Appeal No. UKEAT/0069/19/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 June 2019

Before

HER HONOUR JUDGE EADY QC

(Sitting Alone)

MR D HERRY — APPELLANT

DUDLEY METROPOLITAN BOROUGH COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR D HERRY (The Appellant in Person)
For the Respondent	MS SOPHIE GARNER (of Counsel) Instructed by: Dudley Metropolitan Council Law & Governance The Council House Priory Road Dudley DY1 1HF

SUMMARY

DISABILITY DISCRIMINATION – Disability

VICTMISATION DISCRIMINATION – Other forms of victimisation

UNFAIR DISMISSAL – Reasonableness of dismissal

The Claimant pursued appeals against the Employment Tribunal's dismissal of his claims of disability discrimination, victimisation and unfair dismissal.

Disability

Although it was accepted the Claimant's dyslexia amounted to an impairment, the ET found he had not suffered a substantial (more than minor or trivial) adverse effect on his ability to carry out day to day tasks as a result. The Claimant appealed, contending the ET (1) wrongly had regard to his apparent ability to carry out teaching duties, when he had not worked as a teacher during the material period, and (2) erred in failing to consider the combined effect of his dyslexia when he was also suffering stress/anxiety and/or depression.

Held: dismissing the appeal on the issue of disability

The evidence before the ET included occupational health advice that the Claimant was able to return to his teaching post, a GP fit-note signing him as fit for work, and the Claimant's application to return to his post; all of which related to the material period. The ET did not place undue weight on these matters but was entitled to consider this evidence as part of the relevant factual matrix. The ET had expressly sought to assess the combined effect of the Claimant's dyslexia together with his stress/anxiety and/or depression (although not accepting those matters amounted to a separate impairment). Considering the evidence before it, however, the ET was unable to see there was anything that demonstrated that that effect was "substantial". That was a permissible conclusion on the evidence.

Victimisation

The ET found that the Respondent had acted in breach of its disciplinary process in denying the Claimant a re-hearing at the appeal stage but held that this decision had not been influenced by

any protected act on the part of the Claimant and dismissed his victimisation complaint in this regard. The Claimant appealed, arguing the ET had wrongly focused on the substantive decision taken on his appeal and not the procedural defect of which he was complaining. He also contended the ET had wrongly failed to apply the shifting burden of proof.

Held: dismissing the victimisation appeal

When read as a whole, it was apparent that the ET had in mind both the appeal panel's decision on the merits *and* its decision not to allow the Claimant a hearing; its conclusion that this had not been influenced or motivated by any protected act applied to both aspects of the panel's decision and was a permissible decision on the evidence and the ET's primary findings of fact. In reaching that decision, it was apparent that the ET had been conscious of the shifting burden of proof and had focused on the question of causation, looking to the Respondent to provide an explanation for what had happened that was unrelated to any protected act.

Unfair Dismissal

The ET had also considered the Respondent's failure to afford the Claimant an appeal hearing when determining his complaint of unfair dismissal. Looking at the process overall, it decided that it was fair. The Claimant appealed on the basis that the ET had fallen into the substitution trap, deciding that an appeal hearing would have made no difference in any event.

Held: dismissing the appeal against the unfair dismissal decision

Although part of the ET's reasoning did suggest it had gone on to consider whether or not – on its assessment of the evidence – holding a hearing at the appeal stage would have made any difference, it had first considered the Respondent's own reason for reaching this decision. Doing so, the ET was entitled to find that fell within the range of reasonable responses and that, having regard to the process overall, did not render the dismissal unfair.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal concerns two issues: (1) the approach of the Employment Tribunal ("the ET"), when determining the question of disability for the purposes of the **Equality Act 2010** ("EQA"); (2) the ET's assessment of the employer's failure to conduct an oral hearing of the internal appeal when considering claims of (a) victimisation and (b) unfair dismissal.

2. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below. This is the full hearing of the Claimant's appeal against a Judgment of the Birmingham ET; Employment Judge Gaskell, sitting with lay members Miss Outwin and Mr Simpson over some 14 days in March 2018, with a further day for deliberations in chambers. By that Judgment, it was held that (1) the Claimant was not a disabled person, as defined by Section 6 and Schedule 1 of the **EQA** and, therefore, his various claims for disability discrimination should be dismissed; (2) the Claimant was not unfairly dismissed; (3) he had been lawfully dismissed from his employment such that his claim of wrongful dismissal must fail; and (4) the Claimant was not the subject of unlawful victimisation, as defined by Section 27 of the **EQA.** The Claimant appeared before the ET in person; the Respondent was represented by Miss Garner, of counsel, as it is today.

3. On the initial paper sift of the Claimant's appeal, Simler J (as she then was) took the view that there was no proper basis for this matter to proceed. The Claimant exercised his right to an oral hearing under Rule 3(10) of the **EAT Rules 1993**, and this matter then came before me on 4 March 2019, when the Claimant had the benefit of representation by counsel instructed by Advocate (formerly known as the Bar Pro Bono Unit) but also took the opportunity to

address me himself. After hearing submissions in support of the Claimant's appeal, I permitted this matter to proceed on limited, amended grounds, as set out below.

4. At this hearing, I have asked the parties to remain focused on the grounds of appeal, and the Claimant and Miss Garner's cooperation in this regard has assisted me in being able to reach my determination on the points in issue today. I am grateful to them both for the helpful way they have presented their respective cases.

The Background Facts

5. The ET's detailed Judgment is some 52 pages and 110 paragraphs long, and it addresses a number of matters that are not relevant for present purposes. What follows is, therefore, very much a summary, drawn from the ET's far more detailed findings of fact.

