Neutral Citation Number: [2022] EAT 70

Case No: EA-2019-000943-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26th November 2021

Before:

JUDGE KEITH

- -

Between:

MISS K PACZKOWSKA	**Appellant**
- and -	
R-COM CONSULTING LIMITED	**Respondent**

- -
- -

No representation for or attendance by the **Appellant**
Mr R Kohanzad (instructed by Peninsula) for the **Respondent**

DECISION ON A PRELIMINARY ISSUE
and
FULL HEARING
Hearing date: 25th November 2021

- -

JUDGMENT

SUMMARY

[TOPIC NUMBERS: 4 and 12]

The ET erred, having found that the Appellant's claim of victimisation succeeded, in deciding that it was unnecessary to decide her claim of direct disability discrimination, based on the same detriment. In both claims, the accepted detriment was the respondent's decision not to provide an employment reference. The ET concluded that the reason for this was because the Appellant had presented an ET claim. It did not go on to consider whether the detriment was also because she was disabled. The Respondent accepted that this was an error of law, but argued that it was not material, on the basis that the ET had made clear the reason why the reference had not been provided, which excluded any other reasons. Contrary to the Respondent's argument, the ET had not found that there was only one reason for the detriment. Indeed, the ET had expressly stated that it had not considered the direct discrimination claim.

The second error was in how the ET considered whether to extend time for an out-of-time claim relating to alleged comments during an interview held on 27th April 2016. The ET had referred to no explanation having been given for why this claim had not been presented in time. In fact, the Appellant had applied to the ET on 22nd February 2017 to extend time, with an explanation and reasons. The ET had subsequently noted the time issue at a Preliminary Hearing on 23rd February 2017. The error is not that the ET ought to have extended time (which remains a matter for it). Instead, the ET erred in basing its refusal on the lack of any explanation being put forward, when, in fact, one had.

JUDGE KEITH:

DECISION ON A PRELIMINARY ISSUE

1. A preliminary issue arose as to whether to proceed with the Hearing today. The Appellant had previously applied to postpone the hearing and stay proceedings. I refused her applications yesterday. She did not attend this Hearing and was not represented. I decided that it was in accordance with the overriding objective that the Hearing proceed today notwithstanding the Appellant's non-attendance. I set out my reasons for doing so.

Background

2. The context and background are that last Friday, 19th November 2021, the Appellant applied to this Tribunal for an urgent stay of proceedings. That application was referred to me yesterday. She gave three reasons for her application, as I summarise them. First, in the week commencing 15th November 2021, the Employment Tribunal ('ET') hearing an application to strike out her claims, had stayed proceedings before it, because of contempt proceedings being considered in the High Court relating to the Appellant's unauthorised recording and publication of ET hearings. The High Court might decide that new evidence could be admitted, which in turn was said to show that the ET had been misled in material matters.

3. Second, the Appellant had been confused when seeing the weekly cause list for the EAT and comparing it with her Notice of Hearing, as the cause list used the new case numbering system. In her words, this had caused "confusion, stress and anxiety" as to what issues the EAT was considering, with an implication that there was confusion as to whether the Hearing was going ahead.

4. Third, she remained under huge pressure and stress due to the imminent High Court case and the recent ET proceedings. She was a litigant in person, with medical symptoms which had impinged on her ability to prepare for current proceedings.

5. I refused the Appellant's application, made on 19th November and added to on 22nd November.

My decision stated:

> "Your application for a postponement of the hearing and a stay of the proceedings has been referred to Judge Keith, the judge due to hear your appeal starting tomorrow. The Respondent has not provided its comments, but it is unclear whether the Respondent has had the opportunity to do so, given the short timeframe in which the applications have been made. Both applications are, at this stage, refused, although the Appellant may renew her application at the start of the hearing orally, if she chooses to do so. For the avoidance of doubt, she should come prepared to attend and participate in the hearing, and not assume that it will be postponed."

6. I gave the following reasons for my decision:

> "The Appellant has referred a stay of proceedings by the ET, to consider a strike out application, pending High Court proceedings in relation to alleged contempt of court, namely her alleged recording and publication on social media of previous ET hearings. While I am conscious not to decide any issue that is being decided by the High Court, without having seen documents relating to that action, there is no reason to suppose that the issues it is considering (covert recording and publication) are relevant to the limited issues before the EAT as to whether the ET erred in law. The hearing has already been adjourned once before, on the Appellant's application at short notice and a further delay to the EAT proceedings, would, absent, good reason, not be in accordance with the overriding objective. While I note the Appellant's reference to new medical symptoms, these are not specified and while the Appellant has referred to a recent ET hearing in the last few weeks, she has also been aware of the EAT hearing since July and has had significant time to prepare for it, despite not being legally represented. I do not understand the Appellant's application to be that she is not medically fit to participate in the hearing tomorrow."

