Neutral Citation Number: [2022] EAT 160

Case No: EA-2021-000264-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 October 2022

Before :

HIS HONOUR JUDGE AUERBACH
MS E LENEHAN
MR N AZIZ

- -

Between :

MS M MORGAN	**Appellant**
- and -	
BUCKINGHAMSHIRE COUNCIL	**Respondent**

- -
- -

Margherita Cornaglia (instructed by CHAWREC) for the **Appellant**
Leo Davidson (instructed by Buckinghamshire Council Legal Services) for the **Respondent**

APPEAL AND CROSS - APPEAL
Hearing date: 13 September 2022

- -

JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

The claimant, a supervising social worker in the respondent's fostering team, was dismissed for her conduct in giving gifts to a child for whom she was responsible without the authority of her manager, and because of what was considered to be the inappropriate content of a case note that she had written.

Before the employment tribunal the respondent accepted that the claimant was disabled by reference to autism spectrum disorder, dyslexia and other matters. The tribunal found that the claimant was not unfairly dismissed. It also dismissed her claim under section 15 **Equality Act 2010** in relation to the dismissal because it found the justification defence in section 15(1)(b) to be made out.

The EAT dismisses the claimant's appeal against those decisions. The tribunal properly concluded that the respondent reasonably formed the view that she had breached professional boundaries, and that it could not be confident that she would not repeat that conduct if she was not dismissed. This included a proper finding that the respondent reasonably concluded that the claimant knew that she needed prior authority for the proposed gifts, and that a breach was a potentially serious matter for which she could be dismissed. Evidence from the claimant's witnesses, that gift-giving was common and about another employee who gave an unauthorised gift but was not subjected to disciplinary action, did not mean that the tribunal was bound to conclude that her dismissal was in all the circumstances unfair. The tribunal also properly found that, having regard to its own consideration of these features, dismissal was not disproportionate for the purposes of the section 15(1)(b) defence.

The claimant's case, internally and before the tribunal, was that the conduct was influenced by her autism. The dismissing officer had not accepted that. The appeal officer had invited the claimant to agree to an OH referral in that regard, which, ultimately, she declined to do. The tribunal had not mistakenly inferred that the appeal officer had regarded the claimant declining to consent to the OH referral as additional conduct. Nor had the tribunal, by its decision, wrongly penalised the claimant for her autism. It had, rather, properly taken into account how it had featured in the case that she had advanced internally and before the tribunal; and that the appeal officer had not had the benefit of the OH report that she would have liked to have had, when coming to her own decision.

Nor had the tribunal erred by giving insufficient attention to the impact of the claimant's dyslexia, in addition to her autism. Complaints of failure to comply with the duty of reasonable adjustment during employment in relation to dyslexia were no longer live. The section 15 complaint in relation to dismissal focussed on the autism, or, to the extent that dyslexia was said to have also influenced the conduct, fell away in light of the tribunal's findings of fact about the aspects of the conduct for which she was dismissed, and as to her knowledge of the requirement for prior authority for gift-giving.

In the course of her decision the appeal officer had stated that it was a matter of serious concern that the claimant had chosen to withhold her autism through "masking" throughout much of her employment, potentially putting vulnerable children at risk. The tribunal found that this amounted to harassment by effect (contrary to section 26 of the **2010 Act**). The respondent's cross-appeal against that decision failed. Reading the relevant part of its decision as a whole, the tribunal's reasons conveyed why it considered that the claimant's view that this statement violated her dignity was, in all the circumstances, reasonably held. That conclusion could also not be said to be perverse.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. We will refer to the parties as they were in the employment tribunal, as claimant and respondent. The claimant was employed by the respondent as a Supervising Social Worker in the Fostering Team. Following a disciplinary process she was dismissed for the given reason of conduct with effect on 4 September 2019.

2. The claimant brought a number of complaints in three claim forms. By the time of the full merits hearing the live complaints were of unfair dismissal and under the **Equality Act 2010** relying on the protected characteristic of disability. It was accepted by the respondent that she is a disabled person by reference to dyslexia, dyspraxia, auditory processing difficulties, complex vestibular migraines, and autism spectrum disorder. The complaints were otherwise all defended on their merits.

3. The full merits hearing was before EJ Hyams, Mr W Dykes and Mr T Poil, sitting at Watford. The parties were represented, as before us, respectively by Ms Cornaglia and Mr Davidson of counsel. In a reserved decision the tribunal dismissed complaints of unfair dismissal, direct discrimination, discrimination arising from disability and victimisation. Three complaints of harassment related to disability were dismissed as being out of time. One was upheld.

4. The decision to dismiss was taken by Gareth Morgan (no relation to the claimant). The tribunal found that he did so because of the claimant's conduct relating to a child, referred to as SH, for whose placement she had been responsible. The reasons he gave referred to the following: at a meeting on 12 September 2018 the claimant had given SH two unauthorised gifts and a greetings card worth in total £37.64; she had without authorisation given SH Christmas presents in 2017; she had included in her case note following the 12 September meeting her "own thoughts, views and feelings, rather than an account for the child or a social work analysis" and "criticism of carers'

actions on the basis of their faith"; she had, at that meeting, given SH a "long heartfelt hug"; in the case note she had not described in full the gifts to SH; she had failed to follow instructions given to her by Dan Jones, her line manager from February 2018.

5. The tribunal found that the last of these was regarded by Mr Morgan as part of the background, justifying the conclusion that the claimant had acted in a manner which was, in Mr Morgan's view, such that "she could not be trusted not to breach the respondent's code of conduct again, and that she should as a result be dismissed". It also went on more specifically to find, when reaching its conclusions, that the principal reason for dismissal was that the claimant had given SH the gifts on 12 September 2018 without prior authorisation from Mr Jones, and written a case note in inappropriate terms consisting largely of her own thoughts and feelings. It also found that the giving of Christmas gifts in 2017 was regarded by Mr Morgan as a background factor, when assessing the gift-giving in September 2018.

6. An appeal against dismissal, which was considered by Karen Jackson, was unsuccessful.

7. The appeal to the EAT relates to the decisions of the tribunal that the dismissal was not unfair and that it was not in contravention of section 15 of the **2010 Act**, because it amounted to a proportionate means of achieving a legitimate aim. Following an initial direction of HHJ James Tayler the original grounds of appeal were amended into more concise form. Those grounds were then permitted by Choudhury P to proceed to a full appeal hearing. We will set them out presently.

8. There is also a cross-appeal in respect of the successful complaint of harassment. This was permitted to proceed, in amended form, at an oral permission hearing before HHJ Wayne Beard. A request by the claimant, as part of the Reply to the cross-appeal, for a *Burns/Barke* reference in relation to the cross-appeal, was declined by HHJ Auerbach.

The Facts

9. The tribunal's decision begins with a review of documents relating to the employment, with particular reference to materials relating to conduct, including the following.

10. The claimant's contract of employment included requirements that she be registered with the Health and Care Professions Council (HCPC) and observe the standards expected by it. There was also a reference to Safe Working Practice Guidance produced by the DCSF Allegation Management Advisers which it "is important that you read and understand". Reference was also made to the leaflet: "Professional Boundaries: Your Role with Children and Young People." The contract also referred the claimant to the respondent's Conduct and Discipline Procedure containing rules applicable to her and available on its intranet. The HCPC's standards included the statement: "Maintain appropriate boundaries – You must keep your relationships with service users and carers professional."

11. The respondent's Code of Conduct referred to the Guidance for Safer Working Practice for Adults who Work with Children and Young People in an appendix, and stated that failure to comply with it and associated Council policies may result in disciplinary action. The tribunal cited in full what it regarded as the key paragraph, as shall we.

> **"10. Gifts, Rewards and Favouritism**
>
> **The giving of gifts or rewards to children or young people should be part of an agreed policy for supporting positive behaviour or recognising particular achievements. In some situations, the giving of gifts as rewards may be accepted practice for a group of children, whilst in other situations the giving of a gift to an individual child or young person will be part of an agreed plan, recorded and discussed with senior manager and the parent or carer.**
>
> **It is acknowledged that there are specific occasions when adults may wish to give a child or young person a personal gift. This is only acceptable practice where, in line with the agreed policy, the adult has first discussed the giving of the gift and the reason for it, with the senior manager and/or parent or carer and the action is recorded. Any gifts should be given openly and not be based on favouritism. Adults need to be aware however, that the giving of gifts can be misinterpreted by others as a gesture either to bribe or groom [that term being defined in a footnote as "the act of**

> **gaining the trust of a child so that sexual abuse can take place"] a young person.**
>
> **Adults should exercise care when selecting children and/or young people for specific activities or privileges to avoid perceptions of favouritism or unfairness. Methods and criteria for selection should always be transparent and subject to scrutiny.**
>
> **Care should also be taken to ensure that adults do not accept any gift that might be construed as a bribe by others, or lead the giver to expect preferential treatment.**
>
> **There are occasions when children, young people or parents wish to pass small tokens of appreciation to adults e.g. on special occasions or as a thank-you and this is acceptable. However, it is unacceptable to receive gifts on a regular basis or of any significant value.**
> ***This means that adults should:***
>
> **• be aware of their organisation's policy on the giving and receiving of gifts**
> **• ensure that gifts received or given in situations which may be misconstrued are declared**
> **• generally, only give gifts to an individual young person as part of an agreed reward system**
> **• where giving gifts other than as above, ensure that these are of insignificant value".**

12. Following her return from a period of sick leave in February 2018, the claimant had a new line manager, who had started in January, Mr Jones. Following the claimant raising allegations about her treatment by some colleagues, which were considered under the grievance procedure, she was moved temporarily to a different role in which she was managed by David Glover-Wright, a Principal Social Worker. However, she retained her role as Family Finder for three children, including SH.

13. The tribunal stated that, during the period up to 21 September 2018 there was "a series of events which led to a growing concern on the part of Mr Jones about the manner in which the claimant was dealing with the case of SH." This was discussed further in a section of the decision which drew on materials, including the account that Mr Jones gave in the course of the later investigation which led to the formal disciplinary hearing. In summary, Mr Jones had described

various aspects of the claimant's dealings with SH which gave him concern about the amount of time that she was spending on her case, and the nature of the claimant's activities, in his view crossing boundaries in a way that did not apply to the other two children for whom the claimant retained responsibility. At one point in his investigation interview he had described the gift-giving in September 2018 as "the high-water mark" of such concerns.