6. The Claimant had been employed by the Respondent as a teacher at the Hillcrest School in Dudley. He started that employment on 14 January 2008. On 16 June 2008, he also commenced work for the Respondent as a part-time youth worker.

7. On 6 June 2010, the Claimant commenced a period of sick leave. He never returned to his teaching post, although I understand he subsequently did return to his employment as a youth worker. The Claimant's ill-health absences between 2010 and 2015 were the subject of a number of sick certificates from his GP, giving various reasons for his absence, for example, as being due to stress, a fractured ankle, a head injury, leg pain, work-related stress and anxiety.

8. During his period of employment at Hillcrest School, the Claimant was engaged in various ET claims arising from allegations of unlawful discrimination or harassment and

victimisation. In his first ET claim, lodged on 17 December 2012, the Claimant complained of sex and/or race discrimination and harassment and victimisation. That case was dismissed by the ET after a full-merits hearing that took place on multiple dates between February and July 2014. In the second claim, lodged on 17 July 2014, the Claimant made allegations of discrimination or harassment because of disability or race and/or sex and victimisation. The claim of disability discrimination was dismissed after a preliminary hearing on 24 April 2015; the other claims were subsequently dismissed after a full-merits hearing lasting a number of days in May 2015. Save for one issue relating to a costs order, the Claimant's attempts to appeal against those earlier ET decisions have all been dismissed by the EAT; specifically, by a Judgment handed down on 16 December 2016, the EAT (HHJ Richardson presiding) dismissed an appeal against the ET's finding that the Claimant was not a disabled person for the purposes of the **EQA**, see **Herry v Dudley MBC** [2017] ICR 610 EAT.

9. On 19 May 2015, the Claimant was dismissed from his employment at Hillcrest School for gross misconduct. The letter communicating that decision advised the Claimant of his right of appeal, which he duly exercised by letter of 27 May 2015, seeking a re-hearing of his case on the basis that:

> **"1) Procedural Failure**
>
> **i) I presented relevant material to the Hearing which the governor's failed to examine. I wish to present relevant material to the appeal Hearing which I will present in any agreed timescale so that this material can be properly considered by an appeal panel.**
>
> **ii) As relevant material was ignored by the disciplinary panel which I wish to have examined by the appeal panel, I therefore consider it necessary for Hillcrest School to convene a re-hearing rather than a review of the decision if the appeal is to be heard reasonably."**

10. The Claimant further complained that the dismissal decision had been flawed as invalid reasons had been given, the investigation was unreasonable, he had been subjected to detriment for raising a formal grievance, and/or that the decision to dismiss was disproportionate.

11. The Claimant's appeal was acknowledged by letter of 5 June 2015, which observed:

> **"You have also requested a re-hearing which will be considered by the Chair of the panel in line with the disciplinary policy.**
>
> **I will write you shortly with the details of the arrangements for the appeal hearing including the panel membership."**

12. Subsequently, by letter of 26 June 2015, Mr Herry was further advised:

> **"Following receipt of your letter dated 29 May 2015 appealing against the decision taken to dismiss you without notice following the disciplinary hearing held on 15 May 2015, and included within your letter, you included the grounds of appeal and you requested a re-hearing to take place. Please be advised that the independent governors will be meeting on 7 July 2015 to consider your request for a re-hearing and determine if a re-hearing or appeal should go ahead based on the reasons stated within your appeal letter and in accordance with the Hillcrest School and Community College Disciplinary Policy – June 2013.**
>
> **You will not be required to attend the meeting on 7 July 2015, however, as soon as possible after this meeting you will be notified of the decision to inform you that either a re-hearing or an appeal will take place and the process to be followed."**

13. In fact, when the appeal panel met on 7 July 2015, it determined that it was in a position to decide the Claimant's appeal without further hearing, explaining its position in the appeal outcome letter of 7 July 2015 as follows:

> **"Point 1 - Procedural Failure:**
>
> **The Panel has given due consideration to your request for a re-Hearing based on the grounds contained in your letter. In accordance with the Hilcrest School Disciplinary Policy, the Panel does not agree that there was procedural failure and does not consider that any significant new evidence has been submitted to substantiate the request for a re-hearing. The Staff Dismissal Committee properly considered your request for evidence to be admitted and rejected your request. Therefore, your request of a re-Hearing is not supported."**

14. The appeal panel then went on to address each of the Claimant's further points of challenge, explaining why it rejected his complaints in each case. The ET made findings of fact regarding the appeal process, starting at paragraph 76, as follows:

> **"The appeal panel comprised Mrs Withers together with Mrs H Hughes and Mr P Harrington: again, these were independent governors from within the respondent local authority and they had no previous connection to Hillcrest or to the claimant. The panel convened on 7 July 2015 and was supported by Mrs K Jesson HR, and by Ms Kahn- Hussein from legal services. When the appeal panel met on 7 July 2015, they did not simply decide whether the appeal should proceed by way of review (appeal), or rehearing; they considered the claimant's letter of appeal; the notes of the dismissal hearing; the dismissal letter, and other paperwork provided to them; and concluded that there was no merit in the appeal and dismissed it. In evidence, Mrs Withers told us that she was advised by HR and legal services that this approach was within her panel's powers under the procedure. The panel's decision**

> **was communicated to the Claimant in a letter dated 7 July 2015 and signed by Mrs Withers on behalf of Hillcrest."**

And at paragraph 77:

> **"When asked by this panel what points the claimant believed, he could reasonably have made at an appeal hearing, he referred only to the fact of his ongoing employment as a youth worker; and to his grievances against Mrs Garratt and Hillcrest. He would have produced a 400-page bundle which related mainly to matters which were at that time, current before the Employment Tribunal in Case 1."**

I will return to this point in due course.

