

Neutral Citation Number: [2025] EAT 144

Case No: EA-2022-000729-RS

EMPLOYMENT APPEAL TRIBUNAL

The Rolls Building
7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: 16 September 2025

Before:

HIS HONOUR JUDGE AUERBACH

Between:

SANDRA ASHLEY

Appellant

- and -

WALK THE WALK FAMILY SUPPORT SERVICE COMMUNITY
(formerly known as Hertfordshire Practical Parenting Programme
Community Interest Company)

Respondent

Saul Margo (instructed through Advocate) for the **Appellant**

Rad Kohanzad (instructed by Croner Group Ltd) for the **Respondent**

Hearing date: 16 September 2025

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE; UNFAIR DISMISSAL

Following her dismissal, the claimant in the employment tribunal presented a claim complaining of unfair dismissal and disability discrimination. She was represented by solicitors, and, at the full merits hearing, by counsel.

All of the complaints were dismissed by the tribunal. This appeal relates to the decision dismissing a particular complaint of discrimination arising from disability (section 15 **Equality Act 2010**) and the decision that the claimant was not unfairly dismissed.

The tribunal did not err, at a hearing where the claimant was represented by counsel, by considering the section 15 complaint in the form that it was advanced in an agreed list of issues inherited from a case-management hearing at which she had been represented by a solicitor; nor by failing proactively to raise with her counsel whether it should be differently framed. **Moustache v Chelsea and Westminster Hospital NHS Foundation Trust** [2025] EWCA Civ 185; [2025] ICR 1231 considered and applied.

The tribunal did not err by not concluding that concerns that it expressed about the same managers being involved in initial investigations and the formal disciplinary stage, rendered the dismissal unfair. It properly took into account that an independent appeal was offered, and all of the claimant's requests about arrangements for its conduct were accommodated; but no appeal hearing took place because the claimant then decided not to pursue it. The tribunal was entitled to conclude that the end-to-end process was fair.

HIS HONOUR JUDGE AUERBACH:

Introduction and the facts

1. Following her dismissal, the claimant in the employment tribunal began a claim complaining of unfair dismissal and disability discrimination. There was a full merits hearing at Watford before EJ Tobin, Mr M Bhatti MBE and Mr A Scott. In a reserved decision the tribunal dismissed all of the complaints. The claimant appeals in respect of the decisions (a) that she was not unfairly dismissed; and (b) dismissing a particular complaint that her dismissal was conduct amounting to discrimination arising from disability. There are two live grounds of appeal, one in relation to each of those complaints.

2. I take the following factual summary from the tribunal's decision and matters not in dispute.

3. The respondent is a not-for-profit community interest company. It provides practical skills and guidance to families in crisis. Support is delivered by family support workers ("FSWs"). The claimant was the respondent's founder and for many years its Chief Executive Officer. At the time of her dismissal, Geoff Ogden, Aniel Singh and Elizabeth Baroetta were fellow directors. Dawn Kemp, an HR practitioner, was a member of the management committee, though not an employee.

4. In November 2018, three FSWs resigned from the respondent's employment. Mrs Kemp conducted exit interviews with each of them. At that time, the claimant was away from the office nursing her seriously ill father, who sadly passed away the following January. Her last day in the office was in mid-November.

5. Following allegations about lottery funding raised by the FSWs, a consultant, Jacqueline Gear, was engaged to conduct a funding review and audit. On 13 February

2019, Mr Ogden wrote to the claimant, highlighting a number of areas that the respondent wanted to investigate further. The tribunal set out six bullet-pointed areas of concern raised by him. Broadly speaking, the allegations included bullying and intimidating behaviour towards employees, and certain financial record-keeping and data protection irregularities. Mr Ogden proposed a meeting on 13 March and stated that the claimant would be sent evidence at least a week in advance, or, if it was particularly sensitive, shown the evidence at the meeting. In light of the allegations of bullying and intimidation, the claimant was suspended on full pay.

6. On 6 March 2019, the claimant was sent various documentary evidence, which the tribunal listed in its decision. It observed that she had seen most of this material before. That was save for a four-page document setting out salient points of the allegations of bullying and harassment by the three former SFWs, which was a summary drawn from Mrs Kemp's interview notes, and some photographic evidence. Mr Ogden informed the claimant that the meeting would be an opportunity for her to respond before the respondent decided what, if any, formal action to take.

7. The tribunal found, at [43], that the claimant did not respond to indicate that she could not attend the meeting on 13 March, nor did she raise any concern that she did not or could not understand the contents of Mr Ogden's letters or enclosures. Two days before the meeting, the claimant booked and departed on holiday. The meeting was rescheduled to 27 March 2019. The claimant attended on that day from 3.30 p.m. to 4.05 p.m., but walked out partway through, as the tribunal said at [45], "leaving her co-directors and Mrs Kemp sitting in the meeting puzzled where she had gone."

8. On 4 April 2019, Mr Ogden wrote inviting the claimant to a disciplinary meeting on 9 April. He sent her copies of the disciplinary procedure and set out charges of misconduct. The tribunal set out the bullet-pointed allegations, including breaches of GDPR, failure to supply family file paperwork, and various financial irregularities, including allegations of fraudulent expenses claims. They also included “poor management practices”, which embraced, among other things, the allegations of bullying and harassment. The claimant was informed that she could be represented by a colleague or trade union representative. She asked for the hearing to be postponed to enable her to secure a colleague or union representative to attend. Mr Ogden granted a postponement to 15 April, and also indicated that a friend or relative could accompany her, so long as they were not a lawyer.

9. On 12 April 2019, a psychiatrist from Hertfordshire Partnership University NHS Foundation Trust Crisis Assessment and Treatment Team (“CATT”) wrote that the claimant had been under the CATT since 4 April and was too unfit to attend the meeting on 15 April. Having received that letter, the respondent paused the process.

