Neutral Citation Number: [2026] EAT 21

Case No: EA-2023-001047-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 January 2026

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between:

Mrs M Anea

Appellant

- and -

1) OCS UK & I Limited
2) Mr Kevin Dove
3) Mr Andrew Sales

Respondents

- -

Thomas Ogg (instructed by Brabners LLP) for the **Appellant**
Ishfaq Ahmed (instructed by OCS UK & I Limited) for the **Respondents**

Hearing date: 13 January 2026

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JUDGMENT

SUMMARY

Practice and Procedure

The Employment Tribunal did not err in law in its analysis of the evidence. The correct approach to the assessment of witness evidence considered.

HIS HONOUR JUDGE JAMES TAYLER

The Issue

1. The issue in this appeal is whether it is an error of law to prefer the evidence of one party to that of another where there is any dispute. The claimant contends that the Employment Tribunal adopted an inflexible rule to prefer the evidence of the second and third respondents to that of the claimant on all disputed issues. The respondents assert that on a fair reading of the judgment the Employment Tribunal did not adopt such an inflexible rule and reached findings of fact that were open to it.

The Judgment appealed

2. The appeal is against a judgment of Employment Judge Gaskell, sitting with members, in Birmingham. The hearing took place from 31 July to 4 August 2023 and on 7 August 2023, with a day in chambers on 8 August 2023. The judgment was sent to the parties on 9 August 2023.

3. So far as is relevant to the appeal, complaints of sexual harassment and constructive dismissal were dismissed. An appeal against the dismissal of complaints of race discrimination was not permitted to proceed.

The facts relevant to the appeal

4. The first respondent is a services company (I shall refer to it as the respondent). The claimant was employed by the respondent on their contract to provide cleaning services at the Tesco Distribution Centre at Fradley Park in Lichfield. The second respondent, Kevin Dove, was employed as a supervisor (I will refer to him as Mr Dove). It was part of Mr Dove's role to supervise the claimant when she was working on the afternoon shift. The third respondent, Andrew Sales, was the line manager of the claimant and Mr Dove (I will refer to him as Mr Sales).

5. The claimant gave evidence that from January 2021, Mr Dove embarked on a campaign of bullying and harassment of her. The claimant asserted that Mr Dove's actions constituted direct race discrimination and race harassment. The claimant is of Romanian nationality and claimed that Mr

Dove's behaviour towards her was because of, or related to, her nationality. The claimant relied on specific incidents on 31 August 2021 and 7 October 2021, following which she raised a formal grievance. The complaints against Mr Dove failed, and the claimant has not been permitted to pursue an appeal in respect of them.

6. The claimant asserted that Mr Sales subjected her to sexual harassment on 17 September 2021. The claimant was late for work. She was brought to work by a male colleague. Her complaint was that Mr Sales suggested that she was late because she had been committing a sexual act with the male colleague in his car and Mr Sales made a sexually offensive gesture to accompany this remark. The claimant's case was that the words were said, and the gesture made, in front of a number of her colleagues. The incident was first raised in the claim form. It was not raised in the claimant's grievance.

7. The claimant asserted that Mr Dove's behaviour towards her, and Mr Sales's failure to deal with it, constituted a fundamental breach of her contract of employment, in response to which she resigned.

The credibility assessment

8. The section of the judgment under the heading "The Evidence" included the impugned credibility assessment:

> 10 **The claimant gave evidence on her own account. She did not call any additional witnesses**. **The second and third respondents both gave oral evidence** on behalf of themselves on behalf of each other and on behalf of the first respondent.
>
> 11 In addition we were provided with an agreed hearing bundle running to approximately 300 pages **we have considered those documents from within the bundle to which we were referred by the parties during the course of the hearing**.
>
> 12 **We found the evidence given by the second and third respondents to be clear, uncomplicated and accurate**. The **evidence they gave was consistent** with each other; it **remain[ed] consistent through detailed cross examination** by the claimant; and it was **consistent with contemporaneous documents**.
>
> 13 **We take full account of the fact that the claimant does not speak English as her first language** and throughout the hearing she **required the assistance of a Romanian interpreter.** But by contrast we **found the claimant to be a far less**

