Neutral Citation Number: [2022] EAT 145

Case No: EA-2021-000724-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 7 June 2022

Before :

HIS HONOUR JUDGE WAYNE BEARD
MR N AZIZ
MR S J W TORRANCE

- -

Between :

A	**Appellant**
- and -	
CHOICE SUPPORT (FORMERLY MCCH LTD)	**Respondent**

- -
- -

Emma Sole (instructed by Employment Law 4U) for the **Appellant**
Stephen Wyeth (instructed by DAS Law) for the **Respondent**

ANONYMITY ORDER
Hearing date: 7 June 2022

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JUDGMENT

SUMMARY

Disability Discrimination, Jurisdictional – Time Points and Whistleblowing, Protected Disclosures

Applying **DPP Law Ltd v Greenberg** [2021] IRLR 1016 and **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] IRLR 1050. A benevolent reading of the ET decision makes clear which issues were dealt with, the facts and law applied and why the parties won and lost. The ET was applying a broad discretion and took into account all issues it was required to and none that would undermine its decision, the ET set out the law correctly and applied the law to the facts as it found them to be and within the broad limits of the discretion afforded to the ET

HIS HONOUR JUDGE WAYNE BEARD:

THE ISSUES

1. This is a unanimous judgment in an appeal arising out of the judgment and reasons provided by Employment Judge Burgher, sitting with members Ms G Forrest and Mr S Woodhouse. Following a five-day hearing in May of 2021 the employment tribunal (ET) dismissed claims of sexual harassment, victimisation, constructive dismissal and protected disclosure detriments. The grounds of appeal were considered at the sift stage as arguable by HHJ Tucker. I shall refer to the parties, as they were below, as "Claimant" and "Respondent". The claim was wide-ranging. However, the appeal is limited to two matters:

    i) whether the tribunal erred when addressing the issue of the Claimant being suspended from her employment by not considering the manner in which that was communicated to the Claimant; and

    ii) whether the tribunal erred in failing to exercise its discretion to extend time on a claim of harassment.

As part of the argument on appeal, reference has been made in particular to paragraphs 8 and 9 of the employment tribunal judgment. There, the tribunal expressed concern that they would not be hearing evidence from EA. There was also a comment that there was no witness order sought by the Respondent, but also that the Claimant had not joined EA as a Respondent. The employment tribunal then expressed itself in these terms: "The tribunal was therefore left to determine the very serious allegation in respect of the sexual assault in the absence of the alleged perpetrator." In addition to that, reference was also made to paragraphs 106-108, 115 and 124-129 of the judgment.

THE RELEVANT FACTS

2. The Respondent organisation provides support to vulnerable adults. It employs1,500 people across a number of locations; each location having staff with management support provided by an organisational-level human resources function. The Claimant worked at a property where there were

two staff employed to work 9.00 am to 5.00 pm on weekdays. There were other arrangements for the evenings and weekends. The Claimant made an allegation against a fellow employee, who has been referred to as "EA" throughout the employment tribunal judgment and will be referred to similarly in this judgment and who worked at the same property under the same line management. The allegation was that EA had raped the Claimant at the office in the property on 19 March 2018.

3. The Claimant's employment began on 2 October 2017. The Respondent was aware of the Claimant's medical history; she had suffered from post-traumatic stress disorder. The Respondent was also aware that the Claimant had been sexually abused at secondary school. The Claimant had been previously diagnosed with emotional unstable personality disorder ("EUPD"). However, this was not revealed until the final day of the hearing. The Claimant told the employment tribunal that this diagnosis had been redacted from documentation before them because she believed that EUPD was irrelevant and because of the stigma that could be attached to the diagnosis. The Claimant, however, produced a letter dated 11 May 2021 from her treating psychotherapist which set out the diagnosis and indicated that she struggled with emotional regulation and was challenged by interpersonal relationships.

4. The Respondent had policies which, taken together, provided that, when employees already in post became partners, such relationships must be disclosed. It was set out that, if both partners reported to the same line manager or one partner managed the other, one of them would be transferred to another post. These policies were brought to the Claimant's attention during her induction. The tribunal found that EA and the Claimant were in a sexual relationship from Christmas of 2017. Further that the Claimant and EA had engaged in consensual sexual activity on two separate occasions days before the incident on 19 March 2018. From that, the employment tribunal concluded that the policies meant that both ought to have informed the Respondent about that relationship. The Respondent was ignorant of the fact of the relationship and had no opportunity to manage that relationship. The ET considered that it would have been reasonable in the circumstances for the Claimant to draw the relationship to the Respondent's attention.

