Case No: EA-2019-000480-LA (previously UKEAT/0291/19/LA)
EA-2019-000503-LA (Previously UKEAT/0298/19/LA)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 3 November 2021

Before :

MATHEW GULLICK QC
DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

MS Y AMEYAW	**Appellant**
- and -	
PRICEWATERHOUSECOOPERS SERVICES LTD	**Respondent**

- -
- -

Mr A. Khan and Mr A. Rozycki (instructed by **Dylan Konrad Creolle Solicitors**) for the **Appellant**
Ms C. Darwin (instructed by **PricewaterhouseCoopers LLP**) for the **Respondent**

Hearing dates: 9 & 10 February 2021
Further written submissions: 4 & 11 March; 22 September; 5 & 6 October 2021

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE; VICTIMISATION; UNFAIR DISMISSAL

The claimant's appeals against two decisions of the Employment Tribunal, made in different proceedings brought against the respondent, were heard together.

In the first appeal, the claimant challenged the Employment Tribunal's refusal to reconsider its earlier judgment dismissing the respondent's application to strike out three claims brought by the claimant. The Employment Appeal Tribunal held that there had been a procedural irregularity in the way in which the Employment Tribunal had dealt with the reconsideration application, but that it was not material to the outcome because the claimant (who had successfully resisted the application to strike out her claims) was seeking changes to the Employment Tribunal's reasons for refusing the respondent's application, rather than a change in the result. Applying **AB v The Home Office** UKEAT/0363/13/JOJ, the Employment Appeal Tribunal held that the application for reconsideration was not one permitted by the relevant provisions of the **Employment Tribunal Rules of Procedure 2013**. The appeal against the Employment Tribunal's refusal to reconsider was dismissed.

In the second appeal, the claimant challenged the Employment Tribunal's decision to dismiss a fourth claim brought against the respondent after a full merits hearing.

The claimant contended that the tribunal which heard the fourth claim had erred in law in refusing an application to adjourn the hearing on medical grounds because there were not "exceptional circumstances" as required under rule 30A of the Employment Tribunal **Rules of Procedure 2013**. The Employment Appeal Tribunal held that the tribunal had not erred in law in concluding that there were not "exceptional circumstances" and so refusing the application to adjourn, **Morton v Eastleigh Citizens' Advice Bureau** [2020] EWCA Civ 638 considered and applied.

The claimant challenged various elements of the tribunal's decision to dismiss her fourth claim on the merits as being perverse or otherwise failing to take into account relevant matters. The Employment Appeal Tribunal rejected the claimant's arguments, holding that the tribunal's decision was open to it and none of the alleged errors of law had been established.

The claimant also appealed the Employment Tribunal's decision to refuse her application for an order under rule 50 of the **Employment Tribunal Rules of Procedure 2013**. The Employment Appeal Tribunal held that there was no error of law in the decision to refuse the rule 50 application and that the Employment Tribunal had correctly held that the claimant's Article 8 rights were not engaged where the matter in issue was her conduct at a preliminary hearing in the Employment Tribunal which had been held "in private".

MATHEW GULLICK QC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. In this judgment, I shall refer to the parties as they were in the proceedings before the Employment Tribunal, i.e. as "the claimant" and "the respondent".

2. Before me are two appeals by the claimant. The first appeal is against the decision of Employment Judge Morton, sitting alone in the London South Employment Tribunal, dated 28 March 2019. By that decision, the Employment Judge refused the claimant's application for reconsideration of her earlier judgment dated 17 March 2017 which had dismissed the respondent's application to strike out three claims brought by the claimant. Those three claims were then dismissed in March 2018, after a 17 day final hearing, by a differently constituted Employment Tribunal whose judgment is not the subject of this appeal.

3. The second appeal is against the reserved judgment of a panel comprising Employment Judge Grewal, Mr D Kendall and Ms S Plummer, sitting in the London Central Employment Tribunal, by which it dismissed on the merits a fourth claim brought by the claimant. That judgment is dated 12 April 2019 and was sent to the parties, with written reasons, on 16 April 2019.

4. Although the appeals are brought in respect of separate decisions of the Employment Tribunal, they have been heard together. For ease of reference, and without intending any disrespect to the Lay Members, I shall refer to the latter constitution of the Employment Tribunal as "the Grewal Tribunal".

5. The claimant was represented on these appeals by Mr Arfan Khan of Counsel, leading Mr Alexander Rozycki of Counsel. Neither Mr Khan nor Mr Rozycki had appeared in the proceedings below. The respondent was represented by Ms Claire Darwin of Counsel, who had appeared at the hearing before the Grewal Tribunal. The hearing of the appeals was conducted as a 'hybrid' hearing

using the arrangements adopted in consequence of the COVID-19 pandemic. It took place in Court 30 at the Rolls Building: the claimant, her representatives and I were all present in the courtroom, with the respondent's representatives attending via video-link. Although there were some initial difficulties with the audio, the hearing proceeded smoothly and I am satisfied that this mode of hearing caused no disadvantage to either party.

6. I am grateful to all Counsel for the clarity and high quality of their submissions, and to Mr Khan and Ms Darwin for the considerable assistance provided to me during the oral argument, which took place over two days on 9 and 10 February 2021. The industry of Counsel resulted in an authorities bundle containing no fewer than 44 decided cases, although it has not been necessary for me to refer to all of them in this judgment. I am also grateful to both parties' legal teams for their efforts to complete what was a wide-ranging hearing, raising a number of different points of law, within the two days that had been allotted.

7. Prior to the hearing of the appeals, there had been an order made for the provision of certain parts of Employment Judge Grewal's notes, however the Employment Tribunal had been unable to provide them before the appeal hearing due to the temporary closure of the London Central Employment Tribunal's office at Victory House, Kingsway, as a consequence of issues arising during the COVID-19 pandemic. Neither side sought an adjournment of the appeal hearing; the notes were subsequently provided by the Employment Tribunal. Further written submissions were then made about the content of Judge Grewal's notes during March 2021. I have considered all the written and oral arguments put forward by the parties in coming to my decision. I have also borne in mind, when considering the arguments raised in relation to matters upon which the judge's notes have been produced, the point made by Mr Khan and Mr Rozycki in their submissions that what has been supplied is a typed-up version, prepared two years after the hearing, of manuscript notes (see **Lasila v Apcoa Parking (UK) Ltd**, UKEAT/00012/20/OO at [22]).

Background to the appeals

8. The claimant was employed by the respondent as a consultant between 7 April 2014 and 6 October 2017. She was a Senior Manager. I shall deal with the factual background to the two appeals by separating the events relevant to the claimant's first three claim forms and her fourth claim form.

The First Three Claim Forms

9. On 6 October 2015, the claimant filed an ET1 claim form with the London South Employment Tribunal. I shall refer to that claim as "ET claim 1". The claimant made claims for race and sex discrimination, victimisation and harassment. She alleged that she had been subject to discrimination in relation to the status and quality of the work allocated to her, and that her performance rating had been maliciously downgraded as an act of discrimination. The respondent filed a response in which it denied the claimant's allegations.

10. On 9 August 2016, the claimant filed a second ET1 claim form with the London South Employment Tribunal. I shall refer to that claim as "ET claim 2". By that claim, the claimant made further claims of discrimination, victimisation and harassment arising from events post-dating the submission of ET claim 1. These included further allegations regarding the allegedly discriminatory way in which work had been allocated, that false accusations had been made regarding absence from work and performance, and that there had been attempts to remove her management responsibilities. Again, the respondent filed a response denying the claimant's allegations.

11. On 2 November 2016, the claimant's then Solicitors applied to the Employment Tribunal to amend both ET claim 1 and ET claim 2. It was contended that the claimant had not been aware of the substance of the proposed amendments when filing those claims, and that the matters had become apparent on review of documentation disclosed by the respondent. The amendments were opposed by the respondent.

12. On 11 November 2016, the claimant filed a third ET1 claim form with the London South Employment Tribunal. I shall refer to that claim as "ET claim 3". The claimant made further claims of discrimination, arising from the conduct of a disciplinary hearing on 26 October 2016. The claimant contended that she was being persecuted by the respondent because she was a black woman who had brought Employment Tribunal claims. The claimant referred to having been diagnosed with depression and anaemia and that she had been required to take time off work and had received medical treatment.

13. The result of the disciplinary hearing was that on 29 November 2016, the claimant was given a final written warning, effective for a period of 12 months.

14. On 22 November 2016, Employment Judge Baron directed that the final hearing which had been listed to commence on 1 January 2017 should be vacated, and that a preliminary hearing should be listed after 19 December 2016. A notice of the date and time of the preliminary hearing was subsequently sent out to the parties. That notice stated that the hearing would take place at the offices of the London South Employment Tribunal on 31 January 2017, "at 2:00pm, in private". The notification that the preliminary hearing would be "in private" is of some significance for the purpose of these appeals.

15. On 27 January 2017, Bindmans LLP, the Solicitors who were at that point acting for the claimant, wrote to the London South Employment Tribunal stating that upon instructions from the claimant the application that had been made to amend ET claim 1 and ET claim 2 would no longer be pursued and that the matters raised by the proposed amendments would instead be addressed, where appropriate, in evidence. Later on the same day, the claimant sent an email to the Employment Tribunal stating that this correspondence had been sent by her Solicitors without her approval and that she had requested that it be withdrawn.

16. On the afternoon of 31 January 2017, the preliminary hearing in relation to ET claim 1, ET claim 2 and ET claim 3 took place at the London South Employment Tribunal, before Employment Judge Hall-Smith. The claimant was represented at that hearing by Mr Christopher Milsom of Counsel. The respondent was represented by Ms Laura Bell of Counsel. The parties' Solicitors were also in attendance. During the hearing, Mr Milsom and the representative from Bindmans LLP both withdrew and the hearing continued with the claimant representing herself. Judge Hall-Smith recorded what had happened in a decision with reasons that was signed by him on 2 March 2017 and issued to the parties on 3 March 2017. It is apparent from the contemporaneous notes made by some of those present, to which I was referred, that Judge Hall-Smith dictated the decision and reasons at the conclusion of the hearing on 31 January.

17. The reasons given by Judge Hall-Smith started by recording that he had queried whether the presence of several people accompanying the claimant was appropriate:

> **"3. In addition to her representative, Mr Milsom, the Claimant was accompanied by several individuals. In circumstances where the hearing before me was a closed preliminary hearing, I enquired about the identity of the individuals and the reasons for their presence at the hearing.**
>
> **4. I was informed by the Claimant that she was accompanied by her mother and her brother. The Claimant's mother started shouting and continued to shout from the back of the Tribunal where she was sitting which made the conduct of the hearing difficult to manage. I had intended to enquire of the Respondent's representative, Ms Bell, whether the Respondent had any objection to the presence of members of the Claimant's family at the hearing.**
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> **5. In view of the disturbance created by the Claimant's mother and to some extent by the Claimant who started to address me in a loud voice, notwithstanding the presence of her legal representative, I warned the parties that I was not prepared to conduct a hearing very significantly disrupted by disruptive conduct from the Claimant and from her mother directed towards me. I warned the Claimant and those accompanying her that I was not prepared to tolerate such conduct and that I would accordingly rise for five minutes to enable the Claimant and her mother to consider what I had said, and to moderate their conduct.**
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> **6. I bore in mind that legal proceedings can be stressful for those involved in such proceedings, but on this occasion the conduct of the Claimant and her mother, when I raised an enquiry about the presence of the Claimant's family members at a private hearing, was in my judgment wholly unjustified.**
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> **7. When I resumed the hearing, Ms Bell on behalf of the Respondent, raised no objection to the presence of a family member of the Claimant during the hearing. I invited the Claimant to confer with her representative, Mr Milsom about which member of her family she would like present at the hearing. Having regard to the disruptive conduct which had occurred, I was reluctant to permit two members of the Claimant's family to be present at the hearing. I again adjourned the hearing to allow the Claimant to confer with Mr Milsom. The Claimant returned to the Tribunal accompanied by her brother."**

18. Judge Hall-Smith then went on to record in his reasons the background and history of the proceedings, the amendment application made by the claimant and the terms of the correspondence sent to the Employment Tribunal on 27 January 2017. He stated at [21] of his reasons that in his view there had very clearly been a withdrawal of the amendment application but that, in any event, he had decided to rule on the issue of amendment at the hearing and that he had refused the application to amend, applying the guidance given in **Selkent Bus Company Ltd v Moore** [1996] ICR 836. Having set out his reasons for refusing the application to amend, Judge Hall-Smith then recorded what occurred at the hearing in the following terms:

> **"26. Having announced my ruling, the Claimant interrupted me and alleged that the Respondent had had knowledge of the allegations since April 2016, which appeared to be inconsistent with the letter of application from her then Solicitors that the matters had only come light** [sic] **over the Summer. Ms Bell endeavoured to address me but she was shouted over by the Claimant. Ms Bell stated that she did not wish to enter into an argument with the Claimant.**
>
> **27. I noted that Mr Milsom was clearly in difficulty about the Claimant's conduct and I asked whether the Claimant was representing herself or whether Mr Milsom was representing her. The Claimant continued to interrupt and alleged that her claims were being ambushed and sabotaged. I informed the Claimant that I appreciated that she held strong views, but that I would not allow the Tribunal proceedings to turn into an argument. Ms Bell added that the letter from Bindmans amounted to an effective withdrawal of the application to amend the claim.**
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> **28. I pointed out to the Claimant that I have made my ruling. The Claimant stated that her case had been purposely sabotaged by her Solicitors and by the Respondent. The Claimant shouted that justice had not been done. Mr Milsom informed me that he had ceased to act for the Claimant for about 15 minutes and stated that he had no option but to withdraw from the case.**
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> **29. The Claimant continued to address me. Again I pointed out that I had made my ruling and the Claimant said she had been prejudiced and was threatening to appeal. I pointed out to the Claimant that it was open to the Claimant to appeal my ruling.**
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> **30. The Claimant continued to dispute my ruling. The Claimant stated that she was not represented and had been prejudiced. I found it increasingly difficult to manage the proceedings in circumstances where the Claimant continued to interrupt me. I endeavoured to point out that many Claimants before the Tribunal were unrepresented. In any event the Claimant had been represented by two firms of Solicitors and had been represented by Counsel for part of the hearing before me.**
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> **31. I pointed out that I had refused the Claimant's application to amend and the Claimant shouted that she would not continue and would leave. She made some reference to the justice system not working and she left the room.**
>
> **32. Because of the continued disruptive behaviour by the Claimant, a security guard had been alerted by the disruptive conduct in the Tribunal room and had remained at the back of the Tribunal. After the Claimant had left the room, I informed the guard that he could leave, in circumstances where I believed that there would be no more disruption following the withdrawal of the Claimant from the Tribunal.**
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> **33. A minute later both the Claimant and her mother flung open the door to the Tribunal room and entered the Tribunal. The Claimant's mother was shouting aggressively waving her arms and shouting "*you have not heard the end of this stop smiling you have not heard he*** [sic] ***end of this something will happen you will not get away with this.*"**

> **34. The conduct of the Claimant's mother was both aggressive and threatening. I repeatedly pressed the alarm bell behind my chair to alert and to summon security to return to the Tribunal room. Security did not respond to me frequent alarm calls. In an endeavour to defuse the situation I said that I was rising and that the Respondent should leave the room. Ms Bell on behalf of the Respondent stated that she was not happy to leave the room because she felt threatened. By this time the Claimant had pulled her mother out of the room but she remained in the corridor outside the door of the Tribunal. Understandably Ms Bell and her instructing Solicitor were fearful about the presence of the Claimant and her mother who remained in the Tribunal building near the Tribunal room.**
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> **35. I continued to press the bell for security to attend and I was disappointed that my repeated alarm calls had not been responded to. Eventually security did attend and explained that they had been escorting a disabled party to the car park lift in circumstances where the Tribunal lift had remained out of action for several months.**
>
> **36. It was clear to me that Ms Bell and her Solicitor Ms Coyne had been very shaken and alarmed by the continued disrupted behaviour of the Claimant and the aggressive and threatening behaviour of the Claimant's mother.**
>
> **37. I appreciate that parties can become upset at Tribunal rulings but there was no justification for the conduct of both the Claimant and the Claimant's mother. The Tribunal has case management responsibilities and as I had pointed out, the approach of a party unhappy with a Tribunal ruling or determination is through the process of an appeal. The Tribunal's refusal to grant an amendment to an existing very substantive Tribunal claim should not have triggered what, on any view, was disgraceful conduct on the part of the Claimant and her mother during the course of a legal hearing.**
>
> **38. I then went on to consider directions for the 25 day hearing listed in April 2017."**

19. After the hearing on 31 January 2017, the claimant sent two emails to the Evening Standard newspaper regarding her case. On 1 February, the claimant was certified by her general practitioner as being unfit for work for a period of six weeks. On 3 February, the respondent notified the claimant by email and voicemail that she was suspended from work. On the same day, a suspension letter was hand-delivered to the claimant's home by a solicitor employed by the respondent, who was accompanied by a security guard.

