Neutral Citation Number: [2023] EAT 50

Case No: EA-2021-000621-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 January 2023

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MISS D GIBBONS

Appellant

- and -

(1) MR K CHINAMBU
(2) NATIONWIDE BUILDING SOCIETY

Respondents

- -
- -

Mr S Forshaw (instructed by Hegarty LLP) for the **Appellant**
Ms C Scarborough (instructed by Eversheds Sutherland (International) LLP) for the **Respondents**

Hearing date: 26 January 2023

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JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION

The claimant complained that she was unfairly dismissed and that her dismissal was both conduct because of something arising in consequence of her disability (section 15 **Equality Act 2010**) and harassment related to disability (section 26).

On a correct reading of its decision the tribunal had found as a fact that there were two operative or contributing reasons for the dismissal. It correctly identified, for the purposes of the unfair dismissal claim, which of these was the principal reason for dismissal. But it erred by only considering that reason when adjudicating the **Equality Act** complaints, and failing to recognise that the "because of" test (section 15) and the "related to" test (section 26) are both wider than the principal reason test that applies in relation to unfair dismissal.

HIS HONOUR JUDGE AUERBACH:

1. I will refer to the parties as they were in the employment tribunal. I have heard the claimant's appeal against the dismissal by the employment tribunal of complaints of discrimination contrary to section 15 **Equality Act 2010** and contrary to section 26 of that **Act**, relating to her dismissal by her former employer, the second respondent. I will refer to those complaints for shorthand as being of discrimination arising from disability and of harassment. Her complaint of unfair dismissal was successful and there has been no appeal or cross-appeal in respect of that. Other **Equality Act** complaints brought by the claimant were dismissed by the tribunal. The appeal before me does not challenge the dismissal of any of those complaints and nor does it affect the first respondent before the tribunal, who has therefore played no part in this appeal.

2. There were four claim forms issued at different stages, raising a large number of complaints and factual allegations relating to events over a number of years during the final years of the claimant's long employment by the respondent. Following a multi-day hearing, the employment tribunal (Employment Judge Tsamados, Ms B Von Maydell-Kock and Ms G Mitchell, sitting at London South) produced a lengthy and detailed reserved judgment running to some 68 closely-typed pages. Much of the tribunal's findings, however, deal with matters that are not the subject of the present appeal. For my purposes, drawing on the tribunal's decision, in summary, the material facts are as follows.

3. The claimant was employed from September 1988 until her dismissal in September 2018, at which time she was working at the Wandsworth branch, to which she lives very close. It was accepted before the tribunal that, at all relevant times, the claimant had two disabilities, one being referred to by various names, and which, for convenience, I will refer to as sickle cell anaemia. The other was a condition which, following injuries sustained in 2011, persisted and affected the claimant's spine and shoulders, and was referred to by the tribunal simply as a spinal condition.

4. The tribunal made extensive findings about various events during a period from roughly 2012 up until the claimant's dismissal in 2018. It was a central theme of the claimant's case that the first

respondent, who was at the relevant time her manager at the Wandsworth branch, had in various ways been unsupportive and sought to make her life difficult. The tribunal had to make findings about a number of alleged incidents and episodes and its findings document a number of years of ongoing conflict involving allegation and counter-allegation, grievance and counter-grievance.

5. The tribunal found that, from around May 2017, the claimant was absent on account of ill health. Following an occupational health report having been obtained, and a further discussion, in July 2017, a manager, Mr Fox, wrote to the claimant setting out discussion points, options that he had been investigating and the next steps.

6. It was identified that, because of the claimant's long-term and complex health needs, adjustments had been made to the role that she had latterly been carrying out at the Wandsworth branch, where her duties had been restricted; but there was an issue as to whether it was viable for her to continue only carrying out restricted duties in terms of the needs and demands of the business. It was also noted that the claimant's position was that she was unable to travel or commute any distance to other branches, where the location or the commute would involve her in exposure to higher pollution levels than at Wandsworth, as this would put her health at risk owing to her sickle cell anaemia. It was said that the respondent's researches indicated that this could be a factor, but were inconclusive. But, in light of the claimant's decision not to commute to other branches, what vacancies there might be elsewhere, that might otherwise be suitable for her, had not been explored.

7. The tribunal went on to document ongoing processes of consideration of how to manage the claimant's ill health absence and the way forward in relation to that, and ongoing issues of conflict between the claimant and, in particular, but not only, the first respondent.

8. The tribunal went on to find that in December 2017, during the course of a discussion when managers visited her at home, the claimant asked for there to be a workplace mediation set up that might enable her colleagues better to understand her disabilities, as she felt that she was wrongly perceived as moaning about everything, and, if through the safe space of mediation, her colleagues could air their issues and she could also enable them to understand better the impact of her disabilities,

this might be a constructive way forward. The respondent responded positively and instructed a mediator, who visited the claimant and also interviewed colleagues working at the Wandsworth branch. The mediator produced a report in May 2018. The mediator set out her conclusion that relationships between the claimant and a significant number of colleagues working at the Wandsworth branch had broken down irretrievably.

9. Following this, the respondent wrote to the claimant to invite her to a formal meeting to discuss her ongoing employment. The claimant indicated that she was not well enough to attend such a meeting and it was postponed. A further OH report was obtained and it was indicated that the claimant was not yet ready to engage in a formal meeting process. The meeting was rescheduled once again. In the invitation, it was confirmed that the purpose was "to consider how it may be possible for your employment to continue in light of the mediation report conclusion".

