Appeal No. UKEATS/0027/19/SS

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 4 February 2020

Before

MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

MRS LINDA M GALLACHER — APPELLANT

ABELLIO SCOTRAIL LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Mr Peter Grant-Hutchison (of Counsel) Instructed by Greig Employment Law 2 West Regent Street GLASGOW G2 1RW
For the Respondent	Mr Andrew Crammond (of Counsel) Instructed by Brodies LLP 110 Queen Street GLAGOW G1 3BX

SUMMARY

UNFAIR DISMISSAL

DISABILITY DISCRIMINATION

The Claimant was dismissed without any procedure being followed as a result of a breakdown in relations between her and her manager. The Tribunal found the dismissal was not unfair and also that the Respondent did not know (and could not reasonably have been expected to have known) of her disability. The Claimant appealed.

Held, dismissing the appeal, that although any contention by an employer that following a procedure would be futile would be approached with caution, this was one of those rare cases where it was open to the Tribunal to conclude that dismissal without any procedure was within the band of reasonable responses. The Claimant was a senior manager whose continued good working relationship with her manager was critical during a difficult period for the Respondent's business. Moreover, the evidence was that the Claimant recognised the breakdown in relations herself and was not inclined to retrieve the situation. The Tribunal found that any procedures at this time would not only have served no purpose but would in fact have worsened the situation.

THE HONOURABLE MR JUSTICE CHOUDHURY

1. I shall refer to the parties as they were below. The issue in this appeal is whether the Glasgow Employment Tribunal ("the Tribunal"), Employment Judge McLean presiding, erred in holding that the Claimant's dismissal without following any procedure, following a breakdown in working relations between the Claimant and another manager, was not unfair or discriminatory.

Background

2. The Claimant worked for the Respondent or its predecessors from December 2007 until her dismissal on 13 May 2017. In 2011, the Claimant was seconded to the Customer Experience Directorate where she reported directly to a Ms Taggart. In October 2012, the Claimant was promoted to Head of Customer Delivery and Standards. She continued to report to Ms Taggart with whom she had, at that stage, a very good working relationship.

3. That relationship first began to sour when the Claimant sought a salary increase. Although Ms Taggart was sympathetic to the Claimant's request, she said she did not have the authority to increase the salary. By November 2014, when Ms Taggart learned from another manager that the Claimant had made negative comments about her, Ms Taggart began to doubt the nature of her relationship with the Claimant.

4. In 2015, the business transferred to what is now the Respondent. The Claimant perceived a change in the business culture following the transfer and decided that she wanted out. However, she did not leave at that stage.

5. In December 2015, the Claimant again raised the issue of her salary with Ms Taggart. Although Ms Taggart stated she had made recommendations to Human Resources (HR), her impression was that the Claimant did not trust Ms Taggart to represent her position properly.

6. The Claimant did obtain a salary increase from April 2016.

7. In January 2016, the Claimant learned that Ms Taggart required that all of her direct reports, including the Claimant, should participate in the on-call rota. The Claimant refused, citing lack of technical knowledge and experience. Ms Taggart stated that doing on-call work was part of the Claimant's role and was non-negotiable. The Claimant continued to disagree that she should do on-call work but was added to the on-call roster from about June 2016.

8. Ms Taggart began to have concerns about how to manage the Claimant as she appeared determined to get her own way. By October 2016, the Claimant had made clear in her appraisal that she was looking for a more suitable role within the Respondent.

9. A restructuring exercise in 2016 had resulted in three new roles reporting directly to the Claimant. There was a dispute between the Claimant and Ms Taggart as to one of candidates for one of the roles, with Ms Taggart considering that the Claimant was favouring a candidate that was not ready for the post.

10. On 15 November 2016, the Claimant commenced a period of sick leave. By this stage, Ms Taggart was concerned that the Claimant was doing a job which she did not enjoy and that the working relationship with the Claimant was deteriorating. The Claimant was absent from work for a total of seven weeks (including a period of annual leave) and returned to work on 3 January 2017.

11. At a meeting on the 10 January 2017, referred to by the Tribunal as 'the January meeting', the Claimant and Ms Taggart discussed a wide range of matters including the business challenges and pressures of work that were likely to lay ahead. It was agreed that there would be a four-week phased return to work during which the Claimant and her ability to handle the workload would be monitored. Ms Taggart was, according to the Tribunal, supportive of the Claimant at that time. Ms Taggart summarised the content of the meeting in an email sent the same day. However, on 16 January 2017, the Claimant responded that she did not consider Ms Taggart's email to be a full record of the January meeting and proceeded to set out substantial amendments

to Ms Taggart's summary. Ms Taggart was surprised that the Claimant responded in this way rather than by speaking directly to her.

