Neutral Citation Number: [2024] EAT 38

Case No: EA-2022-001335-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 March 2024

Before :

JUDGE SUSAN WALKER
MR NICK AZIZ
MR STEVEN TORRANCE

- -

Between :

GUY MATTHEWS **Appellant**

- and -

CGI IT UK LTD **Respondent**

- -
- -

MR AMEER ISMAIL (instructed by **Judge Sykes Frixou Ltd**) for the **Appellant**
MS JEN COYNE (instructed by **DAC Beachcroft LLP**) for the **Respondent**

Hearing date: 30 – 31 January 2024

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL – FAIRNESS OF PROCEDURE; VICTIMISATION; BURDEN OF PROOF; AND EXTENSION OF TIME

The claimant was dismissed without a written warning and he was not offered an appeal. The ET accepted that the reason was the irretrievable breakdown of the relationship between the claimant and the respondent. The ET's decision to dismiss the claims of unfair dismissal and victimisation (in respect of the dismissal) was appealed. The ET's decision to refuse to extend time to present a claim of failure to make reasonable adjustments was also appealed.

Held:

The ET was entitled to find that this was one of the rare cases referred to in Polkey where a dismissal may be fair although there has been no formal procedure. The ET did not impermissibly consider what would have happened if a warning had been given or an appeal allowed and they did not apply the wrong test of whether either would be likely to have made a difference. Read as a whole, it was clear that the ET had correctly considered matters from the perspective of the respondent at the time and concluded that it was reasonable for the respondent to dismiss without a warning or an appeal as these would be futile.

The ET's finding that it was reasonable for the respondent not to further explore mediation was clearly one that was available to it in light of its findings that the claimant had adopted an entrenched stance that his manager had to be penalised.

The ET had correctly applied *Turner v Vestric*. Although the respondent had made a mistake in the initial stages of the redundancy process, the ET had found that the respondent was genuine in its attempts to rebuild trust and keep the claimant employed and had put significant and genuine effort in that direction.

The ET's approach to the burden of proof was not in error. They were entitled to apply *Hewage* and consider and accept the respondent's reason for dismissal. Although there was an error in one sentence relating to causation for victimisation, this was in the section dealing with

detriment and the correct test was stated and clearly applied in relation to the alleged victimisation of dismissal.

The ET did not err in its approach to the just and equitable extension under section 123 of the EqA.

JUDGE SUSAN WALKER:

Introduction

1 This is an appeal against the Employment Tribunal in London Central , specifically the judgment of Employment Judge P Klimov sitting with members Ms Plummer and Dr B Von Maydell-Koch ("the ET"). The hearing took place on 20 – 29 September 2022 by video and with deliberations in chambers on 16 and 17 November 2022. The judgment was sent to the parties on 18 November 2022.

2 The parties are referred to as the claimant and the respondent as they were before the ET.

3 The claimant was represented at the ET hearing by Mr Gillie, of Counsel and before the Employment Appeal Tribunal ("the EAT") by Mr Ismail, of Counsel. The respondent was represented at the ET and the EAT by Ms Coyne, of Counsel. Mr Ismail and Ms Coyne provided detailed written skeleton arguments and made supplementary oral submissions.

The outline facts

4 The outline facts are taken from the findings in the ET's judgment.

5 The claimant had been employed by the respondent from 29 May 2017. From June 2018 he worked as a Director/Consulting Expert in the newly created Emerging Technology Practice ("ETP") reporting to Steve Evans ("SE") who was head of ETP. The claimant's role had a particular focus on 5G technology.

6 Until the beginning of 2020 the claimant's relationship with SE was good. On his return from an extended holiday break in January 2020, the claimant became concerned that he was receiving less emails, updates and meeting invites. He raised his concerns with SE.

7 The claimant developed Covid symptoms in early March 2020. Having worked from home for a period he was then signed off at the end of May 2020 until the end of August.

8 Around May/June 2020, the respondent decided to discontinue pursuit of 5G opportunities. The claimant, having been asked for his view, was largely negative about the prospects of securing 5G business in the near future.

9 The respondent commenced a redundancy process and the claimant was advised he was at risk of redundancy and invited to attend a consultation meeting on a number of occasions. He declined to attend as he was unwell and said that because of his medical conditions he could not engage in the process.

10 A colleague ("CA") was dismissed for redundancy.

11 The claimant submitted a grievance against SE. The grievance was upheld in part, after an appeal heard by Mr Ravenhill ("CR"). CR found that undue weight had been placed on the claimant's 5G experience in forming the view that his role was at risk of redundancy and that his other skills and experience and delivery had not been adequately considered. The appeal was not upheld in respect of allegations that SE undermined the claimant and/or scapegoated him for 5G failure. CR recommended a meeting be held with the claimant to discuss a way forward and review the case for redundancy.

12 The claimant responded to the outcome letter in a confrontational manner accusing CR of incompetence, making things up and of making misleading statements. He repeated his intention to initiate two further grievances against SE and CR and Ms Chappell ("SC"). He indicated he was planning to take the matter to an employment tribunal and the respondent's internal ethics team.

13 There were attempts to restart the redundancy process after the grievance process was concluded but these were ultimately abandoned.

14 On 9 November 2020 the claimant commenced a phased return to work following a period of prolonged sickness. Mr McKay ("FM") was asked to find the claimant a role. FM attempted to agree a way forward with the claimant who repeated his allegations about SE and stated that he was not redundant.

15 On 20 November 2020, FM provided options to the claimant that included (1) remaining in the ETP team reporting to SE or (2) trying to find an equivalent role elsewhere in the business.

16 The claimant did not agree with the options proposed. He set various conditions with respect to option 1 that were not acceptable to the respondent in particular with respect to interactions between the claimant and SE. FM suggested "coaching" as a means to repair the relationship between the claimant and SE. Option 2 was acceptable in principle to the claimant but only if the new role was very similar to his role in ETP.

17 On 24 November 2020, FM emailed the claimant to summarise their discussion. The claimant disagreed with the summary and questioned how coaching could resolve the issues. He restated his intention to bring two further grievances.

18 On 25 November 2020, FM told the claimant they would focus on option 1 and try to mutually agree on a set of responsibilities. This included a billable target.

19 On 26 November 2020, the claimant disagreed with the billable target and defining responsibilities and stated that the proposal "was a long way from acceptable".

20 On 27 November 2020, FM and the claimant spoke on the phone. The claimant said he would accept a 50% billable target provided he had a written assurance he would

not be held accountable against that target. He agreed to list elements of his role (without time spent on them) provided he would not be held accountable against the list. He raised the issue that no action had been taken against SE. FM sent a summary of the call to the claimant.

21 On 30 November 2020, the claimant responded to FM. He did not provide a list of his activities because he considered that to be "micro-management". He said he was preparing a number of new grievances. He raised an issue of annual leave carry over and said if it was not resolved he would submit another grievance, a complaint to the ethics team in Canada and add it as a complaint to any legal action. He said his trust in the respondent was hitting "very low levels."

