Appeal No. UKEAT/0039/20/OO

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 January 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

MR D BLEIMAN

MRS M V MCARTHUR BA FCIPD

CUMMINS LTD — APPELLANT

MR W MOHAMMED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ORLANDO HOLLOWAY (of Counsel), Instructed by: Squire Patton Boggs LLP 6 Wellington Place Leeds West Yorkshire LS1 4AP
For the Respondent	MR JAMES CARTER (of Counsel) Instructed by: DWS Legal 14-18 Friar Lane Leicester Leicestershire LE1 5RA

SUMMARY

Disability Discrimination and Unfair Dismissal

The Claimant was dismissed by the Respondent. In considering claims that the dismissal constituted discrimination because of something arising in consequence of disability and was unfair, the Tribunal failed to properly determine the decision maker's reason for dismissal, substituted its view for that of the Respondent, and so erred in law.

HIS HONOUR JUDGE JAMES TAYLER

1. This is an appeal against a decision of the Employment Tribunal, Employment Judge Cassell with Members, who sat to determine this matter from 12 to 16 August 2019. The Tribunal reserved Judgment. The Judgment was sent to the parties on 19 September 2019.

2. The Claimant commenced employment as a Chief Machinist with the Respondent, a global designer and manufacturer of diesel and alternative fuel engines, on 15 May 1987.

3. On 11 July 2016, the Claimant was given a final written warning for aggressive behaviour. On 17 August 2016, the Claimant was diagnosed as suffering from anxiety and depression and began a period of sick leave.

4. On 31 August 2016, the Claimant visited his General Practitioner and was advised to take a short break for a therapeutic holiday. Also on 31 August 2016, there was a telephone call between the Claimant, Mr Hadley, a manager, and Ms Price, Human Resources Manager. Prior to the provision of his witness statement the Claimant had not contended that he had been given permission to travel to Pakistan during the meeting by Ms Price (although it was suggested at the appeal stage that Mr Hadley had given the Claimant permission to travel). In the Tribunal's findings of fact it was repeatedly stated that the Claimant had been given permission to travel to Pakistan to take a recuperative break by Ms Price, or, at least, believed that he had been given permission,

5. The Claimant attended an appointment with Dr Cassidy of Occupational Health on 15 September 2016. It was the Respondent's case that during the consultation the Claimant was informed that he was fit to return to work, despite the fact that he was still subject to a sick note

A that lasted until the end of the month. The Respondent also contended that was the context in which the Claimant had travelled to Pakistan without having permission to do so.

B 6. On 20 September 2016, a letter was delivered to the Claimant's address inviting him to a meeting on 22 September 2016 to discuss the contents of Dr Cassidy's report. On 21 September 2016, the Claimant's wife telephoned Ms Price to state that the Claimant could not attend. Ms Price offered an alternative date of 23 September 2016. The Claimant's wife then told Ms Price
C that the Claimant was in Pakistan.

7. This resulted in the commencement of disciplinary proceedings. A disciplinary hearing
D took place before Mr Smith on 9 June 2017. The Claimant was dismissed without notice by letter of 20 June 2017. Mr Smith concluded:

> **"Having taken into consideration the information you provided and the statement which you made. The company found the allegations of misconduct to be proven on all accounts. You received a final written warning for conduct on 29th June 2016 which was live when the allegation took place, my decision is that**
E **the sanction is escalated to dismissal and your employment is terminated with effect from 20th June 2017."**

8. The Claimant appealed against his dismissal. An appeal hearing was heard on 17 July
F 2017. The appeal was dismissed by letter dated 21 July 2017.

9. The Claimant presented his Claim to the ET on 17 October 2017.

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10. A Preliminary Hearing for Case Management occurred on 3 April 2018 before EJ Ord at Cambridge. EJ Ord set out the issues for determination in detail.

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11. The hearing took place between 12 to 16 August 2019. The Judgment and Reasons were sent to the parties on 16 September 2019. A Remedy Hearing was held on 13 November 2019.

A The Respondent was ordered to pay compensation of £29,721.71 to the Claimant, including an award for injury to feelings of £10,000.

B 12. By a Notice of Appeal with seal date 6 March 2020, the Respondent appealed against the decision of the ET.

