Appeal No. UKEAT/0093/19/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 December 2019

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

APPELLANT

MS S FOX

SOUTH ESSEX ACADEMY TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MATTHEW HODSON (of Counsel) via Advocate
For the Respondent	MR JAMES BROMIGE (of Counsel) Instructed by: DAS Law North Quay Temple Back Bristol BS1 6FL

SUMMARY

UNFAIR DISMISSAL – Constructive dismissal

DISABILITY DISCRIMINATION

HARRASSMENT

The Claimant ('C') appealed against the decision of the Employment Tribunal ('The ET') to dismiss her claims for disability discrimination; unfair constructive dismissal and harassment. The premise of the ET's findings on all three claims was that the Respondent ('R') had made full disclosure of the relevant and available documents to C in the course of its process to decide her grievance. The Employment Appeal Tribunal held that the ET's findings on all three claims were wrong in law because the ET had not understood that such disclosure had not, on the evidence, been made to C.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

1. This is an appeal from a judgment of the Employment Tribunal sitting at East London ("ET"). The ET consisted of Employment Judge Ross, members Ms M Long and Mr D Ross. In a judgment sent to the parties on 14 November 2018, the ET dismissed the claims of the Claimant ("C"). C had claimed disability discrimination contrary to Sections 20 to 21 of the **Equality Act 2010** ("the 2010 Act"), harassment contrary to Section 26 of the **2010 Act** and unfair dismissal. That claim was a constructive dismissal claim. The ET declared that the Respondent ("R") had made unlawful deduction from C's wages. I will refer to the parties as they were below. Paragraph references are to the ET's Judgment unless I say otherwise.

2. On this appeal C was represented by Mr Hodson, acting under the auspices of Advocate (The Bar Pro Bono Unit as it once was), and R by Mr Bromige. I thank both counsel for their excellent written and oral submissions. This Tribunal is always grateful when counsel act pro bono for C who would otherwise be unrepresented.

Brief Outline of the Facts Relevant to the Appeal

3. I have been greatly helped in this outline by the chronology which Mr Hodson helpfully prepared for this appeal. C was employed by R as a primary school teacher from September 2011 until she resigned on 15 May 2017. On 9 June 2015 there was a hearing of an appeal she had made about her pay. This appeal was later referred to in C's grievance, in her claim to the ET, and has been referred to on this appeal. On 16 January 2017 C submitted a formal grievance to Gemma Cahalane, who is R's HR manager. On 20 January a Miss Crystal Wiggs ("CW") was assigned to investigate and to hear the grievance.

4. On 26 January 2017 Gemma Cahalane, whom I will refer to as "GC", contacted Catherine Stalham, the head teacher, whom I will refer to as "CS", and her deputy Gemma Thurston. She referred to documents by number in a pack which was shared by these people. She noted information on a copy of C's grievance form to help them write statements about the grievance. GC asked that, if there were any documents they wanted to be considered, they should be provided to her for inclusion in the pack. The contents of that pack corresponded in number to an HR case file which was later provided to C.

5. On 30 January C went to an occupational health ("OH") appointment. A report was then prepared. On the same day CS and Gemma Thurston forwarded statements to GC. GC added them to the pack with the OH report which had been received from C that day. GC copied that pack for the grievance investigator, CW, and for an HR advisor called Leah Knowles. On 2 February CW, as grievance investigator, collected the pack of documents which GC had put together in order to introduce her to the grievance. She referred to it as "an HR case file."

6. On 5 February CW contacted GC to say that she was reviewing the pack. She asked whether Paloma Grande Ibernon ("PGI"), would be providing a statement. GC then arranged for PGI to send her statement, which was dated 26 January 2017, to CW directly. On 8 February CW sent C an invitation to a grievance hearing on 7 February 2017. C replied to CW on 13 February and asked for adjustments recommended by OH including that documents should be provided in advance in order to enable her to prepare for the hearing. On 14 February CW replied refusing those adjustments as the relevant policy did not require them. On 16 February C replied. She said that without those adjustments she would not be able to attend the hearing which had been scheduled for the next day. She made a data a subject access

request ("SAR") in order to enable her to get the documents in advance of the hearing. CW acknowledged that email and said she would respond by 22 February. On 17 February the grievance hearing was postponed.

7. On 21 February GC advised that the adjustments which C had asked for should be made. In particular the grievance papers should be provided to C at least seven working days before the hearing. At some point CW got a copy of the minutes from the pay appeal to which I have already referred. Point two of C's grievance was about the remedy resulting from that pay appeal hearing. On 22 February CW sent an invitation to a rearranged hearing on 7 March 2017. She said, in particular, that papers from the investigation which she had been carrying out, including statements from witnesses, would be provided to C. On the same date CW sent a list of interview questions to CS. She began the relevant email by thanking her for providing documents for the grievance which she was investigating.

8. On 24 February CS replied to CW with her answers in relation to the investigation questions in what became CS's second statement for the grievance. There is a further email chain between CS and CW about providing the supporting documents which were referred to in the investigation questions. On 26 February CW forwarded her investigation questions dated the 22 and 24 February 2017 and responses from CS to GC for inclusion in the papers to be sent to C. GC did not add those documents to the HR case file.

