Appeal No. EAT/1116/99

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 4 October 2002
Judgment delivered on 18 November 2002

Before

THE HONOURABLE MR JUSTICE WALL

MR M CLANCY

MR J HOUGHAM CBE

MS J S COXON APPELLANT

RANK XEROX UK LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

Revised

APPEARANCES

For the Appellant	THE APPELLANT IN PERSON
For the Respondent	MISS L SEYMOUR (of Counsel) Instructed by: Ms L Mee Xerox (UK) Ltd Oxford Road Uxbridge Middx UB8 1HS

MR JUSTICE WALL

Introduction

1 This is an appeal by Mrs Joanne Sarah Asselman (nee Coxon) (the Appellant) against the Decision of the Employment Tribunal sitting at London North between 14 -21 June 1999. The Tribunal's Reserved Decision is dated 15 July 1999, and was sent to the parties on the following day.

2 The Respondent before the Tribunal was Rank Xerox (UK) Ltd (the Respondent) and three members of its staff. The Appellant appeared in person, both before the Tribunal and before us: on both occasions the Respondent was represented by Miss Seymour of Counsel.

3 The unanimous Decision of the Tribunal was that:

> **"(i) the Applicant was not the subject of discrimination on the grounds of her sex;**
>
> **(ii) the Applicant was initially procedurally unfairly dismissed but that the unfairness was cured at the appeal. The dismissal was therefore fair;**
>
> **(iii) a complaint of equal pay is dismissed."**

The Preliminary Hearing of this Appeal

4 At the preliminary hearing of the Appellant's appeal, in a constitution of the EAT presided over by Miss Recorder Elizabeth Slade QC, the Appellant was permitted to proceed on five points. Firstly, the Appellant asserted that she was led to believe, in the course of a directions hearing, that the question of the fairness of her dismissal would not be in issue. She relied upon a letter from the Respondent to the Tribunal dated 17 May 1999, in which the Respondent sought permission to re-amend its Notice of Appearance by deleting paragraphs 1 and 2 (which contended that the Appellant was fairly dismissed for gross misconduct, alternatively that the Appellant's conduct constituted "some other substantial reason justifying

her dismissal", as provided by section 98 of the **Employment Rights Act 1996**) and by substituting for them the following:

> **"(1) the Respondent acknowledges that its dismissal of the applicant [Appellant] was procedurally unfair;**
>
> **(2) the first Respondent will contend that the Applicant [Appellant] contributed materially to her dismissal by reason of the matter set out in her letter of dismissal, dated 22 October 1997, a copy of which is attached hereto ……"**

On the basis of that material, the EAT took the view that there it was open to the Appellant to argue that she had been led to believe that the fairness of her dismissal was not in issue, and that the hearing would deal with the question of contributory fault on the assessment of compensation.

5 The second basis upon which the EAT permitted the appeal to go forward was on the ground that the Tribunal failed to make any proper finding as to what constituted the "gross misconduct" on the Appellant's part, on the basis of which the Tribunal found the Appellant had been fairly dismissed. The EAT pointed out that the Tribunal did not specify the nature of the gross misconduct which, it concluded, had justified a summary dismissal. There was a reference in general terms to a breakdown of relations but in the view of the EAT, it was arguable that the Tribunal failed to make proper findings as to what that gross misconduct constituted.

6 Thirdly, the Appellant contended that the finding by the Tribunal that her dismissal had been fair was itself perverse, given an absence of prior notification of the precise charges to be considered at the disciplinary hearing and the absence of any sufficient evidence from the Respondent as to what it found to have constituted gross misconduct. In addition, there were admitted procedural errors, and the fact that the handbook which was before the Tribunal made

it clear that the appeal was not intended under the procedure to be by way of rehearing. The EAT quoted from the handbook:

> **"Purpose of Appeal Hearing**
>
> **The appeal is not a re-hearing of the case, its purpose is to provide the Appellant with an opportunity to demonstrate that his or her dismissal was unreasonable. No new evidence or documents will be admitted unless they were unavailable at the time of the dismissal."**

7 Fourthly, the EAT permitted a complaint of victimisation under the **Sex Discrimination Act 1975** to go forward. The EAT considered this arguable on the correspondence passing between the Appellant and members of the Respondent's staff.

