Neutral Citation Number: [2022] EAT 178

Case No: EA-2021-000236-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 December 2022

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

LEICESTER CITY COUNCIL

Appellant

- v –

MR A CHAPMAN

Respondent

- -
- -

Stephen Butler (instructed by Leicester City Council Legal Services**)** for the **Appellant**
Nicholas Bidnell-Edwards (instructed by Lawson West Solicitors Ltd) for the **Respondent**

Hearing date: 17 November 2022

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30 am on 9 December 2022

SUMMARY

Unfair dismissal – fairness of conduct dismissal – section 98(4) Employment Rights Act 1996
Wrongful dismissal – approach to evidence

The claimant was dismissed for a reason related to his conduct but the Employment Tribunal found that the respondent did not have reasonable grounds for considering that he had sexually harassed another employee (AG) and upheld his claim of unfair dismissal. It also upheld the claimant's wrongful dismissal claim, finding that the respondent had not called any relevant evidence in this regard. The respondent appealed.

Held: allowing the appeal

In relation to what it had found to be the crucial remark in this case, the ET had proceeded on the basis that the claimant and AG had given conflicting accounts. By doing so, it had failed to engage with the evidence before the dismissing officer, and with the reasoning he had provided for his decision, and had instead substituted its view of the incident in question. That rendered the ET's conclusion on the unfair dismissal claim unsafe.

As for the wrongful dismissal claim, the ET had stated that, other than CCTV footage, the respondent had not called any relevant evidence. That ignored the documentary and indirect oral evidence adduced by the respondent. Although it would have been open to the ET to reject that evidence and to prefer the claimant's live testimony, it was an error of law to simply disregard the potentially probative material relied on by the respondent.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This appeal raises two issues. First, whether the Employment Tribunal ("ET") fell into a substitution mindset or reached a perverse conclusion when determining a claim of unfair dismissal; second, whether it erred in its approach to the evidence relating to a claim of wrongful dismissal.

2. In giving this judgment I refer to the parties as the claimant and respondent, as below. This is the full hearing of the respondent's appeal against the reserved judgment of the ET (Employment Judge Ahmed, sitting alone) sitting at Leicester and Nottingham over six days during the course of 2020. Representation below was as it has been on this appeal. By its judgment, sent to the parties on 8 December 2020, the ET upheld the claimant's claims of unfair and wrongful dismissal. The respondent appeals both rulings.

3. Given the nature of the underlying allegations, an anonymity order has been made by the ET in respect of a former employee of the respondent, "AG".

The Facts

4. The claimant was employed by the respondent as a leisure centre attendant, working at the Leicester Leys leisure centre, from 31 January 2008 until his dismissal on 24 July 2018. The leisure centre contained a large open gym area and employed dedicated gym staff, one of whom was AG, who worked as a gymnastics coach.

5. On 20 April 2018, AG told another member of staff (Ms Charlotte Waite) of an incident involving the claimant on 13 April 2018. Neither AG nor Ms Waite reported this matter to management at that point. On 23 April 2018, AG discussed the incident involving the claimant with the Facility Manager at the leisure centre, Ms Vicki Allridge. Ms Allridge immediately reported this to the Leisure Facilities Development Manager, Mr Nick Browning, who asked that AG confirm the incident in writing. As a result, AG produced

the following statement (recorded by the ET at paragraph 11 of its decision):

> "Tony Chapman came into the sports hall with Monica and as he came through the door he was shouting he is not our slave, saying why can't you do it. I responded we normally do it but due to the fire in town buses were delayed meaning we were a bit behind in setting up. He then went to shout at me if you went for a shit would you like me to wipe your pissing arse. As a result of what Tony said to me I swore at him. This resulted in Charlie from the climbing wall shout above down to us, please do not swear and stop the shouting we have customers. I apologised. Tony then said he didn't swear which she had. I feel so disappointed as there was a member of management Team present Monica Tebbutt who did nothing and fully witnessed Tony's actions, they then left the hall
>
> Then after the session had finished at 7:15 pm Tony came back into the hall with Joe [Trolley], Monica and a young girl. He came in all macho and larry (sic). Tony started to pick up the mats, he then went to grab me and I said don't because I have a shoulder injury. He then ran after Joyce and chased and grabbed her and was messing about with her. After this he continued to throw the equipment out the cupboard for the next day of archery.
>
> I was then near the roll of mats and he came behind me and put his arms around me from the back and I said let me go or I will bite you. He didn't let go and I bit him slightly. He then grabbed my head and pushed it towards his groin area and said if you want to bite anything bite this. I was in such shock and cannot remember what then happened, all I remember was all staff around me were laughing at it. I am not sure who was there to witness this but it will be on CCTV.
>
> Then after the session had been put away I went out to the side entrance fire exit where my partner picks me up, but he wasn't there yet.
>
> Tony came again to me and grabbed me again by my coat and said get in here, pulled me by the coat neck and said your old man isn't here he don't want you.
>
> I told him to let go what she did, Joe was there, I asked Joe what is wrong with Tony today he's not right and told Joe I was going out the fire exit would you shut the door and I left."

6. Upon receiving AG's statement, Mr Browning reviewed the CCTV footage and discussed the matter with the Facility Manager, Mr Roy Cole. Following this, both the claimant and Ms Tebbutt (the manager present on 13 April) were suspended pending an investigation.

7. On 2 May 2018, Mr Browning took a statement from AG, and held investigation meetings with Ms Joyce Adams and Ms Charlotte Mills (both present on 13 April 2018), with the centre receptionist, and with two other leisure centre attendants; those meetings took place in May and June 2018. The claimant was also invited to an investigation meeting, initially

scheduled for 22 May but ultimately held on 8 June 2018 to accommodate the claimant's trade union representative.

8. The ET recorded the evidence obtained by Mr Browning as a result of his investigation under three headings: "*the set-up incident*", "*the take-down incidents*", and "*the office incident*". Ultimately the ET concluded that the dismissal of the claimant related to the "take-down incidents"; it is how the ET assessed the respondent's conduct and decision in this regard that is the focus of this appeal.

