Appeal No. UKEAT/0348/14/MC

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 2 March 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

BRITISH TRANSPORT POLICE — APPELLANT

MR D NORMAN — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS AKUA REINDORF (of Counsel) Instructed by: British Transport Police Legal Department 25 Camden Road London NW1 9LN
For the Respondent	MR WINSTON BROWN (Solicitor) Brown & Co Solicitors Athelney House 161-165 Greenwich High Road Greenwich London SE10 8JA

SUMMARY

JURISDICTIONAL POINTS - Extension of time: just and equitable

Having concluded that it was not possible to determine whether the Claimant's claims (of disability discrimination by reason of a failure to make reasonable adjustments) were brought out of time without hearing all the evidence (and, thus, would need to be considered at a Full Merits Hearing), the Employment Tribunal nonetheless went on to find that it would be just and equitable to extend time to permit the claims to be brought out of time in any event. Although it was questionable whether the ET had made clear that it was proceeding on assumed facts as to when the primary time limit expired (the first factor laid down in the guidance laid down in **British Coal Corporation v Keeble** [1997] IRLR 336), that might be inferred from the recitation of the Respondent's case in this regard. The real issue was the ET's approach to the Claimant's explanation. The relevant questions were those proposed by Langstaff P in **ABM University Local Health Board v Morgan** UKEAT/ 0305/13/LA, at paragraph 52: (1) why was it that the primary time limit had been missed? (2) Why after expiry of the primary time limit was the claim not brought sooner than it was?

Having found that the Claimant had not provided an explanation, the ET's reasoning was based upon assumptions made in the Claimant's favour. Given that he bore the burden of proof on these questions, and the ET had expressly *not* made findings of fact (presumably not wishing to touch on matters that might fall to be determined at the Full Merits Hearing), this was not a permissible approach and the Judgment that it was just and equitable to extend time was thereby rendered unsafe.

Given the ET had held it was not possible to determine whether the claim had been brought out of time (and there had been no appeal against that conclusion) and the difficulty of then making

findings on the questions that arose in respect of the ET's discretion to extend time, the appropriate course was for this point to be remitted for consideration at the Full Merits Hearing.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent, as below. This is the Respondent's appeal against a Judgment of the London (Central) Employment Tribunal (Employment Judge Lewis, sitting alone on 6 May 2014; "the ET"), sent to the parties on 12 May 2014. Before the ET the Claimant was represented by his wife; before me by his solicitor, Mr Brown. Ms Reindorf, of counsel has represented the Respondent throughout.

2. By its Judgment, the ET held that - assuming the Claimant's claims were presented out of time - it would be just and equitable to permit them to proceed in any event. The Respondent's appeal against that decision was permitted to proceed to a Full Hearing by HHJ Peter Clark.

The Background Facts

3. The Claimant was employed by the Respondent as a police officer from November 2007. In May 2012 he was placed on temporary duty restriction due to ill-health. In early July 2012, Occupational Health advised the Claimant was permanently unfit for operational duties and an ill-health dismissal ("IHD") process commenced. After various meetings at which he was represented by his union, the Police Federation, the Claimant was given notice of his dismissal on ill-health grounds on 14 March 2013; that dismissal took effect on 22 April 2013.

4. On 17 July 2013 the Claimant's then solicitors lodged his ET1 with the ET. It contained complaints of direct and indirect disability discrimination; discrimination arising from disability; disability discrimination as a result of a failure to make reasonable adjustments and victimisation.

5. There were various Preliminary Hearings before the ET, to which I return below, during the course of which all the Claimant's claims were withdrawn save for his claim of disability discrimination as a result of a failure to make reasonable adjustments.

6. The ET found that the Claimant had first visited solicitors about his claims on the Monday after his dismissal (paragraph 12). According to the Respondent's notes of the Claimant's evidence before the ET he had further volunteered that he had consulted lawyers back in July 2012 during the first step of the IHD process. That, however, is not confirmed in the ET's findings. As already recorded, however, the Claimant was being represented by solicitors when he lodged his ET1.

