Neutral Citation Number: [2023] EAT 77

Case No: EA-2021-000454-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 May 2023

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

MR R JAKKHU **Appellant**

- and –

NETWORK RAIL INFRASTRUCTURE LIMITED

Respondent

- -
- -

David Stephenson (instructed by TMP Solicitors) for the **Appellant**
Georgia Hicks (instructed by Dentons UKMEA LLP) for the **Respondent**

Hearing date: 10 May 2023

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30 on 25 May 2023

SUMMARY

Disability discrimination – Equality Act 2010 – direct discrimination (section 13) – unfavourable treatment because of something arising in consequence of disability (section 15) – victimisation (section 27) – burden of proof (section 136) – whether just and equitable to extend time (section 123)

The claimant having succeeded (in part) on an earlier appeal, this matter was remitted to the employment tribunal ("ET") to determine whether his dismissal on 24 September 2014 amounted to an act of direct disability discrimination, unfavourable treatment because of something arising in consequence of disability, or victimisation. At the first hearing before the ET, it had been held that the claimant had been given notice of dismissal for what were genuine reasons related to redundancy (rejecting the claimant's case that this was a sham). The claimant's dismissal had taken effect on 24 September 2014, when he was on sick leave, but it was subsequently realised that this was in breach of an agreement reached with the relevant trade unions, to the effect that there should be no compulsory redundancies prior to 31 December 2014. As a result, on 22 October 2014, the claimant was told that the dismissal would be withdrawn and his notice extended. Later, on 20 January 2015, the claimant's trade union representative requested that the notice be retracted; this was done, and the claimant returned to work on 4 February 2015.

On the earlier appeal, it had been held that the ET had erred in its approach to the complaint relating to the 24 September 2014 dismissal, failing to properly address the question of detriment potentially arising from the dismissal, notwithstanding the claimant's subsequent reinstatement. At the remitted hearing, the ET considered the question of detriment in respect of the 24 September dismissal, the subsequent extension of the notice on 22 October 2014, and the failure to retract the notice until 20 January 2015. It rejected the claimant's claims in each respect. The claimant appealed.

Held: dismissing the appeal

The remission to the ET had been limited to the claim advanced in respect of the dismissal of 24 September 2014; although the ET was entitled to see that act in the broader context of subsequent events, to the extent that it purported to determine wider allegations of detriment arising from the extension of the claimant's notice on 22 October 2014, or the failure to retract that notice before 20 January 2015, that was an error: those matters were not relied on as detriments in the claimant's pleaded case and the order for remission had (necessarily) been limited to the case as put in respect of the 24 September 2014 dismissal.

The ET had not, however, erred in its approach to the burden of proof, and it had reached decisions that were

open to it on the evidence and were adequately explained in its judgment. In particular, it had not erred in failing to draw adverse inferences from the fact that the respondent had not called as a witness the human resources adviser who had given the instruction that led to the extension of notice on 22 October 2014: the claimant had not identified that individual as a putative discriminator and the respondent could not be criticised for failing to address a case that had not been advanced against it.

Finally, even if it was assumed that the ET had erred in its conclusions on the merits, it had reached a decision that had been open to it on the question whether it was just and equitable to extend time.

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT:

Introduction

1. This appeal raises issues regarding the approach taken to the shifting burden of proof on the claimant's claims of disability discrimination and victimisation; a further question relates to the decision that it would, in any event, not be just and equitable to extend time in this case.

2. In giving this judgment, I refer to the parties as the claimant and respondent, as below. This is the full hearing of the claimant's appeal against the decision of the Cambridge employment tribunal (Employment Judge King sitting with members Mr Davie and Mrs Smith on the remitted hearing of this case on 22 September 2020, with a further day in chambers on 6 October 2020 for deliberations; "the ET"). By the ET's reserved judgment, sent to the parties on 9 February 2021, the claimant's various claims of disability discrimination and victimisation, brought under sections 13, 15 and 27 of the **Equality Act 2010**, ("the **EqA**"), were dismissed. That decision followed the claimant's earlier (partly) successful appeal in UKEAT/0276/18/LA, which came before me on 2 April 2019 and related to the ET's earlier judgment, reached after a hearing on 22-26 January 2018, sent to the parties on 31 July 2018 ("the first decision").

3. Representation before the ET at the remitted hearing was as it has been on both this appeal and the previous appeal. The parties were also represented by counsel at the ET hearing in January 2018, albeit Mr Stephenson did not then appear.

The Factual Background

4. The claimant started his employment with the respondent on 22 March 2004. In August 2008, he took up a band five role as a support analyst.

5. The claimant suffers from ulcerative colitis, which renders him disabled for the purposes of the **EqA**; the respondent was aware of the claimant's condition from 2008. At the time of the events with which the ET was concerned, the claimant had had a number of days absent from work; by any standard, his absence record was high, for both disability and non-disability related reasons. In 2011, given his level of sickness absence, the claimant had been referred to occupational health, which advised that his condition was likely to be covered by the **EqA** and that reasonable adjustments could be requested. Thereafter, during the course of 2012 and 2013, the claimant attended a number of meetings relating to his sickness absence and further advice was

sought from occupational health and from his GP.

6. In January 2014, the claimant raised a grievance complaining of a failure to make reasonable adjustments (including permitting him to work from home), and of race discrimination; he specifically complained about his practice manager, Ian Hindler (the person with responsibility for issues outside normal daily work matters). That grievance was not upheld, albeit a number of recommendations were made for adjustments for the future. Subsequently, on 11 March 2014, Mr Hindler raised a grievance about the claimant, essentially complaining about what he saw as unjustified accusations of discrimination made by the claimant against him. Mr Hindler's grievance was also not upheld, a decision confirmed by letter of 29 June 2014.

7. Meanwhile, going into 2014, a re-organisation saw the claimant's role re-located to Manchester and he was put at risk of redundancy. The claimant did not wish to re-locate to Manchester and, on 25 March 2014, he attended a redundancy notice meeting and confirmed he wished to take redundancy rather than be considered for an alternative role. During that meeting the claimant was served with six months' notice of redundancy to take effect on 24 September 2014; the decision to give the claimant notice was taken by the claimant's then manager, Mr Barrett, and human resources adviser, Ms Jethwa. A letter confirming the date of termination, and notifying the claimant of his right of appeal, was sent out on 2 June 2014. The claimant did not appeal.

8. From 6 May 2014, the claimant was absent from work on sick leave, albeit attending various meetings during this period, with a welfare meeting on 13 August 2014 and an occupational health appointment in September 2014. The claimant was also in communication with the respondent as to how his absence was to be treated: there was a time when he was treated as being on garden leave but, at his request, he then went back on sick leave or took holiday. As at 24 September 2014, the claimant was signed off work for ill health reasons when the notice of termination of his employment expired and he was dismissed. Again, at this stage Mr Barrett and Ms Jethwa remained the relevant decision takers.

9. As the ET found, unbeknownst to Mr Barrett and Ms Jethwa, the claimant's dismissal was in fact in breach of a national agreement the respondent had reached with relevant trade unions (TSSA and RMT) during the course of 2014. This agreement provided that no compulsory redundancies would take place in bands five to eight until 31 December 2014.

10. This error having come to light at some stage after 24 September 2014, the fact of the agreement with

the trade unions was notified to Mr Barrett and Ms Jethwa by a Ms Sinead Trudgill, senior HR adviser, on 15 October 2014. On 22 October 2014, Mr Barrett duly spoke to the claimant to tell him of this, stating that the respondent would be extending his notice period to 31 January 2015 (this was the course Ms Trudgill had said should be adopted). That decision was confirmed by letter of 31 October 2014, which explained that the date of 31 January 2015 had been chosen in case the agreement with the trade unions was extended beyond 31 December 2014. At that stage the claimant was angry that (as he saw it) although the respondent wanted to get rid of him it was unable to dismiss him, adversely impacting arrangements he had made that assumed he would be receiving his final salary payments, including redundancy and accrued holiday pay.