22 There were further emails and calls between FM and the claimant in December 2020 with respect to his annual review. The claimant continued to reiterate his position that his role with ETP was not redundant. He queried why no action had been taken against SE and threatened to bring further grievances. He said he would only stay in ETP if something was done with SE. He said that if no action was taken against SE, his role in ETP was untenable and the respondent would need to find him an alternative role.

23 On 9 December 2020, FM persuaded Ian Dunbar, Vice-President of Communications and Media ("ID") to create a role for the claimant and prepare a role remit.

24 On 11 December 2020, FM spoke with the claimant. The claimant said he wanted disciplinary action taken against SE for placing him at risk of redundancy. He said he would be sending information to the ethics team. He said he believed he was being used as cover to dismiss another colleague whose dismissal was discriminatory.

25 On 17 December 2020, FM emailed the claimant summarising the discussion and giving the claimant two options: (1) continue in ETP reporting to SE with detailed objectives or (2) move to ID's team to do a new role based on the remit that had been

provided. He asked the claimant to consider the options and make his decision by 11 January 2021.

26 On 18 December 2020, the claimant emailed FM and said that he had been harassed while on sick leave. He said he was planning to submit four further grievances. He said that "trust has not been repaired to date, it has in fact been undermined (perhaps significantly) so I will in due course be left with little option".

27 On 15 January 2021, having not received the claimant's response, FM called him. The claimant said both options were untenable. The claimant again raised the issue of discrimination against his colleague and said that he had been harassed while on sick leave.

28 FM emailed the claimant on 21 January 2021 and said that his view was that the relationship between the claimant and SE had broken down and he did not see how the claimant could continue to be a part of ETP and not report to any manager. He said that the respondent could not wait indefinitely for the claimant to decide between the two remaining options and if by 29 January 2021 the claimant had not made a choice, he would recommend that the claimant was moved to ID's team.

29 On 29 January 2021, the claimant replied. He said that FM's email was an ultimatum that made his position untenable. He repeated his allegations of harassment and that the redundancy was a nonsense.

30 On 1 February 2021, there was a discussion between FM, the HR Director, internal legal counsel and Ms McGeehan, President of CGI Operations (UK and Australia ("TM"). TM concluded that the claimant could not return to work for SE and therefore option 2 was the only viable outcome.

31 On 3 February 2021 FM replied to the claimant saying that given the issues raised, option 2 was more likely to deliver a successful outcome and the claimant would be moved to the new role from 8 February 2021.

32 The claimant said he did not agree and was acting under duress. He considered the new role to be a clear demotion and a blatant case of constructive dismissal. He said he would be taking legal advice and was expecting that the matter would inevitably lead to legal redress. He said that he had given the respondent "ample opportunity to deal with the clear misconduct and unethical behaviour" which the respondent had failed to do and he had "no option but to take the matter…outside…through legal redress."

33 The next day the claimant said he had taken legal advice and medical advice and would suggest a way forward.

34 On 8 February 2021 the claimant said he had not agreed with the imposition of forcing the new role reporting to ID against his will due to being off sick and he would deal with that on return.

35 On 5 February 2021, TM decided that the relationship between the claimant and respondent had irretrievably broken down and the only remaining option was to terminate the claimant's employment. On 10 February 2021, FM called the claimant to inform him of the decision to dismiss and this was confirmed by letter.

36 The claimant was paid in lieu of notice and no right of appeal was offered.

Proceedings before the ET

37 The claimant presented a claim to the ET. By the time of the hearing the complaints remaining to be determined were of:

- victimisation contrary to section 27 of the Equality Act 2010 ("the EqA");

- automatic unfair dismissal for making a protected disclosure under section 103A of the Employment Rights Act 1996 ("the ERA");
- detriment for making a protected disclosure under section 47B(1) of the ERA;
- unfair dismissal contrary to section 98 of the ERA; and
- failure to make reasonable adjustments under sections 20-21 of the EqA.

38 The ET concluded that:

- The real and sole reason for dismissal was the respondent concluding that the relationship of trust and confidence between the claimant and respondent had broken down irretrievably and that it was reasonable to form that belief at the time.
- Given that finding, there was no proper basis to draw inferences that other impermissible reasons operated on the mind of TM and the claims of automatically unfair dismissal and victimisation were dismissed.
- This was one of the rare cases where the decision to dismiss without a prior warning and without offering the claimant the opportunity to appeal was within the range of reasonable responses and the claim of unfair dismissal was accordingly dismissed.
- Time should not be extended for the claim of failure to make reasonable adjustments.

The detriment claims were also dismissed but these do not form the basis of the appeal.

Grounds of appeal

39 The claimant presented the following grounds of appeal:

Ground 1

40 The Tribunal erred in law by concluding that the dismissal was fair notwithstanding that the claimant was dismissed without any procedure and denied the right of appeal.

Ground 2

41 The Tribunal erred in law by concluding that it was reasonable for the respondent not to explore mediation as an alternative to dismissal on the basis that the claimant's position was that his manager, SE, had to be penalised in some way and that the claimant had previously rejected "coaching" as a means of resolving the conflict with SE.

Ground 3

42 The Tribunal erred in law by concluding that the dismissal was fair due to a breakdown in trust and confidence even though it found that the respondent was partly to blame for that breakdown.

Ground 4

43 The Tribunal erred in concluding "that the fact that the claimant was not afforded the right of appeal did not take the decision outside the range. The decision to dismiss was taken by TM, the most senior manager in the claimant's line of management. It was her reasonable conclusion that the relationship of trust and confidence had broken down irretrievably. Therefore it is very unlikely that the appeal would have helped to restore the relationship."

Ground 5

44 In respect of the claimant's victimisation dismissal claim, the Tribunal erred in law in concluding that the reason for the dismissal was not because of the claimant's protected acts.

Ground 6

45 The Tribunal erred in law by concluding it was not just and equitable to extend the primary time limit to hear the claimant's reasonable adjustment claim.

Discussion

46 Both counsel provided detailed written submissions that were amplified in extensive oral submissions before us. In this decision, we have addressed, in summary, what we understood to be the key arguments.

Grounds 1,2,3 & 4

47 There was significant overlap between the submissions on grounds 1, 2, 3 and 4, all of which challenge the ET's conclusion that the dismissal was not unfair. We have addressed the key arguments arising in these grounds together.

The ET's approach to Polkey

48 The claimant's first argument focuses on the ET's approach to the fairness of the procedure adopted by the respondent in respect of the unfair dismissal complaint and specifically that the claimant was not given a formal warning and was not offered an appeal.

49 Section 98(4) of the ERA provides that where an employer established that there was a potentially fair reason for the dismissal,

> *" the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)*
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee: and*
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

50 It is well-established, in cases such *as Iceland Frozen Foods Limited v Jones* [1982] IRLR 439 that when assessing reasonableness, the Tribunal must focus on whether the employer's decision was within the range of reasonable responses for a reasonable employer in all the circumstances. It must not substitute its own view.

51 In *Polkey v A.E.Dayton Services Ltd* [1988] AC 344, the House of Lords considered how the equivalent provision to section 98(4) should be applied where the procedure under an applicable code (in that case a dismissal for redundancy) was not followed.