9. In relation to the evidence obtained during the investigation, the ET found as follows:

> "The take-down incidents
>
> 20. The take down incidents have been captured on CCTV footage and they show the following events: At around 7:20 pm, several Leisure Centre Attendants, including AG, are seen clearing away equipment in the sports hall. At around 7:24 pm, Mr Chapman, Ms Tebbutt and Mr Trolley arrive in the sports hall. Mr Chapman is then seen chasing Miss Joyce Adams around the hall which involves at one stage him lifting Ms Adams off her feet. There is then physical contact by Mr Chapman with AG. It is described as 'grabbing' by the Respondent. The exchange lasts no more than a few seconds. The Claimant's head visibly moves downwards at the same time that Mr Chapman has his arm around AG's neck. All the staff including Mr Chapman and Ms Tebbutt are then engaged in setting up. Mr Chapman then once again initiates physical contact with AG near one of the walls. This part of the footage is not clear from either angle. Ms Tebbutt is not seen to be directly involved in any of these interactions. At a slightly later point she is seen using the hula hoops for her own leisure. This is followed by some of the other staff who then also begin hula-hooping. Mr Chapman is then seen throwing an unidentified object at one of the staff members (not AG). Finally, after a short interlude Mr Chapman is seen engaging in a verbal exchange with AG by the fire doors.
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> 21. In the statement for the investigation, AG said this of the take-down incidents:
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> > "We started packing up, then he [Mr Chapman] came in with Monica [Tebbutt], Jo, his daughter. He [Mr Chapman] came in leery and loud, starts packing up. He came over and he tried to grab me. Then all of a sudden he ran after Joyce and grabbed her, grabbed her around the legs to pick her up. Off he trots to pick up mats. He then came behind me and puts her arms around me tight, and I said get off or I'll bite you. I bit him lightly, then he grabbed my head and said if you want to bite something bite this as he shoved my head towards his groin. He then ran off and was chucking things. … My husband picks me up. Tony [Chapman] dragged me back in and said "Your husband is not here yet, he don't want you". I said to Jo, what's wrong with him he isn't right. I feel sexually assaulted, manhandled … It's not normal behaviour, it's

> not right. And to behave like that in front of his daughter, it isn't right."
>
> 22. When Mr Chapman was interviewed by Mr Browning he initially said he could not recall the incident. He admitted using the word 'arsehole' but said he did not regard that as swearing. He denied grabbing anyone. At this stage he had not been shown the CCTV footage. During the middle of the interview Mr Chapman is then shown the CCTV footage. His explanation for his conduct was that it was banter."

10. The "take-down incidents" thus comprised two alleged interactions: (1) AG's allegation that the claimant grabbed her head and moved it towards his groin, saying "*if you want to bite something bite this*" (the "*bite this*" incident); and (2) AG's allegation that, when she was leaving the area, the claimant had dragged her back, saying "*Your husband is not here yet, he don't want you*" (the "*your husband*" incident).

11. Following Mr Browning's investigation, disciplinary hearings took place for both the claimant and Ms Tebbutt. The claimant's hearing took place on 24 July 2018, before Mr Andrew Beddow, the respondent's Head of Sports Services. At the hearing, AG gave her account and Mr Beddow also heard from the claimant and from witnesses called on his behalf, including Mr Trolley (another leisure centre attendant present on 13 April 2018). The hearing lasted from 9.37 am until 3.17 pm, when Mr Beddow retired to deliberate, and resumed at 4.15 pm, when Mr Beddow communicated his decision that the claimant should be summarily dismissed. That was confirmed by letter of 1 August 2018 (set out at paragraph 33 of the ET's decision), in which Mr Beddow explained as follows:

> "Allegation 1 – You behaved inappropriately within the workplace, to include verbal abuse, aggression, physical assault and sexual harassment. This is a breach of Leicester City Council Code of Conduct and Dignity at Work policies.
>
> It was evident at the investigation meeting that you were not able to remember the incident and when questioned said that you couldn't remember any grabbing or shoving of the head down to your groin and what you said to AG at this time. Upon viewing the CCTV footage at the investigation meeting, your view is AG is not distressed and that it was just banter and couldn't understand why she would do this?
>
> Although after viewing the CCTV footage you were able to recall the incident you are unable to remember what you said when you grabbed and shoved (AG's) head, I do believe on the balance of the evidence presented that you did

say what was reported by (AG). What you said at this time along with the physical contact is a degrading and humiliating act. Beyond this appalling act it is my view that you continued to humiliate (AG) by dragging her back and saying what you did, as she waits being picked up by her husband.

My assessment of the evidence is that you have physically assaulted a fellow employee and have sexually harassed and verbally abused (AG) causing significant emotional and physical distress to the employee who has had to encounter your extremely offensive behaviour and conduct.

As an experienced Leisure Centre Attendant there is a level of trust and confidence placed in you to go about your duties in a respectful and dignified way. The Leisure Centre Attendant, Job Description states that the role 'is to provide a working environment free of harassment and discrimination'. It is my view that you failed to uphold a fundamental objective of the Leisure Centre Attendant role.

The Council's Dignity at Work Policy states harassment is unwanted physical, verbal or nonverbal conduct, which has the purpose or effect of violating someone's dignity, or which creates a hostile, degrading, humiliating or offensive environment. I have no doubt that your behaviour on the 13 April when you grabbed (AG) amounted to serious physical and sexual harassment.

The Investigating Officer stated in the Management Statement of Case that 'it was evident from the investigation meeting that TC did not understand how the behaviour affected a fellow employee and continued to pass the behaviour off as 'banter' or 'having a laugh'. It is quite concerning that TC does not appear to understand the severity of his actions. I believe that it is no longer feasible for TC to continue in the role of Leisure Centre Attendant at Leicester City Council. Based on the evidence presented at the hearing I fully agree with this statement.

It is my view that you have endeavoured to downplay your actions and behaviour as leisure centre banter with (AG) and deflect attention from, or justify what is actually appalling targeted behaviour that clearly constitutes physical and sexual harassment of a fellow employee. Your behaviour and conduct has no place within Leicester City Council.

Although I took on board that you apologised for your behaviour and that you state that it shouldn't have happened I feel that your position on this has changed due to the evidence that has been presented against you at the hearing.

Allegation 2 - your actions and lost trust and confidence that has been placed in you as an employee of Leicester City Council

I find you blameworthy of this allegation. I have taken in to account my decision against the first allegation, which in itself has resulted in a lack of trust and confidence in you to perform your role with Leicester City Council.
…

Allegation 3 – Your actions have the potential to bring the Council in to disrepute.

Following the evidence presented at the hearing I find you blameworthy of this allegation.