7. There was a telephone Preliminary Hearing on 27 September 2013, at which the Claimant was represented by his solicitor. The Respondent raised the possibility of a strike-out application in respect of certain parts of the claims. A second Preliminary Hearing was listed for 29 November 2013; a hearing at which the Claimant was represented by counsel. Subsequent to this the Claimant produced a list of issues on 9 December 2013. That included clarification as to how he put his reasonable adjustments complaint. Following receipt of the list of issues, on 20 December 2013, the Respondent applied for a strike-out of the reasonable adjustments claim on the basis that it was out of time. A Preliminary Hearing to determine that application was originally listed for December 2013, but that was postponed due to issues relating to the Claimant's health. On 7 April 2014 the Respondent received notification from the Claimant's solicitors that they were no longer acting. Accordingly the Respondent sent its strike-out application directly to the Claimant on 14 April 2014.

8. At the third Preliminary Hearing, on 6 May 2014, the Claimant attended, accompanied and represented by his wife, Ms Foster. Ms Foster is a lay member of Employment Tribunals, attached to the London (South) region. That fact was only discovered after the Employment Judge had heard evidence and submissions and had retired to reach her decision. It was, however, something drawn to her attention before she gave her Judgment and a matter that she expressly referred to in doing so.

The ET's Decision and Reasons

9. The ET concluded that it was not possible to determine whether the claims had been brought out of time without hearing all the evidence. The Employment Judge noted, for example, that one of the complaints required consideration as to whether the Respondent could have been expected to make an adjustment that would have made the Claimant's temporary role permanent. If so, it would need to be determined as to when that would have taken place as that would be the date from which time would run.

10. Having thus concluded that it would be unsafe to reach any final view as to whether the claim had actually been made in time, the ET turned to consider whether it was nevertheless just and equitable to extend time. The ET was satisfied the Claimant would have been aware of the concept of time limits in ET proceedings: (1) because he had previously brought a race discrimination claim and (2) because his wife was a lay member. That said, the ET held that it would have been difficult for the Claimant or his wife to understand how to apply any time limit in a reasonable adjustment case given the complexity of the approach involved. Moreover the Claimant's claim had been brought within three months of the effective date of termination of his employment, and that had been preceded by a continuous series of events so the claim

was not one which (paragraph 24) "feels 'stale'". Additionally the ET took account of the fact that, to the Claimant:

> **"… the discrimination would have additionally have appeared to be continuing right up to his dismissal because of promises he says he received that the respondents would keep looking for Police Staff jobs until the expiry of his notice …" (paragraph 25)**

Albeit that the ET expressly declined to make any findings of fact on the matters relied on by the Claimant in this regard.

11. Acknowledging that the Claimant would have been assisted by his union, the Police Federation, at certain points in the internal process, the ET concluded there was "no evidence that he was specifically told about time-limits" and considered it "would not be surprising if a union representative … did not appreciate the complexities of how time-limits work in reasonable adjustments cases" (paragraph 26). Although the Claimant had contacted solicitors on the Monday after the termination of his employment, he did not remember being told of time limits. The ET found that the most logical explanation was that his solicitors had believed that the claim had to be presented within three months of the effective date of termination.

12. The ET further found that it was unlikely that the evidence of either party would be less cogent because of the delay. The only prejudice to the Respondent was the potential inconvenience of one of its witnesses being unavailable. The prejudice to the Claimant would mean that he was deprived of the entirety of his claim.

13. Further, the Claimant had withdrawn his discrimination arising from disability claim, which the ET considered had been brought in time. There was no evidence as to his reasons for that withdrawal, it appeared to have been part of a general streamlining; it was an unforeseen consequence of focussing in on the key issues that he had ended up with a time limit problem.

14. Noting the burden of proof was on the Claimant and that he had not given a clear explanation for the delay, the ET considered that was due to the Claimant's memory difficulties and to the fact he no longer had his legal advisors acting for him. Taking all the factors into account, particularly the balance of prejudice, the ET held the Claimant was in any event entitled to a just and equitable extension of time.

