Appeal No. UKEAT/0143/17/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 October 2017

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

(SITTING ALONE)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	APPELLANT
MR D MABASO	RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR GEORGE ROWELL (of Counsel) Instructed by: Government Legal Department Employment Group One Kemble Street London WC2B 4TS
For the Respondent	MR DAVID MABASO (The Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

The ET's two-paragraph Judgment was clearly inadequate and failed to comply with the requirements of **Meek** and Rule 62(5). Appeal allowed, remitted to a freshly constituted ET.

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THE HONOURABLE MR JUSTICE CHOUDHURY

1. The Judgment appealed against in this matter comprises just two paragraphs. By those two paragraphs the Tribunal struck-out some of the Claimant's claims but refused to strike-out others. The appeal is brought by the Respondent below on the grounds that the Tribunal's Reasons are not compliant with the requirements of **Meek v City of Birmingham District Council** [1987] IRLR 250 CA or the **Rules of Procedure**, and failed to explain why all of the Claimant's claims were not struck-out.

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Factual Background

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2. The following factual summary is taken from the documents provided to me and from the pleadings, as the Tribunal's Reasons do not set out any factual summary. The Claimant was employed by the Respondent as an Administrative Officer from September 2004 until his dismissal for gross misconduct on 6 May 2016. In this capacity, the Claimant had access to tax credit records of those seeking and receiving that credit. Such access is governed by rules set out in guidance provided to employees. In essence, access was only permitted where there was a legitimate business reason. It was made clear to employees that unauthorised access to the Respondent's systems would be a disciplinary matter and would be treated as gross misconduct.

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3. On 19 February 2015, the Respondent discovered that the Claimant had made a number of attempts to access his own tax credit records and those of a personal acquaintance. The matter was investigated, and, at a fact-finding meeting on 8 April 2015, the Claimant gave his account. At this meeting it is alleged that the Claimant said that he did not recall the attempted access to his own records. As for the attempt to access the records of an acquaintance, it was explained by the Claimant that this was somebody he believed might be defrauding the system,

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that he had made anonymous reports to the Respondent previously about suspected fraudulent activity, and that this was another such instance.

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4. Following further investigation, the Claimant was called to a disciplinary hearing on 11 February 2016 to answer three allegations, namely that he committed an act of gross misconduct in that: (a) on three occasions in February 2015 he deliberately made or attempted to make unauthorised access to his own tax credit records when he had no proper, specific and

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legitimate business reason to do so; (b) on two occasions in September 2013 and July 2014 he deliberately made or attempted to make unauthorised access to the tax credit records of a third person when he had no proper or specific legitimate business reason for doing so; and (c) he

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attempted to mislead the fact-finder by failing to provide full information concerning his tax credit applications.

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5. The Claimant denied any wrongdoing. He said that the dismissal was pre-meditated; that other staff had committed more serious offences and were not dismissed; that the investigation was inadequate; the Respondent failed to consider the impact of his disability on his day-to-day life; and the Respondent had failed to make reasonable adjustments. He also

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alleged that there was less favourable treatment on the grounds of race.

6. By a letter dated 5 May 2016, the Claimant was informed that the first two allegations

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concerning unauthorised access were found proven. The third allegation was not proceeded with. The Claimant was dismissed with immediate effect.

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7. The Claimant's ET1 was presented on 1 August 2016. He made numerous complaints. He claimed that he was unfairly and wrongfully dismissed; that he was subjected to direct and

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indirect race discrimination and harassment; that he was victimised (there had previously been a complaint to the Tribunal); that he was subjected to direct disability discrimination and harassment; that he was subjected to disability discrimination arising from disability; and there had been a failure to make reasonable adjustments. The Respondent has admitted that the Claimant has a disability, namely dyslexia and anxiety/depression.

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8. All of the claims in the ET1 were denied. The Respondent applied for the claims to be struck-out on the basis that they had no reasonable prospect of success or that they be made the subject of a Deposit Order because they had little reasonable prospect of success.