10. On 10 May 2019, Mr Ogden sought the claimant’s consent to enable the respondent to get more information from her medical advisors. He told her to take a complete break from work. He asked for the return of her computer, provision of passwords and return of various other company property, which he offered to collect. By a text of 17 May, the claimant indicated that she was unwilling to share her medical records and wanted to discuss this with Mrs Kemp. Mr Singh responded that the board of directors wanted to receive as much information as it needed to understand her illness and assist her, and that this would be kept confidential and shared only as absolutely necessary. He also said they were finding it difficult to run the company without having access to the various information and property previously requested, and which he requested again.

11. On 18 June 2019, Mr Ogden wrote stating that it was in no-one's interest to have the disciplinary process still on hold after the length of time since the allegations had first been raised with the claimant. He wrote that she may well not be well enough to attend a meeting, but asked for her written comments on the matters previously raised, within 14 days. He raised two further specific financial allegations and asked again for the return of company property. The claimant sent a reply with what the tribunal called "some notes" in relation to the topics that had been raised in Mr Ogden's letter of 18 June, which the tribunal listed. That was received on 1 July.

12. A "disciplinary review" was conducted by Mr Ogden and Ms Baroetta on 4 July 2019. Mrs Kemp was noted to be present in assistance. The tribunal continued as follows.

"57. On 20 July 2019 Mr Ogden wrote to the claimant with the outcome of the disciplinary investigation [HB305-312]. The letter was detailed. It set out the background to matters and then made specific findings in relation to allegations of misconduct and/or gross misconduct.

1) In respect of failure to adequately and securely store personal ID and other data in breach of GDPR, including file storage at home, Mr Ogden in his findings said that the claimant committed numerous breaches of GDPR. He referred to bin-bags of sensitive information in the offices, the inability to find family files and the claimant refusal to return all company property.

2) For the allegation of failing to supply family file paperwork and funding and outcome records to substantiate BLF year 1 funding received, Mr Ogden said the internal audit could find no trace of files to substantiate the statistics on the Year 1 BLF Report.

3) Regarding the potential double funding or misappropriation of funding for families, using both HCC and BLF (year 2 and 3) monies. Mr Ogden made a finding that in the absence of proper family records they had no way of identifying which funding pot was used for which family nor whether funding was used from both pots for the same family.

4) Mr Ogden made a finding that there was a lack of information of journeys taken to substantiate extensive mileage claims. He identified an unauthorised receipt for a spa break and personal supermarket spending for which there was no explanation or reimbursement.

5) For the allegation, fraudulently claiming a refund for parking tickets issued 20 June 2018 in Slough against which no family record is received, notwithstanding Mr Ogden accepted that the claimant had paid that parking fine personally, he found that she appeared initially to try to avoid payment by sending a work-related letter to the parking authority which appeared to fabricate the reason for the car being parked there.

6) In respect of poor management practices, Mr Ogden found that the claimant had a controlling and bullying style of management producing fear and tearful responses from staff. He set out the basis for this conclusion based upon the recent resignations of 3 staff members, which he said was misreported to the management team. He determined that the claimant misled the management team and that these questioned other resignations. Furthermore, Mr Ogden also noted the claimant's failure to co-operate with her co-directors in respect of keys to open office cabinets and failure to return all company property including laptops, key fobs, debit cards etc.

58. In respect of his conclusion Mr Ogden reported as follows:

Having taken a thorough examination of every file and all paperwork stored within the Company's offices, it is the Directors' reasonable opinion that whilst there may have been acts of Misconduct, and potential Gross Misconduct in relation to alleged misappropriation of funds and management practices, there is insufficient paperwork or information received from you to confirm this. We have taken into account your current ill-health. We do consider, however, that there is evidence to uphold the complaints of bullying and poor management practices based on testimony from ex, and current, employees.

Whilst the Directors have determined they do not intend to make findings in relation to misconduct/gross misconduct, the findings taken as a whole have led the directors to conclude that there are potential grounds to terminate your employment. Regrettably as a result of your management practices there is now a complete lack of trust and confidence in you carrying out your position as CEO from staff and Directors.

59. Mr Ogden's outcome letter does fully make sense because it is quite clear from the foregoing that he did make findings of fact yet, in his conclusions, he purported not to make findings of fact. When this was put to Mr Ogden by the Tribunal he said that he was concerned with lottery funding and the effects that a finding of possible fraud, misappropriation of money and/or chaotic management practices might have for the future of the respondent charitable organisation. By talking about an irreparable breakdown in the relationship and the claimant's return to the organisation as being untenable, he said that he hoped to avoid making explicit the financial irregularities and organisational mismanagement.

60. He went on to say that the relationship has irretrievably broken down:

It is apparent that the relationship between you and the staff and your co-Directors in HPP has irreparably broken down. Your return to the organisation is therefore potentially untenable as there is a risk that it could result the immediate resignation of the directors, consultants and employees resulting in the company's likely closure and the real risk of failing the families we are currently supporting. The future security and viability of the Company and its fulfilment of its Contractual obligations to HCC, are at stake."

13. The claimant was invited to a further meeting, set for 12 August 2019, to discuss these matters, which she was told was to consider terminating her employment and directorship. She was told of her right to be accompanied. If she was unable to attend, the

directors would consider comments and/or representations received up until the date of the meeting. The tribunal continued:

“62. The claimant responded on 23 July 2019 to say that she would not be able to attend meetings or reply to emails until advised by her doctor [HB314]. The claimant produced 2 sicknotes during this period stating “Anxiety” from 19 July 2019 to 18 August 2019 and 7 August 2019 to 6 September 2019. She did not produce a letter from her GP or other medical practitioner regarding her engaging with the disciplinary process.

