Appeal No. UKEAT/0363/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 June 2014
Judgment handed down on 29 August 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

AB — APPELLANT

HOME OFFICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	AB (The Appellant in Person)
For the Respondent	MISS LOUISE JONES (of Counsel) Instructed by: Treasury Solicitors One Kemble Street London WC2B 4TS

SUMMARY

PRACTICE AND PROCEDURE - Review

The Claimant applied for a review of a judgment. The Employment Judge refused the application on preliminary consideration. The Claimant appealed the refusal to hold a review (he also appealed the judgment itself, but was out of time as regards that appeal). Held: on careful analysis of the issues and reasons of the Employment Tribunal, it was plain that the Employment Tribunal had decided the issues between the parties and given judgment accordingly. The mere fact that the Employment Tribunals's reasons could have been improved in one respect was not a sufficient reason for ordering a review where, as here, the Employment Judge was entitled to conclude that there was no reasonable prospect of the judgment being varied or revoked.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This an appeal by AB ("the Claimant") against a refusal by Employment Judge Grewal to grant, in one particular respect, his application for a review of a judgment of the Employment Tribunal dated 16 April 2012.

2. Originally the Claimant also sought to appeal against the judgment dated 16 April itself, but he was out of time for doing so and his application for an extension of time was unsuccessful. Moreover his appeal against the review judgment was originally much wider, but at a hearing under rule 3(10) of the Employment Appeal Tribunal Rules 1993 a single ground was considered to be arguable. The ground is as follows:

> **"It was an issue for the ET to determine at the hearing whether R unlawfully discriminated against C by issuing him with a six-month written warning in October 2010: see paragraph 3.5 of the claim form, para 2.2 of the CMD order dated 18 July 2011 and particulars served pursuant to the order made on 18 July 2011.**
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> **The Tribunal entirely overlooked the issue. The claimant drew the matter to the Tribunal's attention and applied for a review by letter dated 29 April 2012. At the CMD on 9 May 2012 and by refusing a review on 28 May the Employment Tribunal erred in law in refusing to hold a review to determine this issue.**
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> **It would have been in the interests of justice to do so."**

3. The question is accordingly whether the ET overlooked an issue when it gave its judgment dated 16 April, and if so whether it ought to have ordered a review. As we shall see, the issue relating to review comes into sharp focus because the appeal against the underlying judgment was out of time.

The background facts

4. The Claimant was employed by the Home Office ("the Respondent") with effect from July 2000. Initially, he was an executive officer. He was promoted to higher executive officer in April 2003. From August 2007 he began to cover a senior executive officer post. It was

common ground that by 2010 he had disabilities for the purposes of the **Equality Act 2010** by reason of two conditions: a severe facial skin condition and a psychiatric condition described as an adjustment disorder with a prolonged depressive reaction and associated anxiety symptoms.

5. In March 2009 the senior executive post in which the Claimant had been acting up was advertised. The Claimant applied for it but was unsuccessful. His substantive post had ceased to exist; he was placed in a redeployment pool. On 3 August 2009 the Claimant made a formal written complaint of bullying, harassment, discrimination and victimisation against five of his colleagues. The Respondent caused an investigation to take place; it was prolonged.

6. In February 2010 one of the persons against whom he complained announced that he was leaving to take a position at a different department. The Claimant sent emails from his home to that department saying that an existing civil servant with the Home Office was under investigation for illegal discrimination, victimisation, harassment and bullying, and that he believed it would be unethical for an individual to transfer in those circumstances.

7. By May 2010 the Claimant had been informed that his allegations had been investigated and that there was no case for the individuals concerned to answer. Now the Claimant in turn came under investigation. In due course disciplinary charges were laid against him. By far the most serious charge against him related to the emails: it was said that he behaved in a way that resulted in a serious breach of confidentiality with regard to colleagues in his Department.

8. There were, however, two subsidiary charges, relating to the way in which he behaved towards two members of management. It was said that on 18 May 2010 he spoke

inappropriately towards one member of management and refused to comply with a reasonable management request when he refused to meet another member of management.

9. On 21 October a disciplinary hearing took place. The Claimant was absent from work on grounds of ill-health and did not attend. He was dismissed on the most serious charge – behaving in a way that resulted in a serious breach of confidentiality. An internal appeal was subsequently dismissed. Again he was absent and did not attend.

10. On 21 October the Claimant was also given a six-month written warning on the lesser charge of refusing to comply with a reasonable management request relating to the incident in May. It is to this written warning that the appeal relates.

