Neutral Citation Number: [2023] EAT 56

Case No: EA-2021-001129-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13 April 2023

Before :

JUDGE SUSAN WALKER
MR NICK AZIZ
MS VIRGINIA BRANNEY

- -

Between :

TOPPS TILES PLC	**Appellant**
- and -	
MR G HARDY	**Respondent**

- -
- -

Mr Sutton KC (instructed by Mills & Reeves LLP) for the **Appellant**
Mr Crammond (instructed by Citizens Advice Gateshead**)** for the **Respondent**

Hearing date: 21 March 2023

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JUDGMENT

SUMMARY

Unfair Dismissal, Disability Discrimination

Discrimination arising from disability (section 15 Equality Act 2010) (causation and proportionality); compensation for unfair dismissal - reduction for contributory conduct (sections 122(2) and 123(6) Employment Rights Act 1996)

The EAT allowed an appeal on the ground that the ET had not applied the correct tests when concluding that the claimant did not contribute to his dismissal such as to merit a reduction in compensation for unfair dismissal.

All other grounds refused.

JUDGE SUSAN WALKER

Introduction

1 This is an appeal against a judgment of an employment tribunal ("the ET") sitting in Newcastle upon Tyne, comprising Employment Judge Langridge, Ms B Kirby and Mr K Smith. After a hearing over two days in July 2021, the ET found that the claimant had been unfairly dismissed and that his dismissal was discriminatory under section 15 of the **Equality Act 2010** ("EqA"). Remedy is to be considered at a hearing yet to take place. However, the ET made a determination in relation to the successful unfair dismissal complaint that the claimant did not contribute to his dismissal.

2 We shall refer to the parties as the claimant and respondent as they were before the ET.

3 The claimant was represented below by Mr Owen of Citizens Advice and the respondent by Mr Proffitt of Counsel. Mr Owen has sadly passed away. At this hearing, the claimant was represented by Mr Crammond, of counsel and the respondent by Mr Sutton, KC. We are grateful for their oral submissions which supplemented their skeleton arguments.

The complaints before the ET

4 We adopt the helpful summary of the claim and response contained in the judgment.

5 The claimant alleged unfair dismissal and disability discrimination arising from his dismissal as a store manager on 22 November 2019. He originally joined the respondent on 5 June 2002. He claimed he had suffered from depression for a period of 20 years and that the respondent was aware of this. The claimant alleged that the respondent had knowledge of his disability following a discussion with an area manager in 2016 though he had been provided with no support. His line manager was also aware of his health problems after he broke down in tears at a meeting with her on 7 October 2019. Not long after this meeting the claimant had an altercation with an abusive customer in the store which led to his suspension and dismissal.

6 The claimant's complaint was that the respondent disregarded the impact of his disability on the altercation simply on the grounds that he was not taking medication at the time and dismissed him

because he admitted he could have handled the situation better. The claimant also complained that the respondent ignored the points he put forward in mitigation including provocation from the customer during the incident. Having appealed against his dismissal the claimant said that the respondent did not investigate his health issues and declined to wait for his redacted GP records to be produced before deciding the appeal.

7 In its response to the claim the respondent said it did not accept that the claimant was disabled nor that the respondent had any such knowledge. In reference to the incident with the customer, the respondent said that the claimant was alleged to have used profanity and foul language; to have been aggressive; and to have thrown tea over the customer, It asserted that a reasonable investigation was carried out and relied on certain admissions made by the claimant as to his conduct such as acknowledging that he should have handled the incident differently.

The ET's judgment

8 The ET concluded that the claimant was a disabled person within the meaning of section 6 of the **EqA** and that the respondent had the requisite knowledge of the claimant's depressive condition at the material times. Those conclusions are not the subject of this appeal.

9 The ET noted that it was not in doubt that dismissal amounted to "unfavourable treatment" in terms of section 15 of the Equality Act. They identified the key question for determination of that complaint to be whether that treatment was because of something arising in consequence of the claimant's disability. The ET was aware that there needed to be a causative element linking the disability to the conduct which in turn led to the dismissal. They concluded that the evidence showed that the claimant's depression was more than a trivial contributing factor and that was enough to support a connection between "the longstanding medical history and the claimant's response to the customer's highly provocative behaviour".

10 They concluded that the claimant was treated unfavourably because of something arising in consequence of his disability, "namely his difficulties in managing his anger in response to a trigger such as an argument with a customer."