In that case, a van driver was made redundant without any consultation and claimed unfair dismissal. The industrial tribunal had agreed that the employer was in breach of their obligations under the code but concluded that if there had been consultation the result would have been the same and dismissed the complaint. The House of Lords considered this "no difference" approach to be wrong.

52 Lord Mackay gave the leading judgment and said:

> *"If the employer could reasonably have concluded in light of the circumstances known to him at the time of dismissal that consultation or warning would be utterly useless he might well act reasonably even if he did not observe the provisions of the code. Failure to observe the requirements of the code relating to consultation or warning will not necessarily render a dismissal unfair. Whether in any particular case it did so is a matter for the industrial tribunal to consider in the light of the circumstances known to the employer at the time he dismissed the employee".*

53 Lord Mackay made it clear in his decision that it is the reasonableness of the employer's actions that has to be assessed and this should not be confused with injustice to an employee.

54 Lord Bridge , having agreed with Lord Mackay, added some additional observations.

"*an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural," which are necessary in the circumstances of the case to justify that course of action. ... If an employer has failed to take the appropriate procedural steps in any particular case, the one question the industrial tribunal is not permitted to ask in applying the test of reasonableness posed by section 57(3) is the hypothetical question whether it would have made any difference*

to the outcome if the appropriate procedural steps had been taken. On the true construction of section 57(3) this question is simply irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section 57(3) may be satisfied"

Arguments

55 Mr Ismail submitted that the ET made an error of law by speculating on what was likely to have happened if the claimant had been warned about dismissal or offered an appeal and, based on that speculation, by concluding that it would not have changed the outcome of dismissal. In doing so, he submitted that the ET directed itself contrary to the rule set out in *Polkey*.

56 He further submitted that the Tribunal failed to find that following a procedure before dismissal would be "utterly useless" instead finding that a procedure was merely "unlikely" to have changed the decision to dismiss. In doing so the ET had misdirected itself as to the exception to the rule set out in *Polkey* by applying a test of low probability rather than futility.

57 Mr Ismail relied in particular on paragraph 170 of the judgment where the ET concluded that if the respondent had issued a prior dismissal warning it would have "most likely" generated a further escalation and "most likely" would have only cemented the claimant's lack of trust in the respondent's processes and the management and on paragraph 172 where the ET concluded that even if the right of appeal was offered it was "very unlikely" that the appeal would have helped restore the relationship**.**

58 Ms Coyne referred to Lord Mackay's opinion in *Polkey*. She submitted that it may be a rare case where a reasonable employer could properly take the view that he may

dispense with procedure but there are cases where the "facts are so manifestly clear" that a reasonable employer could take that view.

59 She submitted that the remark by Lord Bridge did not establish a standard of "futility". This comment was obiter and was not supported by any other member of the House of Lords. Were the position otherwise, it would impermissibly rewrite the plain statutory language of section 98 ERA.

60 She referred to *Gallacher v Abellio Scotrail Ltd* UKEATS/0027/19/SS, which applied *Polkey* and held that an employer following no procedure had dismissed fairly. The evidence established a reasonable understanding of the respondent that there was a genuine breakdown of relations and that a procedure would only worsen the situation serving no useful purpose.

61 Ms Coyne submitted that the ET did not ask the hypothetical question of what would have happened if a warning or appeal were provided. It correctly directed itself that it would be a rare case and the test was whether the dismissal was reasonable in the circumstances.

62 Whether an employer considered a procedure to be "futile" is not the legal test. But in any event, the ET did apply the higher test of futility. They equated the "rare" case with one which an employer considered to be "futile."

63 There were factual findings as to the unreasonable approach of the claimant to his employer and provided the basis for the respondent's reasonable view that the relationship was terminal and not remediable. The necessary implication is that the respondent understood that nothing could remedy it, not even the warning and appeal that the claimant relies on in this appeal.

Analysis and Conclusion – fairness of procedure / *Polkey*

64 The Court of Appeal in *DPP Law Ltd v Greenberg* 2021 IRLR 1016, sets out the principles that govern the approach of an appellate tribunal to the reasons given by an

employment tribunal. Of particular relevance to this appeal are the following passages:

> *"The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical."*
>
> and
>
> *"Where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should… be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, .. the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day-to-day judicial workload.*"

65 It has not been suggested by the claimant that the ET's legal direction in relation to this issue (at paragraphs 89-92 of the judgment) was inaccurate. The EAT should therefore be slow to conclude that it has not applied these principles. The ET recognise (paragraph 164) that in the vast majority of cases, the lack of a warning or other procedure would lead to a finding that the dismissal was unfair. However, they conclude (paragraph 165) that *"Stepping back and looking at the whole picture we find that this is one of the rare cases where the decision to dismiss without a prior*

warning and without affording the claimant the opportunity for appeal was within the range of reasonable responses."

66 Having set out that clear conclusion, the ET says *"We say that for the following reasons"* and the subsequent paragraphs set out the reasons for that conclusion as follows:

> *"166. The decision to dismiss came after a prolonged process during which the respondent genuinely and persistently tried to find a reasonable solution that would enable the claimant to continue in his employment. The claimant essentially turned down both options on the table which left the respondent in the position where there was no other viable alternative to the dismissal. We do not accept Mr Gillie's argument that considering the size of the respondent it should have sought other alternative employment opportunities for the claimant. The claimant was a senior employee with particular technical skills. There were no immediate alternative roles available at the respondent. FM persuaded ID to create a rule specifically for the claimant despite there being no existing vacancy.*
>
> *167. For the reasons explained above we accept that the respondent came to a genuine and reasonable view that the relationship with the claimant had broken down irretrievably. Essentially the parties reached stalemate and in our judgment it was within the range of reasonable responses for the respondent to decide that it was terminal and not remediable.*
>
> *168. Given the claimant's stance on the matter we find it was not unreasonable for the respondent not to wait for the claimant's proposal on a way forward. There was no indication that the claimant would be making a construct proposal. In fact the first time the claimant said he is going to suggest a three months trial period was in his oral evidence to*

the tribunal. It was not communicated to the respondent at the time which would have been very easy for the claimant to do. It is not even in his witness statement which is surprising given how much reliance is being placed on the fact that the claimant was prepared to accept option 2 on a three months trial basis.

169. The claimant had more than ample opportunity to make a constrictive (sic) proposal in the three months that FM was discussing with him a way forward. Instead he chose a rather confrontational approach dismissing the respondent's suggestions as being a "long way from anything that is even remotely acceptable". In the circumstances it was not unreasonable for the respondent to expect that the claimant's way forward would be further unacceptable demands thus simply prolonging the impasse.

170. We find that in the circumstances issuing a prior dismissal warning to the claimant would have most likely generated a further escalation on the part of the claimant and would not have helped to repair the relationship. The claimant held a strong view that he was treated badly by the respondent and the respondent had to accommodate his demands before he would be able to move on. Therefore a warning that the respondent was considering dismissing the claimant most likely would have only cemented the claimant's lack of trust in the respondent's processes and the management. We do not accept Mr Gillie's submission, which was not supported by the evidence, that a warning would have made the claimant to change his stance on the matter because of the importance of the private health insurance for him and his wife.

