Neutral Citation Number: [2025] EAT 50

Case No: EA-2022-000863-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 February 2025

Before :

JUDGE STOUT

- -

Between :

MR AMANUEL GHEBREHIWT

Appellant

- and –

WILSON JAMES LIMITED

Respondent

- -
- -

The Appellant appeared In Person
Mr Piers Chadwick (instructed by KLC Employment Law) for the **Respondent**

Hearing date: 12 February 2025

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The claimant went absent without leave during the early part of the Covid-19 pandemic in order, he said, to care for his vulnerable mother. He refused to return to work even after disciplinary proceedings were threatened. The Employment Tribunal concluded that section 57A of the Employment Rights Act 1996 (time off for dependents) did not entitle the claimant to take a lengthy period of absence in order to care for his mother himself. The Employment Tribunal decided he had not been wrongfully or unfairly dismissed. The Employment Appeal Tribunal found no error of law in the Employment Tribunal's decision and dismissed the appeal.

JUDGE STOUT:

1. This is case number EA-2022-000863-DXA, Mr Amanuel Ghebrehiwt v Wilson James Limited and this is the final hearing in this appeal. I will refer to the parties as they were in the proceedings below. The claimant appeals against the judgment of the East London Employment Tribunal, Employment Judge Peter Wilkinson sitting alone, sent to the parties on 26 July 2022 following a two day hearing on 12 January 2022 and 26 January 2022. In short, the Employment Tribunal found that the claimant had been fairly dismissed for being absent without authorisation from work from 27 January 2021 until 4 March 2021 when a disciplinary hearing took place and, further, that the claimant had not been wrongfully dismissed and had not been entitled by virtue of section 57A of the Employment Rights Act 1996 to time off to care for his dependant mother during that period.

The Employment Tribunal's decision

2. I am going to deal first with the Employment Tribunal judgment in more detail and then with the history of the Employment Appeal Tribunal proceedings before turning to the substance of the appeal. As I have already said, the Employment Tribunal judgment dismissed the claimant's claims for unfair dismissal and wrongful dismissal. The Tribunal noted at the outset that a holiday pay claim had also been agreed and so did not deal with it. The judge in promulgating the judgment apologised for what was some delay of some six months in promulgating the judgment, explaining that this had been as a result of illness.

3. The claimant was employed by the respondent from 21 June 2013 until 11 March 2021 when his summary dismissal took effect. In the judgment, the tribunal first of all identifies the issues for determination at paragraph 3 and at paragraph 7 identified that the claimant had not put in a claim for automatic unfair dismissal under section 99 of the Employment Rights Act 1996, but that as the claimant had referred to an entitlement to take time off to care for a dependant, and it appeared to the

judge to engage section 57A of the Employment Rights Act 1996, the judge indicated he was going to consider that anyway.

4. The tribunal received witness statements and heard oral evidence from the claimant, from Mr Ceesay, security manager and his immediate line manager at the respondent and also from Joseph Gallagher, senior team leader at the respondent. The tribunal also had before it a bundle of documents. At the hearing, the claimant argued that the respondent had fraudulently altered certain records in the bundle and the respondent was allowed on day one of the hearing to produce some evidence to counter that for reasons the tribunal deals with in its judgment and at paragraph 12 the tribunal found that the respondent had not fraudulently doctored any of that evidence.

5. The tribunal went on to make further findings of fact, the important ones of which are as follows. At paragraph 10 the tribunal found the claimant to be an unreliable and evasive witness who gave at times evidence that was not credible. At paragraph 16 the tribunal recorded that it was the claimant's position that he was absent from work from 27 January 2021 until 5 February 2021 because he was self-isolating with Covid and that during that period he had not contacted his manager but had contacted the company operations centre by telephone. He was unable to say who he spoke to. It was further the claimant's case, the judge recorded, that he did not attend work from 5 February 2021 to the date of his dismissal on 11 March 2021 because he was caring for a vulnerable relative who was shielding due to being at high risk of catching Covid.

