Appeal No. UKEAT/0046/19/AT

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 18 February 2020
Judgement handed down on 29 May 2020

Before

THE HONOURABLE MR JUSTICE SOOLE

MS K. BILGAN

MR P L C PAGLIARI

MISS E MARTIN APPELLANT

HOME OFFICE RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MARGARET PENNYCOOK (Counsel) Instructed through Advocate
For the Respondent	LAURA ROBINSON (Counsel) Instructed by the Government Legal Department 102 Petty France Westminster London SW1H 9LG

SUMMARY

UNFAIR DISMISSAL

DISABILITY DISCRIMINATION

The Claimant was summarily dismissed for making unauthorised searches on the Respondent's database. She claimed unfair dismissal and disability discrimination (EqA ss.15 and 20). The ET dismissed all her claims; in respect of unfair dismissal and s.15, having particular regard to the Respondent's 'zero tolerance policy' on database abuse and medical evidence relied on by the Claimant as material to her conduct. The Claimant did not appeal the decision on s.20 EqA.

The EAT allowed the appeal on unfair dismissal and s.15 EqA. In particular the ET had in effect misinterpreted the Respondent's zero tolerance policy as requiring any mitigating factors to be a direct cause of, rather than having a material impact on, the misconduct; and had made errors of fact and explanation in its consideration of the medical evidence. The claims were remitted for rehearing by a freshly-constituted tribunal.

THE HONOURABLE MR JUSTICE SOOLE

1. This is an appeal by the Claimant against the Judgment of the Employment Tribunal at London Central (EJ Goodman and members) sent to the parties on 25 June 2015, with Written Reasons sent on 6 August 2015, whereby her claims of unfair dismissal and disability discrimination were dismissed. The reason for the long delay in this appeal is the previous regime of fees for appeals to the EAT and the subsequent decision of the Supreme Court that this was unlawful. Neither Counsel in this appeal appeared below.

2. The Claimant was first employed by the Respondent in 2009 as a Higher Executive Officer dealing with asylum casework. In July 2012 she began work in the Visa and Immigrations Section, followed by a temporary promotion to Senior Executive Officer presenting the Respondent's case before Immigration Tribunals including the Upper Tribunal. As the Judgment records, she was by all accounts an exceptionally effective and committed employee. She had previously qualified as a barrister.

Narrative

3. The relevant background to this case includes three factors relating to the Claimant's personal life. First, the relationship which she formed with a man who had come to this country on a five-year visa in 2008. By the time of his posting as a soldier to Afghanistan in April 2012, plans had been made for a wedding. Following his return she sponsored his father's visa to enter the UK to witness his medals parade. However the relationship deteriorated and ended in some acrimony in January 2013. Secondly, from November 2012 the Claimant's father had been subject to police investigation for historic sex offences against young girls. The process was prolonged and placed her under additional strain as she liaised between the police, the

victims and other members of her family. Her anxiety about this extended to fear of the effect on her work with the Respondent, including security clearance, and her intended future career as a barrister. Thirdly, as to her health. In January 2013, at the end of her relationship, she suffered a miscarriage and consequent hospital admission. Between June and August 2013 she underwent investigation for suspected tuberculosis, alternatively lung cancer. Although neither condition obtained, she suffered particular anxiety throughout this period.

4. On 5 September 2014 the Claimant was summarily dismissed for data security breaches, namely for carrying out searches on the Respondent's database for data that she did not need for her work. Her appeal was dismissed by letter dated 26 November 2014.

5. The ET found the essential facts of her conduct as follows. After the contentious end of their relationship, her former partner made a number of unwanted calls to her, in the course of which he said that he was going to complain to the Respondent that she had blocked both his application for indefinite leave to remain and the applications of his father and sister for a visa to enter the UK. In consequence on a number of occasions she searched the Respondent's database to obtain information about all three of them. According to the subsequent investigation report, between March and December 2013 the Claimant made 8 searches and 7 views of her partner's records. Between March and May 2013 she made 4 searches and 1 view of the father's records and 2 views of the sister's records.

6. The searches and views were picked up by the Respondent's Security Anti-Corruption Unit (SACU) and a report prepared on 23 December 2013. It was accepted that a number of other questioned searches properly related to her work. The disciplinary investigation followed.

7. Before 10 June 2013, the Respondent's disciplinary policy contained an appendix which contained non-exhaustive lists of the kinds of conduct which would be viewed respectively as serious misconduct and gross misconduct. Serious misconduct included non-compliance with security policies and abuse/misuse of departmental IT. Gross misconduct included very serious breaches of security and breach of the Respondent's security data policy. However the policy stated that it was not possible to be precise about the boundaries between the two levels of misconduct; and that the degree of seriousness would depend on the particular circumstances.