7. My decision was communicated to the Parties yesterday and nothing further was heard from the Appellant. The MS Teams hearing was opened shortly after 10.30am this morning. EAT associates had made two attempts to contact the Appellant by telephone and messages were left, without response. I also asked Mr Kohanzad whether he had had any further information from his client's perspective, and he confirmed that he had not.

Decision on whether to proceed

8. I had already refused both applications (to adjourn and to stay). There was no renewed application. I then considered whether it would be appropriate to adjourn or proceed with the Hearing, notwithstanding the absence of a renewed application. Central to my decision was

the issue of the ability of both Parties to participate fairly in the Hearing, noting the overriding objective and the obvious potential prejudice to the Respondent in a continuing delay.

9. On the one hand, this is an error of law hearing, so proceeding does not mean that evidence which might otherwise have been adduced is not. On the other hand, I do not have the benefit of the Appellant's submissions and my decision will have implications for the Parties, in the event that her proceedings before the ET are not eventually struck out.

10. As the Appellant herself acknowledges in correspondence, this appeal and the ET proceedings relate to events up to five years ago and memories or recollections of events must start to become impaired. There is obvious potential prejudice to both parties resulting from an ongoing delay in finally determining matters, once the stay on ET proceedings is lifted. While previous adjournments have been justified on the basis of the Appellant's ill-health, this is a case of the Appellant simply not attending the Hearing or renewing her application.

11. I considered again whether proceeding with this appeal could cause potential difficulties in respect of the High Court proceedings and the ET's (stayed) consideration of the Respondent's application to strike out her claim (the Appellant's first reason). For the reasons I gave in my decision yesterday, I concluded that no obvious difficulties arose, because the grounds of appeal before me are discrete and separate from the issues of a strike out application and contempt of court proceedings based on covert recording and publications.

12. In relation to the Appellant's second reason for an adjournment, while the EAT appeal reference numbers have changed because the EAT has adopting a new case reference numbering system, it was clear that the Appellant's and Respondent's names were included in the weekly cause list and the Appellant had previously received a specific Notice of Hearing. I did not accept the Appellant's contention that any change in the numbering system was or could be the source of any confusion. Third, as already noted in my previous decision, the Appellant had not applied on the basis that she was not medically fit, and she had had advance notice of this Hearing since July 2021.

13. Turning to the Appellant's non-attendance today, EAT associates made telephone enquiries to the Appellant. They proved fruitless. The Appellant had not herself contacted the EAT and did not provide an explanation for her non-attendance. She has had an opportunity to participate in this Hearing, so a fair hearing has remained possible. To delay further, without obvious reason other than the Appellant's unexplained non-attendance, would not be in accordance with the overriding objective. I therefore proceeded with the Hearing.

FULL HEARING

14. The Hearing was scheduled to be heard on 25th and 26th November 2021 but it proceeded more quickly than anticipated, for the simple practical reason that the Appellant had not attended. I explained at the outset to Mr Kohanzad that it was not my role to put the Appellant's appeal for her, but that instead I would hear submissions from him and, where there were particular points of clarification that I needed, that I would ask him. To his credit, Mr Kohanzad identified areas where there may be issues with the ET's decision under challenge, and I was assisted by the clarity of his submissions. I gave my oral decision at the Hearing.

The Appellant's appeal

15. I now turn to the Grounds of Appeal. The Appellant appeals against the decision of the Employment Tribunal sitting in Manchester, chaired by Employment Judge Sherratt. The Hearing before the ET started on 3rd September 2018; resumed, after a gap, on 11th July 2019; and the ET promulgated its decision on 1st August 2019.

16. The Appellant presented a Notice of Appeal dated 12th September 2019, at pgs [46] to [100] of her bundle, (hereafter, 'AB') which was initially refused on the papers under Rule 3(7) by the President of the Employment Appeal Tribunal ("EAT"), the Hon. Mr Justice Choudhury, but on renewed application before His Honour Judge Auerbach on 19th August 2020, HHJ Auerbach granted permission on six grounds. I emphasise these six limited grounds because

there have been a number of applications since then, which have also been the subject of consideration by various EAT judges, including HHJ Shanks and also HHJ Auerbach, and those are not matters I need deal with today as all have been resolved as preliminary matters before this Hearing.

