Appeal No. UKEAT/0258/18/DA
UKEAT/0066/19/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 & 19 June 2019
Judgment handed down on 29 October 2019

Before

HIS HONOUR DAVID RICHARDSON

MR P.M. HUNTER

MR P.L.C. PAGLIARI

MRS S SOLOMON — APPELLANT

(1) UNIVERSITY OF HERTFORDSHIRE
(2) PAUL HAMMOND — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR CHRISTIAN AMEADAH (The Appellant's husband) and MRS SHARMAIN SOLOMON (The Appellant in Person)
For the Respondents	MR DANIEL DYAL (Of Counsel) Instructed by: Pinsent Masons LLP 3 Hardman Street Manchester M3 3AU

SUMMARY

SEX DISCRIMINATION – BURDEN OF PROOF

PRACTICE AND PROCEDURE - COSTS

The liability judgment

The ET did not err in law in dismissing the Claimant's complaints of unlawful discrimination, victimisation and harassment. In one respect – relating to the ET's reasoning concerning the burden of proof – the EAT's decision is by a majority, Mr Hunter dissenting – see paragraphs 61-76.

The costs judgment

The ET erred in law in its approach to the question of costs. In determining whether the Claimant's conduct (for example in proceeding with the litigation rather than accepting offers) was unreasonable it should not have substituted its own view but should rather have asked whether her conduct was within or outside the range of reasonable responses in the circumstances.

HIS HONOUR DAVID RICHARDSON

1. This is an appeal by Mrs Sharmain Solomon ("the Claimant") against two judgments of the Employment Tribunal sitting in Watford (Employment Judge Smail, Ms Breslin and Mr Bean).

2. The first judgment, dated 15 February 2018, is concerned with liability. The ET rejected complaints of unlawful discrimination, victimisation and harassment which the Claimant had brought against the University of Hertfordshire and her immediate line manager Mr Paul Hammond. At the same time, it upheld a complaint of unfair dismissal, but only to a limited extent.

3. The second judgment, dated 7 November 2018, is concerned with costs. The ET ordered the Claimant to pay the sum of £20,000 towards the Respondent's costs.

4. In this judgment we will first address the Claimant's liability appeal. Her claim required the ET to consider some 38 different allegations over a period of some 3½ years. Its reasons run to some 206 paragraphs over 52 close-typed pages. There are eight quite broad grounds of appeal. We will first summarise the background facts; then give an overview of the ET's liability reasons; and then turn to deal with the grounds of appeal relating to liability individually, re-ordering them to some extent. Finally, we will turn to the appeal against the costs judgment. We will adopt the nomenclature used by the ET: although both the University and Mr Hammond were parties, we will for convenience describe the University as the Respondent and Mr Hammond by his name.

5. The Claimant was represented at the ET hearing by her husband, Mr Ameadah. Her notice of appeal was drafted by Ms Susan Belgrave of counsel. The skeleton argument for the appeal was also prepared by Ms Belgrave. At this hearing on 18 and 19 June the Claimant was again represented by Mr Ameadah, although she spoke herself following his submissions. Mr Ameadah adopted Ms Belgrave's skeleton argument. He supported all the grounds of appeal and made further points.

The background facts

6. The Claimant was employed by the Respondent with effect from 1 November 2010 as an internal auditor. Her commencing salary was £40,119. Her hours of work were 37 hours. She is a black woman of Caribbean origin. At the start of her employment she had two children. She was subsequently to have two more. Her periods of maternity leave were from 25 February 2013 until 13 August 2013 and again from 6 May 2014 until 18 December 2014. Following a hearing on 27 May 2015 she was dismissed by letter dated 1 June 2015 with 3 months' notice.

7. At first the Claimant's manager was Mr Alan Harley. He had concerns which continued from the Claimant's probationary period until his eventual retirement in 2012. They included the following. (1) Timekeeping: there were numerous occasions of lateness, in part because of her use of an unreliable bus service and in part because of issues relating to her children. This was a concern until January 2012 when the Claimant moved to a location close to her work. (2) Sickness absence – for example, between November 2010 and January 2012 there were 21.5 days of sickness absence, all short term and uncertified. (3) The time taken to write reports and the quality of the reports, which he found he often had to revise.

8. On 16 September 2011 the Claimant applied for flexible working as a parent of young children. Mr Harley agreed a proposal which involved a daily working pattern of 9:30 to 2:30 with the balance of contracted hours to be worked at home. This was for 3 months, subject to review. From Mr Harley's perspective the trial did not go well. The Claimant was often late for work (until her move) and he had concerns about her report-writing and audit files. He asked when she was working at home. She said it was sometimes in the evening and sometimes between 4am and 6am. In February 2012, while continuing the arrangement, Mr Harley said that he expected the Claimant to adhere to agreed times and to be advised of the work the Claimant had completed at home. He repeated his concerns about sickness absence.

9. In June 2012 Mr Harley gave notice of his retirement. Mr Hammond was appointed from the existing audit team to replace him. Just before leaving Mr Harley completed an appraisal preparation form on the Claimant. He recorded that the Claimant had done 14 audits in 2011-2012; feedback had been good but it had been necessary for him to spend an average of 1½ days per audit revising her draft reports. Time taken for the reports had been from 2 days to 22 days: the Claimant needed to work to a maximum of 15 days. Mr Harley said that if the Claimant was unable to demonstrate that she was working to a full-time contract he would have to refer the matter to HR to see whether the Respondent could continue the flexible work arrangement and whether the Claimant was able to do a full-time job.

10. In July 2012 the Claimant had informed the Respondent of her pregnancy. From November 2012, by reason of complications in her pregnancy, Mr Hammond found the Claimant a project on which she could work at home for 25 hours per week while remaining on full pay. The Claimant expressed her thanks. This project, together with annual leave, carried her through to her maternity leave on 25 February 2013.

11. On 11 June 2013 the Claimant made a further flexible working request. She proposed a formal variation so that she worked 30 office hours between 9am and 3pm Monday to Friday with 7 hours worked at home each week. Mr Hammond was unhappy with this proposal. He did not think there was enough work to do from home; he did not wish the work to be undertaken at 4.00 or 5.00 am; he and Mr Harley had both felt that the Claimant was not turning around the volume of work to be expected of a full-time member of staff. On 15 July he wrote to the Claimant refusing the request, subject to appeal.

12. The Claimant appealed. Her appeal was heard on 4 September. It was allowed. The hours agreed were 8.30 to 14.50 allowing for a 20-minute break. The remaining seven hours could be done at home. It was for a 3-month trial period. Criteria were set out in general terms to judge its success. Later they were modified to make them clearer. The Claimant was, however, off work a good deal. Moreover, she arrived late on a number of occasions without making it up either at the office or at home. She requested a start time of 9.15 rather than the agreed time of 8.30. On 13 November she informed the Respondent that she was pregnant again.

13. On 9 December 2013 Mr Hammond wrote to the Claimant. He said that the arrangement did not appear to be working well and was certainly unsatisfactory for the internal audit team. He did not believe it could continue because the operational impact on the team was too great. He proposed a change to part-time work either with or without some work at home; but 7 hours would be the maximum at home. It is clear that by this time the relationship between the Claimant and Mr Hammond was under some strain. The Claimant did not actually bring a grievance of bullying and harassment, but she indicated that she was considering it.

