Appeal No. UKEAT/0060/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 4 July 2019

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

MR V MODHA	APPELLANT
BABCOCKS AIRPORT LIMITED	RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR V MODHA (The Appellant in Person)
For the Respondent	No appearance or representation by or on behalf of the Respondent

<u>SUMMARY</u>

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

PRACTICE AND PROCEDURE – Review

The Appellant appealed against a refusal by the Employment Tribunal ("the ET") of his request for reconsideration on two grounds. The Employment Appeal Tribunal ("the EAT") allowed his appeal. The EAT held that the ET had erred in law in not considering the Appellant's application for an extension of time for asking for a reconsideration, and in not giving adequate reasons for refusing the request for reconsideration. The EAT held that both errors of law were immaterial. EAT did not, therefore, remit the case to the ET.

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THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

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1. This is an appeal against the Decision of the Employment Tribunal sitting at Reading ("the ET") ("Decision Two"). The ET consisted of Employment Judge Gumbiti Zimuto ("the EJ").

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2. Decision Two was sent to the parties by email on Saturday, 7 October 2017. A clerk to the ET acknowledged recent correspondence sent to the ET in August, and said that the EJ had directed:

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> **"The application for reconsideration is refused. The application was made out of time. The Judgment and Reasons were sent to the parties on 20 June 2017, the application for reconsideration was not made until 7 August 2017.**
>
> **Further the application is refused because I am of the view that it has no reasonable prospects of success."**

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3. The Appellant has represented himself at the hearing of this appeal. The Respondent wrote to the Employment Appeal Tribunal ("the EAT") on 23 May 2019. The Respondent's position was that the Appellant's appeal had no effect on the Respondent's defence to the original claims. The Respondent did not intend to submit an answer or to attend the hearing. The Respondent did not, however, consent to the appeal. The Respondent relied on its position as set out in its letter of 14 March 2019, which I have read.

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4. Paragraph references in this judgment are to Decision One, unless I say otherwise.

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5. The application which has led to this appeal was an application for reconsideration of the Judgment sent to the parties on 20 June 2017 ("Decision One"). Decision One was made after a hearing lasting seven day at which both parties had been represented by counsel. The ET sitting

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at Reading then consisted of the EJ Gumbiti-Zimuto, Mr Cameron and Ms Osborne. The ET dismissed the Appellant's claims for unfair dismissal, race discrimination, and disability discrimination by reference to an agreed list of issues. The Appellant withdrew some of his claims at that the hearing, as the ET recorded in Decision One. Decision One is 223 paragraphs and 37 pages long. The ET considered four volumes of documents, some 1119 pages in total (see paragraph two).

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6. As HHJ David Richardson noted in his Judgment given on 16 May 2018 in the EAT, the Appellant said he did not receive Decision One in June 2017. After further enquiries, The judgment was sent to him on 3 July, HHJ David Richardson recorded, with the usual explanatory letter a few days later. The Appellant did not appeal against Decision One.

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7. The Appellant emailed the ET on 7 July to ask for an extension of time; the Appellant showed me that email this morning. He told me that he had no response to that application. Nonetheless on 10 July, he emailed the long undated application for reconsideration to the ET. He appended to that application two documents which he said were new documents. The application consisted of a commentary on the ET's reasons. The ET emailed the Respondent, on 7 August, to ask the Respondent for its comments; the Respondent replied on 10 August. The Appellant, in turn, responded to the Respondent's reply on 11 August.

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The History of this Appeal

8. The Appellant's appeal was lodged on 16 November 2017; his grounds of appeal were succinct. He argued, first, that his application for reconsideration had been in time; second, that the issues raised in his application had not been addressed at all; and third, that no reasons had been given for refusing his application, even though it was supported by evidence in the bundle,

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and by the two further documents I have just mentioned. The EAT decided that no further action would be taken on that appeal after a judge of the EAT had decided, on the papers, that the appeal raised no arguable error of law, and after HHJ David Richardson, having held a hearing pursuant to Rule 3 (10) of the **Employment Appeal Tribunal Rules of Procedure**, had decided the same thing.