10. The meeting went ahead in the claimant's absence in September 2018, although an issue was subsequently raised by her that she had not actually received the further invitation letter. Chairing the meeting in her absence, manager Mr Crouch, the area manager for the East of England, decided to dismiss the claimant. He wrote on 20 September 2018 notifying her of this outcome and his reasons. At [222] the tribunal described the material parts of Mr Crouch's letter as follows:

> **"The letter states that having considered the available medical advice and evidence, Mr Crouch had concluded from the letter to the Claimant dated 21 July 2017 and the Case Summary document dated 20 September 2017, that the Claimant was unable to work from any Nationwide location other than Wandsworth, because of the negative impact on her health, namely the impact of pollution levels on her sickle-cell anaemia. Mr Crouch also concluded from the CMP Resolutions report dated 2 May 2018 and the supporting Case Summary document dated 26 June 2018, that as a result of the outcome of the report it appeared that the Claimant's working relationship with the other members of the Wandsworth Branch had reached a point of seemingly irretrievable breakdown. Mr Crouch noted that the Claimant had not attended the formal meeting or made any suggestions as to repairing relationships, which suggested to him that the Claimant also felt that those relationships cannot be repaired. Mr Crouch indicated that he made enquiries in the hope that the other members of the Wandsworth Branch had moved to different Branches, but these confirmed that the majority of those involved was still working within the Branch. Mr Crouch further indicated that he was keen to explore whether there were any suitable alternative roles for the Claimant, but she did not attend the meeting or submit any written statement, and no one had made representations on her behalf. He therefore reached a decision on the basis of the evidence that was available and concluded that the Claimant was unable to work from any other location than the Wandsworth Branch and that it was not tenable for her to return to work at that Branch due to the significant negative impact on the**

> **other individuals working there. He therefore concluded that it was untenable for the Claimant to continue her employment with Nationwide and so she was dismissed with contractual notice with effect from 18 September 2018."**

11. The claimant appealed and her appeal was heard by another manager, Julie Fairfield, chief manager for commercial lending. Following the appeal meeting, she wrote to the claimant notifying her of her decision to uphold Mr Crouch's decision. The tribunal said:

> **"242. The letter then turned to address Mr Crouch's findings that she was unable to work at any Branch other than the Wandsworth Branch due to her ongoing health and a return to the Wandsworth Branch was not possible due to the irretrievable breakdown of the Claimant's relationships with those still at the Branch.**
>
> **243. The letter indicated that given that the Claimant did not attend the dismissal meeting, Ms Fairfield took into account points that the Claimant said that Mr Crouch had not been aware of. Further, the letter stated that Ms Fairfield was hoping that the Claimant would put forward some suggested solutions to enable her to have a working environment which would be productive for her and her colleagues, but regrettably she did not do so.**
>
> **244. The letter recorded that during their meeting, the Claimant confirmed that her health situation had not changed and that she can only work at the Wandsworth Branch based on both the medical evidence previously provided as well as the Claimant's own view. The letter further recorded that the CMP Resolutions report had concluded that relationships at the Wandsworth Branch were beyond repair and that any professional intervention would be cosmetic and at most achieve only a temporary resolution."**

12. After discussing further whether there was any possibility of the claimant returning to work alongside colleagues at Wandsworth, the tribunal recorded that Ms Fairfield concluded that this was not a viable option. The tribunal then said at [248]:

> **"The letter therefore concluded that because the Claimant could only work in the Wandsworth Branch, she was upholding Mr Crouch's original decision because she simply could not find a viable option for her employment with the Second Respondent to be reinstated."**

13. In its self-direction as to the law, the tribunal cited relevant statutory provisions and authorities. Before me, neither counsel criticises that self-direction as far as it goes and I do not need to reproduce it, but I note – and I will return to this – that Mr Forshaw does point to what he says was an omission.

14. The tribunal then worked through its conclusions, first in relation to multiple complaints of harassment during the course of employment and a complaint of harassment in relation to the dismissal, as set out in the list of issues, cross-referring to the paragraph numbering of that list. As

to harassment in relation to dismissal, the tribunal said this:

> **"358. At paragraph 3.18, the Claimant alleges that the Second Respondent dismissed her and/or instead of taking actions against the First Respondent and others. We were concerned about this allegation and we did consider it after we had made our findings as to the Claimant's subsequent dismissal. We do not agree that, given our findings as to this point, that it was fair or reasonable to expect the Second Respondent to have taken action against the First Respondent. Further, it is not clear in what way and we are not even clear who the others are, given that many of the people that the Claimant has complained about and other members of staff in the Branch had left at various points. The allegation is vague and indeterminate. So we are not clear if we can actually make a finding on it in respect of others.**
>
> **359. Having considered the Claimant's dismissal, we have determined that she was not dismissed because of her disability. She was dismissed because of the irretrievable breakdown in the relationship with the other members of the Wandsworth Branch.**
>
> **360. Paragraph 3.18 It therefore fails under paragraph 4 of the List of Issues because it does not relate to the Claimant's spinal injury."**

15. Having addressed some further remaining complaints of harassment, the tribunal then worked through its conclusions in relation to multiple complaints of discrimination arising from disability under section 15, including in relation to dismissal. As to that, at [383] the tribunal said this:

> **"We considered this matter after reaching our findings in relation to the dismissal. As we have indicated above, we did not find on a later consideration of those matters relating to the dismissal, that the Claimant's dismissal was because of her disability and further we would say that she was not dismissed because of something arising from disability. The Claimant was dismissed because of the irretrievable breakdown in the relationship with the other members of the Wandsworth Branch. Paragraph 12 of the List of Issues is therefore not met, the complaint fails and is dismissed."**

