Appeal No. UKEAT/0107/18/DA
UKEAT/0155/18/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 March 2019

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR S DALY APPELLANT

THE NEWCASTLE UPON TYNE HOSPITALS
NHS FOUNDATION TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

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<u>**APPEARANCES**</u>

For the Appellant	MR MATHEW PURCHASE (of Counsel) Appearing via Advocate
For the Respondent	MR ANDREW BLAKE (of Counsel) Instructed by: Samuel Phillips Law Firm 18-24 Grey Street Newcastle Upon Tyne NE1 6AD

SUMMARY

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

PRACTICE AND PROCEDURE – Costs

The Claimant had pursued some 27 allegations of disability discrimination before the Employment Tribunal ("ET"). After a fully contested hearing over five days, the ET had dismissed the Claimant's claims. In providing its reasons, the ET set out its findings on each matter separately, under a summary of the allegation itself, and referred back to those findings - by paragraph number - when setting out its conclusions.

Subsequently, the ET made an order for costs against the Claimant.

The Claimant appealed both decisions. On the ET's Judgment on Liability, he complained that its reasoning was inadequate: the ET had failed to make findings on some allegations; where it had made findings, it had failed to explain why it had formed the view that it had; it had failed to explain its position on critical documentary evidence; and it had failed to explain why it had reached the position it had when setting out its conclusions. The Claimant also raised a procedural issue regarding late disclosure by the Respondent. On the Costs Judgment, the Claimant contended that the ET had failed to demonstrate that it had considered its exercise of discretion – an essential second stage of the decision–making process.

Held: allowing the liability appeal in part and allowing the costs appeal.

In most respects, taking the ET's reasoning as a whole, the ET's findings were apparent and it was clear to the reader (particularly the parties, who did not come to the Judgment as strangers to the case) why the ET had preferred the evidence of the Respondent to that of the Claimant and why it had reached the view it had. As for the documentary evidence, it was unclear whether the points made on appeal had been raised below or what the oral evidence had been; in the circumstances, the Claimant could not make good his challenge to the adequacy of the

reasons on this basis. The Claimant's appeal would, however, be allowed in relation to allegations X and Y – relating to his complaint that false reports had been made against him and that statements and evidence to support those reports were not provided to him; it was not possible to see that the ET had made findings on these points and, to that limited extent, the liability appeal would be allowed. The additional objection made, in respect of what the Claimant contended was a procedural irregularity, did not, however, establish any unfairness: the new material had added nothing of substance to what was already before the ET.

As for the costs appeal, there were three stages to the ET's consideration of costs application: (i) to determine whether its jurisdiction to make a costs award was engaged; (ii) if so, to then consider whether it should make costs award in that case (the use of the word "may" made clear this was a matter of discretion); (iii) to determine the amount of any such award. In the present case, there was nothing to suggest that the ET had understood it had a discretion in making an award of costs, the reasoning moved straight from (i) to (iii). That was an error of law and the Claimant's appeal would be allowed.

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HER HONOUR JUDGE EADY QC

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Introduction

1. These appeals raise issues as to the adequacy of the ET's reasons and as to the correct approach when determining a costs application. In giving this Judgment, I refer to the parties as the Claimant and Respondent, as below.

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2. This is the Full Hearing of the Claimant's appeal against two Judgments of the Employment Tribunal ("the ET"), sitting at North Shields. The first (UKEAT/0107/18) is an appeal against the ET's Judgment on Liability, promulgated on 30 May 2017, after a Full

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Merits Hearing from 27-31 March 2017, with a further day in chambers on 12 May 2017, ("the Liability Judgment"). By that Judgment, the ET dismissed the Claimant's claims of unlawful disability discrimination and public interest disclosure detriment. The second appeal

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(UKEAT/0155/18) is from the Judgment promulgated on 13 October 2017, by which the ET allowed the Respondent's application for costs in the sum of £3,000, ("the Cost Judgment").

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3. Before the ET, the Claimant was represented by a worker from the Gateshead Citizens Advice Bureau ("the CAB"). The Respondent was represented by a Solicitor. On this appeal, both parties are represented by counsel, Mr Purchase appearing *pro bono* through *Advocate*.

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4. Upon initial consideration on the papers, HHJ Barklem was unable to see that the appeal against the Liability Judgment disclosed any reasonable basis to proceed. After a Hearing pursuant to Rule 3(10) **EAT Rules 1993** (as amended) before Slade J (at which Mr Purchase

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first appeared for the Claimant then acting under the Employment Law Advice and Assistance

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Scheme – "ELAAS"), the Claimant's appeal was permitted to proceed on amended grounds, which can be summarised as follows:

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(1) Given that this was a complex case, in which the ET was required to determine some 27 distinct core allegations and where there was little common ground, the ET failed to provide adequate reasons for the decisions it reached.

(2) The ET erred in law and its determination as to whether the relevant conduct had the prescribed effect, so as to amount to harassment for the purposes of section 26 **Equality Act 2010** ("the EqA").

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(3) Further, and in the alternative, the hearing was rendered procedurally unfair by the Respondent's disclosure - after close of business on the penultimate day - of relevant evidence that bore on the credibility of its core witness, Ms Kerridge.

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5. As Mr Purchase (acting for the Claimant) has acknowledged, the approach adopted to section 26 **EqA** by the Court of Appeal in **Pemberton v Inwood** [2018] ICR 1291 (see, in particular, the Judgment of Underhill LJ at paragraph 88) presents a material difficulty for the second of the amended grounds. In the circumstances, that is not a point that he has sought to develop at this stage, albeit reserving his right to argue ground 2 on any further appeal.