14. The relationship with SH came to an end in September 2018, when she took up a place at a boarding school. Mr Jones learned of the gift-giving when he read the claimant's case note of her final meeting with SH on 12 September, prior to a supervision. This led to the claimant being put on management leave in a further discussion with Mr Jones on 21 September. He also made a referral to the local authority designated officer (LADO) who opined that the matter did not meet the threshold for their oversight, as the child had not been harmed, but that it was "clear that professional boundaries have been crossed", and recommended a full investigation. The claimant was subsequently suspended, and an investigation carried out, including interviews with her, Mr Jones and Mr Glover-Wright, from which the tribunal cited various passages. The subsequent investigation report then led to the matter moving to the next stage of a formal disciplinary hearing.

15. Although it had some misgivings the tribunal did not find the overall disciplinary process to be unfair, and we do not need to say more about it, save that we note that, at the disciplinary and internal appeal hearings, the claimant was represented by Lyse Hurd of the BASW. She was also accompanied at both hearings by Alan Castellaro, described in the notes as "AS Mentor, Specialist Mentoring & Employment Support", and as being an Autism Specialist.

16. We have already set out, in summary, the tribunal's factual findings as to the reasons why Mr Morgan dismissed the claimant. The tribunal set out a passage from the claimant's case note, in which she recorded that she had, on her return from sick leave in February 2018, been "disturbed" about SH's placements and that she had been "given up" by her carers while the claimant was on

leave; and her particular concern as to why a placement had been ended at Christmas, which she, the claimant, found difficult "as they are a Christian family" and "it was such a poignant time of year."

17. Mr Morgan stated in his decision that the case note was inappropriate and not in line with the standard expected from a senior social worker. The claimant had referred to the influence "of your medical conditions", and stated that the note was in draft form and mistakenly finalised. Mr Morgan questioned whether it could have been inadvertently finalised, but in any event, even as a draft, it was "fundamentally inappropriate" as it "majors on the author's feelings and emotions and makes inappropriate comments about the faith and practice of foster carers." Regarding the gift-giving, as we will shortly set out, Mr Morgan's conclusions were reproduced in the course of the decision on the claimant's internal appeal, which the tribunal in turn set out in its own decision.

18. As to the appeal stage, again we do not need to set out all the details of the process. However, a particular aspect that the tribunal documented, was correspondence whereby, at the outset, Ms Jackson asked the claimant to agree to an OH referral "because you have stated that your condition may have contributed towards the behaviours and actions which were under investigation." The claimant initially agreed to attend a referral, but in subsequent correspondence Ms Hurd indicated that she had advised the claimant not to participate, for a number of reasons which she (Ms Hurd) set out. Ms Jackson replied, including identifying that the clinician would be a Chartered Occupational Psychologist, and attaching an amended draft referral letter. There was then a rejoinder from Ms Hurd taking issue on some aspects; and the claimant did not consent to the proposed OH referral.

19. Ms Jackson's letter dismissing the appeal set out in turn each of the points raised in the letter of appeal (which we have rendered into italics), followed by Ms Jackson's response, including citations from Mr Morgan's dismissal letter and her comments upon aspects of his decision. At

[70] – [76] the tribunal extracted what it regarded as the key passages:

> **"70 At pages D543-D544 [1102-1103] there was this passage:**
>
> > **"I have set out below my response to each point which I have taken from your Appeal letter and provided a response against each one accordingly:**
> >
> > ***1. The outcome letter fails to detail exactly how the chair concluded that autism played no role in any of the recordings she made or any of the interactions that she has had with management at Buckinghamshire County Council.***
> >
> > > ***a. It is unclear how he reached that conclusion other than it was his own opinion. It is not evidence-based.***
> >
> > **Findings:**
> >
> > **It is my view that once you shared your medical condition with Dan Jones (DJ) he followed the Council's health and attendance procedures. It has been evidenced throughout your employment at Buckinghamshire County Council that you have had a number of OH referrals (July 2016, August 2016, December 2017, February 2018 and May 2019) and I acknowledge you sought your most recent OH referral as it was not progressed until October 2019 due to your ill health. I referred you to OH again on the 9th January at 17:02 via email. You have declined a specialist referral with an Independent Employment Psychologist. I find from the evidence submitted that DJ shared his concerns regarding your behaviours, as he would any other person in his team displaying inappropriate conduct in their duties in supervision.**
> >
> > **From the evidence submitted GM clearly did take into consideration the role that autism played. In the Mitigation section of Gareth Morgan's (GM) outcome letter, you have admitted to deploying 'masking' for many years as a coping technique to operate as a 'neuro- typical' individual. GM had also completed further reading around the neurodiversity in the document (CIPD) which is attached to this e-mail.**
> >
> > **Having listened carefully and considered the evidence submitted, GM concluded that "on the balance of probabilities the condition and its impact on you does not in my view negate or explain your actions as a Senior Social Worker of many years' experience and strong knowledge of policy and process associated with the profession and your current role. You have practiced consistently for a number of years since qualification yet your decisions and actions in relation to SH including gifting are in contravention of guidance and policy and appear to be deliberate, planned actions once 13 months before diagnosis and again 5 months prior, acts which you chose not to share with your manager".**
> >
> > **I believe the above provides a reasoned explanation of how GM concluded that autism was not what caused your misconduct."**
>
> **71 At pages D545-D547 [1104-1106] there was this passage:**
>
> > ***"4. The Chair has erroneously stated that Dan Jones acted appropriately when MM alerted him to her potential autism. The evidence is clear that the***

OH referral was not made until 2 months later, and only at MM's insistence and did not cover the aspects of MM's potential diagnosis that was necessary. Although that fact is acknowledged, the chair implicates that Dan Jones' actions were appropriate. The lack of response does not appear to have been considered by the chair.

> ***a. The chair failed to consider how MM's autism may have impacted on her during the time she was being supervised by Dan Jones.***
>
> ***b. There was no consideration for DJ's lack of knowledge about autism.***
>
> ***c. No consideration was given to the fact that DJ had no professional curiosity about what a member of his staff was saying.***
>
> ***d. The fact that DJ was a social worker and should have known better was not even considered by the chair.***

Findings:

We referred you to OH again on 9th January at 17:02 via email and you have declined a specialist referral with an Independent Employment Psychologist around what should have been in place.

I would like to acknowledge the information you have provided, which has been helpful reading and on top of my already prior knowledge and experience in dyslexia, neurodivergence and autism.

There was no formal diagnosis prior to your suspension or any basis prior to this whereby the Council could reasonably have known that suspected childhood autism entailed a mental impairment which would sufficiently interfere with your normal day to day activities as to amount to a 'disability'. An Occupational Health (OH) referral was directed by DJ. From your evidence around the Dyslexia in the Workplace, adjustments were put in place such as flexible working hours, use of coloured paper, 1.5 spacing with size 12 Arial font.

Taking into consideration your formal diagnosis at the point of dismissal it would not have stopped you following procedures. As an experienced Senior Social Worker, you should have been aware that giving gifts to an individual may have been seen as a form of favouritism and grooming.

DJ appropriately referred you to OH and there were delays that you acknowledge. In addition, I reviewed your supervision notes dated in 2018, pg. 3 that confirmed Access to Work reports and OH support which was funded by Buckinghamshire County Council for counselling sessions which took place during February – April 2018. Extra sessions had been recommended on the 17th May 2018 to which you had declined further PAM Assistance (discussed in your supervision notes dated 13 Sept 2018). Based on the evidence my view is that DJ was aware and had taken appropriate steps in order to support you further."

72 At pages D548-D549 [1107-1108], there was this passage:

"***7. The Chair failed to consider the ambiguity of the policies regarding gift***

giving, including the fact that a local policy and a social work specific policy does not exist.

a. The Chair has considered the allegation of gift-giving as though gift-giving is not accepted practice in Buckinghamshire County Council and social work as a profession.

b. There was also no consideration given to the positive impact that the giving of this gift would have had on this child specifically.

Findings:

Social work ethics books talk clearly about not accepting gifts, so giving gifts will not be appropriate either. The issue is not about whether the child viewed the gifts positively, which remains unclear. The Council's Code of Conduct draws together existing policies (including Conduct & Discipline) and guidance and should be read in conjunction with Guidance for Safer Working Practice for those working with Children and Young People in Education Settings and the Safeguarding Code of Conduct for all those working or Visiting Vulnerable Adults. Your signed contract of employment requires you to adhere to these accordingly. I find it is specified in Guidance for Safe Practice of Adults Working with Young People, Powers and Positions of Trust, that singling out children, is not equal and consistent. It clearly says adults should always have professional boundaries and consideration how actions may be viewed by others. You not only put the child at risk through your actions but also made yourself vulnerable by giving gifts to a child. It is inadvisable to give personal gifts which could suggest coercive behaviour which might also give a perception of grooming. Any reward should be in accordance with agreement and not based on favouritism. You left this open to interpretation. With regard to ambiguity around the policy, I find that it is clear in the two policies in the hearing bundle (Guidance for Safer Working Practice for Adults who Work with Children and Young People [page 15/ Section 10] & Guidance for Safer Working Practice for those working with Children and Young People in Education Settings [page 9 / Section 9) that a discussion should always take place before this happens with management. As a Senior Social Worker who has clearly done considerable academic work and research, I would have expected you to have understood the policies and social worker values."

73 At page D550 [1109] there was this passage:

"***9. The Chair seems to have upheld all the aspects of the disciplinary and terminated MM's contract without considering that none of MM's actions had any kind of negative impact on this child whatsoever. In fact, all of the evidence is the opposite. The evidence indicates that MM's interventions were very positive toward this child; therefore, a dismissal does not make sense.***

Findings: It is not about the positives or negatives for the child, but about your actions as a Senior Social Worker in a professional role failing to follow the policies and procedures which has brought into question key social work ethics. This undermined the relationship of trust and confidence between yourself, your clients and a vulnerable child. Clearly a big part of this is about professional boundaries and those have been seriously overstepped and particularly as a social worker needing to work

within our professional HCPC which Social Workers are expected to follow. This was not a one off, as by your own admission you referred to giving other gifts to SH and to foster carers, and even when you were on sick leave you went to a foster carer's home to deliver presents. Furthermore, your comment to SH that your care was unconditional and your invitation to her to call you at any time that she wanted for an update shows a concerning wider blurring of boundaries."

