Appeal No. UKEAT/0165/19/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 December 2019
Judgment handed down on 13 February 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MR J UDDIN — APPELLANT

LONDON BOROUGH OF EALING — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR KEVIN HARRIS (Of Counsel) Direct Public Access
For the Respondent	MS BETSAN CRIDDLE (Of Counsel) Instructed by: London Borough of Ealing (Legal & Democratic Services) Percival House 14 – 16 Uxbridge Road Ealing London W5 2HL

A **SUMMARY**

UNFAIR DISMISSAL – REASONABLENESS OF DISMISSAL

SEX AND AGE DISCRIMINATION – BURDEN OF PROOF

B

The Claimant was dismissed by reason of conduct, arising from an allegation of inappropriate sexual behaviour towards a colleague in an alleged incident at a bar. Claims of unfair and wrongful dismissal failed, by majority decision of the Employment Tribunal. Claims of sex and age discrimination were dismissed unanimously. Three grounds of appeal proceeded to a full hearing. Grounds 1 and 3 related to unfair dismissal and, as to Ground 3, wrongful dismissal; Ground 4 to one aspect of the discrimination claims.

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Ground 1 turned on the fact that the complainant had withdrawn a complaint to the police, but the manager who took the decision to dismiss, who knew that the complaint had been made, was not told that it had been withdrawn. The Tribunal majority concluded that this did not affect the fairness of the dismissal, because she could in any event have fairly dismissed, had the police complaint never been made. Given that (a) the dismissing officer took into account that the police complaint had been made; and (b) her evidence was that, had she been told that the complaint had later been withdrawn, she would have wanted to know why, the Tribunal erred in its approach. Given that the investigating officer knew that the police complaint had been withdrawn, but did not pass this on to the disciplining officer, and the gravity of the allegations, the only proper conclusion was that this rendered the dismissal unfair. **Royal Mail v Jhuti** [2019] UKSC 55 considered. Whether, had she known of the withdrawal of the police complaint, the disciplinary officer would, or might, have still fairly dismissed fell to be considered by the Tribunal at the remedy stage.

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Ground 3 was to the effect, principally, that, as both the Claimant and complainant had been too drunk to have a clear recollection of what had occurred, and no-one else at the bar had witnessed the alleged incident itself, the majority should have found that there was no proper basis to find the Claimant guilty of the alleged conduct. However, the Tribunal majority properly so found, taking into account its appraisal of photographic evidence, said to be of the complainant's injuries, and the totality of the evidence presented in the disciplinary process. The findings in relation to wrongful dismissal were also properly reached. This ground therefore failed.

Ground 4 challenged the Tribunal's decision in relation to allegations of sex and age discrimination relating to aspects of the conduct of the investigating officer. However, the premise of this ground was that the Tribunal erred in not considering these allegations on a more wide-ranging basis than the complaints identified in a list of issues agreed at a Preliminary Hearing. However, the Tribunal had been right to confine itself to the complaints identified in that list of issues. This ground therefore also failed.

HIS HONOUR JUDGE AUERBACH

The Background and the Employment Tribunal's Decision

1. I shall refer to the parties as they were in the Employment Tribunal ("the Tribunal"), as Claimant and Respondent.

2. The Claimant was dismissed by the Respondent for the given reason of conduct. He presented claims to the Employment Tribunal of unfair and wrongful dismissal, direct sex discrimination, and direct age discrimination. Following a full merits Hearing in November 2018, the Tribunal (Employment Judge Goodman, Mrs J Cameron and Mr D Eggmore), promulgated a Reserved Judgment and Reasons on 15 January 2019. The claims of unfair and wrongful dismissal were dismissed by a majority Decision (Mr Eggmore dissenting). The sex and age discrimination claims were dismissed unanimously.

3. This is the Claimant's appeal. He originally advanced four Grounds in his Notice of Appeal, Grounds one, two, and three relating to unfair dismissal, and Ground four to sex and age discrimination. On considering the Notice of Appeal on paper, Lewis J was of the view that Grounds one and three, only, were arguable and should proceed to a Full Hearing. The Claimant then sought a Rule 3(10) Hearing in relation to Ground four. That hearing came before me. I decided that Ground 4 should be permitted to proceed to a Full Hearing in a limited form, challenging only the outcome of the discrimination claims concerning the alleged conduct of the Respondent's investigating officer, Mr Jenkins. However, I noted that, at the full Hearing of this appeal, the precise scope of such allegations regarding his conduct, that fell to be considered by the Tribunal at the Full Merits Hearing, would need to be further examined.

4. Before the Employment Tribunal the Claimant was represented by Mr Harris of counsel, the Respondent by Mr Quill, a solicitor. At the Hearing of this appeal, Mr Harris appeared again for the Claimant and Ms Criddle of counsel for the Respondent.

5. The allegations that led to the Claimant's dismissal were of inappropriate behaviour, towards someone referred to as SR, during the course of a Friday night visit to a pub, and his alleged conduct in relation to that incident, on the following Monday. It was also said that he had thereby brought the Respondent into disrepute. There was a formal internal investigation conducted by Mr Ian Jenkins, a disciplinary hearing before Ms Carolyn Fair, who dismissed the Claimant, and an appeal hearing before two councillors, who upheld the dismissal.

6. Prior to the full merits Hearing in the Employment Tribunal there had been a Case Management Preliminary Hearing (PH). The minute of that PH exhibited a list of issues which was agreed, subject to an amendment which it noted. This identified that the dismissal was alleged to be an act of both direct sex and direct age discrimination. In addition, the amended agreed list identified that it was alleged that there was direct sex discrimination by "alleged comments made by Mr Ian Jenkins that the Claimant was a married man" and direct age discrimination by "alleged comments made Mr Ian Jenkins and Ms Carolyn Fair that the Claimant was a 'senior manager' and a 'senior member of staff'." According to that list of issues, at the time of the PH, SR was relied upon as an actual comparator in relation to the claims of both sex and age discrimination. The Claimant relied also upon a hypothetical comparator.

7. Within paragraph 2 of its Reasons the Tribunal said this:

> **"The discrimination claim concerns the dismissal process and decision: that stereotypical assumptions about the behaviour of older men informed and infected the fairness of the process. When the list of issues was prepared for a preliminary hearing**

> **the comparator for the sex claim was the claimant's alleged victim, SR, and hypothetical comparators, and for the age claim, hypothetical comparators. During the hearing and at closing it was clarified that it was not alleged that SR had assaulted the claimant and that the respondent should have investigated that. The less favourable treatment for the discrimination claims was the dismissal, and comments by the investigator that the claimant was a married man, and by the investigator and by the decision maker that he was a 'senior manager' and 'a senior member of staff'."**

8. The following summary of the facts draws mainly on the findings of fact made by the Tribunal, although I include some other background facts that are not controversial.

9. At the time of the incident which led to his dismissal, the Claimant was aged 43. He had worked for the Respondent since 2012. He had a clean disciplinary record. He was employed as a deputy team leader in the family intervention programme, but had been seconded to the Acton Locality Team as a support worker. In that role he had no staff to manage.

10. At the time of the incident SR was (according to the later police report) aged 26, though the Claimant estimated her age at 25. She was a university student on a 3-month work placement with the Respondent. She had shadowed the Claimant on two cases some weeks before, but he was not her mentor or supervisor, and she had by this point moved to the Ealing team.

11. On Friday 11 November 2016 drinks at a pub were organised for members of the Acton and Ealing teams. By midnight many had departed, but the Claimant, SR, Shane Conteh and Anna Willis were still there. All had been drinking. The Claimant and SR had been drinking shots.

12. Within paragraph 5 of the Reasons the Tribunal continued:

> **"The CCTV footage from midnight for the next 25 minutes or so shows the claimant and SR sitting side by side on bar stools, he with his hand on her waist, she leaning towards him from time to time for affectionate kissing, "pecks", at one point rubbing his head. Just after midnight they are seen moving toward the disabled toilet and entering it**

> **together. Anna Willis and Shane Conteh follow and bang on the door. After a minute the claimant and SR emerge. SR and Anna Willis then went to the ladies' toilets for 9 minutes. After they come out, the claimant and SR can be seen speaking to each other for just under a minute. Soon after that there is a group hug and all leave."**

13. The Tribunal observed: "This case is about what happened in the disabled toilet." It went on to describe how SR's account emerged from a mixture of statements made by Ms Willis and Mr Conteh, who had taken her home in a car, text messages sent by SR following the incident and through to the following Monday, and an email to her mentor, Hannah Parker-Beldeau, following a discussion in the office the following Wednesday, 16 November 2016.

