Appeal No. UKEAT/0012/18/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 September 2018

Before

HIS HONOUR JUDGE MARTYN BARKLEM

MR D J JENKINS OBE

MR B M WARMAN

MS S CALLENDER — APPELLANT

SOUTH LONDON AND MAUDSLEY NHS FOUNDATION TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS DEBBIE GRENNAN (of Counsel) Instructed by: Doyle Clayton Solicitors 1 Crown Court Cheapside London EC2V 6JP
For the Respondent	MR ROBERT MORETTO (of Counsel) Instructed by: Capsticks Solicitors 1 St George's Road Wimbledon London SW19 4DR

SUMMARY

UNFAIR DISMISSAL – Constructive Dismissal

DISABILITY DISCRIMINATION – Disability related discrimination

An Employment Tribunal ("ET") was entitled to find, on the facts before it, that a letter written by the Claimant referring to "constructive dismissal" and to an ET1 having been lodged demonstrated an intention on the Claimant's part to resign, such that no subsequent act by the Respondent could amount to a "last straw".

It was also entitled to find that a final written warning issued to the Claimant was a proportionate means of achieving a legitimate aim, in circumstances where the Claimant had been absent for lengthy periods over a protracted period.

HIS HONOUR JUDGE MARTYN BARKLEM

1. In this Judgment I shall refer to the parties as they were below. This is Claimant's appeal against a finding of an Employment Tribunal ("the Tribunal") sitting at London South (Employment Judge Pritchard and lay members). The hearing took place over 26 to 28 June 2017, and the Written Reasons were sent to the parties on 11 August 2017; I refer to them as the "Reasons".

2. The Judgment of the Tribunal was that the Claimant's claims (1) that the Respondent treated her unfavourably because of something arising in consequence of her disability, (2) that the Respondent failed to make reasonable adjustments, and (3) that she was constructively and unfairly dismissed, were all dismissed. There is no appeal against finding (2).

3. The Claimant represented herself before the Tribunal but at this Appeal Tribunal, at which I have the benefit of sitting with lay members, is represented by Ms Debbie Grennan of counsel. Mr Robert Moretto of counsel appeared for the Respondent both below and at this appeal. Each has submitted a comprehensive and helpful skeleton argument in electronic format enabling me more easily to cite from their submissions in this ex tempore Judgment. I express my gratitude to them both.

4. The grounds of appeal, as originally settled, are lengthy and include a good deal of argument. They have been encapsulated, accurately in my judgment, by Mr Moretto in his skeleton argument and with some amendments I set them out in that form:

- The first ground is that the Tribunal erred in law in failing to give sufficient reasons for its conclusion that the final written warning issued to the Claimant on 16 June

2016 was a proportionate means of achieving a legitimate aim. The Claimant also argues that the Tribunal took into account irrelevant considerations such that its decision amounted to an error of law.

- The second ground is that the Tribunal misdirected itself in relation to the case of **General Dynamics Information Technology Ltd v Carranza** [2015] ICR 169 or mistakenly treated itself as bound by that decision.
- The third ground is that the Tribunal misdirected itself in finding that the Claimant was not relying on a "last straw" act and/or failed to give adequate reasons.
- The fifth ground is that the Tribunal identified the correct test in determining whether the Claimant resigned in response to the appropriate breach but erred and reached a perverse conclusion or one that failed to give adequate reasons for finding against her in that respect.

5. This matter was permitted to go to a Full Hearing by HHJ Eady QC. Judge Eady commented that, in relation to grounds 1 and 2, relating to the reasons for rejecting the claim under section 15 of the **Equality Act 2010** ("EqA"), it was reasonably arguable that the Tribunal failed to demonstrate that it had undertaken the relevant necessary balancing exercise and that it placed too much emphasis over comments in **Carranza**, failing to demonstrate how it had carried out the task it was required to undertake. In relation to ground 3, Judge Eady commented that she thought it reasonably arguable that the Tribunal erred in failing to permit the Claimant to advance constructive dismissal as a "last straw" claim. She refused permission for the fourth ground of appeal to proceed. She allowed ground 5 to proceed, stating that it was arguable that the Tribunal erred in its construction of a letter dated 6 December 2016 as amounting to a resignation.

6. With that framework in mind, I turn to the facts. The following extracts from the Reasons will serve to put the issues in the Appeal in context.

