Neutral Citation Number: [2022] EAT 41

Case No: EA-2019-001266-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13th January 2022

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between:

MRS L HARRIS	**Appellant**
- and -	
EAST LANCASHIRE HOSPITALS NHS TRUST	**Respondent**

- -
- -

Mr N Harris for the **Appellant**
Mr T Cordrey (instructed by DAC Beachcroft LLP) for the **Respondent**

Hearing date: 13th January 2022

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JUDGMENT

SUMMARY

Unfair Dismissal

The employment tribunal did not err in law in rejecting the claim of constructive dismissal.

HIS HONOUR JUDGE JAMES TAYLER:

1. This is an appeal against the judgment of the employment tribunal; Employment Judge Franey, sitting from 7 to 17 October, and on 18 October 2019. The judgment was sent to the parties on 28 October 2019. The employment tribunal dismissed the claimant's claim of constructive unfair dismissal.

2. The claimant initially started working for the respondent in 1998. She subsequently qualified as a Registered Nurse. The claimant became an employee of the respondent on 20 March 2005. She was an experienced nurse with a good record while working for the respondent.

3. An incident occurred on 22 February 2017 ("the incident"). The claimant accompanied a patient who was being transferred by ambulance. The claimant administered a unit of blood which had not been prescribed by a clinician. Mandatory pre-administration checks had not been undertaken and required documentation was not completed. The incident was subject of investigation.

4. The judgment sets out the sequence of events in great detail from para. 25 to para. 87. Core to this appeal is a decision taken by Mr Smith that the incident would be considered under the respondent's disciplinary procedure. The claimant asserts the decision was taken on 28 February 2017, whereas the tribunal found it was taken on 1 March 2017. The employment tribunal held that the decision to apply the disciplinary procedure had been taken by Mr Smith after a discussion with Ms Dean, the Acute Care Team Leader, during which Ms Dean raised concerns about the extent of the claimant's reflection on her conduct in her "reflective statement" and her likely engagement with further training. The employment tribunal held that the discussion took place shortly before Mr Smith sent an email just after 9.30 am on 1 March 2017 in which he stated:

> "This needs to be managed in line with the Trust disciplinary policy as well as being investigated as an incident (these can complement each other)."

5. The disciplinary investigation took a long time. A disciplinary hearing took place on 11 August 2017. The claimant was given a written warning. The claimant appealed. The appeal was

dismissed on 17 November 2017. Thereafter, the claimant submitted her resignation on 1 January 2018. The resignation was, therefore, long after the decision had been taken that the incident would be dealt with under the respondent's disciplinary procedure.

6. It is necessary to consider the manner in which the issues in the claim developed. The claimant submitted her claim form on 17 April 2018. The claim form included a contention that part of the conduct that was said to have breached the implied term of mutual trust and confidence was that the claimant had been bullied into changing her reflective statement. At para. 19 of the claim form the claimant set out the conduct that she asserted had breached the implied term of mutual trust and confidence. There was no specific reference to Mr Smith's decision to instigate the disciplinary process, although at para. 19.6 the claimant did refer to being subject to the disciplinary process. The claimant raised a large number of incidents that were said to have breached the implied term of mutual trust and confidence, involving a number of members of staff of the respondent.

7. The matter came on for a preliminary hearing for case management before EJ Howard on 25 September 2018. The claimant was granted permission to amend the claim in the form of a list of issues. The list of issues set out 25 alleged acts on the part of the respondent that were said to have breached the implied term of mutual trust and confidence. The expanded list of issues added the question of whether it had been reasonable for Mr Smith to initiate the disciplinary process. The claimant relied on correspondence shortly before her resignation being the last straw; the receipt of the correspondence being the trigger for her decision to resign.

8. After the preliminary hearing for case management new solicitors were instructed by the claimant and a further version of the list of issues was produced, which somewhat limited the complaints. The new list did not include specific reference to Mr Smith's decision to initiate a disciplinary procedure.

9. Once the hearing had commenced, on 8 October 2019, a revised list of issues was produced by the claimant's counsel, which relied once again on Mr Smith's decision to initiate the disciplinary process. The list of issues was amended again on 11 October 2019.

