Appeal No. UKEAT/0186/17/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 & 20 October 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

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(1) X
(2) M — APPELLANTS

Y — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING (IN CAMERA)

APPEARANCES

For the Appellants	MS HEATHER WILLIAMS (One of Her Majesty's Counsel) and MS KATE ANNAND (of Counsel) Instructed by: Slater and Gordon (UK) LLP 50-52 Chancery Lane London WC2A 1HL
For the Respondent	MR CLIVE SHELDON (One of Her Majesty's Counsel)

SUMMARY

PRACTICE AND PROCEDURE - Postponement or stay

Postponement or stay

The two Claimants (both serving police officers) were pursuing separate claims before the Employment Tribunal, which had not been consolidated. Claimant X's first claim - of detriment due to making protected disclosures - was lodged in January 2015 and he had subsequently lodged three further claims, also of whistleblowing detriments. Claimant M was pursuing a claim of race discrimination. A reference to the IPCC had been made in relation to matters raised in Claimant X's first ET claim, which also overlapped with some part of his second claim. Due to the on-going IPCC investigation and the possibility that there might be disciplinary proceedings as a result of any IPCC report, the Respondent had stated she was unable to plead to the ET claims and had sought a stay of the ET proceedings. That application had initially been heard by the ET in September 2015 and by its Order of October 2015 it had stayed those proceedings. Since then, however, there had been significant delays in the IPCC investigation and the Claimants had sought a lifting of the ET stay, an application that was heard by the ET in July 2017 but refused. The Claimants appealed.

Held: *allowing the appeal and remitting the application to the ET to be heard afresh*

Although the ET was exercising its case management discretion in determining whether or not the stay should be lifted, there was a presumption that a complainant was entitled to have their case litigated and determined without delay unless the Respondent to the claim could establish a good reason to displace what would otherwise be the normal course of litigation (**AKJ and Ors v Commissioner of Police of the Metropolis and Ors** [2014] 1 WLR 285 CA at paragraph 51 applied). In the present case there was no indication that the ET had adopted this starting point; indeed, its reasoning suggested that it had seen the burden of proof as neutral between the parties or even as being on the Claimants. Although many of the Claimants' complaints

regarding the ET's assessment of the degree of overlap between the IPCC and the ET proceedings (which went to comparative prejudice) were not made good, the inability to be confident that the ET had started from the right place in its assessment meant its conclusion (which it acknowledged was "*finely balanced*") was rendered unsafe. That concern as to the ET's approach to its task was further underpinned by its apparent failure to consider the two cases (that of Claimant X on the one hand and that of Claimant M on the other) separately (although that may not have been the focus of the Claimants' submissions below, the two cases had not been consolidated and the ET needed to consider its Order in respect of each) and also by its suggestion that there was no medical evidence to support the assertion of prejudice suffered by Claimant X when his witness statement had referred to medical advice to refrain from working etc, which had not previously been disputed by his employer.

This was not a perversity challenge and both sides acknowledged that it could not be said that only one outcome was possible. In the circumstances the appropriate course (there being no agreed position that the EAT should itself determine the issue) was to remit the question whether the stay should be continued to the ET to be determined afresh (**Jafri v Lincoln College** [2014] EWCA Civ 449 applied).

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal concerns a stay on Employment Tribunal ("ET") proceedings, said to have been based upon an error of approach, or understanding of the underlying issues or, alternatively, to have been made without regard to all relevant factors. The appeal is resisted on the basis that no error of law is disclosed: this was a case management decision and there is no proper basis to interfere with the exercise of discretion by the first instance tribunal.

2. In giving this Judgment, I refer to the parties as the Claimants and Respondent, as below. This is the Full Hearing of the Claimants' appeal from the Judgment of the London Central ET (Employment Judge Lewzey sitting alone on 7 July 2017), by which the stay of these claims, initially imposed on 1 October 2015, was continued until 28 February 2018. Considering this appeal on the papers, HHJ Shanks had directed that it should proceed to a Full Hearing on an expedited basis. Consistent with the earlier direction of the ET, Judge Shanks further ordered that the identities of the parties were to remain anonymised and that the hearing should take place in private. To the extent necessary and with the consent of the parties, I continue that Order.

