Appeal No. UKEAT/0218/14/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 & 30 January 2015

Before

THE HONOURABLE MRS JUSTICE SLADE

MS K BILGAN

MR I EZEKIEL

DR M THOMSON APPELLANT

IMPERIAL COLLEGE HEALTHCARE NHS TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL AND CROSS-APPEAL

APPEARANCES

For the Appellant	MR RICHARD O'DAIR (of Counsel) Instructed by: Gately LLP Ship Canal House 98 King Street Manchester M2 4WU
For the Respondent	MISS LOUISE CHUDLEIGH (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St George's Road Wimbledon London SW19 4DR

SUMMARY

DISABILITY DISCRIMINATION - Disability

DISABILITY DISCRIMINATION - Reasonable adjustments

UNFAIR DISMISSAL - Reasonableness of dismissal

UNFAIR DISMISSAL - Procedural fairness/automatically unfair dismissal

UNFAIR DISMISSAL - Polkey deduction

The Claimant, Consultant Neonatologist, was dismissed for bullying colleagues. She asserted that the Respondent failed to make a reasonable adjustment in dismissing her as her admitted disability, dyslexia, made it more likely that she would engage in that type of behaviour. She also asserted that, notwithstanding her disability was identified at the Case Management Discussion as dyslexia, this should be aggregated with depression. Held that the Employment Tribunal correctly considered the claim on the basis that the disability alleged was dyslexia. **Chapman v Simon** [1994] IRLR 124 applied. The Claimant lost the reasonable adjustments claim on the facts. The cross-appeal from the finding of unfair dismissal is dismissed. The Employment Tribunal did not err in concluding that it was unreasonable to assign a doctor who, although of the right level, did not appear to have any training or experience in conducting such hearings to conduct and decide the outcome of the Claimant's disciplinary hearing. He misapplied the Respondent's disciplinary procedure to the detriment of the Claimant. It was not an error for the Employment Tribunal not to permit the doctor to be recalled to give more evidence of his experience/training in disciplinary procedures. It was a case management decision for them in the circumstances. The Employment Tribunal did not err in holding the dismissal to be unfair. The Employment Tribunal did not fail to have regard to guidance in **Software 2000 Ltd v Andrews** in deciding that there should be no **Polkey** reduction on either of the bases contended for. Nor did the Employment Tribunal err in failing to make a deduction of 100% or of a percentage greater than was made for contributory fault.

THE HONOURABLE MRS JUSTICE SLADE

1. Dr Thomson is a Consultant Neonatologist of some 19 years' standing. In 2002 she entered the employment of the Hammersmith Hospitals NHS Trust, which following a merger with another trust, which included St Mary's Hospital, became Imperial College Healthcare NHS Trust. Dr Thomson was summarily dismissed on 15 October 2012 after a disciplinary hearing at which three allegations that the doctor had behaved in a threatening and disrespectful way towards her colleagues was found proved. An appeal against the dismissal was dismissed. Dr Thomson, the Claimant, brought proceedings against the Imperial College Healthcare Trust, the Respondent, which included a claim for unfair dismissal and for disability discrimination. The Respondent agreed that the Claimant has dyslexia, which amounts in her case to a disability within the meaning of the **Equality Act 2010**. The issues were identified at a CMD on 26 March 2013.

2. When the claims came to be heard on 16 September 2013, counsel for the Claimant applied and was given permission to amend the claim to add a complaint that the decision to dismiss was a breach of the duty to make reasonable adjustments under the **Equality Act**, section 20, for the Claimant as a disabled person. By a decision sent to the parties on 18 October 2013 following a hearing at which the parties were represented by the counsel who appeared before us, Mr O'Dair for the Claimant and Miss Chudleigh for the Respondent, the Claimant's complaint of failure to make reasonable adjustments was dismissed and that of unfair dismissal upheld with a reduction of 30% in the basic and compensatory awards. The Claimant appeals from the dismissal of her claim that her dismissal involved a breach of the Respondent's duty to make reasonable adjustments. The Respondent cross-appeals from the

decision that the complaint of unfair dismissal was well founded, the decision not to make a **Polkey** deduction and to make a deduction for contributory fault assessed as low as one-third.

Background: Brief Outline

The Respondent's Policies and Procedures

3. The Respondent has a policy entitled "Promoting Dignity at Work" directed to combating bullying and harassment. Clause 9.7 gives examples of bullying. These include: "persistent shouting, constant criticism, verbal aggression, public undermining, open hostility and persistently rude or inconsiderate behaviour which gives offence or causes hurt".

