Neutral Citation Number: [2022] EAT 102

Case Nos: EA-2019-000964-VP;

EA-2019-001074-VP;

and EA-2019-001156-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1st October 2021

Before :

JUDGE KEITH

- -

Between :

MS SALLY NAILARD	**Appellant**
- and -	
UNITE THE UNION	**Respondent**

- -
- -

MR J WYNNE for the **Appellant**
MR O SEGAL, QC and **MS N NEWBEGIN** for the **Respondent**

Hearing date: 30th September & 1st October 2021

- -

JUDGMENT

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SUMMARY

SEX DISCRIMINATION & PRACTICE AND PROCEDURE

The Employment Tribunal did not err in failing to apply the burden of proof when assessing the appellant's discrimination claims. It addressed her allegation of subconscious bias, assessing the evidence before it. It was unnecessary for it to recite or refer to every piece of evidence in that assessment. Also, there was no procedural unfairness in the respondent not cross-examining the appellant on certain issues, when the parties were already clear what those issues were and had had the opportunity to present evidence.

The Employment Tribunal was also entitled to conclude, on the evidence before it, that the appellant would have left the respondent's employment in the event that she had not been harassed and that the chain of causation in relation to her loss was broken when the appellant obtained a better-paid job with another employer, for whom she worked for 18 months and whom she regarded as supportive, before leaving to go to a less well-remunerated job nearer to her home. The Employment Tribunal had carried out a full assessment of the facts and had not limited its assessment to a finding that the appellant had obtained a better-paid job. The Employment Tribunal did not err procedurally in refusing to adjourn its consideration of the issue to a later hearing to enable medical evidence to be adduced. There had already been an earlier preliminary hearing at which directions had been given on the timing of when certain issues would be addressed and this was, in reality, a late challenge to those earlier case management directions. In any event, the Employment Tribunal considered the appellant's medical issues when assessing the reasons for her resignation from her subsequent job.

Moreover, the Employment Tribunal did not err in making a reduction in its award based on the appellant's conduct, which was only revealed after her resignation. The Employment Tribunal was not required to make findings on the chance that such conduct would have been discovered or revealed.

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Finally, the Employment Tribunal did not err in making an "unless" order and striking out the appellant's personal injury claim for non-compliance, in circumstances where the terms of the disclosure order were clear; the disclosure was necessary for a fair disposal of the issues; the terms of the order were identical to those of an earlier order with which the appellant had consciously chosen not to comply; and which had balanced the appellant's right to respect for her private life by limiting disclosure to a confidentiality ring of senior lawyers outside the respondent's organisation. The Employment Tribunal was entitled to conclude that the appellant's breaches of the terms of the "unless" order were significant and to strike out her personal injury claim.

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JUDGE KEITH:

1. This appeal hearing was held over two days on Thursday, 30th September and the morning of Friday, 1st October 2021, in person. There were three appeal reference numbers: EA-2019-000964-VP; EA-2019-000074-VP; and EA-2019-0011564-VP. In each case, the appellant was Ms Sally Nailard and the respondent, Unite the Union. The appellant was represented by Mr James Wynne of counsel and the respondent by Mr Oliver Segal QC leading Ms Nicola Newbegin. Both representatives appeared below before the Employment Tribunal ('ET').

2. I deal with each challenge in turn, summarising the gist of the issues and submissions, followed by my discussion and conclusions. These summaries are not a full recitation of the detailed and lengthy points made, which I have nevertheless considered in full. I gave an oral judgment on the second day of the hearing, of which this is the transcript.

The first appeal: EA-2019-000964-VP — the first ground

3. This appeal is to challenge the ET's decision promulgated on 1st September 2019, following a hearing from 22nd to 26th July 2019. A copy of that decision is at pages [1] to [23] of the core bundle ("CB").

4. A notice of appeal was filed on 17th October 2019, (pages [30] to [36] CB). Permission was initially refused under rule 3(7) by HHJ Barklem but granted upon oral renewal by HHJ Tayler, for reasons set out at page [302] CB, and with directions at page [309] CB.

5. The first ground of challenge was that the ET had erred in failing to apply properly the burden of proof (**Section 136 Equality Act 2010** ("EqA")) by failing to take into account material capable of supporting an inference of discrimination. The ET had also failed to

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give adequate reasons to support its conclusions. The relevant material had been set out clearly in the appellant's written submissions to the ET at §§15.18 to 15.31, which were annexed to the grounds of appeal to this Tribunal and also included at page [269] of the appellant's supplementary bundle ("SB").

6. Second, the appellant argued that the ET had erred in failing to analyse the implications of its finding, at §73 of its decision:

> **"We admit to not entirely understanding the level of concern the respondent's officers seem to have over the threat to release the DVD, but we accept that that was the primary motivating factor."**

7. The ET's lack of understanding should have led it to conclude that there were facts from which it could decide, in the absence of another explanation, that the respondent's treatment of the appellant amounted to acts of discrimination or harassment, in particular by Mr Kavanagh, the respondent's employee.

8. The ET reminded itself of the burden of proof at §31, page [10] CB. The ET referred to Mr Segal's submissions at §30 and to Mr Wynne's reference to subconscious discrimination at §36, page [11] CB. The ET reached its conclusions concerning Mr Kavanagh at §§71 to 73, page [11] CB, which I briefly recite:

> **"71. We then turn to the question of Mr Kavanagh's interactions with the claimant. There is no question that there was any element of sex discrimination or harassment on the part of Mr Kavanagh up to the decision to transfer the claimant. Before that, she agreed and we have found that he was entirely supportive of her and recognised the serious difficulties she faced, some of which related to her gender.**
>
> **72. The question therefore for us now is whether those facts which do include an element of sex discrimination or harassment, because of the gender-specific language used by Mr Saini and Mr Coxhill, of which Mr Kavanagh was aware, was itself the motivating factor, either consciously or subconsciously, for his decision to transfer the claimant."**

9. The ET went on to provide its reasons as to why it concluded that Mr Kavanagh had not

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discriminated against or harassed the appellant:

> **"73. We have considered this anew with the evidence before us last time and at this hearing. We admit to not entirely understanding the level of concern the respondent's officers seem to have over the threat to release the DVD, but we accept that that was the primary motivating factor. We also accept that Mr Kavanagh was concerned to protect the claimant's health. Looking at matters in the round, and bearing in mind that Mr Kavanagh had moved other officers because of similar problems, we do not infer that there was unwanted conduct which related to her sex which had the purpose or effect of violating the claimant's dignity when Mr Kavanagh took the decision to transfer her from Heathrow. Nor do we find that it was less favourable treatment because of sex. It goes without saying that this does not mean that our findings with respect to the fact that there was a fundamental breach of contract do not still apply. There was still a significant amount of other sexual harassment and discrimination by the lay officials and by other paid officials to create a situation with other matters that led to a fundamental breach of contract in response to which the claimant was entitled to resign."**

The appellant's oral submissions

10. While the ET had considered Mr Kavanagh to be supportive, it had failed to consider whether his actions were affected by subconscious bias. On the one hand, the ET had considered Mr Kavanagh's motivations for his actions. On the other hand, as already noted, it had failed to consider whether to make findings of fact when it did not understand the concerns of Mr Kavanagh and his colleagues over the risk of the release a DVD of a television interview in which the appellant had appeared, a number of years previously, in which it was claimed that she had appeared in British Airways uniform (she was employed by them at the time) and had been critical of industrial action. In essence, lay trade union officials at Heathrow airport, where the appellant worked, were trying to remove her by discriminatory means and, whatever his motivation, Mr Kavanagh was following through and effectively enforcing the desires of others' discriminatory plans. The lack of understanding of Mr Kavanagh's expressed concerns at least discharged the initial burden of proof. This was also in a context of wider organisational failings, which had failed to prevent discrimination against the appellant and sanction the perpetrators.

11. There were strong reasons to believe that the respondent's organisational failings related

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not only in its interactions with the perpetrators but in respect of Mr Kavanagh. Mr Wynne cited the appendix to the grounds of appeal and the various factors from which the ET ought to have concluded that the initial burden of proof had been met. These included that there had been no equalities policy or adequate equality training within the respondent's organisation. Also, Mr Kavanagh knew that the perpetrators wanted the appellant transferred away from Heathrow airport, because of her sex. He had failed to take adequate steps to protect the appellant and had transferred her, without taking the initiative to challenge the perpetrators adequately. There could have been alternatives to a transfer. Her transfer had resulted in her humiliation. This was compounded as the appellant faced particular difficulties in the event of a transfer, because of family commitments, which the ET had failed to consider adequately, and which Mr Kavanagh had regarded as a distraction from the need for the respondent to represent its members.

12. In the context of that overall organisational failure, the ET's failure to engage in the lack of evidence about the respondent's concern about the release of interview footage of the appellant, was an error of law. On the one hand, the authority of **Laing v Manchester City Council** [2006] IRLR 748, explained at §§58 to 59 that the ET should consider all material facts at the first stage of its enquiry, to see what proper inferences could be drawn. Also, the Supreme Court in **Hewage v Grampian Health Board** [2012] UKSC 37, had confirmed at §32 that it was important not to make too much of the burden of proof provisions. On the other hand, the ET should have particularly considered the burden of proof, where it had doubts as to the reasons for the respondent's concerns, as opposed to other circumstances where it might have been able to make more definite findings. In this case, there was a gap in those definite findings. Noting the well-known authority of **Barton v Investec Henderson Crothwaite Securities Ltd** [2003] ICR 1205, and in particular §25(10), the ET had failed to explain why the respondent had proved, on the

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balance of probabilities, that the appellant's treatment was in no sense whatsoever on the grounds of her sex.

The respondent's submissions

13. In response, Mr Segal first referred to the general proposition, as per **Hollister v National Farmers Union** [1979] ICR 452, that points of fact should not be dressed up as points of law. There was a danger of going over findings with a fine comb and that was what was being done here. What were often, in reality, perversity challenges, were often described in other ways. The ET was not required to recite every piece of evidence, nor make findings expressly in relation to each fact. That was not the proper approach and the phrase, "out of sight did not mean out of mind", was relevant.

14. Turning to the specific challenge, Mr Segal referred to the history of the litigation, as reviewed by the Court of Appeal in **Unite the Union v Nailard** [2018] EWCA Civ 1203. Moreover, the ET's liability decision had recorded Mr Kavanagh's genuine concerns about the appellant's health and also the consequences if the contents of the TV interview with her were recirculated (§§14.4 and 14.5, page [185] CB). There also was the fact that the appellant herself, in her own witness statement at §§40 to 41, page [53] SB, had not ascribed any discriminatory motive and regarded Mr Kavanagh as supportive.

15. The appellant's criticisms of organisational discrimination risked falling into the same trap that the Court of Appeal had identified at §104 of **Nailard**, page [299] CB. A failure to protect an employee against discrimination does not, by itself, constitute an act (or omission) on the grounds of the appellant's sex. Instead, there had to be a focus on Mr Kavanagh's motivation.

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16. The ET had conducted a nuanced appraisal of the evidence. In particular, it had considered, and found other Unite officials had treated the appellant in a way that amounted to unlawful harassment (Mr Murray and Mr Hughes, at §70, page [17] CB). It had done so, specifically considering and referring to their conscious or subconscious decision-making. This was a paradigm case where the ET had been acutely conscious of drawing inferences of subconscious discriminatory motivation. The ET had reminded itself correctly of the law and had been willing to draw inferences. It was in that context, having made findings in relation to Mr Murray and to Mr Hughes, that the ET then turned to consider Mr Kavanagh, as already cited. The ET assessed Mr Kavanagh's reasons for treating the appellant in the way that he did. The ET was entitled to make the findings that it did.

17. In relation to the ET's comment at §73 as to not entirely understanding the level of concern about the television footage of the appellant, the crucial point was that this did not qualify the ET's clear finding on the reason for Mr Kavanagh's action. There had already been a liability hearing, which had recorded Mr Kavanagh's fears, as noted earlier in these reasons. His fear was a genuine one as to the consequences of any release or republication of footage of the appellant in a previous industrial dispute many years earlier, which, it was said, would put her in an impossible position at her place of work. The fact that the ET did not share Mr Kavanagh's concerns did not detract from its finding that he genuinely held that belief and the reasons for his treatment of the appellant.

18. The criticism of the respondent's organisational failure and discriminatory bias were, in reality, criticisms of Mr Kavanagh's decision to transfer the appellant, not the basis for inferring that the reasons for his actions were on grounds of the appellant's sex.

