Neutral Citation Number: [2026] EAT 101

Case No: EA-2024-000310-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 July 2026

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

MS CHUNXIU ZHAO

Appellant

- and –

GOVIA THAMESLINK RAILWAY (GTR) LIMITED

Respondent

- -
- -

The **Appellant** in person
Nathaniel Caiden (instructed by Greenwoods Legal Services Limited) for the **Respondent**

Hearing date: 30 June 2026

- -

JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The claimant in the employment tribunal was dismissed for sending an email to HR expressing her concern at the possibility of a colleague moving to be based at the railway station where she worked. Her stated reason for her concern was that he would form a clique with another colleague also based there, as they were both Indian. The tribunal did not err in concluding that the dismissal was fair.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The respondent operates rail franchises. The claimant was employed by it from April 2010 until, following a disciplinary hearing, she was summarily dismissed for the given reason of conduct.

2. During her employment, and following her dismissal, the claimant brought a number of employment tribunal claims, as a litigant in person. There was a multi-day hearing at Croydon (via CVP) during March 2024, before Employment Judge Leith, Mrs C Beckett and Mr K Murphy. The tribunal dismissed complaints of protected-disclosure detriment, victimisation, unfair dismissal by reason of protected disclosures, ordinary unfair dismissal and unlawful deduction from wages.

3. The claimant applied for a reconsideration. That was refused by the judge. The claimant also appealed, acting again in person. Her appeal was considered on paper not to raise any arguable grounds. However, arising from a rule 3(10) hearing, two amended grounds of appeal, drafted by counsel who appeared under the ELAAS scheme, were directed to proceed to a full appeal hearing. Those grounds relate solely to the decision to dismiss the complaint of ordinary unfair dismissal. At the hearing of this appeal, as before the tribunal, the claimant represented herself and Mr Caiden appeared for the respondent. This is my reserved decision.

The Facts

4. I draw the following summary from the findings of fact made by the tribunal and the documents that were before me.

5. The respondent has an Anti-Harassment policy. It contains a definition of harassment, and examples of conduct that might amount to harassment, including: “Spreading malicious rumours, or insulting someone by word or behaviour”, “Copying memos that are critical about someone to others who do not need to know”, and “Preventing individuals’ progression by intentionally blocking

promotion or training opportunities". The tribunal noted that the policy states:

> **"These examples are not exhaustive. Much of this behaviour would be considered to be gross misconduct, the penalty for which is summary dismissal. However, none of the above types of behaviour will be tolerated. All will result in a thorough investigation which may lead to a hearing and may constitute gross misconduct depending upon the circumstances of the case in question."**

6. The policy also states that "any manager who becomes aware of behaviour which breaches this policy, whether or not a complaint has been made, has a responsibility to take action."

7. The respondent also has "Rules of Conduct" which, the tribunal noted, "provided that failing to comply with obligations under the Respondent's equal opportunities and anti-harassment policy would be treated as gross misconduct, for which the normal penalty would be summary dismissal." The respondent also has what the tribunal called a disciplinary policy. The claimant submitted that this was not correctly described as a policy, because it set out procedures relating to the handling of disciplinary issues, rather than substantive disciplinary rules.

8. As to its substantive content, regarding investigations this document provided:

> **"It is very important to carry out investigations of potential disciplinary matters without unnecessary delay to establish the facts of the case. In the majority of cases this will require the holding of an investigatory meeting with the employee to establish the facts."**

9. The tribunal noted that this document "did not expressly provide that the employee would be invited to an investigation meeting in writing, or that the allegations would be set out in advance of such a meeting." Under the heading "informing the employee" this document stated:

> **"If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. (See Appendix A). The notification should contain sufficient information about the alleged misconduct to enable the employee to prepare their case for the disciplinary meeting. It is essential therefore, to provide copies of the completed investigation pack at least 7 days before the disciplinary meeting takes place."**

10. The tribunal made detailed findings about events leading up to the conduct for which the claimant was ultimately dismissed. These reflected the range of complaints that were before it. For the purposes of this appeal, which is much narrower in scope, the following summary suffices.

11. From July 2021 the claimant worked at Carshalton Beeches station as a Station Sales Clerk, also known as a Sales Point Assistant. Sales Point Assistants sell tickets and have some other responsibilities. Teresa Yerrell was the Station Manager to whom the claimant reported. Lynn D'Souza also worked as a Sales Point Assistant, at Carshalton Beeches, as well as elsewhere. She and the claimant worked different shifts. They saw each other occasionally, no more than a couple of times in an average month. Sunju Mani was a Gateline employee who occasionally worked shifts at Carshalton Beeches. Gateline employees supervise the operation of the automatic ticket gates.

12. On 25 June 2022 the claimant changed the safe code at Carshalton Beeches. She emailed the new code to Ms Yerrell, but not to Ms D'Souza. Ms D'Souza did not email the claimant requesting it. On 27 June Ms D'Souza worked the early shift. She could not access the safe and obtain a cash float and so could not take cash payments. After the claimant arrived for the late shift, an altercation ensued, involving the two of them and Ms Yerrell, who was also present at that time.

13. The claimant, Ms Yerrell and Ms D'Souza all emailed the Area Manager, Walid Basma, about the 27 June incident. He appointed another Station Manager, Ramla Abshir-Slevin, to investigate it.

