Appeal No. UKEAT/0292/18/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 September 2019
Judgment handed down on
11 December 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MS Y AMEYAW — APPELLANT

(1). PRICEWATERHOUSECOOPERS SERVICES LIMITED — RESPONDENTS
(2). MARK GOSSINGTON

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS SALLY ROBERTSON (of Counsel) Direct Public Access
For the Respondents	MISS LAURA BELL (of Counsel) Instructed by: PricewaterhouseCoopers LLP 1 Embankment Place London WC2N 6DX

SUMMARY

PRACTICE AND PROCEDURE – Case Management

The Claimant presented three claims containing multiple complaints under the **Equality Act 2010**, of alleged treatment by the Respondents during the course of her employment. In the run-up the Full Merits Hearing, she dis-instructed her solicitors and subsequently retained counsel to represent her at that Hearing on a direct access basis. She made applications to postpone the Hearing, at a Preliminary Hearing twelve days before the first day, and on what was to have been the first day of that Hearing. Both of those applications were refused.

During the course of the Hearing itself, following the Claimant and her other witness having given evidence, and when he was in the course of cross-examining the Respondents' second witness, the Claimant's counsel applied for an adjournment of around four or five days, on the basis that he needed more time to prepare. He was granted a shorter adjournment, on the basis that he should complete cross-examination of the current witness first. He then ceased to be instructed, and the Claimant was allowed a short adjournment before taking over cross-examination in person. The next day, during the course of her ongoing cross-examination of the current witness, the Claimant applied for an adjournment of four or five days with a view to reinstructing her counsel and giving him further time to prepare to cross-examine the Respondents' remaining witnesses. That application was refused.

The principal basis of the appeal was that the Claimant had been deprived of a fair trial, having regard to the decisions on those two particular postponement applications made during the course of the first week of the Hearing.

Held:

(1) Time for appealing a case management decision in its own right ordinarily runs from the date when the written record of that decision is sent to the parties, not the earlier date when it is orally given. **Okoro & Anor v Taylor Woodrow Construction Limited & Ors** [2010] UKEAT/0318/10 considered.

(2) Accordingly, if such a decision is taken during the course of a Full Merits Hearing, when time runs from, to appeal it in its own right, will depend on whether the Tribunal sends the parties any written record of that decision before sending out its substantive written decision, or whether any such record only forms part of the substantive written decision.

(3) An appeal which contends that a party has not had a fair trial, may include a contention that an individual case management decision taken during the course of the Full Merits Hearing, has contributed towards the overall unfairness of that Hearing, even where there has not been a separate and timely appeal against that individual case management decision in its own right. **Shodeke v Hill** [2004] UKEAT/0394/00 considered.

(4) However, the appeal in the present case, so far as it related to procedural matters, was, in substance, an appeal against the Tribunal's decisions on the two adjournment applications in their own right, as no other aspect of the conduct of the trial was alleged by the Grounds of Appeal to have also contributed to its unfairness;

(5) The Tribunal had provided a written record of its decisions on the adjournment applications, some months before it issued its reserved decision on the substance of the complaints considered at trial. The Claimant had previously sought to appeal those decisions within 42 days of the sending of that record; but that appeal had been dismissed. The further attempt to appeal those decisions, by way of an appeal against the later substantive decision, was out of time and an abuse of process.

(6) In any event those decisions were taken in proper exercise of the Tribunal's discretion. No relevant factors were not considered, or irrelevant factors considered, and they were not perverse. They did not deprive the Claimant of the right to a fair trial.

(7) Challenges to the adequacy or cogency of two specific substantive findings made by the Tribunal also failed.

(8) The appeal as a whole was therefore dismissed.

HIS HONOUR JUDGE AUERBACH

1. I shall refer to the parties as they were in the Employment Tribunal, as Claimant and Respondent. This is the Claimant's appeal.

The Course of the Litigation

2. The Claimant's employment with the First Respondent began in April 2014. She presented claim forms to the Employment Tribunal in October 2015, August 2016 and November 2016. The first two claims were against the First Respondent only. The third was against the First and Second Respondents. The claim forms raised multiple complaints pursuant to the **Equality Act 2010**, of direct discrimination, harassment and victimisation. The protected characteristics relied upon were race and sex. The complaints covered a period from, roughly, July 2014 to August 2016.

3. The nature of the Grounds of Appeal in this case is such that I need to set out the course of the litigation thereafter, in both the Employment Tribunal and the Employment Appeal Tribunal ("EAT") in some detail; and it makes sense to do so at the every outset.

4. The first claim was initially listed for a ten-day Full Merits Hearing to take place in July 2016, but that was, by consent, postponed. Following the issue of the second claim, the first two claims were listed to be heard together over 25 days from 18 April 2017. Following the issue of the third claim, at a Preliminary Hearing on 31 January 2017, that claim was ordered to be heard at the same Full Merits Hearing. There was a further Preliminary Hearing on 10 March 2017.

5. The Respondents have been represented by solicitors throughout. At all relevant Hearings in the Employment Tribunal and the EAT, they were represented by Miss Bell of counsel. The

Claimant was represented by solicitors, albeit three successive firms, until the beginning of April 2017. At the Preliminary Hearing on 31 January 2017 she was represented by counsel, Mr Milsom, although at a certain point during that Hearing he withdrew. At the Preliminary Hearing on 10 March 2017 she was represented by Mr Herbert of counsel.

6. On 7 April 2017 there was a telephone Preliminary Hearing before Employment Judge Baron. The Claimant was now a litigant in person and represented herself. Among other matters, the Judge considered an application by her to postpone the Full Merits Hearing, which was refused. The Judge recorded in his minute that she had informed him that she had obtained representation for that forthcoming Hearing.

7. The Full Merits Hearing was listed to open on Tuesday 18 April 2017. In the event a further Preliminary Hearing was conducted on 18 April, before Employment Judge Baron alone. The Claimant appeared in person, although Mr Johns of counsel accompanied her. The applications considered included a further application by her for a postponement of the Full Merits Hearing, which was refused.

8. The full Tribunal allocated to hear the case – Employment Judge Baron, Ms Bonner and Ms Edwards – spent 19 and 20 April 2017 reading evidence. The first day on which the parties attended was Friday 21 April 2017. The Claimant was represented by Mr Johns, instructed by her under the Bar Direct Access Scheme. The evidence of the Claimant and her one other witness, Mr Dijemini, was heard first. Their evidence was completed shortly after lunch on Wednesday 3 May 2017. Presentation of the case for the Respondents then began, with the first of their witnesses, Mr Raines, giving evidence and being cross-examined by Mr Johns that afternoon.

9. At the heart of this appeal is what happened on 4 and 5 May 2017. As I will describe, the Tribunal subsequently produced its own full account of that. In addition, the Claimant had a friend with her at the Hearing, who made some manuscript notes, but these were brief and summary in form. A member of the Respondents' team, Ms McGoldrick, also made a contemporaneous typed note on a lap-top, which, whilst not literally verbatim, was very detailed.

10. Prior to the Hearing of this appeal, the Claimant had opposed any reliance being placed on Ms McGoldrick's note. At the start of the Hearing before me, Miss Bell indicated that she did not propose to rely on it. However, during the course of the Hearing before me, it became clear that it would be helpful for me to have a more detailed understanding of how events unfolded than could be gleaned from the Tribunal's account alone. Upon taking instructions from the Claimant (who attended the Hearing before me with her) Ms Robertson indicated that, while the Claimant did not accept that it was necessarily a complete record of every word that was said, the Claimant did accept that Ms McGoldrick's note was a fair record as far as it went, and the best available; and she no longer objected to recourse being had to it.

11. I am satisfied that I have obtained a clear picture of the material sequence of events, which I will now set out.

12. At the start of the morning on Thursday 4 May 2017, Mr Johns began to cross-examine the next witness for the Respondent, Mr Cooch. There was a mid-morning break. When the Tribunal reconvened, Mr Johns indicated, in so many words, that he had done his best to get up to speed in the time available, but it was clear from the cross-examination that he was not quite where he should be. It was unfair to the Claimant for him to muddle through at the stage of preparation he was. He could cross-examine in very broad terms but not in any detail. His cover

(under the Claimant's insurance) had only been agreed at 5.30pm on the last working day before trial. The Claimant was giving oral evidence for a large part of the interim period; and he had not had sufficient time to speak to her to enable him effectively to present the detail of her case.

13. Mr Johns asked for the Hearing to be adjourned to a further listing to deal with the Respondents' witnesses – maybe eight or nine days for further witness evidence and deliberation time. It would be daunting for the Claimant to have to represent herself. He asked for an adjournment at least to allow him sufficient time to conference with his client, go through all the bundles and be fully up to speed. The Judge asked how much conference time would be needed. Mr Johns said four to five days at least. The Judge asked whether Mr Johns was saying that if the Hearing continued that day, he would cease to be instructed. He replied that that decision had not been made, but he could not see that it would be tenable to continue the instruction.