16. The tribunal then went on to consider **Equality Act** complaints of indirect discrimination, failure to make reasonable adjustments and victimisation, before turning to the complaint of unfair dismissal. After referring to the relevant provisions of section 98 **Employment Rights Act 1996** and certain authorities, the tribunal noted that unfair dismissal was addressed at paragraphs 42 and 43 of the list of issues. It then continued as follows:

> **"439. At paragraph 42 we are asked to determine the principal reason for dismissal and whether it was a potentially fair reason in accordance with section 98 ERA.**
>
> **440. Dealing with the principal reason for dismissal first of all. It seems clear that the reasons for dismissal were that the Claimant was not able to work in the Wandsworth Branch because of the breakdown in work relationships with the other members of staff there which emerged from the mediation process and she was not able to work outside the Wandsworth Branch because of her disability. We likened it to the chicken and egg. Which came first?**

441. We considered the parties submissions at paragraphs 142 and 143 of Ms Scarborough's closing arguments and paragraph 83 and 84 of Ms Boorer's submissions as amplified orally.

442. Ms Scarborough submitted that the principal reason for dismissal was some other substantial reason, namely that the Second Respondent was unable to provide the Claimant with work outside the Wandsworth Branch because of its duty of care to her and it was unable to provide her with work inside the Wandsworth Branch because of its duty of care to the other staff there. She further submitted that it was incorrect to argue that the Claimant was dismissed because of her disability in that she could not work anywhere else other than Wandsworth. It was not that she could not work in Wandsworth because of her disability, it was because of the breakdown in the relationship with her colleagues. In the event, that we found that the Claimant was dismissed because of her disability, she submitted that it was a proportionate means of achieving a legitimate aim in exercising the duty of care to the Claimant and the other employees and there being no other alternatives (which to us appeared to be addressing both the unfair dismissal and the dismissal elements of the disability discrimination complaints).

443. Ms Boorer submitted that this was not a capability dismissal and it was not a dismissal for some other substantial reason based on the irretrievable breakdown of working relationship on the basis that given the limited numbers of staff expressing negative views of the Claimant still in employment at the Wandsworth Branch. Our view was that this submission appeared to conflate the issue of identifying the potentially fair reason with whether it was a substantial reason.

444. To be clear, a capability dismissal is one which relates to an employee's skill, aptitude, health or any other physical or mental quality. Whilst the process leading to the Claimant's dismissal may have started as a capability review in terms of her ability to undertake her full role or otherwise, given her health issues, it moved onto a process of mediation between the Claimant and the other staff members which was not really anything to do with capability. We therefore do not see this as purely a capability dismissal.

445. Equally to be clear, some other substantial reason has to be of a kind such as to justify the dismissal of an employee holding the position which the employee held. We see this as more of an SOSR dismissal. The Second Respondent's position is that following the outcome of the mediation report and further enquiries, it identified that the Claimant could not be accommodated in a role within the Wandsworth Branch because of the irretrievable breakdown in working relationships and further it was not possible to accommodate the Claimant in a role outside the Wandsworth Branch because of her health reasons, which limited the scope to accommodation to a role within the Wandsworth Branch. Whilst we accept that the Claimant disputes the issue of irretrievable breakdown, at this stage we only have to determine whether the Second Respondent has shown a potentially fair reason for dismissal, and if more than one, the principal one, and not whether the reason identified is fair or not. We do not find that the Claimant was dismissed because of her disability or from something arising from her disability.

446. Case law has identified that the reason for dismissal will be a set of facts known to the employer at the time of dismissal or a genuine belief held on reasonable grounds by the employer which led to the dismissal (Abernethy v Mott, Hay & Anderson [1974] IRLR, 213, CA). We would add that an employer is not prohibited from giving one reason for dismissal at the time or immediately afterwards and another once Employment Tribunal proceedings have been started, although it might affect the employer's credibility. To be fair, this has not been raised by the Claimant and we do not see that it is a relevant

> **consideration here. But the issue is that it is the true reason for dismissal at the time of dismissal which is relevant and whatever label is given to this does not necessarily affect a respondent's credibility.**
>
> **447. We therefore find the potentially fair reason for dismissal is as set out at paragraph 42.2 of the list of issues: that the Claimant was dismissed because of the irretrievable breakdown of the working relationship between her and her former colleagues within the Second Respondent's business."**

17. The tribunal then went on to consider whether the dismissal was fair or unfair, applying section 98(4), and worked through a number of arguments in relation to that. It accepted that there was some unfairness in one particular respect, described in the following passage:

> **"460. Was the reasonable step to adjourn and move to a disciplinary investigation into the concerns of the other staff and whether there was a sufficient basis on which to take disciplinary action against the Claimant? The mediation report was never meant for this purpose. However, the process followed by the Second Respondent jumped to the consideration of conduct/ability for her to return to Wandsworth given these issues. There was nothing that the Claimant could have done or said to change the outcome of the hearing on the basis of the mediation report alone. It was a unique situation created by what appears to have been an unchallenged contention by the Claimant that she could only work in the Wandsworth Branch. We have to acknowledge that this was a difficult situation for the Second Respondent.**
>
> **461. However, there was no attempt to raise the possibility that if the Claimant faced dismissal, she could have been more flexible about working elsewhere or enquire into whether her working hours coincided with those who had problems with her or vice versa. We were not even told whether the other members of staff worked parttime or full-time. But there were other possibilities that could reasonably have been explored without jumping to dismissal. These were reasonable considerations.**
>
> **462. Of course the Second Respondent had concerns about breaching the confidentiality of those interviewed as part of the mediation process. However, the situation had reached a stage where someone was facing dismissal because of the report and it cannot be reasonable to do so on the basis of anonymous and unspecified concerns which the accused person cannot address. An employer reasonably should have gone back to those participants and explained to them that this is moving to an official process and you need to come forward and raise your concerns formally. In crude terms it became a 'put up or shut up' process.**
>
> **463. We therefore find that the answer to paragraph 43.1.8 is yes and that this in turn impacts upon paragraph 43.1.7 as to a thorough or fair investigation."**

The tribunal went on to conclude that this unfairness was not remedied by the appeal process and so the unfair dismissal claim succeeded.