14. The Tribunal also said the following, within paragraph 14, about SR's account of events on the Monday following the incident, 14 November 2016.

> **"SR's detailed account of Monday was made two weeks later, on 28 November, when she said the claimant took her on one side into a private room, saying he had not slept or eaten all weekend; he had gone to a club after the pub, and got home at 5 a.m. He knew he had done something wrong when SR did not answer his phone calls. He talked about his wife and young daughter. He asked who knew what had happened, at which the claimant referred him to Anna Willis, and mentioned that she and Shane Conteh knew. He said he was loved and respected by all the teams and if it came out he would not be able to go to work. "He then asked if we had had sex to which I said no and he said ok thank god because he wouldn't have been able to live that down". He referred the effect of drink making him aggressive. He asked for a hug."**

15. The Tribunal then set out, at paragraph 15, the Claimant's account of events on that Monday:

> **"The claimant's account of this encounter is that he made a casual remark over coffee asking if she got home alright, and took her aside because it was a corridor to which public had access. He then spoke to Anna Willis. Asked what happened, she said she and Shane made him open the disabled toilet door, he said: "did we have sex", meaning him and SR, to which she said no, and agreed not tell anyone. Later SR explained to Anna Willis that she had referred the claimant to her for an account of what happened. The claimant says he only discussed with Anna Willis how drunk they were, and she told him when she came into the toilet SR was being sick and the claimant was standing over her."**

16. SR's texts and email were passed up the line of management, and on Friday 18 November 2016 the Claimant was suspended pending an investigation. On Monday 21

November he and his trade union representative were told that the allegations were (as set out by the Tribunal within paragraph 17):

> **"(1) an incident of inappropriate sexual behaviour during social gathering on Friday, 11 November 2016**
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> **(2) a further incident of intimidating and threatening behaviour to a work colleague on Monday, 14 November 2016 and**
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> **(3) bringing the council into disrepute."**

17. Ian Jenkins, a former police officer and Head of the Youth Offending Service, was asked to investigate. He obtained the CCTV. On 28 November 2016 SR set out in an email, her account of events on both 11 and 14 November 2016. Mr Jenkins in due course interviewed Ms Parker-Beldeau, SR, Ms Willis and Mr Conteh. The Tribunal described these as "detailed interviews with structured accounts."

18. The Tribunal continued:

> **"21. In her account SR explained they were very drunk. Asked how she ended up in the toilet with the claimant, she said: "apparently Anna saw him dragging me to the disabled toilet. I can't remember going from the bar to the toilet or him accompanying me." Once in, "he pushed me back, forcibly against the mirror and sink. I can't remember exactly what happened but he had his hands on my breasts pushing them hard to push me back"; asked about the bruises, she said "my chest is extensively bruised". Asked about the conversation on Monday 14 November, she said he concluded with: "we are both to blame for this as we got so drunk. I thought there is no way I am to blame I have huge bruises me: he followed me into the toilet, locked me in and assaulted me. I can't believe he said that". She had not wanted to send the email on 16 November (describing events) but Hannah had insisted on reporting it as a safeguarding issue as well as an attack on her.**
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> **22. SR also showed Ian Jenkins a photograph of bruising to her breasts. He was shocked.**
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> **23. Both Shane Conteh and Anna Willis told Ian Jenkins that they had gone to bang on the disabled toilet door because they saw the claimant lead SR away from the group to the toilet and thought this unusual, because he had just bought drinks and was now walking away, also because if she was going to be sick he could have got a woman to take her. Anna Willis added: "SR was drunk and I thought they would do something inappropriate I thought let's stop this from happening. I just had this feeling that this was all wrong which is why I went to knock on the door".**
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> **24. Ian Jenkins had been told by another manager, Claire Davis, that she had heard the claimant had gone for a meal with another student, SS, before going to the pub; SS confirmed this to her in an email.**
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> **25. Ian Jenkins interviewed the claimant on 19 December. He had drafted a set of 194 questions for the claimant which were very searching, seeking an account of his movements for the day, and including a set of assertive questions about taking SS for dinner before going to the pub, others about being a role model as deputy manager, why he did not water SR's drinks knowing she was drunk, and, after a sequence of questions**

> **about the remarks SR said he had made at the bar: "did you still fancy your chances of having sex with her". To almost all questions about what happened after arriving at the pub the claimant said he could not remember. He denied taking SS out beforehand. Of the planned questions, 29 were not asked. He denied buying any drinks, saying his card was blocked. He said he would never suggest anal sex, nor would he have wanted to suggest sex in the toilet, it was not his nature, nor had he fancied SR, or made any previous approach.**
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> **26. The claimant was asked to produce his bank records to show he had not made card withdrawals that evening. Mr Jenkins said he asked as it was an "integrity issue", as the others said he had been buying drinks, and he can be seen on CCTV paying with a banknote.**
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> **27. Mr Jenkins interviewed SS on 21 December, when she said she had not in fact been out with the claimant that evening, she had confused the dates. She had had a tea with him, not dinner, on another date."**

19. The Tribunal went on to describe the photograph to which SR had referred, and why they (the Tribunal) concluded that it was a photograph of the Claimant. They described the bruising to her breasts that it showed. They concluded: "We, like Carolyn Fair, thought it unlikely that bruising in this area would be caused by a fall." They continued:

> **"29. Taking all that into account the majority of the Tribunal concluded it was probable that it is what SR says it is. Mr Eggmore, dissenting, holds the view there can be no certainty either way on the cause of the bruising, because (1) at least initially the claimant had no recollection of how the bruises were caused, and (2) there was no medical evidence to assist on the point (3) there is no CCTV evidence in the toilet and it does not show the claimant distressed immediately after (4) she reported no assault to Shane Conteh or Anna Willis that night. The panel is unanimous that it is very unlikely that she would have faked the bruising in the photo, or photographed another woman to implicate him."**

20. The Claimant and his union representative viewed the CCTV footage, and he was sent, and amended, his draft interview notes. His amendments included, wherever he mentioned not remembering something, adding that this was because he had had an alcohol-related blackout.

21. On 12 January 2017 Mr Jenkins sent his report with supporting materials to Ms Fair. He concluded that there was a case to answer for gross misconduct, referring to the Respondent's code of conduct and the offence of sexual assault. There was also a case to answer that his conduct subsequently amounted to harassment and intimidating and threatening SR and AW, and that both matters broke trust and brought the Respondent into disrepute.

22. The Claimant was sent the report and supporting materials and invited to a disciplinary hearing. Following postponements at his request, this took place on 31 March and 5 April 2017. The Claimant was represented by a full-time union official, Ms Mills.

23. The Tribunal found that Mr Jenkins had urged SR to go to the police. She did so, and gave them an account on 19 January 2017. The police officer investigating the matter also viewed the CCTV. In her notes the police officer identified what she considered to be some inconsistencies and discrepancies, which the Tribunal set out. She discussed these with SR, who indicated that she wanted to speak to a solicitor, before making a further statement. However, she also said that she wanted to withdraw her allegations because she "didn't realise it would be so griefy and that she felt pressured by the council/Ian Jenkins." The Tribunal also said that she "signed a short withdrawal statement saying she did not remember being sexually assaulted." She also showed the police a photograph on her phone, dated 27 November 2016, but, as it was taken from the neck down, the police could not confirm whether it was of her.

24. On 23 February 2017 the police interviewed the Claimant under caution, with his solicitor present. His solicitor read out a prepared statement to the effect that he had gone with SR to the toilet to help her, and denying that he had locked the toilet door or touched SR's breasts. He declined to answer other questions. On 24 February 2017 the police recorded that SR's account did not reflect what the CCTV showed, the Claimant's account was consistent with the CCTV, and that action against him was not in the public interest.