14. The Tribunal adjourned for a short time, and, when it reconvened, heard from Miss Bell, who opposed the application; and Mr Johns replied. This included detailed submissions about the chronology of events running up to the start of the Hearing. In particular, Mr Johns said that, while he had an initial discussion with the Claimant on 6 April, and discussions with the Respondents' representative about timetabling, he was not able to start properly preparing the case until the Claimant's insurers had confirmed cover. He also said that the Claimant was not herself in a position to continue with cross-examination that day, which she had not prepared.

15. After a further break to deliberate, the Tribunal gave a decision at about 12.35pm. The Tribunal's 29 September 2017 Decision (to which I will come) set out its Reasons as follows:

> **"25 The application was refused. We expressed our dismay that the Claimant and Mr Johns had not made appropriate arrangements for him to be able to properly represent the Claimant. We considered it unfair to the Respondent and the individuals against whom serious allegations of discrimination were being made for there to be a delay until all involved in the proceedings happened to be available again. There was particular pressure on the very limited judicial**

resources now available to the Tribunal and finding an availability of 25 days would involve a delay of many months.

26 The Tribunal considered the fact that some of the factual allegations were historic, going back to the autumn of 2014, and that part of the overriding objective of the Tribunal is to deal with matters expeditiously. Any postponement during the giving of evidence would inevitably cause the Tribunal some difficulty in understanding the significance of evidence given later. We also took into account the financial cost to the Respondent of having to incur further fees of counsel. The final point we took into account was that we saw no reason why the Respondent should be prejudiced by any difficulties which the Claimant had experienced with the various firms of solicitors who had previously acted for her. The Tribunal decided that the cross-examination of Mr Cooch should be completed that day, but that it would not sit for the remainder of the day or the following day. That would provide Mr Johns with some further time to prepare."

16. I note that, although that record refers, in paragraph 25, to "finding an availability of 25 days", it is clear from the contemporaneous note that the figure the Tribunal referred to when giving its decision orally at the Hearing was 10 days. I note also that, when it gave the decision orally, it indicated that it envisaged that cross-examination should still be completed by the end of the following week in accordance with the existing timetable, leaving time, within the existing allocation, for submissions and deliberations the following week.

17. The Tribunal then broke for lunch. After lunch Mr Johns said he was no longer instructed. The Claimant said she had dis-instructed him as she was not receiving full and effective representation. The Judge observed that this was her choice. The Claimant said it was not fair to expect her to continue with the cross-examination of Mr Cooch that day. The Judge understood her to be looking for an adjournment to the following Monday. After a break, Miss Bell opposed the continuation of his cross-examination being put off at all, but confirmed that Mr Cooch would be available the next day. After a further break to deliberate the Tribunal indicated that it would be unsatisfactory to leave Mr Cooch "in the lurch" for three days, but they would adjourn now to enable the Claimant to prepare, and take up his cross-examination in the morning. One other witness would be heard the next day, who would otherwise not be available. Then the Tribunal would adjourn again to the following Monday, to allow the Claimant to prepare other cross-examination. After dealing with a discrete matter, the Tribunal adjourned at about 2.50pm.

18. At the start of the day on Friday 5 May 2017 the Claimant indicated that she was continuing under duress. She then continued the cross-examination of Mr Cooch. However, after lunch she indicated that she was feeling stressed, and that she was being made to "power through". The Judge indicated that the Claimant had, overall, until the end of the next week to complete cross-examination of all the Respondents' remaining witnesses, which he considered sufficient; and it was open to her to manage that time and how best to use it. The Judge had stopped one particular line of questioning of Mr Cooch, because he could not see how it was a good use of the time. It was not easy for litigants in person. She had to do the best she could.

19. In further discussion the Claimant said she needed legal support and asked for four to five days' adjournment so that Mr Johns could prepare. She was not sure that Mr Johns would accept re-instruction, but said she had no indication he would not, as his main concern had been that he was not sufficiently prepared. She could not see how she would be able to get through it herself.

20. After a break, Miss Bell indicated that she opposed the application on the basis, in summary, that nothing had changed since the day before. If the matter was adjourned for four to five days, there was a risk of the evidence going part heard. The Claimant maintained that it would not be a fair trial. If an experienced lawyer could not conduct the cross-examination without more preparation time, it was not fair to expect her to do it.

21. After a break to deliberate, the Tribunal gave a decision. In the 29 September 2017 Decision it set out its Reasons as follows.

> **"30 The application was refused by the Tribunal. We noted that this was the third similar application, and that those applications had been refused. There had not been any material change of circumstances, and there was no reason why we should come to any different conclusion. We did not accept that the trial would not be fair and commented that it was apparent from the cross-examination which the Claimant had undertaken that she had a good knowledge of the bundles, and was able to put points succinctly to the witnesses. We noted that what had occurred was not the fault of the Respondent, but any fault was on the side of the**

Claimant and those representing her. We stated that we accepted that it was a stressful experience for the Claimant, but pointed out that litigation was inevitably stressful."

22. After further discussion with the Judge, the Claimant said she would complete her cross-examination of Mr Cooch that afternoon, which she then, in fact, did.

23. On Monday 8 May 2017 at around 08.24 the Claimant sent an email which included an application for the hearing of the third claim to be stayed, because of a pending appeal to the EAT, and for time for her to cross-examine the Respondents' witnesses to be extended by four or five days. The Respondents had also indicated that one of their witnesses, Ms Woolcott, would, for medical reasons, not now be attending for cross-examination, and the Claimant sought a witness order in respect of her.

24. The first two applications were heard when the Tribunal convened at 10.00am. The Tribunal refused to stay the third claim. It indicated that it could allocate an extra two days for the Claimant's cross-examination of the Respondents' witnesses. The Claimant then departed the hearing, at around 11.50am, indicating that she was going to see her GP. After she departed, the Tribunal decided to adjourn to the next day. It then caused a letter to be emailed, communicating that decision. That letter also stated that the Tribunal could make available Monday 15 and Tuesday 16 May for further cross-examination of the Respondents' witnesses. It also addressed the further management of the witness order application.

25. At around 16.34 on Tuesday 8 May 2017 the Claimant emailed a Med3 form which stated she was not fit for work on account of stress from 8 to 22 May 2017. The Tribunal treated that as a further application to adjourn. On 9 May 2017 the Claimant did not attend. Miss Bell opposed that application. The Tribunal refused the application for what it called a general adjournment and ordered that the hearing would resume on 10 May 2017 at 10.00am. Written

Orders and Reasons were signed by the Judge and promulgated that day. These included a further order that, unless the Claimant indicated, by 12 May, that she wished to make oral submissions on Wednesday 17 May, the Tribunal would give directions for timetabled written submissions.

26. The hearing resumed on Wednesday 10 May 2017. The Claimant did not attend. The Tribunal continued to hear from the Respondents' witnesses, with the Tribunal itself raising some questions of them. That concluded at around 12.55 on Friday 12 May 2017. At around 12.37 that day the Claimant sent an email addressed to the Judge attaching a letter from her and a GP's letter. She said that she was not well enough to represent herself, whether by cross-examining or presenting written submissions. She stated that she had no choice but "to appeal your orders refusing adjournments in the hope that I can have a fair hearing I am fully prepared for."

27. The Claimant indicated that she did not consent to the GP's letter being shown to anyone apart from the Judge. The Judge caused a letter to go to her on Monday 15 May 2017 indicating that it could not be taken into account, unless she consented to it being shown to the Respondents and the Tribunal lay members. Also on 15 May, the Tribunal issued orders providing for two rounds of written submissions during the course of June 2017. A letter was also sent indicating that, having regard to the content of a medical report, a witness order in respect of Ms Woolcott was refused, but the parties could make submissions about weight to be attached to her statement.

28. In a letter of 25 May 2017, the Claimant asked for her GP's letter be taken into account by the Tribunal. She consented to it being shared with the Tribunal lay members and the Respondent "if the Respondent can agree to keep it strictly confidential." She also asked the Tribunal to reconsider its decision not to adjourn the matter. She concluded: "Please provide full written reasons for each of your decisions to turn down my applications for an adjournment."

29. Further correspondence ensued, on various matters, in May, June, and into July 2017.

30. The Tribunal issued a document, signed on 29 September 2017 by Employment Judge Baron. The copy in my bundle recorded that it was sent to the parties on the same day. However, both counsel assured me (and they agreed about this) that it was actually sent to the parties on 18 October 2017. In any event, I will refer to this as the 29 September 2017 Decision.

31. Under the heading: "Decisions and Orders", that document set out that the Tribunal refused an application by the Claimant for copies of the Tribunal's notes of evidence (given during her absence) and extended time for written submissions to dates in October and November. Under the heading "Reasons" there followed 54 numbered paragraphs over some eleven pages.