74 At pages D551-D552 [1110-1111] there was this passage:

"*12. And, perhaps the most significant aspect of this appeal is that there have never been any reasonable adjustments put in place regarding MM's high functioning autism, nor has she ever been properly supported by any manager at Buckinghamshire County Council in respect of neurodiversity, including autism; therefore, terminating at this stage is premature.*

a. There is no evidence as to how MM will perform with the adjustments in place and now that the grievance was upheld and the bullying was acknowledged.

Findings:

Buckinghamshire County Council was under no duty to make reasonable adjustments before it was aware that your autism potentially entailed a mental impairment which would sufficiently interfere with your normal day to day activities as this only came to light after your suspension. Reasonable adjustments had already been made in relation to other medical conditions you had made known to the employer including flexible working and change of paper. From your supervision notes you agreed that the changes were making a positive impact.

As previously mentioned, the grievance was dealt with separately. GM was clear in the previous letter about the adjustments put into place when you joined Buckinghamshire County Council. There had been a preemployment fit for work assessment, numerous return to work interviews, access to a work report, OH support, extra counselling sessions and extra PAMS Assist, which you declined. All adjustments were in place and you acknowledge in your supervision notes the adjustments were having a positive impact. Reasonable adjustments were also put into place to support you at the disciplinary hearings.

It is also of great concern that you chose to withhold your autism through 'masking' throughout much of your employment potentially putting at risk the vulnerable children with which you were working."

75 At pages D552-D553 [1111-1112] there was this passage:

"*13. There is no evidence in the outcome letter that the Chair considered any other alternative to termination, especially given the circumstances of this case. I would have expected him to specify why those other options were not appropriate in this case.*

Findings:

In the questioning at the appeal hearing GM was very clear that he did

> **consider and review all appropriate sanctions available to him prior to reaching the decision to dismiss you. GM reiterated that he took full account of everything discussed during the original conduct and discipline hearing and all the evidence provided in the hearing bundle. He confirmed that he considered a final written warning and possible redeployment into another team within Children's Services.**
>
> **I have checked myself to see whether there may have been another role that you could have been offered as alternative to dismissal. However, I understand that all roles within Children's services require individuals to demonstrate and understand boundaries. I therefore agree with GM's findings that your repeated behaviours and lack of appreciation and understanding for the significance of the breaches would make it difficult for him to allow you to continue to be employed by the Council."**

76 At pages D553-D554 [1111-1112] there was this passage:

> **"*14. We would also like to request that someone completely independent of Buckinghamshire County Council chairs any appeal and that this person has the right to make a decision on behalf of the council. We would also request that this person has knowledge of, and training in regard to autism. We no longer have trust and confidence in Buckinghamshire County Council's ability to consider the facts in this case in a fair and impartial manner.***
>
> **Findings:**
>
> **I find that the Service did make reasonable adjustments with regard to your request by arranging for a different senior manager, outside of the Children's Service, to hear your appeal in line with Buckinghamshire County Council policy and procedures. I can also confirm that I have some knowledge with regard to Autism and Neurodiversity. I am not an expert in this field but I can confirm that I undertook my own research into some of the medical conditions you have as well as I reviewing all the information provided by you. In addition, I also requested your consent to participate in an Occupational Health referral (letter dated 12.12.19), to support me in taking account of your autism in relation to my findings. You had the opportunity to review the content beforehand, which you did. Amendments were included and I also confirmed that the appointment would be with a Chartered Occupational Psychologist, skilled in the assessment of neuro-divergence conditions (email dated 09.01.20). You refused to attend despite my explanation and revisions I had made to the referral form which took into consideration your comments. I have therefore had to reach my conclusions without the insight which such medical advice might have provided." "**

20. Further sections of the tribunal's decision included, at [91] to [97], extracts from the claimant's evidence when cross-examined before it on the subject of professional boundaries. The tribunal also reviewed the conflicting evidence of Mr Otto and Ms Walton (witnesses for the claimant) and Mr Whitley (witness for the respondent), on whether or not gift-giving was

widespread. There was also a section headed: "The claimant's disabilities and the evidence about their likely impact on her judgement" which set out an extract from the documentation diagnosing the claimant's autism.

The Tribunal's Conclusions

21. The tribunal gave itself an extensive self-direction of law, citing relevant statutory provisions and authorities. It was not criticised, as such, before us; and it appears to us to have been sound. It indicated that it did not propose to set out separately the submissions, although it recorded one passage from those of Ms Cornaglia. It then turned to its conclusions, first in relation to unfair dismissal.

22. The tribunal found that the factual principal reason for dismissal, which we have described, was properly classified as relating to conduct. It also considered that there were reasonable grounds for concluding that the claimant had committed the conduct. In particular, while she had asserted that Mr Jones, by telling her, in relation to her final meeting with SH, to "do whatever she needed to do", had given her permission to give the gifts, she did not have express permission, and it was within the band of reasonable responses to conclude that she did not have implied permission either.

23. Though it had some misgivings about aspects of the respondent's investigation, the tribunal concluded that the critical issue was as to the sanction. Its conclusions on that were as follows.

> **"134 The critical issue here was the fairness of the claimant's dismissal, i.e. the question whether it was within the range of reasonable responses of a reasonable employer. We eventually (after much careful consideration) agreed with Mr Davidson's submissions on the importance of boundaries. We concluded that another employer might well have given the claimant a final written warning instead of dismissing her. We also found it a matter of considerable concern that the respondent's HR department had, according to Ms Walton (whom we found to be an honest witness, doing her best to tell us the truth and whose evidence we accepted in its entirety), not advised that at least some sort of warning be given to the employee to whom Ms Walton referred in paragraph 24 of her witness statement, as set out in paragraph 101 above, so that there was an apparent inconsistency of treatment as between the case of that employee and that of the claimant. However, applying Paul v East Surrey District Health Authority, and bearing in mind the fact that here the factual situation concerned a sustained**

course of action towards SH which was evidenced in a number of ways, we concluded that we could not by reason of an apparent disparity of treatment conclude that the claimant's dismissal was outside the range of reasonable responses of a reasonable employer.

135 Similarly, if, as it appeared from the evidence of both Mr Otto (and, as with Ms Walton, we found Mr Otto to have been an honest witness, doing his best to tell us the truth, and whose evidence we accepted in all regards) and Ms Walton, as well as that of the claimant, there was a practice of gift-giving to the persons to whom the respondent's social workers provided services, then it was a matter of considerable concern that the claimant was dismissed for doing that without having been given some sort of clear warning that she should not do it. However, while, as we say in paragraph 50 above, the respondent had not created any kind of "agreed policy for supporting positive behaviour or recognising particular achievements" which the document extract set out in paragraph 30 above envisaged, the claimant was (as we record in paragraph 96 above) herself well aware of the importance of obtaining her line manager's approval for a gift to for example SH. In addition, the respondent could not, without risking severe criticism from the relevant inspectorate (the Care Quality Commission) to whose inspections the respondent is subject, permit social workers, either routinely or at all, to do things which were materially inconsistent with the guidance set out in paragraph 30 above.

136 That guidance was (we concluded) to the effect that in the absence of an agreed policy, it was necessary for a social worker to have his or her line manager approve in advance an intended gift to a person in the respondent's care. We arrived at that conclusion for these reasons. Although the guidance envisaged the creation by a relevant employer of a specific policy concerning "The giving of gifts or rewards to children or young people", one possible (in fact literal) implication of there not being such a policy was that no gifts other than ones of "insignificant value" should be given to children or young persons. However, reading the guidance in a purposive way, it was possible to conclude from it that if a gift was not of "insignificant value", then it should be "first discussed ... with the senior manager". Furthermore, given the guidance set out in paragraph 30 above, we concluded that (1) the claimant was warned that she should not give presents other than ones of insignificant value to persons to whom she was providing services without her line manager's prior approval, and (2) the claimant should have known, from both the sentence on page B49 set out in paragraph 29 above and the sentence on page B86 set out in paragraph 26 above, that a clear and knowing failure to act in accordance with the guidance could be regarded by the respondent as gross misconduct for which she could be dismissed.

137 If the claimant had not had the disability of autistic spectrum disorder, and she had been able to accept unequivocally that she had been at fault in (1) giving to SH those things which she (the claimant) gave on 12 September 2018 without having previously discussed with Mr Jones her plan to give those gifts and obtained his approval for them and (2) showing an initial lack of insight into the inappropriateness of the case note at pages G229-G232 [2453-2456], then doing more than giving a final written warning might very well have been outside the range of reasonable responses of a reasonable employer. We did not come to a conclusion in that regard, however, because

> **137.1 the situation here was different in that the claimant's explanation or excuse for doing those things stated in paragraphs 19.1 and 19.3 above was**

> **(see paragraphs 71, 74, 76 and 129 above) that her disability of autistic spectrum disorder had (to the extent that she accepted she had erred) at least in part led her to err in those regards, but**
>
> **137.2 she refused to be seen by what was in our view plainly an appropriate expert to assess the likelihood of her (the claimant) repeating conduct of the sort for which she was dismissed and to advise on the possibility of measures which could be taken to minimise the risk of a repetition of such conduct.**
>
> **138 We concluded that the critical issue for the respondent was whether the claimant was likely inadvertently in the future to err by breaching boundaries which no competent member of the social work profession would have breached, and that in the face of the claimant's refusal to assist the respondent (in the form of Ms Jackson, who, contrary to Ms Cornaglia's submissions, we concluded considered carefully the "causative impact of C's disabilities") to assess that likelihood in the light of appropriate expert evidence, it could not be said to have been outside the range of reasonable responses of a reasonable employer to dismiss the claimant."**

24. In relation to the section 15 complaint the tribunal's conclusions were as follows.

> **"140 As for the claim of a breach of section 15 of the EqA 2010, while we were inclined to accept the claimant's claim that her dismissal was for conduct which was a result of her disabilities, so that the test in the first limb of section 15(1) was satisfied, we concluded that the test in the second limb of section 15(1) was not satisfied. That was for reasons which were similar to those for our conclusion on the reasonableness of the sanction of dismissal for the conduct for which the claimant was dismissed. In this regard, the test was different from whether or not the claimant's dismissal was outside the range of reasonable responses of a reasonable employer: it was for us to decide whether the claimant's dismissal was a disproportionate means of achieving a legitimate aim.**
>
> **141 However, we could see that the claimant's conduct towards SH had indeed breached boundaries the maintenance of which was, for objectively good reasons, a legitimate aim of the respondent. In the circumstances that (1) the claimant herself alleged that to the extent that she had breached those boundaries she had done so because of a disability, (2) such evidence as there was before us about the claimant's disability of autism and its likely effects on her (and we have set out what we regarded as the most relevant parts in paragraph 105 above) was inconclusive, but (3) she refused to permit the respondent to have her assessed by an expert whose evidence would assist the respondent to determine the likelihood of a recurrence of the claimant's errors and the measures that could be taken to minimise the risk of such recurrence, we concluded that the respondent had satisfied us that the claimant's dismissal was a proportionate means of achieving that legitimate aim."**

25. The complaint of harassment which succeeded related to the final sentence in the passage in the decision dismissing the appeal, set out in [74] of the tribunal's decision, and which we have set out above, referring to "masking" by the claimant of her autism. The complaint was described as

being of harassment by purpose or by effect by "stating, in determining the claimant's appeal against her dismissal, that she had committed deception". The conclusions on that complaint were as follows.

