They met the Claimant along with Mr Coupar on 19 October. Neither Mr Coupar nor the Claimant understood why an investigation was necessary because the Claimant had withdrawn the letter. Mr Baird indicated that the Claimant’s draft stress action plan could be interpreted as highlighting the issues raised by her in her letter. He told her that the investigation had been commissioned by Mr Innes in order that the Respondent could satisfy itself that there were no issues that he needed to address in relation to Mrs Whiteford. Mr Coupar said that the letter sent by Mrs Whiteford after the first meeting was unusually long and the Claimant explained that that letter prompted her to respond. The Claimant’s relationship with Mrs Whiteford was discussed. The Claimant said that prior to her illness it had been one of mutual respect. She said she would be able to work with Mrs Whiteford in the future and would take part in any

mediation. She said that Mrs Whiteford had been supportive when she had gone for treatment and she had no idea how things had changed.

19. Mr Baird then asked Mr Innes if it was necessary to continue the investigation and Mr Innes indicated that it was. Mr Baird and Ms Bett therefore interviewed Mrs Whiteford on 25 October. Mr Baird explained that the Claimant was well enough to return to work, and did not see any difficulty in reporting to Mrs Whiteford. He reported that the Claimant would be willing to go to mediation. Mrs Whiteford was concerned about the investigation not progressing, because of the effect on her of the various criticisms of her management style. She produced a file of papers containing emails relating to the Claimant's requests for time off and hospital appointments and home working. It also contains details of the Claimant's poor performance in relation to the bungee jump transaction. Mrs Whiteford confirmed that she and the Claimant had previously had a pleasant relationship and she said she had been supportive of her when she was off work. She would have difficulty in trusting her in the future. She wanted the investigation to continue because of the effect that the allegations had on her credibility as a manager.

20. Mr Baird and Ms Bett completed the report and it was sent to Mr Innes for him to decide on the next step. The conclusion of the report was that there was no evidence that Mrs Whiteford had been unsupportive or inappropriate in her tone or manner towards the Claimant on any occasion. Mr Innes met Mrs Whiteford and discussed the report's findings with her. He also met the Claimant and Mr Coupar. Mr Coupar was allowed to read the report at the meeting and he found that it confirmed his own opinion that the Claimant's behaviour was odd and that her views did not seem to reflect the reality of the situation. He spoke with the Claimant and advised that she should accept the report and try to get arrangements made to get back to work. He explained to Mr Innes that the Claimant felt vulnerable and that this had

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all stemmed from her previous illness. He mentioned that she was attending the Maggie's Centre and that she was in some way suffering from delayed stress following her illness. The ET found that Mr Innes was highly sceptical of that, observing that he could not understand how the Claimant could say that stress was work related and also suggest that it was related to her previous illness. Mr Coupar said that the condition could be evidenced by his obtaining a report from the Maggie's Centre. He explained that the way that the Claimant saw things was affected by her condition. He explained that the Claimant accepted that the terms of the report exonerated Mrs Whiteford. The Claimant wanted to get back to work and did not think that her relationship with the Respondent had broken down irretrievably.

21. As a result of the report, Mr Innes wrote to the Claimant on 18 February telling her that no further investigation was required. He accepted the terms of the report. He said that the allegations that she had made were "unfounded and inappropriate" and as such constituted a breach of the Council's Employee Code of Conduct and Employee Charter. He told her that she was subject to a disciplinary charge that she had "raised a complaint against your manager that had no basis in fact". He wrote to her again on 23 February advising that he had neglected to add in his earlier letter a warning that the allegation she had made was serious and if proven could constitute gross misconduct and lead to the loss of her job.

22. The Claimant took advice from Mr Coupar who advised her to get supporting evidence about her condition and how it might have affected her. A report was sought from Ms Howells. She assumed from previous experience of dealing with employers that once she had prepared and submitted an initial report she would be asked to do more detailed and focused report. Ms Howells wrote a report dated 2 March in which she stated that clinical experience and research demonstrated that following a cancer diagnosis and treatment people can encounter significant post-traumatic stress and that it can be unexpected, to the particular individual. She

said that in her opinion the Claimant had returned to work too soon after treatment, which she wrongly described as major surgery. She said that cancer sufferers were most vulnerable in the 2 years following treatment. She stated that the Claimant's vulnerability had become apparent, not in the quality of her work but in her ability to juggle post-traumatic cancer stresses. She invited the Respondent to contact her in order to assist with the Claimant's return to work.