The ET's Decision and Reasoning

15. Subsequent to his dismissal, the Claimant pursued two further claims before the ET. Those claims were combined for hearing before the ET in 2018, at the hearing which resulted in the Judgment now under appeal. His third claim related to matters concerning a disciplinary process pursued against the Claimant and his subsequent dismissal, which the Claimant contended amounted to disability discrimination or harassment and/or victimisation. The fourth claim related to the Claimant's later application for his old position at Hillcrest School when it was subsequently advertised as vacant; it was the Claimant's case that the refusal to consider him for this vacancy amounted to an act of victimisation.

16. At the full-merits hearing of these two claims, the ET first considered whether the Claimant was a disabled person for the purposes of the **EQA**. This was dealt with as a preliminary issue, albeit, by that stage, the Claimant had given his evidence on all matters before the ET. The ET gave its oral decision in this regard on 14 March 2019. Having concluded that the Claimant did not meet the definition laid down at Section 6 of schedule 1 of the **EQA**, the ET did not then consider the Claimant's various claims of disability discrimination any further.

17. In concluding that the Claimant was not a disabled person for the purposes of the **EQA**, the ET recorded that it had been accepted that he had suffered from an impairment, namely dyslexia, but no such concession was made in respect of the other disability relied on by the Claimant, that of depression. The material period for these purposes started from 28 June 2014, the earlier ET having previously concluded that the Claimant was not a disabled person before that date (a decision upheld by the EAT, on 23 March 2016). For its part, the ET was not satisfied that the Claimant discharged the burden upon him to demonstrate that, at the material time, he was suffering from depression as opposed to merely showing symptoms of depression as a reaction to life events.

18. Notwithstanding its conclusion in this respect, however, the ET went on to consider the effects on the Claimant of his dyslexia in combination with the stress and anxiety and alleged depression from which he was suffering. It accepted that the Claimant had suffered some adverse effect on his ability to carry out his day-to-day activities as a result of his dyslexia and it allowed that the effect of this condition could be exacerbated during periods of stress and anxiety. In so finding, it seems that the ET had regard to a report prepared by Miss Carol Amos, adduced by the Claimant, in which she recorded a comprehensive list of activities that the Claimant told her gave him difficulty. That said, the ET was unable to see there were any specific details given of such difficulties and observed that the report had not identified anything which he seemed unable to do (indeed, as the ET noted, the list was stated to be "a general list of the likely effect of dyslexia").

19. Noting that, in his earlier ET case, the Claimant had argued that his inability to teach for a prolonged period was itself proof of disability - teaching involving many activities that would be regarded as the normal day-to-day activities of a professional person – the ET allowed that

this was a potentially relevant point. It noted, however, that the evidence given before it included a report from the Respondent's Occupational Health Advisor, who considered the Claimant was fit to return to his work, a view echoed in a fit note from the Claimant's GP of 31 March 2015. The ET had also heard from the Claimant, who had given evidence relating to his disability impact statement, and it recorded its finding in this regard as follows (see the ET at paragraph 15):

> **"The Claimant told us of his initial diagnosis of dyslexia in 1996, his period of study at University of East London until 1999, when he was awarded a 2.2 Degree in Architecture; his subsequent study for a PCGE; and his early employment at Whitfield's school. Thereafter, he gave evidence about events which he claims have happened to him since commencing employment at Hillcrest; and concentrates particularly on how he claims that Hillcrest's treatment of him has adversely affected him because of his dyslexia and later because of suffering with stress and depression. The claimant provided no evidence as to how his claimed conditions of dyslexia and depression adversely affected his ability to carry out normal day-to-day activities."**

20. The ET also considered a number of different medical reports, listed at paragraph 16 of its Judgment, and decisions made relating to the Claimant's claim for benefits. Explaining its approach at paragraph 30 of its Judgment, the ET allowed that, notwithstanding its inability to conclude that the Claimant suffered from the impairment of depression, it should consider the effects on the Claimant of his dyslexia in combination with the stress, anxiety, and alleged depression from which he had suffered. It continued (at paragraph 30):

> **"…We appreciate that the focus must be on those things which the claimant cannot do or can only do with difficulty rather than on those things which he can do. The problem for us is that there is no specific evidence from any source of any activity, domestic; professional; or otherwise which the Claimant cannot do or can only do with difficulty. We have therefore considered the list of activities by Carol Amos which the claimant told her gave him difficulty – and which are activities in which a dyslexic person may have trouble. However, all of the evidence we have is that the Claimant copes well with literacy; numeracy; the specific requirements of teaching; planning; organising; addressing the Tribunal, and so on."**

21. In those circumstances, the ET concluded that the Claimant had not discharged the burden upon him to demonstrate that he was a disabled person for the purposes of the **EQA**; accordingly, it dismissed the Claimant's various claims of disability discrimination.

