Neutral Citation Number: [2022] EAT 75

Case No: EA-2019-000920-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 November 2021

Before :

HER HONOUR JUDGE KATHERINE TUCKER

- -

Between :

MRS R EJVET	**Appellant**
- and -	
GENESIS EDUCATION TRUST	**Respondent**

- -
- -

Mr L Ogilvy for the **Appellant**
Mr J Jupp (instructed by London Borough of Waltham Forest- Legal Services) for the **Respondent**

Hearing date: 9 November 2021

- -

JUDGMENT

Revised paragraph numbering

SUMMARY

PRACTICE AND PROCEDURE, UNFAIR DISMISSAL

The EAT dismissed an appeal against the decision of the Tribunal in which the Claimant's complaints of unfair dismissal contrary to s.98 and s.103A **ERA 1996**, disability, discrimination and detriment for having made public interest disclosures were dismissed.

On a detailed, but fair reading of the judgment and reasons it was held that the reasons complied with r.62(5) of the **Employment Tribunal Rules of Procedure 2013**. Some aspects of the reasons could have been set out more clearly, but, the requirements of that rule were met and the reasons were "**Meek"** compliant. Observations made regarding the requirements of judgment/reasons.

The Tribunal had not erred in taking into consideration (when determining disputed issues of fact) relevant matters or disregarding irrelevant matters.

The EAT was not satisfied that a serious procedural irregularity had occurred during the hearing which had led to the Tribunal seeing and considering a document which the Claimant's side had not seen.

HER HONOUR JUDGE KATHERINE TUCKER:

1. This is my decision in respect of an application to appeal arising out of a decision of an Employment Tribunal sitting in East London. The Employment Judge was Employment Judge Prichard, the Members were Mrs S Boot and Mrs BK Saund. The Tribunal's reserved Judgment was sent to the parties on 20 August 2019. I refer to the Claimant/Appellant as the Claimant, and to the Respondent/employer as the Respondent (as they were before the Tribunal).

The facts

2. The Claimant has a long history of working in education. She has worked for in excess of 20 years with young children as an educational professional. She became a Head Teacher and worked in that capacity for many years. Most recently, she was the head teacher of St Margaret's Primary School based in Barking.

3. On 1 April 2017 that school became part of the Respondent, which is a multi-academy school trust. As part of the process of forming that academy trust, a number of audits took place. One of those audits raised concerns about a contract which had been awarded to a building firm. The concern centred on whether proper procedures had been followed in the award of that contract. Importantly, the building firm to whom the contract was awarded was owned and operated by the Claimant's husband and brother in law. The building firm was called Elite Building and Maintenance Limited ("Elite"). The building contract was for work to be done at the school of which the Claimant was the Executive Head Teacher, St Margaret's Primary School.

4. Auditors initially began work in July 2017. Thereafter, the Claimant was absent from work due to work related stress and anxiety. There was no dispute between the parties at the hearing before

the Tribunal that, as a result of those conditions, the Claimant was disabled within the meaning of section 6 of the **Equality Act 2010** at the relevant date for the purposes of her claims before the Tribunal.

5. At a meeting which took place on 7 September 2017, a decision was taken that the Claimant should be suspended pending investigation of a number of disciplinary offences. The investigation report prepared through that process resulted in a disciplinary hearing being scheduled, initially in December 2017, and subsequently re-scheduled to 12 January 2018. Five disciplinary charges were determined at that hearing.

6. The Claimant did not attend the disciplinary hearing but instead sent in written representations shortly before the hearing. Those ran to some 28 pages and were considered. The disciplinary hearing resulted in three of the allegations/charges being found to be substantiated. Those were

(1) serious breaches of financial management;

(2) serious breaches in the tendering process leading to pecuniary interest; and

(3) serious failures to adhere to a safe recruitment process. This allegation concerned recruitment of the Claimant's daughter and another employee.

Two other allegations were not upheld.

7. It was concluded that the Claimant was guilty of gross misconduct. She was summarily dismissed. The Claimant appealed against that dismissal. That appeal was determined in the early part of 2018 by Mr Moss. The Tribunal found that the appeal took place as a rehearing of the allegations of which the Claimant had been found guilty. The appeal against the dismissal, heard over two days (23 February and 8 March), was unsuccessful.

8. It was accepted by the Tribunal (subject to points made below) that the Claimant made two

protected and qualifying disclosures during the period of time covered by the events set out above. First, that on 20 November 2017 she did so through the making of a written complaint regarding regulatory matters to the Education and Skills Funding Agency OFSTED, the Regional Schools Commissioner and the Diocesan Board. Secondly, the Claimant made further disclosures in a letter of 8 January 2018 to Mr Moss. The Claimant asserted that she was dismissed for having made those disclosures and that, therefore, her dismissal was automatically unfair. She also asserted that she had been unfairly dismissed contrary to s.98 **ERA 1996**. In addition, she asserted that she was subjected to detriment for having made those disclosures.

9. The Claimant made two claims of disability discrimination. First, that she was subjected to disability related discrimination contrary to section 15 of the **Equality Act 2010** and, secondly, that the Respondent had failed to make reasonable adjustments contrary to sections 20 and 21 of the **Equality Act 2010**.

