

Neutral Citation Number: [2026] EAT 99

Case No: EA-2024-001577-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London
EC4A 1NL

Date: 04 August 2026

Before:

THE HON. LORD FAIRLEY, PRESIDENT

Between:

Fieldfisher LLP

Appellant

- and -

Djamshid Rustambekov

Respondent

Zac Sammour and Joseph Lavery, of Counsel, (instructed by **Lewis Silkin LLP**) for the
Appellant
Tom Coghlin K.C. (instructed by **Brahams Dutt Badrick French LLP**)
for the **Respondent**

Hearing date: 16 June 2026

JUDGMENT

SUMMARY

Unfair dismissal; substitution of the Tribunal's view of the evidence

The claimant was dismissed for the stated reason of misconduct. The Employment Tribunal concluded that the dismissal was unfair. In reaching that conclusion, it relied upon evidence about an incident that formed no part of the reason for dismissal but which, it concluded, exercised a “negative pull” on the evidence about one of the matters which formed part of the employer’s composite reason for dismissal. The employer appealed. It contended that the Tribunal had erroneously substituted its view for that of the decision maker.

Held:

A particular application of the principle that a Tribunal must not substitute its own view of reasonableness is that it must not substitute its own evaluation of the evidence that was before the decision-maker. That, however, was exactly what the Tribunal did in this case. That substitution led it to its erroneous conclusion that the respondent did not have reasonable grounds to conclude that the claimant had committed one of the acts of misconduct for which he was dismissed. As that conclusion was a material part of to the Tribunal’s reasons for concluding that the dismissal was unfair, its Judgment to that effect was set aside.

THE HON. LORD FAIRLEY, PRESIDENT

Introduction

1. This is an appeal by Fieldfisher LLP (“the appellant”) against a liability Judgment of an Employment Tribunal at London Central (Employment Judge Anthony, sitting alone). The Tribunal concluded that the appellant’s dismissal of Mr Rustambekov (“the claimant”) was unfair in terms of section 98 of the **Employment Rights Act, 1996** (“ERA”).

Facts

2. The appellant is a firm of solicitors. It employed the claimant as a Senior Associate in its Dispute Resolution Department. His employment commenced in June 2019.

2. It was common ground before the Tribunal that the reason for the dismissal of the claimant on 6 November 2023 was that the appellant genuinely believed that:

a) in January 2023, the claimant had sexually harassed a colleague (“C1”) after a party organised by another employee of the appellant by repeatedly inviting her to cancel her Uber and return with him to the office; and

b) on 20 July 2023, the claimant had acted inappropriately toward a different colleague (“C2”) at a work party by following her to the toilets, placing his arm around her waist and waiting for her outside the toilet.

3. Within the disciplinary process that led to his dismissal, the claimant had also faced a further allegation that the appellant ultimately concluded had not been proved. This was an allegation that, at the same work event as featured in allegation b), the claimant had sexually assaulted C1 by grabbing her, pulling her into a disabled access toilet, locking the door to prevent her from leaving, pinning her against the wall, kissing her, and trying to place his hand under her skirt all without her consent.

4. The disciplinary process began as a result of a formal complaint made by C1 about the claimant on 30 July 2023. That complaint led to an investigation into all three of the matters described above. The investigation was carried out by the appellant’s HR Business Partner, Matt Atkin. Over the course of two days, Mr Atkin interviewed a number of potential witnesses including C1 and C2. The Tribunal summarised the evidence that was ingathered by Mr Atkin at ET § 19 to 44.

5. Having taken notes of his discussions with potential witnesses, Mr Atkin produced a report dated 1 August 2023. The Tribunal summarised Mr Atkin’s summary findings at ET § 46. The report included the following passages:

“[C1] advised that in January 2023 after a ‘team drinks event’, while she was waiting for a taxi, [the claimant] had told her ‘to cancel it [taxi]’ and insisted she ‘come back to the office with me [the claimant]’. This was corroborated by [BH] (Senior Associate) who was present at the time. [BH] advised that [the claimant] repeatedly pestered [C1] to stay with him, even offering to drive her home and that [C1] was clearly uncomfortable by his advances.”

and

“[C2] confirmed that [the claimant] had been flirty throughout the evening [of 20 July 2023] and had walked with her when she left the table to go to the toilet. She alleges that [the claimant] had placed his hands on her waist and she had had to push him away. Then, when she exited the toilet, [the claimant] was waiting for her and walked her back to the table. She alleges that he tried to place his hands on her waist a second time and she had to push him away again. [JS] confirmed that she witnessed [the claimant] place his hands on [C2]’s waist and had decided to follow [C2] into the toilet to make sure she was OK. She confirmed that [C2] has said she was fine and had just told him to *"Fuck off"*.

6. The account given to Mr Atkin by BH about the January 2023 episode was:

“I remember something that happened around January, maybe 6/7 months ago, after we had been out for drinks. At the end of the night, we had ordered Ubers home but [the claimant] was trying to persuade [C1] to cancel her Uber and go home with him. He was pestering her and [the claimant] said he could drive her home, but the Uber arrived and so nothing else happened. I do know that [C1] felt uncomfortable with this.”

7. In Mr Atkin’s interview with C2 about the events of 20 July 2023, she told him:

“I got up to go to the toilet and he said he’d come with me walk with me - he put his hand on my waist and I took it off. Jas came to the toilet and asked if I was ok. I said I was.