> **"144 The claim in relation to the event stated in paragraph 12.4 above was, however, well in time. It was in our view, mistaken to say that the claimant had (as recorded in paragraph 74 above) "chosen" to mask her autism, so that it was implicitly deceptive to do that. Indeed, in our view it was clear that the claimant had simply learnt behaviours which had led to a masking of her autism, and that it was offensive to suggest that she had acted deceitfully in doing so. In our view the test in section 26(1), read with section 26(4) of the EqA 2010 was in the circumstances satisfied in the claimant's favour as a result of the respondent using the words set out at the end of paragraph 74 above in that (1) those words constituted unwanted conduct which was related to a disability of the claimant and (2) although they were not done for a purpose within the scope of section 26(1)(b), those words had the effect of violating the claimant's dignity. If it was possible consistently with the proper interpretation of section 26 to conclude in addition that the respondent had created for the claimant an intimidating, hostile, degrading, humiliating or offensive environment, despite the fact that the claimant was by the time of the dismissal of her appeal by Ms Jackson no longer working for the respondent, then in our view the respondent had also created such an environment for the claimant through the use of the words set out at the end of paragraph 74 above. In any event, we concluded that the claim of a breach of section 26 by doing that which is described in paragraph 12.4 above was well-founded."**

26. We should note also the following paragraph under the heading: "In conclusion".

> **"146 As a result of our above conclusions, the claim succeeds in one respect, and in one respect only. We emphasise, however, that we arrived at our conclusions on the claims of unfair dismissal and a breach of section 15 of the EqA 2010 by reason of the claimant's dismissal only after much deliberation and after taking fully into account the fact that the claimant was dismissed for doing something which resulted from goodwill on her part towards SH. We did not need to decide whether what the claimant did constituted gross misconduct and therefore was such as to justify in the law of contract her summary dismissal. Nor did we need to decide the extent to which any compensation payable to the claimant in respect of that dismissal should be reduced by reason of for example contributory fault. All we ended up deciding was that the claimant's dismissal was not outside the range of reasonable responses of a reasonable employer and that her dismissal was a proportionate means of achieving a legitimate aim, which could just as easily be characterised as not being a disproportionate means of achieving a legitimate aim."**

The Grounds of Appeal and Cross-Appeal

27. The amended grounds of appeal are in the following terms:

> **"*Ground 1* (Reaching a decision on a point which has not been pleaded or**

argued). The ET erred in law in holding that dismissal was proportionate under s. 15 because the Claimant "refused to permit the respondent to have her assessed by an expert whose evidence would assist the respondent to determine the likelihood of a recurrence of the claimant's errors." (§141) The Respondent had not advanced the Claimant's refusal to undergo a further OH assessment as a reason justifying dismissal in that it evidenced a risk of repeat behaviour by the Claimant. As such, the Tribunal was not entitled to ascribe that reasoning to the Respondent and to accept it as a reason for dismissal rendering the dismissal fair and proportionate.

Ground 2 **(Misinterpretation of s.15 Equality Act 2010). The ET's judgment on proportionality at §137, and namely that "if the claimant had not had the disability of autism spectrum disorder … then doing more than giving a final written warning might very well have been outside the range of reasonable responses of a reasonable employer" relies on consequences of the Claimant's disabilities to justify her dismissal, which penalises the Claimant for her disability. The ET's application of the proportionality test evidences a misinterpretation of s. 15.**

Ground 3 **(Misinterpretation of s.15 Equality Act 2010 / Failing to reach a decision on a pleaded point). The ET considered only evidence of the Claimant's autism, when she relied on autism and dyslexia, in equal measure, for the purposes of her s.15 claim. The evidence of the causative impact of the Claimant's dyslexia was before the ET and cited specifically to it in closing submissions. The ET did not address that evidence and there is not a single reference to dyslexia in its findings on disability. The failure to consider the applicability of s.15 in respect of the Claimant's dyslexia evidences and erroneous understanding and application of s.15 as well as a failure to properly consider the Claimant's pleaded case in respect of s.15.**

Ground 4 **(Misapplication of case law / Perversity). The ET held that dismissal was a fair sanction primarily because the Claimant had given unauthorised gifts to a child, which, in the circumstances of the case (where there was an established practice of gift-giving and guidance which was not sufficiently clear nor properly communicated to the workforce), was contrary to the dicta in Distillers Co (Bottling Services) Ltd v Gardner [1982] IRLR 47, W Brooks & Son v Skinner [1984] IRLR 379, Meridian Ltd v Gomersall [1977] IRLR 425, [1977] ICR 597, Bendall v Paine and Betteridge [1973] IRLR 44 and Paul v East Surrey District Health Authority [1995] IRLR 305.**

Ground 5 **(Perversity). The ET concluded that the Claimant "had indeed breached boundaries (§141 etc.) and that dismissal was a fair sanction given the risk that the Claimant would beach boundaries again in the future. That conclusion is perverse: the ET did not make findings of fact specifying what boundaries had been breached and on which occasions. As such, it was unreasonable for it to conclude that the Claimant had repeatedly breached boundaries and for that reason could not be trusted**

not to do so again in the future."

28. The cross-appeal relates to the successful harassment complaint. The grounds are, in summary, first, that it was perverse "to find that a single word in a lengthy letter reached the statutory threshold of seriousness" described in the authorities; and, secondly, that the tribunal failed properly to address whether the remark could be truly said to have violated the claimant's dignity or created the proscribed environment, or whether it was reasonable for the remark to have the effect in question.

Arguments

29. We had the benefit of full and clear skeleton arguments and detailed oral submissions from both counsel. We have considered it all. What follows is only a summary of what seem to us to have been the most significant points advanced on each side.

Appeal – Claimant

30. Ms Cornaglia indicated in oral submissions that ground 1 related to both the section 15 complaint and the unfair dismissal complaint. She relied upon authorities to the effect that it will be unfair for a tribunal to rely upon a point in its decision, if the party to whom it is adverse has not had a fair opportunity to address it, in evidence in chief, cross-examination and/or in submissions. She cited in support passages from **Neale v Hereford and Worcestershire County Council** [1986] ICR 471, **Launahurst Limited v Larner** [2010] EWCA Civ 334 and **Laurie v Holloway** [1994] ICR 32.

31. Ms Cornaglia submitted that it had been no part of the respondent's pleaded case that the claimant's refusal to be examined by OH formed part of the reason for dismissal. The tribunal had asked to see the correspondence on the subject only at the end of evidence, and it was tabled on the

last hearing day, around the time when closing skeletons were exchanged and just prior to oral closing submissions. The tribunal did not indicate that it was doing any more than seeking further clarity as to the facts. Had it been apparent earlier that reliance might be placed on the claimant's conduct in declining to agree to the proposed referral to OH, Ms Cornaglia would have called Ms Hurd and the claimant's lawyer as witnesses, and questioned the respondent's witnesses about the point.

32. Further, the appeal letter indicated that Ms Jackson had simply upheld Mr Morgan's reasons for dismissing, which plainly could not have included the claimant's refusal to attend OH at the appeal stage. Further, Ms Jackson had also made clear her view that Mr Morgan had properly concluded that "autism was not what caused your misconduct". But the tribunal had concluded, at [137] – in particular [137.2], read with [138] – that the claimant's autism, combined with her refusal to attend OH, were causative of the respondent's decision to dismiss. That was in flat contradiction of the reasons that Mr Morgan and Ms Jackson had given for their decisions.

33. Ms Cornaglia accepted that whether the dismissal was proportionate for the purposes of the section 15 defence was an objective question for the tribunal; but submitted that that assessment still needed to be "wedded" to the respondent's stated reasons, not based on the tribunal's own reasons. She referred to the discussion in **Department of Work and Pensions v Boyers**, UKEAT/0282/19, at [31] (in turn citing a passage from **O'Brien v Bolton St Catherine's Academy** [107] EWCA Civ 145; [2017] ICR 737) and at [36]. She also referred to the discussion in **Stott v Ralli Ltd** [2022] IRLR 148 of the correct approach to the defence. Ms Cornaglia submitted that, in the context of the unfair dismissal claim, the tribunal's conclusion on this point amounted to a substitution error.

34. As to ground 2, again Ms Cornaglia clarified that this was relied upon in relation to both section 15 and unfair dismissal. She submitted that the tribunal had, at [137], unfairly and wrongly

criticised the claimant for seeking to explain her conduct by reference to her disability. This affected its conclusion on the fairness of dismissal, and also fed into its conclusion on proportionality for section 15 purposes at [141]. The parties had proceeded on the common understanding that the fairness of the dismissal and the section 15 justification issue were inherently interlocked; and that a dismissal which is discriminatory under section 15 will also be unfair.

35. In oral submissions she added that the tribunal had criticised the claimant for being unwilling to accept that she was at fault, even though it had made findings that at various points in the internal process she, or Ms Hurd, had accepted that she had made some mistakes.