25. The Tribunal explain:

> **"34. This episode is described in detail because the claimant says it should have shown the respondent that SR's evidence was unreliable, and the police did not consider there had been a sexual assault. Ian Jenkins knew the complaint had been withdrawn when he presented the evidence at the disciplinary hearings, but did not tell Carolyn Fair this. The claimant told Ms Fair the police were not proceeding further, but he did not then**

> **have the detail in the police report, that SR had withdrawn her statement after discussion with the police."**

26. On 7 February 2017 the Claimant lodged a grievance about his suspension, alleging that SR had harassed him. Ms Fair responded that the grievance would be considered at the disciplinary hearing. He lodged a supplemental grievance on 29 March 2017 including an allegation that SR had been pressurised to complain to the police against her will and that the police had told him that her evidence was inconsistent and showed no offence, but the Respondent had not told him that. He wanted this grievance dealt with prior to the disciplinary hearing, but that was declined. If he was alleging that SR had been pressurised to make a false allegation, he could use the whistleblowing procedure or raise the matter with internal audit.

27. On 30 March 2017 Mr Conteh gave a further statement about the Claimant approaching him on the afternoon of his suspension in some distress. The Tribunal observed that he should not have contacted a witness once suspended, but this had not weighed against him with Ms Fair. His representative was given a copy of Mr Conteh's statement.

28. At the two-part disciplinary hearing the management case was presented by Mr Jenkins. Ms Willis, SR, Mr Conteh and Ms Parker-Bedeau all gave evidence and were questioned by Mr Jenkins and the Claimant's representative, Ms Mills. The Tribunal said, within paragraph 38:

> **"Mrs Mills read out a prepared submission contrasting the claimant's consistency and SR's inconsistency, that she had only come forward at all under pressure. Ian Jenkins had not been impartial or objective. Bruising was consistent with getting out of a cab when drunk. She was a grown woman who had gone voluntarily to the toilet with the claimant. The witnesses had colluded. All were drunk. The claimant added that his marriage had broken down, he had been very ill with Crohn's disease, and felt the victim of discrimination."**

29. The Tribunal continued:

> **"39. On 12 April 20 the claimant was dismissed for gross misconduct. The letter explaining why is eight pages long. All allegations were upheld. On the sexual misconduct, Ms Fair analysed the evidence to show why she did not accept an innocent explanation. On the alleged bullying, she noted that both SR and Anna Willis felt**

> **pressured not to report anything, compounded by both viewing him as "a more senior and longer serving member of staff in a position of authority", especially SR, "a student who you mentor", as "she had spent time with you shadowing and learning from you at work. This trust has now been broken". In her letter she credited SR with having complained to a manager and gone to the police; in evidence to the tribunal she said if she had known SR had withdrawn her statement she would have wanted to find out from her why."**

30. The Claimant appealed. The appeal hearing took place before two councillors. They had pre-read the file and viewed the CCTV. Ms Fair presented her reasons. Ms Mills made submissions that the decision was based on the Claimant's age and ethnicity and that SR was a mature student. The Claimant said Mr Jenkins had viewed him as "Rochdale man".

31. The appeal panel concluded that the investigation and decision had been thorough and fair and that the conversation on the Monday after the incident was "not a normal social conversation after a night out". Even taking into account the Claimant's five years of good service, trust and confidence had broken down. The appeal failed.

32. The Tribunal directed itself as to the law. As to unfair dismissal, as well as citing section 98 **Employment Rights Act 1996**, **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 and the guidance in **British Home Stores Limited v Burchell** [1980] ICR 303, it said this:

> **"Where the employer establishes that conduct was the reason for dismissal, tribunals must consider whether the employer had a genuine belief in the misconduct, and whether that belief was founded on reasonable grounds, including whether there had been a reasonable investigation – British Home Stores v Burchell (1978) ICR 303. The standard of proof is the civil standard of balance of probability, rather than the criminal standard beyond reasonable doubt, but A v B, EAT/1167/01 establishes that the standard of investigation must be high if the outcome is career-ending for the employee, and the investigator must look for exculpatory evidence too. Jhuti v Royal Mail 2017 EWCA Civ 1362, reviewed how to treat a case where relevant information was withheld from the decision maker. The discussion shows that the acts and omissions of an investigator appointed by the employer in relation to the dismissal decision is part of the dismissal process (as was not the case in on the facts of Jhuti). We were referred to Roldan v Salford (2010) EWCA Civ 822, in that an employer is not forced to choose between two conflicting accounts but can decide that neither was at fault and make a decision based on all the facts available."**

33. Its discussion of the law on discrimination included citation of section 136 **Equality Act 2010** concerning the burden of proof, and authorities relating to it.

34. The Tribunal summarised the rival submissions. For the Claimant this included reference to the fact that Mr Jenkins had not told Ms Fair that SR had withdrawn her allegations from the police, and the assertion that he had persuaded SR to make a report to the police, and that he had decided that the Claimant was guilty before he began.

35. The Tribunal observed:

> **"53. Neither side argued that if the conclusion on the facts was correct there should not have been a dismissal. The respondent submitted that even if the Monday conversations did not amount to bullying, the respondent was entitled to take account of the claimant's behaviour then when deciding what to believe about the Friday. To us, this case was all about whether a reasonable employer could conclude the claimant was guilty of what is said to have happened then."**

36. The majority conclusion in relation to unfair dismissal and wrongful dismissal was this:

> **"54. We considered that the decision maker had all the evidence before her, and all the relevant witnesses were questioned at the hearing. We also considered that generally there were few inconsistencies in SR's account: she was mostly very careful to state what she knew from memory and what she had been told by others, and particularly so at the police station. The exaggeration of the term "dragged" was spotted by Carolyn Fair for herself from the CCTV – SR was being led, on one view, or had walked alongside the claimant. She also identified that the photograph showed bruising not from the collarbone, as Ian Jenkins had described it, but across the mid part of both breasts. Carolyn Fair was an experienced social worker in children and families, used to how people react to violence, and used to judging when and how people reveal information, which she used when considering how SR had added information over time. Her letter shows she had several reasons for preferring SR's account.**
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> **55. The only exception may be where she included the fact that SR had been to the police, as a reason to accept her evidence, not knowing she had retracted her complaint. We considered the effect on the reasoning in her letter if the words "and to the police" was removed from the sentence where it appears. We concluded she had sufficient reasons even so for concluding that the claimant had grabbed or pushed R's breasts, and this complaint had little weight. She already knew the police were taking it no further; and knew there were different standards of proof. More, she had already identified and considered the discrepancies ("dragged", and the inconsistency of what she could remember in the toilet). As for her stopping questions, we can read in the transcript that she did try to do so, to protect SR, but also that Mrs Mills went ahead and asked it anyway, and SR answered, without further intervention from Ms Fair.**
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> **56. The only two witnesses to what happened in the toilet had no, or no reliable, recollection of events. The two friends could have misunderstood the claimant's intentions when he suddenly took SR to the toilet – it is possible that he took her to be sick, but it is also possible, since SR never wavered in her account of conversation at the bar, that he was aroused and did intend sexual contact when she was extremely drunk, and, if he had thought about it, too drunk to consent. What is difficult to explain away – and this perhaps explains why the claimant was so persistent in stating the photograph was faked, of another person, or taken after a different incident – is the photograph. Although the date was not known at the hearing (though since summer 2018 when the claimant obtained the police report we know it was taken on 26 November 2016), the claimant had mentioned to Anna over the weekend that she had "boob bruises", and in the following days she put it in writing. The timing makes it unlikely to be something she made up. There was no certainty as to what happened in the toilet, but the surrounding circumstances and the photograph made it reasonable to draw the inference to a balance of probability standard. We add that although neither person involved had much**

recollection, the claimant was obviously extremely worried that something bad had occurred that night, hence his anxiety and questions on the Monday; so was SR, as immediately after the episode she was upset, indicating it had been "traumatic" and the claimant had been "pervy". The "group hug" before they parted was chaste and brief. By itself "pervy" might allude only to his language, but the photograph and bruises still require explanation. The affectionate kissing on the CCTV shows that was consensual, but we cannot see that this indicates consent to a tongue in the mouth, a proposal of sexual intercourse, anal or otherwise, or pressure on the breasts such as to cause bruising, when a woman is obviously drunk. There was enough there to conclude that the episode in the toilet had led to substantial bruising, and was not consented to. It was also clear enough that the claimant could remember nothing, and anything he said was based on other evidence.