14. On 9 July 2022 the claimant emailed Christopher Gibbs a query regarding the ticket office roster. On 11 July she followed up with an email to Justin Moore, the Resource, Planning and Strategy Manager for Stations. In summary, she wrote that she had heard a rumour that the previous roster clerk had been bribed by Ms D'Souza to alter the roster in her favour. She asked for an investigation to "clear these rumours". Mr Moore forwarded the email to Mr Basma.

15. On 13 July 2022 the claimant emailed Dave Rudman, a member of the HR team whose role related to recruitment. She wrote:

> **"Dear Dave Rudman,**
>
> **Good afternoon!**
>
> **I noticed that Carshalton Beeches Gate line have vacancy advertised, I got concerns and would like**

> **to talk to recruitment team or who is managing our station gate line recruitment. If you could help to pass my concerns:**
>
> **Carshalton Beeches is my home station, and I am ticket office. I am really concerned one of applicants who possibly applied Gate line job: Sunju Varkey Mani who is Sutton gate line part time staff, if he successfully gets the job in Carshalton Beeches, I will imagine he will form cliques with another member of staff, both come from India, because he was gossip and created problems in our station already. Please see investigation meeting Minutes attached.**
>
> **He might be more suitable to Wallington station; I will be highly appreciated if you could pass my concerns.**
>
> **Thanks, and best regards!"**

16. During her investigation Ms Abshir-Slevin was provided with copies of the claimant's emails to Mr Moore and to Mr Rudman. During a second interview with the claimant, on 15 July 2022, she raised the email to Mr Rudman and asked the claimant questions about it.

17. Ms Abshir-Slevin produced a report dated 10 October 2022. The appendices included the emails to Mr Moore and to Mr Rudman, the Anti-Harassment Policy and the Rules of Conduct. Ms Abshir-Slevin concluded that disciplinary action should be taken against the claimant in respect of certain emails that she had sent, unnecessarily copying individuals into grievance-related documents, and the emails to Mr Rudman and Mr Moore. The tribunal observed at [124]:

> **"The way that the allegations were expressed in Miss Abshir Slevin's report was not a model of clarity. The allegations were addressed by reference to the policy said to have been breached rather than the factual allegations being levelled at the claimant in each case, and inconsistencies in the way the appendices to Miss Abshir-Slevin's report had been numbered contributed to the confusing layout of the allegations."**

18. On 12 October 2022 Ms Abshir-Slevin wrote the claimant a letter headed "Notice of Investigation Outcome". The enclosures included a copy of her report and appendices. She wrote that the claimant would be required to attend a disciplinary hearing. The tribunal noted that the letter set out the allegations in the same form as they were set out in the investigation report, as follows:

> **"Chunxiu made many different accusations outside department organisation. Chunxiu has acted on few occasions outside her remit.**
>
> **Chunxiu breached the following policies:**
>
> **- <u>Appendix 8, Appendix 9 and Appendix 10 breach the Anti harassment policy section 4.</u>**

> **- Copying memos that are critical about someone to others who do not need to know**
>
> **- Appendix 11 breaches Anti-harassment section 3 and 4**
>
> **The Company considers that harassment is harmful to employees, employers and customers alike. It can impact badly on employee wellbeing, safety, organisational effectiveness and business success**
>
> **Preventing individuals progressing by intentionally blocking promotion or training opportunities.**
>
> **Copying memos that are critical about someone to others who do not need to know**
>
> **- Appendix 12 breaches Anti-harassment section 4**
>
> **Spreading malicious rumours, or insulting someone by word or behaviour**
>
> **- Appendix 14 breaches Anti-harassment section 4.**
>
> **Deliberately undermining a competent worker by overloading and constant criticism**
>
> **- Rules of conduct section 19**
>
> **You fail to comply with your obligations under the company's equal opportunity and anti-harassment policy***
>
> **Chunxiu ignored reasonable management instruction on more than one occasion."**

19. The 12 October letter informed the claimant that a hearing manager would be appointed who would be in contact to confirm the time and date of the disciplinary hearing. It informed her that an outcome may be dismissal, and of her right to be accompanied. On 15 November 2022 Tim Aveline, Area Station Manager – Gatwick Express, wrote to the claimant expressly referring to the letter of 12 October and requiring her to attend a disciplinary meeting on 22 November. The claimant was again informed that a possible outcome was dismissal and of her right to be accompanied.

20. The disciplinary hearing took place before Mr Aveline on 24 November 2022. There was a note-taker. The tribunal found the written minute to be broadly accurate. The tribunal wrote at [143]:

> **"The notes recorded that there was a discussion of both the email to Mr Rudman and the email to Mr Moore (as well as the other allegations). Mr Aveline then indicated that he would take some time to look further into the matters discussed. The hearing was adjourned."**

21. The tribunal continued, at [147]:

> **"The reconvened meeting took place on 25 January 2023. Mr Aveline announced his decision to the Claimant. His decision was that two allegations were substantiated, namely that:**
>
> **147.1. By the email to Mr Rudman, the Claimant sought to block another member of staff from progression, and this would not have happened but for Mr Mani's race.**

> **147.2. By the email to Mr Moore, the Claimant started a rumour she knew to be untrue regarding Ms D'Souza and the roster pattern."**

22. Mr Aveline found the other allegations not substantiated. He considered the appropriate sanction to be summary dismissal. Mr Aveline confirmed the dismissal in a letter of 26 January 2023. This set out his conclusions that the Mr Moore email on its own would only have justified a final written warning and that the Mr Rudman email on its own justified summary dismissal.