[The claimant] was waiting when I came out and walked back to the table and he tried to put his hand on my waist again. There was flirty behaviour from him through the night.

8. When asked if she was “aware of the claimant’s behaviour being inappropriate”, C2 replied :

“I’m not aware that he’s made advances to anyone – he’s been a bit flirty but not overstepping mark or necessarily made me feel uncomfortable. I’m not aware of him acting like that on previous occasions.”

9. The Investigation Report also contained a summary of the evidence about the alleged sexual assault on C1 on 20 July 2023. This included C1’s account of the incident and evidence from several others (including C2) of C1 looking “really upset”, “pale and stunned”, and “shocked and scared” immediately after she and the claimant emerged from the accessible toilet. There was further evidence C1 having given an immediate account of what she said had happened inside the toilet, but later having told another colleague that “nothing else happened” beyond her being locked in the toilet with the claimant. The same colleague confronted the claimant who appeared “contrite” at the suggestion that he had locked C1 in the toilet, and accepted that his behaviour may have been inappropriate because he was drunk.

10. On 7 August 2023, following his return from a period of annual leave, the claimant was suspended and invited to attend a disciplinary hearing. He was provided with a copy of Mr

Atkin's Investigation Report. He was not given copies of the notes of the discussions that Mr Atkin had with the various witnesses (ET § 48).

11. The Disciplinary Hearing was held on 16 August 2023. It was conducted by the one of the appellant's partners, Ms Banga. Ms Banga took the claimant through the allegations in the Investigation Report and noted his responses.

12. In relation to January 2023 episode, the claimant stated that he recalled asking C1 to stay as there were others still at the bar where the event was being held. He denied asking C1 to come back to the office. He similarly denied that he pestered C1 and offered to drive her home. He expressed surprise that BH had corroborated aspects of C1's account. He gave Ms Banga the name of another employee (AP) who, he said, could corroborate his account.

13. In relation to C2's evidence, the claimant highlighted that she had stated to Mr Atkin that the claimant did not "cross the line". He stated he did not recall touching C2's waist, but accepted that, if he did, it would have been inappropriate.

14. Understandably, a great deal of the discussion between the claimant and Ms Banga related to C1's allegation of sexual assault. The claimant accepted that he had invited C1 into the disabled access toilet to continue a private conversation, but emphatically denied sexually assaulting C1 or behaving in a sexually inappropriate way towards her. He denied kissing her or attempting to put his hand up her skirt. He described her account as "complete fiction" and suggested that CCTV from the venue would provide circumstantial support for his position.

15. On 17 August 2023, the claimant provided Ms Banga with a written response to the various allegations against him. The written response reflected what he had said during the Disciplinary Hearing. In addition (ET § 58), the claimant's solicitor provided Ms Banga with a copy of a WhatsApp message sent by the claimant to C1 which stated:

"Hi [C1], did you get home okay?"

The Tribunal's reasons do not record the date of that message.

16. Following the Disciplinary Hearing, Ms Banga carried out her own interviews with potential witnesses. These included the employee, BH, who was said to have witnessed the episode in January 2023. His evidence to Ms Banga was that whilst he could not recall what was the reason for the January 2023 event, he remembered being there. He recalled that he and C1 had "ordered Ubers" and that the claimant "kept asking C1 to cancel hers". BH stated it was not possible that the claimant was asking C1 to go back to the venue because it was late. Rather, the claimant was suggesting that C1 should go with the claimant, who was offering to drive her home.

17. Ms Banga also interviewed C2. She stated that the claimant had put his hands on her waist twice during the work event on 20 July 2023. Ms Banga questioned C2 as to whether she had tried to get away from the claimant. C2 stated that she was "bored" so she got up and joined C1 and another colleague. In response to the question from Ms Banga:

"That night, would you describe yourself as feeling uncomfortable...when [the claimant] was waiting outside or when he put his hands on your waist?"

C2 replied:

“I did. I definitely felt uncomfortable when he first put his hands on me and I thought it was strange he had waited outside the toilet for me when I had told him not to. I do not know why he tried to put his hands on me a second time. I had told him to stop.”

18. The Tribunal noted that the quoted passage was different to what C2 had said to Mr Atkin who had been told that she was “not uncomfortable” at the claimant’s behaviour towards her that night. At ET § 119, the Tribunal stated:

“I find the change in her evidence is plainly as a consequence of a leading question. I find this significantly reduces the weight which can be attached to the response.”

19. A significant focus of these further investigations (all of which the Tribunal set out in detail at ET § 65 to 122) was upon the allegation that the claimant had sexually assaulted C1. A great deal of the further evidence gathered by Ms Banga appears to have concerned the impressions of co-workers about the claimant’s character rather than eye-witness evidence as to the events of 20 July 2023. It did, however, contain evidence of C1’s demeanour and behaviour shortly after that event,

20. In particular, one witness described C1 as looking “frazzled” when she returned from the area where the toilets were during the evening of 20 July. Another witness, JS, described to Ms Banga what she saw of the July 2023 incident in the following way:

“She then pulled me back into the disabled toilets. She told me he had tried kissing her but she was vague. She was obviously in shock...It was her face. She looked shocked...She looked very broken, shocked almost statuesque. I asked her what had happened and she said he had kissed her, she could not get out and he was standing in front of the door. She said she did not know what had happened but she could not get out.”