Although it was established at the hearing that the Council did not receive any complaints from customers, that may have observed the behaviour or

> overheard the swearing and derogatory language, there was a significantly high level of risk that customers could have made a formal complaint.
>
> The behaviour and conduct shown on the CCTV has the potential to result in formal complaints and comments via social media platforms on the behaviour shown by Council staff. As a Council service we have a responsibility to protect the reputation of the Council to members of the public. The behaviour and conduct of yourself has the potential to create reputational harm both to the service and the Council as a whole. …"

12. Ms Tebbutt's disciplinary hearing was on 20 September 2018; she was also dismissed.

13. The claimant appealed against Mr Beddow's decision and a panel of elected Councillors (chaired by Councillor Cank) ultimately heard his appeal on 14 January 2019 but upheld Mr Beddow's decision. An appeal by Ms Tebbutt was similarly rejected.

14. Claims of unfair and wrongful dismissal were presented to the ET by both the claimant and Ms Tebbutt and were combined for hearing. The respondent called Mr Browning, Mr Beddow and Councillor Cank and submitted documentation from its internal process. The claimant and Ms Tebbutt gave evidence and called Miss China Ball-Chapman (the claimant's daughter) and another leisure centre attendant Mr Neil Lowe; they also submitted witness statements from other leisure centre attendants, Mr Trolley and Ms Sacha McCarrick, although the ET did not consider the content of those statements to be "*particularly crucial*" (paragraph 8 ET decision).

The ET's Decision and Reasoning

Unfair Dismissal

15. Considering the investigation carried out by the respondent, the ET found this fell outside the range of reasonable responses and was "*not the even-handed and fair process it should have been*" (paragraph 68 ET decision); the ET explained its reasoning as follows:

> "56. Whilst I do not consider much turns on the failure to obtain a witness statement from Miss Allridge, it is part of a series of failings. …
>
> 57. The question of delay in the investigation is however a different matter. The relevant incident occurred on 13 April 2018. There was therefore a gap of

10 days until Mr Browning became aware of the incident so the need to expedite must already have been apparent from the outset. Mr Chapman was suspended on 26 April but had not been told that he was accused of an incident as serious as an allegation of sexual harassment. Mr Chapman received a letter of suspension which did not provide any useful information other than that he had "behaved inappropriately". He was not at that stage shown the CCTV footage or offered an opportunity to view it.

58. Mr Chapman was invited to an investigation meeting by letter dated 11 May 2018, when once again he was not provided with adequate details of the allegations, for a meeting on 22 May. The next delay is down to the Claimant as his trade union representative was unavailable. The investigation meeting did not take place until 8 June by which time some 8 weeks had passed since the date of the incidents. …

59. It was at the investigation meeting on 8 June that Mr Chapman was shown the CCTV footage for the first time. The manner in which it was done perhaps more in common with a criminal investigation rather than an investigative workplace interview. Mr Browning began by asking Mr Chapman a number of questions to elicit what he did that day. As it was some time ago Mr Chapman could not unsurprisingly remember. So far as he was concerned nothing exceptional had happened because no-one had mentioned anything to him about it. He was then shown CCTV footage midway through the interview. The way in which the investigation interview is conducted is therefore seemingly designed to catch out Mr Chapman rather than to ascertain the facts in a fair and open-ended way. At one stage Mr Browning puts it Mr Chapman: "You're telling me that didn't happen?"

60. The role of an investigating officer is, broadly, to establish facts rather than to draw conclusions. Whilst it is unrealistic to expect an employer to remain scrupulously neutral throughout, Mr Browning's approach was redolent of a predetermined view. The whole of the investigation is therefore marred by a partial and biased approach. The following extracts from his investigation report illustrate the point:

> A review of the CCTV … shows clear evidence that TC's behaviour at work is inappropriate.
>
> It is evident that the behaviour at work from TC is inappropriate and a clear breach of Leicester City Council's Code of Conduct.
>
> TC clearly does not see the behaviour as an issue, sniggering while watching the CCTV footage at staff behaviour within the investigation meeting. TC passes off the behaviour as a laugh or joke, something that happens everywhere and it is just having banter
>
> The CCTV clearly shows that TC is not being honest, grabbing AG on a number of occasions and there is movement of grabbing AG head and pulling downwards.
>
> AG is clearly very upset by the incident, crying during her investigation meeting.
>
> TC was not concerned by the grabbing of AG, and how she looked intimidated.
>
> TC's behaviour has lost trust and confidence that has been placed in

> him as an employee of LCC. Furthermore, TC has been dishonest throughout the investigation process and failed to show remorse or compassion for his actions.

61. Moreover, Mr Browning reaches conclusions that could not possibly have been based on the evidence before him. The CCTV evidence does not have any sound. It is therefore difficult to see how Mr Browning was able to draw the conclusion that Mr Chapman said to AG: "Your husband isn't here yet, he don't want you". That was a disputed remark and in the role of an impartial investigating officer, Mr Browning was duty bound to set out that it was disputed rather than give the impression that it was said.

62. Mr Browning also appears to conclude that AG must be telling the truth because she is "clearly upset by the incident, crying during her investigation meeting". Even if AG was crying that cannot be detected on the CCTV footage. At no point in her investigatory interview on 2 May did AG say she was crying nor does she ever say that she was crying. If she was crying during the investigation meeting it does not establish any relevant fact.

63. Mr Browning accepted under cross-examination that on viewing the CCTV it was not possible to identify AG biting Mr Chapman even though that was accepted by AG yet he fails to give that any prominence in his report. Mr Browning accepted under cross-examination that the CCTV footage did not show Mr Chapman pulling AG's head near the groin but only that it was pulled in that direction.

64. Mr Browning uses impartial and at times emotive language in describing Mr Chapman's actions. Mr Chapman is said to have 'sniggered', he was 'not honest', he 'grabs' rather than makes contact or places his arms round, the behaviour is 'inappropriate'. …

65. Mr Browning fails to mention matters which could have assisted the Claimants. He fails to mention that AG swore back at Mr Chapman in the set-up. If there was damage caused to the reputation of the Council then both Mr Chapman and AG had caused it, not just Mr Chapman. He places little weight on the admission that AG had bitten Mr Chapman (or attempted to bite him) which might well lend credence to the explanation that it was part of horseplay. … AG has said that others were laughing yet no witness was found who reported any laughing.