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6. As for the second appeal, after consideration on the paper sift, by HHJ Richardson, that was permitted to proceed to a Full Hearing on the question whether the ET erred in law by moving straight from a finding that parts of the claim had no reasonable prospect of success, to the conclusion that costs should be awarded, without considering whether it should exercise its discretion to make a costs award in this case.

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7. For its part, the Respondent resists both appeals, relying on the reasoning provided by the ET.

The Factual Background and the ET's Decisions and Reasoning

8. The Claimant was employed by the Respondent as a Health Care Assistant. He started on 16 March 2015, initially undertaking a two-week placement at the Respondent's Healthcare Academy and then moving to work on Ward 27 of the Respondent's Freeman Hospital where he worked a total of 30 shifts before going on sick leave on 14 May 2015.

9. The Claimant has a congenital deformity of his right hand, which the Respondent accepted amounted to a disability for the purposes of the **EqA**. He had also suffered from stress and anxiety although he did not rely on those matters for the purposes of his **EqA** claims before the ET. It was the Claimant's case that there was a culture of disability discrimination prevalent on Ward 27 and he brought claims in the ET under section 15 'Discrimination arising from disability' and section 26 'Harassment related to disability' of the **EqA**. He also argued that his grievance had amounted to a protected disclosure and that he had suffered a detriment in consequence.

10. Relevant to his claims before the ET the Claimant had kept a diary of events and he relied heavily on his diary entries in pursuing his claims. Specifically, the Claimant raised some 27 separate factual allegations that the ET was required to determine, albeit he accepted that not all the matters he had cited were related to his disability.

11. The ET noted that the Claimant had previously worked as a Mental Health Nurse with another NHS Trust and had successfully pursued a disability discrimination case against his

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former employer and had brought other disability discrimination claims in the past. As he explained to the ET, if the Claimant perceived something to amount to an injustice he found it difficult to let things go.

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12. When the Claimant started to work on Ward 27 he believed that all the staff had been told that he had previously been a Registered Nurse but that he could no longer pursue that career. He felt that they had, in consequence, formed the view that he was weak because of his disability; more specifically, the Claimant felt he was treated in a bullying and humiliating way because the other staff knew he was starting a new career for a reason connected with his disability. The ET however, rejected the Claimant's assertion that the two ward sisters, Sister Kerridge and Sister Cowey had told the other members of staff that he had previously been a Registered Nurse; it found this was something that only became known to those working on the ward as and when the Claimant himself mentioned it.

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13. When considering the Claimant's case, the ET had the benefit of hearing from some 13 witnesses and had before it a trial bundle of over 1,000 pages (although it is unclear how many of those documents were referred to during the hearing). In addressing the issues raised in the Claimant's claims, the ET structured its Judgment by first setting out its findings under each separate allegation - each of the 27 allegations constituting a claim. Not all the matters thus addressed in the ET's Judgment are pursued in the challenges raised in these appeals, although there is a general complaint of inadequacy of reasons.

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14. Prior to starting on Ward 27, the Claimant had met with Sister Kerridge and explained that - due to his disability - he might take a little longer to complete his tasks but he believed he would be able to perform everything required of him on the ward. An Occupational Health

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Assessment in relation to the Claimant had been carried out in January 2015 and this had been sent to Sister Kerridge in February as an attachment to an email, although she said she had not opened this until September 2015. In any event, in his ET claim the Claimant complained that he was unfairly reprimanded or humiliated on a number of occasions due to his disability.

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15. At this stage it is unnecessary for me to set out each of the 27 allegations but the following matters, together with the ET's findings in respect of each, have been referred to on the first appeal and it is helpful to set them out as the ET did, so that the ET's approach can be seen.

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> **"Findings of fact in relation to the matters referred to in the issues**
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> ***a. On the 16 March 2015, the Claimant's first day of employment with the Respondent, a Healthcare Assistant Victoria Carroll commented to him that she was aware that he had previously been a registered nurse which indicated to the Claimant there had been a breach of confidentiality by the Respondent.***
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> **3.6. Ms Carroll did show the claimant around on his first day of employment. He told her that he had previously worked in mental health, but Ms Carroll was unaware that he had been a nurse. He came across to her as a nice friendly gentleman. There had been no breach of confidentiality, as alleged by the claimant.**
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> **….**
>
> ***c. On 24 March 2015 because of difficulty using the hand scanner as a result of his disability Ward Manager Rose Kerridge got him to try different arm and hand positions to try to use the scanner. This caused him extreme discomfort and humiliation and embarrassment as it was done in a public area.***
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> **3.8. Staff sign in on the ward using a biometric hand scanner with their right hand. The claimant was unable to use the scanner using his right hand. Sister Kerridge, after contacting the hospital's technical department and on their suggestion, asked the claimant to try the scanner using his left hand turned upside down. The claimant has no deformity of that hand, but it was nonetheless uncomfortable and difficult for him. This method did not work and as a result, the claimant was asked to sign in by logging on to a computer. The claimant did not complain to Sister Kerridge at the time that he had been humiliated or embarrassed and there is no other evidence to suggest that he had been. We are satisfied that Sister Kerridge was simply trying to identify a suitable reasonable adjustment for the claimant. Although she tried to assist the claimant, putting his left hand on the scanner, she did not do this in a demeaning or humiliating way.**
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> **…..**
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> ***h. On 14 April 2015 when the Claimant asked Healthcare Assistant Chris Dickson on two occasions if he could shadow her for a few tasks she rejected his requests in a dismissive manner stating condescendingly on the first occasion "you don't need to shadow me man, you're a nurse".***
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> **3.13 Ms Dickson has been employed by the Trust for 31 years and has been a healthcare assistant on the Ward 27 for 6 years. She is regarded by the others as a mother figure. The claimant told Ms Dickson that he had previously been a nurse. Ms Dickson does not recall the incident. She did tell us that the claimant had been unpleasant to her, leaning up to her and**

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telling her that if he needed her help, he would ask for it. Ms Dickson had taken fright over this.