4. In an appendix to the policy details are given of the Respondents' mediation service, which is stated to be designed to address conflicts in the workplace and their effect on staff morale and team relationships. The Respondent's disciplinary policy includes the following under the heading of "Formal Disciplinary Sanctions":

> **"5.1. The seriousness of the misconduct will determine the level of disciplinary action to be taken. The procedure may be entered at any stage.**
>
> **5.2. *Stage 1 – First Written Warning*: If the employee fails to meet required standards following informal action or if the offence is sufficiently serious to warrant moving straight to the formal stages, a First Written Warning may be given. First Written Warnings are confirmed in writing and apply for 6 months after which time they lapse.**
>
> **5.3. *Stage 2 – Final Written Warning*: If the failure to meet required standards continues or if the offence is one of sufficiently serious (but not gross) misconduct, a final written warning may be given. Final written warnings are confirmed in writing and apply for 12 months after which time they lapse. In exceptional circumstances, where a final written warning is an alternative to dismissal, final written warnings will be live for up to 24 months.**
>
> **5.4. *Stage 3- Dismissal*: If conduct remains unsatisfactory or if the offence constitutes gross misconduct, dismissal will normally result. Except in cases of gross misconduct, dismissal will be with notice or with pay in lieu of notice. Cases of gross misconduct will result in summary dismissal …"**

5. Under Clause 8.2 examples of offences seen as gross misconduct are given. These include assault, verbal or physical; harassment or bullying and serious breach of professional code of conduct.

6. The Claimant held the position of Chief of Service for Neonatology for three years from April 2008. On 1 October 2007 Hammersmith Hospitals NHS Trust, where the Claimant had been working, merged with St Mary's NHS Trust. The ET observed at paragraph 26 that this exercise was not a comfortable one. It led to a great deal of animosity and mistrust between the two neonatal units. The Employment Tribunal noted that amongst those unsettled were two of the complainants against the Claimant, Dr Srinivasan and Dr Godambe, Consultant Neonatologists at St Mary's. There were complaints by a number of consultants about the Claimant's treatment of them. She was spoken to in about August 2010 and told she should try to treat people better. She acknowledged that she was sometimes rude and attributed this to stress, which she associated with her heavy workload and additional burdensome task of integrating the two neonatal units. Matters improved for a while, but relations between the Claimant and her colleagues were further impaired in November 2010 when they did not support her for reappointment as Chief of Service. Dr Russell took over that post.

7. On 26 July 2011 Dr Russell gave Mr Edmonds, Clinical Programme Director of Women's and Children's Services, complaints about the Claimant's behaviour: bullying, harassment and intimidation. An investigation took place and on 8 March 2012 the Claimant attended a disciplinary hearing chaired by Dr Julian Redhead. The decision was announced on the day, and that was that misconduct by the Claimant was established. Dr Redhead noted the mitigation that her disability had affected the Claimant's management of her work and that she had not been adequately supported. He noted her determination to be proactive and get such help as was necessary. Dr Redhead expressed the intention of ensuring that a mediation process was available for the benefit of the entire team. His decision was set out in a letter of 14 March 2012 which was sent to the Claimant. The letter included a warning in these terms:

> **"This warning will remain on file for 6 months and I must advise you that if there are further allegations of bullying and harassment, that this will be investigated and may lead to your dismissal."**

8. Very soon afterwards, the first of three incidents which ultimately led to the Claimant's dismissal occurred. Those three incidents were set out in the dismissal letter sent to the Claimant. The first was:

> **"… an episode on 16th March 2012 when you spoke in a threatening and disrespectful manner to Dr Godambe in the Consultants Attending room."**

It appears that this incident occurred when the Claimant was working at St Mary's Hospital and took the doctor to task for not fulfilling his responsibility of providing her with a locker in which she should place her belongings safely before going to the wards. The second incident was on 20 March where it was said:

> **"… you behaved in a threatening and bullying manner to Dr Srinivasan in a meeting regarding the Consultants rota."**

This incident occurred at a time when the Claimant was anxious to find out what time off she would have in order to attend to her family members, one of whom was very ill and whose children needed looking after. The third incident was on 11 April when:

> **"… you were verbally aggressive and used inappropriate language towards Dr Groves at a social event."**

This occurred at a leaving party for a colleague. It was said that the Claimant and perhaps others had drunk alcohol, that the Claimant had tried to take over the reading of a handwritten poem from Dr Groves and there had been difficulty between them. It was said that the Claimant swore three times at Dr Groves in the presence of others. When this was put to the Claimant she said she had no recollection, but that she had consumed alcohol.

9. These allegations were investigated. The Claimant was advised that a disciplinary hearing would take place before a panel chaired by Dr Palazzo, Consultant Anaesthetist and of the level, directorate level, of those qualified to chair disciplinary hearings involving a

consultant's behaviour. It was thought by the Respondents that it was not inappropriate for Mr Edmonds or Dr Redhead to chair the hearing as they had been involved in the previous complaint against the complainant.