171. Although mediation might have helped, especially at an early stage of the return to work process, the claimant's position was consistent throughout that SE had to be penalised in some way and the claimant

must be given assurances that he would not be subjected to unfavourable treatment. That is despite that there were no findings from the claimant's grievance that SE undermined the claimant or sought to scapegoat him for 5G failure, or fabricated the claimant's redundancy. The claimant previously rejected coaching as a means of resolving the conflict with SE. His suggestion on 29 January 2021 that he would be open to mediation was made in the context of the demand that the respondent accepts "wrongdoing" on the part of SE and the management. Faced with this stance by the claimant we find that it was not outside the range of reasonable responses for the respondent not to further explore mediation as an alternative to dismissal.

172. We also find that the fact that the claimant was not afforded the right of appeal did not take the decision outside the range. The decision to dismiss was taken by TM, the most senior manager in the claimant's line of management. It was her reasonable conclusion that the relationship of trust and confidence had broken down irretrievably. Therefore it is very unlikely that the appeal would have helped to restore the relationship.

173. Finally we do not accept the claimant's argument that the respondent adopted a closed mind and put the burden on the claimant to prove that the relationship could be fixed. We find that the respondent took genuine and reasonable steps in trying to restore the relationship. We have already dealt with this issue in some detail earlier in the judgement. In contrast the claimant did not appear to be willing to compromise and leave behind ill feelings he had towards SE and other respondent's managers and HR. The respondent did not ask the claimant to prove that the relationship could be fixed. TM assessed the situation as she found it and took the decision that the relationship had broken down irretrievably, which in the circumstances was open to her to take.

> *174. Therefore, we find that in the circumstances of the decision to dismiss the claimant was within the range of reasonable responses and accordingly the respondent acted reasonably in treating the irretrievable breakdown in the relationship and the consequent loss of trust and confidence as a sufficient reason to dismiss the claimant in the way it did.*

67 The error said to be demonstrated by paragraphs 170 and 172 is that the ET impermissibly speculated about what would have happened had a warning or appeal been given and, further, applied the wrong threshold of "likely" instead of "utterly useless" or "futile". However, these paragraphs have to be read in the context of the whole judgment. In particular, paragraph 165 sets out the ET's conclusion that *"this is one of the rare cases where the decision to dismiss without a prior warning and without affording the claimant the opportunity for appeal was within the range of reasonable responses."* This is a clear reference back to paragraph 91, when setting out the relevant law, including *Polkey,* the ET say "*Only in rare cases a dismissal would be fair in the circumstances where the employer dispensed with any procedure because it considered to be futile".* It is clear that the ET had in mind the **"**rare" case where the employer considered the procedure to be "futile" and the ET concluded the present case fell into that category.

68 We consider it is clear that paragraphs 166 – 173 provide further reasons for the overall conclusion that is set out in paragraphs 165 and 174. Paragraphs 170 and 172 need to be read in that context and not considered as individual freestanding paragraphs.

69 It is also relevant that in paragraph 170, the ET is rejecting a submission from the claimant's counsel about the likely effect that a warning would have had on the claimant's position. Read in the overall context of the judgment it is tolerably clear

that the ET is expanding on its conclusion that the decision to dismiss without a warning was within the range of reasonable responses in paragraph 165.

70 In addition paragraph 172, itself, has to be read as a whole. The ET states, with reference to TM, *"It was her reasonable conclusion that the relationship of trust and confidence had broken down irretrievably. Therefore it is very unlikely that the appeal would have helped to restore the relationship".* We consider that the final sentence of that paragraph refers to TM's assessment that it was very unlikely an appeal would have restored the relationship rather than a conclusion of the ET as to its utility.

71 We consider it is clear that the ET considered the reasonableness of the respondent's decision at the time and did not fall into the trap of retrospectively assessing the likelihood of a warning or an appeal making any difference to the outcome.

72 Turning to the use of the word *"likely"* and *"unlikely"* in paragraphs 170 and 172, we do not agree that the ET has applied a lower threshold than the "utterly useless" or "futile" exception suggested in *Polkey*.

73 Again we consider it is important that paragraphs 170 and 172 be read in the context of the judgment as a whole. In paragraph 167, the Tribunal concludes that *"Essentially the parties reached stalemate and in our judgment it was within the range of reasonable responses for the respondent to decide that it was terminal and not remediable".* The logical consequence of a finding that the respondent reasonably considered the relationship to be "not remediable" is that it was reasonable for the respondent to consider that a warning (or an appeal) would be utterly useless or futile. This is not undermined by the use of "likely" and "unlikely" in paragraphs 170 and 172.

74 It is also important that the fairness of the procedure adopted should not be assessed in isolation. It is part of the wider consideration under section 98(4) of whether the

employer acted reasonably in treating the reason as a sufficient reason for dismissing the employee in all the circumstances.

75 The ET accepted that the reason for dismissal was the *"irretrievable breakdown of trust and confidence in the working relationship." The ET explained that they considered this was reasonable "in light of the Claimant's repeated statements of a lack of trust in the respondent's processes, HR and the organisation as a whole, his clear position that SE must be penalised in some way for the Claimant to be satisfied and move on and the deadlock parties had reached in trying to find an alternative solution after three months of trying." (paragraph 136)*

76 From a fair reading of the judgment as a whole, it was clear that the Tribunal focussed (correctly) on the respondent's perspective at the time it made the decision to dismiss and the reasonableness of that decision and that they considered that it was within the range of reasonable responses for the respondent not to provide a warning or an appeal. They did not misapply the guidance in *Polkey*. They reached a decision that we consider was clearly open to the ET on their findings.

77 In ground 4, the claimant made a further argument in relation to the lack of an appeal. Mr Ismail argued that the ET's reasoning was that because the decision to dismiss was taken by the most senior manager that an appeal was very unlikely to affect that decision and the ET treated the decision of TM as "very likely" final and conclusive.

78 Mr Ismail contended that it is implicit in that finding that the status of the decision maker is relevant or decisive to the question of whether dispensing with the right of appeal is fair and reasonable and that cannot be correct. No reasonable and properly directed tribunal would have treated the right of appeal as, in effect, otiose because the decision was made by the most senior manager in the claimant's line management. The ET's finding that the employer had acted reasonably was accordingly perverse. No evidence was before the ET about who would have presided over an appeal if it had been offered.

79 We reject that argument and agree with Ms Coyne that this perversity challenge proceeds on a misunderstanding of the ET's reasoning but regardless it does not approach the perversity threshold. The ET did not find that there was nobody more senior to review the dismissal or that a CEO's/President's judgment could not be reviewed. Instead, it simply stated a fact that TM, the decision maker, was the most senior manager in the line of management. This was correct and a relevant matter as it indicated the seriousness with which the decision to dismiss was considered. Nowhere in the judgment does the ET say that there was no-one in the organisation to hear the appeal or that this was a factor it took into account.

80 The ET was clearly alert to the fact that it would be a rare case where a dismissal without the offer of an appeal would be fair and that a breakdown of trust and confidence does not invariably allow an employer to dispense with an appeal. However the ET was satisfied that the respondent had made *"significant and genuine efforts"* to keep the claimant employed, that the claimant *"did not appear to be willing to compromise and leave behind ill feelings he had to SE and other respondent's managers and HR*" despite what the ET considered to be genuine and reasonable steps by the respondent prior to dismissal to *"restore the relationship"*.