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9. The Respondent's application was heard by Employment Judge Mulvaney (the "EJ") on 24 February 2017. The Respondent was represented by Mr Rowell, who also appears before me today. The Claimant appeared in person as he does today.

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10. The Tribunal announced in its Judgment at the end of the hearing that the claims of indirect race discrimination, indirect disability discrimination, race-related harassment and disability-related harassment were struck-out. A Deposit Order was made in respect of the claim for unfavourable treatment arising from disability under section 15 of the **Equality Act 2010**. However, no Order was made in respect of the remaining claims. That is to say, the claims for unfair dismissal, wrongful dismissal, direct race discrimination, failure to make reasonable adjustments and victimisation were not struck-out and were not made the subject of a Deposit Order.

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11. Brief Reasons were provided for the making of a Deposit Order and these were sent to the parties with the Order on 7 March 2017. However, those Reasons did not deal with the

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strike-out application and nor did they explain why a Deposit Order was not made in respect of the other complaints. Written Reasons for the Tribunal's Judgment in those respects were requested and these were sent to the parties on 6 April 2017. Those Reasons ("the Reasons") were, as I have said, very brief. They comprised just two paragraphs, which provided as follows:

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> **"(1) In a series of cases the appeal courts have highlighted the importance of Employment Tribunals taking a cautious approach to the strike out or ordering of a deposit on discrimination claims. The Judge concluded that the respondent had not met the high test to be applied in respect of the claimant's claims under s13, s20 and s27 Equality Act 2010 and that there were facts in dispute on which evidence needed to be heard.**
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> **(2) The claimant claimed that his dismissal was for a discriminatory reason, that is because of his race and/or because he had done a protected act. Determination of the discrimination claims will therefore impact on the outcome of the unfair dismissal complaint. For that reason it was not appropriate to strike out or make a deposit order on that or on the wrongful dismissal claim, without first hearing evidence on the discrimination complaints."**

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12. It is those Reasons that form the subject of the appeal today. There is no cross-appeal in respect of the matters that were struck-out.

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<u>The Law</u>

13. Rule 62 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** provides:

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> **"62. Reasons**
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> **(1) The Tribunal shall give reasons for its decision on any disputed issue, whether substantive or procedural (including any decision on an application for reconsideration or for orders for costs, preparation time or wasted costs).**
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> **(2) In the case of a decision given in writing the reasons shall also be given in writing. In the case of a decision announced at a hearing the reasons may be given orally at the hearing or reserved to be given in writing later (which may, but need not, be as part of the written record of the decision). Written reasons shall be signed by the Employment Judge.**
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> **(3) Where reasons have been given orally, the Employment Judge shall announce that written reasons will not be provided unless they are asked for by any party at the hearing itself or by a written request presented by any party within 14 days of the sending of the written record of the decision. The written record of the decision shall repeat that information. If no such request is received, the Tribunal shall provide written reasons only if requested to do so by the Employment Appeal Tribunal or a court.**
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> **(4) The reasons given for any decision shall be proportionate to the significance of the issue and for decisions other than judgments may be very short.**
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> **(5) In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the**

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> **relevant law, and state how that law has been applied to those findings in order to decide the issues. Where the judgment includes a financial award the reasons shall identify, by means of a table or otherwise, how the amount to be paid has been calculated".**

14. A "Judgment" for these purposes is defined in Rule 1(3):

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> **"(3) An order or other decision of the Tribunal is either -**
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> **(a) a "case management order", being an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment; or**
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> **(b) a "judgment", being a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines -**

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> **(i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs); …**
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> **(ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue)."**

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15. It is clear from these provisions that a decision on a strike-out application will be a Judgment for these purposes. That is because such a decision is capable of finally disposing of any claim or part of the claim. Thus, the specific requirements under Rule 62(5) in respect of

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Judgments do need to be complied with, that is to say the Reasons shall identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law and state how that law has been applied to those findings in order to decide the issues.

