Neutral Citation Number: [2017] EWCA Civ 257

Case No: A2/2015/1719

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HH JUDGE EADY QC AND LAY MEMBERS

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/04/2017

Before:

LORD JUSTICE LONGMORE
LORD JUSTICE BEATSON
and
LORD JUSTICE UNDERHILL

- -

Between:

TEMITOPE ADESHINA	**Appellant**
- and -	
ST. GEORGE'S UNIVERSITY HOSPITALS NHS FOUNDATION TRUST & ORS	**Respondents**

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Mr James Laddie QC (instructed by **Thomas Mansfield Solicitors Limited**), with **Mr David Gray-Jones** of **Thomas Mansfield** for the **Appellant**
Mr Ben Cooper QC and **Ms Corinna Ferguson** (instructed by **Capsticks LLP**) for the **Respondents**

Hearing dates: 8th and 9th March 2017

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Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. The Appellant is a pharmacist. Since 2002 she has worked in HM Prison Service. At the time material to this appeal she was Principal Pharmacist in the Pharmacy Department at Wandsworth Prison, employed by the St. George's University Hospitals NHS Foundation Trust ("the Trust"). She describes her ethnicity as black African.

2. Following a disciplinary hearing which took place over several days some weeks apart, the Appellant was summarily dismissed by letter dated 15 June 2012. The decision to dismiss was taken by Fiona Ashworth, the Trust's Divisional Director of Operations. The Appellant appealed in accordance with the Trust's appeal procedures. Again, the hearing took place on a number of dates, over a period of no less than ten months, before a panel chaired by Neil Deans, the Trust's Joint Director of Estates and Facilities. By letter dated 31 October 2013 the dismissal decision was upheld.

3. The Appellant brought proceedings against the Trust in the Employment Tribunal for both "ordinary" unfair dismissal, by reference to section 98 of the Employment Rights Act 1996, and "automatic" unfair dismissal by reference to section 103A (part of the so-called "whistleblower" provisions); for "whistleblower detriment" pursuant to Part IVA of the Act; and for wrongful dismissal. She also claimed against the Trust and three of its employees – Ms Ashworth, Ms Caulfield-Stoker and Ms Leegood – for racial discrimination arising out of the dismissal itself and the events leading up to it, and for victimisation. (The Prison Service was also initially a respondent, but no claim is now pursued against it.)

4. The Appellant's claim was heard by a Tribunal chaired by Employment Judge Freer at London South over fourteen days between 18 November and 5 December 2013. By a judgment sent to the parties on 10 April 2014 all her claims were dismissed. The Tribunal's Reasons are very full, running to over 50 pages and some 353 paragraphs.

5. The Appellant appealed to the Employment Appeal Tribunal as regards her claims for ordinary unfair dismissal, wrongful dismissal and racial discrimination (as regards her dismissal). The appeal was heard by a tribunal presided over by HH Judge Eady QC on 30 April and 1 May 2015. By a judgment promulgated on 19 June 2015 her appeal was dismissed.

6. This is an appeal against that decision. The Appellant is represented by Mr James Laddie QC and Mr Gray-Jones, a solicitor advocate. The Respondents are represented by Mr Ben Cooper QC and Ms Corinna Ferguson of counsel. Both Mr Laddie and Mr Cooper appeared in the EAT. Mr Cooper and Mr Gray-Jones also appeared in the ET.

THE APPELLANT'S DISMISSAL

THE BACKGROUND

7. The reasons given by the Trust for the Appellant's dismissal arise out of her involvement in a project, for which the go-ahead was given in January 2011, to re-

organise the way in which pharmacy services were provided at Wandsworth: the existing arrangements were to be replaced by a "Central Pharmacy Unit" ("the CPU"). The aims of the project were set out in a document described as "the Operational Policy". One of the principal features was a change from the provision of pharmacy services at the prison being "nurse-led" to being "pharmacist-led". To anticipate, that was a change of which the Appellant strongly disapproved. The process proved difficult. A meeting of senior managers from both the prison and the Trust took place on 20 July 2011, a few days before the CPU was due to open, because of the lack of progress. The Appellant attended that meeting. She also attended a meeting with Ms Leegood, who was Acting Head of Healthcare, the following day. The CPU formally opened on 25 July.

8. Shortly afterwards both the Governor and the Deputy Governor of the prison and two senior Trust staff – the Chief Pharmacist, Chris Evans, and Ms Leegood – raised concerns about the leadership, or lack of it, shown by the Appellant in the process leading up to the opening of the CPU. As a result of those concerns Ms Caulfield-Stoker, who was the Chair of the Trust's Community Services Division, asked its Deputy Chief Pharmacist, Mr Kumar, to carry out a disciplinary investigation. The Appellant was suspended.