> **straightforward witness.** She **embellished her evidence by referring to incidents not previously mentioned in her claim form or her witness statement**. Her evidence was **inconsistent with contemporaneous documents**: in particular **we find it quite unbelievable that the incident about which she complains on 17 September 2021 could have happened without her making a formal complaint.** Although the claimant has consistently stated that she was unfavourably treated because of the Romanian nationality, **it was only during the course of oral evidence that she complained that other workers of Romanian nationality were also treated badly**. **Not a single colleague of Romanian or any other nationality ever made a complaint about how the claimant was treated or about the treatment of other Romanian nationals.** In our judgement, the claimant's credibility was damaged by the fact that notwithstanding that she received the trial bundle seven months before the hearing in December 2022 there were documents within it such as **the record of her grievance hearing conducted by Jason Gibbins on 6 January 2022** which she claimed never to have read - but **notwithstanding that she had not read the record, and notwithstanding that she had no contemporaneous notes of her own, there were elements of the written record which she disputed.** The claimant's **credibility was further undermined by the readiness with which she makes serious allegations of wrongdoing against other people for which there is no evidence**. In particular **for the claimant's account to be correct there must have been a wide-ranging conspiracy against her** involving at least the second and third respondents together with Ms Maria Chirita, Ms Amanda Tyler. Ms Agnieszle Szymenolerske, Ms Carolyn Radley and Mr Jason Gibbins.
>
> 14 **Where there is a factual clash between the evidence given by the claimant and that given by the second and third respondents we prefer the evidence of the second and third respondent and have made our findings of fact accordingly**.[emphasis added]

The law

9. Judges have provided valuable guidance about the assessment of witness evidence; including:

   9.1. memory is fallible, generally becomes poorer with time, and can be influenced by trial preparation. It is fallacious to assume that (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate: Leggatt J, as he then was, **Gestmin SGPS SA v Credit Suisse (UK) Ltd** [2013] EWHC 3650 (Comm) [15 to 23]

   9.2. when new information is encoded which is related to the self, subsequent memory for that information is improved compared with the encoding of other information - and there is a powerful tendency for people to remember past events concerning

themselves in a self-enhancing light: **Blue v Ashley** [2017] EWHC 1928 [69]

9.3. witnesses may genuinely believe that an event occurred, or occurred in a particular way, when it did not

9.4. a witness may be mistaken on some issues but correct about others; so when evaluating the evidence of witnesses it should be broken down into component parts: **Pomphrey v Secretary of State for Health** 2019 WL 01995493 HC [31-33] and **G.I. Globinvestment Limited v XY ERS UK Ltd** [2025] EWHC 740 [99]

9.5. a witness may have lied about some issues, but be telling the truth about others: **Gorgeous Beauty Limited v Liu and others** [2014] EWHC 3093 (Ch) [33].This is the reason for the **Lucas** direction in criminal cases. A witness may lie in a stupid attempt to bolster a case, but the actual case nevertheless remains good irrespective of the lie; or a witness may lie because the case is a lie: **Singh v Singh** [2021] EWHC 2272 (Ch) [62]

9.6. the fallibility of witness evidence means that it is important to assess it against any facts proved independently of their testimony: **Armagas Ltd v Mundogas SA (The Ocean Frost)** [1985] 1 Lloyd's Rep 1, at page 57

10. These are observations about the nature of witness evidence rather than rules of law. Factfinding must be specific to the evidence in the case in question – there are no immutable rules: **Tosh v Gupta** [2025] EWHC 2025 (KB).