14. In January 2014, however, the Claimant having complained, agreement was reached between the Respondent acting through Ms Fran Shaw of HR and the Claimant that she would work 26 hours office based and 11 hours at home; it was also agreed that she would work from an office in a different building. This was to be a permanent variation of the agreement with an amendment to the contract confirmed by letter dated 19 March 2014. On 6 May 2014 the Claimant's maternity leave commenced.

15. By reason of the breakdown in relationship between the Claimant and Mr Hammond a mediation took place on 3 December 2014. It was not conclusive. On 5 January 2015 the Claimant returned to work. Mr Hammond continued to have concerns about the Claimant's performance. The Claimant was saying, for her part, both in emails and to Mr Hammond in person, that she was unable to trust Mr Hammond or work in the Audit Department. She believed that he was setting her up to fail. At a meeting on 13 April both said it was difficult to see how they could take the working relationship forward.

16. Against this background the Respondent decided to hold a hearing under stage 3 of the disciplinary procedure. Mr Hammond had written a report; the letter convening the meeting referred to the report and said that it raised issues of long term sickness absence and fundamental breakdown in working relationship; a possible outcome was that the Claimant would be dismissed.

17. A hearing took place on 27 May; it was chaired by Ms Sue Grant, who had been heavily involved in previous decisions concerning the Claimant, to the extent that the ET considered that she ought not to have chaired the panel. The ET made the following findings about this hearing and Ms Grant's decision.

> **"142. In the disciplinary hearing on 27 May 2015, the Claimant informed Sue Grant, in answer to the question given the clear breakdown in the working relationship between the Claimant and her line manager and her lack of trust what did she want from the hearing, the Claimant replied that she could not work in the internal audit team and so wanted to transfer out of the team. In her decision Sue Grant says that she had given careful and due consideration to all the verbal evidence and discussions which took place during the hearing and the written material. It was very clear to her that the trust and working relationship between the Claimant and Paul Hammond had fundamentally and irretrievably broken down. That was acknowledged by both. The employment relationship could not continue. The Claimant did not want to work in the internal audit team, the position to which she had been appointed."**

18. By letter dated 1 June 2015 the Claimant was dismissed by reason of "fundamental and irretrievable breakdown of the working relationship and a breakdown of trust". An internal appeal was dismissed on 13 July 2015.

19. The Claimant was entitled to 2 months' notice. The Respondent, however, extended the notice period by a further month to see if any reasonable alternative employment became available within its organisation. None did; and the Claimant's employment terminated on 2 September 2015.

The ET's reasons concerning liability – an overview

20. Prior to the final hearing the Claimant's allegations had been set out in a schedule. There were 38 individual allegations; and against each allegation there were set out the protected characteristics engaged (which were usually race and sex, and sometimes pregnancy/maternity as well as sex), and the type of discrimination (usually direct, harassment and victimisation). The ET appended this schedule to its judgment and reasons. There was also an order of EJ Manley, to which the ET did not refer, setting out the legal elements of the various issues.

21. The ET heard evidence from the key witnesses including the Claimant herself, Mr Hammond, Ms Grant and Ms Shaw. It reserved judgment.

22. In its reasons the ET noted (paragraph 3) that there had been very little evidence in terms of race discrimination: it said that the case "is principally one of sex discrimination and pregnancy and maternity discrimination along with unfair dismissal." The ET set out relevant basic principles of law in paragraphs 4-26 of its reasons. No complaint is made about this statement although, as we will see, it is submitted that the statement is not complete. The ET then set out findings of fact in paragraph 27-156 of its reasons over some 29 close-typed pages. We have already drawn on these findings in our summary, which is of necessity shorter and more selective.

23. In the remainder of its reasons the ET dealt with the 38 allegations in turn. This section runs from paragraphs 157 to 205, over a further 15 pages.

24. In the course of these paragraphs the ET found that neither Mr Harley nor Mr Hammond had discriminated against the Claimant or harassed her at all. In respect of some allegations the ET found that there was no prima facie evidence of less favourable treatment: see for example paragraphs 158, 167, 169 and 191. Generally, however, it made findings as to the Respondent's motivation and acquitted it of unlawful conduct and harassment. The following passages give an indication of its overall reasoning.

25. In paragraph 157, dealing with an allegation that Mr Hammond undermined Claimant's performance following the approval of the flexible working arrangement on a trial basis, the ET said

> **"157. The first point is that Alan Harley, the previous head of internal audit, had significant concerns about the Claimant's performance. It was not just the second Respondent, Mr Hammond. It seems to the Tribunal that these concerns as to performance were genuine. They were documented. When Mr Hammond took over the management of the Claimant there remained concerns about performance. Those were genuine. The concerns of Mr Hammond were similar to those of Mr Harley. It is right that Mr Hammond worked alongside the Claimant whilst Mr Harley was in charge. Mr Harley, however, independently arrived at the concerns he had. It was not a case simply of being primed by Mr Hammond. The probationary reviews and the appraisals evidenced these concerns. Both Mr Harley and Mr Hammond were doubtful that the**

> **flexible working arrangement with a significant period of home working would work. The difficulty for the Claimant is that she never proved that this arrangement could work by producing the required amount of work in the required time. This was both in terms of quality and output. The Claimant did not comply with the agreed start and finish times. This did not help her position. She did not comply with her output targets. The Tribunal does not find any undermining of the Claimant's performance by Mr Hammond. Accordingly there was no discrimination, whether direct or in the form of harassment."**

26. In paragraph 164, dealing with an allegation that Mr Hammond tried to stop flexible working and suggested that she was unable to perform while working flexibly because she was a mother (said to be sex or pregnancy/maternity discrimination) the ET said

> **"164. Following Mr Hammond having set out his position in writing in this way there was a meeting on 2 July 2013 at which the points were aired. There was then exchange of submissions, one by the Claimant; the other by Mr Hammond. Mr Hammond remained convinced that the arrangements proposed were not practicable. There was insufficient work of the sort that could be done at home. There was an impact on the rest of the team. Internal audit was a customer facing operation and he was trying to increase the visibility of the team at the university. In the Tribunal's view Mr Hammond was entitled to express these views. He had performance concerns with the Claimant and with the arrangement that had been temporarily agreed. His position was not harassing or directly discriminatory. It is right that Mr Hammond did not understand how the Claimant would be able to perform the hours from home. He was aware that she had three young children. He expressed this point on numerous occasions throughout the history of the matter. As we have said above, he did not need to emphasise the fact that the Claimant was a mother of three young children. He was entitled, however, to ask when and how the work would be done."**

27. In paragraph 165, dealing with an allegation that Mr Hammond refused the flexible working request, the ET said

> **"165. Mr Hammond in our judgment was entitled to refuse that request. His refusal was not discriminatory. He had honestly arrived at the view that the flexible working arrangement had not worked and was unlikely to work in the future. The nature of the work he fundamentally believed required presence at the university. He was entitled to hold those views."**

28. In paragraph 173, dealing with an allegation that Mr Hammond referred the Claimant to occupational health and questioned her ability to undertake her role flexibly as a mother of young children, the ET said