23. The disciplinary hearing took place on 4 March. The Claimant was represented by Mr Coupar who submitted Ms Howells' report just before the hearing. He explained that the Claimant had acted honestly on the basis of matters she had perceived them. He referred to the report that had been obtained from Ms Howells. He argued that the letter from the Claimant had to be seen in context, and explained that the Claimant had perceived the situation as an attack, counter attack and defence. He agreed that the letter was "not a good letter". He explained that Ms Howells was happy to take part in the process of getting the Claimant back to work. He said that he had not called her as a witness because she could not comment directly on the factual issues but she was prepared to attend. Mr Innes asked questions about the report stating that there was no evidence in his opinion of the delayed aspect of stress. He could not understand why there had been reference to stress caused by the line manager in the report and yet no reference to delayed stress or post-traumatic stress. He said that he found it impossible to accept that the Claimant's condition would not have affected her work. He said that he could not understand how the Claimant could say that Mrs Whiteford had not been supportive towards her when in fact the Claimant had thanked Mrs Whiteford for her support. He said that Mrs Whiteford had adopted a supportive strategy which seemed to work from January 2009 to July 2010. Mr Coupar explained that the Claimant did not know she was suffering from the condition. She herself explained to Mr Innes that she only became aware that she had post-traumatic stress disorder after speaking to Mr Coupar in August.

24. Mr Innes did not accept the suggestion that the Claimant's illness had anything to do with her actions, or provided any mitigation for them. He telephoned the Claimant on 11 March to tell her that her employment was terminated on the grounds of her gross misconduct. He wrote to her on 18 March setting out his recollection of what had been discussed at the disciplinary hearing and confirmed his decision that her employment was terminated as at 11 March. His letter is set out in full at paragraph 120 of the ET decision. He stated that there had been an irretrievable breakdown of trust and confidence in the employment relationship and that the Claimant could therefore not continue to be employed by the council. He set out his reasons for his decision. He noted that Lesley Howells had produced 2 documents but he said he did not find that they were of much use. He did not consider that they explained how stress could manifest itself in such a way that the Claimant would believe things which did not happen, had in fact taken place. He also noted that Ms Howells was not in a position to comment on the quality of the Claimant's work. He said that "he felt that medical reports often say what the authors believe their patients want them to say". He found that the Claimant was still maintaining her position in that he stated: –

**"I also noted that, during the Disciplinary Hearing, you still maintained that you had not been supported by Linda Whiteford and cited a grudging acceptance by her of a phased return to work and attendance at the Maggie's Centre. The investigation report showed that both of these had happened with the support and encouragement of your manager rather than in spite of her. It seems therefore that you are still maintaining at least some of your original complaints against your manager notwithstanding the findings of the investigation report and the withdrawal of your letter.**

**The allegations you made against Linda Whiteford over a prolonged and sustained period of time, and which continue to be made, had no basis in fact and arose after your manager raised issues about the quality of your work. They were not in my view explained by post-cancer stress. They were so serious as to make any further working relationship and trust impossible and destroy the employment contract between the employer and employee. I therefore have no alternative but to summarily dismiss you. Your last day of employment with the Council was Friday 11 March 2011 and you have no entitlement to notice pay or pay in lieu thereof..."**

25. The Claimant appealed the decision to dismiss her. She contacted Ms Howells and explained to her what had happened. Ms Howells agreed to prepare a more detailed report setting out things as fully as she could. That report concluded that the Claimant had

experienced significant psychological and cognitive impairments following her cancer diagnosis and treatment the full nature of which had only slowly become apparent. She had developed symptoms of delayed post-traumatic stress disorder. She now had developed more insight into her condition and Ms Howells was optimistic that with the insight and co-operation of her employer she could be rehabilitated back to a job as a solicitor. This was the third report provided by Ms Howells. It was considerably longer than the others, being 7 pages in length. It began by setting out Ms Howells professional qualifications and experience, explaining that she had qualified as a clinical psychologist in 1991 and since 2001 had specialised in researching the psychological impact of cancer and the development of psychological interventions to assist a person's adjustment to diagnosis, treatment (e.g. chemotherapy) and the optimal resumption of work and home life following treatment. In the report Ms Howells then goes on to detail her knowledge of the Claimant's medical background. She then, over the space of approximately 2 pages, sets out the psychological and cognitive impact of cancer diagnosis and treatment, in the form of a review of current practice and research-based knowledge. She lists as symptoms of cancer related stress the following: –

- intrusive thoughts nightmares and flashbacks
- elevated emotional distress at any reminder of the cancer
- acute physiological symptoms (increased heart rate, rapid breathing, sweating) in response to cancer reminders including bodily symptoms that had been associated with the cancer.
- Regular intentional attempts to avoid thoughts, feelings of conversations about the cancer
- feeling alienated and detached from people
- perception of foreshortened future
- persistent of (sic) physiological arousal and/or anxiety not present before the person's cancer for example



- sleep disturbance
- emotional volatility in particular irritability and anger outbursts
- concentration difficulties
- hypervigilance and sensitivity to perceived danger or threat to self.

