Appeal No. UKEAT/0146/17/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 January 2018

Before

HER HONOUR JUDGE EADY QC

PROFESSOR K C MOHANTY JP

MS N SUTCLIFFE

PETS AT HOME LIMITED — APPELLANT

MRS M J MacKENZIE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEAL & CROSS-APPEAL

APPEARANCES

For the Appellant	MS DEE MASTERS (of Counsel) Instructed by: Squire Patton Boggs (UK) LLP Trinity Court 16 John Dalton Street Manchester M60 8HS
For the Respondent	MR COLIN McDEVITT (of Counsel) Instructed by: Real Employment Law Advice Limited 13 Gustar Grove East Cowes Isle of Wight PO32 6GJ

SUMMARY

MATERNITY RIGHTS AND PARENTAL LEAVE - Pregnancy

MATERNITY RIGHTS AND PARENTAL LEAVE - Unfair dismissal

UNFAIR DISMISSAL - Constructive dismissal

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

Pregnancy and maternity discrimination - burden of proof - constructive unfair dismissal - adequacy of Employment Tribunal reasons

The Claimant, an Assistant Manager with the Respondent, had twice applied for a promotion to Deputy Manager; first, during her pregnancy, the second occasion being when she was on maternity leave. On both occasions, the Claimant had not been automatically promoted into the position but had undergone an assessment, which she had then failed to pass. She subsequently learned that a less experienced Assistant Manager (who had previously reported to the Claimant) had been successful in a further selection exercise for the second Deputy Manager vacancy. The Claimant said this was the last straw and resigned from her employment. In her subsequent claims before the ET, the Claimant complained that the Respondent's failure to fast-track her promotion to the Deputy Manager post amounted to pregnancy and maternity discrimination. The ET, by a majority (the ET Lay Members), agreed with the Claimant but it unanimously found she had presented her ET1 out of time and that time should not be extended for either of these as free-standing claims. That said, the ET Lay Members considered that these acts of discrimination amounted to breaches of the implied obligation to maintain trust and confidence and that learning of the promotion of a less experienced Assistant Manager had amounted to a final straw; the Claimant had not unduly delayed in respect of the last straw and thus should not be taken to have affirmed the repudiatory breach. The Respondent appealed. The Claimant cross-appealed on an incorrect date recorded in the ET's reasoning.

Held: *Allowing the appeal and cross-appeal*

The ET majority's findings of discrimination could not stand. On the first stage of the burden of proof, either the ET majority had failed to have regard to all the evidence, and/or reached perverse findings in some respects, or it had failed to explain its reasoning so as to allow the Respondent to understand why it had lost. As for the second stage, the ET majority failed to demonstrate that it had engaged with the Respondent's explanation and the evidence in that regard. As for the ET majority's conclusions on the constructive unfair dismissal claim, it had needed to be clear as to what it was that the Claimant was alleging was the final straw. If it was simply the promotion of the other Assistant Manager then, on the ET's own finding, that had not occurred until after the date of her resignation. If the ET majority considered it was simply the fact that this is what the other Assistant Manager had told the Claimant, it needed to be clear that this was how the Claimant was putting her claim. Allowing that the Claimant's case might be more nuanced than the Respondent's appeal allowed, the clarity required was not apparent from the ET's reasoning. The ET majority had also failed to engage with the question whether the Claimant had affirmed any repudiatory breach through delay. Although it had reached a conclusion on this point in respect of what it had found to be the final straw, the ET majority had failed to consider this question in relation to the two acts of discrimination it had found and yet the first had occurred over a year before her resignation, the second over three months before. A final straw could not revive an earlier breach of contract that had already been affirmed (**Vairea v Reed Business Information Ltd** UKEAT/0177/15 applied) and the ET majority had needed to address the question of affirmation in respect of the earlier breaches it had found to be necessary to its conclusion on constructive unfair dismissal.

HER HONOUR JUDGE EADY QC

Introduction

1. This is our unanimous Judgment on the appeal and cross-appeal in this matter. The cross-appeal was not specifically addressed before us because it was conceded and is thus allowed. The points in contention were those raised by the appeal.

2. In giving this Judgment, we refer to the parties as the Claimant and the Respondent, as below. This is the Full Hearing of the Respondent's appeal and the Claimant's cross-appeal from a Reserved Judgment of the Employment Tribunal sitting at Southampton (Employment Judge Bridges sitting with Lay Members, Ms Sinclair and Mr Stewart, over four days in December 2016, with a further three days in chambers; "the ET"), sent to the parties on 30 January 2017. Representation below was as it has been on this appeal.

3. By a majority Judgment, the ET Lay Members upheld the Claimant's complaint of constructive unfair dismissal, a conclusion that depended on the majority's prior finding that the Claimant had previously suffered direct pregnancy and maternity discrimination; although the ET unanimously found that the Claimant's free-standing complaints in those respects had been brought out of time, the majority considered that subsequently learning of the apparent promotion of a colleague was the final straw for the Claimant and this, taken together with the earlier discrimination, amounted to a breach of the implied obligation to maintain trust and confidence. The ET majority was further satisfied that the Claimant had resigned in response to the earlier pregnancy and maternity discrimination and had not affirmed the breach of the implied term, given that she had resigned shortly after the final straw. The Respondent appeals against those findings.

4. The Claimant's cross-appeal relates to a distinct error in one of the dates recorded by the ET and is not contested by the Respondent. We have accordingly simply addressed that when summarising the ET's findings.

Factual Background and the ET's Decision and Reasoning

5. The Respondent is the UK's largest retailer of pet food and pet related products, with approximately 400 stores in the UK. The Claimant started her employment with the Respondent on 18 January 2007 as an Assistant Manager at its Newport, Isle of Wight store. The Store Manager was a Mr Wallace. There was also a Deputy Manger and another Assistant Manager. As from September 2015, the other Assistant Manager was Mr Grimes who had previously worked at the store, reporting to the Claimant.