9. On 1 March SF received the HR case file collated by GC and CS and provided to CW on 2 February. The documents that CW found later had not been added to it. CW met CS on the same day and collected the supporting documents referred to in her questions dated 22 February 2017 including papers from 2015 and 2016. On 3 March C postponed the grievance

hearing listed for 7 March because of ill health after receiving the bundle, which caused her concern. On 6 March GC emailed C about the referral to OH to find out what supportive measures could be taken by R for a third attempted grievance hearing. The hearing on 7 March was postponed.

10. On 25 March CW emailed C. She said, first, that she was aware of an OH appointment which C had on 28 March and would consider any adjustments recommended then. Second, she attached an invitation to a re-arranged grievance hearing on 31 March. She warned C that she would go ahead without C if C did not attend. Third, she said that any documents she had about C's grievance would be sent to her. On 28 March C duly attended the appointment with OH and a report was prepared. On that date compliance with the SAR which C had made on 16 February 2017 was due, but it was not complied with on that date. On the same day SF sent an email to CW and GC about this. She said that part of the SAR, that is papers relating to C's grievance, were the most urgent and should be provided in advance of the hearing which had been scheduled for that Friday, 31 March. She listed at paragraphs 6A to L of that email specific documents. She also asked questions about the grievance investigation. She said these matters were necessary and were outstanding and it would be helpful for her to receive answers or documents to prevent the hearing from appearing subjective and biased.

11. On 29 March GC received the report from OH. It said that C agreed that attending a grievance meeting would help to resolve the issues. C had received some papers so far. C was in the process of telling R what other papers she needed before the hearing went ahead. C was fit to attend the hearing. She told OH that she had been asked to go to a meeting this Friday, that is, on 31 March. Whether she could go to the meeting depended largely on when the documents were available. CW on the same day sent two emails in response to C's email on 23

March. The first to C said that she would, "take into account all the evidence C had referred to and signposted." The second email to CS copied and pasted the requests in paragraph 6A to L from C's email of 23 March and asked CS to provide her with any of the material which existed in written form by 8am on 31 March.

12. On 30 March C emailed CW replying to her email of the previous day. CW did not reply. CW forwarded C's email to SH and GC asking if anyone could forward her a copy of the OH report. She said she had asked for what C felt was missing but would not be providing this to C in advance. GC did not provide the OH report but telephoned CW and said that in her view there was no material difference from the earlier advice.

13. On 31 March C emailed CW because she had had no response to her email the day before. CW went ahead with the grievance hearing in C's absence. CW emailed C to tell her that the grievance hearing had gone ahead in her absence and that she would receive the outcome letter in five working days. C copied CW's email back into the chain with the unanswered email she had sent to CW the day before asking CW to consider postponing the hearing. She said she was still waiting for a response to an email sent the day before. C told CW how unhappy she was that CW had gone ahead without making the adjustments to enable her to attend.

14. On 6 April C received CW's grievance outcome letter. She was told that she had five days in which to appeal. On 13 April C's position was that she was unable fully to raise her complaints in the suggested timeframe because she was stressed. She lodged her appeal on "broad grounds" saying that she would need to add further points when she was able to do so.

15. By 21 April C had made many pages of handwritten notes but was not in a position to make all the points she wanted to about her unhappiness with the grievance process and outcome. GC emailed C to say that the remaining papers for the SAR had been found and would be sent out on 24 April. On 27 April C made a complaint to the Information Commissioner's Office ("the ICO"). She complained that R had breached her rights of subject access and that papers had still not been provided in response to an SAR she had made.

16. Later she received an envelope containing three bundles of papers from her SAR. The investigation papers were not in those bundles. C was confused about what was in the papers. Among the papers, however, are leave forms which C had completed and which showed that there had been a mistake in relation to the application of the accrued leave policy. Those had not been found during the investigation of C's grievance.

17. On 2 May C was invited to a hearing of her appeal on 9 May 2017. On 3 May she received a further pack of documents which she had not seen before to be used at the appeal hearing. This pack included the grievance investigation questions CW sent to CS on 22 February 2017. This is the first time C was aware of those. Other documents were also missing. On 12 May GC telephoned C to say that she was disappointed that C was not attending the meeting that day. On 15 May C resigned with immediate effect. On 16 May the grievance appeal hearing was heard.

18. The ICO concluded its investigation on 9 August. It decided that R had breached C's rights under the **Data Protection Act**. The ICO advised R about how to manage SARs correctly in the future. It required R to check C's SAR again properly and to ensure that any further documents were sent to her right away, but in any event within 10 school days. In the

event R sent no further papers to C despite the fact that papers were still outstanding, pre-dating the SAR, such as pay appeal documents, cover diaries, meeting notes and PMRs.

19. On 14 August there was a preliminary hearing before the ET. A draft list of issues was drawn up on 29 September. Document lists were exchanged on 7 November.

Important Relevant Findings of the ET

20. In paragraph 181 of the judgment the ET described C's grievance. The ET said that it included four points: (1) lack of adequate support; (2) failure to support an application for progression through UES1, and a failure to advise C on what evidence she might produce herself; (3) a failure to pay C's annual leave entitlement while C was on sick leave and (4) a complaint about the behaviour of PGI at a meeting on 12 January 2017. The ET recorded that GC collected evidence in the form of statements from those directly relevant to the grievance, that is GC and PGI.