10. The claims therefore before the Tribunal were,

(1) Unfair dismissal; the Claimant contended that her dismissal was unfair contrary to section 98 of the **ERA 1996** and/or alternatively, she contended that her dismissal was automatically unfair contrary to section 103A of that **Act**.

(2) Detriment on grounds of having made protected and qualifying disclosures.

(3) Disability related discrimination contrary to s.15 of the **Equality Act 2010** (EqA 2010) and a failure to make reasonable adjustments contrary to s.20 **EqA 2010.**

11. The hearing took place over nine days from, 8th to the 11th and 15th to 20th April 2019. The Tribunal deliberated over three days on 24 May and 20 to 21 June 2019.

12. By a unanimous decision, the Tribunal dismissed all of the Claimant's claims. The reserved

Judgement and Reasons of the Tribunal are lengthy, running to some 30 pages and 159 paragraphs.

13. Unusually, I consider that the decision on the appeal is best understood by incorporating reference to the Tribunal's reasons within my conclusions on the grounds of appeal.

Grounds of appeal

14. The first ground of appeal, from which some of the others follow, was that the judgmentand reasons amounted to an error of law and was wrong because it failed to comply with the mandatory requirements of rule 62(5) of the **Employment Tribunal Rules of Procedure 2013 2013 (Rules of Procedure)**. The second ground of appeal was that the Tribunal erred because, in reaching the decisions that it did, it took into account irrelevant factors and failed to take into account relevant factors. Thirdly, it was contended that the Tribunal failed, in particular, to set out its conclusions in relation to the public interest disclosure claims. Finally, it was contended that an appeal should be allowed because a serious procedural irregularity took place when, it is contended, a 17 page document was disclosed to the Tribunal during the course of the hearing but neither to the Claimant's representative nor to the Claimant herself.

The law

15. Rule 62(5) of the **2013 Tribunal Rules of Procedures** provides as follows:

> "In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. Where the judgment includes a financial award the reasons shall identify, by means of a table or otherwise, how the amount to be paid has been calculated."

16. This is a more recent version of the same principles set out in r.30(6) of the 2004 Rules of Procedure. The precise wording between the two rules varies slightly. However, at the heart of both, lies the principles set out in 1987 by Bingham LJ in **Meek v City of Birmingham District Council**

[1987] IRLR 250:

> **"8. It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftmanship, 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 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 …"**

17. Times have moved on from 1987. Industrial Tribunals are now Employment Tribunals, their 'Chairmen' now Employment Judges. Tribunals deal increasingly with cases involving complex law and facts, where experienced, skilled legal representatives are often involved and where the legal and factual issues at issue require refined legal analysis in order to be properly determined. However, it is also a venue in which litigants in person frequently appear and can, with confidence represent themselves; Employment Judges, Members and the Employment Tribunal staff having developed particular expertise in working in cases where one side may be represented and the other not.

18. All those matters have evolved over time. However, what is required to comply with the provisions of r.62 must be read through the prism of the words set out in **Meek** in 1987, and rightly so. Whether there has been compliance with that which is demanded by the rule is to be judged by looking at the substance of the relevant decision, not its form. See also **DPP Law v Greenberg** [2021] EWCA Civ 672;**Vairea v Reed Business Information Ltd** [UKEAT/0177/15/BA]; **Revenue and Customs Commisisoners v Mabaso** [UKEAT/0143/17/DM]. As set out at paragraph 20 of the latter judgment by Choudhury P " **the question for this Court is whether the Reasons given by the Tribunal below can be said to satisfy the requirements of r.62(5) and of Meek"**. An expanded analysis of the correct approach for an appellate tribunal or Court to adopt is set out in the **Greenberg** decision by Popplewell LJ which I consider should be repeated here:

> **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".**

This reflects a similar approach to arbitration awards under challenge: see the cases summarised by Teare J in *Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The "PACE")* [2010] 1 Lloyds' Reports 183 at paragraph 15, including the oft-cited dictum of Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery repairs Ltd* [1985] 2 EGLR 14 that the courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration". This approach has been referred to as the benevolent reading of awards, and applies equally to the benevolent reading of employment tribunal decisions.

(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] I.C.R. 437 and in the recent decision in *Varndell v. Kearney & Trecker Marwin Ltd* [1983] I.C.R. 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."**

19. The passage cited from **Greenberg** is also of relevance to the second ground of appeal. When any decision maker is making a finding of fact, or a reaching a legal conclusion, applying legal principles to facts found, he/she/they must take into account relevant matters, and disregard those which are irrelevant (for example those of no probative value or the effect of which may be unfairly or unduly prejudicial). Applying irrelevant legal principles, or failing to apply relevant ones, is likely to amount to an error of law. Considering irrelevant facts or failing to consider relevant ones may lead to an error of law, for example if it leads to an irrational decision or to a perverse one.

20. It is difficult, indeed, may not be possible, to neatly define what a procedural irregularity is, or to lay down a rigid rule as to where the boundaries of one lie, or what makes a hearing unfair. Each case must be considered on its own facts and the circumstances involved. See the comments of the Court of Appeal to that effect in **Stanley Cole (Wainfleet) Ltd v Sheridan** [2003] ICR 1449. It is, in my judgment, important to consider whether what occurred was seriously irregular or unfair, and to consider whether there was a material injustice as a result of what occurred, all with proper regard to the principles set out in Article 6 **ECHR**.

