Neutral Citation Number: [2022] EAT 77

Case No: EA-2020-000901-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 January 2022

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

MISS J KLONOWSKA-SOCHA	**Appellant**
- and -	
FALCK UK AMBULANCE SERVICES LIMITED	**Respondent**

- -
- -

Miss J Klonowska- Socha the **Appellant** in person (assisted by Ms I Budzynska, interpreter)
Ms M Stanley (instructed by Harold Benjamin Solicitors) for the **Respondent**

Hearing date: 20 January 2022

- -

JUDGMENT

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SUMMARY

DISABILITY DISCRIMINATION & PRACTICE AND PROCEDURE

Disability Discrimination - Direct Discrimination - Section 13 Equality Act 2010 - Burden of Proof - Section 136 Equality Act 2010

Practice and Procedure - Employment Tribunal Reasons

The claimant complained of direct disability discrimination in relation to her dismissal (purportedly for performance issues) and in respect of matters occurring before any performance issues had been raised. It was the claimant's case that each of these matters demonstrated that her line manager (who had also taken the decision to dismiss) had treated her less favourably because of her disability. The ET rejected the claimant's complaints, holding that she had not been dismissed because of her disability and, in relation to what it termed the "subsidiary issues", that there was no convincing evidence that the manager was actuated by discrimination or that was the reason for the actions of inaction alleged against her. The claimant appealed.

Held: *allowing the appeal.*

The ET had failed to make any findings of fact on the pre-dismissal complaints (the "subsidiary issues") and it was impossible to discern how it had resolved the evidential dispute between the parties on those matters, which were (on the claimant's case) capable of demonstrating discrimination because of disability. It was equally impossible to know whether the ET had accepted the non-discriminatory explanations provided by the respondent. The ET's failings in respect of the pre-dismissal complaints further tainted the reasoning provided in relation to the claimant's dismissal: the claimant relied on the earlier matters as establishing facts from which the ET could decide, in the absence of any other explanation, that her dismissal had amounted to an act of direct disability discrimination. Having failed to engage with the claimant's case and to make the necessary findings of fact and/or to consider the shifting burden of proof under section 136 **EqA**, the ET's conclusion that the claimant was not dismissed because of her disability could not stand.

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THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT:

Introduction

1. This appeal raises questions regarding the adequacy of the reasons provided by an Employment Tribunal ("ET") when the judgment fails to explain the findings of fact made on matters identified in the list of issues and fails to demonstrate engagement with the burden of proof provisions at section 136 of the **Equality Act 2010** (EqA).

2. In giving this judgment, I refer to the parties as the claimant and respondent as below. This hearing relates to the claimant's appeal against a judgment of the East London Employment Tribunal, Employment Judge Speker sitting with Mrs Legg and Mr Bowman over three days in August 2020, by which the ET dismissed the claimant's claim of direct disability discrimination. The claimant appeared in person both at the full merits hearing of her claim before the ET and (albeit assisted by an interpreter) at this hearing today. She has largely represented herself throughout the ET and EAT proceedings but has been assisted by legal representatives on particular occasions to which I will refer below. The respondent has been legally represented throughout and appeared before the ET by Ms Stanley of counsel, as it has before the EAT today.

The background

3. The respondent is a national company that provides transport services on contract with various health organisations. It has around 500 staff. The claimant started employment with the respondent on 30 July 2018 as a work force planner based at its head office in Bow. Her employment was subject to a six-month probation period.

4. The claimant had been diagnosed with Lyme disease in 2016 and with Babesiosis in September 2018. By the time of the ET hearing, it was conceded that, as a result of these conditions,

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the claimant was to be treated as disabled within the meaning of the **EqA**. There was, however, an issue before the ET as to the extent of the respondent's knowledge of the claimant's conditions, although in October 2018 the claimant had told her then line manager, a Mr Rolton, that she would need to travel to Poland fairly regularly for the purpose of receiving treatment, apparently recorded as relating to a skin condition.

5. In mid-December 2018 there was a restructuring within the respondent and Ms Sarah Brewer, the respondent's Head of Welfare and Work Force Planning, became the claimant's line manager. From 24 December 2018 to 14 January 2019 the claimant was on sick leave. On 23 January 2019 she attended a return to work interview with Ms Brewer who noted that the claimant had had a high number of absences. There seems to have been mention at this meeting of the claimant having physiotherapy for Achilles tenderness and there was a reference to her having had a diagnosis of Lyme disease.