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o. On 24 April 2015 whilst the Claimant was protocolled to a different and unfamiliar ward and explained his manual dexterity problems Helen (a staff nurse) snapped at him in an angry manner saying "go and get Brian and he can show you how to do it".

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3.20 The claimant did not elaborate on this in his evidence and the tribunal heard no other evidence about it. The claimant is not suggesting that being protocolled to another ward had anything to do with his disability. He said he felt it was a punishment for what happened on the previous day. All staff work on another ward on a rotational basis. Given our findings in relation to the claimant's allegations concerning staff members of Ward 27, we approach with caution the suggestion that he was similarly treated on another ward.

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x. Later that day at a meeting, Sister Cowey admitted that the Claimant had been under surveillance as she had had reports from Hayley Cusack and other Healthcare Assistants that he was avoiding duties. These reports were false.

3.29 At the meeting on 14 May 2015, Sister Cowey told the claimant that complaints had been made about him that day by the other Health Care Assistants and that these needed to be investigated. The complaints were basically that the claimant was refusing to undertake some healthcare assistant duties, that he was intimidating, that he had poor communication skills, that he was unapproachable and sometimes difficult to contact. These complaints were spontaneous and did not arise from any surveillance of the claimant."

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16. On 29 September 2015, the Claimant lodged a formal grievance complaining about what he said was the treatment he had faced during his employment with the Respondent. He raised two further allegations relating to that grievance which were set out by the ET - along with its findings of fact on each - as follows:

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"3.29….

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y. On 29 September 2015, the Claimant made a formal grievance which amounted to a protected disclosure regarding the manner in which he had been treated since the start of his employment. During the investigation process the Claimant faced false allegations made against him such as hiding in the toilets, deliberately avoiding duties, being intimidating towards colleagues and harming a patient's skin when shaving him. The Respondent refused his requests for any relevant statements and evidence to support these allegations.

3.30 The claimant raised a grievance on 29 September 2015. He complained of treatment relating to his physical impairment and a mental impairment (anxiety and stress). The grievance and the claims before the tribunal are based on the same allegations. The claimant argues that the written grievance (without analysing the grievance further) is a disclosure of information which in the claimant's reasonable belief was made in the public interest and which tends to show that the respondent had failed, was failing, or was likely to fail to comply with a legal obligation to which it was subject and or that the health or safety of any individual is being, or is likely to be endangered. The claimant complains that he suffered a detriment on the ground that he made the disclosure, namely the matters set out under the next two headings.

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z. The investigation was not carried out reasonably. In particular by not reviewing relevant documents including the original Occupational Health referral and not investigating my complaints about the discriminatory behaviour during the redeployment process.

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3.31 The grievance was investigated by Matron Fiona Hindhaugh. She was concerned that Sister Kerridge had failed to open an enclosure to an Occupational Health report sent to her electronically when the claimant first started to work on the ward. This informed the respondent that the claimant was likely to be regarded as a disabled person and recommended that risk assessments should be carried out to consider reasonable adjustments. Ms Hindhaugh considered the failure to open the report had been unintentional and recommended that in future copies of all such reports should be sent to HR as well as the Ward Sister. On 18 December 2015 Sister Kerridge wrote a formal apology to the claimant. Matron Hindhaugh carried out an investigation. She did not uphold the grievance. The investigation was thorough. The claimant appealed the decision. Matron Kinnersley undertook the appeal. He agreed with Matron Hindhaugh's conclusions."

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17. Thereafter, as the Claimant remained on long-term sick leave, the Respondent took advice from Occupational Health and placed him on its redeployment register for a period of 14 weeks (an increase on the normal eight-week period, that extension being seen as a reasonable adjustment). The Claimant further complained about this process, with his allegation in this regard - and the ET's finding on that allegation - being recorded as follows:

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"*aa. During the redeployment period from September 2015 to January 2016 the Respondent's officers involved in the process consistently showed a negative attitude to employing the Claimant in alternative roles. In particular, the Claimant identified some potential roles but was told he could not apply for them.*

3.32 The claimant remained on the sick after 14 May 2015 with stress and anxiety. Side by side with the grievance investigation, the respondent took further advice from Occupational Health and placed the claimant on its redeployment register for a period of 14 weeks, extending the normal period of 8 weeks as an adjustment. The claimant turned down the opportunity to apply for 6 roles. In addition, he turned down the offer of employment in five other positions. He accepted a role as a radiography assistant at the Freeman Hospital and now works in that capacity. We are not satisfied that the claimant was prevented from applying for roles.

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3.33 The claimant felt that on two occasions when he investigated roles offered to him, the staff involved had not shown a positive attitude to disability. The claimant, however, was not specific about this and did not make a supplementary grievance."

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18. The ET noted that the Claimant had made a total of 27 allegations relating to 13 different members of staff. In respect of 15 of the incidents complained of, the ET did not fully accept the Claimant's version of events. It concluded that there had been no unfavourable or unwanted treatment in those respects. As for the incidents which the ET accepted had occurred, it was satisfied that the conduct in question could not reasonably have had the necessary effect such as to amount to harassment for the purposes of section 26 **EqA**, nor were they because of the Claimant's disability. Specifically, the ET set out its conclusions as follows:

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"5.6 The assertion by the claimant that there had been a breach of confidentiality by Sisters Kerridge and Cowey by telling the other members of the ward that he had previously been a registered nurse is untrue. It only become known to those ward staff when the claimant told them. The behaviour complained of, therefore, must be judged in that light.