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9. In his Judgment HHJ David Richardson said that if the extension of time point had been the only point in the appeal, he would have allowed the appeal through to a full hearing. He had considerable doubt whether the ET or the Respondent had seen the application for an extension of time made on 7 July. Moreover, the EJ had said that the application for reconsideration was dated 7 August whereas it was in fact made on 10 July (see paragraph 14 of his judgment).

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10. 7 August was the date at the head of a chain of emails relating to the reconsideration (see paragraph 15 on HHJ David Richardson's judgment). HHJ David Richardson also said that the EJ had not just refused the application on the grounds that it was late, but had rejected it on the grounds that it had no reasonable prospects of success. HHJ David Richardson did not think that there were reasonable grounds for appealing on the basis that the EJ was wrong to say that there were no reasonable prospects of success, or that the EJ had given inadequate reasons for that conclusion. HHJ David Richardson explained why (in paragraph 17 of his judgment).

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11. The Appellant then appealed to the Court of Appeal. His application for permission to appeal was considered by Lewison LJ on the papers. By an Order dated 1 November 2018, Lewison LJ remitted the appeal to the EAT for the EAT to hold a full hearing. Lewison LJ noted that the Appellant had sought to reargue the case on the facts. Those arguments did not disclose any error of law by the EAT. In a supplementary document, dated 8 October 2018, however,

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Lewison LJ, said, the Appellant had made two arguable points. The first was that the ET had overlooked his application for an extension of time. The second was that the ET had not met its duty to give reasons for its decision when it dismissed the application in one line. Lewison LJ observed that it was arguable that that was not enough on the facts. Lewison LJ limited the appeal to those two points. He ordered the Appellant to file a revised skeleton argument in the EAT to deal with those two points.

The ET's Decision in Outline

12. The claim form in this case was received on 8 December 2015. The Appellant made complaints of unfair dismissal, race discrimination and disability discrimination. In the first few paragraphs of Decision One, the ET set out the background facts. At paragraph three, the ET found that the Appellant was of Indian origin and of the Hindu faith. He had a diploma in Electronics and Communication (1989), and a diploma in Computer Programming and its application (1991). He was employed with Siemens as a PLC_2 Engineer from 1 February 1998.

13. In 2001, the Appellant's employment was transferred to the Respondent under TUPE. The Appellant was promoted to the role of Team Leader 3 on 12 October 2004. The ET recorded that the Appellant suffered from chronic anxiety and depression, and stress and high blood pressure, for which he was prescribed medication. For the purposes of this case, he had anxiety and high blood pressure as mental and physical impairments which gave rise to a disability within the meaning of section 6 of the **Equality Act 2010**. The ET recorded that the Respondent did not accept that the Claimant had a disability for that purpose.

14. The ET said that after an incident on 17 January 2011, the Appellant first had an anxiety attack at work. After that, he had avoided confrontations, and when he felt the initial symptoms

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of panic, he would take steps to avoid these being exacerbated. He attended sessions of cognitive behavioural therapy to help him to learn how to cope with anxiety and how to deal with stress. He also had counselling sessions with the psychiatrist. The ET noted that the Claimant took medication, both for his anxiety and for his high blood pressure.

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15. In paragraph 6, the ET noted that the Appellant had difficulties sleeping at night. He struggled to get up in the morning and suffered from a lack of energy. He avoided socialising and needed a family member or a friend to accompany him with normal day-to-day tasks. When he was still working, he would triple-check that his work was correct, even when he was doing the simplest tasks. He lived in constant fear of making silly little mistakes. He found working at night stressful and it made him particularly anxious. In paragraph 7, the ET said that the Appellant had been signed off work as unfit by his GP from June 2015.

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16. In paragraph 8, the ET recorded the Appellant's evidence that up until 2007, his employment history had been unremarkable. He had received positive feedback in appraisals. The ET gave, as an example, an appraisal by Shane Taylor on 16 August 2004. However, the ET noted that by 7 March 2008, Shane Taylor had written in an appraisal that the Appellant was not "supervisor material". The Appellant was given the role Senior Team Supervisor in August 2009. In 2009 he applied for other roles but was not successful.