63. The claimant was discharged from CATT on 8 August 2019 [HB514] and the Transfer/Discharge Notification gave a diagnosis of “moderate depressive episode”. The respondent witnesses did not know of this diagnosis and there is no evidence that they were made aware of the developments in the claimant’s mental health.

64. The claimant did not attend the meeting on 12 August 2019. Ms Kemp attended the venue and Mr Ogden participated by telephone as he lived some distance away and the claimant had not confirmed her attendance and indeed communicated her likely absence on both 23 July 2019 and 31 July 2019. Mr Ogden decided to dismiss the claimant, with pay in lieu of notice and Ms Kemp concurred.

65. By letter dated 16 August 2019 the respondent dismissed the claimant with immediate effect [HB319-320]. The claimant was paid 12 weeks salary in lieu of notice. The letter confirmed that the claimant had been invited to attend an “outcome meeting” but that she confirmed that she would not be attending. The meeting proceeded, as predicted, in the claimant’s absence and she was given the opportunity to provide comments or representation in writing, but she did not do so. The dismissal letter enclosed a copy of the minutes of that meeting. The letter continued:

The findings were as stated in our letter dated 20th July 2019. Regrettably, you have lost the trust and confidence of the Board of Directors and staff of HPPP in you carrying out your position as CEO. This makes the continuation of your employment untenable and therefore the decision is to terminate your employment on notice [sic].”

14. The tribunal said at [66] that the decision was Mr Ogden’s, but the letter was co-signed by Mr Singh and Ms Baroetta. The claimant was offered the right of appeal. The tribunal noted at [67] that she instructed solicitors, who made certain stipulations in respect of the appeal, which the respondent accepted. But, ultimately, the appeal was not pursued. Later the tribunal made more detailed findings about this aspect, to which I will return.

The Tribunal’s Decision

15. I turn to the salient parts of the tribunal’s reasoning and conclusions with respect to the particular complaints to which the two grounds of appeal relate. At the tribunal hearing

the claimant was represented by counsel and the respondent by Ms Gear. The tribunal had before it a list of issues which had been agreed at an earlier case-management hearing. It was modified at the start to reflect the withdrawal by the claimant's counsel of complaints of indirect disability discrimination. At [3] the tribunal set out the modified list of issues in full. It identified that the claimant relied on two claimed disabilities: dyslexia and depression. In relation to the complaints of discrimination arising from disability contrary to section 15 **Equality Act 2010** the issues were set out in the following way:

"Discrimination arising from disability: s15 EqA

3. Did the claimant's disability cause, have the consequence of, or result in, "something"? The claimant claims that the "something" was:

(a) incapacity for work; and/or

(b) delay in returning to work; and/or

(b) difficulty preparing for and/or inability to attend disciplinary meetings

4. Did the employer treat the claimant unfavourably by dismissing her on or around 16 August 2019 because of that "something"?

6. Did the respondent treat the claimant unfavourably in that way because of the claimant's disability?

7. If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

8. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?"

16. There are some glitches in the numbering and lettering, and to avoid confusion I will refer from here on to the second paragraph 3(b), as paragraph 3(c). I note also that the question numbered 6 in that list would appear to be more apposite to an additional direct discrimination complaint, had there been one; but nothing turns on this.

17. Both counsel at the hearing of this appeal before me, neither of whom has been involved before at any hearing in the tribunal or the EAT, agreed, as do I, that it is clear from an overall reading of the tribunal's decision that it proceeded on the basis that the

claimant was, at the relevant time, suffering from depression, of such a nature as to amount, at that time, to a disability.

18. The tribunal's conclusions in relation to the section 15 complaints were set out in the following passage:

“86. In respect of issue 3(a), we believe that the claimant's dyslexia did not form any significant incapacity for the claimant to work. Indeed, we do not feel that the claimant was to any extent incapacitated for work or for participating in the respondent's enquiries, investigations and disciplinary process due to her dyslexia. Her dyslexia did not preclude the claimant returning to work in issue 3(b). We are not satisfied that the dyslexia gave rise to a difficulty in preparing for or any inability to attend disciplinary meetings for issue 3(c). As can be seen from our findings of fact, the respondent's decision to dismiss the claimant had nothing to do with the claimant's dyslexia.

87. So far as the claimant's depression, we have gone through the claimant's General Practitioner's notes in some detail. There appears to be some reference to earlier incidences but from January 2018 onwards the claimant appears to have suffered from a significant depressive illness. If this is not entirely related to her father's death, then it is largely because of this unfortunate occurrence. There is a surprising lack of reference to the claimant's work in any medical assessment or correspondence. So, we conclude that her depressive illness was not caused by work and there is no evidence to suggest this was aggravated by the respondent's treatment of her. Indeed, at every stage the respondents sought information and offered to make reasonable adjustments to accommodate the distress that the claimant was obviously feeling for her father's loss.

88. So far as the claimant's depressive condition, this created an incapacity for the claimant to work significantly after January 2019. There is some medical evidence of the claimant's incapacity prior to her father's death. Indeed, the substantial evidence of the claimant prior to her father's death was not related to depression, it was more related to the time required to care for someone with a terminal illness although we recognise that there may well be a significant strain involved in this.

89. The respondents were entirely supportive of the claimant around her father's illness and his bereavement. She was allowed considerable paid leave. The respondents were not by any means intrusive in the enquiries, particular given the claimant's key position in this small organisation.