11. In **Martin v Kogan** [2017] EWHC 2927 (IPEC), [2020] F.S.R. 3 Lord Justice Floyd held:

> 88. … We start by recalling that the judge read Leggatt J's statements in *Gestmin v Credit Suisse* and *Blue v Ashley* as an "admonition" against placing any reliance at all on the recollections of witnesses. We consider that to have been a serious error in the present case for a number of reasons. First, as has very recently been noted by HHJ Gore QC in *CBX v North West Anglia NHS Trust* [2019] 7 WLUK 57, **Gestmin is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed.** Earlier statements of this kind

> are discussed by Lord Bingham in his well-known essay The Judge as Juror: The Judicial Determination of Factual Issues (from The Business of Judging, Oxford 2000). **But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence.** [emphasis added]

12. His Honour Judge Auerbach said of fact finding in the Employment Tribunal in **Matondo v Kingsland Nursery Ltd [**2024] EAT 123:

> 16. In *Hovis Ltd v Louton* , EA-2020-000973, 22 November 2021, a similar type of challenge arose. In that case I noted that there are no strict rules of evidence in the employment tribunal, although witness evidence should be taken on oath or affirmation. **The task of the tribunal in the given case is to weigh up all of the evidence, decide what evidence is reliable or credible and what is not, and to make findings of fact drawing on its overall appraisal of the different kinds of evidence that may be presented to it.**
>
> 17. In that case the particular issue revolved around the approach to hearsay evidence. In the present case the particular issue revolves around the approach to witness evidence based on recollection, but which is not corroborated by primary contemporary independent records. Mr Hallström is correct to say that **there is no rule to the effect that such witness evidence cannot be relied upon or cannot be treated as persuasive if it is not corroborated by other evidence** that the tribunal might regard as definitive. **Nor indeed is there any rule that a tribunal is bound to accept opposing evidence which is said to be a contemporaneous primary record, as necessarily trumping evidence based on recollection**, as there may be issues raised as to the reliability of the record-keeping, for example. **Every case must turn on its own facts and on the tribunal's fact- and evidence-sensitive evaluation of the overall evidence presented to it.** [emphasis added]

13. Because the comments made about witness evidence in cases such as **Gestmin** are observations rather than rules of law, does that mean that they can safely be ignored? It would be foolish to ignore the condensed wisdom of so many judges who have heard the evidence of so many witnesses over so many years. The observations provide guidance that can help prevent a judge making an error of law, such as failing to take account of material evidence that would, or could, have changed the outcome of the case. In a very extreme case, if for no good reason the evidence of all of the respondent's witnesses is found to be wholly credible and reliable; and that of the claimant to be of no value whatsoever, that could create an appearance of bias.

14. Judges who try sexual offences know that it is common for victims of such offences not to

report them at the time. Again, this is an observation based on extensive experience, rather than a rule of law that no inference can ever be drawn from a failure to make a contemporaneous complaint.

15. Significant factual disputes should be resolved and determinations should be made on all of the relevant evidence: **Re Abuse Standard of Proof** [2004] 2 FLR 838 (CA) 17. However, it is not generally an error of law not to specifically refer to all of the relevant evidence: **DPP Law Ltd v Greenberg** [2021] IRLR 1016.

16. Considerable deference should be paid to the fact finding of the first instance tribunal: **British Telecommunications Plc v Sheridan** [1990] IRLR 27. In **Fage UK Limited and another v Chobani Limited** [2014] EWCA Civ 5, [2014] E.T.M.R. 26 (CA) Lewison LJ warned against interference on appeal with findings of fact, and considered the requirements of a first instance decision:

> 114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] R.P.C.1; *Piglowska v Piglowski* [1999] 1 W.L.R. 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 W.L.R. 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 W.L.R. 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 W.L.R. 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include
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> > i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
> >
> > ii. The trial is not a dress rehearsal. It is the first and last night of the show.
> >
> > iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
> >
> > iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
> >
> > v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

> vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.
>
> 115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A* [2002] EWCA Civ 1039; [2003] Fam. 55; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Tradi*ng [2006] EWCA Civ 1318; [2006] U.K.C.L.R. 1135.