23. The claimant's appeal was heard by Sophie Hill, Head of Gatwick Express, on 28 February 2023. On 31 March Ms Hill wrote with the outcome. The email to Mr Moore had not been discussed with the claimant by Ms Abshir-Slevin, and notwithstanding that Ms Hill considered that it had been thoroughly covered at the disciplinary hearing, she decided not to take it into account. However, she considered it appropriate to take the email to Mr Rudman into account, and she considered that it constituted gross misconduct. She noted the claimant's lack of understanding of the seriousness of the allegation and lack of remorse. She concluded that summary dismissal was the correct outcome.

The Tribunal's Decision

24. The complaints considered by the tribunal about the dismissal were that it was an act of victimisation, that it was unfair as it was for the reason or principal reason that the claimant had made protected disclosures, and/or that it was ordinarily unfair. While the live grounds of appeal only challenge the decision dismissing the complaint of ordinary unfair dismissal, the conclusions in relation to that complaint to some extent built on those relating to the other complaints.

25. The tribunal first considered the reason for dismissal in the context of the victimisation complaint. At [240] it found that the dismissal was by reason of conduct. Mr Aveline had relied upon the Rudman email and the Moore email, but would have dismissed for the Rudman email alone, whereas for the Moore email alone he would have given a final warning. Ms Hill had relied only upon the Rudman email. Accordingly, the operative reason for dismissal was the Rudman email only.

26. In the course of its findings of fact, the tribunal had recorded, at [89], what the claimant had said in evidence about that email, and why she did not consider it to be racist, including this:

> **"She considered that people who came from a similar culture or with similar beliefs would naturally form cliques, and that saying so was not racist. Her evidence was that if you go to a pub, you will see people sitting in different groups – she referred (by way of example) to Muslims sitting with other Muslims and English people sitting with other English people."**

27. In the course of its conclusion on the victimisation complaint the tribunal said:

> **"240.3 We have carefully considered the Mr Rudman email. We consider that the email was, on its face, a clear breach of the Respondent's harassment policy. The Claimant was advocating for Mr Mani not to be appointed to Carshalton Beeches station. On a plain reading of the email, her reason was because (taken at its best) she was concerned that he would form a "clique" with Lynn D'Souza. The reason she was concerned he would form a clique was because of his race (and that of Ms D'Souza). We find that it was because of a pre-conception that she had about people from cultures other than her own, specifically in the context of those of Indian heritage.**
>
> **240.4. Importantly, as both Mr Aveline and Ms Hill noted, the Claimant showed no insight into the fact that her email was a breach of the Respondent's policy, or that it could be construed as racist. Indeed, the Claimant told Mr Aveline that she would repeat the behaviour. She gave the same evidence to the Tribunal. Flowing from that, both Mr Aveline and Ms Hill took into account the fact that the Claimant showed no remorse. It is perhaps conceptually understandable that she showed no remorse, given that she did not consider that she had done anything wrong.**
>
> **240.5. On the face of it, we find that the Mr Rudman email on its own gave the Respondent ample grounds to dismiss the Claimant. For the purposes of considering causation, we are of course not considering what this Tribunal would have done in response to the email; however, we consider that dismissing the Claimant for the email was not an inherently unreasonable or inexplicable approach, such as to suggest that there was some other underlying reason for the dismissal. On the contrary, it was a decision which was explicitly in line with the Respondent's policies, which made it clear that breach of the harassment policy would be treated as gross misconduct, for which the usual sanction would be summary dismissal."**

28. When considering the complaint of unfair dismissal by reason of protected disclosures the tribunal said that it could not sensibly be suggested that, had there not already been an investigation into the 27 June incident, the Moore and Rudman emails would not have been investigated [244].

29. Having concluded that the dismissal was not in any way influenced by the claimant's prior protected acts or protected disclosures, the tribunal turned to its conclusions on the complaint of ordinary unfair dismissal. I will set out this section of its reasons in full.

> **"246. It follows from what we have already said that we find that the reason for the dismissal was conduct. Mr Aveline (and Ms Hill) genuinely believed the Claimant had committed misconduct. There was no dispute about the underlying facts, in terms of the emails she had sent. The meaning that Mr Aveline and Ms Hill imputed to those emails was an entirely reasonable one.**
>
> **247. We turn then to consider the fairness of the dismissal. Bearing in mind the remainder of the *Burchell* test:**

247.1. It is implicit in what we have already said that Mr Aveline and Ms Hill had reasonable grounds for the belief that they had formed. They had seen the email; they had heard the Claimant's explanation; they had formed what was, on the face of it, and entirely reasonable view about what the email meant and consequently the fact that it was a breach of the Harassment policy.

247.2. In respect of the Dave Rudman email, we consider that the Respondent had carried out a reasonable investigation. Miss Abshir Slevin had discussed the email with the Claimant had some length. We cannot see what more could have been done to investigate the email – the content of the email spoke for itself.