6. At paragraph 17ff the judge made the following findings of fact:

> **"17. The Claimant admitted that he had not sought permission to take time off work to look after his mother and averred that he did not have to, as he had a statutory right to time of work to care for a vulnerable dependent, without needing leave from his employer. He said that he had been told he had this right by multiple sources. His oral evidence on this included "I did not request time off work to look after my family member", " I was her unpaid carer", "authorization is not required for an employee to take time off to look after your mother" and "I did not seek authorization. I did not see that I needed authorization".**
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> **18. The Claimant was taken to phone records which appeared to show that his line manager had messaged him and called him repeatedly from 25/02/2021 onward to ask when he would be returning to work, He denied received any of those communications. He expressly said that he did not receive any of the text messages between 22nd January and 27th January.**

> **Despite this, the records clearly indicate that he replied to one of the messages, at 08:10 on 23rdJanuary. His response to this was to say that the message history had been fraudulently altered. I find as a fact that the Claimant was well aware that his line manager was trying to contact him to see when he would be returning to work and that he deliberately did not respond."**

7. At paragraph 20 the judge records his finding that the claimant was warned by email that his absence had not been authorised and that a failure to attend at work on 22 February may result in disciplinary action. The judgment goes on to record that the claimant was invited to attend a disciplinary hearing on 25 February which was rescheduled to 4 March 2021 when again the claimant did not attend. On 11 March 2021 a letter was sent to the claimant by email informing him that he had been dismissed and notifying him of a right of appeal but the claimant did not exercise that right of appeal. The findings of fact closed with the following at paragraph 25:

> **"At the close of his evidence, the claimant said that he agreed he was absent from work without authorisation but that he did not need authorisation as he was providing care for his mother and the law provides that unpaid carers can take time off in emergency cases."**

8. The tribunal went on at paragraphs 26 through to 31 to give itself directions as to the law in relation to unfair dismissal. At paragraph 32 and 33 the tribunal addressed the question of the reason for dismissal and concluded as follows:

> **"32. I am satisfied that the reason for the Claimant's dismissal was the Respondent's belief that the Claimant had failed to attend work without having permission from the Respondent to not attend.**
>
> **33. I am entirely unconvinced by the Claimant's suggestion that there was some conspiracy to get rid of him to save money not that the senior management in some manner had it in for him because of previous complaints. The Claimant could point to no evidence in support of these contentions, whilst the evidence of the Claimant's unauthorized absence was not only clear, it was not in dispute. As the Claimant himself put it "I did not seek authorization. I did not see that I needed authorization"**

9. The tribunal there concluded as a matter of fact that the reason for the claimant's dismissal by the respondent was the respondent's belief that the claimant had failed to attend work without having permission from the respondent not to attend work. At 34 and 35 the tribunal then made findings that the respondent had reasonable grounds for that belief and at paragraphs 36 through to 40 the tribunal addressed the question of the reasonableness of the investigation and the procedure followed by the

respondent and concluded that a fair procedure had been followed.

10. At paragraphs 41 through to 50 the tribunal addressed section 57A of the Employment Rights Act 1996 and the right to time off for dependants. At paragraph 45 the tribunal held that, although the claimant might have had a right to take off some time around about 1 February 2021 to make arrangements for the care of his mother, section 57A did not give the claimant a right to take time off work to provide care for her himself and not for the length of time that he took off. At paragraphs 47 and 48 the tribunal held that the claimant was not dealing with an emergency over the whole of the period for which he was absent and that he was not entitled by virtue of section 57A to take time off without authorisation to provide care for his mother in the circumstances of this case. At paragraph 50 the tribunal concluded as follows:

> **"As a consequence of the above, I find that the claimant was not entitled to take the relevant period off work without authority from his employer and that the respondent was fully entitled to treat his unauthorised absence as gross misconduct."**

The appeal to the Employment Appeal Tribunal

11. The claimant appealed to the Employment Appeal Tribunal against that judgment by notice dated 12 September 2022 and raised in that notice of appeal a very large number of grounds, at least eleven. The matter came before Judge Keith for a sift under rule 3(7) and Judge Keith made orders inviting Judge Wilkinson to answer certain questions before the Employment Appeal Tribunal considered again whether or not to grant permission to appeal. The questions that Judge Keith directed should be answered related, first, to holiday and sick pay and the answers to those questions from Judge Wilkinson resulted in a reconsideration of that aspect of the judgment and a judgment being issued in the claimant's favour for holiday pay in the sum of about £195.

12. The third question that Judge Keith asked Judge Wilkinson to answer was as follows:

> **"Whether the ET considered the appellant's written representations dated 4 January 2022 which had referred to the appellant claiming automatic unfair dismissal and, if so, what were its reasons for concluding that the appellant had not made any claim for automatic unfair dismissal."**

Judge Wilkinson replied to that indicating that the claim form had not included a claim for automatic unfair dismissal, no application had been made to amend the claim to include such a claim and therefore the tribunal had approached the case in the way that it did.