6. The ET referred to the Claimant's four appraisals during the period with which it was concerned (see paragraph 26 of its Decision), observing that the former Manager preceding Mr Wallace had stated that the Claimant needed to focus on people and people development (see appraisals in 2009 and 2012) and that Mr Wallace had made similar observations in 2013 and 2015, commenting that the Claimant expressed frustration when her high standards were not met by others and needed to help everyone in the store develop their skill set and recommending that she should communicate more openly with him. Further, in 2014, after a visit to the Newport store, the Area Manager, Mr Smith, had written to the local management (including the Claimant) expressing his view that the team was divided, showing no leadership or discipline.

7. Returning to the chronology, in 2012, the Claimant had taken her first period of maternity leave, returning to work on a part-time basis, approximately 32 hours per week. In

December 2014, she informed Mr Wallace that she was again pregnant. It was shortly after this that the then Deputy Manager announced he would be leaving the store, following a promotion, and in February 2015 his post was advertised, the job description emphasising the need for the successful candidate to be a "*people person and a real team player … with excellent communication skills*" who could "*really engage and inspire a team*" (ET paragraph 31).

8. The Claimant put in an application. Mr Smith was responsible for the recruitment of management positions within the stores in his area and there were two ways of filling management vacancies: either the role could be advertised openly, or it could be offered directly to an existing employee if Mr Smith considered they were an outstanding candidate who was ready for promotion. Mr Smith explained to the ET that he did not adopt the fast-track route for the Claimant in this instance because he did not consider she was suitable for promotion due to her poor interaction and communication with colleagues - issues of which he had been made aware from feedback from Mr Wallace and other colleagues (see the ET at paragraph 76). The Employment Judge accepted Mr Smith's explanation in this regard (again, paragraph 76), but the ET Lay Members considered that the failure to fast-track the Claimant in this promotion exercise was sufficient to shift the burden of proof. In so finding, the Lay Members explained their conclusions as follows:

> **"74. However, Ms Sinclair and Mr Stewart in a different majority of the Tribunal decided that, notwithstanding Mr McDevitt had limited his submissions in paragraph 37 to two facts why the burden of proof should shift, the decision by Mr Smith not to fast track the claimant in relation to the Deputy Manager's post in December 2014 was in itself sufficient to shift the burden of proof at Stage 1. A summary of this majority's reasons was because there was no written policy to govern the operation of the fast track process, Mr Smith had made his choice based upon what he knew of the claimant such information coming from the colour coded grid Succession Plan, from frequent store visits, from the grades that the claimant had been awarded in her appraisals and that Mr Smith's decision not to fast track the claimant was not evidenced by contemporaneous documentation. The majority also accepted Mr Harrison's evidence that it was standard practice for someone who had been trained to be promoted afterwards and that it was usually just a matter of time and vacancies. Further, that the claimant's appraisals available to Mr Smith in February 2015 had both been at grade 4 in the two previous appraisals. Moreover, that Mr Smith had concerns about filling the Deputy Manager post because of the claimant's pregnancy and that she would be on maternity leave from July 2015."**

9. The succession plan thus referred to by the Lay Members was a colour coded document that had shown the Claimant in the blue box when she was on maternity leave, when it was her case that she had previously been placed in the green box, which was for those ready to do a bigger role, although that did not always mean promotion to a higher grade. On this document, the Lay Member Ms Sinclair had accepted the evidence of the Claimant and found this alone was sufficient to raise an inference of discrimination (paragraph 70). The Employment Judge and the Lay Member Mr Stewart had, however, found that placing the Claimant in the blue box was simply a record that she was on leave from work; others were also so shown when (for example) on sick leave, and that no inference could be drawn even if the Claimant had seen a succession plan with her being placed in the green box at some point in the past; this was a fluid document, not set in stone, and was changed on a regular basis (see ET paragraph 71).

10. As for the evidence of Mr Harrison (also referred to by the Lay Members at paragraph 74), the Employment Judge again took a different view, noting that Mr Harrison had confirmed that there was no automatic link between completing a training course and being promoted, saying simply that it was usually a matter of time and vacancies; that was consistent with Mr Smith's account that there was no automatic promotion arising from training and that he would never fast-track a Manager unless he believed they were suitable for promotion.

11. Having found that the burden of proof had shifted to the Respondent, the ET Lay Members concluded it had failed to provide a non-discriminatory reason for the failure to fast-track the Claimant. In large part, they relied on the same reasoning as had led them to find the initial burden had shifted. They also considered that a mistake made by Mr Smith in the grievance process (see below) supported their conclusion in this regard. The ET majority thus found that the decision not to fast-track the Claimant, but instead to require her to compete for

this vacancy, was an act of direct pregnancy discrimination, contrary to section 18 of the **Equality Act 2010** ("EqA").

12. That said, the ET went on to conclude unanimously that the Claimant's complaint in this regard had been lodged out of time by nearly a year (ET paragraph 128) or, if seen as part of a continuing act, by some three weeks (ET paragraph 136). It further found, again unanimously, that there was no basis for extending time.

13. Returning to the history, given the decision to advertise the Deputy Manager vacancy in February 2015, there was an assessment day on 27 March 2015. The Claimant attended but failed to meet the minimum scoring threshold on the assessment and was unsuccessful. In the feedback given to the Claimant regarding her performance, communication issues were highlighted as being one of the main reasons for her failure. An external candidate, Ms Brown, was subsequently appointed to this position.

14. The ET by a majority, the Employment Judge and Mr Stewart, rejected the Claimant's case that there had been a conspiracy between Mr Smith and the managers involved in her assessment on 27 March 2015. The Lay Member, Ms Sinclair, found that there had been such a conspiracy, with the other managers being influenced by the fact that Mr Smith had not fast-tracked the Claimant into the position.