57. It seemed to us that Ian Jenkins did adopt a hostile approach to the claimant. He had reason to ask about SS, given she had already stated she went out with him earlier in the evening, and he dropped it when SS then changed the date. He had reason, given what the claimant said about not being able to pay for drinks, to ask to see his bank records to check if it was true. (We do not know of the claimant did supply them or what they showed). He had been shocked by the sight of the bruising and by her tears. It was possible that someone reading the questions could adopt his view that the claimant had to prove his innocence, though we do not think it sinister or showing prejudice that he referred to her as "victim", as he was a former police officer and we can see the police used the same term in their report, but his questioning was tough. There was however evidence for the conclusion he drew; further, the investigation was very thorough, and the report included all the material on which it was based. We were satisfied that Ms Fair was alive to discrepancies, and that over a two day hearing the claimant had ample opportunity to challenge the evidence and any inferences that might be drawn from it. She demonstrated sufficient independence for us to be confident her decision was based on the evidence and did not replicate Ian Jenkins's suspicious hostility. Nor do we think any hostility impaired the claimant's ability to give an account of himself– it seemed to us that he genuinely could not remember, perhaps because he is likely to have gone on drinking through the night. Just as a thorough appeal can "cure" defects in an unfair dismissal decision, so we concluded a thorough and fair hearing "cured" any deficiency in his interview and report.

58. It was suggested at various stages by the claimant and his union representative that the after work drinks was not an official function, and not something the respondent should have concerned itself with. We did not agree that it was an official team building event – though it had that effect - as it was arranged by the team members, not the managers. Nevertheless, it took place because they were colleagues in the two named teams, and was not a private matter divorced from work. No one outside work had been involved in the evening. The claimant was not a manager, and no longer a deputy team leader, but SR had shadowed him as part of her training Case No: 2206904/2017 10.2 Judgment - rule 61 placement, and was entitled to feel safe, not vulnerable, in his presence.

59. As for the second charge, of bullying, it is true there was no open threat, and it is possible that the claimant was simply concerned about gossip and was appealing to her better feelings, and did not intend to warn her off a complaint. Nevertheless, his words can also be read as indicating she might not be believed if she did, and she sensed he was angry and said she was at fault for being drunk. She had not intended to say anything until then – it was being blamed or warned off that led her to complain about it to her mentor, who recognised there might be more to this and encouraged her to complain. The respondent took his conduct into account – that he was trying to warn both off a complaint. By itself it is unlikely to have justified dismissal. Taken with the other matter, if he was concerned something inappropriate (including intercourse) had occurred, he should not have tried to dissuade more junior colleagues not to mention it. We agreed with Ms Jones that his conversation added up to moral pressure rather than specific threat. His explanation of the conversations- especially wanting them in private, away from other colleagues as much as the general public - was implausible when he had already enquired by text on Saturday as to the claimant's wellbeing and been reassured. It was something a reasonable employer could take into account.

60. The appeal was thorough. The claimant noted Mr. Proud was critical of the photograph, but even so, he too concluded the decision was safe. We were satisfied they had engaged critically with the evidence.

> **61. As to whether this was wrongful dismissal, the majority's own assessment of the evidence on a balance of probability was that the claimant had touched the claimant with enough force to cause bruising. Unwanted and forceful sexual contact with a colleague (and she may have consented to affectionate kissing and a hand on her waist in a public area, but not to forceful touching of her breast in a private place) is a breach of contract entitling an employer to dismiss without notice.**
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> **62. The panel had a long and anxious debate about the incident and the evidence, given that both parties were very drunk, SR is not seen on CCTV to resist, she had withdrawn her statement,(though we concluded this did not show she was any less reliable than already shown), and the claimant lost his job and is unlikely to find other work in social services departments because of that, such that we eventually split in our conclusions. The majority agree that it can be said that the claimant was very unlucky, and that when in drink people often act foolishly. Nevertheless, for the reasons given, the majority concluded the respondent had reason to find gross misconduct, and we did not find the dismissal unfair. We also concluded on a balance of probability that an assault had taken place, justifying summary dismissal."**

37. The Tribunal then set out the conclusions of Mr Eggmore, in the minority, in respect of those claims. He explained why he considered that there were inconsistencies in both parties' accounts, that Mr Jones' investigation was hostile and biased in favour of SR, and that it was prejudicial to the Claimant that Ms Fair was not told that she had withdrawn her complaint to police. He did not conclude that the Claimant's conduct on the Monday after the incident amounted to any form of harassment or serious misconduct. The Respondent did not have reasonable grounds for its conclusions. He did not find the Claimant to have caused bruising. He would have upheld the claims of both unfair and wrongful dismissal.

38. The Tribunal's unanimous decision in relation to the discrimination claims was this:

> **"70. As for the discrimination claims, in which our conclusion is unanimous, we discount any comparison with the treatment of SR. They were not comparable, because he did not complain about her until the investigation was concluded. It was not then necessary to go back to SR when her evidence was to be tested in a hearing.**
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> **71. We focused on the hypothetical comparisons. If both claimant and SR had been 26 (or 43) we did not think the outcome would have differed. The claimant may not have been a manager, but there was a hierarchy - he was an established member of staff and had mentored SR on two cases. That made it important that he did not take advantage of his status either in the incident itself (it was not clear he did, but a responsible person would have held back given her student status) or in the conversation about not mentioning it to people. He would have been expected to have higher standards. It was not that she was young, but that she was a student. When the dismissal letter mentioned he was "a more senior and long-serving member of staff" it was about relative status, not relative age.**
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> **72. It may be right that Ian Jenkins was aggressively assuming guilt and that the age difference was a factor he had added to the evidence he already had. We did not think it significant that he collected reports from others before seeing the claimant; an investigation into any serious matter (as more commonly with fraud) may have taken this course. We did not believe Ms Fair was influenced by this. The claimant may have**

been questioned more fiercely, but the evidence of the photographs was a large part of that. Her also had the opportunity to test all the witnesses at the hearing.

73. As for Ian Jenkins saying he was older, we noted that the police report had some standard box factors to tick, including age difference, and the officers had identified an age difference of "10-14 years". In assessing the seriousness of an alleged assault, it was not irrelevant to take account of age, and the risk of abuse of seniority meant it was to be considered; control of such abuse is a legitimate aim, and it was proportionate to mention it.

74. As for the difference in sex and marital status, we considered that a social work department, alive to diversity issues, would have treated the episode as seriously if both had been a woman, or if the sexes of claimant and SR had been reversed (though it was hard to envisage this in reality, perhaps because a male SR may have hit back and a female claimant been unlikely to use sufficient force), or if both had been men. They would still have been averse to blaming the victim, which would have been enough to account for a Case No: 2206904/2017 10.2 Judgment - rule 61 difference in interrogation style. The lay members observe that a local authority (of which both have substantial experience) would be very sensitive to suggestions that inconvenient events were being covered up, and thought it necessary to investigate fully whoever was said to have assaulted whom. Social work managers would also be especially aware of diversity issues, and the need to avoid blaming victims. They also have much experience of assaults, actual and alleged, in their casework, and of forensic situations.

75. The remark about being a married man was relevant, when on SR's account she had declined further engagement before the episode because he was married, and the claimant had mentioned it to the two women in the Monday conversation; in any case marital status has some relevance in considering an allegation of sexual misconduct, whichever sex is involved, and did not indicate discrimination on grounds of marital status. We did not conclude the claimant was less favourably treated by mention of his marital status.

76. None of us was able to conclude that the respondent discriminated because of age, sex or marital status."

The Grounds of Appeal

39. The live Grounds of Appeal: Grounds 1, 3 and the amended Ground 4, were as follows:

Ground 1

The majority of the ET erred in paragraph 55 of the decision where they held that the dismissal was still fair, notwithstanding that the decision maker was not informed that the complainant had withdrawn her allegation of sexual assault to the police and this had not been investigated further by the investigator;

The test applied by the ET at paragraph 55 was whether there was sufficient evidence of guilt, even if the complainant had not reported a sexual assault to the police to dismiss, which conflates the issues of unfairness and *Polkey*;

The correct approach to consider whether i) the failure to investigate the reasons why the complaint was withdrawn and to consider it at the disciplinary hearing made the dismissal unfair; ii) to consider whether the withdrawal meant that that the Respondent no longer had reasonable grounds to sustain their belief; iii) consider the issue of *Polkey*;

If the Respondent had investigated, they would have found out that the complainant had told the police that she was withdrawing her complaint because she was not alleging any sexual assault took place and she had been pressured to complain by the Respondent (para 33).