21. The owners of the venue at which the 20 July 2023 event took place agreed to provide the respondent with a written description of what could be seen on the CCTV footage of that evening. A series of questions was compiled by the respondent to which the representative of the owners who viewed the CCTV responded. In relation to the allegation of sexual assault on C1, the description of C1 and the claimant entering the disabled access toilet, the description was:

“According to CCTV it seems consensual from both sides. Female A initiates a hug, Male A honours this. They are hugging for quite a while then start kissing and Male A gently directs towards the disabled toilet while hugging. Female A does not resist, no force was used at all.”

“Male A directs, very gently. No resistance from Female A. They are hugging, kissing, Male A makes the move and Female A agrees.”

22. The person who had viewed the CCTV also gave a description of the demeanour of C1 on leaving the disabled access toilet that was at variance with several of the eye witnesses:

“Female A smiling, Female B looks surprised, Male A smiling. They all talk in a normal manner, no argument took place. None of them are frustrated or distressed.”

23. Ms Banga considered that, in some respects, the description of the CCTV footage presented a different picture to that provided by both C1 and the claimant. Ms Banga provided the description of the CCTV to C1 at a meeting on 12 September 2023, but did not, either at that meeting or subsequent to it, ask C1 for her comments about the apparent discrepancies between her account and the description of the footage (ET § 129). C1 subsequently refused to give her consent to the owners of the venue to release the original CCTV footage to Ms Banga. As a result, Ms Banga was unable to view it (ET § 134 to 139).

24. In the letter of dismissal, Ms Banga set out a full and careful analysis of the whole of the evidence about this incident and noted that there were a number of inconsistencies, including in the claimant’s own account of it. In cross examination, Ms Banga accepted that C1’s evidence about what happened immediately before she entered the accessible toilet was false. Ms Banga noted the contents of an email between C1 and a colleague in which she stated that she no longer had a clear recollection of what happened immediately before the accessible toilet incident. Ms Banga explained that her conclusion was that C1 had not been deliberately untruthful (ET § 141).

25. At ET § 142, however, the Tribunal stated:

“I find there is no other way to put this.[C1]’s version of events immediately before the accessible toilet incident is wholly unsupported by the CCTV footage description and wholly incredible. However, the issue is whether she deliberately gave false evidence. Having given careful consideration to all of the documentary and oral evidence, I can find no basis to underpin Ms Banga’s reasoning that Colleague 1 did not deliberately give false evidence.”

26. The Tribunal noted also that, after the discrepancies were put to her, C1 continued to insist upon her complaint whilst at the same time refusing to give her consent to the release of the CCTV footage (ET § 143 and 144).

27. At ET § 145 to 148 the Tribunal recorded its findings about Ms Banga’s decision to dismiss the claimant

145. Ms Banga’s decision, and the reasons supporting it, were communicated to the claimant in a letter dated 6 November 2023... In relation to the drinks event in January 2023... in summary, Ms Banga placed reliance on the WhatsApp messages (page 111 to 112). Although Ms Banga acknowledged that the WhatsApp messages do not state exactly what happened outside ‘Be At One’, Ms Banga was of the view that the WhatsApp messages provide “clear contemporaneous evidence” of the following:

- a) the claimant persistently attempted to persuade [C1] to cancel her Uber and to return to the respondent’s offices with him;

- b) he did so in such a way as to cause [C1] to reasonably believe that his conduct was inappropriate and done with an underlying sexual motive, and to reasonably be concerned for her safety; and
- c) that, as a consequence, the claimant's conduct toward Colleague 1 fell below the standards of behaviour expected by the respondent, and in particular that it amounted to harassment.

146. In respect of the work event on 20 July 2023, Ms Banga found...

- a) the claimant put his hand around the waist of [C2] as he accompanied her to the bathroom, waited for her outside the bathroom, and then attempted to do put his hand around her waist a second time when accompanying her back to their table, despite [C2] having told him not to and to "get off" when he first did so;
- b) [C2] felt that she was receiving unwanted attention from the Claimant, such that she had to move to a different group at the event to stay away from him, and;
- c) that the claimant's behaviour fell below the standards expected by the respondent.

147. Ms Banga explained that she had been unable to reach a conclusion regarding the accessible toilet incident owing to the conflicting nature of the evidence from both the claimant and [C1]. However, Ms Banga explained that the claimant's evidence in relation to that incident remained material to her decision to dismiss him. She explained in her letter...:

"...I am not confident that you have been fully transparent in your account about what happened in July. By way of illustration, you denied emphatically that anything at all physical had happened with [C1], but changed your account on being provided with a description of the CCTV footage. As I have mentioned, I do not consider it credible that you went into the accessible toilet to continue a conversation that could easily have taken place outside of it. Given the serious nature of the concerns we were discussing with you, I am concerned by this potential lack of transparency..."

148. Ms Banga explained her decision to dismiss, rather than impose some lesser sanction, as follows:

"...I did consider issuing you a final written warning, but I do not feel that such a sanction would be appropriate given the nature of your behaviour on two separate occasions (as explained in the findings in this letter), the need to protect our employees from

harassment, and my concern at the veracity of your initial account...”

28. The Tribunal’s reference at ET § 145 to “the WhatsApp messages” is unexplained. Nowhere within its reasons did it make any findings of fact about what those messages were or what they said. As will be seen, however, the Tribunal’s analysis of Ms Banga’s reliance upon WhatsApp messages (ET § 155 to 157) ultimately played an important part in its conclusion that the dismissal was unfair. It is unfortunate, therefore, that the Tribunal made no findings of fact about them.