17. In **Oxford Saïd Business School v Heslop** EA-2021-000268-VP Mr Justice Griffith said:

> 47. It is inappropriate as well as inconvenient for the EAT or the Court of Appeal to be asked to conduct a minute examination of ET decisions with a view to overturning findings of fact except in a relatively clear case. Even in a high-value case, or a case in which the reputational issues are acutely felt (both of which are not untypical of discrimination and whistleblowing claims), **the winners should usually be left to retain the fruits of their victory without an expensive, time consuming and exhausting war of attrition in courts of appeal. An appellate court is not well placed to decide or even review questions of fact. It has not heard the evidence; which no written decision, however detailed, can ever fully convey.**
>
> 48. **The working assumption must be that an Employment Tribunal, which has made no clear error of law, has reached no impermissible conclusion of fact. This working assumption should not easily be displaced by hypercriticism of reasoning, or lack of reasoning, or of the way in which a decision is either structured or expressed.** Any decision could usually have been expressed or structured differently, and perhaps a different court might have preferred a different structure or form of expression if it had had the task of writing the decision in the first place. It is, equally, always easy to say that an extra word or sentence would have improved a decision's resilience against an ex post facto attack following detailed scrutiny of it in preparation for an appeal. But that does not in itself mean that the original decision is wrong. **The question is not whether the decision is ideal, or even excellent, but only whether it is good enough, with reasoning which is sufficient, and free of demonstrable error. If it passes that test, the facts (including inferences of fact, and findings of secondary fact) should remain where the independent (and, in the case of Employment Tribunals, specialist) tribunal of fact has left them.** [emphasis added]

18. Judgments primarily set out conclusions, rather than workings, and are not necessarily set out in the same order as the decision making took place. In **Edwards v Everard** [2023] EAT 61, [2023]

ICR 975 EAT, I suggested:

> 39 It is also worth noting that, while judgments are set out in a structured format, **the process of deliberation is often iterative**. During deliberations the employment tribunal will come to focus on the core issues. The judgment and the reasons are designed to show the outcome rather than the totality of the thought processes of the employment tribunal. The employment tribunal should explain why it reached its final decisions. [emphasis added]

19. The deference to be afforded to decision making at first instance was expressed in clear terms by the Supreme Court in **Henderson v Foxworth Investments Ltd and another** [2014] 1 W.L.R. 2600, per Lord Reed JSC:

> 48 …An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration: *Thomas v Thomas* [1947] AC 484, 492, per Lord Simonds; see also *Housen v Nikolaisen* [2002] 2SCR 235, para 72. …
>
> 57 I would add that, in any event, the validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although, as I have explained, it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him, subject only to the requirement, as I shall shortly explain, that his findings be such as might reasonably be made. An appellate court could therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> 67 It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.

20. In **Pal v Accenture (UK) Ltd [2026] EAT 12,** I suggested that generalised findings on credibility are rarely a particularly useful tool for resolving specific issues of fact about which there is relevant evidence. It is best to explain how the evidence resulted in the conclusions on the key factual disputes.

21. Generalised statements about credibility sometimes appear to have been made as a belt and braces exercise. It is often hard to see what the generalised credibility assessment adds when there are reasoned substantive findings of fact. The risk is that may appear that the findings of fact were

founded on the generalised credibility assessment, rather than consideration of all of the relevant evidence.

22. In **Mayanja v City of Bradford Metropolitan District Council** [2025] EAT 160, one specific finding of fact, the rejection of the claimant's evince that he had been offered a job, formed the basis of a conclusion that the evidence of the respondent's witnesses was to be preferred to that of the claimant on all issues. When that specific finding of fact was found to be unreliable, because an email offering the job was discovered, the generalised conclusion on credibility, and the other findings of fact based on it, fell away.