247.3. In respect of the Mr Moore email, we consider that Miss Abshir-Slevin should have discussed it at the second investigation meeting. If she had been unable to do for any reason, she should have convened a third investigation meeting to do so, or at the very least asked the Claimant for comments in writing. But we consider that that failure was cured by Mr Aveline discussing the allegation with her at the disciplinary hearing (which the notes recorded that he did at some length). It was not a complex issue or allegation – it simply turned on one email. The Claimant knew the email would be in issue, because it was referred to in Miss Abshir-Slevin's investigation report. She had the opportunity to respond to the allegation. So overall, we consider that the Mr Moore email was properly investigated before Mr Aveline took his decision. Of course, Mr Aveline would not have dismissed for the Mr Moore email – he expressly indicated that he dismissed for the Mr Rudman email, and would have given a Final Written Warning for the Mr Moore email. And in any event, the Mr Moore email was entirely disregarded by Miss Hill at appeal. So even if we had considered that there was any latent unfairness in Miss Abshir Slevin failing to discuss the email with the claimant, that would have been cured by the appeal.

248. In terms of procedural fairness:

248.1. The Claimant was invited to a disciplinary meeting. She was given the opportunity to be accompanied.

248.2. She was sent the evidence against her in advance of that meeting.

248.3. She was given the opportunity to address the allegations in the disciplinary meeting.

248.4. She was then given the outcome in writing, in sufficient detail to understand why she had been dismissed.

248.5. She was given the opportunity to appeal.

248.6 Her appeal was heard by a more senior manager, and she was again given the right to be accompanied.

248.7. She was given the opportunity to expand on her grounds of appeal.

249. That is not to say that the process was a counsel of perfection. It was not. We have already dealt with Miss Abshir-Slevin's failure to discuss the Mr Moore email with the Claimant. In addition, the allegations as set out by Miss Abshir Slevin in the investigation report and disciplinary investigation meeting were troublingly vaguely expressed. The cross references to the documents appended to her report were inconsistent.

250. However, we are not assessing whether the process was a perfect one. What we must assess is whether it fell within the range of reasonable responses open to a reasonable employer. While the allegations were poorly expressed, Miss Abshir-Slevin's report as a whole did allow the Claimant to understand the misconduct of which she was accused. Putting it another way, she could not be said to have been in any real doubt about the sting of the allegations against her. So, notwithstanding the issues we have identified, we find that the process as a whole did fall within the range of reasonable responses.

251. We turn then to consider whether the dismissal itself fell within the range of reasonable responses. We are not assessing what we would have done in the Respondent's place. Rather, we are considering whether the action taken by the Respondent fell outside the range of reasonable responses open to a reasonable employer. In that regard:

251.1. The Respondent (reasonably) considered that the Claimant had breached the anti-harassment policy, by sending an email it characterised as racist.

251.2. The Respondent's policy made it abundantly clear that breaches of the policy would be viewed as a gross misconduct and were likely to lead to summary dismissal.

251.3. The Claimant had shown no insight or remorse – indeed she said to Mr Aveline that she would do the same thing again.

251.4. The Respondent is a customer service organisation. The Claimant worked alone, in a customer facing role. The Respondent therefore had to place a significant degree of trust in her.

252. In all of the circumstances, we therefore consider that the dismissal of the Claimant fell squarely within the range of reasonable responses.

253. It follows that the complaint of unfair dismissal fails."

The Grounds of Appeal

30. After an opening paragraph, the two live amended grounds of appeal are framed as follows:

"Ground 1

2. In considering whether the Claimant's dismissal was unfair, the ET erred in failing to take into account:

(i) that no letter was sent to the Claimant inviting her to an investigation meeting setting out the allegations she was to face, in particular, an allegation that her email to Dave Rudman ("the Rudman email") was considered to be discriminatory, meaning that the Claimant was, effectively, ambushed at the investigation stage;

(ii) that the extensive investigation report (referring the matter to a disciplinary hearing) did not allege that the Rudman email was discriminatory, rather in relation to the email it obliquely criticised the Claimant because she "doesn't want certain people to work at Carshalton beeches due to cliques or gossip concern. She is stating they gossip in the station, she is making spurious accusations…";

(iii) the letter inviting the Claimant to the disciplinary hearing did not set out the allegation that the Rudman email was discriminatory (in breach of the ACAS Code);

(iv) that the Claimant expressly said at the outset of the disciplinary hearing (when asked if she understood why she had been invited to the meeting) that she thought it was regarding the safe code incident on 27 June 2022; and

(v) that during the course of the disciplinary hearing, the Claimant expressly stated that "she had never been told [the Rudman email and Justin Moore allegations] would be included in the hearing today".

3. Whilst the ET was entitled to arrive at the conclusion that the dismissal was fair, it was an error to fail to weigh these important matters which, individually or collectively, could have rendered the dismissal unfair. In the alternative, if the ET weighed these matters, its conclusion that the dismissal was fair was perverse.

> **4. Whilst the ET was entitled to conclude that the Claimant knew the Rudman email "would be in issue", that conclusion could only be arrived at after considering §2(iv) & (v) above. In the alternative, that conclusion was perverse given the chronology and the Claimant's level of English.**
>
> **Ground 2**
>
> **5. The ET erred in failing to weigh the fact that in dismissing the Claimant, the Respondent concluded that the Claimant would not have sent the Rudman email if the relevant member of staff was not Indian when the Claimant's position was the opposite: that she would have sent the same email if the members of staff shared the same nationality or religion. This conclusion was axiomatic to the Claimant's dismissal."**

The Law

31. Where the employer has shown that the reason for dismissal related to the employee's conduct, whether it is a fair or unfair dismissal will then turn on the tribunal's application of section 98(4) **Employment Rights Act 1996**. That sub-section provides:

> **"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**
>
> > **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> >
> > **(b) shall be determined in accordance with equity and the substantial merits of the case."**

32. **British Home Stores v Burchell** [1980] ICR 303 indicates that, in a conduct case, two of the questions that the tribunal should consider are whether the employer had reasonable grounds to sustain its belief in the misconduct in question and whether it "had carried out as much investigation into the matter as was reasonable in all the circumstances of the case". Other decisions, such as **Sainsbury's Supermarkets Ltd v Hitt** [2002] EWCA Civ 1588; [2003] ICR 111, make clear that the tribunal should apply a "band of reasonable responses" approach when considering the process followed by the employer, as well as the decision to impose the sanction of dismissal.