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17. In the succeeding paragraphs of the Decision, the ET made findings about what had happened during the course of the Appellant's employment. He was eventually dismissed for redundancy, by letter dated 5 August 2015. The ET made findings about the consultation process leading to that dismissal in paragraphs 51 to 71. Three consultation meetings were arranged. The

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Claimant did not attend the third of those. Some efforts were made to find him alternative employment.

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18. The ET made findings in the course of its decision about several incidents which had happened during the Appellant's employment in 2000 and 2015 (see paragraphs 10 to 50 of Decision One). It is clear from Decision One that the Appellant had covertly recorded many incidents and that the ET had been shown transcripts of those recordings (see, for example,

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paragraphs 20, 25, 26, 31, 44, 46, and 49 of Decision One).

19. In paragraphs 23 to 25 of Decision One the ET made some findings which are relevant to

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one of the arguments put forward by the Appellant in his application for reconsideration. I will therefore read those paragraphs of the decision.

> **"23. In an email exchange that took place between David McLucas and Shaun Kennedy, following on from the claimant's appraisal, David McLucas uses the phrase *"Slowly, slowly, catchee monkey"* (page 337B). The context in which the phrase is used by David McLucas does not suggest any disrespect to the claimant's religion. It is used in context to suggest that Shaun Kennedy should show patience, to *"play the long game"*. The passage does not suggest there is a lack of respect for people of different origins and their beliefs.**

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> **24. The claimant also states that Shaun Kennedy, Neil Ferguson and Mark Curphy would pick on him as a form of entertainment; that they would openly make fun of the Hindu Monkey God and Elephant God; and that they would make sarcastic comments about how Hinduism consider the Cow as Holy. These observations by the claimant have not been placed in context. No specific instance has been referred to in the evidence when it was said that this occurred. The claimant has many hours of covert recordings of conversations with his work colleagues in formal and informal situations. These have been transcribed and transcripts were produced for Tribunal. We have not been directed to any recording where there is any comment which contains any racial abuse or contains any disparaging comments towards the claimant or his religion or more generally disrespect for people of other origins and beliefs.**

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> **25. On 17 January 2012, the claimant secretly recorded conversation which took place in his presence. Also present was Neil Ferguson, Shaun Kennedy and Mark Curphy. The claimant says that in this conversation which was about a BAA security officer Mark Curphy was staring at the claimant while making derogatory and threatening comments (page 372). In the recorded exchange reference were made to the *"Indian fellow"*. It is said by Mark Curphy *"he is a funny fucker, want to grab him by the beard and drag him over the desk and beat the fuck out of him"*. There are other offensive and obscene comments about a female police [officer]. The claimant is shown in the transcript as laughing at one point and interjecting in the conversation with a question. There is no indication of the claimant objecting to the conversation from the transcript."**

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20. The ET went through an agreed list of issues in relation to each head of claim. They recorded which issues the Appellant had abandoned and made relevant findings on those which he maintained. Significantly, for current purposes, having examined each of the Appellant's complaints of discrimination and harassment on grounds of race, they found that none of the detriments on which the Appellant relied were because of his race (paragraphs 77 to 121, 122 to 142. They dismissed the victimisation claim because they found that the one potential protected act on which the Appellant relied was not a protected act for the purposes of the **Equality Act 2010** (paragraph 147) as the grievance in question did not make any allegation of a breach of the **Equality Act 2010**.

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21. In any event, the ET found there was no relevant connection between the grievance and the detriment on which the Appellant relied (see paragraph 151). They found that the Appellant had not shown that he had disability for the purposes of the **Equality Act 2010**, which was fatal to his claims of direct discrimination on the grounds of disability and of a breach of the duty to make reasonable adjustments (paragraphs 158 to 175). They nevertheless considered the other claims on their merits and dismissed them (paragraphs 176 to 206). They found that the reason for the Appellant's dismissal was redundancy, and not his race and that the Respondents had acted reasonably in dismissing him for that reason (see paragraphs 207 to 221).