She then set out the cognitive impact including the following impairments: –

- poor concentration
- lack of clear thinking, problems understanding new concepts or argument
- decision making difficulties
- inattention and difficulty dividing attention
- difficulty communicating with more than one person at a time and multitasking
- Short term memory loss
- verbal fluency and work(sic) finding problems
- reduced information processing speed.

Ms Howells then set out, over 3 pages, the Claimants psychological and cognitive functioning following her diagnosis of cancer and its treatment. It is necessary to quote much of this report as follows: –

**“By May 2010 it became evident that although the course and psychological sessions in autumn 2009 had assisted with some aspects of her post-cancer adjustment it had not addressed effectively the full extent of the psychological impact of her cancer. Unfortunately this is not unusual in people who have a coping style like Mrs Gauld’s that can sometimes be classed as ‘fighting spirit’ but has an element of denying self-need which meant she appreciated the support, did not wish to overuse scarce facilities, and felt a surge of confidence from initial progress but that this masked lingering symptoms. The extent of the problem is often only fully appreciated in retrospect.**

**In May 2010 Mrs Gauld sought help from Maggie’s again with work stress as the focus but also continuing and escalating cancer related PTSD symptoms. In particular the over-sensitivity to perceived threat or criticism in the workplace, sleep disturbance, concentration difficulties, emotional volatility including anger, weeping, self-doubt and lowering confidence.**

**Mrs Gauld reported that she was struggling to cope with her manager’s management style. She was profoundly fatigued and worried about her work performance. She perceived her manager as unnecessarily critical of her work and perceived herself as undermined when a piece of work had been withdrawn from her. She felt uncertain and fearful about how to approach her for help and guidance.**

**On 26 June 2010 Mrs Gauld started a period of sick leave for work related stress. She stated that her anxiety in work, loss of confidence and difficulties coping with her manager had**

become so overwhelming that her GP had advised her to take leave. She mentioned a particularly distressing incident in work when her manager stated that she was not prepared to 'walk on egg shells' for Mrs Gauld although I understand that her manager denies such a conversation took place. I am not in the position to comment on whether or not Mrs Gauld's recollection of events is accurate. However as stated previously in the report it is not unusual for someone post-cancer to be over-sensitive to perceived threat and that the actions or comments of managers can be mis-perceived as critical prompting a 'fight or flight' response, for example an angry interpretation of a remark or action. Also, and importantly, when the manager is unaware of the continuing psychological impact of cancer they do not realise the need for continued individualised support to maximise the person's rehabilitation into work. It appears that Mrs Gauld's manager was not aware of the extent of her difficulties.

It was very apparent that Mrs Gauld needed the sick leave taken at the end of June 2010, it was long overdue and within a couple of weeks her anxiety started to reduce however with the advent of the disciplinary proceeding Mrs Gauld's level of stress quite naturally escalated given the enormity of the accusations and she experienced profound despair upon receiving her dismissal.

My 'Psychological Summary Report' in August 2010 was written at Mrs Gauld's request as a contribution to a 'back to work' discussion. In the report I stated that a more detailed report could be provided if requested by her employers. Intentionally details were not given about the full extent of Mrs Gauld's difficulties rather the emphasis was to offer constructive suggestions for her work responsibilities and methods of management to be openly discussed prior to graded return. Had a more detailed report been requested then a fuller description of the psychological and cognitive difficulties encountered by people post-cancer treatment could have been offered and how they related to Mrs Gauld's experiences.

In February 2011 an additional 'Psychological Summary Report' was provided for the disciplinary hearing at Mrs Gauld's request. The document was prepared in haste and I apologise for the inaccuracy in describing Mrs Gauld's treatment, throughout my contact with Mrs Gauld I have been aware that she received chemotherapy and radiation and that her cancer was considered inoperable. The report's intention was to give a brief resume of the psychological impact of cancer and how it related to Mrs Gauld's experiences; and also to state that I considered her problems amenable to change and offer my assistance in her return to work.

It has become apparent to me over the last 2 months the extent of Mrs Gauld's cognitive impairments following her cancer treatment. She describes feeling as if she is emerging from '... Some kind of fog'. Unfortunately not untypically for a person post-cancer treatment she didn't understand what she was experiencing and didn't realise it was associated with her chemotherapy. It is only now the temporary impairments are receding that she fully appreciates the cognitive challenges she has faced and accommodated in home and work life (e.g. difficulty following argument, verbal fluency, word finding difficulty, slowed information processing.)