Ground (1)

17. The Appellant challenged the ET's dismissal of "allegation 16", which the ET recorded as an act of harassment based on an alleged remark about a "Russian woman." The ET had failed to determine what was said and had also erred in dismissing the complaint because it was about an unknown third party.

18. In her Notice of Appeal and skeleton argument, (which I have read in full but only recite where necessary to resolve the issues), the Appellant pointed out that the Respondent had denied that the comment had been made at all. She submitted that on the basis of the authority of **Veolia Environmental Services UK v Mr M Gumbs** UKEAT/0487/12/BA, a false explanation (in this case a denial) could be considered for the purposes of establishing a *prima facie* case under section 136 of the Equality Act ("EqA"), and the comment need not be directed at the Appellant, as for the authority of **Mr I S Cam v Matrix Service Development and Training Ltd** UKEAT/0302/12/MC.

19. In response, the Respondent argued that the ET had analysed both the purpose and effect of the alleged comment, at §69 of its decision, and was unarguably entitled to conclude that even if said, it did not amount to harassment. The ET's analysis was sufficiently explained (permission had not been granted on the basis of an inadequacy of reasoning) and was not perverse.

20. In oral submissions, Mr Kohanzad made the alternative point that the stage of considering purpose or effect of the comment need not have been reached, as the ET was not satisfied that

the comment had been made, or the exact words used. In those circumstances, it was unnecessary to go on and consider inferences, or the purpose or effect of such comments.

Discussion and conclusions on ground (1)

21. I turn in my conclusion on Ground (1). The ET had stated at §69 of its decision:

> "On 1 June 2016 the allegation was that there was harassment on the basis of sex and/or race, with a comment by Ashley Jackson at an all male sales team meeting at an IP Expo meeting in 2016. The comment was "Did you get anywhere with her?" As she was Russian after all".

22. The ET went on to resolve that allegation at §123:

> "This allegation relates to comments regarding Russian women."

§124 continues:

> "Whilst not being satisfied as to the exact words used, we cannot be satisfied that there was any intention on the part of Mr Jackson to harass the Claimant and looking at the claimant's perception and other circumstances we do not consider it reasonable for a comment made about an unknown Russian third party to amount to harassing the claimant. This allegation is dismissed."

23. I note the Appellant's point that the Respondent's denial that the comment was made may be part of a consideration of whether the Appellant had established facts, for the purposes of s136 EqA, from which inferences may then be drawn in the absence of an adequate explanation. However, I am satisfied that the ET's statement at §124 was a sufficiently clear finding that it was not satisfied that the comment was made, as claimed.

24. I also accepted Mr Kohanzad's alternative submission that, even had it been made, the ET was entitled to consider as relevant whether the Appellant was aware of, or knew anything about the third party being discussed. Context was, in the ET's view, key, even noting the authority of **Cam** that a comment need not be directed at a claimant. While the comment did not need to be directed at the Appellant, that did preclude consideration of wider factors.

25. I further accepted Mr Kohanzad' s point that the adequacy of the ET's reasoning on this issue

was not one on which permission to proceed had been granted.

26. In conclusion, ground (1) discloses no error of law and is dismissed.

Ground (2)

27. Ground (2) was described in the following terms:

> "The ET erred in determining in respect of Allegation 20 that the Respondent was not vicariously liable for the by e-mail sent by Ms Dando (and hence dismissing the complaint in relation to that e-mail [having regard to the Claimant having been permitted to add those complaints and the Respondent having conceded vicarious liability at the preliminary hearing on 16th March 2018]."

28. In her Notice of Appeal and skeleton argument, the Appellant referred to the email concerned dated 29th June 2017, which she asserted was in intemperate terms, at pgs [130] to [132] of the Appellant's Supplementary Bundle (hereafter 'SB').

29. The background was that the Respondent had previously accepted that it was in principle vicariously liable for comments made by Ms Dando, who was not an employee of the Respondent, as recorded in the Notice of the Preliminary Hearing of 16th March 2018, pg [108] SB. In reliance on that concession, the Appellant had withdrawn her claims against Ms Dando personally and D4 Digital and the claims against them were dismissed. The Appellant relied on the authority of **E v 1) X, 2) L and 3) Z** UKEAT/00079/20/RN for the proposition that an ET could not effectively revoke prior orders without giving adequate reasons, nor in the absence of any material change in circumstances (see **Goldman Sachs Services Ltd v Montali** [2002] ICR 1251 and **Serco Ltd v Wells** [2016] ICR 768).