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16. It is well-established that the Tribunal is required to provide adequate Reasons for a decision. The most well-known in a long line of authorities making that point is **Meek**. In that

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case Bingham LJ stated as follows:

> **"8. It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises …"**

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17. Mr Rowell's skeleton argument also refers to the decision of **Anya v University of Oxford** [2001] IRLR 377 which refers at paragraph 12 of that judgment to the need for Tribunals to give adequate and intelligible Reasons for their decisions in order to comply with fair trial rights under Article 6 of the **European Convention of Human Rights** ("the ECHR").

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18. More recently in **Vairea v Reed Business Information Ltd** UKEAT/0177/15/BA, 3 June 2016, HHJ Hand QC held as follows:

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> **"88. This Tribunal concluded in *Greenwood v NWF Retail Ltd* [2011] UKEAT/0409/09/JOJ, [2011] ICR 896 that a failure to comply with the requirements of Rule 30(6) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI No. 2004/1861) would amount to an error of law (see paragraphs 51 to 58 of that judgment). Whether there had been such a failure should not be determined solely by whether the Reasons specifically referred to the Rule or not and merely paying "lip service" to it would not comply with its substance (see paragraphs 56 of the Judgment in *Greenwood*). In order to comply with the Rule it was necessary for the requirements of the component parts of the Rule to be discoverable in the Reasons. The approach of the Court of Appeal in *Meek v City of Birmingham District Council* [1987] IRLR 250 should continue to be the prism through which compliance with the Rule was to be viewed (see paragraphs 59 to 63 of the judgment in *Greenwood*).**

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> **89. *Greenwood* traced the history of the Rule relating to the content of the Reasons for decisions by Employment Tribunals. In doing so it demonstrated how the rubric of the Rule had moved from the very general to the very specific, culminating in Rule 30(6) of the 2004 Rules (see paragraphs 31, 35, 39, 42 and 43 of the judgment in *Greenwood*). Rule 30(6) provided that:**

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>> **"(6) Written reasons for a judgment shall include the following information -**
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>>> **(a) the issues which the tribunal … has identified as being relevant to the claim;**
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>>> **(b) if some identified issues were not determined, what those issues were and why they were not determined;**

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>>> **(c) findings of fact relevant to the issues which have been determined;**
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>>> **(d) a concise statement of the applicable law;**
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>>> **(e) how the relevant findings of fact and applicable law have been applied in order to determine the issues; and**

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>>> **(f) where the judgment includes an award of compensation or a determination that one party make a payment to the other, a table showing how the amount or sum has been calculated or a description of the manner in which it has been calculated."**

> **90. Now there is new wording in a new statutory instrument; Rule 62(5) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI No. 2013/1237) ("the Rules") reads:**

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>> **"(5) In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. Where the judgment includes a financial award the reasons shall identify, by means of a table or otherwise, how the amount to be paid has been calculated."**

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In my view this wording, in rather more compact and precise language, expresses broadly the same requirements as those expressed in the previous Rule and I do not regard the change in the statutory rubric as undermining or altering the reasoning in *Greenwood*."

19. It should be said that the Judgment appealed in the **Vairea** case was the Judgment delivered after a substantive hearing. The Tribunal concluded that although aspects of the Judgment fell to be criticised, when read as a whole, the Reasons of the ET gave an adequate explanation for its conclusions.

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20. The question for this Court is whether the Reasons given by the Tribunal below can be said to satisfy the requirements of Rule 62(5) and of **Meek**.

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The Submissions

21. The Respondent submits that the Tribunal erred in law by providing utterly inadequate Reasons in relation to both the strike-out application and the Deposit Order application. Mr Rowell submits that given the requirement of section 62(4) that Reasons be proportionate to the significance of the issue, there was a requirement in this case to give relatively extensive Reasons. He further submits that the Reasons completely failed to comply with Rule 62(5) in that although there is reference to the cautious approach to be taken on such applications the Reasons amount to no more than a summary of the Tribunal's conclusions. He submits that they do not show how the conclusions were reached, that there was no attempt to set out any factual issues other than in very basic summary, no findings were made in relation to any issues, and in short the Tribunal appears to have skipped to the last stage of the exercise required by Rule 62(5) without undertaking the more time-consuming process under the previous stages. In summary, it is said that the Reasons are neither adequate nor intelligible and do not comply with the fundamental requirement in **Meek**, namely that the unsuccessful party should know why it lost.