20. On 6 February 2017, the respondent applied to have all the three claims that were then before the Employment Tribunal struck out under rule 37(1)(b) and (e) of the **Employment Tribunal Rules of Procedure 2013**, because of the claimant's conduct at the hearing before Judge Hall-Smith on 31 January. That application came before Employment Judge Morton at an open preliminary hearing on 10 March 2017. The claimant was represented by Mr Peter Herbert of Counsel and the respondent by Ms Bell of Counsel, who had appeared at the hearing on 31 January. The respondent's application to strike out was dismissed in a reserved judgment dated 17 March 2017 and sent to the parties with written reasons on 24 March. Judge Morton concluded that the application to strike out should be

rejected because a fair trial of the claims was still possible. She refused an application by the claimant to adduce witness evidence to dispute Judge Hall-Smith's record, in his written reasons, of what had happened at the hearing on 31 January. Judge Morton proceeded on the basis that Judge Hall-Smith's account of that hearing would form the basis for her own decision. At paragraphs 19-21 of her reasons, Judge Morton stated:

> **"19. My conclusion from the materials on which I based this decision is that the Claimant undoubtedly lost her cool at times during the hearing and behaved reprehensively but did not do so without justification. Something had broken down in her communication with her solicitors and she found herself at a hearing with matters not proceeding in accordance with her instructions. Her mother's intervention plainly was disgraceful and singularly unhelpful and I am reassured by Mr Herbert's assurance that the Claimant's mother will not be participating in any future proceedings in this case. However all are agreed that the Claimant's mother's conduct cannot be attributed to the Claimant. The Claimant's conduct on its own, although at time** [sic] **uncontrolled and unacceptable, does not in my view on these particular facts amount to conduct that is so exceptional that I need not consider whether a fair trial is still possible.**
>
> **20. Applying that consideration I do consider that a fair trial is still possible. There are no grounds for a firm conclusion at this stage that the Claimant's conduct, which was on 31 January explicable if not reasonable, is bound to recur at a future hearing such as to vitiate the possibility of a fair trial. Having said that I give the Claimant a very clear warning that there must not be any occurrence of uncontrolled and disrespectful behaviour at any future hearing of this case. Parties are given some allowance for the emotional intensity that can characterise Tribunal proceedings, but all participants are nevertheless expected to conduct and express themselves with restraint and courtesy.**
>
> **21. For the same reasons I have given in respect of the main application I do not consider it appropriate to award costs against the Claimant on this occasion in respect of the 31 January hearing or today. The Claimant must however engage fully with the process of preparation for trial and further consideration will be given to an award of costs or other sanctions if preparation for the very lengthy hearing in this case is prejudiced by any failure to cooperate with the Respondent or comply with the case management timetable."**

21. ET claim 1, ET claim 2 and ET claim 3 were then heard together at a final hearing at the London South Employment Tribunal over 17 days, from 18 April to 12 May 2017, before a panel comprising Employment Judge Baron, Ms C Bonner and Ms C Edwards. On 12 May, the claimant wrote to the Employment Tribunal enclosing documents, which included a medical report, which were expressed to be for the consideration of the tribunal only. On 8 June, she wrote stating that the contents of the medical report could be shared with the respondent's legal representatives "if necessary and with agreement to keep it strictly confidential". On 15 May, Judge Baron responded to this correspondence stating that it was not appropriate for the Employment Tribunal to take that report into account unless it was disclosed to the respondent. On 22 June, Judge Baron ordered that the email of 12 May be sent to the respondent's legal representatives.

22. On 7 March 2018, the panel of the Employment Tribunal which had heard ET claim 1, ET claim 2 and ET claim 3 in April and May 2017 sent its reserved judgment and written reasons to the parties. All the claimant's claims were dismissed. An appeal to this tribunal against that decision proceeded to a full hearing and was dismissed by His Honour Judge Auerbach on 11 December 2019 (see UKEAT/0292/18/LA).

23. On 19 March 2018, the claimant asked that Employment Judge Morton's judgment dated 17 March 2017, refusing the respondent's application to strike out her first three claims, should be taken down from the internet because it had caused serious damage to her personal and professional life. That request was refused by the Employment Tribunal on 13 April.

24. On 16 April 2018, the claimant applied to the Employment Tribunal for an order to be made under rule 50 of the **Employment Tribunal Rules of Procedure 2013** prohibiting the publication of her name online. That application was refused by Regional Employment Judge Hildebrand on 2 July 2018. The claimant appealed to this Appeal Tribunal against Judge Hildebrand's decision. Her appeal proceeded to a full hearing where it was dismissed by Her Honour Judge Eady QC in a reserved judgment handed down on 4 January 2019: see **Ameyaw v Pricewaterhousecoopers Services Ltd** [2019] ICR 976. At [57], Judge Eady QC stated:

> **"… The Claimant objects that REJ Hildebrand failed to engage with relevant evidence, in the form of notes from the hearing of 31 January 2017, which contradicted EJ Hall-Smith's account. This was, however, a matter for the ET's case management discretion. The Claimant had supplied (not all at the same time) different notes from the hearing and had asked that the ET read through manuscript transcripts (unsigned by their respective authors) to form a view as to whether or not the record contained in EJ Hall-Smith's Written Reasons was correct. The question as to how to approach EJ Hall-Smith's Written Reasons had, however, already been addressed by EJ Morton; REJ Hildebrand was not determining an appeal from her decision and was entitled to proceed on the basis that she had been entitled to accept that record. That, moreover, was an approach that respected the conventional presumption that a Judgment is to be accepted as conclusive evidence of that which it records (as opposed to the accuracy of the actual decision). Even if there was any question as to whether that was the correct approach in this case, REJ Hildebrand - as a matter of case management discretion - was entitled to decline to consider manuscript notes for which there was no formal ownership by the relevant authors."**

25. On 7 January 2019, the claimant applied to the Employment Tribunal for a reconsideration of the judgment of Employment Judge Morton dated 17 March 2017, on the basis that there was fresh evidence in the form of contemporaneous notes to show that the claimant had not behaved at the hearing on 31 January 2017 in the manner set out in Judge Hall-Smith's written reasons, to which Judge Morton had referred. The respondent objected to that application on the basis that it was out of time and that, in any event, Judge Morton had simply accepted what had been recorded in the earlier decision of Judge Hall-Smith. On 14 January, an official in the London South Employment Tribunal Office wrote to the parties, as follows:

> **"Following the claimant's application dated 7 January 2019 for a reconsideration of her judgment dated 17 March 2017, Employment Judge Morton's preliminary view is that the application should be dealt with at a hearing.**
>
> **The Respondent must write to the Tribunal and the Claimant, giving its views on the application, within 14 days of the date of this letter.**
>
> **Assuming that a hearing will be necessary, the parties are invited to give a time estimate for the hearing and an indication of any case management orders they consider to be needed. In light of their responses it may be necessary to list the matter for a telephone preliminary hearing for case management."**

26. On 28 March 2019, the Employment Tribunal wrote to the parties stating that the claimant's application for reconsideration was being refused. That letter, which made no reference to the letter that had been sent on 14 January, read as follows:

> **"Employment Judge Morton has considered under Rule 71 of the Tribunal Rules the Claimant's application dated 7 January 2019 for her to reconsider, pursuant to Rule 70, her judgment dated 17 March 2017. She has also considered the Claimant's second letter, sent on 9 January 2019 and the Respondent's two letters dated 8 and 10 January 2019.**
>
> **The Claimant's application is refused as there is no reasonable prospect of the judgment of 17 March 2017 being varied or revoked for the following reasons.**
>
> 1. **The application was made out of time. The Claimant bases her application on the content of handwritten notes of the hearing to which the 17 March judgment relates. The Claimant says she was not in possession of the handwritten notes which form the basis of her application until 14 September 2018. If that was the case the Claimant should have made her reconsideration application promptly after receiving the notes. She gives no reason for waiting a further four months before doing so.**
>
> 2. **The Claimant has not explained why I took the wrong approach in deciding to regard Judge Hall-Smith's judgment as a record of what had occurred at the hearing on 31 January 2017. I therefore have no basis for reconsidering the approach that I took. The EAT made a comment in paragraph 53 of its judgment in Miss Y Ameyaw v Pricewaterhousecoopers Services Ltd UKEAT/0244/18/LA that I had approached the question correctly (although I accept that it not** [sic] **actually adjudicate the point). But the fact remains that the Claimant has not explained why the approach was incorrect.**

There is therefore no prospect of the judgment being varied or revoked and the application is refused."

The Fourth Claim Form

27. On 1 May 2017, the claimant filed a fourth ET1 claim form raising allegations in respect of her suspension by the respondent on 3 February 2017. I shall refer to this claim as "ET claim 4". The claimant complained about her suspension by the respondent. She alleged that the respondent had further harassed her in relation to participation in the investigation process, despite the respondent knowing that the claimant had been signed off from work with stress. She also brought a whistleblowing claim, based upon her emails to the Evening Standard newspaper of 31 January 2017, which she contended amounted to disclosures protected under Part IVA of the **Employment Rights Act 1996**.

28. On 25 August 2017, the claimant was sent a letter inviting her to a disciplinary hearing and enclosing an investigation report and supporting evidence. One of the allegations was that her behaviour at the hearing before Judge Hall-Smith on 31 January amounted to misconduct. The claimant did not provide a response to the allegations made in the letter of 25 August and did not attend the disciplinary hearing. On 6 October 2017, the claimant was summarily dismissed by the respondent. The primary reason given for the dismissal was that the claimant's behaviour at the preliminary hearing on 31 January 2017 constituted gross misconduct. The claimant submitted an appeal against her dismissal, but did not attend the appeal hearing. Her appeal was not successful.

29. On 19 October 2017, ET claim 4 was transferred to the London Central Employment Tribunal. The claim was the subject of amendment to address the claimant's dismissal, which had occurred after it had been filed. The claimant alleged that the dismissal was both discriminatory and unfair. The final hearing of ET claim 4 was listed for eight days, to commence on 5 June 2018; a further preliminary hearing had also been listed to take place on 30 May 2018. Both those hearings were, however, postponed on the application of the claimant. The panel sitting at what would have been the

final hearing of ET claim 4 in June 2018 concluded that it was "just persuaded" that a valid medical reason had been shown.

30. On 16 January 2019, the hearing of ET claim 4 commenced in the London Central Employment Tribunal before the Grewal Tribunal. The claimant represented herself and the respondent was represented by Ms Darwin. The claimant made a number of applications at the beginning of the hearing, including an application under rule 50 of the **Employment Tribunal Rules of Procedure 2013**. The tribunal then took 17 January as a reading day, with the evidence commencing on 18 January. Some of the respondent's evidence was taken first. On 21 January, the claimant started giving her own evidence. During the course of that morning a lay representative, Mr Ogilvy, appeared to represent the claimant. He continued to represent her until the afternoon of the following day, 22 January.

31. On 22 January, the claimant applied to adjourn the hearing because she had lost her voice. The tribunal refused that application, considering that the hearing could continue because the claimant was represented and Mr Ogilvy could proceed to cross-examine witnesses for the respondent whilst the claimant recovered. However, during the afternoon of 22 January Mr Ogilvy ceased to act as the claimant's representative (although he appears to have remained involved in order to assist the claimant as a McKenzie Friend) and the hearing was adjourned until the following morning to enable the claimant to obtain medical evidence.

32. On the morning of 23 January, the claimant made another application to adjourn the hearing. The application was made by email, attaching a letter from her general practitioner which stated that that claimant had laryngitis and advising that she rest her voice for a week. In her written application, the claimant recognised that rule 30A(3)(c) of the **Employment Tribunal Rules of Procedure 2013**, which had been drawn to her attention by the respondent's representatives, applied and that an adjournment of the hearing could only be granted if there were "exceptional circumstances". She

contended that the sudden and unexpected loss of her voice during the course of the hearing amounted to "exceptional circumstances" and that she would be placed at a serious disadvantage if the hearing were to proceed. She cited a number of authorities, including **Teinaz v London Borough of Wandsworth** [2002] IRLR 721, CA. The claimant did not attend before the Employment Tribunal to pursue her application to adjourn, which was opposed by the respondent. Nor did Mr Ogilvy return to the hearing after 22 January.

33. The Employment Tribunal refused the claimant's application to adjourn and sent an email to the claimant at 11:40 am indicating the hearing would recommence at 2:00 pm. The claimant responded indicating that she would not attend and reiterating that the hearing ought to be adjourned. The hearing then proceeded on the afternoon of 23 January in the claimant's absence, with several other witnesses for the respondent giving their evidence. It was adjourned to 24 January for closing submissions, with the claimant being contacted by email and given the opportunity to file written closing submissions by 12:00 pm on 24 January. The claimant did not attend on 24 January and did not make written closing submissions. The hearing of ET claim 4 therefore concluded on 24 January 2019.

34. On 16 April 2019, the reserved judgment and reasons of the Grewal Tribunal were sent to the parties. ET claim 4 was dismissed in its entirety. The reasons are 37 pages long and contain 137 numbered paragraphs. At [9-16], the Grewal Tribunal set out its reasons for refusing the claimant's rule 50 application:

> **"Rule 50 application**
>
> **9. The Claimant applied under rule 50 of the Employment Tribunal Rules of Procedure 2013 for an order that either her identity should be anonymised permanently or that the contents of the reasons given by EJ Hall-Smith for the order of 31 January 2017 and of the Judgment and Reasons of EJ Morton on 10 March should not be disclosed to the public. She argued that it was necessary to make one of those orders in order to protect her Article 6 and Article 8 rights.**
>
> **10. This hearing is dealing with the Claimant's complaints of sex and race discrimination and unfairness in respect of the Respondent's decision to suspend her, institute the disciplinary process against her and to dismiss her. The Respondent's case is that one of the two reasons for it taking those actions was the Claimant's conduct at a preliminary hearing on 31 January 2017 at the Employment Tribunal in Croydon. That hearing related to claims which the Claimant had brought against the Respondent. The Respondent**

had and relied upon several accounts of what transpired at that hearing, one of which was the account set out in the reasons given by EJ Hall-Smith. It attached considerable importance to that account. The Claimant had in the course of the internal process the opportunity to challenge any of the accounts upon which the Respondent relied. Both parties in this case give evidence about the various accounts that were given and what weight was and should or should not have been placed on those accounts. The events of 31 January 2017 feature very largely in this case.