## Conclusion

Mrs Gauld has experienced significant psychological and cognitive impairments following her cancer diagnosis and treatment for cervical cancer, the full nature of which are slowly become apparent over the last 2 years. In retrospect she returned to work too early before she had started to adjust to the trauma of her cancer experience and learned to manage continuing uncertainty and fears of recurrence. As a consequence she developed symptoms of delayed cancer-related PTSD and struggled with chronic and profound post-cancer fatigue. These symptoms were addressed but not completely resolved through work with the Maggie's Centre in late 2009. Her employers were unaware at all times of the extent of her psychological difficulties and only within the last 2 months has it become apparent that she was experiencing additional cognitive difficulties. Although she needed additional support in the workplace to rehabilitate to her pre-cancer functioning this was not forthcoming through no fault of either employer or Mrs Gauld but rather simply due to the lack of awareness on both parts of the continuing impact of cancer 2 years on.

It is evident that Mrs Gauld now has more insight about how her cancer has impacted her psychological and cognitive functioning, and how it compromised her perception of the behaviour and relationship with her employers. With this insight and co-operation from her employer I remain optimistic that she can make an optimal rehabilitation to her employment as a solicitor whilst adjusting to the psychological impact of the disciplinary procedure and the remaining psychological and cognitive consequences of her cancer."

26. An appeals subcommittee met to hear the appeal on 31 May and 11 August. It was chaired by Councillor Grant. It heard evidence from Mrs Nicoll, Ms Bett, Mrs Whiteford, Mr Innes, Mrs Howells and from the Claimant. It also had documentary evidence and a written summary of the Respondent's position prepared by Ms Steele of the human resources Department.

27. The decision of the subcommittee was that the Claimant's appeal was partially successful in that they decided that the Claimant's action did not amount to gross misconduct, but had been deliberate, and had led to an irretrievable breakdown in trust and confidence. The subcommittee found that the Claimant had made allegations about Mrs Whiteford over a prolonged and sustained period of time which she had persisted in making, in emails, occupational health reports and discussions with Ms Howells. They found that she had responded unconstructively to efforts to resolve matters and had not apologised to Mrs Whiteford. The subcommittee found that post-traumatic stress disorder was not a likely reason for the Claimant making and persisting with allegations of mistreatment. They found the information in Ms Howells' reports inconsistent. The subcommittee found the Claimant entitled to pay in lieu of notice.

28. The parties were agreed at the ET that any question of contributory fault and any deduction under the case of **Polkey** should be reserved for a remedy hearing, if the Claimant was successful in her claim of unfair dismissal.

29. The ET was addressed fully by the parties and was referred to a number of cases. The ET's decision deals firstly with the **Equality Act 2010** claim, about which I need say no more. When the ET came to consider the question of unfair dismissal it began by reminding itself that the relevant statute is the **Employment Rights Act 1996** and in particular section 98. It

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directed itself appropriately on the case of **British Home Stores v Burchell** and the 3 stage test contained in that case. It directed itself in terms of the case of **William Hill Organisation Ltd v Steele** UKEAT/0154/08 that an ET may carry out a critical scrutiny of the employer's reasoning process. It also directed itself that section 98(4) requires the objective test of the reasonable employer to be applied to every aspect of the decision to dismiss. It made reference in that connection to the case of **Whitbread v Hall** (2001) IRLR 275 and **Sainsbury's Supermarket v Hitt**. The ET also noted that the case of **Midland Bank plc v Madden** [2000] ICR 1283 was to the effect that the ET should not substitute its own view for that of the employer as to whether it was fair to dismiss the employee. It must instead determine whether dismissal was within the range of reasonable responses open to the employer.

30. Having so directed itself, the ET then proceeded to work through the facts which it had found and the submissions which had been made to it. A submission had been made to it that Ms Howells' evidence was not medical evidence as she was not medically qualified. She was described as someone who was not objective and who had become an advocate for her client's position. The ET noted that Ms Steele's summing up at the appeal procedure called into account her professionalism and integrity. The ET took the following view of that, at paragraph 192: –

“Medical evidence like any evidence can vary in quality. The evidence of a specialist consultant commenting on an issue within their expertise may be more persuasive than that of a less specialised and general practitioner. What gives evidence such as medical evidence status is surely the fact that it comes from a skilled source. It is up to an employer to weigh the value of such evidence and in appropriate situations discount it. However the fact that Ms Howells is not a physician in itself is no reason to take her evidence as being less skilled in her field. She was highly experienced in her area of specialism having held the post of head of clinical of clinical health (sic) within the NHS and becoming the lead consultant specialising in the psychological impact of cancer with the Maggie Centre. These are attainments that would lead any reasonable employer to regard her evidence as skilled expert evidence unless there was a cogent reason for not doing so. “