21. At paragraph 184 the ET made a relevant finding about the investigation of the grievance. Having said that CW had been appointed to investigate the grievance, the ET said this:

> **"184. She collected the pack of documents on 2 February, from the school. Subsequently, she was sent the OH advice of 30 January, which stated the Claimant was fit to attend any meetings but recommended various adjustments. These included allowing her to be accompanied… and providing information that forms the context of the meeting beforehand."**

22. At paragraph 187 the ET referred to C's email of 13 February 2017. C made a number of points including in relation to the grievance hearing:

> **"4) ……., you state**
>
> **(a) you will consider evidence gathered by all parties but I am not aware of this evidence as nothing has been disclosed to me prior to the hearing.**
>
> **(b) I will be afforded the opportunity to make verbal representations - this however will present some difficulty for me without full disclosure ahead of the hearing, particularly considering my ill-health.**

A

…..”

The email made further requests for disclosure which the ET set out at the foot of subparagraphs four and five of paragraph 187.

B

23. The ET considered the email which CW sent in reply to that email. Paragraph 191 of the Judgment is significant.

> **“191. On the issue of providing information for the context of the meeting, [CW] quoted the Grievance Policy that “this may involve discussions with witnesses and normally, the persons identified in the grievance.” She did not understand the OH advice to require her to disclose all the evidence in her pack. She explained in her email that this was not necessary, because the purpose of the formal stage was to allow the employee to set out their grievance and the remedy sought. This was, in effect, a refusal to provide a Claimant with the documentation which she had which was relevant to the grievance investigation.”**

C

24. The ET recorded in paragraph 192 that C perceived CW’s email to be hostile. The ET did not find it reasonable for the email and the refusals in it to have the effect. They said that CW had gone to some trouble to respond to all the points raised at short notice and had explained that she was following the grievance policy, and what adjustments had been made, and that there was nothing to indicate that when she sent the response she was ignoring the adjustments or deliberately avoiding C’s concerns. The ET went on to qualify that by saying in paragraph 193:

D

E

> **“193. [CW’s] response was consistent with her not understanding the adjustments sought. We found that she was inexperienced as a grievance hearing officer (this was her first grievance) and that she acted in good faith, taking HR advice. At the time of her response, [GC] was on holiday.”**

F

25. In paragraph 194 the ET recorded that C had sent a long email on 16 February 2017 to CW saying that she would not be attending the meeting and explaining why. The ET also recorded that that email contained an SAR. In paragraph 197 the ET found that CW referred the SAR to GC “who went about collecting the relevant data.” The ET made further relevant findings in paragraphs 198 to 201.

G

H

> **“198. As soon as she returned from leave, on 21 February, [GC] emailed [C], apologising for the delay, and explaining that she had made recommendations for the Grievance Procedure to put into effect the OH advice including… provision of an investigation pack seven working**

days prior to the hearing. In other words, [GC] ensured that the adjustments sought by the Claimant were made as soon as she knew of the request for them in respect of the grievance hearing."

199. By letter 22 February [1059], [CW] invited [C] to the rearranged grievance investigation meeting on 7 March. This invitation offered adjustments including that '[C] could attend with a companion of her choice. Moreover, it stated that any relevant documentation for the investigation would be provided to her at the earliest opportunity…''

200. [CW] understood that the subject access request had been complied with by Human Resource, and did not herself re-send the evidence.

201. On 1 March, the Claimant received the grievance investigation documentation in a bundle, less than 7 working days before the hearing. This was due to an accident in the bundle going out later than [GC] had intend. Although, applying the procedure set out in the correspondence, the Claimant only had 24 hours to respond to indicate any documents she would rely upon, the Claimant could have asked for this to be adjusted, because correspondence from both [GC] (such as p. 1048) and from [CW] all indicated that they wanted the grievance dealt with fairly."

26. The ET made a very important finding at paragraph 200 about CW; that she understood that the SAR had been complied with by Human Resources and that she did not, herself, resend the evidence. At paragraph 201 the ET recorded that C received the grievance investigation documents on 1 March in a bundle less than seven working days before the hearing. This, the ET, was due to an accident in the bundle going out later than GC had intended.

27. In paragraph 210 the ET recorded that C was invited to a further meeting on 31 March by a letter dated 21 March 2017 with an explanation of the adjustments being put in place to facilitate the meeting. The letter also said that if C did not attend, the grievance would nonetheless be heard on that date. CW said that, "….*as Grievance Investigation Manager, I will review all the evidence gathered to date in order to come to conclusions in the absence of any verbal presentation from you*."

28. In paragraph 211 the ET found that CW had a copy of quite recent OH advice dating from 30 January 2017 and that, "it was reasonable for her to decide not to delay the grievance hearing further by waiting for further OH advice…" The ET's view was that CW had acted

from the best of intentions, wishing to move the grievance forward, so as to increase the prospect that C could return to work.

29. At paragraph 214 the ET found that it was a reasonable and sensible step to take to arrange the grievance hearing to avoid time being wasted before the grievance hearing occurred. Moreover, the hearing of the grievance was designed to help C to return to work because the medical advice from OH was that resolution of a pay issue was a hurdle to her return. In paragraph 215 the ET said that C "responded at length" to the further information in the email dated 24 March. She said that she was prepared to attend the hearing but she asked for further documents as part of the SAR which she wished to be put into the evidence bundle.