10. It was at the final hearing that the decision of Mr Smith to deal with the matter under the disciplinary procedure became the focus of the claim. The claimant complained there had been a precipitous decision to move to the formal process that had resulted in many ongoing difficulties for her. The significance of the procedural history is that it explains why the decision of Mr Smith to initiate the disciplinary procedure had not been seen as a key issue when the respondent prepared for the final hearing. Rather surprisingly, the decision to give the claimant a written warning at the conclusion of the disciplinary process was not asserted to have been a breach of the implied term of mutual trust and confidence.

11. The claimant's original Notice of Appeal raised a number of issues, including complaints about the manner in which the employment judge conducted the proceedings. The appeal was considered on the sift by Choudhury J (President) who directed a preliminary hearing so that consideration could be given to the assertions of perversity and/or the appearance of bias, including whether certain findings of fact reached by the Tribunal were unsupported by and/or contrary to the evidence. Choudhury J noted that such allegations were not generally fertile territory for an appeal.

12. The preliminary hearing was conducted by HHJ Katherine Tucker who, by an order with seal date 29 January 2021, permitted the Appeal to proceed on limited grounds. HHJ Tucker stated:

> "I permitted an appeal to proceed in respect of findings of fact relevant to one factual matter on grounds of perversity"

13. The "one factual matter" that HHJ Tucker referred to was the employment judge's conclusion about when and, more importantly, why Mr Smith made the decision to subject the claimant to disciplinary proceedings, when other processes such as training and reflection had not been completed.

14. HHJ Tucker only permitted the appeal to proceed in respect of the employment tribunal's finding about the decision of Mr Smith. She stated of that factual matter:

> "I was persuaded that the question of whether the findings made by the judge were open to him on the evidence should be considered at a full appeal having regard to the witness statements of the key individuals involved and that which I was told about

> their oral evidence, its consistency with their written statements and consistencies or lack thereof between witnesses."

15. When permitting the matter to proceed, HHJ Tucker understood that the core allegation of perversity was based on the oral evidence that had been given at the employment tribunal. The claimant, who was then represented by leading counsel, provided amended grounds of appeal. The amended grounds set out the challenge to the employment tribunal's determination about Mr Smith's decision to apply the disciplinary procedure, although there was a considerable degree of repetition and the revised grounds were lacking in clarity.

16. There was some further interlocutory wrangling. By an Order with seal date 9 June 2021, HHJ Tucker refused permission for an additional ground to be added to the appeal. By an order with seal date 9 June 2021, HHJ Tucker directed that the parties co-operate in the production of an agreed note of evidence. HHJ Tucker stated that she had been under the impression at the preliminary hearing that counsel had some recollection of the evidence that had been given. Subsequently, by an Order dated 23 June 2021, HHJ Tucker accepted that at the original preliminary hearing she had also permitted ground 3 to proceed, which related to the respondent's policies, although on the limited basis that the criticism about the misapplication of policies was limited to the approach adopted by Mr Smith when he took the decision to apply the disciplinary procedure.

17. The parties failed to agree a note of evidence. Counsel who represented the claimant at the original hearing had no note of the evidence. The claimant did not have a verbatim note, although subsequently she has provided a note that sets out her recollections, which does not come close to amounting to a detailed record of the questions asked and the answers given. The respondent's counsel has provided a note of evidence because a note of evidence could not be agreed. HHJ Tucker ordered that a request be made of the employment judge to provide his notes, which he has done. The notes of the employment judge are clear and detailed; generally setting out the questions asked and the answers given.

18. The claimant produced a very detailed skeleton argument for this appeal, running to some 35

pages. Mr Harris, who represented the claimant as a lay person, also made very detailed oral submissions. Much of the skeleton argument and oral submissions amounted to no more than an attempt to re-argue the original claim. Mr Harris did, at the outset of his submissions, set out succinctly what he said were the claimant's key challenges to the judgment of EJ Franey. He stated that there are four principal issues: first, he says that Mr Smith had no reason for deciding to move to a disciplinary process. Second, he asserts that the decision was taken on 28 February not 1 March 2017. Mr Harris contends that the significance of this point is that if the decision was made on 28 February 2017 Mr Smith could not have had a discussion with Ms Dean, in which she raised concerns about the quality of the claimant's reflection on her conduct in her reflective statement and the extent of her engagement with possible further training, before taking the decision to apply the disciplinary procedure. That also gives rise to the third of Mr Harris's grounds, that Mr Smith did not have a discussion with Ms Dean some time before 9.40am on 1 March 2017. Finally, Mr Harris contends that the employment judge substituted his reasons for the decision to move to the disciplinary process for those of Mr Smith.