THE INVESTIGATION

9. On 26 August 2011 Mr Kumar wrote to the Appellant to inform her of the allegations which would be the subject of the investigation, which he formulated as follows:

> "a) your unprofessional behaviour and attitude as a senior manager during a Trust and Prison senior management meeting on Wednesday 20 July 2011 and as a result of what occurred when Chris Evans, Pharmacy Services, St. George's Healthcare NHS Trust and I left the room during the meeting
>
> b) your failure as Head of Pharmacy Services at HMP Wandsworth to be co-operative and to support and lead the major service change in the Pharmacy Department which has resulted in a negative impact on the new treatment centre. Actions were not implemented, the Operational Policy was not instigated by yourself and when the centre opened your attitude was unhelpful and detrimental to the prisoners, your staff and other healthcare colleagues
>
> c) your unprofessional and threatening behaviour towards Sam Osborne, Pharmacy Technician on 1st June 2011 when you confronted him outside the pharmacy dispensary when senior staff were present and your subsequent refusal to apologise to him for your unacceptable behaviour."

10. The result of Mr Kumar's investigation was a "Management Statement of Case" ("the MSC"). Section 4 of the MSC, headed "Findings of the Investigation", sets out, in relation to each of the three allegations in turn, the gist of the evidence that Mr Kumar had heard and his conclusions. He does so with some particularity and there are a series of appendices containing contemporary documents and interview notes. It is a

clear and well-presented piece of work. The final section is headed "Summary". It begins by concluding, with brief reasons, that each of the allegations is made out. It continues:

> "These incidents constitute gross misconduct and misconduct in line with the Trust's Disciplinary Procedure in that:
>
> Gross Misconduct
>
> **Disrepute** – by her actions and behaviour TA has brought the Trust into disrepute.
>
> **Serious Insubordination** – TA's serious failure to lead the Central Pharmacy Room service development and has failed to carry out reasonable instructions to ensure this development as well as her deliberate failure to discharge responsibility and maintain the accepted standards in accordance with statutory requirement, professional standards of conduct and Trust policies and procedures.
>
> **Negligence** – wilful insubordination and failure to lead the Central Pharmacy Room service development which meant that prisoners' healthcare and safety was compromised and also negligence with regard to standards of work and working practice.
>
> Misconduct
>
> **Verbal Abuse** – disrespectful and confrontational behaviour towards a work colleague and a member staff which may cause personal offence."

The four labels there used – "disrepute", "serious insubordination", "negligence" and "verbal abuse" – derive from examples of "gross misconduct" and "misconduct" given in the Trust's Disciplinary Procedure. Although we were not shown a copy, it appears that, as is conventional, the Procedure makes clear that gross misconduct may lead to dismissal whereas mere misconduct will only attract lesser penalties.

11. It is convenient at this stage to say something more about the three allegations considered in the MSC, which I will refer to, as (a)-(c) as per para. 9 above. It is convenient to take (a) and (b) in reverse order:

(1) Allegation (b) is the most general in character. The essential point is that the Appellant disapproved of the philosophy behind the CPU project, and was determined so far as possible to have nothing to do with implementing it. In the Findings section of the MSC several particulars are given of her failing to take necessary action or refusing to take decisions, but it is unnecessary for present purposes that I itemise them – though I should note, because the point comes up later, that one of the pieces of evidence relied on was an e-mail from Ms Leegood following their meeting on 21 July giving details of the Appellant's unco-operative attitude.

(2) Allegation (a) concerns the Appellant's conduct at the meeting on 20 July. As appears from the Findings section of the MCS, the complaint was both about the Appellant's attitude during the meeting itself and about an incident during a break while the meeting was adjourned. As regards the former, she was said to have been dismissive and rude in her demeanour towards colleagues and appeared not to be paying any attention. As regards the latter, she had a conversation during the break on her mobile phone with another pharmacist, Ms Shuramo, in which she expressed her hostility to the project. Other colleagues, including Ms Leegood, were in the room, and when Ms Leegood tried to remonstrate with her she told her in very direct terms to mind her own business.

(3) Allegation (c) is rather different inasmuch as it involves a one-off act of rudeness unrelated to the CPU project, and for reasons which will appear I need give no further details of it.

