Appeal No. UKEAT/0242/19/RN

EMPLOYMENT APPEAL TRIBUNAL
ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 4 February 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

UNIVERSITY HOSPITAL COVENTRY & WARKWICKSHIRE NHS TRUST APPELLANT

MS F BURNS RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR ISLAM-CHOUDHURY (of Counsel)
For the Respondent	MS F BURNS (The Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE

The Claimant, who was a litigant in person, was dismissed while on long-term sickness absence. She presented claims of unfair dismissal and disability discrimination (sections 15 and 21). It was a part of her case that there were other roles available that she would have been well enough to carry out. When she presented her claim she referred to her appeal against dismissal, which had yet to be heard. Subsequently the appeal was heard and dismissed. The grounds of resistance then referred to the dismissal decision and the appeal hearing and outcome. Subsequently there was a case management preliminary hearing at which the issues in the case were considered.

The Tribunal hearing the full merits hearing, conducted it on the understanding that the disability discrimination claims extended to the appeal outcome. However, it became apparent from the way in which the Claimant was cross-examined, that the Respondent's position was that those claims were confined to the original decision to dismiss. The Tribunal raised the issue, and asked the Claimant whether she wished to make an application to amend. The Claimant did so, and the application was granted. The Respondent applied for the Tribunal to recuse itself on the basis that, in its handling of this aspect, and the way that it had questioned the manager who heard the appeal about issues relating to disability, it had descended into the arena. The Tribunal refused to recuse itself.

The Respondent's appeal against both the amendment and recusal decisions was dismissed. Given the particular way in which this litigation had unfolded, the Tribunal had not shown apparent bias. Its questions to the witness were premised on its understanding that there were live disability discrimination claims in relation to the appeal decision, and sought fairly to elicit and clarify his evidence on matters relating to that. Its approach to the emergence of an issue regarding the scope of the disability discrimination complaints was fair to both sides. Its decision

on the amendment application was reached by a proper application of **Selkent** principles, including taking account of the late stage at which it was made, how that had come about, and fairly addressing the potential prejudice to the Respondent of granting it at that stage.

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HIS HONOUR JUDGE AUERBACH

1. I shall refer to the parties as they are in the Employment Tribunal ("ET"), as Claimant and Respondent. This is the Respondent's appeal. It seeks to challenge two Decisions taken by the ET (Employment Judge Woffenden, Mr D McIntosh and Mr Talbot) during the course of a Full Merits Hearing, being (a) to grant an application by the Claimant to amend her disability discrimination claims; and (b) to refuse an application by the Respondent for the ET to recuse itself.

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The Background and Procedural History

2. The following background facts are not in dispute, as such. The Claimant was employed by the Respondent from April 2012. She worked as a Healthcare Assistant based on ward 21, part-time on Saturdays and Sundays. From 24 December 2016 she was absent owing to ill-health. She remained absent until her dismissal on 7 July 2017 on the given grounds of capability. This arose from an ill-health capability hearing held that day before a manager called Ross Palmer.

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3. On 10 October 2017 the Claimant presented a claim form. She has throughout been a litigant in person. She ticked the boxes to indicate that she was claiming unfair dismissal and disability discrimination. In box 8.2 she wrote: "Feel as if I have not yet been treated. I have not been given the chance to return to my previous role or offered an alternative in the interim. Would like the opportunity to be reinstated with full benefits of increased annual leave and pension." She also cut and pasted into that box the first part of her letter to the Respondent of 27 July 2017 appealing against the decision to dismiss her. It included the following:

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> **"There have previously been discussion regarding potential adjustments, but it is alleged that these were limited due to weekend only work pattern. However, having recently viewed the NHS jobs website and vacancies available, there were options available such as an emergency receptionist which is an administration role and is available over weekends and is offered at the same level of band 2, which I would have been more than happy to try as a temporary measure until fully fit to return to my HCO role on ward 21 medicine."**

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4. Within the narrative of additional information in box 15 of the claim form, the Claimant also raised an allegation of discrimination with respect to her being a part-time worker.

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5. The hearing of the internal appeal against dismissal had been postponed at the Claimant's request, but took place on 23 November 2017 before a manager called Nigel Kee. The appeal was dismissed and the decision to dismiss the Claimant was therefore upheld.

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6. On 30 November 2017, the Respondent entered a response to the ET claims. The grounds of resistance included the following:

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> **"11. There were no weekend only administrative role or indeed any other weekend only light duty posts available. That said and due to the length of the claimants absence from work as well as the fact that she had no predicted return to work date, the respondent determined to hold an ill-health capability hearing to consider the claimant continuing employment.**
>
> **13. At the hearing the claimant suggested that she could return to work as a Healthcare Assistant on the labour ward as she perceived that the work on that ward was less physically demanding than the work she did on ward 21.**
>
> **14. Ross Palmer adjourned the hearing to consider his decision. In relation to the claimant's suggestion that she could work on the labour ward, Ross Palmer determine that this option was not feasible due to the physical demands of a Healthcare Assistant role on any ward, including the labour ward."**

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7. This document also referred to the appeal and its outcome as follows:

> **"17. At the appeal hearing the claimant explained that since the ill-health capability hearing on 7 July 2017 she had suffered further problems with her health meaning that until 17 November 2017 she had been signed off as unfit to carry out her Monday to Friday administrative role. the claimant also explained that she could not provide a certain return to work date for her Healthcare Assistant role with the respondent but she hoped she would return in around late January 2018.**
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> **18. The possibility of redeployment was discussed at the appeal hearing and in particular a temporary re-deployment into an administrative (receptionist) role in the Emergency Department, something which the claimant had raised in her grounds of appeal. Nigel Kee expressed concerns about the claimant's ability to carry out such a role due to the heavy lifting the post required. The claimant explained that she was no longer interested in undertaking an administrative role on a temporary basis; rather, she wished to return to her Health Assistant role. the claimant asked that she be "put back on the books" and remained off from work sick until she was fit to return.**
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> **19. Nigel Kee determined to dismiss the claimant's appeal. Nigel Kee subsequently wrote to the claimant to confirm his decision."**

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8. The grounds of resistance maintained that the Claimant had been fairly dismissed. As to disability discrimination, they sought particulars of the claimed disability and in the meantime reserved the Respondent's position as to disabled status. They continued:

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> **"25. In relation to claimant's allegation that the respondent failed to make reasonable adjustment ahead of dismissing her, the respondent avers that ahead of dismissing the claimant, it considered whether there was a suitable light duty role that she could undertake until her health allowed her to return to her post of Healthcare Assistant. The respondent duly searched for suitable roles in line with the claimant's stipulation that she was only available to work Saturdays and Sunday (due to her alternative employment with a different employer Monday to Friday). The respondent was not able to find suitable weekend only light duties role.**

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> **26. It is denied that at the relevant time there was a suitable Emergency Receptionist role available. It is accepted that an Emergency Reception vacancy did exist, but it was not suitable due to physical demands of the role. In addition, the post required applicants to be flexible over the hours that they worked and to be available for work on any day between Sunday and Saturday. The role was therefore not suitable for the claimant who was only available to work on Saturdays or Sunday."**

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9. The **Part-time Workers Regulations** claim was also defended.

10. There was a Preliminary Case Management Hearing before Employment Judge Britton on 6 September 2018. The Claimant appeared in person. The Respondent was represented by a solicitor, Miss Harris. The minute of the Hearing referred to the claims and the issues. In relation to disability discrimination it identified the issues in the following way**:**

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> **"5 <u>Disability</u>**
> **5.1 was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of pain and restricted movement in her right shoulder and impingement in her left shoulder?**
>
> **6 <u>EQA, Section 15, discrimination arising from disability</u>**
> **6.1 Did the claimant's sickness absence from March 2017 arise in consequence of the claimant's disability?**
> **6.2 did the respondent treat the claimant unfavourably by dismissing her because of that sickness absence?**
> **6.3 if so, has the respondent shown that dismissing the claimant was a proportionate means of achieving legitimate aim?**
> **6.4 Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?**
>
> **7 <u>Reasonable adjustments ("EQA") section 20 and 21</u>**
> **7.1 Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?**
> **7.2 A PCP is a provision, criterion or practice. Did the respondent apply the following PCPs?**
> **(a) The requirement for the claimant to return to her substantive role.**
> **(b) Its policy with to regards to absence management which caused the claimant to be dismissed because she was unfit to return to her substantive role within the time scales envisages by the respondent policy/procedure.**

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Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that the pain and restricted movement and lack of weight bearing in the claimant's shoulders, particularly her right shoulder, meant that she was unable to perform the essential functions of her substantive role at any point prior to her dismissal.
(c) If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be paid for any such disadvantage?
(d) If so, were the steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant. However, it is helpful to know what steps the claimant alleges should have been taken and they area identified as follows:

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(i) provided with adequate time in which to recover by extending the timescales envisaged by the relevant policy applied by the respondent within which she was expected to be fit to return to her substantive role:
(ii) place the claimant into a vacant job role, just the role of emergency receptionist, that may have available for her to perform within her normal hours(weekends only) and was suitable for her taking into account the limitation arising from her "disability";

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(iii) the creation of a shift roster or rota elsewhere within the Trust that facilitated a requirement for someone to work a weekend shift only that would have been available for the claimant to work and was suitable for the claimant to take into account the limitations arising from her "disability".
(iv) if so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

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11. The Case Management Orders included a requirement for the Claimant to particularise the part-time worker discrimination claim, permission given to the Respondent to amend its response and Orders in relation to the clarification of the disabled status issue. The matter was also listed for a Full Merits Hearing to take place on 5 to 12 August 2019.