11. Rule 50(2) provides that in considering whether to make an order under that rule the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

12. Article 6(1) of the European Convention on Human Rights provides,

> **"*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*"**

Article 8(1) provides,

> **"*Everyone has the right to respect for his private and family life, his home and his correspondence.*"**

13. The principles to be derived from the authorities are as follows:

(a) The principle of open justice is of paramount importance and derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice. Open justice requires that hearings are held in public, journalists can report proceedings fully and contemporaneously, the identities of the parties and witnesses are not concealed and that the judgment of the court is public.

(b) An order under rule 50 interferes both with the principle of open justice and the right to freedom of expression.

(c) The burden of establishing any derogation from the fundamental principle of open justice or full reporting lies on the person seeking that derogation. It must be established by clear and cogent evidence that harm will be done by reporting to the Convention rights of the person seeking the restriction on full reporting so as to make it necessary to derogate from the principle of open justice.

(d) The balancing exercise to be conducted in a case involving conflicting Convention rights was described by Lord Steyn in In re S (a Child) (Identification: Restrictions on Publication) [2004] 3 WLR 1129 as follows:

> **"*What does clearly emerge from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience, I will call this the ultimate balancing test.*"**

(d) Where full reporting of proceedings is unlikely to indicate whether a damaging allegation is true or false, courts and tribunals should credit the public with the ability to understand that unproven allegations are no more than that. Where such a case proceeds to judgment, courts and tribunals can mitigate the risk of misunderstanding by making clear that they have not adjudicated on the truth or otherwise of the damaging allegation.

(e) In general, parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which is inherent in being involved in litigation. However, they are not all in the same position when applying for such an order. It is not unreasonable to regard the person who initiates proceedings as having accepted the normal incidence of the public nature of court proceedings. The person defending the proceedings has an interest equal to that of the claimant in the outcome of the proceedings, but he has not chosen to initiate court proceedings which are normally conducted in public.

A witness who has no interest in the proceedings has the strongest claim to be protected by the court if he or she will be prejudiced by publicity since the courts and parties depend on their co-operation.

14. The Claimant has not explained how revealing her identity or disclosing to the public the contents of the two decisions will interfere with her right to have a fair hearing in the determination of her civil rights, either in this case or in any other proceedings. It is also difficult to see how Article 8 is engaged. The evidence that the Claimant wants to keep out of the public domain is what is said by an Employment Judge about her conduct at a hearing in an Employment Tribunal. We think that it matters not whether the hearing was a private hearing, in the sense of a preliminary hearing to discuss case management issues and not open to the public, or a preliminary hearing that was open to the public. It was a hearing at an Employment Tribunal and involved her employers, lawyers and an Employment Judge. What the evidence relates to is the Claimant's conduct in a public forum and not in a private place. It is difficult to see how the publishing of that evidence interferes with her right to respect for her private life.

15. In case we are wrong and the Claimant's rights under Article 8 are engaged because publication would cause harm to her reputation, we considered whether her interests in the protection of those rights outweighs the broader interests arising from the principle of open justice and the protection of the rights afforded by Articles 6 and 10. The orders that the Claimant wants us to make – permanent anonymity or an order concealing from the public a crucial piece of evidence – amount to a serious and significant restriction of the principle of open justice. The interference, if there is any, with the Claimant's Article 8 rights is limited. There is evidence in this case from a number of other sources about the Claimant's behaviour on 31 January. She has not sought any orders in respect of that. That evidence is equally critical of her conduct. If the evidence about her behaviour is going to damage her reputation, it is already there. EJ Hall-Smith's record is unlikely to cause any additional damage. Furthermore, we would make it clear that EJ Hall-Smith's account was his account and record and we will deal in our decision with any argument advanced as to why it should have bn rejected by the Respondent. In any case of misconduct dismissal it can be said that publishing the allegations of misconduct can cause damage to the reputation of the individual. That in itself is not a good enough reason to restrict open justice. We also took into account that EJ Morton's decision has been in the public domain for a long time and that the Claimant has only recently, nearly two years after it was promulgated, applied for reconsideration. The fact that the Claimant is belatedly challenging those decisions does not, in our view, change the position.

16 Having done the balancing exercise, we concluded that the restriction to the principle of open justice by making either of the orders sought by the Claimant was not justified or necessary to protect the Claimant's Article 6 or 8 rights."

35. The Grewal Tribunal went on to set out the reasons for its decisions on several other applications which are not relevant to the outcome of the present appeal. At [23-40], it continued:

"<u>Applications made in the course of the hearing</u>

23. The first day of the hearing (16 January) was taken up with the Claimant's various applications. The Tribunal read the statements and relevant documents on 17 January. On 18 January the Claimant cross-examined Ms A Love. She gave evidence by video link. On 21 January 2019 the Respondent began cross-examination of the Claimant. It was not concluded on that day. There were no indications of the Claimant having a sore throat or any difficulties in speaking. In the course of that morning Mr Ogilvy appeared to represent the Claimant. He asked at 2 p.m. to make an application for the Employment Judge to recuse herself. He was told that any application he wished to make would be heard at the end of the Claimant's evidence.

24. On 22 January the Claimant applied to adjourn the hearing as she said that she had lost her voice. The Tribunal decided that her evidence would not continue at that stage, but that the case could continue as her representative could cross-examine the Respondent's witnesses. She was permitted to communicate with her representative for the purpose of giving him instructions during his cross-examination. She was able to do that by passing him notes and, if necessary, whispering to him.

25. Mr Ogilvy then applied for the Tribunal to recuse itself. The application was made on two grounds. The first related to the EJ Grewal's conduct of the preliminary hearing on 20 December 2018. The Tribunal refused to hear the application on that ground as it had already done so, and nothing had

changed since we had given our decision on that on 18 January. The second ground related to what the Claimant had happened on 18 January 2019. She said that shortly before 2 pm on that date she had seen the Respondent's solicitors enter the Tribunal hearing room on two occasions. On the first occasion she had seen one of the panel members leaving via the door at the rear of the hearing room.

26. The Tribunal found that what had had happened was as follows. The case had started in a different hearing room. The parties had been advised on 16 January that we would move to room 509 for the video link evidence. On the morning of 18 January we informed them that we would remain in that room for the rest of the hearing. During the lunch break, when there was no one in the hearing room, the Respondent's solicitors moved their documents from the other hearing room to room 509. Ms Plummer, one of the members, returned to the Tribunal to retrieve something that she had left there. As she was leaving through the door at the rear, the Respondent's solicitors entered the Tribunal. She was not in the hearing room with the solicitors. We concluded that there was nothing in those circumstances that would lead a fair minded and informed observer to conclude that there was a real possibility that the Tribunal was biased. The application was refused.

27. Mr Ogilvy cross-examined one of the Respondent's witnesses that morning. It was clear that he was not well prepared and that the Claimant was not pleased with his performance.

28. At 2 p.m. that afternoon Mr Ogilvy applied to adjourn the case because of an email that the Respondent had sent the Claimant at 10.51 that day. In that email the Respondent had informed the Claimant that they had done a Google search on Mr Ogilvy and seen reports that said that he had a criminal conviction for falsely representing that he was a barrister. They said that they did not know whether the reports were accurate or not but felt that it was only fair to draw the matter to her attention. They provided her with the link to the reports. It was not in dispute that Mr Ogilvy does have the criminal conviction as claimed in the report. The Claimant also said that he had given her a different name – he had told he that he had another name but that he preferred to use Leonard Roberts because it was easier. Mr Ogilvy said that he could no longer act for the Claimant and that she wanted to take legal advice. He also said that the case could not continue if the Claimant was not represented because she had lost her voice.

29. The Tribunal ruled that the sending of that email by the Respondent was not a reason to adjourn the case. There was nothing in the email to suggest that the Claimant had acted improperly in engaging the services of Mr Ogilvy. If Mr Ogilvy wished to withdraw from the case, he could do so. It was not clear about what the Claimant wished to seek legal advice, but she was free to do so. Neither of those matters required the case to be adjourned. The Claimant had started the case representing herself and had done so more ably than Mr Ogilvy. She could continue to represent herself.

30. However, we could clearly not continue that afternoon if the Claimant could only speak in a whisper. We adjourned the case to 10 a.m. the following morning. We directed that if the Claimant wished to apply for a longer adjournment the following morning, she should produce a medical report setting out the diagnosis, its impact on her ability to continue with the hearing, the treatment required and the prognosis. If the Claimant was delayed in the morning in order to get that evidence, she should let the Tribunal know and the application would be heard when she got to the Tribunal. The Tribunal would also consider whether it could make any adjustments that would enable the Claimant to participate in proceedings even if she were unable to speak. The Respondent had said that it might be able to provide technology that would enable that.

31. At 9.10 the following morning the Claimant sent an email to the Tribunal and attached to that a medical report dated 22 January and an application to adjourn the case. She said that she had almost lost all use of her voice and had a fever. The medical report was from her GP and stated,

> **"*I have assessed the above patient today. She has laryngitis, probably of viral origin and exacerbated by talking a lot during her current court case.***
>
> ***As part of the treatment I have advised 7 days of voice rest. If she is not better at this time then we can review her again. I hope that you are able to facilitate this.*"**

The Respondent had in an email the previous day drawn the Claimant's attention to rule 30A of the Tribunal's Rules of Procedure 2013 if she wanted to make an application to adjourn. In the application attached to her email the Claimant said that this was the first time that she was making an application to adjourn on medical grounds. The medical evidence supported the need for an adjournment. It clearly described that the Claimant was unfit and why and also advised a rest period for a week. Therefore, the

Claimant was unable to attend the hearing and the hearing needed to be adjourned. Her ill-health was sudden and outside her control and, therefore, was "exceptional" within the meaning of rule 30A(4((b).

32. The Respondent opposed the application. It had brought technology that would enable to the Claimant to continue cross-examination even if she was not able to speak. It would involve the Claimant typing her questions on a laptop and the questions being projected simultaneously on to a wall in the Tribunal as she typed them. The Respondent carried out a demonstration and it worked perfectly.

33. Rule 29 of the Employment Tribunals Rules of Procedure 2013 "the 2013 Procedure Rules") gives the Tribunal the power to make any case management order at any stage of the proceedings. Rule 30A provides.

> **"…**
>
> ***(3) Where a tribunal has ordered two or more postponements of a hearing in the same proceedings on the application of the same party and that party makes an application for a further postponement, the Tribunal may only order a postponement on that application where –***
> ***… or***
> ***(c) there are exceptional circumstances.***
>
> ***(4) For the purposes of this rule –***
> ***(a) references to postponement of a hearing include any adjournment which causes the hearing to be held or continued on a later date;***
> ***(b) "exceptional circumstances" may include ill health relating to an existing long term health or condition or disability.*"**

34. In this case, the Tribunal had already ordered two postponements on the application of the Claimant. On 11 May 2018 she had applied for a postponement of a preliminary hearing listed for 30 May 2018. That application had been granted on 24 May 2018. On 6 June 2018, the second day of an eight-day full merits hearing, the Claimant applied for an adjournment on medical grounds. The medical evidence supplied in support of that application stated that the Claimant had suffered from depression and anxiety and had been treated for that with medication and counselling since 2016. She was experiencing more severe symptoms at that time and had changed her medication. She was aware of the need to attend court but felt that it was impossible at the time. She and her GP felt that a postponement of two months would be a reasonable timeframe to allow her treatment to take effect. In granting the postponement EJ Snelson noted,

> **"*For reasons given orally today, the Tribunal was just persuaded that a valid medical ground for postponing this eight-day hearing was made out and that that was the proper course to take in all the circumstances. Accordingly the case has been re-listed for 16 January 2019… It was explained to the parties that, were the Claimant to seek a further substantial postponement beyond the re-set date (for any reason), the Tribunal might well find that the balance of prejudice had shifted in the Respondents' favour and refuse the application.*"**

35. Therefore, rule 30A(3) applied in this case. Rule 30A(3) (a) and (b) did not apply in this case. We considered first whether the Claimant's medical conditions amounted to "exceptional circumstances." The Claimant's medical condition was that she had laryngitis which impacted on her ability to speak. That did not prevent her from attending the Tribunal or being able to participate in the hearing; she had done so the previous day when she had not been able to speak. The medical report did not say that she could not attend the Tribunal and take part in the proceedings. It simply said that she had been advised to rest her voice. The Respondent had provided technology that would enable the Claimant to continue with the hearing without her having to speak. In all those circumstances, the Tribunal concluded that the Claimant's medical condition did not amount to exceptional circumstances and, therefore, we could not order a third postponement.

36. In case we were wrong in that conclusion, we considered what we would have concluded under rule 29. We would have come to the same conclusion for the reasons set out above together with the following reasons:

> **(a) All the evidence indicated that the Claimant wanted to delay and put off the conclusion of her claims against the Respondent. The previous full merits hearing of this case had been postponed on the second day on the basis of not very compelling medical evidence and the Judge had made it**

> **clear that a further application to postpone may well not succeed. The Claimant had made six applications to postpone during the hearing of her first three claims in the London South Employment Tribunal in April and May 2017. The Claimant had made numerous applications since this case started, which if granted, would have led to the case being postponed;**
>
> **(b) If the hearing were adjourned today, there would be a delay of several months before the hearing could be listed to continue. This case is already very stale. It relates to events that took place nearly two years ago.**
>
> **(c) Article 6 of the ECHR provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. That applies as much to the Respondent as it does to the Claimant. The Claimant has made many serious allegations against the Respondent's employees. They are entitled to have those claims determined within a reasonable time.**
>
> **(d) The Respondent has incurred significant costs in dealing with the Claimant's case. A further adjournment of several months would lead to additional costs being incurred. It has also made a number of senior partners available to attend the hearing twice already. Any adjournment would mean that they would need to do so for a third time.**
>
> **The hearing was adjourned until 2 p.m.**
>
> **37. At 11.40 the Tribunal sent the Claimant an email which said,**
>
> > **"*The case has been adjourned to 2 p.m. The Tribunal will make adjustments for the Claimant to participate in the hearing without having to speak (she will be able to type her questions which will be projected on to a wall). If the Claimant does not attend, the case will proceed in her absence.*"**
>
> **38. At 1.57 p.m. the Claimant sent the Tribunal a further letter seeking a postponement. She said that attending at 2 p.m. would be to ignore or go against the medical advice which she was not prepared to do. Typing her questions was unorthodox and not known to fair procedure. Such a procedure would be too onerous for her. She wanted Mr Ogilvy to help her as a McKenzie Friend and thus needed to be able to speak to him.**
>
> **39. The Tribunal considered that letter and concluded that there was nothing in it that caused them to change the decision that they had reached earlier. It proceeded with the case in the Claimant's absence. The Respondent called its witnesses. The case was adjourned to the following day for closing submissions.**
>
> **40. At 3.10 the Tribunal sent the Claimant an email informing her of its decision. It advised her that the Tribunal would be hearing closing submissions the following day and that if she wanted to submit written submission she should do so by 12 noon. The Claimant did not submit any written submissions."**

36. The Grewal Tribunal went on to make findings of fact based on the evidence before it, and to reach conclusions on the claimant's claims against the respondent. All the claimant's claims made in ET claim 4 were dismissed. I shall set out the Grewal Tribunal's reasoning in relation to those of its findings which are now challenged when I deal with that part of the appeal.

