Appeal No. EA-2020-000070-DA (Previously UKEAT/0064/20/DA)
EA- 2021-000256-DA (Previously UKEAT/0104/21/DA)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 June 2021
Judgment handed down on 7 October 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

(SITTING ALONE)

Ms M ROONEY APPELLANT

LEICESTER CITY COUNCIL RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	DAVID E. GRANT (Of Counsel) PATRICK TOMISON (Of Counsel) Instructed under the auspices of Advocate
For the Respondent	VICTORIA BROWN (Of Counsel) Instructed by Leicester City Council Legal Services City Hall 115 Charles Street Leicester LE1 1FZ

SUMMARY

PRACTICE AND PROCEDURE

The employment tribunal erred in law in holding that the claimant was not a disabled person. The employment tribunal erred in law in striking out the claimant's discrimination claims without adequately analysing them, and gave insufficient reasons with the result that the claimant could not know why the claims had been struck out. The employment tribunal erred in refusing the claimant's application to amend to claim protected disclosure detriment, principally on the ground that such a claim would be out of time, without giving any consideration to the claimant's explanation for the delay in making the application. The claim was remitted to the employment tribunal.

HIS HONOUR JUDGE JAMES TAYLER

1. These appeals arise out of the case management of two claims brought by the claimant in the Leicester employment tribunal. The challenges are to the strike out of the discrimination claims brought by the claimant and a finding that the claimant was not a disabled person, made at a preliminary hearing held by Employment Judge M Butler on 1 November 2019; and the rejection by Employment Judge Ahmed, at a preliminary hearing held on 9 November 2020, of the claimant's application to amend her claim form to claim detriment done on the grounds of having made protected disclosures.

2. The claimant commenced employment with the respondent on 18 September 2006. She resigned on 29 August 2018, the resignation taking effect on 29 October 2018. The claimant was a childcare social worker.

3. On 24 January 2019 solicitors then instructed by the claimant submitted a claim form bringing claims of constructive unfair dismissal, non-payment of holiday pay and seeking outstanding expenses, unpaid overtime and reimbursement of university fees. The claim form included at paragraph 42:

> **To clarify, the. Claimant is not suggesting that she made a protected disclosure as a result of which she was subjected to a detriment. However, what she is saying is that she raised concerns about a case which could have led to the Claimant officially whistleblowing.**

4. At paragraph 71 it was stated:

> **The Claimant was suffering from work related stress caused by the Respondent's conduct. The Claimant accepts, however, that the work related stress she was suffering from and/or the menopausal symptoms are not sufficient to amount to a disability in accordance with the definition under section 6 of the Equality Act 2010 which may have given rise to a separate disability discrimination claim.**

5. It is the claimant's case that these paragraphs were pleaded without her permission.

A

6. The day after the first claim form was submitted, 25 January 2019, the claimant acting in person, submitted a second claim form. The first firm of solicitors originally instructed were no longer acting. The claimant ticked the boxes asserting disability and sex discrimination and set out at box 8.2 the background and details of her claim:

B

> **I would like to make a claim for sex discrimination & disability discrimination due to my severe menopausal symptoms which I experienced in my workplace where I felt I was not managed fairly & discriminated against on the grounds of my disability due to the menopause.**
>
> **I have suffered with physical, mental & psychological effects of the menopause for the last two years & suffered from severe peri-menopausal symptoms such as insomnia (causing fatigue & tiredness), light headedness, confusion, stress, depression, anxiety, palpitations, memory loss, migraines & hot flushes. These symptoms have had a negative impact on my life as I have really struggled physically & mentally to cope. My GP has prescribed me with HRT & I am under the care & being monitored by a Consultant at a specialist Menopause Clinic.**
>
> **Following a referral for an OH assessment on 12/09/18, I rearranged the appointment as my Union Rep could not attend with me, when I contacted OH I asked for a female doctor (due to my menopause issues) but I was advised "unfortunately we do not have a female doctor to offer". I felt embarrassed & uncomfortable discussing my difficulties/symptoms regarding the menopause especially in the presence of male managers/colleagues. I felt this particularly difficult when I had to attend an Appeal Hearing on 17/08/18 (against my Written Warning for being off sick for work related stress) where there were four men present. Also during a supervision session with my Team Manager (Mr Tingley) he made an insensitive comment when I mentioned I was suffering from hot flushes in the office (he said he also gets hot in the office), which is completely different to a woman experiencing hot flushes during the menopause.**
>
> **My employers did not take my situation into account before making decisions regarding certain aspects of my employment (Written Warning for being off sick) which was an act of unfavourable treatment. My employers also failed to consider my 'individual circumstances' (Leicester City Council Absence Management Policy & Procedure). I experienced reduced confidence in the workplace & my working abilities & this had a detrimental effect on my self esteem/self confidence. This affected me so much (as well as other issues which are outlined in my separate unfair constructive dismissal claim) that I felt I had no other alternative but to leave my job altogether as it was a very stressful & demanding job (Social Work) & there was a lack of management support.**