36. The tribunal's assessment of the impact of the claimant's autism at [105] contained no proper analysis. Although complaints of failure to comply with the duty of reasonable adjustment were not pursued, as such, at the full hearing, the tribunal did not properly consider whether a failure to make reasonable adjustments meant that dismissal could not be justified as a proportionate sanction. Ms Cornaglia referred to passages in the claim forms referring to requests for adjustments relating to the claimant's dyslexia; and to the effect that this had caused spelling, grammatical and other errors in the September case note. It had also been submitted that, on account of her dyslexia, the claimant needed particularly clear written instructions on the topic of the rules relating to gift-giving.

37. Ms Cornaglia stated in oral submissions that the emphasis of ground 3 was in relation to the section 15 complaint, although she wished to rely on it in relation to unfair dismissal as well. She submitted that the claimant had relied upon autism and dyslexia in equal measure. But the tribunal made only a passing reference to dyslexia at the start of its decision. It also did not explain why, at [141], it regarded the evidence relating to the impact of autism as inconclusive. An Access to Work assessment of July 2019 spoke directly to the effects of the autism and dyslexia on the claimant's conduct, and the adjustments needed in relation to them. While it was true that the claimant's

internal appeal focussed on the impact of her autism, she had relied on her dyslexia as well.

38. Ms Cornaglia submitted that the tribunal therefore erred by failing to take into account a material part of the claimant's case. She cited **Transport for London v O'Cathail** [2013] ICR 614 at [44]. Alternatively, its decision was not *Meek*-compliant in this respect (referring to the guidance in **Meek v City of Birmingham District Council** [1987] IRLR 250).

39. Ms Cornaglia submitted that proper consideration of the additional strand of the section 15 complaint relating to dyslexia could have made a difference to the outcome of the defence, had the tribunal also accepted that there had been a failure to make a reasonable adjustment in relation to it.

40. As to ground 4, Ms Cornaglia confirmed that this related solely to unfair dismissal. The claimant had argued before the tribunal that dismissing her for conduct involving gift-giving was unfair, when the respondent had no clear policy on gift-giving, and, as her witnesses testified, gift-giving by social workers to children in the care of the respondent was widespread. She relied on the guidance in the four authorities cited in this ground of appeal.

41. Ms Cornaglia submitted that the tribunal failed to give due weight to the fact that paragraph 10 of the Guidance for Safer Working Practice was not an organisational policy of the respondent and was ambiguous. The tribunal itself found that it was open to different interpretations. It was not clear whether the respondent had communicated its interpretation to the workforce. The tribunal also failed to consider how it was understood by the claimant, including taking into account that her cognitive impairments required information to be communicated to her clearly and in writing.

42. The tribunal also failed to decide the fairness of the dismissal in line with "equity and the substantial merits of the case" having regard to the evidence that it heard from Ms Walton that when she was concerned to discover that a supervisee had bought an expensive gift for a child, HR

advised that, as she had raised it at a supervision, no further action was needed. The tribunal's approach to the guidance in **Paul v East Surrey District Health Authority** [1995] IRLR 305, and its conclusion that the claimant's circumstances were materially different, because there had been a sustained course of action, could not stand if grounds 1 – 3 succeeded. Further, the only conduct that it found was actually relied upon to support the dismissal was the September 2018 gift-giving and the case note.

43. As to ground 5, Ms Cornaglia indicated in oral submissions that this was relied upon in relation to both section 15 and unfair dismissal. She argued that the tribunal's conclusion at [141] that the claimant had breached boundaries was perverse. While referring to the HCPC's Standards at [26], the tribunal did not make any findings as to what specific conduct involved a breach of boundaries that could have amounted to gross misconduct under the respondent's Code of Conduct.

44. References to boundaries in the tribunal's account of Mr Jones' concerns, the LADO's observations, and discussions when the claimant was put on management leave, were cursory and the tribunal's own account of the claimant's cross-examination on the subject demonstrated that the concept in the social work context was not straightforward. The Family Finder role was particularly child-focussed. Because of the lack of clear and specific findings on this aspect, the conclusion that dismissal was not outside the band of reasonable responses, because the respondent considered that the claimant could not be trusted not to breach boundaries again in the future, was perverse.

Appeal – Respondent

45. By way of introduction, Mr Davidson reminded us of some well-known authorities and principles guiding the approach that an appeal court should take in relation to an employment tribunal's decision, as summarised by the Court of Appeal in **DPP Law Limited v Greenberg** [2021] EWCA Civ 672; [2021] IRLR 1016. The decision should be read fairly, as a whole, and without being hypercritical; the tribunal is not required to express its reasoning in every last detail,

more than is necessary to be *Meek*-compliant; it is to be assumed that the tribunal had all relevant evidence in mind, whether or not expressly referred to in its decision; if the tribunal has correctly directed itself as to the law, it should be assumed to have applied it correctly, unless it is clear that it has not.

46. In relation to ground 1, although the tribunal recognised that the reasoning was similar, it also properly recognised that the test of justification for the purposes of section 15 of the **2010 Act** is different from the band of reasonable responses test for the purposes of unfair dismissal. The tribunal stated at [141] its reasons for concluding that dismissal was a proportionate response in this case, and they were sound. As the test was an objective one for the tribunal's own assessment (see: **City of York Council v Grosset** [2018] ICR 1492 at [54]), the claimant's criticism that it had wrongly ascribed reasons to the respondent was misplaced. Indeed, had the tribunal, when considering objective justification, focussed solely on the respondent's thought processes, it would have erred: **DWP v Boyers** at [38]; **Chief Constable of West Midlands Police v Harrod** [2015] ICR 1311 at [41]. The additional point being made in the passage from **Boyers** relied upon by Ms Cornaglia was that, having identified a respondent's legitimate aim, the tribunal should then give proper weight in the scales to its needs in that regard, balanced against the impact of its decision on the claimant.

47. The matter of the attempted OH referral was not a new feature. The respondent had referred to it in its grounds of resistance to the claimant's third claim, and in submissions. Ms Jackson's request that the claimant consent to the OH referral was in the bundle from the outset, and her decision on the appeal referred to it. In any event, Ms Jackson's decision did not suggest that she considered that the claimant's declining to agree to the OH assessment was, *in itself*, further conduct that evidenced a risk of repeat behaviour such as had occurred in relation to SH, or was otherwise *itself* further conduct which she relied on as fortifying the conclusion that the dismissal

should stand. Nor had the tribunal (wrongly) read her decision in that way, or otherwise relied on it as conduct supporting the conclusion that dismissal as a sanction was within the band of reasonable responses.

48. Rather, Ms Jackson simply made the point that she had had to come to a view as to whether Mr Morgan was wrong about the potential impact of the claimant's autism on her conduct, and as to the risk of repeat conduct and whether it could be ameliorated, without the benefit of such a report. The tribunal in turn properly recognised that this was a relevant consideration in judging whether the overall outcome was within the band of reasonable responses. The primary finding (in relation to section 15) was that dismissal was a proportionate act because the claimant insisted that her breaching of boundaries was due to her disability, and would not fully accept responsibility for it. That was reflective of the respondent's pleaded defence. Nor, in the context of unfair dismissal, was it a substitution error, to have regard to what information the respondent did or did not have, when considering whether dismissal was within the band of reasonable responses.

49. The claimant therefore did have a fair opportunity to address the question of the practical impact of her refusal to agree to the OH report, which was indeed done in oral and written submissions on the last day. The claimant's team were therefore not unfairly ambushed by this point.

50. Ground 2 wrongly relied upon a finding in the tribunal's determination of the unfair dismissal complaint, in order to challenge its decision on the section 15 complaint. It also wrongly relied upon a counterfactual scenario about which the tribunal stated it did not need to reach a conclusion. In any event the tribunal was not penalising the claimant for her disability. It was referencing the fact that it was her own case in the disciplinary process, and before the tribunal, that her conduct was attributable to her autism. The tribunal properly concluded that that was also why she had not been prepared in the course of the process unequivocally to accept that she had been at

fault.

51. In considering whether dismissal was within the band of reasonable responses, the tribunal properly took that stance on her part into account, particularly in light of the point that it made at [138]. At worst the reasoning at [137] was infelicitously expressed, but on a careful reading it was clear what the tribunal was saying. There was also no error in regarding the claimant's own stance as having a bearing on the risk of future repetition, and hence whether dismissal, as opposed to some lesser sanction, was a proportionate means of achieving the respondent's legitimate aim.

52. As to ground 3, the tribunal identified dyslexia as one of the claimant's disabilities. The long section at [105] under the heading of "the claimant's disabilities and the evidence about their likely impact on her judgment", referring to "disabilities" in the plural, must be taken to include the tribunal's consideration of the possible impact of her dyslexia. Applying the guidance reiterated in **Greenberg**, the EAT should not assume, because it was not further mentioned, that the evidence relating to it was not considered. In any event, the claimant's own case mainly, and at its highest, relied upon her autism, not her dyslexia, and the tribunal properly focussed on the former.

53. Mr Davidson submitted that this ground was in any event academic, as the tribunal found that section 15(1)(a) *was* satisfied by reference to autism, but the decision to dismiss was nevertheless justified. That finding would have defeated the section 15 claim regardless of any additional findings that might have been reached as to the impact of dyslexia on the conduct giving rise to the dismissal.

54. Ground 4 amounted to an impermissible challenge to findings of fact: that a manager's approval for the gifts had been required, but not sought or given; that the claimant was made aware of this through the guidance referred to at [30] and [136], and that she should have known that what the tribunal called a clear and knowing failure to act in accordance with this requirement would be

regarded as misconduct for which she could be dismissed. The tribunal had adopted the interpretation of the guidance most favourable to the claimant: that on any view it was essential always to get advance permission from a more senior manager. It properly found that on this point the position was clear, and that the respondent was entitled to take the view that she knew, or reasonably ought to have known, this. It was the claimant's own case that it was her practice always to seek permission, and that she had implicitly been given it in this case; not that she did not appreciate that it was needed.

55. The tribunal duly considered the evidence relied upon by the claimant, to the effect that gift-giving was widespread. It also properly relied on the point made in **Paul**, about the need for any comparison of circumstances to be "truly comparable". In particular, in this case the tribunal properly relied upon what it referred to as the claimant's "sustained course of action towards SH". All of the other authorities relied upon by the claimant could be distinguished on their facts.

56. Ground 5 was, in reality, not a perversity challenge but a reasons challenge. But it was perfectly clear what the tribunal found were the boundaries that the respondent considered the claimant had breached, and how, and that this was made clear to her in the internal process.