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22. One issue which arises in connection with the application for reconsideration and which relates to a second document on which the Appellant relied on that application was whether there was a vacancy for a supervisor when the Appellant was made redundant. I should, at this point, refer to some of the relevant findings by the ET on that subject.

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23. In paragraph 183, the ET said that the evidence showed that Karen Butler had at various times discussed with the Claimant the role that he would from time to time perform and roles which he could perform in the future, some of which the Claimant went on to perform. The ET went on to say that during the course of those discussions, in January and February 2012, the

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Appellant working in a supervisory role was mentioned. The ET said that there were:

> **"183. …. historic issues about the claimant's performance in a supervisory role. Karen [Butler] gathered feedback from various managers about the claimant's performance as a supervisor. This was discussed with the claimant. The feedback painted a picture that the claimant lacked supervisory skills and the ability to manage the team. Karen Butler had formed the same opinion of the claimant. Karen Butler told the claimant this. From about 2012 the claimant had not worked in a role as supervisor. The claimant could not work nights. Any role for the claimant had work as supervisor would have required him working nights. The various roles that the claimant performed from about 2012 were deliberately assigned because they did not require the claimant to work nights (except for the blue room role in August 2014)."**

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24. The ET said in paragraph 184 that their conclusions were that the Claimant was told that even if he could work nightshifts, he would not be offered a team supervisor role. They repeated that Karen Butler had formed the view that the Appellant was not suited to a supervisory role; she had taken soundings from other managers with whom he had worked, which had confirmed

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the view that she herself had.

25. There are also relevant findings in paragraph 202, in which the ET recorded the

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Respondent's evidence that there was no supervisory role. The ET repeated, in a similar vein, that the evidence of the Appellant had shown that he could not work nightshifts and that was an essential feature of the supervisor's role. Karen Butler confirmed that supervisors were not made redundant, but she explained that they retained jobs in various places and not all of them were

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supervisory roles. The ET repeated that she had given evidence to the effect that she did not consider that the Appellant was suited to the supervisory role whether or not he could work nights.

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26. In paragraph 204 the ET reminded itself that by the time the redundancy consultation period started, in about 2015, the Appellant had not worked as a supervisor for several years, at

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least since 2012, although the Claimant himself said that he had not worked as one since 2009. The ET said this: "There were no supervisor roles available at that time." The ET said the Appellant had not identified another role to which he could have been moved, but was not moved by the Respondent. In paragraph 205, the ET repeated that the Appellant was unable to work on the night shift because of his anxiety and that the medical advice provided to the Respondent had supported that position. The Respondent had recognised that and had accommodated the Appellant from 2012 onwards, except for a brief period in August 2014, when the Appellant had agreed to attempt the Blue Room role.

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27. In 2016, the ET repeated that the agreed evidence was that the Respondent required all supervisors to work nightshifts. They recorded the Appellant's evidence that he could have worked late shifts and early shifts, but the ET's conclusion was that on the information before them, there was a general requirement for supervisors to work a shift-based pattern that included working the night shift, and that that was a proportionate means of achieving a legitimate aim.

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28. Five points emerged from those passages, in summary. The first is that the Respondent's case appears to have been that there was no vacancy for a supervisor (see paragraph 202). The second is that the ET accepted that (see paragraph 204), but even if that was wrong and there had been a vacancy for a supervisor at the time when the Appellant was made redundant, third, a person in a supervisory role was required to work nightshifts. Fourth, it was accepted that the Appellant could not work night shifts because of his anxiety and fifth, in any event, the Respondent did not consider that the Appellant was suitable to perform a supervisory role.