11 The ET then went on to consider whether the respondent could show that the decision to dismiss was a proportionate means of achieving its stated aim of "a retail business being permitted to ensure a positive customer experience through the management of employees who face those customers". They accepted the legitimacy of the aim but rejected the submission that it could not be achieved by any other option but the claimant's dismissal. The ET commented that it was clear that the respondent gave no thought at all to the possibility of a sanction other than dismissal.

12 The ET considered that the respondent's witnesses had no real understanding of how a person's disability might impact upon their conduct or performance at work. They gave their view that "Had a warning been considered with the benefit of a referral to Occupational Health plus support from management there was every reason to believe that this out of character handling of the incident would not have occurred." However, they considered the respondent did not even address its mind to that option.

13 The ET also criticised the respondent for lack of care in evaluating the specific nature of the allegations and what they described as "the obvious contradictions" in the evidence it had gathered. They concluded that it should have been obvious that the customer was the aggressor and that his behaviour was a completely unacceptable way for a member of staff to be treated and that the customer had either lied or exaggerated his complaint.

14 The ET concluded that the decision to dismiss was not proportionate commenting that the claimant had a successful 17 year career with the respondent and to dismiss him for gross misconduct at the age of 60 had, as the respondent knew, the effect of ending his career.

15 The ET also found that the claimant had been unfairly dismissed. They accepted that the decision makers did genuinely believe that the claimant committed serious or gross misconduct but concluded that this wasn't supported by evidence or by a reasonable investigation. That decision on liability is not the subject of this appeal so we shall say nothing further about it.

16 Although a further hearing was to take place to consider remedy, the ET's judgment on the unfair dismissal complaint included a determination that the claimant "did not contribute to his

dismissal". The reasoning for this conclusion is in paragraph 134 , where the ET state "We find that there was no contribution because we do not agree that a reasonable employer could treat the claimant's handling of the episode, faulty though it was, as an act of gross misconduct in the overall circumstances of the case."

The scope of the appeal

17 The scope of the appeal has narrowed following the decision of DHCJ Mansfield KC on the sift and HHJ Tucker at the rule 3(10) hearing. The grounds allowed to proceed by HHJ Tucker are as follows:

- The first ground is that the ET failed properly to consider the issue of whether the claimant by his conduct, had contributed to his dismissal such as to merit a reduction to the basic and contributory award by applying the correct legal test.
- The second ground (originally ground 3a) is that the ET did not apply the correct approach to establishing causation for the section 15 claim.
- The third ground (originally ground 3b) is that some of the factors relied on by the ET in making the assessment of proportionality under section 15 (1)(b), were speculation or conjecture. In particular the potential efficacy of a referral to Occupational Health and what was described as the "the career ending" impact of dismissal.
- The fourth ground of appeal (originally ground 5) is that the finding that the effect of the claimant's dismissal was to end his career cannot properly be viewed as a matter of judicial notice and, insofar as the finding states that the respondent was aware of this effect, the dismissing officer expressly denied that when questioned by the EJ. This is said to go both to proportionality and remedy.

Burns/Barke procedure

18 Following the preliminary hearing, on the direction of HHJ Tucker, a reference was made to the ET under the Burns/Barke procedure. The ET was asked to explain what it meant by "the dismissal having the effect of ending the claimant's career" in paragraph 117 of the judgment.

19 Employment Judge Langridge responded by letter dated 16 July 2022 and said, "The reference to the dismissal having the effect of ending the claimant's career was intended to emphasise the disproportionate response to the incident, in other words to express that the respondent must have known that its decision was likely to have that effect."

20 Employment Judge Langridge went on, "To be clear, the phrase "ending his career" might be expressed as "the potential effect of ending his career" as it was not the Tribunal's intention to make any finding as to remedy, only on liability whether the proportionality question was the key issue."

Discussion and conclusion

21 We will deal with the grounds of appeal in the order that they were dealt with by counsel at the hearing.

Second ground – (Causation - section 15(1)(a) EqA)

Submissions for the respondent

22 Mr Sutton referred to the leading authority of **Pnaiser v NHS England 2016 IRLR 170**, where the EAT sets out the correct approach to establishing causation under section 15(1)(a). The ET has to first determine whether the claimant was treated unfavourably and by whom. Then it has to determine what caused that treatment focussing on the reason in the mind of the alleged discriminator. (keeping in mind that actual motive is irrelevant.)