THE DISCIPLINARY HEARING AND THE INITIAL DISMISSAL DECISION

12. On 14 October 2011 Ms Ashworth wrote to the Appellant sending her a copy of the MSC and asking her to attend a disciplinary hearing. The allegations against her were specified as follows:

> "Your unprofessional behaviour and attitude as a senior manager during a Trust and Prison senior management meeting on Wednesday 20th July 2011.
>
> As Head of Pharmacy Services at HMP Wandsworth you failed to co-operate, support and lead the major service change in the Pharmacy department which has resulted in a negative impact on the new treatment centre.
>
> Your unprofessional and threatening behaviour towards Sam Osborne, Pharmacy Technician on 1st June 2011 when you confronted him outside the Pharmacy Dispensary and your subsequent refusal to apologise to him for your unacceptable behaviour."

It will be seen that those are essentially the three allegations of which she was originally notified, though more succinctly stated. They were plainly intended as a summary of the full case presented in the MSC. The Appellant was warned that dismissal was a possible outcome.

13. No point arises for our purposes on the conduct of the disciplinary hearing, which, as I have said, extended over several days in late 2011 and early 2012.

14. In her decision letter dated 15 June 2012, which runs to no fewer than seventeen pages, Ms Ashworth first reviewed each of the allegations, summarising the evidence and arguments in relation to each. She found all three to be established, but she that said she would not take allegation (c) into account because Mr Osborne had said that he regarded the incident as closed. She then went on, under the heading "Other Factors", to identify a number of other considerations which she said she had taken into account in reaching her decision. I need not set them out here, but I should note

that they included (a) a particular criticism of the Appellant's attitude to so-called "in-possession rates" (I need not explain what that means) and (b) a suggestion that the Appellant had displayed "a pattern of behaviour", with a reference to "conduct issues" in 2009. She concluded:

> "Taking account of all the above, I have decided to summarily dismiss you from your post of Principal Pharmacist-Head of Pharmacy Services HMPW on the grounds of gross misconduct. This means that your employment with St George's Healthcare NHS Trust ended on 11th June 2012."

THE INTERNAL APPEAL

15. Again, no point arises as to the conduct of the appeal hearing. The extraordinary length of time which it spanned reflected the fact that the Trust agreed to conduct a complete re-hearing, with all the witnesses who had appeared at the first hearing being required to attend and be cross-examined by the Appellant's solicitor. Mr Deans' letter communicating the decision of the appeal panel said that they had considered only allegations (a) and (b). I shall set out their findings fairly fully, though I have omitted a passage that does not not bear on the issues before us[1]:

> "Allegation A:
>
> The panel heard consistent and credible evidence from 4 people present during the meeting on 20th July 2011, 2 of whom were also present during the adjournment. The panel also considered the written evidence from Mr Fanthorpe, who was present during the meeting and the adjournment. You denied that the events had taken place as described by these witnesses, and your explanation of appearing disengaged and rude was in part that you were looking at your notes, and/or in your culture it is not accepted that you look at an older person when they are speaking to you. The panel considered the evidence and concluded that the events at the meeting and during the adjournment did take place as described by the witnesses. It did not accept your explanation of the events in question.
>
> In terms of the adjournment, you held a telephone conversation in the presence of other people, and the remarks you made to Hatatu Shuramo were inappropriate, and demonstrated that you were resistant to the changes in pharmacy. The panel noted that there were three witnesses in relation to this allegation, and their evidence indicated that your comments had been inappropriate. Ms Shuramo gave evidence that she heard part of your comments to Ms Leegood and this evidence also supported the allegation that you had been unprofessional in the meeting. The panel concluded that your comments to Emma Leegood when she asked you to stop the conversation were

[1] I have silently corrected some obvious typographical errors.

inappropriate, unprofessional and demonstrated a lack of respect for Ms Leegood.

The panel noted that you continued to insist throughout the appeals process that the 5 people present on 20th July 2011 were telling lies and that these events did not occur as they described. When asked during the appeal process if you thought there were any aspects of your behaviour for which you should apologise, you said there were none. You maintained that the witnesses were lying and added that they colluded against you. The panel did not accept your evidence that all the people present colluded against you. The panel did not accept your contention that their actions were motivated by race discrimination or because you and others had made a disclosure about management and the standards of care at HMP Wandsworth in 2009 when the healthcare service was provided by Secure Healthcare. When specifically asked at the appeal hearing if you had any evidence to support the allegation of collusion, you said that you did not.

The panel did not accept your evidence regarding this incident and found this allegation proven.

Allegation B:

It was clear to the panel that you were the project lead for the Central Pharmacy project from May 2011 at the latest, and had been involved in the project before that. However, you were not in favour of the Central Pharmacy and rather than taking a lead on this as the most senior Pharmacist at the prison, your approach to this was deliberately passive and limited to tasks such as ordering equipment. At your level in the organisation, it was entirely to be expected that you would take leadership of this project to ensure it was delivered safely and in time. Having worked in the prison service for over 10 years, you were aware of the reasons for the change being proposed, how it would benefit offenders and how important it was to the prison. Instead of raising any concerns you may have had in a constructive manner so they could be addressed, you adopted an approach of passive resistance, only acting when prompted to do so by others. For example, the panel noted evidence that you had taken some action after being pushed to do so at the meetings on 20 and 21 July 2011.