32. The Tribunal recorded that there had been correspondence subsequent to evidence being completed. It had not been able to meet to discuss outstanding matters until 27 September 2017. It set out a history of the litigation in the three claims. It noted that on 6 April 2017 the Judge had refused the Claimant's application to postpone the Full merits hearing. The Tribunal then turned to the further application to postpone, made at the Preliminary Hearing on 18 April 2017, as well as an application made by her that day, for the case to be transferred to another region. It gave a very full account of the arguments, and the Judge's reasons for refusing those applications. In particular, while Mr Johns was in fact present, and the Tribunal was told that the Respondents' solicitors had had some contact with him the previous week, the Claimant had said that she had not been able to instruct him fully because of the funding issue. The Judge considered that the Claimant's difficulties with representation were not the fault of the Respondent, it would be prejudiced by a postponement, and the Judge was not satisfied that a fair trial was not possible.

33. The Reasons then gave an account of events at the Full Merits Hearing. They described Mr Johns' application on 4 May 2017, and the respective submissions, and set out the Decision and the reasons for it. The Tribunal went on to describe the Claimant's further adjournment application, on 5 May 2017, the respective arguments, its Decision and its Reasons. I have already set out the relevant extracts.

34. The Tribunal then went on to describe the events of the following week, and the various orders that were made. It then went on to give an account of events in the remainder of May, June and July 2017, including various communications relating to written closing submissions. The Tribunal said that it was treating the latest correspondence as amounting to an application that the Hearing effectively start again and then continue, picking up from the point at which the Claimant had left the Hearing on 8 May 2017. For reasons it set out, it declined to do that. It also gave its reasons for its further Decision regarding written submissions. The letter indicated that the Tribunal intended to meet again in chambers on 27 November 2017.

35. Following receipt of the 29 September 2017 Decision, on 8 November 2017, the Claimant presented a Notice of Appeal. I will call that the first appeal. Paragraphs 3 and 4 read:

> **"3. The Appellant appeals from the decision of an employment tribunal consisting of three members chaired by Employment Judge Baron sitting in Croydon and sent to the parties on 18th October 2017 to the effect that her request for an adjournment of the proceedings and for provision of notes of the employment tribunal for a period during which the Tribunal carried out cross-examination whilst nobody was present for the Claimant, was turned down.**
>
> **4. The Appellant also contends that the Employment Tribunal has demonstrated bias against her."**

36. The document gave a narrative of events in the run up to the Full Merits Hearing, during that Hearing (including on 4 and 5 May 2017) and then following it. It then set out numbered Grounds of Appeal. Ground 1 concerned the allegation of bias. Ground 2 read as follows:

> **"The Employment Tribunal have acted unfairly, and outwith their discretion, in refusing the Claimant the opportunity to present her case with adequate preparation by adjourning the case or otherwise managing it to allow sufficient time for her to prepare."**

37. Ground 3 challenged the refusal of notes of evidence given during the period when the Claimant did not attend the Hearing. Ground 4 asserted that the Claimant's Article 6 rights had been breached, in particular by the Decision dated 29 September 2017.

38. That Notice of Appeal was considered on paper by HH Judge Eady QC (as she then was) who considered that it did not disclose any reasonably arguable grounds. The EAT wrote notifying the parties of her opinion on 12 February 2018. In the course of her Reasons she referred to the Decision sent (as it appeared) on 29 September 2017 "wherein the ET recorded its refusal of various applications for postponement of the Hearing" and opined that the Claimant had failed to engage with the "careful record provided by the ET" which provided its explanation as to why it refused to grant her applications for a postponement.

39. The Claimant then sought a hearing under Rule 3(10) of the **EAT's Rules of Procedure**.

40. On 14 March 2018, the Tribunal's written Judgment and Reasons, arising from the Full Merits Hearing, were sent to the parties. All of the Claimant's complaints were dismissed. The amended Grounds of Appeal before me (to which I will come) challenge the substance of that Decision only in two limited and specific respects. In view of that, I need not go through the Reasons in detail. But I note that they were thorough, running to 293 paragraphs over 68 pages.

41. In an opening section the Tribunal expressed its regret at the time taken to produce the Decision. It had had a further day in chambers in February 2018. It set out aspects of the procedural history. It set out the law, and gave itself some, proper, self-directions. It itemised the complaints and issues arising from the three claims. There were 33 discrete complaints of treatment amounting to direct discrimination (whether by reference to both sex and race or just race). All of these were claimed in the alternative as acts of unlawful harassment and/or of

victimisation. In respect of victimisation the Claimant relied on 11 claimed protected acts, including a number of grievances and the first and second Employment Tribunal Claims.

42. The Tribunal explained that, rather than set out first all of its findings of fact, and then have a further section, applying the law to them all to reach its conclusions, it would, to avoid repetitiousness, set out its findings and conclusions in relation to each of the matters that were the subject of complaint, sometimes grouping them together, as it went along. It noted, however, that it had taken a holistic view, and not simple analysed each individual matter separately.

43. The Tribunal went on to make findings of fact about the structure of the First Respondent, its grading and moderation process, and its Performance Improvement Plan process. It gave an overview of the Claimant's employment history from when she started in 2014, including dates of various grievances, and, in November 2016, a disciplinary hearing leading to a final written warning. It went on to find that there were certain protected acts (though not all of those claimed). It then spent the remainder, and bulk, of the Decision, working through all of the allegations, making detailed findings of fact about each matter or episode, and explaining, in relation to each, its reasoning as to why the complaints relating to it all failed.

44. I will consider those parts of the Reasons relevant to the particular Grounds of Appeal later in this Decision. For the present, I will now return to the chronology of the litigation.

45. On 24 April 2018 the Claimant presented a further Notice of Appeal to the EAT. I will call that the second appeal. In box 3 of the Notice of Appeal Form, which asks for the particulars of the Decision being appealed from, she referred to the Decision sent on 14 March 2018. The Grounds of Appeal, which were settled by counsel, were to the effect that the Tribunal had erred

in approaching its findings in relation to each of the substantive complaints, in a fragmented way, rather than looking at them all holistically.

46. The Rule 3(10) Hearing in the first appeal came before HH David Richardson on 27 June 2018. The Claimant was represented by Ms Robertson of counsel, under the auspices of the ELAAS scheme. She tabled proposed amendments to the second ground of appeal, in respect of the Decisions to refuse the adjournment applications on 4 and 5 May 2017. The Judge dismissed the appeal. There is no official transcript of the Decision, but Ms Robertson produced a note. The Judge considered that an appeal against a Decision from September could not be treated as encompassing decisions taken the previous May, against which appeals would be out of time. The proper course was to present a separate appeal and apply for an extension of time.

47. The next material event in the chronology, is that the Grounds of Appeal in the second appeal were considered on paper by Simler P (as she then was) who considered them not to advance any arguable error of law. Her opinion to that effect was notified in a letter from the EAT of 9 July 2018. On 2 August 2018 the Claimant wrote to the EAT, requesting a Rule 3(10) Hearing, and applying to amend the Notice of Appeal, in the second appeal.

48. The Rule 3(10) Hearing in the second appeal came before Slade J on 5 December 2018. The Claimant was represented by Ms Robertson. Slade J gave permission to amend to substitute new grounds of appeal in a form tabled by Ms Robertson, and directed that these proceed to a Full Hearing. The full text of those amended grounds appears at the end of this decision. The Respondents then entered an Answer, and applied to discharge Slade J's order. The nub of their case was that, although she was purporting to appeal against the substantive Decision

promulgated in March 2018, in reality the Claimant was once again seeking to challenge the refusals of the postponement applications on 4 and 5 May 2017, which was an abuse of process.

49. After considering written submissions from counsel on both sides, Slade J issued an Order with written reasons refusing that application. She noted that, in **Shodeke v Hill and London Borough of Havering**, UKEAT/0394/00, a general ground failed, because the individual grounds of which it was composed had all been dismissed. But an appellant was not barred from relying on allegations in relation to decisions taken in the course of a Hearing, in respect of which time had expired, in support of a general challenge to the overall fairness of the Hearing. The overall unfairness of a Hearing, and the contribution of such decisions to it, might not become apparent until the conclusion of the Hearing. However, at the Full Hearing of the present appeal, it would still be open to the Respondent to advance the points raised in their set-aside application.

50. So it was that the Amended Grounds of Appeal in the second appeal, permitted by Slade J, came to a Hearing before me, and form the subject of the present Decision. I had the benefit of written skeletons and full oral argument from Ms Robertson for the Claimant and Miss Bell for the Respondents. I will not attempt to set out every detailed point raised, but will summarise what seem to me to have been the most significant submissions.