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7. On 26 April 2019 the parties were informed by the employment tribunal that the two claims would be heard together.

H

8. The claims were considered at a preliminary hearing for case management before Employment Judge V Butler on 22 July 2019. The claimant was represented by a new firm of solicitors in the first claim, but represented herself in the second claim.

9. The claimant applied to remove paragraph 71 (the "concession" that she was not disabled) from the first claim. It was recorded that:

> **10. The Claimant has confirmed that her disability discrimination claims are direct disability discrimination under section 15 EqA and harassment and victimisation under sections 26 and 27 EqA.**
>
> **11. Her sex discrimination claim is one of direct sex discrimination only.**

10. The claimant was ordered to provide further information:

> **By or before 26 August 2019, ;the Claimant shall supply in writing to the Respondent further particulars/additional information setting out full details of her claims of disability and sex discrimination. She should use the tables attached to this document.**

11. A preliminary hearing was fixed:

> **15. Further, I have ordered that this matter be set down for a preliminary hearing to determine the following:**
>
> > **15.1 Whether under rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("The Rules"), the Claimant's claims for constructive unfair dismissal, disability discrimination and sex discrimination should be struck out on the basis that they have no reasonable prospect of success;**
> >
> > **15.2 alternatively, whether the Claimant should be required to pay a deposit under rule 39 as a condition of continuing to proceed with her claims (the Claimant is to be prepared to address her ability to pay a deposit should it be so ordered); and**
> >
> > **15.3 in the event that the claim is not struck out, that the question of whether or not the Claimant is a disabled person for the purposes of section 6 EqA on the grounds of her menopausal symptoms, anxiety and depression.**
>
> **16. If the claims survive, the Claimant should make the application to amend her claim for unfair dismissal to remove paragraph 71.**

12. Employment Judge V Butler fixed the preliminary hearing of her own motion. I find it a little hard to understand why it was not possible for the employment judge, providing no more

than a reasonable level of assistance to a litigant in person as would accord with the overriding objective, to ascertain the claims that the claimant wished to bring from the four paragraphs in the second claim form in which she had sought to set them out. Further, as it was thought that there was merit in requiring the claimant to provide additional information, presumably because it was thought that it could result in arguable claims being set out, I also find it a little difficult to see how it was determined before the schedule had been produced that it was appropriate to list a hearing to consider strike out, particularly in a discrimination claim. Once the listing is made the employment judge is required to determine the strike out application, absent a material change in circumstances: **Serco Ltd v Wells** [2016] ICR 768.

13. The claimant sent the Scott Schedule to the respondent on 2 September 2019. The respondent filed their completed version of the Scott Schedule on 7 October 2019, including their responses to the claimant's allegations.

14. The claimant's Counsel submit in their skeleton argument for this appeal that after the provision of the Scott Schedule the following claims of direct sex discrimination had been set out:

> **There are five acts of direct sex discrimination listed in the Scott Schedule, which break down into seven individual allegations, plus a further allegation which was contained in the ETl:**
>
> **a. Mr Tingley failed to complete the Health and Wellbeing Passport until 22 May 2018 (which the Claimant had emailed to him on 26 April 2018) (Act 7 …)**
>
> **b. Mr Tingley failed to review the reasonable adjustments in supervision sessions (Act 7 …).**
>
> **c. <u>During a supervision session, Mr Tingley said that he also gets hot in the office in response to the Claimant informing him that she was suffering from hot flushes in the office (ETI …</u>).**
>
> **d. Mr Tingley's invocation of the Absence Management Procedure on 25 April 2018 (Act 8 …).**
>
> **e. Mr Tingley issuing a formal written warning for sickness absence on 23 May 2018 (Act 8 …).**

f. On 17 August 2018, the appeal panel upheld Mr Tingley's decision to issue a formal written warning to the Claimant (Act 9 …).