8 Finally, the EAT took the view that it was arguable that insufficient findings of fact had been made by the Tribunal in dealing with the Appellant's equal pay complaint. The EAT thought it arguable that the Tribunal's Decision did not inform the parties adequately why the Respondent won or why the Appellant lost. In an equal pay claim it was, the EAT held, to be expected of a Tribunal in a "like-work" application to set out the job functions performed by the complainant and the job functions performed by the comparator and then to reach its conclusion. Those steps were, it held, arguably not carried out by the Tribunal.

9 The EAT did not permit to go forward the Appellant's claims in relation to sex discrimination, which the Tribunal held were out of time. The judgment is furthermore silent on allegations of bias made by the Appellant. In these circumstances, we were somewhat surprised to see a letter from the Registrar to the Appellant dated 7 June 2002, confirming that the affidavit which the Appellant had sworn for the original preliminary hearing, in which allegations of bias were made, was to be available and that the Appellant was not precluded from raising the issue of bias as part of her submissions at the hearing.

10 Counsel for the Respondent, Miss Lydia Seymour, was equally surprised that the allegations of bias remained alive. She agreed, however, that we should nonetheless hear what the Appellant had to say about bias, on the basis that Miss Seymour reserved her position if it transpired, from what the Appellant said, that she was either not in a position to deal with the allegations or, insofar as they referred to her conduct, she would be embarrassed in so doing. In the event, we came to the conclusion that the allegations of bias did not add materially to the Appellant's case and did not affect our conclusion on the substantive appeal.

11 The final point in relation to the preliminary hearing is that the judgment of the EAT is silent on the finding made by the Tribunal that the Appellant contributed 100% to her dismissal by her behaviour. Despite the length and complexity of the Appellant's Notice of Appeal, Miss Seymour was able to point out with some force that the Appellant had not appealed that finding. Since there was no appeal against that finding, and no permission had been given to advance an appeal against it by the EAT at the preliminary hearing, Miss Seymour's submission was that the Appeal was academic, since even if the EAT found that the Appellant had been unfairly dismissed, the finding that she had contributed 100% to her dismissal by her behaviour was a finding of fact which the Tribunal was entitled to make, and which, in the absence of an appeal, the EAT could not go behind.

12 We will, of course, return to this point later. It is one which has troubled us, and one which, has, in the event, caused us to take a somewhat unusual course in deciding this appeal.

The Allegations of Bias

13 The Appellant is a highly intelligent woman, who has a degree in mathematics. Unsurprisingly, her knowledge of the voluminous documentation was impressive. She conducted her appeal with clarity, force and ability. It was only when she strayed away from

the documentation and reasoning based on the documentation that her case faltered. The allegations which she made of bias came into this category.

14. We propose to give only one example. She accused the Chair of the Tribunal of not having read her extensive statement. We think that allegation quite unfounded. It was based on an assertion by the Appellant that when she wanted to go through her statement in oral evidence, the Chair had told her not to, adding: "We'll read it in our own time". It is not unusual for litigants in person to misunderstand procedural issues, and to think that the Tribunal is hostile to them when it does not permit them full rein. In the instant case, we have no doubt at all that the Tribunal members had all read the Appellant's statement. Those parts of the Chair's notes which have been produced are endorsed in relation to each witness with the phrase "Read statement to ourselves". We have no doubt that this occurred in relation to the Appellant's statement, and it is easily for a person in the Appellant's position to transform "we have" into "we will".

15 The fact that a Tribunal forms an unfavourable view of an applicant, or finds the applicant an unreliable witness does not, of course, mean that the Tribunal is guilty of bias. An important part of the Tribunal's function is to assess the credibility of witnesses, and decide, as an "industrial jury" who is likely to be telling the truth. In our judgment, none of the allegations of bias which the Appellant makes against the Tribunal is either sustainable or advances her case.

16 However, we have considerable sympathy for the Appellant when she complains - in our judgment with some force – that she was summarily dismissed without prior warning for "gross misconduct". She asserts that, as an honest person, she is required to state this when applying for jobs. Furthermore, as will emerge, the first ground relied on by the Respondent in

its dismissal letter of 22 October 1997 for asserting gross misconduct was "breach of trust". No particulars were given of that allegation, which in our view is one of the utmost seriousness.