31. The ET turned to consider the 3 aspects of the **Burchell** test. It considered first whether the Respondent held a genuine belief in the Claimant's guilt. They stated that while the matter UKEATS/0046/13/JW

was not straightforward they were broadly prepared to say that the Respondent had a genuine belief in the Claimant's guilt in that they believed that she had acted in a particular way which formed the basis of the disciplinary charge she faced. They then turned to consider the next issue, which was whether they had a reasonable basis for that belief. They noted that Mrs Whiteford had said, both in documents and in evidence that "a perceived stressor would be something that is actually happening". The ET noted that her understanding gives the word "perceived" no meaning whatsoever. In the end the ET came to the view that the Respondent should have obtained medical evidence of their own if they were, as they stated, concerned about the quality of the evidence given by Mrs Howells. Thus the ET decided that the Respondent did not have reasonable cause for the belief which it held. At paragraph 226 it considered the position should they be in error about that. They expressed their concern that the Respondent had not acted within the band of reasonable responses open to an employer because they had failed to engage with the Claimant's position. Ultimately they came to the view that Mr Innes not approach the disciplinary matter with an open mind.

32. The ET directed itself that even if the first instance decision making had been less than satisfactory any difficulties could have been cured by an appeal, under reference to the case of **Taylor v OCS Group Limited**. However, the ET found that the appeal hearing did not cure the earlier difficulties. The ET found that the appeal committee had accepted the submissions made by Ms Steele about Mrs Howells' reports. She had stated that they had changed over a period of time and she had repeated only what she had been told by the Claimant with no real analysis. The ET found that no reasonable employer could have held that. The ET came to the view that the appeal panel had no proper basis for deciding that the Claimant did not have post-traumatic stress disorder and noted that despite the fact that the Respondent did not accept Mrs Howells' evidence, they did accept that the Claimant suffered from post-traumatic stress. The ET decided that the panel had no basis for deciding that the Claimant had responded

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“unconstructively” to the efforts to resolve difficulties. She had offered to go to mediation and it was apparent that the stress action plan and mediation were blocked by Mrs Whiteford. Further, the ET was critical of the appeal panel’s acceptance of Ms Steele’s reference to a sudden revelation which should take place when a person realises that they have been in the wrong. That was contrary to Mrs Howells’ opinion which was that insight is a process rather than a sudden event. The ET summed up its view of the appeal panel in paragraph 246 as follows: –

**“In our opinion an employer has to consider both parties in such an equation as we have here. The position of Mrs Whiteford is only one important factor. The employer must be able to judge both what the state of the relationship truly is and whether steps can or should be taken to try and restore it. The question of how a return to work could be effected in practice was not explored in any detail as far as we can see from the witness’s evidence. In particular Mrs Howells was not asked to give her views on the way in which relations could be restored and what processes this might involve and what would be expected of parties to make it a success. There was no evidence from the Respondent’s OH providers about the process that they had earlier envisaged or its likelihood of success. We have no doubt that the panel went too far too fast in its conclusion that there had been an irretrievable breakdown. It simply had insufficient evidence to do so. We regret to conclude that it was a convenient escape route offered to them by Ms Steele and one they chose to follow.”**

33. Mr Macmillan produced a skeleton argument on behalf of the Respondent. He supplemented his argument orally. He submitted that the ET had allowed its sympathy for the Claimant and its own high regard for Mrs Howells to influence its decision so as to cause it to substitute its own view rather than to assess the actings of a reasonable employer. He argued that that was apparent from the confused conclusions which the ET had drawn about the demeanour of the Claimant while at work and the extent to which the Respondent was or was not aware of the change in the Claimant’s demeanour. He argued that the ET had reached its own view about Mrs Howells’ reports and had had no regard for what a reasonable employer would make of them.