11. The claimant then remained on garden and/or sick leave, albeit at some point spending some time in India, before entering into further communication with the respondent in December 2014.

12. After a conference call with Mr Barrett and Ms Jethwa on 7 January 2015, a meeting took place on 20 January 2015, when the claimant's trade union representative requested that his notice should be retracted and the process re-started. That was agreed and, by letter of 30 January 2015, it was confirmed that the claimant would return to work. On 3 February 2015, the respondent further wrote to formally retract the notice of redundancy and again confirm the claimant's return to work.

13. The claimant duly returned on 4 February 2015 and I understand that he has since remained in the respondent's employment, albeit that he has had to take extensive periods of sickness absence.

The Claim Before the ET and the First ET Decision

14. By his claim dated 31 July 2015, the claimant (relevantly) complained that his dismissal on 24 September 2014 was an act of direct disability discrimination, and/or that it was unfavourable treatment because of something arising in consequence of his disability, and/or that it amounted to unlawful victimisation.

15. The ET rejected the claimant's case that his redundancy had been a sham; finding that there was a genuine reorganisation that had led to his role being re-located to Manchester and that there was a diminishing requirement for employees to carry out work of a particular kind in the place where the claimant worked, such as to give rise to a redundancy situation. More than that, the ET found that the claimant had himself chosen not to re-locate to Manchester and had declined an alternative position, opting instead for redundancy. On the

ET's findings, at the time when notice was given, there was no basis on which it could be concluded that the respondent had acted in contravention of sections 13, 15 or 27 **EqA**.

16. The claimant had, however, also complained that, in any event, his dismissal (in breach of the respondent's agreement with the trade unions) had constituted direct disability discrimination, unfavourable treatment because of something arising in consequence of his disability, and/or unlawful victimisation.

17. Considering this way of putting the claim, the ET considered it relevant that the claimant had accepted the extension to his notice period communicated to him on 22 October 2014 and continued to treat himself as employed by the respondent. It noted that, when an employee is reinstated after an appeal, this serves to extinguish the dismissal and continuity is restored (**London Probation Board v Kirkpatrick** [2005] IRLR 443 EAT); although there was no appeal in the claimant's case, the ET considered the respondent had put right a bad decision (reached in breach of the agreement with the trade unions), of which the claimant had remained oblivious, and that he had effectively been reinstated.

18. The ET did not consider the gap between 24 September and 22 October to be fatal to this finding: thereafter, the claimant treated himself as not having been dismissed, and the ET concluded the dismissal of 24 September 2014 had been extinguished by the subsequent reinstatement. In any event, the ET was unable to see that there was any less favourable treatment: the comparators identified by the claimant were either employed at a different grade or at a different location where there was no risk of redundancy. Moreover, the ET was unable to see that any difference in treatment was due to the claimant's disability, reasoning:

> "155. If the dismissal was because of the claimant's disability we do not consider that the respondent would have voluntarily reinstated him in circumstances where the claimant had not complained and not appealed, if they had dismissed him because of his disability. He had had the disability for a number of years and not been recently diagnosed with it, equally the respondent did offer him alternative employment which again is contrary to the suggestion that the respondent wanted to dismiss the claimant because of his disability.
>
> 156. As we have set out above the respondent should not have dismissed the claimant as this was contrary to the agreement with the unions. The way this was handled was poor, with the time elapsing before it was noted and then taking some time to set out the error in writing. The fact it happened at all suggests that one part of the organisation does not know what the other is doing and is disorganised with poor communication skills. Notwithstanding this we do not find that this conduct was because of the claimant's disability but rather inept management."

19. Turning to consider this issue in relation to the claimant's section 15 claim, the ET concluded that, even if there had been a dismissal (contrary to its primary finding that the dismissal had been extinguished by

the subsequent reinstatement), it was not because of a reason arising in consequence of his disability (that is, his need to take time off from work), reasoning:

> "178. We would have found as a matter of fact that his dismissal was by reason of redundancy and that the claimant did not want any of the other roles …. It therefore follows that the dismissal would have been for this reason not for a reason arising in consequence of his disability."

20. As for the victimisation claim, the ET accepted that the claimant had performed a protected act in raising his grievance in January 2014. Even if the 24 September 2014 dismissal amounted to a detriment (although given its finding that the dismissal had been extinguished, the ET did not consider it did), the ET concluded that it was not because the claimant had performed a protected act, but rather:

> "220. ... It was because his role was redundant and he did not wish to take the alternative roles which were not suitable alternative employment."

21. There had been other claims before the ET at the January 2018 hearing, of which only one – relating to bonus payments in 2010-2012 – had been upheld. Noting that the bonus payments claim related to events occurring prior to 2 March 2015, and had thus been brought out of time (the claimant had entered Acas early conciliation on 1 June 2015 and this had ended on 1 July 2015; his claim had been lodged on 31 July 2015), the ET observed that the claimant had adduced no evidence to explain the delay. Having found that the claimant had some understanding of the possibility of bringing a legal claim from November 2013, the ET had concluded that it would not be just and equitable to extend time.

The Decision on Appeal UKEAT/0276/18

22. There was no appeal against the ET's finding that the bonus payment claims had been out of time. The claimant did, however, seek to challenge the ET's findings against other aspects of his case on the merits. At this stage, it is only necessary for me to re-visit that appeal in respect of the dismissal claims.

23. Accepting the ET's findings as to the genuineness of the redundancy situation which had led to the giving of notice to the claimant on 25 March 2014, in considering reasoning on the dismissal claims, I noted:

> "56. That, however, was not the end of the matter. At some point in 2014, subsequent to the Claimant having been given notice, the Respondent had entered into an agreement with the trade unions such that (at least in the relevant grades) there would be no dismissals for redundancy that year. That agreement ought to have led to the retraction of the Claimant's notice of dismissal before it could take effect before 24 September 2014 (or, at least, the offer to retract that notice). That did not happen. Instead the Claimant's notice expired on 24 September 2014 and, as of that date, he stood dismissed. The issue for the ET was thus not why had the Claimant been given notice, but why did the Respondent still allow that notice to take effect (or, at least,

take steps to try to stop it having that effect)?"

24. Observing that the ET's primary view was that the question did not need to be answered, because the subsequent reinstatement of the claimant meant the dismissal vanished, I was critical of that approach as viewing what had happened through the prism of the case law on "dismissal", finding the ET had thus focused:

> "57. … on the reinstatement of the Claimant and what that meant for the continuity of his employment rather than on the actual act of which he was complaining, which was the initial dismissal itself. More specifically, the Claimant did not need to demonstrate that this remained a dismissal; he was entitled to complain of this - the failure to offer to retract the notice - as an act of detriment."

25. I further considered that the ET had been required to adopt a broad approach to its consideration of whether a detriment has been established, holding that a dismissal, even if subsequently withdrawn, could give rise to a detriment. Although, in this case, the claimant had suffered no pecuniary loss, I took into account that this was a claim under the **EqA**, allowing for compensation to be awarded for non-pecuniary damages, including injury to feelings.

26. To the extent that the ET had sought to address the question why the respondent had failed to withdraw the notice before it took effect (contrary to the agreement it had reached with the trade unions), I noted that there was no challenge to the ET's rejection of the comparisons the claimant had sought to draw with other employees. As for the ET's consideration of "*the reason why*" the respondent had acted as it had, accepting that it had permissibly found that the respondent's handling of the dismissal had been poor, disorganised, showing poor communication and inept management, I was critical of its approach as follows:

> "60. … It was, however, required to apply section 136 and to ask itself whether, on the facts it had found, it *could* - but not necessarily *would* - determine that the Respondent had acted in breach of the **EqA**. There was no actual comparator, but it seems that no one else was in the same position as the Claimant and no one else had been dismissed contrary to the agreement with the trade unions. There was, thus, a breach of an agreement in circumstances where the Claimant was disabled and had taken significant time off due to his disability (and for other reasons), where he had raised complaints of (race and disability) discrimination, such as to give rise to a protective act and where there had apparently been some animus directed towards him relating to that. The ET was not bound to find that the reason for this treatment was unlawful under section 13, section 15 or section 27 **EqA**, but I am unable to see that it asked itself whether the burden of proof had shifted or whether it could so conclude and, if so, whether the Respondent had provided cogent evidence as to why this had happened."