> **"4. The Claimant was employed by the Respondent from July 2007 to 4 January 2017 as a Community Occupational Therapist. In February 2014, the Claimant transferred from Croydon to the St Giles Resource Centre in the London Borough of Southwark and worked within the St Giles Adult Community Mental Health Team.**
>
> **5. The Claimant worked with clients with severe and enduring mental illnesses who had a range of social problems; she managed a caseload of approximately 30 clients. The Claimant's key responsibilities were clinical case management, working as part of a multi-disciplinary team, communication and documentation. The Claimant was required to visit clients in their own homes. The Respondent provided the Claimant with the benefit of a lease car. The Claimant might visit 4 or 5 clients three out of five days each week following which she would update her notes, in each case taking about 15 minutes to do so. From 2013, the Claimant was provided with a Samsung tablet to enable her to update her notes electronically; she usually did this sitting her car. The Claimant's contracted hours were 37.5 hours a week.**
>
> **….**
>
> **9. The Respondent has in place a Sickness Policy which states, among other things:**
>
> > ***While the Trust understands that there will inevitably be some sickness absence among employees, it must also pay due regard to its business needs. If an employee is frequently and persistently absent from work, this can damage efficiency and productivity, and place an additional burden of work on the employee's colleagues. By implementing this policy, the Trust aims to strike a reasonable balance between the pursuit of its business needs and the genuine needs of employees to take periods of time off work because of sickness.***
>
> **The policy makes provision for the management of both short-term and long-term sickness absence. Employees may appeal against formal actions taken under the policy.**
>
> **10. In February 2015, following a number of sickness absences for various sickness reasons, the Claimant was issued with an Attendance Improvement Plan to be in place for a 6 month period.**
>
> **….**
>
> **13. The Claimant was invited to attend a sickness review meeting on 23 September 2015 at which Bernadette Crosby told the Claimant that she would be issued with a First Written Warning under the Sickness Policy (the letter notifying the Claimant of the First Written Warning not being received by her until November 2015). It was suggested that the Claimant should complete a display screen equipment self-assessment which could then be forwarded to Joan Collins, the Trust's Health and Safety Advisor. However, the Claimant did not complete the self-assessment. The Claimant was also referred to occupational health but she did not attend the appointment.**
>
> **14. On 23 November 2015, the Claimant's GP certificated her as not fit for work because of "cervical spondylosis"[.] The Claimant remained certificated as not fit for work until her return on 26 May 2016 as described below.**
>
> **….**
>
> **21. Following her return to work, the Claimant was invited to attend a formal sickness review meeting with Bernadette Crosby on 16 June 2016. Because the Claimant had taken a further 187 days sickness absence, the Claimant was issued with a Final Written Warning. It is this Final Written Warning about which the Claimant complains to the Tribunal alleging that it amounts to discrimination under section 15 of the Equality Act.**
>
> **22. In December 2015, while off sick, the Claimant had appealed against the Final Written Warning. Given that her appeal was pending, the Claimant communicated her unhappiness to the Respondent that the Final Written Warning had been imposed. The Claimant was informed that if her appeal was successful then the Final Written Warning would be reviewed.**
>
> **….**

32. Because the Claimant was not well enough to attend the appeal meeting on 25 August 2016, it was re-arranged and took place on 14 September 2016, although the Claimant remained off work at the time. Ann Witham chaired the appeal meeting; she concluded that the Written Warning was fair in the circumstances and that appropriate procedures had been followed in line with the Respondent's Sickness Absence Policy. Ann Witham clarified that the Written Warning had been issued before the Claimant's more recent diagnosis.

….

37. On 15 November 2016, the Claimant presented her ET1 Claim Form to the Employment Tribunal in which she claimed disability discrimination and unfair dismissal. Because the Claimant had neither been dismissed nor tendered her resignation, the Claimant's claim of unfair dismissal could not be accepted.

…

39. By email dated 25 November 2016, Sally Dibben informed the Claimant that whilst it was thought that the Final Written Warning had been issued appropriately at the time, because the Claimant's disability was notified shortly afterwards the Final Written Warning would be removed from the Claimant's file as a reasonable gesture.

…

41. In advance of her receipt of Ann Witham's letter, the Claimant had written to Sally Dibben on 6 December 2016 saying, among other things:

> ***How does my condition affect me? I find it difficult sitting down for long periods without experiencing fatigue pain e.g. tension in my shoulders. At my worst I experience pins and needles in my fingers, headaches increased pressure at the back of my neck sometimes with blurred vision and breathing difficulties.***

The Claimant also stated that she felt it would be better to have a fresh start and that she had made a claim for constructive dismissal.