Claimant's Submissions

51. Ms Robertson submitted in her skeleton that "[t]he heart of this appeal is that the Claimant was deprived of a fair hearing because of short-term adjournment decisions made by the ET on 4 and 5 May 2017." The Tribunal had failed to take account of relevant factors and taken account of irrelevant ones, as set out in the Grounds of Appeal.

Abuse of Process

52. Ms Robertson relied on Slade J's Decision and reasoning (above) which, she submitted, agreed in substance with the approach taken in **Shodeke v Hill** (above). The EAT could interfere in a case management decision if relevant matters were not taken into account, or irrelevant ones considered, or it was perverse. If the conduct of a Hearing was flawed or unfair, this could not be saved by the fact that the Decision was otherwise one which the Tribunal was entitled to reach. See: **Stansbury v Datapulse Plc** [2004] ICR 523 at 26.

53. Section 6(1) **Employment Tribunals Act 1996** allowed for representation by counsel or a solicitor. Where both sides were represented, the component of the overriding objective of, so far as possible, putting parties on an equal footing, was furthered. Whether there had been a material change of circumstances, enabling a Tribunal to revisit an earlier order, was an objective question: **Serco Ltd v Wells** [2016] ICR 768. Time to appeal in respect of an order did not run until a written record had been sent to the parties. See: **Employment Appeal Tribunal Rules 1993** at Rules 3(1)(e) and 3(3)(b) and the EAT's **Practice Direction** (2018) at paragraph 4.2.

54. The draft amendments to the first Notice of Appeal were stand alone. But the Amended Grounds of the present appeal, permitted by Slade J to proceed, argued that the Claimant was deprived of a fair hearing, because of errors in dealing with the adjournment applications. Further, the original Ground 2 of the first appeal, did not, technically, form part of a proper appeal, as the decisions and orders listed in the Decision of 29 September 2017 did not include the decisions on the adjournment applications. The Tribunal had set out written reasons for those decisions, but no written record of the orders. So, time had not begun to run in respect of them.

55. It was not unreasonable for the Claimant's counsel to have thought that the challenge to those decisions was already properly covered by the first Notice of Appeal – see HHJ Eady QC's approach in her "sift" reasons. Counsel having discovered her mistake at the Hearing before HH David Richardson, the shift of focus was entirely legitimate. Given the importance of the Article 6 right, it was right to focus on substance rather than form.

Application of 4 May 2017

56. Whether Mr Johns was viewed as having made one adjournment application or two, on the morning of 4 May 2017, the Tribunal had failed to take account of relevant factors, as listed in paragraph 5 of the Amended Grounds. One was the number of days' adjournment that could be accommodated. An adjournment to the following Monday was an obvious compromise. It was unreasonable to require Mr Johns to complete cross-examination of Mr Cooch that day – as reflected in the fact that, later on, the Claimant was allowed an adjournment to the next day. The Tribunal's decision the following week to allow the Claimant a further two days also showed that there was more flexibility in the timetable.

57. As to irrelevant factors, rather than addressing the "actual short-term adjournment application before them" the Tribunal had taken into account the irrelevant factors listed in paragraph 6, on the incorrect footing that that the application was a request for "relisting".

Application of 5 May 2017

58. As to the application of 5 May 2017 the Tribunal additionally erred in its view that there had been no material change of circumstances. It also again wrongly assumed that a further listing was being sought. The objective change in circumstances was that, when Mr Johns made his applications on 4 May 2017 the Claimant was represented; now, on 5 May 2017, she was not.

Adequacy of Reasons

59. As to the adequacy of the Tribunal's Reasons, only two specific aspects were raised in the Amended Grounds and addressed in Ms Robertson's submissions. The first related to a part of the Decision concerned with a group of complaints concerning feedback to the Claimant during a certain period, in the context of her feedback requests and the First Respondent's performance review processes. The complaints were to the effect that this had been delayed and or unjustifiably negative. One of the managers involved in this process was Mr Scott.

60. The Reasons included the following passage (omitting footnotes):

> **"102. The next element is that on 30 March 2015 Mr Scott was not able to substantiate the feedback and labelled the Claimant as being aggressive. There are two elements to that allegation. The first relates to substantiating the feedback. We cannot add anything to the conclusion above relating to issue 6.**
>
> **103. We have only been able to find one reference to the Claimant being referred to as 'aggressive' and that is in the email from Mr Scott to Ms Davé of 11 June 2015 commenting on her notes of the meeting. The paragraph is below. The first sentence comes from Ms Davé's notes, upon which Mr Scott then comments.**
>
> > **"Duncan said your (Yvonne's) communication method had an adverse impact on other people." I am not sure I made such a sweeping statement, but I certainly mentioned something around very direct communication because Yvonne's rebuttal was that she was "consistent" in her communication style. I think this was in relation to my mention of the call Yvonne made to me on a particular Friday that was particularly aggressive and where she threatened not to deliver the restricted persons process.**
>
> **104. Mr Scott repeated the point during his interview with Lindsay Wood on 8 July 2015 when the Claimant's first two grievances were being investigated. Ms Davé said in her witness statement that the word 'aggressive' was not used at the meeting. The Claimant did not include any reference to this allegation in the section of her witness statement relating to the meeting. In cross-examination she said that the description of her as being aggressive was stereotypical of the attitude in the Respondent towards black females. She said that she had been referred to as an 'angry black woman'. In her submissions Miss Bell described these statements by the Claimant as being outrageous and unsupported by any evidence.**
>
> **105. Miss Bell also submitted that a hypothetical comparator who had acted as the Claimant did would also have been described by Mr Scott as being 'pretty aggressive' and that that had absolutely nothing to do with the Claimant's race or indeed her sex.**
>
> **106. We find that at the meeting on 30 March 2015 Mr Scott had said words to the effect that during a telephone conversation in mid-October 2014 at a time that the Claimant was seeking extra resources for the A2 project the Claimant had been 'pretty aggressive'. From all we have read and heard, and from the attitude of the Claimant when giving evidence at this hearing, particularly taking into account the position the Claimant was taking in October 2014 about her role with A2, we accept that Mr Scott could reasonably have perceived her as being 'pretty aggressive' during that call. We have noted that Mr Dawson commented on the Claimant in general and said in his witness statement that she had a 'refreshingly direct style', but that he was 'slightly concerned whether she could adapt effectively to consulting, as she would need to flex her style.'**
>
> **107. Would Mr Scott have described the Claimant's attitude during the conversation any differently if she had not been black or had not been female? We have decided that there is no evidence from which we could reasonably come to that conclusion."**

61. Ms Robertson argued that, in accepting the Respondent's submission that the Claimant's statement that she had been described as "an angry black woman" was unsupported by any evidence, the Tribunal had neglected the evidence of Mr Dijemeni, who, in his written witness statement, had said:

> **"I also became aware of rumours through one of my peers, that Yvonne could not be 'put before a client' and that she received negative feedback from her time on the UBS Project. It was said that Yvonne could be perceived as "an angry black woman" based on how she carried herself."**

62. The second specific matter concerned an allegation that the Claimant was prevented by Mr Cooch and Mr Raines from working on something called the A1/1 project. The Tribunal made detailed findings of fact, and drew its conclusions, about the evolution of the First Respondent's involvement in this project, at paragraphs 108 – 125. In relation to Mr Cooch, it concluded that there was "no evidence at all" that he was "involved in the selection of the team." Ms Robertson submitted that this conclusion was contradicted by a number of emails, and a passage in the evidence of a witness, Ms Wintermantel, which showed that Mr Cooch was "plainly involved in the selection."

Respondents' Arguments

Abuse of Process

63. Miss Bell argued that, apart from the very limited challenge to two aspects of the Reasons, the final amended Grounds of Appeal only challenged the adjournment decisions of 4 and 5 May 2017. This was the only unfairness alleged in relation to the conduct of the Full Merits Hearing. These challenges were long out of time. The 29 September 2017 document constituted the written Record of the Decisions to refuse the postponement applications made on 4 and 5 May 2017. That document also provided written Reasons, though, strictly, these were not required, as the Claimant's request for them had not been made at the Hearing itself. The date of an Order was, for these purposes, the date when it was orally pronounced. Although in **Okoro v Taylor Woodrow Construction Limited** UKEAT/0318/10 the EAT had decided otherwise, relying on

A the **Practice Direction**, that case could be distinguished. In any event the position was governed by Rule 3(3)(b), and the **Practice Direction** was wrong.

B 64. A challenge to these Decisions had been attempted before, as part of the first appeal; but HHJ Richardson had declined to allow it to proceed, because it was out of time. There had been no appeal against his decision.

C 65. There was therefore an abuse of process, because the characterisation of the present appeal as being a general challenge to the overall fairness of the Hearing was a sham, the reality being that this was a second attempt to challenge these Decisions in their own right; and because a challenge to the Decisions on these two adjournment applications was long out of time.