5. The ET had evidence that, on 19 March 2018, the Claimant was at work with EA and that a sexual act took place, the Claimant's account of that sexual act was that it amounted to rape. The Claimant reported rape when she sought medical help; the incident was also reported to the police the same day. On the following day this was reported to the Respondent. The Claimant later withdrew her support of a police inquiry. The ET also had an account of events from EA, originally submitted in a written response to the Respondent, on the allegation of rape. His account was quite different to the Claimant's, stating that they had been in a relationship since about November 2017, that EA had told the Claimant that he was not comfortable in continuing the relationship and that, on 19 March, the Claimant had instigated a consensual sexual act.

6. The ET, taking account of the Claimant failing to provide context for the lead-up to the incident and her denial of a previous significant relationship with EA, drew these conclusions about the incident:

a) there was a discussion about the relationship between the Claimant and EA;

b) the Claimant sought to comfort EA by hugging him;

c) intimacy progressed consensually;

d) the Claimant objected but EA continued, without consent, in having sex;

e) the Claimant had said as much to EA after the act;

f) The Claimant was upset and immediately left to go to hospital; and

h) the matter was reported to the police,

concluding, finally, that the sexual act was unwanted. They were not required to and di not make a specific finding of rape.

7. The tribunal found that, during the course of the Respondent's internal processes, the Claimant had attempted suicide on more than one occasion. On 13 May 2018, the Respondent was told that the Claimant had attempted suicide on a particular occasion and the Respondent agreed not to make contact with the Claimant before 11 June 2018. On 11 June 2018, the Respondent suspended the Claimant, inviting her to attend an investigation meeting. This was an investigation into the

allegations raised by EA, but also into an allegation of unprofessional conduct that had been raised, in the meanwhile, by a service user. It was acknowledged that this would be difficult for the Claimant, but the tribunal found that these steps were necessary for matters to be concluded.

8. The Claimant resigned by a letter dated 13 June 2018. The Claimant contacted ACAS on 21 August 2018, a certificate being issued by ACAS on 28 August 2018. The Claimant presented her complaint to the ET on 27 September 2018.

SUBMISSIONS

9. In respect of the first ground of appeal, Ms Sole for the Claimant argues that, in the ET1, it is set out that the suspension of the Claimant by the Respondent was inappropriate and unfair. However, it is also contended that the timing of the suspension following attempted suicides was part of that unfairness and was unreasonable. In addition, the complaint raised was that there was little detail provided by the Respondent initially and what was provided was provided informally. Ms Sole, contends that the closing skeleton argument presented to the employment tribunal set out that the Claimant should have been informed in person, even if by telephone. Instead, the Claimant was informed of her suspension by email. In short, Ms Sole argued that the manner of the dismissal was a specific and separate detriment claimed and that the employment tribunal did not deal with it.

10. Paragraph 115 of the employment tribunal judgment refers to the reasons the tribunal considered suspension as an appropriate step. This was because EA had given a version of events, which included consensual sex. As such, the employment tribunal considered that, in order for the employer to act fairly, it was a step it could reasonably take to suspend the Claimant.

11. A reconsideration request dealt with by Employment Judge Burgher resulted in him stating that the ET's conclusions at paragraphs 106-108 applied equally to the issue raised in respect of paragraph 115. In those paragraphs the ET indicated that the insensitivity the tribunal found in the application of processes by the Respondent in the Claimant's case were not because of any protected disclosure or protected acts but, in the tribunal's words, to try and properly investigate the serious

allegation a step which it was reasonable for the Respondent to take.

12. The Claimant contends that the burden of proving the reason for detrimental treatment, once such treatment is shown, falls on the employer. Ms Sole contends that the tribunal did not engage with the Respondent's evidence in reaching this conclusion as to the explanation for treatment. Indeed, more specifically, Ms Sole argues that the tribunal did not engage with the issue of the manner of treatment at all.