19. In addition, Mr Harris took me to a number of the respondent's procedures. He contended that the disciplinary procedure and the procedure dealing with misadministration of medication focus on informal resolution and stress that care should be taken not to move to a disciplinary process unless really necessary.

The Law

20. The EAT's jurisdiction is provided for by section 21 of the **Employment Tribunals Act 1996**. It is limited to appeals on questions of law. There is very long-standing authority on the limitations on the power of the EAT to intervene in factual determinations of the employment tribunal. In **Yeboah v Crofton** [2002] IRLR 634 at para. 93 Lord Justice Mummery stated of perversity appeals:

> "Such an appeal ought only to succeed where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached."

21. There are a large number of other authorities which reiterate the very limited extent to which

the EAT can intervene in determinations of fact made by the employment tribunal. The respondent relied on the judgment of Griffiths J in the case of **Oxford Said Business School and Another v Heslop** EA-2021-000268-VP in which he set out (with reference to **DPP Law v Greenberg** [2021] EWCA Civ 672, [2021] IRLR 1016) the approach to be adopted in this type of appeal:

> "44. The Court of Appeal in *DPP Law v Greenberg* [2021] EWCA Civ 672 has recently emphasised how cautious the EAT (or any appellate body) will be when approaching a challenge to the detailed reasoning of a specialist employment tribunal, such as ones raised by the appeal in this case. Per Popplewell LJ (with whom Lewison and Lewis LJJ agreed) at paras 57-58, the correct approach is as follows (with my emphasis added):-
>
> > "57. The following principles, which I take to be well established by the authorities, govern the approach of an appellate tribunal or court to the reasons given by an employment tribunal:
> >
> > (1) The decision of an employment tribunal must be read fairly and as a whole, *without focusing merely on individual phrases or passages in isolation, and without being hypercritical*. In *Brent v Fuller* [2011] ICR 806, Mummery LJ said at p. 813:
> >
> > "The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. *Over-analysis of the reasoning process; being hypercritical of the way in which a decision is written; focussing too much on particular passages or turns of phrase to the neglect of the decision read in the round*: those are all appellate weaknesses to avoid"
> > …
> > (2) A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. To impose such a requirement would put an intolerable burden on any fact finder. *Nor is it required to express every step of its reasoning in any greater degree of detail than that necessary to be Meek compliant (Meek v Birmingham City Council* [1987] IRLR 250). Expression of the findings and reasoning in terms which are as *simple, clear and concise as possible is to be encouraged*. In *Meek*, Bingham LJ quoted with approval what Donaldson LJ had said in *UCATT v Brain* [1981] I.C.R. 542 at 551:
> >
> > "Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law …their purpose remains what it has always been, which is *to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis* and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given."
> >
> > (3) It follows from (2) that it is not legitimate for an appellate court or

> tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind. As Waite J expressed it in *RSPB v Croucher* [1984] ICR 604 at 609-610:
>
> "We have to remind ourselves also of the important principle that decisions are not to be scrutinised closely word by word, line by line, and that *for clarity's and brevity's sake industrial tribunals are not to be expected to set out every factor and every piece of evidence that has weighed with them* before reaching their decision; and it is for us to recall that what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. It is our duty to assume in an industrial tribunal's favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not; and that has been well-established by the decisions of the Court of Appeal in *Retarded Children's Aid Society Ltd. v Day* [1978] ICR 437 and in the recent decision in *Varndell v Kearney & Trecker Marwin Ltd* [1983] ICR 683."
>
> 58. Moreover, *where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles*, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload."

45. Whilst, in the past, the reasoning and conclusions of employment tribunals, particularly in discrimination cases, have occasionally been overturned, and those authorities are frequently cited by appellants as a result, they must be regarded as exceptional. No-one need doubt the correctness of the decisions in *Law Society v Bahl* [2003] IRLR 640 (EAT), [2004] IRLR 799 (CA) or *Anya v Oxford University* [2001] ICR 847 CA, and I, certainly, do not. But the dicta of the Court of Appeal *in DPP Law v Greenberg* [2021] EWCA Civ 672, and the long line of authority quoted in support of them, demonstrate how important it is not to take such cases as a licence to nit-pick and hypercriticise the reasoning of other employment tribunals, so long as they state the law correctly, and demonstrate that they have embarked on a careful and conscientious examination of the evidence, in order to reach decisions on what are, for the most part, questions of fact.