30. In paragraph 216 the ET said this:

> **"[CW] had as far as she was concerned, complied with the SAR. Moreover, she believed that her remit did not extend to considering the further documents that [C] now sought to add to the bundle. [C] herself had not provided any further evidence after submission for her grievance."**

The ET referred in paragraph 217 to further HR advice received by CW. They said that in her response to 29 March CW had said that she would take into account C's evidence and other evidence referred to in her email and that she was committed to hearing the grievance fairly and making adjustments to enable C to attend.

31. The ET summarised C's email of 30 March in paragraph 218. They noted that C said that her anxiety made her question concerns to the point of panic and that she asked for documents, not to be difficult, but because their provision was necessary to answer her questions and minimise her symptoms so as to enable her to attend the meeting. C explained, the ET said, that the documents she had asked for "should have been "*readily available*" and they were necessary."

32. At paragraph 219 the ET found that that response did reflect the effect of C's mental impairment at the time but, "we preferred [CW]'s evidence that the documents were not necessary for the purpose of the grievance meeting, and that they would not have been readily available."

33. At paragraph 221 the ET said that the OH advice had been received on 29 March. This had advised that the **Equality 2010 Act** might apply to C because of the long-term nature of her condition. The advice stated that C was fit to attend the grievance hearing and, "recommended adjustments (which were those made)." Counsel agree that the reference to the recommended adjustments includes a reference to the adjustment requiring timely disclosure of relevant documents.

34. In paragraph 222 the ET recorded that CW decided to go ahead and to hear the grievance without C's attendance because she could not understand why C could not attend and she could not understand what else she could do to facilitate C's attendance. She took into account HR advice and that it was not easy to arrange a meeting given the need for her to be there, for there to be a place for the meeting and the need for a clerk.

35. In paragraph 223 the ET made an important finding that CW had dealt with the grievance on the basis of the evidence that she had before her including that listed at paragraph 30 of her statement. CW's own evidence from her witness statement was that she had been, "forced to conduct the hearing on the strength of the evidence supplied" see paragraph 30 of her witness statement. She listed that evidence in the same paragraph of her witness statement as follows:

> (1) statements from individuals named in the grievance;

(2) evidence of support from Winter Gardens Academy (cover diaries and weekly meetings);

(3) stress risk assessment by Gemma Thurston dated 27 September 2016;

(4) signed performance management documentation from 2015 to 2016 and 2016 to 2017;

(5) lesson observations;

(6) pay appeal minutes dated 11 June 2015;

(7) sickness absence management review minutes dated 12 January 2017;

(8) an OH report dated 30 January 2017.

36. In paragraph three of the same witness statement CW described the contents of the pack which R had supplied to C on 1 March. C was supplied with no other documents for the grievance hearing. 61 documents were listed in that paragraph. Two statements are listed; Gemma Thurston's statement dated 30 January 2017 and Catherine Stalham's statement 30 January 2017. With the exception of those two statements and the sickness review minutes dated 12 January 2017, the pack did not include the documents listed at paragraph 30 of CW's witness statement. Paragraph 30 is not clear about exactly what statements CW did consider. The grievance outcome letter refers to witness statements from CS, GC, PGI and Gemma Thurston. Nor does it specify in any case whether more than one witness statement was considered. It appears in fact that CS made three witness statements or documents which are the equivalent of a witness statement. The grievance outcome letter is at page 264 of the bundle. In it CW said that supportive adjustments had been put in place as recommended by OH in reports dated 30 January 2017 and 29 March 2017. "All the paperwork I have considered I understand was provided to you as part of your subject access request."

37. The letter refers to a risk assessment in September 2016. It is clear that CW decided the grievance on the basis of material which had not been disclosed to C in the pack or at any time before CW made her decision on the grievance. It also appears from this letter that CW mistakenly thought that C had been provided with all these documents as part of her SAR.

38. In paragraph 224 the ET said:

> **"We find that there was nothing unreasonable in the approach by [CW] to proceed to hear the grievance on 31 March 2017, to the extent that it undermined the Claimant's trust and confidence in the Respondent, it was not reasonable for it to do so. Particularly in circumstances where relevant disclosure had been provided where the Claimant had been warned that the grievance hearing would proceed if she did not attend and where the Claimant had not applied for an adjournment (and at first had indicated that she would attend)."**

39. In paragraph 226 the ET referred to C's SAR made on 16 February 2017. It said of that request, "This was not limited to evidence relevant to the grievance, but included a request for "*all personal data*."'