6. A number of issues had also arisen around this time relating to the claimant's performance which included a substantial number of errors and required alterations in respect of the inputting of overtime. Ms Brewer collated documentation relating to these in advance of the claimant's probationary review. On 30 January 2019 she invited the claimant to a meeting in this regard but did not give the claimant advance notice of the matters to be discussed.

7. As the ET noted, Ms Brewer had erroneously proceeded on the basis that the claimant's probationary period was due to end on 28 February 2019 when it had in fact finished on 30 January 2019. In any event, the meeting went ahead on 30 January 2019 when seven areas of concern regarding the claimant's performance were raised. These performance issues were fully discussed at the meeting, with Ms Brewer referring to the claimant's assessment form, which had scored her as poor in four of the categories. The claimant had not countersigned the assessment form and disputed

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each allegation raised, endeavouring to put her case on each. Ultimately, however, Ms Brewer concluded that the claimant's probationary period had not been successful and her employment would be terminated on one weeks' notice which the claimant would not be required to work. That decision was communicated to the claimant by letter of 7 February 2019 which stated that her employment was to be terminated for the following reasons: (i) failure to follow procedure/management instruction; (ii) concern regarding honesty and integrity; (iii) incorrect record keeping/administration.

8. The claimant exercised her right to appeal against that decision, which was heard on 8 April 2019, although it appears there was no outcome letter relating to the appeal.

The Claimant's Case before the ET and the ET's Decision and Reasoning

9. In her subsequent ET claim, the claimant complained that she had suffered disability discrimination. At that stage, the claimant was acting in person and she had also sought to pursue a claim of wrongful dismissal or breach of contract. At a preliminary hearing before the ET on 16 September 2019, when the claimant was represented by counsel, the contract claim was dismissed as withdrawn and the claimant's disability discrimination complaint was clarified as being one of direct discrimination brought under section 13 **EqA**. It was the claimant's case that she had suffered direct disability discrimination by virtue of the following treatment: (i) Sarah Brewer failed to respond to the claimant's email, sent on or around 17 January 2019, informing Ms Brewer of the claimant's condition despite the claimant's request for a response; (ii) at a meeting around the end of January 2019 Ms Brewer told the claimant: (a) that she would not accept her GP's medical note; and (b) asked the claimant if she was not physically but mentally ill; (iii) On or about 1 February 2019 Sarah Brewer dismissed the claimant.

10. It was the claimant's case before the ET, as set out in her witness statement, that after her return from sick leave (which was related to her underlying condition), on 15 January 2019, she had

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provided Ms Brewer with a letter from her treating physician in Poland, the letter being in English but on a Polish template, but was told that this would not be accepted and Ms Brewer would not approve her sick leave because this was not in an English template. The claimant said that, on 17 January 2019, she sent an email to Ms Brewer setting out her medical conditions and her request for sick leave and statutory sick pay, asking for a response, but that she never received any reply, although her request was subsequently approved by the payroll team. Thereafter, at her return to work meeting on 23 January 2019, it was the claimant's evidence that Ms Brewer again said she would not accept the medical note from the claimant's Polish GP because it was not in an English template and appeared unhappy when the claimant said it had already been accepted by the payroll team. It was also at this meeting that the claimant said that Ms Brewer asked how she felt physically and suggested that the claimant was "*not physically but mentally ill*" because she "*had too many illnesses for such a young age*."

11. It was the claimant's evidence, at least as recorded at paragraph 12 of her witness statement, that she felt shocked and upset as a result of these comments and "*felt discriminated against on the basis of my disability*." The claimant further observed that it was at the end of Ms Brewer's notes of this meeting that she had recorded that the claimant would be invited to a probationary review meeting. The claimant said that she had only had one probationary review meeting (with Mr Rolton), when no concerns had been raised and it was only at the meeting on 1 February 2019 – so, after the various issues she had experienced with Ms Brewer relating to her health conditions - that any concerns regarding her performance were raised for the first time. The claimant addressed the performance issues in some detail and said that she had heard rumours that her employment was to be terminated, which she felt was really because Ms Brewer wanted to dismiss her because of her disability.