42. By letter emailed to the Respondent on 4 January 2017, the Claimant resigned with immediate effect. As stated above, the Claimant's application to amend her claim to include a claim of constructive unfair dismissal was granted at a preliminary hearing on 8 May 2017."

7. Having set out the relevant legal principles, the ET made the following relevant findings:

"*Unfavourable treatment under section 15 of the Equality Act 2010*

67. Given the Respondent's concession that by being issued with a Final Written Warning the Claimant was thereby treated unfavourably because of something arising as a consequence of her disability, the question for the Tribunal is whether the Respondent has shown that issuing the Final Written Warning was a proportionate means of achieving a legitimate aim.

68. The Final Written Warning was issued under the Respondent's Sickness Policy which makes it clear that the Respondent must pay due regard to its business needs. This is unsurprising, not least given the nature of the Respondent's duty to care for vulnerable individuals. Although the Claimant's appeal against the First Written Warning remained outstanding when the Final Written Warning was issued, there was no credible evidence to suggest the Final Written Warning was issued in bad faith or inappropriately or otherwise than in accordance with the Respondent's policy. The fact that the Claimant had an underlying medical condition did not preclude formal action under the Respondent's policy. Nor was there any credible evidence to suggest that the First Written warning was issued inappropriately (that first warning was issued in accordance with the Respondent's policy for various sickness related reasons unrelated to the trapped nerve injury as it was understood at the time). The Tribunal accepts Bernadette Crosby's unchallenged evidence that the Claimant's continued sickness absence was having a significant impact on the team, service users and overall service delivery.

69. The Tribunal has had regard to *Carranza* and finds a close analogy with that case and the present case. In *Carranza* the employee had been off work for 206 days; in the present case, the

> **Claimant had been off work for a further 187 days in a six month period; both the employee in *Carranza* and the Claimant in the present case were issued with Final Written Warnings.**
>
> **…**
>
> ***Constructive unfair dismissal***
>
> **74. The Claimant's claim is that, specifically, the erroneous sentence in Ann Witham's letter of 2 December 2016 amounted to a breach of the implied term of trust and confident [sic] amounting to a fundamental breach of contract. The Claimant confirmed in evidence that she resigned in response to that alleged breach. During submissions, the Claimant, for the first time, told the Tribunal that the content in the letter was the "last straw". The Tribunal informed the Claimant that in light of the issues identified at the preliminary hearing, her case had not been understood as one in which she was relying on a "last straw" or a series of events amounting to an alleged breach of contract but, rather, as a one-off discrete act. The Claimant confirmed that she was basing her claim on the sentence in the letter.**
>
> **75. The Claimant first issued her claim to the Tribunal on 15 November 2016. She included a claim of unfair dismissal. In her letter of 6 December 2016, the Claimant states that feels [sic] it might be better to have a fresh start to improve her health and wellbeing and that she had therefore made a claim for constructive dismissal. The Tribunal concludes that the Claimant did not therefore resign in response to the erroneous sentence in Ann Witham's letter which the Claimant only received on 7 December 2016.**
>
> **76. In any event, given the overall context of a lengthy letter, and the circumstances leading up to it, the Claimant has not shown from the perspective of a reasonable person in the Claimant's position that the Respondent demonstrated an intention to abandon and altogether refuse to perform the contract. The tone of the letter was very much one of making concessions. It cannot sensibly be concluded that the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence between Claimant and the Respondent. The inclusion of such an erroneous sentence in the context of the case might be described as a "lesser blow" as described in *Croft*. It comes nowhere near establishing a fundamental breach of contract."**

8. In her skeleton argument, Ms Grennan deals with grounds 1 and 2 in this way: She points out that the final written warning given to the Claimant at a sickness review was conceded by the Respondent to have amounted to unfavourable treatment because of something arising in consequence of disability. Thus, the burden of proving that the final written warning was a proportionate means of achieving a legitimate aim rested on the Respondent.

9. She relied upon the four principles set out by Elias J (as he then was) in **MacCulloch v Imperial Chemical Industries plc** [2008] IRLR 846, see paragraph 10:

> **"10. The legal principles with regard to justification are not in dispute and can be summarised as follows:**
>
> > **(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 862 at [31].**
> >
> > **(2) The classic test was set out in *Bilka-Kaufhaus GmbH v Weber Von Hartz* (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must 'correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to**

that end' (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to 'necessary' means 'reasonably necessary': see *Rainey v Greater Glasgow Health Board* (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp. 30-31.