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12. On 1 November 2018, the Respondent, as permitted, served amended grounds of resistance. At this point it continued to reserve its position regarding disabled status. As to the substance of the discrimination complaints, the amended grounds of resistance provided:

"Section 15 Complaint

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23. It is denied that the respondent treated the claimant less favourably by dismissing her because of her sickness absence as alleged, or at all.

24. Should, which is denied, the Tribunal find that in dismissing the claimant the respondent treated her less favourably because of her sickness absence, the respondent will say that the claimant's dismissal was in all the circumstances a proportionate means of achieving a legitimate aim. In particular the respondent will say: -

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a. The legitimate aim is patient safety which is adversely affected by sickness absence and/or;

b. financial sustainability, which is adversely affected by sickness absence and:

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c. the claimant's dismissal is in all the circumstances proportionate in that there is no less discriminatory way of achieving the legitimate aim

Section 20 and 21 Complaint

Generally

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25. In relation to claimant's allegation that the respondent failed to make reasonable adjustment ahead of dismissing her, the respondent avers that ahead of dismissing the claimant, it considered whether there was a suitable light duty role that she could undertake until her health allowed her to return to her post of Healthcare Assistant. The respondent duly searched for suitable roles in line with the claimant's stipulation that she was only available to work Saturdays and Sunday (due to her alternative employment with a different employer Monday to Friday). The respondent was not able to find suitable weekend only light duties role.

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26 It is denied that at the relevant time there was a suitable Emergency Receptionist role available. It is accepted that an Emergency Reception vacancy did exist, but it was not suitable due to physical demands of the role. In addition, the post required applicants to be flexible over the hours that they worked and to be available for work on any day between Sunday and Saturday. The role was therefore not suitable for the claimant who was only available to work on Saturdays or Sunday

The PCP

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27. "*The requirement for the claimant to return to her substantive role*" (paragraph 7.2 (a) Judge Britton's Order dated 27/09/18).

a. The respondent says that the claimant was required to return to her substantive role, or to another suitable role, within a clear and reasonable timeframe.

The adjustments

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28. *"…provided with adequate time inn which to recover by extending the timescales within which she was expected to be fit to return to her substantive role."* (paragraph 7.2 (d)(i) Judge Britton's Order dated 27/09/18).

a. At both capability hearing and her appeal hearing, the claimant confirmed that she could not provide a firm date as to when she would be fit to return to work. The respondent avers that extending the timescales for recovery for an undefined/indefinite period is not a reasonable adjustment.

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29. *"…place the claimant into a vacant job role,…suitable for her taking into account the limitations arising from her "disability"*"(paragraph 7.2 (d)(ii) Judge Britton's Order dated 27/09/18).

a. The respondent considered whether it was possible to redeploy the claimant into light duties role and determined there was no suitable role available. At the appeal hearing the specific issue of the emergency receptionist role was discussed. The claimant advised that she was not interested in undertaking this or any other light duties role adding she simply wished to be "put back on the books" and remain off sick from work until she was a fit to return.

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b. Further, or in the alternative, it is respondent current understanding that the claimant was signed off as unfit to work from December 2016 until March 2018 in relation to her telephone advisor role Monday to Friday employer. That said the respondent avers that the claimant was not medically fit to undertake a light duties role with any employer in this period. The claimant has refused to voluntarily confirm the dates of and reasons for her sickness absence in respect of her Monday to Friday employment. According, the respondent has made an application for an Order for the disclosure of this information.

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30. *"… the creation of shift roster or rota elsewhere within the Trust that facilitated a requirement for someone to work a weekend shift only that would be available for the*

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claimant to work and was suitable for the claimant to take account the limitation arising from her "disability"".(**paragraph 7.2 (d)(iii) Judge Britton's Order dated 27/09/18).**

a. The Respondent considered whether it was possible to redeploy the claimant into a light duties role and reasonably determined there was no suitable role available.

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b. Further, or in the alternative, it is respondent's current understanding that the claimant was signed off as unfit to work from December 2016 until March 20128 in relation to her telephone advisor role with Monday to Friday employer. That said, the respondent avers that the claimant was not medically fit to undertake a light duties role with any employer in this period. The claimant has refused to voluntarily confirm the dates of reasons for her sickness absence in respect of her Monday to Friday role. Accordingly, the respondent has made an application for an Order for the disclosure of this information."

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13. On 27 December 2018 the Respondent wrote to the ET that it "concedes the disability question", without further elaboration.

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<u>The Full Merits Hearing and the Decisions Under Appeal</u>

14. The Full Merits Hearing opened on 5 August 2019. The Claimant was in person. The Respondent was represented by Mr Islam-Choudhury of counsel. He tabled a draft list of issues. He also made an application to amend to add a further legitimate aim in respect of the claim under

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Section 15 **Equality Act 2010** ("the EqA"). That application was granted. An application by the Claimant to add a claim of holiday pay was refused. A revised list of issues was then produced by Mr Islam-Choudhury and tabled at the Hearing the next day.

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15. The Claimant gave evidence. The witnesses for the Respondent were Candice Nurse, who was the Ward Manager who had been involved in the ongoing management and review of

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the Claimant's ill-health absence, Mr Palmer and Mr Kee. Evidence was completed during the course of the morning of day four, 8 August 2019.

16. That same day the ET permitted the Claimant to amend her claims under Sections 15 and

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21 of the **EqA,** to embrace the decision on the appeal against dismissal; and it gave oral reasons for that Decision. On the next day of the Hearing, 9 August 2019, Mr Islam-Choudhury requested

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Written Reasons for the Decision on the amendment application, and made an application for the ET to recuse itself on the grounds of apparent bias. Having heard the recusal application argued, the ET reserved its Decision on it; and hence at this point the Full Merits Hearing went part heard. The ET's Written Reasons in respect of the amendment application, and its reserved Judgment and Reasons in respect of the recusal application, were set out in a single document sent to the parties on 22 August 2019. The ET declined to recuse itself.

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17. It appears that some steps were thereafter taken with a view to listing further dates for the part-heard Full Merits Hearing to resume. However, by that time the Respondent had embarked on its appeal to the Employment Appeal Tribunal ("EAT"), and in those circumstances the ET stayed any further steps in relation to its Hearing pending the outcome of this appeal.

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18. In its written Decision, after recounting the course of the litigation prior to the Full Merits Hearing, the ET said this:

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> **"11. At the commencement of the final hearing (listed from 5 to 12 August 2019) Mr. Islam-Choudhury had prepared a draft agreed list of issues. The Tribunal asked from what date the respondent had conceded disability. Mr. Islam-Choudhury said it was from 24 December 2016 (the date on which the claimant first went off work sick with shoulder pain) but knowledge was not admitted for the purposes of either the claimant's complaints under section 15 EqA or section 21 EqA. He also conceded that (subject to knowledge) the claimant's dismissal for ill-health capability was unfavourable treatment and dismissal was for something arising from disability (namely 'the claimant's sickness absence'). Subject to knowledge therefore the respondent's defence to that claim was confined to legitimate aim and proportionality. He also applied for and was granted permission by the Tribunal to amend the response to include a third legitimate aim ('Employees should be able to perform the essential functions of their substantive roles.')**

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> **12. In relation to the claimant's dismissal Mr. Islam-Choudhury had reproduced in the draft agreed list of issues the wording used by EJ Britton (see paragraph 7 above).**

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> **13. It was in the circumstances above therefore that the tribunal approached its prereading. It read the claimant's complete letter of appeal dated 27 July 2017 and appeal outcome letter which were included in the agreed bundle of documents and the respondent's bundle of witness statements which included that of Mr. Kee (who had heard and rejected the claimant's appeal). He was evidently to attend the final hearing to give evidence. The claimant's complete letter of appeal dated 27 July 2017 had raised a number of points which included ' Disability discrimination, as technically temporarily disabled until confirmed otherwise' and unfair treatment 'as treatment ongoing/not completed and specialist has not given opinion yet or advised of plan prior to the panel making their outcome decision'. The appeal outcome letter of 30 November 2017 had noted the claimant had been unfit for work for almost twelve months but did not address the claimant's point about disability discrimination although Mr. Kee's witness statement said he had decided to dismiss 'every ground' of the claimant's appeal.**

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14. It is trite law that in relation to a claim of unfair dismissal a tribunal must consider whether the disciplinary process as a whole is fair (Taylor v OCS Group Ltd [2006] IRLR 613 CA).