12. On 6 March 2017, Ms Taggart and the Claimant had a one-to-one meeting in which the recruitment of the Claimant's report was discussed. Ms Taggart favoured a Ms Ferguson, whereas the Claimant wanted a candidate that both Ms Taggart and another fellow director considered to be unsuitable. Ms Taggart sought to understand the Claimant's position. The Claimant said that they would need to agree to disagree and indicated that Ms Taggart should recruit whoever she wanted. They also discussed the difficulties in their relationship caused by previous discussions as to salary and on-call working issues. The Claimant said that she did not behave with anyone else in the same way that she behaved with Ms Taggart.

13. Ms Taggart was taken aback by the Claimant's comments. She considered that the Claimant seemed to be attributing all of the blame for the deterioration in their working relationship to her. Ms Taggart felt that when she asked the Claimant to do something that she did not want to do, the Claimant was not interested in Ms Taggart's thoughts and they were unable to discuss it. At around this time, the Claimant's direct reports had expressed concern about her leadership, ability to delegate and provide support.

14. The Respondent posted a trading loss at around this time. This apparently placed Ms Taggart under significant personal pressure given that that her directorate employed a significant part of the workforce. The business was entering a critical period during which Ms Taggart needed to be able to rely on her reports to "take forward the Customer Experience key deliverables".

15. The Tribunal found as follows:

> **"80. Ms Taggart spoke to John Gillies who had been appointed HR Director and Mr McPhail. The claimant's role in the Customer Service Directorate was pivotal. Ms Taggart had reflected on the situation and felt that there was a breakdown in trust between her and the claimant which was disruptive to the Customer Services Directorate and the business. As this was a critical time for the business Ms Taggart did not feel that the situation was recoverable and to take forward the Customer Experience key deliverables she concluded that there needed to be an immediate change and the claimant should leave the Customer Services Directorate. Ms Taggart had on an ongoing basis been looking for**

opportunities for the claimant elsewhere within the business, as had the claimant but to no avail. The only alternative was for the claimant to be dismissed but Ms Taggart had to meet the cost of this from her budget. Mr Gillies and Mr McPhail supported this decision. Ms Taggart was asked to prepare her justification for the decision and her commitment to cover the costs.

81. Mr Gillies and Mr McPhail spoke to Jim Gibson, Head of HR and told him that Ms Taggart had taken the decision to exit the claimant from the business because of loss of trust and confidence which they supported. Mr Gibson was asked to guide Ms Taggart through the process and give her support.

82. Mr Gibson was aware of the respondent's disciplinary and performance management procedures. However, given the reason for the dismissal and the fact that the decision had already been taken and supported by Mr Gillies and Mr McPhail, Mr Gibson did not consider that the matter was one of conduct or performance management where following a process would help manage the situation. He was also aware that in the preceding three months, three other individuals, who were not disabled, had been asked to leave the business without any process."

16. The Claimant was informed of the decision to dismiss her at her pre-arranged annual appraisal meeting on 19 April 2017. As to that meeting, the Tribunal found as follows:

"85. The claimant's annual appraisal was arranged for 19 April 2017. At that meeting (the April Meeting), Ms Taggart said following their discussion at the March Meeting she had reflected on what more could be done to build up trust and confidence that she felt had been lost. This was not good for the team or the business. After discussion with senior colleagues Ms Taggart said that the only way forward was for the claimant that she was to be exited from the business. Ms Taggart said that it was clear that the claimant did not trust her as was shown by the return to work. She could not *"work with someone who is okay one minute and not the next"*. The claimant asked for someone from HR. Mr Gibson joined the April Meeting. The claimant said that she wanted to record the conversation on her mobile telephone. Mr Gibson said that if she wanted a record he would ask a colleague to do that. The claimant said she did not want to discuss matters. Mr Gibson said that was fine and the claimant said that she would contact him in a couple of days.

86. The following morning Ms Taggart was told that colleagues in the office knew about the April Meeting. Ms Taggart spoke to Mr Gibson and it was agreed that she should speak to her team on a confidential basis.

87. The claimant sent an email to Mr Gibson on 20 April 2017 which she copied to Dominic Booth, Managing Director acknowledging that she had been told by Ms Taggart that she was being exited from the business because Ms Taggart had considered their relationship and there was a lack of trust. The claimant did not dispute that her relationship with Ms Taggart had broken down. She did not mention any medical conditions. The claimant sought confirmation of her status. Mr Gibson offered to meet the claimant the following day. The claimant declined as she was not ready to meet. She was going on holiday and proposed meeting in the week commencing 1 May 2017.

88. The claimant met Mr Gibson on 2 May 2017. She did not ask him for the reasons for her being dismissed. The claimant did not suggest mediation or joint counselling. The claimant did not raise a grievance.