The Tribunal Proceedings and Reasons

11. The Claimant brought proceedings before the Employment Tribunal ("ET"). By the time the Claimant's claims reached a final hearing in January 2012 they had been refined in various ways. The ET was to determine allegations of disability discrimination relating to the disciplinary process and dismissal, unfair dismissal and allegations of race and disability discrimination concerning the internal appeal process. I will return in a moment to the precise way the issues were framed.

12. The ET heard the claims over some five days and reserved judgment. It had granted an order whereby he is described by the ET as "AB" in the heading to the Judgment. The Judgment with Written Reasons was sent to the parties on 16 April 2012.

13. To a significant extent the Claimant was successful. The ET held that the Respondent was liable for unlawful disability discrimination by proceeding with a disciplinary hearing when the Claimant was not fit to attend and had not been able to access a key system in order to prepare for the hearing. The ET further held that the Respondent was liable for unlawful disability discrimination by proceeding with an appeal hearing when the Claimant was not fit to attend it. In these circumstances the ET found that the dismissal was unfair. For the complaints which the ET found to be established it subsequently by Judgment dated 10 June 2013 awarded Claimant the sum of £5,000 compensation for disability discrimination and the further sum of £5,752.50 compensation for unfair dismissal.

14. The ET did not, however, uphold all of the Claimant's complaints. It found that the true reason for dismissal related to the Claimant's conduct; it rejected the allegation that there had been disability-related harassment; and it did not find the dismissal to be unlawful disability discrimination except in respect of proceeding with the disciplinary hearing and the appeal hearing. In all other respects it dismissed his claim of disability discrimination.

15. In one sense the issuing of the written warning along with the dismissal is of little importance: it does not affect the findings relating to dismissal or open up any route to substantial compensation for the dismissal. But the Claimant is aggrieved by the imposition of the warning. He would be entitled to a judgment and perhaps to some modest additional compensation if it had been imposed unlawfully contrary to the provisions of the Equality Act 2010.

The issue concerning the final written warning

16. In order to understand the Claimant's case on appeal it is necessary to trace through the manner in which the issue concerning the final written warning arose and was dealt with by the ET.

17. In the Claimant's ET1 claim form he ticked boxes stating that he was making claims for discrimination based on various characteristics including disability. He said in the "details of his claim" that his claims included disability discrimination and harassment. There followed a lengthy account of the last few years of his employment. The events of 18 May 2010 were not mentioned in the ET1 claim form in themselves.

18. However, the formal written warning on 23 October 2010 was mentioned by the Claimant as part of the "disciplinary process" which he described in some detail in paragraph 35 of his account. It was said that he was being punished in effect for following the Respondent's own workplace stress assessment and policies. It is right to say, however, that the matter occupies just three lines within a lengthy paragraph 35 which concentrates, understandably enough, on matters concerned with dismissal.

19. A Pre-Hearing Review and Case Management Discussion took place on 18 July 2011 before Employment Judge Grewal, the very EJ who was to preside at the eventual ET hearing. It is important to note that as part of her judgment in respect of the Pre-Hearing Review she ruled that the ET had no jurisdiction to hear any complaints under the Disability Discrimination Act 1995 in respect of acts that occurred before 31 August 2010. So even if the giving of a management instruction in May 2010 had been pleaded in itself as an act of discrimination, the ET would not have had jurisdiction to consider it at the final hearing.

20. EJ Grewal proceeded to make a Case Management Order. She set out an agreed definition of the issues. This included the following issue.

> **"Whether in connection with the disciplinary process against the Claimant (as set out in paragraph 35 of the claim form ...) the Respondent discriminated against him because of either/both of his disabilities (section 13 Equality Act 2010), discriminated against him for a reason arising from his disability (section 15 Equality Act 2010), indirectly discriminated against him (section 19), failed to make reasonable adjustments (sections 20-21) or harassed him in relation to his disability (section 26)."**

21. The Claimant was ordered to give particulars in the following terms.

> **"... by reference to the factual matters set out in paragraph 35 of the claim form ... indicate which of those matters are alleged to be acts of disability discrimination and/or harassment, and in each case whether it falls under section 13, 15, 19, 20-21 or 26 of the Equality Act 2010. The particulars are to be limited to one A4 page document"**