C 13. The first ground is that the Tribunal had failed correctly to apply the test when considering the claim under s15 of **the Equality Act 2010** ("**EqA 2010**") and, in particular, the ET had not properly determined the Respondent's reason for the dismissal, but appeared to have accepted a "but for" analysis of the question of whether the dismissal was because of 'something' arising in consequence of disability. The 'something' arising in consequence of disability had been stated at the Preliminary Hearing for Case Management to be the Claimant taking a trip to Pakistan.

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E 14. The second ground of Appeal is that the Tribunal substituted its own decision for that of the employer, in concluding that the dismissal was unfair. Mr Holloway set out in his Skeleton Argument a series of paragraphs in the reasons in which the Tribunal determined as a fact that the Claimant had been given permission by Ms Price to travel to Pakistan or, at the very least, believed that he had been given such permission. In particular, he refers to the following paragraphs in the Tribunal's reasoning: 9.20, 9.44, 15 and 17.

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G 15. The Respondent further contends that in considering the test pursuant to **British Home Stores v Burchell** [1980] ICR 303, the Tribunal failed to determine the specific nature of the misconduct the Respondent found the Claimant was guilty of, and that there had been a failure to determine whether there were reasonable grounds for the Respondent to believe in the misconduct having occurred. The Respondent also contended that the Tribunal had failed to specifically state whether dismissal fell within the reasonable range of responses.

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16. Grounds three, four and five overlapped, and all dealt with the question of whether there was material that the Tribunal failed to consider in determining that the Claimant had been given permission to travel to Pakistan by Ms Price, alternatively that the finding was perverse or, that there were no adequate reasons for rejecting the evidence that the Claimant had not been given such permission.

17. The matter was considered under Rule 3(7) by Her Honour Judge Stacey, who, in an Order with a seal date of 6 March 2020 allowed grounds 1, 2, 3, 4 and 5 to proceed. The focus of her reasoning was in respect of grounds 1 and 2. She considered it was arguable that the Tribunal had not applied the correct test set out in **Psnaiser v NHS England** [2016] IRLR 170 to the discrimination because of something arising in consequence of disability claim and/or that the Tribunal had fallen into the substitution trap in the unfair dismissal claim. A final ground of appeal, ground 6, alleged a failure of the Tribunal to deal with the issue of contribution which was included in the list of issues. That ground was not permitted to proceed on the basis that it was premature and to be dealt with as a matter of remedy.

18. In considering this Appeal, we have regard to the well-known statement by Mummery LJ in **Brent LBC v Fuller** [2011] ICR 806 CA at paragraphs 30:

> **"Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the tribunal, but then overlooked or misapplied at the point of decision. The tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

19. We also considered the statement of Sedley LJ at paragraph 26 of **Anya v University of Oxford** [2001] ICR 847:

> **"The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues."**

20. We also had regard to Rule 62(5) of **The Employment Tribunal Rules 2013** in respect of judgments and reasons:

> "**In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. …"**

21. There are some unusual features of the structure of the Tribunal's decision. It commences with an introduction and then, under the heading "The Relevant Law", only set out the statutory provisions. Case law is considered to some extent in the analysis section. The list of issues is not set out, nor is there evidence of the Tribunal having considered each issue to check it had been determined.

22. The first Ground of Appeal is that the Tribunal failed to apply the correct legal test when it considered s15 **Eq A 2010**, which provides:

> **"15 Discrimination arising from disability**
>
> **(1) A person (A) discriminates against a disabled person (B) if—**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."**

23. In the section headed "The Relevant Law" section 126 **EqA 2010** was quoted, although it was not referred to in the analysis.

24. The correct approach to claims of discrimination because of something arising in consequence of dismissal was set out, after an analysis of the pre-existing authorities, by Simler J in **Pnaiser v NHS England & Anor** UKEAT/0137/15/LA at para. 31:

> **"31. In the course of submissions I was referred by counsel to a number of authorities including IPC Media Ltd v Millar [2013] IRLR 707, Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN and Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, as indicating the proper approach to determining section15 claims. There was substantial common ground between the parties. From these authorities, the proper approach can be summarised as follows:**
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> **(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.**
>
> **(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.**
>
> **(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any *prima facie* case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).**
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> **(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.**
>
> **(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.**
>
> **…**

> **(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."**

25. The most important of the subparagraphs for the purposes of this appeal is (b). The tribunal must consider why the decision-maker acted as he or she did. It is not necessary that the 'something' that arose in consequence of disability be the sole, or even the principle, reason for the treatment, but it must be a material factor. There are cases in which there is evidence that is sufficient to suggest that the reason for the treatment was 'something' arising in consequence of disability, as a result of which the burden would shift to the respondent to prove that the treatment was in no sense whatsoever because of the 'something' arising in consequence of disability. However, as we have already set out, despite referring to the burden of proof provision, the Tribunal did not apply it in this case.