89. The decision to terminate was not conduct or performance based. He confirmed that Ms Taggart had persuaded the business there had been an irretrievable breakdown of her working relationship with the claimant. The

> **respondent did not obtain an OH report. The claimant was not offered a right of appeal.**
>
> **90. The claimant's employment was terminated on 13 May 2017. The claimant was paid nine weeks' pay in lieu of notice. The respondent did not follow any other process in relation to the dismissal."**

17. As can be seen from that passage, in an email sent by the Claimant the day after she was given notice, she did not dispute the breakdown in trust to which Ms Taggart had referred.

18. The Claimant met Mr Gibson on 2 May 2017. He confirmed that the dismissal was because of an irretrievable breakdown in the working relationship with Ms Taggart. The Claimant was not offered a right of appeal.

19. The Claimant's employment was terminated on 13 May 2017. She received nine weeks' pay in lieu of notice. No other procedure was followed in relation to her dismissal.

20. The Claimant complained to the Tribunal that her dismissal was unfair and that it amounted to discrimination in connection with her disability. The disability relied upon, and which was not in dispute, was the symptoms suffered by the Claimant in connection with the menopause and depression. There was, however, a dispute as to when the Respondent had knowledge of the disability.

The Tribunal's Conclusions

21. The Tribunal considered that the evidence of both the Respondent's witnesses was credible and reliable. As to the Claimant, the Tribunal said as follows:

> **"95. The Tribunal had no doubt that the claimant genuinely believed what she said in evidence. However, this was based on her perception and recollection of events which the Tribunal felt with the passage of time had become her reality. The Tribunal formed this view because at the time the claimant's responses and behaviour appeared inconsistent with the position that she now appeared to be adopting. The Tribunal felt that the claimant did not appear to have any insight that she was not the only one to find the business environment stressful and challenging to deal with. The Tribunal also considered that the claimant's view of the workplace and her position in it did not chime with reality. For example, the claimant said that she expected Mr Booth, the Managing Director, to contact her after the April Meeting to say that it had all been a big mistake."**

22. The Tribunal further found that:

a. in relation to the requirement to work on-call, this was a "reasonable management decision" and that the Claimant did not understand or accept why Ms Taggart wanted her to do on-call. The Claimant had not, in the Tribunal's view, moved on to put the matter behind her.

b. in relation to the recruitment exercise, the Claimant had not wanted to deal with the issue and that her response to Ms Taggart's request to explain her position was "truculent".

c. in relation to the Claimant's illness, Ms Taggart did not have a negative view on the menopause and that she was genuinely concerned about the Claimant's return to work in January 2017: see [103**].**

23. As to the reason for dismissal, which the Respondent had contended was 'some other substantial reason', namely the irretrievable breakdown of working relations between the Claimant and Ms Taggart, the Tribunal concluded as follows:

> **"187. The claimant's submission was that this and the subsequent draft report and the examples set out in an email of 20 April 2017 were not credible to support the reason advanced by the respondent. The Tribunal did not agree. The Tribunal considered that it was clear from Ms Taggart's evidence that while there had been issues between them in the past Ms Taggart saw this in the context of the claimant not enjoying her new role. It seemed to the Tribunal that at the March Meeting Ms Taggart understood the claimant to be saying that she was the problem. Ms Taggart no longer had trust and confidence in the claimant. The Tribunal also considered that it was clear from the claimant's evidence that she felt that they had had a difficult relationship with the salary, on call and recruitment issues; it was not the same trusting relationship. On her return from sick leave the claimant felt the need to set out her position in the Amended January Email; she had spoken to another director about her preferred candidate; she did not want to discuss the recruitment issue and did not accept the business reasons given by Ms Taggart for decisions that had been taken. There was no longer trust and confidence between the claimant and Ms Taggart.**
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> **188. Ms Taggart also spoke to the claimant's direct reports. They expressed concerns about the claimant's leadership and felt unsupported. The claimant did not challenge the accuracy of the comments made by her subordinates. The Tribunal did not doubt that the claimant found adjusting to her new expanding role challenging and she excelled in certain areas. However, the Tribunal thought it was highly likely that her direct reports felt unsupported when she did not have the time to manage them and feedback on their performance. It was not clear to what extent this was due to the claimant having insufficient time to do so or lack of experience and needing support or training. The reference in the draft report to this remaining a challenge in another area suggest the latter. However, in the Tribunal's view while Ms Taggart had identified this as a weakness in the claimant's skills set that did not mean it was a performance issue.**