15. In July 2015, the Claimant started her second period of maternity leave. In December of that year, Ms Brown left the Respondent's employment and Mr Wallace told the Claimant that the Deputy Manager position at the store was again vacant. She put in a further application but,

after attending a second assessment day on 13 January 2016, was again unsuccessful. Again, the feedback she was given highlighted communication issues, stating:

> **"41. … Under "Leadership behaviours" it stated that the claimant did not actively get others involved and she "… overspoke people and seemed frustrated with others opinions that differ from yours" [sic]. Under "Bridge" it stated that the claimant's method of communication "… did not result in you influencing the team to follow your idea's [sic]" and "… it appeared at times you looked frustrated and flustered when your idea's [sic] were not being adopted by the group"."**

16. As for the first Deputy Management recruitment process, Mr Smith had taken the decision not to simply fast-track the Claimant into this vacancy but to have an assessment of both internal and external candidates. The ET Lay Members again found this amounted to an act of direct maternity discrimination, their reasoning in this regard being largely as before (see ET paragraphs 96 and 97). Once again, however, the ET unanimously concluded that the Claimant's claim in this regard had been lodged out of time by nearly three weeks (ET paragraph 99), and there was no basis for extending time in this respect (paragraph 136).

17. As for the assessment itself, the ET Lay Member Ms Sinclair again accepted the Claimant's case that the burden of proof had shifted in this regard but the ET majority - the Employment Judge and Mr Stewart - disagreed, finding that the assessment had been carried out in accordance with the Respondent's normal procedure and the burden of proof did not shift in this respect.

18. Picking up the narrative, although he had not been part of the assessment process, Mr Wallace visited the Claimant at home - she was still on maternity leave - to give feedback about her second application. During that conversation, the Claimant said that if Mr Grimes were to be appointed as Deputy Manager, she would not be able to work under him.

19. In the event, the Respondent decided that none of the candidates in that recruitment process were suitable for the Deputy Manger position and it was then re-advertised in February 2016. The Claimant did not re-apply. On this occasion, however, Mr Grimes put in an application and attended an assessment day on 23 February 2016. This is wrongly recorded by the ET as having been on 23 March 2016 (see paragraph 44), and that is the subject of the Claimant's cross-appeal. The correction to the date is agreed between the parties and the cross-appeal is duly allowed.

20. Returning to Mr Grimes' position, having scored full marks in each part of the assessment, he went through to the next stage of the process, which required him to undertake a three-month trial period in another store (a trial period that was longer than the normal four weeks that would be required on such a promotion because of Mr Grimes' relative inexperience). Upon successful completion of the work trial, Mr Grimes then had a final interview with Mr Smith on 21 July 2016 and he was promoted to the position of Deputy Manager on 22 July 2016.

21. Meanwhile, having learned from Mr Grimes of his success on the assessment day, on 30 March 2016 the Claimant wrote to Mr Wallace giving nine weeks' notice of her resignation. She explained:

> **"… I can't work with Sam being my manager when I have managed him since he started with the business 6 years ago and helped him progress and develop himself, this is nothing against Sam personally, I wish him well in his role. I have waited to progress to deputy manager for 9 years and have watched 2 people that I have trained up and developed overtake me …" (Paragraph 45 of the ET's Decision)**

22. Reflecting on her own position, the Claimant stated:

> **"I was never given any help with a plan for my development to ensure I would be ready to progress again if the position arose. Was this because I didn't need developing as I was already doing the job and was just not given the job for other reasons? (Was it because I was pregnant or have a family?) Or because I feel the manager in charge with the assessment process does not like me? I do not know." (Paragraph 46 of the ET's Decision)**

23. The Respondent treated the Claimant's resignation letter as if it had been a grievance and invited her to a meeting on 27 April 2016. It was during the investigation into the Claimant's grievance that Mr Smith erroneously referred to having seen that the Claimant's most recent appraisal had scored her as a 3 when deciding that she should not be fast-tracked for promotion, something that supported his decision. In fact, as he volunteered in evidence, that was wrong: the last appraisal available to him at that time had scored the Claimant at 4, the higher rate (5 being the highest). Mr Smith explained that, when preparing for the grievance investigation meeting, he had mistakenly looked at the most recent appraisal at *that* time, failing to notice this was not the one he would have looked at when actually making his decision. In any event, the Claimant's grievance was not upheld; a decision confirmed to her by letter of 24 May 2016. The Claimant appealed that decision but her appeal was unsuccessful.

24. The ET unanimously rejected the Claimant's complaint that Mr Grimes had been subject to a different, discriminatory recruitment process (see the Judgment at paragraphs 109 to 113). The ET Lay Members (again forming the majority) found, however, that, during a conversation with the Claimant on 12 March 2016, Mr Grimes - who was less qualified and less experienced than the Claimant at that time - had said he had been promoted to the position of Deputy Manager and that had amounted to the final straw (ET paragraph 149). This, the majority held, taken together with the past pregnancy and maternity discrimination (in failing to fast-track the Claimant for the Deputy Manager post in February 2015 and December 2016, see above) amounted to a breach of the implied term of trust and confidence (ET paragraph 150). The ET majority further found that the Claimant had resigned in response to that breach (paragraph 153), and that this had not been waived by the Claimant having delayed (see paragraph 156). In the circumstances, the majority decided that the reason for the Respondent's repudiatory breach of contract - and, thus, for the termination of the Claimant's employment -

was the earlier pregnancy and maternity discrimination by Mr Smith in previously deciding not to fast-track the Claimant to the post of Deputy Manager (paragraph 158). The ET majority did not accept the Respondent's case, that the reason for the Claimant's dismissal was capability, and it concluded that she had been unfairly constructively dismissed.

25. The Employment Judge, in the minority, found that, although Mr Grimes may well have told the Claimant of his success at the assessment stage, the recruitment process had also required him to undertake a three-month trial period and a further interview. It was only after he had successfully completed those further stages that Mr Grimes had been appointed Deputy Manager. In the circumstances, there was no conduct by the Respondent that entitled the Claimant to treat what she had learned from Mr Grimes on 12 March 2016 as a final straw entitling her to resign. Moreover, there was no conduct by the Respondent, whether viewed individually or cumulatively, that, considered objectively, amounted to a repudiatory breach of the implied term of trust and confidence (ET paragraph 151). As for the Claimant's resignation, she had not resigned in response to Mr Smith's decisions not to fast-track her for promotion: her letter had not been until approximately three months after the second of those decisions and the reason for her resignation was, as she had stated, that she could not work with Mr Grimes being her manager when she had previously managed him and had helped him to progress and develop, not because she herself had not been fast-tracked for promotion (ET paragraph 154). In any event, the last act of discrimination (as found by the majority) had been before 1 January 2016, and the Claimant had waived any alleged breach by waiting until 30 March 2016 to resign (paragraph 157).