23 The quality of the causal connection required to satisfy the test is also set out in that case and confirmed in guidance in **Charlesworth v Dransfields Engineering Services Ltd UKEAT/0197/16/JOJ**. It is necessary to establish an influence or cause that did in fact operate on the mind of a putative discriminator, whether consciously or subconsciously and so amounts to an "effective cause".

24 Mr Sutton submitted that the ET's conclusion on this point in paragraph 106 of the judgment does not properly reflect the approach of the authorities. In this paragraph, the ET says this:

"It was also not in doubt that the claimant's dismissal amounted to unfavourable treatment. The key question for us to determine was whether that treatment was "because of something arising in

consequence of" the claimant's disability. We accept that in principle there needs to be a causative element linking the disability to the conduct which in turn led to dismissal. We conclude that the evidence in this case shows that the claimant's depression was more than a trivial contributing factor and that is enough to support a connection".

25 In this case, Mr Sutton submitted that the decisionmakers did genuinely believe that the claimant committed serious or gross misconduct. This is a finding of the ET at paragraph 121 of the Judgment and this was the reason for the dismissal. There is a generic description in paragraph 65 as to what that misconduct was – "aggressive and unacceptable behaviour and the use of foul and offensive language towards a customer".

26 However, Mr Sutton submits that this is an unusual situation where there is an absolute conflict between what the manager's reason for dismissal was and what the ET found to have happened. The ET found that the claimant had not done what was alleged, or at least only at the end when provoked. What the manager believed had happened was a distortion of events.

27 Applying that to section 15, Mr Sutton submitted that the disability could not be the effective cause of the misconduct that led to the dismissal (abusing and assaulting the customer, throwing tea over him and so on) because on the ET's findings the conduct did not take place. The ET should have found that the causation test could not be made out when one considered what was actually made out to have happened rather than what the managers believed to have happened.

28 Did the claimant's disability or depression influence the decision? Mr Sutton submitted not. The ET had concluded that the disability had been brushed aside and had no weight or influence whatsoever. It is submitted that, the ET should then have gone on to identify what the misconduct consisted of.

Submissions for the claimant

29 For the claimant it was submitted that the ET applied the correct analysis. The EAT should have real regard to the reasons given by DHCJ Mansfield for rejecting this ground of appeal at the sift stage.

30 The EAT should not take an overly pernickety approach to the judgment but step back and take a proper and fair reading of the judgment as a whole.

31 In order to challenge "the something", the respondent is seeking to import an unfair reading of the ET's reasons. It seeks to attribute the findings of the ET in paragraphs 119, 121-122 and 124 to a suggestion that the ET had found none of the claimant's conduct to be a significant (more than trivial) influence on the decision to dismiss. These paragraphs relate to why the ET concluded that the respondent did not have reasonable grounds for their belief in misconduct or gross misconduct and why there was no reasonable investigation. By the time of submissions, it was common ground that the potentially fair reason relied on by the respondent was conduct.

32 It is clear on any reading that the reaction of the claimant to the conduct of the customer was the "something". The ET made clear and permissible findings about that.

33 It was the conduct of the claimant that led to dismissal, but the respondent overegged that conduct to make it gross misconduct and that was unreasonable. That does not detract from the fact that the "something" was the conduct.

34 Mr Crammond submitted that there was a logical inconsistency in the respondent's approach. In their submissions on the issue of contributory fault, the respondent says, "there can be no doubt that the claimant's conduct was the sole cause of the dismissal." He also points to paragraph 30, where there is a finding that the claimant decided to play the customer at his own game. It might be said that this was contrary to the respondent's guidance on dealing with difficult customers.

Discussion and Conclusion

35 The critical causative factor in a section 15 claim need not be the disability itself, in this case depression. On the contrary, that would found a section 13 direct discrimination claim. Section 15 is aimed at the protection from unjustified treatment because of the consequences of a disability such as the symptoms or effects of such disability.

36 Section 15 provides that "A discriminates against B if (a) A treats B less favourably because of something arising in consequence of B's disability and (b) A cannot show that the treatment is a

proportionate means of achieving a legitimate aim". Mrs Justice Simler noted in **Pnaiser** that the "something" need not be the main or sole cause for the unfavourable treatment but must have at least a significant (or more than trivial) influence to as to amount to an effective reason or cause for it. This may involve a series of links in a chain of consequences.