Ground 3

The majority of the ET's decision that there had been an assault, and that accordingly the dismissal was fair, was one which no reasonable tribunal having properly instructed itself in the law could come to:

For the reasons set out in the minority conclusion; and

Because the reasoning of the majority was contradictory and inconsistent with the decision as they also found:

i There is no finding in paragraph 14 of any acts which could constitute bullying, harassment or intimidation;

ii 'The only witnesses to what happened in the toilet had no, or no reliable, recollection of events,' (paragraph 56);

iii 'In respect of the second charge of bullying there was no open threat and it is possible that the claimant was simply concerned about gossip and was appealing to her better feelings and did not intend to warn her off a complaint' (paragraph 59);

iv "We agreed with [the appeal officer] that [the Claimant's] conversation added up to moral pressure rather than specific threats' (paragraph 59);

v '[the complainant] was not seen to resist' (paragraph 62);

vi 'she had withdrawn her statement' (paragraph 62);

vii 'the majority agree that it can be said the claimant was very unlucky' (paragraph 62).

Ground 4

The ET erred in law, having made findings from which they could decide, in the absence of any other explanation, that the Claimant had been discriminated against, they failed to consider whether the burden shifted to the Respondent to prove that the treatment was in no sense whatsoever on the grounds of age or sex; or alternatively the ET failed to consider whether 'the reason why' the Respondent behaved as they did was in no sense whatsoever on the grounds of age or sex; in respect of:

Mr Jenkins failing to tell Ms Fair that SR had withdrawn her complaint to the police as set out in paragraph 34 of the Judgment;

That Mr Jenkins aggressively assumed the Claimant's guilt and adopted a hostile approach towards the Claimant in the investigation as set out at paragraphs 72 and 57 of the Judgment;

That the age difference (between the Claimant and SR) was a factor Mr Jenkins added to the evidence he already had, as set out at paragraph 72 of the Judgment [age discrimination only].

The Arguments

40. I had detailed skeleton arguments, and heard very full oral argument. I was referred to a number of authorities. The following is a summary of what seem to me to have been the most significant arguments on each side.

41. Mr Harris' principal arguments were as follows.

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42. In relation to Ground 1 Mr Harris argued that, at paragraph 57, the Tribunal had erred in its approach to the significance of Mr Jenkins not reporting to Ms Fair that SR had withdrawn her police complaint. Given the gravity of the allegations that the Claimant was facing – of what amounted to criminal conduct – the Respondent had the heightened duty of proactive investigation discussed in **A v B** [2003] IRLR 405 at paragraph 60. Ms Fair was aware that SR had complained to the police; and she should have been told of this further development, so that it could also be considered by her.

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43. Further, he submitted, the Tribunal had applied a "no difference" approach at the stage of deciding the fairness of the dismissal. That was to commit the heresy which, as the EAT said in **A v B** at paragraph 86, had been laid to rest in **Polkey v AE Dayton Services Limited** [1988] ICR 142. At the liability stage the Tribunal should have considered solely whether Mr Jenkins' failure to report the withdrawal of the police complaint made the dismissal unfair. It should have concluded that it did. The Tribunal could then, but only then, at the remedy stage, have gone on to consider whether it made any difference to the outcome.

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44. The reason why this aspect rendered the dismissal unfair, submitted Mr Harris, was because there was a material difference between the police having decided to take no further action, and SR having also withdrawn her police complaint. The natural implication of the latter was that she no longer maintained that she had been assaulted. Had Ms Fair known this, she could not have placed any reliance on SR's account, and could not have properly concluded that an assault had taken place. Further, Ms Fair herself had told the Tribunal that, had she known that SR had withdrawn her police complaint, she would have wanted to know why.

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45. Further – relying, said Mr Harris, on the recent decision of the Supreme Court in **Royal Mail Group Limited v Jhuti** [2019] UKSC 55 – Ms Fair's ignorance of the withdrawal of the police complaint could not be relied upon, as Mr Jenkins' knowledge of it could and should be attributed to the Respondent as employer.

46. In relation to Ground 3, Mr Harris acknowledged that this amounted to a perversity challenge. Regarding the finding of assault, the Tribunal had acknowledged that only SR and the Claimant could know what had happened in the toilet. The evidence was that SR had no, or no reliable, recollection of that. She had also withdrawn her statement from the police. Even if it was SR in the photograph, there was no evidence that the Claimant had caused the bruising. If he had, SR could have been expected to have raised it with colleagues immediately following the incident. But she did not. The surrounding evidence did not support the conclusion that the Claimant had assaulted her, but pointed the other way, or was at best contradictory.

47. Mr Harris also argued that the Tribunal's findings at paragraph 59 were perverse. He argued that moral pressure could not be properly viewed as amounting to threats or intimidation and could not be fairly relied upon to support the decision to dismiss.

48. In relation to Ground 4, Mr Harris said that, when the Tribunal came to reach its decision, the *conduct* in relation to which it was being said that Mr Jenkins had discriminated against the Claimant, by reference to both age and sex, was his general approach to the investigation, including in particular his failure to inform Ms Fair that SR had withdrawn her complaint to the police.

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49. The Respondent in its amended Answer (following my allowing the amended Ground 4 to proceed) had asserted that the only discrimination allegations relating to the conduct of Mr Jenkins were: (a) that his referring to the Claimant being a married man was an act of sex discrimination; and (b) that referring to him being a senior manager was an act of age discrimination. Mr Harris accepted that this was how the issues had been correctly identified at the PH. But, as was recognised in **Parekh v The London Borough of Brent** [2012] EWCA Civ 1630, at 31, a list of issues was not always the final word, and could be later reconsidered. Here, said Mr Harris, the case ultimately advanced was a broader one of discrimination by stereotyping the Claimant. That was reflected in his written closing submission to the Tribunal, and was noted by the Tribunal at the start of paragraph 2 of its Decision. The Employment Appeal Tribunal ("EAT") should therefore properly entertain this ground on that broader basis.

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50. Looking at the alleged conduct of Mr Jenkins on that broader basis, however, it was unclear whether the Tribunal had taken the view that the burden had not shifted, or whether it was in any event satisfied that there was no discrimination by Mr Jenkins. But in any event, it had not properly found a non-discriminatory explanation for his conduct. The closest it came to that was in paragraph 74, but it was not entitled to rely on its own general assumptions; and, in any event, they could not be applicable to Mr Jenkins, who was not a social worker.

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51. There were several findings from which the Tribunal could and should have concluded that the burden in relation to Mr Jenkins' conduct shifted. These were (a) his failure to inform Ms Fair that the police complaint had been withdrawn, the significance of which, as a former police officer, he would have appreciated; (b) the fact that he aggressively assumed the claimant's guilt – as found by the Tribunal at paragraphs 57 and 72; and (c) the finding that "age was a factor he added to the evidence he already had", at paragraph 72. This was

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reflective of his having stereotyped the Claimant as a sexual predator. These findings were potential evidence of a general discriminatory attitude on the part Mr Jenkins, from which the Tribunal should therefore have concluded that the burden had shifted, and not been discharged.

52. In the course of oral argument, however, Mr Harris said that he conceded that, if, contrary to his case, I concluded that the conduct of Mr Jenkins impugned by the discrimination claims, which it fell to the Tribunal to consider in its decision, remained confined to that which had been identified in the list of issues at the PH, then Ground 4 could not, on that basis, succeed. It was maintained only if I accepted that the Tribunal ought to have considered the complaints about the conduct of Mr Jenkins as more broadly based, and embracing his failure to report the withdrawal by SR of her police complaint.

53. Mr Harris also accepted in oral submissions, that because the version of Ground 4 that had been allowed to proceed to the full appeal Hearing, did not challenge the Tribunal's conclusions that Ms Fair's decision to dismiss was not an act of direct sex or age discrimination, he could not maintain the argument, advanced in his written skeleton, that, in light of **Jhuti**, the Tribunal should have found that the dismissal itself was "tainted by discrimination".