46. They are difficult questions of fact, no doubt, as questions of motive and causation often are. They are made when it is rare for direct, compelling evidence to be available

> of why things happened as they did, by reference to allegations of unlawful discrimination or whistleblowing. They are questions of fact, nevertheless, and appeals lie only on questions of law.
>
> 47. It is inappropriate as well as inconvenient for the EAT or the Court of Appeal to be asked to conduct a minute examination of ET decisions with a view to overturning findings of fact except in a relatively clear case. Even in a high-value case, or a case in which the reputational issues are acutely felt (both of which are not untypical of discrimination and whistleblowing claims), the winners should usually be left to retain the fruits of their victory without an expensive, time consuming and exhausting war of attrition in courts of appeal. An appellate court is not well placed to decide or even review questions of fact. It has not heard the evidence; which no written decision, however detailed, can ever fully convey.
>
> 48. The working assumption must be that an employment tribunal, which has made no clear error of law, has reached no impermissible conclusion of fact. This working assumption should not easily be displaced by hypercriticism of reasoning, or lack of reasoning, or of the way in which a decision is either structured or expressed. Any decision could usually have been expressed or structured differently, and perhaps a different court might have preferred a different structure or form of expression if it had had the task of writing the decision in the first place. It is, equally, always easy to say that an extra word or sentence would have improved a decision's resilience against an ex post facto attack following detailed scrutiny of it in preparation for an appeal. But that does not in itself mean that the original decision is wrong. The question is not whether the decision is ideal, or even excellent, but only whether it is good enough, with reasoning which is sufficient, and free of demonstrable error. If it passes that test, the facts (including inferences of fact, and findings of secondary fact) should remain where the independent (and, in the case of employment tribunals, specialist) tribunal of fact has left them."

22. There is very good reason why the EAT adopts a restrictive approach to appeals which are, in reality, appeals on issues of fact. The EAT is limited by statute to considering errors of law. It is not in a position to review a limited amount of the material before the employment tribunal and form a better view than the tribunal did itself of the factual issues; nor is it permitted to attempt to do so.

23. The job of the employment tribunal is often difficult. The employment tribunal has to make determinations of fact on the balance of probabilities. The tribunal was not there when the matters in dispute took place. The employment tribunal has to weigh up the evidence and make findings of fact. The employment tribunal has to do so in circumstances in which recollections may well have faded. The main protagonists usually think that they have a very clear recollection of events, but their recollections may be affected by the litigation. Other witnesses may be giving evidence about a matter that occurred long ago; that was one of many issues they were dealing with at the time; and

where a great deal of water has flowed under the bridge since. Often contemporaneous documentary evidence is of particular importance.

24. Accordingly, the tribunal has to look at the totality of the evidence. There is nothing impermissible in the tribunal concluding, when weighing up the evidence, that it accepts some parts of a person's evidence but rejects others. A case may take on a rather different complexion once witnesses have been subject to cross-examination: matters about which they thought they had a clear recollection may be subject to challenge which may require the witness to reflect again and can result in new evidence being given. If significant material did not often come out in the course of oral evidence there would be no real purpose in holding hearings rather than determining cases on the papers by consideration of the witness statements and other documents. It is only after witness evidence has been given and subject to challenge that the employment tribunal considers all of the evidence to reach its factual determinations.

25. In dealing with the decision made by Mr Smith, the Tribunal made very detailed findings of fact. At paras. 76 to 87, EJ Franey set out his conclusions about what had happened on 1 March 2017. In doing so, he left aside the fundamental question of why Mr Smith had decided to instigate disciplinary proceedings against the claimant, appreciating that it was a matter that would require detailed and careful analysis.

26. In his analysis, the employment judge drew out what he described as core themes. He included, as the second theme, the claimant's contention that she had been forced to change her reflective statement. In the claim form the claimant asserted "it appears that the Claimant was being prejudiced because she was unwilling to accept that she would not act in the same way in the future if a Patient appeared to be at risk".