33. In **Taylor v OCS Group Limited** [2006] EWCA Civ 702; [2006] ICR 1602 the Court of Appeal held at [43] that the tribunal " must focus on the statutory test and … in considering whether the dismissal was fair, they must look at the substance of what had happened throughout the

disciplinary process" including at the appeal stage. Further, when considering issues of procedural fairness, the tribunal should do so having regard to the nature of the conduct that it has found was the reason for dismissal, as section 98(4) requires it to consider whether the employer acted reasonably in treating *that* reason as a sufficient reason to dismiss: see **Taylor** at [48].

34. In a case where the dismissal was for a reason relating to the conduct of the employee, the effect of section 207(3) **Trade Union and Labour Relations (Consolidation) Act 1992** is to require the tribunal to take into account the provisions of the *ACAS Code of Practice on Disciplinary and Grievance Procedures* (2015) where they appear relevant to any question relating to fairness.

Discussion and Conclusions

35. As noted, while she had an ELAAS adviser at the rule 3(10) hearing, at this full appeal hearing the claimant represented herself. In her skeleton and oral arguments she raised a number of issues that are not within the scope of the live amended grounds of appeal. In what follows I have focussed on the challenges that are specifically raised by those grounds. I have taken into consideration the arguments raised by the claimant, and by Mr Caiden, that are relevant to them.

Ground 1

36. This ground, in summary, raises two challenges. The first contends that the tribunal erred by not taking into account the things set out at para. 2 (i) – (v). The criticism is not that the tribunal attached insufficient weight to these, but that it failed to take them into account at all. The point is essentially repeated in the first sentences of para. 3 and para. 4. This line of challenge accepts that it would have been open to the tribunal to find the dismissal fair, had it engaged with these features, but contends that they were important features which *could* have supported a finding of unfairness, and should have been expressly considered. The second, alternative, challenge advanced by ground 1 is that, having regard to these same features, the decision that the dismissal was fair was perverse. That contention is advanced by the second sentences of each of paras. 3 and 4.

37. The essential thread running through the five features to which this ground relates (as set out at para. 2 (i) – (v)) is that the claimant was not, prior to the start of the disciplinary hearing with Mr Aveline, fairly on notice that one of the specific charges she was facing, and which might lead to her being dismissed, was that the Rudman email was discriminatory.

38. Taking, first, the factual feature identified at para. 2 (i), as the findings of fact reflect, Ms Abshir-Slevin did not write to the claimant referring to the Rudman email, and indicating that it would be discussed at an investigation meeting. Rather, she simply raised it in the second interview on 15 July 2022. The claimant was, as a matter of fact, not forewarned of that.

39. This, however, was plainly something that the tribunal considered. It noted at [19] that the respondent's disciplinary procedure provided for an investigation meeting "in the majority of cases"; and that it did not expressly provide that the employee would be invited to an investigation meeting in writing, nor that the allegations would be set out in advance. It found that Ms Abshir-Slevin did raise the Rudman email with the claimant at a meeting [122]; and, when reaching its conclusions, for the purposes of the **Burchell** test as to whether the respondent had carried out a reasonable investigation, it expressly referred to the fact that she had discussed it with the claimant "at length" [247.2]. It also noted that there was no dispute that the email had been sent by the claimant [246].

40. Further, section 98(4) does not require, nor do the authorities indicate, that, in order to act fairly, the employer is obliged in every case to carry out an initial fact-finding investigation, or to do so in a particular way, prior to moving to disciplinary charges and a disciplinary hearing. As for the *ACAS Code*, it states at [4] that employers should "carry out any necessary investigations, to establish the facts of the case" and at [5] that "in some cases" this will require the holding of an investigatory meeting with the employee before proceeding to a disciplinary hearing.

41. The tribunal was therefore not bound to regard the fact that the claimant was not notified in

writing, or forewarned, that Ms Abshir-Slevin had widened her investigation to include the Rudman email, and wanted to discuss it with her, as rendering the dismissal unfair. What the tribunal had to consider, pursuant to section 98(4), and in line with the authorities, was whether the claimant had a fair opportunity, in the overall process, to defend herself against the charge of misconduct based on the Rudman email being discriminatory, on which Mr Aveline and then Ms Hill relied.

42. I therefore conclude that the tribunal did not fail to consider what weight to attach to the matter referred to at para. 2(i), nor was it perverse not to conclude that it rendered the dismissal unfair.

43. In argument, the claimant submitted that the raising of the Rudman email was contrary to the respondent's grievance and Anti-Harassment policies. In summary, there had been no written grievance raised about the email by Mr Rudman, Ms D'Souza or Mr Mani, no acknowledgment of any such grievance, and no meeting with any of them. The only complaint about it was from Ms Abshir-Slevin, and so she should not also have been the person to investigate. The claimant submitted that, as a minimum, fairness required that an employer follow its own procedures. She also argued that the handling of this aspect contravened the ACAS Guidance on workplace investigations.