40. The ET then considered whether or not R had complied with the SAR. In paragraph 231 the ET found that on the face of it R had failed to provide all C's personal data within 40 days of the request. They went on to find in paragraph 232 that the rest of the documents sought had been received by C on 27 April 2017, "(as stated by the Claimant during cross-examination)." They found that the allegation that the SAR was not complied with until the end of C's employment was not correct. In paragraph 233 the ET recorded something that C had said in cross-examination when asked if it was her case that provision of the remaining documents was deliberately delayed to April so that she would not have them for the grievance hearing:

> **"233. My issue is when I am saying it's clear what I need for hearing and OH saying I am fit to attend when feel fit, this is an adjustment to let me prepare and not to be given at last minute, when there is a deadline and given late rather than go ahead without me, meeting should have been moved.**
>
> **Paperwork should have been provided before not after Grievance Meeting."**

41. Of this evidence the ET said that C's case was not:

> **"234. …. therefore, that there was a deliberate withholding of these further documents. In these circumstances we did not find that the delay in provision of the Claimant's personal data, even if technically a breach of her legal right to her data, was likely to destroy the relationship of trust and confidence."**

The ET went on to say in paragraph 235 that the failure to comply with the SAR within 40 days was not likely to destroy the relationship of trust and confidence. The ET then said this:

> **"235. It occurred because [R's] witnesses did not at first understand [C] to be seeking all personal data held, including any documents she referred to in her email of 30 March which actually existed. To the extent that this failure did affect C's trust and confidence in her employer, it was not reasonable for it to do so, given that [R] had provided substantial disclosure before the date of the planned grievance hearing on 31 March 2017 and given that [CW] did not refuse to provide [C] with the additional documents that were specified very shortly before the grievance hearing."**

42. Under the heading, "Grievance Outcome" the ET made some further findings about the grievance outcome. They recorded in paragraph 237 C's allegations that the grievance outcome contained numerous flaws. Their view was that the flaws were, in reality, decisions with which C disagreed and that C's evidence showed her overreaction to the decisions reached. They referred to paragraph 346 of C's witness statement as showing the extent of her reaction. "The outcome letter is incorrect throughout and that is what I feared would happen from limiting the documentation I could have access to when somebody partial was controlling the documents included for the hearing."

43. In paragraph 238 the ET found that there was nobody, "partial-controlling the documents." They said that this belief was the product of C's tendency to perceive the course of events in a negative way. They recorded in paragraph 239 that when cross-examining CW, C had particularised what she disagreed with, including that adjustments did not fully take account of her needs, their adjustment after the first hearing (to receive documents within a certain time scale, seven working days before the next hearing) should not be made, and that documentation was not used in the outcome because it was not provided by R. In paragraph

240 the ET accepted, "the measured evidence of [CW] that she had done what she could to adjust the grievance procedure to promote [C's] ability to attend."

44. In paragraph 244 the ET dealt with point three of the grievance. That was whether C had received any annual leave entitlement while on sick leave. CW decided that this had been investigated and responded to by GC. They then said, "In the absence of any evidence of argument from [C] this was not a surprising conclusion. We did not consider this evidence that [CW] acted unreasonably or in error in reaching this conclusion." Mr Hodson makes the point that the relevant policy had not been given to C.

45. In paragraph 245 the ET reached this overall conclusion:

> **"In the circumstances, given the adjustments made for [C] to enable her to attend, the OH advice (that she was fit to attend), and the disclosure already provided, it was not a breach of the implied terms of trust and confidence for [CW] to hold the grievance hearing and determine the grievance. The intention of [CW] was to hold the grievance and facilitate [C's] return to work."**

46. In his oral submissions Mr Hodson drew my attention to an important finding made by the ET in paragraph 362.3 of the judgment: "[C's] mental impairment had strong effect on her ability to process information, to weigh information, and to order her thoughts, which we witnessed during these proceedings." That was a finding made in the context of the ET's alternative finding that it would have been just and equitable if it had been necessary to do so, to extend time for bringing claims which otherwise might have been out of time.

47. In paragraph 405 of the judgment the ET described a provision criterion or practice, ("PCP") which it found that R had applied to C's case. That PCP was a PCP of "not providing the grievance evidence documentation to an employee prior to a grievance hearing." That PCP was taken directly from the list of issues. In paragraph 406 the ET found that there had been no

breach of the duty to make reasonable adjustments on the dates alleged. It then dealt in turn with each of the dates pleaded in the further particulars as follows:

> **"406.1. Despite refusal to provide such documentation by [CW] on 14 February 2017, [C] was not placed at a disadvantage compared to a comparator, because the scheduled meeting on 17 February did not proceed.**
>
> **406.2. On 1 March 2017 [C] was provided with a bundle of documents relevant to the grievance issues which had been generated by [CW's] investigation. This demonstrates that a reasonable adjustment to the PCP was made. It was reasonable for [R] to provide documents which [CW] believed were directly relevant to the grievance. A reasonable adjustment did not require [R] to provide every document to which she was entitled under her SAR. [CW] had never seen those documents forming part of [C's] email request for specific documents made on 28 March 2017.**
>
> **406.3. The grievance meeting scheduled for 7 March 2017 did not go ahead. [C] was not placed at any disadvantage by the PCP, which had, in any event, already been adjusted in a reasonable way.**
>
> **406.4. The email from [CW] of 29 March 2017 is not evidence of a breach of the duty to make reasonable adjustments. On the contrary, it explains that [CW] is committed to making reasonable adjustments. Also, it makes the distinction between the evidence within the scope of the grievance investigation and the evidence requested by the SAR.**
>
> **406.5. [C] alleges that her emails of 30 and 31 March were ignored. [I think this is a reference to the original email of 28 March]. This is not an allegation of breach of the duty to make reasonable adjustments. In any event, we found as a fact that her emails were not ignored by [CW]. We accepted [CW's] evidence that the additional documents requested were not necessary for the purpose of the grievance meeting, and that they would not have been readily available. In other words, the further adjustment sought by [C] (of further disclosure) was not a reasonable one.**
>
> **406.6. The fact that the grievance hearing took place on 31 March 2017 is not evidence of a breach of the duty to make reasonable adjustments. [R] had complied with this duty already by the disclosure provided on 1 March 2017."**