66. Mr Browning appears to have formed a negative view of Mr Chapman as is clear from the following passages in interviews:

> That footage of the incident is consistent with the allegation. It shows you physically grabbing AG, assaulting her at work, grabbing her head and forcing her head down to your chest, she looks distressed. ……
>
> Obviously you sniggered, so you find this behaviour with a member of staff funny? ……
>
> The messing around starts when you, MT and JT come in. Seems like you are the ring leaders? ……..
>
> So yourself, JT and MT seem to be ringleaders of the inappropriate behaviour at LLLC?

67. Mr Browning fails to interview Mr Joe Trolley who was clearly a material

> witness both for the sports hall and for the office incidents. It was left to the Claimants to call Mr Trolley to give his version of events in the disciplinary hearing."

16. Turning to the decision to dismiss, the ET noted (paragraph 69) that the allegations against the claimant were three-fold: *"(1) behaving inappropriately, verbal abuse, aggression, physical assault and sexual harassment (2) loss of trust and confidence and (3) bringing or actions which could potentially bring the Council's name into disrepute*." Accepting the respondent had dismissed the claimant for a reason related to his conduct - a potentially fair reason - the ET went on to find the dismissal was unfair for the purposes of section 98(4) **Employment Rights Act 1996**.

17. Finding that the "take-down incidents" were really at the heart of the decision to dismiss, the ET considered there were two aspects to those incidents: (1) the claimant's physical behaviour (as viewed on the CCTV footage), and (2) the remarks it was said he had used as an accompaniment to that behaviour; absent the latter, the ET found that the respondent would not have regarded the claimant's behaviour as sexual harassment (paragraph 78 ET decision). The ET considered the crucial issue to be whether Mr Beddow had formed a reasonable belief as to what the claimant had said (paragraphs 77-78 ET decision).

18. For its own part, in relation to the "*bite this*" incident, the ET had found that the CCTV footage showed that, when the claimant had his arm around her neck, there was a "*clear movement of AG's head downwards though nowhere near the groin region*". As Mr Bidnell-Edwards confirmed at the hearing, there was no dispute but that AG's evidence in respect of this incident had been consistent throughout. The claimant had, however, only remembered the incident after he had seen the CCTV footage; he described it as "*banter*" and "*a laugh and a joke*", but could not recall what he had said to AG at the time. As for the "*your husband*" incident, the CCTV footage was less clear although the ET recorded that it showed the claimant initiating further physical contact with AG. The claimant again

said this was "*a laugh*" and specifically denied making the comment alleged regarding AG's husband.

19. As for the conclusions reached by Mr Beddow, the ET found these were not based on reasonable grounds; in this regard, it reasoned as follows:

> "79. Mr Beddow faced a serious conflict of accounts. As in most cases, the CCTV evidence was largely inconclusive and was of no value on the alleged comments. Despite the footage from two different angles, it remains relatively unclear.
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> 80. It is self-evident that for an employer to have a reasonable belief there must be a reason for that belief. Mr Beddow evidently considered his task was to decide who to believe in relation to the disputed remarks. Mr Chapman consistently denied that he made them – other than some swearing which does not appear to have been critical in Mr Beddow's thinking - or could not recall making them.
>
> 81. There were no direct witnesses who confirmed or supported AG's account or that of Mr Chapman. The only two independent relevant witnesses were Ms Mills and Ms Adams. Ms Mills had said that whilst she saw Mr Chapman 'grab her [AG's] head' and believed that 'they did speak', she 'did not hear what was said'.
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> 82. Ms Adams was the only other person in close proximity. Her account was as follows:
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> > "Because it happened so quick, I saw him near her but I cannot remember it fully, I know he was close but don't think I seen it, as I was doing the lifting. Must have just had my head down and missed it."
>
> 83. The witnesses in closest proximity therefore did not adequately hear to give a definitive account of the events or could not be certain of what they saw or heard. It is possible that Mr Beddow could have concluded that the act of pushing AG's head down towards his groin or in that direction was consistent with Mr Chapman saying that 'if you want to bite something bite this'. That might provide a possible link. But Mr Beddow does not say that nor does he draw any such conclusion or inference. What he ultimately says is: "I do believe on the balance of the evidence presented that you did what was reported by AG". That was merely restating a conclusion not a reason.
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> 84. The only reason that Mr Beddow gives in deciding to believe the account of AG is in the following passage of the dismissal letter:
>
> > It was evident at the investigation meeting that you were not able to remember the incident and when questioned said that you couldn't remember any grabbing or shoving of the head down to your groin and what you said to AG at this time. Upon viewing the CCTV footage at the investigation meeting, your view is AG is not distressed and that it was just banter and couldn't understand why she would do this? Although after viewing the CCTV footage you were able to recall the incident you are unable to remember what you said when you grabbed

> and shoved (AG's) head….
>
> 85. That passage, appearing as it does at the beginning of the reasons for dismissal letter sets out the only rationale for deciding the conflicting accounts. In other words, Mr Chapman was not believed because when questioned he could not remember the incident but when shown the CCTV he was able to do so. It is essentially that Mr Chapman has not been consistent or that he has shifted his position. That was unfair and unreasonable because when Mr Chapman was initially asked of the incident, prior to being shown the CCTV footage, he had not placed any significance on the events of the day and so it was hardly surprising he could not remember. The fact that nothing had been said to him about for two weeks thereafter no doubt confirmed his view that there was nothing exceptional about the events of 13 April. Had the CCTV footage been shown at the very beginning of the interview Mr Chapman may have given a different answer. Mr Beddow knew from the investigation interview notes that this is how the process had been conducted but he fails to take these matters into account. A reasonable employer would have done so. A reasonable employer would have recognised the dangers of the interview being conducted in the manner that it was.
>
> 86. Mr Chapman accepts that he swore but that of itself would not be dismissible as AG had also sworn but was not subject to any disciplinary action. What was clearly regarded as more heinous was the language used combined with the relevant words. In relation to the latter Mr Beddow disbelieved the Claimant but without giving a proper or valid reason or explanation. In short, he may have held an honest belief but it was not based on reasonable grounds.
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> 87. In relation to the physical assault, this refers to the same event where Mr Chapman puts his arm around AG's neck. There is clear movement of AG's head downwards though nowhere near the groin region. Mr Beddow does not explain why he elevates that to an act of physical assault worthy of dismissal when he did [not] reach the same conclusion for Mr Chapman lifting Miss Adams off her feet. He may have regarded the latter as banter but again he does not say so.
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> 88. In relation to the issue of sexual harassment, Mr Butler submits that this is not a case of banter and that this is simply a red herring. I do not entirely agree. It is sometimes said that context is everything. In isolation, and without any reciprocal act from AG, this would have greater force. However, in this case AG, whilst not in any way encouraging Mr Chapman's behaviour, admits to warning Mr Chapman that she is going to bite him and possibly does so. It is in the context of that the statement as to 'if you want to bite something bite this' has to be viewed.
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> 89. Mr Beddow also falls into the trap of thinking that he has to decide whom to believe and by implication who is to be disbelieved. If he could not fairly conclude who to believe on the evidence, such as it was, it was open to him (as **Roldan** suggests), to say the evidence was inconclusive. There is nothing to suggest that such a possibility was contemplated."