81 We do not consider that the claimant has made the overwhelming case that no reasonable tribunal would find that dispensing with an appeal on these facts was reasonable.

The Tribunal failed to apply the principle in Turner v Vestric

82 The next main focus of the claimant's submissions in respect of the unfair dismissal claim was that the ET failed to apply the principle set out in *Turner v Vestric Ltd* [1980] ICR 528 and erred in law by concluding that the dismissal was fair due to a breakdown in trust and confidence even though it found that the respondent was partly to blame for that breakdown.

83 Mr Ismail argued that the ET failed to ask itself or address whether the respondent had taken all sensible and reasonable steps short of dismissal to improve the working relationship.

84 He further argued that when considering all reasonable steps, where the employer has contributed to the reason for dismissal (*Royal Bank of Scotland v McAdie* [2008] ICR 1087*)* the law may require the respondent to go the extra mile.

85 He argued that the ET erred in focussing on the point of dismissal and not the weeks and months leading up to dismissal and failed to consider whether there were reasonable steps that the respondent could have taken earlier that may have helped restore the working relationship. This was especially so between 12 November 2020 (when the claimant's grievance was upheld) and dismissal on 10 February 2021. He contended that mediation could have been undertaken and could have helped restore the working relationship.

86 There was a perversity challenge in the skeleton argument but this was withdrawn.

87 Ms Coyne contended that , in relation to relying on a breakdown of trust and confidence in the working relationship as sufficient reason to dismiss, the principle from *Turner* is whether "reasonable steps" (not "all reasonable steps") had been taken to try to improve the relationship so that it could be said that the breakdown in their relationship was irremediable.

88 Ms Coyne argued that the ET did address the question of whether reasonable steps had been taken by the respondent on the perspective of the respondent on facts known to it. It found that in a context where the respondent had taken genuine and reasonable steps to repair the working relationship, its perception that the claimant had generated was that he *"did not appear to be willing to compromise and leave behind ill feelings he had towards SE and the other managers and HR"* .

89 Ms Coyne argued that the legal finding of the ET was not that it was reasonable not to explore mediation. It was that dismissal was within the range of reasonable responses in circumstances including that the respondent had not explored a process of (so-called) mediation.

90 The finding relied on by the claimant that "mediation might have helped, especially at an early stage of the return to work process" was expressly a finding as to its potential utility early on in the process. By the stage of the dismissal the parties were not at an early stage so this was not a finding that taking it immediately prior to the dismissal would have been a reasonable step.

91 Further, and in any event, the ET's finding was not that it would have been reasonable for the respondent to further explore mediation prior to dismissal nor that it was outside the range of reasonable responses not to explore more efforts in mediation. It was a finding that, in practical terms, the respondent had open to it potential further steps that it theoretically could have taken. It was not a normative assessment that it should have taken them.

92 Ms Coyne contended that the ET found that on the facts as known to the respondent the claimant was looking for retribution against SE and that his reference to mediation was caveated with demands such that it was reasonable for the respondent to conclude that the relationship of trust and confidence had broken down irretrievably in a context without mediation. That is implicitly a finding that it was reasonable not to explore mediation.

93 Ms Coyne submitted that, as the sole matter particularised by the claimant is the absence of mediation, it follows that the respondent had taken all reasonable or reasonable steps to repair the working relationship.

Analysis and conclusion – *Turner v Vestric*

94 *Turner v Vestric* was a case where there was no attempt at all to solve the problem before dismissal. The ratio of that case was that *"where a dismissal was due to a breakdown in a working relationship it was necessary, before deciding whether or not the dismissal was fair, to ascertain whether the employers had taken reasonable steps to try to improve the relationship; that to establish that the dismissal was not unfair, the employers had to show not only that there had been a breakdown but that the breakdown was irremediable*". Elsewhere in the judgment, the EAT say that *"before somebody in that position is dismissed on this ground there must be some sensible, practical and genuine efforts to see whether an improvement can be effected."*

95 We agree with Ms Coyne that this does not mean "all" reasonable steps must be taken by the employer. We agree with Mr Ismail that where an employer is to blame for the breakdown, it may be reasonable to expect them to do more to repair the relationship. (*McAdie*) .We do not agree that the ET failed to identify that, where a breakdown in the employment relationship is claimed as some other substantial reason justifying dismissal, that the fact that the employer's conduct contributed to the breakdown is a highly relevant factor. On the contrary, this is expressly recognised by the ET at paragraph 94: *"Where the breakdown in the working relationship is a consequence of the employer's conduct that is likely to be a highly relevant factor in determining the reasonableness of the dismissal under section 98(4) (see Tubbenden Primary School v Sylvester UKEAT/0527/11)."*

96 Mr Ismail places significant weight on the ET's finding that the breakdown in the relationship was not **"**solely" the respondent's fault. He suggests this means that the respondent was partly or perhaps mainly to blame with the corresponding requirement to "*go the extra mile*". However the factual findings made by the ET simply do not support that implication. The only "fault" attributed to the respondent by the ET was in relation to the initial redundancy process. The internal grievance appeal found that undue weight had been placed on the claimant's 5G experience and that other skills and experience had not been adequately considered when he was considered to be at risk of redundancy. However, the internal grievance appeal did not

uphold the other allegations that SE had undermined and scapegoated the claimant. The ET considered there had been a genuine redundancy process. The claimant had misunderstood the outcome , he had wrongly concluded the redundancy was a sham and then developed a theory that he was used as a cover for SC to dismiss CA. The ET considered that this appeared to have *"become a casus belli for the claimant in his pursuit against SE, SX and CR and that it evolved into a pursuit for "justice" against the respondent with the claimant becoming more and more entrenched"*.

97 Apart from an error in the redundancy process, that was addressed by the Respondent, the ET does not attribute any blame to the respondent for the breakdown in the relationship with the claimant. On the contrary, the ET considered that the respondent was genuine in its efforts to rebuild trust and keep the claimant employed and that FM put significant and genuine effort in that direction.

98 Although it is correct that the claimant referred to mediation in an email immediately before his dismissal, the context was that he disagreed that he previously had been offered mediation. He said that the previous offer was in coaching on "how to be bullied" and that he would take matters through to legal redress. The ET was entitled to draw the conclusion that *"the claimant was not prepared to explore that option but was looking for some sort of retribution against SE"*.

99 In paragraph 167, the ET concluded that *"Essentially the parties reached stalemate and in our judgment it was within the range of reasonable responses for the respondent to decide that it was terminal and not remediable"*. That was a finding they were clearly entitled to make on the basis of the factual findings.

100 As we have noted already, the consequence of that finding is that it was reasonable for the respondent to consider that further procedure (that would include mediation) would be useless or futile.

101 We consider that the ET properly applied *Turner v Vestric*. They considered whether the respondent should have engaged in mediation. They concluded it was reasonable

for the respondent not to do so in light of the stance that the claimant had adopted that the respondent must accept *"wrongdoing on the part of SE and the management"*. We consider that was a finding they were entitled to make. It was not perverse.