18. The tribunal went on to say that it did not find it appropriate to make any **Polkey v A E Dayton Services Ltd** [1987] UKHL 8; [1988] 1 AC 344 reduction. It then cited section 123(6) **Employment Rights Act 1996** and noted that this raised two questions, being, firstly whether the

claimant's conduct caused or contributed to the dismissal and, if so, by how much it would be just and equitable to reduce any compensatory award. As to that, at [480] it said the following:

> **"In the circumstances, without knowing anything more about the issues arising from the mediation report how can we assess any degree of contributory fault. It was also not the Claimant's fault that she could only work at Wandsworth, it was based on health considerations and the Second Respondent accepted this."**

19. When this appeal was instituted, there was a very lengthy notice of appeal prepared or submitted by the claimant, which was considered on the sift not to raise any arguable points. However, the claimant asked for a rule 3(10) hearing, at which she was represented under the ELAAS scheme by Mr Forshaw of counsel. The tribunal permitted short amended grounds advanced by him to proceed to a full hearing. In summary, the essence of these grounds is as follows.

20. First, it is said that the tribunal erred in concluding that the claimant was not dismissed because of something arising in consequence of disability, because it wrongly relied upon what it had found to be the principal reason for dismissal when determining the unfair dismissal claim, in the context of the section 15 claim. It had erred by not recognising that it needed to consider whether something arising in consequence of disability was a material contributing or effective cause of the dismissal, even if not the principal reason. It had plainly found at [440] that there were two effective contributing causes of the dismissal, and should have so found when deciding the section 15 claim.

21. Secondly, the tribunal is said to have made a similar error when determining the harassment claim relating to dismissal. It effectively dismissed that claim by reference purely to what it had found in the context of unfair dismissal was the principal reason for dismissal. But, had it applied the right test under section 26, of whether the dismissal was related to the claimant's disability, it should have taken on board its findings as to both reasons that contributed to the decision to dismiss, one of which it should have gone on to find was related to her disability.

22. In both cases, it is contended, it was the finding that part of the reason why the claimant had been dismissed was because it was accepted by both Mr Crouch and Mr Fairfield that she could not work at any branch other than Wandsworth on account of her disability, that had been erroneously not taken into account by the tribunal.

23. At the hearing of the appeal today, Mr Forshaw appeared once again for the claimant *pro bono,* succeeding Ms Boorer of counsel who had appeared in the employment tribunal. Ms Scarborough of counsel appeared for the respondent in the employment tribunal and again today. Both counsel provided me with written skeleton arguments and developed their arguments in the course of oral submissions this morning. I will only summarise here their main points and themes.

24. Mr Forshaw argued that, at [440], the tribunal had made a clear finding of fact that there were two operative contributing reasons why the claimant was dismissed, one being what was considered to be an irretrievable breakdown of relations with colleagues at the Wandsworth branch and the other being an acceptance that she was not able to work outside of Wandsworth at another branch because of her disability. For the purposes of the unfair dismissal claim, the tribunal had to decide which of these was the principal reason, which it went on to do in the succeeding discussion, concluding at [447] that the principal reason was the irretrievable breakdown of the working relationship at Wandsworth and that this in principle was a potentially fair substantial reason for dismissal.

25. It was also clear, submitted Mr Forshaw, that this analysis, and these findings of fact about the reasons for dismissal, in turn underpinned the tribunal's conclusions in relation to the section 15 and section 26 claims. But the tribunal erred because, at [359] relating to harassment and [383] relating to discrimination arising from disability, it had relied solely on what it had concluded was the principal reason for dismissal. In so far as it said that disability or something arising in consequence of disability was not the reason for dismissal, it had erred by taking the approach that it had to be one or the other, which was correct in relation to unfair dismissal where there can be only one principal reason, but an error in the contexts of section 15 and section 26. At [359] in relation to harassment, the tribunal had compounded its error by using a "because of" test, rather than a "related to" test, which the authorities establish is potentially a looser connecter.

26. Had the tribunal taken the correct approach to the section 15 complaint, in light of its findings of fact, it would have been bound to find that the claimant's inability to work outside the Wandsworth branch was also a contributing reason for dismissal and was something arising in consequence of her

disability. On the latter point, this reflected what both managers – Mr Crouch (who dismissed) and Ms Fairfield (who considered the appeal) – had accepted in their decisions, and which the tribunal plainly had found reflected the true combination of reasons why the claimant was dismissed.

27. Furthermore, it was apparent that, even if there was a potential issue at the start of the tribunal hearing as to whether the claimant was unable to work outside the Wandsworth branch because of disability, that was no longer an issue by the end, as it was not made an issue by the respondent in the course of the hearing, nor referred to as an issue in closing argument. Further, in any event, the tribunal, in its decision, made what amounted to a finding of fact that the claimant could not work elsewhere because of her disability, at [480] when deciding the issue of contributory conduct.