...

The panel concluded that you did not want to take responsibility for this new service to the extent that you tried to change the operational policy to pass responsibilities to other staff groups. An example of this was when you re-wrote the section of a policy to remove reference to the fact that the

> pharmacy technicians were responsible/accountable to you as the Head of Pharmacy. The panel heard evidence that your changes to the operational policy in the draft circulated on 29 June 2011 and the further draft with tracked changes on 21 July 2011 did not reflect a pharmacy-led service.
>
> The panel considered the evidence carefully and found this allegation proven."

The letter concluded, under the heading "Sanction", as follows:

> "The panel considered the issue of the appropriate sanction very carefully. Both allegations are serious. If you had accepted that your behaviour at the meeting had been inappropriate and demonstrated a willingness to address those concerns, the panel considers that it might have been appropriate to consider a final formal warning. Similarly, if you had accepted that your approach to the Central Pharmacy project was inappropriate and indicated that you were willing to learn from the process, improving your behaviour in future, the panel would have expected a final formal warning to have been issued.
>
> However, you demonstrated no insight into your behaviour in relation either allegation and, instead, sought to criticize others involved and suggest some kind of wide-ranging conspiracy, which the panel is clear did not exist. The panel has considered carefully whether or not it has any comfort that your behaviour was likely to improve if you were given a warning, rather than being dismissed. It has concluded that it does not and that your inappropriate behaviour was likely to continue if you returned to the workplace.
>
> The panel noted that HMP Wandsworth would not have granted you access to work at the prison without an assurance from the Trust that your behaviour would improve in the future, which is indicative of the seriousness with which the concerns were viewed. However, your lack of insight or willingness to acknowledge the seriousness of your behaviour did not give any such assurance, and the panel is unable to give any such assurance to the prison authorities.
>
> In those circumstances, the panel concludes that the sanction of dismissal was appropriate in the circumstances and upholds Fiona Ashworth's decision."

One feature of the appeal panel's reasons is that, although it heard much the same evidence as Ms Ashworth, it managed to state its conclusions – clearly and cogently – in four pages rather than seventeen. Reasons do not generally get better, or less vulnerable to challenge, by being longer.

THE DECISIONS OF THE ET AND THE EAT

16. The Appellant's grounds of appeal challenge separately the ET's reasoning on her complaints of unfair dismissal, wrongful dismissal and discrimination. Since these form self-contained parts of its Reasons it will be more convenient to summarise the reasoning as part of my consideration of each ground. I will not have to refer to the reasoning of the EAT, since the essential error alleged against it is simply that it failed to find the errors in the reasoning of the ET which the Appellant alleges.

A. UNFAIR DISMISSAL

17. The Tribunal deals separately with Ms Ashworth's initial dismissal decision and with the decision of the appeal panel.

18. As regards Ms Ashworth's decision, the Tribunal's conclusions can be summarised as follows:

    (1) As for allegation (a), it held that she had been entitled to find the allegations about the meeting of 20 July 2011 proved (see para. 93). However, it noted that her decision letter had referred also to the Appellant's conduct during her meeting with Ms Leegood on the following day which had not formed the basis of any of the formal allegations against her; and it held that that had not been fair (see paras. 99-101).

    (2) As for allegation (b), it found that the Appellant had indeed had "principal involvement in leading the project and … would have been aware of that" (para. 104) and that she had been "slow to engage with the Operational Policy" (para. 107). It said that the key evidence before Ms Ashworth about the Appellant's overall attitude consisted of the terms Ms Leegood's e-mail of 21 July to which I have referred at para. 11 (1) above; and it found (at para. 113) that "Ms Ashworth's belief in this allegation falls within the range of reasonable responses" (though it said that it reached its conclusion "marginally given the comparative weakness of the supporting evidence"). But it was critical of Ms Ashworth's conclusions about some of the other evidence of the Appellant's uncooperativeness.

    (3) It found that Ms Ashworth had been wrong to take into account some of the "other factors" relied on in her decision letter, and in particular those which I have identified at para. 14 above (para. 158). It made the general point that it was procedurally unfair to rely on matters not charged. More specifically, as regards the in-possession rates, Ms Ashworth's conclusion had been based on a misunderstanding of the Appellant's attitude arising as a result of (my phrase) Chinese whispers; and as regards the reference to conduct issues in 2009 that was unfair because Ms Ashworth did not ascertain the details.