The Relevant Background

3. The Claimants, both serving police officers with the Respondent police force, are each pursuing claims before the ET. Although they have been dealt with together for the purposes of the ET decision with which this appeal is concerned, the claims have not been consolidated.

4. Claimant X, a Detective Chief Inspector, lodged his first ET claim on 9 January 2015. He complained of suffering detriments by reason of having made protected disclosures under section 47B **Employment Rights Act 1996** ("ERA"). Prior to this, in September 2014, Claimant X had submitted an internal complaint regarding these matters, which the Respondent determined should be referred to the Independent Police Complaints Commission ("the IPCC"). It was initially submitted as a mandatory referral but, when the IPCC refused to accept it, was resubmitted as a voluntary referral.

5. The Respondent's response to Claimant X's first ET claim does not advance a substantive defence but requests a stay of the proceedings until the outcome of any possible misconduct proceedings, which could potentially follow from the IPCC's investigation and report (see the grounds of resistance attached to the ET3). That is effectively the Respondent's position in response to each of the subsequent ET claims.

6. In August 2015, Claimant X submitted a second ET claim, alleging he had suffered further detriments as a result of making protected disclosures. It is common ground that there is at least some degree of overlap between the issues under consideration by the IPCC and those raised by Claimant X's first and second ET claims.

7. Claimant M, a Detective Inspector, lodged his ET claim in February 2015. He complains of unlawful race discrimination. In her response to Claimant M's claim, the Respondent adopted the same approach as for Claimant X's ET proceedings and also sought a stay of Claimant M's ET claim on similar terms.

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8. Directions in the ET proceedings were given on 29 June 2015. A Preliminary Hearing was listed for September 2015 to determine the Respondent's stay applications. In the meantime, the Respondent was ordered to inform the IPCC of "*the hope of the Tribunal and the parties that the interviews of the relevant officers will be carried out prior to the hearing listed for 25 September 2015*" (see paragraph 3 of the record of the Preliminary Hearing before the ET on 22 June 2015, sent to the parties on 29 June 2015).

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9. In the event, no officers had been interviewed by that date. Instead, by letter of 24 September 2015, the IPCC Commissioner overseeing the investigation indicated that it would be complete and a written report provided to the Respondent by September 2016 at the earliest. The letter concluded, "*… the IPCC does not envisage any prejudice to our investigation arising should you decide to proceed with your processes*".

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10. Following the Preliminary Hearing on 25 September 2015 (by an Order sent out to the parties on 1 October), the ET ruled that the Claimants' claims should be stayed pending the outcome of the IPCC investigation, providing that the stay would be reviewed after the IPCC had finished collating evidence or a period of six months, whichever was the sooner. The ET at that stage concluded that, although there was a prejudice:

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> **"18. … in the extensive delay that will result from a stay … there is overlap in the issues before the Tribunal and the IPCC and, potential overlap if misconduct proceedings arise as a result of that investigation. … the Respondent is severely prejudiced in relation to any subsequent misconduct proceedings if the Employment Tribunal proceedings take place first. …" (See paragraph 18 of the ET Order of 1 October 2015)**

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11. In June 2016 and then in November 2016, Claimant X lodged two further ET claims in which he complained of further detriments by reason of having made protected disclosures, and asked for those claims to be joined to his earlier ET complaints.

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12. Meanwhile, on 27 April 2016, the IPCC's Lead Investigator wrote to the Claimants' solicitor indicating he anticipated that the officers served with notices of the investigation by the IPCC would now be interviewed in July/August 2016. On 9 December 2016, the IPCC informed the Respondent that it hoped the entire investigation would be complete and the report written and provided to the Respondent by September 2017, albeit, on 5 June 2017, the IPCC's Lead Investigator wrote to Claimant X indicating that, "*Due to urgent operational needs there has been a delay to this investigation. It is likely to push back our suggested investigation deadlines by at least 3 months*". Some three weeks later, however, on 27 June 2017, the IPCC's Lead Investigator indicated to the Claimants' solicitor that it was now hoped the officers served with notices of investigation would be interviewed in September 2017 and the entire investigation completed and the report written by February 2018, noting that the timescales were approximations that might be subject to further change. It was again observed, "*please note that the IPCC retains the stance that we see no reason the tribunal proceedings cannot go forward alongside our investigation*".