12. It was Ms Brewer's evidence, however, that other than needing to travel to Poland to receive

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treatment for a skin condition, something the respondent had accommodated, she was unaware that the claimant was suffering from symptoms or illness until the return to work interview towards the end of January 2019. On the question whether she had failed to respond to the claimant's email of 17 January 2019, it was Ms Brewer's evidence that the claimant had originally provided a medical certificate in Polish (although the copy provided to me at this hearing is in English), which had not been accepted by the payroll team and that the claimant had then tried to raise the matter with her when she had made clear it was not her decision. When the claimant sent her an email on 17 January 2019, Ms Brewer had spoken to her in person and again said she would need to sort this out with payroll; she did not send a written response because they had spoken. I note that this account is disputed by the claimant, who says Ms Brewer was not in work that day.

13. In addressing the question of what was said at the return to work meeting on 23 January 2019, at paragraph 14 of her witness statement, Ms Brewer said that, in discussing the claimant's levels of absence, she had asked whether there were any underlying issues including welfare issues. That, she explained, was the only thing she could think the claimant was referring to when alleging that she (Ms Brewer) had asked if the claimant was not physically but mentally ill. It was Ms Brewer's evidence that she had never used those words. As for the suggestion that she again refused to accept the claimant's medical note, Ms Brewer was unable to remember that being an issue discussed at the return to work meeting and could only think the claimant was referring back to the earlier discussion relating to her email of 17 January 2019. Otherwise Ms Brewer detailed the particular performance concerns she had gone onto raise with the claimant on 1 February 2019 and confirmed that she had dismissed the claimant not because of her illness but because she was not capable of doing the job properly.

14. In its reserved judgment, the ET set out the issues that it was to determine as identified at the preliminary hearing, as I have recorded above. Noting that there had been a discussion of the

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claimant's absences at the return to work interview, the ET observed that for the claimant to complain of discrimination based upon absences she would have needed to have brought a claim under section 15 **EqA**, discrimination arising from disability, but she had not. As for the claim that had been pursued under section 13 **EqA**, the ET identified that the question it had to answer was whether the less favourable treatment complained of was because of the claimant's disability.

15. On the question of the reason for the claimant's dismissal, it was the respondent's case that there was no evidence that Ms Brewer had knowledge of the claimant's disability, but in any event she had dismissed the claimant for issues relating to her performance, those performance issues being supported by the evidence. It was the claimant's case, however, that the performance issues raised at the review meeting on 1 February 2019 were not the genuine reason for her dismissal and she was dismissed because of her disability.

16. The ET referred to having heard very detailed evidence relating to the performance issues raised at the review meeting on 1 February 2019. It reminded itself that it was not determining an unfair dismissal complaint and that the claimant's contract specifically stated that the procedure for ending the probationary period need not comply with the respondent's disciplinary procedures. The ET identified the question it had to determine as being:

> "6. …whether the claimant was discriminated against because of her disability. That is the protected characteristic in this case. The question is: was she treated less favourably by the respondent than it would have treated others. Was it, as Sarah Brewer maintains, performance, or was it because of the claimant's disability."

Stating that it had considered all the evidence, the ET concluded that it did not find that the claimant had been dismissed by Ms Brewer because of her disability (see the ET at paragraph 7).

17. When considering what it characterised as the "*subsidiary issues*" (which I understand to be a reference to the earlier matters, which were separately complained of as acts of disability

discrimination by the claimant, but on which she also relied as amounting to a continuing act on the part of Ms Brewer) the ET similarly did not find there was any convincing evidence that Ms Brewer, "*was actuated by discrimination or that it was the reason for the actions or inaction alleged against her*." (see the ET at paragraph 8). The ET did, however, go on to voice some criticisms about how the respondent had conducted matters in relation to the claimant's employment and her probationary period, finding that there had been a failure to keep records of training and an absence of monitoring records in respect of the claimant's probationary period; that the respondent had been confused about the start and end times of the claimant's probation; that the claimant had been informed that she would be subject to a review meeting about her absence but this was then not referred to; that there was a lack of notification to the claimant of the matters that were to be discussed in detail at the review meeting, which had led to the termination of her employment; and that there had been no outcome letter following her appeal and no response to her email. Although these were matters of concern, the ET was clear that it did not consider that these impacted on the case before it.