(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]-[34], Thomas LJ at [54]-[55] and Gage LJ at [60].

(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA."

10. She also relies on **Bank Mellat v Her Majesty's Treasury (No. 2)** [2014] AC 700, when Lord Sumption at paragraph 20 (page 770) put the position on proportionality in this way:

> **"20. … the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of the fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of community. …"**

11. Ms Grennan also pointed to **Buchanan v Commissioner of the Police of the Metropolis** [2017] ICR 184 in which HHJ Richardson drew a distinction between cases in which the unfavourable treatment is a direct result of applying a general rule or policy and cases where a policy permits a number of responses to an individual's circumstances. She submits that the present case falls into the latter category and thus it is the particular treatment of this Claimant which must be examined to consider whether that treatment is a proportionate means of achieving the legitimate aim relied on.

12. She submits that the Tribunal failed to apply the correct test to the proportionality question at all. Had it done so, she argues, it would have had to consider or weigh up all relevant circumstances and in particular the discriminatory impact of the unfavourable treatment on this Claimant. Nowhere, she says, does the Tribunal address its mind to that balancing exercise.

13. Ms Grennan points to a number of factors which, she says ought to have been weighed in the balance and complains that nowhere in the Tribunal's Judgment is there evidence of it balancing these or any other factors against the Respondent's stated reasons for issuing the final written warning. Indeed, she says, although the Judgment makes reference to the Respondent's position, it does not address the contrary position. Thus, she submits, the Tribunal did not address the question whether it was reasonably necessary at that particular point of time for the Respondent to issue any further attendance warning or whether a proportionate response might have been to defer the consideration of any further warnings until the medical position was clear and/or the question of reasonable adjustments had been fully addressed. Either the Tribunal did not engage with the Claimant's case, she says, or, if it did, it failed to explain how it had undertaken the necessary balancing exercise before reaching the conclusion set out at paragraph 70 of the judgement. It is also said that the Tribunal placed undue reliance on a passage in **Carranza** which was *obiter*, that case having been principally concerned with reasonable adjustments.

14. In relation to ground 3, Ms Grennan made reference to a number of matters which, she said, pointed to the Claimant having on numerous occasions made it tolerably clear that this was a "last straw" case. Indeed, her resignation letter made express reference to this being a "last straw". In the course of evidence, she had referred to her trust in the Respondent having been eroded over time and that, when she received the letter that caused her to resign she had thought "enough is enough". She says that the Tribunal misdirected itself when finding, at paragraph 74 of the Reasons, that the case of constructive dismissal was limited to one in which the letter of 20 December 2016 was the sole act relied on as constituting a fundamental breach.

15. Ground 5 is concerned with the Tribunal's placing reliance, at paragraph 75, on the letter written by the Claimant on 6 December 2016, which included reference to her having made a claim for "constructive dismissal". Ms Grennan submits that the Tribunal has fundamentally and impermissibly mischaracterised that letter as a resignation and/or has impermissibly found that it showed that, by that date, she had formed a settled intention to resign. She asserts that there was no proper basis upon which such a conclusion could possibly have been formed and points to numerous passages in the letter, which taken as a whole, she says, demonstrate this. I do not propose to set out the various issues raised in the letter to which she refers. We have had regard to them all. To avoid repetition later, however, I set out one paragraph, which reads as follows:

> **"In thinking about the future in all honesty, I feel it might be better for me to have a fresh start in order to improve my health and wellbeing. In addition I have concerns about the organisations [sic] ability to assist in my ongoing professional development as an Occupational Therapist. I have therefore made a claim for constructive dismissal and have indicated that I will be seeking financial compensation on the ET1 form which I submitted on 15.11.16 which you should now have in your possession."**

That is the form ET1 in which the Claimant had ticked the box marked "unfair dismissal"

16. In her submissions today, Ms Grennan amplified the points raised in her skeleton argument. She pointed out that grounds 1 and 2 are linked and, in addition, that should her submissions on either ground 3 or 5 fail, the other of that pair must necessarily fail too. She took us to a number of important documents including attendance notes provided by the Respondent of the Preliminary Hearing and the Full Hearing itself.