26. Her Honour Judge Stacey in **Kelso v Department for Work & Pensions** UKEATS/0009/15/SM held:

> **"35. In my opinion the case pled by the claimant under section 15, which includes the admission made at the preliminary hearing, has no reasonable prospects of success. I agree with the EJ that the disability which the claimant claims to suffer is part of the background of the case. It is not on these pleadings possible to construe the unfavourable act of dismissal as "treatment [which] is because of something arising in consequence of the disabled person's disability." It is necessary to construe the section by considering the words used in it. Thus there must be treatment, in this case dismissal; then there must be something arising from disability, in this case the claim for benefits. Final and vitally the treatment must be "because" of the "something." The claimant has agreed in her pleadings that she was dismissed because her employers thought she had been dishonest. That dishonesty is not something arising from disability."**

27. In **Charlesworth v Dransfields Engineering Services Ltd** UKEAT/0197/16/JOJ Simler J returned to the issue as to the required mental process, stating:

> **"It seems to me that the words are used synonymously to mean in both cases an influence or cause that does in fact operate on the mind of a putative discriminator whether consciously or subconsciously to a significant extent and so amounts to an effective cause."**

28. In so doing, Simler J was applying the test in determining mental processes that generally applies in discrimination claims. At paragraph 18 Simler J noted that there may be circumstances in which a factual matter that arises in consequence of disability is effectively a context for the decision, but not in any way the effective cause of it:

> **"But that does not detract from the possibility in a particular case or on particular facts, that absence is merely part of the context and not an effective cause. Every case will depend on its own particular facts. Here, the Tribunal concluded that the Claimant's absence was not an effective or operative cause of his dismissal but was merely the occasion on which the Respondent was able to identify something it may very well have identified in other ways and in other circumstances, namely that the particular post was capable of being deleted with its responsibilities absorbed by others. That conclusion led the Tribunal to hold that what caused the Claimant's dismissal on these particular facts was the view that the Respondent could manage without him and that the absence formed part of the context only and was not an operative cause. In my judgment, that was a conclusion open to the Tribunal, applying the statutory test, and reached without error of law."**

29. What is clear from these authorities is that the fundamental matter for the tribunal to determine is the reason for the impugned treatment? The treatment in this case was dismissal. The Claimant relies on paragraphs 9.39-9.41 to contend that it was to do with his trip to Pakistan. When the Tribunal came to reach its key finding, it did so without determining the specific reasoning process of Mr Smith. It was dealt with at paragraph 19 as follows:

> **"19. The unfavourable treatment was dismissal. Had it not been for his disability the claimant would not have taken his "therapeutic" break to Pakistan and been required to attend the disciplinary hearing. Dismissal was the decision of Mr Smith who was acting on behalf of the Respondent in the role of disciplining officer. In our judgment the break was an effective cause of the unfavourable treatment. We agree with the submissions made by Mr Carter at paragraph 47 of his written submissions, in which this analysis was developed."**

30. That key paragraph of the ET's decision simply fails to grapple with the reasoning process of Mr Smith; which facts he took into account; precisely what (if any) of those factors was something that arose in consequence of the Claimant's disability. Was it the mere fact of travelling to Pakistan that resulted in the dismissal or was the visit to Pakistan the context of a dismissal that resulted from the fact that the Claimant made the visit in circumstances in which

A he had been told by Dr Cassidy that he was fit to return to work and he had not been granted permission to make trip. The reasoning process of Mr Smith was by no means self evident.

B 31. We do not accept that a tribunal, in dealing with such a fundamental question as the reason for treatment, can simply adopt one party's submissions, in this case by referring to "submissions made by Mr Carter at paragraph 47 of his written submissions". Furthermore, the submissions included as 'something' arising in consequence of the Claimant's disability, the fact that he had

C not understood the correct procedure to follow. That was not how the Claimant had pleaded the claim. To put the claim on that basis would have required an amendment.