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22. The Claimant submitted that the Reasons were adequate. He reminded me that the Tribunal's decisions did not need to be elaborate pieces of formal drafting. He says that the Tribunal gave further Reasons and explanation orally during the hearing. He complains that no transcript had been provided today in order to put the Reasons into context. He reminds me that there were clear factual disputes and referred to the unfair dismissal complaint, in particular, where he said the allegations were very weak against him and that he had requested a computer expert to investigate the matter and those are all matters of fact which needed to be determined at Full Hearing. He said that the Tribunal Judge in her experience reached the decision having heard the submissions and that her Judgment - that the matter would benefit from a Full Hearing - should not be readily set aside. He also referred in his skeleton argument (submitted to me this morning) to two cases, which he says are of particular relevance to this issue apart from **Meek**. The first is **Balfour Beatty Power Networks Ltd v Wilcox** [2006] EWCA Civ 1240. The principle relied upon in that case is that Rule 62 is not to be followed in every case to the precise letter of the rule. He also referred me to **Armstrong v Newcastle Upon Tyne NHS Hospital Trust** [2006] IRLR 124. Reliance is placed upon a passage at paragraph 43 of that Judgment of Arden LJ, which says:

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> **"43. … this Court should look at the arguments and evidence placed before a tribunal where it is dealing with a decision of an employment tribunal, as opposed to a court of record. In the case of an employment tribunal, the reasons are primarily addressed to the parties and will not establish a binding precedent."**

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23. The essential point Mr Mabaso makes in reliance upon that case is that the Tribunal's Judgment should be assessed by reference to the documents presented to the Tribunal as well as having regard to the Reasons themselves.

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Discussion and Analysis

24. The Tribunal, in referring to the caution to be exercised, appears to have had in mind the correct approach to be taken to an application to strike-out a discrimination complaint. However, it is not clear from the Judgment to what extent the relevant authorities were taken into account. None are expressly mentioned, and apart from the mention of the cautious approach to be taken, none of the relevant principles are stated. It has often been said that discrimination cases, in particular, are fact-sensitive disputes and that they should only be struck-out in rare cases: see the recent summary of the applicable principles in the case of **Mechkarov v Citibank NA** [2016] ICR 1121, in which it was said that the proper approach to be taken in a strike-out application in a discrimination case is as follows: (1) only in the clearest case should a discrimination claim be struck-out; (2) where there are core issues of fact that turn to any extent on oral evidence they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is conclusively disproved by or is totally and inexplicably inconsistent with undisputed contemporaneous documents it may be struck-out; and (5) a Tribunal should not conduct an impromptu mini-trial with oral evidence to resolve core-disputed facts.

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25. Of course, those principles do not mean that a claim for discrimination should never be struck-out; clearly the Tribunal did not take that view because it did strike-out several of the Claimant's claims. However, the only detail given by the Tribunal as to why the remaining claims were not struck-out is that there were "facts in dispute on which evidence needed to be heard". No further explanation is given at all as to why the Respondent has not shown that this was one of those rare cases where discrimination claims could be struck-out without hearing the evidence. In my judgment, the Reasons were inadequate in this regard.

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26. The absence of any detailed explanation going either way is significant. It appears that the Tribunal thought that the high threshold had been met in respect of some of the Claimant's claims but not in respect of the others. The difficulty is that it is impossible to tell why the Tribunal decided that way for some of the claims and not for the others. If it concluded that there were no core issues of fact in respect of indirect race and indirect disability discrimination nor harassment or direct disability discrimination, it is wholly unclear on what basis the Tribunal decided that there were core issues of fact in respect of the other complaints. Furthermore, if it is the case that the Tribunal considered the Claimant's case was conclusively disproved by some feature of the evidence in relation to some of the allegations it is not clear why the same did not apply to the remainder.