20. The ET further rejected the respondent's submission that Mr Beddow had given genuine and adequate consideration to the allegations against the claimant, stating:

> "90. … Firstly, there is more than a sense of indignation in Mr Beddow's language which is a continuation of the predetermination mindset introduced by Mr Browning:
>
> > It is quite concerning that TC does not appear to understand the severity of his actions …. appalling targeted behaviour that constitutes physical and sexual harassment of a fellow employee. Your extremely offensive behaviour and conduct.
>
> 91. The second is the relatively short amount of time that Mr Beddow took to decide. The disciplinary hearing began at 9.37am and lasted until 3.17pm when Mr Beddow retired for deliberations. At 4.15pm, less than an hour later, Mr Beddow was able to reach his decision. The relatively short amount of time spent in deliberation could not have meant that Mr Beddow gave this matter the genuine and careful consideration as suggested on his behalf."

21. As for the appeal, the ET found there had been significant delays at this stage and that the panel had failed to give any reasoned view for its conclusions.

Wrongful Dismissal

22. In defending the claim of breach of contract arising from the claimant's summary dismissal, the respondent relied upon what it contended had been the claimant's breach of the implied duty of mutual trust and confidence and/or of an express term in relation to the Code of Conduct. The ET rejected this case, explaining:

> "101. The Respondent has failed in my judgment to establish that the misconduct did as a matter of fact occur. It has not called any relevant evidence to discharge the burden other than the CCTV evidence which of course has no audio. The Respondent has fallen into the trap of thinking that the only relevant witnesses would be the dismissing officer and an appeal panel member. Whilst that is ordinarily sufficient for unfair dismissal purposes it is not generally sufficient for the wrongful dismissal claims. Absent proof of misconduct (on a balance of probabilities) then the Code of Conduct becomes irrelevant. It may have been difficult to call AG but not impossible. At best, the Respondent is able to establish physical contact by Mr Chapman from the CCTV evidence but the physical contact of itself does not establish sufficient evidence of a repudiatory breach, let alone physical assault or sexual harassment."

The Grounds of Appeal and the Parties' Submissions

23. The respondent's appeal was permitted to proceed to a full hearing on five grounds. Grounds (1)-(3) relate to the ET's findings on the decision to dismiss; ground (4) to the conclusion reached in relation to the investigation; ground (5) to the decision on the

wrongful dismissal claim.

24. By ground (1), it is said the ET erred in concluding that Mr Beddow had faced "*a serious conflict of accounts*" (paragraph 79 ET decision); specifically, as to whether the claimant had said "*if you want to bite something bite this*", which was relevant to the sexual harassment charge. The two accounts were not mutually exclusive: AG said the remark was made, the claimant could not remember. Alternatively, by ground (3), it is said the ET made a substitution error in this regard.

25. The claimant argues that the reality was that AG was alleging she had been sexually assaulted whereas the claimant had described what had taken place as "*a laugh or a joke … banter*"; even if the claimant could not recall the specific words alleged, it was apparent that he disputed the construction given to what he had said. Mr Beddow acknowledged this conflict in his dismissal letter, saying that the claimant had "*endeavoured to downplay your actions and behaviour*". Moreover, in referring to a "*serious conflict*", the ET was making a broader observation, which included the claimant's denial in relation to the alleged "*your husband*" remark. By grounds (1) and (3), the respondent was asking the EAT to adopt the pernickety critique warned against in cases such as **London Borough of Brent v Fuller** [2011] ICR 806. There was no criticism of the ET's legal directions and it had given coherent reasons for finding that Mr Beddow's belief was not based on a reasonable investigation; the EAT ought not interfere with that conclusion.

26. By ground (2), the respondent had contended that the ET erred by assessing the reasonableness of the decision to dismiss against the parties' positions and evidence at the hearing, not against the positions and evidence before the dismissing officer. It was common ground that the reasonableness of a decision to dismiss is to be assessed by reference to the circumstances before the decision-taker at the relevant time (**London Ambulance Services NHS Trust v Small** [2009] EWCA Civ 220). The parties disagreed,

however, as to whether there was any difference in the claimant's account within the disciplinary process and his evidence before the ET. At the hearing, having investigated this point further, it was ultimately agreed that, in respect of the "*bite this*" remark, the claimant's position did not change: he did not remember what he said when he was holding and moving AG's head but considered it was "*banter*". In the circumstances, I cannot see that ground (2) takes matters any further.

27. By ground (4), the respondent says the ET either made an error of substitution or reached a perverse conclusion in finding that the investigation did not fall within the range of reasonable responses. Specifically: (a) the ET had itself found that nothing much turned on the failure to interview Ms Allridge (paragraph 56 ET decision); (b) as for delay, the ET failed to take into account its own finding that almost half of the delay prior to the investigation meeting was "*down to the claimant*" (paragraph 58); (c) in relation to the "*your husband*" remark, given that the ET had recorded that AG had confirmed this in her evidence to Mr Browning (paragraph 21) it was perverse for it to find there was no evidence to support his conclusion that this had been said (paragraph 61); (d) as for the prominence given (or not given) to AG biting the claimant, that could not take the investigation outside the range of reasonable responses, especially as the evidence and conclusions in the investigation report were further tested at the disciplinary hearing; (e) more generally, the investigation was within the reasonable range, especially as the claimant was permitted to (and did) view the CCTV footage and call any other evidence and witnesses he wished at the disciplinary hearing, thus rectifying any earlier failures.