54. However, if I found that the Tribunal had erred in concluding that there was no discrimination on the part of Mr Jenkins, and were the Claimant then to secure a fresh finding that there *was* discriminatory conduct by him, then Mr Harris maintained that that could in turn open the door to a submission at the remedy stage, that Mr Jenkins' discriminatory conduct had caused the Claimant to lose his job.

55. Ms Criddle's principal arguments were as follows.

56. In relation to Ground 1, she drew attention to the fact that Mr Jenkins completed his investigation and report on 12 January 2017, but SR did not withdraw her allegations to the police until some weeks later. So, Mr Jenkins could not be criticised for not covering in his formal investigation, something that had not yet happened when that investigation concluded.

57. In oral argument Ms Criddle confirmed, however, that she did not dispute that the fact that Mr Jenkins later learned that SR had withdrawn her police complaint, and the fact that Ms Fair did not know this (because she was not told), was something that the Tribunal could properly take into account at the section 98(4) stage. **Jhuti**, she argued, was not actually authority for that proposition, but none was needed, and it was not controversial, as such.

58. However, Ms Criddle argued, the majority *had* sufficiently and properly engaged with these features of the facts at the section 98(4) stage. The real issue, said Ms Criddle, was whether the majority were entitled to conclude that Ms Fair's belief that the Claimant was guilty of inappropriate sexual behaviour was reasonably reached, taking account of the fact that she was not aware of the withdrawal of the police complaint. The majority had concluded, drawing on the dismissal letter, that there were several reasons why Ms Fair had preferred SR's account to that of the Claimant. The fact that SR had complained to the police was merely a factor that added weight to her conclusion, not a necessary ingredient of her reasoning.

59. The majority also properly took into account the significance of the complaint to the police having been withdrawn, as part of its assessment of the question of reasonable belief. They carefully assessed the evidence that Ms Fair did have, and what she did know. She knew

A that the police were not taking the matter further. She took into consideration inconsistencies in SR's account, and therefore specifically considered her credibility. Further, the core of the evidence before Ms Fair, as discussed by the Tribunal at paragraph 56, was the photograph. The majority of the Tribunal properly concluded there that, while there was no certainty as to what happened in the toilet, the surrounding circumstances and the photograph made it reasonable to draw the inference that Ms Fair drew, on the balance of probabilities.

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60. Alternatively, submitted Ms Criddle, if the dismissal was, by reference to the handling of this aspect, unfair, then, in light of the Tribunal's further findings, I was in a position to determine that a 100% **Polkey** reduction must apply, and there was no need to remit. Indeed, I could also conclude, in light of its finding in respect of wrongful dismissal, that the Tribunal would be bound to make a 100% finding of contributory conduct.

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61. In relation to Ground 3, Ms Criddle submitted that, as matters stood, this Ground only impugned the majority's own finding that the Claimant had assaulted SR, and hence the decision to dismiss the claim of wrongful dismissal. In any event, even if this ground could be treated as also challenging the decision on unfair dismissal, the reasoning of the majority was clear and cogent, and this challenge fell well short of surmounting the high hurdle of perversity.

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62. In relation to Ground 4, Ms Criddle said the starting point must be to consider the actual claims of discrimination relating to the conduct of Mr Jenkins. They concerned his comments that the Claimant was a married man, a senior manager and/or a senior member of staff. That was accurately captured in paragraph 2 of the Tribunal's Reasons, as could be seen from the list of issues attached to the PH minute and the further particulars of the Grounds of Claim which had preceded that PH (a copy of which was also in my bundle for this full appeal Hearing).

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63. The list of issues had been agreed at that PH, at which the Claimant was represented. Mr Harris did not challenge it, as such. As for his argument relying on **Parekh**, this foundered on the rock that there had, in this case, been no process of the Tribunal reviewing the list of issues, and sanctioning a variation to it. In any event, even the expanded case that Mr Harris sought to advance in his closing submission to the Tribunal had not included the proposition that Mr Jenkins not telling Ms Fair of the withdrawal of the police complaint, was conduct amounting to discrimination. Further, in any event, the Tribunal had not adopted a wider list of issues in paragraph 2 of its Reasons, but had accurately set out what the PH list recorded. The Tribunal could not stray outside of that list. See **Chapman v Simon** [1994] IRLR 124.

64. Even if, contrary to her case, the Tribunal could have considered the failure to report the police withdrawal to Ms Fair, as allegedly discriminatory conduct, it was hard to see on what basis it was being said that this conduct should have pointed to a shifting of the burden of proof. Further, the Tribunal was entitled simply to consider the Respondent's explanation for its conduct, and whether it was satisfied by it. That was what it properly did.

Discussion and Conclusions

Ground 1

65. The starting point is, as always, the words of the statute. In particular, the Tribunal, having accepted the Respondent's case that the reason for dismissal was his conduct, as alleged, had to apply section 98(4) **ERA 1996**, which provides that:

> **"… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

66. A number of points that are well-established in the authorities are then particularly pertinent in this case. First, the Tribunal had to consider the fairness of the "end to end" process (including, indeed, the appeal). See **Taylor v OCS Group Limited** [2006] ICR 1602.

67. Secondly, **British Home Stores Limited v Burchell** [1980] ICR 303 establishes that, in a conduct case, the Tribunal should consider whether the employer formed a view that was reasonably open to it following a reasonable investigation; and other authorities establish that a 'band of reasonable responses' approach applies to these questions. What this means, putting it all together, is that the Tribunal must consider whether there has been a reasonably sufficient investigation, and a reasonable view formed, at the point when the decision to dismiss is taken (and/or, in an appropriate case when the decision on the appeal is taken). The notion of "investigation" in this context is not confined to any formal pre-investigation which may occur in the given case, but embraces the overall process of gathering and examining evidence, up to the point when a decision is taken, including at the disciplinary hearing itself.

68. Further, it must be remembered that, basic and important though the questions identified in **Burchell** are, they are not exhaustive of the considerations that may have a bearing on the fairness of a conduct dismissal in a given case, whether procedural or otherwise. It is not therefore necessary in every case to attempt to shoehorn a critique of the fairness of a conduct dismissal, into one or other stage of the **Burchell** process. The Tribunal should always consider, applying section 98(4), how the particular feature of the circumstances of the case in hand did or did not affect the fairness of the decision to dismiss for the found reason.

69. It is therefore certainly not a sufficient answer to this Ground, that Mr Jenkins had completed his investigation and delivered his report, in point of time, before SR withdrew her

complaint to police. She did so, and Mr Jenkins learned of this fact, before the disciplinary hearing took place; but this was information that he did not share with Ms Fair (nor, it was not disputed, was it known to the Claimant or Ms Mills).

70. The question, then, for the Tribunal, was whether, applying section 98(4), those circumstances affected the reasonableness of the decision to dismiss for the reason found, and hence its fairness. As I have indicated, in oral submissions Ms Criddle did not dispute that, as such. It is also the conclusion that I would have reached, had I been deciding this appeal prior to the decision of the Supreme Court in **Jhuti**. But because Ms Criddle and Mr Harris still disagreed about whether the Tribunal had properly addressed this issue, it is worth examining, more specifically, what light the authorities thrown on this aspect.

71. I note the following points about the Supreme Court's decision in **Jhuti**. First, while the question posed by Lord Wilson in paragraph 1 of his speech (with which the other four Justices concurred) was broad, the answer that he gave in paragraph 62 was much narrower, and tailored specifically to the "extreme" particular facts of the case, summarised at paragraph 41.

72. Secondly, **Jhuti** was concerned with whether, and if so in what circumstances, the Employment Tribunal could impute to the employer, for the purposes of an unfair dismissal claim, a *reason* for dismissal different from that which had influenced the mind of the person who actually took the decision to dismiss. It was also a case where a person in the hierarchy above the employee had invented a reason, in order to hide the true reason why they wanted the employee dismissed; and in which the true reason was withheld from the dismissing manager, and the invented reason was then adopted by her, on the basis of evidence presented to her that suggested it provided a proper ground for dismissing.

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73. The present case is not one in which the reason for dismissal was found to have been invented, or in which Mr Jenkins had a different true reason from the reason why Ms Fair in fact dismissed, or the basis on which the appeal panel upheld the dismissal. The argument concerning the significance of the conduct of Mr Jenkins is of a different kind, and I do not think the strict ratio of the Supreme Court's decision in **Jhuti**, in terms of what it had to decide, and did decide, in order to resolve the appeal of which it was seized, has any application to it.