102 Mr Ismail had an additional related argument under ground 3 that "the Tribunal failed to take account of or apply the principle that no reasonable employer would conduct itself in such a way as to give an employee reasonable grounds to raise a grievance and begin settlement negotiations but then rely on those matters to form a belief that there had been a breakdown in relations justifying dismissal". We do not consider there is such a principle but, in any event, as we have discussed above, the ET did not attribute any blame to the respondent for what happened after the start of the redundancy process. The breakdown in relations was because of the claimant's misunderstanding of the outcome of the grievance and his subsequent entrenched position. Even if such principle applied, it is clear from the ET's findings that the respondent in this case would not be in breach of it. There is no error of law in the ET's approach.

The OMF policy

103 Mr Ismail made an additional argument relating to the ET's finding on the application of the respondent's OMF policy. This policy included a provision that *"in order to ensure that no member is dependent on the judgment of a single person and also to provide a check and balance leading to better decisions, dual approvals are required for dismissal"*.

104 Mr Ismail argued that there was a clear rationale for dual approval to provide a check and lead to better decisions. The ET found that SE's approval under the OMF policy had been to rubberstamp TM's decision. Mr Ismail argued that the ET's implicit decision that the OMF policy was not breached was directly inconsistent with the unchallenged evidence of the wording of the OMF policy.

105 Mr Ismail argued that either the ET perversely concluded that the policy had not been breached when no reasonable and properly directed Tribunal would have treated the rubberstamping as equivalent to dual approval or, alternatively, the ET perversely found that the dismissal was fair when the OMF policy had materially been breached with no apparent consideration of the relevance of the breach of the OMF policy on whether the dismissal was fair.

106 Either way, he submitted that the decision is unsafe and cannot stand.

107 Ms Coyne submitted that there is no need for the second signatory to have detailed engagement with the decision, it was just approval and that this ground doesn't come close to an overwhelming case for perversity. There is no inconsistency. The reason for that finding in the judgment was that the claimant was seeking to demonstrate that SE was a decisionmaker for the purposes of the victimisation and protected disclosure claims. The ET was not invited to find that there had been a breach of the OMF policy but whether an inference should be drawn from SE approving the dismissal.

Analysis and conclusion (OMF policy)

108 There does not appear to have been an argument before the ET that the dismissal was unfair because there had been a breach of their own internal OMF policy. Even if we had agreed with Mr Ismail that the findings about this policy and SE's counter signatory were inconsistent and therefore perverse, it would not impact on the unfair dismissal decision and so would not make any difference to the ET's decision.

109 In any event, we do not agree there was an inconsistency. It seems clear to us that the ET was addressing an argument that SE was in fact a decision maker, a point that would be important in relation to some of the other complaints before the ET but not the ordinary unfair dismissal complaint that is subject to this ground of appeal.

110 We do not consider there is anything in this ground of appeal that comes close to a perversity argument.

Conclusion – Grounds 1,2,3 and 4

111 For the reasons given above, we dismiss grounds of appeal 1,2,3 and 4.

Ground 5 - In respect of the claimant's victimisation claim, the tribunal erred in law in concluding that the reason for dismissal was not because of the claimant's protected acts.

112 The ET concluded that protected acts had taken place and that TM was aware of the protected act contained in an email on 29 January 2021. However they concluded that there was no proper basis to draw inferences that discriminatory reasons operated on TM's mind at the time of dismissal and that it was unnecessary to apply the burden of proof provisions as the ET had made "positive findings on this issue". In adopting this approach they relied on the decision of the Supreme Court in *Hewage v Grampian Health Board* [2012] UKSC 37.

113 The claimant submits that the ET misdirected itself as to the application of *Hewage*. In particular they erred in failing to apply the applicable burden of proof and adhering to the guidance in *Igen v Wong* [2005] ICR 931 ,CA in circumstances where there was room for doubt over the facts necessary to establish discrimination.

114 He submitted that the ET made no finding that there was no doubt over the facts necessary to establish discrimination. On the facts, the ET heard evidence that TM had been "briefed" by others "closer to the situation" prior to the decision to dismiss and the decision was taken jointly with the approval of SE.

115 Applying *Field v Steve Pye and Co (KL)* Ltd [2022] EAT 68, Mr Ismail argued that, as there was room for doubt on the facts, the ET was not permitted to conduct an overall assessment on the balance of probabilities and then conclude by making a

positive finding that there was a non-discriminatory reason for the treatment. The ET was bound to apply the guidance in *Igen v Wong* and consider the first stage of the burden of proof on the assumption that there was no adequate explanation. Instead, Mr Ismail contends that the judgment reveals that the ET's assessment was upside down finding that the claimant's explanation was "not sufficient to displace the clear and consistent evidence by TM on this issue". He submitted that *Igen v Wong* is intended precisely to avoid a situation where the complainant is faced with the burden of disproving the putative discriminator's reasons.

116 Ms Coyne submitted that the criticism of the application of the burden of proof is misconceived but regardless cannot amount to arguable ground of appeal as any error was to the claimant's favour. The burden of proof provisions assist a claimant by requiring a claimant to cross a lower threshold of proof than in general common law – of proving a prima facie case (*Hewage*) . If a claimant discharges that initial burden then the burden shifts to the respondent.

Analysis and conclusion (applying the burden of proof)

117 *Igen v Wong* provides well-known guidance on how tribunals should apply the burden of proof provisions now contained in section 136 of the EqA:

"The first stage requires the complainant to prove facts from which the tribunal could…conclude in the absence of an adequate explanation that the respondent has committed , or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage which only comes into effect if the complainant has proved these facts requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld."

118 The Supreme Court in *Hewage* gave guidance that tribunals are not required to focus on the shifting burden when the evidence is sufficiently clear in one direction: *"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. 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".

119 In *Field*, the EAT warned that there were risks of adopting this approach. HHJ Taylor cautioned that *"if there is evidence that could realistically suggest that there was discrimination it is not appropriate to just add that evidence into the balance and then conduct an overall assessment on the balance of probabilities and make a positive finding that there was a non-discriminatory reason for the treatment. To do so, ignores the prior sentence in Hewage that the burden of proof requires careful consideration if there is room for doubt".*

120 However, *Field* does not mean that the ET is bound to apply *Igen v Wong* in all circumstances. In *Hewage* the Supreme Court makes it clear that it is permissible to depart from the two-stage approach in appropriate cases. In the present case, the ET concluded that the protected acts did not have "any influence whatsoever on the decision to dismiss" and accepted TM's evidence as to the real and the sole reason for dismissal. The ET did not conduct an overall assessment of the kind cautioned against by HHJ Taylor in *Field*. They made a positive finding that the reason for dismissal was the irretrievable breakdown of relations and that that decision was not materially influenced by any of the protected acts. It is unfortunate that they said "it is unnecessary to apply the burden of proof provisions". However, it is clear that they effectively put the burden on the respondent as if the claimant had passed the first stage. Despite the wording, it is clear that there is no error of law here.