17. Mr Moretto had the advantage of having appeared below. He begins his skeleton argument by reminding us of well-known dicta in a variety of cases, including **Meek v City of Birmingham District Council** [1987] IRLR 250 in which at paragraph 8 it was said:

> **"8. … the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those**

basic facts. The parties are entitled to be told why they have won or lost. There should be a sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises …"

18. He also referred to **Hewage v Grampian Health Board** [2012] ICR 1054 when Lord Hope at paragraph 26 said:

"26. It is well established, and has been said many times, that one ought not to take too technical a view of the way an employment tribunal expresses itself, that a generous interpretation ought to be given to its reasoning and that it ought not to be subjected to an unduly critical analysis. …"

19. Then to **ASLEF v Brady** [2006] IRLR 576 when Elias J (then President) said at paragraph 55:

"55. … The EAT must respect the factual findings of the employment tribunal and should not strain to identify an error merely because it is unhappy with any factual conclusions; it should not 'use a fine tooth comb' to subject the reasons of the employment tribunal to unrealistically detailed scrutiny so as to find artificial defects; it is not necessary for the tribunal to make findings on all matters of dispute before them nor to recount all the evidence, so that it cannot be assumed that the EAT sees all the evidence; and infelicities or even legal inaccuracies in particular sentences in the decision will not render the decision itself defective if the tribunal has essentially properly directed itself on the relevant law."

20. Mr Moretto reminds us that the Employment Tribunal's Judgment must be read as a whole and that it is wrong to focus on a few paragraphs without reference to the Judgment as whole, including the directions of law and the Tribunal's findings of primary fact. Ms Grennan, at the outset of her submissions, had made clear to us that she takes no issue with these preliminary points.

21. So far as grounds 1 and 2 are concerned, Mr Moretto took us to the relevant findings of fact in the Reasons concerning the various warnings which had been given to the Claimant in pursuance of the sickness absence policy. He points to the Tribunal having correctly identified, at paragraph 67 of the Reasons, that its task was to determine whether the final written warning was a proportionate means of achieving a legitimate aim. Paragraph 70, he says, identified the aims of the policy as being to improve attendance and to ensure it could provide service to its

clients to the best of its ability. He notes that, at paragraphs 68 and 69, the Tribunal accepted the unchallenged evidence on behalf of the Respondent that the Claimant's continued sickness absence was having a significant impact on the team, service users and overall service delivery and that the Tribunal had observed that the Claimant had been off work for a further 187 days in a six-month period. He pointed to the Claimant's acceptance in cross-examination (supplementary bundle page 33) that it was reasonable to advise her that if her attendance did not improve her employment might be terminated. For these reasons, he says, it is wrong to characterise the reasons at paragraph 70 of the Reasons as constituting the relevant factors taken into consideration.

22. Mr Moretto says it is clear that the Tribunal found the issuing of the final written warning to have been proportionate given the Claimant's level of absence and the effect that her absence was having on the team, service users and overall service delivery. As to the identification of matters relevant to her, he points to the Tribunal's reference to the "*factors of the case*" or "*circumstances of the case*" as indicating that it had regard to matters relevant to her, not least given its detailed examination of the medical evidence, at paragraphs 9 to 39 of the Reasons.

23. He also points to the absence of any evidence from the Claimant as to any other means of meeting the legitimate aim which made the giving of the warning disproportionate and says that it was incumbent on the Claimant to put those forward. She did not do so.

24. So far as grounds 3 and 5 are concerned, Mr Moretto focused on the history of the claim. Having claimed unfair dismissal prior to her having resigned, that element had been struck-out. It went back in as a claim of constructive dismissal following a hearing at which, as the Respondent's solicitor noted, the Judge ruled that the "*Claim is amended to include unfair*

constructive dismissal as described. [The Claimant] resigned in response to [the Respondent] making false allegation against her in letter dated 2.12.16 and resignation is 4 January 2017" (supplementary bundle page 30).

25. Following the Preliminary Hearing, an Order was sent to the parties on 9 May 2017. It recorded the Claimant's case as being that the Respondent had "breached the term of mutual trust and confidence implied into her contract of employment by making false allegations in a letter" (core bundle page 88). That Order, which sets out the case as permitted to proceed, was never appealed or otherwise challenged by the Claimant at all before the start of the Full Merits Hearing. If the Order did not record her case, as she wished it to be, she had every opportunity to seek to correct it but did not do so. It was too late, Mr Moretto says, to seek to amend an unparticularised "last straw" argument advanced, so far as the Employment Judge was concerned, only in the course of final submissions. Mr Moretto says that even if an application had been made, it could not have realistically have gone ahead, pointing to the case of **Honeyrose Products Ltd v Joslin** [1981] ICR 317 when Waterhouse J (at page 322G) said, "*It is plainly fair that the employee should either be limited to the matters that he has specifically referred to, or that he should give particulars of any additional matter that he seeks to raise*". In addition, he refers to a comment of Langstaff J (as he then was) in **Chandhok & Another v Tirkey** [2015] ICR 527 when he said at paragraph 18, "*a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it*".