48. The ET dismissed C's harassment claim in paragraphs 429 to 435 of the judgment. The ET referred to findings of fact it had made on the complaints within issues 6A to 6N in the list of issues. That list of issues did not contain any issue about inadequate disclosure. The ET said that it had found that C had been mistaken or incorrect in her factual interpretation of some events and in relation to other complaints, that the conduct concerned was not unwanted. The ET found in any event, in paragraph 431, that whether or not the conduct set out at issues 6A to N had occurred and whether or not it was unwanted, the ET would have concluded that it did not have, as its purpose, the violation of C's dignity, nor the creation of an environment that was hostile, offensive or humiliating.

A

49. Finally, in paragraph 432, the ET found that even if those hurdles had been crossed, it was not reasonable for the conduct to have that effect and that they had given many examples of that as set out in their findings of fact. They said in paragraph 433 that, as they had explained, C was over-sensitive to perceived or actual criticism from managers or management direction with which she did not agree. She had overreacted to certain events. That that was probably a result of her stress-related symptoms such as "her impaired ability to process information and her tendency to ruminate over and over on events." For the avoidance of doubt, in paragraph 434 they found that none of the allegations of harassment had been made out.

B

C

D

50. It is relevant at this point to refer to C's ET1. In paragraph 73 of the ET1, C said that she considered that R's actions as described in various paragraphs of the grounds of claim amounted to harassment on the grounds of her disability. One of the paragraphs she referred to was paragraph 55 which says:

E

> **"55. On 22nd February 2017 [R] wrote to [C] confirming the grievance hearing had been rescheduled for 7 March 2017. [C] did not consider she had all the information necessary to attend this meeting and as a result of the constant battle to obtain information, did not feel well enough to attend the rearranged grievance hearing."**

F

As Mr Bromige pointed out in his oral submissions, this paragraph of the pleading refers to a meeting that had been scheduled for 7 March and which in fact was rescheduled again. It does not appear to be a reference to a later failure of disclosure. He points out that paragraph 58 of the ET1 says:

G

> **"58. On 30th March 2017 [C] wrote to [R] again requesting information she felt had not been provided in the subject access request and asking for the grievance hearing to be postponed until the documents had been provided.**
>
> **59. However [R] ignored this request and proceeded with the grievance in the Claimant's absence."**

H

51. He points out that paragraphs 58 and 59 are not referred to in paragraph 73.

52. The ET dismissed the claim for constructive dismissal in paragraphs 436 to 441. Paragraph 436 the ET found that C did resign in response to events on the 11 and 12 May 2017, which was supported by the terms of her resignation letter. In paragraph 437 the ET found that the series of acts or omissions relied on at issues 2A to 2BB (which I am told includes complaints about disclosure), did not, whether taken cumulatively or when examined individually, amount to a breach of the implied term of trust and confidence. That led the ET to find, in paragraph 438, that R and its predecessor had not conducted themselves in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence even though C believed that that was the case. In paragraph 440 they said that on the very limited occasions where, objectively reviewed, R might have acted unreasonably, "we found that this was done by mistake or oversight. It was not done deliberately."

53. In paragraph 442 they dealt with an alternative argument based on "the last straw" doctrine. They found that the incidents on 12 May 2017 were insufficient to justify C's resignation, "even if there had been a series of other incidents which were capable of forming part of a repudiatory breach (which there had not been in this case)." In paragraph 444 they said that in the light of those conclusions the issue of affirmation did not need to be decided because they had found that there was no breach of contract.

54. I noted that there is no issue in the list of issues which directly engages the disclosure complaint apart from, possibly, issue 20 which says that CW allegedly refused to provide C with investigation documentation before the grievance meeting scheduled on 17 February 2017 and issue S "Throughout employment [R] allegedly failed to comply with a [SAR]."

Submissions

55. In paragraph 9 of his skeleton argument Mr Hodson put C's case in seven propositions.

(1) R had a duty to make reasonable adjustments for C because she suffered from a disability, that is stress and anxiety

(2) R had a PCP of not providing grievance documentation to an employee in advance of a grievance hearing

(3) A reasonable adjustment would have been to provide those documents in advance

(4) The ET wrongly came to the conclusion there was no breach of duty because the necessary documents were in fact provided and any additional documents would not have been necessary and would not have been readily available

(5) In fact, there were readily available and necessary documents that were relevant to the grievance but which were not disclosed to C in advance

(6) Accordingly, the ET decision in so far as it dismissed C's complaints about her grievance was wrong on the facts. That decision should be set aside

(7) That decision is significant because it underpins the ET's findings on the failure to make reasonable adjustments, harassment and constructive unfair dismissal with a result that those findings must be reconsidered.