22. The Claimant's particulars included the following.

> **"Para 35 subsection "23.10.10" (re formal written warning) – the contents of my stress assessments, cited policies and workplace evidence of reasonable adjustments establish that I was complying with formal written policies and a reasonable adjustment in asking to meet another manager and that the employer had a duty in regard of my stress disability to allow me to meet with another manager as requested – Direct Disability Discrimination in reference to EA Section 13(1); Discrimination in reference to section 15(1); Indirect Disability Discrimination in reference to section 19(1) and 19(2); Failure to make a reasonable adjustment in reference to section 20(2), 20(3) and section 20(4); failure to comply with a duty to make reasonable adjustments Section 21(1) and (2); and Harassment in reference to Section 26(1)(a), 1(b)(i) and 1(b)(ii) which included breaches of established reasonable adjustments without notice during stress to exacerbate stress."**

23. The Claimant provided written closing submissions. His case concerning 18 May was that he was harassed at his desk to create an investigation managed by Mr Rowland: see paragraph 85 of those closing submissions. His case concerning the written warning was that the formal written warning was imposed "as a result of his clearly being subjected to bullying harassment and distress in respect of his protected characteristic of mental illness: see paragraph 119. He said he had asked Mr Rowland to meet him in an open plan office but Mr Rowland lied about that: see paragraph 160.

24. In the ET's written reasons for the liability judgment it set out a paragraph entitled "The Issues", with six sub-paragraphs. The ET quoted the issue which EJ Grewal had defined in the

Case Management Order. It also summarised in general terms the complaints which the Claimant had made in paragraph 35 of his ET1 claim form. The ET did not quote from the Claimant's particulars or make any specific mention of the written warning.

25. In its findings of fact (which run from paragraphs 16-92) the ET did set out findings concerning the events on 18 May. These findings were as follows.

> **"34. On 18 May the Claimant sent Mr Eglington, his line manager, a text to say that he was going to be late for work as he was feeling stressed and had not been sleeping well. When he arrived at work Mr Eglington approached him and asked whether he wanted to talk about it and the Claimant responded that he did not. Mr Eglington asked him if he would like to talk to someone else in the Unit and the Claimant declined that. The Claimant was obviously upset and his responses were short and abrupt but Jon Scanlan, a colleague who heard the conversation, did not think that he was rude. Mr Eglington, however, was trying to be supportive and was taken aback at the Claimant's responses. Following the conversation, Mr Scanlon went for a walk with the Claimant, during which he said that the Claimant was very upset.**
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> **35. Mr Eglington told Mr Rowland, his line manager, about his conversation with the Claimant. In the afternoon Mr Rowland approached the Claimant and asked to meet with him. The Claimant refused to meet with him on his own. Mr Rowland reiterated the request pointing out it was a reasonable management request and the Claimant again refused and said that he was only prepared to meet with Mr Rowland with a union representative present and if the questions that he wished to ask were e-mailed to him in advance. Mr Rowland pointed out that the meeting was part of normal business and it was not one which required the presence of a union representative. The Claimant again refused to meet with him.**
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> **36. On 20 May 2010 Mr Rowland commissioned Sue Young to investigate the following allegations against the Claimant – he had failed to comply with a reasonable management question from Simon Eglington to meet with him as his line manager, the way in which he had spoken to Mr Eglington was inappropriate and not consistent with Home Office values and he had failed to comply with a reasonable management request from Mr Rowland to meet with him."**

26. The ET later recorded (paragraph 49) that the investigation report found no case to answer in respect of the allegation that the Claimant had failed to comply with a request to meet with Simon Eglington, but that there was a case to answer in respect of the other two allegations. It made findings as to the disciplinary process and recorded the result of the process, in so far as it concerned the events in May 2010, as follows.

> **"Ms Gipson found that the first allegation of misconduct, namely that the Claimant had spoken inappropriately to Mr Eglington on 18 May 2010, was substantiated. Hwever, she accepted that stress had been a factor and, therefore, did not impose any penalty in respect of that allegation. The second allegation was that the Claimant had failed to comply with a reasonable management request when he refused to meet with Mr Rowland. She found that allegation of misconduct to be substantiated and although stress was a factor she did not believe that it excused his behaviour and she, therefore, issued a first written warning for six months in respect of that allegation."**

27. In its conclusions the ET rejected the claim for direct disability discrimination. It then turned to the complaint concerning discrimination arising from disability (section 15 of the Disability Discrimination Act 1995). It said that the Claimant's case could be summarised as follows: (1) the disciplinary hearing on 21 October had taken place in his absence and he had been unable to defend himself; (2) it had taken place at a time when he had been unable to access a particular computer system to retrieve material which might help his defence; (3) there had been no referral to occupational health and the Respondent had falsely alleged that he had refused consent to a referral; (4) the appeal hearing had taken place in his absence. It upheld these complaints as matters of discrimination arising out of disability: see paragraphs 95-103. It also found that by failing to extend the timescale for the process and in various other respect the Respondent was in breach of the duty to make reasonable adjustments in the Claimant's favour; and that the imposition of time limits to the process amounted in the Claimant's case to indirect discrimination. It found that the dismissal was unfair for those reasons – though not that the dismissal itself, as opposed to the process, was an act of discrimination.