g. On 17 August 2018, the appeal panel was composed exclusively of men (Act I 0 …).

h. On 21 September 2018, the Claimant was refused a female doctor for her Occupational Health assessment (Act 13 …). [emphasis added]

15. The Scott Schedule included at allegation 10 a complaint of sex harassment and victimisation.

16. The claimant also provided a disability impact statement on 16 September 2019 and medical evidence in support of her disability discrimination claim. The impact statement summarised her claims:

6. I have confirmed that my disability discrimination claim is direct disability discrimination under Section 6 of the EQA and harassment and victimisation under sections 26 and 27 of EQA. My sex discrimination claim is one of direct sex discrimination under Section 11 of the EQA and harassment and victimisation under Sections 26 & 27 of the EQA.

7. I claim that my disabilities for the purposes of Section 6 of the EQA are menopausal symptoms which amounted to a disability and chronic work-related stress caused by the Respondent's conduct/treatment which manifested itself in depression and anxiety, also giving rise to disabilities

17. The preliminary hearing was heard by Employment Judge M Butler on 1 November 2019. The respondent did not contend that any claims of sex harassment or victimisation were precluded by paragraph 11 of the record of the preliminary hearing for case management held by Employment Judge V Butler on 22 July 2019 in which it was stated that the sex discrimination claim was only of direct discrimination. The respondent did not assert that any claim of disability discrimination was precluded by a "concession" made in paragraph 71 of the first claim form.

18. The claimant had dispensed with the services of her second firm of solicitors by the time of the preliminary hearing but was represented by Counsel instructed through the direct access scheme.

19. Employment Judge M Butler did not give an oral decision at the hearing. I was provided with a note of the preliminary hearing for case management produced by the respondent's solicitors in which it was recorded that Employment Judge M Butler said that he considered the case to be one of the most interesting and difficult he had come across in a long time. The note suggests that there were extensive submissions about the Scott Schedule and that the judge stated that the matter would require careful consideration.

20. The judgment of Employment Judge M Butler was sent to the parties on 7 December 2019, and was in the following terms:

> **The decision of the Employment Tribunal Judge is that:**
>
> **1. The claims of constructive unfair dismissal, non-payment of holiday pay, outstanding expenses, unpaid overtime and reimbursement of a university course fee are not struck out or made subject to a deposit order.**
>
> **2. The Claimant's alleged medical conditions of anxiety and depression and menopausal symptoms do not amount to a disability for the purposes of the Equality Act 2010 ("EQA") and are dismissed.**
>
> **3. The claim of sex discrimination has no reasonable prospect of success and is struck out pursuant to rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.**
>
> **4. The claims of harassment and victimisation are dismissed.**

21. Employment Judge M Butler made orders to prepare the claims that were progressing for hearing, including for disclosure. Employment Judge M Butler gave reasons for the judgment that were very brief and, on an initial reading, suggest that either the judge concluded that the matter was not nearly as difficult as he had thought or, as the claimant contends, he failed to address the difficulties.

22. On 16 January 2020 the claimant submitted her first appeal. She appealed against the determinations of Employment Judge M Butler that she was not disabled, that the sex discrimination claims had no reasonable prospect of success and that the claims of harassment and victimisation were "dismissed".

23. On 18 March 2020 the respondent sent a copy of the hearing bundle to the claimant. The claimant contends that on reading an email in the bundle she realised that she had a viable claim for protected disclosure detriment (and possibly automatic unfair dismissal) because a safeguarding concern she had raised had not been kept confidential as she had believed but had been passed on to others as a result of which she had an arguable claim that her treatment by them resulted from making the protected disclosures.

24. On 16 June 2020 Linden J considered the first appeal on the sift. He held that the Notice of Appeal did not disclose reasonable grounds for bringing the appeal against the Tribunal's decision that the claimant did not have a disability at the material time. However, he considered that it was arguable that the Tribunal erred in law in relation to the claimant's allegations of sex discrimination, sex related harassment and victimisation.