22. Turning then to the remaining claims and issues, the ET first considered the complaint of victimisation. Relevantly for present purposes, the Claimant claimed that his dismissal had been an act of victimisation. The ET disagreed, concluding that this related solely to his conduct and was in no way due to any protected act. More specifically, although the ET accepted that the way in which the Claimant's appeal against dismissal was determined was outside the Respondent's process and served to deprive the Claimant of his right to an appeal hearing, it considered that the appeal panel had reached a permissible decision in this regard that was in no way related to the protected acts. In this respect, the ET explained its reasoning as follows (see paragraph 95(l)):

> **"At the meeting convened on 7 July 2015, Mrs Withers and her panel considered the Claimant's letter of appeal and reached a genuine conclusion that the appeal was without merit and accordingly, dismissed it. The way in which this occurred was in breach of the respondent's disciplinary policy: we consider below the extent to which this breach rendered the claimant's dismissal unfair. But, for the purposes of the victimisation claim, we are quite satisfied that the Withers panel reached a Decision which they believed was open to them and dismissed the appeal based on merit as it appeared to them. This Decision was in no way motivated or affected by the Claimant's protected acts: the dismissal of the appeal without a hearing was not an act of victimisation."**

23. The ET then considered the Claimant's unfair dismissal complaint. It had already found that the Respondent had established the reason for dismissal - that was its belief in his serious misconduct in persistently failing to provide original sick certificates within a timely manner, his failure to cooperate with a necessary renewed CRB check, and his refusal to say that he would undertake to comply with the Respondent's absence management and safeguarding policies in the future. As for fairness, the ET was satisfied that there had been a thorough investigation and ample opportunity for the Claimant to explain himself. It also concluded that the sanction of dismissal was open to the Respondent – falling within the range of reasonable responses in the circumstances of this case. As the ET reasoned, the panel was:

> **"101 …entitled to regard this misconduct as serious. The claimant has persistently failed to comply with the relevant policies over a period in excess of three years. A teacher is in a responsible position: it is essential that the headteacher and managers of the school can trust a teacher to behave responsibly. The Claimant's persistent failure, (despite much encouragement and opportunity to comply) was a gross breach of that trust. The Claimant's refusal to give any undertaking as to future compliance (a wholly**

reasonable request) fundamentally undermined the implied term of trust and confidence."

102. In these circumstances, we are quite satisfied that the decision to summarily dismiss the claimant was well within the bounds of reasonable responses to the misconduct found…"

24. The ET was also satisfied that the dismissal had been procedurally fair. The Respondent had had to modify its procedures to enable independent persons to make relevant decisions - those who would normally have done so having been the subject of complaint by the Claimant. It accepted however, that there had been a breach of procedure in respect of the appeal but ultimately concluded that this did not render the dismissal unfair. Its reasoning in this regard is explained as follows:

"104. We spent a considerable amount of time considering the position regarding the appeal. The way in which the appeal was conducted was not in accordance with the disciplinary procedure even as modified by the steps taken to avoid conflicts of interest. The net effect of what happened was to deprive the claimant of an appeal hearing. But did this give rise to unfairness? Mrs Withers' panel properly considered all that had happened at the disciplinary hearing and the Claimant's grounds for appeal. They concluded that the grounds were without merit, and the appeal was dismissed."

105. In reality, there was nothing the claimant could say in relation to the findings of misconduct. The facts were unarguable: he had not produced the sick notes in a timely manner; and he had failed for three years to cooperate in the renewal of the CRB. There was not a hint from the Claimant that, had he attended an appeal hearing, he would have modified his position as regards his future conduct and the provision of an undertaking as requested. And, in our judgment, this all could have realistically changed the position. The claimant confirmed that, if he had attend an appeal hearing, his energy would have been directed towards furthering his complaints against Mrs Garratt and the papers that he would have submitted were the very papers that had been before the Employment Tribunal in Claims 1 and 2.

106. Looking, as we must, at the disciplinary process overall, our judgment is that it was procedurally fair: and the manner in which the appeal was conducted does not render it unfair."

The Grounds of Appeal

25. The Claimant's challenge to the ET's rejection of his claims was permitted to proceed on limited amended grounds of appeal. Grounds (1) and (2) relate to the ET's finding that the Claimant was not a disabled person for the purposes of the **EQA**. By Ground (1) the Claimant contends that the ET wrongly took into account irrelevant matters, referring back to the Claimant's apparent inability to meet the, "*Specific requirements of teaching*", which meant

A that it must have been swayed by a matter falling outside the material period, as the Claimant had not been carrying out any of the requirements of teaching at the relevant time. By Ground (2) he complains that, having said it would consider the combined impact of the Claimant's stress and anxiety/symptoms of his dyslexia, the ET then failed to carry out the requisite assessment of the evidence, in particular, having regard to the Claimant's own testimony relevant to this issue.

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C 26. Ground (3) addresses the ET's finding on victimisation, specifically, in respect of the failure to afford the Claimant a hearing of his appeal. The Claimant contends the ET failed to address the question why this error had arisen and argues that, given the denial of his right to an appeal hearing, the ET should have found that the burden of proof shifted on this point and that it thus erred in failing to make a finding as to the Respondent's explanation.

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27. By Ground (4), the Claimant challenges the ET's rejection of his unfair dismissal claim, arguing that the ET fell into a substation mind-set when determining that the denial of an appeal hearing did not render the dismissal procedurally unfair. The Claimant observes that the ET was not making a **Polkey** assessment, as to whether the appeal would have made any difference, but had to determine whether, in deciding the appeal without permitting the Claimant a hearing, the Respondent's procedure was one that fell within the bound of reasonable responses. He submits that it failed to carry out the exercise required of it in this regard.

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28. For its part, the Respondent resisted the appeal, essentially relying on the reasoning provided by the ET.