19. Criticism was made of Mr Kavanagh's reference, in an email to the appellant dated 3rd August 2014 (§4.10 of the ET's liability decision, page [187] CB), to hostility towards the

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appellant, which had been fended off, had taken up an inordinate amount of time and had been "distracting" officials from their primary task. However, this was the opposite of any discriminatory reason for Mr Kavanagh's actions. Put another way, this was a weak perversity appeal.

Discussion and conclusions on the first ground

20. I accept Mr Segal's general submission that it is not an error of law for the ET to have failed to refer to all of the evidence or submissions before it. I accept the thrust of his proposition that "out of sight" does not mean "out of mind." This is particularly so where, as I also accept, the ET was obviously alive to the need to consider and, where appropriate, draw inferences, including those of subconscious reasons for actions. The ET did so in relation to Mr Hughes and Mr Murray and explained clearly, and in my view, adequately, why it did not do so in relation to Mr Kavanagh.

21. I conclude that the ET did not err in considering and applying the burden of proof in respect of the allegation against Mr Kavanagh, and its findings were open to it to reach on the evidence before it. In terms of the sequence of events, the ET was entitled to take as its starting point that the appellant did not criticise Mr Kavanagh's actions until he took the decision to transfer her.

22. Next, the question is whether the ET erred in failing to consider Mr Wynne's submissions regarding the respondent's organisational failings, as set out in the appendix to the appellant's grounds, which were an extract from the appellant's final submissions to the ET (pages [42] to [46] CB). I address this in four ways. First, I refer to the proposition in **RSPB v Croucher [**1984] ICR 604 at page [609] that:

> **"decisions are not to be scrutinised closely word by word, line by line, and that for clarity's and brevity's sake industrial tribunals are not to be expected to set out every factor and every piece of evidence that has**

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> **weighed with them before reaching their decision…It is our duty to assume in an industrial tribunal's favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not."**

23. Second, I accept Mr Segal's submission that the list of factors in the appendix amount to a general criticism that the ET had failed to resolve Mr Kavanagh's subconscious reasons for transferring the appellant, in the context of institutional discrimination and discrimination by colleagues. That criticism does not address the Court of Appeal's concern that what needed to be focussed on was the reason for Mr Kavanagh's decision, (§103, page [299] CB), not the question of whether, as a result of that decision, the aims of those who were guilty of discriminating against or harassing the appellant were fulfilled.

24. Third, the ET made detailed findings, already cited, as to the reasons for Mr Kavanagh's transfer decision. The fact that the appellant is critical of those reasons, as found, does not amount to an error of law.

25. Fourth, I accept Mr Segal's submission that the ET's reference to not quite understanding Mr Kavanagh's concerns about republication of the interview footage did not qualify its findings as to the reason for Mr Kavanagh's decision. Referring back to the ET's original findings on liability, already cited, they recorded quite clearly Mr Kavanagh's evidence of his genuine concerns if the material were recirculated. While the ET did not share or understand those concerns, it accepted them as the reason for Mr Kavanagh's actions.

26. In summary, there were no gaps in the findings or evidence which the ET had failed to consider. On any fair reading, it was plain that the ET was willing, and indeed did make inferential findings about subconscious reasons for the actions of some of the respondent's other officials. It was entitled not to draw such inferences, and adequately explained why

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it did not, in respect of Mr Kavanagh. The first ground discloses no error of law by the ET and fails.

The second ground

27. I turn to the second ground. The appellant submitted that the ET had erred in considering and concluding that the appellant would have been likely to remain in the respondent's employment as regional officer until January 2017, when she would have left its employment and found equivalent work.

i) First, the ET had erred in setting a wholly arbitrary date by which it concluded that the appellant would have left her employment. It had failed to give any or adequate reasons for that date. In particular, it had done so, rejecting the appellant's assertion that she would have remained employed until retirement at 65 or 67. It had referred to only one matter, a meeting with a senior official, Mr Beckett in September 2013, which she had covertly recorded (§§12 pages [4] and [5] CB; §27, page [9] CB; and §84, page [21] CB) and after which she had expressed her unhappiness. While the ET had referred to "several reasons" at §84, it had only explained her unhappiness with Mr Beckett.

ii) The ET had failed to explain why 2017 was identified as the "cut-off" date.

iii) The appellant had not been asked about, nor did the respondent lead any evidence that the appellant would have resigned from her employment before her retirement age. The ET had impermissibly attached little or no evidential value to a report produced by the appellant, entitled "Women Officers in Unite", which referred to long service being the norm (see page [86] SB).

iv) The ET had failed to consider that the appellant had generous remuneration and benefits when employed by the respondent, which made her less likely to resign.

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The appellant's submissions

28. Mr Wynne submitted that one point flowed through this ground, which was the respondent's failure to cross-examine and put its case to the appellant that she would have left her employment with the respondent in any event before retirement. There was very little evidence on the point. He relied on **NHS Trust Development Authority (NHSTDA) v Saiger** [2017] ICR 29, in particular §§80 to 82, as authority for the proposition that it was a serious procedural irregularity to make findings about a scenario, without that being put to the relevant witness. The respondent would need to have adduced relevant evidence and had not done so. Instead, the ET had referred, at §53, page [14] CB, to "very short submissions" about the length of time that the appellant would have remained in the respondent's employment. The ET had not made any findings or discussed why the appellant would have left the respondent's employment, to go to another employer. If the finding were that, had the appellant not been treated unlawfully, she would have moved to a similarly well-paid role, there was no basis for finding that she would have resigned in 2017. The most natural date was at the point of retirement. An earlier date needed to have been put to the appellant and was not. The appellant had positively adduced evidence of the Unite report as to service being the norm. The ET had also failed to attach weight to an actuarial report, which at §31.2, page [4] SB, had referred to few leavers after the age of fifty, other than by way of retirement, for those in final salary pension schemes.

29. Considering the authority of **Abbey National v Chagger** [2010] ICR 397, §§65, 71 and 74, the ET had found that he would only have moved to another employer on comparable benefits to those he already received. It was therefore appropriate to award damages based on a "career loss" basis. In the appellant's case, she had been discriminated against and had resigned. Having done so, she found it more difficult to work and on gaining

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alternative employment, the terms had not been comparable, as she worked at a less senior level. The appropriate question for the ET was what she should have earned, had she not been discriminated against.

