

ENGLAND AND WALES / JUDGMENT

Williams v Home Office

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Neutral Citation Number: [2005] EWCA Civ 1648 IN THE SUPREME COURT OF JUDICATURE IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE HIGH COURT EMPLOYMENT APPEAL TRIBUNAL (His Honour Judge McMullen QC) B E F O R E: LORD JUSTICE AULD LORD JUSTICE TUCKEY LORD JUSTICE MAURICE KAY

- ----- SANDRA WILLIAMS -v- HOME OFFICE A2/2004/2268 Royal Courts of Justice Strand London, WC2 Wednesday, 27 July 2005 Claimant/Appellant Defendant/Respondent
- ----- (Computer-Aided Transcript of the Stenograph Notes of Smith Bernal Wordwave Limited 190 Fleet Street, London EC4A 2AG Tel No: 020 7404 1400 Fax No: 020 7831 8838 Official Shorthand Writers to the Court)
- ----- MR MARK AFEEVA (instructed by Umrankhan & Partners) appeared on behalf of the Appellant MR PHILIP COPPEL (instructed by Treasury Solicitor) appeared on behalf of the Respondent
- ----- J U D G M E N T 1. 2. LORD JUSTICE MAURICE KAY: Mrs Sandra Williams began to work for the Home Office in 1982. By 1999 she had moved to Gatwick Airport, South Terminal, where she was working as an immigration officer. The event giving rise to this appeal began with allegations made by her against her employers that she was the victim of race discrimination. She is a black woman of Jamaican origin. The matter has something of a tortuous history. Her application to the Employment Tribunal was first heard in September 2002. That application was unsuccessful, but the Employment Tribunal itself, on a review hearing, subsequently decided that the matter ought be reconsidered by a newly constituted tribunal as a result of some material that had come to light after the initial hearing. The review tribunal, in ordering a fresh hearing, stated that the issues to be determined were - "whether the applicant was directly discriminated against on the grounds of her race by the respondent's refusal to extend the applicant's full pay beyond 16 November 2001 and or the applicant being told on 21 November 2001 that she would get full pay for hours worked and pension pay for those not worked." It was apparent therefore that the second Employment Tribunal to have considered the matter was going to address those two issues. It did so in a hearing which occurred in March 2004. 3. In a reserved decision that was promulgated on 15 April 2004 it decided the first issue in favour of Mrs Williams but dismissed her application in relation to the second issue. The application was then adjourned to a remedies hearing in relation to the first issue. That has yet to take place.

4. Mrs Williams appealed to the Employment Appeal Tribunal in relation to the second issue and an aspect of the case connected with the first issue, in due course the Employment Appeal Tribunal dismissed her appeal. That was on 12 October 2004, the Employment Appeal Tribunal then comprising His Honour Judge McMullen QC, Mr H Singh and Mr M Worthington. She now appeals to this court. 5. 6. Initially her application for permission to appeal was refused on the papers by Lord Justice Peter Gibson. She was granted permission to appeal with a conspicuous degree of hesitation by Lord Justice Mummery and Mr Justice Munby on 28 January 2005. Indeed, unusually, each of the two judges considering the matter on that occasion concluded that the appeal did not have a real prospect of success but that it ought to be allowed to proceed to a full hearing in any event. That then is the procedural history. I turn now to the underlying facts which were found by the Employment Tribunal. As I have indicated, the period of employment began in 1982. At that time Mrs Williams was taken on as a clerical assistant at the Immigration Department in Croydon. In 1988 she was promoted to administrative officer and moved to the Public Inquiry Office where she worked for 11 years. In 1999, while on maternity leave, she successfully applied for the post of immigration officer. It was in December 1999 that she moved to Gatwick Airport in that capacity. 7. 8. In March 2000 Mrs Williams made a complaint that she had been harassed at work by Mr Gormally, a chief immigration officer at Gatwick Airport. It was investigated. Without going into all the detail, it is apparent that her complaint had been justified. The outcome was that Mr Gormally was reprimanded. From March 2001 Mrs Williams was on sick leave. It is necessary to say something about her terms and conditions of employment in that regard. A document entitled "Sick Leave with Pay During Sick Absences" dealt with arrangements for payment of staff during sickness. Paragraph 7.3 (1) stated: "Provided that there is a reasonable prospect of eventual recovery your sick leave allowances as a full time member of staff are as follows: (a) full pay for not more than 6 months in any period of 12 months, and (b) thereafter half pay subject to a maximum of 12 months' sick leave in any period of 4 years or less." When staff have exhausted sick leave on full and half pay they may be allowed pay during a further period of sick leave at a rate not exceeding the amount of the pension for which they would have qualified if they had retired on ill health grounds.
9. Mrs Williams' sick leave, which would have commenced in March 2001, was unfortunately of some duration. Her entitlement to sick pay at full rate came to an end on 5 September 2001. She was then due to be paid at half rate by reason of the document to which I have referred.
10. That brings me to the period of time which gives rise to the matters in dispute. At the material time Mr Ian Baxter was head of two of the three operational personnel teams, managing some 75 staff and responsible for 5,500 staff at the Immigration and Nationality Directorate. At the end of September 2001 Mrs Williams met Patricia Fuller of the Health and Welfare Services, as a result of which Patricia Fuller wrote a memorandum to Ian Baxter dated 1 October 2001. She referred to the history, including the incident of harassment and the subsequent illness and absence. Patricia Fuller reported that Mrs Williams had made inquiries into the possibility of her remaining on full pay until the whole matter was resolved. Mr Baxter sent a copy of the memorandum to his deputy in an e.mail. He said: "We