8. In 2013 the Respondent moved to a stricter enforcement of the policy with regard to breaches of data security, because of concern about employees' searches of the database for non-business reasons. Such conduct was to be categorised as gross misconduct. The policy came into force on 10 June 2013. As the ET found, the only direct communication of the policy change to staff was by a message on its intranet, Horizon, on June 6 2013. This message described it as a 'zero tolerance policy on misuse of Home Office IT systems'. Having referred to examples of employees looking up information of 'high-profile' figures in the sport and entertainment world and conducting searches for purely personal interest, the message continued: *'Inappropriately looking up information is considered gross misconduct. Robust action including dismissal and in more serious cases prosecution will be taken against those who are found to have accessed records without legitimate business need.'* The message then referred to the pre-existing '10 golden rules' to be found on the intranet, the first of which was *'Never access personal or protectively marked information unless it is part of your job and you have a business need to do so.'*

9. The new policy was not in fact issued until December 2013; and the guidance to disciplining officers did not appear until March 2014. At section 8 under the heading 'Gross

misconduct: Zero tolerance', that guidance stated : *'Accessing records without a legitimate business need is a breach of the Data Protection Act and is not tolerated… Unauthorised access is a gross misconduct offence and may also result in criminal prosecution. The sanction for proven breaches is summary dismissal, i.e. immediate dismissal without notice.'*

10. However the guidance also made general provision, not limited to this particular type of misconduct, for 'Mitigating factors'. Thus under the heading 'What is meant by mitigating factors', section 21 of the guidance stated : *'Consideration of mitigating factors is of vital importance, particularly in cases where dismissal is a potential outcome'*. It then set out a non-exhaustive list of potential mitigating factors, including *'issues related to disability, for example whether condition can influence behaviour;… exceptional pressure upon the employee;… serious personal trauma'* and *'the employee appears to have been acting out of character, particularly where they have a previously unblemished record.'* The section concluded : *'Mitigation is not simply about one of the above existing* ***but for it to have had a material impact on the behaviour****.'* (emphasis added).

11. Although this section of the guidance was not directly quoted in the Judgment, it is not disputed that the section 8 zero tolerance policy was subject to its terms. Furthermore the question of mitigating factors was central to the hearing below and is at the heart of this appeal.

12. Returning to the narrative, the 23 December report of the SACU was sent to the Claimant's line manager Mr Kyriakou. He expressed the view that this was a case where dismissal would be disproportionate and proposed that she should be given a warning. The Respondent arranged an investigation meeting on 27 May 2014 to be conducted by Hannah Wallis as Investigating Manager.

A

13. In the meantime the Respondent referred the Claimant to a Consultant Occupational Physician, Dr Allison. The resulting report (2 April 2014) concluded that the Claimant was currently not fit for work but that there was no medical contraindication to her participation in an investigatory or disciplinary process; and that the sooner that was resolved the better it would be for her psychological health. The report also observed that the security breach *'…was the final straw of a number of events that have been impacting very significantly on her psychological health since 2012'* and referred to medical and relationship issues and the matter concerning her father. The Claimant had *'…developed symptoms of low mood as far back as 2012. Principally this was impacting upon her sleep and she has had some quite significant sleep disturbance for 2 years now. The other symptoms of low mood such as lack of motivation, impact on concentration and a limitation in daily activities have all become more apparent in more recent times and particularly since the alleged security breach.'* Furthermore her long working hours were compromising her psychological health. As to the disciplinary process : *'There may well be mitigating factors here in that clearly her concentration and possibly her judgement would have been impaired by her underlying low mood'.* Furthermore: *'I do think that the disability provisions of equality legislation are going to apply to her mood. She has now had some quite significant symptoms for well over 12 months which have impacted on her ability to undertake her daily activities and she has required treatment… However, I would be hopeful that if a return to work is achieved that she would be able to provide effective and reliable service and attendance prospectively.'*

14. As to the investigation meeting, the Judgment records that *'She said that she was not aware that the policy on data misuse was now zero tolerance, or at least not until Mr Kyriakou told her about it at the end of January* [i.e. 2014] : [54]. It was arranged that the Claimant

would send a letter from her treating psychologist Dr Parritt. That report dated 1 June 2014 referred to her symptoms of anxiety and stress arising from the deterioration and breakup of her relationship, miscarriage and the problems concerning her father. It noted that she had continued to work effectively and reliably through this period; but also opined that she had not had the space and time to adequately address *'the extreme level of psychological stress she was under.'*

15. Ms Wallis' investigation report was sent to the appointed decision-maker, Mr Marcus Ridge. Stating that there could only be a case to answer on the facts, the report however *'recommended that compelling mitigating factors in this case should be carefully considered.'* Mr Ridge corresponded with Ms Wallis to find out what mitigating factors should be reviewed. As the Judgment states : ***"He wanted her to demonstrate the links between particular causes or mitigating factors and the actions for which she found a case to answer."*** [58]. Ms Wallis responded with an expanded report (27 August) which itemised the mitigating factors and stated that it was logical to conclude that it was the accumulation of all these factors that triggered the offence.

16. Mr Ridge then sought a brief from the HR Department. Point seven in that brief advised him to consider if the Claimant's welfare and mitigating circumstances had any effect on her actions. It concluded that, if he decided there was a breach of trust, then dismissal would be an appropriate penalty.