10. The Employment Tribunal recorded, at paragraph 42:

> **"Dr Palazzo told us that he had never before chaired a disciplinary hearing. Nor had he been trained in the conduct of disciplinary proceedings."**

11. The Tribunal noted that the Claimant had been informed that Dr Palazzo would chair the meeting. She made no objection to his doing so. The disciplinary hearing eventually took place on 4 October 2012. Included in the documents before the disciplinary hearing was a letter from Dr Russell of 15 June 2012 to Mr Mitchell, the Medical Director of the Trust. The Employment Tribunal recorded at paragraph 45 that in that letter:

> **"Dr Russell referred to the first disciplinary process and the fact that a second set of proceedings was now underway. He went on to complain of the 'chronic and repetitive nature' of the Claimant's unacceptable behaviour' and stated his belief that it was no longer possible for the team which included her to be cohesive, safe and supportive. He referred to her failure to acknowledge or apologise for her previous conduct and voiced doubt that she would change her behaviour in the future. He complained that consultants and other staff felt intimidated and drew attention to the clinical risks associated with a 'dysfunctional team'. He discounted mediation as a solution owing to a 'serious lack of trust' in the Claimant."**

12. The Claimant submitted evidence to the panel about her condition of dyslexia and neurodiversity. The Employment Tribunal recorded at paragraph 47 the Claimant's answers to the complaints. By letter dated 15 October 2012 the Claimant was summarily dismissed. The letter of dismissal stated that the panel had considered evidence relating to the Claimant's dyslexia and neurodiversity, but did not accept that this was mitigation for the incidents of bullying and harassment. The Claimant appealed, but her appeal was dismissed.

The Decision of the Employment Tribunal on the Reasonable Adjustments Claim

13. The provision, criterion or practices ("PCPs") were asserted by the Claimant, and found by the Tribunal to be in two instances the following:

> **"(1) a practice of normally dismissing in the case of conduct found to be gross misconduct;**
>
> **(2) a practice of normally dismissing if conduct remains unsatisfactory."**

14. A third PCP advanced by the Claimant of "a practice of zero tolerance with respect to conduct found to be bullying" was found by the Tribunal not to be established as a PCP. The two PCPs accepted by the Tribunal follow the wording of the Respondent's disciplinary and policy procedures. The reasoning of the Employment Tribunal on the reasonable adjustments claim is set out in paragraph 57, and it is this paragraph to which Mr O'Dair on behalf of the Claimant addressed his Grounds of Appeal on the failure to find the reasonable adjustments claim to be established. The ET held in Paragraph 57:

> **"Did the (valid) PCPs put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled? We have reminded ourselves of the wording of paragraph 48 of the amended Grounds of Appeal (quoted above). The comparative disadvantage was said to arise from the alleged fact that the Claimant's disability made her more likely to be found guilty of conduct amounting to or perceived as bullying. That is to say more likely than persons who were not disabled. Essential to the argument is the stated link between dyslexia and/or neurodiversity (the disability or disabilities pleaded) and the behaviour liable to amount, or be perceived as amounting, to bullying. In our judgment, the insurmountable difficulty confronting Mr O'Dair is that the link is simply not made out. Dr Harrison's evidence in answer to Dr Mitchell's first question was very clear (see above). He makes no connection between dyslexia or neurodiversity and bullying behaviour or conduct which might be seen as harassment. Nor does Dr Roberts offer any support for Mr O'Dair's theory. Subtle problems of perception and misreading of verbal cues are a world away from the sort of behaviour of which the Claimant was accused. As the case progressed Mr O'Dair appeared to seek to overcome these difficulties by focussing on the evidence of Professor Harrison pointing to incipient depression. But the obvious answer to that is that we are not dealing with a disability discrimination case based on depression. No such complaint is before us."**

The Grounds of Appeal

Ground 4

15. Ground 4 was taken first. Mr O'Dair contended that, when considering whether the PCP put the Claimant at a substantial disadvantage with persons who are not disabled, two conditions, dyslexia and depression, referred to in the medical reports, must be aggregated. Mr

O'Dair relied on the case of **Patel v Oldham Borough Council** [2010] IRLR 280, in which it was held that two disabilities of short length could be aggregated where one arose from another when considering whether disability for the requisite duration had been established. By analogy, Mr O'Dair contended that, as in **Ginn v Tesco** UKEAT/0197/05/MAA, the two impairments should be taken together: that is, the impairments of dyslexia and depression. Mr O'Dair relied upon the following medical evidence which was before the Employment Tribunal: a letter dated 10 July 2012 from Dr David Mitchell, the Medical Director, Professional Development, to Professor Harrison, Director of Occupational Health. In that letter Dr Mitchell asks:

> **"Could I have your advice:**
>
> **1. In your opinion is it likely that the bullying and harassing behaviour are due to dyslexia?**
>
> **2. If you think they are then, in your opinion is it likely that any necessary adjustments and support for the dyslexia will stop the bullying and harassing behaviour?"**

16. In answer to that letter Professor Harrison wrote on 12 July 2012 as follows:

> **"… I am unaware that dyslexia *per se* is considered to be a cause of bullying and harassment. Indeed, I would say that the opposite is more likely to be the case, ie people with dyslexia may be the victims of bullying by others.**
>
> **Dyslexia may be associated with other conditions. This has been termed neurodiversity. Examples of other conditions include dyspraxia, dyscalculia, ADHD and Autism Spectrum Disorder. … As a consequence of having neurodiversity, low self esteem may develop leading to depression and anxiety. People who are increasingly anxious or depressed may behave erratically and may display irritability and short temper and lack of tolerance of others."**