23. There are occasions on which Employment Tribunals appear to have adopted a generalised credibility assessment, but have not in fact done so, having only made a generalised comments about the witness evidence. In **Inland Revenue Commissioners v Millar** UKEATS/0003/08/MT Elias J stated:

> 66. There is also criticism of the fact that **the Tribunal noted** that whereas everyone was seeking to tell the truth, **in the event of conflict they preferred the evidence of the claimant to that of the respondent's witnesses** because, putting it broadly, the incidents were directly affecting him and he would be likely to have a better reason to recall them.
>
> 67. Mr Thomson submits that this ignores the fact that whereas the claimant may well have been credible, in the sense that he was seeking to tell the truth, nonetheless the reliability of his evidence had to be tested not only against the other evidence from other witnesses, but also against the documentary evidence.
>
> 68. **Again, we do not think that this is a material error. We do not accept that the Tribunal was intending to say that it would accept the claimant's evidence even in the face of conflicting documentary evidence. It was only making a general observation concerning the assessment of evidence.** In any event, given the extensive agreed statement of facts, there were very few areas indeed where the primary facts, as opposed to inferences to be drawn from those primary facts, were in issue. So in practice the observation had no real significance.
>
> 69. Moreover, **it is plain that in one or two cases the Tribunal did make findings which showed that they were assessing the evidence in the round.** For example, the claimant apparently gave contradictory evidence as to whether or not he had attended a particular meeting with Mrs McKean. The Tribunal concluded that he had, and accepted Mrs McKean's evidence on this. There was documentary evidence about that meeting. [emphasis added]

24. In **Granger v Scottish Fire & Rescue Service** [2025] EAT 90, Lady Haldane adopted the approach to errors of law that can arise in respect of findings of fact set out in **R (Iran) v SSHD** [2005] EWCA Civ 982, from which I shall quote a slightly longer passage than she did:

> 9. When the court gave this guidance in *Subesh*, it was aware that it would not be of any relevance to an appellate regime in which appeals were restricted to points of law. It may be convenient to give a brief summary of the points of law that will most frequently be encountered in practice:
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> > i) Making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");
> >
> > ii) Failing to give reasons or any adequate reasons for findings on material matters;
> >
> > iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
> >
> > iv) Giving weight to immaterial matters;
> >
> > v) Making a material misdirection of law on any material matter;
> >
> > vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
> >
> > vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made.
>
> 10. Each of these grounds for detecting an error of law contain the word "material" (or "immaterial"). Errors of law of which it can be said that they would have made no difference to the outcome do not matter.

25. In **R (Iran) v SSHD** it is suggested that it is necessary to identify an error of law which would have made a material difference to the outcome. I would be inclined to say it is necessary to identify an error of law that could have made a material difference. In many cases where there is an error of law in fact finding the matter would have to be remitted to the Employment Tribunal to be determined afresh.

26. In the **EAT Practice Direction 2024** at Section 2.5.1.d, the following is given as an example of what might be an error of law:

> failed to take into account a relevant matter or took into account an irrelevant matter (you would need to state what the relevant matter was and how the Employment Tribunal knew you relied on it and/or state what irrelevant matter was taken into account)

27. The term relevant should be taken to require that the matter is material, because "errors of law of which it can be said that they would have made no difference to the outcome do not matter".

28. Section 2.4.1.c of the **EAT Practice Direction 2024** suggests it is not an error of law to "prefer the evidence of the other side".