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The Legal Framework

Disability

29. By Section 6 of the **EQA**, it is provided that:

> **(1) A person (P) has a disability if-**
> **(a) P has a physical or mental impairment, and**
> **(b) the impairment has a substantial or long-term adverse effect on P's ability to carry out normal day-to-day activities.**

30. The term "substantial" is defined by Section 212(1) **EQA** as meaning "*more than minor or trivial*". It sets therefore, a fairly low threshold for a Claimant who bears the burden of proving that she is a disabled person for the purposes of the **EQA (**see **Kapadia v London Borough of Lambeth** [2000] IRLR 699 CA). Indeed, there is no real dispute between the parties as to the approach that an ET is to adopt in this respect, as was explained by the EAT (Langstaff J presiding) in **Adremi v London and South Eastern Railway Ltd** [2013] ICR 5912:

> **"14. It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a tribunal has to consider is on adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a tribunal must necessarily be upon that which a claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other."**

31. As the ET acknowledged in its reasoning in the present case, further guidance in the determination of the question of disability is then provided at schedule 1 of the **EQA** and in the **Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011)** ("the Guidance"). It has also been made clear in the case law that, where there are two or more impairments, the combined effect must be considered by the

ET in determining what the effect is and whether the Claimant is disabled or not (see **Ginn v Tesco Stores Ltd** [2005] UKEAT/0197/05).

Victimisation

32. By Section 27 of the **EQA**, it is relevantly provided that:

> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act."**

33. Under the **EQA**, there is a shifting burden of proof; Section 136 relevantly providing that:

> "…
>
> **"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

34. In determining whether a person has been subjected to a detriment, although this is not necessarily the same as less favourable treatment, as was recognised by Elias LJ at paragraph 26 in **Dr Cecile Deer v University of Oxford** [2015] EWCA Civ 52:

> **"…There will be very few, if any, cases where less favourable treatment will be meted out and yet it will not result in a detriment. This is because being subject to an act of discrimination which causes, or is reasonably likely to cause, distress or upset will reasonably be perceived as a detriment by the person subject to the discrimination even if there are no other adverse consequences."**

In **Deer**, counsel for the University:

> **"47 …accepted that there will be cases where procedural failings may give rise to a detriment even although it is plain that they had no effect on the substantive outcome of the investigation, but she submits that this is not such a case."**

Elias LJ disagreed, holding:

> **"48. In principle I do not see why not: if the appellant were able to establish that she had been treated less favourably in the way in which the procedures were applied, and the reason was that she was being victimised for having lodged a sex discrimination claim, she would have a legitimate sense of injustice which would in principle sound in damages. The fact that the outcome of the procedure would not have changed will be relevant to any assessment of any compensation, but it does not of itself defeat the substantive victimisation discrimination claim."**

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Unfair Dismissal

35. The touchstone in any unfair dismissal case must be the language of the statute itself; specifically, for present purposes Section 98(4) of the **Employment Rights Act 1996** ("the ERA") which relevantly provides:

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> **"(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."**

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36. As the ET directed itself in the present case, in determining the question of fairness for these purposes, it is not for the ET to substitute its own view; its task is to consider whether the Respondent's decision fell within a band of reasonable responses open to a reasonable employer in those circumstances (see **Iceland Frozen Food v Jones** [1982] IRLR 439 EAT, and **Post Office v Foley** and **HSBC v Madden** [2000] IRLR 827 CA). That is so not only in relation to the substantive decision to dismiss but also in respect of the question of procedural failures, albeit that the ET is required to consider decisions taken in this regard not in isolation but as part of the overall process, as was explained by the Smith LJ in the case of **Taylor v OCS Group** [2006] ICR 1602 CA:

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> **"47 … employment tribunals … should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.**
>
> **48. In saying this, it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not; indeed, it is trite law that section 98(4) of the Employment Rights Act 1996 requires the employment tribunal to approach its task broadly as an industrial jury. That means that it should consider the procedural issues together with the reason for the dismissal, as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss. So, for example, where the misconduct which founds the reason for the dismissal is serious, an employment tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee.**

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> **Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the employment tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee. The dicta of Donaldson LJ in Union of Construction, Allied Trades and Technicians v Brain [1981] ICR 542,550 are worth repetition:**
>
> **""Whether someone acted reasonably is always a pure question of fact… Where parliament has directed a tribunal to have regard to equity -and that, of course, means common fairness and not a particular branch of the law -and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane.""**

The Parties' Submissions

The Claimant's Case

37. The Claimant first sought to address me on what he said were outstanding applications for reconsideration before the ET but was unable to explain how any of these related to the grounds of appeal that had been permitted to proceed for determination at this Hearing. Turning then to those grounds, by Ground (1), the Claimant contends the ET fell into error because it was not considering the correct time period that had previously been agreed. The only time that the ET seemed to refer to the material period was in its formal Judgment, not in its reasoning on disability. More specifically, on several occasions, the ET referred back to the Claimant working as a teacher and how he had been successful at that, but that failed to recognise that, at the particular time, he was not suffering from stress or depression, and so it was an irrelevant matter. The Claimant also complained that the ET had erred in drawing any conclusion from his ability to conduct litigation; that failed to take into account that was (i) at a time that he was not teaching; and (ii) at least in part, fell outside the relevant period.

38. Under Ground (2), the Claimant first addressed the ET's reasoning at paragraphs 16 (m) and (p) of its Judgment; he complains that the ET failed to assess all the documentation before it. In particular, as regards the report from Carol Amos (referenced by the ET at paragraph 16 (m)), the Claimant contended that the ET's consideration of that evidence seemed to be more in

A the nature of a criticism than an appraisal of the content. Moreover, he submitted that the ET had been wrong to say that Ms Amos had not been aware of the purpose of the report given that she had expressly explained her awareness of the position, as follows:

> **"[The Claimant] referred himself to an assessment in order to more fully understand his learning needs and to help direct any needed support]. Currently, … [the Claimant] is working part-time as a youth worker with Dudley MBC. He is in Tribunal proceedings for alleged unfair dismissal from his teaching post."**

B Accepting that passage refers to an unfair dismissal claim and does not explain that Ms Amos understood she was providing a report that might be used to determine whether the Claimant C was a disabled person for the purposes of the **EQA**, the Claimant says that he did make this clear, both to Ms Amos and to the ET. The Claimant also says it was apparent Dr Balint (referred to by the ET at paragraph 16 (p)) understood that his report was to be used for ET D proceedings, specifically to determine whether or not the Claimant was a disabled person for the purposes of the **EQA**. Although that was not stated in Dr Balint's report of 17 November 2016, the Claimant referred me to an email of the same date, which he says was sent from his legal advisor at the Mary Ward centre to Dr Balint and made it clear what the report was to be E used for. That email was not before the ET, but I am told that it forms part of the Claimant's application for reconsideration, which remains outstanding.