37 The ET noted that the evidence in the medical records "explicitly identifies a connection between the claimant's depression and his difficulties in managing his irritability and anger". Added to that was the evidence from the claimant himself and the two incidents that had caused concern while working for the respondent. The ET concluded that the claimant was treated unfavourably because of something arising in consequence of his disability, namely his difficulties in managing his anger in response to a trigger such as an argument with a customer.

38 The ET in this case identified that the dismissal had been caused by the claimant's response to a customer's highly provocative behaviour. They found that that response was caused "by the claimant's "difficulties in manging his anger in response to a trigger such as an argument with a customer."

39 Mr Sutton's principal submission, with reference to **Pnaiser**, was that on the ET's findings, the conduct relied on by the decisionmakers to dismiss the claimant had not in fact occurred (or most of it had not) and so the necessary causative link was missing. The dismissal had not been caused by conduct that was caused by the claimant's disability.

40 We reject that submission. At paragraphs 29 to 37 of the judgment, the ET make specific factual findings about the claimant's conduct during the incident. They found that the claimant had decided to "play the customer at his own game"; that he had said he "wasn't trying to be an arsehole"; that he called the customer a "nightmare" ; that he was angry at the way that the customer spoke to him and gestured for the customer to leave the store using words "fucking" or "fuck off" ; and that in gesturing with his hand the claimant's cup of tea splashed and a little landed on the customer's face. In paragraph 132, when considering the unfair dismissal claim, the ET refer to "the fact that the claimant did not, by his own admission, handle the situation as well as he could have."

41 While the dismissal was found by the ET to be unfair and the investigation to have been flawed, this is some distance from saying that the conduct of the claimant during the altercation was not a significant influence on his dismissal. "Significant" in this context means more than trivial. The ET's conclusion at paragraph 109 is carefully worded. It states that "the claimant was treated unfavourably because of something arising in consequence of his disability, namely his difficulties in managing his anger in response to a trigger such as an argument with a customer". This does not refer to any specific aspect of the alleged conduct and is a conclusion reached after a careful fact-finding exercise by the ET.

42 We consider that the ET carried out the proper analysis in accordance with the legal test and reached a permissible conclusion in accordance with section 15 (1)(a),

43 This ground of appeal is dismissed.

Third ground – proportionality section 15(1)(b) EqA

Submissions for the respondent

44 Mr Sutton submitted that when carrying out the balancing exercise under section 15(1)(b), the factors that the ET took into account were as follows:

- No thought had been given to a lesser sanction
- Depression was not given weight as a mitigating factor
- The respondent failed to evaluate the nature of the allegations and the contradictions in the evidence
- The claimant's propensity to commit further acts of misconduct was capable of being addressed by a warning and a referral to occupational health ("OH")
- The sanction of dismissal would have the effect of ending the claimant's career.

45 Mr Sutton acknowledged that proportionality was a matter for the ET's objective assessment but submitted that it cannot be founded on matters of speculation or conjecture. He submitted that the potential efficacy of an OH referral or the imposition of a disciplinary warning was a matter of pure conjecture on the part of the ET.

46 He submitted that the evidence cast significant doubt on the ET's assumption because:

- A disciplinary warning had already been given.
- The claimant undertook to seek support from his GP and recognise triggers and remove himself from situations. Clearly those strategies were not effective.
- He declined to avail himself of counselling offered by the respondent.

47 He submitted that the career impact of the dismissal on the claimant is a purely speculative matter that had no apparent relevance to whether a disciplinary response was proportionate. If the aim was legitimate, the sanction of dismissal was not capable of being rendered disproportionate because the employee was 60 rather than 30.

Submissions for the claimant

48 Mr Crammond submitted that the ET's reasoning on this point is thorough and sound. The judgment clearly indicates that the ET undertook the balancing exercise required of it and did so thoughtfully and carefully. There was nothing by way of conjecture or speculation.

49 A lesser sanction and/or referral to OH are clearly less discriminatory alternatives to dismissal. The ET as an industrial jury is well entitled to consider without any speculation or conjecture that these are reasonable alternative ways of achieving the legitimate aim set out.

50 There is no suggestion that the respondent sought to obtain OH input in relation to the earlier event.

51 The reference to career ending impact of dismissal has been readily and properly explained by the ET in response to questions asked under the Burns/Barke process.