13. The fourth question was:

> **"Whether the ET considered the appellant's written representation, paragraph 8.16, that the appellant's main accuser was also said to be the disciplining manager and as a consequence the manager was not impartial and, if so, what were its reasons for concluding that there was no lack of impartiality."**

The judge in response to that question set out four paragraphs:

> **"1. Despite this being asserted in the written representations, this is not the way in which the Appellant put his case to the Respondent's witnesses, nor his oral submissions. His case at the hearing was that there was bias against him by Alison Fraser, who the Appellant averred was the real decision maker, with Alieu Ceesay (who chaired the meeting on 04/03/2021 at which the decision was taken to dismiss).**
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> **2. The recommendation to proceed to a disciplinary hearing for gross misconduct was made by Joseph Gallagher, the Appellant's team leader, albeit on different grounds. Mr Gallagher also gave evidence that he had written to the Appellant raising the issue of him being absent from work without leave and inviting him to an investigation meeting at which that was one of the issues. There was also relevant input on the issue of failure to attend his place of work from Hannah Bury in Employee Relations.**
>
> **3. It was clear from the evidence before the Tribunal that a number of members of the management team were involved in the process leading to the dismissal. Complaints were made of absence and refusal to cooperate by Joseph Gallagher, who carried out the initial investigation process. The dismissing manager line managed the team leaders, who in turn line managed the Appellant. The tribunal heard evidence from Alieu Ceesay and from Joseph Gallagher, as well as from the Appellant.**
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> **4. The Tribunal saw no evidence suggestive of a lack of impartially and, given the management structure and the involvement of the appellant's line manager in the complaint that the Appellant was away from work without authorisation, and having heard oral evidence, the Tribunal did not consider there was any evidence in support of the allegation of a lack of impartiality."**

14. In summary, those paragraphs explain the differences between the claimant's case as advanced orally at the hearing and in his written submission and set out that as a matter of fact the judge considered that the recommendation to proceed to a disciplinary hearing for gross misconduct was made by Joseph Gallagher, albeit that a number of members of the management team were

involved in the process leading to dismissal and that the tribunal concluded there was no evidence suggestive of a lack of impartiality given the management structure and the fact that the claimant was away from work without authorisation.

15. The claimant's appeal then came back before Clive Sheldon KC (sitting as he then was as a deputy High Court Judge) who rejected the appeal on the paper sift under rule 3(7). The claimant renewed his application for permission to appeal at a rule 3(10) hearing. At that hearing the claimant put forward reformulated grounds of appeal as set out in a skeleton argument which appears at page 133 of the core bundle. That skeleton argument identified 14 grounds of appeal and Mathew Gullick KC (sitting as a Deputy High Court Judge) decided to give permission on four of those grounds, being grounds 3, 7, 9 and 11.

16. In the order granting permission to appeal, Judge Gullick specifically stated that the grounds that were allowed were as numbered/referred to in the appellant's skeleton argument for the rule 3(10) hearing and that all other grounds of appeal were dismissed. Judge Gullick also considered it would be helpful if the Employment Tribunal were to answer further questions about its reasons in the claimant's case. Those questions were put to Judge Wilkinson but by that stage he had ceased to be a fee paid employment judge and the Employment Appeal Tribunal was told that it was not practicable for him to answer those questions so we have not had the benefit of any responses to those questions.

The matters that are not part of the grounds of appeal

17. The grounds of appeal that are before me are therefore confined to those four grounds, 3, 7, 9 and 11 as set out in Judge Gullick's order. The claimant has appeared before me today, having put in a written skeleton argument and being assisted by a McKenzie friend, Mr Smith of CILEX. The claimant has made oral submissions in response to questions that I have asked him. He was not planning initially to give oral submissions but in the end he has expressed himself fully and carefully and I am grateful to him for the assistance that he has given me.

18. The claimant has during the course of this hearing, and indeed in his skeleton argument for this hearing, mentioned a number of matters which it seems to me do not fall within the scope of the grant of permission and in respect of many of them, they were mentioned elsewhere in his skeleton argument for the rule 3(10) hearing and thus are matters in respect of which permission was specifically refused.

19. The matters that are not before me include the following. First, any challenge to the tribunal's findings of fact that the claimant agreed he was absent without leave but contended that he did not need authorisation because he was entitled to take time off to care for dependants. That is not a ground of appeal in these proceedings. Those findings of fact remain and the appeal needs to be considered against the background that those are still the facts found by the tribunal.