27. I expressed the view that this was a question that particularly arose in relation to the section 15 claim: the claimant's absence from work was the "*something*" arising from his disability, and there was a question whether this was the reason why the respondent failed to retract the notice in time. I concluded I could not be

satisfied that the ET had engaged with that question in relation to any of the claimant's claims, in particular taking into account the application of the shifting burden of proof under section 136 **EqA**:

> "62. … It seems to me that the ET wrong-footed itself by failing to properly consider what the actual detriment was. In taking that misstep, the ET failed to then ask itself whether the Claimant had established facts for the purposes of section 136(2) and, if so, whether an adequate explanation had been provided that was other than for one of the prohibited reasons relevant to these claims. That renders the ET decision on the question of the 2014 dismissal unsafe and I therefore allow the appeal in this regard."

28. Having allowed the appeal on that limited basis, I directed that this issue be remitted to the same ET:

> "70. … The result of my Judgment is that I have found that the ET erred in its approach to the Claimant's complaint of detriment in respect of his dismissal on 24 September 2014. That act of detriment gives rise to an issue - albeit no doubt limited - for the ET to determine. Correctly applying the burden of proof, the ET will need to consider whether the reason for the failure to retract the notice of dismissal (or offer to do so) was by reason of the Claimant's disability, or something arising from that disability, or because of his protected act. If the ET concludes that liability should be determined in the Claimant's favour (albeit there may also be issues as to whether or not the claim was brought in time and whether it would be just and equitable to extend time), although the Claimant may have suffered no pecuniary loss, the ET would then need to consider whether the Claimant suffered any injury to feelings. These are all matters for the ET to determine. There is no one answer, nor can I be satisfied that the error in question is immaterial to the overall conclusion reached by the ET."

29. My order on the appeal provided (relevantly) as follows:

> "Ground 1 of the amended Grounds of Appeal be allowed, relating to the question whether the dismissal of the [claimant] on 24 September 2014 amounted to an act of direct disability discrimination and/or discrimination contrary to Section 15 Equality Act 2010 and/or an act of victimisation, and that the matter be remitted to the same Employment Tribunal for reconsideration of this issue …"

The Remitted Hearing Before the ET

30. At the remitted hearing. the ET took the view that the issues it had to consider were as follows:

> "17. … whether the failure to offer to retract the notice was an act of detriment. This was also put as why the Respondent had not sought to retract the notice of dismissal any earlier. ... We should consider [whether] dismissal (even if subsequently withdrawn) can amount to a detriment …"

31. Considering first whether there had been detriment or unfavourable treatment, the ET ultimately concluded that there had:

> "52. The … fact the claimant did not know what was going on at the time is immaterial
> ...
> 53. The claimant had by the time he discovered this reconciled himself to leaving. However, we need to go back further in time. What would the claimant have considered if he had known about the union agreement and discovered that he was being dismissed notwithstanding it? We consider that he would have been aggrieved. We believe that this would have been his genuine perception at that time so conclude

> that allowing the dismissal to take effect notwithstanding the union agreement amounted to a detriment.
> 54. The failure to retract the notice in October 2014 when it was extended equally could be a detriment. Again, whilst the claimant had reconciled himself to leaving by this point, had he known about the process error subsequently highlighted by his union he would have felt aggrieved in the same way. We therefore conclude that failure to retract the notice in October 2014 (when instead it was extended) amounts to a detriment in this case. For completeness the failure to retract it up to this point could equally amount to a detriment in this case.
> 55. It must also follow that the failure to retract that notice until the meeting on 20th January 2015 (as communicated in writing on 3rd February 2015) was also a detriment for the same reasons as paragraph 54 above.
> 56. If allowing the dismissal to take effect notwithstanding the union agreement, the failure to (or to offer to) retract it in October 2014 which was ongoing until 20th January 2015 are all detriments then this is clearly capable of amounting to less favourable treatment for the purposes of s13 EqA 2010, unfavourable treatment for the purposes of s15 EqA 2010 and a detriment for the purposes of s27 EqA 2010."

32. The respondent argued that, nevertheless, the dismissal of the claimant on 24 September 2014 was not less favourable treatment for the purposes of section 13 **EqA**, but should be seen as falling outside the scope of the agreement with the trade unions as the claimant's redundancy at that point was the result of his election.

33. Noting that this had not been an argument previously taken (either at the initial liability hearing or the EAT), the ET further concluded:

> "60. Considering the detriments found at paragraph 56 the respondent did treat the claimant less favourably than a hypothetical comparator by allowing the dismissal to take effect notwithstanding the union agreement, the failure to (or to offer to) retract it in October 2014 which was ongoing until 20th January 2015 …"

34. Turning then to the *reason why* question, at the heart of its analysis under section 13 **EqA**, the ET considered whether the claimant had proved facts from which it *could* conclude that the respondent's treatment of the claimant was because of his disability, such as to shift the burden of proof pursuant to section 136(2). In carrying out this exercise, however, the ET noted that it was not necessary to go through a two-stage process under section 136(2) where it could be satisfied that the respondent had shown a non-discriminatory reason for the treatment in issue. In the present case, the ET concluded that the burden had not shifted and there was a non-discriminatory reason for the acts complained of, reasoning (see ET paragraphs 61-76):

(1) At the time when the claimant's dismissal took effect, it was not in dispute that those involved (Mr Barrett and Ms Jethwa) were unaware of the respondent's agreement with the trade unions.

(2) The reason why the claimant had been placed on notice of dismissal on 25 March 2014 was due to a genuine redundancy situation; but for the subsequent agreement with the trade unions, that dismissal would have remained in place.

(3) The reason why the respondent allowed the dismissal to take effect notwithstanding that agreement was simply because those dismissing the claimant by reason of redundancy (Mr Barrett and Ms Jethwa) were unaware of the union agreement.

(4) Considering why, once the agreement with the trade unions had been brought to the attention of Mr Barrett and Ms Jethwa, the decision was then taken, on 22 October 2014, to extend the notice period rather than retract it, the ET noted that this was an instruction given, by email of 15 October 2014, by Ms Trudgill.

(5) The claimant was no longer asserting that either Mr Barrett or Ms Jethwa had acted from any discriminatory motivation and the ET was satisfied that Mr Hindler was not involved in the decision to extend the notice period. It further recorded:

> "67. … there is no evidence that Sinead Trudgill acted in this way because of disability. The claimant has never suggested that Sinead Trudgill was discriminatory and she was not involved in this case previously. There is no link with the claimant's case other than giving the advice and the instruction to extend the notice period."

(6) The union agreement had been that no redundancies would take place until after 31st December 2014 and the ET found that the extension:

> "68. … was therefore to give effect to the agreement. There is no evidence that this was because the claimant was disabled. This was simply to give effect to the union agreement."

(7) The ET further found that:

> "69. … any employee who was band 5-8 would have been treated the same way and that given those involved in the decision were unaware of the union agreement any hypothetical employee without a disability would also have had their dismissal take effect. We further find that any band 5-8 employee without a disability would still have had their notice extended to give effect to the agreement in line with that instruction. These were not because of the claimant's disability."

(8) As for the period between 22 October 2014 and 20 January 2015, the ET considered:

> "72. … why was it not revoked then? The HR advice had not changed in that period and to a certain extent things had moved on by the 31st October 2014 as the claimant had other plans, had booked leave and considered that the respondent was incompetent for having allowed this state of affairs as set out in his 31st October 2014 email. Certainly by 7th January 2015 the claimant was considering redundancy and expressed his views about how he saw his future not with the respondent. None of this would have led the respondent to consider revoking the notice as the HR advice they had to extend it was unchanged."