52 Moreover, the ET gave other permissible reasons for its finding on proportionality which were not specifically challenged by the respondent.

Discussion and conclusion

53 There is no appeal against the ET's conclusion that the respondent had a legitimate aim of "a retail business being permitted to ensure a positive experience through the management of employees who face those customers". The ET considered whether dismissal was a proportionate means of achieving that legitimate aim. This requires the ET to balance the reasonable needs of the respondent against the discriminatory effect of the unfavourable treatment on the claimant.

54 We do not accept the respondent's submission that the ET's remarks about a referral to OH were conjecture. It is correct that there were factual findings that a disciplinary warning had already been given and that the claimant had not taken up an offer of counselling. It may also be suggested that his coping strategies, having consulted his GP, were not working in light of the incident that took place.

55 However, we do not consider that these factual findings make the ET's decision on proportionality a matter of conjecture such as to amount to an error of law. Although the respondent may have offered informal support, a formal referral to OH is a qualitatively different process. The lay members of the EAT drawing on their industrial experience considered it was a reasonable assumption for the ET to make that if a referral to OH had been offered as an alternative to dismissal, the claimant may have taken it much more seriously. The ET was entitled to conclude that this was an option that was worth considering, notwithstanding what had gone before. Of course, the result of taking such a step is necessarily uncertain but that does not mean that the ET was wrong to consider this factor in their conclusion or has impermissibly engaged in pure conjecture.

56 The respondent further criticises the ET for taking into account what it described as the career ending effect of the dismissal when assessing proportionality. Employment Judge Langridge has clarified that this meant "potentially career ending" and that no finding has yet been made in relation to remedy.

57 When carrying out the balancing exercise required for proportionality under section 15(1)(b), it is a key task for the ET to weigh the effect of the treatment on the claimant against the respondent's reasonable need to achieve the legitimate aim. The particular circumstances of the individual claimant are plainly relevant. The ET was entitled to take into account the potential effect of dismissal on the claimant as an individual. That would include his depression, the fact that he was dismissed for gross misconduct, his length of service and also the fact that he was 60. We consider that the ET was entitled to take his age into account as a factor in this balancing exercise and to conclude that he would find it difficult to find a new job. The reference to the dismissal ending the claimant's career was, perhaps,

unhelpfully dramatic but, with the clarification provided by Employment Judge Langridge, it is within the margin of appreciation for an ET judgment read as a whole.

58 It is clear that the ET was in a position to make an overall finding as to whether the test of proportionality was met based on its findings of fact and the industrial experience of its members. It was entitled to place particular weight on the finding that the respondent did not consider any alternatives to dismissal.

59 This ground of appeal is refused.

Fourth ground – judicial notice

Submissions for the respondent

60 For the respondent it was submitted that the conclusion reached by the ET was unambiguously to the effect that the claimant's career was at an end in consequence of his dismissal and the respondent knew the dismissal would have this effect. These findings would have far reaching effects on remedy and were unsupported by evidence. They cannot properly be viewed as a matter of judicial notice.

61 Reference was made to the case of **Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] ICR 1699.** This was an important finding. Unless it was a matter of such notoriety that judicial notice can be taken of it, there should be evidence to support it.

62 The adverse impact of age cannot be assumed. The respondent's knowledge of the effect was specifically denied by the respondent's dismissing manager when questioned by the EJ. The Employment Judge's clarification does not provide a fair summary of the enquiry it made at the time of the hearing. Even if the ET did not intend to make a finding that determined an important remedy issue, the finding of fact it has made has that effect.

Submissions for the claimant

63 For the claimant it is said that there is no error of law. Had the ET failed to consider the potentially discriminatory impact of the dismissal upon the claimant when considering proportionality, it would have been wrong to do so.

64 An ET is well entitled to consider as part of that balancing exercise that the decision to dismiss someone at 60 years old is potentially career ending. It is self-evident especially where that person had a successful 17-year career with the respondent and was dismissed for conduct labelled by the respondent as gross misconduct.

65 There is yet to be a remedy hearing at which the claimant's losses as a result of the unfair dismissal and discrimination will be ventilated

Conclusion

66 We have set out our conclusion on this matter with respect to the decision on proportionality under the previous ground. The ET was entitled to take account of the claimant's age as a factor when considering proportionality for the reasons given above.

67 Judge Langridge has made it clear that the ET have made no findings in relation to remedy and so the concerns that this finding would have far reaching effects on remedy are unfounded.