34. Perhaps mindful of the decision I had made at the stage of the sift, Mr MacMillan submitted that the essential basis of the appeal was that the ET had erred in law by substituting

its own views for those of the employer. He submitted that the Respondent had proved that the Claimant had made false allegations and they had done so by having an independent investigation. In the evidence given by Mr Innes, he had explained that the allegations were both serious and false. He explained that he regarded them as a serious matter. He also explained the view he had taken of the report given by Ms Howells and the explanation given by Mr Coupar. He was entitled, as the officer within the Respondent dealing with the matter to take the view that he did. The ET had substituted its own view. He argued that they had conducted no analysis whatsoever of the actings of a reasonable employer. He argued that the ET did not consider the evidence given by the witnesses for the Respondent that the Claimant was irritated by Mrs Whiteford's criticism of her work. They did not consider the evidence given by Mr Innes and Mrs Whiteford that they saw no signs of stress. They did not take into account the fact that the Claimant's GP had certified her as fit for work. They did not take properly into account that the first report from Ms Howells did not mention cancer related stress but only mentioned the actings of the manager as the problem. Mr Macmillan argued that the ET had found the Claimant to be unreliable in some respects but they had relied on her when she said that the problem was stress following on her cancer. He argued that the ET had given no rationale for why it reached that conclusion.

35. Mr Macmillan argued a fairly detailed analysis of the judgment of the ET in which he pointed out that they had dates wrong, which he said materially affected the logic of its decision. He argued that these errors betrayed a stance of sympathy to the Claimant. In particular, he submitted that the ET had got the facts wrong with regard to Mr Coupar's knowledge of the Claimant's health. He argued that this was demonstrated by paragraphs 105 and 106 which he said were incompatible with paragraph 80.

36. Paragraph 80 begins thus: – “Through his dealings with the Claimant Mr Coupar had formed the view that there was something 'wrong' with her. He could not understand why she had reacted as she had to Mrs Whiteford’s letter. He was suspicious that her behaviour might be related to her illness...” In paragraphs 105 and 106 the ET find that in January 2011 when Mr Coupar read the investigation report on Mrs Whiteford’s behaviour it confirmed in his own mind suspicions about the Claimant’s behaviour. In paragraph 106 Mr Coupar is recorded as explaining to the Respondent that the Claimant felt vulnerable and that this stemmed from her previous illness. In my opinion there is no essential contradiction between paragraphs 80 on one hand and 105 and 106 on the other.

37. Further, Mr Macmillan submitted that paragraph 116 of the principal judgment taken along with paragraphs 191 and 192 of that judgment and paragraph 95 of the review judgment were extremely telling of the Employment Tribunal having decided that it would reach a conclusion based on its favourable view of the Claimant and Mrs Howells, and entirely disregard the need to make an appropriate assessment of how the Respondent had acted. He argued that paragraph 95 of the review judgment is completely at odds with paragraph 116 of the principal judgment. Paragraph 95 of the review judgment is in the following terms: –

**“We had evidence from both Mr Innes and Mr Coupar about what was said at the meeting. The notes that were taken were not verbatim. The suggestion is that we have reworded what Mr Coupar said. Mr Macmillan referred us to page 250 and 255 of the productions. As far as we can see we have used the words that appear at page 250 and we certainly did not accept the interpretation put on these words by Mr Innes who recorded them in his letter as ‘medical reports often say what the authors believe their patients wasn’t (sic) them to say’ (page 255). This would be an extraordinary thing for an experienced representative to say and if said an extraordinary thing for Mr Innes to accept namely that an experienced professional person would act in this way.”**

In paragraph 116 the ET found as follows: –

**“Mr Coupar remarked that patients present in a particular way to medical people who respond to support the patient. Their concern was to resolve the situation. Mr Innes queried why Mrs Howells had not explained to the Claimant that she had “classic” symptoms and ask her to reflect on her treatment of Mrs Whiteford. Mr Coupar said that he had challenged Mrs Howells about her earlier letter and she had explained that they do not challenge the**



patient on such matters but that she accepted that the terms of the letter in hindsight might not have been helpful.”

He also made reference to paragraph 211 of the principal judgment in which the ET set out the following trenchant criticism of Mr Innes.

“The position taken by Mr Innes is to fully disregard the reports of Mrs Howells. His evidence reflected the views he expresses in his letter dismissing the Claimant. We regret to say that Mr Innes did not convince us that he approached the disciplinary hearing and in particular the weighing of the psychological evidence with an open mind. His tone of voice, a matter noted by all three members of the Tribunal, was contemptuous of her. He had never met Mrs Howells and yet was scathing about her abilities and professionalism to such an extent that we found impossible to reconcile this to the evidence that he had at that time before him. In effect he accused her of tailoring her views to suit the client’s position. This is an extremely serious allegation for a professional person to make about another.”

38. Mr Macmillan made reference to the case of Schenker v Doolan, unreported, EAT. He said that the ratio of that case is that the decision to dismiss is a managerial decision and not a medical decision. He argued that the ET had failed to apply the proper test and had instead imposed its own view of the quality of Mrs Howells’ reports without properly considering the responsibility of the Respondent. He made reference particularly to paragraph 225 which he argued was completely contrary to the case of Schenker.