have very occasionally agreed to not reducing pay due to extended sick leave when clearly the Department is at fault because of a particular chain of circumstances, eg, over-lengthy investigation From the limited amount I know about this case I think it is likely we will have to concede something here. Can we discuss early next week please?"

11. Without referring to all the matters that then occurred, there was another e.mail from Mr Baxter to his deputy referring to exceptional cases where pay had not been reduced "where clearly the Department is at fault". He had in mind cases where investigations had taken longer than they should have done. Mr Baxter at that stage was concerned about the length of the investigation relating to the harassment. He had a conversation as a result of which he was informed that the disciplinary proceedings against Mr SMITH BERNAL WORDWAVE Gormally were on going but they were expected to be completed by 16 November. In fact, at that time the disciplinary proceedings had already been completed and Mr Gormally had received a reprimand against which he did not appeal. There was no real significance in the 16 November in relation to the investigation.
12. On 17 October 2001 Mr Baxter extended Mrs Williams' sick pay entitlement at full pay to 16 November 2001. In an e.mail to Patricia Fuller he said: "Taking account of the circumstances of the case, I am exceptionally prepared to put her back on full pay with effect from 5 September."
13. As time went by Mrs Williams became more positive about a return to work. A meeting was arranged for 14 November. Mrs Williams asked whether she could return on a phased basis and, if so, how she would be paid. Following that meeting, the lady with whom she had been dealing prepared a memorandum confirming that Mrs Williams was ready to return to work, but felt that it would need to be phased in. Mrs Williams was to produce details of a proposed plan for a phased return. She did so. She indicated that she planned to work between 11 and 7 from Monday to Wednesday inclusive and to maintain that pattern for three months. She then wrote to Mr Baxter on 20 November in the following terms: "I wish to inform you that on the advice of my doctor on the possible phased return to work, I will be returning to Gatwick South Terminal on Monday 26 November 2001. The idea is that this is a hostile environment because of the way I am being treated. This phased return to work is only under the strict understanding that it is on full pay, that I remain under the care of my doctor. I expect a review after three months phased return to work once full pay is completed."
14. By that time Mrs Williams had involved her union representative. There were communications raising various issues related not only to pay but also to a period of probation and as to the identity of her line manager. One of the managers was able to say that Mrs Williams had told her that she had been signed off by the doctor and was fit to return, and she had offered her full support. Be that as it may, the terms as to pay on a phased return to work were, and continued to be, a sticking point. 15. In the event, Mrs Williams did not return to work on 26 November, as had been indicated. She remained on sick leave thereafter, as indeed she still was at the time of the Employment Tribunal hearing.

She was in receipt of pay at the lesser pension rate.