D 66. In any event, argued Miss Bell, the Decisions on those applications did not deprive the Claimant of a fair hearing. The Tribunal did not neglect relevant factors, or consider irrelevant ones. It properly exercised its discretion.

E 67. In relation to Mr Johns' application on 4 May 2017 (which, she said, was one application), the Tribunal took into account (relevantly), the time and point in the Hearing at which the application was raised, that the request was (ultimately) for an adjournment of four to five days, and that cross-examination of Mr Cooch was part way through. It was entitled to take a view that a fair solution was to require the cross-examination of Mr Cooch to be completed, but then allow an adjournment until the following Monday. All of these matters were reflected in the September 2017 Reasons. All of the relevant matters referred to in the Grounds of Appeal were, demonstrably, taken into account by the Tribunal.

F

G

H 68. The Tribunal did not take account of irrelevant factors. It was not irrelevant, or unreasonable, to take into account the risk of the Hearing going part heard, and the likely delay

before further dates could be found. The extent of the adjournment in fact offered to Mr Johns – the remainder of the day after finishing Mr Cooch, and the following day, was within the scope of the Tribunal's proper discretion. It was not *Wednesbury* unreasonable. The decision of the Tribunal the following week, to allow the Claimant two further days to cross-examine the Respondent's witnesses, was taken in different circumstances. It did not show that the decision taken the previous week was wrong.

69. There was no discrete separate or alternative application by Mr Johns that the Claimant should not be required to continue the cross-examination of Mr Cooch that day. In any event, after the decision on Mr Johns' application, and he had ceased to be instructed, and upon the Claimant's further application, that adjournment was allowed to her.

5 May 2017 Application

70. The 5 May 2017 application was made after Mr Johns was no longer instructed, but on the basis that an adjournment of four to five days, would enable him to be *reinstructed*, and give *him* the time he needed to prepare. It was therefore similar to the application made by him the previous day. It was not made with a view to *the Claimant* having more time to prepare as a litigant in person. The Tribunal was therefore entitled to take a view that there had been no material change in circumstances. Again, the Tribunal took into account the relevant factors, did not consider any irrelevant ones, and did not make a *Wednesbury*-unreasonable decision. The Claimant was not, as a result, deprived of a fair hearing.

Adequacy of Reasons

71. Miss Bell, as well as referring to **Meek v City of Birmingham District Council** [1987] IRLR 250 – and the test of whether the parties can understand why they have won or lost – referred also to the established principle that it is not necessary for a Tribunal to make findings

A on all matters of dispute before them, nor to recount all of the evidence. See: **ASLEF v Brady** [2006] IRLR 576 at paragraph 55.

B 72. As to paragraph 104 of the Reasons, this referred to a statement made by the Claimant, in her evidence in the course of being cross-examined. The Tribunal recorded there a submission made by the Respondent's counsel about that. It did not make any finding of its own. The Tribunal was not obliged specifically to refer to Mr Dijemeni's evidence in its Reasons. He was C also cross-examined, so his evidence did not rest with what was in his written statement. In any case the contents of his statement did not show that the Tribunal erred.

D 73. As to the challenge to the finding concerning Mr Cooch's role in relation to the A1/1 Project, the Tribunal set out carefully reasoned findings about these complaints over three pages of its Decision. It expressly referred to certain of the documents relied on in this Ground. Other documents relied upon were not relevant to, or did not contradict, the Tribunal's findings.

E **Discussion and Conclusions**

74. I will start with the question of when time to present an appeal in respect of an Order begins to run.

F 75. Rule 3 of the **Employment Appeal Tribunal Rules 1993** is concerned with the institution of an appeal. Rule 3(1)(e) makes provision that, where the appeal is from an Order of the Employment Tribunal, the appellant must serve on the EAT a copy of "the written record of the G order of the employment tribunal" and, if available, the written reasons. Rule 3(3)(b) provides that, in the case of an appeal from an Order, the period within which an appeal may be instituted is 42 days from the date of the Order.

H

76. The EAT's **Practice Direction 2013**, which was the one in force when this appeal was instituted, provided at paragraph 5.2:

> **"If the appeal is against an order, direction or decision, the appeal must be instituted within 42 days of the date of the order, direction or decision. The EAT will treat a Tribunal's refusal to make an order or decision as itself constituting an order, direction or decision. The date of an order, direction or decision is the date when the order, direction or decision was sent to the parties, which is normally recorded on or in the order, direction or decision."**

77. I note that paragraph 4.2 of the EAT's **Practice Direction 2018** (which came into force on 19 December 2018) is in the same terms.

78. I was referred to various other provisions, including of the Civil Procedure Rules. I do not need to set out all of this material. What it shows is that, for some purposes, the date of an Order made at a Hearing will be the date on which it is orally pronounced by the Judge, Court or Tribunal, at that Hearing, and, for other purposes, the date of such an Order will be the date on which the written record of it is sent to the parties, or otherwise formally promulgated.

79. In my judgment, it is clear, as a matter of construction of the EAT's Rules, that, for the purposes of institution of an appeal to the EAT, both in terms of documentation required, and time to appeal, it is the written record that is pertinent, and, for these purposes, the date of the Order is the date on which that record is sent. The **Practice Direction** is therefore consistent with the Rules. The Rules are, I think, clear, read alone; but if (contrary to my view) they are ambiguous, or leave the point open, the **Practice Direction** is certainly not inconsistent with them and does not deal with the matter in an impermissible way.

80. **Okoro** (above) is to the same effect. I do not see how it can be distinguished, but in any event my decision on this point would be the same, even if I was not bound to follow it.

81. For these purposes an Order includes an "order, direction or decision". See the wording of the **Practice Direction** and the definition of "case management order" (as opposed to a

"judgment") in Rule 1(3)(b) of the **Employment Tribunals Rules of Procedure 2013**. It therefore includes a decision refusing an application to postpone a hearing.

82. Ms Robertson argued that the 29 September 2017 document did not amount to a written record of the Orders refusing the 4 and 5 May applications, so time to appeal those Decisions did not begin to run when it was sent to the parties. I disagree. Rule 61(2) of the **Employment Tribunals Rules of Procedure 2013** stipulates that, in the case of a decision announced at a Hearing, what is to be provided to the parties is "a written record" of the decision. True it is that the 29 September 2017 document did not include the decisions on these two postponement applications among the decisions and orders listed in its *heading*. It appears to me that that is because the Tribunal listed there those Orders that it was making for the first time. But it plainly identified those decisions, in terms, in the body of its content, as well as setting out the reasons for them. That was sufficient to constitute the provision of a written record of those decisions. Nor is this affected by the fact that, in the later Reasons for its substantive Decision arising from the Hearing, the Tribunal referred briefly to one of those Decisions again.

83. Miss Bell made a submission by reference to the provision in Rule 61(2), that decisions concerned only with the conduct of a Hearing need not be identified in the record of that Hearing unless a party specifically so requests. The Claimant had not made such a request at the Hearing. So, she said, the Tribunal was not obliged to produce a record. As to that, it is not clear to me that this provision requires the request to be made at the Hearing itself. But even if that is the correct construction, it would still have been open to the Tribunal to decide, on its own initiative, to produce such a record, whether or not in response to a request, and whether as part of its overall record of the outcome of the Hearing, or separately, in advance, if it so chose.

84. I should add this. In argument Ms Robertson submitted that it would, from a practical and policy point of view, be unattractive if a Tribunal was required to produce separate records of its decisions on case management matters during the course of a Hearing, and an aggrieved party obliged to present multiple appeals against each one, rather than all of the ground being covered in the Tribunal's substantive Decision, and a single appeal presented in relation to it.

85. I agree. But that is not the effect of the Rules, nor my understanding of them. The following points bear repetition. Firstly, a Tribunal is not *obliged* to record a case management decision made during the course of a Hearing, at all, unless requested to do so. Secondly, if it does so (whether in response to a request or on its own initiative) it can, in principle, choose whether to do so in a freestanding record, or as part of the record of its substantive Decision arising from that Hearing. But if the Tribunal *does* produce a separate record, then time to appeal that Decision *in its own right* will run from that date. Finally – a point to which I will come – failure to appeal such a decision in its own right, does not mean that it cannot be later relied upon as part of a wider challenge to the fairness of the hearing; but these are not the same thing.

86. Pausing there, I conclude that time to appeal the decisions refusing the adjournment applications of 4 and 5 May 2017 *in their own right* did not run from the dates on which they were orally given, nor from the date on which the Tribunal's substantive Decision was sent to the parties (on 14 March 2018). Rather, it ran from the date on which the 29 September 2017 Decision was sent to the parties. As I have noted, I was told that this date was, in fact, 18 October 2017. On that basis, time to appeal those decisions in their own right ran from 18 October 2017.