20. Secondly, there is no ground of appeal in relation to the tribunal's conclusion that section 57A of the Employment Rights Act 1996 did not apply in the claimant's case so as to entitle him to take the time off to care for his mother. Again, that finding is not subject to challenge on this appeal.

21. Thirdly, the issue of whether the tribunal failed to consider whether putting the claimant on furlough would have been an alternative to dismissal is not a ground of appeal. That did not form part of any of the three grounds on which permission had been granted, and it did not feature in the skeleton argument in relation to any of those four grounds. However, it is appropriate for me to make the following observations about this argument.

22. The claimant has relied on the case of **Loving Angels Care Ltd** [2023] EAT 65 to say that a judge considering an unfair dismissal case should consider whether a claimant should be put on furlough as an alternative to dismissal. However, the **Loving Angels** case could not, in my judgment, assist the claimant in this case. That is just a case in which the Employment Appeal Tribunal held that it was open to an Employment Tribunal considering a redundancy dismissal to find that it was unfair because the employer had not considered furlough as an alternative. The furlough scheme was

introduced by the government to avoid redundancies and so the relevance of it to such a dismissal is obvious. In contrast, the claimant in this case was dismissed for misconduct, not because he was redundant and I do not see that **Loving Angels** would have assisted him even if this point was before me. The government furlough scheme was not there to provide an alternative source of income for those dismissed for misconduct.

23. Fourthly, the claimant's complaint that the judge had forgotten evidence as a result of delay in writing up the judgment is also not part of any of the grounds of appeal that were given permission, nor is the question of the tribunal's finding of fact that the claimant was invited to an investigation meeting in relation to the matter for which he was dismissed. Although I note that the respondent agrees that the tribunal has erred at that point because the investigation meeting to which the claimant was invited related to the allegations of GDPR breaches which preceded the issue of the claimant's unlawful absence, there is no ground of appeal dealing with that point and so it is not before me.

24. I add in relation to that this point, however, that I do not consider this factual error by the judge was material. In a case of absence without leave an investigation meeting would often be an unnecessary step because the fact that someone is absent without leave is really all that is needed for there to be a disciplinary case to answer. It is not the sort of thing that requires an investigation and in this case it certainly did not as the facts were crystal clear. Further, the mistake that the tribunal made about that investigation meeting does not in my judgment undermine the tribunal's more general findings that the claimant did not engage with investigative or disciplinary processes that the respondent invited him to engage with. There was evidence to support that finding without the erroneous reference to an investigation meeting.

25. Fifthly, the claimant also made a further point about Employment Judge Wilkinson having made an error at one point in saying that it was because of his mother's age that he had wished to have time off to care for her rather than her ill-health. As I have already indicated, there is no challenge before me in relation to the judge's conclusion on section 57A and, in any event, if one

looks at the judge's reasoning on section 57A it is plain that he accepted and understood that the claimant wanted time off to care for her because of her ill-health and not because of her age, so there is no material error in relation to that point either.

The grounds of appeal

26. That brings me now to the things that are actually before me as grounds of appeal and I need at this point to say something about the law that I have to apply when considering grounds of appeal. Under section 21 of the Employment Tribunals Act 1996 an appeal to the Employment Appeal Tribunal lies only on a question of law. This means that the appellant must show that the tribunal made an error of legal principle such as misreading or misapplying a statute or principle established by case law, leaving out of account a relevant factor or taking into account irrelevant factors or otherwise making an irrational decision.

27. In scrutinising the judgment of the Employment Tribunal, the Employment Appeal Tribunal is required to read the judgment fairly and as a whole, remembering that the tribunal is not required to express every step of its reasoning but only to set out sufficient reasons to enable the parties to see why they have lost or won and that no error of law has been made. That is a point made in numerous authorities. I have in mind **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672 at paragraph 57. In that case the Court of Appeal also made the point that where the tribunal has correctly stated the law, the Employment Appeal Tribunal should be slow to conclude that it has misapplied it.

28. So far as errors of fact are concerned, those are not errors of law unless they satisfy the high threshold set out by the Court of Appeal in **Yeboah v Crofton** of amounting to an overwhelming case that the Employment Tribunal reached a decision which no reasonable tribunal on a proper appreciation of the evidence and law would have reached such as where the tribunal misunderstood the evidence in a way that led it to make a crucial finding of fact unsupported by evidence or contrary to uncontradicted evidence. As Lord Justice Mummery cautioned in that case, no appeal on a question

of law should be allowed to be turned into a rehearing of parts of the evidence by the Employment Appeal Tribunal. I should add that the **Greenberg** case also makes the point that it is not an error of law for a tribunal simply to fail to mention a particular fact in its judgment.