The Appeal

15. There are six grounds of appeal, as follows: (1) the ET erred in deciding it was just and equitable to extend time without first making a finding as to whether the claims were brought in time; the error was to consider the just and equitable extension of time question without first reaching a decision as to when time began to run and, thus, as to the extent of the default; (2) the ET erred in exercising its discretion to extend time when the Claimant had not given a clear explanation for the delay; (3) the ET erred in taking into account an irrelevant matter in finding that a reason for the late presentation of the claim was that time limits were difficult to understand in reasonable adjustments claims; (4) the ET misapplied **Matuszowicz v Kingston-upon-Hull City Council** [2009] ICR 1170 CA; that case allowed of a possible right to extend time, when the Claimant was not aware the start date had occurred for time limit purposes because the employer had lulled the employee into a false sense of security but the ET had expressly not made findings of fact on these points; (5) the ET's findings as to the Claimant's knowledge of time limits and the extent of advice given to the Claimant regarding time limits was absent any evidential basis or was perverse; (6) the ET's finding as to the presumed fact that the Claimant's abandoned claim would have been in time was again absent any evidential or proper basis; alternatively was an irrelevant factor.

16. By his Respondent's Answer the Claimant resisted the appeal, relying on the ET's findings and reasons and observing that the ET, having accepted that the discrimination claims were out of time and thus the issue for it was whether it was just and equitable to extend time, there was, as such, no need for any separate finding of fact on that question. Moreover, as to the Claimant's explanation for the delay, he had given evidence that the Respondent had led him to believe that it was in the process of making an adjustment and would continue to do so. As for the ET's view as to the complexity of the time limits issue, that was for the ET and its conclusion was not perverse.

The Relevant Legal Principles

17. By section 123(1) **Equality Act 2010** a complaint to an ET must be presented within three months of the act complained of. By section 123(3)(a) an act of discrimination which extends over a period shall be treated as done at the end of that period. Section 123(3)(b) then provides that:

> **"failure to do something is to be treated as occurring when the person in question decided on it."**

18. An inadvertent failure to make a reasonable adjustment may constitute a "continuing omission" in respect of which (section 124 of the **Equality Act**) time begins to run either from the date on which the Respondent did an act inconsistent with the making of the adjustment or from the expiry of the period within which the Respondent might reasonably have been expected to make the adjustment, see **Matuszowicz** (cited above), **Cyprien v Bradford Grammar School** UKEAT/0306/12, **Mears Group plc v Vassall** UKEAT/0101/13/LA.

19. An ET has a discretion to extend time in a discrimination case where it considers it just and equitable to do so (section 123(1)(b) **Equality Act**). The discretion is a wide one.

Nonetheless the grant of an extension of time should be the exception rather than the rule (**Robertson v Bexley Community Centre** [2003] IRLR 434 CA). Furthermore it is for the Claimant to persuade the ET that it is just and equitable to extend time, see per Langstaff P in **ABM University Local Health Board v Morgan** UKEAT/0305/13/LA at paragraph 52.

20. In considering whether to exercise its discretion the ET should consider the prejudice which each party would suffer as a result of granting or refusing an extension of time and should have regard to all the other relevant circumstances, see, in particular, the guidance given in **British Coal Corporation v Keeble** [1997] IRLR 336, particularly at paragraph 8.

21. The first relevant circumstance cited in **Keeble** is, however, the extent of the default in issue. To know how long the delay has been for limitation purposes, however, one must know when time began to run, see per Beatson J in **Outakumpu Stainless Ltd v Law** UKEAT/ 0199/07/MAA, at paragraph 16:

> **"… it is necessary for a Tribunal considering the exercise of its discretion to ascertain when the time limit expires in order for it to approach the exercise of discretion properly and lawfully. If it does not it cannot consider the length of the delay, and it cannot properly consider whether it is just and equitable to allow the claim to proceed. …"**

22. Determining that first question could give rise to difficulties in reasonable adjustments cases, where both employer and employee may not realise the time limit has started to run and where this question - as the ET concluded here - might only be capable of determination after hearing all the evidence. That said, the possibility of a just and equitable extension of time might apply in any event, for example where the employer's decision had not been communicated to the employee or where the employer had otherwise sought to lull the employee into a false sense of security (see per Lloyd LJ in **Matuszowicz** at paragraph 24, and per Sedley LJ at paragraph 37).

23. The second relevant circumstance cited in **Keeble** relates to the explanation given for the default. In **ABM University Local Health Board v Morgan**, Langstaff J indicated a Claimant can hardly hope to meet the burden of demonstrating why time should be extended unless:

> **"52. … he provides an answer to two questions … The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was. …"**

24. The answers to those questions, as Langstaff J reminds us, cannot simply be assumed. As to how a Claimant might make good his explanation, that will be fact- and case-sensitive and ETs have a degree of flexibility in terms of whether that comes from witness evidence given pursuant to a statement or whether there might be other material from which an explanation is made good, see per Underhill J (as he then was), in **Accurist Watches Ltd v Wadher** UKEAT/0102/09/MAA, particularly at paragraph 16.