Ground One: the Judgment failed to comply with the requirements of r.62(5) of the 2013 Rules of Procedure and Ground three: failure to adequately set out the conclusions in respect of the PID claims

21. I consider that these two grounds are best considered together.

22. The Claimant contended, by reference to authority, that the requirements of rule 62(5) are mandatory, in other words, they are something that a Tribunal must achieve when setting out their reasons for a judgment.

23. In this case, it was submitted that a number of criticisms could be made of the judgment: it did not, it was contended, identify relevant issues, nor did it state the findings of fact in relation to those issues; it did not, it was contended, identify relevant law, nor did it then set out how the law applied to the findings of fact that it had made in order to decide the issues. It was submitted that it was not sufficient that issues were identified by the parties.

24. The Claimant set out a list of the matters that were said not to have been addressed within the judgment. These were identified by reference to a document that was in the bundle before the Tribunal and which was described as a "Draft List of Legal and Factual Issues". It was common ground between the parties that that was a document which had been created by the parties in preparation for the hearing. It was submitted that the Tribunal failed to make relevant findings regarding key parts of the Claimant's claim. By way of examples, but examples only, it was said that in relation to the question of whether or not the dismissal was procedurally or substantively unfair, the Tribunal had failed to conclude whether or not the investigation into the asserted conduct was satisfactory, and, that the Tribunal had failed to consider whether the Respondent had failed to properly consider the Claimant's evidence, submitted on 12 January 2018, in response to the disciplinary allegations. It was submitted that the Respondent had failed to follow the London Borough of Barking and

Dagenham disciplinary policy, and that the Tribunal had failed to determine what, if any, impact it had upon the decision. It was submitted that the Tribunal had failed to determine whether or not the **ACAS Code of Practice** in relation to disciplinary and grievance procedures had been followed.

25. In respect of the whistleblowing complaints, it was contended that the Tribunal's failures were, if anything, greater: for example, that the Tribunal did not determine whether or not the Claimant had disclosed information which tended to show, in her reasonable belief, a contravention of a legal obligation; nor had it determined whether or not that which was disclosed amounted to a breach of the Respondent's legal obligations to act in the best interests of St Margaret's School and the pupils of the school. It was contended that the Tribunal had not determined whether or not the matters complained of were because of the Claimant having made those disclosures.

26. I was referred to a number of authorities, **Greenwood**, and **HMRC v Mabaso**, particularly paragraphs 30 and 34. I was asked to conclude that, even standing back and taking a broad view of the reasons, it would not be possible to salvage parts which were deficient for similar reasons set out by the President of the EAT at paragraphs 34, 35 and 30 of that decision.

27. In response, the Respondent contended that it was important to remember who a judgment and reasons are written for, namely the parties, and that the judgment should be read as a whole, referring me in particular to a passage in **DPP v Greenberg** [2021] EWCA Civ 672 at paragraph 57 of the report, set out above.

Ground one: conclusion and analysis

28. In paragraph 57 of the **Greenberg** decision, the established principle is set out that a Tribunal's judgment should be read fairly and as a whole, without unnecessary scrutiny of individual words or phrases; that Tribunals, like other judges, do not have to determine every disputed issue

within a case, or refer to all of the evidence before it; that it would not be appropriate for an appellate court to conclude that, simply because a particular piece of evidence has not been referred to in a judgment, that therefore either that evidence did not exist, or it should not be taken into account.

29. My conclusion in relation to ground one is as follows. A key responsibility and duty which is placed on the shoulders of Employment Judges and the members with whom they sit, is to provide a decision which is **Meek** compliant and which complies with the provisions of rule 62(5) of the **2013 Rules**. That duty is one of the key elements of justice: that when matters come before an independent, impartial Tribunal, the parties to that litigation, and indeed any other member of the public who chooses to take an interest in it, should know what has been decided and why. Those are important principles. They are part of a fair and independent judicial process.

30. At the same time, it is important to note that there is no 'right' way or one way to write a judgment or reasons. Cases are all different. So too, are the individuals, the people, involved in those cases, the facts involved and the way those facts are presented and by whom. There can be an enormous disparity in all of those matters in individual cases. For those reasons it is helpful if, when a decision is made, judgment given and the reasons for it is written, or given orally, the decision maker takes a moment to think about the different audiences who are likely to hear or read that judgment and reasons.

31. First and foremost, the judgment and reasons are written for the parties themselves. They will be the most interested in the outcome of the litigation and need to be able to understand it. They need to know what the 'answer' is to the claim and they need to know why the decision was taken in the particular way it was. Closely allied to those individuals are the parties' representatives. They need to understand, perhaps in a more refined way, whether there is any legal challenge to that which has been determined. They need to be able to advise their clients on the consequence of the decision,

whether there are grounds for appeal, and if not been, they need to be able to explain to parties, some of whom will be deeply disappointed in the outcome, why it is that the judge or the panel, was entitled to come to the decision that they did.