26. Going on to consider whether there should be any **Polkey** reduction, the ET majority considered none should be made: in circumstances in which the discrimination had arisen from

Mr Smith's decision not to fast-track the Claimant for promotion, it took the view that the Claimant would have continued working for the Respondent for the foreseeable future. The Employment Judge again disagreed, concluding (in the alternative) that any loss of earnings should be limited for a 12-month period: the Claimant would have voluntarily resigned within 12 months because she would not have wanted to work with Mr Grimes as her line manager.

The Appeal

27. The Respondent's appeal was permitted to proceed to a Full Hearing on the following grounds:

27.1. In respect of the conclusion that the Claimant was constructively unfairly dismissed, the ET majority had erroneously concluded that Mr Grimes telling the Claimant that he had been promoted was a final straw when there was no legitimate basis for this conclusion, especially given the ET had also found that he had not in fact been promoted at that point in time (see ET paragraphs 44 and 45).

27.2. Also in respect of the conclusion that the Claimant had been constructively dismissed, the ET majority erroneously failed to consider whether she had affirmed the historic discriminatory conduct which formed part of the repudiatory breach. Alternatively, it had perversely concluded that she had not affirmed the breach of the implied term of trust and confidence arising from historic discriminatory conduct it had found, given that this had ended by 1 January 2016, some three months before her resignation.

27.3. On the majority finding on pregnancy and maternity discrimination there was, moreover, a failure to provide **Meek**-compliant Reasons for the conclusion reached, specifically as to why it had rejected Mr Smith's explanation for not fast-tracking the Claimant (that she had not been considered suitable because of her people

skills). Further/in the alternative, there was no proper basis upon which the ET majority could conclude the burden of proof had shifted and it had reached a series of perverse findings in this regard: (1) emphasising the colour coding system used by Mr Smith without explaining why this was significant and when the ET, by a different majority, had already concluded it was not discriminatory; (2) misunderstanding the evidence in relation to the interplay between training and promotion, correctly summarised by the Employment Judge at paragraph 78; (3) mischaracterising evidence of the Claimant's suitability as recorded in the appraisal documentation when the ET's findings recorded concerns about her people skills consistent with the Respondent's explanation for non-promotion; (4) finding that Mr Smith had concerns about filling the Deputy Manager post because of the Claimant's pregnancy and that she would be on maternity leave from July 2015 when Mr Smith had given no evidence to that effect; (5) considering relevant Mr Smith's explicable error during the grievance process when there was no conceivable reason why this invalidated his explanation not to fast-track the Claimant. These findings were either perverse or inadequately reasoned.

28. The Claimant resists the appeal, essentially relying on the reasoning provided.

Submissions

The Respondent's Case

29. In its submissions, the Respondent started with the approach adopted by the ET majority to the burden of proof in respect of the allegations of pregnancy and maternity discrimination. Specifically, it contended the ET majority erred in law and/or reached a perverse conclusion when finding the Claimant had discharged the first stage of the burden of proof and/or further

A erred in failing to provide **Meek**-compliant Reasons when it concluded the Respondent had failed to discharge the second stage.

B 30. Under section 136 of **EqA**, the ET's task at the first stage was to identify whether there were facts, having considered all of the evidence, from which it could be inferred there was a *prima facie* case that the reason for the Respondent's action was discriminatory (see **Ayodele v Citylink Ltd** [2017] EWCA Civ 1913 at paragraphs 30 to 59, 87 to 107 and especially at C paragraphs 93 and 103). The majority's reasoning at paragraph 74 did not withstand scrutiny. The majority suggested that the decision not to fast-track the Claimant was not evidenced by contemporaneous documentation, but it then relied on exactly such documentation. It relied on D the colour coded succession plans but the ET by a different majority (the Employment Judge and Mr Stewart) had already determined that these were non-discriminatory. The majority had relied on the Claimant's appraisals, specifically that she had been graded 4 in the two relevant E appraisals, but failed to have regard to *all* of the evidence (as it was required to do), including the observations regarding her people and communication skills, not just made by Mr Wallace but also by the earlier Manager in two previous appraisals. Further, the majority failed to have regard to the other material available to Mr Smith, which included the feedback he had received F from Mr Wallace and the Claimant's colleagues at the store. The majority had also apparently accepted what it considered to be Mr Harrison's evidence of automatic progression after training. Whilst the Respondent had always accepted the Claimant had the right training to be G fast-tracked, that was a necessary but not sufficient condition. The problem with the Claimant was not the absence of training but her people skills. The conclusion of the majority was founded upon a mis-characterisation of Mr Harrison's evidence, which was as the Employment H Judge had recorded and did not support a finding that there was automatic progression. Yet

A further, the majority had mis-represented the evidence, in stating Mr Smith had concerns about the Claimant's pregnancy and maternity leave - there was no evidence to support that finding.

B 31. As for the second stage, the ET's task had been to identify whether the Respondent had established a non-discriminatory explanation for the treatment in issue. Here, the Respondent's case had been that the Claimant had not been fast-tracked because of Mr Smith's concerns regarding her people skills. The majority rejected that explanation for the same reasons as C those relied on to shift the burden of proof at stage 1 (see paragraph 80). That failed however to engage with the various factors relied on by the Respondent, in particular, the contemporaneous record of Mr Smith's concerns in July 2014 which, whilst relating to the store management D team as a whole, had apparently supported his view that no one in the store should be fast-tracked. There were further observations to this effect in the appraisals carried out by Mr Wallace and the previous Manager, the requirement for the Deputy Manger post being E expressly one that identified the need for strong people skills, and the assessment process undertaken in respect of the Claimant (not discriminatory), which found she was not suitable for appointment for reasons corroborating Mr Smith's own prior assessment. As for the additional reason relied on by the ET majority, that relied on a perverse finding in respect of Mr F Smith's evidence. He had, as the Employment Judge had recorded at paragraph 80, provided an explanation for the error he had made in the grievance process and the majority provided no explanation as to why it had rejected this (if it had); there was simply no reason why Mr G Smith's explicable error invalidated his evidence.