The appeal

29. As developed in Mr Ogg's skeleton argument for the claimant, the main argument advanced was that set out in paragraphs 6 and 7.6 of the grounds of appeal:

> 6. The Tribunal erred in its approach to the assessment of the credibility and reliability of the Claimant's evidence, an error which renders the Tribunal's findings of fact on disputed matters to be unsafe. This may be characterised as a procedural irregularity, or alternatively, that the Tribunal reached a conclusion regarding the Claimant's credibility which was perverse.
>
> 7. The Claimant relies in particular on the following matters in support of this Ground of Appeal:
>
> > 7.6. The Tribunal in paragraph 14 of the Judgment stated: "*Where there is a factual clash between the evidence given by the claimant and that given by the second and third respondents we prefer the evidence of the second and third respondent and have made our findings of fact accordingly*." That was not an approach which was open to the Tribunal in the circumstances of this case. Even if the Tribunal was of the view that on certain matters the Claimant's evidence was not to be preferred to the evidence given by the witnesses for the Respondents, that did not mean that it was open to the Tribunal to adopt an inflexible rule that the Claimant's evidence was to be discounted in relation to any disputed matter.

30. In Mr Ogg's skeleton argument he put this asserted error of law in slightly different terms:

> 1.1. **It is not open to any Tribunal to adopt, as the Tribunal did in this case, an inflexible rule that the evidence of a witness is to be wholly discounted wherever there is a factual clash** between that witness and other witnesses in the case. Such an approach is a procedural irregularity amounting to an error of law; and,
>
> 1.2. Alternatively, **it was not open to the Tribunal on its own findings as to the Claimant's credibility and reliability to adopt, as it did, an inflexible rule** that the Claimant's evidence was to be wholly discounted wherever there was a factual clash

between her evidence and that of the second and third respondents. [emphasis added]

31. The first, and fundamental, question is whether the Employment Tribunal applied the inflexible rule as asserted by the claimant. Reading paragraph 14 by itself it might appear that the Employment Tribunal did so because it said that "Where there is a factual clash between the evidence given by the claimant and that given by the second and third respondents we prefer the evidence of the second and third respondent" and that they "made our findings of fact accordingly". I accept Mr Ogg's suggestion that generally the EAT should not go behind a statement by an Employment Tribunal of how it went about its decision making. However, reading the judgment as a whole it is clear that this is an example of the type of iterative decision making I referred to in **Edwards v Everard**. At paragraphs 10 to 13 the Employment Tribunal clearly stated that it took account of all of the evidence presented to it and made its findings of fact on the basis of that evidence. The Employment Tribunal referred to its finding of fact about the alleged sexual harassment at paragraph 13, stating it was "quite unbelievable that the incident about which she complains on 17 September 2021 could have happened without her making a formal complaint". On a fair reading of the judgment the overall assessment of credibility was made because of the findings of fact, rather than the findings of fact being made because of the overall assessment of credibility.

32. After the credibility assessment in paragraph 14 the Employment Tribunal said it "made our findings of fact accordingly". That is poorly worded and does not properly reflect the decision making process of the Employment Tribunal demonstrated by the rest of the judgment. The situation is much like that considered by Elias J in **Inland Revenue Commissioners v Millar** discussed above.

33. The finding in respect of the complaint of sexual harassment, was in the following terms:

> Sexual Harassment
>
> 43 **On the evidence** before us **we are not satisfied that the incident of 17 September 2021 occurred as described by the claimant.** If the third respondent had made the comment attributed to him, accompanied by the gesture attributed to him, then firstly **we fully expect that the claimant would have made a complaint** at the time **further and perhaps more importantly we would have expected others to have complained.** In particular, **other female employees who on the claimant's account**

> **saw what happened.**
>
> 44 Accordingly **the claimant is not established before us the simple fact upon which we could find that she was sexually harassed that day.** Her claim for sexual harassment is therefore dismissed. [emphasis added]

34. The Employment Tribunal does not specifically refer to the evidence of Mr Sales, although he gave evidence denying the alleged sexual harassment. The Employment Tribunal did not state that it had considered the evidence of the claimant and Mr Sales and preferred Mr Sales' evidence because of its overall assessment of credibility. The finding of fact that the harassment did not occur was based on the fact that the claimant did not complain until she submitted her claim to the Employment Tribunal and, more particularly, the lack of any complaints from any of the other women who the claimant said had been present. While the lack of a contemporaneous complaint about sexual harassment may generally be understandable, the analysis of the Employment Tribunal was in the context of the claimant having submitted a grievance shortly after the alleged sexual harassment and not having mentioned it. These were factors that the Employment Tribunal was entitled to take into account.