32. Thirdly, as decisions that are reached can be subject to scrutiny through appeal, an appeal court needs to be able to see, within a decision, what the decision was and why that decision was reached, both as a matter of fact and as a matter of law.

33. Finally, any member of the public who wishes to, should be able to read and understand a decision. Again, the principle of open, transparent justice, is an important one.

34. Some parties will be very sophisticated litigants, others much less so and it is often the case that judges tailor the way they give the decision and the language used, deliberately, so as to ensure understanding by the litigants involved in the litigation. However, at the same time, it is important to recall that the parties are the ones who will have sat through the litigation at first instance, who will have the best awareness, the best understanding of everything that is said about the evidence that was given, because they were there and they heard it and they saw it. They might not agree with the decisions that are given, but they are likely to have background knowledge which should, and hopefully would, ease their understanding of the decision.

35. If authority were required for that, I refer to **Derby Specialist Fabrication Ltd v Burton** [2001] ICR 833 at page 844, paragraph 32:

> "As we have already said, it must be borne in mind that the extended reasons of an Employment Tribunal are directed towards parties who know in detail the arguments and issues in the case. The Tribunal's reasons do not need to be spelt out in the detail required, were they to be directed towards a stranger to this dispute."

36. A concise, reasoned decision and concise, structured analysis and reasoning can be helpful to all readers of judgments and reasons and is to be encouraged. A succinct judgment and reason should not simply be taken to indicate a lack of work or care. On the contrary, it often takes more work, and longer to write short reasons or a short judgment than a longer one because the author is seeking to express, sometimes, complex analysis in fewer words. It may be helpful to use headings and sub-headings to guide a reader through reasons and a judgment. However, that is not the only way to write **Meek** and r. 62(5) compliant reasons and judgments. What is required of a Tribunal is that they set out what the issues are, they set out what the facts are, they set out what the relevant law is and they set out their conclusions. Whichever style is adopted, the question is one of substance, not form: does the judgment do what it needs to do? Does it tell the parties and other readers what was decided and why?

37. In this particular case, in many ways it may have been easier for the reader, perhaps preferable, had the judge and the members adopted a clearer structure to their analysis. My initial view was that there *might* be some merit in this ground of appeal. That was my initial view however. Initial views can change. Mine did so in this case. Following proper analysis, I am satisfied that this judgment does comply with rule 62(5) and that it is **Meek** compliant.

38. Unlike the **Mabaso** case, here there was a detailed explanation of the Tribunal's conclusion and it told the relevant 'story' of what had occurred. The Tribunal, in my judgment, found, clearly, a number of important matters. First, that it was 'beyond doubt', significant words to use, that the reason for the dismissal of the Claimant in this case was conduct. That is set out at paragraph 133 of the judgment which stated:

> **"It is beyond any doubt or dispute that the Claimant was dismissed for reasons related to her conduct under s 98(2) of the Employment Rights Act 1996, as opposed to any of the other potentially fair reasons there."**

39. In addition, within its analysis of the disability discrimination claim contrary to s.15 of the **EqA 2010**, the Tribunal stated that:

> **"The claimant's actual dismissal was nothing whatsoever to do with her absence from work. It was because the Trust, justifiably, had lost all trust and confidence in the claimant. That is the essence of gross misconduct. That is what happened in this case. How could they continue to employee and(sic) Executive Headteacher who had shown such a fundamental lack of judgment?"**

40. At paragraph 134 the Tribunal recorded, having previously set out relevant facts, that:

> **"As may already be clear from our recitation of the facts, the Respondent's handling of the Claimant's dismissal and the sanction of dismissal itself comes nowhere near to being outside the range of reasonable responses mandated by section 98(4) of the Employment Rights Act 1996, and the case law. The matter has caused reputational damage. In the tribunal bundle we saw adverse reports in the press. The school and the parents were acutely aware of this. The threat to the reputation of the school was not merely theoretical."**

41. Although shortly said, in truth what those few lines did, was properly to identify the relevant law set out in s.98 **ERA 1996** as the applicable law. The Tribunal also implicitly referred to relevant principles. Whilst the passages are short, they are (perhaps just) enough to identify those matters. The Tribunal could have gone on and referred to **British Homes Stores v Burchill** [1978] IRLR 379 and later cases including **Sainsbury Supermarkets v Hitt** where the appellate courts have set out the relevant legal principles to be applied when determining whether or not dismissal for conduct is fair or unfair and reminded Tribunals not to substitute their own view for that of the employer, rather that its role is limited to determining whether or not dismissal was within the range of reasonable responses open to the employer. However, focusing on the substance, what the Tribunal was required to do was to determine whether the Respondent had a genuine belief that the Claimant was guilty of the relevant conduct or misconduct; whether that belief was based on reasonable grounds and in circumstances were a reasonable investigation had taken place. Ultimately, the Tribunal was required to consider whether the decision to dismiss this particular employee in respect of the relevant conduct came within or without the range of reasonable responses open to a reasonable employer.

42. I am satisfied that the Tribunal did indeed answer those questions having regard to paragraphs 135 through to 144, with reference back to paragraph 41, and paragraphs 101-111 of the Tribunal's reasons.