90. The dismissal itself is, of course, unfavourable treatment so dismissing the claimant on 16 August 2019 amounted to unfavourable treatment. The claimant was not dismissed because of her incapacity for work because the respondent's letter goes into some considerable detail to explain her dismissal was occasioned by a breakdown in relationships between the claimant and the directors and this was due to conduct issues. Any incapacity to work or delay in returning to work does not feature in the respondent's decision to dismiss, however, nor did any difficulty in preparing or inability to attend disciplinary meetings. The respondents gave the claimant a considerable benefit of the doubt by not drawing conclusions where conclusions ought to have been drawn. However, the respondents clearly indicated that the claimant had been off for a substantial period, which is why the directors needed to bring matters to a head as was set out in Mr Ogden's correspondence. So this is why the disciplinary process and eventual dismissal proceed. However, the claimant's depression (such that the respondent was aware of) was not an influence or cause that operated in the minds of Mr Ogden or his co-directors. We find that the claimant was dismissed because of the conduct matters set out in Mr Ogden's letter of 20 July 2019.”

19. In relation to unfair dismissal, the list of issues was as follows:

“19. What was the reason for the claimant’s dismissal (the respondent alleges the reason was conduct or some other substantial reason)?

20. Was this a potentially fair reason for the purposes of s98 ERA?

21. In deciding that, did the respondent: (a) reasonably believed misconduct occurred?; (b) have reasonable grounds to support this belief?; and (c) carry out a reasonable investigation prior to reaching this conclusion?

22. If so, was dismissal within the band of reasonable responses open to the respondent?”

20. The tribunal’s conclusions in respect of unfair dismissal began as follows:

“96. Notwithstanding Mr Ogden’s conclusion in his letter dated 20 July 2019 that he did not make any findings of fact that misconduct occurred. As identified in our findings of fact above, the Tribunal is quite clear that he found misconduct at the heart of the claimant’s behaviour. This was set out in the appropriate findings contained in that letter. We find that there were reasonable grounds to support such a belief. The respondent’s findings were measured in not jumping to conclusions. Mr Ogden was unwilling to make findings of fact in respect of misconduct because of the lottery funding and possible reputational damage. Whilst we consider this an irregular and ignorant approach, it is understandable in the circumstances and displays a genuine desire to act in (what he perceived to be) the best interest of the business. The claimant was dismissed for a conduct related reason, pursuant to s98(2)(b) ERA.

97. We find that the employer utilised a fair process and this was in line with the ACAS guidelines as set out above. A reasonable investigation was carried out by Mr Ogden and Mrs Kemp. Indeed, the claimant’s written response of 1 July 2019 were considered by Mr Ogden with Ms Barroeta.

98. Mr Ogden set an investigatory meeting for March 2019 and the claimant snubbed her colleague by booking and departing for a holiday just before the meeting. This was rude, deliberate and designed to unsettle a long-standing colleague. It was unacceptable behaviour. We were struck by the 3 FSW statements referencing the claimant walking out of meetings. This appears to be an occasional outburst of petulant behaviour which was displayed by the claimant at the investigatory meeting of 27 March 2019. The claimant refused to attend at her disciplinary hearings of 20 July 2019 and 12 August 2019, which fitting into a pattern of refusing to explain herself.

99. We were concerned with Mr Ogden’s role, and that of other directors, in both the investigation and the claimant’s dismissal. There was no clear distinction of the separate strands of investigation and dismissal to this disciplinary process. Had the claimant responded to the allegations with more than a cursory rejection then the respondent might have been in trouble on this point. However, we note that the appeal was offered before a wholly independent human resources consultant, so the respondent was keen to correct this procedural irregularity.

100. So far as the Burchell test is concerned, we are satisfied that: the respondent directors had a genuine belief that the claimant was guilty of misconduct; there were reasonable grounds for holding that belief; and this had come from a reasonable investigation.

101. The claimant was the CEO of this organisation. She wrote or imported the disciplinary procedures, and we heard that in the past she had recourse to these procedures in respect of other staff. So, there is little excuse for her not following the respondent's procedures.

102. Dismissal was within the range of reasonable responses. It was based upon findings of bullying by the claimant of the 3 FSWs and evidence of unacceptably poor management practices from the Chief Executive Officer. This was set out fully in Mr Ogden's letter of 20 July 2019. The respondent sought the claimant's participation in a further hearing, yet the claim still refused to engage. The claimant was dismissed on 16 August 2019. The claimant had lost the trust and confidence of the Board. This dismissal letter was signed by Mr Ogden, Mr Singh and Ms Barroeta. The claimant was offered the right of appeal. Reference was made to the staff handbook and that the appeal should be received within 5 working days. In the circumstances the respondent extended this right of appeal to 10 days."

21. The claimant's solicitors appealed on her behalf 14 days after the date of dismissal, and therefore outside the extended time allowed. They asked for the appeal to be before an external HR consultant and suggested that a shortlist of three be agreed. By a letter of 11 September 2019, the respondent's solicitors agreed to an appeal by way of rehearing before an independent HR consultant. They accepted a neutral venue and said any reasonable choice of companion would be accepted. They asked to be provided with substantive grounds of appeal. They agreed to the claimant having supervised access to the office. The respondent would preserve documents and evidence, although it was noted that absence of documentation was one of the concerns arising from the disciplinary investigation.

22. On 27 September 2019, the respondent provided a list of three HR consultants. Following chasing by them, the claimant, on 16 October, chose one and, as the tribunal put it at [105], "ignored the other outstanding matters". On 26 November, Mr Singh chased the claimant's solicitors. There was no further response thereafter. The claimant told the tribunal that she had run out of money at that point so "she did not wish to pursue her appeal because she could not afford to pay her solicitors on her behalf". For reasons the

tribunal gave at [106], it considered that not to be a satisfactory explanation as to why she was no longer pursuing her appeal and, indeed, to be a breach by her of the *ACAS Code*.