17. The disciplinary hearing before Mr Ridge took place on 5 September. After a 16 minute hearing, a 20 minute adjournment and 15 minutes of further discussion, the decision was announced. The ET stated that it had not detected any discussion of the causative links between her difficulties and her actions [62]. In announcing the decision that her actions constituted gross misconduct and that the appropriate penalty was summary dismissal, Mr Ridge stated that

it was not established that the actions she referred had been *'directly causative'* of her behaviour [64]. His confirmatory letter of 11 September 2014 stated that she had committed a number of data breaches over several months and that she had been aware of the *'Home Office zero tolerance published around June 2013'*. He had considered the evidence presented in mitigation *'...but I do not accept that it directly caused you to commit the data breaches or that it justifies your actions.'*

18. The Claimant's appeal from this decision was heard by Ms Ailish King-Fisher over three hours on 16 October 2014. Following the hearing she contacted Mr Steve Tucker of SACU who stated *'I'm not sure there can be any justifiable mitigation in this case. They either had a business reason in which case it is not gross misconduct, but if they didn't have a business reason it is gross misconduct and the policy applies.'* [68]. Ms King-Fisher asked for information about the annexes to the investigation report on the 'look ups' so that she could consider how it *'correlated with the mitigating factors'* [70].

19. By letter dated 26 November 2014 the appeal was dismissed. As the ET stated, it ran to 6 pages and reviewed the matter thoroughly and in detail [71]. The letter recorded the Claimant's presentation of evidence on the mitigating factors and her argument that all these circumstances together had caused her stress anxiety and depression, and were 'impacting' on her judgment and her 'cognitive and emotional' ability; and that, together with the supporting evidence from the medical reports of Dr Allison and Dr Parritt, this demonstrated a clear link between the circumstances she was facing and her rationality and judgment. The Claimant placed express reliance on the March 2014 guidance on mitigating factors.

20. The letter stated that the purpose of the appeal included consideration of whether the decision-maker had taken into account irrelevant facts or failed to take into account relevant

facts; any new evidence and any mitigation; and whether the original decision and penalty were reasonable in all the circumstances. As to mitigation factors, Ms King-Fisher concluded in particular : *'Having considered the evidence, and spoken to the decision-maker, I am satisfied that the mitigation you presented was properly considered. I accept that the personal circumstances you describe were very serious and would have impacted upon you in many ways. However, this is set against the number of breaches, over a sustained period of time, after the introduction of the Zero Tolerance policy.'* Having identified the number of breaches after that date, she continued *'I accept that your circumstances may have impacted upon your judgment but not over such a sustained period of time. I have also taken account of evidence that you presented from your managers and in your performance reports that show that during this period of time you continued to perform well at work, there did not appear to be any impact upon any of your objectives of your personal circumstances, indeed you were nominated for a bonus in recognition of your outstanding performance.'* She concluded that the mitigating factors had been properly considered and that Mr Ridge had come to a reasonable decision in the light of all the evidence. Having regard to the policy and the evidence, the serious nature of her actions constituted gross misconduct and the appropriate penalty was summary dismissal.

The ET decision

21. The ET began its consideration of the claim for unfair dismissal by reference to s.98 **ERA 1996** and the **British Home Stores v Burchell** **([1978] ICLR 378)** tests in the case of a dismissal for conduct. Noting that there was no dispute that conduct was the reason for dismissal and that it was not seriously disputed that there was a proper investigation, it continued **"This case is all about the penalty."** Turning to s.98(4), the ET in particular reminded itself of the 'range of reasonable responses' and that it must not substitute its own judgment for that of a reasonable employer [80]. It then considered whether the Claimant knew how serious the

conduct was and whether she was courting summary dismissal; and for that purpose considered the ACAS guidance about communication to employees of rules about conduct [81].

22. The ET had serious concerns about the communication of the zero-tolerance policy to the workforce by no more than the Horizon message [82]. It stated : **"Each individual member of the panel thought that any organisation that wanted to change policy on something so crucial would have done more to communicate the fact that a change was being made, for example, by having it discussed on the agenda of every team meeting, or more and clearer notices."** [83]. It continued at [85]: **"Nevertheless, we had to ask ourselves whether in this we were substituting our own judgment for that of a reasonable employer. We asked whether we could say that no reasonable employer would treat this as inadequate communication to the workforce… Had there been no notice at all, we would have concluded that this was an unfair dismissal, but after anxious consideration it seemed to us that there was *a* message, and we could therefore say that a reasonable employer would consider that was adequate notice to work force. An employer, like a supplier of goods and services, can give information, but they cannot require employees to read it.**

86. It was also relevant that the claimant has never said that she did not know it was wrong, and she has never argued that she did not know the policy was now one of zero tolerance. We made no finding that Mr Ridge did discuss that with her at the meeting. Whatever she did or did not read in the way of the employer's policies, she did agree that looking at it for private purposes was against the rules, and against the law.