> **"173 …. To us, it is legitimate that Mr Hammond had concerns about output and quality of work. The mere fact that the Claimant was a mother of three small children would not necessarily impact on that. To that extent Mr Hammond was introducing a potential irrelevancy which exposes him to criticism of taking into account the Claimant's maternal status. However, as we say, he was rightly concerned about output and quality of work. Had there been no issues in that regard, he would not be making these points. The reason why he made the referral was, in addition to concerns about the Claimant's health, was concern about the output and quality of her work in the circumstances the Claimant found herself in."**

29. In paragraph 184, dealing with an allegation that Mr Hammond had told the Claimant she should not attend a meeting in London, the ET said

> **"184. It was open to Mr Hammond in his email dated 20 January 2014 to suggest that the Claimant did not attend the day meeting of the Council of Higher Education Internal Auditors in London. Whilst ordinarily he would encourage all members of the team to attend, it was a matter of fact that the Claimant was significantly behind in her output targets. This had nothing to do with pregnancy and maternity discrimination. It was down to the fact that the Claimant was behind in terms of her expected output. The reasoning in respect of both these matters was explained at the time…."**

30. In paragraph 195, dealing with an allegation that Mr Hammond pressed her to move her role to part-time working, the ET said

> **"195. In this same meeting Mr Hammond did say that there were things that the university could offer and had offered in the past that might help if the Claimant thought she was not coping, for example part time working. Mr Hammond recorded the meeting as saying that only the Claimant could make that decision on her personal circumstances. As stated above, the Claimant said this did not mean she was not coping with the work/home balance. She saw the problem as a working relationship with Mr Hammond. It had been Mr Hammond's position for some time that part time working would be available if that would help the Claimant cope. We know that the Claimant did not want part time working. This is likely to have been for financial reasons. On this occasion we do not see that Mr Hammond said the Claimant was struggling to deal with work and look after four little children. His position was that if she was struggling with full time work, then part time was an option. There is nothing discriminatory in that position. We have commented above that a common sex discrimination claim seen in the Tribunals is indirect sex discrimination for refusing part-time working for women with childcare responsibilities. The Claimant's position is the reverse of that."**

31. In paragraph 197, dealing with a complaint that the Claimant should not have been subject to disciplinary proceedings, the ET said

> **"197. There was no breach of the Equality Act 2010 here. That it was the Claimant's position that there was a total breakdown in the relationship with her line manager made it reasonable for there to be a formal meeting to consider the position. The problem needed to be stated and the Claimant needed to have the opportunity to state a case. A procedure modelled on the disciplinary procedure at stage 3 was a reasonable one to follow because the termination of the employment relationship on the basis of irretrievable breakdown was a clear possibility in all of the circumstances."**

32. In paragraph 199 the ET, building on earlier findings of fact, found that the dismissal was procedurally unfair because Sue Grant chaired the disciplinary panel. It said

> **"199. We have found it inappropriate that Sue Grant chaired the panel. That fact makes the dismissal procedurally unfair. Sue Grant was too close to the history of the matter to be independent. Sue Grant did not discriminate, victimise or harass the Claimant in that regard, however. Her decision to sit was made in good faith but was wrong. She sat because she is the head of the non-academic staff. She should, however, have brought someone in who was unconnected with the previous history."**

33. In paragraph 200, dealing with the allegation that the dismissal amounted to direct discrimination, harassment or victimisation, the ET said

> **"200. The dismissal was procedurally unfair for the reason given in the preceding paragraphs. The decision to dismiss was in no sense discriminatory or victimising. The reason for it was that the employment relationship had irretrievably broken down. That position was not discriminatory, harassing or victimising in any way whatsoever. The decision was entirely feasible given the fact of the breakdown in relationship between the Claimant and Mr Hammond."**

34. There were two concluding paragraphs, headed respectively "Generally on harassment" and "Generally on victimisation".

> **"204. Whatever the Claimant's perceptions, the concerns of Mr Hammond that the Claimant was not performing and the belief by the Respondent that the employment relationship had irretrievably broken down were held in good faith. It would not be reasonable to regard the Claimant as harassed in respect of any protected characteristic.**
>
> **205. The Respondent concedes that the Claimant's email to Mr Hammond dated 30 January 2014 was a protected act. The Respondent does not concede that the Claimant's requests for flexible working were protected acts. The Tribunal does not have to decide whether they were or not because none of the Respondents' decisions subjected the Claimant to detriments because the Claimant did a protected act. The reasons why for the Respondents' decisions, as set out above, were not because of any actual or potential protected act."**

35. In the result, the ET found the dismissal to be procedurally unfair, because Ms Grant ought not to have chaired the panel: she was too close to earlier decisions. The ET subsequently awarded a basic award in the sum of £1900 and declined to make any compensatory award.

The grounds of appeal relating to liability

36. As we turn to consider the various grounds of appeal, we emphasise that the EAT hears appeals only on points of law: see section 21(1) of the **Employment Tribunals Act 1996**. In a case such as this, the EAT is concerned to see whether the ET applied correct legal principles, gave sufficient reasons to explain its findings and conclusions, and reached findings and conclusions which are supportable, that is to say not perverse, if the correct legal principles are applied. A finding or conclusion is perverse if and only if it is one which no reasonable tribunal,

on a proper appreciation of the evidence and the law, would have reached. The EAT's role is therefore limited. Parliament has made the ET the arbiter of all questions of fact.

Grounds one and two

Submissions – grounds 1 and 2

37. On behalf of the Claimant Ms Susan Belgrave in her skeleton argument took these two grounds together and concentrated them on the following points. She argued that the ET erred in law in failing to apply relevant statutory provisions and guidance from the case law to the question whether the dismissal was automatically unfair on grounds of pregnancy. By virtue of the order of EJ Manley a claim for automatic unfair dismissal pursuant to section 99 of the **ERA 1996** was a listed issue. The ET did not mention this provision in its summary of the law or its reasons. Nor did it mention section 18(5) of the **Equality Act 2010**. It did not analyse the facts in terms of these provisions.

38. In support of her argument she referred to an email dated 8 October 2014 in which Mr Hammond said that a manager was upset at the "whole Sharmain situation" and that Sue Grant had "reigned [sic] him back because we haven't been able to do anything due to her being on maternity leave. There was, therefore, evidence that during the maternity leave period there was concern that the Claimant's maternity absence, pregnancy and pregnancy related absence were having a significant impact on the service. Concern over the Claimant's absence record was also a feature of the report which Mr Hammond wrote prior to the termination of the Claimant's employment. Section 18(5) of the **2010 Act** was therefore engaged; but the ET did not address it. Nor did the ET draw any conclusion from the unsatisfactory dismissal procedure adopted.

39. In addition to these points ground 1 of the grounds of appeal asserts that the ET did not examine each allegation separately, did not make a finding as to whether there was less favourable treatment and did not provide **Meek** compliant reasons.

40. In his submissions to us Mr Ameadah made one quite discrete additional point. He submitted that there was a complaint of automatic unfair dismissal under section 100 of the **Employment Rights Act 1996** relating to health and safety which he had always pursued and which was never resolved. He applied if necessary for permission to amend the Notice of Appeal to take this point.