17 In these circumstances, it is perhaps not surprising that the Appellant entertains strong feelings both about the Respondent and about the appeal. Nonetheless, of course, we can only interfere with the Tribunal's Decision if there is an error of law. We accordingly turn to examine the facts of the case in greater detail.

The facts

18 The Appellant began work for the Respondent on 23 January 1995 as a Customer Support Analyst in the "Helpline" team. She started at the same time as two men, Michael Hughes and Scott Morehead.

19 Within a relatively short time, the Appellant expressed concern that Mr Hughes and Mr Morehead were receiving more training than she had, and this led to early difficulties with her line manager, Denise Trew, and the latter's line manager Chris Lyons. Ms Trew's evidence to the Tribunal was that during her time with "Helpline" the Appellant failed to gel with the rest of the team. By contrast, the Appellant's evidence was that she was treated differently from her male colleagues, in particular in relation to the opportunities they had for team-building and attendance at training courses.

20 On 9 November 1995, the Appellant invoked the Respondent's grievance procedure against Ms Trew, amplifying her complaints in a letter of 10 November 1995, in which she identifies eight specific points of dissatisfaction.

21 The Personnel Manager within the "Helpline Team" was Tom Maddison, and the Appellant's grievance procedure was forwarded to him. The upshot was that on 20 March 1996, (as the Tribunal commented, "greatly outside the ten working days allowed within the procedures") the manager appointed to investigate the grievance, Diane Burton, wrote a report in which she identified what the Tribunal described as the three concerns of the Appellant namely "training, environment and victimisation". Diane Burton appears to have concluded that there was a difference identified in the opportunities provided in relation to the rest of the team so far as training was concerned, and as a result of that a new process had been agreed. Ms Burton also noted that occasionally, for business reasons, there would be individuals who received more training than their peers. She also concluded, under the heading "Environment" that the relationship within the group seemed to have been improving. As regards the Appellant's allegation of victimisation she concluded:

> **"specific details on this subject have not been forthcoming. It is therefore difficult to obtain clarity without the facts and this has been the principal reason for not responding to these grievances earlier …..**
>
> **I have raised with Chris [Lyons] also and I am assured that similar matters will continue to be dealt with promptly and consistently in the future. ….**
>
> **In conclusion I am satisfied that sufficient actions are in place to ensure frequent review and close monitoring of training levels and that your Manager, Chris Lyons, has taken a particularly heightened awareness of the concerns regarding your working environment and the behaviours within the entire team."**

22 There appears to have been an agreement that the Appellant should seek a job outside the "Helpline" department, and the Appellant moved on 24 May 1996 to the Marketing Department, where she was employed within the team of Mr Neil McTeir, who was her line manager.

23 Somewhat surprisingly, the Respondent does not appear to have standardised procedures whereby one line manager or human resources manager briefs another when an employee moves from one department to another. As a consequence, the Appellant understood

that on her transfer to her new section, nothing of the outstanding problems that she had encountered in the "Helpline" department would be made known to her new manager. What appears to have happened in fact is that Mr Maddison spoke to Shirley Bennett, Mr McTier's line manager and told her that there had been, in the Tribunal's words, "some problems" with the Appellant's previous manager, but that this had been a personality clash.

24 The job to which the Appellant moved in the Marketing Department gives rise to the Appellant's claim relating to equal pay. The job had previously been held by a Mr J P Srvilsan, whose salary was higher than the £16,000 that the Appellant was paid as her starting salary. Mr McTier's evidence to the Tribunal was that the Appellant's salary was fixed on the basis that the job she had been asked to do was not the "whole job" that Mr Srvilsan had formerly done. Part of that job, which involved the external contracting work, was done by another employee. Mr Maddison described to the Tribunal how salaries were calculated within the Respondent's organisation, namely by using external benchmarking and the skills and abilities required for the job together with the skills and abilities of the postholder.

25 Nothing of material substance appears to have occurred between 24 May 1996 and March 1997. In November 1996, the Appellant attended a course designated "Positive Power and Influence" at which she expressed concern at the way in which staff were treated. She was also unhappy with one of the students who was allocated to her, who had to be swapped for another. Mr McTier, however, according to the Tribunal's findings had concerns about the way in which the Appellant interacted with the rest of the team. He expressed concerns that the Appellant, who was expected to prepare reports, would work in her own manner and to her own agenda. He was also, apparently, unhappy that she chose to prepare reports using Microsoft Access rather than the system that all the other people had used, as this created technical

difficulties in dealing with the database. Mr McTier had no concerns whatsoever about the Appellant's technical ability. He concluded that the Appellant had some behavioural problems.