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27. On the face of it, the claim for harassment on the grounds of race might have some overlap with or have some similar factual background to the claims of race discrimination. If that were the case then it would be incumbent upon the Tribunal, in my judgment, to explain why one claim has no reasonable prospects of success whereas the other does. However, as no facts or allegations are set out in the Reasons at all, one is left completely in the dark as to why the Tribunal decided to strike-out in some cases and not others.

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28. It is not enough, in my judgment, simply to say that there are facts in dispute. It will be a rare case where there are no disputes of fact at all. Thus, simply to say that there are facts in dispute does not explain to the Respondent why its case that the claims had no reasonable prospect of success had been rejected. The Respondent had submitted below that in relation to the disability claim there was not the slightest evidence that the Respondent would have treated non-disabled comparators more favourably than it did the Claimant. Similarly, in relation to the race discrimination complaint it said that there is not the slightest bit of evidence in support of

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that claim either. Neither contention was addressed by the Tribunal and there is no explanation as to why, as would appear to be the case, they were rejected.

29. It is noteworthy that the Claimant's pleaded case does not identify any actual comparators who he says were treated more favourably than him on the grounds of race and/or disability. There are generalised references to non-disabled comparators and a generalised allegation that ethnic minorities within the service were more likely to be investigated and dismissed for similar offences than people who were of a white background. It is arguable that even taking the Claimant's case at its highest does not give rise to a claim of discrimination with more than a little reasonable prospect of success. I emphasise that I am not expressing any final views as to prospects at this stage but merely stating that, based on the material available, the position is arguable.

30. The Tribunal does not grapple with any of these issues at all.

31. Mr Mabaso has clarified that some comparators' names had been provided to the Tribunal. If that is so then it underlines the fact that none of these matters were set out in the Reasons. They could have been but they were not and if those matters had been set out it might have explained why the Tribunal decided in the way it did.

32. The second paragraph of the Reasons does not improve matters. It would appear that the reason for not striking-out the unfair dismissal or wrongful dismissal claims was that they were somehow contingent upon findings in the discrimination complaints. There does not appear to have been any separate analysis of the unfair dismissal claims or wrongful dismissal claims to determine whether they had a reasonable prospect of success. Insofar as the

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Tribunal's conclusions in respect of those claims were dependant on its conclusions on the discrimination complaint, then the flaws in the latter necessarily would affect the conclusions in respect of the former.

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33. I turn then to Mr Mabaso's submission that one should look at all of the material that was submitted to the Tribunal and what it said in its oral decision, instead of just the Reasons in isolation. He submits that an oral transcript would have revealed that the Tribunal's reasoning was more extensive than that set out in the Reasons. Unfortunately for Mr Mabaso the EAT cannot infer from what might have been said at the hearing orally that the reasons were more extensive than those set out in the Reasons. The EAT can only go by what is provided in the Reasons. The Tribunal was expressly requested to provide Written Reasons and this is what was provided. Had there been other matters which the Tribunal thought were relevant and worthy of inclusion, they could have been included, but they were not.

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34. As to the contention that one can step back and take a broad view of the Reasons in order to try and salvage that part which is deficient, I am afraid that cannot be done in this case. That is for the obvious reason that there is nothing else to consider. There is no reference to any story or any factual summary, any identification of any issues of fact or any detail which would enable this Court to conclude that, notwithstanding the paucity of reasoning, the Tribunal had properly considered the matter and explained their decision.

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35. In view of the above, in my judgment, this decision cannot stand as it fails to meet the requirements of Rule 62(5) and is not compliant with the decision in **Meek**.

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Disposal

36. Mr Rowell submits that this is one of those clear cases where only one outcome is possible, thereby enabling the EAT to determine the application itself. I was referred to the decision of the Court of Appeal in **Jafri v Lincoln College** [2014] ICR 920, where Underhill LJ held as follows (at paragraphs 45 to 47):

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> **"45. It must follow, pace Carnwath LJ, that the fact that in a given case the Employment Appeal Tribunal "is in as good a position [as the employment tribunal] to decide the matter itself" is not sufficient to justify it in taking that course. If, once the employment tribunal's error of law is corrected, more than one outcome is possible, the authorities are clear that it must be left to the employment tribunal to decide what that outcome should be, however well placed the Employment Appeal Tribunal may be to take the decision itself.**