43. As to the Respondent's genuine belief, the Tribunal found as a fact that the issues giving rise to dismissal came to light through an audit carried out by an independent auditor. That information was then placed before the Board in the September which in turn led to the Claimant's suspension, then to the investigation and, ultimately, the decision to dismiss. The Tribunal held that, although there were some criticisms to be made of the investigation undertaken, overall, it was a reasonable one. The Claimant was given an opportunity to participate in it; enquiries were made about her health and her ability to participate because of her health. The Tribunal found that the Respondent had a pressing need (to enable the school to keep functioning) to make a decision in respect of the allegations against the Claimant because of the rumours which were surrounding the Claimant's absence and the issues giving rise to that. The Tribunal found that the school acted fairly and properly in holding the disciplinary proceedings when it did. It also found that, overall, the appeal process was fair, noting that it was lengthy and detailed. Such faults as there might have been in the underlying process were subsequently resolved. Fairly read, it is clear that the Tribunal was satisfied that there was a genuine belief in the Claimant's misconduct, based on reasonable grounds following a reasonable investigation. It concluded that the dismissal was fair applying the correct legal test.

44. As regards the draft List of Issues of Fact and Law, whilst the Tribunal did not expressly incorporate that list of issues into the judgment and reasons, it is clear that it had been before the Tribunal. At different points of the Reasons the Tribunal went through the issues that are identified within that document. For example, they determined that it was not unreasonable to suspend the Claimant, that that was a neutral act and appropriate in the circumstances; they were satisfied that the investigation met the standard of reasonableness; they expressly rejected the assertion that the

Respondent accelerated the disciplinary hearing, setting against that the findings that it made about the need to make a decision because of the rumours that were circulating the enquiries that were being made by parents of the school; they considered that the disciplinary panel did consider the information presented by the Claimant at the disciplinary investigation and, in any event, that the appeal was a re-hearing.

45. In addition, whilst the Tribunal accepted that not all of the witnesses that had been identified by the Claimant were interviewed, the Tribunal found that, overall, the disciplinary investigation was a reasonable one. The Tribunal rejected the Claimant's case that the disciplinary meeting did not take place at a neutral venue. It accepted that some criticism could be made about who had undertaken the disciplinary process, but to the extent that that was a valid criticism, they concluded that the overall process, having regard to the appeal, was fair. The Tribunal specifically engaged with the criticism about the use of one particular disciplinary policy over another, noting that there was, to their mind, no particular difference between the two and that such difference as there was, was not a difference of substance. They rejected the assertion that there had been failure to follow the ACAS procedure. They rejected the assertion that there had been failure to follow a disciplinary procedure. They found that the evidence submitted by the Claimant had been submitted as required and that the investigation was reasonable, thereby dealing again with the repeated complaint about the interviewing of witnesses.

46. Having listened carefully to the oral submissions made, I considered that there may have been some misunderstanding about the approach taken by the Tribunal to the claims of detriment for having made public interest disclosures. In my judgment, a fair reading of the reasons reveals that the Tribunal expressed some reservation about whether or not, the disclosures made, coming at the point in time when they did, i.e., after disciplinary proceedings had begun and just before the disciplinary hearing, were self-serving, as opposed to genuinely in the public interest. However, at paragraph 147

of the Reasons, the Tribunal set out that, notwithstanding those reservations, it was prepared to agree for the purposes of its analysis that the letter of 20 November was a protected qualifying disclosure. However, they then set out their conclusion: that they considered that the making of the disclosure did not play any causative role whatsoever in accelerating the disciplinary hearing on the school's part. It was for this reason that the Tribunal concluded that the Claimant's claim failed.

47. They then set out some of their analysis about why the disciplinary hearing needed to take place. In doing so, the Tribunal acknowledged that the Claimant had asked for delay because of depression and anxiety. However, the Tribunal accepted Mr Moss's account that a balance had to be struck. They observed that there was hardly 'unseemly haste' in the relevant time-line.

48. I acknowledge that in paragraph 147, the Tribunal did not address, expressly, how they treated the second disclosure. It may be recalled that the Claimant asserted that she had made two disclosures, one in November 2018 and one in the January 2019.

49. The detriments which the Claimant stated that she had suffered were as follows: that there was expedition of the disciplinary process; that the Claimant was reported to the police; and, albeit a claim of automatic unfair dismissal, that she was dismissed.

50. It is important to note that the police report pre-dated the making of disclosures. The Claimant was told that she was to be reported to the police when the investigation started in September 2017. On any analysis, that is prior to her having made her protected disclosure on 20 November 2017. It is also prior to the Claimant having made the second disclosure in January 2018.

51. As regards the asserted expedition of the disciplinary proceedings, the Tribunal made an express finding that the first disclosure played no causative role whatsoever in the timing disciplinary

hearing and set out clear conclusions about why the hearing needed to take place. They did not expressly address, however, in paragraph 147 the second disclosure. I invited further submissions on that point before setting out my conclusions below.