(9) The ET noted that:

> "73. At the meeting on 20th January 2015 when the claimant's representative told the respondent that they should retract the notice they agreed to do so. The advice had not changed from HR in this period and when the union representative suggested it be revoked the respondent accepted this was the way forward and agreed to do it in the meeting."

That did not, the ET considered, provide grounds to infer discrimination from what had been said to have been the failure to revoke the notice sooner. That was so, even if this was taken together with the other matters relied on in the claimant's submissions, not least as the ET noted that these did not represent the facts it had previously found; in particular, the claimant had not been the only person placed at risk of redundancy, and whilst he was the only person dismissed because of redundancy, the ET was satisfied that:

> "74. … this was because firstly he did not wish to relocate when others did and secondly as he was unsuccessful (for non-discriminatory) reasons in other applications or simply did not so apply like his colleagues."

Moreover:

> "76. … the claimant's disability was not the reason for any of his treatment leading up to the September 2014 dismissal … as the respondent's actions in voluntarily reinstating the claimant in circumstances where he had not appealed or complained are not supportive of that suggestion. We referred [in our first decision] to the fact that the respondent had offered alternative employment which was contrary to the suggestion that dismissal was because of disability which was not challenged. We stand by these conclusions. Indeed, the retraction of the notice in 2015 is similarly contrary to the suggestion that the dismissal was because of the claimant's disability."

35. The ET then went on to make clear that, even if the burden had shifted, it was satisfied that, on the basis of its findings (as set out above), the respondent had demonstrated that its treatment of the claimant was in no way because of disability: his dismissal had been allowed to take effect on 24 September 2014 because those who made the decision were unaware of the union agreement; his notice was then extended to 31 January 2015 to give effect to that agreement; once the claimant's union representative stated that the notice should be withdrawn, the respondent did so (see the ET at paragraphs 78-80).

36. Turning then to the claim under section 15 **EqA**, the ET understood the claimant's complaint to be that his dismissal had been permitted to take effect because of his absence from work: the "*something*" which he said arose in consequence of his disability. Accepting that the claimant had been, in part, off work by reason of his condition of colitis as at 24 September 2014, the ET found that this was not a case where he had been "*out of sight and out of mind*", noting that there had been various meetings and communications between the

claimant and respondent at around this time. Further acknowledging that the "*something*" need only be a factor in the mind of the decision-taker, the ET nevertheless concluded that:

> "88. The simple fact is that the dismissal was allowed to take effect as those who made the decision were unaware of the union agreement and this is the reason why the dismissal took effect. The decision was not related to his absence and as they were all unaware of the union agreement at the time of dismissal, dismissal would have taken effect even if he had been at work, irrespective of his attendance record and regardless of any disability related absence. ..."

37. Considering then whether, once advised of the union agreement the decision to extend the claimant's notice rather than retract it had been tainted by something arising in consequence of his disability, the ET was again satisfied that it had not:

> "89. … We know that Mr Barrett and Ms Jethwa were told that the claimant could not be dismissed because of the union agreement and that his notice period should be extended. This was simply to give effect to the union agreement. The claimant was absent from work from 24th September to 22nd October 2014 but given that Ms Jethwa and Mr Barrett considered he had been dismissed by the time they knew (but was not yet processed as a leaver) his absence at that time was not covered by a sick note until he later got one retrospectively. The reason for his absence in that period was his dismissal. The claimant was not absent in the period 24th September 2014 – 22nd October 2014 due to his disability so there was not "something (namely absence) arising from his disability" at this relevant time.
> 90. The decision to extend the notice period was therefore taken whilst the claimant was absent for non-disability related reasons namely that he was considered no longer an employee at that time. Even if the claimant had been absent for disability related reasons at that time, the reason why Mr Barrett and Ms Jethwa extended the notice period was because Sinead Trudgill told them to. This was not challenged. There was no suggestion from the claimant that her decision was in anyway motivated by or related to his absence or indeed his attendance record. Mr Hindler was no longer involved in the matter at this stage. We have no reason to go behind the instruction to extend the notice period.
> 91. On 28th October 2014 the claimant obtained a retrospective sick note to cover him for three months since dismissal for disability and non-disability reasons. However, in the call on 22nd October 2014 Mr Barrett agreed with the claimant that he would be on garden leave from then until 31st January 2015. The decision to place him on garden leave pre-dated the sick note."

38. Finally, the ET turned to the claimant's complaint of victimisation. Accepting that the claimant's January 2014 grievance against Mr Hindler had been a protected act, the ET was nevertheless satisfied that this had played no part in the original decision to give him notice of dismissal: that had been because his position was redundant and he had expressed a wish to pursue redundancy rather than any alternative position or re-location. The reason why that dismissal had been permitted to take effect was simply because that position had not changed and the relevant decision-takers (Mr Barrett and Ms Jethwa) were unaware of the respondent's agreement with the trade unions. When the agreement was drawn to the attention of those

decision-takers, the advice given was that this meant the claimant's notice should be extended. Mr Hindler was not involved in giving that advice, or in any of the relevant decisions; the nature of the advice was entirely consistent with the agreement; there was no evidence to suggest any link to the claimant's protected act.

39. For completeness, the ET also noted that the claims in question related to events occurring prior to 2 March 2015 and had thus been brought out of time (the claimant had entered Acas early conciliation on 1 June 2015 and this had ended on 1 July 2015; his claim had been lodged on 31 July 2015). The claimant had known of his rights from November 2013 and had been in receipt of trade union advice in January 2015. If it had found for the claimant in respect of the dismissal, the ET considered that an issue of prejudice would arise given that Mr Barrett had left the respondent's employment before the first hearing.

40. In urging (on behalf of the claimant) that the ET ought to find it just and equitable to extend time, at the remitted hearing it was submitted that:

> "65. … the Claimant suffered with depression at the material time. For example, he saw his GP in early 2015 because he was feeling depressed. On 08.05.15, he was assessed by a specialist Cognitive Behaviour Therapist. His scores showed that he was suffering from severe depression and severe anxiety …. Further, the Claimant went on long term sick leave on 20.07.15 and remains absent from work …. The Claimant submits that this made it more difficult for him to present his claim to the ET."

41. The ET rejected this submission, explaining as follows:

> "113. We do not accept the claimant's attempts to introduce evidence now under the guise of submissions as to his mental state at the relevant time. This was not evidence before the tribunal when we heard this case. He was well enough to return to work in February 2015. He took holiday and travelled abroad in December 2014. He had union assistance in January 2015 (having had so previously) and as such the claimant has not established it is just and equitable to extend time."

42. In the circumstances, even if the claimant's claims had not failed on their merits, the ET would have found that the claimant had failed to demonstrate that it would be just and equitable to extend time, and, accordingly, that there was no jurisdiction to determine these complaints.

The Appeal and the Claimant's Submissions in Support

43. By his first ground, the claimant contends that the ET misapplied the burden of proof under section 136 **EqA** and/or reached a decision that was perverse and/or inadequately reasoned. It is argued that the ET erred in: (1) taking account of the respondent's explanation in considering whether the burden of proof had shifted (see **Igen v Wong** [2005] EWCA Civ 142; **Madarassy v Nomura International plc** [2007] ICR 867; **Hewage v Grampian Health Board** [2012] ICR 1054; **Griffiths-Henry v Network Rail** [2006] IRLR 865; **Efobi v Royal Mail Group** [2021] ICR 12163); (2) failing to consider the mental processes of the decision-takers and/or the reasons behind the explanation provided by the respondent, that is, the instruction given by Ms Trudgill (see **Amnesty International v Ahmed** [2009] IRLR 884; **Gould v St John's Downshire Hill** [2020] IRLR 863; **X v Y** [2013] UKEAT 0322/12); (3) concluding that there was no reason to go behind the instruction given to extend the notice period, in particular as Ms Trudgill was not called to give evidence (see **Bennett v Mitac Europe Ltd** [2021] UKEAT 2020).