> **Under other circumstances the Tribunal considered that this would have been addressed through the appraisal system especially as, in the event, the claimant who considered herself to be a high achiever, conceded that there was room for improvement in this area.**
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> **189. The Tribunal did not accept the claimant's evidence that Ms Taggart did not want a person affected by illness in the Customer Services Directorate. Although Ms Taggart said at the April Meeting that she did not want to work with someone who was *"okay one minute and not the next"* it was in the Tribunal's view said in the context of having referred to the January Meeting where agreement was reached yet six days later the claimant felt it necessary to send the Amended January Email setting out her position rather than speaking to Ms Taggart.**
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> **190. The claimant's comments at the March Meeting understandably in the Tribunal's view caused Ms Taggart to reflect on the position. The recruitment issue was unresolved. The claimant appeared to have no empathy for how the candidates that had been involved in the recruitment exercise felt and how the uncertainty might affect them. Ms Taggart understood from what the claimant said that she was the problem. The Tribunal was satisfied that by March 2017 there was evidence that there was a breakdown in their relationship which was disruptive to the Customer Services Directorate and the business.**
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> **191. At a critical time for the business Ms Taggart had to consider what options were available and how this would impact financially on the Customer Services Directorate and its ability to meet key deliverables. Ms Taggart did not consider that their relation was recoverable. She had on an ongoing basis been looking for opportunities for the claimant elsewhere within the business, as had the claimant who had indicated that she did not want to do the role in the medium to long term but to no avail.**
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> **192. At no time has the claimant conceded that there was any validity in Ms Taggart's position in relation to salary, on-call or recruitment nor has she conceded that on reflection her own view on the issues has changed. The Tribunal did not consider that there was any suggestion by the respondent that the claimant was not capable of performing her role or there was misconduct on her part. To the contrary the Tribunal's impression was that had the personal relationship not deteriorated to the extent that it did none of the examples raised would have resulted in Ms Taggart taking any disciplinary action against the claimant."**

24. The Tribunal went on to reject the Claimant's contention that she was dismissed because of her disability, finding, in particular, that the difficulties in the working relationship had pre-dated the Claimant's menopausal symptoms and that Ms Taggart was unaware of the details of the symptoms or that the Claimant had depression: see [197].

25. As to the allegation the Claimant was dismissed because of something arising in consequence of her disability, the Tribunal concluded that the issues between the Claimant and Ms Taggart had not arisen in consequence of disability: see [211].

26. The Tribunal also concluded that the Respondent did not know and could not reasonably have been expected to know that the Claimant had a disability. In support of that conclusion, the

Tribunal referred to the fact that the Claimant herself was unaware that she had depression and menopausal symptoms until November 2016 and that during her absence, she had not said that she was disabled nor had she requested a reasonable adjustment:

> **"213. The claimant was unaware that she had depression and menopausal symptoms until 22 November 2016. She was unable to say how Ms Taggart would know that she was suffering the effects of a disability during 2016.**
>
> **214. While Ms Taggart asked the claimant in early 2016 if she was menopausal, the claimant said that she was not. The Tribunal did not find that the claimant said that she was menopausal or suffering the symptoms of the menopause before November 2016 and in relation to depression until December 2016. The fit notes provided in December 2017 refer to menopausal symptoms and do not provide details. There is no mention of depression.**
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> **215. The claimant's absence was relatively short and included holidays. On her return in early January 2017 she did not say she was disabled or that she required adjustment."**

27. At paragraph 220, the Tribunal said:

> **"220. The Tribunal concluded that while Ms Taggart had knowledge of certain information pertaining to the claimant's disabilities neither she nor the respondent knew or could reasonably have been expected to have known that the claimant was disabled."**

28. The Claimant's other claims of sex and age discrimination were rejected.

29. As to the question of the fairness of the dismissal, the Tribunal held as follows:

> **"244. The Tribunal found that there were significant issues between the claimant and Ms Taggart in 2016. They worked at a senior level in an important part of the business which was under high pressure and public scrutiny to deliver a public service. While Ms Taggart sought HR advice on how to manage the situation there was no suggestion that there was any misconduct by the claimant in raising the issues that she did. Ms Taggart and the claimant did not have a clash of personality nor was it suggested that the claimant's conduct caused the breakdown. The fact was that the claimant and Ms Taggart had different opinions particularly about the requirement for the claimant to work on call and the recruitment issue. The claimant had already indicated her desire to leave the Customer Services Directorate but despite efforts had been unable to find a suitable alternative role.**
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> **245. The recruitment issue remained unresolved into 2017. At the March Meeting Ms Taggart genuinely believed that the claimant no longer had trust and confidence in her; their relationship had broken down and that it could not be retrieved. The Tribunal considered that the claimant's evidence also demonstrated that she had no trust and confidence in Ms Taggart.**
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> **246. While the draft report referred to various matters that the claimant submitted were characterised as performance or conduct, the Tribunal considered that none of these would have resulted in any disciplinary or performance management. The Tribunal was in no doubt that had Ms Taggart not believed that the claimant had no trust and confidence in her, the claimant would not have been dismissed.**

247. The Tribunal concluded that the reason for the dismissal was a lack of trust and confidence between two employees at senior level which was a barrier to delivering the objectives of the business. The dismissal was for some other substantial reason.

248. The Tribunal then turned to consider whether the dismissal was reasonable in all the circumstances (including the size and administrative resources of the employer's undertaking) in accordance with section 98(4) of the ERA.