56. Mr Bromige's response was that the way that the case is now argued is not the way that it was argued in the ET. He submitted that the ET is not obliged to deal with a case which has not been put by the parties. He argued, in relation to the reasonable adjustments claim, that with the exception of the second witness statement of CS, C did not, in any of her pleadings, or in her witness statement, identify the documents that are now relied on. C did not complain, in her witness statement, that R failed to disclose to C before 31 March the documents which CW

A in fact relied on in deciding the grievance. The ET, he submits, did not refer in the relevant parts of the judgment dealing with the complaints about documents to the case which is now being put on appeal and that even now, he submits, C cannot say which documents should have been provided to her. The structure of the judgment shows that the ET knew what C's case was and that they dealt with it methodically. It is disingenuous of C to argue that all the evidence was before the ET. Before the rule 3(10) hearing on this appeal C had not analysed the documents as they have now been analysed and she did not rely on that analysis in her claim.

B

C

57. He submitted in relation to the unfair dismissal claim that the ET found that CW refused to provide documents but that she acted in good faith. The refusal to provide the documents could not therefore amount to a breach of the duty of trust and confidence. He further submitted that the ET dealt at length with the SAR. It focussed correctly on the documents which C asked for on 30 March 2017. The ET dealt with allegation 2(W) (that the grievance outcome had many flaws) in paragraphs 236 to 245 of the judgment. The way in which the ET dealt with that complaint reflects what C had argued in her witness statement and the evidence she had given in it. She did not complain that the relevant documents had not been disclosed to her. Her case was not that non-disclosure of documents was a breach of the implied term.

D

E

F

58. Mr Bromige also submitted that the scope of the harassment claim was narrower than the scope of reasonable adjustments or unfair dismissal claims. There was only one complaint about the grievance hearing, complaint 6(G) and that had nothing to do with disclosure. C was wrong to argue that the premise of the ET's finding that the conduct did not have the prescribed effect was that all the relevant documents had been provided and that all reasonable adjustments had been made. He made the point in relation to the list of issues and the ET1, which I have already described.

G

H

59. C's response to R's arguments was that it is clear from paragraph 218 that the ET understood that C's case was that she needed documents in advance to minimise her symptoms so as to enable her to attend the hearing. Natural justice requires that if documents are relevant to a decision, a person who will be affected by that decision should be entitled to see those documents. The ET concluded in paragraph 219 that the documents were not necessary and not readily available. That conclusion was not supported by the evidence before the ET. The documents were relevant because they were taken into account by CW and readily available for the same reason. It is hard to see how that case was not before the ET as they made a positive and wrong finding about it.

60. The ET failed to notice that the documents before CW were not disclosed to C. That error was compounded in paragraph 224 when the ET found that trust and confidence were not undermined, "particularly in circumstances where relevant disclosure had been provided." This argument must have been raised in some form before the ET because the ET dealt with it in paragraphs 237 and 238. Moreover, the ET dealt with the argument wrongly. There had in fact been an unfair limitation on disclosure to C.

61. Mr Hodson also relied on paragraph 239 of the judgment, which I have already read. C's case at the ET was that she was concerned that the grievance outcome was based on documents she had not seen. That case was wrongly rejected by the ET. Mr Hodson also referred to paragraphs 53, 55 to 59 and 74 of ET1. C was saying there that she did not have the information she needed to attend a meeting and the battle to get information meant that she did not feel well enough to go to the meeting. C identified the PCP in her further particulars and the ET used that PCP in its judgment. Paragraphs 220 to 225 of C's witness statement dealt

with her dissatisfaction about the documents that were provided. Some of the documents that she refers to are documents that were taken into account by CW – see paragraphs 303 and 320.

62. If R's submission was that the C did not present the ET with an itemised list of the missing documents, that is an unfair point to take in relation to a litigant in person. She raised the general point. Not only was she a litigant in person but she was suffering from anxiety and stress. This was a complicated, fact-heavy case. The bundle was over 1,800 pages long. The ET itself made reasonable adjustments for C. She could not be expected to run her case with the high technical standards which would be appropriate for a lawyer.

63. Mr Hodson made the further point that the documents were not disclosed to C until a late stage after the ET1 was submitted and after the list of issues was formulated. I observe that this is a little surprising since at least some of the documents were referred to in the grievance outcome letter and were obviously relevant. Indeed, one document, he says, was not disclosed until the sixth day of the hearing. C did not know at those two stages in her preparation of the case that the documents would be available to prove her case. The failure to disclose documents to C for the grievance hearing and in the litigation are particularly unfair because the documents were relevant, were relied on by CW, and were available (for the same reason). In paragraph 23 of his skeleton argument he set out the dates on which the various documents were disclosed.

64. For those reasons, he submitted that this is not a new issue. He further submitted that the ET accepted that there was a duty to make reasonable adjustments by providing documents in advance of any hearing but it had held that there was no breach of that duty. That finding was based on the misapprehension that all necessary disclosure had been made in the pack sent

to C on 1 March 2017. The relevant documents were not all provided then, as a comparison between paragraphs three and 30 of CW's witness statement shows. This is a separate point from the documents C asked for in her emails of 31 March 2017. The ET had focussed on the documents specifically asked for by C and did not realise that there was a wider problem, that is that R had relied on documents which it had not disclosed to her.

65. He submitted that C was put at a substantial disadvantage by this failure of disclosure because she had no opportunity to consider the documents before the grievance decision was made (or at all). The fact she did not mention the documents in the run-up to the grievance hearing cannot be taken against her. She did not, at that stage, know that they existed, still less that CW would take them into account. He submitted that C was clear that her harassment claim included a point about disclosure of documents. He relies, in this context, on paragraphs 73 and 55 of the grounds of claim which I have already read. As a litigant in person she was at a disadvantage in formulating the list of issues. She did not then have the documents which have now been disclosed. It was unfair to limit the appeal to that list when it did not fairly represent her pleaded case and could not because the evidence had not been disclosed. The unfair dismissal claim was also linked to that issue.