30. Moreover, the ET had failed to consider medical evidence that following her resignation, the appellant could no longer work in as demanding a role as previously. The ET's assumption that she could and could mitigate her losses accordingly was without an evidential basis.

The respondent's submissions

31. In response, Mr Segal returned to the case of **Chagger**. The first proposition in that case, not relevant here, was the limited ability to recover "stigma" damages. The period for which Mr Chagger would have stayed was relevant, until he found a job on comparable terms, but the Tribunal had not considered Mr Chagger's unhappiness and whether that might have an impact. The question, as the Tribunal considered at §73 of **Chagger**, and the best evidence, was whether he would have obtained a comparable alternative job. Mr Segal submitted that **Chagger** might have been decided differently, if in fact Mr Chagger had obtained another job on better terms, having left employment. The ET had to address the facts of the appellant's case. That was what it had done at §5.3, page [3] CB.

32. Mr Segal submitted that in one sense, it was a moot point whether the appellant would have obtained alternative work on comparable terms. Between 2015, when the ET's original liability decision was promulgated, and the subsequent remedy hearing in 2019, the appellant had not only left the respondent's employment but had obtained another job, on more generous remuneration terms. Moreover, assessment of future losses was never an exact science. The fact that an ET had applied a "broad brush" and there was an element of speculation, did not make its reasoning impermissibly arbitrary. Instead, what the ET

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did this in this case was to consider the fact that by January 2017, the appellant was working for another employer, Network Rail.

33. On the appellant's own case, she had never suggested that she would have remained employed by the respondent until retirement until aged 65. Rather, she had indicated that that that was a date to when she would have worked, after which she would have drawn her pension (§86 of her witness statement, page [211] SB). The ET was entitled to consider the appellant's circumstances that she had been employed by the respondent for a relatively brief period of time (starting in May 2012) before she became unhappy (as evidenced following her meeting with Mr Beckett in September 2013) and shortly after which, in 2014, she made complaints against 15 employees, with most of those complaints not upheld. The appellant had left her employment and had gone to a better paid job. In those circumstances the ET was entitled to consider, and find, that her losses as a result of the discrimination against her would have stopped by the date of the start of her alternative employment. While the appellant said that there was no evidence, that was not correct.

34. The appellant had placed a different focus on the "Women officers in Unite" report 2016 before the ET, than reliance on it that the appellant would have remained in employment until retirement. The report was relied on as evidence of organisational discrimination or institutionalised harassment, which the ET had not recognised. Instead, what the ET was entitled to consider, at §83, page [20] and §87, page [21], CB both during and after the appellant's employment by the respondent was that it was most important for her to be employed at the right work location. There is no criticism of that, but her work location was a key consideration. She wanted to work close to or at home and was not prepared to work in a role which required substantial travel away from home.

35. In response, the respondent's evidence was that there was a strong likelihood that not only

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the appellant, but other union officials were required to move work locations, (see Mr Beckett's witness statement, §30, page [228] SB to §35, page [231] SB). The ET expressly identified, as an issue, the chance that the appellant would have been required to leave her Heathrow role (§5.2, page [3] CB). Even though the ET did not accept that Mr Beckett's evidence was sufficient (§83, page [20] CB) the issue was clearly identified, and the respondent had produced evidence.

Discussions and conclusions on the second ground

36. First, I turn to the issue of whether the ET's findings were arbitrary. I accept that the ET was entitled to make a broad-brush analysis, but also needed to do so in the context of the specific evidence. The ET's finding of a "cut-off" date for the appellant's losses of January 2017, was not arbitrary. It was clearly in the context of the gap between the liability hearing in 2015 and the further hearing in 2019, by when the appellant had already obtained another job with Network Rail on 4th January 2017. The questions posed in **Chagger** when a person might leave employment, absent discrimination, in circumstances where they would only do so on at least comparable terms, were answered by the ET's findings about the appellant's unhappiness relatively early on in her employment by the respondent and the fact that she had already found another job on better remuneration terms.

37. The ET's explanation of its findings was sufficient. It had referred to the appellant's unhappiness in 2013 and while it did not expand upon the other reasons for why she was unhappy, its reasons have to be read in the overall context of the claims, including the original liability findings which had considered wide-ranging complaints brought against a number of employees, as to which there had been no criticism by the ET, and was in the context of the appellant's unhappiness, having been employed by the respondent for a

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relatively brief period of time.

38. In relation to the challenge that the ET had failed to consider that the respondent had not put its case to the appellant that she would have left the respondent's employment before retirement age to her, I accept Mr Segal's submission that, as per the authority of **Deepak Fertilizers & Petrochemical Ltd v Davy McKee (UK) London** [2002] EWCA Civ 1396, particularly §49, which I discussed with both representatives, where a party had been put on notice of the respondent's position, failure to cross examine a witness should not be taken as acceptance of their contrary position. In this context, there was no procedural unfairness. The respondent had made its position clear that it did not accept that the appellant would have remained in her role. That was identified as an issue. The respondent produced evidence of likely changes of work location because of the nature of the role carried out by the appellant on an industry sector basis, rather than a geographic basis. The consistent theme of the appellant's actions, before and after her employment by the respondent, was the importance she placed on her work location. The ET was unarguably entitled to consider that the appellant had already obtained another job by 2017 on more generous terms, with an employer whom she accepted was supportive and accommodating.

39. While it is correct that before the ET, the Women officers in Unite report had referred to officers typically having longer service, I accept Mr Segal's submission that the emphasis before the ET (and indeed Mr Wynne's appendix, reciting his final written submissions before the ET) was on institutional discrimination, which the ET did not accept. I further accept that the criticism that the ET did not specifically refer to the longer service element of the report is a criticism of the kind counselled against in the **RSPB** case and, in reality, is a disagreement with the ET's findings rather than an error of law, as per **Hollister**.

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The third ground

40. This challenge was in two parts, both of which related to the ET's finding that the appellant's employment by Network Rail provided the "cut-off" for her losses. First, the appellant argued that the ET had erred in concluding that the chain of causation was broken when she started employment with Network Rail in January 2017. The appellant had adduced expert medical and actuarial reports, which supported her contention that she would be unable to work in a role as demanding as her role with the respondent. The ET had impermissibly excluded this evidence, contrary to previous directions that the issue of quantum would be resolved at a separate hearing, after all issues of liability had been determined.