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74. However, in the course of the discussion, Lord Wilson observed (at paragraph 39):

> **"The court's answer to the question in relation to section 103A must relate equally to the other sections in Part X in which the same words appear, and also, for example, to section 98(4), which requires the tribunal to determine whether the employer acted reasonably in treating the reason for dismissal as sufficient."**

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75. Further, at paragraphs 49 – 52 he discussed the decision of the Court of Appeal in **Orr v Milton Keynes Council** [2011] ICR 704 (CA). That case was concerned, not with the reason for dismissal for the purposes of section 98(1), but with the potential impact of the fact that certain salient facts had been known to a manager, but not included in the information given to the dismissing officer, on the fairness of the dismissal under section 98(4). On the facts of that case the majority (Underhill and Aikens LJJ, Sedley LJ dissenting) had concluded that knowledge of the additional facts known to the manager could not be imputed to the employer for the purposes of deciding whether the dismissal was fair.

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76. In **Orr** the manager concerned was not, in fact, the investigating officer. Lord Wilson in **Jhuti**, however, referred, at paragraph 53, to a hypothetical variation of the actual factual scenario in **Orr**, considered by Underhill LJ in **Jhuti**, (with whose speech, I interpose, Jackson and Moylan LJJ agreed) as follows.

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> **"While in the present case he correctly acknowledged that the Court of Appeal was bound by its majority decision in the *Orr* case, Underhill LJ identified at para 62 a different situation in which, so he suggested, it might be appropriate for a tribunal to attribute to the employer knowledge held otherwise than by the decision-maker. He was referring to the knowledge of a manager who, alongside the decision-maker, had had some responsibility for the conduct of the disciplinary inquiry. It was a suggestion which he had first made in his judgment in *The Co-Operative Group Ltd v Baddeley* [2014] EWCA Civ 658. There, in para 42, he had referred to a situation in which the decision-maker's beliefs had "been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation". "For short," Underhill LJ had added (perhaps questionably), "an Iago situation". He had proceeded:**
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> ***'[Counsel] accepted that in such a case the motivation of the manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation; and for my part I think that must be correct.'***
>
> **I respectfully agree that in the situation there identified by Underhill LJ it might well be necessary for the tribunal to attribute to the employer the knowledge of the manipulator; but, as Underhill LJ accepted, the proposition in no way helps to resolve the present case because Mr Widmer cannot be taken to have had responsibility, alongside Ms Vickers, for any part of the conduct of the inquiry."**

77. I note also that, towards the end of his speech in **Jhuti**, at paragraph 61, Lord Wilson observed that: "There is no need to overrule the decision in the *Orr* case; by our decision, we attach only a narrow qualification to it."

78. Drawing it all together, I conclude that Lord Wilson (and his fellow Justices) were of the view, first, that the question of whether the knowledge or conduct of a person other than the person who actually decided to dismiss, could be relevant to the fairness of a dismissal, could arise, *both* in relation to the Tribunal's consideration of the reason for dismissal under section 98(1) and/or its consideration of the section 98(4) question; and that, in a case where someone responsible for the conduct of a pre-investigation did not share a material fact with the decision-maker, that *could* be regarded as relevant to the Tribunal's adjudication of the section 98(4) question. Though these passages were, strictly, *obiter*, they draw also on the reflections of Underhill LJ in the earlier authorities there mentioned (see, further, Underhill LJ's concluding remarks at paragraph 62 of his own speech in **Jhuti**). I, respectfully, agree with them.

79. How does that bear on the present case? Mr Jenkins conducted the pre-investigation, concluded that there was a case to answer in disciplinary process, and was then the person who presented the management case at the disciplinary hearing. His involvement did not end with

the presentation of his investigation report and recommendations. The fact that he knew that SR had withdrawn her allegations from the police, and the fact that Ms Fair took her decision without taking account of that piece of information, because she was not told of it, was something that therefore properly fell to be considered by the Tribunal, in deciding the fairness of the dismissal at the section 98(4) stage.

80. Bearing in mind the need for the Tribunal to consider the fairness of the end to end process, and the high investigative standard which fairness dictates in cases of this sort, I consider that these were circumstances of which the Tribunal should have taken full account. This did not require any finding about *why* Mr Jenkins did not share this information with Ms Fair (or indeed the Claimant or his union representative). It turns simply on the propositions that: (a) given Mr Jenkins' role, the information was something that fell to be treated as known to the employer; (b) it was at least potentially relevant evidence that could potentially be argued to provide some support to the Claimant's case; and (c) because she did not in fact know about it, it was, however, not given any consideration by Ms Fair, when she came to her decision.

81. Was this a development that the Tribunal should have considered was, at least *potentially* relevant to what Ms Fair had to decide, as potentially lending some support to the Claimant's case? Mr Harris, as I have noted, argued that it was not only relevant, but decisive. He argued that Ms Fair, and the Tribunal, should have regarded it as inevitably pointing to the conclusion that SR's position was now that she had *not* been assaulted, and that Ms Fair, had she known this, would have been bound to reject the principal allegation against the Claimant.

82. I do not agree with that. The evidence in the police report (whether of what she was recorded as at first having said to the police, or written in her official withdrawal a few days

later) was not of SR having said words to the effect that her previous allegations were false. Nor did the Tribunal so find.

83. However, having regard to (a) the fact that Ms Fair *was* aware that SR had complained to the police, and the fact that she attached some weight to SR having done so; and (b) her own evidence to the Tribunal that, had she known about the withdrawal, she would have wanted to understand the reason for it; and in light of the guidance in cases such as **A v B**, as to the heightened standards expected of the employer in a case such as this, this should have been regarded by the Tribunal as something that, in fairness, should have been considered.

84. How did the majority of the Employment Tribunal in fact approach this feature of the case? In paragraph 54 they say, at the start, that Ms Fair had "all the evidence before her" and at the end, that the dismissal letter "shows that she had several reasons for preferring SR's account". Then, at the start of paragraph 55, they say that "[t]he only exception may be where she included the fact that SR had been to the police, as a reason to accept her evidence, not knowing she had retracted her complaint." They then considered the effect of the reasoning in her letter *if the words "and to the police" were removed*, and concluded that Ms Fair had sufficient reasons "even so", for concluding that the Claimant had assaulted SR.

85. However, in my judgment, that approach was not the correct one. That is for the following reasons. First, I do not agree with Ms Criddle that the dismissal letter either was construed by the Tribunal, or properly could have been, as showing that the fact that SR had complained to the police was regarded by Ms Fair as merely additional support for a decision she had reached, in any event, without reliance upon it. The dismissal letter states that she found that the Claimant's behaviour was of an inappropriate sexual nature "based on a number

of factors". This matter then appeared on the list of such factors that followed, and was said by her to "add weight" to her conclusion that he had behaved inappropriately. She did not say that she had reached that conclusion in any event, or before coming to that aspect.

86. Secondly, it was wrong for the Tribunal to proceed on the basis that a situation in which SR had made a complaint to the police, and then later withdrawn it, could automatically be equated with one in which she had never made the complaint in the first place. Ms Fair having been made aware of, and invited to take into account, SR's decision to report to the police (which she said she in fact then did), the Tribunal should have concluded that fairness demanded that she *also* take into account the later decision to withdraw the police complaint. The Tribunal could also not be sure, bearing in mind in particular Ms Fair's evidence that, had she known of the withdrawal, she would have wanted to know the reasons for it, that *she* would have regarded the two situations as equivalent.

87. Thirdly, even if the Tribunal was entitled to take a view that Ms Fair *could* still have fairly relied on the other evidence to find the Claimant guilty, this was still the wrong approach. First, as the Tribunal should have concluded, at the liability stage, that fairness demanded that Ms Fair be informed of, and take into account, the fact that SR had withdrawn her police complaint, but this did not happen, it would have been bound to conclude that the dismissal was, for this reason, unfair. Further, at the remedy stage, the Tribunal would then need to consider, not merely what Ms Fair *could* have found, but whether Mr Fair *would*, *or the chance that she might*, still have (fairly) dismissed the Claimant, had she been aware of, and considered, this additional fact.