13. In response to that, in respect of ground 1, Mr Wyeth reminded us of the principles underlying the approach to be taken to examining a tribunal's reasons on appeal. He contended that the tribunal had worked through the list of issues provided by the parties and that could be seen by the structure of the judgment. He argued that, read as a whole, the conclusions were clear and to say otherwise was to engage in the kind of nit-picking over tribunal judgments which is deprecated in the various authorities.

14. In respect of ground 2, Ms Sole contended that the complaint contained matters of detriment, which continued up until the end of employment on 13 June 2018. She argued that the ET had taken account of matters it should not have done in coming to its conclusions. Specifically the ET took account that the Claimant had not joined EA as a Respondent to the proceedings and that the Respondent defended the claim without calling EA as a witness. Further, the ET took account of the fact that the Respondent did not know about the relationship during the course of the employment and had no opportunity to manage it within the relationship policies referred to above. Ms Sole contended that neither matter should have been weighed in the balance by the ET on time limit issues, that these must be the factors which the employment tribunal took account of in deciding the balance of prejudice and were, in Ms Sole's words, plainly irrelevant.

15. In terms of the first of these matters, she argued that the tribunal felt discomfort in having to make a decision without the evidence of EA. She referred in particular to paragraphs 8 and 9 of the ET judgment:

> **"8. The Tribunal indicated to the Respondent at the outset of the hearing that it was concerned that it would not be hearing any evidence from Employee A (EA) who was the employee in respect**

> **of the Claimant's sexual harassment complaint. Mr Wyeth submitted that the contemporaneous documentary evidence would be referred to demonstrate that the sexual assault did not take place.**
>
> **9. EA was dismissed by the Respondent on 30 May 2018, nearly 4 months prior to the Claimant bringing the claim. The Claimant did not name EA as an individual Respondent to the claim. No application for a witness order was made to secure the attendance of EA. During his evidence on the fifth day of the hearing, Mr Ferry stated that, following the Tribunal's observations about the absence of EA made at the start of the hearing, he attempted to contact EA to see if he would be willing to attend. He was informed by EA's father that EA was suffering from a 'catastrophic mental breakdown' and would be unable to attend. We did not have any medical evidence to this effect. The Tribunal was therefore left to determine the very serious allegation in respect of the sexual assault in the absence of the alleged perpetrator."**

16. Ms Sole said that it was unfair of the employment tribunal to lay that matter at the Claimant's door. This was particularly so because the Respondent had defended the case on the basis of the truth of EA's account. It could, of course, she said, have defended solely on a "prove your case" basis, asking the Claimant to establish matters instead of raising a denial in contravention. Ms Sole contended that there was no logical link between the Claimant's failure to inform the Respondent of the relationship in breach of policy and any prejudice to the Respondent. It was her position that no specific evidence of prejudice was advanced by the Respondent in contrast to the obvious prejudice to the Claimant that she would not be compensated for a good claim.

17. Mr Wyeth repeats the arguments that he made in respect of scrutiny of tribunal judgments. He contended that the employment tribunal took account of the whole picture when reaching its decision as to what was just and equitable in respect of an extension. He contended that there is an obvious prejudice to the Respondent in EA not being joined when considering the Respondent's ability to defend the claim. He further argued that the concealment of a relationship need not relate to prejudice, the question of equity having also to be considered by the ET. However, he said that, in any event, the concealment of a relationship until the start of the hearing would obviously impact on issues of prejudice.

18. At the heart of Ms Sole's arguments, therefore, was this contention: those matters would not impact on the Respondent’s ability to defend a case in comparison to whether the case was presented in time or later, the effect of delay made no difference. On that basis the ET was considering irrelevant matters.