44. The second ground specifically relates to the ET's conclusion in respect of the claim under section 15 **EqA**, whereby the claimant contends that the ET misapplied the law/misdirected itself and/or reached a conclusion that was perverse or inadequately reasoned. It is the claimant's case that the ET failed to consider whether the relevant connection with his disability-related to sick leave (the "*something*") might arise from a series of links (see **City of York v Grosset** [2018] EWCA Civ 1105; **Sheikholesami v University of Edinburgh** [2018] IRLR 1090). He further contends that the ET also erred in failing to ask itself whether Ms Trudgill's instruction of 15 October 2014, taken together with her knowledge of concerns about the claimant's history of ill-health absences, was sufficient to raise a prima facie case that the something was (consciously or unconsciously) a reason in the mind of the decision-taker/s so as to shift the burden to the respondent (and see the arguments under ground 1).

45. The third ground of appeal attacks the ET's conclusion in respect of the section 27 **EqA** claim, contending that it misapplied the law/misdirected itself and/or reached a perverse conclusion or provided inadequate reasons. In this regard, the claimant again contends that the ET erred in failing properly to consider whether the protected act had a material influence on the mental processes of the relevant decision taker/s; in particular, given that both Ms Trudgill and Mr Barrett had known of the claimant's grievance.

46. By the fourth (contingent) ground of appeal, the claimant argues that the ET erred in its approach when considering whether it was just and equitable to extend time under section 123(1) **EqA**. Under this ground, the claimant argues: (1) had the ET properly approached the burden of proof in this case, it would have been able to appreciate the prospective merits of the claim as a relevant factor; (2) in any event, the ET had wrongly failed to take into account the evidence as to the claimant's ill-health (physical and mental) at the relevant time/s.

The Respondent's Position

47. As a preliminary objection, the respondent contends that the ET erred in extending the scope of the remitted hearing beyond consideration of the detriment that took place on 24 September 2014: that went beyond the claimant's pleaded case and could not have been part of the EAT's order in appeal UKEAT/0276/18.

48. In any event, in relation to the first ground of appeal, the respondent submits that: (1) the ET had not found a *prima facie* case of discrimination such as would shift the burden of proof in this case; (2) the ET did not take into account the respondent's explanation at stage one but merely had regard to all the evidence (as it was entitled to do); (3) it was no part of the claimant's case that Ms Trudgill had discriminated against him or subjected him to detriment/s, or (more generally) that the ET was required to look behind the decision not to retract the notice; (4) in this case, there was, therefore, no reason to draw an adverse inference from the failure to call Ms Trudgill; (5) there were no other facts from which discrimination could be inferred.

49. As for the second ground, it is emphasised that the ET did not find that the respondent had treated the claimant unfavourably because of his absence: rather, the dismissal and the decision not to retract his notice were taken for a number of other reasons and not because the claimant had taken sick leave or because he was "*out of sight, out of mind*". In any event, the ET had found that the claimant's absence did not arise in consequence of his disability: he was absent between 24 September and 22 October 2014 because he had been dismissed by reason of redundancy and he was subsequently on garden leave.

50. Turning to the third ground, it was apparent that the ET had in mind the need to consider whether the protected act had influenced the relevant decisions and had clearly found that the reason for extending (rather

than retracting) the claimant's notice was unrelated to that act. The fact that the decision taker/s knew of the claimant's grievance was nothing to the point given the ET's finding on reason.

51. Finally, in relation to the fourth ground of appeal, the respondent submits: (1) the ET did not err in requiring that the claimant demonstrate a good reason for delay but was entitled to take into account that he had failed to provide any clear explanation (**Bexley Community Centre t/a Leisure Link v Robertson** [2003] EWCA Civ 576 at paragraph 25); (2) the mere fact of the claimant's medical condition did not present an explanation for the delay, in particular when he had been well enough to travel at the relevant time, had been able to return to work in early 2015, and had been aware of his legal rights since November 2013; and (3) there was no checklist of relevant factors and the merits of a claim could not rescue it from the consequences of any delay (**Edomobi v La Retraite RC Girls School** UKEAT/0180/16).

The Law

52. The ET was considering claims made under sections 13, 15 and 27 **EqA**, which (relevantly) provide:

Section 13(1):

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

Section 15(1):

> "A person (A) discriminates against a disabled person (B) if—
> (a)A treats B unfavourably because of something arising in consequence of B's disability, and
> (b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

Section 27(1):

> "A person (A) victimises another person (B) if A subjects B to a detriment because—
> (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act."

53. In respect of each of the complaints made, the ET had to determine the reason why the relevant treatment happened; whether it was "*because*" of: the claimant's disability (section 13), or something (here, the claimant's sickness absence) arising in consequence of his disability (section 15), or his earlier grievance (the protected act) (section 27). That did not require that the relevant factor (disability; "*something arising*"; protected act) was the only cause of the impugned treatment; it would be sufficient that it was a material cause or influence, a more than trivial part of the reason for that treatment (**O'Neill v Governors of St Thomas**

More Catholic Voluntary Aided Upper School [1997] ICR 33 EAT; **Sheikholeslami v University of Edinburgh** [2018] IRLR 1090 EAT).

54. In order to determine whether the relevant factor was such a material cause or influence, an ET will need to look into the mental processes of the putative discriminator: save in those cases where the discrimination is inherent in the act or treatment complained of, the enquiry is necessarily subjective and requires the ET to make findings as to the (conscious or unconscious) motivations (but not necessarily motives) of the relevant decision-taker/s; see **Amnesty International v Ahmed** [2009] IRLR 884 EAT.

55. As well as determining the subjective reason for the unfavourable treatment, under section 15 **EqA**, the ET is also required to consider whether there is a causal link between that reason – the "*something*" – and the claimant's disability: did that "*something*" arise in consequence of his or her disability? As was explained in **Sheikholeslami**, that is a question of objective fact for the ET to determine in the light of the evidence. As there may be more than one consequence of the disability in issue, there may be several links between the "*something*" and the disability (see paragraph 65 **Sheikholeslami**; paragraph 50 **City of York Council v Grosset** [2018] EWCA Civ 1105; paragraph 31(d) **Pnaiser v NHS England** [2016] IRLR 170 EAT).

56. More generally, in determining complaints under the **EqA**, an ET is bound to apply the shifting burden of proof under section 136, which provides:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

57. The shifting burden of proof thus created by section 136 has been considered in a number of cases (see **Igen Ltd v Wong** [2005] EWCA Civ 142, [2005] ICR 931, endorsing (with amendments) **Barton v Investec Henderson Crosthwaithe Securities Ltd** [2003] ICR 1205; **Madarassy v Nomura International Plc** [2007] EWCA Civ 33, endorsing **Laing v Manchester City Council** [2006] ICR 1519; **Hewage v Grampion Health Board** [2012] UKSC 37), albeit, as Lord Hope noted in **Hewage** (agreeing with the warning given by Underhill J (as he then was) in **Martin v Devonshires Solicitors** [2011] ICR 352):

> "32. … it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence, one way or the other."

58. As Elias P (as he then was) observed in **Laing**:

> "75. The focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race".
> 76. Whilst, as we have emphasised, it will often be desirable for a tribunal to go through the two stages suggested in *Igen*, it is not necessarily an error of law to fail to do so. There is no purpose in compelling Tribunals in every case to go through each stage. They are not answering an examination question, and nor should the purpose of the law be to set hurdles designed to trip them up. The reason for the two stage approach is that there may be circumstances where it would be to the detriment of the employee if there were a prima facie case and no burden was placed on the employer, because they may be imposing a burden on the employee which he cannot fairly be expected to have discharged and which should evidentially have shifted to the Employer. But where the Tribunal has effectively acted at least on the assumption that the burden may have shifted, and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever."

59. In **Laing**, it was observed that an appropriate case in which an ET might "*go straight to the second stage*" might be where the claimant is seeking to compare their treatment to that of a hypothetical employee:

> "74. … In such cases the question whether there is such a comparator - whether there is a prima facie case - is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at paras 7-12, it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage."