15. In Baldeh v Churches Housing Association of Dudley & District Ltd [2019] UKEAT 0290 His Honour Judge Shanks held in relation to a section 15 EqA complaint and a complaint of unfair dismissal (under section 103A ERA) the outcome of an appeal against dismissal was integral to the overall decision to dismiss (paragraph 15) and that in that case the tribunal should have considered the appeal decision as part of the overall decision to dismiss the claimant and decided whether it was itself discriminatory. In that case an earlier tribunal had identified one act of unfavourable treatment namely the claimant's dismissal in the case management summary of a preliminary hearing. Further, a failure by a respondent to make reasonable adjustments is relevant to objective justification under a section 15 EqA complaint (see Paragraph 5.21 of The Code of Practice on Employment (2011) ('the Code') –'If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified'.) and the duty to make reasonable adjustments applies at all stages of employment including dismissal (Paragraph 6.8 of the Code).

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16. The tribunal therefore formed the initial view that the appeal was part and parcel of the claimant's dismissal and relevant to all her complaints."

19. After referring to the application to add a holiday pay claim, which was refused, and also to the Claimant having initially indicated she was applying to add an indirect discrimination claim, which was ultimately not pursued, the Tribunal continued as follows:

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"18. The claimant was cross-examined by Mr. Islam-Choudhury on 5 and 6 August 2019. She confirmed she had presented her claim to the tribunal on a precautionary basis because she understood there were time limits which ran from her dismissal. She said she had not told EJ Britton at the preliminary hearing she was complaining about the way the respondent had handled her appeal and that it was discriminatory because she did not see that was the place to do so and she had found him 'quite direct'. She accepted Mr. Kee had dealt with all the bullet points in her appeal but said she did not agree with the outcome and later agreed he had dealt with her appeal in a fair and reasonable manner but repeated that she did not agree with the outcome.

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19. Mr. Kee attended the hearing on 8 August 2019 and was cross examined by the claimant. She began by asking him what experience he had had of managing capability hearings when the employee concerned was disabled and later whether he was happy due process had been followed and whether he had authority to change the outcome of dismissal and reinstate her. He was also asked about the evidence he had about reasonable adjustments and whether disability had been considered and the nature of the hearing he had undertaken and whether he had before him or sought to obtain new evidence."

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20. After citing Rule 41 of the **Employment Tribunals Rules of Procedure 2013** ("the ET Rules"), the ET continued its account of events on 8 August 2019, which set out in full:

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"21. After the claimant had concluded her cross-examination of Mr. Kee and in the light of the view it had formed (as set out paragraph 16 above) and in accordance with Rule 41 the members of the tribunal each asked him as decision-maker in relation to the appeal questions in order to clarify what training he had had about disability; whether he thought he was conducting a rehearing or review of Mr Palmer's decision to dismiss; whether further investigations would have been carried out if new information emerged; whether or not he had considered the disability discrimination point raised by the claimant in her appeal and if he had not done so was this because it was not a point raised before the dismissing officer Mr. Palmer; and whether he had regarded the disability discrimination

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point as new information which warranted further investigation by him. Mr Kee did not decline to answer questions put to him and Mr. Islam-Choudhury did not object to any question put by the tribunal or (when asked if he wished to do so) conduct any re-examination of Mr. Kee, and told the tribunal that concluded the respondent's case.

22. Having considered Mr Islam-Choudhury's cross-examination of the claimant about the appeal the tribunal became unsure whether the respondent had had regard to *Baldeh*. The tribunal therefore took the opportunity prior to written and oral submissions by the parties to provide Mr Islam-Choudhury with its copy of *Baldeh* (an authority of which he told the tribunal he had not hitherto been aware) with paragraph 15 highlighted.

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23. Mr. Islam-Choudhury made his oral submissions later that day. He first addressed the issue of knowledge in the context of the claimant's section 15 EqA complaint .His written submissions (prepared the previous afternoon) stated it was irrelevant whether Mr. Kee had actual or constructive knowledge because the appeal was heard after the presentation of the claim and the claimant had not amended the claim or put the tribunal on notice that she wished to allege his decision was discriminatory; therefore the issue of knowledge was relevant only to Ms. Nurse (the claimant's line manager) and Mr. Palmer (the dismissing officer) . The claimant had had the opportunity to clarify on what matters in the appeal she wanted to rely at the preliminary hearing before EJ Britton on 6 September 2018 but had not referred to the appeal. The tribunal sought clarification from which it emerged that although Mr. Islam-Choudhury accepted that in relation to the unfair dismissal claim the appeal was integral he did not accept that was the case as far as disability discrimination was concerned because the last act complained of was the dismissal by Mr. Palmer on 7 July 2017. He submitted this case could be distinguished from *Baldeh* because in the latter the claimant (also a litigant in person) had referred to discrimination on grounds of disability and recited the appeal and the appeal decision letter in her claim form. The tribunal asked him why he had not then objected to what (on his analysis) were irrelevant questions posed by the tribunal to Mr. Kee. He said it was up to him to decide to do so if he wished; he was reserving his position and to do so at the time might have been more time consuming. He then went on to conclude his oral submissions before the lunch time adjournment.

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24. After the lunch time adjournment and before the claimant made her submissions the tribunal referred her to *Baldeh* and gave her a copy (highlighted as for Mr. Islam-Choudhury). It asked the claimant to clarify if she wanted the tribunal to consider the appeal decision as part of the overall decision to dismiss her and whether it was discriminatory as part of her section 15 EqA claim and/or part of the respondent's alleged failure to comply with its duty to make reasonable adjustments under section 21 EqA. She confirmed she did.

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25. The tribunal informed her that in that case she would have to apply to amend her claim to include those matters in the absence of any reference to the appeal in her claim form and reminded her of the contents of Guidance Note 1 which she had read earlier in connection with her application to amend her claim to include a complaint under Section 19 EqA. The tribunal expressed its regret at this turn of events at such a late stage in the proceedings. Mr. Islam-Choudhury observed that an application to amend could be made at any time before judgement was issued.

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26. The claimant then made an application to amend and said she had not been aware as a litigant in person hitherto that the whole process would not be considered by the tribunal as far as her disability discrimination complaints were concerned. She did not know that after the issue of her claim (which she had presented because she was aware there were time limits) there was any subsequent action for her to take.

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27. Mr. Islam-Choudhury objected to the application to amend. He submitted the claimant's witness statement did not deal with the appeal. If an unrepresented claimant brought such a claim, they might presume incorrectly that an appeal was included. However, in this case there were two aspects which pointed against leniency. Firstly, the claimant did have a preliminary hearing before EJ Britton, and he would have explored all such issues precisely. The appeal hearing had been in 2017. The preliminary hearing was in 2018. Secondly if the claimant had erroneously thought this was a technical amendment there would be a proper evidential basis for it in her witness statement. It had only arisen because he had taken the point. If parties changed their positions where they realised where the other party was coming from there would be a never-ending circle of amendments. There was prejudice to the respondent; he would need to cross-examine the claimant further and Mr Kee would have to be recalled. The timescale for the hearing would be prejudiced and the production of judgement would be delayed, and the relevant facts had taken place as long ago as July 2017.

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28. The claimant responded that she believed that because she was complaining about the way the respondent's attendance policy had been applied to her that would cover everything which happened under that policy. She thought everything was covered in one application to the tribunal. It would be detrimental to her case if the appeal was not dealt with as part of her disability discrimination claims. The tribunal decided to grant the application and gave oral reasons for its decision.

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29 Mr. Islam-Choudhury asked for and was given a short adjournment in order to consider the way forward. He then asked that the claimant provide further information about what she alleged Mr Kee had or had not done so that he could prepare further cross-examination of the claimant. The tribunal ordered her to do so by 9 August 2019 and gave the respondent leave to amend the response and for Mr. Kee to prepare a supplementary witness statement (if so advised). The tribunal did not envisage that these steps and any further evidence and submissions could not be concluded in the remaining time available and proceedings ended for that day."

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21. After describing Mr Islam-Choudhury's application on 9 August 2019, the ET set out its reasons for both decisions. In relation to the amendment application it cited **Selkent Bus Co Ltd v Moore** [1996] ICR 836, including the particular considerations highlighted in that case. It then

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cited the observations of Langstaff P in **Chandhok v Tirkey** UKEAT/0190/14/KN to the effect that the particulars of claim are an important initial document and not merely something to get the ball rolling.