25. On 17 July 2020 the claimant applied by email to amend her first claim form:

> **I would like to make an application to amend my claim to include a 'whistleblowing' claim in relation to two protected acts. This relates to Paragraph 42 of my Details of Claim (ET1)**
>
> **The protected disclosures/acts are:**
>
> **1. On 15 March 2018 I sent a confidential email to Ms Julie Jordan (the Respondent's Safeguarding Service Manager), raising serious safeguarding concerns relating to management failures on a high risk/high profile CSE (Child Sexual Exploitation) case. This was viewed as a whistleblowing concern by Ms Jordan on 20 March 2018 following her review/investigation of the young person's case records. I have since found out (following receipt of the proposed bundle from the Respondent for the Final Hearing) that Ms Jordan breached my confidentiality to Ms Uzma Moody (my Service Manager) on 20 March 2018 (in an email with the subject heading: Maria Rooney raising concerns). As a result of this, I was then harassed & intimidated by Ms Moody from 22-27 March 2018 via emails/letters whilst I was on sick leave with work related stress.**
>
> **Please see the Respondent's Whistleblowing Policy: …**
>
> **2. On 28 March 2018, I sent an email to Ms Jeannette Harvey (new LAC Service Manager) raising concerns about management bullying, harassment & intimidation**

> **in the workplace. I also raised these concerns with another manager, Michelle Kenney, on 22 March 2018; to David Thrussell (LAC Head of Service) in an email dated 14.03.18; to my new line manager, James Tingley at my Return to Work meeting on 25.04.18 & at my Formal Absence Management meeting on 23.05.18; in my Written Grounds of Appeal dated 22.06.18 & also at my Sickness Appeal Hearing on 17.08.18 with James Tingley (line manager), Mike Evans (Service Manager) & Alan Faulkner (HR Advisor).**
>
> **I believe I suffered detrimental/unfavourable treatment connected to raising these concerns (victimisation & harassment). This treatment continued throughout my employment with the Respondent by various managers (including James Tingley & Mike Evans) until I felt forced to hand in my notice of resignation on 29.08.18 due to my employer's conduct (which relates to my constructive dismissal claim). [emphasis added]**

26. The claimant provided a witness statement for the preliminary hearing to consider her application to amend, in which she stated at paragraphs 9 and 10:

> **9. Subsequently, following receipt of the proposed bundle for the Final Hearing from the Respondent, I discovered that Ms Jordan breached my confidentiality to Uzma Moody (my Service Manager) on 20 March 2018 (in an email with the subject heading: Maria Rooney raising concerns). Ms Moody then breached my confidentiality to two other managers (RS & TB) whom she emailed following her telephone call with Ms Jordan. As a result of this breach of confidentiality, I was then harassed & intimidated by Ms Moody from 22-27 March 2018 via emails/letters whilst I was on sick leave with work related stress.**
>
> **10. I believe that as a result of this protected disclosure, I was subjected to a detriment and my employer became even more hostile towards me as a consequence. The Respondent's attitude towards me was such that it represented a further erosion of the implied term of mutual trust and confidence.**

27. The preliminary hearing was held on 9 November 2020 before Employment Judge Ahmed, who refused the application to amend. The decision was sent to the parties on 14 December 2020.

28. On 13 January 2021 the claimant appealed against the refusal of permission to amend to add the protected disclosure claim.

29. On 11 March 2021, HHJ Auerbach granted permission for the appeal against the finding that the claimant was not a disabled person to proceed to a full hearing.

30. On 17 May 2021 I directed that the amendment appeal should proceed to a full hearing to be heard with the other grounds of appeal.

31. It appears that the disability discrimination claims were dismissed because it was held that the claimant was not a disabled person. The direct sex discrimination claims were dismissed as having no reasonable prospect of success. It is not clear on what basis the harassment and victimisation claims were dismissed. I consider it is logical to deal with the grounds in the appeals by considering the issue of disability, dismissal of the direct sex discrimination claims, dismissal of the harassment and victimisation claims and finally the amendment application. Before doing so, I shall consider the authorities the respondent relies on in both appeals about the generous ambit to be given when reading the decisions of the employment tribunal and the importance of the EAT only interfering where there is a genuine error of law.

The role of the EAT

32. Although not cited in argument, I have had regard to the recent forceful summary of the principles by Popplewell LJ in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672. The respondent relied on **Elmbridge Housing Trust v O'Donoghue** [2004] EWCA Civ 939 in support of the long-established proposition that the employment tribunal's decision should be read generously and not overturned merely because of infelicitous or inappropriate statements which when looking at the matter in the round are of an inessential nature. The employment tribunal cannot be criticised for not dealing with matters that were not raised by the parties, particularly if represented. Sometimes, brief reasoning is all that is required.