87. So to that extent we did not think that the change in policy, or her knowledge of any change in policy, would have had much impact on her actions. The claimant was not saying that had she known that summary dismissal would result she would of not (sic) **have continued with this. She said that she did it because of the special impact on her judgment of personal events, and the real issue in this case was whether the employer considered the mitigation."**

23. Turning to the mitigation issue, the ET rejected the Claimant's contention that Mr Ridge and Ms King-Fisher had not been exercising independent judgment or considering the mitigating factors. Even before the disciplinary hearing, Mr Ridge had been considering **"whether the mitigating factors were relevant, or had an impact on her looking up information on the database"** [89]. Ms King-Fisher **"even with though** (sic) **her consideration was relatively brief, did take it on board** (sic) **the claimant's account of linkage of her actions with the timing of her personal difficulties. She did some work on the dates**

that breaches occurred, and considered that carefully" [90]. The ET concluded : **"We also consider the fact that, although at this hearing she has given us a great deal of information about what was going on in her personal life and of the repeated and difficult calls from her partner, she has still not linked that with particular look-ups, even though she now has the information in the hearing bundle** [91]**. So we concluded that mitigation had been adequately taken into account"** [92].

24. Its conclusion on unfair dismissal must be set out in full :

> **"93. This is again a case where, given the lack of use of the information she looked up, her personal worries and good employment record, this is a very hard decision, to the point where we began to worry, as was apparent from one of our questions, whether *any* mitigating factor would have operated to lead to a decision not to dismiss her but to give her a warning, given the pressure from higher up the organisation, through HR, to hold the line and dismiss for all breaches. There was a risk that the discretion the managers used to decide appropriate penalty for misconduct may have been fettered by pressure to hold the line. However, having regard to the need not to substitute our judgment, but to look at what a reasonable employer would do, it was clear that both Mr Ridge and Ms King-Fisher did consider the mitigating factors in detail, and more particularly they looked at the causation issue carefully. While these are factors which on the face of it seem, as a matter of common sense to have impacted on the Claimant's judgment, there was material from which they could conclude that it did not, and that she acted wilfully. For example, the medical evidence was that she only suffered low mood up** (sic) **after being told that it was a disciplinary issue, and that until then she was continuing to maintain a very competent, not to say excellent performance at work, as shown by the fact that she was still taking cases in the Upper Tribunal, apparently successfully. It could not be said that she was beside herself or out of her mind.**
>
> **94. Therefore we concluded that although this case is at the very extreme limit of what a reasonable employer would do, it was within the range, and it was not an unfair dismissal."**

25. As to disability discrimination, the Respondent admitted that, depression having been advanced as the mental impairment, she was a disabled person in relation to her mood at the time of the relevant events [95]. The case of failure to make reasonable adjustments (s.20 **EqA**) was dismissed and is not appealed.

26. By s.15 **EqA** a person discriminates against a disabled person if (A) treats (B) unfavourably because of something arising in consequence of (B's) disability and (A) cannot show that the treatment is a proportionate means of achieving a legitimate aim.

27. The unfavourable treatment was the dismissal. The Claimant alleged that her conduct in searching the database was the 'something arising'. There being no dispute that the dismissal was for that conduct, the first question for decision was whether that conduct arose 'in consequence of' the Claimant's depression and mood at the material time. At [103] the ET expressed the rival arguments as follows :

> "**The argument is that the disability was a factor in the conduct, and that it is unlikely that she would have acted as she did but for the disability. Her statement about her rational state of mind and the available medical evidence support this, and the respondent, she argues, knew, or ought of known** (sic)**, of the disability. They knew of the stress in her life, and that at the date of dismissal the decision maker was aware of the facts indicating disability. The respondent submits that they rely on the medical evidence to the effect that the condition was not causative of her actions, that she was at all times able to conduct case work at a high level, and that the sort of pressure she was under was not related to her low mood."**

28. Accepting the Respondent's arguments the ET concluded at [104]:

> **"…her errors of judgment, if one can characterise them as that, were those that could have been made under pressure of threats from a former partner at a time when other life events were making life difficult for her to think straight, were not of themselves related to her having been of low mood, or indeed seeing a psychotherapist over the year. So while we are not unsympathetic, we do not think that this was arising in consequence of the disability, rather perhaps that it arose from the same causes as led to the disability."**

29. Accordingly the s.15 claim failed. However the ET went on to consider the question of whether the Respondent could establish that the dismissal was a proportionate means of achieving a legitimate aim : s.15(1)(b). The legitimate aim was identified as :

> "**to ensure that Home Office staff strictly observe government legislation about data protection, and also the standard the public expect from a government body, and that dealing with public concern about misuse and neglect of data was a legitimate aim" :** [105].

30. The ET accepted that dismissal was a proportionate means of achieving that aim :

"Whether there was a proportionate means, we consider that using a disciplinary policy to enforce rules is entirely appropriate for an employer, and if those rules continue to be flouted, it may be necessary for an employer to move to making the penalty extremely high, even summary dismissal, in order to reduce the incidence of the offence. We thought that this was a proportionate means, and our only misgiving would, as expressed in the unfair dismissal, be on the way that it was communicated to the work force" : [105].