41. Specifically, the ET had failed to adopt the central principle in the case of **Dench v Flynn & Partners** [1998] IRLR 653 not to treat supervening employment as automatically ending loss, as otherwise there could be awards that are not just and equitable, as they focus impermissibly on the effective cause which is simply closest in time. The ET had considered that the Network Rail role was a permanent role but had ignored the medical evidence about the appellant's PTSD and moderate depression. The consequence of those conditions was that the appellant had only been able to perform the role at Network Rail for a short period.

42. Second, it was procedurally unfair for the ET to have failed to adjourn consideration of this issue until a later, separate remedy hearing. Moreover, the appellant had never been cross-examined on her reasons for leaving her employment at Network Rail.

43. By way of background, the ET identified the question of the break in causation as issue 6, page [3] CB. It discussed the evidence at §§21 to 26, page [7] CB. It recorded Mr Wynne's

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submissions at §§54 to 55, page [14] CB and Mr Segal's submissions at §§57 to 59, pages [14] to [15] CB. It then resolved the issue and reached its conclusions at §§85 to 88, pages [21] to [22] CB.

The appellant's submissions

44. Mr Wynne submitted that the issue of causation could not be resolved satisfactorily without medical evidence, which had been consistent with previous case management orders dated 6th June 2019, §12, page [51] CB. The ET had instead impermissibly narrowed its focus, rather than considering the future losses flowing from the acts of discrimination. **Dench** had not dealt with that point. The ET ought to have looked more widely. The ET ought to have deferred considering the issue, despite it being listed as an issue to be determined at the hearing in the case management directions (§6, page [52] CB), as a number of the issues in the draft list of issues (starting at page [218] SB) could not be separated. There was particularly cogent evidence, (see for example the report of a psychiatrist, Dr Carnwath, at §4.21, page [143] SB) which referred to the atmosphere at Network Rail reminding her to some extent of the working situation at Heathrow, as well as the appellant's witness statement, §§79 to 80, page [209] [SB], which referred to no longer being able to function at the same level and suffering from trauma. Although the ET had before it the appellant's witness evidence, it had failed to attach appropriate weight to that evidence because of the absence of the medical report. It was right for the ET to have considered the issue, but it did so too early, without all of the relevant evidence.

45. The ET's second error was the failure to consider that the respondent had never put to her that she had left Network Rail for reasons unconnected with her ill health.

The respondent's submissions

46. In response, Mr Segal emphasised that as per the authority of **Wardle v Credit Agricole**

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Corporation and Investment Bank [2011] ICR 1290, particularly §52, page [1306], assessments of this nature were only ever a best estimate, and a tribunal's prediction was rarely accurate. It was because of the delay in resolution of the litigation that by the time of the remedies hearing, the appellant had already got another a job and had performed highly successfully in it. Mr Wynne's characterisation of the litigation history was not entirely accurate. At the preliminary hearing of 3rd June 2019, (§12, page [49] CB) the question was whether there was a need for expert evidence, which would either be eliminated or would be more helpful. There was no tactical move by the respondent, rather a case management discussion to consider proportionality, with a split of the issues listed in full at page [218] SB.

47. Mr Wynne had argued before the ET that issue 6 should not be decided. Mr Segal had vigorously opposed that suggestion and the ET had made its decision to consider the issue. In reality, this ground was a substantially out of time challenge to case management directions issued in June 2019. I also had to bear in mind the high threshold for a challenge to case management directions.

48. In relation to the case of **Dench**, the appellant's circumstances could not have been more different. In **Dench**, having been dismissed, the claimant, an assistant solicitor, had very reluctantly accepted a temporary role, which she was warned not to accept and worked there for a matter of weeks. All the court was saying at §§19 and 20 of **Dench** was that a new job should not always be regarded as the cut-off for recoverable losses, which could be regarded as continuing. In the appellant's case, the ET had needed to consider whether the appellant wanted the new Network Rail job; how long it had lasted; and why it had ended. The appellant did want the Network Rail job; it lasted from January 2017 to July 2018, so not a brief period; and the appellant resigned because she found an even more

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conducive job closer to home. The appellant's remuneration at Network Rail was higher than her remuneration at the respondent (see §60, page [201] SB). Network Rail had demonstrated themselves as consistently flexible, varying the appellant's working pattern and location as per the appellant's request, initially working reduced four-day weeks, then full time, but one day a week from home; followed by flexible hours and home working. The appellant had described her colleagues as professional and friendly. They also worked hard to promote inclusiveness (§74 of her witness statement, page [207] SB). To ascribe losses she suffered when she resigned from Network Rail to take a lower paid but local job with a family friend, two and a half years after her resignation, would defy common sense.

49. It was entirely predictable that the ET had concluded that the appellant's new job with Network Rail should stop the chain of causation. Moreover, the ET had noted, at §§87 and 88, page [22] CB that the appellant was certainly physically well enough when she took the new role. While she had provided detailed evidence about the cost and length of her commute, as well as her health issues, she had described her new employer in glowing terms. The ET had not fallen into the trap counselled against in **Dench** of ignoring the appellant's personal circumstances. Whilst it had not considered the medical report of Dr Carnwath, which was not available to it, it had considered the appellant's assertions in her witness statement. Any additional weight that Dr Carnwath would have added in circumstances, where the appellant had not resigned from Network Rail because of medical illness, would have been correspondingly limited.

Discussion and conclusions on the third ground

50. Central to the appellant's challenge is that the ET had excluded evidence, or failed to apply sufficient weight to it, that the appellant had joined Network Rail with significant health

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issues and therefore the ET had fallen into the error identified in **Dench**. The answers to this are that the ET did not ignore the appellant's specific circumstances, including her ill-health and applied the very guidance suggested in **Dench**. The ET considered the fact that Network Rail were willing to be flexible about the appellant's working pattern and location. The ET noted that the appellant's GP had been willing to sign her as fit when she started the role. The ET also noted that she had supportive colleagues and was successful in her role. She resigned from Network Rail to take an even more conducive role. The ET had before it and had considered the appellant's witness statement, which referred to her ill health and reason for resigning from Network Rail. The ET had clearly not taken the view that the fact of having another job automatically meant that the appellant's recoverable losses ended.