33. The requirements of rule 62 of the ET Rules was considered by the Court of Appeal in **Simpson v Cantor Fitzgerald Europe** [2021] IRLR 238. Rule 62 provides:

> **(1) The Tribunal shall give reasons for its decision on any disputed issue, whether substantive or procedural (including any decision on an application for reconsideration or for orders for costs, preparation time or wasted costs) ...**
>
> **(5) In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues ...**

34. Bean LJ considered what is necessary to comply with the rule, and the consequences of non-compliance at paragraph 29:

> **29. Failure by an ET to set out even a brief summary of the relevant law is a breach of r 62(5) of the ET Rules. But I do not think it is a profitable discussion to consider whether it is an error of law, nor whether there has been 'substantial compliance' with r 62(5). It is an error, but the real question in my view is whether the error is material. That is surely what Morison P meant when he said in Kellaway that it does not 'amount to an automatic ground of appeal'.**

35. Nonetheless, generosity in reading decisions of the employment tribunal has its limits, as Sedley LJ held in **Anya v University of Oxford** [2001] ICR 847 in the well known passage at paragraph 26:

> **The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues.**

36. Consideration of the reasons of the employment tribunal is a matter of substance rather than form. While a failure to quote the relevant legal principles and scant reasoning may make the role of the EAT more difficult, if the EAT is satisfied that, on a fair reading of the judgment of the employment tribunal, a specialist tribunal dealing day to day with employment disputes, the correct questions have been asked and answered, the appeal will go nowhere. Conversely, if, having granted the employment tribunal a wide margin of appreciation, the EAT cannot be satisfied that the employment tribunal has properly determined the issues that were before it on a

correct direction as to the law, an appeal should be allowed. Excessively generous reading of tribunal decisions should not be adopted so as to make them appeal proof, not to keep the judges of the EAT in work, but because a fair opportunity to appeal is an important component of the proper administration of justice. At the very least a party must know in broad terms why they won or lost: **Meek v Birmingham City Council** [1987] IRLR 250

The disability appeal

The Law

37. The Tribunal set out section 6 of the Equality Act 2010 in the section headed "The law":

> **(1) A person (P) has a disability if –**
>
> **a) P has a physical or mental impairment, and;**
>
> **b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.**

38. The Tribunal did not direct itself as to the statutory definition of "long term" provided for by Paragraph 2(1)(b) of Schedule 1:

> **2 Long-term effects**
>
> **(1) The effect of an impairment is long-term if—**
>
> **(a) it has lasted for at least 12 months,**
>
> **(b) it is likely to last for at least 12 months, or**
>
> **(c) it is likely to last for the rest of the life of the person affected.**

39. There was no consideration of the case law in the section headed "The law", although there was some reference to some important authorities in the conclusions. The Tribunal directed itself that:

(1) consideration should be given to the employee's condition rather than focussing on a medical diagnosis;

(2) the EQA guidance refers to normal day to day activities as:

> **"In general, day to day activities are things people do on a regular or daily basis, and examples including shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities."**

(3) the focus should be on what the employee cannot do or can do only with difficulty and not on what they can do easily;

(4) the effects of an impairment must be more than minor or trivial.

40. The Tribunal did not refer to **Ahmed v Metroline Travel Ltd** UKEAT/0400/10/JOJ in which Cox J considered the importance of not carrying out a balancing exercise between what a person can and cannot do, although what can be done may be evidence that is relevant if there is a challenge to what the person states that she or he is not able to do:

> **46. Ms Kochnari is correct in submitting that, under the DDA, the Tribunal must focus upon what a Claimant cannot do. I accept therefore that, as a matter of principle, it will be impermissible for a Tribunal to seek to weigh what a Claimant can do against what s/he cannot do, and then determine whether s/he has a disability by weighing those matters in the balance.**
>
> **47. However, I am not persuaded that this Tribunal fell into error in approaching the matter in that way. Each case will, of course, depend on its own particular facts, and there will sometimes be cases where there is a factual dispute as to what a Claimant is asserting that he cannot do. In such circumstances I agree with Mr Dyal that findings of fact as to what a Claimant actually can do may throw significant light on the disputed question of what he cannot do. This, in my view, was such a case.**