41. In response on behalf of the Respondent and Mr Hammond, Mr Daniel Dyal submitted that the ET did not fail to address these provisions; or if it did, it made findings which are such that the complaints must inevitably fail. He argued that the ET followed the 38 allegations in the schedule in the way it addressed the claim. The allegation in the schedule which dealt with unfair dismissal was number 35. This was said to be "direct harassment, victimisation, unfair dismissal, automatically unfair dismissal". The ET dealt with that allegation in paragraph 200 of its reasons. The conclusions in paragraph 200 were brief but built on earlier findings of fact and holdings and sufficiently dealt with section 99. It was not necessary to make specific reference to section 18(5) given the issues in this case. The ET plainly dealt with the allegations separately. It was entitled to decide the case by reference to the "reason why" question without separately addressing "less favourable treatment". Its reasons were **Meek** compliant.

42. As to section 100 of the **Employment Rights Act 1996**, Mr Dyal's position was that it was not an issue for the ET. He accepted that Mr Ameadah sought to raise it, but on his instructions and on the basis of a note of the evidence his position was that the EJ enquired if the

matter was being pursued during the hearing and was told that it was not. He opposes any application to amend.

Discussion and conclusions – grounds 1 and 2

43. It is convenient to begin with section 99 of the **Employment Rights Act 1996**. Section 99 provides that an employee will be regarded as unfairly dismissed if the reason or principal reason is of a prescribed kind or the dismissal takes place in prescribed circumstances. These have been set out in a series of Regulations. Regulation 20 of the **Maternity and Parental Leave Regulations 1999** sets out relevant prescribed kinds of reason. These include the pregnancy of the employee, the fact that the employee has given birth to a child and the fact that she took or sought to take or avail herself of the benefits of ordinary or additional maternity leave: see regulation 20(3).

44. We think that section 99 automatic unfair dismissal was an issue for the ET to determine. It had been listed in the order of EJ Manley; and allegation 35, which refers to unfair dismissal, specifically makes reference to automatic unfair dismissal. In its summary of the law the ET did not mention section 99. Nor did it mention section 99 in the heading to paragraph 200 of its reasons, where it summarised allegation 35. However, the ET made a quite specific finding as to the reason for dismissal which we have quoted. The reason was that the employment relationship had irretrievably broken down; the ET rejected the allegations that it was tainted by discrimination, harassment or victimisation. We are not sure whether the ET recalled that section 99 was an issue for it to determine; but in finding that the reason for dismissal was that the employment relationship had broken down it dealt with key issue raised by section 99. The reason or principal reason was not one to which section 99 applied.

45. We turn then to section 18 of the **Equality Act 2010**. Section 18 defines pregnancy and maternity discrimination for work cases. Sections 18(2) - (4) provide as follows.

> **"…..**
>
> **(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —**
>
> **(a) because of the pregnancy, or**
>
> **(b) because of illness suffered by her as a result of it.**
>
> **(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.**
>
> **(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.**
>
> **……"**

46. For the purposes of section 18(2) the protected period begins with the start of pregnancy and may last until the employee has exercised her rights to maternity leave and then returns to work: see section 18(5). For the purposes of section 18(3) and (4) there is no protected period. Section 18(3) may be inherently limited to the compulsory maternity leave period; but section 18(4) is not limited by a period. If therefore the employer treats the employee unfavourably for the reasons set out in section 18(4) by dismissing her, this will be unlawful whether inside or outside a protected period: see section 39(2)(c).

47. In this case the ET was well aware that section 18 was engaged. It summarised sections 18(2), (3) and (4) of the **2010 Act** in paragraph 16 of its reasons. We do not find it surprising that it did not mention the protected period in section 18(5) – this applied only to limit section 18(2) and we do not think the ET was required to explain the law to that level of detail. That the case was principally one about sex and pregnancy and maternity discrimination, along with unfair dismissal, was expressly stated in paragraph 3 of the reasons.

48. When the ET said that the reason for dismissal was not discriminatory, harassing or victimising in any way whatsoever, we have no doubt that it had section 18 fully in mind. Its reasoning did not in any way depend on whether the Claimant was still in a protected period. The ET was plainly finding that the decision to dismiss the Claimant was not tainted by sex or maternity discrimination in any of its forms.

49. The email dated 8 October 2014 to which Ms Belgrave referred did not require special treatment by the ET. As we have seen, the step which the Respondent took shortly after this time and before the end of the Claimant's maternity leave was to arrange mediation by reason of the breakdown in relationships; this is powerful support for the ET's position. The ET was entitled to find that the Respondent had given the true reason for dismissal and that it was not in any way influenced by considerations of pregnancy or the taking of maternity leave. Nor was it bound to draw any adverse conclusion as to the reason for dismissal from the fact that the procedure adopted was unsatisfactory. We shall return to this last point in relation to another ground of appeal.

50. The general points made in ground 1 of the appeal are to our mind not persuasive. It is plain that the ET considered the allegations separately; it devoted a significant part of its reasoning to doing so. It is plain that the ET generally (subject to exceptions, examples of which we have given already) decided the case by reference to the "reason why" question rather than by first articulating whether the treatment of which the Claimant complained was less favourable treatment. That is not an error of law. It has always been permissible to do so - see **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 at paragraphs 7-12.

51. Subject to specific questions of burden of proof, harassment and comparators, which we will consider separately in this judgment, we see no force in the general criticism that the ET failed to provide sufficient reasons. It is true that occasionally the reasons are quite brief: see, for example, paragraph 200, dealing with dismissal. But the reasons have to be read as a whole, and when they are read in this way the ET's reasoning emerges quite fully. Given that there were 38 different allegations all put in multiple ways, it is understandable that by the end of the reasons the ET was addressing them quite briefly, building on earlier findings.

52. This brings us to Mr Ameadah's point about section 100 of the **Employment Rights Act 1996**. It is common ground that Mr Ameadah was still pursuing this point at the start of the ET hearing; the parties differ as to whether he subsequently told the ET that he was not pursuing it. The point is not the subject of any ground of appeal. (It may have been mentioned at the Rule 3(10) Hearing in the EAT, for there is a brief reference to it in a skeleton argument prepared for that hearing, but if so it does not seem any application for leave to amend was made – had it been made and rejected it would not be possible to renew it at the full hearing). If the point had been the subject of a ground of appeal, no doubt the ET would have been asked to comment and provide any relevant notes.

53. Since the point is not the subject of any ground of appeal, permission is required to amend the Notice of Appeal. The EAT decides such applications by applying the overriding objective set out in the **Employment Tribunal Rules of Procedure**, having regard to guidance contained in **Khudados v Leggate** [2005] IRLR 540 at paragraph 86. Applying that approach, we have no doubt that leave to amend the Notice of Appeal should be refused. The application was made at a very late stage; if it was to be made at all it should plainly have been made much earlier. Further investigation would be required; and since the parties have taken opposite positions as to what

occurred at the ET hearing there is a very significant risk that a further appeal hearing would be required. There would accordingly be delay, prejudice to the orderly working of the EAT and further expense for the Respondent. Given the ET's positive findings as to the principal reason for dismissal, there seems to be little strength in the section 100 argument even if, which we doubt, the ET was wrong to disregard it.