44. These criticisms are all beyond the scope of the live grounds of appeal. But in any event, as the tribunal found at [17], the Anti-Harassment Policy placed a duty on managers to investigate matters of which they became aware, whether or not a complaint had been made. It found that Ms Abshir-Slevin was provided with copies of the Moore and Rudman emails [122], and that, had her investigation of the 27 June 2022 incident not been in train, they would still have been investigated [124]. In any event it is not the law that a failure by an employer to follow its own procedure in some respect will necessarily render a dismissal unfair. Ms Abshir-Slevin was neither the recipient, nor one of the subjects, of the email. It was not an error for the tribunal not to conclude that it was unfair for her to be the person to investigate it.

45. The next matter relied upon in ground 1, at para. 2 (ii), is not that Ms Abshir-Slevin's report did not raise an allegation about the Rudman email *at all*, but that it did not allege that it was *discriminatory*. The related criticism, at (iii), is that the letter inviting the claimant to the disciplinary hearing did not set out the allegation that that email was *discriminatory*, and it is contended that this was contrary to the *ACAS Code*.

46. The *ACAS Code* states, at para. 9: "If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. The notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting."

47. In argument the claimant also contended that Ms Abshir-Slevin's letter of 12 October 2022 could not be relied upon at all, because it merely notified her of the outcome of the investigation. The only letter inviting her to a disciplinary hearing was the letter from Mr Aveline of 15 November 2022, which did not set out the charges at all. This particular criticism goes beyond the live amended grounds of appeal, but it is, in any event, ill-founded. The letter from Mr Aveline referred back to the letter from Ms Abshir-Slevin, and conveyed clearly that the claimant was being invited to a disciplinary hearing in respect of the charges that Ms Abshir-Slevin's earlier letter had set out.

48. Returning to the substance of the criticism advanced by ground 1, in relation to (ii) and (iii), Mr Aveline's dismissal letter of 26 January 2023 described the charge in relation to the Rudman email, which he upheld, and on the basis of which he dismissed the claimant, as being that "in breach of sections 3 and 4 of the Anti-Harassment Policy, you tried to prevent an employee from gaining a full time role in the Company due to him being of Indian origin." The claimant submitted that it should have been regarded as significant that the words "due to him being of Indian origin" did not appear in the charge as formulated by Ms Abshir-Slevin, and were introduced by Mr Aveline.

49. Mr Caiden submitted that Ms Abshir-Slevin's report and charge sheet sufficiently explained that the Rudman email was alleged to contravene the Anti-Harassment Policy. It was not essential to spell out that the allegation was, more specifically, that it was discriminatory, as the particular provisions of the policy relied upon had been identified. Further, or alternatively, it was not necessary to do so, given that the entire charge was about an email that the claimant did not dispute sending, of which she had been given a copy, and in which she expressly referred to Ms D'Souza and Mr Mani both coming from India. Mr Caiden submitted that, in referring to the charge in the way that he did, Mr Aveline was not moving the goalposts, but merely making explicit what was, or should have been, clear and obvious to the claimant, in terms of why the email was regarded as objectionable.

50. The import of ground 1's reliance on the matters at (iv) and (v) is that it was a material feature, which should have been expressly considered by the tribunal, that the claimant was saying, at the start, and later on, in the disciplinary hearing that she did not appreciate that the matters to be considered included the Rudman email. The criticism here is that the tribunal failed to consider the significance of this for the question of whether she was fairly on notice, not merely of the specific charge in relation to that email, but of the fact that it was the subject of a disciplinary charge *at all*.

51. As to that question, while the tribunal expressed some misgivings about the format of the charges in Ms Abshir-Slevin's report at [124], it also specifically further considered at [249] and [250] whether the shortcomings that it had identified meant that the process fell outside of the band of reasonable responses. It concluded that they did not, in particular because the report *as a whole* did allow the claimant "to understand the misconduct of which she was accused", and she could not have been in any real doubt about "the sting of the allegations against her." That is, at least, a conclusion that the claimant could be in no doubt that the Rudman email was on the charge sheet.

52. The tribunal had evidence to support that conclusion. The report attached the Rudman email as an appendix. It also attached the minute of the second investigatory meeting at which Ms Abshir-

Slevin had discussed it with the claimant, and it contained a section specifically discussing it. The allegations set out in the report, and reproduced in Ms Abshir-Slevin's letter enclosing it, included that the Rudman email (being the document at appendix 11) breached sections 3 and 4 of the Anti-Harassment Policy, the provisions of which were referred to, and a copy of which was also attached to the report. The tribunal specifically found, at [248.2], when considering procedural fairness, that the claimant "was sent the evidence against her" in advance of the disciplinary hearing.

53. The tribunal did not specifically refer, in its decision, to the claimant's statements during the course of the disciplinary hearing said to be to the effect that she had not appreciated that the Rudman email was the subject of a distinct charge at all. The ground also refers at para. 4 to the claimant's "level of English". As to that, however, while English is not the claimant's first language, the tribunal would have been well placed to assess her command of it, in terms of both reading and writing, as well as spoken English, from the material before it and from her participation in the hearing.