28. The claimant resists the suggestion that the ET engaged in an error of substitution; it had found a wide range of failings which meant that, overall, the investigation was not reasonable: (a) it found the failure to interview Ms Allridge meant the consistency of AG's account could not be tested for subsequent embellishment/exaggeration; (b) it permissibly had regard to the extensive delay between the events of 13 April 2018 and the request for

the claimant's comments; (c) it was entitled to find that Mr Browning's approach was an attempt to catch the claimant out; (d) it was entitled to have regard to the inconclusive nature of the CCTV evidence and to the claimant's denials of some of the remarks and inability to recall others; and (e) it had applied the range of reasonable responses test.

29. Finally, by ground (5), the respondent says the ET erred in law in considering that the only evidence that was admissible and/or capable of being relevant to the wrongful dismissal claim was live witness evidence. Relevant evidence was that which was "*logically probative or disprobative of some matter which requires proof*" (**O'Brien v Chief Constable of South Wales Police** [2005] UKHL 26; [2005] 2 AC 534 per Lord Bingham at paragraph 3). The reasoning at paragraph 101 of the decision showed the ET had wrongly discounted the written evidence adduced by the respondent, which included statements from witnesses in the disciplinary process (Ms Charlotte Mills, Ms Adams, and AG), notes of the investigation interviews, the investigation report, notes of the disciplinary hearing, and other documents. It had also wrongly discounted the evidence of Mr Browning and Mr Beddow as to what witnesses had said during the investigation and disciplinary process. Although the ET would have been entitled to place less weight on such evidence (as compared to primary witnesses subject to cross-examination), it was an error of law to treat (without explanation) such evidence as not having been adduced.

30. For the claimant it is objected that the respondent was focusing narrowly on one sentence. The ET had found that the respondent would not have regarded the incident as one of sexual harassment but for the remarks AG alleged the claimant had made. The question whether the respondent would have lost trust and confidence in the claimant depended solely on what was said; AG did not give live evidence but the claimant did; the ET was entitled to criticise the respondent's failure to call direct evidence.

The Relevant Legal Principles

31. The ET accepted that the respondent had established a reason for the claimant's dismissal that was capable of being fair (conduct). It was thus required to determine whether, having regard to that reason, the dismissal was fair or unfair, depending on whether, in the relevant circumstances (including the size and administrative resources of its undertaking), the respondent acted reasonably or unreasonably in treating this as a sufficient reason for dismissing the claimant, determining that question in accordance with equity and the substantial merits of the case (section 98(4) **Employment Rights Act 1996** ("ERA")).

32. In carrying out its task, the ET was required to decide:

> "… whether the employer … entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. … It is not relevant, as we think, that the tribunal would itself have shared that view in those circumstances." per Arnold J in **British Home Stores v Burchell** [1980] ICR 303 EAT at p 304.

33. The standard against which the fairness of the employer's decision is to be assessed is thus not whether the ET would have reached the same view, but whether the decision fell within the "*band of reasonable responses*" open to the employer:

> "The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band it is unfair." **HSBC Bank plc v Madden** [2000] EWCA Civ 3030; [2000] ICR 1283.

34. Where the allegations of misconduct in issue might amount to criminal misbehaviour that will be a relevant circumstance; applying the band of reasonable responses test, the employer might reasonably be expected to undertake a more careful investigation:

> "Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him." **A v B** [2003] IRLR 405 EAT.

35. Moreover, in considering the evidence available, an employer is not obliged to believe a complainant; as the Court of Appeal observed at paragraph 73 **Salford Royal NHS Foundation Trust v Roldan** [2010] EWCA Civ 522; [2010] IRLR 721:

> "... Employers should remember that they must form a genuine belief on reasonable grounds that the misconduct has occurred. But they are not obliged to believe one employee and to disbelieve another. Sometimes the apparent conflict may not be as fundamental as it seems; it may be that each party is genuinely seeking to tell the truth but is perceiving events from his or her own vantage point. Even where that does not appear to be so, there will be cases where it is perfectly proper for the employers to say that they are not satisfied that they can resolve the conflict of evidence and accordingly do not find the case proved. That is not the same as saying that they disbelieve the complainant. For example, they may tend to believe that a complainant is giving an accurate account of an incident but at the same time it may be wholly out of character for an employee who has given years of good service to have acted in the way alleged. In my view, it would be perfectly proper in such a case for the employer to give the alleged wrongdoer the benefit of the doubt without feeling compelled to have to come down in favour of on one side or the other."

36. In carrying out its task under section 98(4) **ERA**, an ET must guard against what has been described as "*a substitution mindset*"; as Mummery LJ warned, at paragraph 43 **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220; [2009] IRLR 563:

> "It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question- whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

37. This approach applies as much to the ET's consideration of the employer's investigation as to the decision to dismiss itself, see **Sainsbury's Supermarket Ltd v Hitt** [2002] EWCA Civ 1588; [2003] IRLR 23. More generally, the ET is required to consider the fairness of the disciplinary process as a whole; as the Court of Appeal observed at paragraph 47 **Taylor v OCS Group Ltd** [2006] EWCA Civ 702; [2006] IRLR 613:

> "… [the ET] should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care … to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage."

38. As for the approach that the EAT should take, as the appellate tribunal, the principles are well established, as summarised in the judgment of Popplewell LJ in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672; [2021] IRLR 1016, at paragraph 57. In particular, the decision of the ET is to be read fairly and as a whole, without focusing on individual phrases or passages in isolation and without being hypercritical; see per Mummery LJ in **London Borough of Brent v Fuller** [2011] EWCA Civ 267; [2011] ICR 806, at p 813:

> "The reading of an employment tribunal decision must not … 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."

39. Moreover, as Popplewell LJ made clear at paragraph 58 **DPP v Greenberg**:

> "… where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should …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."

Discussion and Conclusions

Unfair Dismissal

40. The ET accepted that the respondent had established that the claimant was dismissed for a reason relating to his conduct, which was a potentially fair reason for dismissal for the purposes of section 98 **ERA**. The ET did not, however, accept that a dismissal in relation to "the set-up incident" or "the office incident" would have amounted to a fair dismissal: it was satisfied that the respondent would not have dismissed the claimant in respect of those matters. There is no appeal against this aspect of the ET's reasoning.