51. In terms of the appellant's procedural challenge, I accept Mr Segal's submission that the challenge was, in reality, an out of time challenge to the Tribunal case management directions of June 2019. The ET had explained why it regarded medical evidence as potentially relevant at later stages of the litigation, namely a future remedy hearing. The ET decided on evidence in stages, both from the perspective of proportionality and in order to make findings on the sequence of events, before asking experts for their evidence. In doing so, the ET did not impermissibly exclude evidence necessary for determination of the earlier issues. At best, the expert reports gave a view on when, according to the financial expert, people typically retire or move jobs and from the perspective of the medical expert, a diagnosis of PTSD. The ET plainly considered the circumstances of when the appellant would have left the respondent's employment and the effect of the appellant's ill-health on her ability to carry out her role at Network Rail.

52. In relation to the appellant's final procedural challenge that the respondent's case was

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never put to the appellant, this is answered by the **Deepak** point. The appellant was aware that the respondent's position was that her employment by Network Rail had broken causation. She had positively advanced, in her witness statement, points around her ill health, which the ET had not accepted.

The fourth ground

53. This was a challenge to the ET's conclusion on the chances (30%) that the respondent would have dismissed the appellant, regardless of her resignation, as a result of three claimed acts of misconduct (covert recording of the meeting with Mr Beckett; racially discriminatory remarks about him; and the appellant sending emails from her work email address to a personal email address). The appellant submitted that the ET had erred in failing to consider that the burden of proof was on the respondent, which had failed to present adequate evidence, from which it was open to the ET to reach its findings. Whilst the respondent provided Mr Beckett's witness statement, the respondent had not disclosed its disciplinary procedure, which might otherwise have explained that only the respondent's General Secretary could have dismissed the appellant. There was no evidence of who would have carried out any investigation, who else would have been involved in the disciplinary process and no explanation for the gaps in that evidence. It was never put to the appellant that her actions amounted to gross misconduct. The respondent had avoided calling relevant witnesses or other evidence. The ET had reached its conclusions on a basis that was said to be "loose and unprincipled."

The appellant's submissions

54. In oral submissions, Mr Wynne argued that the ET had failed to consider whether the respondent would have ever discovered the misconduct in question. He developed the argument that the reasoning in particular had been based on conduct which the ET had

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failed to consider whether the employer would ever have known about, particularly in respect of the covert recording which only came to light as a result of the litigation, (see §5.1.2, page [2] CB, and §§75 and 82, at pages [18] and [20] CB). The authority of **Chagger**, in particular §91, required consideration of that issue. The burden of proof was on the respondent. As per the authority of **Hill v Governing Body of Great Tey Primary School** [2013] IRLR 274, §24 it was necessary for the ET to assess a chance of dismissal. However, crucially the ET in this case was not and had never been asked to consider contributory fault, or the principle set out in **Devis (W) & Sons Ltd v Atkins** [1977] AC 931. The issues had been alluded to by the ET at §75 but had never been resolved. The appellant had also never been cross-examined on either issue. While the respondent may seek to rely on **Beatt v Croydon Health Services NHS Trust** [2017] IRLR 748, in particular §101, whilst an assessment of what might have happened could be a broad brush one, nevertheless it had to be confined in certain ways.

55. Dealing with the remainder of the grounds, while the appellant had asserted in the Notice of Appeal that the ET had erred on the basis that its conclusions on the lawfulness of any possible dismissal were not open to it, Mr Wynne no longer relied on that point. However, he maintained that the ET had erred in reducing the appellant's award under the principle of **Polkey v A E Dayton Services Ltd** [1988] AC 344, because the ET had not analysed adequately the chance that the respondent would have learned of the appellant's covert recording, nor the fact that the appellant had only forwarded emails from her work email account to her personal email account because she had decided to resign as a result of her treatment by the respondent. At §81 of its reasons, the ET had raised concerns about the limits of the evidence before it but had never resolved those concerns and had simply concluded that a reduction in the award was appropriate at §82.

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The respondent's submissions

56. The appellant's challenge amounted to no more than a disagreement with the extent of the reduction that the ET had regarded as appropriate as a consequence of **Polkey**. It was perfectly appropriate to consider facts which only post-dated the question of dismissal. This case did not involve any issue of contributory fault and Mr Segal accepted that facts of which the respondent was unaware could not have resulted in contributory fault. The authority of **Polkey** had applied the principle in **Devis**. There was no exception because of the need to consider whether the appellant would disclose or cease to conceal evidence, as many facts would not have come to light before a dismissal. The more recent authority of **Phoenix House Ltd v Stockman** [2019] IRLR 960 was on point. Mr Segal pointed out that consideration of concealment would become a "rogue's charter." It was entirely appropriate for the ET to have considered the appellant's admitted conduct, and the witness evidence of Mr Beckett as to the seriousness with which he viewed the appellant's racist language about him (see page [224] SB) and the appellant's clandestine recording of their meeting. On the challenge that the appellant had never been cross-examined on these issues, it would have been impermissible for Mr Segal to have cross-examined the appellant on how seriously Mr Beckett regarded these matters. The facts of the conduct in question were accepted and there was no need for further cross-examination.

Discussion and conclusions on the fourth ground

57. I have considered the challenge of whether the ET erred in failing to consider that the appellant's admitted actions would not have been discovered, what disciplinary action would have resulted, and whether the ET had confused this with the issue of contributory fault. I accept Mr Segal's submission that the ET was unarguably entitled to consider and reduce the award on the basis of the appellant's conduct, and the respondent's response to that conduct had it known of it. This is for a number of reasons.

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58. First, the reduction made by the ET was not based on contributory fault, in the sense of whether the appellant's actions would have caused or contributed to the chance of dismissal. The ET did not apply some form of unconfined general discretion in making its reduction. Rather, the ET was entitled to consider and apply a reduction based on matters, which if it could not, would result, in Mr Segal's memorable phrase (and consistent with the **"Devis"** principle) in a "rogue's charter," specifically it would benefit those who had committed undiscovered misconduct. The appellant's actions had been disclosed or discovered, and it was entirely appropriate to consider those actions.

59. Second, there is no authority to which I have been referred for the proposition that the ET must assess the chances of discovery of relevant conduct. Indeed in the case of **Phoenix House Ltd** which had similar circumstances, it was never suggested that there was such an inquiry despite there being a **Polkey** reduction in that case.