The Grounds of Appeal and the Parties' Submissions

18. This matter was previously before me at a hearing under rule 3(10) of the **Employment Appeal Tribunal Rules 1993**, on 28 July 2021. At that stage I made clear that I would not permit the appeal to proceed on a number of the claimant's original grounds of appeal, but I did allow amended grounds to be filed, which I considered raised arguable questions of law that should be determined at a full hearing. By those Amended Grounds of Appeal the claimant complains that ET erred in:

(1) Failing to provide adequate reasons for its conclusions that the respondent had not discriminated against her under section 13 **EqA**.

(2) Its misapplication of section 136 **EqA** in that it: (a) failed to identify whether there were facts from which it could have decided in the absence of any other explanation that the respondent had contravened section 13; and/or (b) having identified that such facts existed,

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failed to hold that a contravention of section 13 had occurred, alternatively, failed to give reasons for finding that contravention did not occur. The facts from which the claimant says the ET could have decided, in the absence of another explanation, that a contravention of section 13 had occurred are as follows: (i) a seeming discrepancy between Ms Brewer's assertion that she was unaware of the claimant's disability and what is said to have been the ET's implied finding that she was so aware; (ii) if established (which did not appear to have been determined) that Ms Brewer failed to respond to the claimant's email sent on 17 January 2019; (iii) if established (which did not appear to have been determined) that Ms Brewer, during a meeting around the end of January 2019, told the claimant that she would not accept her GP medical note and/or asked whether she was not physically but mentally ill; and/or (iv) the various shortcomings set out at paragraph 10 of the ET's reasons, identified as areas of concern.

19. In her skeleton argument for today's hearing, the claimant sought to address again some of her original grounds of appeal and to raise a new claim under section 15 **EqA**. Those were, however, matters that were considered and rejected at the rule 3(10) hearing and were not matters that I allowed to be re-opened before me today.

20. To the extent that the claimant has addressed the grounds of appeal that are to be determined, she complains that the ET had not explained why it chose to believe or otherwise place weight on the testimony of Ms Brewer and to accept the reasons she gave for why the claimant was dismissed. She submits that the ET failed to address the issues before it and to draw the relevant inferences from the evidence.

21. For the respondent, it is contended that the reasons provided by the ET were adequate to permit the parties to the dispute, who could be assumed to have knowledge of the evidence given and

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the submissions made, to know why they had won or lost. In particular, the ET had accepted the respondent's case that the claimant's dismissal was because of performance issues, about which detailed evidence had been given by Ms Brewer. In oral argument, Ms Stanley accepted that the ET had not reached a clear conclusion that performance issues were the reason for dismissal but she emphasised that it had made a finding of fact that there had been performance issues (documentation in respect of which had been collated by Ms Brewer) and had concluded that the dismissal was not finally because of the claimant's disability. As for the ET's approach under section 136 **EqA**, as had been held in **Hewage v Grampian Health Board** [2012] UKSC 37, as the ET had been able to make clear findings of fact as to what had occurred, the reverse burden of proof had no relevant impact. That the ET had not expressly referred to section 136 did not amount to an error of law and it was not bound to draw any inferences from any findings to the extent that any were made adverse to the respondent (**Chief Constable of Kent Constabulary v Bowler** UKEAT/0214/16). Ultimately, the answer to this ground of appeal was that the ET had clearly found that the reason for dismissal was not the claimant's disability, that was sufficient to mean that the respondent had not discriminated against the claimant in deciding that she should be dismissed.

22. More specifically, addressing each of the particular matters relied on by the claimant: (i) the ET had made no finding as to whether or not Ms Brewer knew of the symptoms of the claimant's conditions, let alone that she had knowledge or constructive knowledge of the claimant's disabled status; as to whether (ii) Ms Brewer failed to respond to the claimant's email sent on 17 January 2019 or (iii) whether she had made the comments alleged in a meeting on 23 January 2019, the ET had not made specific findings on those allegations but had concluded against the claimant "*on the merits of those aspects of the case*" (see paragraph 8); and (iv) the ET had made clear that the concerns it had identified did not affect the outcome of the case (see paragraphs 9 to 11).