57. Mr Davidson referred to the tribunal's references to the HCPC's standards referring to maintaining appropriate boundaries, paragraph 10 of the Guidance for Safer Working Practice, the citation from the notes of the meeting in which the claimant was put on management leave, including Mr Jones referring to "serious concerns about the lack of professional boundaries observed in this situation and in particular the gift given to the young person", and the LADO opining that "professional boundaries have been crossed" and recommending a full investigation. He also referred to the passages set out by the tribunal from the cross-examination of the claimant on this topic.

58. He submitted that it was, plainly, the unauthorised gifts in September 2018, and the attitudes evinced by the case-note, which were viewed as crossing boundaries, against a background of ongoing concerns about the claimant's approach to the relationship with SH. The tribunal properly found that the dismissal for this conduct was within the band of reasonable responses, having regard to the importance of boundaries. Whilst, at [140] – [141], correctly identifying the different test of justification under section 15, the tribunal also properly identified there that the reasons for its conclusion on proportionality were "similar". It clearly, in that context, made its own objective findings that the claimant had breached boundaries, the maintenance of which was a legitimate aim. These conclusions were not inadequately explained, nor perverse.

Cross-Appeal – Respondent

59. Mr Davidson submitted that the tribunal's upholding of the harassment complaint rested on limb (b)(i) of section 26(1) of the **2010 Act**, and the concept of violating dignity.

60. Mr Davidson relied on authorities which emphasise the seriousness of the threshold which conduct must cross to infringe section 26: **Richmond Pharmacology v Dhaliwal** [2009] ICR 724, **Land Registry v Grant** [2011] ICR 1390 and **Betsi Cadwalladr University Health Board v Hughes**, UKEAT/0179/13. He also drew attention to the remarks of Underhill P (as he then was) in **Dhaliwal**, as to the potential relevance, when judging whether a claimant's perception of effect is reasonable, of whether, in context, it was, or should have been, apparent, that the conduct was not intended to cause such an effect; and to observations along similar lines made by Elias LJ in **Grant**.

61. In the present case the threshold of seriousness was not met. This was a single brief remark in the course of a long letter which covered a very wide range of difficult issues and multiple points. The word that was said to be significant was not "masking" (a term used by the claimant herself) but "chose". Mr Davidson said in oral submissions that he did not seek to go behind the tribunal's finding that this word implied deceit; but the words could have been read differently. The tribunal

also found that they were not used for a proscribed purpose and were, in its judgment, "mistaken".

62. The claimant had insisted that her conduct had been attributable to her disabilities, and Ms Jackson had wanted to consider that contention by having the benefit of an OH advice. That was a conscientious approach. There was no malign intent, and no basis to infer otherwise from the fact that Ms Jackson was not a witness before the tribunal. Even if the comment was ignorant or thoughtless, or caused some offence, that could not reasonably have been regarded as crossing the seriousness threshold emphasised in the authorities. The tribunal was wrong not to so find.

63. As to the second strand Mr Davidson relied on **Quality Solicitors CMHT v Tunstall**, UKEAT/0105/14. In that case a tribunal had found that a remark to a client of a solicitors' firm, which referred to the employee being Polish, had the proscribed effect; but the EAT found that the tribunal had failed to consider whether her perception of it as such was reasonable, as required by section 26(4). The EAT also said that the tribunal in that case had needed to "directly and carefully address" whether the single remark on that occasion could truly be said to have the proscribed effect. The present tribunal was guilty of the same errors. The finding that the remark was "offensive" showed that the right test had not been applied. There was no engagement at all with the section 26(4) reasonableness test. Citing the sub-section was not enough. No amount of benevolent or generous reading of the decision could make good these deficiencies.

Cross-Appeal – Claimant

64. Ms Cornaglia submitted that the respondent should not be permitted to rely on ground 1, as the point raised by it had not been raised before the tribunal. So it could not now be criticised for not addressing it. In any event, this ground did not surpass the high threshold for a perversity challenge. The tribunal referred to the guidance in **Dhaliwal**, **Grant** and **Hughes**, and must be taken to have applied it. This was a considered remark in a formal letter, which stated in terms that the claimant's conduct was a cause for great concern, as it potentially put at risk the children with

whom she was working. It also thereby invoked a stereotype that autistic people are dangerous to children.

65. Further, the respondent could not rely on the relevance of intention, when Ms Jackson was not called to give evidence before the tribunal, no finding about her intention was made, and in any case her intention would not have been determinative. It was implicit from the reference to section 26(4) in the conclusions that the tribunal had considered the objective limb of the test of perception; and it did not need to say more, as the remark was plainly very offensive and vituperative.

66. As to ground 2 the reasons were *Meek*-compliant and compliant with rule 62 of the **Employment Tribunals Rules of Procedure 2013**, bearing in mind that this was one complaint in a case that was primarily about dismissal. The reasons were proportionate to the significance of the issue. The parties could understand why the claimant had succeeded in this complaint. Ms Jackson had, earlier in her decision, sought to reassure the claimant about her understanding of autism; yet she then accused her of choosing to rely on masking in a way that posed a potential risk to children. **Tunstall** could be distinguished, as the tribunal plainly had not forgotten section 26(4) when deciding effect under section 26(1), expressly citing it again in its conclusions.

The Law

67. Section 98 **Employment Rights Act 1996** provides (omitting irrelevant parts) as follows.

> **"(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."**

68. In applying section 98(4), including in relation to whether it was fair or unfair for the employer to dismiss the employee for the found conduct, the tribunal must take a "band of reasonable responses" approach, and must not substitute its own view for that of the employer. It is also established that, in a case where there has been an internal appeal, the tribunal should consider and decide whether the overall process and outcome, taking into account the appeal stage, was fair: **Taylor v OCS Group Limited** [2006] EWCA Civ 702; [2006] ICR 1602 at [38], [43], [46] – [48].

69. Section 39 **Equality Act 2010** makes it unlawful, among other things, for an employer to discriminate against an employee by dismissing her. That includes so-called discrimination arising from disability, contrary to section 15, which provides:

> **"(1) A person (A) discriminates against a disabled person (B) if—**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."**

70. Section 40 makes it unlawful for an employer to harass an employee. Harassment is defined by section 26, the relevant provisions of which are as follows.

> **"(1) A person (A) harasses another (B) if—**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

…

- **disability;**

… .”

71. In **Dhaliwal** at [15] the EAT explained that the test of effect at section 26(1) and (4) has a subjective element but is overall objective, and whether it is reasonable for a claimant to have felt her dignity to have been violated “is quintessentially a matter for the factual assessment of the tribunal.” It will be important to have regard to all the relevant circumstances, including potentially, whether the context makes apparent the intentions of the speaker. In **Grant** at [47] the Court of Appeal said that the tribunal must not cheapen the words of section 26(1)(b), which are “an important control to prevent trivial acts causing minor upset being caught by the concept of harassment.”

72. Where an employee has been dismissed because of what the tribunal finds was something arising in consequence of disability, then there may well, particularly in certain types of case, be considerable overlap between the features which it considers to be pertinent to whether it was fair to dismiss, for the purposes of section 98(4) of the **1996 Act**, and to its consideration of whether the so-called justification defence in section 15(1)(b) of the **2010 Act** is made out. See, for example, the discussion in **O’Brien v Bolton St Catherine’s Academy** [2017] EWCA 415, [2017] ICR 737,

a case concerning a dismissal following a long-term absence that arose in consequence of disability.

73. Nevertheless, in principle, the two tests are different. In particular, for the purposes of section 98(4), the tribunal must decide whether the step of dismissal was one reasonably open to the employer in light of the information available to it, and the conclusions that it reached, applying a "band of reasonable responses" approach. But, for the purposes of section 15, the tribunal must decide, applying the well-established structured approach described in the authorities, whether dismissal was a proportionate means of achieving a legitimate aim, on the basis of its findings on the evidence before the tribunal. See **Grosset** at [55]. For completeness, we note also that under section 98(4) the burden of proof is neutral, whereas it is for the respondent to make good the section 15(1)(b) defence.

74. The present tribunal correctly directed itself as to the law on this point, and, accordingly, while recognising the factual overlap between the considerations which fed in to its conclusions on each complaint, therefore rightly devoted separate sections of its conclusions to the fairness-of-sanction question for unfair dismissal purposes and to the section 15 complaint.

Discussion and Conclusions

75. We will start with the appeal, and, first, ground 1. This has a substantive element and a procedural element. The tribunal's substantive error is said to be that it proceeded on the basis that the claimant's refusal to undergo an OH assessment was "a reason justifying dismissal in that it evidenced a risk of repeat behaviour"; but the respondent had not so reasoned.

76. However, in our view the premise of this ground, as to the tribunal's reasoning, is not sound. The tribunal did not proceed on the basis that Ms Jackson had relied on the refusal to agree to the OH referral as further misconduct, fortifying the correctness of Mr Morgan's decision to dismiss. Nor did the tribunal itself treat it as such, for either section 15 or unfair dismissal purposes.

77. Rather, in agreement with Mr Davidson, it appears to us that the tribunal's point was simply that, because the claimant ultimately declined consent, Ms Jackson had to take her decision without the benefit of whatever insights such a report might have offered (which it regarded as relevant to the section 98(4) question); nor was any such evidence available to the tribunal itself (which was relevant to the section 15(1)(b) question). That analysis was supported by the correspondence. Ms Jackson had stated that she was requesting the referral because the claimant maintained that her condition may have contributed to the behaviours in question; and she stated in her decision letter that she had had to reach her conclusions "without the insight which such medical advice might have provided."

78. The tribunal's reasoning in relation to unfair dismissal at [137] and [138] was to the effect that what it regarded as relevant to the issue of reasonableness of sanction was the interaction of (a) the claimant relying on her disability as an "explanation or excuse" for her conduct; (b) the absence of an expert report which could have been expected to advise Ms Jackson on the likelihood of repeated conduct of this sort and the possibility of measures to minimise the risk of a repetition; and (c) hence the difficulty for the respondent of being able to assess that risk in the absence of such advice.