F 39. The Claimant also points out that he continued to have consultations with Dr Balint and his other medical advisors, and this remained relevant evidence to which the ET ought to have paid proper regard. He further complained that the ET failed to have regard to his impact G statement, which explained how he was affected by the combined impact of his dyslexia and stress. Although the ET referred to the Claimant's statements, in particular, his disability impact statement and his oral evidence (see paragraphs 14 and 15 of the Judgment), the Claimant contends that there was nothing that demonstrated the ET had engaged with that H evidence and the material he had adduced. Specifically, although the ET had recognised that

A the Claimant's dyslexia had inevitably had some adverse effect on his ability to carry out normal day-to-day activities, it had failed to explain what effect it found and failed to demonstrate that it had assessed that effect, having regard to how it might have been exacerbated by suffering stress or anxiety (something the ET had accepted was possible, see paragraph 18 of the Judgment).

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C 40. In addressing Ground (3), the Claimant took me to the correspondence relating to his appeal (referenced at paragraphs 11 and 12), which he says makes clear that at no stage was he notified he was to be denied a re-hearing. To the extent the Respondent (in its skeleton argument for today) suggested there could have been no detriment, the Claimant says that

D cannot be right: a failure to comply with the internal procedure was plainly less favourable treatment, and, as had been recognised by the Court of Appeal in the case of **Deer**, there would be few cases where less favourable treatment would be meted out and detriment would not

E result (see paragraph 26 of **Deer**, supra). There was, moreover, no evidence that anyone else had been denied this procedure, and it had not been explained to the Claimant at the time. The ET had, however, failed to demonstrate that it had seen that this must have shifted the burden of proof and that it had looked to the Respondent for any explanation, or that it had considered

F whether the failure to follow the procedure - the detriment that resulted - was because of the Claimant's protected acts.

G 41. By Ground (4), the Claimant contends there was nothing to show the ET had engaged with the potential unfairness resulting from the failure to allow him a re-hearing of his appeal. Rather, in evaluating the decision taken by the Respondent - which was to deprive the Claimant

H of an appeal hearing - the ET formed its own view as to whether this could have made any difference (see paragraph 105 of the Judgment). Although there was some explanation for the

Respondent's decision not to hold a hearing (in the letter dismissing the Claimant's appeal), there was nothing to suggest that the ET had that in mind when considering the question of fairness. Contrary to what the Respondent had said, the decision was not in accordance with its procedure, and the ET would have needed to engage with that fact, which it had not.

The Respondent's Case

42. In respect of Ground (1), noting that the burden of producing the necessary evidence to establish disability was on the Claimant (see **Kapadia**), the Respondent contends: (i) in determining whether the Claimant suffered a substantial (more than minor or trivial) adverse impact on his ability to carry out day-to-day activities, the EAT had been entitled to look at the surrounding circumstances relating to his medical condition; (ii) given that the period under consideration (28 June 2014 to 23 March 2016 - a period expressly referred to in the ET's reasoning at paragraph 9 and which it plainly had in mind) immediately followed a period considered in detail by an earlier ET, it was valid to consider what findings had previously been made so as to aid this ET's understanding of the development of the Claimant's condition; (iii) in any event, the inclusion of the reference to the GP was amongst a list of other factors that were taken into account; it was not the only matter to which the ET had regard (note, e.g., the Occupational Health report from Dr Suveizdis of 17 March 2015 OH opinion) and there was no indication that the ET was particularly swayed this aspect of the evidence or that it gave it any more weight than any other matter.

43. On Ground (2), the Respondent accepts that, in assessing adverse effect where there are two more impairments, the ET must consider the combined impact, see **Patel v Oldham MBC** [2010] IRLR 280, and **Ginn v Tesco Stores Ltd** (supra). That said, although the ET had not accepted that the Claimant's stress/anxiety amounted to an impairment, it had proceeded to

undertake an assessment of the combined effect to establish whether the impact on the Claimant's ability to carry out day-to-day activities was substantial. Doing so, the ET was faced with the difficulty arising from the paucity of evidence before it from which it could assess any combined effect. None of the medical evidence listed by the ET at paragraph 16 addressed this, other than in general terms, and whilst the ET had regard to the Claimant's own evidence, and allowed that he had suffered some adverse effect on his ability to carry out day-to-day activities (essentially accepting the list within Ms Amos' report), it had been entitled to find that - other than "assertions", see paragraph 24 - there was no evidence that this had anything more than a minor or trivial adverse effect. The ET's overall view of the totality of the evidence was permissibly that: (i) there was only limited evidence of any combined effect; (ii) that effectively comprised three paragraphs of the Claimant's witness statement, to which the ET had regard; (iii) even considering the combined effect, the evidence did not support a conclusion that the Claimant had suffered from any substantial adverse effect.