121 After the ET had made positive findings that the protected acts did not have "any material influence whatsoever on the decision to dismiss", they went on, in paragraphs 143 to 146 to reject the facts relied on by the claimant to infer victimisation. That was not strictly necessary to their decision and it does not demonstrate that the ET was applying section 136 "upside down" as suggested by Mr Ismail. It is clear that the ET had gone straight to the second stage and accepted the

reason given by the respondent for the dismissal. Paragraphs 143 to 146 merely demonstrate that if the ET had applied the approach in *Igen v Wong*, the burden would not have passed to the respondent and the outcome would have been the same.

Causation

122 The second ground of challenge in this ground of appeal is that the ET erred by asking incorrectly "what was the principal reason for dismissal" (paragraph 118) without asking itself whether any of the protected acts materially or significantly influenced the decision to dismiss the claimant.

123 Paragraph 150 of the judgment is relied on to suggest that the ET were applying the wrong legal test when considering whether the dismissal amounted to victimisation. In that paragraph, the ET reminded themselves that *"a different legal test must be applied, namely whether protected acts/protected disclosures materially influenced the Respondent's decision and not whether they were the reason or the principal reason for the decision"*.

124 Paragraph 150 is in the section of the judgment dealing with "detriments". It is clear that the ET had in its mind here the different tests for causation for automatically unfair dismissal and detriment claims in respect of protected disclosures. It is unfortunate that they referred to "protected acts" in this section. That was an error. However, this does not mean that the ET applied the wrong test when considering the alleged victimisation of dismissal. When considering that claim, the ET identified the correct legal test in paragraph 105(f) and then applied it in paragraph 141 where they reject the submission that the claimant's protected acts "had any influence whatsoever on the decision to dismiss". It is quite clear that the correct test was applied and the ET did not apply a test of what was the "principal reason" for dismissal. The quote relied on by the claimant is in a different part of the judgment dealing with other

complaints. It cannot displace the correct statement of, and application of, the test for causation in the section dealing with the alleged victimisation of dismissal.

Joint or sole decision maker

125 The third sub-ground to Ground 5 is that the ET erred in applying the material influence test as they failed to clearly determine whether the decision to dismiss was solely or jointly taken. Mr Ismail argued that the findings were equivocal at best on this point. He submitted that the evidence before the tribunal was that the decision to dismiss the claimant was made by TM in conjunction and in discussion with FM and SE, that the formal decision to dismiss the claimant was taken by TM and SE and that the ET failed to consider whether the protected acts materially influenced the breakdown in working relationships between the claimant and SE. He argued that there was a failure to consider whether the protected acts had operated consciously or unconsciously on their minds in causing the breakdown of the working relationship. Had the ET found that the protected acts had materially or significantly influenced the breakdown in relationships between the claimant and SE, he argued that the only answer would be that the protected acts significantly influenced the outcome of the claimant's dismissal.

126 In response, Ms Coyne submitted that this is a perversity appeal in breach of the EAT practice direction. An essential first step in such an appeal would have been for the alleged evidence, said to be contrary to the findings, to be have been particularised for this ground to have any coherence. On this basis alone it should be dismissed.

Conclusion – ground 5

127 We consider that there is no substance to this ground of appeal. The ET made clear findings about the decision-making process and who had taken the decision. Mr Ismail again relies on the OMF policy and the finding that SE had rubberstamped the dismissal. However, the ET made clear findings that the decision to dismiss was taken by TM and not SE. They also made clear findings in paragraph 141 that they rejected the submission that the protected acts had any influence on the decision to dismiss

and that there was no proper basis to draw an inference that the discriminatory reason operated on TM's mind when she decided to dismiss.

128 This challenge does not come close to the threshold required for perversity and, in addition, as Ms Coyne says, the basis for such a contention would have had to be particularised before the hearing.

129 Ground 5 is dismissed.

Ground 6 – consideration of the just and equitable extension.

130 A claim of failure to make reasonable adjustments was advanced under section 21 of the Equality Act 2010. This was based on three alleged PCPs:

- requiring employees to co-operate with redundancy procedures (this was withdrawn at submissions);
- requiring employees to agree to unilateral changes to their roles;and
- requiring employees to accept grievance outcomes.

131 It was common ground that the claim was out of time and the ET concluded that it was not just and equitable to allow an extension of time under section 123.

Arguments

132 Mr Ismail argued that the ET misdirected itself on the question of prejudice. Where it is a relevant factor the tribunal must consider the balance of prejudice between the parties in deciding whether to extend time. He submitted that the ET failed to identify any forensic or actual prejudice to the respondent and thus failed to properly consider the balance of prejudice. It is submitted that there was no prejudice to the respondent in allowing this complaint to proceed.

133 Second, Mr Ismail argued that the ET failed to take account of relevant factors including the difficulty caused by the effects of the claimant's disability on his ability

to comply with the primary time limit and the length of the delay itself. Although the ET was directed to the disability impact statement, they only considered the impact to be relevant to the period between June 2020 and January 2021 and did not address the purported delay between 29 March 2021 and 29 April 2021. Mr Ismail referred to a preliminary hearing at which EJ Burns had found the claimant to be disabled. Those findings were not in dispute and there was nothing to suggest that these symptoms had been alleviated between dismissal and the date the complaint was presented.

134 Mr Ismail argued that the ET failed to take into account the finding that the claimant was disabled by reason of long covid from 27 August 2020 and thus remained disabled throughout the relevant period beyond January 2021. He submitted that the ET ought to have taken into account the likely effect of the claimant's disability as it existed and to which it had evidence between June 2020 and January 2021 on his ability to comply with primary time limits.

135 Mr Ismail argued that paragraph 111 includes a significant misdirection as to the relevant facts and the length of the delay. The ET erroneously assumed that the time limit for the claimant's failure to make reasonable adjustments ran up to 29 April 2021 such that the delay was a period of one and a half months. However, the earliest date that the act complained of could have taken place is the date the relevant PCPs were applied being 21 January 2021.The limitation would have run to 1 June 2021 at the earliest and most likely closer to 18 June 2021. The length of the delay becomes less if at all substantial. The tribunal in any event erred in law in its material misunderstanding of the length of the delay which is a relevant factor and renders the decision unsafe.

136 Third, he argued that the ET erred in placing significant weight on the irrelevant factor that the claim for reasonable adjustments was a product of his lawyers creative thinking. The ET erred in law in treating the additional PCPs as creating an additional burden on the respondent to prove a negative. The burden of proof lies with the claimant to prove the existence of a PCP. No amount of creative thinking could shift

that burden to the respondent. No reasonable and properly directed tribunal would have come to this conclusion.

137 Finally Mr Ismail argued that the ET perversely concluded that the requirement for the respondent to prove that the PCPs were not applied created an additional evidential burden on the respondent. There was no additional evidence that the respondent would be required to adduce and it was perverse of the Tribunal to conclude otherwise.

138 Ms Coyne responded that a tribunal has the widest possible discretion so long as it doesn't leave a significant factor out of account.

139 She argued that there was no misdirection as to prejudice. The ET specifically identified prejudice to the respondent. The respondent would have to make enquiries and give evidence that was different to other claims. There was particular work for the respondent to dispute the three PCPs. They were creatively formulated and, so much so, that 2 out of 3 were abandoned.