16. Her complaints therefore were that she was the victim of discrimination both in the fixing of the term of the extension of full pay after 5 September and limiting it to 16 November and, secondly, in relation to the refusal of full pay upon the commencement of her phased return to work. Her case was advanced by reference to two white female comparators, Deborah Fearn and Sonia Hatfield. They, too, had made internal complaints of discrimination and victimisation against a more senior officer. In each case there had been a resulting period of absence from work. Mrs Fearn had commenced proceedings in the Employment Tribunal complaining of race SMITH BERNAL WORDWAVE discrimination and victimisation. Prior to any hearing a settlement was reached. There was a compromise agreement dated 9 September 2001. One of its provisions was that Mrs Fearn should continue to receive full pay, including during a phased return to work. She returned to work on 11 March 2002. 17. Sonia Hatfield was informed in May 2001 that her complaint had been upheld. In April 2001 she had presented an originating application to the Employment Tribunal. In May 2001 she had become unwell. In August 2001 her application to the Employment Tribunal was dismissed. She had withdrawn a claim for unfair dismissal. The Tribunal had decided that it had no jurisdiction to hear a claim of race discrimination in her case, and her sick pay was reduced to half salary after six months. However she took legal advice. The eventual outcome was that in early February 2002 a decision was taken that she should go on to full pay during her agreed phased return to work, that being on the basis that it would bring her in line with Mrs Fearn. Those two women became the comparators for the purposes of the present litigation. 18. In its decision the Employment Tribunal set out the basic legal principles to be derived from the Race Relations Act 1976 and the leading authorities. They were set out in this passage: "Direct race discrimination is defined by s.1 (1) (a) : 'A person discriminates against another in any circumstances relevant to the purposes of any provision of this Act if on racial grounds he treats that other less favourably than he treats or would treat other persons'. It is unlawful by s.4 (2) for a person in the case of a person employed by him at an establishment in Great Britain to discriminate against that employee by dismissing her or subjecting her to another detriment. Where a complainant proves facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent has committed such an act of discrimination the Tribunal shall uphold the complaint unless the respondent proves that it did not commit or, as the case may be, is not to be treated as having committed that act. (s.54A) A comparison of the case of a person of a particular racial group with that of a person not of that group must be such that the relevant circumstances in the one case are the same or not materially different to the other. (s.3 (4))" Reference was then made to the burden of proof and the guidelines given by the Employment Appeal Tribunal in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205 and the general principles referred to in the Employment Appeal Tribunal decision in *Law Society v Bahl* [2003] IRLR 640. (I interpose that principles expounded by Mr Justice Elias on that occasion were later approved by this Court on appeal.) The Employment Tribunal then made reference to the fact that it - " may infer discrimination if there is no

explanation for the treatment SMITH BERNAL WORDWAVE or the explanation is rejected (see *Anya v University of Oxford* [2001] ICR 847; *King v Great Britain-China Centre* [1992] ICR 516; *Glasgow City Council v Zafar* [1998] ICR 12)."