44. Turning then to Ground (3), the Respondent contends that the answer to this ground was that the ET had reached the permissible conclusion that the Claimant suffered no detriment. In the alternative, allowing that - pursuant to **Deer**, at paragraph 48 - pure procedural error could give rise to a detriment if it gave rise to a legitimate sense of injustice, the Respondent submitted that the ET was entitled to find no causative link in this case. Paragraph 95 (l) of the ET's Judgment did not just relate to the final decision reached by the appeal panel, it also addressed the panel's decision to proceed without a hearing; that much was clear when the ET's conclusion was read alongside its earlier findings of fact at paragraph 76. As for the burden of proof, the ET's general explanation of its approach at paragraph 95 demonstrated that it had required the Respondent to provide a non-discriminatory explanation.

45. As for Ground (4) and the ET's treatment of the same issue - the procedural failing in respect of the Claimant's appeal - in relation to the unfair dismissal claim, the Respondent reminds me that the starting point must be the language of the statute and that the question of fairness is to be looked at in relation to the process as a whole (see **Taylor** and other authorities to like effect, including **Turner v East Midlands Trains** [2013] IRLR 107 and **South London and Wardsley NHS Foundation Trust v Balogun** [2014] UKEAT/0212/14). Here, it was apparent that the ET had looked at the disciplinary process overall (see paragraph 106 of its Judgment) and it was satisfied that it was fair. This was not a case, such as that considered in **Mirab v Mentor Graphics UK Ltd** [2018] UKEAT/0172/17, where the ET had failed to have regard to the defect in the appeal process. Moreover, the ET in the present case had been entitled to find that the overall process was fair notwithstanding the decision taken to deny the Claimant an appeal hearing; the ET had not erred in looking at the substantive merit of the point (paragraph 105), as that was (i) permitted by Section 98 (4), and (ii) allowed by **Taylor**.

The Claimant in Reply

46. In reply, Claimant made clear that he did not accept the report of Dr Suveizdis should have been given as much weight as the medical evidence from his previous physicians, Ms Amos or Dr Balint. More generally, the Claimant contended that the Respondent's submissions depended on a number of assumptions as to what the ET had or had not considered.

Discussion and Conclusions

Disability

47. The first issue raised, by Ground (1) of the appeal, is whether, by referring back to the Claimant's apparent ability to meet the "*specific requirements of teaching*" (see the end of paragraph 30 of the ET's Judgment), the ET took into account something that was irrelevant; that is, by a matter falling outside the material period, given that the claimant had not been carrying out any teaching at the relevant time. I was previously persuaded that this was a point that should proceed to a full hearing. Upon proper examination, however, it is apparent that the criticism is based on a misreading of the ET's decision.

48. That is so because, first, it is clear that this was simply one matter among many to which the ET had regard in reaching its decision; there is nothing to suggest it was particularly swayed by this fact. Second, it is also apparent that, although the ET kept its focus on the material period under consideration (28 June 2014 to 23 March 2016), it permissibly saw that in context and therefore took into account medical evidence adduced by the Claimant that post-dated the relevant period. In that regard, it was not prohibited from considering how the Claimant's impairment might have developed over a period of time, or from taking into account the fact that the Claimant's absence from his work as a teacher on sick leave had continued into the relevant period. Indeed, the Claimant's absence from work had been a factor upon which he had relied when pursuing his earlier claim of disability discrimination and the ET accepted that teaching could involve many activities that would be considered to be day-to-day activities for a professional person. Thirdly, part of the evidence before the ET - relevant to the material period it had to consider - included the Occupational Health Advice that the Claimant was fit to return to teaching on a phased basis. In addition, the ET also had before it the Claimant's own application to be appointed to his former post. By referring to the Claimant's ability to work as

a teacher, therefore, the ET was not considering the position outside the material period; it was quite properly having regard to the question whether the Claimant remained unable to carry out certain activities during the relevant dates and was entitled to consider evidence that suggested that that was no longer the case.

49. By Ground (2), the Claimant makes a more general point as to the ET's approach to the question of disability, arguing that it failed to properly consider the combined effect of his anxiety/symptoms of depression on his dyslexia. In this regard, the Claimant complains that the ET erroneously recorded that it was not clear that his medical evidence - from Ms Amos, in relation to dyslexia, and from Dr Balint, in respect of his stress and anxiety - had been obtained for the purpose of proceedings at which the question of disability would be determined. Unhappily, apart from telling me that he had told the ET that both of these practitioners were aware of the purpose for which these reports were being obtained, the Claimant was unable to demonstrate this point on the documents. Even assuming this to be correct, however, I am unable to see that the ET erred in law in recording its apparent understanding that the practitioners may not have been entirely clear as to the purpose for which the reports were to be used; the ET's main concern in this regard was that neither Ms Amos nor Dr Balint had completed the declaration that would be expected if they were providing expert opinion evidence, something that is obvious from the record. In any event, notwithstanding that (entirely legitimate) concern, the ET plainly did have regard to the evidence in question, expressly stating that it had done so (see paragraph 16) and then going on to specifically draw on Ms Amos' report in its findings as to the effects on the Claimant of his dyslexia.

50. I also do not consider it to be a fair criticism of the ET's Judgment to suggest (as the Claimant does) that it failed to have regard to the Claimant's own testimony on this issue. As it

made it clear (see paragraphs 14 and 15), it plainly did take that evidence into account. The difficulty was - as is apparent from my own reading of the Claimant's disability impact statement - that there was no real information provided by the Claimant as to the impact on his day-to-day activities. In the circumstances, the ET was entitled to then consider what the Claimant had said, in the light of his answers under cross-examination and to the ET itself. Doing do, the ET permissibly concluded that the Claimant had failed to provide evidence as to how dyslexia and depression adversely impacted on his ability to carry out day-to-day activities.