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22. The ET noted that in this case the presentation of the claim predated the outcome of the internal appeal. It described the application as a substantial one and the complaints sought to be added were now very substantially out of time. However, it was persuaded it was just and

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equitable to extend time. In particular it said:

"35. However, under section 123 (1) (b) EqA tribunals have the power to extend time where they consider it would be just and equitable to do so. It is for the claimant to persuade us to exercise our discretion in her favour. She has discharged that burden. She is a litigant in person and did not realise until 8 August 2019 that the appeal was not included as part of her complaints which she understood to encompass the application to her of the respondent's attendance policy in its entirety including appeal. She had not appreciated that she could have brought up the appeal with EJ Britton at the preliminary hearing. There was no evidence before us about what was explored at that hearing other than the record of it. She has acted as soon as she became aware of the situation. There is no evidence that the cogency of Mr. Kee's evidence has been affected by the delay. The prejudice to the claimant would be substantial; she will be deprived of the opportunity to have the entirety of the application of the respondent's attendance policy considered by the tribunal as part of her disability discrimination complaints (as she believed it would do) but truncated at the point of dismissal. Any prejudice to the respondent however (other than potential delay and legal costs) can be mitigated by the giving the respondent the opportunity to amend its response in relation to the appeal (which already pleaded the fact of the appeal by Mr. Kee though the claimant's claim form was silent about it) and the preparation of a supplementary witness statement by him.

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36. As far as the manner and timing of her application is concerned the tribunal has accepted the claimant's explanation why it was made at this very late stage. Although she (like the claimant in *Baldeh*) complained of unfair dismissal and the unfavourable treatment under section 15 EqA was dismissal and under *Baldeh* the outcome of an appeal against dismissal is integral to the overall decision to dismiss, her claim form had predated the appeal conducted by Mr. Kee and she had not known until this point in the proceedings that amendment was necessary to include this. We do not consider that omission of the appeal from the claimant's witness statement is a relevant circumstance which we should take into account against the claimant as submitted by Mr. Islam-Choudhury. Although she did not raise any procedural complaints about the appeal, she had made it clear under cross examination that she did not agree with the outcome and she then cross-examined Mr. Kee about his conduct of the appeal as set out in paragraph 17 above.

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37. The tribunal reminds itself that the balance of hardship and injustice is a balancing exercise. It has decided it would be just and equitable to extend time and that that is a forceful (though not determinative) factor in favour of granting permission to amend. The tribunal concludes that the hardship and injustice on the claimant is greater if the amendment was refused than to the respondent if were granted. The application to amend is therefore granted."

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23. In relation to the application to recuse, this had been advanced on the basis of apparent bias. The ET had been referred to a passage in *Harvey on Industrial Relations and Employment Law* and the decision of Burton J, approved by the Court of Appeal, in **Ansar v Lloyds TBS Bank plc** [2007] IRLR 211. I need to set out the ET's substantive Decision in full:

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"40. Mr. Islam-Choudhury submitted that the factual basis upon which he made his application was at that on day two of the hearing he had cross-examined the claimant and, on the appeal, and she had conceded it was fair and reasonable in the context of the dismissal. He had put it to her that it was not part of her claim because her appeal had been launched on 23 November 2017 and she had not suggested that the appeal was part of her disability discrimination claim. EJ Britton said that at the preliminary hearing her claim had been explored at great length and detail and she had not said that the appeal was part of her claim of disability discrimination. The tribunal was therefore alive to the fact that this was an argument which the respondent was running. When the appeal officer was cross-examined by the tribunal panel a number of questions were asked which went to the issue of whether the claimant had been discriminated against. The tribunal had acted as the claimant's advocate beyond ensuring "equality of arms". Any reasonable person would have found that the tribunal had gone beyond its remit when embarking on that line of questioning because immediately afterwards although there have been no objections the witnesses informed him that they felt the tribunal had become the claimant's advocate. He was an experienced practitioner and was familiar with the way in which tribunals conducted themselves. He was aware that it was the tribunal's duty to ensure equality of arms and that the claimant's case was properly put but he was not confident that he could say that here because it was not part of the case that the claimant had put; in fact in his closing submissions he made that very point. The claimant had never asserted in her claim form or in the proceedings that the appeal was discriminatory. She had provided a witness statement and had not made the allegation in it either. She had conceded in reply to his cross-examination that although she did not agree with the outcome, the appeal had been conducted in a reasonable and fair manner and that the respondent had been fair to dismiss her for capability. The tribunal had identified the discrimination complaint as extending to the appeal and had acted quite improperly by inviting the claimant to cure a defect in her claim. The tribunal had descended into the arena rather than ensure equality of arms. He asked what a claimant was to do when the tribunal had embarked on detailed questions and then asked, "Do you wish to amend your claim to include what you have heard?" A fair-minded and informed observer would have formed the view that the tribunal was unconsciously biased. It was not an application he made lightly but what had persuaded him was that after the tribunal had invited the claimant to make an application to amend the immediate reaction of his witnesses was that the tribunal was biased. He volunteered that

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they were not objective but were informed observers. He had taken instructions this morning and the result was this application.

41. The claimant opposed the application. She said she appreciated the assistance she had been given by the tribunal in directing her to the Code of Employment 2011. She had been upset while giving her evidence and just said yes when asked if the procedure was reasonable but had limited knowledge of employment law and had made a plethora of errors in her witness statement; she had not known what to do and there were lots of matters she did not address. She had been given a fair opportunity to put her case and had been grateful for the opportunity to understand the process and address the issues. She repeated that she had regarded her complaints as not being segregated but all part of one process.

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42. The test for apparent bias is set out in *Porter v Magill* [2002] UKHL 67 formulated by Lord Hope of Craighead as follows: 'The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.'

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43. Such an observer would be informed of all the relevant circumstances above which include the tribunal's reasoning, the way the final hearing had progressed and the crystallisation of the approach the respondent was taking to the appeal as far as the ambit of the claimant's disability discrimination complaints concerned. They would have in mind the overriding objective (Rule 2 of the Employment Tribunals Rules of Procedure 2013) to which tribunals are required to seek to give effect in interpreting and exercising any power given to it under those Rules. The overriding objective of the Rules is to enable tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –

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'(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and

important of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues;

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and

(e) saving expense.'

They would also be aware of the tribunal's powers under Rule 41 of the Employment Tribunals Rules of Procedure 2013 to put questions to witnesses and to permit amendments. They would know that the former reflects the long standing practice that the tribunal gives assistance to unrepresented parties (like the claimant) and the latter can be made at any time provided the parties have been given the opportunity to set out the grounds of any such application and make any objections. They will also be aware that if assistance is provided the tribunal must not overstep the mark and act (or give the impression of) acting for that party because if it did so it would not be deal with a case fairly or justly.

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44. Having regard to those circumstances such an observer would not have concluded either from the fact the tribunal questioned Mr Kee or the content of the questions or the way they were posed to Mr. Kee at the material stage in the proceedings or the way the tribunal approached the question of the amendment of the claimant's claim that there was a real possibility that the tribunal was biased. The respondent's witnesses are neither as objective nor as well-informed as the hypothetical fair-minded and informed observer. Such an observer would not have considered the tribunal had descended into the arena and acted as the claimant's advocate, thus going beyond ensuring "equality of arms". The application to recuse is therefore refused."

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24. When I considered the grounds of appeal of paper, I observed that the grounds as framed were somewhat discursive, but I considered the challenges to both Decisions to be arguable. I therefore directed a Full Appeal Hearing. That has come before me today.

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The Appeal - Arguments, Discussion, Decision

25. As in the ET, Mr Islam-Choudhury has appeared for the Respondent, now the Appellant. For the Respondent there were written grounds of appeal, a written skeleton argument, I was referred to authorities and I heard oral argument. The Claimant relied upon her written answer and skeleton argument and also a number of authorities to which she referred, although she indicated that as a non-lawyer she did not feel able to develop her arguments to the same degree. On the morning of the present Hearing, following an email from the Claimant indicating that she would be unable to come to the Hearing in person, arrangements were made at her request for her to participate by telephone, and Mr Islam-Choudhury did not object to her doing so as such.

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26. The Claimant's Answer to this appeal had been submitted late. She had applied for an extension of time, which Mr Islam-Chowdhury opposed. After hearing argument, I granted the extension of time, essentially on the basis that I was satisfied that the Claimant had been genuinely confused, in part because there was simultaneous correspondence at this time from the ET about the matter being relisted there. In addition, having regard to the fact that Mr Islam-Choudhury acknowledged there was no prejudice caused to the Respondent by the delay, it would have been disproportionate to disbar the Claimant from defending the appeal on that account.

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27. I have considered all the arguments presented to me in writing and orally today. I will summarise in the discussion that follows what seemed to me to be the most significant points.