19. The Employment Tribunal then divided its consideration by addressing the two issues separately. Dealing first with the question of the duration for which full pay was being conceded up to 16 November 2002, the complaint of Mrs Williams was that Mr Baxter's decision to that effect amounted to less favourable treatment than had been afforded to Sonia Hatfield. This called for an explanation on the part of Mr Baxter. The decision of the Employment Tribunal records that he said that he was unaware of the racial origins of Mrs Williams at the time he made the decision. He said a number of things related to that. He said he did not know what her ethnic origin was. He did not think about what was meant by allegations of "racial motivation" that had been made by her. He said he did not speculate whether an allegation of racial motivation meant that she was from an ethnic minority. He said that, quite simply, race had not entered into his decision-making process. The Employment Tribunal was wholly unimpressed with those explanations. It said: "The Tribunal were troubled by these statements from someone with many years' experience in human resources. They appeared to be inconsistent. Mr Baxter should have known (from the documents he had seen) that the applicant was black. He might not have recalled that her origins were Jamaican. But he ought to have known or at least have made a connection between her allegations that she was from an ethnic The explanation that his conduct did not amount to minority. discrimination because he did not know that she was black lacks credibility." That is what led to the finding of discrimination on the first issue. That finding was coupled with this passage: "The Tribunal has to be satisfied that the explanation for the differential treatment is credible. It is not. Clearly a decision was made in relation to the applicant that resulted in her sick pay at full rate terminating on 16 November and not on the 26 November when she was well enough to return to work."
20. The Employment Tribunal then turned to the second issue which it headed "Full pay only for hours worked during phased return to work." It compared the cases of Mrs Williams, Mrs Fearn and Miss Hatfield. It noted significant similarities. Dealing with the explanation proffered by Mr Baxter to what was, on the face of it, less favourable treatment, the Tribunal said: "Mr Baxter explains his decision by saying that he followed the rule - recently confirmed to him - that employees returning to work after sickness on a phased basis should be paid only for the time they worked. He did not know that a different arrangement had been made for Debbie Fearn (and the arrangement in the case of Sonia Hatfield was made after SMITH BERNAL WORDWAVE Mr Baxter had made his decision). Mr Baxter followed the rule and did not believe he had any discretion in the matter - indeed the reminder sent out to managers was precisely to avoid inconsistencies that might result from the use of discretion and to ensure that all were dealt with alike. It does not matter that the decisions in these three cases may have been taken by different individuals. In the case of Debbie Fearn it was part of a negotiated settlement of her Employment Tribunal complaint. In the case of Sonia Hatfield it was the result of pressure from her and her union to be treated in

the same way as Debbie Fearn. The fact remains that viewed objectively the applicant has been treated less favourably. The Tribunal considered the explanation given by Mr Baxter. He had followed the rule and dealt with the situation strictly in accordance with the rule. He did not consider that he had any discretion in the matter. The Tribunal has tried to get inside his mind and is satisfied that he simply kept to the rule and the racial origins of the applicant played no part in his decision. He has given the Tribunal cogent reasons for his decision." It is against that conclusion that much of this appeal is directed.

21. The first submission made by Mr Afeeva, on behalf of Mrs Williams, is a simple one, namely that the acceptance of Mr Baxter's explanation on the second issue was perverse. He submits that having rejected Mr Baxter's explanation in relation to the first decision as lacking credibility, the Employment Tribunal ought to have rejected his explanation in relation to the second decision because he was, or had become, a discredited witness. Mr Afeeva has referred to numerous documents in order to demonstrate just how lacking in credibility the explanation in relation to the first issue had been. There is force in his submission about that, and in those circumstances it is perhaps not necessary to itemise the documents. However I do not consider that that in itself required the Employment Tribunal to reach a similar conclusion about Mr Baxter's explanation in relation to the second issue.
22. Mr Afeeva seeks to rely on passages from the judgment of Lord Justice Sedley in *Anya v University of Oxford*, in particular these two passages. At paragraph 11 he said: "Very little direct discrimination is today overt or even deliberate. What King and Qureshi tell courts to look for, in order to give effect to the legislation, are indicators from a time before or after a particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by racial bias." Later in paragraph 23 it is stated: "It is precisely because a witness who by himself comes across as essentially truthful may be shown by documentary evidence or by inconsistency to be less reliable than it seems that the totality of the SMITH BERNAL WORDWAVE evidence in a case like this has to be evaluated; and there was in this case no useful way of approaching the totality except through its parts." That leads Mr Afeeva to contend for what he describes as a holistic approach. 23. In my judgment there is no reason to suppose that that was not the approach of the Employment Tribunal in relation to the second issue. I therefore reject this first ground of appeal. The Employment Tribunal did not err in law simply by reaching different conclusions in relation to the two explanations.
24. The second submission is more difficult. In essence, it is that it was perverse to accept Mr Baxter's explanation of the second decision in the light of evidence and documents which demonstrated his involvement with the two comparators. This allegation of perversity is directed not only at the Employment Tribunal but also at the Employment Appeal Tribunal which considered further evidence and documentation particularly in relation to Mrs Fearn. As I have related, Mr Baxter's explanation was that he had followed what he considered to be the rule and did not believe that he had any discretion. As to the two comparators, his explanation was that he had not known the precise details of the arrangement made in the