35. The finding in respect of constructive unfair dismissal was in the following terms:

> Constructive Dismissal
>
> 45 **The incidents of 31 August and 7 October 2021 as described by the claimant were in our view routine workplace disputes between a supervisor and a worker**. There is nothing to indicate that the second respondent had decided that he would no longer be bound by the implied term of mutual trust and confidence. **If his behaviour was so bad as to justify such a conclusion then our expectation is that others would have complained.**
>
> 46 **The claimant did not resign in response to either incident, instead quite properly, she raised a grievance**. The **principal reason for her resignation was that she failed to secure the changing shift pattern** which she wanted.
>
> 47 We are satisfied that the third respondent had commenced an investigation. He did not make any decision with regard to the grievance and certainly he did not reject it. He was given advice by HR and this led to the cancellation of the meeting on 12 October 2021. Thereafter the respondent was given no proper opportunity to complete the grievance investigation before the claimant resigned.
>
> 48 The claimant was not entitled to a change of shift pattern. Certainly not unless the

> respondent concluded that this was necessary after a full investigation into her grievance. The fact that the respondent may have employed workers on an AM only contract two months after the claimant's resignation is irrelevant. But nevertheless we accept that those workers were employed on a temporary basis through an agency to cover the busy Christmas/New Year period.
>
> 49 **Accordingly, we conclude that the respondent did not breach the claimant's contract of employment and absent such a breach there can be no claim for constructive dismissal.**
>
> 50 The claimant was not dismissed by the respondent. Her claim for unfair dismissal is not well-founded and is dismissed. [emphasis added]

36. Again, on a proper assessment of the judgment, I consider that it is clear that the Employment Tribunal took account of the totality of the evidence in rejecting the claimant's contention that Mr Dove had behaved in a manner that constituted a fundamental breach of her contract of employment. I accept Mr Ogg's contention that while the Employment Tribunal stated "The incidents of 31 August and 7 October 2021 as described by the claimant were in our view routine workplace disputes" the Employment Tribunal must have rejected the evidence given by the claimant in her witness statement in which she asserted that Mr Dove had shouted, grabbed her sleave and sworn at her. The Employment Tribunal did not say that it had considered the evidence of Mr Dove and that of the claimant and preferred that of Mr Dove based on its overall assessment of their credibility. The main factor the Employment Tribunal relied on was the lack of any complaint about Mr Dove by colleagues of the claimant. Mr Ogg correctly refers to an exchange of texts between the claimant and a colleague, Scott Reeves, who said that he considered Mr Dove's conduct on 7 October 2021 was "disgusting", although he did not refer to any swearing, which was the claimant's main complaint. The Employment Tribunal referred to this at paragraph 18 and so can be assumed to have had it in mind. It did not constitute a complaint, not having been made to anyone other than the claimant. The Employment Tribunal was entitled to consider the lack of any complaints by the claimant's colleagues about Mr Dove's alleged conduct as significant.

37. Because the Employment Tribunal did not apply the inflexible rule the appeal necessarily fails. Even if the Employment Tribunal had made core findings of fact on the basis of an overall

assessment of credibility, I do not consider that would have amounted to an error of law of itself, unless it resulted in some demonstrable error of law, such as a failure to take account of significant evidence on material matters that was likely to have affected the outcome of the complaints.