88. The appeal against the decision that the Claimant was not unfairly dismissed therefore succeeds on Ground 1.

Ground 3

89. I consider, first, Ms Criddle's submission that, as framed, this Ground relates only to the wrongful dismissal outcome, and not to the unfair dismissal outcome, and would have required an amendment in order to engage with the latter.

90. As to that, the Ground, as presently drafted, refers in terms to the majority's decision that the dismissal was fair. It is, of course, an error for a Tribunal to confuse its task when deciding, for the purposes of an unfair dismissal claim, whether the employer reached a view of the evidence it had, that was reasonably open to it, with its task, when deciding a wrongful dismissal claim, of coming to its own view, based on the evidence it has, or, when deciding an issue of contributory conduct, of again coming to its own view, applying the legal test appropriate to that. There is no ground of appeal to the effect that this Tribunal confused these tasks or fell into the substitution mindset. But what Ground 3 argues is that the evidence presented both to the Respondent and the Tribunal could not properly support the conclusion that the Claimant was guilty of assault, on the part of *either* the Respondent or the Tribunal. I consider that this Ground does, therefore, include a challenge to the unfair dismissal decision.

91. Turning to the substance, as framed, Ground 3 argues that the majority's conclusions that there was an assault, *and* that the Respondent was reasonably entitled so to find, were perverse. However, I agree with Ms Criddle (in her alternative submission) that this challenge does not surmount the high perversity threshold. In relation to the findings and discussion

concerned directly with the alleged assault itself, the majority do indeed refer to a number of shortcomings of, and difficulties with, the evidence, as identified in the full text of the Ground.

92. However, their ultimate conclusion is that, having regard to the content of the photograph, and all the surrounding circumstances, it was "reasonable to draw the inference to a balance of probability standard." So far as the Tribunal's appraisal of Ms Fair's decision is concerned, subject only to the point raised by Ground 1, it seems to me that this was a properly-reasoned conclusion that the majority was entitled to reach. In particular, they were entitled to take the view that Ms Fair could properly infer (herself applying the balance of probabilities) that the photograph was of SR, and supported the conclusion that SR sustained the bruises that it showed in an assault, and not by falling. I conclude that, in relation to unfair dismissal, this Ground adds no further valid challenge to Ground 1.

93. In relation to the Claimant's conduct on the Monday following the incident, the majority's reasoning in paragraph 59 is carefully expressed and reasoned. They recognise that there was no open threat to SR, and consider the possibility that the Claimant was merely concerned about gossip, was trying, as it was put, to appeal to her better feelings, and did not intend to warn her off complaining. But they also give cogent reasons why a separate interpretation was tenable. The matters they point to all seem to me to have been reasonably regarded as capable of supporting a different view. The majority sensibly say that this conduct was nevertheless unlikely to have justified dismissal by itself, they characterise it themselves as moral pressure, and conclude no more than that it was something that a reasonable employer could take into account. They were entitled so to find. That was not perverse.

94. Finally, I cannot say that the Tribunal was not entitled to find, having regard to the evidence that it had (including that SR had withdrawn her police complaint, but bearing in mind what the police report recorded about her stated reasons for doing so) that, on the balance of probabilities, the assault had occurred.

95. Ground 3 therefore fails.

Ground 4

96. As I have noted, Mr Harris indicated that this Ground rested on his contention that the Tribunal at the full Hearing should have treated the allegations of discriminatory conduct on the part of Mr Jenkins as broader than those reflected in the minutes of the earlier PH.

97. At the Rule 3(10) hearing in relation to this appeal I only had sight of the original Grounds of Claim that were attached to the claim form. It was then, and remains now, my view, that these, taken alone, left the position unclear. I considered there was a sufficient basis to allow this Ground through to a full Hearing; but it was for that very reason that I indicated that the EAT would need, at that Hearing, to have a clearer picture of what the issues actually were, arising from the discrimination claims, specifically in relation to Mr Jenkins' alleged conduct, that fell to be considered by the Employment Tribunal at the full merits Hearing.

98. In my bundle for this appeal was a further document that had been tabled to the Tribunal, giving further particulars of each occasion when the terms "married man", "a senior manager" and "senior member of staff" were said to have been used. These set out that the first two expressions were said to have been used by Mr Jenkins, in his investigation meeting with the Claimant, and then in his handwritten notes of that meeting, the second also by him in the

disciplinary hearing, and the third in his closing statement following the disciplinary hearing. The last of these was said also to have been used by Ms Fair in the dismissal letter.

99. There then followed the list of issues attached to the minute of Preliminary Hearing before Employment Judge Stewart. That, in terms, identified that, apart from the dismissal itself, the *conduct* alleged to involve discrimination was Mr Jenkins' comments that the Claimant was a married man – said to amount to sex discrimination; and his comments that the Claimant was a senior manager (as well as those of Ms Fair) – said to amount to age discrimination.

100. It seems to me that what the Employment Tribunal wrote, in its Reasons arising from the full merits Hearing at paragraph 2, was wholly consistent with that. They recorded that it was asserted that stereotypical assumptions about the behaviour of older men informed and infected the fairness of the process. But they went on to specifically identify, in terms, and correctly, in line with the previous list of issues, what the specific allegedly less favourable treatment was. The reference to stereotyping (used also, Mr Harris pointed out, by him in his closing submissions to the Tribunal at the full merits Hearing) is to an *argument* as to why the conduct complained of is said to be on grounds of age or sex, or why that inference might be drawn. That is because, according to this argument, the references made to these things is said to betray a stereotypical attitude. But the fact that the stereotyping argument was run, does not point to the conclusion that any *conduct* was complained of, beyond that identified in the PH.

101. I do not agree with Mr Harris that the EAT can or should consider this ground on any wider basis than that. In light of the contents of the original particulars of claim, there was a need for the precise alleged conduct to be relied upon to be clarified and identified; and this was

then resolved, with clarity, at the PH, at which the Claimant was represented. The Tribunal at the full merits hearing properly stuck to the list of issues. As Ms Criddle correctly submitted, all of this does matter, for the reasons discussed in a number of authorities, including **Scicluna v Zippy Stitch** [2018] EWCA Civ 1320. While (see **Parekh** at paragraph 31), a Tribunal *may*, where there is material change in circumstances, properly revisit a list of issues, that did not happen in this case, and the list agreed and identified at the PH continued to apply.

102. Accordingly, I conclude that the alleged discriminatory *conduct* on the part of Mr Jenkins, which fell to be considered by the Tribunal at the full merits Hearing, did *not* include the fact that he did not tell Ms Fair that the Claimant had withdrawn her allegations to the police. As I have indicated, Mr Harris indicated that he accepted that, if I concluded that the only issues relating to Mr Jenkins' conduct that fell to be considered by the Tribunal at the full merits Hearing, were those identified in the minute of the earlier PH, then Ground 4 could not succeed. I therefore do not need to embark on a specific analysis of the Tribunal's unanimous conclusions as to why the sex and age discrimination claims failed, save to record that they appear to me, in light of the issues having been narrowly confined in that way, to have been sound; and that concession was therefore rightly made by Mr Harris.

Outcome

103. Accordingly, this appeal is allowed, in relation to the decision that the Claimant was not unfairly dismissed only, and on Ground 1 only. The Employment Tribunal erred in concluding that the fact that Ms Fair took her decision in ignorance of the fact that SR had withdrawn her police complaint, when this was known to Mr Jenkins, did not render the dismissal unfair. For reasons I have explained, had it approached this aspect correctly, the Tribunal would have been bound to conclude, on the facts found, that the dismissal was, on this account, unfair.

104. Accordingly, applying the guidance in **Jafri v Lincoln College** [2014] ICR 920 I will substitute a decision that the dismissal was (on this account) unfair. However, it will be for the Tribunal, and not me, now to consider, and decide, whether it thinks that, had Ms Fair been made aware that SR had withdrawn her police complaint, she, Ms Fair, then would, or might (with some degree of percentage chance), have made a different decision; and, depending on its answer to that question, the impact on its remedy decision. I cannot say either that there is only one answer to that question which the Tribunal could correctly give, nor any particular answer that it would necessarily be wrong to give. Nor can I go so far as to say that there is only one proper outcome possible on the question of contributory conduct.

105. The parties agreed at the Hearing of this appeal, that it would be desirable for any further matters falling to be considered by the Tribunal, to be considered by the same panel as before, if available. I agree, and I will be accordingly so direct.