30. The Respondent countered that the ET had identified the concession as to vicarious liability as arguably erroneous in law and had permitted (and had been entitled to permit) the Respondent to withdraw its concession. In terms of procedural fairness, the issue had been identified in correspondence and the Parties' respective arguments had been fully ventilated and considered. Mr Kohanzad candidly accepted that the one possible detriment to the

Appellant was that her claims against Ms Dando and D4 Digital had been dismissed. However, the answer to this was that the ET set out in clear terms at §§78 to 83 the relationship between the Parties, which could not be said to be perverse or an error of law.

31. In essence, the consequence of that reasoning was that no liability could be attached to the Respondent, Ms Dando or D4 Digital, in circumstances either under s109(2) of the EqA or for any other reason. Even if there were any disadvantage, the findings meant that liability would never have attached. The Appellant had never been employed by D4 Digital and, whilst she had withdrawn her claim against that party (resulting in the claim being dismissed), the fact that she was not employed by D4 Digital (which did not act as an employment business, but was instead an employment agency), meant that by the time of the impugned e-mail, Ms Dando was not acting nor could she be said to be acting as an agent under s109(2) EqA. This was all dealt with in the findings at §5 and §§76 to 79.

32. Mr Kohanzad also referred to **Centrica Storage Ltd v Tennison** [2008[UKEAT 0336 RN, **Braybrook v Basildon Thurrock University NHS Trust** [2004] EWHC 3352 and **C Nowicka-Price v The Chief Constable of Gwent Constabulary** [2009] EAT/02068/09/ZT for the proposition that not only prejudice to the Parties but a variety of factors needed to be taken into account, including the timing of the withdrawal of the concession and explanation for it but, primarily and ultimately, one of fairness. The point here was that the ET had raised the matter a significant amount of time before eventually reaching its decision and had allowed the Parties to make submissions.

Discussion and conclusions on ground (2)

33. I turn, then, to the conclusion. The ET had raised the issue, following post-hearing deliberations in chambers, in correspondence (a copy of which was at pg [254] AB):

> "The Tribunal met in chambers on 10 December 2018 with a view to reaching

> conclusions upon the claimant's case. The Tribunal has identified two issues which they feel need to be discussed with the parties before deliverations can be concluded.
>
> The first issues concerns the allegation numbered 20 in the Schedule contained within the claimant's opening statement. It relates to the email from Sue Dando. The second relates to the failure to provide a reference which was allegation number 21.
>
> In the note of the preliminary hearing on 16 March 2018 it is written that "the claimant applied for leave to include Susan Dando as an individual respondent. The respondent confirmed it would not be claiming the statutory defence and would accept vicarious liability for her".
>
> The Tribunal's preliminary view is that as a matter of law there is nothing within the Equality Act 2010 that could place any liability upon R-Com Consulting Limited for the actions of Susan Dando, who was not employed by R-Com Consulting Limited, notwithstanding the possibility of one person holding shares in both R-Com Consulting Limited and D4 Digital Limited and/or there being a common director, Mr. A Rathmore.
>
> With regard to the failure to provide a reference, the claimant was, at the preliminary hearing on 16 March, permitted to add a claim of disability discrimination. The claim was noted as being brought under section 13 of the Equality Act which deals with direct discrimination where someone is treated less favourably than others because of a protected characteristic which in this case is disability.
>
> A claim of direct disability discrimination requires the respondent to have knowledge of the disability because the treatment has to be because of the protected characteristic. In this case the evidence before the Tribunal does not tend to show that Ms Halliwell, who took the decision not to provide the reference, had any knowledge of the claimant's disability.
>
> Had the claim been brought as a claim for victimisation under section 27 of the Equality Act the provisional view of the Tribunal is that Ms Halliwell was aware when she made her decision that the claimant had done one or more protected acts in that she had raised a grievance and brought proceedings under the Equality Act.
>
> The Tribunal would like to discuss these issues with the parties. Notice of a hearing will be sent separately.
>
> If either party wishes to make any application to be considered by the Tribunal in respect of these two issues, then will they please put their applications in writing ..."

That then led to a subsequent hearing at which the issues were the subject of further submissions.