28. In relation to harassment, had the tribunal properly considered its findings as to the two reasons for dismissal, and on the basis, as Mr Forshaw submitted, that it would then have been bound to conclude that the claimant's inability to work elsewhere than Wandsworth arose from her disability and influenced that decision, it would then, he said, have been bound to conclude that, for that reason, the dismissal was also related to disability for section 26 purposes. He invited me to allow the appeal, substitute findings to that effect, but then remit the matter to the tribunal in relation to harassment only, to decide whether the conduct dismissing the claimant had the proscribed purpose or effect. In relation to the section 15 complaint, he said that there was no need to remit because, on the remaining issue of whether the conduct could be justified, only one answer was possible in light of the tribunal's findings of fact, which was that it could not.

29. Ms Scarborough submitted that this was a case where the tribunal had correctly directed itself as to the law, it had had the benefit of detailed submissions from counsel and had clearly considered them. This was a detailed and wide-ranging decision in the course of which it considered many factual disputes and many individual complaints. The EAT should be slow to find that it had fallen into error in one small part of its decision where, at worst, it may perhaps have expressed itself a little unclearly. She accepted that the findings at [383] and [445] in relation to the section 26 and section 15 complaints relating to the dismissal drew on the more detailed findings of fact and conclusions at

[440] to [447] in relation to unfair dismissal, but disagreed with Mr Forshaw's reading of that passage.

30. In particular, she submitted that [440] did not contain any finding of fact or conclusion about the reason or reasons for dismissal; the tribunal was merely identifying the potential candidates for consideration. It had made a clear finding of fact in the last sentence of [445], that the claimant was not dismissed because of something arising from her disability. In [447] it referred to *the* potentially fair reason, not to the *principal* reason. It had made a clear finding that the irretrievable breakdown of relationships at Wandsworth was the *sole* reason for dismissal. The tribunal's findings at [383] and [445] were clear, that the dismissal was solely because of the breakdown in relations and not because of something arising from disability. This was a matter for the appreciation of the tribunal.

31. The fact that the claimant's disabilities were admitted and featured in the narrative or context was not enough. Ms Scarborough referred, merely for illustrative purposes, to two authorities. **Charlesworth v Dransfield Engineering Services Ltd** UKEAT/0197/16 was a case in which the employee's absence on account of disability gave rise to a realisation on the part of the employer that it could manage without someone carrying out the role that he had hitherto carried out. The tribunal had been entitled to find that his disability was part of the background circumstances giving rise to the dismissal but that he had not been dismissed because of the absence that arose from the disability, as such. In **Warby v Wunda Group Plc** UKEAT/0434/11, a manager accused an employee of lying, specifically giving the example that, according to him, she had lied about matters to do with pregnancy and miscarriage. But the fact that the protected characteristic of pregnancy was the subject matter of that allegation did not mean that his conduct was for a reason related to pregnancy for section 26 purposes, as he could equally well have seized on another example to make his point.

32. Ms Scarborough's point was not that these authorities were factually on all-fours with the present case, but that they illustrated that a protected characteristic featuring in the narrative was not enough; and it was a matter for the appreciation of the tribunal whether the protected characteristic merely formed part of the background or context. In the present case, the tribunal, as she submitted, had found the sole reason for dismissal was the irretrievable breakdown of relations at Wandsworth;

and it was not an error for it to have treated the inability to move to a different branch as context or background, and not an operative cause.

33. Even if, contrary to her case, the tribunal had erred by not finding that inability to work at another branch was a contributing reason, Ms Scarborough submitted that the tribunal had not made a positive finding that this was something arising in consequence of disability. The fact that Mr Crouch and Ms Fairfield had both accepted, on the basis of what the claimant had said and such medical evidence as was before them, that this was the case, did not preclude the respondent before the tribunal from putting the claimant to proof that this was so. This was because this question is a matter for objective decision by the tribunal on the evidence before it. She cited by way of example **iForce Ltd v Wood** UKEAT/0167/18. It was not obvious that there was such a link. Indeed, it might require expert evidence to make it good. The tribunal had not made a positive finding that there was.

34. Ms Scarborough did acknowledge that this issue was not the subject of a challenge by her during the course of the hearing. Although she said it was identified in the list of issues, she could not say that she had cross-examined the claimant about it. She also accepted that it was not raised as an issue in her closing written submission, but noted that this had been a long hearing raising many disputed facts and complaints and not everything could be covered in that document. She suggested that the penultimate sentence of [460], referring to an unchallenged contention by the claimant that she could only work at Wandsworth, demonstrated that the tribunal had not itself made a finding about that. She did not accept that [480] amounted to such a finding, bearing in mind that it was dealing with a different test for the purposes of deciding the contributory conduct issue.

35. Ms Scarborough made similar points in relation to the harassment complaint.

36. I turn to the law. Section 98 **Employment Rights Act 1996** provides:

> **"(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—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) 'capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) 'qualifications', in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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.

(5) Subsection (4) is subject to—

(a) sections 98A to 107 of this Act, and

(b) sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action)."