Further into the letter Professor Harrison writes:

> **"It is also reported that she has neurodiversity. It is not stated that she has a distinct additional disability, such as autism spectrum disorder. …"**

Further down:

> **"… As with dyslexia, people with neurodiversity are often bullied. However, it is conceivable that people with Asperger's syndrome, for example, might behave in a way that could be construed as bullying behaviour. I am not aware that Dr Thomson has ever been assessed as having an autism spectrum disorder or Asperger's syndrome. Based on her clinical appearance, use of language and behaviour during consultations, I did not form a view that she was likely to be affected by these conditions."**

The letter concludes with a paragraph starting as follows:

> **"The deficits in cognitive functioning do need to be addressed and reasonable adjustments are necessary to help her function in different environments without undue stress. Examples of adjustments can be found in the report prepared by Access to Work following a workplace assessment. The focus of the report is the purchase of software and hardware and some training to support their usage. …"**

And he remarks:

> **"… Additional training will be required to address the neurodiversity issues. The aim will be to change behaviour. I am not able to comment on the efficacy of therapy. I can seek further opinion about this, if this will be helpful."**

17. Mr O'Dair contended that because the Employment Tribunal, in paragraph 72, considered in dealing with compensation for unfair dismissal that "there is the important medical evidence which demonstrates that the Claimant's mental health was compromised at or around the time of the three incidents" and in paragraph 77 that "there were signs of an incipient mental health problem," the Employment Tribunal erred in failing to aggregate mental health difficulties with dyslexia when considering whether the Claimant's disability placed her at a substantial disadvantage.

18. In response to the submission by Miss Chudleigh that the Claimant had consistently advanced her case on the basis that her disability was dyslexia not dyslexia and depression, Mr O'Dair said that the evidence was before the Respondent. He referred to a letter dated 10 September 2013 in which Dr Anderson, Consultant Psychiatrist, referred to the Claimant seeing a Consultant Psychotherapist since April 2012. Mr O'Dair submitted that the Employment Tribunal erred by not taking this evidence into account and by observing that Dr Roberts' report did not support a connection between dyslexia and bullying. He said that Dr Roberts' report was concerned with reasonable adjustments for dyslexia only. Mr O'Dair contended that the Employment Tribunal erred in law in focussing on the dyslexia and failing to aggregate depression with it. Their focus should have been on the consequence of the Claimant's

conditions in deciding whether she was placed at a substantial disadvantage for the purposes of her claim under section 20 of the **Equality Act**.

Ground 3

19. In addition to relying on Dr Harrison's letter of 12 July 2012 on the aggregation point, Mr O'Dair contended that the Employment Tribunal erred in failing to construe it as answering "Yes" to the first question in Dr Mitchell's letter of 10 July 2012. Mr O'Dair submitted that unless the answer to the question was "Yes", Professor Harrison would not have gone to refer to adjustments. The question of aggregating depression with dyslexia, Mr O'Dair suggested, was signalled by his asking questions of Dr Palazzo about their relationship and their link to the behaviour of the Claimant. We were told that Employment Judge Snelson challenged this interpretation of Professor Harrison's letter. Mr O'Dair reasoned that, if there were adjustments which could have prevented further bullying, then it would have been a breach of duty to the Claimant for the Respondent not to make the further adjustment of not dismissing her for bullying behaviour.

20. Miss Chudleigh submitted that the Claimant had based her claim on dyslexia. This was the claim made in the ET1, "dyslexia with neurodiversity". It was the disability identified in the CMD list of issues and formed the basis of the agreement by the Respondent that the Claimant was disabled within the meaning of the **Equality Act**. Miss Chudleigh referred to the long-established authority of **Chapman v Simon** [1994] IRLR 124 that the Employment Tribunal has jurisdiction to determine the case advanced before it. This was that the disability was dyslexia. Counsel also referred to the case of **Ministry of Defence v Hay** [2008] IRLR 928 to demonstrate that **Chapman v Simon** is still very much good law. Miss Chudleigh described the reliance on behalf of the Claimant on paragraphs 18 to 20 in the Skeleton

Argument for this appeal and on Professor Harrison's letters of 12 and 25 July 2012 as showing that the Claimant was relying on depression as well as dyslexia as, in her words, "hopeless". At the Employment Tribunal Mr O'Dair emphasised mental health in his final submissions to the Employment Tribunal. The Employment Tribunal was right to comment, as they did, in paragraph 57 that:

> **"As the case progressed Mr O'Dair appeared to seek to overcome these difficulties by focussing on the evidence of Professor Harrison pointing to incipient depression."**