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> **46. I am bound to say that I reach that conclusion with regret. As Jacob and Carnwath LJJ pointed out in the *Bournemouth University* case, to remit an issue which the Employment Appeal Tribunal is as well placed as the employment tribunal to decide exposes the parties to unnecessary cost and delay. Remittal is not necessary in order to ensure that the decision is taken by the expert tribunal, since the appeal tribunal is itself such a tribunal: there is here a difference from the position on judicial review. Also, references to the "industrial jury" have less force now, when so many decisions are taken by an employment judge sitting alone. I should have preferred a more flexible approach, under which the Employment Appeal Tribunal had a discretion, in a case where it was genuinely in as good a position as the employment tribunal to make the decision in question, whether to remit it nevertheless or to decide it for itself. But it is clear that that is not the law.**

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> **47. The disadvantages of this ruling can be mitigated to some extent if the Employment Appeal Tribunal always considers carefully whether the case is indeed one where more than one answer is reasonably possible: there are plenty of examples in the authorities of a robust view on that question being taken. Further, even where more than one outcome is indeed possible, there is in my view no reason why the appeal tribunal cannot still decide the issue if the parties agree; and in an appropriate case they should be strongly encouraged to do so. It is important to appreciate that the requirement to remit enunciated by the authorities referred to by Laws LJ is not based on a formal problem about jurisdiction. Section 35(1) of the Employment Tribunals Act 1996 reads:**

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>> **"For the purpose of disposing of an appeal, the appeal tribunal may - (a) exercise any of the powers of the body or officer from whom the appeal was brought, or (b) remit the case to that body or officer."**

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> **A determination by the Employment Appeal Tribunal of an issue in respect of which the employment tribunal had erred in law would plainly be made "for the purpose of disposing of the appeal". Rather, the issue concerns, as Sedley LJ expressed it in the *Bennett* case, at para 30, the correct use of that power. The point made in the authorities is that it is wrong in principle for the appeal tribunal as a reviewing tribunal to make a decision which falls within the scope of the fact-finding (and that includes fact-assessing and discretion-exercising) tribunal. But there can be no such objection where the parties consent."**

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The Claimant understandably does not agree that this Court should proceed to determine the matter.

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37. I do not accept Mr Rowell's submission that only one outcome is possible in this case. The claims as they are pleaded undoubtedly have weaknesses. However, it is quite possible that the Tribunal might conclude that there are certain issues of fact whether in a discrimination complaint or in the unfair/wrongful dismissal complaints which need to be heard. As such, it seems to me that the only just course of action the stage is to remit the matter for reconsideration by the Tribunal.

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38. That leaves the question of whether it should be the same Tribunal or differently constituted Tribunal. Mr Rowell reminded me of the relevant principles set out in the case of **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 at paragraph 46. These are as follows:

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> **"46.1. *Proportionality must always be a relevant consideration.* Here the award was for £900,000, and although we are conscious that ordering a fresh hearing in front of a different tribunal would add considerably to the cost to parties on both sides who have already invested in solicitors and counsel, both at the tribunal and on appeal (in the case of the applicants, two counsel for the appeal), sufficient money is at stake that the question of costs would from the one point of view not offend on the grounds of proportionality and from the other not be a decisive, or even an important, factor. Similarly the distress and inconvenience of the parties in reliving a hearing must be weighed up, but (a) are rendered necessary in any event by the decision to set aside the original decision and (b) will not be greatly less by virtue of the extra time taken by a fully, rather than partially remitted, hearing, the main distress and inconvenience being caused by the matter being reopened at all.**