    (4) On the basis of those criticisms – and particularly, I think, those at (1) and (3) – it found (para. 159) that the procedure followed by Ms Ashworth "falls outside

the range of reasonable responses" and that as a consequence "the belief held by Ms Ashworth also [falls] outside that range"[2].

19. However, the Tribunal found that the defects in Ms Ashworth's decision-making were cured by the appeal. Its conclusions can be summarised as follows:

(1) The appeal panel had conducted a procedurally fair re-hearing at which it had heard all the relevant evidence (paras. 178-9). It had not, unlike Ms Ashworth, taken account of anything that occurred on 21 July (para. 180).

(2) The panel had reached conclusions about the Appellant's conduct which were reasonable on the basis of that evidence (para. 184). The Tribunal said, at para. 185:

> "Having regard to the procedure overall the Tribunal concludes that the Respondent did have a reasonable belief in the Claimant's conduct. At the appeal stage reasonable and relevant information was available. That information was reasonably considered by the appeal panel. On the evidence before it, it was open for the panel to form a reasonable belief in the Claimant's conduct."

The reference to "having regard to the procedure overall" is, as is clear from elsewhere in the Reasons, a reference to the decision of this Court in *Taylor v OCS Group Ltd* [2006] EWCA Civ 702, [2006] ICR 1602.

(3) The Tribunal addresses at paras. 186-9 the fact that the Trust's case was that it did not over the period leading up to the launch of the CPU regard the Appellant's performance as a disciplinary matter and that it was only at the end of the process, looking back "through the prism of the final alleged escalation of behaviour", that it appreciated that she had in fact been guilty of gross misconduct. In that connection it observed, at para. 187, that it would itself have "adopted greater management over the Claimant" and at para. 188 that there could have been better communication and that there had been "confusion between respective roles and responsibilities". It says that with more effective management the Appellant's attitude of non-co-operation and "passive resistance" could have been confronted earlier and perhaps overcome. However it concludes at para. 189 that that would be to apply a standard of perfection rather than one of reasonableness.

(4) At paras. 190-4 it concludes that the appeal panel was entitled to conclude that the Appellant's conduct merited the sanction of dismissal.

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[2] The Tribunal's use of the phrase "the range of reasonable *responses*" is rather awkward. Ms Ashworth was not "responding" to anything. What the Tribunal clearly meant was that what she did was unfair. The hallowed formula has expanded from its original context of whether dismissal was an excessive response to particular misconduct – see *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17, at p. 24H – and is often now employed in contexts where it does not quite work as a matter of language. But of course the Tribunal was using it to convey that it appreciated that it should not find the dismissal unfair only because it would not itself have taken the "other factors" into account.

20. The Tribunal's overall conclusion, at para. 195, is that:

> "195. The Tribunal concludes, having regard to all the circumstances, the disciplinary process as a whole, equity and the substantial merits of the case, that on balance the Claimant's dismissal fell within the range of reasonable responses and was fair in all the circumstances."

21. The Appellant's primary challenge to that reasoning is that the misconduct found against her was incapable of justifying dismissal. Mr Laddie developed that point as follows.

    (1) As to allegation (a), this was no more than an allegation of rudeness towards colleagues at the meeting on 20 July 2011 (and during the break in that meeting). In the summary section of the MSC (see para. 10 above) it clearly fell under the definition "verbal abuse" and so constituted mere misconduct.

    (2) As to allegation (b), as formulated in Ms Ashworth's letter the Appellant's failure to co-operate and to lead is not said to have been deliberate. It could simply have been the result of incapability. It was an essential requirement of fairness that the nature of the complaint be spelt out: Mr Laddie referred to the judgment of Pill LJ in *Strouthos v London Underground Ltd* [2004] EWCA Civ 402, [2004] IRLR 636, at para. 12 (p. 637).