D 32. In the circumstances, we conclude that the tribunal failed to properly determine Mr Smith's reason for dismissal and whether it was 'something' that arose in consequence of disability.

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33. The second ground of appeal is that the tribunal substituted its own decision for that of the employer in concluding that the dismissal was unfair. Section 98 of **the Employment Rights Act 1996** provides:

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> **"98 General.**
>
> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it—**
>
> **…**
>
> **(b) relates to the conduct of the employee,**
>
> **…**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**

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> **(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."**

34. In a claim of unfair dismissal, the fundamental task of the ET is to decide the reason for dismissal; in a misconduct case the tribunal should consider whether the respondent genuinely believed that the Claimant was guilty of the conduct alleged and whether it had reasonable grounds for that belief after having carried out a reasonable investigation. In the light of the conduct that has been found the tribunal must consider whether dismissal fell within the band of reasonable responses. The band of reasonableness applies to the investigation as well as to the decision taken at its conclusion: **J Sainsbury Plc v Hitt** [2003] ICR 111.

35. It is important not to confuse the factual reason for dismissal with the potentially fair categories of reasons for dismissal provided for in section 94(1) **ERA**. Determining the factual reason for dismissal involves determining what matter or matters resulted in the decision to dismiss. It requires a consideration of the thought processes of the decision maker. It is not sufficient for a tribunal merely to say that the reason for dismissal was misconduct; the tribunal must identify what that misconduct was.

36. There was some difficulty in this case because of the shift in the way the case had been put by the parties, which is a matter to which we will return briefly later in this decision. But, however the case was put, the Tribunal had to reach a factual conclusion as to what conduct the Claimant was dismissed for. Furthermore, it had to determine what potential reason for dismissal was in the mind of Mr Smith when considering the reasonableness of the investigation in respect of that matter, and whether there were reasonable grounds for the decision he reached. The

Tribunal had to do so on the basis of the material as it was before Mr Smith when he made the decision to dismiss, rather than as it was at the ET hearing.

37. In **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220 CA Lord Justice Mummery dealt with the matter at paragraph 43 with customary brevity:

> **"It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."**

38. The Tribunal gave its reasoning on the issue of unfair dismissal at paragraph 25:

> **"25. It is of course for the respondent to show the reason or principal reason for dismissal. The evidence points to the principal reason in the mind of the dismissing officer, Mr Smith, as being the conduct of the claimant. We have already commented on the linkage between the claimant's disability and his actions. What section 98(4) refers to and the emphasis under (a) is whether in the circumstances, which includes the size and administrative resources of the employer's undertaking, the employer acting reasonably or unreasonably in treating it as a sufficient reason for dismissing him. In British Home Stores Ltd. v Burchell [1980] ICR 303, the tests are laid out carefully and are well known and often cited. The second and third questions, the reasonable grounds for the belief based on a reasonable investigation go to the question of reasonableness under section 98(4) and there the burden is neutral. We must not of course substitute our own views. We have already commented on the deficiencies in the investigation. There were failings such that we do not find the investigation to have been a reasonable one. The whole process took many months to complete and there was ample time to undertake those enquiries that any reasonable investigator would have undertaken. The impression that we were given was that the Respondent was focussed purely on the apparent need for the claimant to follow process and the reasons for his behaviour were of relatively little importance. The appeal hearing did nothing to rectify the situation. Mr Barker, in our judgment did little but go through the motions of an appeal hearing. It was an opportunity to reconsider the inherent and obvious unfairness in dismissing the claimant in the circumstances that were apparent. He simply endorsed the earlier decision. For these reasons we find that the dismissal was unfair."**

39. We note that in the second sentence of that paragraph the Tribunal stated "The evidence points to the principal reason in the mind of the dismissing officer, Mr Smith, as being the conduct of the claimant." However, the paragraph does not set out what conduct Mr Smith determined the

Claimant to be guilty of. While there are a number of other passages that suggest that there was an issue in respect of the way in which the Claimant had dealt with his visit to Pakistan; there were a number of potential reasons that could have been at play in Mr Smith's mind. It could have been the mere fact of travelling to Pakistan; that he did not have any permission to do so; that he had oral permission but had travelled without written permission (although that is not the way the case was put before Mr Smith); that he travelled despite Dr Cassidy having suggested that he was fit to return to work and so the Claimant had made himself unavailable for meetings. The Tribunal was required to reach a clear conclusion about Mr Smith's reason for deciding to dismiss the Claimant but failed to do so.