21. Miss Chudleigh contended that the pleading point is a complete answer to the Grounds of Appeal challenging the dismissal of the disability discrimination claim. The cause of the impairment to a Claimant in a reasonable adjustments claim is not relevant. In this case the impairment was dyslexia. It was contended by Miss Chudleigh that there is no basis for overturning the decision of the Employment Tribunal. Miss Chudleigh referred to the report of Dr Roberts, observing that nowhere in the report does Dr Roberts say that, because the Claimant is dyslexic, she is more likely to be bullying. The Employment Tribunal not only had the letter of Professor Harrison of 12 July before them but other material. The Employment Tribunal rightly referred to all the material placed before them of relevance on this issue and they came to a permissible conclusion. As for the construction of Professor Harrison's letter, Miss Chudleigh contended that, just because Professor Harrison made observations on reasonable adjustments which could be made or considered, that did not mean that the answer to the first question put to him was "Yes." In that letter it was said he answered question 1 in the negative.

Discussion and Conclusion

22. The **Equality Act**, section 20, in material part provides that where the Act imposes a duty to make reasonable adjustments the duty imposes three requirements the first of which is :

> **"(3) … where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage."**

That sets out the scope of the duty to make reasonable adjustments where there is such a duty imposed by the Act. The asserted disability in the Claimant's claim was dyslexia. This is plain from the ET1 and the CMD. It is to be noted that there was an application by Mr O'Dair at the outset of the substantive hearing of the claim to make amendments, but no amendment was sought to be made as to the scope of the disability relied upon. The addition of depression cannot be divined from the letter upon which Mr O'Dair relies, namely that from Professor Harrison of 12 July 2012. Further, there was no evidence before the Tribunal placed before us to support the conclusion that the Claimant was suffering from depression to the extent and for the length of time required to constitute disability, even aggregated with the existing disability of dyslexia at the material time. The Employment Tribunal came to their conclusion on the facts.

23. So far as the reliance placed by Mr O'Dair on the letter of 12 July is concerned, we do not agree with his construction of the letter. That letter cannot, on a reasonable reading, be read as answering the question: "Is it likely that the bullying and harassing behaviour are due to dyslexia?" in the affirmative. The professor does not give that answer or give any answer or observation suggestive of that answer. He says, in terms:

> **"… I am unaware that dyslexia *per se* is considered to be a cause of bullying and harassment. Indeed, I would say that the opposite is more likely to be the case, ie people with dyslexia may be the victims of bullying by others."**

24. So far as depression is concerned, on which Mr O'Dair places considerable reliance for his aggregation argument, on the evidence placed before the Tribunal we see from the later letter of 25 July 2012 from Professor Harrison to Mr Kuku, the BMA representative Senior

Employment Advisor acting for the Claimant, the Professor's view of the Claimant's anxiety was as follows:

> **"… Based on my own assessment, I had formed the view that she had developed an adjustment disorder including anxiety and depression. Although I have not had contact with the MedNet psychiatrist, it appears that there is an external opinion that Merran is suffering from severe stress and reactive depression. In my judgement I think this is due to the effect of the investigations that have taken place, the outcome of the first investigation which placed her on a final warning and concerns that more complaints have been made about her. …"**

That is a clear opinion expressed that any anxiety and depression observed in the Claimant was caused by the processes which led to her dismissal. In other words the investigations into her conduct and what happened thereafter. They do not, in our judgment, lend support to a suggestion that the Employment Tribunal erred in failing to hold that the Claimant was suffering from depression at the material time, whether or not that was to be relied on as constituting the disability for the purpose of their claim before them standing on its own alongside the dyslexia or as amalgamated with it, as in the **Patel** case, resulting from dyslexia. On the evidence before the Tribunal, in particular Professor Harrison's letter of 25th July 2012, on whose previous letter considerable reliance was placed, Professor Harrison was of the view that such anxiety and depression was caused by the inquiry into the complaints against the Claimant and was not present at or before the events which led to the inquiry.

25. This claim was lost on the facts. The Employment Tribunal held that:

> **"In our judgement the insurmountable difficulty confronting Mr O'Dair is that the link is simply not made out".**

That is the link which they held was essential to the argument that there was a link between dyslexia and/or neurodiversity and the behaviour liable to amount or be perceived to amounting to bullying. Even if, which we do not accept, the Tribunal erred in failing to aggregate depression with dyslexia, on the evidence before the Tribunal that depression was not present at the time of the material events but may have been caused by the investigations and

consequences of those events. On the facts, in our judgment, the decision of the Tribunal to dismiss the reasonable adjustments claim is unimpeachable and the appeal from it is dismissed.