39. Paragraph 225 is in the following terms: –

“We now turn to the issue of whether there was a reasonable investigation in all the circumstances. The only live issue to which this relates is whether the Respondents had sufficient medical or psychological evidence before them. Even if they did not accept that the Claimant’s perception of events was driven by her mental condition if it had contributed to a greater or lesser extent then it would obviously be of potentially significant mitigation of those actions. It might also have a bearing on whether relations between the parties were irretrievably broken. Mr Glass made reference to the case of *East Lindsay Council v Daubney* as authority for the proposition that the employer must take such steps as necessary to be appraised of the Claimant’s medical position. That case concerned a dismissal for ill-health and a failure by an employer to consult with the employee concerned. It requires to be treated with a little caution in the context of a dismissal for conduct and indeed the judgment recognises that every case will depend on its own merits. A case which we found more in point is the case of *City of Edinburgh Council -v- Dickson*. In that case a finding of unfair dismissal, although not findings of disability discrimination, was upheld on appeal where an employer was held not to have engaged with the employee’s defence to disciplinary charges based on the effect on his behaviour of a hypoglycaemic episode. In that case the employer did not seek medical advice and discounted the medical advice that potentially assisted the Claimant. In this case the Respondents argue that they did obtain medical advice and considered the reports prepared by Mrs Howells. We would have had more sympathy for this argument had the various reasons given for discounting Mrs Howells findings been criticised or even commented upon by their OH providers or some other skilled person instructed by them. What appeared to happen both at the disciplinary stage and that the appeal stage was that the

**Respondents chose to take it upon themselves to become their own experts. There was in this case no real engagement with the Claimant's position or any genuine attempt to understand it. If the Respondent's genuinely believed that the Claimant's health, whether characterised as stress, workplace stress or PTSD could provide no explanation or mitigation whatsoever for her actions then fundamentally these are medical/psychological matters that they required to take skilled advice upon."**

40. Mr Macmillan argued that the ET had substituted its own view in connection with the Claimant's perception. He criticised paragraph 199 where the ET stated that they were of the view that no reasonable employer given the greater understanding that society now has of mental illness would necessarily assume that a perception or in the terms used "perceived stressors" would have to relate to something that actually happened or is happening. He argued that the ET ignored its own factual analysis which was that Mrs Whiteford had in fact not acted wrongly. Further, he criticised the ET for failing to take into account the fact that the Claimant who had backup from professional advisers said that it was not medical stress which caused her difficulties, but stress caused by her manager. Mr Macmillan made the point that the Claimant said that it was her manager who was affecting her health and when that was investigated and found to be untrue the Claimant then presented evidence from Lesley Howells, and attempted to change her position by arguing that her condition was as a result of post cancer PTSD. He argued that Mr Innes was entitled to reject that evidence if so minded.

41. Mr Macmillan criticised the ET for its wording of paragraphs 204 to 207. He pointed out that Mr Innes said in the letter of dismissal that "they were not in my view explained by post-cancer stress" but the ET changed the wording round to say that it found that "the Claimant had no basis for such a belief".

42. Mr Macmillan argued that the ET had made a number of errors which must diminish confidence in the decision. He made reference to the case of **London Ambulance v Small** [2009] EWCA Civ 220. He relied on the opinion of Mummery L J from paragraphs 40 to 44 in

connection with the Tribunal slipping into “substitution mind-set”. He argued that what his Lordship had said was directly in point in the present case.

43. For the Claimant, Ms Stobart submitted that many of the factual errors that the Respondent claimed had been made by the ET were not in fact errors. Given the view which I have taken of this case it is not necessary for me to repeat all of the allegations of error made by Mr Macmillan nor of the refutations of those errors made by Ms Stobart. It may be of more importance to consider what Ms Stobart had to say about the reliance on the case of Schenker. She argued that it was not in dispute that the decision to dismiss is a managerial decision. She argued however that the ET was entitled in this case to find that the Respondent should have instructed a medical report if it was minded to read the report from Mrs Howells and dismiss it. She argued that the content of the reports was plainly a matter for a skilled witness. While it was for the Respondent to make what it thinks proper of evidence including evidence from skilled witnesses, in this case the Respondent in both the first instance and on appeal had rejected Mrs Howells’ reports for reasons which were not acceptable.

44. Ms Stobart argued that the ET considered what Mr Innes had done in terms of what a reasonable employer was entitled to do. They found that the Respondent had become experts in their own cause. She relied on the case of City of Edinburgh Council v Dickson for the proposition that where an employee proffers a medical explanation for the conduct, no reasonable employer would fail to investigate that explanation before reaching a decision to dismiss.