22. I cannot accept that submission. My starting-point is that it is clear that both allegation (a) and allegation (b) were being said potentially to constitute gross misconduct. The various categories of gross misconduct and misconduct itemised at the end of the MSC are plainly not intended each to correspond separately to one of the three allegations. What was being said was that the conduct alleged fell under one or more of the categories of gross misconduct or misconduct identified. There is nothing wrong with that. No final categorisation was necessary in order to give the Appellant the opportunity to meet the case against her, and in any event how her conduct was eventually categorised would depend on exactly what view the decision-taker took on the evidence adduced. Specifically as regards allegation (a), if it turned out that the Appellant was guilty of no more than being rude to Ms Leegood for disapproving of her telephone conversation with Ms Shuramo during the break in the meeting of 20 July, it might indeed be no more than an act of "disrespectful and confrontational behaviour towards a work colleague" and thus mere misconduct. But if she was found also to have been ostentatiously disengaged during the meeting itself, and/or to have been expressing strongly disaffected views to Ms Shuramo, that might indeed constitute or evidence serious insubordination. In that context the conduct alleged under (a) would be a particular example of the wider misconduct alleged under (b). As to that, the suggestion that what was being alleged might be no more than incapability is wholly unsustainable. Even the short summary in Ms Ashworth's letter – "failed to co-operate, support and lead" – naturally reads as connoting a deliberate failure. But in any event her letter has to be read with the MSC, which in the summary refers in terms to "deliberate failure" and "wilful insubordination": see para. 10 above. Mr Laddie submitted that the letter must be regarded as having refined the statement of the allegations in the MSC and that it should be construed on its own. That is an unreal approach to the practicalities of a disciplinary process: the

letter expressly referred to the MSC and the MSC was plainly meant to amplify and, so far as necessary, clarify the case against the Appellant.

23. Mr Laddie also advanced a secondary, though related, argument. He submitted that whereas Ms Ashworth had found only a "lack of full commitment" on the Appellant's part the appeal panel had clearly found what amounted to deliberate insubordination. He submitted that it was inherently unfair for more serious findings to be made at a re-hearing by way of appeal than had been made by the original decision-maker. He referred to the decision of this Court in *McMillan v Airedale NHS Trust* [2014] EWCA Civ 1031, [2015] ICR 747, in which it was held that where an employee who had been found guilty of misconduct at a disciplinary hearing and given a warning appealed it was not contractually open to the appeal panel to increase the sanction to dismissal.

24. I do not accept the premise of Mr Laddie's argument. Although Ms Ashworth may have used somewhat milder language than the appeal panel, in substance she and they found the same allegations proved. But even if her findings were demonstrably less grave than theirs the case would not be in any way comparable to *McMillan*, where the appeal panel imposed a more serious sanction instead, as here, of confirming the sanction imposed first time round. And in fact in my concurring judgment in that case I expressly pointed out that, even if it were a breach of contract for an employer to dismiss an employee where an appeal from a decision to impose a lesser sanction had disclosed more serious misconduct than the original decision-maker had found, the dismissal would not necessarily for that reason be unfair: see paras. 72-73 (pp. 762-3).

25. In truth both Mr Laddie's submissions, well though they were presented, depended on a formalistic approach to the documents generated in the course of the disciplinary process which is quite inappropriate in the unfair dismissal context. Employment tribunals are concerned with substantive justice. I have no doubt that the Appellant always understood the substance of the case against her and had a full opportunity to meet it.

26. I would therefore reject the Appellant's challenge to the dismissal of her unfair dismissal claim.

B. WRONGFUL DISMISSAL

27. I should reproduce the Tribunal's reasoning on the wrongful dismissal claim in full. It reads:

> "196. After considering all the evidence, the Tribunal concludes on balance that the Claimant did commit a repudiatory breach of her contract of employment with regard to her conduct at the meeting on 20 July 2011 and also her resistance/obstruction to the Central Pharmacy Project.
>
> 197. The Tribunal prefers the evidence of those others present at the meeting on 20 July 2011 with regard to the Claimant's behaviour during the break and the meeting itself. That matter was a serious incident.

> 198. The Tribunal has considered the Claimant's conduct overall relating to the Central Pharmacy, particularly in light of the Claimant's behaviour at the meeting on 20 July 2011 and although a difficult and marginal decision, concludes that given the Claimant's senior position the Claimant's conduct did display a deliberate resistance towards the Central Pharmacy both as a concept and with regard to its implementation.
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> 199. The Tribunal has found as fact that the Claimant was to lead the project and it was to be a pharmacy lead service. The Claimant was aware of that position given her own representations during the disciplinary process as set out above and most certainly should have been aware of those two key elements. The Claimant was also aware that the project was a significant event for both HMP Wandsworth and the First Respondent.
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> 200. The Tribunal could not determine on the evidence it received the reason behind the Claimant's palpable resistance, for example whether it was the potential of varied working hours or simply a reluctance to take on main responsibilities, but the Tribunal finds from the evidence it received that there was a deliberate reluctance by the Claimant that displayed itself in her conduct towards and engagement with the Project.
>
> 201. Given the terms of the Claimant's contract of employment, this demonstrated a deliberate intention to disregard the essential duty requirements of her contract and accordingly the claim for wrongful dismissal is not well-founded."