29. During this appeal, the parties provided me with two pages of screenshots of WhatsApp messages. It was agreed that these screenshots were of the WhatsApp messages referred to by the Tribunal at ET § 145. It was also agreed that these were messages that passed between C1 and the witness BH around the time of the January 2023 episode. The sequence of messages was:

BH: All ok?
C1: I’m in!
BH: Wahoooo
C1: Why did jams get so creepy?!
C1: You in your Uber?
BH: Bizarre, didn’t think he was that way...
BH: In Uber all good
BH: Glad you’re in yours
C1: So weird wasn’t it!!
C1: He can’t be driving right?!
BH: I really hope not...
BH: He was fucked
C1: Man so glad you were still there at the end to back me getting my own cab home
C1: I was already clinging to you before he was telling me to cancel
BH: Beyond creepy from him
BH: Didn’t expect that from him
BH: Glad you got into your Uber!
C1: Same! Makes it worse tbh too
C1: Ugh tomorrow is going to suuuuuck
BH: Agreed! Very weird behaviour telling you to cancel your cab
etc

30. The parties were agreed that the screenshots of these messages were not provided to the claimant, nor was he advised of their existence or content prior to Ms Banga’s decision to dismiss him. In her dismissal letter, however, Ms Banga summarised parts of the exchange including the references to “jams” behaving in a way that was “creepy” and quoted the two messages from C1: “Man so glad you were still there at the end to back me getting my own cab home” and “I was already clinging to you before he was telling me to cancel”.

31. The claimant appealed against his dismissal. The appeal was heard on 21 November 2023 by one of the appellant’s partners, Ms Cassels. Following the appeal meeting, the claimant was provided with the notes from the prior investigations, with the exception of those from C1

and JS who each refused to give consent to their release. The claimant commented on the notes that were provided to him, and Mr Cassels considered that commentary (ET § 152).

32. The appeal was unsuccessful. Mr Cassels concluded that (i) the claimant had behaved inappropriately towards C1 and sexually harassed her at the event in January 2023; (ii) his conduct towards C2 at the event on 20 July 2023 fell below the standards required by the respondent; and (iii) dismissal was an appropriate sanction (ET § 153).

The Tribunal's analysis

33. The Tribunal's analysis and explanation of why it considered the dismissal of the claimant to be unfair was set out between ET § 154 and ET § 191. It began, at ET §154 to 171 with its analysis of the evidence.

34. In relation to the January 2023 episode, it noted that Ms Banga relied upon WhatsApp messages that were not disclosed to the claimant during the disciplinary process (ET § 155 and 156). In relation to the content of those messages, it stated:

“I find that there is nothing within the WhatsApp messages to indicate that the claimant invited C1 to go back to the office and that there was an underlying sexual motive to that invitation.” (ET § 157)

It further concluded that BH's evidence:

“...also does not suggest that there was an invitation to return to the office because of a sexual motive”

35. The Tribunal's assessment was that [BH's] account to Mr Atkin was consistent with an offer of a lift home but no more than that, and that BH's failure to intervene at the time did not suggest that there was an invitation to return to the office (ET § 158 and 159). It also found that it was never suggested to the claimant during the disciplinary process that his conduct in asking C1 to cancel her cab was due to her gender (ET § 160).

36. Between ET § 161 and 162, the Tribunal then turned to consider what it described as “the negative pull of the lie”. This was a reference to its earlier conclusion (at ET § 142) that C1 had deliberately lied about what happened outside the disabled access toilets in July 2023.

37. At this stage in its reasons (ET § 162 and 163), the Tribunal gave itself further legal directions based upon the decision of the Supreme Court in **MA (Somalia) v. Secretary of State for the Home Department** [2010] UKSC 49. That case concerned a decision of the Asylum and Immigration Tribunal. At ET §162, the Employment Tribunal directed itself that **(MA Somalia)** the Supreme Court:

“considered how a fact finding Tribunal should deal with the impact of lies on the evidence considered”.

38. It began by noting that, in delivering the Judgment of the Supreme Court, Sir John Dyson referred (at paragraph [31]) to the following passage from the judgment of the Court of Appeal:

"The lie may have a heavy bearing on the issue in question, or the tribunal may consider that it is of little moment. Everything depends on the facts. For example, if in the Eritrea cases the Secretary of State had *prima facie* evidence that the appellants had left legally, the tribunal might think it appropriate to put considerable weight on the fact that the claimant told lies when seeking to counter that evidence. The lie might understandably carry far less weight where, as in *YL* itself, the judge is satisfied that the appellant has lied where the lie is against her interests."

32. The Tribunal then noted the Supreme Court's own observation (at paragraph [32]) that:

"Where the appellant has given a totally incredible account of the relevant facts, the tribunal must decide what weight to give to the lie, as well as to all the other evidence in the case, including the general evidence. Suppose, for example, that at the interview stage the appellant made an admission which, if true, would destroy his claim; and at the hearing before the AIT he withdraws the admission, saying that his answer at interview was wrongly recorded or that he misunderstood what he was being asked. If the AIT concludes that his evidence at the hearing on this point is dishonest, it is likely that his lies will assume great importance. They will almost certainly lead the tribunal to find that his original answers were true and dismiss his appeal. In other cases, the significance of an appellant's dishonest testimony may be less clear-cut. The AIT in the present case was rightly alive to the danger of falling into the trap of dismissing an appeal merely because the appellant had told lies. The dangers of that trap are well understood by judges who preside over criminal trials before juries. People lie for many reasons. In *R v Lucas* [1981] QB 720, the Court of Appeal had to consider whether a statement containing a lie was capable of amounting to corroboration. At p 724F, Lord Lane CJ said:

"To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly, it must relate to a material issue. Thirdly, the motive for the lie must be a realisation of guilt and fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family...."