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28. Mr Islam-Choudhury captured a bird's-eye view of the nub of the Respondent's case in paragraph 18 of his written skeleton for this appeal where he said this:

> **"Essentially, the Respondent's case is that when the Claimant had not pursued an allegation of discrimination in respect of the appeal against dismissal, it was not for the Tribunal to; (1) question the appeal officer Mr Kee on this basis to set up the basis of such an allegation and; (2) to suggest the need for an amendment and invite the Claimant to amend the claim after the Respondent's closing submissions and; (3) then to grant the amendment. In effect the Tribunal had become the Claimant's advocate and rewritten the basis of the claim and descended into the arena."**

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29. I note that, in relation to the conduct of the Hearing, the factual basis for the apparent bias challenge relates to (a) the ET's questions to Mr Kee; and (b) the ET's discussion with the Claimant of the question of an application to amend. However, Mr Islam-Chowdhury also seeks to rely on the Decision on the amendment application as lending weight to the apparent-bias ground of appeal. Separately from the ground of appeal based upon apparent bias, the Decision to allow the amendment application was challenged in its own right.

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Recusal Decision – Apparent Bias

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30. The well-established test for apparent bias, deriving from **Porter v Magill** [2002] 2 AC 357, is this: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased."

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31. Mr Islam-Choudhury also highlighted a passage in **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] IRLR 96 at [25] where it was said: "If in any case there is real ground for doubt, that doubt should be resolved in favour of recusal." I observe, however, that this was in the context of a discussion of whether matters such as a personal friendship between the Judge and someone involved in the case might provide grounds for a Judge to recuse themselves from hearing a case at all. This requires a judgment call; and the Court of Appeal was making the point that, if in doubt in a case like that, the Judge should recuse. The question here, however, is whether, applying the **Porter v Magill** test, which is an objective test, there was apparent bias or

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there was not. Other authorities to which I was referred concerned particular scenarios in which issues of apparent bias may arise, but the overriding test is that in **Porter v Magill**, and each case is acutely fact sensitive.

32. On the subject of questions from the court or the ET to witnesses, a body of authority from the civil jurisdiction stresses that in the adversarial mode of trial a Judge must take care not, as it is said, to descend into the arena, and must not assume the role of advocate.

33. Rule 41 of the **ET Rules** provides as follows:

> **"41. The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts."**

34. This was considered in a particularly useful discussion in **East of England Ambulance Service NHS Trust v Sanders** [2015] IRLR 277. In that case the ET had, of its own initiative, carried out research on the internet in relation to a drug that had been prescribed to the employee, and had then introduced evidence of the fruits of its research into the Hearing. The EAT said:

> **"28. First, we accept entirely that the cases to which we have been referred, with the exception of *McNicol* are cases which describe the adversarial procedure as it was some time ago, in courts in which the full rigour of court rules and procedure applies and in which the parties were represented. Tribunals were designed to provide swift, informal justice to ensure access to justice with a degree of simplicity that would assist ordinary people, with no particular legal expertise, to vindicate their rights. It is part of the culture of a Tribunal that it will become familiar with people who have no legal training and who may find the whole process of going to law distressing and certainly difficult to navigate without having any experienced person to turn to. Inevitably it will seem that they are at a disadvantage when confronted by the legal team instructed by another party. A Tribunal, given its origins, has to be sensitive to that. This may, however, lead to a fudging of the boundary which must be kept between that which a Tribunal is obliged to do, that which it is not obliged to but can do, and that which it has no right to be doing at all. The proceedings are not inquisitorial, as this Tribunal seemed to think. A broad view of the rules demonstrates that immediately: to start a case it is necessary to make a claim and say sufficient about it in an originating application. It is that to which the Respondent will respond. If an amendment to the claim is needed, permission has to be asked for and obtained. These are matters of some formality. They need not be overcomplicated, but they indicate that the process is designed to identify what is the real dispute between the parties so that a Tribunal, acting as an umpire and not as a participant in a courtroom battle, can fairly resolve it.**
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> **29. Rule 41 does not, in our view, allow a Tribunal to make enquires on its own behalf into evidence which was never volunteered by either party. The Tribunal may, in an appropriate**

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> **case, ask the parties whether they have thought about particular evidence or even, possibly, whether in an appropriate case the parties or one of them would wish an adjournment in order to obtain it. But it is not, as the Judge appeared to think, for the Tribunal itself to investigate the evidence and rely upon its own investigations. The Tribunal is, as we said at the start of this Judgment, to act as the adjudicator not as advocate. Actively seeking fresh evidence on one or other party's behalf is inevitably likely to lead towards the latter.**
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> **30. In *McNicol* the Judgment falls short of saying that a Tribunal must not act inquisitorially in some respects, though it is clear that it is authority that there is no duty to do so. It is important that the obligations of a Tribunal to deal sensitively with litigants in person and those who may be vulnerable for one reason or another, not least through mental illness, should not be confused with adopting an inquisitorial procedure. It is the role of the Judge to ensure, by making proper allowance, by ensuring that the form of questioning by one side or the other is appropriate, by controlling the amount of time that a witness is in the witness box and, as Rule 41 itself suggests, asking its own questions, that a witness gives the best evidence that that witness would wish to give. It remains, however, that witness's evidence. It is that witness's case. It is not the Tribunal's case. It is not the Tribunal's evidence.**
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> **31. Accordingly it is quite likely that there will be a degree of intervention in proceedings before a Tribunal which might raise some eyebrows in civil courts. But the purposes, as we have identified them, should be kept clear. When a Judge does under Rule 41 ask questions to elicit the evidence - that is, not the evidence which the Tribunal wishes to hear but the evidence which the witness wants to give, as best the Tribunal can understand it - it is advisable that the Tribunal asks those questions in a non-leading form. That is not because form should triumph over substance. It is because non-leading questions give rise to the most reliable answers. If a Judge suggests an answer to witnesses, they are much more likely to agree with it than they would if asked an open question about the same point, and the Tribunal should be careful to avoid making a case for either party.**
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> **32. The Tribunal will begin with a complaint before it. It will wish to understand why the complaint had been made, and what are the main reasons for it. It will wish to ensure clarity. There may be a need to explain procedure to the witness and to explain what the purpose is of the enquiry which the Tribunal is making. This is best done in simple terms, however sophisticated the witness may be. But it is not the role of the Employment Tribunal to find evidence to support one party's case or the other. Adjudicating upon the evidence put before it is not producing the evidence for it to consider."**

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35. A further matter arises from the fact that in this case the Respondent applied, during the course of the Hearing itself, for the ET to recuse itself, and has then immediately appealed against its Decision not to do so, with the net effect that the Hearing before the ET remains part heard. There is, therefore, as yet no concluded Hearing or outcome on the substantive claims in the case, whether or not those ultimately fall to include, depending on the outcome of this appeal, the issues raised by the amendment.

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36. Whether that is the appropriate course is a subject that was considered in **Ansar v Lloyds TSB Bank plc** (above) and **Westlb AG London Branch v Pan** UKEAT/0308/11. I refer in particular to what was said in **Pan** at [26] and [27]:

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> **"26. There was is some debate as to whether it is appropriate for an Employment Judge or Tribunal to hear an application for recusal on the grounds of bias. In <u>Peter Simper & Co Ltd v Cooke (No 2)</u> [1986] IRLR 19 Peter Gibson J said**
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> **"Save in extraordinary circumstances, it cannot be right for a litigant, unhappy with what he believes to be the indications from the Tribunal as to how the case is progressing, to apply, in the middle of the case, for a re-hearing in front of another Tribunal. It is, in our view, undesirable that the Tribunal accused of giving the opinion of bias should be asked itself to adjudicate on that matter. The dissatisfied litigant should ordinarily await the decision and then, if he thinks it appropriate, he should make his dissatisfaction with the conduct of the case by the Tribunal a ground of appeal."**
>
> **27. It is plain, however, from the guidance in *Ansar* that if an objection of bias is made it will be the duty of the Employment Judge or Tribunal as the case may be to consider it, giving full weight to the considerations laid down in that case."**

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37. From these authorities, it is clear that the general approach is that it is undesirable for a challenge of this sort to be raised by way of an application to recuse during the course of a Hearing. The better course is to await the outcome, and, if the losing party believes there are grounds for appeal on the basis of apparent bias, an appeal can then be advanced on that basis. The earlier case of <u>**Peter Simper & Co Ltd v Cooke (No 2)**</u> was regarded as an exception to that general rule, because, in that case, the matter had in any event gone part heard when the application was made. See also the remarks to similar effect in <u>**Nawaz v Dockland Buses Ltd**</u> UKEAT/0104/15 at [28].

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38. Mr Islam-Choudhury said that the present case was exceptional because, subject to the fact of the amendment application being raised, the end of evidence had been reached; and so the recusal application was appropriately made at the point when it was. The Claimant submitted that this was a tactical application, designed to stop the Hearing in its tracks. By virtue of the application the Tribunal felt the need to take time and reserved its Decision. Then the matter was stayed because of the ongoing appeal. As a result the Respondent has achieved a tactical advantage. Mr Islam-Choudhury very firmly submitted that there was no question of this application being made for the sake of tactical advantage. It was made at what was considered to be the appropriate time, and on the basis that it had merit.