68 This ground of appeal is refused

Ground 1 - contribution

69 It is unclear whether the conclusion that the claimant did not contribute to his dismissal was intended to apply to any possible reduction of the basic award under section 122(2) of the **Employment Rights Act 1996** ("ERA") as well as the compensatory award under section 123(6). Having raised this with the parties, they understood that this finding applied to both sections and we have approached it on that basis.

Submissions for the respondent

70 We were referred by Mr Sutton to guidance from the caselaw as follows:

(i) It is the conduct of the employee alone that should be considered. The respondent's conduct is not a relevant consideration (**Nelson v BBC (no 2) [1980] ICR 110, CA**)

(ii) The conduct of the employee should be "culpable and blameworthy" As explained by Brandon LJ in **Nelson**, this includes conduct which "while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish or…bloody-minded. It may also include action which, though not

meriting any of those more pejorative epithets is nonetheless unreasonable in the circumstances."

(iii) The steps that should be followed are to identify the conduct said to give rise to possible contributory fault, decide whether it is culpable or blameworthy and decide whether it is just and equitable to reduce the amount of the basic award to any extent. (**Steen v ASP Packaging Ltd [2014] ICR 56, EAT** (noting a different approach to the compensatory award in section 123(6))

(iv) An employee's unacceptable conduct should not be ignored simply because it was connected with a background of underlying illness (**Edmund Nuttall Ltd v Butterfield [2006] ICR, 77, EAT**

(v) It is important to keep distinct the consideration of whether an employer's culpable or blameworthy conduct has contributed to their dismissal from the counterfactual question of whether the respondent would have dismissed the claimant for that conduct if it had acted properly, reasonably or fairly (**Renewi UK Services Ltd v Pamment, UKEAT 0109/21/DA**)

71 It was further submitted that as part of the claimant's own case he realistically accepted that he had contributed to his dismissal. This is mentioned in the ET's reasons (para 770). In fact, it is the respondent's counsel's recollection that the claimant accepted in answers to cross-examination, the accuracy of the dismissing manager's findings as to what had occurred. The only point he disputed was whether he had deliberately thrown tea at the customer.

72 Mr Sutton submitted that the ET failed to make a finding that there was culpable and blameworthy conduct. The classic statement is in **Nelson v BBC (No 2) [1979] IRLR 346.**

73 There is an absolute demarcation between contributory fault and whether there has been a fair dismissal. The question of what a reasonable employer would have done is completely irrelevant. If the ET considered he was only the recipient of aggressive behaviour, how does that square with its conclusions in relation to section 15? It is disconcerting that the self-direction has no engagement with the prescribed evidential enquiry.

74 It is submitted that the ET did not apply itself correctly to the legal test. If it had it would have concluded that a contribution finding was merited.

Submissions for the claimant

75 For the claimant it was submitted that on a fair and proper reading of the judgment there was no error of law by the ET in any respect. It was entirely permissible by the stage of reasoning on contributory fault to find either that there was no culpable or blameworthy conduct or that it would not be just and equitable to make a deduction.

76 There is limited scope for successful appeals on issues of remedy and specifically on issues of contributory fault. These assessments are obviously matters of impression, opinion and discretion that there must be a plain error of law to succeed (reference to **Hollier v Plysu Ltd [1983] IRLR 260**).

77 It was submitted that the conduct was found to be something arising in consequence of his disability. With reference to **First Great Western Ltd v Waiyego UKEAT/0056/18/RN**, it is submitted that this makes a finding of culpable or blameworthy behaviour even less likely.

78 The ET was properly addressed on the issue of contributory fault and reference made to the proper test. There is no indication that the ET ignored these submissions.

79 It is entirely permissible that the ET found that there was no culpable or blameworthy conduct which contributed to the dismissal and/or that it would not have been just and equitable to have made a deduction. The ET was addressed on **Nelson** and it says it considered the submissions.

80 The degree of the employee culpability needs to be seen in context and the fault on the part of the employer is not wholly irrelevant to the exercise of discretion under section 123(6). Reference to **Wilkinson v Driver and Vehicle Standards Agency [2022] EAT 23**

81 There is no indication that the ET ignored the correct principles or the submissions. These are commonplace principles of ETs across the country. It would need to be very clear that the ET had gone wrong in applying the test to allow the appeal. The EAT must not take an over pernickety approach and remember that paragraph 134 comes after 133 detailed paragraphs.