33. At ET § 163, the Employment Tribunal stated:

"Although the analogy is not exact, it is close enough for these words to be of relevance in the present context. I have already found above that the CCTV footage description demonstrated that [C1's] evidence regarding the accessible toilet incident was wholly incredible. I have already found it was deliberate false evidence. I find that her false evidence regarding the accessible toilet incident was not a mistake and did not arise out of confusion. I find [C1's] false evidence relates to a significant issue, namely her allegation of sexual assault. That allegation is similar in nature to the January 2023 allegation of sexual harassment. [C1] was not interviewed by Ms Banga regarding the discrepancies in her evidence against the CCTV footage description. I have already found this was a lost opportunity in establishing her motive for making allegations of sexual assault."

34. The Tribunal then moved on to consider, in some detail, what it described as “evidence of flirting” between C1 and the claimant at the July 2023 event (ET § 165). It concluded that this:

“...strongly undermine[s] the allegation that the claimant sexually harassed [C1] in January 2023”

35. The Tribunal then expanded its inquiry into the “general evidence of flirting” amongst the appellant’s employees (ET § 166 to 168), noting *inter alia* that one colleague had described the claimant as liking to present as a “ladies’ man” before stating (at ET § 169):

“I have considered whether the general evidence is sufficiently strong to counteract ‘the negative pull’ of [C1’s] lies. Having considered all of the evidence, I find that the general evidence is wholly insufficient to counteract ‘the negative pull’ of [C1’s] lies. This is because the general evidence indicates that the claimant’s behaviour was not considered inappropriate by many other colleagues. I conclude that the negative pull of [C1’s] lies is such that the her allegation that the claimant harassed her in January 2023 is wholly undermined.”

36. The Tribunal then turned its attention to the July 2023 incident involving C2. It noted that C2 made no formal complaint about the claimant, stated to Mr Atkin that she did not feel that the claimant overstepped the mark or made her feel uncomfortable, and that her reference to feeling uncomfortable only arose when she was questioned by Ms Banga. In that latter regard, the Tribunal’s view (ET § 170) was that Ms Banga’s:

“...failure to question [C2] in a neutral way... significantly reduces the weight which can be attached to the subsequent evidence by [C2] to Ms Banga that the claimant made [C2] feel uncomfortable.”

37. At ET § 171, the Tribunal then made its own assessment of what it considered happened between the claimant and C2 during the July 2023 incident.

The Tribunal’s analysis of fairness

38. Between ET § 172 and 180, the Tribunal assessed the fairness of the procedure followed by the respondent. It concluded that five matters “taken together” (ET § 178) amounted to procedural unfairness. There were:

- (i) the fact that the Claimant was only given the Investigation Report and not the notes of the interviews in circumstances where there were errors in the Investigation Report’s summary of the evidence regarding the July 2023 accessible toilet allegation (ET § 172);
- (ii) the fact that Ms Banga relied upon the undisclosed WhatsApp messages and “some of the evidence obtained post 16 August 2023” (ET § 175);
- (iii) the fact that the Claimant was still not given the notes of the investigation interviews with C1 and JS at the appeal stage (ET § 176);
- (iv) the fact that it was not put to the claimant his conduct towards her in January 2023 was because of her gender, and the fact that “the issue of sanction” was not discussed during the appeal process; and

- (v) the fact that the respondent “chose not to address the serious discrepancies between [C1’s] account and the CCTV footage description of what happened immediately before going into the accessible toilet and did not interview C1 about this.”

39. On point (v), the Tribunal stated (at ET § 178)

“I find that this has material relevance for the finding and decision that the respondent arrived at in respect of the January 2023 incident.”

40. Turning to the issue of whether or not the respondent’s genuine belief in the existence of misconduct was reasonably held, the Tribunal stated (ET § 181)

“As a consequence of the respondent’s failure to follow a reasonably fair process in respect of its investigation, disciplinary and appeal process in respect of the January 2023 incident, I find that the respondent did not have reasonable grounds for belief of misconduct regarding the January 2023 incident.”

It reasoned that the CCTV discrepancy issue and the evidence of flirting between C1 and the claimant in July 2023, were:

“...significant and weighty factors affecting [C1’s] credibility as a witness in relation to the January 2023 incident”

that the respondent’s conclusion about the January 2023 incident was one to which no reasonable employer would have come. It concluded (at ET § 182)

“I find that a reasonable employer acting reasonably would consider a lie on a material matter to be significant and that it should be accorded adequate weight.”

41. Curiously – given that the January 2023 incident only came to light after the report about events in July 2023 – the Tribunal also stated (at ET 183) that:

“The respondent’s case that the claimant’s behaviour was two serious acts of misconduct over six months was also not within the band of reasonable responses because it is clear that the respondent did not speak to the claimant immediately or in the period post January 2023 allegation to inform the claimant that his behaviour was unacceptable.”