32. Turning then to the majority's finding on unfair dismissal, there was an overlap between H the discrimination claims and the complaint of constructive unfair dismissal: the majority finding in respect of the latter was dependent upon its prior finding on discrimination; if the

appeal succeeded on discrimination, the unfair dismissal finding must also fail. In any event, the ET majority had erred in its analysis of what was said to have been the final straw. Critically, it had not been the Claimant's case that the final straw was that Mr Grimes had progressed further than her in the recruitment process; her case was that the final straw was the effective promotion of Mr Grimes but that had only taken place after the Claimant's resignation on 22 July 2016 and thus could not have been the final straw. The ET majority concluded that Mr Grimes had told the Claimant on 12 March 2016 that he had been promoted (see paragraph 149), but the ET had already unanimously found he had not been promoted by that stage (see paragraphs 44, 55 and 111). It was impossible to reconcile the ET majority's analysis with these findings and the conclusion on the last straw could not stand.

33. The ET majority had further adopted an erroneous analysis of whether the Claimant had affirmed any historic discrimination by delaying her resignation. The Claimant had only resigned on 30 March 2016, despite knowing she had been unsuccessful in the first recruitment process since March 2015 and the second since January 2016. Where an employee relies on a course of conduct for the purpose of a constructive unfair dismissal claim, she cannot rely on any conduct which she has affirmed. A final straw does not revive any historic affirmed breach of contract (see **Vairea v Reed Business Information Ltd** UKEAT/0177/15, especially at paragraph 84). The majority erred in law in that they focussed only on the affirmation or delay issue in relation to the purported last straw on 12 March 2016, and did not consider whether there was any delay or affirmation in relation to the historic discrimination (see the reason in paragraphs 155 to 156). Moreover, to have failed to find delay or affirmation in respect of the earlier discrimination would have been perverse.

The Claimant's Case

34. Once it was accepted that Mr Grimes had been selected for the promotion after attending the assessment day on 23 February 2016, the majority finding that the Claimant had resigned after that event could not be faulted: Mr Grimes' conversation with the Claimant had indicated to her that the Respondent preferred to promote a less qualified and less experienced colleague to her; the last straw need not be blame-worthy, it merely needed to contribute something to the breach of the implied term of trust and confidence, even if that contribution was relatively insignificant.

35. As for affirmation or delay, the majority was entitled to find that the reason for the Respondent's repudiatory breach of contract and constructive unfair dismissal was the earlier discrimination followed by the last straw of Mr Grimes telling the Claimant he had been promoted. There was no error of law in the ET majority not considering any affirmation of the earlier discriminatory conduct (see **Vairea**). The majority considered the last straw to be part and parcel of the Respondent's treatment of the Claimant: the discriminatory decision not to fast-track her for promotion was intimately linked to the decision to promote Mr Grimes; Mr Grimes could not have been promoted if the Claimant had not been passed over for fast-track promotion. This was not a case of separate, stand-alone and discrete acts which were capable of being affirmed, but rather a set of circumstances where there was repeated linked conduct. The last straw did not occur in a vacuum or where a scale had been emptied of straws by the Claimant's affirmation. Alternatively, the ET majority decision could be seen as accepting that the last straw was a repetition of the discriminatory breach; as per paragraph 84 of **Vairea**. The promotion of Mr Grimes in preference to the Claimant was effectively a repetition of discrimination passing over of the Claimant and could thus properly be characterised as a situation where the factual matrix of the earlier breach is repeated.

36. On the Respondent's alternative argument, it was not perverse for the majority to have concluded that the Claimant had not affirmed the breach arising from the discriminatory conduct due to the three-month long delay. That was a permissible finding given the Claimant was on maternity leave from the summer of 2015 until the termination of her employment.

37. As for the majority reasoning, the Reasons were **Meek**-compliant, explaining to the parties why the Claimant had won and the Respondent lost. At paragraph 74, the ET majority had set out the reasons why it had found the burden had shifted. There had been no written policy to govern the operation of the fast-track promotion system; it was based on information from the colour coded grid succession plan, from frequent store visits and from appraisal grades; it was not evidenced by contemporaneous documentation. The decision at issue had been made notwithstanding it being standard practice for someone who had been trained to be promoted afterwards; it would be usually just a matter of time and vacancies for that to occur (and the ET majority had permissibly adopted Mr Harrison's evidence in this respect). The decision was made, moreover, as at December 2014, when the two most recent appraisal documents for the Claimant both showed that she had been rated at grade 4 - a time when Mr Smith had concerns about filling the Deputy Manger post because of the Claimant's pregnancy and that she would be on maternity leave from July 2015. The Claimant had been heavily critical of the lack of objectivity and transparency in Mr Smith's decision taking and the Respondent was therefore able to understand the ET majority's decision in the light of the way her case had been put; it was not coming to the decision as a stranger.

38. As for the finding regarding Mr Smith's evidence concerning the Claimant's appraisal grading, that had been in the context of his view that the Claimant had been graded a 3, which was too low to consider for a fast-track promotion. He had been cross-examined as to the

changes in his explanation and (given the absence of any written record) it was permissible for the ET majority to have rejected his explanation in this respect: it had had the benefit of hearing him give evidence and was entitled to reach that conclusion. This was, further, in the context of Mr Smith having before him the colour coded succession plan which had marked the Claimant as on maternity leave and so demonstrated that he had noted this in July 2015 and attached some relevance to it. Accepting that the significance of the colour coded succession plan was not expressly explained by the majority (see ET paragraph 74), the Claimant contended that the ET majority had still been entitled to draw inferences, not least as previously (in August 2012) she had been put into the relevant box - as having the potential for promotion - but had then moved down into the blue box in July 2015; under cross-examination, Mr Smith had failed to provide an adequate explanation for that. As for the finding regarding Mr Smith's concerns about the Claimant's pregnancy and maternity leave, this was permissible given he had expressly noted her maternity leave on the colour coded succession plan and in the light of the ET majority's other findings. Having found that the burden had shifted to the Respondent, the ET majority was similarly entitled to reject Mr Smith's explanation for failing to fast-track the Claimant: it did so for the reasons already given regarding stage 1 and its permissible rejection of his explanation for his mistake in the grievance investigation.