28. The ET's judgment, in so far as relevant, was

> **"1. The Respondent discriminated against the Claimant contrary to sections 15, 19 and 20 of the Equality Act 2010 by proceeding with the disciplinary hearing on 21 October 2010 and the appeal hearing on 19 January 2011.**
>
> **2. All other complaints of disability discrimination are not well-founded. ....**
>
> **4. The complaint of unfair dismissal is well-founded"**

29. As the EJ later confirmed, the reference to dismissing "all other complaints of disability discrimination" included rejecting the argument that the dismissal in substance was an act of disability discrimination. The ET's findings of disability crimination related to the process.

The application for a review

30. The Claimant was dissatisfied with the ET's reasons. He wrote a letter dated 29 April 2012 which was primarily couched as an application for further written reasons but also, in the alternative, for a review. Among his complaints he mentioned the matter of the formal written warning, saying that it "was included in written and oral evidence and in closing submissions, but has been excluded from the judgment". He went on to say:

> **"As a litigant in person, if no further written reasons are to be provided, then please accept this as an application for a review of the findings of Cover Page Paragraph 2 ('All other complaints of disability discrimination are not well-founded'), and Judgement Paragraph 107 ('We did not find that there was any disability related harassment')."**

31. The ET had listed a case management discussion to identify the issues to be determined at the remedy hearing. This took place on 9 May 2012 before the Employment Judge ("EJ") alone. It is the Claimant's case that there was discussion of his request for written reasons at this hearing; and that the EJ showed she had misunderstood which written warning he was discussing in his letter dated 29 April, thinking that he was referring to an earlier warning in 2010 relating to sickness absence. He believes that the EJ effectively denied his request for written reasons or for a review at this hearing.

32. The EJ certainly did refuse the Claimant's application for a review. By letter dated 28 May she said –

> **"Employment Judge Grewal has considered your application for a review dated 29 April 2012 under Rule 35(3) of the Employment Tribunal Rules of Procedure 2004. The grounds on which a decision can be reviewed are set out at Rule 34(3). Your application is not made on any of those grounds, but is simply an application for the Tribunal to give further reasons. A party's entitlement to ask for written reasons only exists when the Tribunal has not given any written reasons (see Rule 30(5)). It does not permit a party to ask for further written reasons when the Tribunal has given written reasons for its decision.**
>
> **Your application for a review is refused because there are no grounds for the decision to be reviewed under Rule 34(3) and there is no reasonable prospect of the decision being varied or revoked."**

Submissions

33. Before me the Claimant represented himself. He prepared a bundle running to 209 pages and a supplemental bundle running to 50 pages. He produced a substantial skeleton argument. He submitted that the ET entirely overlooked the issue about the written warning. He said that the EJ had misunderstood the written warning to which the issue referred. He took me through the way in which the matter arose procedurally. He argued that the EJ had denied him a review at the case management discussion on 9 May 2012.

34. He submitted that the EJ erred in law in refusing to grant a review so as to deal with the issue. He submits that rule 34(3)(e) of the Employment Tribunal Rules of Procedure 2004, which was then the applicable rule, was broad enough to permit a review in order to address an issue which the ET had overlooked. The ET was obliged to give reasons for disposing of an issue: see **Meek v City of Birmingham DC** [1987] IRLR 250. Holding a review was an appropriate way of dealing with that matter. He was therefore entitled to apply for a review and, if the review failed to correct the matter, to appeal the decision on review: see **Williams v Ferrosan** [2004] UKEAT/1005/03.

35. On behalf of the Respondent Ms Louise Jones makes three submissions. Firstly she submits that the ET did not overlook the question of the six month warning, which was dealt with at the same disciplinary hearing as dismissal; references to "proceeding with the disciplinary hearing" encompassed the six month written warning, for both matters were dealt with at the same disciplinary hearing. To that extent the ET found in Claimant's favour. In any other respect it found against him, since it said that "all other complaints of disability discrimination are unfounded". Secondly, she submits that it was not open to the ET to grant a review, given the importance of finality in litigation: see for example **Newcastle City Council**

v Marsden [2010] ICR 743 at paragraph 16. Thirdly, she submits that a review would in any event have been academic and unnecessary, given the findings of the ET in Claimant's favour on the dismissal issue.