249. The Tribunal was mindful that at this stage the burden of proof was neutral; it must not substitute its own decision for that of the employer; and that the test was one of the band or reasonable responses.

250. It was accepted that there was no formal procedure before dismissing the claimant. Often this failure would lead the Tribunal to conclude that the dismissal was unfair. However, it was not for the Tribunal to substitute its own decision for that of the respondent. The Tribunal therefore considered the reasonableness of not having a formal procedure in the circumstances of this particular case.

251. The Tribunal had concluded that the reason for dismissal was an irretrievable breakdown in trust and confidence. Accordingly, the ACAS Code of Practice did not apply only to conduct and capability dismissals.

252. The Tribunal then considered the reasonableness of not following any process in the circumstances of this case. The claimant referred to numerous internal policies and submitted that following these would have been reasonable and avoided dismissal. The Tribunal agreed with the respondent's submission that an irretrievable breakdown in trust and confidence particularly between two senior managers in an important area of the business and at a critical time did not naturally fit into any internal policy especially when there are no alternative roles available within the business.

253. The Tribunal noted that Ms Taggart did not react at the March Meeting but reflected and reached the decision following discussion with the HR Director and Finance Director. Ms Taggart did not decide on the process but took advice from Mr Gibson which was based on his experience and expertise.

254. Having heard evidence from the claimant and Ms Taggart about the issues that arose between them and their respective opinions the Tribunal did not consider that any procedure would serve any useful purpose and if anything it would have worsened the situation.

255. The Tribunal considered that while the claimant suggested following these procedures now there was no evidence that at the time the claimant was interested in retrieving her relationship with Ms Taggart. She was also aware that there were no alternative roles within the business as she had been looking for some time.

256. The Tribunal felt that any appeal would have been going through the motions. Several members of the executive already knew of the breakdown in the relationship between the claimant and Ms Taggart which could not be ignored or allowed to continue when the business was under pressure to deliver and substantial fines would be imposed if targets were not met. It was not a situation where an alternative decision could be reached.

257. The Tribunal therefore concluded that in the particular circumstances of this case the decision to dismiss was substantially and procedurally fair."

30. Accordingly, the Claimant's claims were dismissed.

The Grounds of Appeal

31. The Claimant's Notice of Appeal dated 28 November 2018 raised numerous grounds of appeal. However, only two of those were permitted to proceed following the Rule 3(10) hearing before Lord Summers on 1 August 2019. These were that:

a. Ground 1 - The Tribunal erred in concluding that the dismissal was not unfair in circumstances where: (a) the Claimant was not given any notice that her annual appraisal meeting would be used to inform her of her dismissal; and (b) where the Claimant was not afforded any opportunity to respond to the decision to dismiss by way of appeal or otherwise;

b. Ground 2 - The Tribunal erred in failing to consider the implications of its findings of fact at [64] (as read with [220] of the Reasons) in concluding that the Respondent did not know and could not reasonably be expected to have known that the Claimant was disabled at the relevant time.

Submissions

32. The Claimant, ably represented in this appeal by Mr Grant-Hutchison, submits that the Tribunal failed to consider whether the Respondent's response to the breakdown in working relations fell within the band of reasonable responses. Had it applied that test, it would undoubtedly have concluded that the failure to follow any procedure at all in this dismissal fell outside the band. That is particularly so when the decision was communicated at a meeting arranged for a different purpose and where the assessment that there was an irretrievable breakdown was based on matters which were largely subjective and not subject to any oversight or scrutiny by any objective third person. The Tribunal ought to have considered the size and administrative resources of this large employer before accepting that the Respondent could simply rely on Ms Taggart's view.

33. Furthermore, the absence of any right of appeal or opportunity to challenge the decision clearly takes this dismissal outside the band. An investigation carried out before dismissal could

have found that the key difficulties could have been ameliorated or that the faults in the relationship were in fact, as the Claimant was found to believe, all the fault of Ms Taggart.

34. In relation to ground 2, Mr Grant-Hutchison submits that the findings at [64] are highly supportive of the conclusion that the Respondent did have the requisite knowledge of disability. Had the Tribunal so found then its conclusion as to whether the dismissal because of something arising in consequence of the disability is likely to have been different.

35. Mr Crammond, who appears for the Respondent, submits that it is wrong to suggest that there was no opportunity to respond to the dismissal as the Claimant was told of the dismissal at a meeting at which she could have challenged the conclusion that there was a breakdown in relations. However, she did not do so at that or at any stage. In any event, the failure to follow the procedure or confer a right of appeal does not automatically render the dismissal unfair. Whether or not it is unfair is a question of fact for the Tribunal and there is nothing in the circumstances of this case to suggest that the conclusion that the dismissal was not unfair was perverse. He submits that this was one of those exceptional cases where the employer could reasonably say that any procedure would have been futile and that it was reasonable to move straight to a dismissal. Given that the reason for dismissal, namely the irretrievable breakdown in relations, is not under challenge, the Tribunal's conclusion that it was not unfair to follow a procedure was one that was open to the Tribunal on the facts.