13. At the ET hearing in July 2017, it was confirmed that nine individuals had been served with notices indicating that they were under investigation for potential gross misconduct by the IPCC. That said, four of the nine had already retired - meaning that they could no longer be subject to disciplinary proceedings - and another two were shortly due to retire.

14. It is also relevant to record the evidence of Claimant X before the ET. In his statement, he explained how he had been signed off work due to stress from 2 August 2016 to 29 January 2017 and had been diagnosed with severe depression and he had also undergone a period of counselling. He continued:

> **"34. Over the course of the last few years, my life has imploded. At points I have felt extremely low. This was at its most severe in April 2016. I still feel there [is] no end in sight. I cannot move on or bounce back as these matters look set to stretch out in the years ahead.**

> **Not only has my career been affected but the stress of all this has severely impacted on home life. After 21 years together, my wife and I have separated. I am no longer living at home with her and our two children." (Page 23 of the supplementary bundle)**

15. To complete the picture, for the purposes of this hearing, I have been provided with further correspondence from the IPCC in August, September and October 2017. The final email, of 6 October 2017, states that the remaining actions would be completed by the end of the month and the report would be concluded thereafter. The Respondent has also informed me that another of the officers served with notices by the IPCC has since retired, albeit that was not an officer in respect of whom there was any particular overlap as between the matters raised in the ET proceedings and the matters raised in the IPCC investigation.

The ET's Decision and Approach

16. The ET set out the approach it considered it was to adopt at paragraph 10 of its Reasons as follows:

> **"10. In determining whether or not to stay the proceedings, I must have regard to overall fairness to both parties, the likely length of any delay, whether the issues before the Tribunal and the IPCC are the same and, if so, whether it would be unjust to hear the Employment Tribunal claims first, and the impact of other proceedings. It is necessary for me to weigh the interests of both parties in considering where the balance of prejudice lies."**

17. Then, after referring to the case of **BUPA Care Homes (CFC Homes) Ltd v Muscolino** [2006] ICR 1329 EAT, the ET stated:

> **"11. … It is clear that the potential impact is not conclusive that the stay should be lifted."**

18. Although referring to the argument that the starting point must be that the Claimants were entitled to have their claim litigated without delay (paragraph 13), the ET did not explain whether or not it accepted that premise. It instead went on to set out the factors for and against the continuation of the stay in terms of what might be said was the respective balance of prejudice (see paragraphs 16 and 17).

19. By analogy with the approach adopted in the case of **North Yorkshire Police v Ashurst** UKEAT/1280/95, the ET (at paragraph 18) reminded itself that there was a public interest in the fair resolution of the issues in the ET proceedings, the IPCC investigation and in any possible misconduct proceedings arising out of that investigation; fairness needed to be ensured for all parties.

20. The ET then set out its conclusion at paragraph 19:

> **"19. The only change since the Stay Order was made is the increase in the delay. This is a case where the situation is finely balanced. There is prejudice in the extensive delay that will result from a continuation of the stay. However, there is overlap in the issues before the Tribunal and the IPCC and, potential overlap if misconduct proceedings arise as a result of that investigation. The Respondent is severely prejudiced in relation to any subsequent misconduct proceedings if the Employment Tribunal proceedings take place first. In my judgment, the balance of prejudice weighs in favour of the continuation of the stay for a limited further period."**

21. On that basis, the stay was continued until 28 February 2018.

The Relevant Legal Principles

22. It is common ground that the ET has the power to grant (or lift) a stay of proceedings pursuant to its general case management powers under Rule 29, Schedule 1, of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"). In exercising that power, the ET is obliged to seek to give effect to the overriding objective at Rule 2 **ET Rules**. That said, an ET's exercise of its case management powers is a matter of judicial discretion; it can only be challenged where there is an error of legal principle in the approach taken, on the basis that the ET failed to have regard to all relevant considerations or took into account irrelevant considerations, or reached a conclusion properly to be described as perverse (see Mummery LJ at paragraph 44, **O'Cathail v Transport for London** [2013] ICR 614 CA).