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39. I do not find any basis to assume that this was a tactical application on the part of the Respondent. However, I am not persuaded that it was the appropriate course to make the application at the time when it was made, simply because, subject to the amendment application, the end of evidence had been reached. The Hearing was still ongoing. There was at least the possibility of it being completed within the allocated time. In addition, even if it had been necessary for it to go part heard in order to be completed, it would still have been possible, if ultimately the outcome went against the Respondent, for it to mount an appeal on the basis of apparent bias, and indeed to challenge the Decision on the grant of the application to amend, by way of an appeal, if it considered that it had grounds to do so.

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40. I echo what has been said in the previous authorities, about the undesirability of apparent bias applications being made in the course of a Hearing, save in very exceptional cases. However, I stress that the timing of this application does not, as such, affect my consideration of the merits of this appeal. The application was made. The Tribunal determined it. That was a Decision which is amenable to an appeal, and therefore falls properly to be considered by the EAT.

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41. Mr Islam-Choudhury argues that there was apparent bias, looking at the overall picture of the ET's conduct of which he complains. But, of necessity, I need to consider each aspect in turn, at least to start with. I will start therefore with the ET's questions to the witness Mr Kee. The ET in summary described those questions at [21], which I have already cited.

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42. Mr Islam-Choudhury accepted that was a fair summary of those particular questions. But he said this passage was focused on questions asked by members of the ET, after cross-examination of Mr Kee by the Claimant had been completed. He referred also to a note produced

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by the Respondent, of questions asked by the Judge *during the course* of the Claimant's cross-examination of Mr Kee. This included the Claimant asking: "Are you happy that a fair process was followed?", Mr Kee replying: "Yes", and the Judge then asking: "Did you think about applying reasonable adjustments?" Further on, the Claimant asked: "At the hearing was disability considered?" Mr Kee replied: "We were referred to the original hearing and there was no return to work. We were looking at whether you could return to work." The Judge then observed: "That doesn't answer the question." Mr Kee replied: "I believe that this was considered as part of Occupational Health." The Judge then observed: "Occupational health is silent on this." A little further on the Judge asked him: "Did you not consider disability?" There is also a note of the Judge responding to him stating that the appeal was not a complete rehearing of the case; "So it was a review of Mr Palmer's decision? Did you consider whether the Claimant was disabled?"

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43. Mr Islam-Choudhury argued that these questions from the Judge went beyond appropriate questioning, within Rule 41, the purpose of which might have been to clarify the issues or illicit the evidence. Rather, the ET had thereby descended into the arena and given the appearance to the reasonably-informed observer that it had taken sides. Developing that submission, Mr Islam-Choudhury's main points were, it seems to me, as follows.

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44. Firstly, he said there was, at this point, when Mr Kee was giving evidence, no live claim of disability discrimination in respect of the decision on the appeal. The matter had not been addressed in his witness statement. It was therefore neither necessary nor appropriate for the ET to ask Mr Kee questions concerning disability or issues relating to it.

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45. Secondly, the ET wrongly reacted to Mr Islam-Choudhury's submission, in his closing written arguments, that the question of whether Mr Kee had actual or constructive knowledge

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that the Claimant was disabled was irrelevant. It was wrong for the ET to react by raising with the parties the potential significance of **Baldeh v Churches Housing Association of Dudley** UKEAT/0290/18. That was particularly he said, given that **Baldeh** was distinguishable, as in that case the claim was begun after the appeal had in fact been heard and decided. Further, said Mr Islam-Choudhury, in the course of her own evidence under cross-examination, the Claimant had agreed that Mr Kee's knowledge, or not, of her disabled status was irrelevant.

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46. Thirdly, the reasonable observer would conclude that, in the way that it raised the question of a possible application to amend, the ET was plainly encouraging the Claimant to make such an application, in order to pave the way to a defeat of the very submission he had made in his skeleton argument. In addition, the reasonable observer would infer that, if she did apply, the application would be likely to succeed. He said that was reinforced by the fact that, in due course, the amendment was indeed granted.

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47. The Claimant, who is a non-lawyer, did not structure her submissions in the Answer or skeleton argument on this appeal, or orally, in the way that a lawyer might have done, although she did make reference to a number of legal points and authorities. Broadly, it seems to me her position was that the ET had asked proper and appropriate questions in order to clarify the evidence of Mr Kee in relation to the issues, bearing in mind also her status as a litigant in person. As I have indicated, she considered, although I do not accept this submission as such, that the recusal application was a ploy. But certainly it was her case that there was no merit in it.

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48. In my judgement, the starting point is to consider to what extent issues relating to the conduct of the appeal were in play and had, in one form or another, already been raised by the time of the start of the Full Merits Hearing. Firstly, there was from the outset a claim of unfair

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dismissal. As Mr Islam-Choudhury was bound to acknowledge, consideration of the appeal and its outcome were a necessary part of consideration of that complaint, notwithstanding that the appeal was not concluded until after the claim form was presented, and in light of **Taylor v OCS Group Ltd** [2006] ICR 1602.

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49. Secondly, the Claimant had indicated that she presented her claim form when she did, in order to comply with time limits, and the claim form itself went as far as it could, by identifying that an appeal was in train and indeed partly quoting from her letter of appeal and the arguments which it foreshadowed. Further, whilst Mr Islam-Choudhury stressed that the Claimant had acknowledged during the course of evidence that she did not complain about the conduct of the appeal in terms of the process, I think it was clear from the outset, that her issue in relation to the appeal was always with the outcome that the decision to dismiss her was upheld, rather than one of the other courses, to reinstate her and keep her in employment, being adopted.

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50. The essence of the Claimant's case was that she should not have been dismissed because this was premature, having regard to ongoing investigations into her ill-health; because there was a particular role of emergency receptionist available for which she should have been considered and would have been able to carry out; and because other options for rostering her to weekend work that she might have been able to carry out should have been considered. She appealed because essentially for these reasons she wanted the decision to dismiss her to be reversed. Her appeal was also clearly based on the proposition that this should be reviewed based on how matters stood, for example in relation to alternative employment, at the time when the appeal was heard, in particular in relation to what she said was the suitable emergency receptionist vacancy. She also raised an argument on appeal that the Respondent should consider reinstating her on the basis of her then having a period of sabbatical while she remained unwell.

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51. All of these were issues which the ET was bound to consider in any event as part of its consideration of the unfair dismissal claim. Equally the ET was bound to consider various arguments raised by the Respondent, including as to the state of play as at the date of dismissal, and then as at the date of the appeal decision, as to the evidence regarding the prospects for the Claimant's health improving to the point of her being fit to return to her original role, and the question of how much time had already passed since she had first gone off sick.

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52. The Respondent also plainly appreciated that these issues were in play. The original grounds of resistance therefore addressed what had happened at the appeal hearing, and the rationale for the decision to dismiss the appeal, at [16] to [19], including: the state of the Claimant's health at the point of the appeal hearing and the evidence about the prospects for a return to fitness. Further, as I have noted, the grounds of resistance, in addressing the disability discrimination claims, referred to the emergency receptionist role and the position at the appeal stage in that regard, as did the amended grounds of resistance at [26], [29] and [30].

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53. Further, it seems to me that the issue of whether the disability discrimination claims should be treated as extending to the outcome of the appeal was not expressly considered as an identified question at the Preliminary Hearing before EJ Britton. Neither the case management summary nor the way the issues were framed there suggest that they were, or that the Judge applied their mind to, and formed a clear view about, that question. Although paragraph 6.2 refers to unfavourable treatment by dismissing the Claimant, this is potentially ambiguous as to whether "dismissing" there embraces the decision on the appeal or not. Further, in setting out the issues in relation to the reasonable adjustment claim, there is clear reference again to the

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emergency receptionist's role, and issues that arose at the appeal stage and that were, as I have noted, referred to in the grounds of resistance.

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54. Further, I note that the Respondent had not raised, either in the original grounds of resistance or the amended grounds of resistance, any issues relating to knowledge or constructive knowledge of the Claimant's disabled status. This issue too appears not to have been explicitly brought out by either side, or the Judge, at the Preliminary Hearing. The list of issues at that

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stage is silent about it. The first time that the knowledge issue was raised was in the draft list of issues brought by Mr Islam-Choudhury to the Full Merits Hearing. However, while he included in that document (a) the dates to which he said this issue was relevant, ending with the date of

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dismissal, there was no application by the Respondent to introduce knowledge issues by way of amendment. There was also no discussion either on the first or the second day of that Hearing, of the implications of this, or whether there was or was not any live claim under the **EqA** in relation to the outcome of the appeal.

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55. As I have noted, the ET recorded that when the Hearing got under way it proceeded on the basis that the **EqA** claims did embrace the outcome of the appeal, and that this was not

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controversial. I am not greatly surprised that it formed this impression, having regard to the history of the litigation, the decision in **Baldeh**, the potential interaction and overlap between these claims, and the reference to this in the EHRC Code, and, above all, the fact that this issue

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had been referred to in the grounds of resistance, but had not at any point been picked up and discussed as an issue, whether at the Preliminary Hearing or at the start of the Full Merits Hearing.