Submissions

The Respondent's Case

25. The Respondent submits that it is essential, before considering whether to extend time, for the ET to first make a finding as to the date on which time expired for the presentation of the claim (per Beatson J in **Outokumpu**); the length of, and reasons for, the delay are the first matters to be considered when deciding whether it would be just and equitable to extend time (**Keeble**). If an ET was allowed to consider an extension of time when not prepared to make a finding as to when time began to run, it would need to make clear its assumption as to when time started, and that assumption must be against the party bearing the burden of proof: it must take the Respondent's case at its highest and to do so in a clear way.

26. As for the question of explanation, the Respondent accepted (per **Accurist Watches**) that may have been provided by way of reference to witness evidence, other material and/or by submission. But there had to be some explanation, and here the ET had not made proper findings of fact so as to answer the questions suggested in **Morgan** (see above).

27. That overlapped with the next point, which related to the ET's taking into account the fact that the law on time limits in reasonable adjustments cases can be difficult to understand. First, that was not a relevant factor. In any event, the ET thereby made an assumption in the Claimant's favour for which there was simply no evidential basis. The Claimant had received advice from trade union representatives and from solicitors and counsel; it could not be assumed that they all definitely failed to understand the law on this point.

28. The next ground raised the question whether the ET had misapplied **Matuszowicz**, i.e. whether the Claimant was relying on something that had been said to him to suggest that the duty was ongoing. If the ET had indeed approached the case in this way - having expressly stated it was making no findings of fact on the point - then it did so apparently purely on the assumption that what the Claimant said was right.

29. Moreover, the finding that the Claimant's abandoned claim would have been in time and had been abandoned without realising the impact of that in terms of the application of the time limit to his remaining claim was (1) an irrelevant factor, and (2) again proceeded on the basis of an assumption in the Claimant's favour. It was a point that was irrelevant to the question before the ET because it was obviously something that occurred some time after the lodging of the claim. Even if the ET was entitled to take this into account, it could only be right to do on a clear evidential basis; not an assumption. Indeed, given that the time limits question had been

raised at the second Preliminary Hearing, the only safe assumption was that the Claimant had streamlined his case in full knowledge of the implications of that for the time limits issue. Thus the ET's decision was unsafe and should be quashed.

30. As the question of disposal, there would be greater fairness for both parties if the time limit issue was fully argued at a Full Hearing rather than any assumptions being made on the question of prejudice. If, however, the matter was to be left to the ET determining this case at the Full Merits Hearing, it should be before a different Employment Judge. This Employment Judge had reached conclusions based on assumptions made in the Claimant's favour and there was no indication that she retained an open mind on these points.

The Claimant's Case

31. On behalf of the Claimant it was submitted that the ET was right not to seek to determine when time started to run given the conflict on the evidence. That said, the ET expressly proceeded on the assumption that the claims were out of time (paragraph 22) and had clearly understood the Respondent's case, specifically setting out each time limit arising, and therefore by how long the ET1 was late (paragraph 11). Moreover the Judgment was clear as to the reasons the ET had accepted for the delay: the Claimant had received promises that the Respondent would keep looking for police staff jobs until the expiry of his notice and beyond. Accepting that the ET had ended the relevant paragraph (25) by saying that it made no finding of fact on that point, all that was doing was seeking to avoid making specific findings of fact that might impact on the Full Merits Hearing. The ET was still entitled to take into account the way the Claimant's case was being put. Assuming that assertion made by the Claimant was true, it could be relevant and taken into account on the question of an extension of time.

32. As for the other matters relied on by the ET - the complexity of the principles to be applied; the Claimant's ability to understand or recall matters given his depression; the advice that he was likely to have been given (and the Claimant did not accept the Respondent's note of his evidence on the timing of this) - all were potentially relevant matters that the ET was entitled to take into account.