23. As for the approach to be adopted when determining whether proceedings before the ET should be stayed, the starting point must be that a complainant is entitled to have their case litigated without delay unless the Respondent to the claim establishes a good reason to displace what might otherwise be seen as the normal course of litigation. As was observed in the case of **AKJ and Ors & AJA and Ors v Commissioner of Police of the Metropolis and Ors** [2014] 1 WLR 285 CA:

> **"51. … The claimants are entitled to have their common law claims decided by the court. It is for the defendants to show why the vindication of that right should be delayed. The onus is on them to persuade the court that there is a real risk that they would suffer prejudice if the court proceedings took precedence over the tribunal proceedings. The "default" position is that a party has a right to have its civil claim decided without delay unless the party seeking the stay can show otherwise."**

And see, to like effect, paragraphs 28 and 29, **BUPA Care Homes (CFC Homes) Ltd v Muscolino** [2006] ICR 1329 EAT per Elias J (as he then was), and **Gloucestershire Constabulary v Peters & Peters** UKEAT/0322/10, HHJ Ansell citing the principle identified by Neill LJ, in **ex parte Fayed** [1992] BCC 524, at page 531E.

The Appeal

24. The Claimants' appeal has been pursued on three main grounds:

(1) The ET erred in failing to apply the correct starting point, namely that the Claimants are entitled to have their cases litigated without delay unless the Respondent seeking the stay can show otherwise.

(2) The ET's conclusion - that the Respondent would be severely prejudiced in relation to any subsequent misconduct proceedings if the ET proceedings take place first - was based upon a failure to assess or appreciate the limited extent to which the asserted prejudice could arise, a failure to understand the nature of the alleged prejudice and a misplaced equation of the circumstances of the present case to those

which arose in **North Yorkshire Police v Ashurst** and **North Yorkshire Police v Rose** UKEAT/1085/95.

(3) The ET further erred in failing to take into account the ongoing prejudice to Claimant X in terms of the additional detriments he has been exposed to since the imposition of the stay and the ongoing impact upon his health, family and work life.

25. The Respondent resisted the appeal, relying on the reasons given by the ET.

Submissions

The Claimants' Case

26. The Claimants observed that the IPCC investigation has been protracted, with time estimates for its progression and conclusion repeatedly extended; neither Claimant has any confidence in the IPCC process and they have both opposed the grant of a continuation of the stay of their ET claims, disputing the degree of overlap and prejudice to the Respondent if the ET proceedings were permitted to proceed. Even if the IPCC report was finalised by the end of February 2018 - and the Claimants have no confidence that will be done - the decision whether or not to take disciplinary proceedings against any serving officer may take time and, if the decision is not to do so, the IPCC may then direct that such proceedings are taken and that direction may be the subject of challenge, allowing for further substantial delay, if the Respondent's case for a stay is accepted.

27. All that said, the Claimants acknowledged that as the decision to continue the stay was made in exercise of the ET's discretion, it could only be challenged on the limited bases identified in **O'Cathail v TfL**. There was, however, nothing in the ET's Reasons to indicate it had approached the task from the standpoint that the Claimants' right to litigate their claims

should prevail unless the Respondent was able to establish a good reason why the ET should depart from that normal process. Rather, the reasoning at paragraphs 10, 11 and 16 to 17 indicated only that the ET weighed the various factors identified by the parties. Indeed, if anything, the reference at paragraph 11 suggests that the ET saw the onus as being on the Claimants to establish a reason for lifting the stay. The starting point was significant because this was a case in which the ET acknowledged the respective factors were finely balanced.