The appeal

Ground 1 : s.98(4) and the Respondent's policy

31. The first ground of appeal is that the ET failed to apply the s.98(4) test properly; and in effect substituted for that test the Respondent's policy on data breaches. Citing the EAT in **Taylor v. Parsons Peebles [1981] IRLR 119 : "The proper test is not what the policy of the respondents as employers was but what the reaction of a reasonable employer would have been in the circumstances… It is not to the point that the employers' code of disciplinary conduct may or may not contain a provision to the effect that anyone striking a blow would be instantly dismissed. Such a provision no matter how positively expressed must always be considered in the light of how it would be applied by a reasonable employer having regard to circumstances of equity and the substantial merits of the case."** [5].

32. On behalf of the Claimant, Ms Pennycook acknowledged that the ET had correctly set out the s.98(4) test in its Judgment at [80]. However in substance its consideration focussed only on the Respondent's policy. In consequence, its conclusion that *'mitigation had been adequately take*[n] *into account'* [92] reflected no more than its application of the evidence to the policy terms and thereby failed to apply the statutory test which it had identified.

Conclusion on Ground 1

33. We do not accept that the ET fell into the suggested error. The Judgment carefully set out and considered the s.98(4) test, including reference to relevant case law [80]. Its following paragraph [81] had regard to the ACAS guidance to employers on disciplinary rules and procedures. Having considered and taken account of the policy, the concluding paragraphs on this issue [93-94] each referred to the question of *'what a reasonable employer would do'*. On a fair reading of the Judgment there was no substitution of the Respondent's policy for the statutory test.

Ground 2 : misinterpretation of Respondent's policy

34. The second ground of appeal is that the ET misinterpreted the Respondent's policy, as had the Respondent itself, and that in consequence its decision on the reasonableness of the decision to dismiss was flawed.

35. The argument is focused on the causation test in section 21 of the Respondent's policy, i.e. in respect of 'mitigating factors'. As already noted, this provides that the mitigating factors must have had *'a material impact on the behaviour'*. Ms Pennycook describes that as a relatively loose test of causation. She contrasts it first with the language of Mr Ridge's dismissal letter of 11 September 2014. Having noted the submission on behalf of the Claimant at the disciplinary hearing that *'the mitigating circumstances may have had an impact on your actions'*, his conclusion was that *'I do not accept that it directly caused you to commit the data breaches or that it justifies your actions'*. Thus he had wrongly interpreted the policy as requiring a stricter causation test of direct cause and effect between any mitigating factors and the misconduct. This was matched by his previous correspondence with Ms Wallis in which, as the ET recorded, *'He wanted her to demonstrate the links between particular causes or mitigating factors and the actions for which she found a case to answer.'* [58].

36. As to Ms King-Fisher, in dismissing the appeal she had concluded that Mr Ridge had properly considered the matters presented as mitigating factors and had reached a decision that was reasonable. She had thereby, in effect, endorsed Mr Ridge's misinterpretation of the causation test.

37. By its reasoning and decision, the ET had also effectively endorsed and applied the stricter test of causation applied by the Respondent. Thus e.g. it noted without adverse comment Mr Ridge's references to direct causation [64, 65] and that Ms King-Fisher *'did take it on board the claimant's account of linkage of her actions with the timing of her personal difficulties'* [90]; and observed that the Claimant had in respect of the information about her personal life *'still not linked that with particular look-ups, even though she now has the information in the hearing bundle.'* This was a misinterpretation of the policy; and reflected the Respondent's written closing submissions that both Mr Ridge and Ms King-Fisher had interpreted the policy as *'requiring a direct causative link between the mitigation and disciplinary offence to be established in order for a lesser disciplinary sanction to be imposed'*; and that this approach (i) was consistent with a reasonable construction of the document and policy considerations and (ii) had been accepted by the Claimant in cross-examination as a reasonable construction of the policy (para.13).

38. There was a clear distinction between a test of direct cause and effect and the policy test of *'material impact'*; and it was a potentially important distinction on the facts. The ET had concluded that the case was *'at the very extreme limit of what a reasonable employer would do'.* Had the correct test been applied the ET's decision on the reasonableness of the sanction of dismissal would or might have been different.

39. In response, Ms Robinson submitted first that the Claimant's suggested contrast between 'direct cause' and 'material impact' was the type of hair-splitting distinction drawn by lawyers rather than by employers. There was in reality no distinction between the tests. Furthermore the language of Mr Ridge's conclusion ('I do not accept that it directly caused you to commit the data breaches *or that it justifies your actions'* : emphasis added) qualified the reference to direct cause and/or provided an alternative legitimate and reasonable basis for the decision to dismiss.

40. In any event, Ms King-Fisher had not merely reviewed Mr Ridge's decision or otherwise endorsed his approach. On the contrary she had made her own independent assessment and in doing so had applied the test of material impact. Thus her letter of 26 November recorded that one of the purposes of the appeal was to *'consider…Any mitigation put forward'*. Having considered all the mitigating evidence, she was satisfied that it had been properly considered by Mr Ridge; but also went on to make her own judgment. She accepted that the personal circumstances would have *'impacted'* upon the Claimant's judgment, but did not accept that it would have done so over the sustained period of misconduct. In reaching that conclusion, she had also taken account of the evidence which demonstrated the Claimant's continuing good performance at work throughout this period.