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> **46.2. *Passage of time.* The appellate tribunal must be careful not to send a matter back to the same tribunal if there is a real risk that it will have forgotten about the case. Of course, tribunals deal with so many different cases per month that it is impossible for them to carry the facts in their minds, nor would they be expected to do so. But they can normally refresh those minds from the notes of evidence and submissions if the case occurred relatively recently. This case was a relatively long one, and will not on that basis alone have completely evanesced from the minds of the tribunal. It was only just over a year ago. That in itself is quite a long time, though the lengthy reserved decision sent to the parties on 30 July 2003 would have kept the case in the minds of the tribunal at least until then: but in addition they have held a remedies hearing which began in October 2003, the hearing lasting until 18 December, and then required consideration in chambers' meetings in January and March, and did not result in a promulgated decision until as recently as 19 March 2004. We are satisfied therefore that the question of delay and loss of recollection is not a material factor in this case one way or the other.**

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> **46.3. *Bias or partiality.* It would not be appropriate to send the matter back to the same tribunal where there was a question of bias or the risk of pre-judgment or partiality. This would obviously be so where the basis of the appeal had depended upon bias or misconduct, but is not limited to such a case.**

> **46.4. *Totally flawed decision.* It would not ordinarily be appropriate to send the matter back to a tribunal where, in the conclusion of the appellate tribunal, the first hearing was wholly flawed or there has been a complete mishandling of it. This of course may come about without any personal blame on the part of the tribunal. There could be complexities which had not been appreciated, authorities which had been overlooked or the adoption erroneously of an**

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incorrect approach. The appellate tribunal must have confidence that, with guidance, the tribunal can get it right second time.

46.5. *Second bite*. There must be a very careful consideration of what Lord Phillips in *English* (at paragraph 24) called 'A second bite at the cherry'. If the tribunal has already made up its mind, on the face of it, in relation to all the matters before it, it may well be a difficult if not impossible task to change it: and in any event there must be the very real risk of an appearance of pre-judgment or bias if that is what a tribunal is asked to do. There must be a very real and very human desire to attempt to reach the same result, if only on the basis of the natural wish to say 'I told you so'. Once again the appellate tribunal would only send the matter back if it had confidence that, with guidance, the tribunal, because there were matters which it had not, or had not yet, considered at the time it apparently reached a conclusion, would be prepared to look fully at such further matters, and thus be willing or enabled to come to a different conclusion, if so advised.

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46.6. *Tribunal professionalism*. In the balance with all the above factors, the appellate tribunal will, in our view, ordinarily consider that, in the absence of clear indications to the contrary, it should be assumed that the tribunal below is capable of a professional approach to dealing with the matter on remission. By professionalism, we mean not only the general competence and integrity of the members as they go about their business, but also their experience and ability in doing that business in accordance with the statutory framework and the guidance of the higher courts. Employment law changes; indeed it has been a rapidly developing area of the law. Employment tribunals are therefore all too familiar with the need to apply a different legal approach to a case today from that which they applied last year, or even last week, where the law has changed, although the cases may be on all fours as regards their facts. Some areas of employment law have not been easy, and the approach to be adopted in considering whether there has been race or sex discrimination in a case such as this is just such a matter which has understandably caused problems for tribunals. It follows that where a tribunal is corrected on an honest misunderstanding or misapplication of the legally required approach (not amounting to a 'totally flawed' decision described at 46.4), then, unless it appears that the tribunal has so thoroughly committed itself that a rethink appears impracticable, there can be the presumption that it will go about the tasks set them on remission in a professional way, paying careful attention to the guidance given to it by the appellate tribunal."

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39. As to proportionality it does not appear to me that there would be any significant saving of resources if I were to remit the matter to the same Tribunal. This is not a decision which has been reached after several days of hearing. It seems to me that whether I remit to same Tribunal or to a fresh Tribunal the amount of time taken to determine the strike-out application will be the about the same. This is, therefore, a neutral factor. As for partiality and pre-judgment I have no doubt that if this matter were remitted to the Tribunal it would discharge the duty reconsidering the complaint in a professional and detached matter. However, it does appear to me that the Reasons in this case were so flawed that it would be right to start afresh. I therefore direct that this matter be remitted to a freshly constituted Tribunal to reconsider the Respondent's applications for strike-out and/or Deposit Orders in respect of those claims that remain live.

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40. I should make it clear that this Judgment does not affect those claims that were struck-out by the Tribunal. Those claims remain dismissed and are not resurrected by any part of this Judgment.

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