The Appeals

37. As I have already indicated, the present appeals are against Employment Judge Morton's decision of March 2019 to refuse the claimant's request for reconsideration of her decision on the respondent's strike-out application in respect of the first three claims and in relation to the decision

of the Grewal Tribunal to dismiss ET claim 4. The final version of the Grounds of Appeal in relation to the decision of the Grewal Tribunal is that drafted by Mr Khan and Mr Rozycki in November 2020, following a case management hearing before His Honour Judge Auerbach, which replaces previous Grounds of Appeal. That in relation to the decision of Employment Judge Morton is the version submitted with the notice of appeal. The following issues, in summary, are raised by the appeals:

a. In relation to Judge Morton's decision, that it was procedurally unfair to dismiss the claimant's application for reconsideration without holding a hearing or receiving further submissions, given the content of the Employment Tribunal's notice to the parties sent on 14 January 2019. It is also alleged that the substance of Employment Judge Morton's March 2019 decision to dismiss the application for reconsideration is erroneous in law, both in relation to extending time and on the merits.

b. In relation to the decision of the Grewal Tribunal:
    i. the tribunal erred in law in refusing the claimant's application to adjourn the hearing on 23 January 2019, because (contrary to the finding made by the tribunal) her medical condition amounted to "exceptional circumstances", and the hearing ought to have been adjourned;
    ii. the tribunal erred in law in refusing the claimant's application under rule 50 of the **Employment Tribunal Rules of Procedure 2013** because (contrary to the findings made by the tribunal) the claimant's Article 8 rights were engaged and were not outweighed by other considerations, and/or because the tribunal made no reference to the medical report of 10 May 2017 in connection with its decision on that application and/or because the tribunal made no reference to the London South Employment Tribunal's letter of 14 January 2019 in connection with its decision on that application;

iii. certain of the findings made by the Grewal Tribunal on the substance of ET claim 4 were perverse and/or failed to take into account relevant facts – I will set out the points made in more detail when dealing with this ground.

The Appeal against Employment Judge Morton's Decision

38. I shall deal first with the appeal against the March 2019 decision of Employment Judge Morton to reject the claimant's application for reconsideration of the earlier judgment dismissing the respondent's application to strike out the first three claims. The claimant contends that there was a material procedural irregularity in the way in which Judge Morton determined that application. This arises from the Employment Tribunal having indicated to the parties on 14 January 2019 that the application for reconsideration was not being dismissed summarily under rule 72(1) of the **Employment Tribunal Rules of Procedure 2013**, and that it was proceeding under rule 72(2).

39. Rules 70-72 of the **Employment Tribunal Rules of Procedure 2013** set out the process by which an application for reconsideration is to be made and considered:

> **"Principles**
>
> **70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.**
>
> **Application**
>
> **71. Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.**
>
> **Process**
>
> **72.—(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.**
>
> **(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered**

> **at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.**
>
> **(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part."**

40. This appeal was the subject of a reference back to the Employment Tribunal under the ***Burns / Barke*** procedure for clarification of the Employment Judge's reasons for proceeding as she did. The Employment Tribunal's response discloses that the communication sent to the parties on 14 January 2019 was an initial draft which had been sent out in error, and contrary to the Employment Judge's instructions; and, moreover, that Employment Judge Morton was not aware of that communication having been sent until the ***Burns / Barke*** reference was made during the course of this appeal.

41. Mr Khan contended, on behalf of the claimant, that there was a material procedural irregularity here. The Employment Tribunal had notified the parties that the application for reconsideration would be dealt with in accordance with rule 72(2) of the **Employment Tribunal Rules of Procedure 2013**. Although it has since been discovered that the notification was sent in error, the parties (and, in particular, the claimant) did not know this. The claimant was entitled to rely on what the Employment Tribunal had said in its notification of 14 January 2019. Accordingly, Judge Morton's subsequent decision in March 2019 to refuse the application for reconsideration without hearing further from the parties should be set aside and the application for reconsideration should be remitted for redetermination.

42. For the respondent, Ms Darwin submitted that the appeal should be dismissed for three reasons. Firstly, it was now apparent that the notification sent to the parties on 14 January 2019, upon which the claimant relies, was sent in error. Secondly, the claimant's appeal against Judge Morton's decision of 24 March 2019 to refuse to reconsider her decision on the respondent's strike-out

application was academic because the Employment Tribunal had dismissed the first three ET claims on their merits in March 2018. Thirdly, the claimant's application for reconsideration was misconceived because it did not seek to challenge the substance of Judge Morton's Judgment of 17 March 2017 (which was favourable to the claimant) but instead the content of the Employment Judge's reasons.

43. I accept Mr Khan's submission that what occurred in this case was a procedural irregularity. The Employment Tribunal had notified the parties that the application for reconsideration would be determined after hearing further submissions from the parties, and potentially at a hearing, in accordance with rule 72(2). That notification, although it now appears that Employment Judge Morton was not herself aware that it had been sent, was not withdrawn. In my judgment, the Employment Tribunal erred in law in then proceeding to dismiss the claimant's application for reconsideration summarily under rule 72(1) after the parties had already been notified that it would be the subject of a substantive determination under rule 72(2). I reject Ms Darwin's submission that there is no error because it has subsequently been discovered that the letter of 14 January 2019 should not have been sent to the parties in the first place. The parties – and, in particular, the claimant – were not to know, and did not know, that the Employment Tribunal had issued that letter to the parties in error. The claimant was entitled to proceed on the basis that there would be either a hearing of the application for reconsideration under rule 72(2) or the opportunity for further written representations to be made.

44. However, although what occurred here amounted to a procedural irregularity, I accept Ms Darwin's alternative submission that the reconsideration application that was advanced by the claimant could not have been successful in any event and that, therefore, the procedural error below made no difference to the outcome of the application. That is because the claimant sought in the reconsideration application not to challenge the result of the respondent's application to strike out her first three claims – she had successfully resisted it, and the claims had not been struck out – but only

parts of the Judge's reasons, relating to the question of what had occurred at the 31 January 2017 preliminary hearing before Judge Hall-Smith.

45. I accept Ms Darwin's submission that an application for reconsideration is not a vehicle for challenging an Employment Tribunal's reasons or, insofar as not part of the essential reasoning upon which the decision is based, other things said by the Employment Tribunal in arriving at its decision. That proposition is established by the decision of this Appeal Tribunal in **AB v The Home Office**, UKEAT/0363/13/JOJ, where His Honour Judge Richardson dismissed an appeal against the Employment Tribunal's decision to refuse the claimant's application for a review of its judgment allowing his claim in part and dismissing it in part, under the previous version of the Employment Tribunal rules. At [37-44], this Appeal Tribunal stated:

> **"37. The Claimant's application for a review was decided when the applicable procedural rules were to be found in the Employment Tribunal Rules of Procedure 2004 (Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004). Rule 34(1) provided for "certain judgments and decisions" to be reviewed. These included all judgments other than default judgments: see r 34(1)(b). The grounds of review included that "the interests of justice require such a review": see r 34(3)(e). Where an application for review is made it was to be considered in the first instance by the Employment Judge: see r 35(3). It was to be refused if the EJ considered that there was "no reasonable prospect of the decision being varied or revoked."**
>
> **38. I would add that the 2013 Employment Tribunal Rules of Procedure (Sch 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) are broadly to the same effect. The word "reconsideration" is used in place of "review". The Rules provide for reconsideration of any judgment where it is "necessary in the interests of justice" to do so. There is again provision for an EJ to consider in the first instance whether there is any reasonable prospect of the original decision being varied or revoked. See rr 70 – 72 of the 2013 Rules.**
>
> **39. I do not accept the Claimant's submission that the EJ decided the application for review at the case management discussion on 9 May. The case management discussion was listed to give directions concerning the remedy hearing. It was not listed for the hearing of an application for review, and the EJ made no order relating to the review. There may have been discussion concerning the Claimant's dissatisfaction with the liability judgment but it is plain that the EJ later considered the application for review and determined it by letter dated 28 May. This letter and its reasons are central to the appeal.**
>
> **40. Nor would it matter if, at the case management discussion, the EJ did not at first understand which warning the Claimant was concerned with. She had heard the case and deliberated with her members three months earlier. The faired** [sic] **judgment and written reasons had been sent out by the ET nearly four week before. The case management discussion was listed for directions concerning remedy. The EJ was not required to master all the detail of the liability proceedings for that hearing. She was entitled to – and did – deal with the application for review separately after consideration some time later.**
>
> **41. In her reasons for refusing a review the EJ correctly identified r 35(3) as the power which she was exercising. The key question for her was therefore whether there was any reasonable prospect of the decision being varied or revoked. It was not the purpose of rr 34 – 36 to provide a mechanism for an ET to improve (or change) its reasons in the absence of a reasonable prospect of the decision being varied or revoked.**

> **42. There is, I think, a distinction to be drawn between (1) overlooking an issue altogether, and therefore not deciding it and (2) deciding an issue and giving reasons for it which are inadequate or incomplete. I think the distinction is the same under the old Rules and the new Rules. I will refer to "reconsideration" under the new Rules because this is the language with which we are now familiar.**
>
> **43. An EJ who, upon receiving an application for reconsideration, appreciates that the ET has altogether overlooked deciding an issue can and usually should arrange for the ET to reconsider its judgment. The ET will have failed to decide an issue which was for before it for determination: it will be necessary in the interests of justice for the ET to determine that issue. This happens rarely, but it can occur in cases where there are many issues. The ET may hold a further hearing or (in a case where a hearing is not necessary in the interests of justice) may give the parties a reasonable opportunity to make further representations.**
>
> **44. On the other hand, if the EJ considers that that the ET did decide the issue, and at most the reasons might be considered incomplete or inadequate, but there are no reasonable prospects of the judgment being varied or revoked, the EJ must not order reconsideration. Neither the 2004 nor the 2013 Rules permit the re-opening of a judgment in such circumstances."**

46. In my judgment, the claimant's application for reconsideration of Employment Judge Morton's decision to refuse the respondent's strike-out application is a clear example of the situation described by His Honour Judge Richardson in which a judgment cannot be re-opened simply to address alleged errors in the Employment Tribunal's reasoning. In the present case, the issue between the parties – i.e. whether the claimant's first three claims should be struck out as a result of the claimant's behaviour at the preliminary hearing on 31 January 2017 – had been determined by the Employment Tribunal. The claimant had been the successful party. She did not wish to have the judgment on the respondent's strike-out application – which was to her advantage – varied or revoked. Her challenge was only to the reasons given by the employment judge. In those circumstances, the conclusion reached by His Honour Judge Richardson at [44] of **AB v The Home Office** is directly applicable. What the claimant was seeking to achieve was an alteration in the content of the Employment Tribunal's reasons, not a change in the result. In those circumstances, the application for reconsideration was not one permitted by the **Employment Tribunal Rules of Procedure 2013**. There would, therefore, be no purpose in setting aside Judge Morton's decision of 28 March 2019 to dismiss the claimant's reconsideration application, despite the procedural irregularity which occurred below. This analysis also applies insofar as the claimant challenges the substantive decision made by Employment Judge Morton to dismiss the reconsideration application as unmeritorious.

47. I do not consider that anything in **Office of Communications v Floe Telecom Ltd** [2009] EWCA Civ 47, to which Mr Khan made reference, affects the position established by this Appeal Tribunal in **AB v The Home Office** in relation to applications for reconsideration. That was an appeal to the Court of Appeal in very unusual circumstances which was concerned with the correctness of at least part of the order made by the Competition Appeal Tribunal (see at [15] and [17]).

48. In those circumstances, it is unnecessary to address Ms Darwin's separate submission (which was disputed by Mr Khan) that the Employment Tribunal's judgment of 14 March 2018 dismissing the claimant's first three claims on their merits meant that the claimant's subsequent application in March 2019 to reconsider the earlier decision made on the respondent's strike-out application in relation to those claims was academic. I dismiss the appeal against Employment Judge Morton's decision of March 2019 to refuse the reconsideration application because the substance of the application was, in my judgment, outside the scope of the relevant provisions of the **Employment Tribunal Rules of Procedure 2013** and the procedural irregularity which occurred can have made no difference to the result.

The Appeal against the Grewal Tribunal's Judgment

Ground 1: The Refusal of the Claimant's Adjournment Application

49. The claimant contends that the Grewal Tribunal erred in law in refusing her application to adjourn the hearing after she had lost her voice, having contracted laryngitis during the hearing. Mr Khan accepted that this was, as the Grewal Tribunal held at [33-35] of its written reasons, a case to which rule 30A(3)(c) of the **Employment Tribunal Rules of Procedure 2013** applied. Because there had been two prior postponements of hearings in ET claim 4 on the application of the claimant, a third postponement could only be ordered if there were "exceptional circumstances". The relevant provisions of the **Employment Tribunal Rules of Procedure 2013** are rules 29 and 30A:

"29. The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. Subject to rule 30A(2) and (3) the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."

"30A. (1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.

(2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where—

(a) all other parties consent to the postponement and—
(i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or
(ii) it is otherwise in accordance with the overriding objective;

(b) the application was necessitated by an act or omission of another party or the Tribunal; or

(c) there are exceptional circumstances.

(3) Where a Tribunal has ordered two or more postponements of a hearing in the same proceedings on the application of the same party and that party makes an application for a further postponement, the Tribunal may only order a postponement on that application where—

(a) all other parties consent to the postponement and—
(i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or
(ii) it is otherwise in accordance with the overriding objective;

(b) the application was necessitated by an act or omission of another party or the Tribunal; or

(c) there are exceptional circumstances.

(4) For the purposes of this rule—

(a) references to postponement of a hearing include any adjournment which causes the hearing to be held or continued on a later date;

(b) "exceptional circumstances" may include ill health relating to an existing long term health condition or disability."

50. In **Morton v Eastleigh Citizens' Advice Bureau** [2020] EWCA Civ 638, the Court of Appeal dismissed an appeal against the Employment Tribunal's refusal to adjourn a final hearing where Rule 30A(2) applied. In so doing, Lewison LJ (with whom Underhill LJ agreed) stated:

"23. A decision by a tribunal to refuse an adjournment is a case management decision. A decision of that kind often involves an attempt to find the least worst solution where parties have diametrically opposed interests. In the case of an adjournment application the grant of an adjournment will cause delay in resolving the dispute, will gave rise to abortive and irrecoverable costs, will lose hearing time in the ET to the inconvenience of other users. All these are factors which the ET routinely has in mind when considering such applications. On the other hand, it must take into consideration the need for a fair process (fair to both sides, that is); and consider any prejudice that the applicant will suffer if the application is refused.