87. It follows that, insofar as HH David Richardson proceeded, at his hearing, on the basis that time to appeal those decisions ran from the dates on which they were orally pronounced, I would respectfully disagree. Further, in my view (as, I think, may also have appeared to HHJ Eady QC) reading it as a whole, the first Notice of Appeal did in fact seek to challenge those two

decisions, in the form in which it was originally presented – it refers to them specifically in its narrative of events, and Ground 2 was arguably capable of encompassing them. That said, the original Notice of Appeal and Grounds covered other matters as well, and did not explicitly state that it was seeking to challenge those two decisions; and, as I have described, Ms Robertson came to the Rule 3(10) Hearing seeking to amend Ground 2 in order to refer to them specifically.

88. In all events, it would have been open to the Claimant, if so advised, to seek to appeal HHJ Richardson's decision, on the basis that she had presented, in the first Notice of Appeal, and was merely seeking to amend in order to expand, a timely appeal in relation to the decisions of 4 and 5 May 2017, which ought not to have been dismissed. Further, even if (contrary to my view) the first Notice of Appeal did not in fact include an appeal against those decisions, time to appeal them in their own right still ran from 18 October 2017, and it could have done so.

89. It follows that if Miss Bell is right that the present (second) appeal does amount, in effect, to an attempt to appeal directly against the Decisions on those two adjournment applications in their own right, then that is an abuse. That is because (on my reading) such appeals have indeed been previously raised and disposed of, without further challenge to that disposal, as such, (or, alternatively, this could and should have been included in the first appeal); and/or it must fail because, in any event, it is out of time, and no application for an extension of time has made.

90. However, Ms Robertson submitted that the present Notice of Appeal should not be viewed in that way. Rather, she said, it challenged the overall fairness of the Tribunal's Decision promulgated on 14 March 2018, permissibly relying upon what happened in relation to those two postponement applications, as part of that overall challenge.

91. As to that, Miss Bell did not dispute the general legal test to be applied, as articulated by Slade J: that an appellant is not barred from relying on allegations in relation to a particular

decision taken during the course of a Full Merits Hearing, in support of a challenge to the overall fairness, and outcome, of that Hearing, by the fact that an appeal against that decision in its own right would be out of time. She was right not to do so. I agree with Slade J's formulation.

92. However, what I have to decide, definitively, is the application of that legal principle to the particular facts of this case. Slade J's decision (which she was then invited to revisit) was taken at a Rule 3(10) Hearing. She had only to decide whether the Claimant's position on this point was arguable. She, properly, did not determine it, and specifically confirmed that she left the door open to the same issue being further explored at the Full Hearing of the appeal. Miss Bell, while not disputing the proposition of law, argued that, on analysis, the point of law identified by Slade J did not assist the Claimant in this appeal. I agree. My reasons are as follows.

93. First, the existence of a further Ground of Appeal challenging the Tribunal's substantive Reasons in respect of two matters, has no relevance to this point, precisely because they are concerned with aspects of the substantive decision. They do not, in any way, challenge the fairness of the Hearing, or the Tribunal's conduct of the Hearing, or purport to contribute anything to any such challenge. Secondly, the *only* other issues raised by the Amended Grounds of Appeal, relate to the refusal of the adjournment applications on 4 and 5 May 2017. Paragraphs 9 and 10 relate, effectively, to the time point in relation to them; paragraph 11 to the Reasons challenges. All of the preceding paragraphs raise issues about, and only about, those two Decisions.

94. In particular, and strikingly, the Amended Grounds of Appeal raise no challenge to the decisions which the Tribunal took the following week, whether on the Claimant's further adjournment applications, or otherwise in relation to the conduct of the Hearing; or subsequent to the Hearing. There is no challenge to any such decisions in their own right. Nor is any such further Decision or development relied upon as having contributed to the unfairness of the

A Hearing. The only matters alleged by this appeal to have made the Hearing unfair are those two decisions taken on 4 and 5 May 2017.

B 95. Thirdly, the challenges to those two decisions are advanced by reference to the circumstances obtaining when the Tribunal took them, and the reasons why it came to those decisions when it took them. As Ms Robertson put it in her written skeleton argument, the Claimant's case is that the Tribunal erred "when dealing" with those applications. The only C reference at all to developments following those two decisions is to the fact that, the following week, the Tribunal offered the Claimant an extra two days to complete cross-examination. But the point of this reference is not to seek to challenge *that* decision, or to suggest that it further contributed to the unfairness of the Hearing. Rather, it is relied upon merely as having evidential D value, by (it is claimed) casting light back on the fairness of the decisions taken the week before.

96. This appeal is not therefore advanced or argued on the basis that this is a case where these E two decisions *contribute* to the picture of a Hearing which is said to have been unfair on wider grounds, or where it has emerged that they form part of a wider picture. I stress again that the Amended Grounds do not anywhere refer to the alleged unfairness, or contribution to unfairness, of later developments or decisions in the course of the Hearing; nor was there any argument about F that, written or oral, before me.

97. I therefore agree with Miss Bell that the Grounds of Appeal (other than the Reasons challenges) are an abuse, because they effectively seek to challenge Orders or Decisions in their G own right, out of time, without the Claimant having sought, and obtained, an extension of time, rather than relying on arguments about those decisions as contributing to a wider Ground or Grounds of Appeal that the conduct of the Hearing was unfair. As I have said, I also think that H they attempt to revive challenges that were in fact raised in the previous appeal.

98. However, in case I am wrong in any respect about that, and because the substantive Grounds relating to those decisions were fully argued, I will consider them on their merits.

99. Ms Robertson emphasised in her submissions that Mr Johns' application was, as she put it, by any token unusual. It was made in the middle of cross-examination of an important witness. He was stating that he needed more time to prepare, in particular to complete the cross-examination of that witness. That, she said, should not have been surprising, given the volume of material and number of witnesses. The timing, she said "objectively" showed that he did not feel able properly to continue with the cross-examination; and the Tribunal should have recognised that it was not fair to the Claimant not to allow him more time.

100. However, I agree with Miss Bell that the unusual nature and timing of the application reinforced, rather than undermined, the propriety of the Tribunal's response to it. First, as Miss Bell pointed out (adopting a distinction identified in **Shodeke** (above) at 47 between lack of representation and lack of preparedness), this was not a case of the Claimant having unexpectedly found herself deprived of Mr Johns' representation – he had not suddenly fallen ill or prey to some other calamity. Rather, it was being put that he was not sufficiently prepared.

101. However, as of 18 April 2017 Mr Johns and the Claimant were aware that the Claimant's further application for a postponement, made on that date, had been refused. By that time, Mr Johns' authority from the insurers had come through (apparently on 13th April, albeit I was told there was some delay in this being communicated to the Claimant). Following the further two days which the Tribunal spent reading, Mr Johns had also appeared at the start of the hearing of live evidence on 21 April and thereafter, and he had cross-examined the Respondents' first witness, and embarked on the cross-examination of the second one, all without his at any point raising any issue about lack of preparedness and needing more time.

102. Against that background I do not think find anything troubling in the Tribunal having registered its "dismay" at the 4 May 2017 application being raised. The application was unheralded, and came at a time when the Hearing was well advanced and on course. Certainly, I do not regard that remark as supporting the contention that the Tribunal was in some way punishing the Claimant or her counsel when it refused the application. It plainly considered the application, heard submissions on it, deliberated, and gave a reasoned decision on it.

103. Nor do I think that the Tribunal wrongly proceeded on the basis that what was being sought was a "relisting", rather than, as Ms Robertson put it, a "short-term adjournment". Plainly this was not an application made before the trial had begun, for the trial dates as a whole to be postponed. Nor was it – or was it understood to be – an application to, as it were, scrap the trial so far, and start again on another occasion from day one, re-running the cross-examination of the Claimant and her other witness, Mr Raines and Mr Cooch. What Mr Johns was seeking, the Tribunal plainly understood, was an adjournment to allow him more time to prepare, before then *continuing* with the cross-examination of Mr Cooch and then the remaining witnesses.

104. However, in the way that he first advanced his application, it *was* put on the basis that, if it were granted, the Tribunal would have to find more dates outside of the existing listing, in order to complete the Hearing. He suggested eight or nine fresh days would be needed. (As I have noted, the Tribunal, in giving oral reasons, referred to ten days, which seems to me to have simply been a cautious rounding up of his estimate.) In lawyers' jargon, the matter would go part heard.

105. In further dialogue, Mr Johns invited the Tribunal to grant an adjournment of about five days, and suggested that evidence could *then* still be completed within the existing allocation. However, it is clear that the Tribunal considered that allowing that length of adjournment would still risk the matter going part-heard, not just because deliberation time would be lost, but because

of the risk of witness evidence then not being completed in the existing allocation. That was a judgment call for the Tribunal to make. It was itself plainly very familiar with the issues and the documents, and had had the experience of the Hearing over many days up to that point to draw on. I do not think it can be said that its view was plainly perverse.