26 In relation to this aspect of the case, the Appellant showed us a number of documents which appeared to contradict the findings made by the Tribunal. In particular, amongst the three bundles of documents produced for the purposes of the appeal, the Appellant produced a Performance Planning Appraisal Review apparently signed by Mr McTier on 14 August 1997 describing how the Appellant had developed a new method of providing reports and analysis to users with different tools with the consequence that the service to customers was now of a higher quality and more timely for the regular reports they needed in most areas. This, he stated, had been as a result of the Appellant's technical knowledge and ability to pick things up from a position of no computer expertise at the start of the job.

27 The same document described the Appellant as needing to concentrate on the "social and general working style" as this detracted from the work she had completed, and caused conflict. He described her as a:

> **"high maintenance individual who has some difficulties with the office environment"**

and that her

> **"calibration of stress and problems and her ability to agree to others' arrangements and needs if these are not the same as hers."**

He described her year as:

> **"Overall, a year with some good work and some areas which are necessary to modify for the future as otherwise they will seriously impact on Joanne's future in this job."**

Ms Bennett's analysis was similar.

28 In relation to the complaint about her use of different software, the Appellant produced memoranda from Brian Heath and Robert Corbishley in June and early July 1997 praising the Appellant's work in strong terms.

29 So far as the student is concerned, the Appellant made the point, quite reasonably, that Mr McTier himself had recognised his deficiencies, and had arranged for him to be moved.

30 On 12 March 1997 the Appellant wrote to Richard Sullivan, who was the Director with overall control of Human Resources. Somewhat curiously, the Tribunal purports to quote the whole letter, whereas in fact it continues for a further one and a half pages of A4. We do not think this of any material importance. It appears, however, that Mr McTier took the view that it was inappropriate for the Appellant to write to Mr Sullivan, who himself replied advising the Appellant to discuss the difficulties raised in her letters with her manager. The Appellant submitted to us that it was reasonable for her to write to Mr Sullivan on the basis that her complaints were in large measure about her manager and his manager. In any event, it does not seem to us that the Appellant's conduct in writing to Mr Sullivan can be said, of itself, to constitute gross misconduct.

31 The Tribunal cites extensively from the appraisal to which we have referred. It records that the Appellant was "understandably upset" by certain aspects of it and sought a meeting with Shirley Bennett about it.

32 We now move to the events leading up to the Appellant's dismissal. We say at once that we find both the procedures involved and the Tribunal's analysis of them unsatisfactory. Very little detail emerges. A flavour is given by the way the Tribunal introduces the subject:

> **"16. In October 1997 the Applicant attended a course at which she expressed very forcibly her concerns about events at the "Possible Power and Influence Course" she had attended the**

> **previous year. The trainer at the course, which is run by Xerox International, rather than Xerox (UK) notified Kelly Kang-Kersey, the Human Resources Manager for Marketing of his concerns, as a result of which an investigation was undertaken. It was considered that the actions of the Applicant fell within the meaning of gross misconduct as a disciplinary procedure. The disciplinary procedure prescribes that in the event of investigation of gross misconduct, an employee must be suspended. Three days before the Disciplinary Hearing was held the Applicant was notified that the hearing would address her conduct at the course, the continuing trend of behavioural problems as discussed at her recent appraisal, and breach of trust and her attitude towards the organisation. The Chairman identified was Dave Mee. As Dave Mee had been a Manager who had been involved with the Applicant during her time at "Helpline" the Applicant objected to his chairing the meeting, and Tracey Mudge was substituted. Neither of these Managers was a Manager who had ever had direct responsibility for the Applicant."**

33 No further enlightenment is given about what the Appellant is alleged to have said at the conference which appears to have caused such concern. Furthermore, it is, in our judgment, difficult, without any particularity, to understand how what was said amounted to "gross misconduct". We have in our papers an extract from the Respondent's "Counselling and Disciplinary Procedures" in which "gross misconduct" is defined as:

> **"misconduct of such gravity that it totally undermines the relationship of trust and confidence between employer and employee and renders the employee's continued employment untenable"**

The document continues:

> **"Examples include (this is not meant as an exhaustive or exclusive list): misappropriation of company property, theft, fraud (including false expenses claims or other documents upon which payments are based) manipulation of a compensation or bonus plan, fighting, wilful or gross negligent damage to company property, persistent refusal to obey reasonable instructions, persistent incapacity due to alcohol or any other substance.**
>
> **Repeated acts of misconduct may constitute gross misconduct particularly where a warning or warnings has/have been issued.**
>
> **Criminal offences which the company reasonably believes to have been committed by employees, whether or not in working hours or on company premises, may constitute gross misconduct if the offence is of such a nature as to damage the company's reputation or likely to render the employee's continued employment untenable."**

34 As we have said, it is, we think, difficult to see how a forcible expression of concern can constitute gross misconduct of the type envisaged in the handbook. That, however, is not the only issue. The Appellant was notified of the disciplinary proceedings by means of a letter dated 16 October 1997 (a Thursday). The letter was addressed to the Appellant at home, and in the ordinary course of events she should have received it on 17 or at the latest 18 October. The

letter notified her that there was to be a disciplinary meeting on 20 October, the following Monday, at 10 am. The only particulars the Appellant was given of the allegations against her are contained in the second paragraph of the letter which reads:-

> **"As you are aware, I am concerned about your conduct on the BOMAS course, the continuing trend of behavioural problems as discussed at your recent appraisal and breach of trust and your attitude towards the organisation. I wish to hold a formal meeting at which you will be given the opportunity to discuss this matter further, and to present any relevant information. I enclose copies of the information gathered so far on this matter"**

35 The Appellant was given the names of the persons who were to attend. She was then told:

> **"I must advise you that this meeting is a formal disciplinary meeting and could lead to formal disciplinary action being taken which could lead to dismissal. I enclose a copy of the Company's Counselling and Disciplinary procedure for your information.**
>
> **You are entitled to be accompanied by a fellow employee at this meeting. Please advise me as soon as possible if you wish to bring a fellow employee, or wish to call any witnesses."**

36 We have to say to say that in our judgment this is an extraordinary letter for a company of the size and resources of the Respondent to send to an employee. The allegation of "breach of trust" is, in our judgment, quite inappropriate when compared with the findings of the Tribunal. Miss Seymour, for the Respondent, engagingly sought to persuade us that "breach of trust" was, in the context, simply another way of expressing the fact that the implied term of mutual trust and confidence in the Appellant's contract had broken down. We reject that submission. In our view, the phrase "breach of trust", like "gross misconduct", implies allegations of the utmost seriousness. It was, in our judgment, further quite inappropriate for the Respondent to put forward Mr Mee as the Chairman of the Disciplinary Hearing. It should not have been for the Appellant to have to object to the Chair: the Respondent should have chosen a Chair who was wholly uninvolved.

37 The Tribunal found as a fact that the Appellant was "represented" at the hearing and had the opportunity fully to air her views, not only about work tasks but about her feelings towards the company. We have some concern about that finding, since from the documentation before us it appears that the person who accompanied the Appellant did not "represent" her, but was there essentially as note-taker.

38 The Respondent rightly concedes that the decision to dismiss taken by the substitute Chair, Tracy Mudge, on 20 October 1997 was procedurally defective. In its conclusion, the Tribunal describes this as "a minor procedural defect". We are unable to agree with that conclusion. We must recall that we are dealing with a major international company with substantial resources. In our judgment, to give an employee at best two or three days notice of unparticularised allegations described as "gross misconduct" and "breach of trust" is more than procedurally unfair. In our judgment, it renders the whole process defective.

39 The matter is made worse in our view by the terms of the letter of dismissal. This is dated 22 October 1997 and signed by Ms Mudge. It reads as follows:

> **"Dear Joanne**
>
> **I am writing to confirm your dismissal from the Company effectively immediately as discussed at our meeting earlier today.**
>
> **The reasons for your dismissal from the Company on the grounds of gross misconduct are:**
>
> **1. Breach of trust - impossible to continue working relationship because of a breach of trust between you, your immediate management and your fellow team members. An example of this includes your relationship with Yvonne and Eddie McCarroll on the Coverage Contracts Project.**
>
> **2. Behaviour and attitude - your regard for the Company is not at a level we expect from an employee, there is always something wrong. You deliberately went against Neal's advice when sending a letter to Richard Sullivan and when asked to not do so because your issue should have been discussed with Neal, you then sent another letter directly to Richard Sullivan against Neal's instruction. Your unreasonable behaviour towards Kieran Chandler, Corporate Business Manager. Your meeting with a consultant from Swiftware, where your behaviour wasted time by covering subject matter that was not related to the outside consultant.**
>
> **3. Disruption - you have been given ample support, training and coaching by the Company and more time has been spent on you than other members of the team. You have recognised that you are not good at being obedient and this alone, indicates you need more help than others. Your approach to office work is high maintenance and your capacity to learn in this area has not been demonstrated, despite many attempts to help.**

The situation has worsened rather than improved. Other examples of disruption include your concerns over the Company's use of your home address with your numerous memorandums, meetings and phone calls on the subject. Also, your preparation for various meetings, e.g user reviews.

You do have the right to appeal against this decision and the procedure has been included with this letter. If you do decide to appeal, this must be returned in writing within five days of receipt of this letter to Christopher Dale, Human Resources Manager.

You will be paid for all outstanding holidays due by bank credit transfer at the end of November.

Yours sincerely

Tracy Mudge"

40 In our judgment, the contents of this letter are wholly inadequate to warrant findings of "gross misconduct" and "breach of trust". Not only does it lack particularity: by the definitions contained in the Respondent's own documentation, the allegations struggle to come anything near a definition of "gross misconduct". Miss Seymour courageously submitted that the proverbial man on the Clapham omnibus would not only understand from the letter why the Appellant had been dismissed, but what she had been dismissed for doing. From their different disciplines, the three passengers making up the EAT on this occasion are unanimous in their rejection of that submission. No doubt the Respondent found the Appellant a difficult employee, and one whom others found it difficult to work with. The Respondent may well have decided, as Miss Seymour submitted, that since the employment relationship had broken down, it was for the employer to terminate it. None of that, in our view, excuses the manner in which it appears to have been done. Any system, including the Tribunal and EAT system has to be judged by how it deals with people whom it regards as the most difficult. By that standard, the Respondent's system was seriously lacking in this instance.

41 The Appellant told us that she felt particularly aggrieved at being accused of "breach of trust", which she - perfectly reasonably in our judgment - equated with criminal behaviour and dishonesty. She also explained her sense of dismay at having to tell prospective employers that

she had been dismissed for "gross misconduct". In our view, those sentiments are natural and well-founded.

42. As intimated in paragraph 39, Miss Seymour submitted that the reality was that the relationship between the Appellant and the Respondent had, like a marriage, irretrievably broken down. This was an analogy the Tribunal adopted. The implied term of "mutual trust and confidence" had been breached. The Appellant did not want to work for the Respondent, and the Respondent did not want her to work for it. Since the "marriage" had irretrievably broken down, it had to be dissolved; it was for the employer, as employer, to set the agenda, and if the Appellant was not willing to conform then there was no alternative but for her to be dismissed.

43 Miss Seymour's analysis may, on the facts found by the Tribunal, represent an accurate summary of what in fact occurred. The analogy with a broken marriage may be apt, but as with marital breakdown, factual grounds have to be put forward to obtain a divorce. There clearly were grounds, but in our assessment on the evidence available to us, they did not amount to breach of trust or gross misconduct. There is, moreover, a world of difference between an allegation of "breach of trust" and an allegation that the "implied term as to trust and confidence" between employer and employee has broken down.

44 The Tribunal took the view that the procedural defect in the dismissal process was rectified by the appeal which the Appellant entered against her dismissal. We do not agree. Moreover, the Tribunal deals with this very shortly. It says simply:

> **"This was heard by two appeals officers, Richard Stillory and Frank Mooney. They had all the papers which Tracey Mudge had had before her. They listened to the Applicant's [Appellant's] version of events and they concluded that dismissal was the only reasonable outcome of the procedures."**

45 In our judgment, if the disciplinary hearing leading to the dismissal was unfair on the basis that (*inter alia*) it made unparticularised allegations of "gross misconduct" and "breach of trust", we would need a great deal of persuading, as a matter of law, that an appeal which considered the same material was right to reach a similar result. The Respondent's handbook makes it clear that the appeal was not a re-hearing. The relevant paragraph of the handbook states:

> **"Purpose of the Appeal Hearing**
>
> **The appeal hearing is not a re-hearing of the case. Its purpose is to provide the Appellant with an opportunity to demonstrate that his or her dismissal was unreasonable. No new evidence or documents will be admitted unless they were unavailable at the time of the dismissal."**

46 Two items in the definition of the "Role of the Appeal Hearers" in the Respondent's handbook seem to us of particular relevance. The appeal hearers are:

> **"to decide whether or not the decision to dismiss was within the range of reasonable actions open to the company"**

and also:

> **"to review the fairness of the disciplinary process. If there were any defects in the disciplinary process, the appeal hearers may take the view that the holding of a properly conducted appeal hearing adequately and fairly remedies such defects. Alternatively they may decide that the procedural defects were of such gravity that the dismissal must be regarded as unfair and consequently uphold the appeal."**

47 There is no evidence that the appeal hearers considered the fairness of the disciplinary process, and since their function was (amongst others) to decide whether or not the decision to dismiss was within the range of reasonable actions open to the company, our previously expressed anxiety that a defective dismissal could be rectified by such an appeal remains at large. Furthermore, it appears that additional documents were introduced into the appeal hearing. We remain entirely unclear about the manner in which the appeal was conducted, and how their responsibilities were perceived by those hearing it.

48 In the event, therefore, we respectfully dissent from the Tribunal's finding that the dismissal was not procedurally defective as a whole. In our view, the concession apparently made by the Respondent in its amended pleading that the dismissal was procedurally unfair, was the correct concession to have made, and the Respondent should not have been permitted to resile from it.

49 In our judgment, the Appellant is entitled to succeed on the first three issues identified by Miss Recorder Slade QC and set out in paragraphs 4 to 6 of this judgment. In our view, the Appellant was not fully alerted to the fact that the fairness of her dismissal was in issue: she did not come prepared to deal with the point, and was in our view in any event entitled to succeed on it. Secondly, the assertion that the Tribunal failed to make any proper findings as to what the gross misconduct was (or what constituted breach of trust) is made out. We also take the view that the procedural aspects of the dismissal, including the appeal, were defective for the reasons which we have given.

The outcome of the appeal on unfair dismissal

50 It is, however, at this point that the Appellant, in our judgment encounters an insuperable difficulty. Critical as we are of the Tribunal for its failure to make relevant findings of fact, it reached the conclusion, adopted by Miss Seymour, that, like a marriage, the relationship between the Appellant and the Respondent had irretrievably broken down. Having found that the procedural defect was cured by the appeal hearing, such that the dismissal was not unfair, the Tribunal went on to find that:

"in any event the Appellant contributed 100% to her dismissal by her behaviour."

51 For the Respondent, Miss Seymour argues that this is a finding of fact that the Tribunal was entitled to make. She identifies five key findings made in the Decision. They are:

> **(a) that by the time of the Appellant's dismissal the relationship between the Appellant and the Respondent had entirely broken down;**
>
> **(b) that the Appellant was responsible for that total breakdown;**
>
> **(c) that the Respondent acted reasonably in its decision to dismiss;**
>
> **(d) that the procedural defects established would not have made any difference to the final outcome of the Appellant's employment; and**
>
> **(e) that the Appellant contributed to her dismissal by her own behaviour totally.**

52 Miss Seymour stresses the fact that the Appellant did not appeal against (b) and (e). The Appellant told us that she thought she had so appealed, but she was unable to point us to any reference to such an appeal in her voluminous Notice of Appeal. Furthermore, Miss Recorder Slade QC did not advert to the point in her careful judgment on the preliminary hearing.

53 We have to give full weight to the fact that the Tribunal saw and heard the Appellant give evidence, and that findings of fact are for the Tribunal to make unless there is no proper basis upon which such findings can be made. Whilst we are highly critical of the Tribunal's analysis that the facts found amounted to "gross misconduct" and "breach of trust", such a criticism does not mean that the Tribunal, which heard the evidence, is not entitled to make findings about what actually occurred. Whilst, once again, we are critical of the lack of particularity in the allegations made against the Appellant, we have to recognise that the Tribunal was entitled to prefer the evidence of the Respondent to that of the Appellant, and to form an assessment of the Appellant, which it sets out in some detail in paragraph 42 of the Reasons, and which we need not repeat.