37. Section 15 **Equality Act 2010** 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."

38. Section 26 **Equality Act 2010** provides:

> **"(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.**
>
> **(2) A also harasses B if—**
>
> **(a) A engages in unwanted conduct of a sexual nature, and**
>
> **(b) the conduct has the purpose or effect referred to in subsection (1)(b).**
>
> **(3) A also harasses B if—**
>
> **(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,**
>
> **(b) the conduct has the purpose or effect referred to in subsection (1)(b), and**
>
> **(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.**
>
> **(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—**
>
> **age;**
>
> **disability;**
>
> **gender reassignment;**
>
> **race;**
>
> **religion or belief;**
>
> **sex;**
>
> **sexual orientation."**

39. There was no dispute before me, of course, that, for the purposes of section 98, the tribunal must decide what was the reason, or, if more than one, the principal reason, for dismissal before considering whether that reason or principal reason was potentially fair and, if so, applying section

98(4). There was also no dispute before me, and again it is well established, that, for the purposes of deciding whether unfavourable treatment was "because of something…" under section 15(1)(a) of the **2010 Act**, the words "because of" apply the same test as would apply to a complaint of direct discrimination under section 13, where the same connecter is used; and that what this means is that there can be more than one such reason, because it is sufficient if something is an effective or materially contributing reason for the conduct in question. It does not have to be the principal reason. Nor was there any dispute before me that, as the authorities establish, whether the something in question is something "arising in consequence of" the claimant's disability is an objective question for the appreciation of the tribunal.

40. Nor was it disputed that the test for the purposes of section 26, of whether conduct is "related to" the protected characteristic relied upon is also a question for the appreciation of the tribunal, but "related to" is a looser connecter than "because of".

41. In this case, the tribunal had to decide what was the reason or reasons for dismissal for the purposes of more than one complaint, and then apply the appropriate respective law relating to each such complaint to its factual conclusions.

42. Directing itself correctly by reference to **Abernethy v Mott, Hay & Anderson** [1974] IRLR 213 CA, the tribunal properly considered in relation to unfair dismissal what facts or beliefs influenced the decision to dismiss. In my judgment, it is clear that the tribunal found that, in terms of what influenced the mind of Mr Crouch, there were two contributing reasons for his decision to dismiss. His dismissal letter, set out extensively at [222], referred to both the breakdown in relationships at Wandsworth *and* his conclusion that it was untenable for the claimant to work elsewhere, as leading in combination to the conclusion that it was therefore untenable for her employment to continue at all. The findings in relation to Ms Fairfield's appeal decision letter at [240] to [248] record her upholding Mr Crouch's decision, and refer both to the claimant maintaining that her health situation had not changed and she was unable to work elsewhere, and to it being untenable for her to return to working at Wandsworth.

43. The tribunal was not bound to accept the accounts given in these letters as true. There might have been an issue as to whether Mr Crouch and/or Ms Fairfield really did believe that the situation at Wandsworth was untenable, or really did believe that the claimant could not, on account of disability, work at any other branch. But, whether or not any such issue was canvassed during the course of the hearing, there is no suggestion in the tribunal's decision that it concluded other than that the reasons for dismissal were truly as stated in those letters.

44. On the contrary, I think it is clear that the tribunal accepted that both Mr Crouch and Ms Fairfield did believe both of those things, and that, in the minds of them both, it was the combination of the two reasons that led to the conclusion that there was no alternative but to dismiss. This is, I think, clear, firstly from the reference in [440] to the reasons for dismissal in the plural, identified in the remainder of the paragraph as being both of those things. I do not think this paragraph can be construed as ambiguous or as merely identifying the potential candidates for the reason. The words "it seems clear that the reasons for dismissal were" are quite clear and wholly unambiguous.

45. The tribunal rightly recognised at [439] and in the paragraphs that follow that it had to decide for the purposes of the unfair dismissal claim, which of these two reasons was the principal reason; and, then whether that reason was a potentially fair reason within section 98(1) and (2). But, somewhat unhelpfully, the questions of which was the principal reason and whether that reason amounted to a potentially fair reason are effectively considered together in the paragraphs that follow, reflecting, it appears to me, some intermingling of the issues in the framing of these two aspects, in the framing of the list of issues and indeed in parts of the written closing submissions on both sides.

46. But what is clear is that the list of issues at paragraph 42 identified rightly that the tribunal needed to decide what was the principal reason for dismissal, and that there were effectively two candidates. I think it is also clear, reading this passage as a whole, that the tribunal concluded that the principal reason for dismissal was the breakdown of relationships at Wandsworth. It rejected a submission from the claimant's counsel, that that could not amount to a substantial fair reason within section 98(2). It accepted that it could, and considered that whether or not the dismissal for that

reason was ultimately fair therefore fell to be determined under section 98(4).

47. As I have said, I do not agree with Ms Scarborough that [440] does not make a finding of fact that there were two reasons, nor do I agree with her reading of [447]. I do not think any significance can be attached to the fact that the tribunal referred to *the* potentially fair reason, rather than the *principal* potentially fair reason. [447] is the conclusion of a discussion about which was the principal reason for dismissal, out of the two candidates identified at [440], and whether that was a potentially fair reason. The discussion is bookended in [439] and [447] by specific reference to paragraph 42 of the list of issues, which identifies that the tribunal would need to decide which of the two reasons was the principal reason. The tribunal opted in [447] for the second of these, referred to in paragraph 42.2 of the list of issues, being the irretrievable breakdown of the relationship at Wandsworth, and also concluded that this amounted in principle to a substantial fair reason for dismissal.

48. To read [447] as concluding that there was only one reason for dismissal would be flatly contradictory to [440] and to the tribunal's earlier findings about the reasons given in the letter of dismissal and the letter determining the claimant's internal appeal against dismissal, upon which the tribunal plainly drew; and inconsistent with the tribunal identifying that it needed to decide which of these was the principal reason. Given all of that, I do not accept that the last sentence of [445] points to a different overall reading. It falls within the context of a discussion as to which of two factual reasons was the principal reason.