> **24. As Mummery LJ explained in *O'Cathail v Transport for London* [2013] EWCA Civ 21, [2013] ICR 614 at [44]:**
>
> > **"In relation to case management the employment tribunal has exceptionally wide powers of managing cases brought by and against parties who are often without the benefit of legal representation. The tribunal's decisions can only be questioned for error of law. A question of law only arises in relation to their exercise, when there is an error of legal principle in the approach or perversity in the outcome. That is the approach, including failing to take account of a relevant matter or taking account of an irrelevant one, which the Employment Appeal Tribunal should continue to adopt…""**

51. I was taken to some of the background material which preceded the amendment to the **Employment Tribunal Rules of Procedure 2013** in April 2016 which introduced rule 30A, including some of the material generated during the government's consultation process; I did not, however, find this to be of any great assistance in determining the issues arising on the present appeal. Insofar as the purpose behind the introduction of rule 30A is concerned, Lewison LJ identified it at [26] of his judgment in **Morton** when he stated:

> **"… Clearly this rule is intended to discourage late adjournments."**

I do not agree with Mr Khan that this passage is inapposite in the present situation because the Court of Appeal in **Morton** was dealing with a decision made under rule 30A(2). The purpose behind the introduction of rule 30A is clearly to impose a high threshold (described by Underhill LJ at [43] as a "serious hurdle") for the granting of an adjournment in either of the circumstances specified within the rule. In **Lunn v Aston Darby Group Limited & Another**, UKEAT/0039/18/BA at [18], Her Honour Judge Eady QC contrasted the requirement in section 128(5) of the **Employment Rights Act 1996** for there to be "special circumstances" in order to postpone the hearing of an interim relief application with the wording of rule 30A:

> **"…. there will be no postponement unless there are special circumstances. That said, it is to be noted that the language used is that of "special", not "exceptional" circumstances (in contrast, for example, to the terminology used at Rule 30A(2) of the ET Rules). Furthermore, section 128(5) does not remove the ET's discretion to permit a postponement of the hearing; it informs the ET as to the kind of circumstances that must exist before a postponement is granted: they must be special, even if not exceptional."**

52. I accept Mr Khan's submission that no assistance can be derived, in the present context, from the wording of rule 30A(4)(b); that sub-paragraph clarifies that ill-health consequent upon a long-

term condition or a disability (which is not an issue in the present case) may constitute "exceptional circumstances", but it does not provide any more exhaustive definition than that. I agree with Mr Khan that the definition of "exceptional circumstances" is not closed and that it is a question for the judgment of the Employment Tribunal in the individual case, something which is apparent from the way in which the Court of Appeal approached the decision of the Employment Tribunal in **Morton**.

53. The issue in the present appeal is, as it was in **Morton** (see at [27]), whether the Grewal Tribunal erred in law in concluding that there were not "exceptional circumstances" in existence. Mr Khan submitted that the Grewal Tribunal had indeed erred in law in finding that the circumstances of the claimant's application to adjourn the hearing were not exceptional.

54. Mr Khan accepted that the decision whether or not to adjourn was a matter of discretion but submitted that the Grewal Tribunal should, when determining whether there were "exceptional circumstances", have considered whether it was fair to adjourn the hearing and that it should have applied a broad "interests of justice" test, in accordance with the overriding objective in rule 2 of the **Employment Tribunal Rules of Procedure 2013**. rule 2 provides:

> **"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—**
>
> **(a) ensuring that the parties are on an equal footing;**
> **(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;**
> **(c) avoiding unnecessary formality and seeking flexibility in the proceedings;**
> **(d) avoiding delay, so far as compatible with proper consideration of the issues; and**
> **(e) saving expense.**
>
> **A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."**

Mr Khan submitted, in my judgment correctly, that the overriding objective in rule 2 applies to "any power" given to the Employment Tribunal under the rules, so including the power to adjourn in rule

30A(3); see also, on this point, Judge Eady QC's judgment in **Lunn** at [13-14] and at [22]. He submitted that the ultimate issue was therefore whether or not it was fair to adjourn the hearing.

55. I do not accept, however, that the general applicability of the overriding objective in rule 2 means that the question before the Grewal Tribunal was anything other than whether there existed "exceptional circumstances" for the purposes of the adjournment application. Ms Darwin accepted that when applying rule 30A an Employment Tribunal must seek to give effect to the overriding objective but pointed out that rule 30A provided for a specific threshold. The overriding objective could not, Ms Darwin argued, be relied on so as to effectively disapply specific requirements elsewhere in the rules. I agree with Ms Darwin that it was not open to the Employment Tribunal to "sidestep" – as she put it – the plain wording of rule 30A and to impose a different and more general test. As both Lewison and Underhill LJJ stated in **Morton** (see at [27], [43] and [47]), it is necessary for an Employment Tribunal to find that, unless the other criteria which appear in the various sub-paragraphs of rule 30A are satisfied (which it is accepted they were not in the present case), the circumstances are exceptional before an adjournment can be granted in the situations specified in the rule. Mr Khan submitted that no issue had been raised in **Morton** regarding the interrelationship between Rule 30A and the overriding objective. However, I do not regard either the approach of the Court of Appeal in **Morton** or the clear purpose behind rule 30A as being incompatible with the overriding objective in rule 2: indeed the limitation provided for in the rule on granting either late or repeated adjournments to situations in which (unless the other criteria are satisfied) there are "exceptional circumstances" in existence is itself an aspect of dealing with cases fairly and justly, something which is not confined to the interests of one party. Nor do I consider that the Grewal Tribunal lost sight of the provisions of the overriding objective in considering whether there existed "exceptional circumstances" in the present case. The tribunal expressly considered whether the proposed adjustment of using the computer and projection equipment provided by the respondent would enable the claimant to participate effectively in the hearing. Indeed Mr Khan accepted – rightly,

in my judgment – that it is not a requirement of a fair hearing that a party should be present at all. Many hearings are conducted in the absence – for whatever reason – of one or more of the parties. See **O'Cathail v Transport for London** [2013] EWCA Civ 21, [2013] ICR 614 at [47].

56. In his challenge to the substance of the Grewal Tribunal's conclusion on the existence of "exceptional circumstances", Mr Khan submitted that the adjustment proposed by the respondent and accepted by the Grewal Tribunal was unorthodox and would have prevented the effective participation of the claimant in the proceedings, and that the Grewal Tribunal had not balanced the disadvantage to the claimant when deciding whether to proceed. He submitted that the medical evidence before the tribunal had been clear, that it had to be accepted and that an adjournment of seven days was all that was required. The tribunal could have reconvened shortly thereafter. Mr Khan submitted that the prejudice to the claimant, who by that point was not being represented, in refusing the adjournment was so great that the inconvenience caused by the delay had to be accommodated.

57. Ms Darwin submitted that the question of whether or not there were "exceptional circumstances" for the purposes of rule 30A(3)(c) had been left to individual Employment Tribunals to determine, based upon the particular facts of each case. Ms Darwin submitted that the hearing could only be postponed where there were "exceptional circumstances", as specified by rule 30A(3)(c), and that the Grewal Tribunal had made findings which were open to it regarding the absence of "exceptional circumstances". The tribunal had found that that the claimant's laryngitis impacted on her ability to speak, but that she was otherwise able to attend the hearing and to participate in it. The Grewal Tribunal had considered whether the situation amounted to "exceptional circumstances" and had concluded that it did not. The Grewal Tribunal had specifically considered whether the claimant would be able to participate in the proceedings despite having lost her voice and considered that she would be able to do so. It has also legitimately concluded that the practicalities of the situation meant that it would not have been possible to reconvene the hearing for a much longer

period of time than that suggested by Mr Khan. Ms Darwin submitted that this was a conclusion on the facts of the particular case which was open to the Grewal Tribunal to reach and which gave rise to no error of law.

58. I accept Ms Darwin's submission that the Grewal Tribunal was entitled to find that there were not "exceptional circumstances" present and therefore that the claimant's application for an adjournment of the hearing could not be granted. In my judgment, the Grewal Tribunal did not err in law in its approach to this question, and its conclusion that there were not "exceptional circumstances" for the purpose of rule 30A(3)(c) was not perverse (see the passage from **Morton**, above, citing **O'Cathail**).

59. The situation in which the Grewal Tribunal found itself was that the claimant had lost her voice and had medical evidence recommending that she should rest her voice for a period exceeding the remaining time available for the completion of the hearing. Mr Khan is right to submit that the medical evidence was clear – indeed, I do not think that the Grewal Tribunal itself doubted its correctness – but the medical letter, as the Grewal Tribunal itself pointed out, did not state that the claimant was unfit to attend the hearing or that her ability to present her case was otherwise impaired on medical grounds. Although Mr Khan made reference to the claimant having other medical issues relevant to the issue of adjournment, such issues were not identified in the medical evidence that was supplied in support of the adjournment application. The claimant's doctor had advised a week of "voice rest" but had not stated that the claimant was unable to attend a hearing on medical grounds or that she was unable to present her case in writing, in circumstances where the tribunal had directed medical evidence on, amongst other things, the issue of the claimant's ability to continue with the hearing (see at [30] of the reasons). Indeed, on the morning of 23 January 2019, the claimant had sent the tribunal what was a clear and well-constructed written adjournment application, citing five appellate cases. The situation in this case can therefore be contrasted with that in some of the cases relied upon by Mr Khan, such as **Teinaz**, **Pye v Queen Mary, University of London**,

UKEAT/0374/11/ZT & UKEAT/0447/11/ZT and **Solanki v Intercity Telecom Ltd** [2018] EWCA Civ 101, in which the medical evidence was to the effect that the party seeking to adjourn was unfit even to attend a hearing. Contrary to the submission made by Mr Khan, there was no requirement for the Grewal Tribunal to adjourn for any further medical evidence, in circumstances where it had already directed the claimant to provide medical evidence going to the specific issues that were identified at [30] of the reasons.

60. Deciding an application for an adjournment of this sort is not an exercise in seeking perfection; as Lewison LJ stated in **Morton** at [23], it is often an attempt to find the "least worst solution". The respondent had offered to accommodate the claimant – who had demonstrated by making the adjournment application that she was still able to communicate with the tribunal by email and that she was able to make submissions to the tribunal in writing – by providing facilities to enable her to type what she was otherwise unable to say and to have her typed communications projected within the hearing room. I accept that this solution would not have precisely replicated the situation as it would have been if the claimant had not lost her voice. However, the Grewal Tribunal made two important findings which, in my judgment, were clearly open to it: firstly, that the equipment provided by the respondent, having been demonstrated to the tribunal, "worked perfectly" (see at [32] of the written reasons) and, secondly, that the claimant would have been able to participate in the hearing, using that technology (see at [35] of the reasons). The difficulty for Mr Khan in advancing the submission that the claimant would, contrary to the findings made by the Grewal Tribunal, have been unable to participate effectively in the proceedings by this method – and indeed that she would have been materially disadvantaged by it, to the extent of the hearing being rendered unfair – is that the claimant, having been advised of the refusal of her adjournment application, did not thereafter attend the remainder of the hearing and so made no attempt to use the equipment provided. The essence of the submission now being made is really, in my judgment, that the claimant had an absolute entitlement to have the hearing delayed until she had sufficiently recovered her voice and that any decision to the contrary would have been perverse. I do not accept that. Nor does the Grewal

Tribunal's decision, on the afternoon of 22 January, to adjourn the hearing until the following day due to the issues which the claimant was having with her voice at that point demonstrate that it ought then to have granted the much longer adjournment sought by the claimant on 23 January.

61. In the circumstances as they stood on 23 January 2019, in my judgment it was open to the Grewal Tribunal to conclude that the circumstances in which the adjournment application came to be made were not "exceptional circumstances" as required under rule 30A. Indeed even if, contrary to my view, the correct question in determining whether the circumstances are "exceptional" is (as Mr Khan submitted it should be) whether it was "fair to adjourn" the hearing, I do not see that the Grewal Tribunal would have reached a different result in the particular circumstances as it found them to be.

62. I therefore dismiss the appeal against the Grewal Tribunal's refusal of the claimant's application to adjourn the hearing on 23 January 2019, because the tribunal did not err in law in concluding that there were not "exceptional circumstances" present for the purpose of granting an adjournment where rule 30A(3)(c) of the **Employment Tribunal Rules of Procedure 2013** applied.

63. It is therefore unnecessary to determine whether, in the event the Grewal Tribunal did err in its conclusion that "exceptional circumstances" were not present, it would have been necessary for the tribunal to go on to consider (as it in fact did) whether to order an adjournment as a matter of discretion under rule 29. Mr Khan submitted that if the Grewal Tribunal had found that there were "exceptional circumstances" under rule 30A(3)(c) then an adjournment would necessarily have followed and the further consideration of the position under rule 29 which the Grewal Tribunal went on to conduct at [36] of the reasons was otiose. In contrast, Ms Darwin submitted that the Grewal Tribunal's approach was entirely correct and that rule 30A was only a gateway to the more general power to adjourn under rule 29, which would have fallen to be exercised even if "exceptional circumstances" had been found to exist. This point does not strictly arise for decision in the present appeal, and I consider that there is some force in the arguments that were advanced on both sides on

this question. Nonetheless, I should indicate that I incline to the position advanced by Ms Darwin, at least to this extent. Firstly, rule 30A does not direct an Employment Tribunal to grant an adjournment if the conditions set out in sub-paragraphs (2) or (3) are satisfied: it states that a tribunal "may only" order a postponement when they are satisfied. Secondly, I find it difficult to conceive that a tribunal would postpone a hearing without considering all the material circumstances, including the sorts of countervailing considerations identified by the Grewal Tribunal at [36] of the reasons.

Ground 2: The Refusal of the Claimant's Rule 50 Application

64. Rule 50 of the **Employment Tribunal Rules of Procedure 2013** provides, in the first three paragraphs, as follows:

> **"(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.**
>
> **(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.**
>
> **(3) Such orders may include—**
>
> **(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;**
> **(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;**
> **(c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;**
> **(d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act."**

65. The claimant made an application to the Grewal Tribunal for an order that either her identity should be anonymised permanently or that the contents of the reasons given by Employment Judge Hall-Smith and by Employment Judge Morton should not be disclosed to the public. The Grewal Tribunal refused that application for the reasons given at [9-16] of its written reasons, which I have set out above.

66. Mr Khan's first submission on this part of the claimant's appeal was that the Grewal Tribunal had erred in law at [14] of its written reasons in concluding that the claimant's Article 8 **ECHR** rights

were not engaged, because the hearing before Judge Hall-Smith on 31 January 2017 had been held "in private". This is what had been stated to the parties by the London South Employment Tribunal in the notice of hearing that they had been sent. Mr Khan submitted that the claimant had a reasonable expectation of privacy in relation to what had occurred at the hearing. He relied on what this Appeal Tribunal had said in **X v Y** [2021] ICR 147, where Cavanagh J stated at [23]:

> "**The test for whether the Article 8 right to privacy has been engaged is that set out by the House of Lords in Campbell v MGN [2004] 2 AC 457 and approved by the Supreme Court in Khuja at paragraph 21, namely that the right is in principle engaged if in respect of the disclosed facts the person in question had a reasonable expectation of privacy. The test is whether, if a reasonable person of ordinary sensibilities, placed in the same situation, was the subject of the disclosure rather than the recipient, that reasonable person would find the disclosure offensive.**"

67. In my judgment, however, the argument that the claimant's Article 8 **ECHR** rights were engaged in this case in relation to her conduct at the hearing before Judge Hall-Smith founders on the following propositions, which reflect the arguments advanced by Ms Darwin in her submissions:

a. Article 8 guarantees respect for an individual's private and family life. Perhaps unusually, in the context of applications made under rule 50, the material said to result in Article 8 being engaged in the circumstances of the rule 50 application to the Grewal Tribunal was not material external to the conduct of legal proceedings themselves and forming part of the claimant's private life, e.g. (subject to the point discussed at [71-74], below) medical evidence or evidence given under oath about the events which form the subject matter of a claim before the Employment Tribunal. Rather, what is relied upon is the claimant's conduct at a hearing in the Employment Tribunal which is recorded in the written reasons of the Employment Tribunal issued following that hearing.

b. In my judgment, it is not the case that events of the sort presently in issue which take place in a hearing in an Employment Tribunal, even if that hearing is one from which the public are excluded, must then be taken to form part of a litigant's "private life" which is

protected by Article 8 **ECHR.** Mr Khan's submission conflates the concept of a "private" hearing before a court or tribunal, i.e. one from which the public are excluded, with the sphere of a litigant's "private life". The two are not the same. The Grewal Tribunal was correct, in my judgment, to make this point at [14] of its reasons. This is not a case about the protection of "privacy interests" (see **Cape Intermediate Holdings Ltd v Dring** [2019] UKSC 38, [2020] AC 629 at [46]).

c. I reject Mr Khan's submission that the claimant had a reasonable expectation of privacy, in relation to her conduct at the hearing before Judge Hall-Smith, arising from the terms of the Employment Tribunal's notice of hearing or the fact that Judge Hall-Smith's decision and reasons resulted from a hearing held in private. Applying the test set out in **X v Y**, cited above, a reasonable person of ordinary sensibilities would not, in my judgment, consider the public disclosure of the nature of their conduct at an Employment Tribunal hearing – even one from which the general public had been excluded, and which was attended only by the judge and the representatives of the other party – to be offensive. It is clearly a foreseeable consequence that a litigant who misconducts themselves at a court or tribunal hearing will have the nature and extent of such misconduct set out in the decision of the court or tribunal. An Employment Tribunal is a public body – in the sense of being an independent tribunal established by the State to resolve disputes in the field of employment – and is not a private forum. The analogy that was drawn by Mr Khan with the disclosure of witness statements in advance of their deployment at trial (see **Blue v Ashley** [2017] EWHC 1553, [2017] 1 WLR 3630 at [23]) is inapt because the current situation involves consideration of events which occurred at a hearing.

d. Mr Khan submitted that the notice of hearing before Judge Hall-Smith having specified that the hearing would be "in private", any public reference to what had occurred at that that hearing would amount to a breach of the conditions upon which the hearing was to be

conducted, and so a reasonable expectation of privacy did arise. He relied on **In Re Martindale** [1894] 3 Ch 193 at 200, where North J held that it was a contempt of court for a newspaper to publish details of a case which had been dealt with at a hearing before him in private. But the issue before North J in **Martindale** was different to that which arose in relation to Article 8 **ECHR** on the claimant's rule 50 application. It was whether the newspaper's publication of the details of the case amounted to a contempt of court. In the present case, the issue was whether the claimant's Article 8 **ECHR** rights were engaged in respect of what had occurred during the course of an Employment Tribunal hearing. Other cases which Mr Khan relied on in support of his argument about the consequences of the hearing being "in private" do not, in my judgment, have the effect contended for, for the reasons which I give below.