27. The employment judge described the decision to institute a disciplinary process as the fourth theme. It is the core issue for the purposes of this appeal. The reasoning runs from paras. 228 to 269. In those paragraphs, the employment judge concluded that the decision to move to the disciplinary process had been made on the morning of 1 March 2017 by Mr Smith, after he had had a discussion

with Ms Dean, in which Ms Dean had told him that she did not think that the claimant had reflected adequately on the incident and did not fully appreciate its seriousness. The employment judge set out the reasons why Ms Dean came to that conclusion at para. 243:

> "243. I found as a fact that Mrs Dean did convey to Mr Smith on the morning of 1 March 2017 that the claimant had been difficult to engage with, that her reflective statement was not adequate and that she did not think the claimant appreciated the full seriousness of the incident. That impression of the claimant was drawn from Mrs Dean's interactions with her, including the following:
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> > (1) The email from the claimant of 24 February at page 94 said that the matter was about her failure to complete a form, and that the claimant would be off sick until her ability to perform her role properly had been reinstated;
> >
> > (2) The claimant reiterated in her email of 25 February at page 103 that she never denied not signing for the blood and yet now insisted she was not off sick but had been suspended, and importantly she said in the final paragraph of that email that her error was not the improper administration but the failure to complete documentation;
> >
> > (3) Mrs Dean had seen the reflective statement and Mrs McLean's concerns as expressed at page 157B."

28. At para. 245 the employment judge concluded that Ms Dean was entitled to decide that the claimant had not reflected adequately on the incident and did not fully appreciate its seriousness. The employment judge set out what he decided were Mr Smith's reasons for deciding that the incident should be considered under the disciplinary procedure. He rejected some of the evidence given by Mr Smith in his witness statement and orally, and accepted other parts of his evidence.

29. The question of when the decision had been taken and the dispute about the discussion with Ms Dean was canvassed in considerable detail in cross-examination of Mr Smith. The employment judge helpfully numbered each question and answer in his note. The relevant extracts from his notes at questions 332 through to 476 demonstrate an ample evidential basis for the judge to conclude that the decision was taken on the morning of 1 March 2017.

30. The claimant relies heavily on what was said in Mr Smith's witness statement. He dealt with the decision particularly at paras. 12 to 14:

> "12. I was copied into an email from Mrs Harris to Jane on 24 February 2017 (94-95),

> which related to the incident and restrictions placed on Mrs Harris's duties. Mrs Harris said that the restrictions rendered her unable to return to her position until she could perform her role competently. She advised that she would be off sick until her ability to perform her role was reinstated. I replied, advising that this matter should be dealt with at team leader level (93).
>
> 13. On 28 February, I was emailed by Mark Wilson (114), who attached a rapid review report on the incident (98-100). I advised that this should be managed as a disciplinary matter and as an incident under the Trust's policy. I copied in Fiona Chetwood, the HR Business Partner for Surgery and Anaesthetics (113).
>
> 14. On 2 March, I wrote to Mrs Harris, advising that a disciplinary investigation was taking place in relation to the incident (107-108). Mrs Harris had failed to undertake a reasonable request to complete a programme of work and training, and had failed to demonstrate an understanding and insight into the reflection and training process. Mrs Harris had not completed the relevant training to carry out any Blood Transfusion, and was, therefore, also knowingly non-compliant with her training which meant she had administered a blood transfusion which was neither prescribed nor indicated. This posed a fundamental risk to the Trust, to Mrs Harris as a practitioner and to patient safety. Prior to this, there were extensive discussions with Jane Dean and senior HR support to decide on what would be the best course of action. Throughout this process, the seriousness of the incident was recognised: at best this patient would have survived, at worst, this patient could have suffered a transfusion related reaction or be over-transfused resulting in heart failure or death. Acknowledging the positive outcome for the patient however, and using the Incident Decision Tree (2065A-2065C) to decide on appropriate actions. It was my opinion that Mrs Harris should know that she was deviating from safe practice which is widely recognised and mandated for update in her role and continued to do so. Using the decision tree:
>
> 14.1 It was my opinion that Mrs Harris did not intend to cause harm to the patient (Deliberate Harm Test);
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> 14.2 Did not have, nor was there previous history of ill health or substance misuse (Incapacity Test);
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> 14.3 That Mrs Harris took an unacceptable risk: in that the patient was safe to transfer, was not haemodynamically unstable (the patient's blood pressure and pulse were within normal ranges) and had no signs of active bleeding (foresight test);
>
> 14.4 Finally, there were no significant mitigating factors (Substitution test)."