49. The conclusion that the tribunal found that there were two contributing reasons is also supported by what the tribunal said at [460], where it referred both to the conclusion of the mediator about the situation at Wandsworth and the claimant's unchallenged contention that she could only work in the Wandsworth branch, and at [480] where, in deciding whether the claimant had contributed to her dismissal, the tribunal referred both to the reasons arising from the mediation report and to the fact that the claimant could only work at Wandsworth.

50. Ms Scarborough's submission that it would have been open to the tribunal to find that there was a sole reason for dismissal, being the breakdown at Wandsworth, and to find that the inability to

work at another branch was merely context or background, therefore does not assist her, since that is not what the tribunal in fact found. As I have said, she did not seek to suggest that the facts were analogous to the facts in either **Charlesworth** or **Warby v Wunda**; and certainly they were not.

51. It was agreed by counsel – and I agree – that it is clear that, although the tribunal dealt in its decision with the **Equality Act** complaints first, before turning next to the unfair dismissal complaint, the conclusions that it reached about the section 26 and section 15 dismissal complaints at paragraphs [359] and [383] drew upon the findings and conclusions that it had reached in relation to unfair dismissal, as the tribunal indeed itself indicated in observations that it made at [358], [359] and [383].

52. It follows from all I have said that I agree with Mr Forshaw that the tribunal did err in concluding for the purposes of the section 26 and section 15 claims that the claimant was dismissed solely because of the breakdown of relations at Wandsworth. I agree that it appears, in error, to have carried across its finding as to the principal reason for dismissal. In any event, those findings cannot stand, because they are in contradiction of the findings of fact it made at [440] and [447].

53. Mr Forshaw observed that, in its self-direction as to the law, the tribunal had not referred to any of the authorities on the meaning of the "because of" test or the meaning of the "related to" test. As I have said, the self-direction as to the law was right as far as it went, and the EAT will be slow to find an error unless it is clear from the substance of the decision that the tribunal has gone wrong. But, in my view, in this case, it is clear that the tribunal took its eye off the ball when reaching its conclusions on the section 15 and section 26 complaints. Whether or not that was because this was a very long judgment that had to deal with many findings of fact and many individual complaints, I do not think it is possible to attribute this to a mere infelicity of language in [440] to [447].

54. So the tribunal did err in relation to both the section 15 and section 26 complaints relating to dismissal. What are the further consequences? In relation to the section 15 complaint, given what the tribunal found were the reasons for dismissing, and rejecting the appeal against dismissal, and that it is clear that it accepted that two reasons were at work, I agree with Mr Forshaw that, had it applied the law correctly to the facts found, it would have been bound to conclude for section 15

purposes that there were two material contributing reasons, and that, in that sense, the dismissal was in part *because of* a belief that it was not an option to relocate the claimant somewhere other than Wandsworth. I do not therefore need to remit that point for further consideration by the tribunal.

55. Mr Forshaw, as I have noted, contends that the tribunal also effectively concluded that the claimant was unable to work elsewhere because of something arising from disability. I agree. Whilst this was identified as an issue at the start, Ms Scarborough accepts that it was not a live or contested issue during the course of the hearing, and the claimant's case on this point was not challenged. Further – I will not set out all the relevant passages – on a fair reading of her written closing submissions, no such issue was raised. Whilst I take on board her point that these dealt with many matters, and, as I understand it, there will have been oral submissions as well, there is a specific passage in which she addresses the possibility that the tribunal might conclude, contrary to her primary submission, that inability to work at Wandsworth was a contributing reason and that this arose from disability, but that passage does not suggest that that connecter remained an issue, but rather focuses on the issue of justification. In any event I do not agree that [460] indicates that the tribunal considered this to be an unresolved issue. It was referring there to the employer having accepted internally the claimant's case that she could not work elsewhere on account of disability.

56. I also agree with Mr Forshaw that the tribunal did effectively make a positive finding in the claimant's favour on this point at [480]. It had to apply its own view, when deciding the question of contributory conduct, including, as it identified, whether, even if the claimant had in some way contributed to her dismissal, it would be just and equitable to reduce her compensatory award on that account. The statement that it was "not the claimant's fault that she could only work at Wandsworth, it was based on health considerations and the Second Respondent accepted this", amounts to a finding not merely that this was accepted in the internal process, but that the tribunal accepted it as well. It was not suggested that "health considerations" was a reference to anything other than disability. Accordingly, this is not a matter that needs to be remitted for further consideration either.

57. There was no knowledge issue in this case, so what remains under section 15 is the

justification defence. Mr Forshaw rightly accepted that the tests of justification and of fairness in section 98(4) are not the same, and the tribunal is not bound in every case to reach the same conclusions in respect of them (see **City of York Council v Grosset** [2018] EWCA Civ 1105; [2018] ICR 1492 at [15]). The discussion in **Grosset** recognises (referring to the discussion in the earlier case of **O'Brien v Bolton St Catherine's Academy** [2017] EWCA Civ 145; [2017] ICR 737) that, in certain types of case, the outcome may well be the same. But this is a fact-sensitive matter.

58. Mr Forshaw submitted that, in this particular case, given that the tribunal had found that the dismissal was unfair because of a failure by the respondent to investigate whether there truly was no viable way in which the claimant could be returned to working at Wandsworth, that showed that there would be no possibility of the respondent being able to make good before the tribunal that the decision to dismiss the claimant was a proportionate means of achieving the aim on which it relied.