40. Furthermore, it is clear that it was not alleged when Mr Smith conducted the disciplinary hearing that the Claimant had been given permission to travel to Pakistan by Ms Price. Yet, notwithstanding this, the Tribunal repeatedly found, as a fact, that the Claimant had, or reasonably believed that he had, been given such permission by Ms Price (see paragraphs 9.32, 9.44, 9.50 and 17. The Tribunal referred to the core of his case having been that he had been given permission to travel to Pakistan. The was not his argument at the time of the disciplinary hearing. We consider that the failure to clearly determine the reason for dismissal and the focus of the Tribunal on its conclusion that the Claimant had been given permission to travel to Pakistan by Ms Price, demonstrates that it adopted a substitution mindset and so erred in law.

41. We conclude that, as the Tribunal decided not to deal with **Polkey** or contribution, there was no need for it to reach a factual conclusion as to whether the Claimant had been given permission to travel to Pakistan by Ms Price. In those circumstances, Grounds of Appeal 3 to 5 do not require determination.

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42. We conclude that the Tribunal erred in law in its approach both to the decision that the Claimant had been dismissed because of something arising in consequence of his disability; namely, his visit to Pakistan and that he had been unfairly dismissed.

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43. Next, we must consider the appropriate disposal of the appeal. The Respondent contends, in respect of disability discrimination, that we should determine the matter ourselves, although a similar submission is not made in respect of the unfair dismissal claim. In **Jafri v Lincoln College** [2014] IRLR 544, Lord Justice Underhill considered the authorities concerning the circumstances in which the EAT may determine matters after allowing an appeal. Although he regretted the fact that the EAT could not substitute a decision merely because it was in as good a position as the ET to decide the matter itself, he concluded that, on a proper analysis of the existing authorities, the EAT could only substitute a decision if it could determine that only one outcome would be possible. We consider that in the absence of a clear determination by the Tribunal of why Mr Smith decided to dismiss the Claimant we cannot realistically conclude that this was a case in which there was only one possible outcome, necessarily that means that the entirety of the case must be remitted.

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44. We have then gone on to consider whether that should be to the same tribunal or a differently constituted tribunal, having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. Considerable time has passed since the Hearing. One of the difficulties of remitting the matter to the same tribunal would be the necessity of bringing together the employment judge and lay members. This could cause further significant delay. We also regretfully conclude that this decision was fundamentally flawed due to the tribunal's failure to clearly determine a key issue; namely, the factual reason for the decision to dismiss. That raises the risk that it might be thought by the Respondent that the tribunal could be inclined to take a

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'second bite of the cherry'. In those circumstances we consider that the matter has to be remitted to a newly constituted tribunal.

45. Some problems have arisen in this case because there was a shift in the arguments of both parties by the time the matter reached the ET. The Respondent has shifted to an extent in what it contends was the reason for dismissal. In part, that may be because the Claimant had shifted position to contend that Ms Price had given the Claimant permission to go to Pakistan. That was not an argument that was raised at all internally, although it was suggested at the appeal stage that Mr Hadley had given the Claimant permission to travel. There has also been a shift, to some extent, on the part of the Claimant to contend that the 'something' that arose in consequence of disability may have been the Claimant's understanding of the process to be adopted when seeking leave from work in his unusual circumstances. It may well be thought appropriate on remission to the employment tribunal for a case management discussion to be held to revisit the issues if the parties wish to do so. Any applications to amend could be determined to ensure that when the matter is reheard there is clarity as to precisely what the Respondent says was the reason for the dismissal of the claimant and precisely what the Claimant contends was the "something" arising in consequence of disability. Such case management is a matter for the employment tribunal not the EAT.

46. It is with considerable regret that we made this determination as it puts both parties in the unenviable position of the claim being remitted for a further full hearing. We hope that the parties will take some time to consider whether rehearing is the only option, and whether there might be some alternative route to resolve their differences.