28. It will be seen that in the paragraphs set out above the Tribunal to a considerable extent incorporates by reference findings which it has already made in the section of its reasoning concerned with unfair dismissal. Mr Laddie submitted that that technique is dangerous, given that the Tribunal's task in deciding a wrongful dismissal claim is fundamentally different from its task in an unfair dismissal claim. He submitted that it had indeed led the Tribunal in this case to fail to engage properly with crucial issues. It is most convenient to address that criticism by taking the paragraphs of the Tribunal's reasoning in turn.

29. Para. 196 is conclusory and depends on the more particular reasoning in the following paragraph. But it is important to note that, as I would expect when it was chaired by a very experienced employment judge, the Tribunal had a clear understanding that it was its role under this head to decide for itself whether the Appellant was guilty of the misconduct alleged and whether it was sufficiently serious to justify summary dismissal.

30. As to para. 197, Mr Laddie accepted that the Tribunal had in an earlier passage set out the evidence from witnesses called by the Trust about the Appellant's conduct at the meeting of 20 July and that it was in principle open to it to accept that evidence. But he said that there were inconsistencies between the accounts of those present at the

meeting and that it was necessary for the Tribunal to make precise findings about what occurred, so as to be in a position to assess whether it amounted to a repudiatory breach. I do not accept that. I need not go in detail over the evidence in question: it is sufficient to say that, even if (unsurprisingly) there are discrepancies of detail, a clear picture emerges of the Appellant evincing an attitude of deliberate disengagement during the meeting proper, expressing a mutinous attitude in her telephone conversation with Ms Shumaro during the break and rudely rebuffing Ms Leegood's remonstrances. It was not necessary that the Tribunal should reach an express decision on whether this particular conduct amounted to a repudiatory breach: its description of the incident as "serious" is sufficient for it to be fed into the overall assessment.

31. As to para. 198, Mr Laddie submitted that this paragraph was of crucial importance and that it was not acceptable for the Tribunal to reach a wholly generalised conclusion about the Appellant's conduct and whether it was deliberate. I do not accept this criticism either. The Tribunal evidently intended its conclusion to be read in the light of the evidence which it had set out fully earlier in the Reasons. There was no need for it to highlight this or that piece of evidence or this or that aspect of the Appellant's conduct. The real issue in the case did not turn on the details of particular incidents but on whether the Appellant's attitude was indeed one of "deliberate resistance". The Tribunal's finding on that necessarily depended on an overall assessment of her conduct. It does of course state explicitly that it attached particular weight to her conduct at the meeting of 20 July. I should add in this connection that Mr Laddie drew our attention to some of the leading authorities which consider what constitutes gross misconduct/repudiatory breach, and in particular to *Tullett Prebon plc v BGC Brokers LP* [2011] EWCA Civ 131, [2011] IRLR 420, (*per* Maurice Kay LJ at paras. 19-20) and *Robert Bates Wrekin Landscapes Ltd v Knight* UKEAT/0164/14 (see *per* HH Judge Richardson at paras. 23-24). Mr Cooper in turn referred us to the recent decision of this Court in *Adesokan v Sainsbury's Supermarkets Ltd* [2017] EWCA Civ 22 (*per* Elias LJ at paras. 21-24). But nothing in this case depends on how the test is formulated. There can be no doubt that if the Appellant did indeed adopt an attitude of deliberate non-co-operation such as the Tribunal found her conduct was repudiatory.

32. Mr Laddie contended that the finding made in para. 199 is inconsistent with the Tribunal's earlier finding that there had been some confusion about roles and responsibilities: see para. 188, referred to at para. 19 (3) above. I do not accept that. Para. 188 makes no finding that the Appellant herself was confused about her role: the reference is evidently to those who should have been managing her. It is entirely clear that the Tribunal in this paragraph, and in para. 104 (see para. 18 (2) above), to which it refers, meant to find in terms that the Appellant knew that she was meant to be leading the project. That is a crucial finding. Mr Cooper told us, and it can in any event be inferred from the rest of the Reasons, that the central element in the Appellant's defence of her conduct throughout was not that she had in fact shown an unappreciated leadership and commitment to the CPU project but that no-one had ever made clear to her that that was her responsibility. The Tribunal's finding on this point undermined the heart of her case, and the fairly general way in which the Tribunal deals with other aspects reasonably reflects that.

33. Mr Laddie made the same point about para. 200 that he did about para. 198, but I would reject it for the same reasons.