68. In any event, even if Article 8 **ECHR** were engaged, I also accept Ms Darwin's alternative submission that the Grewal Tribunal's conclusion at [15] of the reasons that the result of the balancing exercise was against the making of an order under rule 50 was not only one which it was entitled to reach, but that it was entirely correct. I reject Mr Khan's submission that the analysis, conducted in the alternative, is somehow tainted by what are (on this premise) errors made at the earlier stage. Even if the claimant did have a reasonable expectation of privacy in relation to what had occurred at the hearing before Judge Hall-Smith, the powerful countervailing considerations identified by the Grewal Tribunal were such as to clearly override the claimant's Article 8 **ECHR** rights – see the discussion of the powerful nature of the principle of open justice by Simler J, sitting in this Appeal Tribunal, in **Fallows v News Group Newspapers Ltd** [2016] ICR 801 at [48] and [57-59]. I do not accept Mr Khan's submission that **Fallows** is distinguishable because that case involved an application to revoke an order made under rule 50 but no application was made to revoke the direction that the hearing before Judge Hall-Smith was to be held in private. That the claimant then had an outstanding challenge by way of reconsideration application in respect of Employment Judge Morton's judgment was something recognised and taken into account by the Grewal Tribunal, and I do not consider that

the tribunal's failure to refer expressly to the London South Employment Tribunal's letter of 14 January 2019, which indicated that the reconsideration application would be proceeding, vitiates its analysis.

69. Insofar as Mr Khan advanced any subsidiary argument to the effect that, irrespective of the engagement of Article 8 **ECHR**, the Grewal Tribunal erred in law in refusing the rule 50 application because of the London South Employment Tribunal's direction that the hearing before Judge Hall-Smith was to be held "in private", I reject it. It is important to note that no wider reporting restriction was ever imposed by the London South Employment Tribunal in relation to the first three ET claims, and that the argument advanced on behalf of the claimant derives its force solely from the fact that the hearing before Judge Hall-Smith was held in private. However, none of the cases cited by Mr Khan establish the proposition that it is impermissible for a court or tribunal to refer, in a public judgment (or one which does not have the restrictions that were sought by the claimant in her rule 50 application attached to it), to a party's conduct at an earlier court or tribunal hearing which has been held in private.

70. The case of **Martindale** was, as I have already indicated, about a very different issue. **Scott v Scott** [1913] AC 417, HL, does not assist Mr Khan's argument, either. That case was about the basis upon which the High Court could order matrimonial proceedings to be heard *in camera*. Indeed, as I read the speeches of their Lordships they appear to caution against a state of affairs which would preclude any publication, after the conclusion of litigation, of a report of proceedings which had been held in private: the headnote to the Appeal Cases report states that the House of Lords held, "that the order, assuming there was jurisdiction to make it, did not prevent the subsequent publication of the proceedings"; this point is reflected in the more recent analysis of Simler J in **Fallows** at [57-59]. Mr Khan also relied on **A v BBC** [2014] UKSC 25, [2015] AC 588. But that case involved the making of an order for anonymity in deportation proceedings, where the appellant would have been at risk on return to his home country if he had been identified. In the present case, the Employment Tribunal

did not make an order for anonymity in relation to the first three ET claims and the notification that the hearing would be "in private" is materially different in character. Nor does **Queensgate Investments LLP v Millett** [2021] ICR 863 assist the claimant's case, either. That decision establishes that applications for interim relief are public hearings and are not held in private. But it does not address the question of whether a court or tribunal is precluded from referring, in a subsequent public decision, to what has occurred at a hearing that has been held in private and in respect of which no separate reporting restrictions have been imposed.

71. The second aspect of this Ground of Appeal relates to the content of the medical evidence supplied by the claimant to the London South Employment Tribunal (see above, at [21]), to which the Grewal Tribunal made reference in the substantive part of its reasons. It is submitted by Mr Khan that, firstly, the claimant did base her application for an order under rule 50 on the separate issue of the content of medical evidence and that the Grewal Tribunal failed to address that point at all in its reasons for refusing the rule 50 application. In the alternative, Mr Khan submits that the Grewal Tribunal ought to have considered of its own motion whether to make an order on this basis. Ms Darwin submits that the Grewal Tribunal did not err in law in relation to the rule 50 application because this point was not argued by the claimant and that the alternative argument made by Mr Khan is outside the scope of the notice of appeal.

72. This aspect of the appeal resulted in an order being made for the production of Employment Judge Grewal's notes. I have considered the notes and the written submissions made by both parties on them. I do not consider that I can accept the argument advanced on behalf of the claimant that she did indeed rely on the medical evidence before the Grewal Tribunal when making her application, as justifying an order under rule 50. As Ms Darwin correctly points out, the Grewal Tribunal's detailed analysis of the rule 50 application does not refer to the medical evidence as being a basis for the claimant's application. Indeed, the only reference to the medical evidence appears to have been made by Ms Darwin in her oral submissions in response to the claimant's rule 50 application, when the

Judge's notes record that Ms Darwin noted that there was sensitive medical evidence in the bundle and suggested that a separate application could be made by the claimant under rule 50 to deal with that material if it were necessary to do so. The Employment Judge's notes support Ms Darwin's submission as to what occurred at the hearing. Ms Darwin's submission is also supported by correspondence sent by the Employment Tribunal to the parties on 20 December 2019, after the claimant had made a request for the removal of certain references to the medical evidence from the published decision:

> **"The Claimant did not make any application for redaction of any medical information before or during the hearing. The judgment was promulgated on 16 April 2019. No application for redaction was made immediately after that. The application was first made on 27 September 2019. The judgment and reasons have been entered on the Register. They have been in the public domain for over 5 months. EJ Grewal considers that she does not have any powers to remove a judgment from the Register and to make amendments to it. The Claimant's Rule 50 application to the Tribunal at the start of the hearing made no reference to the evidence about her medical conditions. It was not the basis on which she sought the Rule 50 order. The Tribunal's decision at paragraphs 9 to 16 deals with the grounds on which the orders were sought."**

73. In the written submissions filed on behalf of the claimant, Mr Khan and Mr Rozycki also contend that it is sufficient that the Employment Judge's notes show Ms Darwin had referred to the medical evidence during the argument on the rule 50 application. But the Judge's notes record that Ms Darwin had identified that this material might potentially be the subject of an entirely separate rule 50 application in the event that it became necessary to refer to it. That does not demonstrate that the claimant did in fact base the rule 50 application which was rejected by the Grewal Tribunal on that material – indeed, quite the reverse. That there may have been reference during the argument on the rule 50 application – and by Ms Darwin, not by the claimant – to the medical evidence does not demonstrate that the Grewal Tribunal erred in not addressing it in the reasons.

74. It is further contended on behalf of the claimant that the Grewal Tribunal erred in law in failing to consider this issue of its own volition, even absent an application by the claimant. Even assuming that this argument is within the scope of the amended notice of appeal (and it is certainly not raised as a discrete point, the pleaded allegation being that the tribunal "did not consider" the report in connection with the rule 50 application), I reject it as unmeritorious. This case is some way from **X v**

Y, which Cavanagh J held at [36-37] was one of the rare cases in which an Employment Tribunal ought to have considered anonymisation even though it had not been raised by the claimant. In the present case, not only was the claimant well aware of her right to apply for an order to be made under rule 50, but she made an application at the hearing on grounds other than those now raised on appeal relating to the medical evidence. Still further, the issue of whether a separate application might be made, based on the content of the claimant's medical evidence, was expressly raised by Ms Darwin during the hearing. The claimant did not make such an application. In those circumstances, I do not consider that the Grewal Tribunal erred in law in failing to make an order under rule 50 of its own motion based on the content of the medical evidence.

75. I therefore dismiss the claimant's appeal insofar as she challenges the Grewal Tribunal's refusal of her application for an order to be made under rule 50.

Ground 3: The Grewal Tribunal's Decision to Dismiss ET Claim 4

76. The claimant also challenges the substantive decision of the Grewal Tribunal to dismiss ET claim 4. This aspect of the claimant's challenge to the Grewal Tribunal's decision has several elements, but with the common theme of alleged perversity. The test for perversity is a high one: 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 law, would have reached." See **Yeboah v Crofton** [2002] EWCA Civ 794, [2002] IRLR 634 at [92-96].

77. Because of the issues raised by Ms Darwin regarding whether some of the arguments advanced by Mr Khan were within the scope of the amended grounds that had been permitted to proceed following the case management hearing before His Honour Judge Auerbach, I ought to set out those grounds in full. They are as follows:

"*Ground 3: Error of law on ground of perversity or failing to take into account relevant facts*

(3) The Employment Tribunal erred in law in that:

(a) The findings at paragraph 65 were perverse or not supported by the evidence in that:

(i) The ET found that the Appellant repeatedly shouted at the Judge when the Non Verbatim Attendance Note dated 31/1/2017 does not record the Appellant shouting.
(ii) The notes of Christina McGoldrick from the 31/1/2017 hearing do not record the Appellant shouting at the Judge and/or in the course of the hearing.

(b) At paragraph [131](i) the Employment Tribunal held that it was reasonable not to specify the behaviour the Respondent relied upon for the purposes of the letter inviting the Appellant to a disciplinary hearing which was perverse.

(c) The Employment Tribunal at paragraph [136] were perverse to find that the Appellant's conduct was likely to bring the Respondent into disrepute when the hearing was in private.

(d) The Employment Tribunal were wrong to find at [120] that there was no evidence before it from which it could infer that a senior manager of the Respondent, who had behaved in the same way as the Claimant but not done any of the protected acts, would have been treated any differently, because it failed to consider the Respondent's failure to follow its own suspension policy in respect of one or more of the following facts or allegations:

(i) The suspension decision not being made at the appropriate business level;
(ii) The Respondent not having established that there were good grounds for taking the decision,
(iii) Ms Henry not having consulted with Employee Relations, Policy & Advice, before taking the decision, and
(iv) The suspension letter being delivered to the Appellant at home.

(e) The Employment Tribunal were wrong at [126] & [127] to conclude that the email to the Evening Standard was for the purpose of personal gain and, therefore, not a protected disclosure, without assessing the Appellant's subjective intent in sending the same."

Ground 3(a) – allegedly perverse findings regarding the hearing before Judge Hall-Smith

78. Firstly, the claimant contends that at [65] of its written reasons, the Grewal Tribunal made perverse findings of fact regarding what had occurred at the hearing before Judge Hall-Smith. At [63-65], the Grewal Tribunal referred to the events at that hearing in the following terms:

"63. There was a preliminary hearing of the Claimant's claims at the London South Employment Tribunal on 31 January 2017. On 27 January 2017 solicitors acting for the Claimant wrote to the Tribunal indicating that the Claimant would not be pursuing the applications to amend her claims which she had previously made. The Claimant made it clear to her solicitors that she was not happy that the letter had been sent as she wished to pursue her application. She wrote to the Tribunal that the letter had been sent without her approval and that the contents of the letter had not been agreed. That letter was not copied to the Respondent.

64. At the preliminary hearing the Claimant was represented by counsel. She was accompanied by her mother and friend. Employment Judge Hall-Smith ruled that as it was a private case management hearing only one of them could remain. The Claimant's mother shouted at the judge but ultimately left. The Respondent was also represented by counsel. Also in attendance were Louise Coyne and Christina McGoldrick (solicitors working for the Respondent) and Denise Lake (from the Employee Relations Policy and Advice team ("ERAP"). All three of them made notes at the hearing.

65. According to their notes the Claimant's counsel said that she wished to pursue the application to amend but that he would have to withdraw due to conflict between his instructing solicitors and his lay

> **client. The Respondent's counsel objected to the application being heard on the grounds that she was not prepared to deal with it. There was a lengthy discussion on the issue, at the end of which the Employment Judge said that he was not allowing the amendments. The Claimant then engaged in a heated exchange with the judge. She said that her lawyers had not had her approval to withdraw her application to amend and that her application to amend was as stated in her previous solicitor's letters. She continued arguing with the Judge and he eventually said that he had made his ruling. The Claimant said that her case had been purposely sabotaged by the Respondents and that she had professionals submitting applications to the Tribunal without her approval. She said that there had been a travesty of justice. The Claimant's counsel said that he had ceased to act for her fifteen minutes ago and he withdrew. The Claimant continued shouting at the Judge and he repeated that he had made his ruling. The Claimant said that she had been prejudiced and needed to make an emergency application. She continued arguing with the judge and he tried to placate her. The Claimant then shouted that she could not continue and that this was not the way the justice system worked. She then gathered her things and stormed out of the room. The Respondent's counsel said that she felt that she should apologise for the Claimant's conduct. The Claimant's mother then came to the door of the Tribunal and shouted at the Judge and the Respondents. The Claimant was beside her mother. Security staff were called and were present at some stages of the hearing. Finally, the Claimant and her mother left and the Judge dictated his reasons for refusing the Claimant's application."**

79. Mr Khan submits that the finding at [65] of the reasons that the claimant had shouted at Employment Judge Hall-Smith was contradicted by the notes made by some of those present at the hearing, in particular an attendance note prepared by the claimant's solicitor and the handwritten notes of Ms McGoldrick, which Mr Khan submits refer only to the claimant's mother shouting. Ms Darwin was right to point out that Mr Khan's oral submissions on this part of ground 3 ranged wider than the particulars of the allegedly perverse findings given in the amended grounds of appeal.