38. I will deal with the other specific grounds of appeal for the sake of completeness.

> 7.1. The Tribunal **relied on the fact that other workers did not complain** about the incidents in question in paragraphs 43 and 45 of the Judgment (a point repeated in the Judgment at paragraphs 13, 17, 18, and 40), **notwithstanding the circumstances of the workers in question, namely low-paid cleaners working in a distribution centre**. The appropriate starting point was that the workers in question held comparatively insecure jobs, suffered from a power imbalance in the employer's favour, and accordingly were unlikely to complain about the incidents in question; [emphasis added]

39. There is nothing to suggest this was an argument that was made at the Employment Tribunal. Even if it was relevant that the claimant and her colleagues were "low-paid" cleaners working in a distribution centre, that did not mean it was an error of law for the Employment Tribunal to have regard to the lack of complaints. The claimant raised a grievance so had felt able to make a complaint.

> 7.2. The Tribunal in paragraph 13 of the Judgment **found that the Claimant had "*embellished*" her evidence by introducing factual evidence which was not contained in her claim form or her witness statement**. The Tribunal similarly relied, in relation to the Claimant's credibility, on the Claimant **only introducing "*during the course of oral evidence*" the fact that other workers of Romanian origin were also badly treated**. In so relying, the Tribunal **erred, having regard to the fact that the Claimant does not speak English as a first language, is a litigant in person, and the fact that it is not uncommon for litigants to introduce evidence in the circumstances described**; [emphasis added]

40. The Employment Tribunal specifically took account of the fact that the claimant does not speak English as a first language. The Employment Tribunal knew she was a litigant in person. The assessment of her evidence was a matter for the Employment Tribunal that was entitled to conclude that she had embellished her evidence. The claimant is not able to establish an error of law in this regard.

> 7.3. The Tribunal in paragraph 13 of the Judgment found that the Claimant had given evidence which was "*inconsistent with contemporaneous documents*" and "*in particular*" stated that it was "quite unbelievable" that an allegation of sexual harassment relating to 17 September 2021 "*could have happened without her making*

> *a formal complaint*". **However, the example relied upon by the Tribunal "in particular" in this regard was not an example of evidence being 'inconsistent' with contemporaneous documents, given that it is implicit in the Tribunal's criticism of the Claimant that there were no such contemporaneous documents at all**; [emphasis added]

41. While the Employment Tribunal did not phrase itself as clearly as it might, it was entitled to take account of the fact that, despite raising a grievance, the claimant did not raise the allegation of sexual harassment.

> 7.4. **The Tribunal in paragraph 13 of the Judgment found that the Claimant's "*credibility was damaged*" by the fact that she disputed the accuracy of a document despite having not read it herself, in circumstances in which the Claimant does not speak English as her first language and required an interpreter throughout the proceedings.** The Tribunal further relied on the fact that the Claimant had the trial bundle in her possession for seven months prior to trial and had not read the document, notwithstanding the Claimant's circumstances set out in this paragraph; [emphasis added]

42. The Employment Tribunal was entitled to rely on this as a factor in its assessment of the claimant's evidence. It was not an error of law to do so.

> 7.5. The Tribunal in paragraph 13 of the Judgment **alleged there was "no evidence" for the Claimant's allegations of wrongdoing against the Respondent**. Whilst, of course, **on a fair reading the Tribunal intended to mean there was no evidence other than the witness testimony of the Claimant for those allegations**, the use of that phrase is **itself indicative that the Tribunal erred in the evaluation of the Claimant's credibility and reliability**; [emphasis added]

43. The Employment Tribunal clearly took account of the evidence of the claimant, otherwise there would have been no point in it stating that it preferred the evidence of Mr Dove and Mr Sales to that of the claimant.

44. Despite the careful and considered arguments made by Mr Ogg, I do not consider that there is any error of law in the determination of the Employment Tribunal. I am grateful to Mr Ogg and Mr Ahmed for their helpful written arguments and concise oral submissions. I am also grateful to Mr Ogg and his solicitors for acting pro bono for the claimant.