34. The ET had referred to allegation 20 at §§76 to 83 in relation to the e-mail sent by Ms Dando on 29th June 2017 and made findings about the corporate relationship between the Respondent and D4 Digital, as well as Ms Dando's role with the latter company.

35. I accept that although the Respondent accepted vicarious liability in principle, the ET did not err in permitting the Respondent to withdraw that concession.

36. I note the authorities relied on by Mr Kohanzad and accept that the ET was entitled to consider not only the prejudice to the Appellant in permitting the Respondent's concession to be withdrawn, but also the prejudice to the Respondent; the stage in the proceedings at which the application to withdraw was made; the prospects of success in relation to the conceded issue; and, ultimately, the administration of justice. The ET was entitled to consider all of the circumstances of the case and give effect to the overriding objective. While the ET raised the issue at a late stage of the proceedings, the Appellant was given more than sufficient time to make submissions. She was put on notice, weeks in advance. She had the opportunity to make submissions in writing, as well as making submissions at a further hearing. I further accept the submission that the prejudice to the Appellant was answered by the ET's analysis of the arrangements between Ms Dando, the Respondent and D4 Digital. There is no identified error of law in that analysis. At the relevant time, Ms Dando was neither an employee nor an agent of the Respondent, but at the time of the impugned email, an otherwise unconnected third party.

37. In the circumstances, the ET was entitled to conclude that it was in accordance with the overriding objective that the Respondent be permitted to withdraw its concession. This ground also discloses no error of law and is dismissed.

Ground (3)

38. HHJ Auerbach summarised this ground as being that the ET had erred when, having found that a claim of victimisation in respect of allegation 21, concerning a reference request, succeeded, it was not necessary to make findings in relation to direct disability discrimination. The Appellant pointed out that the 16th March 2018 Case Management Summary included a

claim of direct discrimination (see pg [104] SB). The Appellant was cross-examined on her disability claim, but the ET had failed to make findings.

39. The Respondent pragmatically accepts that the ET erred in law, in concluding that it was not necessary to make findings as to whether the alleged acts amounted to direct disability discrimination. Nevertheless, the Respondent argued that the error was not material, as it followed from other findings that the claim would have failed. The ET found that a Ms Halliwell's reason for not giving a reference was because there were outstanding issues and not for any other reason, i.e., because of the Appellant's disability.

40. Mr Kohanzad urged me to consider §127 of the ET's decision, where the ET had expressly considered the all-important reason why the reference had not been given, and it was not in any sense to do with a protected characteristic. That was, in turn, based on specific evidence (at §89), that Ms Halliwell had been informed of the Appellant's reference request, but not the details of the Appellant's grievance or its outcome (§90).

41. I explored with Mr Kohanzad whether the claims of victimisation and direct discrimination were mutually exclusive. He accepted as a matter of law that they were not. The question for me was whether it was sufficiently clear that the only reason for Ms Halliwell not providing the reference request was because of the Appellant's protected act, and not direct discrimination because of her disability.

Discussion and conclusions on ground (3)

42. The ET confirmed at §5 that allegation 21 was allowed to proceed as a claim of victimisation and direct discrimination. The ET went on to deal with the allegation at §§85 to 92. The ET's findings include, at §91, the following:

> "Ms Halliwell confirmed that she did know the details of the claimant's grievance and its outcome. She was disgusted and shocked personally about what was in the grievance but on a professional level she did what she needed to do in terms of

> responding to it and arranging for the appeal. The refusal to give the reference was nothing to do with the grievance. She did not give it as she did not want to say anything that could be misconstrued, not being aware that just a factual reference giving employment dates could be given. She was concerned that if she gave a reference it could have repercussions if she said that the claimant had been employed for 2.5 years when she had in fact been off sick for two years. She did not think she needed to consult with anyone else at the company about the reference request. She did not consider that she was biased when she decided not to give the reference."