80. In any event, I accept Ms Darwin's submission that the claimant's argument on this part of ground 3 mischaracterises the exercise being undertaken by the Grewal Tribunal at [65] of the reasons. The Grewal Tribunal was not at [65] making findings of fact about what had happened at the hearing before Judge Hall-Smith. Rather, the tribunal was setting out what was recorded in the notes made by the respondent's representatives at the hearing. The concluding sentence of [64] of the reasons refers to the notes that were made by those attending the hearing on behalf of the respondent. The next paragraph of the reasons, which is now criticised on appeal, makes clear that what follows is a summary of what is set out in those notes. It begins with the words, "According to their notes…" The Grewal Tribunal was not, therefore, making findings of fact about what had occurred at the hearing, but was setting out the content of the notes made by the respondent's representatives at the

hearing, which was part of the evidence before the respondent's dismissing officer. That is a complete answer to this aspect of ground 3.

81. Turning to the particular documents relied on, the attendance note made by the representative of the claimant's then Solicitors, Bindmans LLP, who attended the hearing was not one of the notes made by the respondent's representatives and was not before the dismissing officer. It cannot, therefore, have been perverse for the Grewal Tribunal to say what it did at [65] in relation to what was contained in the respondent's representatives' notes, because of anything said in the notes made by the claimant's legal representative. In any event, however, even if the Grewal Tribunal had been making primary factual findings at [65] of the reasons, it is clear that the claimant's legal representatives left during the course of the hearing and were not present for the entirety of it – including when the claimant is recorded by Judge Hall-Smith as having shouted at him (see [31] of Judge Hall-Smith's reasons), and for part of the period that is covered by the narrative at [65] of the Grewal Tribunal's reasons. Further, as Ms Darwin submitted, there was in any event considerable evidence before the Grewal Tribunal that the claimant had shouted at Judge Hall-Smith, and the fact that notes compiled by the claimant's Solicitor during the period when they were present do not refer to the claimant shouting does not mean that, if the Grewal Tribunal was making primary factual findings at [65] of the Reasons, such findings were perverse.

82. The second pleaded aspect of ground 3(a) is that what is said at [65] of the reasons is not consistent with the notes made by Ms McGoldrick, one of those who had attended the hearing before Judge Hall-Smith. I do not accept the submissions advanced by the claimant on this part of ground 3, either. Ms Darwin submitted that what appeared at [65] of the reasons appeared to be a summary of what she described as a "composite note" which was a typed-up note of the hearing that had been agreed by all three of the respondent's representatives identified in [64] of the reasons. That "composite note" had been included in the disciplinary papers (as Appendix 8), and is there identified as having been agreed by Ms McGoldrick, Ms Lake, Ms Coyne and also the respondent's Counsel,

Ms Bell. The material part of that note for present purposes, relating to the events immediately after the decision on the claimant's amendment application, reads as follows:

> **"Judge Hall-Smith confirmed that he had made his ruling. The Claimant interrupted and said that her case had been purposely sabotaged by her solicitors and the Respondent knowingly. She stated that she had professionals submitting applications to the Tribunal without her approval. She said she would have to say there was a failure of justice. The Claimant continued shouting that it was not justice.**
>
> **Mr Milsom said that he ceased to act "around 15 minutes ago" and said that he withdrew.**
>
> ***Mr Milsom and Miss Marshall left the room immediately – time 3:40 pm***
>
> **The Claimant remained standing and continued to address the Judge with a loud voice. She said that the Bindman's partner refused to withdraw her application without her approval. Judge Hall-Smith reiterated that he had made a ruling. The Claimant said that she had been prejudiced and threatened to appeal his decision. Judge Hall-Smith explained that the Claimant could appeal. The Claimant sat down where Mr Milsom had been sitting at the Claimant's table. The Claimant said that she needed to make an emergency application. She was not represented now and had written to Bindmans on 27 January requesting withdrawal of their letter. She was unrepresented as a layman. The application she had made had been within the knowledge of the Respondent for over a year.**
>
> **Judge Hall** [sic] **attempted to speak to the Claimant, who was now standing again, but she continued to talk over him. Judge Hall-Smith explained to the Claimant that she seemed to take the view that her application would have to be granted. The Claimant interrupted Judge Hall-Smith and said that he had refused an application that was withdrawn without her approval. She stated that she was not represented and was prejudiced. Judge Hall-Smith explained that lots of claimants were unrepresented. The Claimant said that she was not given an opportunity to prepare.**
>
> **Judge Hall-Smith explained again that he had turned down the application. The Claimant shouted that she could not continue and would have to leave. She said this could not be the way the justice system works. The Claimant gathered her things and marched out of the room.**
>
> ***The Claimant left the room at 3.42 pm.*"**

83. It will be apparent that in this part of the "composite note", there are two references to the claimant "shouting" at the Employment Judge and one reference to her addressing him "with a loud voice". I agree with Ms Darwin that what appears at [65] of the reasons appears to be a summary by the Grewal Tribunal of the relevant part of the "composite note". In my judgment, it is clear that what was said by the Grewal Tribunal at [65] of the reasons was not perverse, whether or not the Grewal Tribunal was purporting to make findings of primary fact. The tribunal was there accurately recording the content of the respondent's note of the hearing, which had been relied on in the disciplinary process. Even if the individual handwritten note made by Ms McGoldrick does not expressly record the claimant as having shouted, the "composite note" plainly does. On that basis, in my judgment, the threshold for perversity is not met here.

84. I therefore dismiss the appeal on ground 3(a). What was stated in [65] of the Grewal Tribunal's reasons was not perverse.

Ground 3(b) – allegedly perverse conclusion regarding detriment consequent upon protected disclosures

85. Given the appeal against the Grewal Tribunal's finding at [123-128] of the reasons that the claimant had not made any protected disclosures has not been pursued (see [104], below), I do not see how this element of ground 3, which challenges the conclusion on the alleged detriments consequent upon such disclosures, could now result in the Grewal Tribunal's decision to dismiss the claim being overturned. Nonetheless, I will deal with the arguments that were advanced.

86. By this part of ground 3, the claimant contends that the Grewal Tribunal made a perverse finding at [131(i)] of the reasons that one of the detriments alleged by the claimant in her whistleblowing claim had not been made out. This sub-paragraph, which appears in a passage under the heading "Protected Disclosure Detriments" at [129-132] of the reasons, reads as follows:

> **"131 That Claimant also complained that she had been subjected to a number of detriments in the dismissal process. We deal with each of them in turn below (setting out the alleged detriment by the Claimant first) –**
>
> > **(i) The letter inviting her to the disciplinary hearing had said that the allegation of misconduct was her behaviour at the preliminary hearing but had not specified what that behaviour was. The investigation report was attached to the letter. It contained all the accounts given by the witnesses of the Claimant's behaviour at that hearing and the decisions of EJ Hall-Smith and EJ Morton. The Claimant, therefore, had sufficient information to know what the Respondent alleged that she had done at the hearing. She had sufficient detail of the allegation to be able to respond to it. The Claimant was not subjected to a detriment by not being given specifics of the allegation that she had to answer."**

87. Mr Khan submitted that the finding made by the Grewal Tribunal was indeed perverse. He contended that the letter setting out the allegation against the claimant was inadequate and that the tribunal's finding to the contrary was perverse. Mr Khan submitted that what had occurred was a breach of the principle of natural justice. He referred to a number of authorities, including **Stevenson v United Road Transport Union** [1977] ICR 893, CA, and **Strouthos v London Underground Ltd**

[2004] EWCA Civ 402, [2004] IRLR 636, but in my judgment these demonstrate no more than the proposition of law applied by the Grewal Tribunal at [131(i)], namely that a person must have sufficient information to know what they are alleged to have done so as to be able to respond to the allegation made against them. Whether the information is sufficient will depend on the circumstances of the particular case.

88. In the present case, the allegation against the claimant which resulted in her dismissal was contained in correspondence sent to her by the respondent on 25 August 2017, notifying her that a disciplinary hearing would take place:

> **"The purpose of the hearing is to consider an allegation of misconduct against you for your behaviour at the Preliminary Hearing at the London South Tribunal on 31 January 2017 and your subsequent communications with the press… PwC has caried out an investigation and has received statements from those who witnessed your behaviour at the tribunal. I enclose a summary of the findings of the investigation, which sets out further details of the allegations together with copies of relevant statements and other documents which may be referred to at the disciplinary hearing…"**

Attached to the letter were a number of appendices, including detailed written statements made by those who attended the preliminary hearing for the respondent on 31 January 2017 and the "composite note", to which I have already referred.

89. The relevant findings made by the dismissing officer, Claire Stokes, in her decision to dismiss the claimant dated 6 October 2017 were in the following terms:

> **"Having reviewed the evidence, I believe that you acted in an inappropriate manner on a continued and sustained basis during the course of the Employment Tribunal Preliminary Hearing… I believe that you behaved in an excessively aggressive manner which included shouting and interrupting Judge Hall-Smith in the course of his duties on a number of occasions.**
>
> **I acknowledged your previous responses in relation to your behaviour during the Hearing, namely that you deny that you had shouted or threatened the parties in any way, or that you had behaved in a way that would be in breach of the Firm's expectations of conduct.**
>
> **I have taken into consideration that the Hearing could have been a stressful environment for all parties, however notwithstanding I noted that you had continued to demonstrate unacceptable behaviour after an adjournment of the Hearing, and after you had been warned by Judge Hall-Smith that he would not tolerate such disruptive conduct.**
>
> **I believe that it is relevant to note that you cannot be held accountable for the behaviour of your mother who was also present at the Hearing. However, I believe that there is significant evidence pertaining to your own unacceptable behaviour and how your conduct was received by the attending parties.**

> **I have particularly considered the views of Laura Bell (external counsel) and Judge Hall-Smith in relation to your behaviour during the Hearing, specifically that they referred to your conduct as being disgraceful and exceptional, even taking into account their many years of experience in an Employment Tribunal setting. I have considered that a number of individuals in the room during the Hearing were affected by your actions, including Judge Hall-Smith who was said to have been visibly upset and shaken.**
>
> **I believe that it is reasonable to assume that your behaviour could have had a detrimental impact on people's perceptions of PwC as a Firm and your actions were likely to bring PwC into disrepute.**
>
> **As a result of the above and your sustained grossly unacceptable behaviour during the course of the Employment Tribunal Hearing, I believe that your actions resulted in a serious breach of the ongoing employment relationship.**
>
> **I have therefore found that this allegation is proven, and that your behaviour in relation to this specific allegation is tantamount to gross misconduct."**

90. In my judgment, the Grewal Tribunal's conclusion at [131(i)] of its written reasons discloses no error of law in the circumstances of this case. It was not perverse. The Grewal Tribunal was entitled to conclude that the respondent had provided sufficient information to the claimant, in advance of the disciplinary hearing, to enable her to know what she was alleged to have done, and that she had not been subjected to any detriment in this respect. It was clear that the respondent was relying on the claimant's behaviour at the hearing on 31 January 2017 as constituting misconduct justifying disciplinary action and the statements of those present at the preliminary hearing, which were provided to the claimant, set out the claimant's alleged unacceptable behaviour at the preliminary hearing on 31 January 2017 in some detail. There was no error of law or perversity in the Grewal Tribunal's conclusion at [131(i)] of the reasons that the claimant had sufficient details of what was alleged against her to be able to respond to the disciplinary charge that her behaviour at the hearing constituted misconduct.

91. Mr Khan placed particular reliance on the decision of the Court of Appeal in **Strouthos**. In that case (see at [6]), the material part of the disciplinary charge against the claimant, for present purposes, read as follows:

> **"Gross misconduct in that on Friday 14 September 2001, you took the Line Car and failed to disclose the destination to the Duty Manager. You then without permission, and the appropriate insurance, took the car to Belgium..."**

The Court of Appeal held that the way in which the charge against the claimant had been framed did not include an allegation that the car had initially been taken by the claimant without permission – only that the claimant had subsequently taken the car to Belgium without permission. Pill LJ (with whose judgment May and Dyson LJJ agreed) stated at [11]:

> **"The point has arisen, and has only arisen at this hearing, as to whether the evidence which was given to the disciplinary panel of the respondents is covered by the formal charge as laid, and if not, what are the consequences of that? In my judgment, the effect of the charge is clear.** [Counsel for the employer] **has strenuously submitted that, while it is ambiguous, it could bear the meaning that a dishonest initial taking of the vehicle is covered by the charge. I do not agree. On a reading of it, the action without permission relates to the taking of the car to Belgium. That appears in a different sentence from the words "you took the Line Car and failed to disclose the destination to the Duty Manager". The sentence in which the expression "without permission" is contained follows and begins with the word "then", which indicates a period later in time than the first sentence."**

Pill LJ went on to repeat, at [35], that in his opinion the charge against the claimant "did not include an allegation of dishonesty in the initial taking… of the motor vehicle".

92. Mr Khan particularly relied on the following passages of Pill LJ's judgment in relation to the framing of disciplinary charges:

> **"12. It is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed, and that evidence should be confined to the particulars given in the charge…"**
>
> **"38. This is not a case, especially as the matter has been raised only during the hearing in this court, in which to attempt to state general principles as to when a disciplinary charge of this kind may be departed from when disciplinary action is taken. However, it does appear to me to be basic to legal procedures, whether criminal or disciplinary, that a defendant or employee should be found guilty, if he is found guilty at all, only of a charge which is put to him. What has been considered in the cases is the general approach required in proceedings such as these. It is to be emphasised that it is wished to keep proceedings as informal as possible, but that does not, in my judgment, destroy the basic proposition that a defendant should only be found guilty of the offence with which he has been charged."**
>
> **"41. What has to be considered is the overall fairness of the procedure.** [Counsel for the employer] **has argued that even if the charge was defective (he does not accept it was), any defect was cured by the procedure followed before the Disciplinary Panel. Having decided the case as I would, it is not necessary to make a ruling, but it does appear to me quite basic that care must be taken with the framing of a disciplinary charge, and the circumstances in which it is permissible to go beyond that charge in a decision to take disciplinary action are very limited. There may, of course, be provision, as there is in other Tribunals, both formal and informal, to permit amendment of a charge, provided the principles in the cases are respected. Where care has clearly been taken to frame a charge formally and put it formally to an employee, in my judgment, the normal result must be that it is only matters charged which can form the basis for a dismissal. That is something which may have come to the notice of the Disciplinary Panel as shown by their declining to make the finding of fact upon which the Tribunal subsequently permitted reliance to be placed by the employers."**

93. In **Strouthos**, the claimant had not been charged with a disciplinary offence of initially taking his employer's vehicle without permission – only of subsequently taking it abroad without permission. The disciplinary charge against the claimant in the present case was that her behaviour at the preliminary hearing before Employment Judge Hall-Smith constituted misconduct. That charge was upheld by the dismissing officer. Returning to the points made by Pill LJ in **Strouthos** at [11] and [38], the charge against the claimant was covered by the evidence adduced by the respondent (which set out her alleged inappropriate behaviour at the hearing in some detail), and the claimant was found guilty of the charge as put. In my judgment, the Grewal Tribunal reached a conclusion that was open to it in the circumstances of this case. The allegation of perversity advanced by the claimant is not made out.