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The Application for Reconsideration in More Detail

29. The application comments, paragraph by paragraph, on many, but by no means on all, of the paragraphs of Decision One. Many of the comments add material but do not suggest that the ET's findings are unsupported by the evidence. The comments stop at paragraph 71 of Decision One, which is where the ET's primary findings of fact end. There are no comments, significantly, on the ET's analysis of the claims in light of those findings, and, in particular, in the light of the fact that the ET did not, on the basis of those findings, draw any of the inferences which the ET would have had to have drawn in order to enable the Claimant's race claims to succeed. There is no challenge to the ET's finding that there was no protected act. There is no challenge to the finding that the Appellant did not have a disability for statutory purposes, to the findings about the reason for the Appellant's dismissal, or to the finding that the Respondent acted reasonably in dismissing him for redundancy.

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30. The application for reconsideration simply says, "No comment at present" in relation to many of the paragraphs of the ET's decision. It may suffice if I give two examples of the points which the Appellant sought to make. One is a point which he made in his oral submissions about the events which had happened in November 2014. I asked him where in the application for reconsideration there was any commentary about events in November 2014. He accepted that there is no such material in that application. The month November 2014 falls between paragraphs 35 and 36 in Decision One and there is simply no material commenting on the absence of findings about November 2014 in the application for reconsideration.

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31. The second example concerns an incident which was considered by the ET in paragraphs 19 and 20 of Decision One. Those paragraphs read as follows:

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> **"19. In either November or December 2011, the claimant and Shaun Kennedy had a difference of view about the claimant's actions when he found a dead mouse. The claimant was subjected to verbal abuse by Shaun Kennedy on 23 December 2011 when he reported a**

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dead mouse. Shaun Kennedy was angry and ridiculed the claimant in public for making a report about the dead mouse. The claimant says that Shaun Kennedy hated him. The claimant feels that this was because of his race. The claimant referred to how Shaun Kennedy made references to his salary and the anger he displayed to him in relation to the mouse incident.

20. The claimant recorded the exchange between himself and Shaun Kennedy about the dead mouse. The recording was made covertly without Shaun Kennedy's consent or knowledge. Shaun Kennedy's account in his witness statement is that he was frustrated by the claimant because he did not consider that the claimant should have reported the dead mouse on AIRSWEB. The claimant could have dealt with it without escalating it. Shaun Kennedy accepted that he raised his voice and that he did so in the presence of other employees. Shaun Kennedy subsequently apologised to the claimant for raising his voice and speaking to him in front of other members of the team."

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32. The application for consideration says this,

"19.

- **Claimant did not find Dead Mouse, shift technician Harry Hunjan reported dead mouse (in front of ABF office) to Claimant.**
- **[C]laimant had to take appropriate action within Health and Safety Guidelines, to report to airport environmental services and document it.**
- **Instead supporting Claimant who was senior level, Shaun Kennedy angrily shouted at claimant and forcefully ordered claimant to pick mouse with his hands himself and made him feel vulnerable and threatened and demeaned him in front of his junior colleagues.**

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- **Claimant was shocked and feeling helpless.**
- **Team members made suggestion to have one to one with Shaun and clear the issue.**
- **Claimant went to meet Shaun Kennedy in Control Room, and as Claimant was feeling vulnerable and threatened he recorded the meeting, as in past similar incident of shouting and threatening happened on 17th January 2011, and claimant ended up falling unconscious and needing paramedic attention."**

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33. The Appellant accepted that paragraph 19 of the ET's Decision is factually accurate apart from two matters. The first is that the Claimant asserted that he did not find the dead mouse, rather, his colleague Harry Hunjan found the dead mouse. The Claimant also objected to the use of the phrase "difference of view" to describe the events which were recounted by the ET in paragraph 20. I consider that what this example shows is that, by and large, the Claimant is not taking issue in a substantial way with the findings of the ET, and that the material adduced in paragraphs 19 and 20 of the application for reconsideration do not give rise to any arguable issue in relation to those findings.