42. In relation to the July 2023 incident involving C2, the Tribunal found that the respondent did have reasonable grounds for its belief that there had been misconduct (ET § 186) but found that dismissal was not a reasonable sanction for that incident in isolation (ET § 188) and that there were “alternatives to dismissal” (ET § 190).

Submissions

Appellant

43. Five grounds of appeal were sifted to the full hearing of the appeal. Whilst Counsel for the appellant did not withdraw grounds 3 and 5, the focus of his oral submissions was ultimately only upon grounds 1, 2 and 4.

44. Under the first ground, Counsel submitted that it was clear that the Tribunal had erroneously substituted its view for that of the respondent in three important respects: (i) in its findings as to the credibility of C1 about the July 2023 incident (ET § 143, 144 and 163); (ii) in its conclusions as to the meaning and relevance of the WhatsApp messages (ET § 157); and (iii) in its findings about “flirting” and the way that colleagues characterised the behaviour of the claimant (ET § 165 to 167). These substitutions were errors of law (**Morgan v. Electrolux Limited** [1991] ICR 369 at pages 372H to 374F). The Tribunal had then further misdirected itself by relying upon **MA (Somalia)** and had, in consequence, substituted its own view of the January 2023 incident for that of the respondent. This could be seen in its repeated references to the “negative pull of the lie” on the evidence the respondent had about the January 2023 incident. There was no good reason for the Tribunal to have made its own findings on these issues.

45. Under the second ground, Counsel submitted that the conclusion that C1 had deliberately lied was, in any event, perverse having regard *inter alia* to (i) the independent evidence of C1’s distress and her immediate accounts to others of what had happened inside the toilet; (ii) the evidence of the claimant’s apparent contrition (ET § 37); (iii) the fact that both Mr Atkin and Ms Banga spoke directly to C1 about the allegations and were in a position to make their own assessment of her credibility; and (iv) the fact that the Tribunal did not itself view the CCTV footage. The Tribunal had failed to recognise the distinction between credibility and reliability, and had thus failed to recognise the possibility which Ms Banga had recognised that C1 was merely mistaken in her recollection about what happened outside the toilet. Counsel submitted that, in circumstances where the Tribunal had not heard from C1 in evidence, it should not have taken the exceptional step of making an adverse finding about her credibility.

46. Under ground 4, counsel began by noting that the Tribunal’s assessment of procedural unfairness was a cumulative one based upon five matters which, when “taken together” (ET § 178) caused it to conclude that the dismissal was procedurally unfair. It followed that, if the Tribunal’s conclusion about any one of those matters was flawed, its conclusion on procedural fairness could not stand.

47. Counsel submitted that the Tribunal’s errors of law in relation to procedural fairness fell into two categories. First it had taken into account matters that were unrelated to the reasons for the dismissal. The main example of this was seen in its conclusions about the investigation into C1’s allegation of sexual assault. Secondly, it had imposed too high a standard of procedural fairness. A fair procedure simply required the claimant to know the charges against him and to have a fair opportunity to answer them (**Lamb v. Teva UK Limited** [2026] EAT 8 at paras [45] to [48]). The allegations which formed the basis of the dismissal were straightforward, and the claimant had been given a fair opportunity to respond to both. His position had been to deny that either incident had happened. The allegation of sexual motivation had been clearly put as part of the January 2023 allegation, and it was not necessary in the appeal process specifically to discuss the issue of sanction. The Tribunal seemed to have failed to consider whether any defect in fairness by non-disclosure of the WhatsApp messages had been cured by the stage of the appeal.

Respondent

48. Senior Counsel for the claimant submitted that the Tribunal had given a correct self-directions on the law at ET § 7 to 17. Express reference was made by the Tribunal at ET § 182 to the band of reasonable responses test. There should, therefore, be a strong presumption that it had followed those directions (**DPP Law v Greenberg** []. On a careful analysis of its conclusions at ET § 171 to 191, the Tribunal had not substituted its view for that of the appellant. Rather, it had determined that the appellant's conclusions about the evidence fell outside the band of reasonable responses and that its ultimate decision was, therefore, unreasonable.

49. In relation to the July 2023 allegation, the description of the CCTV (ET § 124 and 125) was wholly inconsistent with C1 having been grabbed or pulled into the toilet. It also suggested that C1 had initiated the kissing outside the toilet. There was no room for a finding that C1 was merely mistaken. The Tribunal was therefore correct to conclude that Ms Banga's conclusion that C1 was merely unreliable fell outside the band of conclusions reasonably open to her.

50. In relation specifically to the January 2023 incident, what the Tribunal had, in fact, concluded was that any reasonable employer would have taken into account C1's lack of credibility about the first part of the July 2023 allegation. The Tribunal had been correct to conclude that there was no evidential basis for a sexual motivation to the January 2023 incident and that the suggestion that the claimant had not offered any male colleagues a lift home had not been put to him during the disciplinary process. The WhatsApp references to the claimant being "creepy" were not an adequate basis on which to infer sexual motivation or harassment.

51. Ground 2 stood or fell with ground 1. The Tribunal's conclusions about C1's credibility were not perverse. There was sufficient evidence that C1 had deliberately given a false account, at least in part, of the July 2023 incident. Even genuine distress or the immediacy of an allegation did not imply truthfulness. The fact that C1 did not give evidence to the Tribunal was irrelevant where the Tribunal had a description of the CCTV footage.