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The relevant legal principles

23. The claimant's complaint of disability discrimination was brought under section 13 **EqA** which relevantly provides as follows:

> "Direct discrimination
> (1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

24. In considering that complaint, by section 136 **EqA** the ET was required to adopt the following approach:

> "Burden of proof
> …
> (2) if there are facts on which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred;
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

25. Section 136 is not, however, to be applied by ETs in an overly mechanistic manner; see per Maurice Kay LJ, at paragraph 12 in **Khan & Anor v The Home Office** [2008] EWCA Civ 578. The approach laid down by section 136 **EqA** will require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but where the ET is able to make positive findings on the evidence one way or another, the provisions of section 136 will be of little assistance; see the observations made by Underhill J (as he then was), at paragraph 39 **Martin v Devonshires Solicitors** [2011] ICR 352, approved by the Supreme Court at paragraph 32, **Hewage v Grampian Health Board** [2012] UKSC 37.

26. As for drawing inferences from the facts found, as Simler J (as she then was) explained, at paragraph 97 **Chief Constable of Kent Constabulary v Bowler** UKEAT/0214/16, this is simply part of the fact-finding process and, again, is not an exercise to be carried out mechanistically.

27. By rule 62(5) Schedule 1 **Employment Tribunal (Constitution of Rules and Procedure) Regulations 2013** (the "ET Rules") it is required that the ET's reasons shall:

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> "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…"

28. That Rule provides a guide for the ET; it is not a straitjacket; see per Buxton LJ, at paragraph 12 of **Balfour Beatty Power Networks Ltd v Wilcox** [2007] IRLR 63 (although that case was determined under the former **2004 ET Rules**, the point equally applies to the **ET Rules 2013**). The judgment provided by the ET must enable the appellate court to understand why it reached the decision it did; that does not mean the ET has to address every factor considered but the issues vital to the conclusion should be identified and explained; see per Lord Phillips MR, at paragraph 19 **English & Emery Reimbold & Strick Limited v D J & C Withers (Farms) Limited & Anor** [2002] EWCA Civ 605.

29. As was made clear by Bingham LJ in **Meek v City of Birmingham District Council** [1987] IRLR 250:

> "The decision of an Industrial Tribunal is not required to be an elaborate formulistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost."

And, reading the reasoning provided by the ET, an appellate tribunal is to bear in mind:

> "That the extended reasons are directed towards parties who know in detail the arguments and issues in the case. The tribunal's reasons do not need to be spelt out in the detail required, were they to be directed towards a stranger to this dispute."

See paragraph 32 **Derby Specialist Fashion Ltd v Burton** [2001] ICR 833 (EAT).

30. More generally, the relevant question is not whether the ET's reasons are perfect but whether they are adequate to the task. As Singh LJ observed in **Sullivan v Bury Street Capital Limited** [2021] EWCA Civ 1694, an ET is not sitting in examination and it is helpful for any judge sitting at

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an appellate level to keep in mind the guidance summarised by Popplewell LJ, at paragraphs 57 to 58 **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672.

Discussion and conclusions

31. In her original ET claim, the claimant had made clear that she was pursuing a complaint of disability discrimination. At that stage she was acting in person and the particulars of her claim were set out in narrative form, without identifying the distinct acts of which she was making complaint, although it was clear that she disputed the reasons given for her dismissal and was saying that, if she had not been disabled, she would not have been dismissed and would have been treated in the same way as other members of her team.

32. At the preliminary hearing on 16 September 2019, the ET was able to clarify the nature of the claimant's case and the issues that would need to be addressed in order to determine her claim. The claimant had the benefit of being represented by counsel at that hearing and it was made clear that she was pursuing a claim of direct disability discrimination under section 13 **EqA**. Her complaint, however, was not limited to the question of dismissal. The claimant was permitted to amend her claim to add allegations relating to meetings she had with Ms Brewer prior to the probation review and in respect of Ms Brewer's failure to respond to an email of 17 January 2019. In the ET's record of the case management discussion at that hearing, it is further noted that there was a possibility that those additional allegations might give rise to a question whether they had been raised in time and/or whether they amounted to a continuing act, of which the dismissal was the last part. Those were matters, the ET recorded, that would need to be dealt with at the full merits hearing.