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34. The application for reconsideration ends with this passage:

> **"Hope comments mentioned above will help tribunal understand that sufferings Claimant faced since December 2009, and its impact on Claimant's health.**
>
> **Claimant was qualified Electronics Engineer with 17 years working for Babcock and was de-skilled over the years and was unfairly dismissed due to redundancy as tool. Currently Claimant is deskilled to the extent where he has no skills in management or Technical and will have to start from scratch at the age of 51.**
>
> **If Tribunal has any further questions then please let the Claimant know without hesitation."**

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35. This is a theme of the application for reconsideration. Similar points are made against paragraphs 54, 58, 59, 61, and 66 of the ET's Decision. To give a further example, at paragraph 70, the Claimant says, first of all, that he applied for a role, having original been employed at the Airport in this role in 1998. At the second bullet point he says:

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> **"70. ….**
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> **Claimant had suffered continuous bullying and harassment since December 2009, he was not offered any training, nor career development support. He was the only Indian supervisor belonging ethnic group and was hated by his colleagues. Also since Dec 2009 Claimant was forced to carry out tasks below the Claimant's skills and paygrade."**

At the third bullet point he says:

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> **"Claimant anxiety issues were very severe and Claimant had no confidence at all and self esteem was very low as the place he worked for the last 17 years had no role for him. The CST Support Engineer role Claimant had applied was the job that he started in his career in Feb98 and was rejected for that, hence Claimant was deskilled over the period due to discrimination and no support."**

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36. In some of the comments the Claimant refers to his chronic anxiety issues and stress leading to hypertension and high blood pressure which meant that he was not able to do nightshifts due to, "Sufferings at work since December 2009" (see the third bullet point against paragraph 66 of the ET's Decision).

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37. It was clear to me, from the Appellant's articulate submissions this morning, that he feels a sense of loss and betrayal and that the Respondent has treated him unjustly, if not throughout his employment, then certainly the last 10 years or so, and that the Respondent has unjustly brought his career and his hopes of a career to an end.

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38. A further point made in the application for consideration relates to the findings of the ET which I have already read, in paragraphs 23 to 25 of Decision One. In his comments on those paragraphs, the Appellant says that David McLucas knew very well that foul language was used very commonly in the company but name calling and unhealthy banter were very common in the Respondent's culture. There was a massive personal leadership event going on in the Respondents at the time in which it was identified that racial abuse was going on in the company.

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39. The Appellant said that he wanted to include a document but that this was refused by the Respondent's counsel. This is the first of the two documents which I have already mentioned. It was attached to the Appellant's application for reconsideration. It is a letter dated 10 January 2012. It is addressed to the Appellant, but he told me in the hearing that similar letters were sent to his colleagues. It is from Ged Conway, who was a Director of the Respondent at that time.

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> "….
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> **It has come to my attention that one of our Colleagues is being subjected to racial harassment whilst at work.**
>
> **I feel be disappointed that any member of my team should be subjected to this kind of abuse whilst working for me.**
>
> **Let me assure everyone that I will not tolerate any form of abuse at work. If there is sufficient evidence to identify the perpetrators of the abuse, they will face the full force of the Disciplinary Procedure and may also face criminal charges that could result in a prison sentence.**
>
> **It is possible that other Babcock staff are also suffering from mindless abuse because of their race, sex, beliefs or any other reason that the bigots think gives them licence to abuse one of their Colleagues.**
>
> **I understand that some may see workplace banter as humorous, but if you are constantly on the wrong end of the abuse it quickly becomes tiring and wearing. The incident, of which I have recently become aware goes far beyond banter and is ugly and disturbing.**
>
> **I know that from events like the Personal Leadership sessions, the vast majority of my staff want to work in harmony with their colleagues and do not apply any form of discrimination to their relationships. Those few that do, if we obtain sufficient evidence, will find themselves ejected from Babcock without any hope of a reference or compensation.**
>
> **Please help me stamp out discrimination in Babcock Airports.**
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> …."