52. In relation to ground 4, the appellant accepted that it was factually correct that the claimant was given nothing other than the investigation report prior to the appeal stage. The investigation report was, however, "replete" with inaccuracies and omissions. These defects were not cured at the appeal stage where the issue of male comparators and sanction were not put to the claimant, nor was there any exploration of the inconsistency between C1's account and the description of the CCTV footage.

Law

53. So far as material to this appeal, section 98 **ERA** states:

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

...(b) relates to the conduct of the employee...

(4) 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.

54. In **Smith v. Glasgow City District Council** [1987] ICR 796, Lord Mackay of Clashfern considered the predecessor provision to section 98 ERA and stated:

"It is important to notice that the resolution of the question what is the reason or, if there is more than one, the principal reason for the dismissal is important not only in relation to subsections (1) and (2)... but also in relation to subsection [(4)] for the question in subsection [(4)] is whether the employer acted reasonably or unreasonably in treating *it* as a sufficient reason for dismissing the employee and *it* must refer back to the reason or the principal reason determined under subsection (1). As Lord Simon of Glaisdale said in **W. Devis & Sons Ltd. v. Atkins** [1977] ICR 662, 682-683, referring to the predecessor of the present legislation:

"the employer must satisfy the tribunal that he acted reasonably in treating 'it' (i.e., the reason shown by the employer as the reason for the dismissal of the employee) as a sufficient reason for the dismissal. . . . The reference to 'equity and the substantial merits of the case'— and I would add the reference to the circumstances including the size and administrative resources of the employer's undertaking added by the Employment Act 1980 —merely shows that the word 'reasonably' is to be widely construed; but they in no way affect the proposition that what must be shown to be reasonable and sufficient is the employer's action in treating the reason shown by him (the employer) as the reason for dismissing the employee."

55. In a case of a dismissal for misconduct, the role of the Tribunal is to consider whether the employer genuinely and reasonably held a belief in the guilt of the employee of the misconduct in question at that time. There are three components to that analysis. First of all, the employer must establish that it genuinely held the belief. The Tribunal must then consider the second question of whether that belief was held on reasonable grounds. Thirdly, the Tribunal must consider whether, at the final stage at which the employer formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in all the circumstances of the case (**British Home Stores v. Burchell** [1980] ICR 303).

56. As has been stated on many occasions, however, the Tribunal must not substitute its view for that of the employer. The relevant question for the Tribunal is whether the employer's assessment of the evidence before it and decision to dismiss fell within the band (or range) of

reasonable responses (**Iceland Frozen Foods v. Jones** [1983] ICR 17); **Morgan v. Electrolux Limited** [1991] ICR 369).

Analysis and decision

Ground 1 - substitution

57. At ET § 3 the Tribunal recorded that there was no dispute that the respondent's reason for dismissing the claimant was a genuine belief that he had sexually harassed C1 in January 2023, and that he had acted inappropriately towards C2 in July 2023. The effect of that agreement was to answer the section 98(1) and 98(2) **ERA** questions. The reason for the dismissal was a composite one in which both component parts were "conduct" in terms of section 98(2) **ERA**. Importantly, however, C1's allegation of sexual assault in July 2023 formed no part of that reason.

58. The fairness of the dismissal then fell to be assessed by reference to section 98(4) **ERA**. In accordance with that subsection, "having regard to the reason shown by the employer" under subsections 98(1) and (2), the Tribunal required to consider whether the respondent acted reasonably or unreasonably in treating that reason a sufficient one to dismiss the claimant. In the course of its exhaustive forensic review of the evidence about the C1's allegation of sexual assault in July 2023, however, the Tribunal lost sight of that principle and of **Burchell**.

59. The Tribunal's first error was to substitute its own conclusion for that of the respondent about C1's credibility in relation to part of the July 2023 incident (at ET § 143, 144 and 163). That step in reasoning was inappropriate. The allegation of sexual assault ultimately formed no part of the reason for the dismissal. In any event, the Tribunal's conclusion that C1 deliberately lied about an element of the July 2023 incident was not the only possible inference. As Ms Banga correctly recognised, it was at least possible that C1 was merely unreliable in her account of what happened outside the toilet. Ms Banga had the benefit of speaking directly to C1, which the Tribunal did not. Ms Banga also took account of all the evidence – including witness evidence of C1's observed apparent distress – in reaching her conclusion that whilst part of C1's account was unreliable, she was not being deliberately untruthful. The Tribunal's substitution of its view that C1 had deliberately lied was based entirely upon a description by a third-party of the CCTV footage. That single piece of evidence was not an appropriate basis for the Tribunal to substitute its own view that C1 was incredible rather than merely unreliable about a part of the July 2023 incident.

60. The Tribunal's second, more significant, error of substitution arose when it turned to consider the component parts of the appellant's reason for dismissal. Whilst its self-directions at ET § 7 to 17 were correct, its further self-directions at ET § 161 and 162 were not. In its consideration of the part of that appellant's reason for dismissal that was the January 2023 incident, the Tribunal erroneously relied upon **MA (Somalia)**. In particular, at ET § 161 and 162, the Tribunal failed to recognise the fundamental difference between its role in making an assessment of fairness under section 98(4) **ERA** / **Burchell** and that of the Asylum and Immigration Tribunal ("AIT") in **MA (Somalia)**.