26. I turn first to grounds 1 and 2. I have had considerable assistance from the lay members sitting with me, Mr Jenkins and Mr Warman, who have considerable workplace experience. Each takes the view, which I share, that, having read the Tribunal's Reasons as a whole and having

regard to the principles of law advanced by Ms Grennan summarised above, the Tribunal can be seen both to have identified and also carried out the task that was required of it. The lay members point in particular to the fact that a final written warning is not an extreme sanction and to the third proposition identified in **MacCulloch** (see above); namely that "*The more serious the disparate adverse impact, the more cogent must be the justification for i*t".

27. We each take the view that the adverse impact on anyone who has already received two warnings in light of her attendance and then received a third in the form of the final written warning is self-evident and requires little further analysis. Beyond the self-evident, there was nothing in particular advanced by the Claimant, who accepted in evidence that it was reasonable to warn someone with her attendance record of the potential consequences should this continue.

28. We note the point made as to the application of **Carranza** and to the point that the commentary on a hypothetical section 15 **EqA** claim referred to in that case was *obiter*. It is accepted by both sides that the case was of relevance. However, we do not accept Ms Grennan's point that the ET was confused as to the application of the case. It is right that HHJ Richardson was considering a case brought on the basis of a failure to make reasonable adjustments, such adjustments being, in effect, to overlook the existence of a warning. Paragraph 47 was HHJ Richardson's way of testing his hypothesis by looking at the possible outcome had the claim been brought under section 15. His remark that "*it was legitimate for an employer to aim for consistent attendance at work; and the carefully considered final written warning was plainly a proportionate means of achieving that legitimate aim*", is plainly of relevance to this case, albeit the decision turns on its particular facts.

29. It may be that, at paragraph 68 of its Reasons, the Tribunal's mention of there having been "*no credible evidence*" to suggest that the final or earlier warnings had been issued in bad faith or inappropriately suggests that they had borrowed from paragraph 53 of **Carranza** which was dealing with unfair dismissal. This is because there was no issue of a lack of good faith in the present case. However, looked at in the round, which we must, we do not consider that the ET thereby erred in law.

30. We turn to grounds 3 and 5. We have considerable sympathy for the position of any unrepresented Claimant. However, any system of justice would fall down very quickly if, at the end of a three-day hearing, a party should be able fundamentally to re-open the nature of his or her case, if that is what the Claimant was seeking to do, something which is not entirely clear. Ms Grennan does not dispute that, notwithstanding the brief reference in answer to a lay member of the Tribunal to the words "last straw", the Employment Judge in the present case had genuinely not picked up on what is now said to be the true nature of the Claimant's case before closing submissions.

31. Having regard to the Order made following the hearing at which the amendment to the ground of constructive dismissal was made and framed in the narrow terms identified by the Judge and again at the outset of the hearing, we reject that the suggestion that the Tribunal either misunderstood or misdirected itself as to the Claimant's case. We do not accept from a reading of the notes of the hearing the suggestion that the Tribunal "shut down" the Claimant at that stage. She continued to make submissions based on the evidence. We accept Mr Moretto's submissions that his case would have been significantly differently cast had he thought that the constructive dismissal claim was to be advanced on the much wider "final straw" basis. It is not incumbent

for a Tribunal to go beyond the basis of a claim identified and neither appealed nor sought to be varied in an Order following a Preliminary Hearing.

32. I turn finally to the letter of 6 December. The lay members each questioned Ms Grennan about this in argument. Each is firmly of the view, with which I concur, that whatever the tone of the first few pages might be, any letter written to an employer making reference to the bringing of the claim of constructive dismissal is likely to be regarded as indicating an intention to resign. This is fortified by the fact that the letter mentioned that the form ET1 had been issued. In their words, that paragraph "swamps" the remainder of the letter.

33. The significance of this is the challenge to the finding at paragraph 75 of the Reasons that the Claimant did not resign in response to the erroneous statement in the letter, which she received on 7 December, because she had already evidenced her intention to resign in her letter the previous day. The point is that one cannot characterise something as a "last straw" which post-dates a decision to resign.

34. For all those reasons, we do not find any error of law in any of the grounds raised and consequently dismiss this appeal.