The Relevant Legal Principles

39. The Claimant had brought her complaints of pregnancy and maternity discrimination under section 18 of the **Equality Act 2010** ("EqA") and of constructive unfair dismissal under section 94 of the **Employment Rights Act 1996** ("ERA").

40. Although her complaints of discrimination were not upheld as free-standing claims (having been brought out of time), the ET majority found that failing to fast-track her into the

A Deputy Manger vacancy, in 2015 and then in 2016, amounted to pregnancy and then maternity discrimination, which was relevant to the subsequent question whether the Respondent had acted in breach of the implied obligation to maintain trust and confidence. In finding that there had been discrimination in these respects, the ET majority found that the burden of proof had shifted to the Respondent and there had been a failure to provide a non-discriminatory explanation for the relevant decisions. The shifting burden of proof applicable to discrimination claims arises from section 136 of the **EqA** which relevantly provides:

> **"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

41. The approach to section 136 of the **EqA** has most recently been considered by the Court of Appeal in **Ayodele v Citylink Ltd** [2017] EWCA Civ 1913, in particular see per Singh LJ (with whom the other members of the Court agreed) at paragraphs 93 and 103:

> **"93. … It seems to me that there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a *prima facie* case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage.**
>
> **…**
>
> **103. What then is to be made of the fact that the wording of section 136 is different from the predecessor provisions? It seems to me that the answer lies in the fact that the previous wording was not entirely clear that what should be considered at the first stage was *all* the evidence, from whatever source it had come, and not only the evidence adduced by the *claimant*. Its express wording was apt to mislead in that regard, as it referred only to the complainant. This had been clarified in the case law on the predecessor provisions, in particular by the EAT in *Laing*, which was approved by this Court in *Madarassy*. Parliament can be taken to have known of that case law when it enacted section 136. The provision can sensibly be read as making that point clear on the face of the legislation."**

42. As for the complaint of constructive unfair dismissal, for an employee's resignation to amount to a constructive dismissal, it is well established that four conditions have to be met.

1. There must be a breach of contract by the employer.

2. That breach must be sufficiently important to justify the employee resigning or must be the last in a series of incidents that justify her resigning.

3. She must leave in response to the breach and not for some other unconnected reason.

4. She must not delay too long in terminating the contract in response to the breach, otherwise she may be deemed to have waived it and agreed a variation.

43. This contractual approach was laid down by the Court of Appeal in **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221 and imports an objective test into the question whether there has been a constructive dismissal.

44. Whether an employer's conduct amounts to a fundamental breach of contract justifying resignation is essentially a question of fact and it is not open to the EAT to seek to substitute its view for that of the ET (see **Woods v WM Car Services (Peterborough) Ltd** [1982] ICR 693 CA). Moreover, where the employee resigns in response to what is said to be the final straw, the ET is entitled to take into account the cumulative affect of the breaches of the implied term of trust and confidence; the approach to be adopted in such cases being laid down by the Court of Appeal in **Omilaju v London Borough of Waltham Forest** [2005] ICR 481 per Dyson LJ, specifically at paragraphs 19 to 22:

> **"19. The question specifically raised by this appeal is: what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract? When Glidewell LJ said that it need not itself be a breach of contract, he must have had in mind, amongst others, the kind of case mentioned in the *Woods* case at p671F-G where Browne-Wilkinson J referred to the employer who, stopping short of a breach of contract, "squeezes out" an employee by making the employee's life so uncomfortable that he resigns. A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.**

20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

22. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective (see the fourth proposition in para 14 above)."

45. A final straw does not however revive any historically affirmed breach of contract; as HHJ Hand observed, in **Vairea v Reed Business Information Ltd** UKEAT/0177/15:

"83. But what is to happen in the case of a breach of the implied term as to mutual trust and confidence? Suppose that in a "final straw" case the balance has tipped over, by the latest in a series of events, to a breach of the implied term of mutual trust and confidence but after that and before the breach has been accepted as giving rise to a termination there is then an affirmation. If all that is necessary to justify a subsequent resignation as a constructive dismissal is the addition of a yet further "final straw" then that would be a revival by an act, not in itself repudiatory, of a previous breach which has been affirmed. But, in my judgment, it is this very concept that was being addressed by Dyson LJ in *Omilaju* and his answer clearly means that an "entirely innocuous" further event subsequent to an affirmation does not reopen the matter. Obviously, I am bound by this and, in any event, I have no difficulty in accepting it as entirely correct.

84. I think when a contract has been affirmed a previous breach cannot be "revived". The appearance of a "revival" no doubt arises when the breach is anticipatory or can be regarded as "continuous" or where the factual matrix of the earlier breach is repeated after affirmation but then the real analysis is not one of "revival" but of a new breach entitling the innocent party to make a second election. The same holds good in the context of the implied term as to mutual trust and confidence. There the scale does not remain loaded and ready to be tipped by adding another "straw"; it has been emptied by the affirmation and the new straw lands in an empty scale. In other words, there cannot be more than one "last straw". If a party affirms after the "last straw" then the breach as to mutual trust and confidence cannot be "revived" by a further "last straw".

85. In my view, this is not in any way unfair to an employee, who has elected to go on with the contract. On the contrary, that is the whole point of an affirmation. Affirming the contract obviously involves its continuance and that continuance is on the basis that the remedy for past breaches will be purely monetary. The result is that a further "entirely innocuous" action on the part of the employer cannot entitle the innocent party to revert to the pre-affirmation breach. That is just as much the position where the pre-existing breach comprised a "bundle of straws" amounting to a breach of the implied term as to mutual trust and confidence as it is with a "unitary" repudiatory breach."

A

46. Although these are primarily matters of assessment for the ET, the approach it has taken must be apparent from the Reasons provided, so the parties can understand why they have won or lost (and see the well known guidance given by the Court of Appeal in **Meek v City of Birmingham District Council** [1987] IRLR 250).