41. The ET in turn concluded that Mr Ridge and Ms King-Fisher had considered the mitigating factors in detail and had looked at the causation issue carefully. Its critical paragraph on this issue [93] had used the causal language of 'impacted' and held that there was material from which the Respondent could conclude that the mitigating factors did not impact on the Claimant's judgment and that she had acted wilfully. In reaching that conclusion it had particularly noted the evidence of the Claimant's continuing *'very competent, not to say excellent performance at work'* throughout the sustained period of misconduct. There was no

error in the interpretation of the policy; and in any event no basis to conclude that a different conclusion on the reasonableness of the sanction of dismissal might otherwise have been reached.

Conclusion on Ground 2

42. We do not accept that the distinction between a causation test of 'direct effect' and 'material impact' can be brushed aside as the language of lawyers rather than of employers. 'Material impact' evidently involves a looser causal test than 'direct effect'; and the Home Office policy document chose the former. In our judgment the problem in this case is that the distinction between the two tests was not truly considered at any stage of the domestic procedures or by the ET.

43. As to Mr Ridge, his dismissal letter records the submissions made on behalf of the Claimant that the mitigating circumstances had had an 'impact' on her actions. However his rejection of the mitigating factors is on the basis that he does not accept that these *'directly caused you to commit the data breaches…'* Thus the test he applies is of direct effect. This requirement of direct effect is also reflected in Mr Ridge's prior correspondence with Ms Wallis in which *'He wanted her to demonstrate the links between particular causes or mitigating factors and the actions for which she found a case to answer'* [58]. Nor do we accept the argument that this is qualified, or materially supplemented, by his words *'or that it justifies your actions'*.

44. As to Ms King-Fisher, we accept that her decision combined both a review of Mr Ridge's decision and her own assessment of the mitigating factors. However in each case her analysis drew no distinction between the concepts of direct effect and material impact. True it is that

paragraph 12 of her letter of 26 November uses the language of 'impact'; and concludes that the mitigating factors did not have any impact on her conduct. However this is immediately followed by the conclusion that Mr Ridge properly considered the mitigating factors; and without comment on his language of direct cause.

45. In considering the approach of the ET to this aspect of the policy, we bear in mind that the written closing submissions of Counsel who appeared below for the Claimant did not specifically deal with this point on the construction of the policy; and that we have no direct information as to what was said by either Counsel in their oral closing submissions. However, in our judgment it was necessary for the ET to consider the potential difference between the causal tests of direct effect and material impact and it did not do so. Having duly noted the Mr Ridge's references to direct cause [64, 65], its judgment on Ms King-Fisher's consideration of the mitigating factors was in the language of a search for a direct linkage between the occurrence of personal difficulties and of the particular individual 'look-ups' [90]. Thus it observed that the Claimant, notwithstanding her provision of a great deal of further information about a personal life, had *'still not linked with particular look-ups´* [91].

46. In our judgment the effect of the ET's decision was to treat the two causation tests as the same. That was an error of law. Properly construed, the policy language of 'material impact' involves a looser causal link than that of direct cause and effect.

47. We are also persuaded that if that distinction had been drawn by the ET it might have resulted in a different decision on the critical issue of the reasonableness of the sanction of dismissal. In reaching that conclusion we have particularly in mind the ET's observation that

the case was *'at the very extreme limit of what a reasonable employer would do'* [94]. Accordingly this ground of appeal succeeds.

Ground 3 : evidence of Ms King-Fisher

48. The third ground of appeal can be taken very shortly. It is based on the contention that in the course of cross-examination Ms King-Fisher admitted that the number of the Claimant's breaches was smaller than the number on which the Respondent relied throughout the disciplinary procedure. The ET's notes of evidence being no longer available, this ground depended on the notes of the Claimant's former solicitor and the Respondent's previous Counsel. These do not provide support for this ground of appeal, which must therefore be dismissed.

Ground 4 : Claimant's knowledge of the zero-tolerance policy

49. The fourth ground is that the ET failed to make a finding as to whether the Claimant knew about the zero-tolerance policy; and that this was relevant to the issue of the reasonableness of the decision to dismiss.

50. Ms Pennycook points first to [54] where the Judgment records the evidence given by the Claimant at the investigation meeting with Ms Wallis that she was not aware that the policy on data misuse was zero tolerance until Mr Kyriakou told her about it at the end of January 2014. This was further emphasised in paragraph 3(iv) of her previous Counsel's written closing submissions to the ET. However at [86] the ET stated that *'... she has never argued that she did not know the policy was now one of zero tolerance'*. Her ignorance of the new policy was evidently relevant to the reasonableness of the decision to dismiss; and yet her contention had been misstated and no finding made. Rather than making such a finding, the ET had taken the

impermissible course of considering whether the Claimant would have acted any differently if she had known of the zero tolerance policy; and concluded that she would not [86-87].