33. To exercise its discretion to extend time the Claimant agreed the ET had to answer the questions laid down in **Morgan**. In answering those questions, however, it was entitled to have regard to a wide range of material. That included what was said by Ms Foster in submissions, what was apparent from the material before the ET and what could be inferred from what had happened (**Accurist Watches**). Moreover, as was made clear in **Accurist Watches** (paragraph 25 of that Judgment) if not spelled out in terms, the EAT could read between the lines of the ET's reasoning and infer what had been found.

34. Ultimately, there was sufficient for the ET's decision to be upheld. If the court was against the Claimant on this, the matter should simply fall to be determined at the Full Merits Hearing when everything would be at large.

Discussion and Conclusions

35. Having reminded myself of the relevant statutory provisions (see above), I keep in mind the guidance provided in **Keeble**. Whilst the factors listed do not act as a straitjacket, it is obviously sensible guidance that ETs plainly do well to bear in mind.

36. I can see the point that, without knowing when time started to run, one cannot properly assess the first factor referred to in **Keeble**; the extent of the delay (and see **Outokumpu** on this

point). I do not think that inevitably means that an ET can never consider the question of extension of time as a preliminary issue without first determining, as a matter of fact, whether the claim was out of time and when precisely time began to run. I do think, however, that the ET has to work on some basis as to when time began to run, even if only assumed. If the ET feels it cannot determine that question - when did time begin to run and, thus, how long was the delay; what was the extent of the default? - without hearing all the evidence, then it might nevertheless consider whether it would be just and equitable to extend time if the starting point was to be as the Respondent was asserting; that is, assuming the worst against the Claimant.

37. In the present case, I am not satisfied that the ET did this. I accept that it expressly references the Respondent's case on time limits at paragraph 11 but I can discern no engagement with those time limits in the conclusions section. If I ask what was the ET's finding, or basis for proceeding, on the first **Keeble** factor - the extent of the default - I cannot readily find the answer. That said, I have been persuaded by Mr Brown that it might be appropriate to read between the lines - to take a broad and flexible approach to the reasons given - to infer that the ET was assuming the matters as the Respondent contended.

38. Assuming that to be correct, I turn to the next matter cited in **Keeble**, which all parties agree is crucial; the Claimant's explanation. I ask the questions stated in **Morgan**: (1) why was it that the primary time limit had been missed? And, (2) why after the expiry of the primary time limit was the claim not brought sooner than it was?

39. I allow that there can be a degree of flexibility as to how ETs go about answering those questions. In some cases, it might be simply be a matter of submission. In others it may be relevant to hear evidence and make findings of fact on that evidence. Alternatively, it may be

necessary to make certain assumptions or proceed on the basis of agreed facts. Where, however, a contentious factual matter is relied on there has to be some evidential basis for it (assuming no agreement as to how it should be treated). I do not see how an ET can - on a contentious matter - simply make an assumption in the Claimant's favour when deciding how to exercise its discretion to extend time and I do not read **Accurist** as suggesting otherwise.

40. Thus, it might not have been wrong for the ET to have had regard to what Ms Foster said in submissions, as to when the Claimant went to see the solicitors who represented him when he lodged his ET1. If she was able to confirm that date (and his evidence had made it plain that he could not), then I would not consider the Judgment vitiated by the fact that she might not have given that evidence in a formal sense. The point, however, becomes more problematic when there is some basis for thinking that the Claimant had himself said in evidence that he had taken advice from solicitors at an earlier stage (which is what the Respondent's note of his evidence suggests). If Ms Foster was saying something contrary to that in closing, then there was a need for her submissions to have some evidential basis.

41. I cannot determine precisely what was said, however, because (contrary to the EAT's order and directions) there is no agreed evidential record and there has been no application for the ET's notes. If this was the only point of substance arising on the appeal, I might have been inclined to adjourn, to enable it to be properly addressed. Such a course is rendered unnecessary, however, because there are more fundamental errors in the ET's approach.

42. Returning to what might be considered the very straightforward questions set out in **Morgan** as to the Claimant's explanation, the Claimant says that the ET accepted his evidence that this was effectively a **Matuszowicz** case, as is made plain by paragraph 25. There the ET

sets out the Claimant's case as to what he had been told, suggesting that he had been led by the Respondent into thinking that it saw its duty to make reasonable adjustments as ongoing.