51. On the other hand, the ET did accept that the evidence - which included that from Ms Amos - showed that the Claimant's dyslexia had had some adverse effect on his ability to carry out day-to-day activities. During the course or argument, I asked Ms Garner whether that presented a problem, in that the ET had not expressly identified such effects when recording this finding at paragraph 28 of its reasoning. As she submitted, however, reading the ET's conclusions in the round (as I am bound to do), it is apparent that the ET's acceptance of Ms Amos' report did not answer the question whether the difficulties he suffered were, in relation to normal day-to-day activities, more than merely minor or trivial. On that question, the ET thus had to form its own view based on all the evidence it had before it. Doing so, it concluded that there was nothing to establish that there was such an effect. In reaching that conclusion, I am satisfied that the ET did not lose sight of the need to take into account the potential exacerbation of the Claimant's difficulties when suffering anxiety, stress, and depression; it permissibly concluded that took the position no further - there remained no evidence of a substantial (that is, a more than trivial or minor) effect on the Claimant's ability to carry out normal day-to-day activities.

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52. I turn then to the way in which the ET addressed what it had found to be a procedural failing on the part of the Respondent, in its failure to hold an oral hearing of the Claimant's appeal. Under Ground (3), the Claimant relies on this finding in respect of his complaint of victimisation; this was a specific detriment of which the Claimant had complained and - as Ms Garner accepted in oral argument - the fact that the procedural step in question might have made no difference to the ultimate decision does not mean that it could not amount to a detriment for these purposes (see **Deer**). It is the Claimant's complaint on appeal that, although the ET considered whether the decision to reject his appeal had amounted to an act of victimisation, it had not specifically addressed the question why the Respondent had acted in default of its own procedure - the actual detriment of which he was complaining. This is a point that initially troubled me: the wording of the ET's reasoning on victimisation, at paragraph 96(l), does seem to focus on the final decision. That said, as Ms Garner emphasised, the task of the appellate Tribunal is not to engage in a detailed deconstruction of an ET's reasoning, on a paragraph-by-paragraph basis. Reading the Judgment holistically, and thus returning to the ET's findings of fact (see, in particular, paragraph 76), it is apparent that the ET had in mind the two aspects of the appeal panel's reasoning: (i) whether to grant a re-hearing and (ii) whether to allow the appeal. As the ET their records, the appeal panel accepted advice from HR and from the Respondent's legal advisor that it was entitled to decide there should be no hearing if it took the view there was no merit in the appeal. Given that finding, when one returns to paragraph 95(l), it is apparent that the ET's conclusion - that the panel reached a decision that was in no way motivated or affected by the Claimant's protected acts - relates not just to the decision on the merits of the appeal but also to the decision not to hold a further hearing.

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53. For completeness, I should say that a sub-category of the Claimant's Ground (3) challenge raises the question whether the ET might have erred in failing to treat its finding (that is, as the procedural defect in not allowing an oral hearing of the appeal) as a basis for determining that the burden of proof had shifted. The finding of procedural error was, however, no more than a finding of less favourable treatment against the background of a protected act; of itself, that would not necessarily shift the burden of proof. In any event, as Ms Garner has submitted, the ET's reasoning demonstrates that it did look to the Respondent to provide a non-discriminatory explanation for its conduct in this regard, and was satisfied that it had done so. That is apparent both from the opening part of paragraph 95 - where the ET explains its approach, which incorporates the question of causation - and from the way in which the ET considered this matter at paragraph 95(l).

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54. Ground (4) also relates to the ET's finding of a procedural error at the appeal stage. In this regard, the Claimant complains that when considering this point in the context of his complaint of unfair dismissal, the ET fell into a substation mind-set in determining that the denial of the appeal hearing did not render the dismissal at least procedurally unfair. If considering the ET's reasoning at paragraph 105 in isolation, I would agree with the Claimant. The ET's task was not to state what it had itself concluded (having heard the Claimant give evidence before it some years later) but to ask whether the Respondent's decision - procedurally as well as substantively - was fair; specifically, the ET was not making a **Polkey** assessment as to whether the appeal would have made any difference but had to determine whether, in deciding the appeal without permitting the Claimant a hearing, the Respondent's procedure was one that fell within the band of reasonable responses.

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55. For the Respondent, Ms Garner emphasises that the ET's task was to consider the process as a whole: the appeal was simply one stage in the overall procedure and the ET specifically stated that its conclusion was reached looking at that process as a whole (see paragraph 106). That is right, but the failure to allow a proper right of appeal can render an otherwise fair process unfair (and see the discussion in this regard in **Mirab**); as the ACAS Code on Discipline and Grievance recognises, the appeal stage is an important part of a disciplinary process and it would be wrong for the ET to fail to properly assess the question of fairness if that part of procedure has been denied. Although the denial of an appeal does not necessarily render a decision to dismiss unfair, it is a matter that an ET would need to consider in determining the question of fairness for Section 98(4) purposes and the ET's reasoning should demonstrate that it had asked itself the correct statutory test, which is not done by simply explaining what the ET itself would have decided.

56. All that said, I again have to remind myself that I am bound to consider the ET's reasoning holistically. The ET was plainly troubled by this point and it expressly asked itself whether it had given rise to an unfairness (see paragraph 104 of its Judgment). Reading that paragraph against the ET's earlier findings of fact - which explained the panel's reasons for proceeding in the way that it did, testing that against the explanation given to the Claimant at the time - I am again bound to conclude that the ET reached a permissible decision in this respect.

Disposal

57. On each of the points raised by this appeal, for the reasons I have set out above, I am satisfied that the ET made no error of law and reached decisions that were open to it on the evidence. I therefore dismiss the appeal.