94. In his oral submissions, Mr Khan also sought to rely on the arguments deployed under this sub-ground, and in particular the case of **Strouthos**, to criticise the Grewal Tribunal's conclusion on the claimant's unfair dismissal claim at [136-137] of the reasons, where it found that the dismissal was fair:

> **"Unfair Dismissal**
>
> **136 We considered first what the reason for the dismissal was. It was abundantly clear to us that the Claimant was not dismissed because she had given information in the emails of 31 January which tended to show that her solicitors had been in breach of their legal obligations to her and that that had resulted in a miscarriage of justice. If the Claimant had made any protected disclosures to the Respondent, that was the extent of it. We concluded that the reason for the dismissal was the Claimant's behateavior** [sic] **at the preliminary hearing on 31 January – Ms Stokes believed that she had behaved in an excessively aggressive manner which had included shouting at and interrupting the Judge, the unacceptable behavior** [sic] **had continued after an adjournment and after the Judge had said that he would not tolerate it, that seasoned users of the Tribunal had described her conduct as disgraceful and exceptional and that a number of people in the room had been affected by her conduct. That was conduct that was likely to bring the Respondent into disrepute. That is a reason related to conduct and a potentially fair reason for the dismissal.**
>
> **137 We then considered whether in all the circumstances the Respondent acted reasonably in treating that as a sufficient reason for dismissing the Claimant. At the time when Ms Stokes formed the belief that she did about the claimant's conduct at the preliminary hearing, the Respondent had conducted as much investigation as was reasonable and had she had reasonable grounds on which to sustain her belief. The Respondent had the accounts of its three employees who had been present at the hearing, the Respondent's counsel and the Employment Judge. The Claimant was provided with the evidence upon which the Respondent relied and was given the opportunity to present her side of the story and any evidence that she wanted to present. She was advised of her right to be accompanied. The Claimant chose not to engage in the process. She was offered a right of appeal and the time for presenting her grounds of appeal was extended on two occasions. An appeal pack was prepared by the Respondent and the Claimant was provided with a copy of it. Although the Claimant did not submit detailed grounds of appeal her appeal**

> **was nevertheless considered on the basis of her emails. The procedure and the process followed was fair. The decision to dismiss fell within the range of reasonable responses available to a reasonable employer in the circumstances. We concluded that the dismissal was fair."**

95. Mr Khan contended that the tribunal had failed to deal with this issue when considering the fairness of the dismissal, despite it having been specifically pleaded by the claimant in connection with the unfair dismissal claim. In my judgment, however, this argument must also be rejected. Firstly, as Ms Darwin correctly submitted, it does not form part of the claimant's amended notice of appeal (see at [77], above), which specifically challenges only the conclusion reached at [131(i)] of the reasons in relation to the existence of a detriment for the purposes of the protected disclosure claim and does not challenge the conclusion reached on the fairness of the claimant's dismissal, or allege that the tribunal failed to deal with a material matter at [136-137] of the reasons. Secondly, in any event I do not consider that the argument is made out, for the reasons that I have already given. To the extent that the Grewal Tribunal did not again specifically refer to this issue when considering the question of the fairness of the claimant's dismissal, then any error was immaterial to the outcome because it had already dealt with the point in the passage at [131(i)], which I have set out above.

96. I therefore dismiss ground 3(b) of the appeal against the Grewal Tribunal's judgment.

Ground 3(c) – allegation of perverse finding regarding the fairness of the dismissal

97. By this part of ground 3, it is contended that the Employment Tribunal's finding at [136] of the reasons regarding the reason for the claimant's dismissal, which I have set out when addressing ground 3(b), was perverse. The basis for the claimant's contention of perversity is the issue already discussed above regarding the hearing before Judge Hall-Smith having taken place "in private", i.e. one from which the general public were excluded. Ms Darwin submits that this was not a perverse finding in light of the fact that there were individuals in the hearing room who did not work for the respondent – i.e. the claimant's counsel and solicitor, the respondent's counsel and the Employment Judge. I agree with her that the Grewal Tribunal was entitled to find that there was a potentially fair reason for dismissal in this case – i.e. conduct – and, to the extent that criticism of the tribunal's

conclusion on the reasonableness of the dismissal was advanced in connection with this aspect of the appeal, that its conclusion was one which was open to it to reach. It was not perverse.

98. I therefore dismiss ground 3(c) of the appeal against the Grewal Tribunal's judgment.

Ground 3(d) – failure to consider certain matters in connection with the victimisation claim

99. This part of ground 3 relates to the claimant's complaint of victimisation, contrary to the provisions of the **Equality Act 2010**. It was accepted that the claimant had done several protected acts. It is now contended on behalf of the claimant that the Employment Tribunal's finding at [120] of the reasons that there was no evidence before it that a senior manager of the respondent who had not done protected acts would have been treated differently failed to take into account what are said to be four breaches of the respondent's suspension policy in dealing with the claimant. Although Ms Darwin argued that the submissions made by Mr Khan were outside the scope of the notice of appeal, I do not agree: the pleaded complaint is that the tribunal "failed to consider" certain matters. The relevant paragraph of the Grewal Tribunal's reasons reads:

> **"120. We considered the suspension and the instigation of the disciplinary investigation together. We accepted Ms Henry's evidence that, on the basis of the reports she had received, her preliminary view was that the Claimant's conduct on 31 January 2017 at the preliminary hearing and in sending the emails afterwards was serious and could potentially amount to gross misconduct. The Claimant was a senior employee of the Respondent and the alleged misconduct had taken place in a public forum. It was clearly not a minor or trivial matter and it cannot be said that this was a case of an employer using a flimsy reason to suspend an employee and start a disciplinary process because it had an ulterior motive. Ms Henry took the view that the matter clearly needed to be investigated and, having regard to the nature of the misconduct alleged, she had genuine concerns about the Claimant having access to the Respondent's systems and premises while the matter was investigated. There was no evidence before us from which we could infer that a senior manager of the Respondent, who had behaved in the same way as the Claimant but had not done any of the protected acts, would have been treated any differently. Having considered all the evidence, we concluded that the Respondent had not suspended the Claimant or started the disciplinary process against her because she had done any of the protected acts."**

100. For the respondent, Ms Darwin submitted that the Grewal Tribunal was here concerned with a specific allegation, identified in the List of Issues set out at [2.2] of the tribunal's reasons, under the heading "Victimisation", as follows:

> **"… whether the Claimant was subjected to the following detriments because she had done the above protected act(s):**
>
> **(a) Her suspension on 3 February 2017;**

(b) The disciplinary investigation into allegations about her from 6 February 2017;
(c) The Respondent's decision to rate her as "Not Assessed" for the 2016/2017 performance year, as communicated to the Claimant on 30 March 2017."

Ms Darwin submitted that whether the respondent had breached its suspension policy in the respects now alleged was not an allegation made in connection with the victimisation claim. What was complained about was the fact of suspension having occurred, not the manner in which it was carried out. I agree. I also accept Ms Darwin's submission that there was no requirement for the Grewal Tribunal to address, at [120] of the reasons, the matters that are now relied on in relation to whether or not the decision to suspend was an act of victimisation consequent upon protected acts because they were not the basis upon which the claimant's claim was put to the Employment Tribunal. There is no allegation of such breaches of the suspension policy in the claim form or the further particulars of that claim which were supplied by the claimant; although it appears that the policy was disclosed by the respondent only very shortly before the hearing, no amendment was made in order to raise the points now relied on and it is not reflected in the List of Issues which appears in the Grewal Tribunal's reasons.

101. Sarah Henry (the senior employee of the respondent who had taken the decision to suspend the claimant) was cross-examined by the claimant's representative, Mr Ogilvy, on the morning of 22 January 2019, and it is apparent from the judge's notes that at least some aspects of the suspension policy (which appeared at pages 1733-1734 of the bundle before the Grewal Tribunal) were referred to during cross-examination. Although it appears from the notes that Ms Henry was questioned about the basis for her decision to suspend the claimant and about why the suspension letter was delivered to the claimant's home rather than a suspension meeting being held (the policy referring to it being "best practice" to have a suspension meeting and Ms Henry's evidence, according to the Judge's notes and reflected in the tribunal's reasons at [70-72], being that this was because the claimant was signed off sick and that it was necessary to hand-deliver the suspension letter to ensure it was received by the claimant), the notes do not record that it was put to her in cross-examination that any breaches

of the suspension policy now raised on appeal had anything to do with the claimant's protected acts. The judge's notes also do not indicate that any point was raised with Ms Henry about the suspension decision being made at an inappropriate level of management or regarding failure to consult with the respondent's employee relations team. The claimant did not make any closing submissions to the Grewal Tribunal, either, despite having the opportunity to do so (see at [33], above), and so the arguments now raised in relation to the significance of these alleged breaches of policy in connection with the victimisation claim were not made to the tribunal. Mr Khan submits that the Grewal Tribunal ought to have drawn an inference against the respondent in respect of the victimisation claim in relation to these matters – but such a submission was not made to the tribunal below.

102. In these circumstances, in my judgment, the Grewal Tribunal's conclusion at [120] of the reasons discloses no error of law. It does not, as Mr Khan and Mr Rozycki now submit, fail to engage with the identified issues in the case (see **Dutton v Governing Body of Woodslee Primary School**, UKEAT/0305/15/BA at [22]) or reach an impermissible or perverse conclusion on the point (see **Piggott Bros & Co Ltd v Jackson** [1992] ICR 85 at 92F, CA). The point made on appeal seeks, in effect, to advance a case which was not made below, to criticise the Grewal Tribunal for failing to deal with arguments that were not pleaded, identified in the list of issues, raised in cross-examination or made in closing submissions, and to re-argue the victimisation claim on appeal.

103. In any event, the substance of at least two of the points made was dealt with by the Grewal Tribunal. Insofar as it is contended that the respondent breached its suspension policy by not having a "good reason" to suspend the claimant, the issue was dealt with by the Grewal Tribunal when it stated at [120] of the reasons that, "It was clearly not a minor or trivial matter and it cannot be said that this was a case of an employer using a flimsy reason to suspend an employee…" Further, insofar as the decision to hand-deliver the suspension letter to the claimant's home was concerned, this issue was addressed by the tribunal in connection with the claimant's claims for direct discrimination and harassment at [134] of the reasons, in respect of which that matter had been identified as a complaint.

The tribunal noted that this "would not be the normal way of sending a suspension letter" but accepted the explanation that had been given by the respondent regarding the reasons for the manner in which the decision to suspend had been communicated.

Ground 3(e) – alleged error in finding of no protected disclosures

104. This part of ground 3, by which it was contended that the Grewal Tribunal had erred in law in its finding that the claimant had not made protected disclosures in her emails to the Evening Standard newspaper, was not pursued by Mr Khan at the hearing of the appeal. Accordingly, I need not address it further.

105. Ground 3, upon which the claimant's appeal against the substance of the Grewal Tribunal's decision to dismissed ET claim 4 has been permitted to proceed, is therefore dismissed in its entirety.

Conclusion

106. Both the claimant's appeals are dismissed.

Postscript

107. On 22 September 2021, whilst my draft judgment was being prepared for promulgation, Mr Khan sent an email drawing my attention to the decision of this Appeal Tribunal in **TYU v ILA SPA Limited**, EA-2019-000983-VP, which had been given on 16 September. He submitted that the judgment of Deputy High Court Judge Heather Williams QC was supportive of the position taken by the Claimant that the Grewal Tribunal had been wrong to find that Article 8 ECHR was not engaged in relation to the claimant's application under rule 50 and that the Grewal Tribunal had also erred in the balancing exercise. At my direction, on 5 October Ms Darwin submitted a short note in response to Mr Khan's submissions.

108. The decision in **TYU** does not cause me to change my view as to the correct outcome of this part of the claimant's appeal against the decision of the Grewal Tribunal. In that case, the application for anonymity had been made by the appellant, an employee of the respondent who was neither a party to nor a witness in the proceedings before the Employment Tribunal. The Employment Tribunal had held (see at [16] of this Appeal Tribunal's judgment) that the appellant had no reasonable expectation of privacy, so as to result in Article 8 ECHR being engaged in relation to her subsequent anonymity application, because information revealing her identity had been discussed during a public trial. This Appeal Tribunal held that to have been an error of law: see at [59-60]. It was further held at [67-72] that, on the facts found by the Employment Tribunal, Article 8 ECHR was indeed engaged because the appellant did have a reasonable expectation that she would not, as someone who had not participated in the tribunal proceedings, be named in the particular context that she was in the Employment Tribunal's judgment (i.e. in relation to "potential criminal acts of dishonesty by the appellant in her workplace" and the referral of theft allegations against her to the police: see at [71-72]). The factual basis of the rule 50 application in the present case is, for the reasons which I have already given, significantly different. It concerns the conduct of one of the parties to litigation during the course of a hearing before the Employment Tribunal. Indeed at [43] and [57] of her judgment in **TYU**, Deputy Judge Williams QC addressed the decision of Her Honour Judge Eady QC in the present claimant's earlier appeal (see at [24], above) and expressly distinguished the circumstances of the appellant in **TYU**.

109. In any event, nothing in **TYU** undermines the Grewal Tribunal's alternative conclusion that, even if Article 8 ECHR was engaged, the claimant's rule 50 application should nonetheless be dismissed. Deputy Judge Williams QC held in **TYU** that the Employment Judge (whose brief reasoning on the point appears at [17] of this Appeal Tribunal's judgment) had not conducted a balancing exercise between the competing rights in play. In the present case, the Grewal Tribunal did conduct such an exercise at [15-16] of its written reasons. Mr Khan however submits, relying on **TYU**, that the Grewal Tribunal erred in the balancing exercise "in that it did not consider the relevant

measures that could be adopted to protect the Appellant's Article 8 rights such as the use of a cipher instead of her name." In my judgment, there is nothing in this point. The Grewal Tribunal expressly considered at [15] of the written reasons whether what it described as "permanent anonymity" should be given to the claimant. The balancing exercise in this case was not flawed on any of the bases identified as potential grounds for appeal at [47] of the judgment in **TYU**.

110. On 6 October, the claimant sent an email to the Employment Appeal Tribunal responding to the note sent by Ms Darwin. She said that she was doing so herself because her Solicitors had refused to comply with her instructions to send such a response (for which, I should add, I had not given any direction). In that email, the claimant made the following points, which I shall address for the sake of completeness:

a. *That she had raised the issue of medical information before the Grewal Tribunal as a ground for making her rule 50 application.* I have already dealt with that issue at [71-74], above.

b. *That the Grewal Tribunal had found at [15] of the written reasons that "prior publicity" was fatal to the claimant's rule 50 application.* The criticism of the Employment Tribunal in **TYU** was in relation to its having found that the prior publicity given to the allegations against the appellant at the public tribunal hearing was fatal to the engagement of Article 8 ECHR. The Grewal Tribunal did not, for the reasons which I have given, make the same error in relation to the engagement of Article 8 in this case. Nor did it find at [15] of the written reasons, when conducting the balancing exercise, that "prior publicity" was fatal to the claimant's application in this respect; indeed, the first countervailing consideration identified by the Grewal Tribunal was that the order sought by the claimant was a serious interference with the principle of open justice.

c. *That the claimant was in a position analogous to the appellant in **TYU**, because of the publication of a "false narrative" of her conduct at the hearing on 31 January 2017.* I

have dealt with this point at [108], above. The claimant's position is not analogous to that of the appellant in **TYU**.

d. *That the decision and reasons of Employment Judge Hall-Smith following the hearing on 31 January 2017 were "ultra vires by reason of lack of jurisdiction, lack of due process, misconduct by the Respondents and negligent publication" and that they were "void and of no effect*". I am not dealing with an appeal against the decision of Judge Hall-Smith, but instead with a challenge to the Grewal Tribunal's refusal of the claimant's much later rule 50 application.

111. For these reasons, the decision of this Appeal Tribunal in **TYU** and the further submissions made by Mr Khan and by the claimant herself do not, in my judgment, assist the claimant in her appeal against the Grewal Tribunal's refusal of her rule 50 application.