60. In considering the approach the ET is to take in applying section 136 **EqA**, in **Efobi v Royal Mail Group** [2021] UKSC 33, [2021] ICR 1263, Lord Leggatt (with whom the other Supreme Court Justices agreed) identified the purpose underlying the shifting burden of proof, as follows:

> "15. The rationale for placing the burden on the employer at the second stage is that the relevant information about the reasons for treating the claimant less favourably than a comparator is, in its nature, in the employer's hands. A claimant can seek to draw inferences from outward conduct but cannot give any direct evidence about the employer's subjective motivation - not least since, as Lord Browne-Wilkinson observed in *Glasgow City Council v Zafar* [1997] 1 WLR 1659 at 1664: "those who discriminate … do not in general advertise their prejudices: indeed they may not even be aware of them." On the other hand, it would be unduly onerous to require an employer to disprove a mere assertion of discrimination. The aim … was accordingly to strike a fair balance by requiring proof of primary facts from which, in the absence of explanation, an inference of discrimination could be drawn; but then, if that hurdle is surmounted, requiring the employer to prove that there has been no contravention of the law. As Advocate General Mengozzi said in *Meister v Speech Design Carrier Systems GmbH* (Case C-415/10) [2012] ICR 1006, para 22, in explaining the approach to the burden of proof taken in the European Directives:

> 'A measure of balance is therefore maintained, enabling the victim to claim his right to equal treatment but preventing proceedings from being brought against the respondent solely on the basis of the victim's assertions.'"

61. This balance can be seen in the way in which section 136 has been interpreted in the domestic case-law. At the first stage, a difference in treatment, without more, will not be sufficient for an inference of discrimination to be drawn; as Mummery LJ held in **Madarassy v Nomura International Plc** [2007] EWCA Civ 33:

> "56. … The burden of proof does not shift to the employer simply on the claimant establishing a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination."

And, in respect of claims under section 27 **EqA**, see **Greater Manchester Police v Bailey** [2017] EWCA Civ 425.

62. The "*more*" that is required at this stage, however, need not be a great deal (see *per* Sedley LJ at paragraph19 **Deman v EHRC** [2010] EWCA Civ 1279), and a finding of "*poor management*" might not be sufficient to counter an inference of discrimination not least as that might itself be a symptom of discriminatory conduct (see paragraph 60 **X v Y** UKEAT/0322/12). Moreover, when considering the case advanced in respect of particular treatment, it may be necessary to look at evidence about the conduct of the alleged discriminator both before or after the actual treatment about which complaint is made: even at the first stage, the ET is entitled to look at matters holistically (again, see paragraph 60 **X v Y**).

63. Where a claimant has proved facts from which an inference of discrimination could be drawn the burden must shift to the respondent to establish (on the balance of probabilities) that the impugned treatment was in no sense whatsoever because of the relevant protected characteristic. At that second stage, the ET is entitled to expect cogent evidence to be adduced to discharge that burden, since it will normally be the respondent that will normally be in possession of the relevant facts (see **Barton** paragraph 25(10)-(12), as approved in the subsequent authorities).

64. In **Efobi**, Lord Leggatt provided the following guidance, in particular as to how inferences of discrimination might be drawn at the first stage, (I summarise):

(1) At the first stage, the burden of proof remains on the claimant:

> "30. … This means that the claimant has the burden of proving, on the balance of probabilities, those matters which he or she wishes the tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed."

(2) The ET is not, however, prevented:

> "20. from taking into account … evidence adduced by the respondent insofar as it is relevant in deciding whether the burden of proof has moved to the respondent."

(3) That will include:

> "30. … any facts proved by the respondent which would prevent the necessary inference from being drawn."

(4) However, *explanations* (as opposed to evidence) should not be taken into account at the first stage, as the statutory language mandates that the ET must ignore any explanation for those facts given by the respondent and assume that there is no adequate explanation for them (see paragraph 22).

(5) So, at the first stage under section 136, the ET must consider what inferences can be drawn in the absence of any explanation for the treatment complained of, but:

> "40. … no adverse inference can be drawn from the fact that the employer has not provided an explanation."

(6) That would not, however, mean the ET could not draw an adverse inference from a respondent's failure to call relevant decision-takers:

> "40. … It does not follow, however, that no adverse inference of any kind can ever be drawn at the first stage from the fact that the employer has failed to call the actual decision-makers. It is quite possible that, in particular circumstances, one or more adverse inferences could properly be drawn from that fact."

(7) In this regard, the ET:

> "41. … should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense … Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant circumstances will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given evidence, and the significance of those points in the context of the case as a whole."

(8) In arguing that a tribunal ought to have drawn an inference from the fact that certain decision-makers were not called to give evidence, a claimant would need to show that:

> "42. … no reasonable tribunal could have omitted to draw such an inference. That is, in its very nature, an extremely hard test to satisfy."

65. As the guidance in **Efobi** makes clear, the assessment to be undertaken under section 136 **EqA** is for the ET as the first-instance tribunal of fact. Where such an assessment is challenged (as here) on perversity grounds, the appeal can only succeed where an overwhelming case is made out that the ET reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached; **Yeboah v Crofton** [2002] EWCA Civ 794. As the case-law has cautioned, the EAT must be wary of attacks on findings of fact being dressed up as points of law (see **Hollister v National Farmers' Union** [1979] ICR 542 CA). In particular, the EAT should be careful to note the way the case was run below and to keep in mind the issues that were in contention before the ET; it would not be permissible to interfere with the ET's decision by addressing issues that were not in play before it whilst ignoring findings on issues that were; see **JJ Food Service Limited v Zulhayir** [2013] EWCA Civ 1226. More specifically, where required to consider the mental processes of individuals in order to determine their subjective motivation/s for the act or treatment in issue, the ET's task is set by the case advanced before it: the burden of proof does not serve to extend the issues before the ET or place a blanket obligation on a respondent to prove the absence of discrimination in every act of every employee forming part of the chain of causation leading to the act complained of; and the EAT should not infer that the lower tribunal fell into error in not considering a case other than that which was in fact before the ET (see paragraphs 48-52 **CLFIS (UK) v Reynolds** [2015] EWCA Civ 439; [2015] IRLR 571 CA).

66. Where, as here, a claim of unlawful discrimination has been brought out of time, section 123(1)(b) **EqA** provides that time may be extended so as to allow the claim to be brought within:

> "(b) such other period as the employment tribunal thinks just and equitable."

67. There can be no presumption that such an extension will be granted and the burden of proof will be on the claimant; see **Bexley Community Centre (t/a Leisure Link) v Robertson** [2003] EWCA Civ 576, [2003] IRLR 434. That said, a broad discretion is afforded to the ET under this provision and it is not bound to refuse to extend time if it does not accept the explanation provided by the claimant. The ET should consider all potentially relevant factors and evidence before it (see **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640, [2018] ICR 1194), but ultimately this is an exercise of judicial discretion and the EAT should only interfere with an ET's decision in this regard if it has erred in principle,

had regard to that which was irrelevant or failed to take into account that which was relevant, or reached a decision that can properly be characterised as perverse.

Discussion and Conclusions

68. In his claim, as presented on 31 July 2015, the act of dismissal of 24 September 2014 was only one of a number of matters of which the claimant sought to complain; as the spotlight has focused in on this particular aspect of his case, it is perhaps inevitable that greater detail has become apparent than might initially have been appreciated. In seeking to define the detriment or unfavourable treatment the claimant might be said to have suffered as a result of that dismissal, the ET identified three potentially relevant circumstances: (i) allowing the dismissal to take place on 24 September 2014; (ii) extending the notice period on 22 October 2014, rather than retracting notice of dismissal at that stage; (iii) failing to then retract notice of dismissal until 3 February 2015. The claimant's initial claim had, however, only referenced the date of 24 September 2014 (which was also the only date identified in the list of issues drawn up for the remitted hearing; see the case management summary order of Regional Employment Judge Byrne of 13 December 2018), and it is clear from my order on the first appeal that it was this date that I had in mind as relevant to the issue to be determined at the remitted hearing.