36. In the course of submissions we discussed the difference between (1) overlooking an issue altogether when giving a judgment and written reasons, (2) deciding the issue, but giving no reasons, or insufficient reasons, for that decision. This is not a distinction which is of importance if an appeal is brought in time against a judgment. It might, however, be of importance if an application for review is brought. The Claimant's primary case is that the ET overlooked the issue altogether. But I did not understand him as limiting his submissions in any way. He was submitting to me that, whatever the precise nature of the ET's error (as he believed it to be) a review was appropriate.

Discussion and conclusions

37. The Claimant's application for a review was decided when the applicable procedural rules were to be found in the Employment Tribunal Rules of Procedure 2004 (Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004**). Rule 34(1) provided for "certain judgments and decisions" to be reviewed. These included all judgments other than default judgments: see rule 34(1)(b). The grounds of review included that "the interests of justice require such a review": see rule 34(3)(e). Where an application for review is made it was to be considered in the first instance by the Employment Judge: see rule 35(3). It was to be refused if the EJ considered that there was "no reasonable prospect of the decision being varied or revoked."

38. I would add that the 2013 Employment Tribunal Rules of Procedure (Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**) are broadly to the same effect. The word "reconsideration" is used in place of "review". The Rules provide for reconsideration of any judgment where it is "necessary in the interests of justice" to do so. There is again provision for an EJ to consider in the first instance whether there is any reasonable prospect of the original decision being varied or revoked. See rules 70-72 of the 2013 Rules.

39. I do not accept the Claimant's submission that the EJ decided the application for review at the case management discussion on 9 May. The case management discussion was listed to give directions concerning the remedy hearing. It was not listed for the hearing of an application for review, and the EJ made no order relating to the review. There may have been discussion concerning the Claimant's dissatisfaction with the liability judgment but it is plain that the EJ later considered the application for review and determined it by letter dated 28 May. This letter and its reasons are central to the appeal.

40. Nor would it matter if, at the case management discussion, the EJ did not at first understand which warning the Claimant was concerned with. She had heard the case and deliberated with her members 3 months earlier. The faired judgment and written reasons had been sent out by the ET nearly 4 week before. The case management discussion was listed for directions concerning remedy. The EJ was not required to master all the detail of the liability proceedings for that hearing. She was entitled to – and did – deal with the application for review separately after consideration some time later.

41. In her reasons for refusing a review the EJ correctly identified rule 35(3) as the power which she was exercising. The key question for her was therefore whether there was any reasonable prospect of the decision being varied or revoked. It was not the purpose of rules 34-36 to provide a mechanism for an ET to improve (or change) its reasons in the absence of a reasonable prospect of the decision being varied or revoked.

42. There is, I think, a distinction to be drawn between (1) overlooking an issue altogether, and therefore not deciding it and (2) deciding an issue and giving reasons for it which are inadequate or incomplete. I think the distinction is the same under the old Rules and the new Rules. I will refer to "reconsideration" under the new Rules because this is the language with which we are now familiar.

43. An EJ who, upon receiving an application for reconsideration, appreciates that the ET has altogether overlooked deciding an issue can and usually should arrange for the ET to reconsider its judgment. The ET will have failed to decide an issue which was for before it for determination: it will be necessary in the interests of justice for the ET to determine that issue. This happens rarely, but it can occur in cases where there are many issues. The ET may hold a further hearing or (in a case where a hearing is not necessary in the interests of justice) may give the parties a reasonable opportunity to make further representations.

44. On the other hand, if the EJ considers that that the ET did decide the issue, and at most the reasons might be considered incomplete or inadequate, but there are no reasonable prospects of the judgment being varied or revoked, the EJ must not order reconsideration. Neither the 2004 nor the 2013 Rules permit the re-opening of a judgment in such circumstances.

45. This distinction between a review or reconsideration and the giving of further reasons is recognised in the EAT's standard form of order under what is known as the **Burns/Barke** procedure: for this procedure see **Barke v SEETEC Business Technology Centre Ltd** [2005] IRLR 633. Where an ET is alleged to have failed in its judgment to deal with an issue at all, or to have given no reasons or no adequate reasons for a decision, the EAT may invite ET to clarify, supplement or give its written reasons before proceeding to a final determination of the appeal. The EAT's standard form of order effectively invites the ET to consider review (now reconsideration) as an alternative to providing further reasons. In this way an ET which has not merely omitted to give reasons but has actually omitted to decide an issue may reconsider its judgment; an ET which has merely omitted to give reasons may give those reasons in response to the EAT's request.