45. She argued that the argument from Mr Macmillan about the allegations against Mrs Whiteford was misconceived. She pointed out that the ET found that Mrs Whiteford had been exonerated. That is not in dispute. She argued however that the Tribunal were entitled to

find that a reasonable employer would have considered whether the delayed stress that the Claimant was said to experience was what caused her to have perceptions about Mrs Whiteford's behaviour even if those perceptions were not accurate. Ms Stobart argued that only after considering that question properly, including evidence from experts, would the Respondent be in a position to decide whether the Claimant had deliberately made the allegations against Mrs Whiteford because she was irritated by Mrs Whiteford criticising her work. Ms Stobart argued that the ET was entitled to find that there had not been a reasonable investigation.

46. When I considered this case at the stage of the sift, I wrote the following: –

**“I have decided to fix a full hearing in this case. I refer to the parties as Claimant and Respondent.**

**The decision of the ET is very long and has not been proof read. It is therefore difficult to understand as the grammar is poor and at times the meaning is obscure. The review has resulted in many of the errors being corrected. Some however remain. The ET judgment in the review was broadly to the effect that the substance of the decision is not altered in any significant way.**

**The Notice of Appeal is also long and difficult to understand. It is set out in a manner which makes it excessively long and repetitive. It is necessary to remember that an ET judgment should be read as a whole, and should not be subjected to analysis more appropriate to a conveyancing document. Further, appeal to the EAT lies only if there is an error of law. The many typing and grammar errors do not amount to errors of law. Criticisms of the way in which the decision is expressed do not amount to assertions of errors of law.**

**The part of paragraph 7.1 before the heading “Review Application General and Specific” is introductory and contains no specific arguments that specific errors of law have been made.**

**In the lettered paragraphs after that heading (d) (e) (f) (g) (h)\_(j) (k) and (l) do not set out freestanding assertions of errors of law. The assertions under the heading “credibility” do not amount to errors of law.**

**It appears to be arguable that the ET had substituted its own judgment for that of the Respondent. The judgment following the review may give insufficient reasoning....”**

47. The arguments put up at the EAT did not in my opinion show that there had been any error of law by the ET. I appreciate that a judgment and written reasons which has not been proof read and which on any view of it contained a number of errors does not inspire confidence and I understand the concern which Mr Macmillan, on behalf of the Respondent, expressed over that. I do not accept however that his analysis of the judgment has shown that

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there is any contradiction within it. In my view the ET required to decide if the reasonable employer would have reacted in the way which the Respondent did to the evidence of the opinion of Mrs Howells as shown in her reports. Further, it required to consider whether a reasonable employer would have reacted in the way that the Respondent did to the withdrawal by the Claimant of her allegations against Mrs Whiteford. The ET did so. There is nothing to indicate that they fell into the trap described by Mummery LJ in the **London Ambulance** case.

The paragraphs to which Mr Macmillan made particular reference are as follows: –

**“43. It is all too easy, even for an experienced ET, to slip into the substitution mind-set. In conduct cases the Claimant often comes to the ET with more evidence and was an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against and by his employer. He has lost his job in circumstances that may make it difficult for them to get another job. He may well get the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of dismissal.”**

48. I accept entirely that there are cases, the last mentioned being one of them, where the ET directed itself appropriately on the law and then proceeded to substitute its own judgment thereby failing to take notice of its own direction. I do not however accept that this happened in the current case. The ET was careful to direct itself on the law and there is in my view no indication that it allowed sympathy for the Claimant or admiration for Miss Howells to influence it. I am fortified in that view by the fact that the question of the treatment of Mrs Howells' evidence was essentially one of the law and the ET was careful to state what the correct procedure for the Respondent with evidence relating to medical matters is.

49. I did not find it helpful to go through the written reasons and the review judgment line by line seeking to find inconsistencies. While it can be argued that the reasons could have been expressed more cogently in my opinion it is clear what the ET thought of the evidence before it, and why it came to the view that the Respondent had not acted as a reasonable employer would have acted. The Respondent cannot have been left in any doubt; the ET state that the decision

to dismiss was taken by a person who did not have an open mind; the appeal panel were influenced by an inaccurate summing up; neither first instance nor appeal dealt with the evidence from Ms Howells in the way in which a reasonable employer would. The Respondent could have had a further OH report on the Claimant with a view to discovering if a suitably qualified OH expert disagreed with Ms Howells, but did not do so.

50. As I have found that the ET made no error of law this appeal fails. The matter of the remedy must now be considered by the ET.