106. Nor does the fact that, the following week, the Tribunal offered the Claimant an extra two days to cross-examine show that its earlier decision was perverse. I was told (and this would all have been quite usual) that the representatives had, prior to the start of the Hearing, discussed a proposed timetable, and this was discussed with the Tribunal as well, and it indicated its expectations. It is apparent from a careful consideration of the materials that the Tribunal's original aim had been to complete evidence by 12 May and start submissions on 15 May. By the time of the "offer" of two more days to complete cross-examination, when the Claimant was in person, and there was no longer any further suggestion that she might reinstruct Mr Johns, the Tribunal may have been prepared to take the step of making *her* that offer, even though it risked eating into its deliberation time. That does not show that it was perverse of it not to make the same offer to Mr Johns in the circumstances obtaining on 4 May.

107. Nor was it wrong for the Tribunal to take into account the potential costs implications for the Respondents of the hearing going part-heard. There might be cases where such a cost factor is wrongly regarded as *outweighing* other factors; but I cannot see why it should be regarded as necessarily or automatically wholly irrelevant.

108. Miss Bell also submitted that, not only was this not a case where Mr Johns had not previously signalled at any point before, that he was not sufficiently prepared, nor was this a case where he had, on the day of the application itself, withdrawn against the Claimant's wishes, leaving the Claimant without representation in circumstances where she had wanted him to continue. Rather, submitted Miss Bell, it was plain that the Claimant chose to dis-instruct Mr

Johns, because of her own dissatisfaction with his performance and/or command of the material thus far. That was her choice. Ms Robertson did not accept that characterisation of the matter.

109. As to that, what I have to consider is the decision which the Tribunal took, in the light of the information which it had, and the picture with which it was presented, at the time. I note first, to repeat, that there had been no previous indication that Mr Johns was not sufficiently prepared to embark on, or continue with, the representation of the Claimant at this trial. I note also that, before making its Decision, the Tribunal specifically asked whether, if the application was refused, he would cease to act, and he told it that that was a decision that had yet to be taken. It is fair to assume that the Tribunal had that possibility in mind. Mr Johns did also ask that, in that event, *the Claimant* not be required to complete the cross-examination of Mr Cooch that afternoon. But, with reference to paragraph 2 of the Amended Grounds of Appeal, that did not fall to be considered, as such, unless or until, following the giving of the Tribunal's decision on *his* application, he was, in fact, dis-instructed. After that occurred, that was granted.

110. The Tribunal was also aware of the Claimant's account of the background in which she had dis-instructed her first firm of solicitors in January 2017, the second firm had come off the record after two weeks, and she had dis-instructed the third firm in April. She had set all of this out in particular in her 6 April 2017 postponement application. It was therefore fully apprised of her position on that, and able to take it into account. I do not think it was perverse or wrong for it to take a view that her past difficulties with representation were a matter between her and those firms, and should not be visited on the Respondents.

111. I also agree with Miss Bell, that it was not perverse, or wrong, for the Tribunal, given that it was prepared to offer Mr Johns a break for the remainder of the Thursday, and then the Friday, after he had completed cross-examining Mr Cooch, not, instead, to offer him a break at least of equivalent length *before* finishing Mr Cooch. Some advocates choose to complete their

preparations of cross-examination, in tandem with the Hearing progressing, keeping, as it were, one or two witnesses ahead. Advocates who do that can find themselves in difficulty if there is a sudden change of running order. A Tribunal may be sympathetic to that. But this Tribunal was merely expecting the advocate to complete the cross-examination of the witness he had already begun to cross-examine. The Grounds of Appeal refer to the particular importance of Mr Cooch to the Claimant's case, as he featured in a number of the complaints. But, as Miss Bell correctly submitted, Mr Johns was seeking more preparation time to complete his cross-examination of the Respondents' witnesses generally, and there were certainly other important witnesses as well.

112. The Tribunal was entitled, also, to take account of the impact on the witness himself of his cross-examination being broken and delayed. The allegations against him were serious for him as well as for the Claimant. Nor does the fact that the Tribunal later allowed the Claimant the break of the remainder of the afternoon advance this Ground. At that precise point the Claimant was now no longer represented, and having to take over the cross-examination herself. The Tribunal had also had confirmation from Miss Bell that Mr Cooch was, as a matter of fact, available the next day. The fact that it was prepared, at that point, to grant *her* that indulgence, does not mean that it was wrong not to grant the same indulgence earlier on to Mr Johns.

113. As to the size and complexity of the case, the issues, and the evidential material, the Tribunal was plainly extremely well acquainted with all of that, and referred to it in the Reasons that it gave for its decision. It was entitled to come to the view that it did, as to whether there had been a fair opportunity overall to prepare, taking account of the prior history of the litigation, and involvement of representatives on behalf of the Claimant, with which it was very familiar.

114. I do not agree, therefore, that the Tribunal failed to take account of the relevant factors identified in paragraph 5 of the Grounds of Appeal. It did not attach the *weight* to them that Ms Robertson argued that they should have, but that was a matter for its appreciation, unless its

approach was so unbalanced as to be *Wednesbury*-unreasonable. Nor do I think that the Tribunal wrongly took account of any irrelevant consideration, as contended by paragraph 6. As I have indicated, it fairly estimated, in light of Mr Johns' own submission, the number of further days' that might be needed, fairly took into account (given the number of people involved) that there could be a significant delay before convenient dates could be found, the costs implications were not wholly irrelevant, and the "dismay" comment did not point to an intent to punish.

115. In short, it was entirely within the scope of the proper exercise of the Tribunal's discretion when responding to Mr Johns' application, to require him to complete cross-examination of Mr Cooch, and then to limit the adjournment that it would permit him, to the remainder of that day, and the following day, taking him to the weekend. Further, when he then ceased to represent the Claimant, it did not require the Claimant herself to complete Mr Cooch's cross-examination that day (and Ms Robertson confirmed that no complaint was made of that decision, as such). I do not think the Decision on Mr Johns' application deprived the Claimant of the right to a fair trial.

116. I turn to the 5 May 2017 decision. Ms Robertson says that the circumstances were materially different from the day before, because the Claimant was now representing herself, whereas previously she had been represented by Mr Johns. But I agree with Miss Bell, that the Tribunal was entitled to have regard to the fact that she was not asking for a further break to enable her to continue conducting the cross-examination herself, but, once again, for an adjournment of four or five days, with a view to her reinstructing Mr Johns. That was, as such, effectively the same application as he had made the day before.

117. Of course, the fact that she was now representing herself *could*, in turn, have given rise to some further change in circumstances which the Tribunal ought to have taken account. But it was anticipated when it took its decision the previous day, that, if Mr Johns' application were not

granted (or not in full) he might cease to represent, and the Tribunal had in fact accommodated the request made by him (against that contingency) and then by her (after it transpired) that she not be required to complete the cross-examination of Mr Cooch that afternoon. Given that, and to repeat, the nature of her specific postponement application, the Tribunal was therefore entitled to take a view that the fact that it was now she who was cross-examining him on the Friday, did not, *as such*, represent a material change of circumstances.

118. In any event, the Tribunal plainly considered the Claimant's representations on the Friday that she was struggling, and felt that she was being placed under undue pressure; and it gave a considered response to them, taking into account that she was a litigant in person, but also its assessment of her command of the materials and general ability to carry out the task. It was entitled to take a view that her difficulty was not lack of preparedness, as such. It was also, once again, entitled to take account of the position of the current witness, whose cross-examination was not yet complete. I conclude that I cannot say that it erred in its approach to this further decision, or thereby deprived the Claimant of her right to a fair trial.

119. With respect to paragraph 3 of the Amended Grounds of Appeal, the Reasons for these two Decisions were set out in the 29 September 2017 Decision, which adequately explains them.

120. I conclude that, that, even if the Claimant was entitled to seek to challenge these Decisions as part of the present appeal, and/or by way of a challenge to the overall fairness of the Hearing of these claims, I would not have allowed the appeal on these Grounds.

121. I turn, then, to the challenges to the substantive Reasons.

Reasons Challenges

122. Although the Amended Grounds of Appeal postulated that they were examples, it only identified two specific challenges to the adequacy of the Tribunal's Reasons. The first, in paragraph 11.1, related to what the Tribunal said at paragraph 104 of its Decision.