The Cross Appeal

26. By the cross-appeal the decision of the Employment Tribunal allowing the claim of unfair dismissal is challenged. The Employment Tribunal found the dismissal to be unfair on two bases, each of which is self-standing, and each of which supports that decision in its own right. The Employment Tribunal made the unchallenged finding that the reason for the dismissal was the Respondents' belief that the Claimant had committed the misconduct to which the three charges related. That was a reason relating to conduct and a potentially fair reason for dismissal. The Employment Tribunal then directed themselves to the correct approach in ascertaining the reasonableness of the dismissal. They state at paragraph 61:

> **"We have paused to remind ourselves, again, that it is our duty to apply the 'band of reasonable responses' test (in relation to both process and substance). It is not permissible for us to substitute our view for that of the employer. Having taken this precaution, and reviewed our findings of fact and the evidence as a whole, we have reached the clear conclusion that the Respondents did not act reasonably in dismissing the Claimant. On the contrary, we consider that, as a matter of process and substance, dismissal fell comfortably outside the range of permissible options available to the Respondents in the circumstances."**

27. The Employment Tribunal first considered the fairness of the process leading to the dismissal and then moved on to the substance of the decision to dismiss. They recorded that Mr O'Dair made five points challenging the process adopted by the Respondents. The second attack made by Mr O'Dair was that the Respondents were wrong to press ahead with the disciplinary proceedings in circumstances where a grievance had yet to be resolved. He had submitted, and this is of relevance because this is an additional ground relied on by Mr O'Dair in resisting the cross-appeal, the grievance was relevant to the complaints made against the Claimant in the disciplinary process. The Employment Tribunal rejected that challenge. They said:

> **"There may be cases where procedural unfairness will result from a decision by an employer to complete a disciplinary process while a grievance is pending, but this is not one of them. The grievance was principally directed to two matters: the alleged failure to make suitable workplace adjustments to cater for the Claimant's dyslexia and the complaint of bullying by Dr Russell. The fact that these complaints remained outstanding did not preclude the Respondents from doing justice to the unrelated disciplinary charges against the Claimant. Moreover there was no suggestion by her or on her behalf at the time that the disciplinary proceedings should be adjourned pending the outcome of the grievance."**

28. The Employment Tribunal, however, found that the fifth complaint made by Mr O'Dair about the procedure adopted by the Respondents was well-founded. In paragraph 66 the Tribunal held:

> **"Finally, Mr O'Dair submitted that the disciplinary proceedings were flawed by the appointment of Dr Palazzo, given his complete lack of relevant experience. We were surprised to hear the glib and complacent evidence of Mr Griffin on this aspect. He mounted an uncompromising defence of the appointment of Dr Palazzo and acknowledged not the slightest concern about entrusting a case of this weight to a decision-maker with no relevant experience whatsoever... He also stressed that the Respondents' procedures prescribed that the case be heard by a CPD."**

The Employment Tribunal held that:

> **"It is self-evident in our view that this employer did not act reasonably in giving the case to Dr Palazzo. To do so was not fair to the decision-maker. But more importantly, it denied the Claimant a fair hearing. As a minimum, fairness entails, amongst other things, a decision by someone equipped with ability and experience commensurate with the demands of the case."**

29. The Employment Tribunal continued:

> **"It is no answer to say that Dr Palazzo was within the class of persons who were eligible to chair the disciplinary hearing under the Respondents' written procedures. Fairness does not depend on a 'box-ticking' approach to procedures. An unfair process does not become reasonable simply because it does not conflict with a written procedure. For these reasons, we find real force in Mr O'Dair's fifth point and we hold that the defect here identified is sufficient to place this case outside the range of permissible action open to the Respondents and accordingly renders the dismissal unfair as a matter of process."**

30. The Employment Tribunal then turned to the question of substance. They consider, at paragraph 67, the evidence of Dr Palazzo and, in particular, they refer to the fact that

> **"… he accepted in his evidence before us that the behaviour with which the Claimant was charged was not the stuff of gross misconduct. This was consistent with his witness statement in which he felt unable to put the case higher than one of 'serious misconduct'. At another point he told us that he regarded the three incidents in themselves as relatively minor (he saw the third as more serious than the other two) but based the dismissal on the context of the prior warnings, the impact on the individuals concerned and the perceived risk of wider impact on the team if the Claimant remained part of it."**

They further held :

> **"Asked directly if he had dismissed for gross misconduct, he replied:**
>
> **'Yes. In the context of a previous warning.'"**

The Tribunal continued:

> **"Reading the evidence in the round, we interpret it is meaning that Dr Palazzo did not regard the three incidents, singly or collectively, as amounting in themselves to what he understood as 'gross misconduct', worthy of dismissal in themselves."**

The Tribunal continued that "Dr Palazzo purported to apply the disciplinary procedure." They considered that procedure, saying that:

> **"It envisages conduct-based dismissal arising in one of two ways: either as the culmination of a graduated series of warnings or on a finding of 'gross misconduct'. The procedure does not permit Dr Palazzo's logic of converting misconduct which was 'not the stuff of gross misconduct' into 'gross misconduct' by calling up reinforcements in the form of context (notably the prior warning), consequences (such as the risk of damage to team cohesion), want of mitigation (eg perceived lack of remorse) and so forth. Save where a final warning has already been given, the procedure does not permit dismissal for conduct which, of itself, falls short of amounting to gross misconduct."**

31. The Tribunal then considered whether the departure from the disciplinary procedure took Dr Palazzo's decision making outside the band of reasonable responses. The Tribunal said in paragraph 70:

> **"...we have reached the very clear conclusion that Dr Palazzo's reasoning was fatally flawed and quite impermissible. Disciplinary procedures exist to tell employees and decision-makers where accepted limits of managerial action lie."**

They continued:

> **"In our judgement it was plainly not open to Dr Palazzo to depart radically from the disciplinary procedure as he did. Nor did he set out to do so. He simply misinterpreted the procedure, erroneously believing that he was free to elevate a case of, at worst, 'serious misconduct' into one of 'gross misconduct' by reference to attendant circumstances and consequences. In reasoning as he did, we are satisfied that he reached a decision which no decision-maker, reasonably applying the Respondents' disciplinary procedure, could have reached."**

The Tribunal therefore concluded that "as a matter of substance" the decision to dismiss fell well outside the range of reasonable responses open to the Respondents in the circumstances.

32. Miss Chudleigh, under Ground 1 of the cross- appeal, submitted that their view or decision that Dr Palazzo was ill-equipped to chair the disciplinary was a case of impermissible trespass on the ambit of discretion and powers of the Respondents. The Respondents applied their procedures; they carefully considered who should chair the hearings. Two of the individuals at the appropriate level could not chair the meeting because of previous involvement with the Claimant.

33. So far as the second ground of cross-appeal is concerned, it was said that the Respondents had asked Dr Palazzo be recalled to deal with a question which had arisen, namely that of his experience and his qualification to chair the disciplinary panel. That request was refused, and it was said that refusal was inconsistent with the overriding objective applicable to Employment Tribunal procedures and it rendered the decision in this regard unfair.

34. So far as the third ground of cross-appeal is concerned, it is said that the Employment Tribunal erred in failing to take into account in considering the overall fairness of the dismissal Dr Russell's letter of 18 July 2011 dealing with clinical risk by the continued presence of the Claimant in the neonatal team and failing to take into account the series of complaints stretching back a considerable period of time.

35. So far as Ground 4 of the cross-appeal is concerned, Miss Chudleigh contends that the Employment Tribunal erred in rejecting the Respondents' argument for a **Polkey** reduction. That **Polkey** reduction was put before the Tribunal on two bases: first, that if a fair procedure had been followed, the same result would have resulted. In other words the Claimant would have been dismissed. Accordingly she has suffered no loss by that unfairness. The second basis was that, on the evidence before the Employment Tribunal, the Claimant would not have

remained long in her post even if she had survived the disciplinary decision under review, because her conduct had shown that she had ignored the previous warning given to her. The first of the three events on which the more recent disciplinary investigation and hearing was based happened a matter of days after she had received a warning about another matter. Therefore, in effect, it was perverse of the Tribunal to fail to make a **Polkey** reduction which should, on the evidence before them, have been based on a conclusion that the Claimant would have been fairly dismissed fairly soon after the events with which we are concerned.

36. In this regard, the Respondents challenge the finding of the Employment Tribunal that they were conscious that the authorities stressed the need for Tribunal to engage in a speculative exercise following the emphasis in **Item Software** on determining whether it is likely that a Claimant would have been dismissed within a certain period of time after the actual unfair dismissal. It is said that, on the material before them, it was impermissible for the Employment Tribunal to fail to make such an assessment. The Employment Tribunal in paragraph 76 said:

> **"We cannot speculate in any informed way about how long she would have been away on sick leave."**

Further that they "find it impossible to reach a confident view as to what would have happened if they had not unfairly dismissed her." Then they go on to posit certain situations. They say:

> **"She might have received a final written warning. Such a warning would certainly have strongly inhibited her from resorting to further intemperate exchanges with colleagues. No doubt she would have received appropriate medical care to overcome her psychiatric condition."**

The Employment Tribunal further state:

> **"We cannot speculate in any informed way about how long she would have been away on sick leave."**

It is said that the ducking of the question was perverse on the material before the Employment Tribunal and that they failed to carry out their duty as directed in **Item Software (UK) Ltd v Fassihi** [2004] EWCA Civ 1244.

37. Mr O'Dair submitted that, so far as the challenge to the finding about Dr Palazzo is concerned, the Respondents rely on the same arguments as they relied on before the Employment Tribunal. He suggested that all the grounds of cross-appeal thereafter were all perversity grounds. So far as the decision in paragraph 70 on procedure and substance is concerned, the Tribunal's reasoning was unimpeachable. It is said that the Employment Tribunal carefully considered the suitability of Dr Palazzo to conduct the disciplinary hearing, and it was open to them, bearing in mind that Dr Palazzo had made a fundamental error in applying the Respondent's disciplinary procedure, to hold that he was an unsuitable person to chair such an important disciplinary hearing. The conclusions of the Employment Tribunal in holding that the dismissal of the Claimant was unfair, it is said, are unimpeachable.