31. The claimant's contention that because at para. 13, Mr Smith refers to being sent an e-mail by Mark Wilson attaching the rapid review report on 28 February 2017 and in the next sentence Mr Smith states he advised that the matter should be managed as a disciplinary issue, that necessarily implies that Mr Smith made the decision on the same day as the e-mail was received from Mr Wilson. That is not the only way in which that paragraph can be read. All that one can tell from the paragraph

is that the decision was taken after receipt of the e-mail.

32. The core decision of the employment judge appears at paras. 246 to 247:

> "246. It followed, therefore, that when Mr Smith made his decision the picture before him was composed of the following:
>
> (1) He had the email from Mr Wilson at page 114 and the attached Rapid Review. The email identified very significant gaps in practice in breach of Trust policies, including the fact the blood had not been prescribed and the two-person checks had not been done;
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> (2) He had the result of his application of the Incident Decision Tree;
>
> (3) He had the claimant's email of 24 February at pages 94 and 95 which had been sent to him as well as to Mrs Dean;
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> (4) He had the benefit of his discussions with senior HR advisers as to the appropriate course of action;
>
> (5) He had the benefit of his discussion with Mrs Dean on the morning of 1 March leading him to the belief the claimant had been difficult to engage with and lacked insight into the serious nature of the incident.
>
> 247. I found as a fact that Mr Smith's decision to institute the disciplinary investigation was because of this combination of considerations not because of any one reason."

33. The question for the EAT is whether there was evidence to support those findings of fact. Mr Cordrey put the matters considered by Mr Smith into chronological order. The first chronological consideration was the claimant's e-mail of 24 February 2017. It is clear that Mr Smith had seen the e-mail. The e-mail demonstrated some reluctance by the claimant to accept responsibility for the incident but, instead, to see it as a "paperwork" issue. There clearly was evidence to support the email being a factor in Mr Smith's decision.

34. The next chronological issue was receipt of the rapid review report. The report had been received by Mr Smith. The report did raise serious concerns about the incident. The claimant contends that the incident was not the issue; the issue was her reaction to it. This is because a number of the respondent's witnesses had made the point that if they had felt that the claimant had properly reflected on the incident, the matter could have been resolved informally without the need to instigate disciplinary proceedings. That evidence did not mean that the incident was not serious, it indicated

that there could have been an alternative way of dealing with it, had the respondent's witnesses been satisfied that the claimant had reflected on the incident properly and she understood the seriousness of it. Mr Smith stated at para. 13 of his witness statement that he took the report into account. He also said in his oral evidence that he took that matter into account as is recorded in the judge's notes of evidence.

35. The next issue was the application of the incident decision tree. It is clear that Mr Smith had applied the decision tree; he stated so at para. 14 of his witness statement. He also referred to the matter in evidence as is recorded in the employment judge's notes of evidence.

36. Mr Smith stated he had discussed matters with HR; the evidence for that was included in para. 14 of his witness statement and in his oral evidence.

37. The key issue in this appeal is whether the employment tribunal was entitled to hold that Mr Smith had a discussion with Ms Dean on the morning of 1 March 2017 in which she raised her concern about the adequacy of the claimant's reflection on the incident. The concern about the adequacy of the claimant's reflection on the incident had first been raised in the evening of 28 February 2017, after Mr Smith had left work. Mr Smith said that he had had regard to the concern that the claimant had not adequately reflected on the incident in deciding to invoke the disciplinary procedure. He referred to it in para. 40 of his witness statement. As is noted at para. 235 of the judgment, Ms Pemberton (at para. 13 of her witness statement) said that Mr Smith gave this as his explanation for his decision to invoke the disciplinary process during an oral discussion she had with him during the appeal process. Accordingly, as Mr Smith was aware of the concern that the claimant had failed adequately to reflect on the incident when he made his decision to move to the disciplinary process, he must have been made aware by someone. Ms Dean was not clear about the matter in her oral evidence, but suggested that she would have had a discussion with Mr Smith and did raise the issue of the quality of the claimant's reflection on the incident. Ms Dean had a relatively limited recollection of the issue. Mr Smith stated in cross-examination that his recollection was that the discussion took place on the morning of 1 March 2017. That recollection was consistent with the

surrounding evidence because before 1 March 2017 he would not have been aware of the specific concern that the claimant had not adequately reflected on the incident. Mr Smith referred to other matters, including the suggestion that the claimant had said that she would do the same thing again. That part of his evidence was rejected by the employment judge on the basis that it was not so stated by the claimant in her reflective statement. That does not mean that the employment judge was not entitled, on a consideration of the evidence as a whole, to conclude that the reasons for Mr Smith deciding to instigate the disciplinary procedure were those he identified at para. 246.