Grounds 3 and 7

Submissions – grounds 3 and 7

54. It is argued by Ms Belgrave and Mr Ameadah that the ET did not deal adequately with the burden of proof and with the drawing of inferences. As to the burden of proof, it is argued that there was material from which the ET could have drawn the conclusion that the Respondent and Mr Hammond had committed unlawful acts of discrimination and harassment; the burden of proof provisions in the **Equality Act 2010** were accordingly in play; and it is not possible to see how, at the point of decision, the ET applied them.

55. Further it is argued that the ET did not apply established principles of law relating to the drawing of inferences either in respect of discrimination or victimisation. Ms Belgrave refers to **Anya v University of Oxford and Another** [2001] EWCA Civ 142 (which predates statutory provisions concerning the burden of proof) and to **Igen Ltd v Wong** [2005] EWCA Civ 142 and other cases which apply those provisions. Put shortly, the Claimant must provide evidence of a prima facie case of discrimination, following which the onus is on the Respondent to prove that there was no discrimination.

56. In this case, it is argued, the ET accepted the Respondent's explanations without any serious scrutiny. It did not consider "the eloquence that the cumulative effect of the primary facts

might have" – **Qureshi v Victoria University of Manchester** [2001] ICR 863. The ET did not address the wholesale departure from good practice involved in the Claimant's dismissal.

57. Nor, it is argued, did the ET analyse or draw conclusions from the treatment of the Claimant's requests to work flexibly. The ET ought to have drawn inferences from (i) the reluctance to accede to her requests to work flexibly, (ii) the attempts to micromanage work which she did from home, (iii) the linkage of performance to flexible working, (iv) the suggestions by Mr Hammond that she should work part-time, (v) the ignoring of her allegations of bullying. These points raise a prima facie case of unlawful discrimination or victimisation.

58. A point which Mr Ameadah emphasised during the hearing relates to the flexible working policy. This policy envisages that if a change is agreed it will be permanent: see section 2 of the policy. Initially the changes were agreed only for temporary periods. The ET ought to have drawn an adverse inference from the Respondent's failure to follow the policy.

59. In response Mr Dyal submitted that the ET correctly directed itself to the burden of proof provisions. The ET was not obliged to follow a two-stage approach where it could make positive findings of fact on the evidence: see **Hewage v Grampian Health Board** [2012] IRLR 870 at paragraph 32, consistent with earlier cases such as **Brown v London Borough of Croydon and Anor** [2007] ICR 909. The EAT was entitled to infer that this was the ET's course even if it did not expressly say so: see **Marlow v AIG Asset Management (Europe) Ltd** UKEAT/0267/17/BA at paragraph 44 (the majority).

60. Mr Dyal accepted that, when doing so, the ET should not simply assess credibility or reach a bare conclusion. He argued that it did not fall into this error. It took into account and

drew upon a wealth of documentary material in reaching its conclusions. It is true that it did not always repeat its reasoning for rejecting earlier allegations when it dealt with later ones; but that would have required a great deal of unnecessary repetition. As to dismissal, there were two features which might be said to be unsatisfactory; the identity of the dismissing officer and the use of a disciplinary procedure. The ET addressed both of these. Mr Dyal took us through the ET's conclusions relating to the Respondent's treatment of requests to work flexibly.

Discussion and conclusions – grounds 3 and 7

61. The EAT's conclusions on this part of the case are in part unanimous and in part by a majority. The following paragraphs of this judgment will make clear what is unanimous and what is by a majority.

62. ***Unanimous reasoning.*** The ET cited the burden of proof provisions from section 136 of the **Equality Act 2010** in paragraphs 19 and 20 of its reasons. It noted the decision of **Igen v Wong** [2005] ICR 935. It said that it was for the Claimant to establish a prima facie case of discrimination; and if she did so successfully the burden transfers to the Respondent to show that the protected characteristic played no role whatsoever in its reasoning. Apart from some cases where the ET found that there was no evidence of less favourable treatment (examples of which we have already given), the ET did not explicitly say how it applied the burden of proof provisions in deciding the case.

63. The ET did not cite the decision in **Hewage v Grampian Health Board** [2012] IRLR 870. It is, however, well known. Lord Hope said (paragraph 32)

> **"32. …. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to**

make positive findings on the evidence one way or the other. That was the position that the tribunal found itself in in this case…..."

64. We consider that it is good practice for an ET to articulate in its reasons how it has applied the burden of proof – in particular, whether it is a case in which it has been able to make positive findings on the evidence without resort to the burden of proof at any stage, or whether the burden of proof has played a part and how. As we have said, the ET in this case did not do so. The question is whether this leads to the conclusion that the ET's reasoning is insufficient or that the ET has made a positive error of law concerning the burden of proof. At this point the reasoning of the majority and the minority diverge.

65. ***Majority reasoning.*** Although the ET did not say that how it had applied the burden of proof provisions, we consider that its approach emerges clearly from its reasons as a whole.

66. We have no doubt that the ET, just as it generally went straight to the "reason why" question, also found that the Respondent had indeed demonstrated on the evidence that the protected characteristics played no part in its reasoning. Given that the ET had a wealth of documentary evidence and heard directly from the key witnesses, it was in an excellent position to make findings as to the reason why the Respondent and Mr Hammond treated the Claimant as they did.

67. There were two points at which the ET said that it placed reliance on the burden of proof: these were concerned with whether Mr Hammond made particular remarks to the Claimant, and they were points at which the ET appears to have had difficulty in making primary findings of fact. We consider that if the ET had not been able to make positive findings of fact on other issues it would have said so. We think it is clear that as regards the reasons for their actions the

A Respondent's witnesses gave evidence which the ET accepted. We therefore do not think that the ET erred in law in any way.

B 68. There remains the question whether the ET's reasons were sufficient, given the absence of an explanation as to the manner in which it applied the burden of proof. This issue arose in **Marlow v AIG Asset Management (Europe) Ltd** [UKEAT] 0267/17/BA. In that case the ET had found that "the considerations which lean against the inference of unlawful discrimination C for the purposes of the broad claim are stronger than those which lean in favour" and had explained its reasons. It had correctly cited the burden of proof provisions but had not explicitly addressed them at the point of decision. It was argued that this was indicative of an error of law D or insufficiency of reasoning.

69. By a majority the EAT rejected this argument. The majority, after citing **Hewage** and E **Martin v Devonshires Solicitors** [2011] ICR 352 (to which Lord Hope referred in **Hewage**) continued as follows (paragraph 43)

> **"43. Unlike the position in Martin, the Tribunal in this case did set out the burden of proof provisions. The criticism is that no reference was made to them thereafter, thereby suggesting that they had not been applied. However, in the majority's view, on a fair reading of the Judgment, it is apparent that the Tribunal considered there to be no real doubt as to the facts about the Respondent's motivation for acting as it did. The Tribunal was in a position to make positive findings on the evidence that that motivation had nothing to do with maternity and everything to do with the ongoing restructuring. Thus, although not expressly stated to be such, it can, in the view of the majority, be inferred that the Tribunal considered that this was a Hewage-type case."**

G 70. We agree with this approach. We do not think the EAT in **Marlow** intended to say that it would always be the case that reasons will be sufficient if findings are made with no statement as to how the burden of proof was approached. There will be cases – perhaps cases where important witnesses were not called or their evidence is critically inconsistent with H contemporaneous documents – where reasoning as to the application of the burden of proof may

be very important and it may be not merely good practice but essential to set out explicitly how it was addressed. But we think that in this case, where the ET heard the relevant witnesses, had a great deal of documentary evidence and reached positive conclusions, its reasons viewed as a whole sufficiently explain the approach it took; and, as in **Marlow**, that its decision is not vitiated merely because it has not expressly returned to the burden of proof provisions.