36. As to Ground 2, Mr Crammond submits that the appeal was no more than an attempt to re-run the case that had failed below. The findings in [64] do not and should not lead to a conclusion that there was actual or constructive knowledge. There were ample findings elsewhere in the judgment in support of the conclusion as to the lack of knowledge. This ground of appeal he submits is academic in any event because it was clear that disability or anything arising from it played no part in the reason for dismissal.

Discussion and Analysis

Ground 1 – Error in concluding that the dismissal was not unfair.

37. There is no issue as to the Tribunal's findings as to the reason for dismissal. Its conclusion was that the reason was some other substantial reason within the meaning of Section 98(1) of the **Employment Act 1996**, namely the breakdown of trust and confidence and the working relationship between the Claimant and Ms Taggart, which was a barrier to delivering the objectives of the business. The Tribunal also concluded that it was Ms Taggart's genuine belief that the relationship had broken down and could not be retrieved: see [245].

38. Having reached that conclusion, the Tribunal's next task was to consider whether dismissal for that reason was fair in all the circumstances (including the size and administrative resources of the employer's undertaking) in accordance with Section 98(4) of the **1996 Act**.

39. In approaching that question, the Tribunal was required to consider whether the employer's actions in treating the reason for dismissal as sufficient to dismiss fell within the band of reasonable responses. That band is not of infinite width and the Tribunal should be able to conclude that an employer's response was outside the band without it being accused of substituting its own views for those of the employer: see **Newbound v Thames Water Utilities Limited** [2015] IRLR 734 at [61].

40. In the present case, the Tribunal undoubtedly directed itself correctly as to the approach it should take. The terms of Section 98(4) were set out at [126], there was a clear self-direction against substitution, and, at [249], it reminded itself that the test was one of the band of reasonable responses.

41. The question for this Appeal Tribunal is whether the Tribunal's judgment demonstrates that this correct self-direction in law was correctly applied to the facts of this case. I am in no doubt that it was.

42. Before looking at that question more closely, I deal briefly with the point taken by Mr Grant-Hutchison arising out of the terms on which the Tribunal cautioned itself against substitution. He submits that by referring to the rule against substitution in the context of fairness,

the Tribunal thereby precluded itself from reaching a conclusion that the dismissal was unfair. Mr Grant-Hutchison's point is that if the dismissal is outside the band of reasonable responses and is unfair, then the Tribunal is entitled to say so and that the rule against substitution does not prevent that. That proposition is of course correct. However, there is nothing in the judgment to indicate that this Tribunal fettered its analysis of fairness by an inappropriate application of the rule against substitution. That much is clear from the reference at the end of [249], to the test being one of the band of reasonable responses. In referring to the rule against substitution, the Tribunal, in my judgment, was saying no more than that the question of fairness is not to be judged by reference to what the Tribunal might have done, but by reference to what the employer actually did. That is precisely what the Tribunal proceeded to do in this case, as emerges from the final sentence of [250] and subsequent paragraphs. The Tribunal expressly considered the reasonableness of not following the procedure in the particular circumstances of this case.

43. The fact that no procedure is followed prior to dismissal would in many cases give rise to the conclusion that the dismissal was outside the band of reasonable responses and unfair. Such procedures, including giving the employee an opportunity to make representations before dismissal and to appeal against any dismissal, are fundamental to notions of natural justice and fairness and it would be an unusual and rare case where an employee would be acting within the band of reasonable responses in dispensing with such procedures altogether.

44. The Tribunal was well aware of this when it stated at [250] that, "*Often this failure [to adopt any formal procedure before dismissing] would lead the Tribunal to conclude that the dismissal was unfair*." The Tribunal was correct to state that this would "*often*" be the case rather than that it would invariably be so. It is well-established but there may be cases, albeit rare, where the procedures may be dispensed with because they are reasonably considered by the employer to be futile in the circumstances. Such a situation is contemplated in **Polkey v Dayton**, where Lord Bridge stated as follows:

> **"It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under s.98(4) may be satisfied"**

45. In the present case, the Tribunal expressly stated that it did not consider that any procedure would serve any useful purpose: see [254].

46. In fact, the Tribunal went further than merely concluding that the procedure would not serve any useful purpose and went on to state that "*if anything it would have worsened the situation*". This Tribunal heard the evidence over a number of days and was well-placed to form views as to the position between the two protagonists at the time of the Claimant's dismissal. Its conclusion that a procedure would have "worsened" the situation was open to it in the rather unusual circumstances of this case.