52. Although at paragraph 147, the Tribunal did not expressly consider the second protected disclosure, the Tribunal did set out, in express terms, their conclusion as to the reason for the dismissal. In addition, they also set out at paragraph 130 that they gave serious consideration to whether Mr Moss had been motivated by the fact that the Claimant was a whistle blower because of the volume of work that was required as a result of the disclosures that she made; whilst the report to the police predated the second disclosure, the dismissal post-dated it.. At paragraph 146, the Tribunal also referred to 'disclosures' in the plural. It is also important, in my judgment, to have regard to the way in which the reason for dismissal was actually dealt with in the closing written submissions before the Tribunal. At paragraph 15 of those written submissions, counsel for the Claimant stated:

> **"The Respondent relies upon gross misconduct as the reason for dismissal. Whilst the Claimant has pleaded a s103A dismissal in light of the sequence of events (i.e. suspension and investigation before 20/11) this is lightly put as the "sole or principal" reason.**

The Claimant did, however, go on to allege that there were other non-potentially fair reasons for dismissal. The Claimant asserted that the true reason for dismissal was the takeover of St Margaret's to bring it in line with the wishes of the former Federation of Schools. The Claimant pointed to a number of features as to why she thought that that was the real reason for dismissal. A number of points come from these matters. First, the case of automatic unfair dismissal was 'lightly put'; more forcefully, the Claimant asserted that the true reason for dismissal was the takeover of the school. The Tribunal clearly addressed that issue by making a very clear finding that the true reason for the dismissal, having heard nine days of evidence, was conduct, not because of the takeover of the school. In context, in my judgment, the finding that it was beyond any doubt that that was the reason for the dismissal, was broad enough to encompass a dismissal of the 'lightly put' automatically unfair dismissal claim.

Ground Two: The Tribunal took into account irrelevant factors and failed to take relevant factors into account

53. The second ground of appeal was twofold. First, that the Tribunal took into account irrelevant factors; and, secondly, that the Tribunal failed to take into account relevant factors. The submission made on behalf of the Claimant was that a number of matters identified by it had not been properly taken into account by the Tribunal and, conversely, that factors which were not relevant had been taken into account.

54. The position of the Respondent in relation to this ground of appeal was, first, to draw to the EAT's attention that this was a case not where a discretion was being exercised, but where the Tribunal was engaged in fact finding; secondly, in relation to each matter, the broad submission of the Respondent was that either the matters were taken into account if relevant and were not if not relevant.

55. I addressed first the Respondent's submission that this was not a case where the Tribunal was exercising a discretion. I accept that that is right. This was a situation where the Tribunal was required to determine disputed facts and then reach a final decision on a number of claims. However, in determining those disputed facts, the Tribunal was required to take relevant matters into account, not to disregard them. In addition, the Tribunal needed to determine facts on a proper evidential basis. It should not make findings of fact based on irrelevant matters which were neither of probative value nor which might have been prejudicial to the correct determination of the facts.

Failure to take into account relevant matters

56. It was submitted that the Tribunal did not take into account a number of relevant factors. The first was whether, and the extent to which, the award of the relevant contract should have gone through (or did go through) a robust tendering and approval process, could not be tested. This was

recorded in the minutes of the disciplinary hearing (the Claimant was not present due to ill health). The passage relied upon read as follows:

> "*Haslers advised that owing to the size of the transaction and the connection of Ms Ejvet to the building company, the intended work should have gone through a robust approval and tendering process. This was not something we could test due to the lack of documentation available*."

57. Secondly, a linked point, was that in the course of the investigatory process, there was no document to show how the contract was procured and how it was approved other than that the contract was approved by the building committee and that it was common ground that the Claimant was not a member of that committee. My attention was drawn to the disciplinary hearing minutes which provide as follows:

> *"As shown by the minutes of the full governing body on 28 April 2015 there was a discussion about a policy for tendering and it was agreed that a proposal would be presented at the next meeting; this did not happen. At a full governing body meeting (minutes dated 6 October 2015) Governors clearly had concern regarding the use of Elite and decided to go out to tender; however, this did not happen. What happened instead was the setting up of a new Building Committee which met on 25 February 2016."*

58. It was submitted that there was no policy in place at the time of the award of the contract, and no meeting of the governing body. Instead a building committee was set up which awarded the contract. The Claimant was not a member of the building committee.

59. In my judgment, these submissions, although articulately made, rather missed the point.

60. The conduct the Respondent organisation was concerned about was the fact that a contract was awarded to a company where it was clear that there was a close relationship between, on the one hand the executive headteacher of a school and, on the other those who ran that company. In blunt terms, it was concerned that the executive headteacher of the school would have a pecuniary

advantage or other benefit from that contract being awarded to the particular company it was awarded to because she was married to the person that ran the business.. The amount of money involved was significant, some £149,000. It was public funds. The Respondent contended that there had not been a sufficiently robust, transparent and clear process through which that contact was awarded and, further as executive head of the school, the Claimant had a responsibility to ensure that (a) such processes were in place, and (b) that they were followed. It contended that there were no such procedures and the process followed was significantly flawed. It contended that the Claimant was at fault for that.

61. It is clear from the Reasons that once these matters came to light the Claimant's response was not to assert that she had not understood the importance of those steps or not adequately reflected upon what had occurred. Rather, it was that she had done nothing wrong.