69. That is not to say the ET was necessarily wrong to consider the broader picture – sometimes it will be necessary to look at the particular treatment in a wider context (see **X v Y**, *supra*) – but the claimant's pleaded case had only put in issue the dismissal of 24 September 2014; he had not relied on any subsequent decision or omission (to extend his notice on 22 October 2014, or to fail to retract notice at any time before 20 January 2015) and my judgment in UKEAT/0276/18 did not extend that case (and could not have done so; see **JJ Food Service Limited v Zulhayir** at paragraphs 36 and 41). To the extent that the ET purported to determine allegations of detriment occurring subsequent to 24 September 2014, it fell into error. Allowing that it might have seen it as necessary to consider matters subsequent to that date in order to carry out its task at the remitted hearing, it remains important to keep in mind how the case below was put: it would be wrong for the claimant to criticise the respondent for failing to call evidence to address a case he had not previously advanced, still less for him to criticise the ET for failing to draw adverse inferences in that regard.

70. As for the ET's approach to the burden of proof, I bear in mind that it had previously rejected the comparators relied on by the claimant and was, therefore, considering this as a case requiring a hypothetical comparison. In those circumstances, it was entitled to "*go straight to the second stage*" (per **Laing**), to consider the explanation provided by the respondent. Certainly, on its consideration of the claimant's case at the first stage, the ET was unable to see that he had discharged the preliminary burden under section 136 **EqA**. Given that which was not in issue in the case before the ET, taken together with its earlier findings of fact, that was a permissible conclusion. In particular, I note:

(1) The claimant had been given notice of dismissal because his job was redundant and he had made clear that he did not wish to re-locate or be considered for any alternative position.

(2) As at 24 September 2014, it was not in dispute that the relevant decision-takers (Mr Barrett and Ms Jethwa) did not know of the agreement with the trade unions; as far as they were concerned, by the time notice of dismissal was due to come into effect in the claimant's case, nothing had changed.

(3) The claimant was unable to point to any actual comparators as, although the redundancy exercise had impacted on others, they had sought and secured alternative employment or re-location: their circumstances were not the same as the claimant's.

(4) The ET had found as a fact that the decision communicated on 22 October 2014, to extend the claimant's notice period, was due to an instruction given to Mr Barrett and Ms Jethwa by Ms Trudgill; she had told them that the claimant could not be dismissed because of a union agreement. Prior to that instruction, Mr Barrett and Ms Jethwa had remained unaware of the union agreement.

(5) The ET was satisfied that any (non-disabled) employee in band five-eight in the claimant's position would have been treated in the same way: their dismissal would have taken effect and their notice of dismissal would subsequently have been extended.

(6) Having considered the evidence, the claimant had confirmed to the ET that "*he did not consider Mr Barrett or Ms Jethwa to be discriminatory towards him*"; the ET had found that Mr Hindler was "*not involved in the decision to extend the notice period*"; and the claimant had "*never suggested that Sinead Trudgill was discriminatory*" (ET paragraph 67).

(7) As for the period between 22 October 2014 and 20 January 2015, the HR advice had not changed and the claimant's position had remained unchanged.

(8) As soon as the claimant's union representative requested that the notice be retracted, the respondent agreed to do so.

71. Whilst the matters I have listed above include findings derived from aspects of the evidence adduced by the respondent, the ET was entitled to take that into account in determining whether, at the first stage, there were facts from which it could infer that an unlawful act was committed (see the case-law cited above, in particular, as summarised in **Efobi** at paragraphs 20 and 30). In suggesting that the ET's reasoning in this regard is inadequately explained, the claimant relies on his written submissions below. The ET did not, however, accept that those submissions properly reflected its findings of fact; the bases on which it rejected the claimant's case are adequately set out in its judgment.

72. Turning to the respondent's *explanation*, I do not accept that the ET was bound to draw an adverse inference from the respondent's failure to call Ms Trudgill. In this regard, the claimant places emphasis on the remarks of HHJ James Tayler in **Bennett v Mitac Europe Ltd** [2021] UKEAT 2020, in particular his observation that:

> "51. …
> (7) It will usually be necessary to consider why a decision maker was not called to give evidence. There may be a compelling reason - a witness could be unwell or have died. Distance should not be assumed to be an insurmountable barrier to a witness giving evidence because an application can be made for a witness to give evidence by video, and could be made before the Coronavirus pandemic made it a commonplace occurrence. Where no reason or an unconvincing reason is given for the absence of the decision maker, particularly careful analysis is required of the evidence to determine whether, on balance of probabilities, it is sufficiently cogent to prove that the protected characteristic was not a material factor in the decision taken."

As always, however, context is everything (see **Efobi** paragraph 41, *supra*). In the present proceedings, the claimant's case had never been put on the basis that Ms Trudgill's motivation was discriminatory or that there was any link between her instruction to Mr Barrett and Ms Jethwa in October 2014 and the claimant's earlier grievance. Although the claimant says he was only aware of Ms Trudgill's instruction after seeing Ms Jethwa's witness statement, I note that he (1) had in fact seen the email of 15 October 2014, sent to Ms Jethwa and Mr Barrett, before he completed his first witness statement (it is referred to at paragraph 70), and (2) then served a further two statements *after* receiving the respondent's witness evidence (I understand that this was during the course of the first ET hearing), but still did not seek to make any positive assertion against Ms Trudgill. Indeed, at the ET hearing in January 2018, it is apparent that the claimant's case (to the extent now relevant)

was solely focused on the original implementation of his dismissal on 24 September 2014; he did not seek to suggest that he had suffered further detriment through the failure to retract his notice in October 2014. As I have previously observed, the ET was not wrong to consider the evidence holistically, and to thus take into account events both before and after 24 September 2014, but that did not mean that it was then required to explore a positive case that the claimant had never put (and see **CLFIS (UK) v Reynolds** *supra*). Even at the remitted hearing, although the claimant emphasised the ET's earlier finding of inept management, no positive case was advanced in respect of Ms Trudgill's involvement. In these circumstances, it cannot be said that the ET was bound to draw an adverse inference from the fact that Ms Trudgill had not been called as a witness.

73. Even if I was wrong as to the limit of the case before the ET, it was, in any event, entitled to find there was other cogent evidence that established the respondent's non-discriminatory reason for its actions in this case. First, it had heard from Ms Jethwa and accepted her (unchallenged) evidence as to the instruction that she and Mr Barrett had received. Second, it had seen the email from Ms Trudgill of 15 October 2014, which stated as follows:

> "I have just seen that [the claimant] is a Band 5. Given the fact that we have agreed with the Unions at National level that there will be no compulsory redundancies Band 5 to 8 we need to extend [his] notice period. … we also need to provide him with access to job and roles to enable him to apply."

The ET was entitled to accept that contemporaneous, documentary evidence. Doing so, it permissibly concluded that the reason why the claimant's notice period had been extended was because this was perceived as being necessary in order to comply with the agreement that had been reached with the trade unions at national level.

74. The claimant objects that the ET thereby failed to properly consider the mental processes of the decision-takers or the "*reasons behind the explanation provided by the respondent, that is, the instruction given by Ms Trudgill*". Accepting that determining *the reason why* the relevant treatment happened - whether it was "*because*" of the claimant's disability (section 13), or of something (here, his sickness absence) arising in consequence of his disability (section 15), or of his earlier grievance (the protected act) (section 27) - will require the ET to look into the mental processes of the putative discriminator (**Amnesty International v Ahmed**), I do not consider the ET can be said to have failed in its task in this case.