47. This was a case involving two senior managers who needed to be able work together effectively in order the deliver what the business required at a critical juncture. The Tribunal considered that the Claimant was not interest in retrieving the relationship at the time: see [255]. That conclusion was supported by, amongst other matters, the findings that neither individual had trust and confidence in the other; that the Claimant had been "*truculent*" towards Ms Taggart in relation to the recruitment issue; that the Claimant had been unable to put matters behind her and move on; that longstanding issues between them remained unresolved even at March 2017; and that Ms Taggart genuinely believed that there was an irretrievable breakdown in relations.

48. Mr Grant-Hutchison's overarching point is that the absence of any procedural right of appeal is enough in itself to render the dismissal unfair. However, that submission does not address the particular findings of fact in this case, all of which tend to show that this was one of those cases which Mr Grant-Hutchison accepted can arise where procedure can be dispensed with.

49. Mr Grant-Hutchison made several points in support of the contention that this should not have been treated by the Tribunal as one of those exceptional cases:

a. First, he says that the position might have been retrievable but that the employer's stance meant that any exploration of that possibility was eschewed. I cannot see how that submission can stand with the Tribunal's clear conclusion that a procedure would not only serve no purpose but would in fact have made things worse;

b. He also submits that the antagonism might in the event have been found to have been entirely down to Ms Taggart. That is also inconsistent with the Tribunal's findings that the Claimant also considered there to be no trust and confidence. The finding that there was an irretrievable breakdown in relations is not entirely based on the subjective viewpoint of Ms Taggart, as submitted by Mr Grant-Hutchison. The Tribunal found that there was a two-way process with both the Claimant and Ms Taggart feeling that way and that that view of the relationship was shared by other managers who were also familiar with the Claimant and Ms Taggart;

c. Thirdly, Mr Grant-Hutchison submits that a process of mediation might have made a difference. That submission fails to recognise the Tribunal's findings that there was no evidence that the Claimant was interested in retrieving the relationship herself at the time. Of course, it might be said that had the Claimant been on notice that, unless the relationship was retrieved and retrieved very quickly, the breakdown would lead to the loss of her job, she might have been more amenable to efforts in that direction than she was up to the point of being told that she was being dismissed. However, the Tribunal noted in this case that the Claimant had been on the lookout for other opportunities, had decided she wanted to move on, that at the 2017 April meeting itself she did not wish to discuss matters, and that in correspondence immediately after the April meeting, the Claimant said nothing to dispute that there had been a breakdown in relations with Ms Taggart. Bearing in mind the seniority of the individuals involved, these and other matters

are such as to entitle the Tribunal, in my judgment, to conclude that the situation was indeed irretrievable. It was certainly not perverse to so conclude.

d. Fourthly, Mr Grant-Hutchison submits that the Tribunal's reliance on the business' critical need at the time for the parties to be able to work together was misplaced since a short period of investigation would not have substantially hindered business performance. That is particularly so having regard to the fact that the Claimant had been absent for some weeks in the period between December and January. The difficulty with that submission is that the Tribunal made a clear finding of fact that this was a critical period for business and the Respondent was concerned about the impact of breakdown in relations would have on the business. That finding is not challenged as being perverse and nor could it be. The Tribunal also took account of the fact that the breakdown here was as between two senior managers. Mr Grant-Hutchison suggested that a breakdown in relations might render all procedures futile where the breakdown was as between, for example, the Chairman and Chief Executive of an organisation, but that extreme caution must be exercised in dealing with less senior persons. I do not consider that one can apply any rigid boundaries on the seniority of managers that must be involved before there can be a fair dismissal by reason of a breakdown in relations. Clearly, seniority will always be a relevant factor with any substantial disparity in seniority between protagonists being likely to put the Tribunal on high alert that the alleged breakdown in relations is a cloak for another reason for dismissal. But that was not the situation in this case.

e. Mr Grant-Hutchison also submitted that the Tribunal, at [254], effectively conducted its own investigation into whether the relationship was retrievable instead of assessing the facts as they were at the time. I do not agree that there was anything inappropriate or erroneous in the Tribunal's approach. It did state that whilst the Claimant was seeking now - i.e. at the time of the hearing - to suggest that the procedures would have made a difference, there was in the Tribunal's view no evidence of her being interested in such

retrieval at the time. For the reasons already set out earlier, that too, was a finding that was open to the Tribunal to reach.

f. Mr Grant-Hutchison also submitted that the Tribunal did not have regard to the terms of Section 98(4) and the need to take account of equity and the substantial merits of the case. However, this is referred to expressly in [126]. Furthermore, it is evident from the Tribunal's own remark that the absence of procedures would often lead to a conclusion of unfair dismissal that the Tribunal was alive to equity and substantial merits. Once, again the real thrust of Mr Grant-Hutchison submissions seems to me that the absence of any procedure of itself rendered the dismissal unfair. However, that is not the law and it ignores all the other circumstances in the case, which the Tribunal was bound to, and did, take into account.