82 Mr Crammond also questioned the purpose of the appeal as the ET has not yet determined remedy and the issue of compensation for discrimination has yet to be assessed. Any finding on contribution for unfair dismissal would not affect that.

Discussion and conclusion

83 Section 123(6) of the **ERA** is as follows:

"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

84 Section 122(2) of the **ERA** is as follows:

"Where the tribunal considers that the conduct of the complainant before the dismissal…was such that it would be just and equitable to reduce or further reduce the amount of the basic award, the tribunal shall reduce or further reduce that amount accordingly".

85 In the ET's judgment, this issue is dealt with in very brief terms. At paragraph 134, the ET say simply "We find that there was no contribution because we do not agree that a reasonable employer could treat the claimant's handling of the episode, faulty though it was, as an act of gross misconduct in the overall circumstances of the case."

86 Dealing first with a reduction to the compensatory award, this is a three-stage consideration for the ET based on its findings in fact about the claimant's actual conduct. First, it should identify whether there is any culpable or blameworthy conduct. Second, it should consider whether that culpable or blameworthy conduct caused or contributed to the dismissal. If the first two stages are passed, then the third stage is to consider by how much to reduce the compensatory award on a just and equitable basis. This may be anything from 0% to 100% but reasons must be given for the proportion arrived at.

87 There is just enough in paragraph 134 of the judgment to find that the ET **has** made an assessment that there is culpable and blameworthy conduct. It describes the claimant's handling of

the episode as "faulty". Although very brief, we consider that is just sufficient, in the overall context of the case and the ET's other findings, to suffice as a conclusion on that first issue.

88 The next question under section 123(6) is whether that conduct caused or contributed to the dismissal. The ET concluded that this "faulty" conduct did not contribute to the dismissal. The reason given is that the ET does not agree that a reasonable employer could treat that conduct as an act of gross misconduct in the overall circumstances of the case.

89 We agree with Mr Sutton that the ET has fallen into error here. Instead of considering the actual conduct of the claimant and whether or not it contributed to the dismissal, it has focussed on the question of whether it was reasonable for the respondent to treat the conduct as gross misconduct. This is the same error as that identified in **Renewi** where the ET considered whether a claimant would have been dismissed if the respondent had acted reasonably, fairly or in accordance with its own policies.

90 The EAT should take care, of course, not to focus on one individual paragraph in a judgment of the ET. However, even reading the judgment as a whole, we are unable to find another explanation for why the ET has found that the claimant's conduct has not contributed to the dismissal when this conduct was accepted as the effective cause for the dismissal in respect of the claim under section 15 of the **EqA**.

91 Mr Crammond invited us to consider the decision of the EAT in **Wilkinson** and conclude that fault on the part of the employer is not wholly irrelevant to exercise of discretion under section 12(6). However, the fault of the employer can be taken into account only when section 123(6) is engaged by the existence of blameworthy conduct which contributed to the dismissal. So, it may be taken into account when considering the appropriate percentage reduction to the compensatory award on a just and equitable basis but not earlier.

92 Mr Crammond, in an alternative submission, suggested that the ET had made a decision based on "just and "equitable" grounds. We do not agree. There is no mention of "just and equitable" in paragraph 134, or indeed, in any other part of the judgment. The ET does not appear to have got to

that third stage of consideration. It has simply concluded that the conduct did not contribute to dismissal.

93 Even with the most generous reading, it appears that the ET has not applied the correct test under section 123(6) and this ground of appeal is allowed.

94 If this conclusion was also intended to determine the issue of a potential reduction under section 122(2), then the correct test has not been applied. Section 122(2) is not concerned with whether any relevant conduct "contributed" to dismissal. It is a simple "just and equitable" test. As noted above, there is no reference in paragraph 134 to consideration of whether a reduction to either award is "just and equitable".

95 This ground of appeal is also allowed in respect of a reduction under section 122(2).

Disposal

96 The appeal succeeds on the first ground. The issue of contribution under section 123(6) is remitted to the ET. If the decision was intended to apply to a reduction under section 122(2), that decision is also remitted.

97 There is no reason why the same ET cannot deal with the issue and the same ET is clearly best placed to deal with this matter if they are able to do so. Without binding the ET, it is likely that this question would most appropriately be dealt with as part of the remedy hearing that is still to take place.

98 All other grounds of appeal are refused.