66. R again focussed on the list of issues. The ET1 was clear. In paragraph 71 of C's grounds of claim, page 122 of the bundle, C relied on the implied term not to be discriminated against as part of her unfair dismissal claim. The list of issues refers to the unsatisfactory provision of documents though albeit in that context, it might have been a different point.

67. Most significantly, whatever the list of issues might have said, the ET took this issue into consideration when it dealt with the unfair dismissal claim; see paragraph 224. Its findings

in paragraph 224 and 245 would have been different if the ET had appreciated the actual position about disclosure.

Discussion

68. I have great sympathy with the ET. There were many documents in this case. There were many long letters by C raising a range of detailed issues and a very long witness statement. It seems that the list of issues did not entirely reflect C's pleaded case. The hearing lasted nine days. C was a litigant in person and had a disability. It is clear from paragraphs 3 to 13 that the ET considered with care and sensitivity what adjustments it should make for the hearing to accommodate C's difficulties. It is also evident from the length and detail of the judgment that the ET did an admirable job in marshalling the mass of material and in making detailed findings about it.

69. I am conscious that this Tribunal should not, on an appeal of the point of law, review the decision of the ET with a fine-tooth comb or retake its decisions on the evidence. I also readily accept Mr Bromige's argument that C should not be permitted to put forward a new case on appeal. As he pithily put it in his oral submissions, if C properly argued the case at first instance you have the findings of fact. If she did not properly argue it, she should not be given a second bite of the cherry on appeal.

70. The list of issues does not bind the ET, although it is an obvious starting point. It is clear from the judgment that the ET rightly appreciated that this disclosure issue was relevant to reasonable adjustments claim and to the unfair dismissal claim. I do not criticise the ET for missing this point in the morass of detail which it had to consider. Nevertheless, in my judgment, the ET did err in law in holding that pack disclosed to C on 1 March amounted to the

disclosure of the relevant and readily available documents. I accept Mr Hodson's submissions that, with one or two exceptions, the documents relied on by CW in making her decision on the grievance were not in the pack given to C on 1 March. There was a ready means by which the ET could check what was missing, provided helpfully by R. That is, a comparison between paragraphs three and 30 of CW's witness statement. The information was hiding in plain sight. The documents were both relevant and readily available because CW relied on them in making her decision on the grievance.

71. This failure makes the ET's conclusions about the reasonable adjustments and unfair dismissal claims unsafe. Those conclusions, which I have set out at some length, rely on the premise that R had disclosed to C the relevant and readily available documents in good time for the hearing on 31 March. Indeed, the premise of the ET's approach is that those documents had been disclosed in the pack on 1 March. I take into account Mr Bromige's argument about the finding that the ET made in paragraph 214. However, I do not consider that this finding on its own is enough to save the day for R. As Mr Hodson submitted it is bound up in the other issues and is not an answer to the concerns which I have just described.

72. I have considered carefully Mr Bromige's submissions about the way in which the case was argued by C before the ET. He pointed out that she had some legal help in the preparation of her case. There are, however, two answers to that. The first point is that C was a litigant in person and not a trained lawyer. She could not, in particular, be expected to have cross-examined R's witnesses to the level of detail in this complex case which one would expect of a trained advocate. Second, more importantly, the ET itself appreciated that the disclosure issue was relevant, both to the reasonable adjustments claim, and to the unfair dismissal claim. The ET based its conclusions on those claims in part on the wrong premise that the relevant and

A available documents had been disclosed to C in good time for the hearing on 31 March because they were included in the pack that had been disclosed to her on 1 March.

B 73. I have also considered Mr Bromige's argument that the ET made specific findings of fact in favour of R in paragraphs 406.2, 406.4, and 406.5 of the judgment. I consider however that those findings are flawed by three factors; first, the ET's failure to appreciate that in fact disclosure of all relevant and necessary documents had not been made; second, the ET's C conflation of the documents for which C had asked in her email of 28 March and the relevant and readily available documents; and third, by the fact that some of the documents which C did ask for in that email were relevant and readily available documents.

D

74. I have found it more difficult to decide whether these points undermine the ET's findings on the harassment claim. Mr Bromige is quite right to point out that paragraph 55 of the ET1 refers to C's view about the information that she had, and whether she had the E information that was necessary to enable her to attend the meeting on 7 March, whereas paragraph 58 of the ET1 refers to C's perception and to her email on 30 March 2017.

F 75. I consider on balance that the express complaint about disclosure earlier on in the process embraces this point because the ET concluded in paragraph 406.2 that C had been provided with the relevant documents on 1 March 2017. In other words, the failure to comply G with the reasonable adjustment was an ongoing failure. It was not an isolated failure simply before the hearing on 7 March and it was not remedied by the disclosure on 1 March. Therefore, with some hesitation I have concluded that ET's findings on the harassment claim are also undermined by this failure to appreciate the point about disclosure.

H

A

Conclusion

76. For those reasons, I allow the appeal.

B

C

D

E

F

G

H