38. As for the decisions of the Employment Tribunal on **Polkey** are concerned, Mr O'Dair submitted that, even after **Item Software**, it is possible for a Tribunal, having engaged with trying to do the best they can to envisage what would have happened had the dismissal not taken place, as to how long the employment would have continued thereafter, it is still permissible for them to conclude that it is impossible to reach a view as to what would have happened if the Claimant had not been unfairly dismissed. This Employment Tribunal was well aware, and expressly stated so, that they had to engage in the exercise of considering what would have happened had the Claimant not been unfairly dismissed when the dismissal took place. They did so, and they reached a permissible view. As to the challenge made to their conclusion on **Polkey**, having regard to the fact that the Claimant carried out the first act of

which complaint was made very shortly after she had previously received a warning, a final warning is a different matter. Mr O'Dair submitted that, even having regard to the history, the conclusion reached by the Employment Tribunal, was permissible.

39. Mr O'Dair submitted that the percentage reduction for contributory fault is a matter peculiarly within the discretion of an Employment Tribunal and it is only in extreme cases of perversity or misdirection that Employment Appeal Tribunal can interfere with that assessment.

40. In our judgment the Employment Tribunal did not err in finding that the involvement of Dr Palazzo as chair of the disciplinary panel hearing the proceedings against the Claimant rendered the dismissal procedurally unfair. Although he was in the category of those qualified to chair such a panel it seems that there was no evidence that he had training or experience to carry out that duty. It was observed by Miss Chudleigh that disciplining consultants is very rare indeed and that individuals cannot be expected to have experience of carrying out that exercise.

41. However, the failure of Dr Palazzo to properly apply the Respondents' own disciplinary procedure is very striking indeed and, in our judgment, justifies the Tribunal in concluding that the absence of training or experience of Dr Palazzo in these matters was something that directly affected the fairness of the disciplinary proceedings against the Claimant. In our judgment the Tribunal cannot be said to have reached a perverse conclusion or erred in law in holding that the defect was sufficient to place the dismissal outside the range of permissible action open to the Respondent.

42. So far as the criticism that the Employment Tribunal acted outwith the overriding objective in refusing Miss Chudleigh's application to recall Dr Palazzo to deal with his

experience or qualification to chair a panel, it is striking that at no time in support of the cross-appeal has anything been provided that if he had been recalled he could have given evidence that he had suitable training or qualification for that purpose. If there had been, it may be that a real injustice may have been suffered. However, it was not. The Tribunal made a case management decision in the absence of any demonstration that it caused any injustice. In our judgment their refusal to have Dr Palazzo recalled is not a ground for challenging the procedural basis for the Tribunal's reasoning in holding the dismissal to be unfair.

43. It is not necessary to consider Mr O'Dair's additional ground for supporting the decision of the Tribunal that an unfair procedure was adopted, namely that the Tribunal should have held that failure to conclude the grievance procedure before embarking on disciplinary proceedings concerned, with the same substantive reasons was unfair. The cross-appeal against the finding of unfair dismissal is dismissed for other reasons.

44. Turning therefore to the second and independent basis, on which the Tribunal found that the dismissal of the Claimant was unfair, in our judgment the Tribunal's reasoning is unimpeachable. They did not substitute their own view of the gravity of the conduct for that of the Respondents. Indeed, in part, they based their view on that of Dr Palazzo. He had not viewed the three matters, the subject of the disciplinary proceedings, as amounting to gross misconduct in themselves. The Respondents erroneously did not apply their own disciplinary procedure in concluding that dismissal should follow. That would only have been correct if those incidents had followed a final written warning.

45. The other matter relied upon by Miss Chudleigh, namely the letter from Dr Russell setting out concerns of the Claimant's colleagues, cannot in our view convert otherwise

insubstantial grounds justifying summary dismissal into substantial grounds. In our judgment the Employment Tribunal, did not err in their decision, which was that there was independent support for the decision that this was an unfair dismissal as it was substantially unfair. The dismissal fell, in their words, well outside the range of reasonable responses open to the Respondents in the circumstances.

46. So far as the challenge to making no **Polkey** reduction is concerned, the Employment Tribunal carefully and properly directed themselves on the approach to considerations of the **Polkey** issue and the authorities stressing the need for Tribunals to engage in the necessary speculative exercise even if it is difficult to do so. However, they quite rightly state "There must be a proper evidential base for any finding". This Employment Tribunal engaged in that exercise and came to their conclusion. The closeness in time of the first of the three incidents to a previously issued warning, which was not a final written warning, does not in our judgment render perverse their view that they could not reach a conclusion on the question of whether and when the Claimant would in any event have been dismissed. Accordingly the **Polkey** challenge fails.

47. The Employment Tribunal reached a judgment on contributory fault having heard the evidence over a number of days. As is plain from the authorities and in particular from **Hollier v Plysu** [1983] IRLR 260, the decision on contributory fault is peculiarly within the scope of decision-making of an Employment Tribunal. The deduction of 30% rather than a larger percentage or indeed 100% is not a conclusion which is perverse in the circumstances. Accordingly all grounds of cross-appeal are dismissed.