41. Focusing on the "take-down incidents" - (1) the "*bite this*" incident; and (2) the "*your husband*" incident – it is clear that the ET made a number of adverse findings in relation to the respondent's investigation. What is less clear, however, is the extent to which the ET might have considered that any such failings were, or were not, rectified by the later stages of the disciplinary procedure (and see **Taylor v OCS**). For example, although the claimant may have been prejudiced by being shown the CCTV footage only midway through the investigation interview, he was not placed at the same disadvantage when he had the opportunity to provide his response at the disciplinary hearing. Similarly, to the extent that Mr Browning's report failed to give particular prominence to the claimant's denials, the notes from the claimant's investigation interview were before Mr Beddow and the claimant was able to provide his account at the disciplinary hearing. The same can be said in respect of other aspects of the evidence, such as whether AG was upset by the incident or in relation to her account of biting the claimant. As for Mr Browning's failure to interview the other leisure centre attendant present, the claimant was able to make good that deficiency by calling Mr Trolley as a witness before Mr Beddow. That said, it is apparent that the ET considered the language of the dismissal demonstrated a

"*continuation of the pre-determination mindset*" (paragraph 90 ET decision). It is therefore necessary to turn to the ET's findings in relation to Mr Beddow's decision.

42. In assessing the reasonableness of Mr Beddow's conclusions, the ET considered there were two aspects to "the take-down incidents": (1) the claimant's physical behaviour, which could be viewed on the CCTV footage; (2) the remarks said to have been made by the claimant, accompanying that behaviour. Accepting that Mr Beddow honestly believed the claimant had physically assaulted and sexually harassed AG, the ET considered the real question was as to the reasonableness of that belief. The ET took the view that that depended upon the findings made as to the remarks the claimant was alleged to have said: absent those remarks, the ET was satisfied the respondent would not have regarded this as sexual harassment. The respondent does not take issue with that approach.

43. When deciding which account to accept, it was plainly for Mr Beddow to determine what evidence was credible and what was not, and to decide what (if any) weight was to be given to different aspects of the evidence. Provided there were reasonable grounds for his conclusion, the ET would not be entitled to find it was unfair because it would have reached a different view (**Burchell**; **Madden**).

44. In the present case, the ET considered that Mr Beddow had been faced with a "*serious conflict of accounts*" (paragraph 79 ET decision) and found that his belief in the claimant's misconduct had not been based on reasonable grounds because he had fallen into "*the trap*" of thinking he must accept AG's account if he could not accept that provided by the claimant (paragraph 89). As the respondent points out, however, in relation to the "*bite this*" incident, the claimant had said he could not recall the words he had used: on one view, there was no conflict and Mr Beddow could accept AG's account without necessarily disbelieving the claimant.

45. For the claimant, Mr Bidnell-Edwards has emphasised the different accounts given by AG

and the claimant viewed in more general terms: on AG's account, this was unwanted conduct, amounting to sexual assault, whereas the claimant said it was "*banter*" – a joke between them. It is the claimant's case that the ET could be taken to have had that in mind when it referred to the "*serious conflict of accounts*". As for the specific remarks the claimant was alleged to have said, the ET had rightly referred to "*disputed remarks*", given that (for instance) the claimant denied making the "*your husband*" comment. Although he could not recall what he had said when holding and moving AG's head downwards, the ET had been entitled to construe this as a conflict on the evidence, given the claimant's view that this was all "*banter*". In those circumstances, the ET permissibly concluded that Mr Beddow had fallen into the trap (identified in **Roldan**) of failing to allow for the possibility that the serious allegation levied against the claimant had not been made out.

46. I am unable to agree with the claimant's submissions. Mindful of the guidance provided in **DPP v Greenberg**, I consider this is a case where the ET fell into the substitution mind-set it had warned itself against. In finding there was a conflict of accounts, the ET failed to properly engage with the basis upon which Mr Beddow had reached his decision and substituted its view for his.

47. Acknowledging that there was a more general dispute between the claimant and AG as to the nature of the conduct involved in "the take-down incidents", it is clear the ET considered that Mr Beddow's belief as to whether or not the claimant had made the "*bite this*" remark was crucial. Even if the other aspects of "the take-down incidents" were seen as "*banter*", the ET found it was Mr Beddow's acceptance of AG's evidence in relation to the "*bite this*" comment that led to the respondent's view that a line had been crossed, such that this was properly to be viewed as sexual harassment; as the ET expressed the point:

> "78. In relation to Mr Chapman and the take-down incidents there are two aspects to consider: there is firstly the physical behaviour of Mr Chapman as viewed on the [CCTV] footage and secondly, his remarks that are said to accompany the behaviour. Absent the latter, I am satisfied that the Respondent

would not have regarded the incident as one of sexual harassment. …"

48. Although, as Mr Bidnell-Edwards has emphasised, the claimant did dispute some aspects of AG's statements, he had not given a conflicting account as to what he might have said when (as was shown on the CCTV footage) he had held and moved AG's head in a downward direction; he had simply said he did not remember. The ET appears to have read the dismissal letter as suggesting that Mr Beddow had rejected the claimant's account because, in his investigation interview, he had initially been unable to remember the incident but was then able to do so after he had been shown the CCTV footage; given the adverse view the ET had taken in relation to the conduct of the investigation interview, it found that was unfair. That was, however, not what Mr Beddow had said: in explaining why he had accepted AG's account, he did not say that he had found the claimant had "*not been consistent or … has shifted his position*" (the reasoning suggested at paragraph 85 ET decision) but recorded that, when able to recall the incident after seeing the CCTV footage, the claimant had been "*unable to remember*" what he had said to AG, and that he (Mr Beddow) had concluded "*on the balance of the evidence presented that [the claimant] did say what was reported by (AG)*" (see the dismissal letter cited at paragraph 33 of the ET's decision, set out at paragraph 11 above).

49. As for the ET's objection to Mr Beddow's acceptance of AG's account as explained at paragraph 89 of its reasoning (where it refers to the guidance provided in **Roldan**), this criticism again fails to engage with the respondent's reasoning. On the specific point the ET considered to be crucial to the respondent's finding of sexual harassment - whether the claimant had made the "*bite this*" remark – Mr Beddow had not identified any conflict in the two accounts before him: AG had consistently said the claimant had made the remark in question when moving her head downwards; the claimant had acknowledged the action as shown on the CCTV footage but could not remember what he had said to AG at the time. Although, as Mr Bidnell-Edwards has stressed, the claimant had consistently said

this was all just "*banter*" and "*a laugh and a joke*", he had not denied that he might have made the remark in question, nor had he suggested that he had in fact said something else. Given that context (and accepting that the claimant's responses to the disciplinary charges were not to be construed as if they were a form of legal pleading), I cannot see why it fell outside the range of reasonable responses for Mr Beddow to find "*on the balance of the evidence*" that the claimant had made the remark as alleged by AG.