60. Third, the ET had clearly identified at the hearing the issue of the appellant's conduct. The appellant had not contended before the ET that a key issue was the chance of discovery of that conduct, as she now contends.

61. Turning next to the challenge that there was limited evidence before the ET of the disciplinary process that would have been followed in respect of the appellant's conduct, the ET was acutely conscious about the limited evidence on the disciplinary process, which it addressed head-on. I accept Mr Segal's submission that this was a factor in, and had a corresponding impact on, the size of the '**Polkey**' reduction. I further accept that having known of the issue and having addressed the allegations of misconduct in her own witness statement, the criticism that the appellant was not cross-examined does not amount to an error of law, as the appellant admitted her conduct, namely the covert recording of a

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meeting, the transfer of emails from a work to a personal email account, and her use of plainly discriminatory language about another colleague. Other questions of her about how the respondent would have then responded, had it known at the time, would have been wholly impermissible.

62. As already noted, Mr Wynne did not pursue the ground that it was not open to the ET to have considered whether the appellant would have been lawfully dismissed.

63. In relation to the appellant's challenge to the ET's reduction on the basis that the ET had failed to consider the context of the conduct as being of discriminatory treatment towards the appellant, I conclude that the ET unarguably considered this context, particularly when considering the period of the appellant's losses and what would have happened, had such discriminatory treatment not taken place.

The second and third appeals: EA-2019-000074-VP; and EA-2019-0011564-VP

64. These two appeals are interlinked, and I deal with both together. One (EA-2019-000074-VP) is a challenge of an "unless" order made by EJ Manley on 14th October 2019. The final appeal (EA-2019-0011564-VP) is a challenge to EJ Manley's decision on 9th November 2019 to strike out the appellant's personal injury claim.

65. In relation to the "unless order", the appellant asserts that the effect of the order was to force her to choose between her right to respect for her private life, in not having to disclose unredacted medical records, and being able to pursue her claim for personal injury, in the context of succeeding in her claim of unlawful discrimination.

66. Second, the ET had not considered adequately whether it was proportionate to order disclosure of unredacted documents.

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67. Third, the ET had failed to assess the impact of the "unless" order on the appellant's right to respect for her private life and had made an order which was unnecessary and disproportionate. Moreover, its terms were vague and risked confusion.

68. In respect of striking out, the ET ought to have provided the appellant the opportunity of a hearing. The appellant had also complied with the terms of the "unless" order.

The appellant's submissions

69. The appellant had disclosed the expert report of Dr Carnwath, in which he had indicated that he would have liked to have seen earlier medical records, of which the respondent also sought disclosure. The dispute over the extent of disclosure focussed on the period of disclosure and the redaction of sensitive personal medical records.

70. Turning to the relevant correspondence between the parties, the appellant's representatives had written on 3rd September 2019 (page [63] CB) indicating that there were four areas of concern, where the appellant sought to redact medical records, which were for wholly appropriate reasons, including intimate personal matters which could have no relevance. Notwithstanding this, the ET had made an "unless" order on 14th October 2019, whose scope was the same as an earlier order of 25th July 2019, which made no reference to redactions. The appellant accordingly disclosed medical records in *unredacted* form, which was the focus of the respondent's expressed concern, rather than a focus of concern being that there were missing documents, which the respondent only raised in correspondence on 25th October 2019, at page [78] CB. At the point of the "unless order," the disclosure had been without redaction, at which point the respondent had effectively led the appellant into a "trap".

71. Given the draconian consequences of an "unless" order, its terms had to be clear, noting

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the authorities of **Mace v Ponders End International Ltd** UKEAT/0491/13/LA and **Ijomah v Nottinghamshire Healthcare NHS Foundation Trust** UKEAT/0289/19/RN. Any ambiguity in the terms of an unless order needed to be resolved. Mr Wynne also relied on **Wentworth-Wood & Others v Maritime Transport Ltd** UKEAT/0316/15/JOJ as authority for the proposition that a Tribunal should only make such an order where necessary because of its powerful effect. He also referred to **Uwhubetine and anor v NHS Commission Board England and ors** UKEAT0264/18, in particular, §45, where the EAT made clear that if there is ambiguity in the terms of an order, the Tribunal's approach should be facilitative rather than punitive, and any ambiguity should be resolved in favour of the party who was required to comply.

72. Moreover, when the respondent's solicitors raised their concerns, the appellant's representatives were given only a short period (24 hours) to comply. It was impractical for them to have carried out any further searches for documents in that timescale. This was in the context of an ambiguity in the terms of the "unless" order.

73. The ET's error in failing to consider the appellant's right to respect for her private life related to the procedure by which confidentiality could be maintained. Mr Wynne relied upon **Science Research Council v Nassé** [1980] AC 1028. The material had to be discloseable and the appellant had genuine concerns about inadvertent further circulation of such sensitive material. In summary, the terms of the "unless" order were ambiguous such that the appellant had thought she had complied and had addressed the respondent's concerns.

The respondent's submissions

74. In response, Mr Segal reiterated the context of the "unless order." The cause of the appellant's mental ill-health was disputed. The potential value of the personal injury

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claim, linked to her successful discrimination claim, was significant. It was therefore essential to a fair resolution for the respondent to be provided with disclosure of medical records, particularly where, as here, the appellant had not apparently sought treatment for her recent mental health issues before Dr Carnwath was instructed to provide an expert report and there could be causes unrelated to the discriminatory treatment of the appellant.

75. Mr Segal also referred to the chronology of the disclosure of medical evidence. The initial disclosure on 11th April 2019 was limited (see Dr Carnwath's summary in his report at page [144] SB). Despite the respondent making three requests in May 2019, the appellant had resisted further disclosure. At a preliminary hearing on 3rd June 2019, the appellant's representative had resisted a specific disclosure order on the basis that she was willing to provide voluntary disclosure and the only reason for the lack of previous disclosure was the appellant's GP's unwillingness to co-operate. That explanation in June 2019 appears to have been based on inaccurate instructions, as the medical records which were later disclosed were printed out no later than May 2019.