59. But I do not agree that only one outcome is possible, applying the law to the facts found. The tribunal has not made any finding about whether, despite the mediator's view, such a solution might have been achievable. Mr Forshaw's contention amounts, in effect, to a submission that the respondent will struggle to convince the tribunal of that in circumstances where it did not itself conduct the further investigation that the tribunal considered fairness required it to do. But, even if – and this is a separate aspect to which I will come – the tribunal considers the matter next time around only on the basis of the evidence that it had last time around, I cannot be sure that it will not consider that it has sufficient evidence to reach its own conclusion on that question, or that the conclusion will necessarily be that dismissal was not justified. I simply do not have before me all of the evidence that will have been available to the tribunal on that subject; and it will be a matter for the tribunal, not me, to evaluate the evidence, make further findings as necessary and draw a conclusion on that issue.

60. I will therefore remit the issue of justification in respect of the section 15 complaint for further consideration by the employment tribunal.

61. As to the harassment complaint, Ms Scarborough sensibly acknowledged that there can be no real issue that being dismissed was unwanted conduct. Mr Forshaw submitted that if, as I have

concluded, the findings of fact point to the conclusion that the claimant was dismissed in part because of something arising in consequence of her disability, it must also inevitably follow that her dismissal was related to disability, so that is a question which I also do not need to remit to the tribunal.

62. However, whilst it is established that "related to" is a looser connecter than "because of", and hence that conduct which is because of disability is bound also to be related to it, the matter is not so straightforward in this case, because the other complaint apart from the section 26 complaint was not a section 13 direct discrimination complaint but a section 15 complaint. The question therefore arises as to whether it is necessarily true in every case, that conduct which is because of something that, in turn, is arising in consequence of a protected characteristic, is therefore also conduct related to that protected characteristic. I suspect that, in many cases, the answer to that question will be yes, but I do not think that, in this case, I can say for certain on the facts so far found that it inevitably will be.

63. I think that this may require some further consideration by the tribunal of what it is about the act of dismissal that is said overall to meet the definition of harassment, including, of course, the requirement for it to have a proscribed purpose or effect, which Mr Forshaw accepts is also a question that the tribunal will have to consider on remission. I have not heard really at all about the claimant's case or what the arguments might be, on that limb of the definition; and, whilst it is distinct from the "related to" requirement, I think the appropriate course in this case is to remit both questions for determination by the tribunal, although the findings as such that dismissal was in part because of the inability to work elsewhere, and that *that* arose in consequence of disability, will be a given.

64. Pausing there, I will therefore substitute for the employment tribunal's decision dismissing the section 15 complaint, a decision that the claimant was dismissed because of something arising in consequence of disability. But I will remit the question of whether the respondent can show that the dismissal was a proportionate means of achieving a legitimate aim. I will overturn the tribunal's decision dismissing the complaint of harassment relating to the dismissal, and I will remit that complaint for further consideration by the tribunal, as to whether it succeeds on its merits.

65. That leaves two remaining matters relating to the terms of remission on which I have already

heard argument from both counsel as well, against the possibility that I might find as I have. The first is whether remission should be to the same tribunal if available or a differently constituted tribunal, and the second is what I should say about whether it may consider new evidence.

66. As to the first of these, those findings of fact and conclusions reached by the tribunal in its 2020 decision which are unaffected by the outcome of this appeal stand, and will be a given next time around for both parties. Plainly, however, the tribunal is likely to have to make further findings of fact and will have to draw further conclusions. It will at least be entitled to do so drawing on the existing findings of fact, and such evidence as was presented to it, whether in witness statements, documents or oral evidence, last time around, that it considers relevant. But, although ultimately he did not go so far as to say that I would err if I did not give such a direction, Mr Forshaw invited me to direct that the tribunal should not permit any *further* evidence to be presented on the questions remitted to it. I decline to give such a direction. I do not have the full picture of all of the evidence that was presented to the tribunal last time around, and I cannot say whether that will be sufficient.

67. I think it better, therefore, to leave it to the tribunal itself to decide whether or to what extent it will admit or allow the possibility of further evidence being presented on the issues I have remitted to it. Both parties should, of course, one way or another, be permitted to make submissions to the tribunal about that question, to the extent disputed, before it decides whether to allow any further evidence to be given or admitted and, if so, of what nature or how.

68. I also consider that the matter should be remitted to the same tribunal panel so far as they are available. Whilst I have found that they erred, the central issue on which they erred, is in relation to the section 15 complaint, one that I have found there can be only one conclusion about, and the conclusion on factual reasons for dismissal will also be a given in relation to the harassment complaint. The matters the tribunal will now have to decide on remission are matters on which it has not yet reached any decision at all. This is not a case where a tribunal is being asked to put aside a previous decision and come to a fresh view of something it has already decided once.

69. Although the tribunal did err in the way I have found, this is also a thorough, detailed and

overall, in other respects, carefully-reasoned decision; and I think the tribunal can be relied upon to reach a conscientious decision on the issues that are being remitted to it. Remitting to the same tribunal has the advantage that, to the extent they feel able, they will be able to draw on their own recollections of the evidence given last time and/or their notes of it. It is also supported by the fact that there has yet to be a remedy hearing in relation to the unfair dismissal. Although it would not be impossible, had I thought it necessary, to remit to another tribunal, which could even decide remedy, that is another attraction to all matters being dealt with by the same tribunal if possible.

70. Accordingly, I will direct that what, if any, further evidence should be permitted to be adduced on remission is to be determined by the tribunal after allowing a fair opportunity for submissions to it on that question; and that remission be to the same tribunal panel so far as available.