5.7. We were asked to focus on specific matters and we have done so. The case was pleaded on the basis that the unwanted treatment was afforded not only because of the claimant's physical impairment, but also a mental impairment, namely anxiety caused by depression. The claimant abandoned the case based upon his mental impairment. The incidents listed as d,e,g,h,j,k,l,m,n,p,q,t,w and x cannot be said to be unfavourable treatment because of the inability of the claimant to carry out tasks requiring manual dexterity as quickly or accurately as staff without that disability. Nor can they be characterised as unwanted conduct that was connected to the congenital deformity of the claimant's right hand.

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5.8. It will be apparent from our findings of fact that we do not accept entirely the claimant's version of events in respect of incidents, a,b,d,f,g,h,i,k,m,n,o,q,s,u and w. We are not satisfied in these instances that there was unfavourable treatment or unwanted conduct related to the claimant's disability.

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5.9. Item c relates to the hand scanner. We do not consider that Sister Kerridge's actions amounted to unfavourable treatment. She was trying in good faith to find a suitable adjustment for the claimant. To the extent that the claimant considered her conduct to have violated his dignity or to have created the environment proscribed by section 26 Equality Act 2010, we do not consider it was reasonable for the conduct to have had that effect."

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19. On that basis the ET rejected the Claimant's claims of disability discrimination and harassment and a protected disclosure of detriment.

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20. Before I leave the Liability Judgment and the appeal in that respect, it is apparent that towards the end of the hearing - at 17.33 on 30 March 2017 - those acting for the Respondent made late disclosure of an email chain and attachments. This demonstrated that the January 2015 Occupational Health Report relating to the Claimant had again been forwarded to Sister Kerridge on 14 May 2015. The Claimant contends that this late disclosure undermined the credibility of Sister Kerridge's evidence, as to when she had actually read the Occupational Health Report, and may have impacted upon the view formed of her evidence on more specific allegations, including whether she had discussed the Claimant's history with the other staff on Ward 27. This said, although the additional documentation was handed into the ET, no application was made to recall Sister Kerridge or for adjournment to allow further investigation of this possibility (the evidence had continued into 31 March, but Sister Kerridge had given her evidence at an earlier stage and was not herself present on the last day of the hearing).

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21. After receiving the ET's Liability Judgment, by letter of 16 June 2017, the Respondent made an application for costs, on the basis that many aspects of the Claimant's case had had no reasonable prospect of success. In addition, although it had asked the Claimant to reflect on his claim, in order to limit the number of witnesses the Respondent would be required to call, he had refused to do so, instead requiring all the Respondent's witnesses to attend to give evidence.

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22. The Claimant resisted the Respondent's application contending that the entirety of his claim had been legitimate and substantiated by apologies he had received in the internal processes. He noted that there had been no strike-out or deposit Order and he contended that he had taken a reasonable view on settlement, given he had been advised his claim was worth between £10,000-£12,000. Moreover, the Claimant argued that the Respondent had acted unreasonably in accessing his counselling records and then withholding other documents. In addition, he contended that the Respondent's solicitor had harassed him during the subsequent discussions and had, more generally, acted unreasonably.

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23. The parties agreed that the ET could determine the costs application on the papers. In doing so, the ET noted that although the original claim had been framed on the basis that the Claimant had suffered from both physical and mental impairments, on the first day of the hearing he had limited his disability discrimination case to a claim based on his physical impairment. Not all the incidents relied on had, however, been relevant to a claim of disability discrimination based on a physical impairment. Moreover, the Claimant had originally pursued a claim of disability discrimination due to a failure to make reasonable adjustments but had abandoned that case on the fifth day of the hearing. As a result, the Respondent had been put to unnecessary preparation to respond to these aspects of the claims and the length of the hearing

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had been prolonged. The Claimant had thus acted unreasonably in his conduct of the claims. More than that, the ET was satisfied that neither the protected disclosure detriment claim and the claim in relation to the redeployment exercise had had any reasonable prospect of success. Given what was left of the Claimant's complaints as at the end of the hearing, this had been a modest claim restricted to an injury to feelings award, albeit the ET did not feel it could say the Claimant's decision to turn down the Respondent's settlement offer had been unreasonable.

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24. Assessing the additional time spent by the Respondent and its witnesses on those aspects of the Claimant's claim that it had essentially fallen away during the hearing and/or had no reasonable prospect of success, the ET considered the costs thus involved would amount to something over £2,860 plus VAT. Having regard to the Claimant's limited means, the ET concluded that an award of costs should be made in the sum of £3,000.

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<u>The Parties Submissions: The Liability Appeal</u>

The Claimant's case

(1) Ground 1

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25. The Claimant observes that the ET's Judgment was structured by setting out under each allegation some lines relating to it. He contends the ET then often simply accepted the evidence of the Respondent without giving reasons for doing so and, in some cases, it was not possible to discern the ET's conclusions on the competing views of the facts. The ET neither listed the witnesses who had given evidence, nor clearly set out the competing accounts of each incident nor explained why it preferred the account given by the Respondent. Although the Claimant had relied on his diary (in which he kept contemporaneous records supporting his account of events), the ET did not refer to this in its reasoning on the specific allegations, let alone explain how it had treated it. Four categories of deficiencies could be discerned: (1)

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failing to make findings; (2) failing to explain why it had formed the view it had where there was a conflict of evidence; (3) failing to explain its position on critical documentary evidence on factual disputes; (4) failure to explain why it had reached the position it had in setting out its conclusions.