43. The ET determined the allegation at §§127 to 131:

> "127. Given Ms Halliwell's evidence that if there were no outstanding issues she would have provided a full reference for the claimant, and given that at the time of the reference request the claimant's outstanding issues included these proceedings she had brought under the Equality Act 2010, we determine that her motivation for not giving the reference was based upon the fact that the claimant had brought her claim to the Employment Tribunal alleging discrimination based on sex.
>
> 128. The evidence given by Ms Halliwell did not go so far as to say that the provision of a refence for the claimant might compromise the way in which the company handled the case brought against it by the claimant.
>
> 129. The respondent submitted that the Tribunal should consider section 27(3) of the Equality Act 2010 which provides that "giving false evidence or information or making a false allegation is not a protected act if the evidence or information is given, or the allegation is made, in bad faith". Although we have only found for the claimant in respect of one of the preceding allegations, we do not find that there was any question of the claimant giving false evidence or that she acted in bad faith.
>
> 130. We therefore find that the respondent did victimise the claimant when failing to provide the requested references.
>
> 131. Having reached this conclusion in favour of the claimant on victimisation it is not necessary for us to make findings on the question of disability or direct discrimination."

44. I turn to the crux of this ground, which I agreed with Mr Kohanzad, focuses on the question of whether the ET's findings as to the reason for not giving the reference are only because of the protected act and not also because of the Appellant's alleged disability. I do not accept Mr Kohanzad's submission that when read as a whole, the ET did make findings which excluded the additional reason for Ms Halliwell's action in failing to provide a reference. Indeed, the ET expressly said that it was unnecessary to make such findings. It may be the case that, on revisiting the issue, the ET does not find in the Appellant's favour, but the ET did materially err in failing to decide on a claim which it acknowledged was before it. The

ET can, of course, approach its analysis in light of its existing, undisturbed findings.

45. In conclusion, the ET materially erred in law on the basis of ground (3), but the error does not undermine the ET's findings. Rather, there is a gap in them which the ET needs to address.

Ground (4)

46. The fourth ground, as summarised by HHJ Auerbach, is that the ET was procedurally unfair in allowing the Respondent to call six live witnesses and tender further witness statements, whereas at the Preliminary Hearing in March 2018 it had indicated that it would call four witnesses. The Appellant referred to and relied upon the 16th March 2018 directions which confirmed that no further witness statements would be allowed without the ET's permission (see §6.1, at pg [112] SB).

47. The Respondent's reply was that the admission of the further witness evidence did not result in any procedural unfairness or breach of natural justice. The reference in the Preliminary Hearing notes to four witnesses was provided to assess the length of the final hearing.

48. Mr Kohanzad tackled head-on the issue as to whether, as was a concern of HHJ Auerbach, there might be an unfairness because witness statements had been produced late in the day which could have been the source of potential unfairness. That was not the case here. Mr Kohanzad's instructions were that witness statements were directed to be exchanged by 28th July 2017. The additional statements were disclosed no later than 19th April 2018, but the Hearing did not begin until 3rd September 2018, so the Appellant had all of the witness statements for many months before the hearing.

49. Moreover, the Notice of Appeal was, at best, ambiguous on how the Appellant had been unable to prepare because of the additional statements. It may not have been apparent to her until the morning of the first day of the Hearing as to which witnesses the Respondent would be tendering, but as a matter of common practice, parties did not necessarily call all of the

witnesses for whom statements had been provided. That was a different matter from, as here, a suggestion of late disclosure (literally on the day) for which the Appellant would be unprepared, which was not the case.

Discussion and conclusions on ground (4)

50. I turn to the ET's resolution of the issue, at §2 of its decision:

> "The claimant had given evidence on her own behalf… [and then a number of other witnesses were listed]. There were two additional respondent witness statements presented by witnesses who did not attend. The hearing bundle contained in the region of 440 pages."

51. I accept Mr Kohanzad' s submission that it is not uncommon for those in respect of whom witness statements are tendered not to give evidence at a Hearing itself, for practical reasons such as availability, and that it is not uncommon, for the witnesses eventually called to give evidence at a Hearing to change from those identified at an earlier case management stage.

52. Mr Kohanzad was unable to comment on EJ Warren's reference in the Preliminary Hearing notes (§62, page [205] AB) to statements being able to be adduced from further witnesses if they related to matters in the amended Claim Form, and whether the additional witnesses were giving evidence on these new matters. His central submission was after the witnesses were identified at the Preliminary Hearing, the Appellant was under the misapprehension that these could never change. The Appellant had been aware many months before the Hearing of the additional witness statements. In this context, I accept Kohanzad's submission that the ET did not err in law in permitting the additional witnesses to give witness evidence, about whom the Appellant had been aware for a long time before the Hearing. I am satisfied that the Appellant was not thereby deprived of a fair hearing. This ground is also dismissed.