Conclusion on Ground 4

51. As Ms Robinson accepted, the ET's statement that the Claimant had never argued that she did not know the policy was now one of zero-tolerance cannot be reconciled either with its account of her evidence at [54] or with the clear terms of her written closing submissions. Furthermore it would have been better if the ET had made a clear finding on this point. However we are persuaded that, in the light of its finding that the Claimant knew that data searches for private purposes were *'against the rules, and against the law'* [86] and that the focus of the case was on the mitigating factors and their impact, the ET was entitled to consider whether the change in policy would have affected her conduct; and to conclude that it would not have 'much' impact. Accordingly in our judgment the point falls away as a ground of appeal independent of the critical issue of the impact of the mitigating factors.

Ground 5 : Perversity test

52. The fifth ground of appeal is that the ET wrongly applied a perversity test to the question of whether the Respondent had taken reasonable steps to communicate the zero-tolerance policy to the Claimant. Ms Pennycook points first to [83] where it stated that *'Each individual member of the panel thought that **any** organisation that wanted to change policy on something so crucial would have done more to communicate the fact that a change was being made.'* (emphasis added). At [85], having reminded itself of the risk of substitution of its own judgment, the ET posed the necessary question as *'whether we could say that no reasonable employer would treat this as inadequate communication to the work force'*; and concluded that

'a reasonable employer would consider that [i.e. the June 2013 intranet message] *was adequate notice to work force.'*

53. Ms Pennycook submitted that the ET had wrongly applied a perversity test, thus conflicting with the principle that s.98(4) and its statutory predecessor did not require *'such a high degree of unreasonableness to be shown that nothing short of a perverse decision to dismiss can be held to be unfair within the section'* : **Foley v. Post Office** [2000] ICR 1283, 1292E, following **Iceland Frozen Foods Ltd v. Jones** [1983] ICR 17. In any event, the ET's conclusion that a reasonable employer would consider the notice to be adequate [85] could not be reconciled with its prior statement that each member thought that *any* organisation would have done more to communicate such a crucial change of policy.

54. Ms Robinson responded that the issue of reasonable communication of the policy did not fall within the ambit of the s.98(4) issue, so that the cited authorities did not apply. In any event, the question identified by the ET in [85] did not involve a perversity test once its double negative had been removed. This was further emphasised by the terms of its conclusion. Nor, on a fair reading of the judgment, was there any inconsistency with the panel members' own reaction in [83]. The ET was doing no more than stating its own view; then reminding itself that it must not substitute its own judgment; and then applying the appropriate test.

Conclusion on Ground 5

55. With every respect to the ET, we have struggled with the language of [85]. In our judgment, the critical sentence cannot be read in the way advanced by Ms Robinson, i.e. as containing a double negative. We conclude that its words *'as inadequate communication'* contain a typographical error and are intended to read *'as an adequate communication'*. That

makes more sense and is consistent with the language of the later sentence where the ET concluded that a reasonable employer would consider that the website communication was *'adequate notice'*.

56. When that typographical error is corrected, the question posed does amount to a perversity test. We consider that the reasonableness of the method of communication of the change of policy does fall within the overall s.98(4) question; but in any event it would be equally wrong to consider the reasonableness of communication on the basis of a perversity test. In considering this and all the grounds of appeal we bear in mind the imperative that the EAT must not nit-pick over the language of judgments. However we conclude that on a fair reading the ET did fall into the error of applying a perversity test. We also find it difficult to reconcile the ET's conclusion on this point with the language of the panel members' views on what *'any organisation'* would have done [83]; and are not persuaded that this sentence can be read on the basis advanced by Ms Robinson. Accordingly this ground succeeds.

Ground 6 : findings on medical evidence

57. The sixth ground of appeal is that the ET erred by making findings which were not supported by the medical evidence and were in fact contradicted by it. The focus of this ground is the main concluding paragraph at [93] where the ET states : *'For example, the medical evidence was that she only suffered low mood up* (sic) *after being told that it was a disciplinary issue,…'* Ms Pennycook contrasts [52] where the ET correctly records the evidence of Dr Allison in his report of 2 April 2014 that it was quite clear that she had developed symptoms of low mood as far back as 2012. That this error of fact was central to the ET's adverse conclusion was apparent from the terms of [93]. Thus, in its conclusion that there was material from which the Respondent could conclude that the mitigating factors had not impacted on the Claimant's

judgment but had acted *'wilfully'*, the first example given was that she had only suffered low mood after being told that it was a disciplinary issue.

58. Ms Robinson acknowledged that, on the face of it, the first clause in the example at [93] could not be reconciled with the recorded evidence of Dr Allison. However, pointing to the presence of the word 'up' in the challenged sentence at [93], she submitted that there must have been some missing words which would explain the apparent contradiction. In any event, it was only one part of a sentence whose critical feature was the clear and unchallenged finding that the Claimant had continued to provide excellent performance at work throughout the relevant period. Together with the lack of any established correlation between the mitigating factors and the individual look-ups, there was ample basis for the ET's conclusion that the sanction of dismissal was reasonable in the circumstances.