29. Errors of procedure are also not errors of law unless the error gives rise to material injustice (see **Stanley Cole (Wainfleet) Ltd v Sheridan** [2003] EWCA Civ 1046), or meets the bias test set out in **Porter v Magill** [2002] 2 AC 357 that the fair-minded and informed observer would conclude there was a real possibility of bias as a result of some aspect of the judge's conduct of the hearing or relationship to the parties.

Ground 3

30. Taking now each ground of appeal in turn, ground 3 was identified by Judge Gullick as follows:

> **"Notifying the employer: whether the Employment Tribunal materially erred in law in finding that dismissal was for the reason asserted by the respondent and/or was fair having regard to the statement on page 2 of the disciplinary hearing record that the claimant had ignored all correspondence and the argument raised at paragraphs 4.2 to 4.9 of the appellant's written submissions to the Employment Tribunal regarding the correctness of that statement."**

In terms of the first part of this ground relating to whether the tribunal materially erred in law in finding that dismissal was for the reason asserted by the respondent, that particular part overlaps with a point raised again by the claimant in ground 9 and it is convenient to deal with it compendiously here. The judgment, as it seems to me, does deal with the reasons for dismissal at paragraphs 32 and 33 and, in particular, at paragraph 33 the judge dealt head on with the claimant's case that there was some conspiracy to get rid of him or some other ulterior motive for the dismissal being to save money or because of the prior allegations about GDPR complaints or GDPR breaches.

31. The judge expanded on those reasons when answering Judge Keith's questions. Although in some cases further reasons supplied by the judge subsequent to the decision would not be admissible, in this case the EAT asked the judge to provide further reasons following the *Burns/Barke* procedure

and the reasons provided appear to me to be 'of a piece' with the original judgment and legitimately 'flesh it out'. They do not strike me as 'post hoc justification'. I therefore take the further reasons into account. Reading those together with the original judgment, this is not a case where the judge has failed to deal with the substance of the arguments raised by the claimant. The reasons are there.

32. The claimant's complaint, therefore, must be that the tribunal has left out of account certain points that he wished to advance in dealing in support of his arguments in those respects. The central argument of the claimant is that he did maintain contact with the respondent throughout his period of absence and that this has been ignored by the respondent and the tribunal and/or that Mr Ceesay has lied or sought to mislead people about the nature of that contact and that this should indicate or should have indicated to the tribunal that there was some ulterior motive for the dismissal.

33. The difficulty with that argument, it seems to me, is that it is essentially addressed to a fictional reason for dismissal of the claimant's own making because he was not dismissed for failing to maintain contact with the respondent. He was dismissed for failing to attend work without authorisation.

34. The starting point for the appellant's argument appears in any event to me to be based on a mischaracterisation of the documentary evidence. The claimant's starting point for his argument is the notes of the disciplinary hearing which include under the heading "the evidence that you considered relevant" on page 41 of the supplementary bundle the following sentence:

> **"AG showed no interest in presenting himself to explain his side of allegations against him. Letters, emails, telephone calls, ER letters, all were ignored by AG."**

35. The claimant has taken that to mean that Mr Ceesay (who wrote that note) was saying that the claimant had not been in contact at all, but that is evidently not the proper way of reading that sentence as the very next entry on the same page refers to Mr Ceesay having discounted the claimant's defence statement sent to employee relations (ER). In other words, there is an immediate acknowledgement that the claimant has, in fact, been in contact with the respondent.

36. The only place in the documentary evidence where, on the face of it, Mr Ceesay did tell someone else that the claimant had not been in contact with him when, in fact, he had was in an email of 17 February 2021 which appears at page 26 of the supplementary bundle. Mr Ceesay's email of 17 February does, indeed, appear to overlook the one-line email that the claimant sent to Mr Ceesay on 7 February 2021 in which the claimant just said:

"Aforesaid, I am unable to attend site for the forthcoming meeting."

However, as I have said, there is nothing anywhere in the documentation to suggest that the claimant was dismissed for failing to maintain contact with the respondent rather than for unauthorised absence. The dismissal letter does not say that and although the respondent's case before the tribunal included evidence that the claimant had not responded to some communications, it was not its case that the claimant had not been in contact at all, just that he had failed to return to work even when told he would face disciplinary proceedings if he did not do so and that he had failed to attend any investigation or disciplinary meetings.