41. Counsel referred me to helpful passages in the **Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability**:

> **A6. It may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. Furthermore, effects of a mainly physical nature may stem from an underlying mental impairment, and vice versa. …**
>
> **Cumulative effects of an impairment**
>
> **B4. An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.**

> **B5. For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities. …**
>
> **B6. A person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day-to-day activities. For example, a minor impairment which affects physical co-ordination and an irreversible but minor injury to a leg which affects mobility, when taken together, might have a substantial effect on the person's ability to carry out certain normal day-to-day activities. The cumulative effect of more than one impairment should also be taken into account when determining whether the effect is long-term**
>
> **B9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do, or can only do with difficulty. …**
>
> **D16. Normal day-to-day activities also include activities that are required to maintain personal well-being or to ensure personal safety, or the safety of other people. Account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, keeping warm or personal hygiene; or to exhibit behaviour which puts the person or other people at risk. …**
>
> **D22. An impairment may not directly prevent someone from carrying out one or more normal day-to-day activities, but it may still have a substantial adverse effect on how the person carries out those activities. For example: pain or fatigue: where an impairment causes pain or fatigue, the person may have the ability to carry out a normal day-to-day activity, but may be restricted in the way that it is carried out because of experiencing pain in doing so. Or the impairment might make the activity more than usually fatiguing so that the person might not be able to repeat the task over a sustained period of time. [emphasis added]**

The Tribunal's approach to the evidence

42. The Tribunal considered the evidence about the claimant's asserted disability in a section headed "The Claimant's Evidence". Unusually, the employment tribunal did not expressly find facts before applying the law to determine the issues. Any findings of fact that were made are to be inferred from the conclusions eventually reached.

43. From paragraph 19 the Tribunal summarised the claimant's evidence:

> **19. The Claimant's impact statement is at page 109. She says that her work related stress began in 2017 as a result of having to work excessive hours, sometimes**

travelling long distances, lack of managerial support, bullying, harassment and intimidation which led to her going off on sick leave on 6 December 2017. She said her symptoms were, inter alia, insomnia, fatigue, low mood, irritability, anxiety, heart palpitations, memory loss, confusion, concentration problems, low self-esteem and confidence and headaches/migraines.

20. She states that her menopausal symptoms included, inter alia, hot flushes and sweating, palpitations and anxiety, night sweats and sleep disturbance, fatigue, poor concentration, urinary problems and headaches.

21. Specifically, she said that her symptoms led to her forgetting to attend events, meetings and appointments, losing personal possessions, forgetting to put the handbrake on her car and forgetting to lock it, leaving the cooker and iron on and leaving the house without locking doors and windows. She also spent prolonged periods in bed due to fatigue/exhaustion. She further refers to dizziness, incontinence and joint pain.

22. She states at page 121 that the symptoms "significantly affect my quality of life and has (sic) had a significant effect on my presentation, and personality".

44. The claimant was not cross-examined on the basis that her description of her symptoms and the effects they have on her are untrue. The employment judge did not expressly state that he did not accept the claimant's evidence.

45. The Tribunal described the medical evidence from paragraph 23:

23. The medical records which appear in the bundle from page 128 do not entirely support the Claimant's impact statement. Her GP records suggest her husband was diagnosed with bone cancer in his knee in January 2015 and on Christmas day in 2014 her mother suffered a broken hip as a result of being mugged. At page 134, it is noted that she first consulted her GP about stress at home on 21 January 2015. This diagnosis was noted again in February 2015, April 2015, August 2015 and October 2015. No medication was prescribed although fit notes were given by her GP on a number of occasions.

There is no record of the Claimant mentioning her menopausal symptoms to her GP until February 2017 and in between October 2015 and December 2017 there is no reference to stress at home. In December 2017 she gives her medical problem as stress at work and this was again discussed with her GP in January 2018, March 2018 and August 2018. She was referred for counselling for stress at work but was not prescribed any other medication. There is no reference to anxiety and depression until 29 August 2018.

24. I note that at her consultation on 29 August 2018, the Claimant said she goes to the gym, swims and runs.

25. I also note the contents of the occupational health reports at pages 136 and 141. On 19 April 2018 (page 138) the report states "in my clinical opinion Ms Rooney is fit to continue in her current role". The summary on the same page notes that the Claimant reported "stress and anxiety perceived to be related to circumstances at work". At this time, there had been no diagnosis or discussion with her GP about anxiety. At page 139, the report states "the terms of the Equality Act 2010 are unlikely to apply to her recent ill health".