50. For completeness, I note that the ET also considered the evidence relevant to the allegation of sexual harassment at paragraph 88 of its decision. At this point, the ET appears to have allowed that the claimant might have made the "*bite this*" remark, as alleged by AG, but states that this would need to be seen in context, in particular in relation to what is described as a "*reciprocal act from AG*". That seems to have been a reference to AG's account of having warned the claimant (after he had put his arms around her from behind) that she would bite him. The ET reasons that it was "*in the context of that*" that the remark said to have been made by the claimant - "*if you want to bite something bite this*" - had to be viewed. The ET's reasoning in this regard is somewhat difficult to understand but, having regard to the context thus identified, it would, in my judgement, be perverse to find that it was outside the range of reasonable responses for an employer to consider that the remark in question crossed a line and amounted to an unwanted act of sexual harassment. Certainly, it would suggest that the ET had adopted a substitution mindset in how AG's response was to be viewed.

51. In making these criticisms of the ET's reasoning, I remind myself that this is a decision by an experienced Employment Judge, well used to making the kind of assessments required in an unfair dismissal case such as this. I also keep in mind that there is no suggestion that the ET erred in its self-direction as to the relevant legal principles. Notwithstanding that direction, however, I am satisfied that an error arose in the approach that was then taken to the reasoning of the relevant decision-taker. First, because the ET

failed to acknowledge the evidential picture as it was actually presented to Mr Beddow. Although the claimant and AG had given different characterisations of the surrounding interactions, the claimant had not denied the "*bite this*" remark that was crucial to the finding of sexual harassment. Second, because the ET failed to engage with Mr Beddow's reasoning and assumed a basis for the decision (the rejection of the claimant's account because he had been inconsistent in his recollection of the incident) that had not featured in the explanation provided in the dismissal letter. Third, because the ET substituted its view of the nature of the interaction in issue for that of the employer. Not only did the ET reveal that it had fallen into the substitution mindset when treating this as a case where there was a conflict on the relevant evidence, its reasoning in respect of what it characterised as a "*reciprocal act*" on the part of AG can only be read as founded upon the ET's own view of the interaction.

52. Having identified what I consider to be errors in the ET's reasoning, I have then stood back to review the decision overall, seeking to ensure that I do not engage in the kind of pernickety critique warned against in **LB Brent v Fuller**. In carrying out this exercise, I have again counselled myself against falling into the error of thinking that the ET did other than seek to faithfully apply the legal principles it had set out at an earlier stage in its judgment. In particular, I again take on board Mr Bidnell-Edwards' point that there was a more general dispute between the accounts given by AG and the claimant and accept that the ET would have been entitled to test the respondent's reasoning against that broader backdrop. All that said, however, it was the ET that had found that the "*bite this*" remark was really the significant issue in this case: it had permissibly seen that remark as the tipping point in the respondent's treatment of the claimant's conduct as an instance of sexual harassment. It is not overly pernickety to adopt the same focus as the ET when considering the reasons provided for its conclusion.

53. That does not mean, however, that the ET erred in failing to find that this was a fair

dismissal. Although many of the difficulties it had identified in relation to the investigation might have been rectified at the disciplinary hearing, I can see that (for example) it might still have been open to the ET to conclude that the delay in this case had given rise to an unfairness that was not resolved by the subsequent stages in the process. Although the ET's judgment is rendered unsafe by the errors I have identified, this is not a case where it can be said that only one outcome is possible.

Wrongful Dismissal

54. Turning then to the ET's decision in relation to the wrongful dismissal claim, there is no dispute between the parties as to the approach it was required to take in this regard. The question for the ET was not whether the summary dismissal fell outside the band of reasonable responses; the ET was required to determine for itself whether the respondent had established that the claimant had committed a repudiatory breach of contract such that it had been entitled to dismiss him without notice.

55. In finding that the respondent had failed to discharge this burden, the ET explained that this had been because it had "*not called any evidence … other than the CCTV evidence which … has no audio*" (paragraph 101 ET decision). That, however, was not correct: as well as the CCTV evidence, the respondent had relied on the statements obtained from AG and other witnesses in the internal investigation and disciplinary process; it had also adduced indirect evidence as to what had been said by AG and those other witnesses, in the form of the investigation report and disciplinary hearing notes and through the evidence of Mr Browning and Mr Beddow. As the respondent acknowledges, it would have been open to the ET to have rejected that evidence or to have determined that it should be given little weight (in particular because the primary witnesses were not available to be cross-examined), but it could not be said that the respondent had failed to call that evidence.

56. Mr Bidnell-Edwards contends that this amounts to an overly pernickety reading of the ET's decision, which was drawing a distinction between "live" testimony and other forms of evidence. That is, however, not what the ET said. Given that the ET apparently considered the CCTV footage to be potentially "*relevant evidence*", it does not appear to have been seeking to distinguish between the direct testimony of witnesses and other forms of evidence. More generally, I do not consider this falls into the category of being "*pernickety*" or "*hypercritical*". It is not uncommon for parties to ET proceedings to seek to rely on indirect evidence, such as statements obtained in the course of internal proceedings. Although it will be open to the ET to prefer the testimony of "live" witnesses, to simply ignore other forms of evidence would be to disregard that which might be logically probative or disprobative of an issue in the proceedings without providing any reason for doing so.

57. Although, therefore, it would have been open to the ET to prefer the claimant's evidence and thus to have rejected the respondent's case on the wrongful dismissal claim, I again consider the ET's conclusion is rendered unsafe by the error disclosed in its reasoning.

Disposal

58. For the reasons explained above, I allow the respondent's appeal against the ET's judgment on both the unfair and wrongful dismissal claims. In these circumstances, I do not understand there to be any dispute but that this matter will need to be remitted to the ET. The parties should, however, provide written representations as to the terms of that remission; such representations should be limited to one side of A4, and must be filed and served at least 24 hours before the date provided for the formal handing-down of this judgment.