37. The question as to whether the claimant maintained contact with the respondent is thus essentially immaterial to the Employment Tribunal's judgment. The Employment Tribunal concluded that the claimant did not have authorisation to be absent and knew he did not have authorisation to be absent and that the respondent dismissed him for being absent without authorisation. The contact that the claimant says he had with the respondent does not change the substance of that case in any way.

38. It is also apparent from the claimant's emails of 7, 12 and 21 February 2021, which are in the supplementary bundle before me, that the claimant had on a number of occasions told the respondent that he was not going to be returning to work before the end of lockdown because of his responsibilities caring for vulnerable family members. However, telling your employer you will be absent from work is not the same as asking for authorisation and certainly not the same as getting authorisation for that absence. The absence was not authorised and the claimant knew that at the very

least by 22 February which was the date by which, as the Employment Tribunal found, he was to return to work or disciplinary proceedings would be commenced.

39. The Employment Tribunal in its judgment is not obliged to deal with every argument a party raises or every part of the evidence. In my judgment, there was no error of law in it failing to deal head on with the claimant's contentions that he had been in contact with the respondent. The claimant's arguments about contact were directed at a target that was not in issue in the case and which was obviously immaterial to the reasons for dismissal. The claimant has focused on it but it seems to me that is because he has a blind spot about being absent from work without authorisation, but it is clearly misconduct and it is normally sufficient in and of itself to justify dismissal, particularly where it is continued after the employer has made it clear that disciplinary proceedings will follow if the employee does not return to work.

40. The tribunal's findings that this was that sort of case are, it seems to me, more than sufficient to explain its decision and it did not err in law by failing to go through the argument about whether the claimant had been in contact with the respondent. That was not part of the reasons for dismissal, it was not part of the case put forward by the respondent and there was no need for the tribunal to deal with it in order to explain why the claimant had lost his case. That is sufficient to comply with the tribunal's obligation in terms of giving reasons for its decisions. That disposes of ground 3 although, as I have indicated, I will come back to the questions of Mr Ceesay's role in the dismissal and those arguments under ground 9.

Ground 7

41. Ground 7 was entitled "new or fuller evidence" and the grant of permission put it as follows:

> **"Whether the ET materially erred in law in refusing to permit the claimant to adduce further evidence on day two of the hearing."**

At this hearing, the claimant has clarified that the additional evidence he wished to present was evidence he wanted to put forward in response to something Mr Ceesay had said in the course of

giving oral evidence. Mr Ceesay in his witness statement accepts that he had received all the emails from the claimant that are in the supplementary bundle including, in particular, the emails of 7 February 2021 and 21 February 2021. However, it seems to be agreed between the parties that in the course of answering questions orally, Mr Ceesay suggested that he had not received some emails from the claimant, or may not have received some emails from the claimant, and suggested that this might have been because he had had trouble with his Wilson James email address, that being the address to which those two emails of the claimant had been sent. It was in response to that oral evidence that the claimant on day two wanted to put forward evidence to show that Mr Ceesay had been successfully receiving and responding to emails sent to the Wilson James email address during that period.

42. The specific additional pages that the claimant wanted to put in are the pages that are now at pages 22, 35 and 39 of the bundle. It is agreed that the claimant sent an email to the judge on day two of the hearing requesting that these emails be admitted and it is agreed that the judge did not admit them or deal with them.

43. The claimant's complaint has two aspects to it. First, he complains that an apparent bias arises from the fact that his application to adduce further evidence was dealt with differently to the respondent's application to adduce additional evidence.

44. It seems to me that there is nothing that can be drawn from the different handling of these two requests that would indicate apparent bias. The two applications were made at very different stages in the hearing and the purposes for which the evidence was sought to be admitted were very different. The respondent was responding to an allegation of fraud by the claimant. That is a very serious allegation that the respondent was entitled to respond to and which the tribunal was entitled to take seriously and give it an opportunity to respond. The claimant's evidence, however, was intended to contradict a small point that had been made by the respondent's witness in oral evidence and his application was made on the second day of the hearing after that witness had already finished giving

his evidence.

45. There is no doubt that the judge should have dealt with this application formally and that the reasons for refusing the application should have appeared in the judgment, but the fact that it was dealt with informally and that that did not happen does not, in my judgment, by itself give rise to an appearance of bias in this case. Much more would be needed to cross that threshold.