61. In **MA (Somalia)**, the role of the AIT, as primary fact finder, was to determine whether MA, who had applied for asylum in the United Kingdom, would be subjected to breaches of his Article 3 ECHR right were he to be deported to Mogadishu. To determine that question, the AIT heard evidence *inter alia* from MA. The AIT noted that it was for MA to satisfy it, on

the evidence, that there was a real risk that MA's deportation would result in him suffering ill treatment of such severity that his Article 3 right would be breached. The AIT found that MA had not been truthful in his evidence about his connections and contacts in Mogadishu. It could not, therefore, accept his evidence that he would be at risk there. On that factual issue, the jurisdiction of the AIT permitted it to make its own decision based upon the evidence it heard. What the AIT was not doing, therefore, was making a **Burchell** assessment of the reasonableness of the decision of a third party.

62. By contrast, the role of the Employment Tribunal in considering the section 98(4) **ERA** question involved following the guidance in **Burchell** and **Iceland Frozen Foods**, and applying that to the two component elements of the established reason for the dismissal. The genuineness of the appellant's belief that the January 2023 incident had happened in the way alleged was not in dispute. The task for the Tribunal was, therefore, limited to an assessment of whether the appellant had reasonable grounds on which to hold that belief, having carried out such inquiry into the incident as was reasonable.

63. The Tribunal's erroneous reliance upon the passages which it quoted out of context from **MA (Somalia)** and its application of those passages to its very different task under section 98(4) **ERA** caused it to substitute its own assessment of what it called "the negative pull of the lie" – an expression it derived from paragraph [31] of **MA (Somalia)** – to the evidence that the appellant took into account in considering the January 2023 episode. The Tribunal, thus, fell into error by substituting its own assessment and interpretation of the evidence about the January 2023 incident for that of the respondent.

64. When ET § 169 and 182 are read together, it is tolerably clear that the Tribunal reasoned that, had it been in the position of Ms Banga, it would have considered that the "negative pull of the lie" that it had found to exist in relation to the July 2023 incident was wholly destructive of the credibility of C1 in relation to the January 2023 episode. That, however, was not the Tribunal's decision to make. The mere reference at ET § 182 to the band of reasonable responses did not cure that error given the extensive and erroneous reliance upon **MA (Somalia)**. That error was compounded by the Tribunal's apparent belief that every (or, indeed, any) element of C1's account of the January 2023 incident needed to be corroborated by a second source of evidence.

65. Had the Tribunal properly applied **Burchell**, it would have recognised that its task was not to re-take the disciplinary decision based upon its own assessment of the evidence but was, instead, to determine whether, after reasonable inquiry, the respondent had reasonable grounds for concluding that the January 2023 episode happened in the way alleged. On the question of "reasonable grounds", it would have seen that Ms Banga and Mr Cassels had three sources of relevant evidence about the January 2023 incident. The first was the account given by C1. The second was the evidence of BH. The third was the contemporaneous WhatsApp messages. On the basis of that evidence, the appellant concluded that the claimant had behaved in the way alleged. It is clear that the appellant treated the messages and BH's evidence as consistent with and supportive of C1's account. The descriptions of the claimant as "creepy" in the texts was treated by the appellant as providing circumstantial support for C1's assessment that the claimant's behaviour towards her was sexually motivated. BH's evidence to Mr Atkin was seen as undermining the claimant's suggestion that the claimant had merely been inviting C1 to go back to the party venue. The claimant's account of the January 2023 incident to Ms Banga was simply one of denial.

66. As was noted in **Morgan** (at page 373 B to F) a particular application of the principle that a Tribunal must not simply substitute its own view of reasonableness is that it must not substitute its own evaluation of the evidence that was before the decision-maker. That, however, was exactly what the Tribunal did in this case. That substitution led it to its erroneous conclusion (expressed by it at ET § 181) that the respondent did not have reasonable grounds to conclude that the claimant had sexually harassed C1 in January 2023. Since that conclusion was a material part of the Tribunal's reasons for concluding that the dismissal was unfair, its Judgment to that effect must be set aside.

Ground 2 – perversity

67. In light of the conclusion that I have reached about ground 1, it is neither necessary nor appropriate to determine ground 2. The Tribunal's error was not that, within the proper scope of its fact-finding jurisdiction, it reached a conclusion on the evidence that the Employment Appeal Tribunal might potentially overturn on the ground of perversity. Rather, the problem lay in the Tribunal's failure to recognise the limits of its fact-finding role. That led, ultimately, to an erroneous substitution by the Tribunal of its own view of the evidence about the January 2023 incident.

Ground 4 – procedural fairness

68. Again, given the conclusion I have reached about ground 1, it is not necessary for me to determine ground 4. I agree with the appellant, however, that, in relying upon aspects of the disciplinary procedure that had no relationship to or bearing upon the reason for the dismissal, the Tribunal erred in law by failing properly to apply section 98(4) **ERA**. That error undoubtedly had a material impact upon its conclusion that, "taken together" the deficiencies it found in the investigation resulted in overall procedural unfairness. An assessment of the issue of whether there was any material procedural unfairness on a matter that *did* form part of the appellant's reason for the dismissal is one that can only be determined on a remit to the Employment Tribunal.

Disposal

69. Counsel for the appellant submitted that the appropriate disposal of this appeal would be to set aside the Judgment of the Tribunal and remit the case for re-determination by a differently constituted Tribunal. For the reasons I have given, I agree with that submission.