> **26. At page 141, the occupational health report states "She felt that stress, anxiety, depression and symptoms around her menopause were not taken into consideration in the workplace. I relay this information as it has been relayed to me. However I am not able to make any comment". [emphasis added]**

46. The employment judge went on to note that the claimant was able to provide care for others:

> **27. Currently, I note that the Claimant has moved back to Nottingham to live with her husband and children. She is not currently working but, because of her husband's football injury, she will be looking after the family. She also states she is the carer for her mother, who lives in Leicester, and spends time in Leicester each week to look after her.**

47. The employment judge noted that the claimant was able to carry out some day to day activities as she provides care to others. I have considerable doubts as to how much this added to the analysis. Many people, including those with disabilities, have caring responsibilities.

48. The employment judge noted paragraph 71 of the first claim form, in which it had been stated that the claimant was not contending that she was disabled, but did not note that the claimant had an extant application to amend the claim form to remove that paragraph.

49. At paragraph 29 the employment judge stated:

> **29. In the light of these matters, I treat the Claimant's evidence with some circumspection.**

50. In the context "these matters" appear to be the medical evidence that does not "entirely support the Claimant's impact statement" and paragraph 71 of the original claim form. There are no findings that the claimant's evidence about specific symptoms or effects on her life were rejected.

The Tribunal's Analysis

51. The Tribunal stated at paragraph 36:

> **36. The Claimant did have a mental impairment. As far as I can see, she does not rely on the physical symptoms associated with the menopause. If she does rely on such symptoms, nothing in the evidence before me suggests that they are physical impairments which are long standing and have or had a substantial adverse effect on her ability to carry out day to day activities. [emphasis added]**

52. This was inconsistent with the description the claimant gave of her menopausal symptoms as including, inter alia, "hot flushes and sweating, palpitations and anxiety, night sweats and sleep disturbance, fatigue, poor concentration, urinary problems and headaches". As set out above the claimant's evidence in this respect was not rejected. I consider that it is clear that contrary to what the Tribunal stated the claimant did rely on physical symptoms associated with the menopause. The Tribunal stated, in the alternative, that any physical symptoms were not physical impairments that were long standing or had a substantial adverse effect on her ability to carry out day to day activities. This again is contrary to the evidence of the claimant that the Tribunal did not reject. The claimant's evidence was that she did have significant physical impairments. The Tribunal's statement that any impairment was not "long standing" presumably was a conclusion that the impairment had not lasted or was not likely to last for 12 months. This conclusion was unsupported by any reasoning. The Tribunal recorded that the claimant stated that the menopausal symptoms started in August 2017. The Tribunal did not reject this evidence. The claimant resigned with effect on 29 October 2018 when the symptoms were ongoing. The reasons do not explain in those circumstances how the impairment was not long term.

53. The Tribunal summarised the claimant's evidence that her symptoms resulted in her "forgetting to attend events, meetings and appointments, losing personal possessions, forgetting to put the handbrake on her car and forgetting to lock it, leaving the cooker and iron on and leaving the house without locking doors and windows. She also spent prolonged periods in bed due to fatigue/exhaustion. She further refers to dizziness, incontinence and joint pain". There is no explanation as to how the Tribunal concluded that this evidence, which it did not reject, did not demonstrate an effect on day-to-day activities that was more than minor or trivial.

54. I also consider that the Tribunal erred in focussing on the things that the claimant could do at paragraph 41 and 42 so that Tribunal fell into the error of weighing what the claimant could do against what she could not do contrary to the approach required in **Ahmed**.

55. To the extent that the Tribunal relied on the pleading at paragraph 71 of the original claim form stating that the claimant was not contending that she was disabled the Tribunal failed to take into account the fact that the claimant stated that the paragraph had been pleaded without her instructions and that there was an outstanding application to amend the claim form by removal of that paragraph.

56. Accordingly, I consider that the Tribunal erred in law in holding that the claimant was not a disabled person at the relevant time. Determination of whether the claimant was a disabled person will require a careful factual analysis. The issue must be remitted to the employment tribunal. As the disability discrimination claim was dismissed on the basis that the claimant was not disabled the appeal against the dismissal of the disability discrimination claims is allowed.