38. There is nothing unusual in an employment tribunal not accepting all of the evidence of a witness. I consider the decision of the employment tribunal fell well within what was permissible on the evidence in this case. Mr Harris has taken me to extracts of the evidence that might have pointed in a different direction. That is not sufficient to overturn the decision.

39. EJ Franey also considered the submission made on the claimant's behalf that it was incompatible with the respondent's procedures to move to a disciplinary process prior to the conclusion of informal processes. The employment judge concluded that there was nothing that prohibited the two processes occurring side-by-side. The employment judge considered in considerable detail the submissions made by the claimant's counsel on this matter, setting out the key complaints at paras. 251 through to 262 of the judgment. The judge noted that, although the reflective statement did not state the claimant would do the same again, there had been an issue about what the claimant said she would do in similar circumstances. In the Claim Form the claimant asserted that she had been bullied into changing her statement to say that she would not act similarly if the same circumstances arose. In any event, this matter was not of great significance to the decision-making of the employment judge.

40. The employment judge concluded at para. 267 that "there was reasonable and proper cause" for Mr Smith to instigate the disciplinary process, which meant that the implied term of mutual trust and confidence as set out in **Malik** had not been breached.

41. At para. 268, the employment tribunal stated:

> "268. Further, even if it had been an unreasonable decision, in my judgment it would not have been serious enough when viewed objectively to be calculated or likely to destroy or seriously damage trust and confidence. It was not something which showed any intention to abandon and altogether not to perform the contract of employment; it was not something with which an employee could not be expected to put up. There may be situations in which the commencement of a disciplinary investigation - as opposed to disciplinary charges or a sanction - can amount to a breach of the implied term but this was not one of those cases. Underlying the claimant's case was a perception about the significance of a disciplinary investigation which was not objectively justified. I did not accept Mr Cordrey's suggestion that it was an advantage to be put into a disciplinary investigation: for an experienced medical professional with an unblemished record it was plainly most unwelcome. However, nor was it a foregone conclusion that it would end with disciplinary charges and a sanction. I accepted Mrs Bebb's evidence in cross examination that her investigation did not mean that disciplinary charges would inevitably follow. She would have assessed that after sitting down with the claimant for what she termed "a reasonable adult discussion" in which, she said, the claimant would hopefully have shown some insight into the risk.
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> 269. Regrettably that discussion never took place. I noted that in her email sent at 2.00pm on 1 March 2017 (which the claimant reproduced at page 290) the claimant said she welcomed the full investigation, but, unbeknownst to her, two hours earlier her husband had emailed the Chief Executive (page 109) describing the investigation as a "witch-hunt due to a totally vindictive and illegal agenda". Unfortunately, the latter view held sway over the former in the months that followed. By insisting on providing written input rather than a face to face discussion with Mrs Bebb, the claimant deprived herself of the very thing she was complaining had not happened: someone asking her about the incident in detail. I accepted that the claimant wanted to go through the incident with Mr Smith in the meeting on 4 May 2017 but was prevented from doing so, but there was reasonable cause for Mr Smith to do that. The disciplinary investigation was already under way and his letter of 24 March 2017 (page 189A) had made clear that the purpose of that meeting was to discuss resolution and a return to work."

42. The employment judge was entitled to conclude that Mr Smith did have proper reasons to move to a formal disciplinary process. That decision was made on 1 March, not 28 February 2017. The employment judge was entitled to conclude that the decision was made after the discussion with Ms Dean, during which Ms Dean explained that she felt that the claimant had not sufficiently reflected on the incident, despite providing her reflective statement. The employment judge was entitled to accept that the respondent's procedures did not prevent Mr Smith acting as he did. The employment judge did not substitute his reasons for those of Mr Smith. Having considered the evidence of Mr Smith, he accepted some elements of it and rejected others. I appreciate how very strongly the claimant feels about this case and her very great disappointment in having failed in her claim of

constructive dismissal, I do not consider that there is any error of law that is identified in this appeal. To find otherwise would go against the statutory provisions and authorities that limit the EAT's role to considering appeals asserting errors of law and do not permit the EAT to redetermine issues of fact. The appeal fails and is dismissed.