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56. It is clear to me that as a matter of fact the ET did not pick up, from the dates that Mr Islam-Choudhury put into the list of issues regarding the concession of disabled status, the

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particular significance that he attached to those dates. Further, the ET correctly identified that in her letter of appeal the Claimant had asserted that she was a disabled person at the time of her dismissal, and that there had been a failure to make reasonable adjustments. In addition, the ET correctly identified that this complaint was one that Mr Kee did not address in his letter giving his decision on her appeal. I did not have a copy of that letter in my bundle, but Mr Islam-Choudhury acknowledged that the ET was factually correct about this.

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57. It seems to me that it was the fact that this issue had been raised in the appeal, but had not been addressed by Mr Kee in his letter deciding the appeal, that prompted much of the questions raised by the ET of Mr Kee, together with the fact that the ET was at that stage proceeding on the basis that there was a live issue in relation to claims of discrimination extending to the decision on the appeal. Seen in that light, this was appropriate questioning, in order to clarify his evidence on matters that had not been addressed in his witness statement and/or covered by questions asked of him in cross-examination by the Claimant, and which the ET properly considered to be potentially relevant to the complaints and issues that it had to decide.

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58. I have considered carefully the questions asked by the Judge of Mr Kee during the course of the Claimant's cross-examination of him. I think it would have been better for the Judge to have save those questions, and to ask them after cross-examination of the witness was complete. However, I do not think that the questions were unduly leading or displayed apparent bias. They followed on from a question asked by the Claimant and essentially either pointed out factually where something the witness had said appeared from other evidence not to be correct, or raised issues that were potentially relevant.

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59. Further, this was not a case where the ET had sought to introduce new evidence of its own, as happened in **Sanders**. Further, all of the questions covered issues that the ET considered were in play; and/or were the sort of general questions routinely asked by lay members of witnesses in such cases, such as what training they have had in relation to discrimination.

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60. Further, sometimes, when questions from the members of the ET after cross-examination of a witness, though not inappropriate, have elicited further significant evidence from a witness, it will be fair to then allow the advocates the opportunity to ask further questions of the witness if they wish. I note that in this case Mr Islam-Choudhury was offered the opportunity of further re-examination of this witness after the ET's questions, but chose not to take it up.

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61. Pausing there, for all of these reasons I have concluded, applying the **Porter v Magill** test objectively, that the questions from the ET did not cross the line and bespeak apparent bias.

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62. As to the sequence of events leading up to the application by the Claimant to amend, this needs to be considered with some care. Critical is the background of the Tribunal having proceeded from the start of the Hearing, for reasons I have accepted, on the assumption that there were in play **EqA** claims under Sections 15 and 21 extending to the outcome of the appeal as well as the original decision to dismiss. What then prompted the ET to raise with Mr Islam-Choudhury whether he had considered **Baldeh**, was the fact that, during the course of evidence, it became apparent to the ET that *he* may be viewing the scope of the issues before the ET more *narrowly*, and viewing the **EqA** claims as *not* extending to the decision on the appeal.

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63. **Baldeh** *was* a relevant authority on which to invite submissions on this point. In that case the EAT said:

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> **“14. I therefore ask myself whether the ET should have considered the rejection of the appeal as part of the unfavourable treatment about which the Claimant was complaining. Mrs Peckham says very simply that the only complaint made was ‘dismissal’. She refers to the issues as described in the Case Management Summary, which is at page 53 of my bundle and paragraph 9.4, where the Judge says, “The claimant relies upon only one act of unfavourable treatment /detriment that is her dismissal for both the discrimination and whistleblowing complaints”. Then in the Judgment itself the Tribunal set out the issues under disability discrimination. I have already read them into the record but relevantly issue number IV is described as: did the ‘something arising from her disability’ materially influence her dismissal; there is no mention of the appeal.**

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> **15. On the other hand, the Claimant was of course a litigant-in-person in pursing her claim. Her ET1 form refers to discrimination on the grounds of disability and then recites the appeal and the appeal decision letter. The bundle which the Tribunal had included the appeal letter and the appeal outcome letter and a short statement was also put in by Mrs Greenidge who heard the appeal. She was not in fact called to give evidence because she had left the Respondent in the meantime, but it was accepted that she would have been called by the Respondent otherwise. For whatever reason, the ET did make findings about the state of knowledge of Respondents between the actual date of dismissal and the appeal. The outcome of an appeal against a dismissal is, one can say, integral to the overall decision to dismiss.**

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> **16. The Tribunal at paragraph 99 made some rather sweeping findings, which I may say at this stage I do not think are part of the findings of primary fact, to effect that the Respondent’s management of the appeal was fair and reasonable and not tainted by, among other things, discrimination so as to render the decision to terminate unreasonable or unfair or discriminatory. Therefore, in fact, at paragraph 99 the Tribunal appear to have themselves considered the effect of the appeal on the overall decision to dismiss.**

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> **17. Looking at the whole picture, as I have just outlined it, I think the ET should have considered the appeal decision as part of the overall decision to dismiss the Claimant and decided whether it was itself discriminatory under section 15 of the** Equality Act 2010**. For the reasons indicated, I simply cannot say that if that issue had been properly considered, the Claimant would have lost on section 15 and, therefore, it seems to me that I must allow this appeal and remit the case to that extent, even though unfortunately it is nearly four years since the dismissal.”**

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64. Whilst Mr Islam-Choudhury submitted that **Baldeh** could be distinguished on the basis that in that case the appeal outcome was already known by the time the claim form was issued, the underlying point in **Baldeh**, that in a case of this sort, arguably a challenge to the dismissal should be seen as embracing a challenge to the appeal against dismissal, remained pertinent.

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65. The ET also identified that it raised this matter before it had considered his written submissions, whether or not they had been handed up at that point, and before it had heard oral submissions. Mr Islam-Choudhury, very properly, during the course of argument this morning, acknowledged that he could not say that the ET was mistaken about that. From this it is clear that this was *not* a reaction to a particular *closing submission* made by Mr Islam-Chowdhury about the significance of this issue, but merely prompted by the ET being concerned that it

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appeared, from his cross-examination of the Claimant, that he was taking the stance that the scope of the claims was narrower than the ET had previously assumed was common ground. For reasons I have described, the ET reasonably considered that this concern needed to be addressed, and that this matter might not have been appreciated by the Claimant hitherto either. Having given Mr Islam-Choudhury a copy of **Baldeh**, it fairly gave her a copy to consider as well.

66. Nor do I agree with Mr Islam-Choudhury that the fact that, in answer to a question in cross-examination, the Claimant had said that she agreed that the state of Mr Kee's knowledge or not of her disability was not relevant, meant that the ET could safely assume that this issue was off the table. This was said in response to cross-examination, not a concession made by her in the capacity of her own representative, still less a clear and unequivocal concession.

67. In any event, the ET was reasonably entitled to proceed on the basis that the substance of the Claimant's isssues about the outcome of the appeal had not changed, and she had not abandoned her stance on that generally. I do not consider it was unfair of the ET to the Respondent, against this background, to draw to the attention of the Claimant, and explain to her, what had emerged, bearing in mind that she was a litigant in person, and so that she understood that it was being said that, as matters presently stood, there was no live **EqA** claim in relation to the appeal decision. It was fair for the ET, in those circumstances, also to explain to her that this could not be addressed by the ET, unless she applied for, and was granted, an amendment.

68. Mr Islam-Choudhury made the point in submissions this morning that the ET did not consider that this simply *was* already a live issue which did not require an application to amend. As to that, there are cases in which the way that the litigation unfolds can leave it uncertain or grey as to whether a matter has effectively become, or should be treated as, a live issue or requires

an application to amend. Arguably, the ET was erring on the side of the Respondent by proceeding, once it was identified that there was a difference as to whether this was a live issue, on the footing that it ought not to be treated as such unless there were proper grounds for granting an amendment in relation to it.

69. I therefore do not accept that the reasonable observer would conclude that the ET had encouraged the Claimant to make an application to amend, in order to remedy a difficulty that his written submission argued she faced, to the effect that, although it had been conceded that the Claimant was a disabled person at the date of the dismissal the Respondent could not reasonably have been expected to know that at that time. Rather, the ET was seeking to respond to a situation in which an issue concerning the scope of the disability discrimination complaints, had unexpectedly emerged at this relatively late stage of the Full Merits Hearing.

70. I do not think the reasonable observer, who followed and understood this sequence of events in the detail that I have set them out, would consider the ET was displaying apparent bias by its attempt to address this, by allowing the Claimant the opportunity to make an application to amend. I am fortified in that view, though I do not rely upon it, by the fact that the observer who had followed the whole trial would be aware that the ET had earlier refused the Claimant an application to amend to add a holiday pay claim, and had raised issues with her regarding her suggestion that she might make an application to amend to add a claim of indirect discrimination. Those aspects would not tend to suggest that the ET was readily disposed to granting applications to amend from the Claimant, simply because she was a litigant in person.