79. In the context of the section 15(1)(b) defence, it is clear from [140] and [141] that, while the tribunal was "inclined to accept" that the conduct for which the claimant was dismissed was "as a result of her disabilities", it put it no higher, because it considered that such evidence as it had as to the impact of autism upon the conduct was "inconclusive", and that the evidence of an expert would have assisted in assessing the risk of a recurrence and/or how that might have been minimised. In fact, therefore, the tribunal's reasoning was along similar lines to that of Ms Jackson. But we do not think it was in any event wedded to her *reasoning*. The point made in **Boyers** is that a tribunal needs, having identified the respondent's aim, to assess whether dismissal was proportionate by

reference to the *needs* of the respondent's business to which that aim gives rise. The present tribunal was properly entitled to take the foregoing features into account when weighing up whether, in its view, retaining the claimant in employment with a warning would have sufficiently addressed the risk of a repeat of her conduct in future, and hence sufficiently served the aim.

80. We therefore conclude that the factual premise advanced in the body of this ground does not actually reflect the significance which the tribunal either found Ms Jackson to have attached to the claimant's not agreeing to an OH referral, or attached to that feature itself. The tribunal did not err in its substantive decision in this regard, whether in relation to section 15 or section 98.

81. The procedural strand of this ground is that the respondent did not have fair notice of how this feature of the evidence would be relied upon by the tribunal. As to that, once again, it is pertinent that the ground proceeds on a false premise as to what significance the tribunal in fact attached to this feature. Had the tribunal imputed a view to Ms Jackson, that the claimant's conduct in declining the OH referral was itself further misconduct, or itself taken that view for the purposes of section 15(1)(b), we might have agreed that the claimant should have been better forewarned, so that she could consider calling further evidence to explain that conduct. But as this was not in fact, in the event, how the tribunal relied upon this material, that particular point of objection falls away.

82. The significance which the tribunal did in fact attach to this feature was, in our view, something which the claimant had a fair opportunity to address. The relevant grounds of resistance referred to Ms Jackson having referred the claimant to OH "in order to better understand the effects of [her] disabilities." The correspondence laid out why Ms Jackson considered that a report would assist her. Mr Davidson also flagged his point up in his closing skeleton, where he referred to the claimant's refusal to co-operate with the referral, and submitted that, in light of it, she could therefore hardly complain that the respondent did not have sufficient regard to the effects of her disabilities. Ms Cornaglia had the opportunity to respond to this point in oral submissions on the

final afternoon.

83. We conclude that, in both its substantive and its procedural strands, ground 1 fails.

84. We turn to ground 2. This ground asserts that, by what it said in [137] about what the position might have been had the claimant not had autism, but in then going on to conclude that the situation was different, the tribunal wrongly effectively penalised the claimant for her disability.

85. We do not agree. So far as section 98 is concerned, the tribunal found that Mr Morgan concluded that he was not persuaded that the claimant's autism had influenced her conduct in relation to the gift-giving or the content of her report, that the claimant maintained that contention on the internal appeal, and that Ms Jackson then considered that argument, but for her part properly concluded that Mr Morgan's view was one that it had been open to him to reach. In our judgment, the tribunal properly regarded the interaction of (a) the claimant maintaining that her autism had affected her conduct; (b) the claimant for that reason being reluctant fully to accept that she was at fault; and (c) Ms Jackson not having the benefit of any further evidence that might have cast light on that, and/or measures that might be taken for the future, as relevant to whether it was reasonably open to the respondent to reject the option of a final warning instead of dismissal.

86. That approach did not involve wrongly penalising or punishing the claimant for her disability. Rather, it involved the tribunal simply properly recognising that these features had an impact on the assessment of the options that were reasonably open to the respondent, given its concern about the need to avoid a risk of a repetition of the claimant's conduct if she remained in employment. This was an inescapable part of the factual matrix, whether indeed the respondent might have concluded (as the tribunal found Mr Morgan did) that the claimant was unwilling fully to accept responsibility for her conduct by wrongly attributing it to her autism, or (as the tribunal found Ms Jackson sought to investigate) whether it might have had an influence, in which case what, if anything, could be done to minimise the risk of it causing such errors of judgment in the

future, needed also to be considered.

87. We note that, in this regard, the tribunal took care in the way it expressed itself at the start of [138] to make it clear in non-pejorative language that the concern was about whether the claimant was "likely inadvertently in the future to err by breaching boundaries", whilst also properly concluding that the concern was a serious one, and that Ms Jackson had considered the causative impact, but was hampered in that task by the lack of an OH report. Nor do we agree that the tribunal effectively perversely concluded that the claimant had not accepted that she was at fault. Whilst the findings indicated that some concessions or acknowledgment were offered by her or Ms Hurd, at certain points, the overall picture was one in which the claimant was unwilling at first to recognise that there might be any valid cause for criticism of her conduct, and did not ever fully acknowledge or accept during the course of the internal process, why the conduct was viewed as being so serious.

88. Turning to the section 15 justification defence, again the mere fact that the tribunal, albeit with some tentativeness, was prepared to accept on the evidence before it, that the claimant's conduct was influenced by disability, does not mean that it was bound to conclude that the decision to dismiss could not be justified, or that to find otherwise amounted to wrongly punishing the claimant for being disabled. The defence only needs to be invoked at all if the conduct is found to be something arising from disability. It is nevertheless a defence that Parliament has allowed, if it can be made out.

89. In so far as the tribunal's reasoning in [137] (which was, at that point concerned with unfair dismissal), or, implicitly, a similar line of reasoning, also informed its conclusion on that defence, we therefore do not think that the tribunal erred in its approach in the principled way alleged by this ground. It was entitled, as such, to have regard to the features it referred to at [141] in deciding whether, on the evidence before it (which did not include an OH report addressing the particular

issues identified by Ms Jackson) dismissal was a proportionate response in furtherance of the aim, rather than retaining the claimant in employment with a warning.

90. Ground 2 therefore also fails.

91. We turn to ground 3. At the heart of this ground is the proposition that the claimant relied on her autism and her dyslexia "in equal measure" in relation to her section 15 claim, and that the tribunal failed properly to address the strand related to dyslexia. As we have noted, Ms Cornaglia argued that this had a knock-on effect on the safety of the tribunal's decision on unfair dismissal as well.

92. In assessing this ground it is, in our judgment, important to consider how the claimant's dyslexia featured in her various claims in the litigation as it unfolded.

93. In the first claim form, presented after the claimant had been suspended, but prior to her dismissal, she referred to having informed the respondent of her dyslexia when she applied for the job in 2016, and to having told her manager in 2018 that she "had Asperger's". As the tribunal noted in its decision, she referred in evidence to being formally diagnosed with autism more recently, and it cited from letters from an autism assessor of December 2018 and January 2019.

94. The first claim form included a complaint of failure to make reasonable adjustments for her dyslexia during the course of her employment from its start in 2016, in a variety of ways, including such matters as provision of various software and technical aids. There was also a section 15 complaint in relation to the conduct issues that had been raised in relation to the September 2018 case note. It was said that it contained some spelling and grammatical errors, missing and misplaced words and miscommunications. These were said to arise from "my processing order and dyslexia" and it was said that if "the appropriate adjustments" had been made these would not have arisen.

95. In the second claim form, presented after the dismissal, it was said, in summary, that the claimant had accepted that her case note was "written from the wrong perspective", but that error and the alleged failure to follow reasonable management instructions were both linked to Mr Jones' "failing to make adjustments for a neurodivergent employee". Under the heading of discrimination arising from disability it was said that in "expecting a person with a neurodivergent disability to behave in a set way she has been put at a disadvantage." There was also a further complaint of failure to make adjustments in relation to the meeting with the investigating officer, and that officer and the hearing officer's refusal to take into account "her disability" in considering the allegations.

96. The third claim form, presented following the appeal decision, referred to Ms Jackson's request for an OH assessment to assist in understanding the claimant's "disability", contended that she had not provided a reasoned explanation about why Mr Morgan believed that "her disability" did not affect her actions; and it raised complaints that the remark in the appeal decision about masking was discriminatory, of discrimination arising from disability by the manner in which Ms Jackson "considered her disability" and continuing failure to make adjustments for "her disability" when assessing the allegations which formed the basis for her dismissal.

97. The original miscellaneous complaints of failure to comply with the duty of reasonable adjustment during the course of the claimant's employment, in relation to the claimant's dyslexia, were no longer live by the time of the full merits hearing. As Ms Cornaglia acknowledged during the course of argument, there was in fact no freestanding complaint of failure to comply with the duty of reasonable adjustment that was live at all at that point.

98. While one of the issues that had troubled Mr Jones initially was the omission from the case note of any reference to a gift voucher, as the tribunal found, the principal reason why Mr Morgan dismissed the claimant was the giving of unauthorised gifts, and then writing the case note in

"inappropriate terms reflecting her own thoughts and feelings". As the appeal decision identified, in the internal appeal, the criticism directed at Mr Morgan was that he had failed to accept the impact of her *autism* on the conduct for which she was dismissed, how this may have impacted on her during the time when she was being managed by Mr Jones, and what was said to be Mr Jones' own lack of knowledge about autism. The tribunal also referred, at [67] and [68] to an exchange during the appeal hearing, in which Ms Hurd questioned Mr Morgan's conclusion on the impact of the claimant's autism, and said that Mr Jones had failed to make a reasonable adjustment for it, once diagnosed; and the claimant referred to Mr Morgan having said that he had read a paper "on neuro-diversity".

99. So, while there were originally complaints about failure to make adjustments for the impact of the claimant's dyslexia in relation to her working arrangements generally, these were no longer live by the time of the full merits hearing. We also conclude, standing back, that her case in relation to her working relationship with Mr Jones, as her new manager in 2018, and the reasons for the conduct for which she was eventually dismissed, was focussed on what was said to be the impact of her autism. This was reflected in the various features that we have noted: the way in which her case in the internal process focussed on autism, the way in which her later complaints to the tribunal were framed, the later references to her disability in the singular, to her neurodiversity, and so forth.

100. While it was said that the claimant's dyslexia had led to misspellings and suchlike in the note, the tribunal found as a fact that Mr Morgan did not accept that it had been uploaded in error; and in any event what affected his decision to dismiss was his view of the substantive content.

101. So far as the issue of unauthorised gift-giving was concerned, the material relied upon by the respondent was in fact all in writing. The nub of the claimant's case was that paragraph 10 of the Guidance did not set out the position sufficiently simply and clearly, taking into account that, because of her autism, she tended to understand instructions literally, and would be liable to miss

nuances of meaning. In any event the tribunal found as a fact that the claimant *did* understand that she should not have given the gifts that she did to SH without getting Mr Jones' permission to do so first.