54 In these circumstances, we can see no way the Appellant can seek to overturn the finding made by the Tribunal that she contributed 100% to her own dismissal. We therefore agree with Miss Seymour that, on the question of unfair dismissal, there would appear to be no point in returning the matter to the Tribunal for it to reconsider its position on compensation.

55. We do not, however, agree that from the Appellant's point of view the appeal is academic. Our Decision is not simply that the Appellant's dismissal was procedurally unfair. In our view, she is entitled to a finding that she was not guilty of a breach of trust towards the Respondent, nor was she guilty of gross misconduct.

56. Accordingly, in the highly unusual circumstances of this case, the order we propose to make on this aspect of the case is as follows: -

The Appeal is allowed to the following extent: -

1. **Paragraph (ii) of the Tribunal's decision is set aside**

2. **The Tribunal's finding that the Appellant was guilty of breach of trust and gross misconduct is set aside**

3. **It being common ground that the employer / employee relationship between the Appellant and the Respondent has irretrievably broken down and in the light of the Tribunal's finding that the Appellant had contributed 100% towards the breakdown of that relationship the EAT declines to direct that the matter be remitted to the Tribunal for further consideration**

57. We appreciate that this is an unusual order. We note, however, that the Appellant unsuccessfully took further proceedings against the Respondent some two years after the termination of her employment, resulting in a decision of the Tribunal on 4 February 2000, and an unsuccessful appeal to the EAT on 9 March 2001. In our view, it is high time this protracted litigation came to an end. The Appellant has married, and has moved on. She has achieved in this appeal what we understand to be one of her main objectives. The findings that her behaviour was in breach of trust and constituted gross misconduct have been set aside. She can approach any fresh employment on that basis.

The balance of the appeal

58 We can deal quite shortly with the remaining parts of the appeal. We have already made clear that we do not think that the allegations of bias have any substance. This leaves the questions of victimisation and equal pay. So far as the former is concerned, the Tribunal's finding that the Appellant was 100% responsible for the position in which she found herself seems to us fatal to her claim for victimisation under the **Sex Discrimination Act 1975**. As the Tribunal pointed out, in order to succeed on a complaint of victimisation, the Appellant had to show that there was a causal connection between her dismissal and the fact that she brought a claim that fell within section 4 of the **Sex Discrimination Act 1975**. The Tribunal, in our judgment, was entitled to conclude, as it did, that it was the Appellant's behaviour pattern overall that was the one operating factor for the dismissal, not the fact that one of those matters related to sex discrimination and another to equal pay.

59 Finally, in relation to equal pay, the Tribunal accepted that it had heard insufficient evidence to determine the equal pay question. It described it as "scant". Its conclusion is set out in paragraph 40 in these terms: -

> **We were not satisfied on the scant evidence before us that the (Appellant) had demonstrated that her job was that that had hitherto been held by Mr. Srvilsan. Even if it were, it would not necessarily mean that she would be entitled to the same rate of pay, given that he had been in the post for some 12 years and had a broad experience within the Respondent's organisation, where the (Appellant) was a relative newcomer and acknowledges she had to pick up a great many of the technical skills……The Respondent's evidence was strongly that part of the work was given to another employee and in the circumstances, the Tribunal did not consider that the (Appellant) had made out a prima facie case that she was performing the same job as her predecessor and entitled to the same rate of pay.**

60. Miss Seymour, for the Respondent, argued that the Tribunal could not be criticised for failing to make sufficient findings when they had insufficient information upon which to make such findings. Although the matter was dealt with in a general way, the burden of proving a *prima facie* case of like-work was upon the Appellant: there was a conflict of evidence, and the

Tribunal made a general finding that they preferred the Respondent's evidence to that of the Appellant. Miss Seymour submitted that the Appellant failed to make out her case that she was engaged in like-work, and accordingly the Tribunal was entitled to dismiss the claim.

61. Whilst we have less sympathy with Miss Seymour's argument that the Appellant should have appealed the Decision of the Tribunal not to order disclosure of the relevant documents, we nonetheless take the view that, on balance, the Tribunal was entitled to find that the Appellant had not made out her case on equal pay, and that the Tribunal was accordingly entitled to dismiss her claim. In these circumstances, since we cannot detect any error of law, the Appellant's appeal against the Tribunal's findings of victimisation and equal pay will be dismissed.