28. Turning to the second basis of challenge and the factors considered by the ET, at paragraph 16.1, the ET gave weight to the concern that the Respondent was unable to plead to the Claimants' allegations. That was founded upon the Respondent's submission that she had to remain neutral in order to avoid abuse of process arguments being raised by officers who might subsequently face misconduct proceedings. There were, however, only three officers who could still be disciplined by the Respondent after the IPCC reported. They were the only officers still serving within this police force who are still under investigation. Moreover, the Claimants did not accept that the issues raised by their ET claims gave rise to the prejudice alleged. As regards Claimant X's claims under section 47B **ERA 1996**, the ET would not be required to determine whether the content of these alleged protected disclosures was accurate or not; the question was whether the disclosure was, in the reasonable belief of Claimant X, made in the public interest, intended to show one or more of the matters listed in section 43B. Equally, the Respondent did not have to plead as to whether the allegations were true or not; she simply had to admit or deny whether the communications relied on by her did or did not meet the statutory criteria for qualifying as protected disclosures.

29. As for the detriments, of which the Claimants complain (X in his protected disclosure complaint, M in the race discrimination case), the Respondent could plead to Officer M's race

discrimination claim without giving rise to any risk in so doing that a future misconduct process could be derailed by an abuse of process contention; there was no relevant officer who could be facing such a process and the assertion of prejudice was simply misplaced in his case. As regards Officer X's claims, the Respondent could plead to the issues raised by the third and fourth claims in their entirety, without any risk of the asserted prejudice arising. The Respondent could also plead to the vast majority of the issues raised in the second claim, save for a relatively limited part of one of the four detriments relied upon. It was, however, accepted that, in theory at least, the asserted prejudice could arise in relation to the detriment alleged in the first claim. The ET had failed to assess the extent of the prejudice alleged, simply proceeding on the basis that the Respondent was more generally unable to advance a positive or negative case in relation to the Claimants' allegations. Much of the ET's concern in this regard appeared to have been based on its earlier October 2015 ruling given, significantly, before the IPCC terms of reference were available, hence the similarity of text between paragraphs 16 and 19 of the current decision and the earlier ruling in the October 2015 decision.

30. Moreover, the ET erred in failing to appreciate the relevant distinctions between the present proceedings and the cases of **North Yorkshire Police v Rose** and of **North Yorkshire Police v Ashurst**. In identifying parallels between the present case and **Rose** and **Ashurst**, it was apparent that the ET approached this matter at a level of high generality. Whilst it might always be claimed that there was a public interest in a fair resolution of both ET proceedings and whatever other legal or disciplinary process is relied on in support of a stay, that said little about whether a stay should be granted and also for how long in a particular case. Here the IPCC - the body charged by Parliament with investigating conduct allegations in respect of police officers, and in maintaining public confidence in that regard - had stated it did not consider its investigation being prejudiced by the ET claims proceeding. The ET's conclusion

in this case, in terms of the balance of public interest, was also contradicted by its own recognition that the stay should not last beyond 28 February 2018, albeit the Respondent had been saying that prejudice continued to the end of any potential misconduct proceedings.

31. Finally, the ET's reasoning failed to demonstrate that it had regard to the prejudice suffered by Claimant X. At paragraph 17.4, the ET referred to an absence of medical evidence, but Claimant X's witness statement attested to the prejudice he suffered in terms of the impact of these proceedings on his health and family; his sickness absences had been supported by medical certificates and the counselling he had referred to had been provided by the Respondent itself. There had been no earlier dispute by the Respondent in this regard (albeit Claimant X's witness statement had been served only shortly before the hearing).

The Respondent's Case

32. By way of preliminary observation, the Respondent noted the appeal was not pursued on a perversity basis; it concerned an exercise of judicial discretion, which could only be subject to interference by the EAT if a wrong approach was taken of a matter of law, or if the ET took into account that which was irrelevant or failed to take into account that which was relevant.