The sex discrimination strike out appeal

57. There was no dispute between the parties as to a number of well known key principles in considering strike out; including that only in the clearest case should a discrimination claim be struck out, where there are core issues of fact that turn to any extent on oral evidence they should not be decided without hearing oral evidence, and that the claimant's case must ordinarily be taken at its highest. Nonetheless, strike out can be appropriate in discrimination claims such as where the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents.

58. The claimant relied upon the important point of principle made by Choudhury P in **Silape v Cambridge University Hospitals NHS Foundation Trust** UKEAT/0285/16/DA that:

> **It is incumbent upon a Tribunal to examine each of the claims carefully and not to group claims together, when only some are so deficient as to warrant striking out, and thereby strike all of them out. That seems to me to be unfair to the Claimant, does not take the Claimant's claim at its highest and results, potentially, in a claim with some prospect of success being struck out unfairly.**

59. In **Malik v Birmingham City Council** UKEAT/0027/19 Choudhury P reminded employment tribunals that:

> **It should not be necessary to add that any decision to strike out needs to be compliant with the principles in *Meek v City of Birmingham District Council* [1987] IRLR 250 CA and should adequately explain to the affected party why their claims were or were not struck out."**

60. The Tribunal held:

> **34. In relation to sex discrimination, I do find that this claim has no reasonable prospects of success. As far as I can make out, the Claimant relies on her embarrassment at discussing her menopausal symptoms with men. This manifested itself in her requesting, at a late stage, to see a male doctor at a referral to occupational health and her embarrassment at not being able to discuss her menopausal symptoms in front of five men in her appeal against a warning for a sickness absence. No comparator has been suggested, real or hypothetical, and the claim appears to me to be an "add on" without any substance. It is therefore struck out under rule 37 as having no reasonable prospect of success.**

61. The Tribunal's analysis simply did not consider the claimant's claims as clarified in the Scott Schedule. The Tribunal did not suggest that reliance on the matters in the Scott Schedule would require an application to amend. The claims, either as set out in the claim form or as added to in the Scott Schedule, cannot realistically be characterised as being limited to the claimant being embarrassed about discussing her menopausal symptoms with men. Employment Judge M Butler had said that he considered the case to be one of the most interesting and difficult he had come across in a long time. The respondent contends that there was a detailed discussion of all of the allegations in the Scott Schedule at the hearing. However, there is simply no consideration of them or explanation of why those claims have been dismissed. The decision fails to comply

with the fundamental requirement to explain to the claimant why her complaints were struck out. Accordingly, the appeal against the strike out of the discrimination sex claims must be allowed.

The harassment and victimisation strike out appeal

62. The judgment recorded that the claims of harassment and victimisation were dismissed. The respondent contends that the claimant had not been able to specify a protected act for the purposes of the victimisation complaint and had at the preliminary hearing for case management before Employment Judge V Butler on 22 July 2019 limited the sex discrimination claim to one of direct discrimination. However, that was not the reasoning given by the Tribunal for dismissing the claims. The Tribunal gave no reasoning for the decision that the victimisation and harassment complaints were dismissed. The claimant cannot know why the claims were dismissed. The appeal on this ground is allowed.

The amendment appeal

63. The application to amend the claim to add a complaint of detriment done on the ground of having made protected disclosures was dismissed on the basis that the amendment involved adding a new cause of action and because the Tribunal held at paragraph 13:

> **"The Claimant has provided no evidence to support a possible argument that it was not reasonably practicable for the claim to have been presented in time."**

64. Unfortunately, this was simply incorrect. The claimant had given an explanation of why the application to amend was made late. She contended that she had been unaware that she had an arguable complaint until she had seen documentation provided in the tribunal bundle. This contention was not considered at all by the employment tribunal. It therefore failed to properly consider the application that had been made to amend. The claimant cannot know why her explanation for the delay in making the application to amend was rejected. The appeal is allowed.

Disposal

65. The matter will be remitted to the employment tribunal. The parties may wish to take some time to consider the best way forward. It may be sensible for the employment tribunal to conduct a brief preliminary hearing for case management. I consider it is appropriate that the matter be remitted for consideration by employment judges other than those who made the two decisions that have been appealed as the matter will need to be considered afresh, there has been considerable delay, this delay would be exacerbated by having to find dates on which the original judges are available, and so I consider a remission for consideration by a new tribunal is proportionate.