71. ***Minority reasoning***. Mr Hunter takes a different view, which may be summarised in the following way.

72. Section 136 sets out a two-stage process for the determination of complaints under the **EqA 2010**. It is important for the ET to know which track it is on: is it considering whether there is a prima facie case (in which case the burden of proof is on the Claimant) or is it considering whether there is a non-discriminatory explanation (in which case the burden is on the Respondent)? If the ET does not articulate how it is addressing the case, there is a risk that the ET will itself be confused; and in any event, it will be difficult or impossible for the parties or an appellate tribunal to know how the ET has reached its conclusion.

73. In this case the ET ought to have considered first whether there was material from which an inference of unlawful discrimination could be drawn. If there was, it was then the Respondent which had to prove, on the balance of probabilities that the treatment was in no sense whatever for a prohibited reason. Mr Hammond had, at different times, appeared critical of absence without distinguishing between pregnancy related absence and other absence; and he had appeared doubtful whether the Claimant could manage full-time work on a flexible basis by reason of child care responsibilities. In these circumstances it is not possible to be confident that the ET had applied the burden of proof provisions properly.

74. ***Unanimous reasoning again*.** We do not accept that the ET dealt in a cursory way with the issue of flexible working. We have given extracts from the ET's reasoning already in this judgment. They indicate that the ET gave careful thought to the question and based on the evidence and the contemporary documents. It was not bound to draw inferences of discrimination from any of the features which the Claimant relied on. While it is true that Mr Harley and Mr Hammond did not grant permanent variations to the contract, their reasons lie in the unsatisfactory start which the Claimant had made to her employment.

75. Nor do we accept that the ET failed to look at the cumulative effect of the Claimant's allegations, or in any other way erred in law in failing to draw inferences adverse to the Respondent or Mr Hammond. Where, as here, a very large number of individual allegations are made the ET generally has no alternative but to work through them individually and make individual findings: it would usually be open to criticism if it did not do so. The individual findings must not be made in isolation from each other: they will be informed by the overall context and picture, which the ET must keep in mind. A person's motivation in relation to one piece of conduct may be very helpful in deciding that person's motivation in relation to another. In this case, reading the ET's reasons as a whole, we think it is clear that they had the cumulative picture in mind.

76. As to dismissal, the ET addressed the two aspects of the dismissal which were potentially unsatisfactory – the fact that Ms Grant chaired the meeting and the use of stage 3 of the disciplinary procedure. The ET was not bound to draw an adverse inference for the purposes of discrimination and victimisation claims from these aspects.

Grounds 4 and 6

Submissions – grounds 4 and 6

77. Here it was argued that the finding of the ET that the reason for dismissal was the irretrievable breakdown of the relationship between the Claimant and Mr Hammond was an error of law. Ms Belgrave relied on the following points. Firstly, the management report prepared for the disciplinary hearing made express and detailed reference to the Claimant's sickness record. Secondly, Ms Grant was the decision-maker: she had been involved throughout the process and was well aware of the background issues. Thirdly, there was no evidence that the Claimant was at fault in any way. Fourthly, the ET did not take sufficient account of the unsatisfactory procedure followed, which she would say encompassed not only the appointment of Ms Grant and the use of stage 3 of the disciplinary procedure but also the lack of any formal investigation.

78. Mr Dyal replies that these grounds of appeal do not disclose any real point of law and are in effect perversity challenges. The high hurdle for such challenges are not met. The ET was entitled to conclude that the use of stage 3 of the disciplinary procedure was reasonable and that no further investigatory stage was required.

Discussion and conclusions – grounds 4 and 6

79. The difficulty of succeeding on a perversity appeal before the EAT is well known. A perversity appeal is essentially a complaint about the ET's findings of fact. Because Parliament has expressly provided that there is to be an appeal to the EAT only on a question of law, there is only the most limited scope for such an appeal. Thus in the leading case, **Yeboah v Crofton** (2002) IRLR 634 at para 93 Mummery LJ said -

> **"93. Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal**

Tribunal has "grave doubts" about the decision of the Employment Tribunal, it must proceed with "great care", *British Telecommunications PLC –v- Sheridan* [1990] IRLR 27 at para 34."

80. The ET's acceptance of the Respondent's evidence that the true reason for dismissal was the breakdown of trust and confidence can only be challenged on perversity grounds. The ET saw and heard Ms Grant. It was entitled to accept her evidence as to the reason for dismissal. Powerful support for the truth of that reason comes from its finding, quoted above, as to what the Claimant herself said at the hearing.

81. Nor was the ET bound to find that the procedure adopted was fundamentally unsatisfactory. In our collective experience hardly any employer has a specific procedure for dealing with a case where the reason for dismissal is a breakdown in trust and confidence. In such a case it is necessary to invent or adapt an appropriate procedure. It is essential that the employee should be told the potential reasons; that he or she should be given the time and opportunity to respond before or at a hearing; and that he or she should appreciate that dismissal is a potential outcome. Beyond that, the degree of investigation required and the nature of the process will depend on the case.

82. The ET was entitled to find that using stage 3 of the disciplinary procedure, even if the case was not strictly a disciplinary one, met the requirements of a fair procedure. The Claimant was told that her employment was at risk; she was given a report setting out in some detail the Respondent's concerns; she had the opportunity to respond both in writing and at a hearing where, to a significant extent, her position supported the Respondent's concerns.

83. In summary, we do not accept that the ET reached perverse conclusions or erred in law on these questions.

Ground 5

Submissions – ground 5

84. It was argued that the ET did not adequately deal with the question of comparators. As Mr Ameadah explained to us during his oral submissions, there were issues as to actual comparators – in particular in various respects Mr Allen was relied on as a comparator as was Mr Hammond especially in the sense that the Respondent recognised a duty of care to him. That these comparators were relevant was recorded in the issues listed by EJ Manley.

85. Mr Dyal submitted that the ET did address the issue of comparators so far as it was realistically required to do so. There was no basis upon which Mr Allen could be considered a comparator for flexible working; he had only asked to come into work late on a day so that he could drop off his child; his request did not involve a variation to entitle him to work at home. The Respondent plainly recognised a duty of care to the Claimant.

Discussion and conclusions – ground 5

86. We prefer the submissions of Mr Dyal. The ET made specific findings on key issues where it was reasonably arguable that Mr Allen might be a comparator. The key issues were allegations 2, 23, 15 and 38; the ET dealt with each of them in its findings of fact and conclusions. There was no basis upon which Mr Allen could have been considered a comparator for the Claimant as regards flexible working; the arrangements in play were so different that no useful comparison could be drawn. The Respondent's treatment of the Claimant plainly recognised that there was a duty of care: this can be seen its referrals to occupational health, grant of reduced hours, mediation, permission to work in a different building and agreement of a flexible working pattern.