54. The tribunal was also not obliged to refer to every feature of the evidence. I note also that in the second passage in the disciplinary hearing, the claimant's principal point might be read as being, as elsewhere, that she considered that it was wrong for Ms Abshir-Slevin ever to have widened her investigation to include the Rudman email (and the Moore email), and wrong for her to have included them in the disciplinary "pack" for this hearing. In all events, as Mr Caiden noted, the tribunal did not conclude that the claimant had failed to appreciate that the Rudman email was the subject of a disciplinary charge at all. Standing back, while it might have been better if the tribunal had said something specific about these passages, I do not think it vitiates its reasoning that it did not do so.

55. In argument the claimant also referred to something said by Mr Aveline in the course of the disciplinary hearing, being: "we are here today to discuss an incident on 27th June". The ground does not specifically rely on this statement. But in any event what the minute records was that, in response to a reference by the claimant to September, he said was "we are here today to discuss an incident on

27th June, and you are now stating the conversation didn't happen until September". It is apparent, therefore, that Ms Aveline was here simply addressing the question of *when* the incident occurred.

56. I turn from the general question of the Rudman email being the subject of a disciplinary charge, to the particular question of the substance and gravamen of that charge. In light of the facts found by the tribunal, and particularly in light of the content of the dismissal letter, I agree with the claimant's submissions to me that *the* thing that caused Mr Aveline to consider that she should be dismissed for writing the Rudman email, was his view that the content was discriminatory by reference to race. This was also *the* thing that caused Ms Hill to uphold that decision, including the sanction. The tribunal also stated, at [251.1], when considering whether dismissal as a sanction was reasonably open to the respondent, that it had reasonably considered that the claimant had breached the Anti-Harassment Policy by sending an email that "it characterised as racist."

57. The tribunal therefore, in my judgment, needed to consider whether the claimant had a fair opportunity to defend herself, specifically against the allegation that the Rudman email was regarded as particularly serious, and potentially as warranting dismissal, not merely on the basis that it was alleged to be an improper attempt to meddle, as such, in the exercise of filling the Gateline post at her station, but because of the alleged discriminatory nature of the content.

58. As to that, as noted, the framing of the disciplinary charges in Ms Abshir-Slevin's report and letter did not expressly set out that the Rudman email was said to be discriminatory. While the definition of harassment in section 4 of the Anti-Harassment Policy referred to a list of protected characteristics including race, the only part of that section highlighted in the charges, was the examples of types conduct that might amount to harassment.

59. However, as I have set out, the tribunal did revisit in the course of its conclusions on the unfair dismissal complaint, at [249] and [250], the concerns that it had expressed at [124] about the format

of the disciplinary charges. Its conclusion at [250] was that "Ms Abshir-Slevin's report as a whole" did allow the claimant to understand the misconduct of which she was accused, and that she "could not be said to have been in any real doubt about the sting of the allegations against her".

60. I note also that, when considering the victimisation complaint relating to the dismissal, at [240.3], the tribunal observed that on a plain reading of the email, the claimant's reason for advocating against Mr Mani being moved to Carshalton Beeches was that she was concerned that he would form a clique with Ms D'Souza, and the reason in turn why she was concerned about that was "because of his race (and that of Ms D'Souza)". Further, at [247.2], the tribunal said that Ms Abshir-Slevin had discussed the email with the claimant "at some length" and that the content "spoke for itself". In this regard, I note that the Abshir-Slevin report attached her note of the 15 July interview, in the course of which she asked the claimant why "his country" mattered and why she had raised "where they are from", asked whether the claimant considered it contravened the Anti-Harassment Policy and about whether she would have a concern about "any other Indian person working here", and (when the claimant denied that), asked whether she could see why her message "could be perceived differently." The report itself had a section which highlighted these features of that interview.

61. Given the concerns which the tribunal had itself identified about the way that the disciplinary charges were framed, the fact that the charge as framed by Ms Abshir-Slevin did not expressly refer to the allegation that the email was discriminatory, and the fact that this was, in substance, the reason why the claimant was dismissed for writing it, it would have been better had the Tribunal spelled out at [250] what it considered the "sting" of the allegations relating to the Rudman email to be. But standing back, and reading these passages as a whole, I conclude that the tribunal did consider that, going into the meeting with Mr Aveline, the claimant did understand – though she strongly disagreed – that the gravamen of the charge was that the content was regarded as discriminatory.

62. Mr Caiden argued that, even if the tribunal should have concluded that the claimant was not, prior to the start of the disciplinary hearing before Mr Aveline, sufficiently on notice of the charge that the Rudman email was discriminatory, in any event, reading its reasons as a whole, the tribunal plainly considered that the claimant had been given a fair opportunity (which she had taken) to respond to this specific allegation in the "end-to-end" process, including the appeal stage; so that it was in any event entitled to conclude that the dismissal was, overall, fair.

63. As to that, I note that, in its self-direction as to the law, the tribunal did not specifically refer to **Taylor** or otherwise to the principle that fairness under section 98(4) falls to be judged by reference to the "end-to-end" process, including the appeal stage. However, the principle is an extremely well-established and familiar one to employment tribunals. Further, it is clear that, in its substantive reasoning, the tribunal did have it in mind. In its discussion of the Mr Moore email, the tribunal concluded that, notwithstanding that (unlike in the case of the Rudman email) Ms Abshir-Slevin did not raise it in interview with the claimant, a reasonable investigation had been carried out in relation to it by the point when Mr Aveline took his decision. But it also noted that it was in any event not relied upon by Ms Hill, so that any earlier unfairness in this regard "would have been cured by the appeal" [247.3]. I agree with Mr Caiden that this shows the tribunal having regard to the end-to-end process, including the appeal stage, when considering an issue of fair process.