B

Discussions and Conclusions

47. In the present case, the ET majority's decision on constructive unfair dismissal flowed from its prior findings on maternity and pregnancy discrimination arising from Mr Smith's decisions not to fast-track the Claimant for promotion in 2015 and 2016. It is therefore logical to start with the grounds for appeal relating to the discrimination findings and, in particular, with the approach to the burden of proof.

C

D

48. The ET appropriately approached the burden of proof in two stages. As explained in **Ayodele** under section 136 of the **EqA**, the task at the first stage required the ET to identify whether (having considered all the evidence) there were facts from which it could be inferred that there was a *prima facie* case that the reason for the Respondent's action was discriminatory. As for what the ET majority took into account in this case, it is apparent that this went somewhat further than the more limited basis on which the Claimant's case had actually been put (see paragraph 59 of the ET's Judgment). The majority's explanation as to what it considered relevant in this regard is set out at paragraph 74.

E

F

G

49. One of the factors that the ET majority apparently considered relevant was what it described as the lack of contemporaneous documentation evidencing Mr Smith's decision not to fast-track the Claimant. The Respondent says that that is simply perverse: there was a wealth of contemporaneous documentation to which the ET majority itself referred. We do not, however,

H

consider this objection, of itself, is particularly compelling: the sentence relied on by the Respondent can be seen as referring as to the lack of any contemporaneous record of Mr Smith's decision making in this regard; albeit that there might have been contemporaneous documentation that he said he had relied on, the ET majority may simply have been referring to the absence of documentation as to his own decision.

50. Certainly, the ET majority did have regard to aspects of the contemporaneous documentation. In particular, it is apparent that it relied on the colour coded succession plans. As the Respondent observes however, the ET by a different majority - the Employment Judge and Mr Stewart - had already determined that these were not discriminatory. For the Claimant it is said that the ET majority was making a somewhat different point relating to the concern that the majority (the Lay Members) had regarding the differences between the succession plan and the Claimant's appraisals. We, however, consider that this aspect of the reasoning is, indeed, problematic. The ET majority refers to the succession plan as a relevant factor in shifting the burden of proof when that appears to be inconsistent with Mr Stewart's earlier finding (along with the Employment Judge) in relation to that document (see paragraphs 71 and 72); if there is an explanation for Mr Stewart's apparently contradictory conclusions in respect of this document, we are unable to discern what it is from the reasoning at paragraph 74.

51. It is, however, apparent that the ET majority also relied on the Claimant's appraisals, specifically that she had been graded 4 in the two relevant appraisals. In this regard, the Respondent complains that the ET majority failed to have regard to *all* the evidence, as it was required to do at that stage, which included the observations regarding her people and communication skills (and not just as made by Mr Wallace but also by the earlier Store Manager in the two previous appraisals) and also the other material available to Mr Smith, such

as the feedback he had received from Mr Wallace and the Claimant's colleagues at the store. For the Claimant it is said that it is apparent that the ET majority had regard to the fact that Mr Smith only looked at the Claimant's appraisal grades (that being consistent with his evidence in cross-examination) and so was, itself, entitled not to look further into the content of the appraisals.

52. We have been taken to the notes of Mr Smith's evidence in cross-examination and can see that might be a way of interpreting his answers, but if that is what the ET majority were intending to find (and we allow that is a possible reading of paragraph 74), that still does not engage with his evidence that he had regard to wider information, consistent with the more detailed material available from the appraisals, specifically from his store visits and the feedback from the Manager and others at the Newport store. And as the Employment Judge recognised in his minority reasoning (see paragraph 76), the ET's findings of fact in relation to the Claimant's appraisals went far wider than simply the grades given and provided support for what Mr Smith said was the feedback he had received about the Claimant about the others. On its face, the reasoning of the ET majority at paragraph 74 does not explain how this material could have supported the conclusion that the burden of proof had shifted. It may be that the explanation required further unpacking or it may be that this points to the ET majority having reached a perverse conclusion; either way, we consider that this apparent failure to have regard to the entirety of the factual matrix undermines the ET majority's decision.

53. The majority also apparently accepted what it considered to be Mr Harrison's evidence of automatic progression after training. On the Respondent's case, however, that was only a necessary not a sufficient condition; the problem with the Claimant not being the absence of training, but with her people skills. More particularly, the Respondent contends that the

A conclusion of the majority was founded upon a mischaracterisation of Mr Harrison's evidence which was, as the Employment Judge had recorded, and did not support a finding that there was automatic progression. The reference to being automatically promoted after having undertaken training in fact came from the Claimant's witness statement but had undergone revision in her evidence before the ET. The Claimant disagrees, contending that this represented a permissible finding on the evidence but we are not persuaded, in large part because it is not entirely clear to us precisely what the ET majority had in mind when saying it accepted Mr Harrison's evidence; the 'standard practice' does not mean that the Claimant was bound to have been promoted. We consider, therefore, that a question arises as to what the ET majority was actually finding and, if that was a finding of automatic progression (as the Claimant was originally saying), what was the evidential basis for that?

54. The final explanation for the ET majority's conclusion on the first stage of the burden of proof is stated to be that Mr Smith had concerns about the Claimant's pregnancy and maternity leave. If this was a finding as to something that was said by Mr Smith, we would expect to see a clear evidential trail but there is none. For the Claimant, however, it is said that the ET majority had been entitled to draw an inference in this regard from their earlier findings, in particular as regards the reference to the Claimant being on maternity leave in the succession plan. Again we are not persuaded: given the significance of such a finding, we would expect a clear evidential basis to be apparent, but there is none and we do not see how it is supported by the ET majority's earlier findings.

55. Having been unable to be satisfied as to the basis of the ET majority's conclusion at this stage when considering each of the reasons identified, we have stood back to contemplate the reasoning provided more generally but remain unable to see that it demonstrates that the

majority correctly approached its task in this respect. In the circumstances, we consider the ET majority's conclusion on the first stage of the burden of proof is unsafe and we cannot uphold the decision on this basis.