102. In light of all of the foregoing we do not think the tribunal erred, when it referred, in a sub-heading, to "[t]he claimant's disabilities and the evidence about their likely impact **on her judgement**". This properly reflected that the thrust of her case was about the impact of her autism on her own judgment and understanding in relation to the gift-giving and the substantive content of the case note; and the tribunal properly focussed its attention in that section of the evidence on the letters specifically written by the Autism Assessor. That assessment, we also note, itself made some reference to features which the claimant referred to as "feeling dyslexic", but in the course of discussion of behaviours and habits that contributed to the overall assessment and diagnosis of autism.

103. In conclusion, in view of how the claimant's case was advanced in relation to the complaints with which the tribunal was concerned, and its findings of fact, we do not consider that the tribunal erred in failing to give further consideration to her dyslexia, separately from her autism, whether in terms of how that was treated and considered in the internal process, and/or what impact it may or may not have had on the section 15(1)(b) defence. The tribunal's approach was reflective of how the claimant advanced her case, and the implications of the factual findings that it made.

104. Doctrinally, a failure to make an adjustment which the tribunal considers reasonably should have been made might have an impact on whether a dismissal was justified, for section 15 purposes, or, in some cases, within the band of reasonable responses. But, given all the foregoing, we do not think the tribunal erred by failing to consider whether there was a failure to make a reasonable adjustment for the claimant's dyslexia, when coming to its conclusions in this case. We also agree with Mr Davidson that, in this case, the finding that the section 15 defence was made out with

reference to autism was, in any event, completely determinative of that complaint.

105. Ground 3 therefore also fails.

106. We turn to ground 4. The points raised by it were specifically run before the tribunal, and it considered them at [134] and [135]. It stated that it regarded both as matters of "considerable concern" but explained why ultimately it concluded that they did not point to the sanction of dismissal being unfair. In our judgment, the tribunal did not err in reaching that conclusion.

107. It must be remembered at the outset that the starting point for the tribunal was to consider whether it was reasonably open to Mr Morgan to conclude that the claimant did appreciate that she should not have given the gifts without getting prior permission from Mr Jones, and that this was conduct for which she could potentially be dismissed.

108. As to the contractual documentation on which the respondent relied, it is correct, as such, that the Guidance, including paragraph 10, is generic, not bespoke to the respondent. However, as the tribunal found, the claimant's contract referred her to the respondent's Code of Conduct, and the Code said it must be read in conjunction with this Guidance, which appeared in an appendix. The tribunal was entitled to view that as clearly conveying that it had been adopted as part of the respondent's own disciplinary rules that the claimant was required to comply with. It was also entitled to view that as clearly conveying that, as a minimum, any proposed gift needed to be discussed with (and, by plain implication, authorised by) a senior manager.

109. It was also, as we have noted, found by the tribunal to be a feature of the claimant's case in the internal process, that she maintained that it had been her practice to seek authority for gifts, and that she considered that she had impliedly been authorised by Mr Jones's words to buy the gifts for SH. At [135] the tribunal referred back to [96], which formed part of its review of the evidence on this subject, noting that the claimant's evidence to the tribunal, that her practice was to seek

permission, was consistent with what she said in the internal investigation and at the disciplinary hearing. It was not, in our view, an error for the tribunal not to hold that it was not open to Mr Morgan to infer that this supported his conclusion that she knew that permission was required.

110. So the tribunal properly decided that Mr Morgan reasonably concluded that the claimant did understand that permission was required, and had not obtained it in this case. It was also reasonably open to the tribunal to conclude, having regard to the overall language of the Guidance, the signposting to it in the claimant's contract, and the nature of her work, that these materials sufficiently conveyed that a breach of it could potentially be serious enough to warrant dismissal.

111. Against that background, we do not think that the tribunal was obliged to regard the evidence from the claimant's witnesses to the tribunal itself, to the effect that gift-giving by social workers in the respondent's organisation was common place, as meaning that the respondent had not sufficiently conveyed to her the seriousness with which unauthorised gift-giving might be viewed, or that any reasonable manager in the position of Mr Morgan would have so concluded. We note in this regard also that, elsewhere in its decision the tribunal referred (at [49]) to Mr Glover-Wright having told the internal investigator that, had the claimant asked him, he would have told her that the gifts were inappropriate, and he did not believe there was any local custom and practice; and (at [102] – [104]) that the respondent's witness Mr Whitley, when asked whether gift giving was prevalent, replied "no", he had never done it, and never known anyone else to give such a substantive gift as the claimant did to SH. The evidence that the tribunal had on this point was therefore plainly far from all one way.

112. We do not think the tribunal erred by not treating the evidence of the particular case referred to by Ms Walton, as pointing to the conclusion that it was unfair to dismiss the claimant. It could be said that this evidence in fact provided some support for the respondent's position, as it indicated that Ms Walton was sufficiently concerned when she found out about a gift, to ask HR for guidance

about what to do. Secondly, and perhaps more importantly, the tribunal's reference to a sustained course of action in the claimant's case appears to us plainly to refer back to the background in which Mr Jones' concerns about the claimant's breaching boundaries in relation to this particular child had built up over months, and that the problem had "persisted over time", despite her being given advice. As we have noted, the tribunal specifically found at [96] that failure to follow instructions given by Mr Jones formed part of the background supporting Mr Morgan's conclusion that she could not be trusted not to repeat again the particular conduct for which she was dismissed. As the tribunal also recorded at [73] Ms Jackson for her part considered that, on the claimant's own account, this was not a one off, and that there was what she called a "concerning wider blurring of boundaries."

113. In **Paul v East Surrey DHA** [1995] IRLR 305 Beldam LJ (with whom the other members of the Court gave concurring speeches), at [34] said that tribunals would be wise to heed the warning in the earlier case of **Hadjioannou v Coral Casinos Ltd** [1981] IRLR 352 that arguments based on disparity should be scrutinised with particular care, that there will not be many cases, in which the evidence points to the conclusion that there are other cases which are truly or sufficiently similar, and that each individual case must be judged on its own particular circumstances.

114. Ms Cornaglia submitted that the tribunal did not find that the claimant was, or was regarded by Mr Morgan or Ms Jackson as, specifically guilty of misconduct in relation to any earlier conduct relating to SH. However, the point of the guidance in **Hadjioannou** and **Paul** is simply that every case must be judged on all its relevant circumstances. In our judgment the tribunal did not err in taking into account this background history and context of the claimant's case, and the view that the respondent took of it, when considering whether Ms Walton's case, about which it appears in any event to have had very limited information, was truly or sufficiently similar, so as to point to the necessary conclusion that the sanction of dismissal was in the claimant's case unfair.

115. We turn to ground 5. We can deal with it shortly. The tribunal was plainly entitled to conclude that the concept of breaching boundaries was clearly understood by the claimant, Mr Morgan and Ms Jackson as referring to the need, in line with HCPC's core standards, in her relationships with the children for whom she was responsible, to stay the right side of the line between the professional and the personal, particularly in relation to matters such as gift giving. It was noteworthy that the tribunal also had evidence that the LADO opined, that, whilst this was not a case of the kind that required their intervention, it raised a breach of professional boundaries that should be investigated.

116. The tribunal fully and clearly explained why it considered that the respondent had properly concluded that the conduct involved a serious breach of professional boundaries, and that it could not be confident that, if the claimant remained in its employment, that would not be repeated; and why it considered that this supported its own conclusion for the purposes of the section 15 claim, that the dismissal was justified. Having regard to all the evidence that the tribunal had, these conclusions were also not remotely perverse.

117. Ground 5 therefore also fails.

118. We turn to the cross-appeal in relation to the successful harassment complaint.

119. We will consider first the strand to the effect that the tribunal failed to address the section 26(4) questions, or alternatively to explain its reasoning in relation to them. As to the first of those, we think it is clear that the tribunal did consider the section 26(4) questions. It not only cited that sub-section in its self-direction as to the law, and discussion in the authorities of the importance of context, but it also specifically stated in the course of [144] that its view was that section 26(1) "read with section 26(4)" was satisfied. It plainly, therefore, specifically did consider section 26(4) when reaching its conclusions.

120. We also consider that, reading [144] as a whole, it is apparent what the tribunal considered the relevant circumstances to be, supporting the conclusion that the claimant's perception was reasonable. In particular, the tribunal considered that the "sting" of Ms Jackson's remark was that the claimant had chosen to act deceitfully by concealing her autism, and that this was wrong because the claimant had in fact simply learned behaviours which led to her masking her autism. It appears to us that when the tribunal went on in the next sentence to say that section 26(1) read with section 26(4) was "in the circumstances" satisfied, these were the circumstances that it had in mind in concluding, by plain implication, that it was reasonable for the claimant to take the view she did. This case is therefore not, in our view, on all fours with **Tunstall** in that regard.

121. A further strand of the cross-appeal challenges that conclusion as perverse. However, whether it was reasonable for the claimant to have felt her dignity to have been violated is, as **Dhaliwal** reminds us, "quintessentially a matter for the factual assessment of the tribunal" and so we can only interfere if the tribunal's view was simply not reasonably open to it on the facts found.

122. The fact that this was a single remark does not by itself establish perversity. It is a relevant consideration that this was a considered observation in a formal letter, not an unscripted oral comment, again a point of distinction from **Tunstall**. Nor do we think that the tribunal's use of the word "offensive" signifies that it had forgotten about the high threshold of violating dignity, given its own citation of the authorities to that effect, and its reference within this same paragraph to "violating the claimant's dignity". We also take into account that the tribunal properly found that the words conveyed that the claimant had been deceitful (and, so, were reasonably perceived as such). While we do not read the tribunal as having found that they were viewed as stereotyping autistic people generally as a danger to children, Ms Jackson did state that the claimant's conduct was "of great concern" as it had potentially put at risk the vulnerable children with whom she was working.

123. Taking account of all of that, and while we do consider that another tribunal could permissibly have come to a different view, we cannot say that this tribunal's finding that the claimant's relevant perception was reasonably held, was in the legal sense perverse, such that it cannot stand.

124. The cross-appeal therefore ultimately fails.

Outcome

125. Both the appeal and the cross-appeal are dismissed.