26. As for the particular allegations, the ET had failed to make a finding as to whether the facts set out in allegations H, O, X and Y were established. As for the allegation relating to the hand scanner (allegation C) the Respondent's own report in to the Claimant's grievance had recorded that Sister Kerridge "*acknowledged it was a distressing experience*" and had said "*it was awful*" and in oral evidence she had accepted that the experience might have been uncomfortable for the Claimant. Given that evidence the ET's reasoning was inadequate to explain why it had found there was no other evidence to suggest the Claimant had been humiliated or embarrassed or why it had then concluded that it would not have been reasonable for the conduct in question to have had the relevant effect for section 26 **EqA** purposes. On the question of the investigation into the Claimant's grievance, the ET had held this was thorough but failed to set out the factual basis on which it had reached that conclusion and failed to address the particular allegations made as to the false statements and the failure to review relevant documents. As for the redeployment process, the ET set out a brief summary of its findings but failed to determine whether or not the Respondent's officers involved in that process had showed a negative attitude to employing the Claimant in alternative roles, in particular by telling him he could not apply for the roles he had identified.

27. The Claimant's case was that these incidents were related to the understanding of others as to his previous career as a nurse and therefore to his disability as being the reason why he was no longer a nurse. The ET had found that the ward sisters did not tell others of this but

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(2) Ground 3

28. This ground related to the late disclosure of the email chain showing that the January Occupational Health Report was resent to Sister Kerridge on 14 May 2015. The Claimant contends that, had this been disclosed in accordance with the ET's directions, it would have been used to challenge Sister Kerridge's credibility and that was potentially relevant to a number of the ET's findings. Although accepting that the Claimant had not (through his then representative) applied to recall Sister Kerridge, or made express reference to the unfairness of this late disclosure before the ET, the Claimant argued that an appeal to the EAT can arise from the ET proceedings, not just the Judgment reached (see section 21 of the **Employment Tribunals Act 1996**), so the hearing might be rendered unfair by the conduct of one of the parties – here, by the Respondent's late disclosure.

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The Respondent's Case

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(1) Ground 1

29. For the Respondent, it is observed that the Claimant's claims related to a limited timeframe and were - given his redeployment to another role - of limited pecuniary value. The ET Rules (see Schedule 1 of the **ET (Constitution of Rules and Procedure) Regulations 2013**) permitted the ET to take a proportionate view when providing its reasons. Moreover, in deciding whether the Claimant knew why he had lost, it was noticeable that in his original grounds for appeal he did not complain of adequacy of reasons, but largely criticised the ET's findings as perverse.

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30. Here the ET had adopted the structure it was required to do under Rule 62 of the **ET Rules**. As for the requirements laid down in the case-law, the authorities had to be seen in the light of the particular facts that the tribunal of first instance was dealing with. No error of law arose from the failure to list the witnesses and, as to whether the ET explained why it had preferred the evidence of the Respondent's witnesses to that of the Claimant, the ET had plainly done sufficient. As for the specific criticisms, on the question of the hand scanner Sister Kerridge's evidence was set out in her witness statement and it was unclear whether the documents now relied on had been put to her in cross-examination or even referred to before the ET. As for the Claimant's diary, again it was unclear as to how much reference had been made to this by the Claimant: it had not been referenced in his witness statement and the only entry referred to on the appeal was on the question of redeployment and the entry in question did not greatly assist. As for the question whether the documentary evidence demonstrated that the Claimant's past career history might have been overheard, if not revealed by Sister Kerridge, again it was unclear as to how this was put below or whether the ET had been referred to the documents in question. It could not be an error of law for the ET not to have carried out a search itself.

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31. Turning to the specific criticisms made as to whether the ET had failed to make findings on particular allegations, it was the Respondent's case that was apparent from the ET's reasons what it had found and that it had rejected the Claimant's case. In a case where there were numerous allegations but the evidence in respect of each was very brief, the requirement on the ET had to be seen in that specific context. Moreover, it was notable that in respect of a number of the allegations, the ET had been clear that the matters relied on could not be said to amount to unfavourable treatment or as related to the Claimant's disability.

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(2) Ground 3

32. On the additional documentation it was accepted that, on 14 May, Sister Kerridge had been sent the Occupational Health Report for a second time. That, however, was a point that could have been inferred from the documentation the Claimant had already seen within the ET bundle, specifically page 213 where a meeting note of 14 May 2015 had referred to the Occupational Report and to the content of that report. Sister Kerridge's statement was ambiguous as to whether she was saying that she had not seen the Occupational Report until September or that she simply had not opened the attachment to the February email until that time. In any event, it had been open to the Claimant's representative to put the issue to her on the basis of the documents already before the ET.

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The Costs Appeal

The Claimant's Case

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33. As Rule 76(1) of the **ET Rules** and the case-law made clear, there were three stages to the award of a Costs Order: (1) determining whether the conditions for making the Order were met; (2) if so, determining whether or not to exercise the discretion to make an Order; and (3) only if satisfied in respect of the first two conditions, to decide the amount of the award.

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34. Here the ET had failed to address the second of those questions and that constituted an error of law.

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The Respondent's Case

35. The Respondent did not disagree with the Claimant's analysis as to the correct legal approach to a cost award under Rule 76 but contends the ET did not fall into the error identified. Rather, it acknowledged it had to exercise discretion not least by its reference to the

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Judgment of the Court of Appeal in **Barnsley Metropolitan Borough Council v Yerrakalva** [2012] IRLR 78 and that could also be inferred from its recitation of the relevant factors, which it would have needed to take into account when exercising such a discretion.