123. The short answer is that, as Miss Bell pointed out, the Tribunal did not itself say that the suggestion made by the Claimant was unsupported by the evidence. It referred to that having been Miss Bell's submission. Further, I consider that the Tribunal's reasons in the relevant passage of its Decision, concerning the particular complaint, were sufficient. It was not necessary to include specific mention of, or a finding drawn from, Mr Dijemini's evidence. In any event the Tribunal was not bound, in view of his statement, to find that the Claimant had, indeed, been referred to, in terms, as an "angry black woman". It does not unambiguously say that; and Miss Bell also fairly made the point that he had been cross-examined, and I did not have the basis to say that, in light of his overall evidence, the Tribunal should have made such a finding.

124. The second specific challenge was to the Tribunal's finding, in paragraph 125, that there was no evidence that Mr Cooch was involved in the selection of the A1/1 project team.

125. The underlying complaint was that the Claimant was, because of race, prevented by Mr Cooch and Mr Raines from working on this project. In addressing it, the Tribunal made very detailed findings about the whole course of events relating to this project, over more than four pages. These included that Mr Cooch was the Engagement Partner, but Mr Raines was the Lead Engagement Director and responsible for determining the requirements for people on the team, and the resourcing of those people. I do not need to reproduce the Tribunal's account of decisions taken about the Claimant's participation or not, in aspects of the project, at different points. The overall tenor is that these decisions were taken, at various points, as events unfolded, by Mr Raines, but that he was involved in various communications with other colleagues about them.

A The Tribunal made specific findings about each decision made, at each stage of the process, and why, including referring to what various emails, including some those relied upon by Ms Robertson, showed. It was not obliged to refer to every document in its bundle on this subject.

B 126. Some of the documents relied upon in support of this ground show Mr Cooch being copied in on email exchanges. One shows him making an enquiry about progress, and one offering a comment to Mr Raines about another candidate. Others related, Miss Bell pointed out, to a C different project. An email from Ms Wintermantel of HR was by way of a comment on the Claimant's later internal grievance on the subject. The burden of this complaint as against Mr Cooch, was that he had taken, or participated, in a decision to remove or exclude the Claimant from the project (and did so by reason of race). I do not think it can be said that any of this D material shows that the Tribunal should have found that he was an actual decision-maker, or that that complaint was well-founded.

E **Outcome**

127. For all of the foregoing reasons, this appeal fails and is dismissed.

Appendix – The Amended Grounds of Appeal

F 1 The Claimant was deprived of a fair hearing: the tribunal erred in law by failing to take account of relevant factors and by taking account of irrelevant factors in exercising its direction and refusing to adjourn in response to the applications made:
1.1 by the Claimant's then counsel for a 4 to 5 day adjournment at @ 11:35 am on 4 May 2017 [§22 of the 29 September 2017 reasons]; and or
1.2 by the Claimant's the counsel at@ 12:30 on 4 May 2017, that "*in any event…the Claimant should not be required to continue with the cross- examination of Mr Cooch* G *that day"* [§24 of the 29 September 2017 reasons]
1.3 by the Claimant herself on 5 May 2017 [§28 of the 29 September 2017 reasons]

2. The first and second of counsel's applications on 4 May 2017 were decided at the same time- see §25 of 29 September 2017 reasons. Counsel was part-way through cross examination of Mr Cooch when he applied for more time to prepare. No reasons are given for refusing counsel's application that the Claimant should not be required to continue H with cross examination of Mr Cooch that day.

3. Further, or alternatively, the relevant findings of fact and reasons given by the tribunal in their liability judgment, promulgated on 14 March 2018, (read incorporating §22 to §30 of their September 2017 reasons) for these three exercises of discretion are inadequate are inadequate in the respects outlined below.
   3.1 At §5, §6 and §7 of the reasons for the liability judgment dismissing her claims, the tribunal refer to the reasons it provided for other applications. Reasons in relation to these three applications were provided as part of the tribunal's reasons given on 29 September 2017 but in relation to a different Decision and two different Orders (attached to this draft and the subject of UKEATPA/0765/17/LA).
   3.2 An order made on 9 May 2017 refusing a later request made on 8 May 2017 for general adjournment did not deal with these applications.

Re: the applications made at @ 11:35am and 12:30 pm on 4 May 2017

4. The reasons given at §5 of the reasons in UKEAT/0343/18/LA state that this application was for a *"relisting"* of the hearing. That conflicts with what is said in §22 and 23 of its reasons provided on 29 September 2017.

5. The ET failed to take account of relevant factors:
   5.1 That the first application was made at @ 11:35am on 4 May 2017, the 12th day of a hearing listed for 25 days;
   5.2 That the second 'in any event' application made at@ 12:30 on 4 May 2017 was made when counsel was still representing the Claimant, indicating he needed further time to prepare before completing questioning of Mr Cooch.
   5.3 The size and complexity of the three consolidated ET1 claims before it- with 16 lever arch files of documents holding @ 6,000 pages; the extensive agreed list of issues in the case spanning the period from@ July 2014 to September 2016; and the number of witnesses with 1 lever arch file of Respondent witness statements (17 Respondent witnesses in total, although one was not called).
   5.4 The importance of Mr Cooch to the Claimant's case given Issues 3.1.7, 3.1.9 to 3.1.11, 3.1.13, 3.1.15, 3.1.16 and his relevance to 3.1.17, such that it would be unreasonable to require completion of his cross-examination that day;
   5.5 that the application was two-fold; an 'in any event' application for an adjournment to complete preparation to enable completion of the cross-examination of Mr Cooch; and an application for a 4 to 5 day adjournment;
   5.6 the timing or number of days of adjournment that could be accommodated in the interests of justice and fairness
   5.7 its being prepared to allow the remainder of the Thursday (after completion of the cross-examination of Mr Cooch) and the Friday, with the weekend to follow, before resuming
   5.8 its near contemporaneous ability (on the following Tuesday) to find two extra days for the Claimant to cross examine Respondent witnesses.

6. At §25 and §26 of the 29 September 2017 reasons, it took into account factors irrelevant in the circumstances in refusing the adjournment requested: -
   6.1 That there would be a delay of many months [before resuming]
   6.2 The need to find 'an availability of 25 days' [to resume]
   6.3 The financial cost to the Respondent of incurring further fees of counsel
   6.4 The tribunal's 'dismay' at the claimant and her counsel-suggesting punishment, an irrelevant factor, was also in play

Re: the application made on 5 May 2017

7. Additional to the factors identified above, the tribunal further misdirected itself at §30 (of the 29 September 2017 reasons) that there had not been any material change of circumstances when the claimant applied for an adjournment on 5 May 2017. It failed to take account of relevant factors that:
   7.1 Prior to midday on 4 May, the claimant had been represented by solicitors and then by direct public access counsel.
   7.2 From the afternoon of 4 May she was no longer represented. Objectively, that was a change of circumstances. It put the claimant in a materially different position from before.

   C relies on paras 43 to 45 **Serco v Wells**

8. As such, the ET's exercise of discretion on 5 May was founded upon a false premise. It accordingly failed to take account of relevant factors,
   8.1 that she was in a materially different position from before,
   8.2 the nature and scale of the case (as outlined above in GOA 5.3) still to be completed with @14 Respondent witnesses to cross examine

Reason for delay

9. In a letter/e-mail sent to Employment Judge Baron referring to the Tribunal's communications of 15 May 2017, the Claimant ended by asking for *"full written reasons for each of your decisions to turn down my applications for an adjournment"*. Until the reasons on 14 March 2018 (UKEAT/0343/18/LA), no appeal was technically possible-it being trite that an appeal does not lie against reasons, but against Judgments, Decisions and Orders only.

10. Reasons were given as part of the reasons for a Decision and Orders on different matters provided on 29 September 2017. The Claimant appealed against that decision (UKEATPA/0765/17/LA) and included at Ground 2 a ground relating to adjournment. She thought that was the appropriate course, so did not earlier seek to include grounds relating to adjournments in her appeal against the judgment given on 14 March 2018. She discovered her mistake at the r 3(10) hearing on 27 June 2018. She now includes an application to amend as part of her application for a r 3(10) hearing in relation to her appeal against the judgment of 7 March 2018.

Inadequate reasons

11. The tribunal also erred in that relevant findings of fact and reasons given by the tribunal are inadequate, failing to explain adequately the basis upon which the tribunal resolved conflict with documentary and witness evidence to contrary effect before the Tribunal, in some instances relying instead on the Respondent's submissions. Specific examples are;-

Re: 'Feedback -allegations 5,6 & 8'

11.1 At §104, the Tribunal accept R's submissions that C's statement of being described as "an angry black woman" was outrageous and unsupported by any evidence. This fails to recognise or evaluate Mr Dijemeni's oral and witness evidence – see paragraph 19 of his witness statement.

Re: A1/1 project – allegation 7

11.2 At §125, the Tribunal found that no evidence that Mr Cooch was involved at all in the selection of the team. They fail to deal with the conflicting documentary

A evidence at pages 668, 669, 670, 671, 803.1, 809 and with the evidence of Ms Wintermantel at page 1593 of ET trial bundle.

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