140 Ms Coyne argued that the ET was entitled to find there was little prejudice to the claimant. He had identified his complaints about the dismissal as his primary complaint. It did not mean there was no prejudice but little in the context of the claim and what was important to the claimant. The weight put on the complaint was the claimant's own express position and it is unfair to criticise the ET for adopting it. Indeed the claimant failed to address why it would be just and equitable to extend time at all in his written submissions. Even now, the claimant has not particularised any other alleged prejudice that he suffered.

141 Ms Coyne argued that the ET identified the weakness of the section 21 complaint. That, together with prejudice, was sufficient to justify the refusal of an extension. It further goes to why there was little prejudice to the claimant to be able to prosecute a claim that he himself was confused about.

142 The ET did not fail to take into account the difficulty posed by his disability. The standard of assessment is whether no reasonable tribunal could have reached the finding on paragraph 111 on the basis, the claimant says, that a factor was not taken into account. The ET was entitled to find as it did because the claimant led no evidence that properly went to the alleged causal connection of diabetes to any substantial disadvantage.

143 The claimant did not enter written submissions on this point but after a break he relied on certain paragraphs of his disability impact statement. The ET expressly referred to the claimant's submissions at paragraph 107 and found that the evidence presented was not directed to explaining why he could not present the s21 claim in time. That finding is not challenged in an appeal led on perversity grounds nor could it be. The claimant's assertion that his disability was not taken into account is plainly without proper basis.

144 Ms Coyne argued that it was not perverse to take into account that the claim was the product of a lawyer's "creative thinking". The ET explained that the claimant gave evidence that was inconsistent with PCP2 and abandoned PCP1. This is indicative of a creatively formulated case.

145 It cannot be said that no tribunal could reach a finding that the PCPs created an additional evidential burden by requiring the respondent to prove a negative. It was no misunderstanding of the burden of proof but a practical recognition that if the respondent opposed the claim it would need to make enquiries and adduce evidence in relation to it including the PCPs. The respondent would also need to spend time disputing the claim in cross-examination and submissions.

146 In any event the prejudice of defending the section 21 claim extended beyond the PCP element. As found at paragraph 113 this is a very different claim calling upon different types of inquiries and evidence that included inquiries and evidence related

to knowledge of disability and substantial disadvantage inquiries, evidence relating to the existence of PCPs inquiries and evidence relating to adjustments.

Ground 6 - Analysis and conclusion

147 Section 123 of the EqA does not specify any list of factors that the tribunal must take into account. However the tribunal must take into account any factor that is relevant in the particular circumstances and, equally, it must not take into account a factor that is not relevant. Otherwise, the tribunal has a very wide discretion. The EAT should not interfere unless there has been a clear error. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640 Leggatt LJ said that "factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of and reasons for the delay (b) whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh)".

148 Some time was spent at the hearing before us, trying to establish when time started to run for the section 21 claims. In the judgment, paragraph 111, it is stated "had he presented his complaint by 29 April 2021, the complaint would have been in time". It was not in dispute that there was a concession that the claims were out of time and that, working backwards, time had therefore started to run before 8 February 2021. That is clear from the list of issues. Neither party was able to assist us with the starting date from which time had been assumed to run. Having considered the matter further, we concluded that the ET may have assumed that time started to run on 29 January 2021 (the date of an email sent by FM to the claimant giving his final options) and had simply not take account of any period of early conciliation that would have extended time had the complaint been presented by 29 April 2021. However in light of the concession that the complaints were out of time, we do not consider this potential error affected the ET's consideration of whether it was just and equitable to extend time. They were clearly focussing on the period from late January 2021 onwards.

149 The claimant submits there was a failure to correctly deal with prejudice. We do not accept this. The ET set out the correct test and applied it. We accept there is a distinction between the simple prejudice of the respondent having to meet a claim that it would not otherwise have to meet and "forensic" or actual prejudice. The ET clearly considered that there would be forensic prejudice. Although there were overlapping factual matters with the claims that were made in time, they were entitled to take into account that the respondent would have to meet a different kind of complaint with a different legal test requiring different types of enquiries and evidence. That was an assessment they were entitled to make.

150 Equally the ET was entitled to conclude that there was little prejudice to the claimant who had said at the ET that his primary complaint was about his dismissal and that he was able to pursue that claim. That is a relevant factor.

151 As is often the case in a complaint under the EqA, the issue of whether an extension of time should be granted was reserved for determination at the final hearing. Mr Ismail relies on this fact to say that there was no actual prejudice to the respondent in allowing the reasonable adjustment complaint to proceed as they had had to prepare for it and deal with it at the hearing in case the complaint was allowed to proceed. We do not consider that is a valid argument when considering prejudice. The fact that the prejudice has already been suffered does not mean it has to be discounted. There are often very good reasons to reserve the issue to the final hearing but if Mr Ismail was correct, it would never be fair to a respondent to take that approach. We do not consider there was any identifiable error in the ET's approach to prejudice.

152 The second submission is that the ET did not deal properly with the claimant's disability, saying there was no explanation why the claimant could not present the claim in time. The ET notes the witness statement but says that it only covers the period from June 2020 to January 2021 whereas the delay was between the claimant obtaining the EC certificate on 29 March 2021 and presenting his claim on 18 June 2021.The claimant says that the ET should have taken into account the findings by

Judge Burns at the preliminary hearing that the symptoms continued. We do not accept that criticism. When dealing with an application for an extension of time, the ET only has to consider the evidence presented. The onus is on the claimant to present relevant evidence. If the claimant did not refer to the continuing symptoms the ET does not make an error of law in not taking these into account.

153 The third ground of challenge is that the ET erred in taking into account an irrelevant factor, specifically that the claim for reasonable adjustments was a product of his lawyers creative thinking. We do not accept that criticism. The ET's discretion is wide. We understand the ET to be saying, as part of the weighing of prejudice to the claimant, that this late addition was not something that was in the claimant's mind but an invention of his lawyers'. So much so that the claimant himself was confused about it. While that may not always be a matter taken into account, we consider that the ET was entitled, to rely on what they clearly saw as a relevant factor in the overall justice of allowing or not allowing and extension of time.

154 The final ground is that it was perverse to conclude the PCPs created an additional evidential burden by requiring the respondent to prove a negative. The ET was entitled to consider that in practical terms, the respondent would need to make enquires and adduce evidence that may be different to that produced for the unfair dismissal complaint. It is clear they were referring to the fact that the respondent would need to make enquiries and adduce evidence in relation to the section 21 claims, including the PCPs. We do not consider this to be a clear error that would entitle us to interfere with the ET's overall assessment under section 123 of the EqA.

155 Ground 6 is dismissed.

Conclusion

156 All grounds of appeal are therefore dismissed. The members of the panel, and particularly the lay members appointed for their industrial experience, wish to stress that this is an unusual and rare case where a dismissal has been found to be fair when

there has been no written warning and no offer of an appeal. However, the ET had the benefit of hearing all the evidence over 8 days and spent two days in deliberation. The ET, like the EAT, sat as a full panel with the benefit of non-legal members with industrial experience. They made clear factual findings and were entitled to conclude that this was such a rare case. It is not for the EAT to interfere with their findings where there has been no error of law. We unanimously dismiss all grounds of appeal.