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The Law

36. On the liability appeal and the question of adequacy of reasons, the starting point is Rule 62, Schedule (1) of the **ET (Constitution of Rules and Procedure) Regulations 2013** ("the ET Rules"), which relevantly provides as follows:

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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).**
> **...**
> **(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.**
> **(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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37. It is common ground that whilst not imposing a straitjacket upon the ET, a failure to comply with the requirements of Rule 62 can amount to an error of law, see **Vairea v Reed Business Information Ltd** UKEAT/0177/15/BA.

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38. The requirement on the ET was explained in the well-known guidance set out in **Meek v City of Birmingham District Council** [1987] IRLR 250 CA:

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> **"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; and it is highly desirable that the decision of an Industrial Tribunal should give guidance both to employers and trade unions as to the practices which should or should not be adopted."**

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39. In the case of **Kibirango v Barclays Bank PLC** UKEAT/0234/14, the EAT (Kerr J presiding), summarised the approach to be adopted in this jurisdiction as follows:

> **"63. … one should not expect a Tribunal's Reasons to be a model of legal draftmanship. The words should not be subjected to detailed legal analysis on appeal. The Appeal Tribunal must be slow to criticise the manner in which a Tribunal expresses itself, and may not itself find any facts or substitute its view of what findings of fact should have been.**

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> **64. In short, the Appeal Tribunal is confined to examining whether the decision below was lawfully made. In the present context the essential point is, as Ms Harris submitted, that Mr Kibirango is entitled to know why he has lost. Provided the Tribunal's Reasons enable him to understand that, the reasons are sufficient.**

> **65. That does not mean, however, that a Tribunal can fulfil its obligation to give adequate reasons for a finding of fact by saying it preferred the evidence of one witness over another on that issue, without saying any more than that. Henry LJ's judgment in Flannery is not authority for that proposition. He went on to say at 382C-D:**

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>> **"… This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain *why* he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword."**

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> **66. In Anya v University of Oxford [2001] ICR 847 CA, Sedley LJ said this at paragraphs 24 and 25, referring to the decision in Meek:**

>> **"… to the effect that tribunals are not required to do more than make findings of fact and answer a question of law. In the race relations field this principle does no more than beg the questions: what findings, what law? It is elsewhere, above all in *King v Great Britain-China Centre* [1992] ICR 516, that the answers lie. In *Tchoula v Netto Foodstores Ltd* (unreported) 6 March 1998 Morison J in the Employment Appeal Tribunal spelt out what this means in practice:**

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>> **"A bald statement saying that X's evidence was preferred to Y's is, we think, both implausible and unreasoned and therefore unacceptable; and it might appear to have been included simply to try and prevent any appeal. It seems to us likely that there will be a great deal of background material which is non-controversial. There is no need to recite at length in the decision the evidence which has been received. What a tribunal should do is state their findings of fact in a sensible order (often chronological), indicating in relation to any significant finding the nature of the conflicting evidence and the reason why one version has been preferred to another. It is always unacceptable for a tribunal to assert its conclusion in a decision without giving reasons."**

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> **25. To assert this is not to demand, as Mr Underhill sought to suggest it did, an infinite combing by the industrial tribunal through endless asserted facts or an over-nice appraisal of them. It is simply that it is the job of the tribunal of first instance not simply to set out the relevant evidential issues, as this industrial tribunal conscientiously and lucidly did, but to follow them through to a reasoned conclusion except to the extent that they become otiose; and if they do become otiose, the tribunal needs to say why. But the single finding of the industrial tribunal in this case on Dr Roberts's honesty as a witness, while important, does not make the other issues otiose: on the contrary, it begs all the questions they pose. …"**

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40. The requirement upon an ET will, however, always be fact and case-specific. The guidance provided in the authorities has to be seen in the relevant context of the particular

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A issues to be determined; as the Court of Appeal opined at paragraph 46, **Miriki v General Council of the Bar** [2002] ICR 505:

> **"…. Each case must be decided in the light of its own particular circumstances. It cannot be right that in every case the tribunal must make express findings on every piece of circumstantial evidence, however peripheral, merely because the applicant chooses to make it the subject of complaint."**

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41. Turning then to the costs appeal, the ET's power to make an award of cost is found at Rule 76 of the **ET rules**, which relevantly provides:

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> **(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –**
>
> > **(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or**
> >
> > **(b) any claim or response had no reasonable prospect of success.**

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42. It is common ground that there are three stages involved in the determination of a costs application. First, the ET needs to determine whether or not its jurisdiction to make a costs award is engaged - here, whether the circumstances provided by Rule 76(1) existed. If so, second, it must consider the discretion afforded to it by the use of the word "may" at the start of that rule, and determine whether or not it considers it appropriate to make an award of costs in that case. Only then would it turn to the third stage, which is to determine how much it should award. See **Abaya v Leeds Teaching Hospital NHS Trusts** UKEAT/0258/16, paragraphs 14-18; **Haydar v Pennine Acute Hospitals NHS Trust** UKEAT/0023/18, paragraphs 25 and 37; **Ayoola v St. Christophers Fellowship** UKEAT/0508/13 at paragraph 17.

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Discussion and Conclusions

43. The structure of the ET's Judgment in this case is unusual. The ET's findings of fact do not set out the history in narrative form, nor is there an overview of the evidence - no record of who gave evidence before the ET, which documents were referred to, no explanation of the

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ET's view on the credibility of the witnesses in general terms and little reference to the particular documents or testimony of individual witnesses, and whether the ET found that testimony compelling, or otherwise. The ET, instead, goes directly to each of the allegations - which were each separate complaints of disability discrimination - and it then sets out the Claimant's case, followed by the ET's finding or conclusion. The adoption of that structure does not, of itself, amount to an error of law, but setting out the ET's reasoning in this way does not absolve it from complying with the requirements under the **ET Rules** and as explained in the case-law. Critically, the parties must be able to understand why they have won or lost. Specifically, the ET was required to properly explain its findings and conclusions on each of the claims before it. In this case, each of the 27 separate allegations stood as a specific claim.