33. Turning to the individual grounds, the Respondent contended there is nothing in the first ground of appeal. The ET plainly proceeded on the basis that, if the Respondent had not satisfied it that "*the balance of prejudice weighs in favour of the continuation of the stay for a limited further period*", it would not have continued the stay (see paragraph 19). Accepting that it was unclear what the ET was saying at paragraph 11, the Respondent did not agree the ET was there suggesting the burden was on the Claimants; that was apparent from paragraph 19.

34. As for the second ground, on the question of prejudice, the ET had carried out the appropriate balancing exercise as explained in paragraphs 16 and 17 of its Judgment. The IPCC had a statutory role to ensure misconduct is looked into and no criminal or disciplinary proceedings could be brought in relation to any matter subject to an IPCC investigation without special certification, unless a report on that investigation had been submitted (see paragraph 20, Schedule 3, **Police Reform Act 2002**). The approach the Respondent had adopted - consistent with that of other police authorities in similar circumstances - was that she could not take a view as to the position to be adopted in the ET proceedings until after the IPCC had reported; any admissions or denials she made in the ET could be challenged as showing pre-judgment in any subsequent decision as to whether or not disciplinary proceedings should follow. The fact that the prejudice involved an element of speculation was only because it was not known what the IPCC would report, but that did not lessen the need for the Respondent to maintain neutrality until that point and it was apparent that there were also difficulties for potential witnesses in the proceedings. As for the suggestion that the ET should have carried out separate scrutiny of the Claimants' cases, that was not the way the matter was argued below: although not formally consolidated, the Claimants' arguments had always been put on a collective basis and there was a clear overlap in the background evidence relevant to both. Similarly, there was no suggestion that Claimant X's third and fourth claims should be separated off; something that could not, in any event, be done in any sensible or proportionate way.

35. The ET had previously had regard to the relevant statutory regime involving the IPCC when making its original decision to stay the proceedings given its October 2015 Judgment. In considering whether it was appropriate to continue the stay, the ET had accepted there was a substantial overlap between the ET claims and the matters under investigation by the IPCC and

it had been referred to the IPCC's terms of reference (see paragraphs 14, 16.4 and 19), albeit that the existence of an overlap had not then been seriously contested on the Claimant's own case. That arose in respect of the entire first claim brought by Claimant X and in relation to at least a part of the second claim.

36. As for the question of prejudice suffered by Claimant X, all the ET had been referring to (at paragraph 17.4) was the entirely fair observation the Respondent had made that no medical evidence had been provided to corroborate what Claimant X had said. As to the ET's reference to the **Ashurst** case, it was not confusing the facts of that case with the present proceedings, but was simply acknowledging the public interest that existed in both the IPCC and ET processes.

Discussion and Conclusions

37. The ET was here concerned with an application to lift a stay in the proceedings before it that had been in place since 1 October 2015 (wrongly recorded as "October 2016" in the first paragraph of the Judgment now under appeal). It was required to adopt as its starting point the presumption that the Claimants had a right to have their cases determined without delay unless there was a good reason to displace what might otherwise be seen as the normal course of litigation (see **AJA and Ors v Commissioner of Police of the Metropolis and Ors** above). Notwithstanding that general principle, in these cases there had been (on any view) a significant delay with nothing substantively having occurred from the first ET claim in January 2015. That might not be wrong - there might have been good reason to displace what would otherwise be the presumption as to how the litigation should proceed - but the question raised by this appeal was whether what would otherwise be a matter of case management discretion for the ET was rendered unsafe because it erred in law or in its approach.

38. A focus of the Claimants' complaints on appeal has been on the ET's assessment of comparative prejudice, specifically in relation to its view as to the degree of overlap between the IPCC investigation, the ET proceedings and any potential disciplinary proceedings. That fed into the ET's conclusion on prejudice suffered by the Respondent.