64. Turning specifically to the Rudman email, the charge in question related to the content of a single email, which the claimant did not dispute sending, and of which she had been provided with a further copy prior to the hearing before Mr Aveline. As noted, the tribunal had evidence that the discrimination issue relating to it had been specifically raised with the claimant by Ms Abshir-Slevin, and by Mr Aveline at the disciplinary hearing, including the reference in it to Mr Mani, and Ms D'Souza being Indian, and whether she appreciated that his was a problem "as far as the Equal Opportunity & Anti-Harassment Policy is concerned." The tribunal also had evidence, from Ms

Hill's decision, that, at the appeal hearing, the claimant again had the opportunity to, and did, put forward her case in response to the allegation that the email was discriminatory.

65. At [246] the tribunal said that the meaning which Mr Aveline *and Ms Hill* imputed to the email was entirely reasonable. At [247.1] it said that Mr Aveline *and Ms Hill* had reasonable grounds for their belief and that they "had heard the Claimant's explanation". It also found at [247.2] that Ms Abshir-Slevin had discussed it with the claimant "at some length", that it could not see what more could be done to investigate it, and that the content "spoke for itself." When generally considering procedural fairness at [248] it also noted that the claimant was given the opportunity to appeal, before a more senior manager, and was given the opportunity to expand on her grounds of appeal.

66. Standing back, I conclude, in light of all these features of the decision, that the tribunal did, in substance, consider that, in the end to end process, including the appeal, the claimant had had a fair opportunity to defend herself against the charge that this email was discriminatory. In light of the features of the evidence to which I have referred, that was also not a perverse conclusion.

67. I conclude that the tribunal did not err by failing to taken into account any of the features referred to at para. 2(i) to (v) of this ground, nor did any of them render its conclusion that the dismissal was fair perverse.

68. Ground 1 therefore fails.

Ground 2

69. In submissions the claimant suggested that the reference to Mr Mani and Ms D'Souza both coming from India was merely descriptive. This argument is not advanced in this ground of appeal and it is plainly untenable. The tribunal plainly properly concluded that the respondent reasonably concluded that the claimant referred to this, because it was the material explanation she put forward for her belief that the two of them would form a clique, which was in turn the reason for her raising

her concern at the possibility of Mr Mani being given the Gateline job at Carshalton Beeches.

70. The ground advances a different criticism. It contends that the tribunal failed to consider that in dismissing the claimant the respondent concluded that she *would not* have sent the email if "the relevant member of staff" were not Indian, whereas her position was "the opposite" of that, being that she *would* have sent the email "if the members of staff shared the same nationality."

71. The starting point is what the email said, which was, in substance, that the claimant was concerned that, if appointed, Mr Mani would form a clique with Ms D'Souza because both come from India. It is clear that the claimant's case, at every stage when it was put to her that her attitude was discriminatory – whether by Ms Abshir-Slevin, Mr Aveline or Ms Hill – was in substance the same. As the tribunal described at [89.2] how she put it in evidence to the tribunal itself, it was that "people who came from a similar culture or with similar beliefs would naturally form cliques, and that saying so was not racist"; and her view would be the same if, in her examples, the colleagues were two Muslims, two Chinese Buddhists, or two people of any other shared race or religion.

72. The tribunal had evidence that the respondent's managers did understand that this was her case. Ms Abshir-Slevin wrote that "Chunxiu believes that if staff members are from the same country religion, they will form cliques." It is clear from the whole dismissal letter, that when Mr Aveline referred in it to the claimant having said she would not have sent the email if Mr Mani wasn't Indian, this meant: if he was of a different race to Ms D'Souza. Ms Hill stated that she had upheld the dismissal because the claimant had tried to block Mr Mani from moving to Carshalton Beeches "because of his race, namely the fact that your other colleague at this station is also of that race and you felt they would form a clique."

73. At [240.3] the tribunal found that on a plain reading of the Rudman email the reason why the claimant was advocating for Mr Mani not to be assigned to Carshalton Beeches was because she was

concerned that he and Ms D'Souza would form a clique, and that she had that concern "because of his race (and that of Ms D'Souza)". The tribunal also held that the meaning which both Mr Aveline and Ms Hill imputed to this email was "an entirely reasonable one".

74. I agree with Mr Caiden that ground 2 proceeds on a false premise that the two propositions it sets out are opposites. The tribunal plainly found that both Mr Aveline and Mr Rudman reasonably considered that the claimant would not have sent the email if Mr Mani had not been Indian – because he would not then have been of the same race as Ms D'Souza, and that it was no answer to say that she would still have sent it if *both* had had some other shared race or religion. The claimant's stated concern was that, because they were both Indian, they would form a "clique", meaning not merely that she inferred that they would have cultural or other interests or heritage in common, but that she believed that they would *exclude her* because she was not of their shared race. The tribunal properly found that the respondent reasonably considered that stance to be discriminatory.

75. For these reasons ground 2 fails.

Outcome

76. As I have noted, the claimant maintained before the tribunal (and the EAT) that the Rudman email was not discriminatory. She remains highly aggrieved that she lost her job of twelve years because of it. But the tribunal correctly identified that the issue for it was whether the dismissal for sending it was fair, applying section 98(4) of the **1996 Act**. The question for the EAT is whether the tribunal erred in concluding that it was fair, for any of the reasons advanced in the two live amended grounds of appeal. Both grounds have, on all points, failed. The appeal is therefore dismissed.