43. The difficulty is that the Respondent did not agree that was what the Claimant had been told and the ET did not resolve this conflict. Paragraph 25 thus suggests that, while making no finding of fact on the point, the ET was making an assumption in the Claimant's favour. The Claimant says I can read the paragraph differently: the ET was not making a finding of fact on this point (because it might impact on the Full Merits Hearing) but was accepting (and was entitled so to do) the Claimant's case for an extension of time as one of a number of relevant factors. I find this submission difficult. It might be appropriate to proceed on assumed facts in certain cases. Here, however, this would be assuming disputed facts in the Claimant's favour on a point on which he had the burden of proof and on which the ET expressly made no finding. The ET's apparent reliance on this as a relevant factor is thereby undermined: it could not be relied on as constituting the Claimant's explanation absent an evidence-based finding of fact.

44. The same is true in respect of what the Claimant was (or was not) advised and when. Although the Claimant bore the burden of proof of establishing his explanation and although it could only be the Claimant who could have called evidence as to what he had been advised, and when (it being for him to decide whether to waive legal privilege), the ET proceeded - absent any actual evidence - upon the assumption that it was likely that all his advisors had not understood or had misunderstood the correct legal principles applicable in his reasonable adjustments case. Given that the burden of proof was on the Claimant to establish the explanation for the delay and the extent of the delay, I have difficulties with this approach. I am also sympathetic to the Respondent's argument that, even if that assumption was correct, it was not - without more - a relevant consideration. If a trade union or legal advisor failed to spot

the issue (and there is no real evidential basis for saying that they did), then the ET needed to address head on the question why that should make it just and equitable to extend time.

45. The ET makes a further assumption in proceeding on the basis that the Claimant had withdrawn his other claims without appreciating the implications of so doing. To the extent that the ET was entitled to have regard to the surrounding facts, absent any specific evidence from the Claimant on the point, then I can see strength in the submission that the other corroborative material might have pointed in favour of the Respondent rather than the Claimant on this issue; the other claims having been withdrawn after the time limit issue had been raised.

46. It is of course critical for me to remember this is a Judgment of an ET, which I should not expect to be drafted to the highest standards of legal draftmanship. It is also trite that a Judgment must be taken overall and viewed as a whole. Bearing all that in mind, however, I cannot here conclude other than that the ET here took a broader view than the evidence before it permitted and, in so doing, made a number of assumptions in the Claimant's favour. As the burden of proof was on the Claimant, and he could not have been said to have discharged that burden when it came to the question of his explanation for his default, I find the ET's Judgment to be unsafe. Accordingly, I allow the appeal and duly quash the extension of time.

Disposal

47. The question then arises as to whether I should remit this point for consideration afresh or determine it myself. One argument in favour of the latter course might be that this will all ultimately come down to the question of relative prejudice; if I assume everything else in the Respondent's favour, I might then be in a position to determine that question myself. I am,

however, not convinced that is right. It seems to me that more than one view is possible and, that being so, the point is one for an ET not the EAT.

48. Allowing that I should thus remit this issue to an ET, the next question is whether I should remit it to be considered at a further Preliminary Hearing. It seems to me that doing so is only likely to give rise to the same difficulties. Given the ET's decision (against which there is no appeal) that it would be wrong to seek to determine as a preliminary issue the question when time actually started to run, it would be very difficult to properly exercise the just and equitable discretion in this case. That is all the more so given the need to avoid making findings of fact that might impact on the matters to be determined at the Full Merits Hearing.

49. Having due regard to the overriding objective, it seems to me that the right course is to acknowledge these difficulties and remit this point to be considered by the ET charged with determining all the other issues at the Full Merits Hearing in this case.

50. I then ask whether I should say anything about this going back to a different Employment Judge for the Full Merits Hearing. In so doing, I apply the factors in **Sinclair Roche Temperley v Heard and Fellows** [2004] IRLR 763. There have been no findings as to the merits of this case. There is no particular utility in saying that the same Employment Judge should be involved. Equally, however, I see no reason as to why this experienced Employment Judge would not be capable of adopting an objective and professional approach to this matter if the Full Merits Hearing happened to be listed before her. In those circumstances I simply direct that the point is remitted to the ET for determination at the Full Merits Hearing along with all other points. I make no direction as to the identity of any member of that ET.