23. The tribunal concluded that the claimant was not unfairly dismissed.

The Grounds of Appeal, Discussion, Conclusions

24. The first ground of appeal before me, as framed in the notice of appeal, contends that the tribunal erred in respect of the specific section 15 complaint identified at paragraph 3(c) of the list of issues, because the tribunal failed to make findings of fact in respect of the effect of the claimant's depression on her capacity to engage with the disciplinary process, whether by way of preparing for or attending disciplinary meetings.

25. However, in his skeleton argument, and at the hearing of this appeal today, Mr Margo, who was not counsel who drafted the grounds of appeal, put the challenge differently. He accepted that, as section 15(1)(a) provides that discrimination occurs if "A treats B unfavourably because of something arising in consequence of B's disability", subject to the remaining provisions of that section, it follows that, if a tribunal properly concludes that *either* the "because of" limb *or* the "arising in consequence" limb of that provision is not satisfied in a given case, then that particular complaint must fail.

26. Mr Margo also said that he accepted that, on a fair reading of paragraph [90], the tribunal had made findings in this case that the claimant was dismissed because of the conduct matters and *not* because of any of the "somethings" identified in paragraph 3 of the list of issues, including 3(c). He said that he therefore accepted that, *if* the tribunal did not err in taking the list of issues that it had set out as its reference point, *then*, once it had determined that the "because of" limb was not satisfied, the complaint therefore must fail. In that case, it would not then have been necessary for the tribunal to determine whether

the claimant had, in fact, experienced any difficulty in preparing for or attending disciplinary meetings arising in consequence of her depression, and so in that case the tribunal would *not* have erred by failing to make such findings.

27. However, Mr Margo submitted that the tribunal’s error lay in its failure to *revisit* the list of issues and, in particular, paragraph 3(c). He submitted that this was a case where the tribunal was bound to revisit and modify the list of issues in order to discharge its duty to determine the case in accordance with the law and the evidence. He relied in this regard, as I will explain, on a particular aspect of the Court of Appeal’s decision in **Moustache v Chelsea and Westminster Hospital NHS Foundation Trust** [2025] EWCA Civ 185; [2025] ICR 1231, which in turn referred to the earlier decision of that court in **Parekh v London Borough of Brent** [2012] EWCA Civ 1630; .

28. In his skeleton argument, Mr Margo also relied upon a passage in **Charlesworth v Dransfields Engineering Services Limited** UKEAT 0197/16, 12 January 2017, a decision of Simler P (as she then was). But in oral submissions he did not refer to **Charlesworth**, and when I raised this, he acknowledged that it does not assist his case as he now puts it. I do not, therefore, need to say anything more about **Charlesworth**, save to say that it appears to me to be entirely in line with the line of familiar authorities, including another decision of the then Simler P, and decisions of the Court of Appeal, on the meaning of the “because of” test in section 15(1)(a).

29. Mr Margo submitted that, as he put it in his skeleton, the claimant’s case “manifestly was not that the respondent dismissed her because, for example, she had difficulty in preparing for a disciplinary meeting”, but that her disability “resulted in her not being able properly to address the allegations put to her or properly to defend herself”. She was

contending, as he put it in his skeleton, that “there was a sufficient causal link between her inability to prepare for and attend disciplinary meetings and the dismissal decision”.

30. In oral argument, Mr Margo contended that, to reflect that way of advancing the complaint, the tribunal should, instead of following paragraph (c) of the list of issues as it appeared, have treated it as modified so that it contended that the “something” relied upon was *not* the claimed difficulty in preparing for, and/or ability to attend, disciplinary hearings, but was, rather, the respondent’s conclusion that the claimant should be dismissed for misconduct. The contention would then be that *that* “something” arose from her depression, because the depression impaired the claimant’s ability to prepare for, or attend, such hearings and thereby effectively to defend herself. The contention would be that there was then a sufficient causal link between *that* “something” and the respondent’s conclusion that the claimant’s conduct was such that directors and staff could no longer have confidence in her. That would be because, had she had been better able to defend herself at such meetings, she might have persuaded Mr Ogden otherwise.

31. In **Moustache** the only reasoned speech was given by Warby LJ, with whom Elizabeth Laing LJ and Dingemans LJ both agreed. He conducted a comprehensive survey of a number of prior authorities of the EAT and the Court of Appeal under the heading “What is the nature and scope of the ET’s duty to identify and determine issues in the proceedings, where the parties have agreed a list of issues?”

32. Beginning at [32], Warby LJ first set out some general points. First, proceedings in the tribunal are adversarial and the primary onus lies on the parties to identify which complaints they wish to bring and which responses to advance. Secondly, the issues raised by the parties are those which emerge clearly from an objective analysis of their statements

of case. Thirdly, where a party seeks a ruling on an issue that does emerge from such an objective analysis, the tribunal has a duty to address it unless it has been abandoned.

33. Mr Margo acknowledged that the fourth point, set out at [37], was that the tribunal's role is arbitral and not inquisitorial or investigative, and that it has no general duty, even where a party is unrepresented, to take proactive steps to prompt some expansion or modification of the case advanced by them, where that might be to their advantage. However, Mr Margo relied on observations made in the succeeding paragraphs, in particular at [40], whereby Warby LJ observed that a tribunal will usually be entitled to confine its attention to the issues on an agreed list, but it may, by way of exception, be necessary in the interests of justice to depart from an agreed list.

34. Warby LJ identified that there were at least two distinct categories of such situations. Mr Margo contended that the present case fell into the second category, being "where the claim has not been pleaded but the fundamental duty of fairness makes it necessary (that is to say, essential) that it should be raised and considered". Mr Margo referred also to Warby LJ's citation, at [41], from a passage in **Parekh**, to which I will return.