71. I appreciate that, as Mr Islam-Choudhury told me, his clients, and in particular his witness, felt that the ET had crossed a line and was taking the Claimant's side. But he, of course, accepted

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that what they subjectively thought is not the test, nor indeed what the Claimant subjectively thought. What matters is the objective view of the informed observer. For the reasons that I have given, I am not persuaded that the ET's conduct in relation to raising the matter of the amendment would be viewed by that observer as bespeaking apparent bias.

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The Amendment Decision

72. I turn then to the Tribunal's Decision on the amendment application, both in its own right and as to whether that affects the conclusion in relation to the issue of apparent bias. Mr Islam-Choudhury argued that this Decision was problematic for a number of reasons.

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73. Firstly, he said that the ET had failed, as it should have done, to get clearly from the Claimant in writing the terms of the proposed amendment before considering it. It only asked her to reduce them to writing after it had granted the application. He referred to **Chief Constable of Essex Police v Kovacevic** UKEAT/0126/13. Secondly, the ET had erred because it had failed to distinguish **Baldeh**. Thirdly, the ET failed to take any proper account of the fact that the Claimant had not referred to the appeal in her witness statement. Fourthly, the ET had failed to take sufficient account of the fact that allowing the amendment would almost certainly result in the case going part heard, with consequent prejudice to the Respondent.

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74. Fifthly, he argued that the ET's decision to grant the amendment further reflected the fact that it was taking the Claimant's side in reaction to his written submissions, which was unfair. Next, he argued that it was unfair to grant the amendment, because it resulted in a significant change to the position on the question of knowledge, given that the Respondent was in a much better position to argue that the employer should not be treated as having constructive knowledge

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of the disability at the time when it dismissed her in July, compared with how matters stood when she was still labouring under the same condition four months later in November.

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75. My conclusions on this aspect are as follows. Firstly, the ET properly directed itself in accordance with **Selkent**. It properly drew the Claimant's attention to the guidance note of the **President of Employment Tribunals (England and Wales)** on applications to amend. It properly and fairly noted that Mr Islam-Choudhury had acknowledged that, in principle, an

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application to amend could be made even at this late stage in the Hearing. The ET also, it seems to me, fairly set out and considered the respective arguments at [26] to [28], including those raised by Mr Islam-Choudhury as to the potential prejudice to the Respondent if the amendment were

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to be granted. As well as correctly applying **Selkent**, the ET also correctly reminded itself of the dictum in **Chandhok v Tirkey**. It properly took a view that this was a significant amendment and that, had it been a freestanding claim brought at that point, it would have been out of time.

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76. The ET's consideration of whether it was just and equitable to extend time, which effectively overlapped with wider issues of the balance of prejudice if it either did or did not grant the amendment, also referred to relevant considerations, and, it seems to me, fairly and properly

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weighed them up. The ET was entitled to accept that the Claimant had not appreciated that this was an issue until it was raised in this way; and was entitled to accept what she said about why she, for her part, had not raised it at the Case Management Hearing. Nor do I think that the ET

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should have considered that she was obliged to refer to it in her witness statement. She had set out clearly her factual case about the basis on which she brought the appeal and what happened at the appeal hearing. She was not obliged to address the matter further in her statement.

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77. The ET carefully considered the potential prejudice to both sides, including whether the potential prejudice to the Respondent could be addressed by allowing for further evidence to be introduced, cross-examination of the Claimant and Mr Kee on the subject and further submissions, all of which it addressed at [35]. Earlier, at [29], it recorded the steps that it took with a view to ensuring that that potential prejudice to the Respondent was indeed properly addressed, once the application to amend had been granted.

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78. Whilst Mr Islam-Choudhury told me, and I accept, that something was said about the difficulties from a practical point of view, of Mr Kee coming back to give further evidence in the remaining day or days of the Hearing, he also properly acknowledged that this was not a case where it was being said that it was impossible for the witness to do so. Further, ultimately, the ET did have the option of listing further additional days if it considered that necessary in order to resolve this issue fairly. In summary, the application to amend undoubtedly did come at a very late stage in the Hearing; but the ET was plainly alive to this, addressed how this came about, and properly addressed the potential prejudice caused by it.

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79. Nor do I think that the ET was bound to distinguish **Baldeh** or regard it as irrelevant. The general point made in **Baldeh** was a valid one to consider. The ET fairly noted that the Claimant's substantive issue was always with the outcome of the appeal process, not with the procedural fairness with which it was conducted.

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80. I should also note that this was not a case where the Claimant was seeking to add a direct discrimination or harassment complaint, where further issues would have arisen, such as to whether Mr Kee had been influenced by the knowledge or belief that she was a disabled person. Although Mr Islam-Choudhury is right to say that the outcome of the unfair dismissal and

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disability discrimination claims would not necessarily be the same (see the discussion in **Gallop v Newport City Council** [2013] EWCA Civ 1583 and **City of York Council v Grosset** [2018] ICR 1492) there nevertheless was a substantial factual overlap between the unfair dismissal claim and the Section 15 and Section 21 claims that the Claimant sought to introduce. This needs to be borne in mind when considering the submissions on the proposed amendment, though it did introduce new causes of action and would have necessitated the giving of some further evidence.

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81. Further, I note that these points were not particularly run by Mr Islam-Choudhury before the ET. What he did focus on before the ET was the significance of the knowledge point. This is a point that potentially cuts both ways, because, if there was potential prejudice to the Respondent (in terms of risk of losing) if it had to deal with a knowledge point that had a different complexion at the stage of the appeal, so there was greater potential prejudice to the Claimant (of the same sort) if the ET was not able to deal with that point on its merits. In addition, the Respondent had, and has, other points in its armoury about the state of play at the time of the appeal, including the significance of the passage of time and the Claimant continuing to be unwell and there still having been, on the Respondent's case, no reasonable prospect of a firm date for her return to good health another four months down the line when the appeal was heard. Allowing these claims to be canvassed, therefore, does not mean that the Claimant is bound to succeed in them. That is not a matter for me, but will be for the ET.

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82. I agree that it would have been better for the ET to require the proposed amendment to be reduced to writing before the application was considered rather than after. That is certainly the approach which ought generally to be followed in the interests of clarity and fairness to both sides. However, it is not fatal in every case if it is not. See the observations indeed in the discussion in the **Kovacevic** case at [21].

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83. In this case, the substance of the Claimant's case factually was already known and in play. It was known what outcome she wanted from the appeal and what she said factually were the options that ought to have been considered, rather than dismissing her appeal. Essentially, the application was to run her existing factual case in support of Section 15 and Section 21 claims, as well as in support of an unfair dismissal claim. It would have been better to get some written identification of the basis of that before considering the application. However, it is clear from the ET's record of the arguments and how it dealt with them, that Mr Islam-Choudhury did not suggest that he was in some difficulty in opposing the application, because of lack of clarity as to what the point of it was. He was able to make his substantial arguments in relation to it.

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84. Ultimately, I conclude that it was not outwith the ET's proper exercise of its discretion, applying **Selkent** principles, to grant this application to amend. I repeat that this does not mean that the claims will necessarily succeed. They may or may not. They have yet to be considered by the ET.

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Outcome

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85. I return, and I have quoted it earlier, to what Mr Islam-Choudhury said in paragraph 8 of his written submissions was the nub of this appeal on both grounds. It is an attractive and initially compelling way of putting the case; and indeed, he returned to that way of stating his general theme a number of times during the course of oral submissions this morning. However, ultimately, I do not think it is a fair depiction of what happened in this case.

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86. What happened is that, unfortunately there was a lack of the clarity that there should have been, by the time of the start of the Full Merits Hearing, regarding whether the disability

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discrimination claims were agreed and to be treated as extending to the appeal outcome or not. That could or should have been avoided in a number of ways, including, had the Respondent been clearer about its own position in the grounds of resistance and/or the amended grounds of resistance and/or by stating openly its position at the Case Management Hearing or at the start of the Full Hearing. In addition, I have to say, this is a matter on which perhaps greater clarity should have been achieved, had the Employment Judge who conducted the Preliminary Hearing reflected on the issue and sought, and insisted upon, clarity in relation to it.

87. As I have said, I understand why the ET conducting the Full Merits Hearing, did not pick up on the issue at the start, although it is unfortunate that it also did not do so. I accept that when the issue emerged it acted properly, to seek to ensure that this situation was addressed fairly to both sides, and notwithstanding that it had emerged at a very late stage. The ET's questions to Mr Kee did not cross the line. The granting of the amendment still leaves the Respondent fully able to defend its case in relation to these claims on their merits, by the presentation of further witness evidence and arguments.

88. I therefore conclude that both grounds of appeal fail. This appeal overall must be dismissed; and the ET, subject to its consideration of any further directions it may now feel it needs to give, must pick up where it left off.