56. Should we be wrong about this, we have further considered the approach taken in respect of the second stage. Here, the ET's task was to identify whether the Respondent had established a non-discriminatory explanation for the treatment in issue. The Respondent's case had been that the Claimant had not been fast-tracked because of Mr Smith's concerns regarding her people skills. The ET majority rejected that explanation for the same reasons as those relied on to shift the burden of proof at stage 1 (see paragraph 80). The Respondent objects, however, that that failed to engage with the various facts that it had relied on. For the Claimant, on the other hand, it was said that, having found that the burden had shifted to the Respondent, the ET majority was entitled to also reject Mr Smith's explanation for why he failed to fast-track the Claimant, doing so for the reasons already given and the further permissible rejection of his explanation for the mistake in the grievance process: the ET majority had the benefit of seeing Mr Smith answer questions on this point his various different explanations; in the circumstances, it had been entitled to reject his evidence.

57. We remind ourselves that the findings of the ET must be given appropriate respect. It has the benefit of hearing the evidence; we do not. That said, in this case the reasons given for the ET majority's decision in this regard is just inadequate to its task. The Respondent had put forward detailed evidence to explain Mr Smith's approach and decision. It was open to the ET majority to reject that account, but it needed to engage with it and its apparent failure to do so - or to explain how it did so - amounts to an error of law and again renders the decision unsafe.

58. Given that the ET majority's decision on constructive unfair dismissal was dependent upon its earlier findings on discrimination, that would be sufficient to dispose of the appeal: the ultimate conclusion is thus undermined. That said, it is right that we go on to consider the Claimant's case on constructive unfair dismissal and the ET majority's decision in this respect. First, in the alternative, in case we are wrong in our findings in the discrimination complaints and, second, because the points raised in this respect might provide a complete answer to the appeal, rather than requiring a remission back.

59. The first point relates to the ET's finding as to the reasons for the Claimant's resignation. The Claimant says that, once the date of Mr Grimes' assessment was corrected (the cross-appeal), it was apparent the ET majority's finding could stand. The Respondent observes, however, that the Claimant's case had been put on the basis that Mr Grimes had actually been appointed to the Deputy Manager role, not simply that he had got further in the recruitment process to her. Even accepting the point raised by the cross-appeal in terms of the correct dates for Mr Grimes' assessment, it was simply wrong for the ET majority to find the final straw had been his promotion, given that the ET had unanimously found he had only been promoted on 22 July, i.e. *after* the Claimant's resignation. The majority's conclusion could only be saved if it was either read as a finding that a later date for Mr Grimes' promotion was as a sham (how the Claimant seemed to be putting her case in her witness statement) or, if it was read as finding that it was sufficient that Mr Grimes had told the Claimant that he had been promoted. It could not, however, be the former, given that the ET did not find that the process was a sham, and could not be the latter, as that was not how the Claimant's case was put.

60. We consider the position in this regard to be somewhat more nuanced than either party suggests. While the Claimant's case was put on the basis of Mr Grimes' actual promotion, it

was also explained that she had learned of this from her conversation with him, just before her resignation, and that this was the reason for that resignation. We can see that learning from Mr Grimes that he had been promoted - even though that was not strictly the correct description of the stage that he had reached in the appointment process at that point in time - might have been the final straw for the Claimant and thus that the ET majority might have been entitled to so find. The issue was whether this was really the way in which the Claimant's case was being put and that was a question that needed to be addressed, so as to make sure that the ET was properly determining the case before it. In the circumstances, therefore, we do not find this to be a knockout point for either party, although it was a point that deserved further explanation in the ET's reasoning.

61. Finally, we turn to the point on affirmation by delay. This, we think, gives rise to a further difficulty in the ET majority's reasoning. The Claimant resigned on 30 March 2016. She had known that she had not been fast-tracked or even considered as suitable for promotion both in March 2015 and January 2016. To the extent that the ET majority had been entitled to find that these were discriminatory decisions, any action on the part of the Respondent had been completed by those dates and the Claimant had a choice whether to accept the apparent breaches of the implied term or not. The ET majority focussed only on the affirmation and delay issue in relation to what it considered to be the last straw on 12 March 2016; it failed to consider whether the earlier acts of discrimination or breaches of contract had been affirmed, but, as **Vairea** makes clear, if affirmed, a breach cannot subsequently be revived.

62. The Claimant accepts that the ET majority failed to deal with this point head on, but suggests it effectively treated this as a continuing breach - so it did not matter that the earlier matters had taken place some months before - and thus the majority could simply have regard to

A the final straw and the question of delay. When we asked Mr McDevitt to explain to us how there could have been a continuing act in this case however, he was unable to do so, accepting that the most that could be said was that there was a continuing effect. In the alternative, the Claimant says that the final straw could be seen as a fresh act. That, however, is not what the ET majority found; its finding on the last straw was dependent upon its findings of earlier acts of discrimination as it saw them. In the further alternative, the Claimant says she could have relied on the fact that she had been on maternity leave and thus that explained her delay. Again however, that is not what the majority found, and we are not convinced that was how her case was put below. Ultimately, we conclude that the ET majority simply failed to deal with the affirmation point or, if it did, its conclusion in this respect would seem to be perverse.

Disposal

63. Having therefore allowed the appeal in this matter, we turn to the question of disposal. This was a difficult Decision to understand because of the fluctuating majorities, the various differences in the findings and the way in which the reasoning was expressed. In these circumstances, we consider there would inevitably be a danger in us seeking to reach any final conclusion ourselves on the basis of the findings as expressed; we consider, therefore, that the case must be remitted to the ET to carry out the requisite assessment.

64. The parties have discussed between themselves the possible issues arising on the disposal of this matter and have adopted a mature approach in canvassing the various outcomes. Having heard from both representatives, we agree that the appropriate course is for this matter to be remitted to the same ET to consider the questions identified at paragraph 77 of the Respondent's skeleton argument, but, if that is not practicable (and we are aware that there may

be particular difficulties in this regard), then it will be for the Regional Employment Judge to assign this case to a freshly constituted ET and it will have to start again.