35. Mr Margo accepted that, while the original claim form in this case raised a section 15 complaint, it had not advanced such a complaint pleaded in the way that he said the tribunal should have considered it. I observe that the original particulars of claim did not set out at all the particular way or ways in which such a complaint was framed, by identifying the "something" or "somethings" relied upon, or in any further way.

36. Mr Margo submitted that, nevertheless, complaints of this legal type are particularly difficult, even for lawyers, to analyse and to frame correctly; and that where such a complaint is raised, it is incumbent on the tribunal to take particular care to consider how

the underlying case being advanced is correctly analysed. He submitted that in the present case the claimant was plainly not, in fact, asserting that she was dismissed because of her inability to prepare for, or to attend, disciplinary hearings. He argued that it should have been obvious to the trial tribunal that something had gone wrong with how her case was being put, notwithstanding that she was legally represented.

37. Mr Kohanzad's first submission in reply was that I should not entertain this way of advancing this part of the appeal, as this was not how the ground in question had been framed in the notice of appeal. The ground in the notice of appeal was what had been permitted, at a preliminary hearing, to proceed to this full hearing. He submitted that, to advance the challenge in the way that Mr Margo now sought to do required permission to amend; and, applying the guidance in **Khudados v Leggate** [2005] ICR 1013, permission should be refused. In particular, the original grounds of appeal had been settled by counsel. The claimant had also been represented at the preliminary hearing by another barrister under the ELAAS scheme, and no application had been made to amend at that hearing. Now a third counsel, Mr Margo, was involved and was raising the point for the first time.

38. Mr Margo responded that he had raised this different way of framing the ground, having considered the respondent's Answer to the ground in the form that it was permitted to proceed at the preliminary hearing in the EAT, which Answer had relied upon what the tribunal said at paragraph [90]. Mr Margo also submitted that Mr Kohanzad had not been at any disadvantage in responding to his way of putting the challenge. It had been set out in Mr Margo's skeleton argument exchanged in advance of today, and Mr Kohanzad had been able fully to respond and engage with it today.

39. I consider that, applying the guidance in **Khudados**, it would not be wrong to refuse permission to amend and to dismiss this challenge for that reason alone. The challenge that Mr Margo seeks to advance is materially different from the ground that was permitted to proceed, and requires permission to amend. This is not a case, as contemplated in **Readman v Devon Primary Care Trust**, UKEAT/0116/11, where the proposed amendment is raised in advance of the full appeal hearing and on the first occasion when the appellant has the benefit of legal advice.

40. The original grounds of appeal were settled by counsel. The claimant then had the benefit of the involvement of a second counsel, albeit in the limited context of the ELAAS scheme, at the preliminary hearing. Nor is the fact that the respondent put in an Answer to the original ground, which Mr Margo acknowledged he could not gainsay, provide a compelling reason for allowing a different way of putting the challenge now to be advanced at the stage of a full appeal hearing. Nevertheless, Mr Kohanzad did not claim to be in difficulty in fully responding to the point today, which he indeed did; and I have decided that I should address it on its merits.

41. I have already referred to the four general points which Warby LJ in **Moustache** drew from his review of the authorities. He discussed the fourth in the following passage:

“37. Fourthly, however, the ET's role is arbitral not inquisitorial or investigative. It must perform its functions impartially, fairly and justly, in accordance with the overriding objective, the law, and the evidence in the case. It may consider it appropriate to explore the scope of a party's case by way of clarification. That may, in particular, be considered appropriate in the case of an unrepresented party. Whether to do so is however a matter of judgment and discretion which will rarely qualify as an error of law such that the EAT can interfere. The ET has no general duty to take proactive steps to prompt some expansion or modification of the case advanced by a party where that might be to their advantage. These propositions emerge clearly from a series of decisions of this court and the EAT.

38. We have been referred to the decisions of this court in Mensah (above) at [28] and [36] and Muschett v HM Prison Service [2010] EWCA Civ 25; [2010] IRLR 451 [31]. I do not consider it necessary to review those two cases in further detail. That was done in Drysdale v Department of Transport [2014] EWCA Civ 1083; [2014] IRLR 892 where the court subjected the relevant authorities to a detailed analysis from which

Barling J (with whom Arden and Christopher Clarke LJJ agreed) derived the following general principles:

- (1) It is a long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case.**
- (2) What level of assistance or intervention is "appropriate" depends upon the circumstances of each particular case.**
- (3) Such circumstances are too numerous to list exhaustively, but are likely to include: whether the litigant is representing himself or is represented; if represented, whether the representative is legally qualified or not; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.**
- (4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.**
- (5) The determination of the appropriate level of assistance or intervention is properly a matter for the judgment of the tribunal hearing the case, and the creation of rigid obligations or rules of law in this regard is to be avoided, as much will depend on the tribunal's assessment and "feel" for what is fair in all the circumstances of the specific case.**
- (6) There is, therefore, a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/omitted to do, and which amounts to unfair treatment of a litigant.**

39. The following analysis seems to me correct in principle and consistent with the case law. The starting point is to consider what claims emerge from an objective analysis of the statements of case. A failure by the tribunal to identify and address those claims is liable to amount to a breach of its core duty and hence an error of law. A failure to identify and determine a claim that does not emerge from such an analysis can amount to an error of law but only in rare or exceptional circumstances of the kind outlined in *Drysdale*. It is in this overall context that the role of an agreed list of issues falls for consideration.