Ground (5)

53. HHJ Auerbach summarised this ground as an argued procedural error on the basis that the ET did not allow the Appellant to give evidence last, after the Respondent's witnesses, rather than before them. I am conscious that the Appellant had specifically requested that she be allowed to give evidence last, in pre-hearing correspondence, when requesting reasonable adjustments (pgs [68] to [71] SB). Given that she broke down on several occasions during cross-examination, the failure to allow her to give evidence last deprived her of a fair hearing and she relied on the authority of **Galo v Bombardier Aerospace** [2016] NICA 25.

54. In response, Mr Kohanzad urged me to consider that that the Appellant's request in correspondence was in the context of very extensive pre-and post-hearing correspondence between the parties, with numerous allegations and numerous applications. The Respondent's e-mails in correspondence alone numbered over 400. Where the issue was not one that was identified in a case management direction, the natural danger (as here) was that any such request would be lost in the multitude of e-mails and the flurry of activity between the Parties.

55. Mr Kohanzad again, pragmatically, in my view, accepted that it could potentially amount to a reasonable adjustment, but he argued that while the Appellant had requested the adjustment in pre-hearing correspondence, she had not raised the issue again at the Hearing. The ET could not be expected (and it would not be usual) to read through all of the pre-hearing correspondence. Moreover, the Appellant had specifically made an opening statement at the beginning of the Hearing and was perfectly able to raise the matter of giving evidence last but had not done so.

Discussion and conclusions on ground (5)

56. I accept the force of Mr Kohanzad' s submissions. The context was of extensive pre-hearing email correspondence, which was not easy to follow, as part of a chain. The Appellant made

an opening statement, in which the ET discussed with her the issues. That was the obvious opportunity for the Appellant to have raised the issue. In these particular circumstances, where the Appellant then proceeded to give evidence first without further objection at the Hearing, and notwithstanding the need for the ET to consider reasonable adjustments itself, as it had a disability discrimination claim before it, I do not accept that there was procedural irregularity such that the Appellant was deprived of a fair hearing. While the Appellant referred to her distress during cross-examination, it did not follow in this case that she was unable to proceed with the remainder of the Hearing or cross-examine the Respondent's witnesses. In the particular circumstances of this case, this ground discloses no error of law and is dismissed.

Ground (6)

57. HHJ Auerbach summarised this ground as follows:

> "The Employment Tribunal erred in deciding that it was not just and equitable to extend time in relation to Allegation 1 on the basis that no explanation had been given for the delay in complaining where the Claimant had put forward arguments in correspondence and/or because she did not have a fair opportunity to do so before it was decided. The Appellant argued that the Employment Tribunal had never mentioned in the full hearing the issue of whether Allegation 1 was out of time. The Appellant had been allowed to give evidence on the allegation but not an opportunity to make any submissions on why the claim had not been presented earlier."

58. 'Allegation 1' related to comments allegedly made by the Respondent's Managing Director during his interview of the Appellant for her job. By way of further background, the Appellant had applied on 22nd February 2017 to include this allegation (see pg [41] AB), with reasons. At a Preliminary Hearing on 23rd February 2017 (pg [182] AB), the ET had specifically identified this as an issue and whether there was a continuing act of discrimination for the purposes of it being in time. There was not only an application to include the claim, but it was recorded as an issue in Preliminary Hearing notes.

59. The Appellant argued that the Respondent had never objected to inclusion of 'Allegation 1.' As the Appellant had only been in active work for the Respondent for four months (as opposed to the lengthy period when she was later absent through illness), most of the allegedly discriminatory acts were all within a short timeframe and so there was unlikely to be any prejudice to the Respondent of the inclusion of the allegation. Moreover, the ET had not considered possible reasons for the delay in presenting this allegation, to which the Appellant had specifically referred to in her application for an extension of time.

60. In response, the Respondent said that the ET had decided that the Appellant had provided no explanation for the late presentation of this allegation, either in evidence or submissions. It was the Appellant's case and for her to put forward her submissions and evidence on why time should be extended.

61. Mr Kohanzad referred to the authority of **Doherty v The Training and Development Agency for Schools** UKEAT/0394/09 in particular, §§243 to 248:

> "243…. Whilst there must be evidence before the Tribunal, upon which they can make findings as to the reason for the delay, and be satisfied that it is just and equitable to extend time, that evidence can come from a variety of sources and not just from the claimant in a witness statement or in the witness box. This is likely to be the case where, as here, there are many allegations of victimisation made on a "continuing act" basis, involving different events and personnel over a lengthy period of time, but where eventually only one of them succeeds. It is in our view unrealistic, in such circumstances, to expect a claimant, in evidence, to have dealt with the extension of time point separately, in respect of each, discrete allegation, on the somewhat artificial and entirely hypothetical basis that only one of them might succeed."