46. The next question is whether there was any material unfairness to the claimant in those emails not being considered. In my judgment, there was no material unfairness because the emails in question and the reasons that the claimant sought to have them admitted simply have no bearing on the outcome of the case. The issue is really the same one as I have already dealt with under ground 3. What the claimant was trying to get at and what he has been very preoccupied to demonstrate is that he was in contact with the respondent. However, as I have already explained at length, that really was a non-issue in this case. It would not matter how many times the claimant had been in contact with the respondent if in substance he still was not at work and was not authorised not to be at work. As such, these emails go to an issue that played no part, it seems to me, in the judge's reasoning and also go to an issue which, for the reasons I have explained, really was not an issue in this case. So the non-admission of the additional evidence that the claimant sought to have admitted caused him no prejudice and no material unfairness and I therefore dismiss ground 7 as well.

Ground 9

47. Ground 9 is headed "procedural irregularities" and the grant of permission states as follows:

> **"Whether the ET materially erred in law in finding the dismissal to be fair notwithstanding the point made at paragraph 8.16 of the appellant's written submissions to the Employment Tribunal regarding the role of Mr Ceesay."**

48. Paragraph 8.16 was a complaint that Mr Ceesay held the disciplinary hearing even though he was the person who raised the allegation that the claimant was absent without leave and also that there was a note-taker at that hearing who had made the earlier accusations of GDPR breaches. The

claimant said that the disciplinary hearing was not therefore impartial and there was also a failure to comply with the ACAS code of practice. I asked the claimant about his argument in that respect at this hearing and he confirmed that the point about the code of practice did not raise any separate point. His complaint here was that the judge was wrong to conclude and/or not to give adequate reasons for concluding that Mr Ceesay was an impartial decision-maker, despite having made the allegation of absence without leave and then also sat on the disciplinary hearing, or that he was motivated to dismiss because of the earlier allegations of GDPR breaches by the claimant or as a result of a need to save money as the claimant's hours of work had previously been reduced.

49. As I have already indicated, the judge has dealt with the claimant's case on these points in paragraphs 32 and 33 of its judgment and also in his answer to Judge Keith's fourth question. Those conclusions can only be challenged if they are perverse and I do not consider that they come anywhere near that. So far as the reduction in hours or the saving of money argument is concerned, it was clearly open to the judge to conclude that this had nothing to do with the claimant's dismissal. As a reason, that does not feature in any of the documentation that immediately precedes the dismissal. The focus of the respondent, understandably, is on the fact that the claimant is absent without leave and, as I have already indicated, being absent without leave is normally more than sufficient to justify dismissing an employee. All of that points firmly towards it being entirely open to the judge to conclude that reduction in hours or saving of money had nothing to do with the dismissal.

50. As to the GDPR breaches and the possible link to that, the claimant's main point is that there was a reference in the disciplinary hearing notes to the letter that was at the heart of the allegation of GDPR breaches. However, nothing more is said about it in the disciplinary hearing notes, it is merely listed as part of the chronology and it was not, of course, utterly irrelevant to that disciplinary hearing as it was part of the chronology that led to the claimant's period of absence and then the matters that were being considered on 4 March 2021. Beyond that reference in the disciplinary hearing notes, there is nothing to suggest that it featured in the actual reasons for dismissal. It is essentially pure

speculation by the claimant that it was part of the reasons for dismissal and that speculation was not in the end made out on the evidence either in the documents or, it seems, in the witness evidence. It was a matter for the judge to consider whether or not the witnesses had been influenced or whether that had been part of the reason for dismissal and the judge, for the reasons set out in the judgment and further in the response to Judge Keith's questions, concluded that it was not. Again, there was nothing perverse in that conclusion.

51. The same goes for the claimant's argument that it was Mr Ceesay who made the allegation and also conducted the disciplinary hearing. As the judge explained in response to Judge Keith's questions, it was apparent to him that the process had not been driven solely by Mr Ceesay - a number of members of staff had been involved and he had heard nothing to suggest that Mr Ceesay was propelling the investigation, or the dismissal, or that there was anything improper in him being the person who conducted the disciplinary hearing. It seems to me again that that was a conclusion that was well open to the judge in a case like this where the nature of the misconduct is simply being absent without leave. It is not the sort of thing that needs any investigation. It is a matter of fact and, indeed, it was accepted by the claimant that he was absent without leave.