40. A list of issues is not a pleading but a case management tool. The main purpose of such a document is to summarise the existing pleadings not to amend them. On the other hand, as *Mensah* shows, a party may conduct itself in such a way as to lose the right to have the ET decide a pleaded issue, thereby reducing the scope of the tribunal's corresponding duty. An agreed list of issues is one way in which that could in principle be done. Such a list is, after all, an express agreement that the tribunal should conduct the proceedings in a particular way, and an invitation to the tribunal to do so. A tribunal will usually be entitled to confine its attention to the issues on the list. By way of exception, however, it may be necessary in the interests of justice to depart from even an agreed list. There are at least two distinct categories of situation in which that may be so. The first is where a pleaded claim has been omitted from the list in circumstances that do not amount to abandonment of the claim. The second is where the claim has not been pleaded but the fundamental duty of fairness makes it necessary (that is to say, essential) that it should be raised and considered.

41. In *Parekh v Brent London Borough Council* [2012] EWCA Civ 1630 the employee, who had represented himself before the ET, complained that one issue had

been omitted from a list of issues arrived at through discussion at the Pre-Hearing Review and recorded in the judge's written reasons for the directions he then gave. The Court of Appeal dismissed the appeal on the basis that it was not a challenge to the tribunal's order but to its reasons and there was no error of law. Mummery LJ explained:

31. A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will as a general rule limit the issues at the substantive hearing to those in the list.

32. ... if a list of issues is agreed, it is difficult to see how it could ever be the proper subject of an appeal on a question of law....

On the other hand, as Mummery LJ observed at [31]:-

As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list (...) of issues where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence. ... case management decisions are not final decisions. They can therefore be revisited and reconsidered, for example if there is a material change of circumstances. The power to do that may not be often exercised, but it is a necessary power in the interests of effectiveness."

42. In the present case, the claimant's original claim form identified that she was represented by solicitors. The particulars of claim identified the disabilities relied upon and gave a narrative account of the sequence of events. They stated that one of the complaints being pursued was under section 15 but, as I have said, provided no further particulars. There was, as I have mentioned, a case management hearing. At that hearing, the claimant was represented by a solicitor, as was the respondent, and it was from that hearing that the agreed list of issues emerged. That recorded the particulars of the section 15 complaint upon which the tribunal at the full merits hearing then relied. At that full merits hearing, the claimant was represented by counsel and there was a discussion of the list of issues at the start, in the course of which her counsel withdrew one complaint.

43. It is true, as Mr Margo noted, that in one of her witness statements that was relied upon at that full merits hearing the claimant said that both her dyslexia and her depression

had caused her difficulty in dealing with the letters and documents sent to her, and in preparing for and attending the investigation and disciplinary meetings, and that for that reason she could not properly defend herself. Nevertheless, her counsel at that hearing did not, in the discussion at the start of the hearing, ask to revisit the way that the section 15 complaint was framed, in particular, to raise a different “something”. Nor, Mr Margo properly accepted, did her counsel do that in his closing submissions to the tribunal at that hearing, a copy of which was also before me.

44. As Mr Kohanzad fairly submitted, in light of the guidance in **Moustache**, in order to conclude that the tribunal erred by not revisiting proactively the list of issues that was before it on this aspect, I would have to conclude that this was an exceptional case where any tribunal acting in accordance with its duty to do justice to the parties would necessarily have to have intervened. The formulation of this gateway to error by non-intervention effectively sets a perversity bar. Mr Margo, for his part, acknowledged in addressing me that it was what he described as a “narrow window”.

45. I do accept that the law of disability discrimination in some of its aspects gives rise to some very challenging conceptual problems, even for specialist lawyers. The framing of a provision, criterion or practice for the purposes of an indirect discrimination complaint is a notorious example where the cases show that even lawyers can get into difficulty. I accept that the framing of a section 15 complaint may also require some careful care and reflection, and that litigants-in-person might sometimes find that particularly challenging. The authorities also discuss that some litigants, and some litigants’ lawyers, are not always as astute as perhaps they might be, to reflect, and focus upon, the type of complaint of disability discrimination which is the best fit for their factual case.

46. But in the present case, the claimant had legal representation at every stage. The list of issues that was presented to the tribunal at the full merits hearing had been agreed at a previous hearing at which she had been legally represented. Her counsel at the full merits hearing, who was not the lawyer who appeared at the case-management hearing, did not raise any problem with this aspect of the list of issues that they had inherited. I do not accept that it should nevertheless have been obvious to the tribunal that something had gone wrong with the framing of the section 15 complaint. It was not glaringly obvious, for example, that the claimant could not possibly have been seeking to argue that, in deciding to dismiss her, the respondent had taken against her and been adversely influenced, for example, by the fact of her having walked out of one meeting and failed to attend others, or by what the tribunal called at one point her “cursory rejection of the allegations”.

47. It was not obvious to the claimant’s solicitor at the case management hearing that the complaint should be run in a different way, nor to her counsel at the full merits hearing. Nor did the point appear obvious to counsel who drafted the grounds of appeal, nor to counsel who appeared at the preliminary hearing in the EAT. I do not consider that the tribunal, for its part, erred by failing proactively to raise with counsel at the full merits hearing whether some amendment to the agreed list of issues in this respect might be needed. It was entitled to proceed on the basis of that agreed list (taking on board that one complaint was withdrawn by counsel); and, indeed, I consider that it was in accordance with the overriding objective that it did so.

48. Mr Kohanzad advanced a further argument, that on a generous reading of what the tribunal said at [90] it had in any event effectively answered implicitly Mr Margo’s way of putting the case. I have noted also the tribunal’s trenchant comments, albeit in the context of its determination of the unfair dismissal claim, at [98], [101] and [102], upon the

claimant's conduct not attending the investigatory meeting on the original date set for it, departing a meeting partway through, and, finally, abandoning her appeal. It might be said that these observations do not, at any rate, bespeak an acceptance of the claimant's underlying case as to the impact of her depression on her ability to participate in the internal process. However, these are not points that I have to decide, because, for all the reasons I have given, I consider that in any event there was no error by the tribunal in not revisiting the list of issues, as contended by Mr Margo. As I have noted, he has effectively conceded this ground of appeal in the form in which it was originally framed.