62. Against that background, the Tribunal made a number of specific findings of fact. It found that in the summer of 2015, the Claimant had drafted a tendering policy document, albeit that appears not to have been adopted or acted upon. That appeared to have occurred after the need for such a policy was identified at a full governing body meeting in April 2015. At a full governing body meeting on 6 October 2015, governors expressed concerns about the use of Elite to do proposed building work and decided that it should go out to tender. That did not happen. Instead, what happened was that a new sub-committee, the building committee, was set up which met in February 2016. That sub-committee then awarded the contract, contrary to the express directions of the full governing board that a tendering process should be followed.

63. I have not seen a document which suggested that the full governing board ever delegated the power to award the contract, nor have I understood that submission to have been made to the Tribunal. Before the Tribunal the Respondent asserted that it had concerned about the lack of relevant

documentation to evidence that a robust process had been followed. The Tribunal found that that concern existed and, further, that there were reasonable grounds for that concern. In those circumstances, the fact that the disciplinary hearing stated that they could not test whether or not a robust approval and tendering process had gone through because of the lack of documentation, was just the very point that the Respondent was concerned about; because there was not documentation, they could not test it. The need for documentation and a robust tendering process was the Claimant's responsibility and she had not fulfilled that responsibility.

64. Thirdly, it was asserted that the Tribunal had not properly considered that the Claimant was not part of the decision making body which awarded the contract, that is the building sub-committee, and that the Tribunal did not properly consider her lack of pecuniary interest in the award of the contract. In my judgment, these matters were addressed properly within paragraphs 101 to 110 of the Tribunal's judgment. The Tribunal noted that the Claimant clearly recognised that there was a potential conflict of interest between the school awarding the contract to her husband/brother in law's company and her own position as executive head teacher. It concluded that, nonetheless, she allowed a decision to be taken by a panel of three governors, without delegated powers, to award that contract; the creation of the committee did not absolve her from her responsibility to ensure that a proper process was followed.

65. In addition, the Tribunal went further and considered that, on the facts, the Claimant probably had a guiding hand in the award of that contract knew exactly what was going on.

66. Fourthly, it was contended that the Tribunal erred because it did not take into account:

(1) that the charges determined by the disciplinary panel (which took place in the Claimant's absence) included a breach of trust of confidence. It was submitted that that had never been part of the charge brought against the Appellant.

(2) That it was not clear within the dismissal letter that any sanction short of dismissal was ever considered

(3) That proper consideration had not been given to the Claimant's length of service.

67. In terms of the issue as to trust and confidence, I accept that the Claimant was not asked to meet a case that she had 'acted in breach of trust and confidence' or that her actions had caused there to be a breach of trust and confidence. Rather, it was put to her that she was guilty of the three matters that I have already alluded to. However, I considered that there was merit in the Respondent's submissions in respect of this matter. First, this was not one of the 13 reasons relied on by the Claimant in the list of issues to establish unfair dismissal. Secondly, that, in this case, the Tribunal legitimately concluded that the effect of the three breaches which were found to be proven, was that there had been, in effect, a breach of trust and confidence because the Claimant had been found to be guilty of gross misconduct such that the employer no longer had, or could have, trust and confidence in her. The points made by the Respondent my judgment, were also relevant to the matters set out at paragraph 58 (2) and (3). The Tribunal's conclusion that the Respondent had lost trust and confidence in the Claimant was, essentially, describing the effect of the serious conduct that the Claimant was found guilty of. Further, that in those circumstances the employment relationship could no longer continue and dismissal was the appropriate sanction, was within the band of reasonable responses of a reasonable employer, notwithstanding her length of service. That was also relevant to the question of whether or not a lessor sanction would have been appropriate. In addition, the Claimant had not acknowledged or accepted that she had done anything wrong.

68. On a fair reading, I consider that, although the Reasons could have been more clearly expressed, the Tribunal concluded that the employer's decision to dismiss in this case was within the range of reasonable responses, given the seriousness of the misconduct, its consequences and the approach adopted by the Claimant which was, in essence, that she had not done anything wrong.

The Tribunal took into account irrelevant matters

69. I was not satisfied that this ground of appeal was made out. As regards the defects in the building work, it is important to note that the Tribunal expressly dealt with this matter, identifying the irrelevance of the point. The Tribunal noted that Mr Moss dealt with that matter well on appeal, because he identified that it was quite wrong to take that matter into account. The Tribunal made the same point.

70. As to Elite's VAT registration, it is the case that Tribunal made the following observation in respect of Elite's VAT registration at paragraph 49:

> **" 49. The Tribunal could not help noticing that for the first six years Elite was not VAT registered. They registered for VAT in July 2016 and one can understand why. They exceeded the compulsory registration threshold in one invoice in July 2016. The bill was £96,387.50 plus VAT so the total turnover of Elite was clearly low for the first six years of their relationship with the school."**

71. Again, on an objective and fair reading of the Reasons, I am satisfied that that was referred to in order to explain why the building contract appeared to be an important one for Elite. That in turn had some potential relevance to the question of indirect benefit to the Claimant having regard to the relationship between the headteacher and the directors of Elite. In any event, it was one observation, no more, no less. It is not, in my judgment, one which vitiates the decision. No allegation of bias is made. It does not in itself amount to an error of law.