52. So this is not one of those cases where it could be said that Mr Ceesay, for example, was a witness to some misconduct and thus should not have been hearing the disciplinary hearing or even that there was anything that had really needed investigating before that disciplinary hearing in which Mr Ceesay needed to be involved. All of the people involved on the part of the respondent were simply dealing with a state of affairs which was that the claimant was absent without leave and in those circumstances it seems to me that the judge's conclusions are not perverse and are also adequately reasoned.

53. The final point I need to deal with here is a point that the judge does not deal with in the reasons, but it seems to me to that it is not a point that the judge needed to deal with in the reasons. That is the email from Allison Fraser which refers to the claimant being in breach of contract and

sanctions being required for that. The claimant points out that this was in advance of his disciplinary hearing and he suggests that it rendered the process unfair.

54. Given what I have said already, it will be apparent that in my judgment all that email is doing is to state the obvious fact that the claimant was absent without leave and that that is misconduct and that consequences need to follow. There is nothing that the claimant can draw from that email to point to the ultimate disciplinary hearing being unfair and this is, in my judgment, a point that is so minor that it does not undermine the judge's conclusion that he did not deal with it specifically in his judgment or reasons.

55. What the judge did say about Ms Fraser was to note in answering Judge Keith's questions that the appellant had at the hearing been arguing that Allison Fraser was the real decision-maker. That obviously is a somewhat different case to the one that he put in his written submissions to the tribunal and also the one that he put to me but, nonetheless, the judge has dealt with it in responding to Judge Keith's questions. It seems to me, for the reasons I have given, that putting all of those matters together, the judge has more than adequately explained why he rejected the claimant's case that there was a reason for dismissal in this case that was other than the one the respondent said it was. For those reasons, I also dismiss ground 9.

Ground 11

56. Ground 11 relates to the tribunal's approach to the wrongful dismissal claim. Judge Gullick identified the issue as follows:

> **"Whether the ET materially erred in law in failing to analyse the wrongful dismissal claim separately from the claim for unfair dismissal and/or materially erred in law in failing to make primary findings of fact on the evidence before it in relation to the alleged gross misconduct for the purpose of the wrongful dismissal claim."**

The judgment does not contain a section headed "wrongful dismissal" or a specific consideration of the wrongful dismissal claim. However, it seems to me that the judge has done enough to deal properly with this claim and that is because in substance the judge has dealt head on with whether or

not the claimant was guilty of gross misconduct thus entitling the respondent summarily to dismiss him. The judge does this in the section of the judgment dealing with section 57A of the Employment Rights Act 1996, in other words at paragraphs 41 through to 50.

57. In a wrongful dismissal claim, unlike in an unfair dismissal claim, it is for the tribunal itself to decide whether or not gross misconduct has occurred so that summary dismissal was lawful. The tribunal is not to apply a range of reasonable responses test. The way the tribunal expressed its conclusion at paragraph 50 in saying that the respondent was fully entitled to treat his unauthorised absence as gross misconduct is suggestive of a range of reasonable responses approach being applied, but when one reads paragraph 50 in context, it is clear that that is not what the judge has done.

58. The judge has approached the issue in those paragraphs by asking himself whether or not section 57A gave the claimant an entitlement to be absent in order to care for his mother by concluding that it did not and by putting that fact together with the claimant's admission that he did not have authorisation to be absent. On that basis, the judge concludes that the claimant's conduct amounted to gross misconduct.

59. It is also important in this respect that the judge in paragraph 50, though he uses the language of reasonable responses in the latter part of the sentence, does at the beginning of the paragraph use language which indicates that he is making the decision for himself:

> **"I find that the claimant was not entitled to take the relevant period off work without authority from his employer."**

All of that, it seems to me, is sufficient to amount to the tribunal having decided for itself that the claimant's conduct amounted to gross misconduct.

60. Even if I am wrong about that and the tribunal had become confused about the legal test that it was supposed to be applying at this point, it seems to me that this is one of those cases where it is inconceivable that there would have been a different outcome if the tribunal had applied the objective test rather than the range of reasonable responses test. This is one of those cases where no reasonable

tribunal could have concluded that being absent without leave for such a long period was not gross misconduct. It is really one of the most basic forms of misconduct by an employee to be absent from their employment without the leave of their employer, and if it continues for a lengthy period and even after it has been made clear that disciplinary proceedings will be commenced if the employee does not return to work, it is plainly gross misconduct. The employee is in those circumstances repudiating the contract.

61. So for all those reasons, I conclude that ground 11 too should be dismissed. That means that the whole appeal is dismissed and these proceedings are at an end.