49. For all of these reasons, what I will call ground 1, being the ground challenging this aspect of the tribunal's decision on this particular section 15 complaint, fails.

50. The second ground relates to the decision that the claimant was not unfairly dismissed. It relies specifically upon what the tribunal said at [99], where it indicated that it was concerned with Mr Ogden and other directors' role in both the investigation and the dismissal, and that there was no clear distinction between the investigation and dismissal strands. As drafted by Mr Margo's predecessor, this ground submits (a) that these criticisms were of such magnitude that they would, in principle, render the dismissal unfair; and (b) that the tribunal concluded that this would not matter, in part because of the offer of a thorough appeal before an independent HR practitioner; but the fact that this appeal was *offered* was not a proper basis for treating the unfairness as cured, when no such appeal hearing, in fact, took place. Mr Margo confirmed that some further points of challenge raised in this ground, as originally framed, were not pursued or relied upon by him.

51. The ground contends, as did Mr Margo, that while **Taylor v OCS Group Limited** [2006] EWCA Civ 702; [2006] ICR 1602 makes it clear that an appeal can potentially cure

an earlier procedural shortcoming, it does not follow that an offer of an appeal process which *might* have done so would also have that effect. It would, submitted Mr Margo, be the actual delivery of such a fair appeal hearing that might do so, not the mere offer of one that, had it been held, might or might not have turned out to be fairly conducted.

52. Mr Kohanzad submitted that the first difficulty faced by this ground is that the tribunal did not actually hold at [99] that the features that it identified there *would* have rendered the dismissal unfair, had the respondent not offered an independent appeal before an HR practitioner. Mr Margo disagreed with that reading. He submitted that the fact that the final sentence began “However” and referred to a “procedural irregularity” showed that the tribunal considered that there *would* have been unfairness, but for the offer of the independent appeal.

53. Mr Margo acknowledged that section 98(4) does not require an employer in every case to have separate investigatory and disciplinary stages. The statutory question is simply whether the dismissal is fair or unfair, applying the test as set out in that subsection, which does not include any such requirement. Further, for the purposes of the guidance in **British Homes Stores Ltd v Burchell** [1980] ICR 303 the issue is whether, at the point of dismissal, the respondent has carried out a reasonably sufficient investigation, including the employee having had a fair opportunity to respond to the charges up to that point.

54. Nor does the *ACAS Code of Practice on Discipline and Grievance Procedures* (2015) require there to be a separate investigation and disciplinary process conducted by different managers in *every* case. Paragraph 5 provides that in *some* cases the need for an investigation to establish the full facts will require the holding of an investigatory meeting before proceeding to a full disciplinary hearing; and paragraph 6 provides that, where

practicable in misconduct cases, different people should carry out those different hearings. In this case, I also observe, the matter proceeded to its final disciplinary stages in circumstances where management considered that the claimant's conduct in walking out of a meeting meant that the initial investigations could not be completed.

55. In light of all that, insofar as it is contended by this ground that the procedural irregularity identified by the tribunal was of such magnitude that it would, in principle, be bound to render the dismissal unfair, I do not agree. Nor am I persuaded that the tribunal was, in fact, of the view that it did so, subject only to the effect of an independent appeal having been offered. I do see Mr Margo's point about the language used in the final sentence of paragraph [99], but the language used in that paragraph overall begins with a reference to a particular *concern* on the part of the tribunal, and then refers to the counterfactual possibility that the respondent *might* have been in trouble, had the claimant responded with more than a "cursory rejection". That suggests that it stopped short of a firm conclusion on this aspect, before getting to the point about the offer of an appeal.

56. But even if [99] is to be read in the way that Mr Margo suggests, I do not consider that this ground establishes any error on the part of the tribunal. **Taylor v OCS Group** was a case in which the employment tribunal had found that the procedure at the initial disciplinary hearing had been fundamentally flawed. What the Court of Appeal then considered was the submission that an internal appeal which fell short of a rehearing, and was only by way of a review, could not be treated as having cured that fundamental flaw. That was a submission which the Court of Appeal did not accept. The wider takeaways from that decision are, firstly, that the tribunal is always concerned ultimately to apply the words of section 98(4) when considering whether the particular dismissal was fair or unfair;

and, secondly, that in doing so it should consider the overall fairness of what is generally referred to as the end-to-end process.

57. In some cases, the end-to-end process will include the matter proceeding to an internal appeal hearing followed by a decision on the internal appeal, or sometimes, more than one internal level of appeal. In other cases, the employee may not appeal at all. In some cases, as in the present case, she may start an appeal, but then abandon it before it gets to a hearing. In the present case, the end-to-end process included the decision to dismiss the claimant followed by all the further steps that the respondent took to offer, facilitate and agree the arrangements for the appeal that the claimant, through her solicitors, initially sought; and the process ended after, following chasing, the claimant did not respond or pursue the appeal any further.

58. It is clear from all of the tribunal's findings about the steps that *the respondent* took in that end-to-end process, including at the appeal stage, that it considered that the respondent had acted fairly in its approach, in particular by offering the claimant an appeal, allowing it to be pursued out of time, and agreeing to all of the requests made on her behalf about arrangements for it. Certainly on no reading can it be said that the tribunal considered that there was any step with respect to offering the claimant the opportunity to appeal, that the respondent failed to take, and that any employer acting reasonably would have taken.

59. The tribunal was entitled to take all of that into account in deciding whether the dismissal was fair or unfair, applying section 98(4). It did not err in that regard. For these reasons, ground 2, relating to the outcome of the unfair dismissal complaint, fails.

60. Accordingly, the outcome is that this appeal is dismissed.