33. The list of issues agreed and endorsed by the ET at the preliminary hearing, thus set out the issues to be determined (relevantly) as follows:

> "Direct Disclosure (Disability - section 13 **EqA** 2010)

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…

(ii) Was the claimant subjected to the following treatment:
a) Sarah Brewer failed to respond to the claimant's email sent on or around 17 January 2019 informing Ms Brewer of the claimant's condition (despite the claimant's request for a response);
b) at a meeting around the end of January 2019 [agreed at the hearing to be the return to work meeting on 23 January 2019] Sarah Brewer told the claimant (i) that she would not accept her GP's medical note; and (ii) asked the claimant if she was not physically but mentally ill;
(c) On or around 1 February 2019 Sarah Brewer dismissed the claimant.
(iii) If so, was this less favourable treatment on the grounds of the claimant's own disability.
The claimant relies on a hypothetical comparison in respect of each allegation of discrimination.
Timepoints:
(iv) Did any of the acts complained of take place more than three months (plus the extension arising out of conciliation) before the presentation of the ET1. If so, were they part of conduct extending over a period and if so treated as brought in time…
(v) If so would it be just and equitable to extend time."

34. It is apparent from the claimant's witness statement for the ET hearing that she was complaining that Ms Brewer had treated her less favourably because of her disability. First, in how Ms Brewer had responded to her after her return to work in January 2019; then in failing to reply to the claimant's email about her condition; in dismissively refusing to accept the claimant's medical evidence and in her pejorative comments about the claimant's health issues at the return to work meeting; and then in deciding to raise performance issues with the claimant at a probation review meeting - the claimant pointing out that this was only referenced in the notes after the discussion about the claimant's health issues at the return to work meeting (those performance issues, the claimant contended, were not justified but were used by Ms Brewer as a false reason for the claimant's dismissal when her true motivation was the claimant's disability).

35. As Ms Stanley has accepted in oral argument, a number of factual disputes arose in respect of different aspects of the claimant's case. Although the respondent had conceded that the claimant met the statutory definition of disability under the **EqA**, it had not accepted that Ms Brewer (the relevant

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decision taker) had known of this, or of the relevant circumstances demonstrating that the claimant had a requisite impairment. It was Ms Brewer's evidence that she knew only of the labels attached to the claimant's diagnoses, not of the effect of the conditions or the way in which the claimant was impaired as a result; that, the respondent contended, was relevant given that the claim the claimant had brought was one of direct disability discrimination. There was also a dispute as to whether Ms Brewer had responded to the claimant's email of 17 January 2019: Ms Brewer said she had, orally; the claimant denied that was the case. Equally there was a dispute as to what had been said regarding the medical evidence, and as to whether or not Ms Brewer had suggested the claimant was mentally rather than physically ill. On each of those points, as Ms Stanley accepts, the ET made no finding. To the extent that it resolved the evidential disputes between the parties, the reasons provided do not make that clear. Indeed, it seems that the ET failed to make any findings of fact in respect of any of those points.

36. There was also a dispute between the parties as to the performance issues that Ms Brewer relied on as the reason why she had determined that the claimant should be dismissed. As the ET recorded, both Ms Brewer and the claimant gave detailed evidence on these issues. Once again, that evidence indicated clear lines of dispute between the parties. The ET did not, however, determine who was correct, although it did find that performance issues had arisen in relation to the claimant's work at around the time she returned after her sick leave and that documentation relating to those concerns had been collated by Ms Brewer prior to the review meeting.

37. As the ET fairly noted, it was not determining a complaint of unfair dismissal and it did not specifically make a finding of fact as to what was the reason for the dismissal in this case. What the ET did find, however, was that the claimant was not dismissed by Ms Brewer because of her disability. Although the ET thus rejected the claimant's contention that her dismissal was because of her disability, it did not make findings of fact as to what it termed the "subsidiary issues" and, to the

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extent that it accepted the claimant's evidence on any of those issues, it did not seek to answer the question why Ms Brewer might have behaved in the way, or ways, alleged. At most, the reader is left with the ET's observation at paragraph 8 of its judgment, that "*similarly*" it did not find "*any convincing explanation that Sarah Brewer was actuated by discrimination or that it was the reason for the actions or inaction alleged against her with regards to those points*".