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40. The Appellant told me that this letter was prompted by an incident of racial harassment, not affecting him, but affecting another colleague. The Appellant relied on this document in the

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application for reconsideration in support of his contention that David McLucas had been referring to the person of Indian Hindu origin when he used the phrase about the monkey because he knew well that Hindus pray to a Monkey God. His case was that, “during banter, it was implied people worshipping Monkey God are monkeys.” He said that the email showed David McLucas’s strategy of catching people out unfairly. He said that he had been assigned to a task to install a camera and then stopped from carrying out the task and said that it could be shown that he had failed to carry out an assigned task. He said that that is what the phrase, “slowly, slowly, catchee monkey” meant to David McLucas. If it was innocent, he said, why did David McLucas not copy the email to the Claimant. The Claimant’s case in the application for reconsideration was that this was the culture at the Respondent, and it was considered as banter regardless of individuals’ feelings and beliefs. He also referred to a recording of a discussion between him and Harry Hunjan about racial discrimination in the Respondent, which he showed me during the hearing. In that document, Harry Hunjan is recorded as expressing his views that there is race discrimination going on in the Respondent’s organisation.

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41. He made several comments, under five bullet points, about the findings in paragraph 25 of the ET’s Decision. His case was that this was an indirect threat to him. He said that it was sad but true, but if you are in a situation and feeling vulnerable you try to mask your feelings and not to show it and it can only be understood with personal experience. What he was trying to do, in this instance, was to divert the topic by pretending to ignore what was happening and by not taking the abusers, bait, as any reaction would have been one person’s word against another’s. He said that his past experience was that senior management were promoting a personal leadership campaign against racism, but did not practise what they preached, otherwise staff would not be openly discussing such things in front of Shaun Kennedy without fear of

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A disciplinary action. His case was that such racial behaviour was indirectly supported. He said that when he tried to complain against Shaun Kennedy, he was dissuaded from doing that.

B 42. The other documents which the Claimant attached to the application for reconsideration are at pages 111 to 113 of the bundle. There is a chain of emails in May 2015 which refers to the need to sort people first, 'people' being the Appellant, and which may, in an email dated 11 May 2015, refer to the fact that there was a vacancy for a supervisor at Terminal 1. Both those C documents, the Appellant told me when I asked him about them in oral submissions, were documents which he had at the time of the hearing. I was not clear whether either of them had been in the bundle but he told me that he had shown both documents to his counsel. That means D that the documents are not "fresh evidence" for the purposes of the rule in **Ladd v Marshall** because they were material that was available to the Appellant and his representative at the time of the Hearing. I should in any event, consider what significance, if any, of the documents have E to the overall claim.

43. The Appellant submitted, as I think I have indicated, that the email chain to which I have referred shows there was a vacancy for a supervisor at the time when he was made redundant. F That, it seems to me, cannot, in any way, have affected the ET's ultimate decision on the issues which it had to decide because of the five matters that I mentioned in relation to the findings, at paragraphs 183, 184, 202, 203, 204, and 206. In short, the point is that even if the ET's finding G that there was a vacancy for a supervisor was wrong, the material before the ET showed that the Appellant would not have been given a supervisory role. The first document does no more than to show, first of all, that there had been an example of racial harassment, of which the Respondent H was aware, but secondly, that the Respondent's senior management took a very harsh view of

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such behaviour. It is not relevant to the question whether or not the Appellant was himself discriminated against which was one of the issues which the ET had to decide.

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The Law

44. I start with the relevant rules. Rule 1.3 of Schedule One to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the Rules") provide as follows:

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

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> **(ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue) …"**

45. Rule 62 is headed "Reasons"

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> **"62 - (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).**
>
> **(2) In the case of a decision given in writing the reasons shall also be given in writing. In the case of a decision announced at a hearing the reasons may be given orally at the hearing or reserved to be given in writing later…Written reasons shall be signed by the employment judge.**
>
> **…..**

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> **(4) The reasons given for any decision shall be proportionate to the significance of the issue and for decisions other than judgments may be very short.**
>
> **(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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46. Later on, in the Rules there is a section headed, "Reconsideration of Judgments". Rule 70 is headed, "Principles". It provides:

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> **"70. A tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again."**