Ground 4: Serious procedural irregularity

72. The third ground of appeal was that a serious procedural irregularity occurred when a document was disclosed late in the hearing. That document was a 17-page document. (Appeal bundle at tab 25, page 205). It was dated 23 February 2018 and it was written by Mr Moss. It was sent to ESFA, Academies Operational Delivery Centre in response to letters sent from that organisation to the Trust and to Mr Moss. It set out in detail a number of responses to specific questions. I have had

the opportunity now to read that document and to understand the points that are raised within it.

73. There was a dispute as to what actually happened at the Tribunal in relation to this document. An affidavit has been prepared by the Claimant and also by a witness on the Claimant's behalf who is described as an independent witness and who also is a solicitor. In addition, an affidavit was obtained from counsel for the Respondent. No statements or comments have been obtained from counsel who appeared for the Claimant at the Tribunal, Mr Chris Milsom. I did, however, see and read the written closing submissions he prepared for the Tribunal.

74. Comments were also obtained from the Employment Judge and the Members of the Tribunal. and from the members.

75. It is accepted that during the cross examination of one witness, Mr Moss, the document was referred to. It then became apparent that the document had not been disclosed. It appears from the account provided by Mr Evans, counsel for the Respondent, that he thought that the document had been disclosed. He accepts in his affidavit that it became evident that he was wrong about that and that the document had not, in fact, been disclosed.

76. What then happened was a matter of dispute. The Claimant and her witness asserted that the document was not provided to her or her counsel. That account was disputed by counsel for the Respondent.

77. Counsel for the Respondent stated that Mr Milsom made submissions on behalf of the Claimant, contending that the document should be disclosed. Mr Evans stated that a copy of the document was obtained and provided to Mr Milsom, that Mr Milsom reserved his position in relation to the document and to any potential cost consequences. Mr Evans was clear that he considered that

Mr Milsom had a copy of the document.

78. That account is supported to some extent by notes provided by one of the Employment Tribunal lay members. Mrs Saund's notes read as follows:

> "*On Wednesday, 22/5/19 we paused Beverley Hall's to interpose Mr Graham Hall's cross examination by Mr Milsom.*
> *We took midmorning break from 11.35 to 11.50 am.*
> *I got note where Graham Moss is saying "23/2/18, letter not given to us".*
> *About 12 noon Mr Evans re-examined Mr Moss on this February letter:-*
> *Q. Document handed to Graham Moss? February letter?*
> *A. Yes, same document but it was a thick bundle of Appendices (Letter 17 pages long).*
>
> *Mr Evans then says that*
>
> *"Since witness referred to this document, it can be disclosed now to Claimant's side".*
> *We the Tribunal to be given copy too.*
> *But my notes do not make it clear if this 23/2/18 letter was disclosed to us*."

79. The Employment Judge was also asked to comment on this. The judge stated that his notes were not as clear as he might have hoped. However, he stated that within his notes, he had placed an asterisk in his notes. He explained that he used an asterisk to denote when a new document was introduced and that sometimes he would then add a page number to show when it was inserted. He stated that he thought that the 17 page letter was never inserted into the bundle. However, he noted that there were two asterisks on his notes which indicated to him that this was raised when the document first appeared (as described during cross examination), and then later when it was copied. The judge stated that he had no detailed independent recollection of what had occurred and that that in itself, he thought, was of some, albeit perhaps limited, significance because he considered that, if there had been something unusual, he would be more likely to recall it than not. On balance, he tended to think that his notes suggested that an issue arose about the documents and a copy made of it.

80. The Claimant and her witness are clear in their affidavits that the document neither reached the Claimant nor was it provided to the Claimant's counsel.

81. I noted that the Claimant's counsel refers to the document in his written submissions. On that basis it would appear to be likely that the Claimant's counsel had sight of that document. I conclude on the basis of the evidence that I have seen that it is more likely than not that he was provided with a copy and that those witnesses who did not think that occurred are mistaken in that regard. It appears clear, however, having regard to the written closing submissions, that the Claimant's counsel had sight of that document. Whether or not it was handed to the Claimant and/or her legal team, is a matter which should be resolved between counsel and that team.

82. Finally, and in any event, having looked at that document in some detail, I cannot see that it takes matters significantly further. It is clear that the Tribunal had regard to the document and saw it; it is also clear that the Claimant's counsel was able to make submissions upon it. I do not consider that I should allow the appeal in respect of the serious procedural irregularity that is contended for. I cannot see that a material injustice or unfairness arose because of it. The Claimant's experienced counsel had clearly considered the document and referred to it in submissions.

83. For all those reasons, my view is that the appeal should be dismissed.

84. I add the following observations with the agreement of both parties. The Claimant has worked for many years in education and has had a long career in that profession. On the basis of the documents before me, there would appear to be no reason to doubt that, throughout her career she has sought to, and has, assisted young children in their initial journey through education. That is something that I hope she will remember and celebrate. It is not uncommon, in employment litigation, to see individuals overwhelmed with the events leading to dismissal and then the process of litigation in the

Employment Tribunals. In some cases, people become very unwell and also entirely focused upon the events which gave rise to the proceedings.

85. I hope that the Claimant, now that this matter has been heard, can put this behind her and move forward. I hope that she will be able to focus on other matters and remember the good work that she has done for those young people whom have been fortunate to have her as a teacher and guide through their early stages of education.