Conclusion on Ground 6

59. In our judgment this ground of appeal also succeeds. The presence of the word 'up' shows that something has gone wrong with the sentence, but Ms Robinson was inevitably unable to state what that was. On the only available and fair reading, its statement about the time of commencement of low moods is contradicted by the recorded evidence of Dr Allison. Furthermore we accept that the statement is central to its finding on reasonableness. It is the first matter identified in support of the ET's conclusion that there was evidence consistent with wilfulness. Whatever weight is given to the evidence of continuing excellent performance at work, we do not accept that this error in respect of low moods can be treated as immaterial. Furthermore its potential significance is enhanced by the policy causation test of material impact.

Disability discrimination : s.15

Ground 7 : medical evidence

60. The remaining grounds of appeal concern the claim of disability discrimination under s.15 **EqA.** The seventh ground relates to the medical evidence on causation and the ET's acceptance of the Respondent's submission which it records as : *'…they rely on the medical evidence to the effect that the condition was not causative of her actions, that she was at all times able to conduct casework at a high level, and that the sort of pressure she was under was not related to her low mood'* [103]. Ms Pennycook submits that there was no medical evidence to the effect that the Claimant's condition was not causative of her actions; and therefore no basis for the Tribunal's

acceptance of that argument at [104]. On the contrary, the medical evidence (and of Dr Allison in particular) provided evidence of the necessary causal link, namely that the 'something arising', i.e. the misconduct, was 'in consequence of' the Claimant's disability. As the authorities demonstrated, this involved a looser connection which might involve more than one link in the chain of consequences : **Sheikholesami v. University of Edinburgh** [2018] IRLR 1090 at [66], following **City of York Council v. Grosset** [2018] IRLR 746, CA.

61. Ms Robinson submits that this ground of appeal misreads the Judgment. Paragraph [103] simply sets out in turn the rival arguments of the Claimant and Respondent as to whether the medical evidence does or does not establish the necessary causal link between her disability and her conduct; the burden of proof being squarely on the Claimant. Although not as clearly expressed as it might have been, the challenged passage is simply recording the Respondent's submission that the medical evidence does not establish the link. It is not suggesting that the Respondent had submitted that there was medical evidence which disproved causation; nor

therefore was the ET accepting any such argument in [104]. On the contrary, the ET was simply concluding, consistently with the Respondent's submissions, that the medical evidence did not establish the causal link.

Conclusion on Ground 7

62. In our judgment, the language of [103] is just too unclear and elliptical to enable the reader to understand how the ET approached its consideration of the medical evidence for the purposes of the causal link which the Claimant had to establish between her disability and the 'something arising', i.e. the unauthorised data searches. We are not satisfied that it can be explained in the way suggested by Ms Robinson. Furthermore we consider that there is a potential overlap between the application of the medical evidence to the issue of 'material impact' in the unfair dismissal claim and to the relatively loose causation test ('in consequence of') in s.15. In consequence (and subject of course to the appeal on the further issue of proportionality) there is a risk of inconsistent judgments if one is reconsidered but not the other.

63. In reaching this conclusion we acknowledge that this ground of appeal is not presented in the language of a **Meek**-reasons or perversity challenge. However we consider that the overall lack of clarity in paragraphs [103-104] is sufficiently embraced by its terms.

Ground 8 : proportionality

64. The eighth ground is that the ET erred in its decision on proportionality [105]. Ms Pennycook in essence adopts all the arguments advanced on the first seven grounds of appeal and submits that the ET's conclusions overlap with its reasoning on the unfair dismissal claim. In the event of success on that appeal it must equally follow that the ET's decision on the proportionality of the Respondent's disciplinary policy to the identified legitimate aim cannot

stand.

65. Ms Robinson submits that the issue of proportionality between the means of the policy and the identified legitimate aim is quite unchanged by any of the matters of in respect of the appeal against the decision on the claim for unfair dismissal; nor therefore by any success of the Claimant on those grounds of appeal. The legitimate aim and the means, i.e. the policy, each remain the same. Whatever its correct interpretation or its application for the purpose of the unfair dismissal claim can have no impact on that assessment for the purpose of s.15.

Conclusion on Ground 8

66. We prefer Ms Pennycook's submissions and accept that there is a potential overlap in the ET's reasoning on the two claims. We do not agree that the legal and evidential issues arising in the unfair dismissal and s.15 claims can necessarily be kept in watertight compartments. By way of express example in the Judgment, we note the ET's closing observation on proportionality that *'…our only misgiving would, as expressed in the unfair dismissal, be on the way that it was communicated to the work force'* [105]. In our judgment, the correct interpretation of the policy is potentially relevant on the issue of proportionality; and the ET might otherwise have reached a different conclusion. We accordingly allow the appeal on s.15.

Disposal

67. In the event of a conclusion that the claims must be remitted, the parties submitted that this should be to a freshly-constituted tribunal. This is in particular because of the substantial passage of time since the ET decision and the likely difficulties of reconstituting the same

tribunal. We agree. Accordingly the appeal is allowed on grounds 2 and 5-8; and the decisions on the claims of unfair dismissal and s.15 EqA are set aside and remitted for consideration afresh by another tribunal.