50. I have referred already to the case of **Newbound** to the width of the band of reasonable responses. I was also referred to the case of **Perkin v St Georges Healthcare NHS Trust** 2005 IRLR 934. These cases, whilst instructive of general principles, do not assist the Claimant in this case because the circumstances of the dismissal in those cases were very different from those here. Furthermore, those were not cases where the employer considered it appropriate to eschew procedures altogether.

51. Dismissals without following any procedures will always be subject to extra caution on the part of the Tribunal before being considered to fall within the band of reasonable responses. Despite Mr Grant-Hutchison's careful and thorough submissions, I am satisfied that this Tribunal did exercise such caution and came to a conclusion that was open to it on the evidence that it heard. Ground 1 is therefore dismissed.

Ground 2 – Error as to knowledge of disability

40. Mr Grant-Hutchison's short point here is that at the January 2017 meeting, the Claimant provided ample detail for the Respondent to be on notice that she had a disability and that the

Tribunal erred in concluding that there was no knowledge or constructive knowledge of the same. He took me in detail to [64] in particular which provides as follows:

> **"64. The Claimant and Ms Taggart had a meeting around 10 January 2017 during which the claimant said Ms Taggart took notes (the January Meeting). The claimant observed that since mobilisation the workload had been heavy and when she took time off in November 2016 she felt angry. It was the combination of her symptoms of menopause/depression and the pressure of work. It was acknowledged that the claimant and Ms Taggart had had difficult conversations about salary, on-call and recruitment. The claimant said that it was not the job but the environment and how people are feeling. Ms Taggart said that this was unlikely to change in the foreseeable future given the business challenges and there would be significant pressures for some time. There was discussion about the claimant's medication (anti-depressants and beta blockers). The claimant indicated that she had been offered medication (HRT) but was not planning to take it. Ms Taggart said that the menopause could go on for some time. Ms Taggart questioned whether the claimant should be in work, but the claimant insisted that she was fit. Ms Taggart emphasised the importance of the claimant's health and suggested an OH referral which the claimant thought would be worthwhile. As a result, they agreed a four-week phased return during which.**
>
> **a. The claimant's direct reports would report directly to Ms Taggart.**
>
> **b. The claimant would work 11am to 3pm and this would be reviewed after four weeks.**
>
> **c. Team meeting attendance could be done by teleconference or attendance.**
>
> **d. The claimant would consider what she could handle in terms of work load and advise Ms Taggart.**
>
> **e. Ms Taggart would arrange for an OH referral and the claimant would consider talking to the employee assistance programme, Validium and/or consider CBT.**
>
> **f. One to one meetings were to take place fortnightly.**
>
> **g. The team were to be advised that the claimant was on a phased return."**

41. The submission is that all of this detail, as to the Claimant's symptoms, the medication she was on and the various measures that would be taken to facilitate her return to work, including the referral to occupational health, was sufficient to give rise to constructive knowledge. That was so even though the Claimant was not aware herself that she was disabled at the time. The Tribunal's error had, according to Mr Grant-Hutchison, a knock-on effect on the Tribunal's conclusion as to whether there was discrimination because of something arising in consequence of disability. In particular, he submits that had there been an occupational health referral, it might have led to the conclusion reached some time later by the Claimant's GP that her condition affected her interactions with colleagues.

42. Mr Crammond submits that there is nothing in the constructive knowledge ground, but even if there was, the ground of appeal was academic given the various reasons given by the Tribunal for concluding that there was no discriminatory treatment. That included the absence of any causative link between the act complained of and the disability or something arising from it, and the fact that the Tribunal considered the Claimant's treatment to be justified in all the circumstances.

43. I agree with Mr Crammond that even if there were something in the constructive knowledge ground, the point would be academic for the reasons he gives. But in any event, it is my judgment that the constructive knowledge ground cannot succeed. I say that for the following reasons:

a. The Tribunal reached a clear conclusion of fact that while some information was provided by the Claimant to Ms Taggart as to her conditions, there was none of the detail required as to substantial disadvantage, the effects on her day-to-day activities or the longevity of those effects so as to satisfy the requirements of Section 6 of the **2010 Act**: see [216] and [217].

b. The Tribunal also noted that the Claimant was herself inclined to under-report her symptoms at the time and did not consider herself to be under any disadvantage in light of the arrangements that had been put in place: see [219].

c. The Tribunal was entitled, in the circumstances, to conclude that the OH referral would have been unlikely to change the state of knowledge so as to give rise to constructive knowledge being present on the part of the Respondent.

For these reasons, Ground 2 of the appeal also fails and is dismissed.

Conclusion

44. For all of these reasons, and notwithstanding Mr Grant-Hutchinson's careful and forceful submissions this morning, this appeal is dismissed.