38. Ms Stanley says that although the ET failed to make findings of fact on all the issues before it, that might have reflected the parties' focus on the performance matters relied on by Ms Brewer, and the claimant could understand why she had lost her case on the pre-dismissal subsidiary issues because the ET had made clear there was no evidence that Ms Brewer had been actuated by discrimination or that that was the reason for those actions or omissions. Taken in context, and the parties not coming to the decision as strangers to the case, the reasons given were adequate.

39. Accepting that the ET is required to provide reasons that are adequate, and not perfect, I am not persuaded that the relevant test is met in this case. The list of issues in this case was not unduly long and clearly set out the factual disputes that the ET had to determine. Here, however, the ET failed to make any finding of fact as Ms Brewer's state of knowledge of the claimant's impairments, or as to whether or not she had acted in the ways about which the claimant had complained. Although the matters raised by the claimant, relating to the pre-dismissal points, might have been capable of a non-discriminatory explanation, the way she had put her case in this regard raised facts from which an ET could, absent such an explanation, infer that there had been direct discrimination. The ET thus failed in its basic task to make the required findings of fact. That is not an error that can be overlooked. If, for example, it were to be assumed that the ET had accepted the claimant's case on the "subsidiary issues", then the reasons fail to demonstrate any engagement with the possible shifting burden of proof, providing no indication as whether or not the ET had accepted the explanations provided by Ms Brewer. In the circumstances, it was not sufficient for the ET to simply assert that it had not found in the claimant's favour on the merits on those aspects of her case.

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40. Furthermore, in recording the ET's conclusion on the "subsidiary issues", I note its use of the word "*similarly*" (paragraph 8 of the judgment). That would appear to refer back to the finding on dismissal and to suggest that the ET had not found that there were any matters that would suggest any discriminatory motivation on Ms Brewer's part in determining to terminate the claimant's employment. The difficulty with that, however, is that the ET had failed to make any findings of fact on the matters relied on by the claimant as demonstrating the necessary motivation on Ms Brewer's part; that is – on the claimant's case - the dismissive and pejorative attitudes she had displayed in relation to the claimant's health, as demonstrated by the subsidiary issues the claimant had complained of. Ms Stanley argues that this is not fatal because the ET made clear that it had not found that the dismissal of the claimant was because of her disability. That, however, was a conclusion reached, absent findings of fact, on the very matters relied on by the claimant as facts from which she said the ET could decide, in the absence of any other explanation, that Ms Brewer had discriminated against her. Of course, it might have been open to the ET to reject the claimant's allegations in those respects and/or to accept that non-discriminatory explanations had been provided by Ms Brewer, but it did not adopt either course. Equally it might have been open to the ET to conclude that, even if Ms Brewer had behaved in a potentially discriminatory way before, it was clear that her reason for dismissing the claimant was because of performance concerns; again, however, the ET did not make a specific finding to that effect.

41. In order to address the claim of direct disability discrimination in this case, the ET was required to make findings of fact on the issues that had been identified. The case presented by the claimant was one of a discriminatory mindset on the part of Ms Brewer, which had been evidenced by her reaction to the claimant on her return from sick leave and which ultimately led to her dismissal. To determine whether or not that case was made out, the ET needed to reach conclusions as to what was known by Ms Brewer in relation to the claimant's underlying health issues and impairment, and as to whether she had indeed responded to the claimant in the ways alleged before any issue of

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performance had been identified with the claimant. Those findings were potentially relevant to the question whether the claimant's dismissal had been because of her disability. Even if the ET had found in the claimant's favour on the earlier matters, that might not mean that it did not accept the respondent's evidence on the decision to dismiss; had it found in the claimant's favour on those matters, however, it is at least possible that it might then have drawn an inference that the real reason for the claimant's dismissal had been motivated by her disability. In short: the ET needed to demonstrate engagement with the questions that were raised by the case before it; doing so, it needed to consider whether that case raised issues that were relevant to the shifting burden of proof under section 136 **EqA**.

42. In this case, it is unfortunate that the ET did not carry out the task required of it. It neither made findings of fact on the allegations that had been made, which were in dispute between the parties, nor as to the potential explanations provided. Instead the ET moved straight to what might be seen as the ultimate answer - that is, that the decisions taken were not motivated by the claimant's disability – but, in doing so, it had failed to make the necessary findings preliminary to that conclusion so as to demonstrate that it had engaged with the case before it. For all those reasons, I therefore allow this appeal and remit this matter to be re-heard by a differently constituted ET.

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