34. I would accordingly reject the challenge to the Tribunal's dismissal of the wrongful dismissal claim.

C. RACIAL DISCRIMINATION

35. The Appellant did not allege that the decision of the appeal panel was influenced by her race: the ET observed that Mr Deans is in fact himself black. But she did allege that her treatment by Ms Ashworth was discriminatory. As to that, the Tribunal said:

> "216. The Tribunal has found that some procedural and consequential belief matters fell outside the range of reasonable responses with regard to Ms Ashworth's decision to dismiss the Claimant. However, the Tribunal repeats the now trite law that a detriment and membership of a protected class is not enough to found a successful race discrimination claim. There needs to be something more. Otherwise, for example, a finding of unfair dismissal of anyone falling within a protected class would lead to an automatic finding of direct discrimination.
>
> 217. The Tribunal is entirely satisfied that those unfair dismissal matters that the Tribunal concludes on balance fell outside the range of reasonable responses were genuine mistakes made by Ms Ashworth unrelated to race."

The "procedural and consequential belief matters" referred to are plainly those which I have summarised at para. 18 above. After addressing the issue of potential comparators at para. 218, it continued:

> "219. In any event, the Claimant has not produced that something more. Ms Ashworth was independent from the mass of background evidence and allegations relied upon by the Claimant. There was no evidence reasonably proffered to demonstrate any collusion with others, particularly Ms Leegood who has been singled out by the Claimant for particular criticism. There was no evidence to show collusion with Ms Caulfield-Stoker. Any discrimination would be a stand-alone act by Ms Ashworth.
>
> 220. Having regard to all the evidence as a whole, the Tribunal concludes that the decisions made by Ms Ashworth during the disciplinary process were genuinely made by her in an effort to discharge her responsibility of determining the disciplinary matter with which she was entrusted. In parts the Tribunal concludes that decision-making was flawed, but the Tribunal comfortably arrives at the unanimous conclusion that there is no inference of discrimination to be drawn. Those matters were genuine mistakes arising from Ms Ashworth attempting to determine the disciplinary allegations. Adopting a *Shamoon*

> approach (which in essence addresses step two of the burden of proof provisions), the reason why the Claimant was dismissed was because Ms Ashworth genuinely considered the Claimant was culpable of gross misconduct, as later reasonably concluded by Mr Deans and the appeal panel. Any mistakes in the process arose because of genuine errors that were not consciously or subconsciously tainted by race discrimination."

36. Mr Laddie contended that the failings which the Tribunal had found in Ms Ashworth's decision-making were sufficiently egregious as by themselves to raise a "prima facie case" that she was consciously or sub-consciously influenced by the Appellant's race, within the meaning of that phrase as used by Mummery LJ *in Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867, at paras. 48-62 of his judgment (pp. 877-9); and that accordingly the burden had shifted to the Trust to show a non-discriminatory explanation, which it had not done. He referred us to the classic exposition of the correct approach to such cases in the judgment of Elias J in *Bahl v The Law Society* UKEAT/1056/01, [2003] IRLR 640, at paras. 99-101 (p. 651) and also to the judgment of this Court in *Anya v University of Oxford* [2001] EWCA Civ 405, [2001] ICR 847. He acknowledged that a finding that the mistakes in question did not raise a *prima facie* case of discrimination was in principle open to the Tribunal, but he submitted that such a finding required a fuller explanation than the purely conclusory statements made by the Tribunal. He said that his complaint was not so much about the Tribunal's approach to the statutory burden of proof as about its failure to explain its reasoning.

37. I cannot accept that submission. The degree of reasoning required to justify the conclusion that a prima facie case of discrimination has not been shown depends on the particular case. Here the mistakes on the part of Ms Ashworth which had led the Tribunal to find that her initial dismissal decision was unfair had been specifically identified. There was, contrary to Mr Laddie's submission, nothing about them that was unusual or called for some specific explanation beyond that appearing from its own analysis. On the contrary, they are just the kind of mistake that a manager, even when helped by good HR advice (or, a cynic might say, when hindered by poor HR advice, which sometimes errs on the side of over-elaboration) might make in a tricky conduct case – or, as the EAT observed at para. 50 of its judgment, nothing more than human error. Certainly, that was a matter on which the ET and EAT were well-placed to form a judgement and on which this Court should be very slow to take a different view.

38. I would add that Mr Cooper told us, and made good by reference to the Appellant's closing submissions in the Tribunal, that the case now advanced by Mr Laddie bore little relation to the way the race discrimination claim was advanced in the Tribunal, where the focus was almost entirely on an alleged animosity felt towards the Appellant by Ms Leegood and other managers at her level and where there was almost no mention of Ms Ashworth. That is indeed the point being made by the Tribunal at para. 219 of its Reasons.

DISPOSAL

39. I would dismiss the appeal.

Beatson LJ:

40. I agree.

Longmore LJ:

41. I also agree.