44. In carrying out its task in this case, I do not consider (contrary to the suggestion made by the Respondent in argument) that an ET would be permitted to adopt a short cut in setting out its reasons because of what might have seemed the limited monetary value of the claim. The importance of discrimination claims is often hard to quantify in monetary terms and proportionality for the purposes of Rule 62(4) is not to be assessed solely by the potential financial award that might be made. The fact that the ET was concerned with events over a short time-frame, or that the Claimant had suffered little, if any, pecuniary loss did not mean that it was in some way under a lesser obligation.

45. I also do not consider that it is determinative of the question of adequacy of reasons that the Claimant did not himself articulate his original grounds for appeal using that language. Very often, a complaint put as a perversity challenge is in fact reflective of a litigant's inability to understand why they have lost; in some cases, that would be because they have not been provided with adequate reasons. A litigant acting in person may not articulate their complaint

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using the correct legal terminology; that is why ELAAS can provide such an essential service at the oral permission stage. Thus, in the present case, the Claimant's grounds for appeal were permitted to be amended at the Rule 3(10) hearing and can be seen to have properly put his complaints in the form of an adequacy of reasons challenge.

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46. All that said, the ET was of course, entitled to expect the parties to read its Judgment not as strangers, but in the light of their own understanding of the issues and of the evidence

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given at the hearing. As such, they - and the ET itself - have an advantage over the any appellate Tribunal. I have been taken to some of the documents, undoubtedly before the ET, but I do not know which parts of those documents were relied on in the evidence, if indeed any

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reference was made to those documents at all.

47. An example of the difficulty that can arise in carrying out a critical appraisal of the

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ET's Judgment, as against the documentation before it, arises in relation to the Claimant's diary. He undoubtedly relied upon his diary entries - in particular, in formulating his claim – but his witness statement did not include page references to particular parts of the diary and, save for one entry, it has not been suggested that the ET failed to have regard to extracts from

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that document that would have had any material significance for its findings. As for the passage to which I have been referred, it remains unclear to whether any emphasis was placed on that particular extract at the ET hearing itself.

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48. As for the other criticisms made about what is said to have been the ET's failure to explain its position on critical documentary evidence, I fear the Claimant is asking the EAT to

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itself evaluate the evidence in question, without even knowing whether the pages to which I have been taken were referred to before the ET and, if so, in what context and with what

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explanation or response from any of the witnesses. The grievance report, for example, may well have referred to an acknowledgement of difficulties in relation to the hand scanner, but I do not know whether the ET was taken to those passages or, if it was, whether there was any explanation by the Respondent's witnesses dealing with that issue. There may have been other references in the documentation to employees overhearing information potentially relevant to the Claimant's argument that other staff knew of his career history but there is nothing to suggest that the ET was referred to this material (let alone that it was put to the Respondent's witnesses in cross-examination) and it was not required to itself seek out potentially relevant evidence from the documentation before it.

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49. On this question, I am left with the impression that the representations made on appeal are those which the Claimant might wish had been made below but were not. It cannot be open to me to find that the ET has inadequately explained its position on specific documents without clarity as to whether it was ever referred to the material in question.

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50. As for the more fundamental criticism that the ET failed to make the findings of fact on particular allegations, I bear in mind that I have to read the decision as a whole. In so doing - and thus reading paragraph 3.13 together with paragraph 5.8 - it is apparent to me that the ET largely rejected the Claimant's case on allegation H; even if it did not make a specific finding as to what Ms Dickson said, it put her response to the Claimant in context. Further, and in any event, the ET found that the Claimant's case in this regard could not establish disability discrimination or conduct related to his disability, see paragraph 5.7

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51. As for Allegation O, the ET made clear the limited evidence before it from both sides. It was further clear that it did not accept the Claimant's evidence as to what had happened on

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the other ward, given its findings in respect of the allegations he had made (which the ET had not accepted in respect of incidences on Ward 27). The fact that it did not accept the Claimant's case is thus made apparent from paragraphs 3.20 and 5.8 (and allowing for the fact that the ET was able to draw from its more general view of the reliability of the Claimant's evidence).

52. Turning to allegations Z and AA - which relate to the grievance and redeployment process - again, I reject the complaints made. In my Judgment the ET's findings are apparent in the reasoning provided at paragraphs 3.31, in relation to the grievance, and paragraphs 3.32 to 3.33, in relation to the redeployment process. Its findings in those aspects are adequately explained.

53. Where I consider that the Claimant has made good his complaint of inadequacy of reasons is in relation to allegations X and Y; specifically, his allegations that false reports were made against him and that he was not provided with the statements or evidence to support those reports, notwithstanding his requests.

54. The Respondent says that was not the real point of the allegations in issue, but that would seem to be contradicted by the Claimant's closing submissions before the ET and I am satisfied that this was part of the Claimant's case below.

55. Accepting that this was part of the case before the ET, if I then ask myself, what was the ET's decision (for example) on the allegation that false complaints had been made by Health Care assistants on 14 May, or whether false allegations were made during the investigation process and the Claimant's request for relevant statements and evidence refused?