46. In this case therefore the EJ was correct to refuse a review if she was entitled to conclude, as she did, that the application was in reality only an application for better reasons and there was no real prospect of the ET varying or revoking its decision. If, however, the ET had altogether omitted to decide an issue, the EJ would have been wrong to refuse a review.

47. I have reached the conclusion that the ET had given judgment on the issues between the parties; that the only possible criticism is that it could have expressed its reasons more fully as regards the written warning; and that the EJ did not commit any error of law in approaching the review as she did. I reach this conclusion for the following reasons.

48. Firstly, I agree with Ms Jones that the main issues for the ET to determine related to the dismissal and to the disciplinary process. The dismissal had nothing to do with the incident in May for which the written warning was given; but the disciplinary process plainly covered the

written warning. The ET's judgment concerning the disciplinary process included the process as it concerned the written warning. The ET plainly intended to cover this issue when it gave judgment in favour of the Claimant as regards discrimination in the disciplinary process, but gave judgment against him in respect of all other complaints of disability discrimination.

49. Secondly, the ET's reasons show that it had not forgotten that the written warning was in play. I can see no other reason why it would have made the detailed findings in paragraphs 34-36 and 74 which I have quoted. I have no doubt that it intended to deal with and dispose of the Claimant's case concerning the written warning.

50. Against that background I turn to the Claimant's point that the ET did not deal with the particulars which he had given, which I have already quoted. His complaint in that paragraph was that there should have been a reasonable adjustment by allowing him to meet another manager. Three points should be noted about this paragraph.

51. Firstly, it is important to recall that at the Pre-Hearing Review the EJ had already ruled that it had no jurisdiction in respect of acts which occurred prior to 31 August 2009. The ET was not therefore dealing directly with the incident in May. It was too late for the Claimant to complain that there should have been a reasonable adjustment in May. The ET was only concerned with the written warning given consequent upon that incident.

52. Secondly, on the ET's findings, the written warning was given because the Claimant refused to meet Mr Rowland without a union representative present and questions provided in advance by email. That this is what the ET found is clear from paragraphs 34-36 and 74 read together. I have also looked carefully at the detailed minutes of the disciplinary hearing: it is

again clear that the Respondent found that he refused to meet Mr Rowland without a union representative present and an email in advance outlining questions to be asked.

53. Thirdly, the ET's findings in respect of what occurred in May accord with the Respondent's evidence. Mr Rowland asked to meet with the Claimant and there was a refusal to do so. The background to this was set out in the minutes of the decision at the disciplinary hearing. The Respondent had not required the Claimant to meet Mr Rowland one to one while there was an outstanding grievance by the Claimant against him; but that had been resolved in April 2010 and it was entirely reasonable for Mr Rowland to expect to meet with the Claimant.

54. I have therefore concluded, having traced this matter carefully through the ET proceedings, that the ET intended to dismiss the Claimant's complaint of disability discrimination in all its aspects other than those concerned with the disciplinary process and appeal. It would have been better if it had dealt in its reasons more specifically with the paragraph of the Particulars on which the Claimant relies, drawing upon the factual findings it had made. In truth, however, there was little if anything left of the complaint in the Particulars, given that the ET was not directly concerned with the events in May, given the Respondent's reason for the final warning and given the ET's findings of fact. The EJ was correct not to accede to a review when the complaint in reality related only to the ET's reasons and there was in her view no reasonable prospect of the decision being varied or revoked – a conclusion which cannot possibly be described as perverse or an error of law.

55. I observe, finally, that the issue on this appeal arises because the Claimant failed to appeal the substantive judgment of the ET in time. His real complaint is of course about the substantive judgment – but his only remaining way of attacking it is through the application for

a review. If he had appealed the substantive judgment the EAT would have addressed the question of the written warning principally as a "reasons" question: it might have asked a **Burns/Barke** question to the ET to draw out its reasoning as regards the written warning. But it is important to keep the distinction between the judgment and a subsequent review or re-consideration, lest ETs regard themselves as under a duty to reconsider a judgment whenever there is a perceived insufficiency of reasoning. An appeal against a refusal to review or reconsider a judgment is not to be equated with an appeal against the judgment itself.