76. Having avoided a disclosure order being made, for a period of a further three months the appellant did not provide any disclosure. Had the existence of the records been known earlier, a disclosure order may have been made earlier. In any event, the ET did not proceed simply to make an "unless order." It made a specific disclosure order on 21st July 2019, referring to disclosure of precisely the same scope of records as the later "unless order," namely:

> **"copies of unredacted medical records from 2007 to date."**

77. The respondent's solicitors had not seen the records in question at that stage and so they could not possibly be expected to have raised concerns about partial disclosure. Notwithstanding the July order, the appellant failed to disclose her medical records. It was

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only after the respondent's representatives chased in August 2019 that on 3rd September 2019, the appellant objected to full disclosure, three months after the Preliminary Hearing when it had been indicated by her representative that she would provide voluntary disclosure. The appellant's resistance to full disclosure resulted in a further Preliminary Hearing on 11th October 2019, which resulted in the "unless order."

78. Mr Segal accepted that the respondent had not, before 25th October 2019, referred to missing documents, which had to be seen in the context of late disclosure by the appellant (11th October 2019). In any event, as she had done previously, EJ Manley clearly considered the appellant's right to respect for her private life and mitigated the risk of inadvertent disclosure through the use of a confidentiality "ring," which comprised Mr Segal, one named external solicitor (not the respondent's in-house legal department) and any instructed medical expert. The steps which the respondent had offered, and the ET had ordered, as early as July 2019, were clear. The continuing lack of willingness to comply with the order and the delay in seeking a variation of that order until chased, in September 2019, was the context of the "unless" order.

79. Moreover, as Mr Wynne accepted, the ET was not in a position to conduct a review of relevance. The scope of the July and October 2019 orders was proportionate, and concerns over right to respect for private life were increasingly moot as the appellant had already volunteered a substantial part of her relevant history. The meaning of the order was plain. What, Mr Segal asked, would the addition of the word, "all," before "medical records" add? Put another way, what did the appellant think that disclosure of medical records within a time period meant? Had there been any question or concern about lack of clarity, then it was open to her to either seek clarification, or if she thought the scope was too wide, to have sought promptly a variation of the July order.

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80. In relation to the ET's decision to treat the personal injury claim as struck out, not only were the terms of the order clear, but as per the authorities of **Wentworth-Wood** and **Royal Bank of Scotland v Abraham** UKEAT/0305/09/DM, partial compliance with an order was not sufficient. To reiterate, the order related to a large value personal injury claim; where the causation was complex and disputed; the appellant had never sought to excuse why she had failed to disclose the missing documentation, and has still not, certainly in the response to the respondent's specific concerns. The appellant's suggestion that there was somehow a last minute "trap" ignored the protracted history of apparently intentional non-compliance with the ET's July order. The consequence of continuing non-compliance would inevitably have been an unfair trial of the remedy issue on 9th December 2019, not least because of the practical difficulty for the respondent in instructing its own expert in time, without that expert's access to the full medical records.

Discussion and conclusions on the second and third appeals

81. The core challenges to the "unless" order are the process by which it came to be made and the vagueness of its terms.

82. I do not accept that the ET erred in law by the process it reached in issuing the "unless order," particularly that the appellant was somehow "trapped" by the respondent raising a hitherto unforeseen concern. The disclosure process began with disclosure that was clearly only partial. Dr Carnwath had expressly stated so in his report commissioned by the appellant. In May 2019, the respondent promptly asked for access to those medical records to instruct its own expert. There was apparently no response. At the closed Preliminary Hearing on 3rd June 2019, without criticism of the appellant's representative, he gave assurances that an order for specific disclosure was unnecessary, as the appellant

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was willing to disclose her medical records and the only reluctance was on the part of her GP. The order for specific disclosure, when made, was limited to a confidentiality ring (page [306] CB):

> **"limited disclosure to the external lawyer and to Mr Segal QC."**

83. The appellant did not comply with the terms of that order and resisted compliance. The remedy hearing was scheduled for 9th December 2019. It was in that context that the respondent then sought the "unless order." In response to the application for an "unless order," the appellant's solicitors did not suggest that the documents identified as missing were not material, relevant or disclosable. The complex issue of disputed causation of the appellant's mental ill-health necessarily required candid disclosure. The ET had already mitigated the risk of inadvertent circulation of the evidence through the confidentiality ring. The ET did not leap straight to a disclosure order. Rather, EJ Manley issued first a specific disclosure order, with which the appellant consciously chose not to comply, and the ET fully and fairly considered the right to respect for private life fully before issuing the "unless order."

84. I also reject any suggestion that the terms of either the July 2019 order or the later "unless" order were unclear. They related to disclosure of unredacted medical records for a specific time period. The appellant's challenge that the order omits the word "all" begs what meaning the terms of the order would otherwise have borne.

85. In relation to the ET's decision to treat the personal injury claim as struck out, I also conclude that the ET was unarguably entitled to conclude that the appellant had not complied with the terms of the "unless order." Partial compliance was not sufficient. The challenge that the respondent had only previously identified concerns about redaction, rather than missing documents, and so the appellant should have been granted relief,

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discloses no error of law by the ET. The order was made and explained in the context of intentional, protracted non-compliance with an earlier order, which if continued, would have resulted in the upcoming trial not going ahead. The ET was, in those circumstances, entitled to decline relief from the consequences of the "unless" order, and did not err in failing to hold a further hearing, when one had already been held a short period before, following which the "unless" order had been issued. I accept Mr Segal's submission that this challenge is, in reality, a perversity challenge. The challenge fails as the ET's refusal to grant relief against strike out of the appellant's personal injury claim was unarguably open to EJ Manley to make. In the circumstances, the second and third appeals fail and are dismissed.

86. By way of further directions, the appellant has requested a transcript of my oral reasons, to which I agreed.

87. I declined Mr Wynne's request that he be granted an extension of time to seek permission from the Court of Appeal itself, such extension being until 21 days after production of the transcript. To be clear, Mr Wynne confirmed that he did not apply to me for permission to appeal to the Court of Appeal, despite being given the opportunity to do so.

88. My reasons for refusing his request were first, that I had given full oral reasons, rather than reserving my decision. Second, it would not be appropriate that I extend time where that decision is a matter for the Court of Appeal (see §24.1 of the Practice Direction (Employment Appeal Tribunal - Procedure) 2018 and Practice Direction 52D - statutory appeals and appeals subject to special provision, §11.1).

Judge J Keith

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