62. However, Mr Kohanzad urged me to consider that there had to be something on which the ET could base a conclusion in relation to whether it was just and equitable to extend time, bearing in mind that it was for the Appellant to justify such an application. Moreover, whether or not there was an act extending over time, was not an issue in respect of which permission had been granted. This was a paradigm case in which there were extremes of the timeline: the first allegation related to the circumstances of the Appellant's recruitment; the last in relation to post-working employment references, and there was no sense in which, on the evidence

before the ET, they were connected with one another. It was, therefore, highly unlikely that the ET would ever have concluded that they constituted a series of acts.

Discussion and conclusions on ground (6)

63. The ET recorded 'Allegation 1' at §8 of its decision as relating to allegedly discriminatory comments made at the Appellant's job interview on 27th April 2016. At §104, the ET stated:

> "Allegation 1
>
> 104. This is pleaded as harassment and direct discrimination on the ground of race and/or sex but it was in the claimant's job interview on 27 April 2016 and so must come under section 40 of the Equality Act 2010 which provides for claims of harassment to be brought by job applicants.
>
> …
>
> 106. The comment and the question, in our judgment, amounted to harassment related to the protected characteristics of race and sex but as the allegation relates to 27 April 2016 and the claim was made on 3 December 2016 the Tribunal will have to consider whether the claim is in time when we have reached our conclusions on the other allegations."

64. At §132, the ET stated:

> "Time Limits
>
> 132. We made findings in favour of the claimant in respect of the first allegation which related to 27 April 2016 and the last allegation which related to 19 and 27 October 2017.
>
> 133. Given that the claimant's claim was presented on 2 December 2016 it was not presented within the period of three months starting with the date to which the first allegation related. This isolated act, occurring during the claimant's recruitment, cannot be regarded as conduct extending over a period as it was a one-off action.
>
> 134. No explanation has been given as to why this claim was not presented in time. There is no basis upon which we can consider it just and equitable to extend the time period therefore the first allegation must be dismissed as being out of time."

65. I do find that there was an error of law on this point, but it is important for me to identify the narrow scope of that error. On the first point, as to whether there is conduct extending over a period, I accept Mr Kohanzad's submission that permission has not been granted on this

ground. Rather, the ET erred in its conclusion that no explanation had been given as to why this allegation had not been presented in time; in other words, the question of whether it was appropriate to extend time.

66. I note two points in relation to this: the first is to draw a distinction between the previous ground, where I made clear that the ET could not be expected to identify from lengthy correspondence each and every outstanding application where, in the absence of a case management hearing or discussion, the issue was not obvious. That is distinct from this ground, where the Appellant not only had made an application, albeit in the context of voluminous correspondence, but this had been identified as an issue in a Preliminary Hearing in 2017. Second, the issue of whether to extend time was also an obvious one to have raised with the Appellant, a litigant in person. Had the ET explored the issue further with the Appellant at the Hearing, it would then have been open to her to have pointed to her previous correspondence.

67. The correspondence in question (starting at page [139] AB) refers to "request for extending time." At pg [143] AB, it gives reasons for the late production of the evidence: she stated that in her "fragile state of health at the time of dispute with the Respondent", she was forced to be both a victim and defend herself at the same time. She added that she "needed to recover from mistreatment by the Respondent and the huge negative impact" on her health for which she was still struggling and awaiting therapy. She continued:

> "If I missed any time limits I admit I wasn't functioning and coping well suffering with depression, anxiety and not able to leave home a lot of times"

68. In the circumstances, whilst I do not say that the ET ought necessarily to have extended time, what was clear was that there was an application before the ET, albeit in the context of voluminous correspondence and also recorded as an issue in a Preliminary Hearing; it had clearly set out the basis for the request to extend time and why the Appellant said it should have been extended; and it was one which the ET could be reasonably expected to have

explored with the Appellant, in contrast to the order of witness evidence. In the circumstances, I regard the ET's failure to consider that earlier application in relation to the reasons for extending time, as opposed to whether it constituted conduct extending over a period, as amounting to a material error of law.

69. In summary, the Appellant succeeds on grounds (3) and, to the extent identified above, ground (6). The remainder of the grounds are dismissed.