case of Mrs Fearn and that the arrangement in Miss Hatfield's case had come at a later date. 25. It is necessary to keep in mind the high test of perversity which is now applied when dealing with appeals from Employment Tribunals. As was said by Lord Justice Mummery in *Yeboah v Crofton* [2002] IRLR 634, paragraph 93: "Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has 'grave doubts' about the decision of the Employment Tribunal, it must proceed with 'great care': *British Telecommunications Plc v Sheridan* [1990] IRLR 27 at paragraph 34." 26. I now turn to the documents and the material upon which Mr Afeeva relies in support of his submission that the acceptance of Mr Baxter's explanation was perverse. Dealing first with Mr Baxter's connection with Sonia Hatfield, he points to Mr Baxter's witness statement prepared for the second tribunal hearing. Mr Baxter said: "I did not consider that I had any discretion to authorise S to be paid full pay in this situation. Rather, I considered that this was a matter more appropriate for Steve Barnett the Director of Human Resources, one level above me. It was my understanding that Mr Barnett had agreed the handling of the employment tribunal issues and presumably, as Director, had agreed what had been settled under [Mrs Fearn's] compromise agreement. I therefore felt that he should be making the decision in relation to dealing with S's claim. Following my conversation with Ms Young, [one of Mr Baxter's SMITH BERNAL WORDWAVE colleagues] she wrote to Mr Barnett in January 2002 with draft letters of apology to S and suggesting that she and I felt that as a 'sign of goodwill', S should have her pay restored to full pay, thus treating S and [Mrs Fearn] in a like manner as regards their pay. Ms Young suggested that this should be done in conjunction with the letter of apology. It is my understanding that a letter of apology was duly sent and an offer was made that her full pay be restored."

27. The question that arises is whether that evidence necessarily undermines Mr Baxter's account that when dealing with Mrs Williams he did not believe that he had discretion. Mr Afeeva submits that - although there dealing with a point in time some months after the dealings with Mrs Williams - the evidence points to Mr Baxter having knowledge of the availability of a departure from the strict rules in appropriate circumstances.
28. Turning to Mrs Fearn, the material relied upon is that which emerged on appeal to the Employment Appeal Tribunal. It will be recalled that Mr Baxter's explanation to the Employment Tribunal had been that at the time of his decision in relation to Mrs Williams he had not known the details of the arrangement which had been made with Mrs Fearn about a phased return on full pay.
29. Mr Afeeva has taken us to a number of documents. I do not propose to refer to them all but the main ones would appear to be as follows. There was a letter of 11 October 2000 from Mr Baxter to the Permanent Secretary of the Home Office putting the Permanent Secretary in the picture as to Mrs Fearn's complaint and suggesting a way in which the matter should be dealt with at that time. There is a file note in January 2001, apparently in Mr Baxter's

handwriting, suggesting that Mrs Fearn should be kept on full pay until the current investigation is totally completed. An e.mail of 16 February 2001 from a colleague to Mr Baxter refers to the need for Mr Baxter to sign a minute. It goes on: "Although you said to say in the letter that we'd keep her on full pay and monitor it I feel this leaves it too open. Hence I've put in that we'll keep her on full pay until the result of the investigation is known - You may wish to change this back The decision is yours " A note of 30 August 2001 refers to the maker of the note having spoken to Mr Baxter and that he had repeated that someone had done a statement. It would appear that that relates to what was then thought to be the forthcoming Employment Tribunal hearing in Mrs Fearn's case. However on 9 September Mrs Fearn entered into the compromise agreement. There is a file note from 18 September suggesting that the file had been passed to Mr Baxter and he had been asked to find a suitable posting for Mrs Fearn, presumably pursuant to the compromise agreement. There was a letter to Mr Baxter of 19 September from a colleague asking if he could let her know his decision so that "I can inform Debbie." That was a reference to Mrs Fearn. Finally there is a file note of 16 November 2001 indicating that, a request having been made by someone whose name is redacted: "Draft response sent to Ian Baxter for clearance in view of the high profile nature of this case." SMITH BERNAL WORDWAVE There is no doubt that that is a reference to Mrs Fearn's case.