39. I am not convinced that this was a point put in the same way or with the same degree of force before the ET. Moreover, it is apparent that a number of the complaints made by the Claimants on the appeal do not withstand scrutiny when assessed against the ET's reasoning. Thus, it is apparent that the ET did have regard to the fact that only three of the seven officers served with notice of misconduct by the IPCC were still serving with the Respondent (see paragraph 8); a relevant factor that then expressly features in the matters identified by the ET as favouring the lifting of the stay (see paragraph 17.3). Although not expressly stated by the ET, reading its Judgment as a whole (as I am obliged to do), I would also not accept that it failed to have regard to the fact that disciplinary proceedings could not be pursued against officers no longer serving with the Respondent. Equally, although the ET wrongly said "*The only change since the Stay Order was made is the increase in the delay*" (paragraph 19) - that was wrong because it was significant that the IPCC had since provided its terms of reference which enabled the ET to properly assess the true degree of overlap as it was not able to before - I am unable to agree that the ET then failed to have regard to the relevant material that was before it at this second hearing; indeed, it was expressly referred to the IPCC terms of reference by the Respondent (see paragraph 14) and that is what I have concluded it had in mind when it made its assessment of overlap at paragraph 16.4.

40. I am also not persuaded that the ET wrongly considered that these proceedings were on all fours with those in **Ashurst** or **Rose**. Its reference to the **Ashurst** case at paragraph 18 was

clearly in terms of how the public interest was to be seen in each set of proceedings (relevantly, those before the IPCC, those before the ET and the disciplinary proceedings); I cannot see that the ET did anything more.

41. Where, however, I am persuaded the Claimants are right in their concerns is at a much more fundamental level; that is, as to the ET's starting point. Going back to the beginning of this discussion, the ET was obliged to start from the premise that the Claimants had a right to have their claims before it litigated and determined without delay. The Respondent says I can take it from paragraph 19 that is really the approach the ET adopted: finding the Respondent had discharged the burden upon it satisfied the ET that it would be severely prejudiced if the stay were lifted. I do not, however, think I can read paragraph 19 as going that far. The ET's finding is there expressed in neutral terms, without any reference to any burden of proof. The reasoning suggests that the ET saw the burden as neutral between the parties. There are, moreover, other aspects of the ET's reasoning which seem to suggest that, if anything, it saw the burden as being on the Claimants to show why the stay should be lifted; see its observation at paragraph 11, which is hard to read in any other way.

42. The Respondent says it is apparent that the ET, in any event, asked the correct questions. Neither side has suggested, however, that this was a decision that could only have gone one way. As the ET acknowledged, "*the situation is finely balanced*" (paragraph 19). In context, while the starting point objection might seem like a matter of nuance, that is not unimportant. In those circumstances, I am unable to be satisfied that the conclusion reached can be seen as safe, given that I cannot be sure that the ET started in the right place.

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43. There are further points of concern which may also arise from this most basic error in approach. First, in the ET's apparent failure to consider the cases of both Claimants separately. I appreciate that this may not have been how the Claimants' arguments were presented below, but their claims had not been consolidated and the ET needed to make its decision as to whether or not the stay should be continued on each case before it. Secondly, the ET apparently gave less significance to the prejudice suffered by Claimant X because there was "*no medical evidence*", but that was not so: the medical evidence was referred to in Claimant X's statement. He had attested to being signed off due to stress at work and to receiving counselling and there had been no suggestion within his workplace that that was not the case; indeed, it seems that the Respondent had provided the counselling services itself. I do not say that the evidence of prejudice to Claimant X meant the ET was bound to find that the stay should be lifted or even that it should have concluded that proceedings in Claimant M's case should have been permitted to proceed, even if the stay otherwise continued. These are, however, illustrations of an approach adopted by the ET that suggests that it was not starting its assessment from the right place and may thus have placed an unwarranted burden on the Claimants.

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44. Thus absent certainty as to the ET's starting point, I cannot be satisfied that the conclusion reached was safe and that, I conclude, must mean that this matter returns to the ET for fresh consideration. I appreciate that introduces further unfortunate delay but, given that there is no one answer (as both parties have recognised) and no agreement that I should undertake the assessment myself, this must be the appropriate course.

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45. I would hope that the matter can be expedited before the ET and I can see no reason why it could not be considered by any Employment Judge in the discretion of the Regional Employment Judge (not least as Employment Judge Lewzey has since retired).

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