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The Case Law

47. In **Meek v City of Birmingham District Council** [1987] IRLR 250, the Court of Appeal considered the obligation (of what was then an Industrial Tribunal) to give reasons for its decision. Bingham LJ (as he then was), giving the judgment of the court, said this:

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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 practices which should or should not be adopted."**

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48. Bingham LJ quoted a statement in **Alexander Machinery (Dudley) Limited v Crabtree** [1974] ICR 120:

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> **"It is impossible for us to lay down any precise guidelines. The overriding test must always be is the tribunal providing both parties with the materials which will enable them to know that the tribunal has made no error of law in reaching its findings of fact. We do not think the brief reasons set out here suffice for that purpose."**

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49. He also cited an observation in the decision of the Court of Appeal in **Martin v Glynwed Distribution Limited** [1983] ICR 511 at page 520F:

> **"The duty of an industrial tribunal is to give reasons for its decision. This involves making findings of fact and answering a question or questions of law. So far as the findings of fact are concerned, it is helpful to the parties to give some explanation for them, but is not obligatory. So far as the questions of law are concerned, the reasons should show expressly or by implication what were the questions to which the tribunal addressed its mind and why it reached the conclusions which it did, but the way in which it does so is entirely a matter for the tribunal."**

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50. The second case, which I should mention, concerns the EAT's powers on an appeal and, in particular, where it allows an appeal having detected an error of law in the decision. In **Jafri v Lincoln College** [2014] EWCA Civ; [2015] QB 781, at paragraph 21, Laws LJ, with whom the other two members of the court agreed, said this:

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> **"21. I must confess with great respect to some difficulty with the "plainly and unarguably right" test elaborated in *Dobie*. It is not the task of the EAT to decide what result is "right" on the merits. That decision is for the ET, the industrial jury. The EAT's function is (and is only) to see that the ET's decisions are lawfully made. If therefore the EAT detects a legal error by the ET, it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been. In neither case is the EAT to make any factual**

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assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from findings made by the ET, supplemented (if at all) only by undisputed or indisputable facts. Otherwise, there must be a remittal."

Discussion

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51. I consider the first ground of appeal first. It seems likely that, for reasons which can only be speculated about, the ET overlooked the Appellant's application for an extension of time for applying for reconsideration. I consider that the ET erred in law in not considering the Appellant's application for an extension of time. I am nonetheless satisfied, however, that that error of law was immaterial. There are two reasons for that: first of all, the Appellant nevertheless submitted his application for reconsideration only three days after applying for the extension of time; and second, because the ET despite that error, went on to consider the application for reconsideration on its merits.

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52. I turn then to the second ground of appeal for which permission was given, which concerns the adequacy or otherwise of the ET's reasons for refusing to reconsider Decision One. It seems to me clear that the refusal of the application for reconsideration was a judgment within the scope of Rule 3.1 of the Rules. It follows that rule 64 of the Rules applied to that decision. Given that this was a decision on an application for reconsideration and not the substantive judgment, and given that Decision One was a substantive judgment which fully complied with rule 64.5, there must be some scope for adapting the requirements of rule 64.5. However flexibly those adaptations might be made, I do not consider that they permi reasons as scant as these. The reasons given by the ET were not reasons; they simply amounted to the statement of a conclusion. No underlying reasoning supporting that conclusion was given. In my judgment, therefore, the ET erred in law in addressing its duty to give reasons in the way it did.

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53. The next question is whether the error of law was a material error of law requiring remittal to the ET or not. I have considered the application for reconsideration very carefully. In my judgment, for the reasons which I have given, the only conclusion which the ET could have reached in relation to the application for reconsideration was that it did not satisfy the test for granting a reconsideration. In short, the reason I consider that that is the case is because the application for reconsideration, as I have indicated, consisted of a commentary on parts only of the ET's factual conclusions but did not in any way seek to contradict or undermine the inferences which the ET drew, or did not draw, from those conclusions in the second part of its decision.

54. For those reasons therefore, I allow the appeal on grounds one and two. As I have indicated, I do not consider that either error of law was material for the reasons that I have explained, and I therefore do not order that the matter be remitted to the ET.