75. Again, even if it is allowed that the ET was correct to consider events subsequent to 24 September 2014 as potential detriments, it is still necessary to keep in mind how the claimant's case was put (**CLFIS**

(UK) v Reynolds). The ET had heard from Ms Jethwa, who explained what was in her and Mr Barrett's minds in their dealings with the claimant relating to the notice of dismissal (Mr Barrett had since left the respondent). The claimant sought to challenge Ms Jethwa's evidence by relying on how other employees were treated and she plainly provided considerable detail as to why those other cases were not comparable. The claimant did not, however, seek to suggest that the instruction given to Ms Jethwa by Ms Trudgill had been in bad faith or was in any way open to question. Indeed, Ms Jethwa also gave evidence as to how the claimant was treated after his notice had been extended, including the steps she and Mr Barrett put in place to ensure he was informed of possible alternative positions, which was entirely consistent with the instruction having been given – and followed – in good faith and for entirely non-discriminatory reasons. Yet further, Ms Jethwa's evidence included details of her dealings with the claimant during this period, from which the ET was entitled to conclude (as it did) that this was not a case where the claimant's absence on sick leave meant he was "*out of sight and out of mind*".

76. As for Ms Trudgill's position, I have already addressed the suggestion that the ET erred in not drawing an adverse inference from the fact that she had not been called as a witness. More generally, the claimant's case did not postulate any link between Ms Trudgill's instruction and his earlier grievance and the ET permissibly concluded that no such link existed. This was not a case where the ET was bound to find that any obvious question arose to require it to look behind the explanation that had been given; after all, Ms Trudgill's instruction had the effect of prolonging the claimant's employment with the respondent rather than bringing it to an end. Finally, the ET was entitled to consider it relevant that as soon as the claimant (through his union representative) requested that the notice of dismissal be retracted, the respondent immediately agreed. In the circumstances, it is difficult to see what adverse inference could be drawn from Ms Trudgill's instruction that the claimant's notice was to be extended and that he should be provided with information about alternative positions.

77. Even allowing the greatest possible latitude in terms of how the ET approached the claimant's case at the remitted hearing, it reached decisions that were plainly open to it on the evidence before it, and the findings of fact it had made. This is not a judgment that can be characterised as perverse.

78. Turning to the more specific complaint made under the second ground of appeal, relating to the ET's conclusion on the section 15 claim, the claimant contends that this demonstrates a failure to allow that the

"*something*" might arise from a series of links: the fact that he might not have actually been on sick leave at the time of a particular decision need not be fatal to his claim. Moreover, it is the claimant's case that the ET lost sight of the fact that the "*something*" need not be the main or sole reason for the unfavourable treatment, provided it has a more than minor influence (conscious or unconscious) on the mental processes of the relevant decision-taker/s.

79. As was made clear in **Sheikholeslami**, section 15 **EqA** requires an investigation of two causative issues:

> "62. … (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability?"

80. In the present case, it is right to say that the ET spent some time seeking to determine whether the claimant's absence from work (the "*something*") was in fact related to his disability when particular decisions were taken (the second of the questions identified in **Sheikholeslami**). The claimant says this missed the point: if his dismissal had been allowed to take effect because he was seen to be someone who was simply not around ("*out of sight and out of mind*") then this could still be "*something arising"* – even if not entirely directly – in consequence of his disability. In particular, given the possible stereotypes arising in disability discrimination cases, where there is a history of ill-health absence, it is said that the ET ought to have found that this established a *prima facie* case of discrimination such as to shift the burden of proof. Considering, however, the ET's answer to the other question identified in **Sheikholeslami**, this becomes academic. The ET was clear: however the unfavourable treatment was characterised (permitting the claimant's dismissal to take effect on 24 September 2014; failing to retract the notice of dismissal on 22 October 2014; failing to retract the notice of dismissal prior to 20 January 2015), it was not because of the claimant's absence.

81. This was an aspect of the ET's first decision that I had considered wanting in my ruling in appeal UKEAT/0276/18; on the limited findings made, it seemed possible that the claimant's dismissal had come about because he was not present at the relevant time. On its careful consideration of events, in its judgment on the remitted hearing, the ET was clear, however, that this was no part of the reason why the claimant had been treated in the way that he was. First, he was not out of sight or out of mind, as there had continued to be meetings with the respondent and at least one reference to occupational health; the unfavourable treatment had not arisen by oversight. His absence from work raised no *prima facie* case. Second, the unchallenged evidence demonstrated a very obvious reason why the claimant's dismissal had been permitted to occur, notwithstanding

the respondent's agreement with the trade unions. Put simply, the relevant decision-takers were totally unaware of that agreement and, from their perspective, nothing had changed: the claimant's position was redundant, he still did not wish to re-locate, and he had not identified any alternative role he might wish to pursue instead of redundancy. Third, the ET had found that, once it was realised that the claimant fell within the scope of the national agreement, the instruction to extend his notice period was considered to be what was required to comply with the terms of that agreement. As the ET concluded, whether or not the claimant was absent from work was entirely irrelevant.

82. On this final point, the claimant suggests that the ET ought to have found that Ms Trudgill's instruction, taken together with her knowledge of concerns about the claimant's history of ill-health absences, established a *prima facie* case in this regard. Even if it had been open to the ET to treat the claimant's case as including an allegation of detriment in respect of the instruction of 15 October 2014 (and, as I have already said, I do not accept that it was), this is an argument that fails in a number of respects. First, it was not previously the claimant's case that Ms Trudgill had any discriminatory motivation. Second, the ET found that there was simply no evidential link to establish such a case. Third, on the contrary, Ms Trudgill's instruction was entirely consistent with a wish to act in accordance with the agreement reached with the trade unions (to ensure no dismissal by reason of compulsory redundancy took place within the relevant bands before the end of December 2014), and the ET was entitled to so find. Fourth, the instruction had the effect of continuing the claimant's employment; again the facts simply did not suggest that Ms Trudgill's conduct was motivated by a reaction to his absences from work.

83. The third ground of appeal attacks the ET's conclusion in respect of the section 27 **EqA** claim, contending that it misapplied the law/misdirected itself and/or reached a perverse conclusion or provided inadequate reasons. In this regard, the claimant again contends that the ET erred in failing properly to consider whether the protected act had a material influence on the mental processes of the relevant decision taker/s; in particular, given that both Ms Trudgill and Mr Barrett had known of the claimant's grievance. Again, even if it was open to the ET to treat the claimant's case as including an allegation of detriment in respect of the events subsequent to 24 September 2014, for the reasons I have already provided, I am satisfied that there is nothing in this criticism. In this regard, it is apparent that the ET had well in mind the need to consider whether the protected act had influenced each of the decisions or omissions the claimant had sought to rely on at the

remitted hearing, and had clearly found that the reason for extending (rather than retracting) his notice was unrelated to that act. The claimant had not postulated that Ms Trudgill formed part of the chain of causation such as would give rise to the necessary link in this case but, in any event, the fact that the decision taker/s knew of the claimant's grievance was nothing to the point given the ET's finding on reason.

84. Given my conclusions on the first three grounds of appeal, the final point of challenge – relating to the ET's decision that it would not be just and equitable to extend time under section 123(1) **EqA** – becomes academic. Even if I was wrong, however, in the view I have formed on the claimant's first three grounds of challenge, and I assume that his case ought to have succeeded on the merits, I would still not be persuaded that the ET can be said to have erred in its approach to the exercise of its discretion as to whether or not to extend time.

85. The ET's reasons in this regard include those given previously in respect of the claimant's bonus claims (against which there was no appeal). The ET did not simply ignore the evidence relating to the claimant's health, but was entitled to consider that this was not a factor that should carry weight in its assessment under section 123. Although the claimant's closing submissions had referenced evidence previously adduced relating to his suffering with depression in early 2015 (a general reference to seeing his GP; an assessment by a cognitive behaviour specialist on 8 May 2015; and his going on long term sick leave on 20 July 2015), the claimant had not given evidence as to how this had impacted upon his ability to commence ET proceedings in the period between 24 September 2014 and 1 June 2015 (when he entered Acas early conciliation) or 31 July 2015 (when the ET1 was lodged). On the contrary, as the ET noted, the claimant had been well enough to go on holiday and to travel (to India) during this period, had been able to return to work in early 2015, had been aware of his legal rights since November 2013, and had trade union assistance in January 2015. In the circumstances, the ET was entitled to give little, if any, weight to the claimant's health issues.

Disposal

86. For all the reasons provided, I therefore dismiss this appeal.