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I am unable to see the answer. Reminding myself that I need to read the ET's reasoning as a whole, I note that the ET concluded that the incidents raised under allegation X could not be said to be unfavourable treatment arising from the issue of the Claimant's disability or as unwanted conduct connected to his disability. But while the ET addressed the detail of the allegations relating to the earlier period of the Claimant's time on ward 27, these later allegations concerned the Claimant's last day on the ward (14 May) and the investigation of his grievance in September, and the question whether false complaints were made at that stage raises different issues to the allegations relating to the earlier period. Those were allegations that the ET needed to grapple with, to explain what conclusion it reached and why, but I am unable to see that it did so. On these issues, therefore, I consider the appeal on this ground is made out.

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56. Otherwise, on the more general conflict of evidence point, I consider that where the ET has made findings, its view on the evidence is clear. There are times when an ET needs to set out more fully why it has accepted the testimony of one witness rather than another (**Anya** was such a case). In other instances, however, it will be apparent from the ET's findings why it found one account more compelling than another.

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57. Here, the Clamant has focussed as an illustration of his point on the ET's finding under allegation A. But the finding that Ms Carroll was unaware that the Claimant had been a registered nurse makes clear the ET's finding of fact. It rejected the Claimant's version of events that there had been a breach of confidentiality, and its recitation of Ms Carroll's account provides the context for why it preferred one side's evidence that there had been no breach of confidence to that of another. More generally, in explaining its conclusions at paragraph 5, I do not consider the ET erred by not repeating its earlier findings. The way it chose to set out its

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reasoning may require more work on the part of the reader but it is possible to understand and, even if not best practice, it is, in my judgement, adequate to the task.

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58. Turning then to Ground 3, I do not think this challenge is made out. First, because if there was any failing it was on the part of the Claimant and his then representative. The additional disclosure was made on the penultimate day and before the evidence was closed. No application was made to adjourn or recall Sister Kerridge; indeed, it seems little point was made

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about this documentation until the appeal. Again, it may be that this is a point the Claimant wishes had been taken below, but it was not I do not consider the ET can be said to have erred in law. In any event, as the Respondent has observed, the point the Claimant now wishes to

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make - relating to Sister Kerridge's credit - could have been made on the documentation already before the ET. In the note relating to her consideration of the Occupational Health referral on 14 May, there was a reference to the content of the January Occupational Health

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Report and Sister Kerridge could have been cross-examined on that. The Respondent may be criticised for its late disclosure but the issue reveals no procedural unfairness such as to disclose an error of law by the ET.

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59. Finally, I turn to the costs appeal and on this I am satisfied that the Claimant's appeal must be allowed. Apart from the reference to **<u>Barnsley Metropolitan Borough Council v Yerrakalva</u>**, there is simply no indication that the ET considered whether it should exercise its

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discretion to award costs in this case. I have considered whether the reference to **<u>Yerrakalva</u>** might be sufficient for me to infer that the ET did embark upon an exercise of its judicial discretion in this regard, but it is one thing to state the relevant approach laid down in the case

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law, it is another to apply it. I can see no evidence that the ET did so in this case; its reasoning suggests, on the contrary, that it moved straight from the first to the third stages of the exercise

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it had to undertake, failing to demonstrate any appreciation of the discretionary nature of a costs award.

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60. There is a slightly wider point that arises in relation to costs, given the conclusion I reached on the liability appeal. Although the ET's decision on costs may be seen to have been dependant on matters that are not strictly addressed by the allegations in relation to which I have allowed the liability appeal, in the broader exercise of its discretion as to whether or not it is appropriate to make a costs award, those would be potentially relevant (depending on the final view taken on remission).

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Disposal

61. For the reasons stated, I allow the first appeal, against the ET's liability Judgment, to the limited extent I have explained. I also allow the second appeal, against the ET's costs Judgment.

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62. On the question of disposal, both parties were agreed that the issues identified at allegations X and Y must now be remitted. For the Claimant it is said that that should be to a differently constituted ET. While accepting that the limited nature of his success might normally suggest remission should be to the same ET, the Claimant observes that the Employment Judge has since retired, so that may not be practical. In any event, the Claimant considers it would be appropriate for this matter to be considered by a fresh ET. The Respondent disagrees and contends that, if at all practical, this matter should go back to the same ET.

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63. I remind myself of the factors that I need to take into account on the question of remission, as set out in **Sinclair Roche & Temperley & Ors v Heard & Anor** [2004] IRLR 763. In this case, the ET made extensive findings of fact on a large number of allegations and I

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have rejected the appeal relating to all but two allegations. The basis of the remission is thus quite limited and it would be proportionate if the same ET. I bear in mind that the Employment Judge has since retired but that need not rule out remission to the same ET. In any event, should that prove to be an insurmountable difficulty, that is a matter that the Regional

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Employment Judge. Given the limited nature of the remission, I consider the appropriate course is for this matter to return to the same ET, so far as that is practical, for reconsideration specifically of issues arising in relation to allegation X - the allegation that the Claimant was

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subjected to false reports - and in relation to allegation Y – that, during the investigation process, the Claimant faced false allegations and the Respondent refused his request for relevant statements and evidence to support those allegations.

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Appeal

64. The Claimant has sought permission to appeal to the Court of Appeal, essentially on the same basis as his grounds of challenge before the EAT, but emphasising what he says is the

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potential wider impact of the conflict of evidence point. For the reasons I have already given, I am unable to see that the appeal would have any realistic prospect of success. The question of the ET's approach to evidence, and the conflict of witness evidence in discrimination cases, is a

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matter that has been addressed in numerous authorities as has been made plain in the arguments before me and I cannot see any other compelling reason for this issue to trouble the Court of Appeal in the present case. I therefore refuse the application for permission.

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