Ground 8

Submissions – ground 8

87. It is argued that the ET did not deal adequately with the question of harassment. As its reasons proceed, it did not state or apply the statutory tests and stated only terse conclusions. A further complaint is that the ET decided a question – whether Mr Hammond had said on one occasion that the Claimant was "talking rubbish" – by reference to the burden of proof without taking into account that the Claimant had written to complain of this a week later.

88. Mr Dyal replies that the ET did specifically address the tests for harassment in section 26 in paragraph 204 of its reasons, and its reasons as a whole, including its initial statement of the law, are sufficient to show that it applied the law correctly. The ET did not err in law in deciding the matter on the burden of proof.

Discussion and conclusions – ground 8

89. The statutory definition of harassment is set out in section 26 of the **Equality Act 2010**. So far as relevant to this appeal, section 26 provides as follows.

> **"(1) A person (A) harasses another (B) if—**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…..**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> **(a) the perception of B;**
>
> **(b) the other circumstances of the case;**
>
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **….."**

90. It is established law that if it is unreasonable for conduct to have the effect in question, that conduct will not satisfy the requirement within section 26(1)(b) as to effect. This was the position under the legislation preceding the **Equality Act 2010**. The Court of Appeal in **Pemberton v Inwood** [2018] ICR 1291 affirmed that the position had not changed notwithstanding the less direct wording of the **2010 Act**. Underhill LJ summarised the position as follows in paragraph 88 (Gloster LJ agreed, and the judgment of Asplin LJ appears to us to be to similar effect).

> **"88. …. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the proscribed effects under sub-paragraph (1) (b), a tribunal must consider both (by reason of sub-section (4) (a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as[3] having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4) (b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment[4] created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."**

91. An attack on the reasoning in **Pemberton** was rejected by the EAT in **Ahmed v The Cardinal Hume Academies** UKEAT/1096/18/RN at paragraph 39. Further **Pemberton** is binding on us; and we agree with it.

92. The ET summarised the statutory provision accurately in paragraph 17 of its reasons. It made findings of fact and stated conclusions relevant to the issues of harassment as it proceeded in its lengthy reasons. As it did so, it made findings of primary fact and set out the relevant circumstances of the case. It did not, as it dealt with each allegation, specifically address elements within section 26. In a shorter set of reasons it might have been expected to do so, but given that there were no less than 38 allegations, all put in multiple ways, it is understandable that it did not.

93. These were the circumstances in which the ET returned to the question of harassment in paragraph 204 of its reasons. It did not precisely follow the statutory language, but we do not think it fell into error of any kind by reason of this failure. It is inherent in its findings throughout its reasons (and implicit in paragraph 204) that the Respondent's conduct did not have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. In paragraph 204, although the ET did not precisely reproduce the statutory language, it is plain that it was considering whether it was reasonable for the conduct to have that effect: see section 26(4)(c) of the **Equality Act 2010**. The ET plainly found that it was not reasonable for the conduct to have this effect. If so, the conduct did not amount to harassment: see **Pemberton**. We do not see any error of law in this approach. The ET's conclusion relating to the "talking rubbish" issue was a pure finding of fact giving rise to no question of law.

94. For these reasons the appeal in relation to the liability judgment will be dismissed. We now turn to the appeal against the costs judgment.

The costs application and judgment

95. The Respondent and Mr Hammond brought an application for costs dated 27 April 2018. The application was heard on 19 October 2018. The Respondent limited its application to the sum of £20,000, which was the highest amount that the ET could award without a detailed assessment. Its case was that up to the date of the liability judgment it had incurred costs of about £122,000 and that by the date of the hearing a further £17,000 had been incurred; these figures would no doubt be reduced on a detailed assessment, but on any view they greatly exceeded the sum of £20,000 which the Respondent actually claimed. The ET reserved judgment.

96. By its judgment dated 7 November 2018 the ET ordered the Claimant to pay to the Respondent the sum of £20,000 in costs. It selected three particular reasons from the application in support of its conclusion. We will take these in turn.

97. Firstly, the ET found that it was unreasonable for the Claimant to withdraw from a judicial mediation on 4pm before its due date. The Claimant had withdrawn ostensibly because the Respondent's counter schedule prepared for the mediation had suggested, incorrectly, that the Respondent had made a specific job offer of alternative employment to her on a particular date: that was untrue. The ET found that her withdrawal was unreasonable: the error by the Respondent was a matter which could have been considered and thrashed out at the mediation. The ET put the wasted costs of the mediation were at £4,142.62, after making a broad allowance of one-third for the effects of a detailed assessment.

98. Secondly, the ET found that the Claimant acted unreasonably in failing to take advice on and accept an offer of settlement in the sum of £50,000 with an additional offer to pay £500 for her to take independent advice on the settlement. The offer was made in the run up to the hearing. The ET put the wasted costs of the full hearing at £23,548, again after making allowance for the effects of a detailed assessment.

99. As part of its reasoning the ET set out in paragraph 11 what it regarded as significant difficulties to which the ET considered that the Claimant should have been alive, and in the light of which the offer was in the view of the ET a "generous and fair offer of settlement". Paragraph 11 is quite lengthy, but we think we should set it out in full.

> **"11. There were significant difficulties, on any view, with the claimant's case; ones that she if she were acting reasonably would have been alive to. First, she accepted herself that her relationship with Mr Hammond had deteriorated such that she would have to leave her old job. Secondly, she had not raised an internal equalities grievance which would**

> **have afforded an opportunity internally to raise matters of alleged discrimination and for those to be considered by the respondent. This was so despite there having been a meeting with the Equalities Department to discuss whether or not to make an equalities complaint. The claimant had made a positive decision not to raise an equalities complaint. This led to the next point that because an equalities challenge had not been made, and this was a point noted in particular on appeal in this case, there was no basis for removing Mr Hammond from the role. She therefore had to leave the role. It was her who could not work with him, not the other way round. Next, it being her who had to leave, the issue then became whether there any credible redeployment opportunity. The first respondent had made efforts in this regard. First it had extended the notice period by one month to facilitate more time for the claimant to find an alternative job. Secondly, it had identified a supernumerary role that she could work in during the notice period. It was this point that Mr Childe was alluding to in his email of 19 April 2016. In the event, the claimant worked only seven days in that supernumerary role. Some of the time was spent preparing her position for present purposes, some of that time we acknowledge was spent absent ill, but fundamentally, notwithstanding being given this extended opportunity to find redeployment, none was found and there has been no evidence put forward for example today indicating another credible path to redeployment. Lastly, and fundamentally in terms of the case, notwithstanding being given ample trial opportunities, the claimant had failed to make the flexible working period work. She had failed to hit reasonable targets that were set for her in terms of output during the periods that flexible working had been granted by the respondent."**

100. Mr Ameadah had made the point on the Claimant's behalf that £500 plus VAT was not enough for advice to be taken on the settlement. The ET noted that the Claimant did not say this to the Respondent and concluded that the Claimant was not interested in settling for that amount.