30. All that leaves Mr Afeeva to submit that it establishes beyond doubt that Mr Baxter must have known what had been agreed with Mrs Fearn and, in particular, the terms on which she would return on a phased basis on full pay. The Employment Tribunal never had an opportunity to consider that submission because it lacked the material. However it was all considered by the Employment Appeal Tribunal and the conclusion about it, as set out in the judgment, was this: "In respect of Mrs Fearn, even after looking at the new evidence which shows the paper trail we accept the respondent's contention that there was no link between what Mr Baxter knew of Mrs Fearn's criticisms and the terms of the compromise agreement relating as it did to her return on full pay or working shorter hours. Thus even in the light of that new material the Tribunal's decision cannot be said to be perverse."
31. Mr Coppel submits that that was a correct conclusion or at least an unassailable one and that the high demands of the perversity test are beyond the reach of the appellant in this regard. I agree. The documents show an involvement with the decision to keep Mrs Fearn on full pay when off sick and an involvement with some of the arrangements at about the time of the compromise agreement. But they do not point unequivocally to involvement in contemporaneous knowledge of the fact that one of its terms was full pay on a phased return. It may be that another Tribunal would have reached a different conclusion about these documents. That is not the test. The question is whether it was perverse of the Employment Appeal Tribunal to reach the conclusion that it did, having regard to the stringent test set out in *Yeboah v Crofton*. In my judgment, it cannot be said that it was perverse in that sense. Neither do I consider that the evidence of the way in which Mr Baxter subsequently dealt with the case of Sonia Hatfield, by referring it up to his line manager, points to perversity in the conclusion about Mr Baxter's treatment of Mrs

Williams.

32. The final ground of appeal relates to the finding that the decision not to extend sick leave on full pay until Mrs Williams was well enough to return to work on 26 November was an act of unlawful discrimination. The complaint is that having found discrimination the Employment Tribunal ought not to have put a terminal date on its consequences because that is, more appropriately, a matter for the remedies hearing which is yet to take place.
33. There was some debate as to whether it is open to Mrs Williams to appeal this part of the Tribunal decision because it is the part on which she succeeded. For my part, I see no technical difficulty when there remains the live issue of remedy. The decision of the Employment Appeal Tribunal in *Harrod v Ministry of Defence* [1981] ICR 8 is readily distinguishable. However I do not consider that there is merit in this ground of appeal. It was inevitable that the Employment Tribunal was going to concern itself with the facts as at 26 November because it was central to Mrs Williams' case that she had been well enough to return to work as at that date albeit on a phased basis. SMITH BERNAL WORDWAVE
34. Her second allegation was that it was an act of unlawful discrimination not to allow her to do so on full pay. Moreover the evidence was compelling. She had said that she would return on that date. When questioned by the chairman of the Employment Tribunal as to her reasons for not having Ing started work on 26 November, it is clear that they were unrelated to her health and were concerned entirely with her way of responding to the unfavourable decision as to the terms and conditions, including remuneration, which would apply. There is a passage which appears in the notice of appearance lodged by the Home Office in answer to the appeal to the Employment Appeal Tribunal which Mr Afeeva accepts accurately states the position. It is in these terms: "When questioned in detail by the chairman the appellant made it perfectly clear that the reason she did not return to work after 26 November was not because of ill health or because of Mr Baxter's decision not to extend her full pay beyond 16 November 2001; it was because of the subsequent decision that she should not be paid full pay during her phased return to work on a part time basis but should only be paid in full for the hours she actually worked. The Tribunal held that that decision was not an accurate basis for resignation."
35. All that leads me to the conclusion that there was no error of law made by the Tribunal relating to the finding of facts. It is the consequence of the discrimination found in relation to the first issue which had a terminal date of 26 November. Anything else would have been inconsistent with the case advanced on behalf of Mrs Williams and would have been at variance with her own evidence. 36. It follows from what I have said that, for my part, I would dismiss this appeal.
37. LORD JUSTICE TUCKEY: I agree.

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38. LORD JUSTICE AULD: I also agree for the reasons given by my Lord, lord Justice Maurice Kay, that the appeal should be dismissed. Order: Appeal dismissed SMITH BERNAL WORDWAVE
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Prepared on 22 October 2026 · Esheria