101. Thirdly, the ET criticised the Claimant for not accepting a further offer of settlement after the merits judgment was promulgated. On 20 February the Respondent offered to pay the Claimant the basic award of £1,900 (to which, of course, she was entitled by virtue of the judgment) in full and final settlement. This would have prevented the Respondent from pursuing an application for costs, but it would also have prevented the Claimant from appealing. The ET put the costs since February 2018 at £11,343.84 (a figure which seems to us rather high for the period in question). The ET reasoned as follows (paragraph 13).

> **"13. Thirdly, in our judgment unreasonably the claimant did not accept an offer of settlement even after the merits Judgment was promulgated. On 20 February 2018 the respondent offered the claimant £1,900 (i.e. the basic award) and not to pursue its costs so as to avoid this remedy and costs hearing. Of course, a settlement would also have the effect of preventing the claimant pursuing an appeal. We consider her failure to settle at this point was unreasonable. She could have prevented exposing herself to a Costs Order and avoiding the respondent incurring further costs."**

The appeal against the costs order

102. The grounds of appeal against the costs order were not drafted by Ms Belgrave. They are lengthy and repetitive. At a Rule 3(10) Hearing Choudhury J allowed the appeal to proceed, encapsulating the points which he regarded as reasonably arguable. He said:

> **" ….. Although the Tribunal has a broad discretion in respect of costs decisions, it is just about arguable that the Tribunal erred in failing to take account of all relevant matters in the exercise of that discretion. It is arguable that it is not unreasonable for a litigant in person to take the view that the erroneous schedule was indicative of a lack of good faith on the part of the Respondent. As to the failure to accept the offer of £50,000, it is arguable that the Tribunal did not factor in the Claimant's desire to have her case determined by the Tribunal. Finally, it is arguable that it was not unreasonable for the Claimant to refuse a settlement offer of £1,900 which would have had the effect of precluding any appeal.**
>
> **…..**

103. In written submissions on behalf of the Claimant Ms Belgrave concentrated on these points. She emphasised that in deciding whether to make an award of costs the status of the litigant was a matter to be taken into account: see **Vaughan v London Borough of Lewisham & Others** [2013] IRLR 713 at paragraph 25, endorsing the approach set out in **AQ Ltd v Holden** [2012] IRLR 648. She submitted that the Claimant's decisions could not be characterised as unreasonable – in particular the ET's conclusion that it was unreasonable to agree a settlement which gave her the basic award but would deprive her of any right to appeal was indicative of an error of law.

104. Mr Dyal submitted that the ET applied the correct legal provisions, had regard to the overall position and reached permissible conclusions which did not leave out of account any factor of significance. The offers of £50,000 had been expressed in cogent and well-reasoned terms. He pointed out that, at the date of the costs hearing, the Claimant's liability appeal had been rejected on paper; only subsequently was it found to disclose reasonable grounds for appealing – supporting a view that it was unreasonable to refuse the post-judgment settlement offer.

Discussion and conclusions

105. The power to award costs is found in rule 76 of the **Employment Tribunal Rules of Procedure 2013**, which provides as follows.

> **(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.**
> >
> > **(c) A hearing has been postponed or adjourned on the application of a party made less than seven days before the date on which the relevant hearing begins."**

106. In this case there was no finding that any claim made by the Claimant lacked reasonable prospect of success. The ET found that the Claimant's conduct of the proceedings was unreasonable in three particular respects – failing to attend the mediation, continuing with the litigation rather than accepting the pre-hearing offer, and again continuing with the litigation rather than accepting the post-judgment offer.

107. It is, we think, important for an ET, when it is dealing with the question whether the conduct of litigation is unreasonable, to keep in mind that in many (though not all) circumstances there may be more than one reasonable course to take. The question for the ET is whether the course taken was reasonable; the ET must be careful not to substitute its own view but rather to review the decision taken by the litigant. Even where a party is legally represented there may be more than one reasonable course; and the ET must also bear in mind that it is not to judge a person who is representing herself or who has a lay representative by the standards of a legal professional: see the discussion in **Vaughan v London Borough of Lewisham & Others** at paragraph 25.

108. We find it helpful, against that background, to look first at the ET's conclusion that it was unreasonable for the Claimant to have refused the post-judgment offer. Acceptance of this offer (which amounted to an offer of £1900 to which she was entitled and the forgoing by the Respondent of any application for costs) would have prevented the Claimant from appealing. We think that many litigants, represented or unrepresented, might have found this a difficult decision to take; we can see that it would have been reasonable to accept the offer, but we do not see why it was unreasonable to refuse it. The Claimant went on to instruct counsel who drafted grounds of appeal; they were in due course found to provide reasonable grounds for appealing and sent through to a full hearing. It is precisely the kind of decision where litigants, represented or unrepresented, may take different courses without either course necessarily being considered unreasonable. The ET's reasoning is quite short; it does not recognise the possibility that litigants may form different views as to whether they should give up their right of appeal without either view being characterised as unreasonable. We think its conclusion on this point indicates that it has approached the matter on the basis of its own view, without first considering the position of the Claimant and then applying the range of reasonable responses test apposite to this question. In short, we think the ET's decision is based on an error of law.

109. Although we do not think the position is so clear as regards the £50,000 offer, we conclude that the ET has adopted a similar approach. Its reasoning in paragraph 11, which we have quoted already, makes the point that on the Claimant's own account there came a time when her relationship with Mr Hammond deteriorated to the point that she would have to leave her old job. That is true; but her perspective was that this was due to Mr Hammond's mindset and conduct towards her which (she said and evidently believed) had been tainted by considerations of sex and maternity over a long period. If she had succeeded in that point her compensation would not have been limited by the fact that she would have had to leave her own job. So, once it is

appreciated that the true task of the ET was to examine why she took the decision to refuse the offer and whether that decision was within the parameters of reasonableness, a key question may be whether it was reasonable for her to hold these underlying views about her case. The question identified by Choudhury J might also arise: was it reasonable for her to wish to have her case determined by the ET? If, however, the Claimant had what was described in **Vaughan** as a "fundamentally unreasonable appreciation of the behaviour of her employers and colleagues" then it might indeed have been unreasonable for her to refuse the offer.

110. We wish to say a word about the offer of £500 to the Claimant to obtain legal advice. We think it clear that the advice which the Claimant could expect to receive for this sum (or any sum remotely like it) would only relate to the terms and effect of the proposed settlement and its effect on her ability to pursue her rights thereafter (see section 203(3) of the **Employment Rights Act 1996**). Any advice as to the merits of the Claimant's claim and the likely award of compensation would require reading and consideration on a quite different scale. So even if the Claimant had sought advice, she would still have had to make her own lay assessment as to the merits of her claim and the likely award of compensation. The ET said, in paragraph 10 of its reasons, that the offer of £500 plus VAT was for a solicitor "to advise on the merits of a settlement". If so, the offer was wholly unrealistic.

111. For these reasons we have concluded that the ET has not correctly applied the law in determining the costs appeal, which must be allowed. The Respondent's application will be remitted for re-hearing at which it will, of course, be entitled to rely on the full application not merely on the three points which the ET selected for determination. We will give the parties 14 days to make written submissions on the question whether remission should be to the same ET or to a differently constituted ET.