THE LAW

19. We have been referred to numerous authorities, all of which we have taken account of. However, we consider that the judgment of Popplewell LJ set out in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672; [2021] IRLR 1016 is of particular relevance to the arguments raised. Popplewell LJ reviews the authorities as to the approach to be taken on appeal to ET Judgments, summing up the way in which they should be approached. At paragraph 57, he sets out the principles in this way:

> **"The following principles, which I take to be well established by the authorities, govern the approach of an appellate tribunal or court to the reasons given by an employment tribunal:**
>
> **(1) The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical."**

He refers there then to **Brent v Fuller** [2011] EWCA Civ 267, where Mummery LJ said:

> **"The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which a decision is written; focussing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

Popplewell LJ then continues:

> **"This reflects a similar approach to arbitration awards under challenge: see the cases summarised by Teare J in *Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The "PACE"* [2009] EWHC 1975; [2010] 1 Lloyds' Reports 183 at paragraph 15, including the oft-cited dictum of Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery repairs Ltd* [1985] 2 EGLR 14 that the courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration". This approach has been referred to as the benevolent reading of awards, and applies equally to the benevolent reading of employment tribunal decisions.**
>
> **(2) A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. To impose such a requirement would put an intolerable burden on any fact finder. Nor is it required to express every step of its reasoning in any greater degree of detail than that necessary to be *Meek* compliant (*Meek v Birmingham City Council* [1987] IRLR 250). Expression of the findings and reasoning in terms which are as simple, clear and concise as possible is to be encouraged. In *Meek*, Bingham LJ quoted with approval what Donaldson LJ had said in *Union of Construction, Allied Trades and Technicians v Brain* [1981] IRLR 224 at [227]:**
>
> > **"Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law ... their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given."**

> **(3) It follows from (2) that it is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind. As Waite J expressed it in *Royal Society for the Protection of Birds v Croucher* [1984] IRLR 425:**
>
> > **"We have to remind ourselves also of the important principle 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 weighed with them before reaching their decision; and it is for us to recall that what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. 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; and that has been well-established by the decisions of the Court of Appeal in *Retarded Children's Aid Society Ltd v Day* [1978] I.C.R 437 and in the recent decision in *Varndell v Kearney & Trecker Marwin Ltd* [1983] I.C.R. 683.""**

Paragraph 58 goes on with Popplewell LJ saying this:

> **"Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload."**

20. That approach was specifically applied by Griffiths J in **(1) Oxford Saïd Business School (2) Dr Andrew White v Dr Elaine Heslop** (EA-2021-000268-VP) handed down on 11 November 2021.

In that case, referring to the **DPP v Greenberg** decision, Griffiths J follows through the same analysis and, at paragraph 48, says this:

> **"The working assumption must be that an Employment Tribunal, which has made no clear error of law, has reached no impermissible conclusion of fact. This working assumption should not easily be displaced by hypercriticism of reasoning, or lack of reasoning, or of the way in which a decision is either structured or expressed. Any decision could usually have been expressed or structured differently, and perhaps a different court might have preferred a different structure or form of expression if it had had the task of writing the decision in the first place. It is, equally, always easy to say that an extra word or sentence would have improved a decision's resilience against an *ex post facto* attack following detailed scrutiny of it in preparation for an appeal. But that does not in itself mean that the original decision is wrong. The question is not whether the decision is ideal, or even excellent, but only whether it is good enough, with reasoning which is sufficient, and free of demonstrable error. If it passes that test, the facts (including inferences of fact, and findings of secondary fact) should remain where the independent (and, in the case of Employment Tribunals, specialist) tribunal of fact has left them."**

21. What those authorities set out is that a benevolent approach should be taken to reading ET judgments. The work of Employment Tribunals, unlike commonly held misconceptions, is not short cases involving uncomplicated fact finding. Employment Tribunal's face cases which, often, last many days, often, again, dealing with multiple claims brought under various jurisdictions, numerous witnesses and thousands of documents. Therefore, Employment Tribunals already face a herculean task in preparing what are necessarily long, legally and factually complex judgments (a task which, in my experience, they achieve well in the overwhelming bulk of judgments). The appellate courts should not add to this burden by examining such judgments line by line. Judgments and reasons are documents to be read in the round. The approach taken should be:

i) Are the issues dealt with?

ii) Is the law explained and applied?

iii) Can the parties understand why they have won or lost on any particular issue that is salient?

22. Section 123(1) of the **Equalities Act 2010** provides as follows:

> **"Subject to section 140B (which is not relevant for this matter) proceedings on a complaint within section 120 may not be brought after the end of—**
>
> > **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
> >
> > **(b) such other period as the employment tribunal thinks just and equitable."**

23. In the Court of Appeal case of **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640; [2018] IRLR 1050, Leggatt LJ gave the judgment of the court. At paragraphs 18-20, he says this:

> **"18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi* [2003] EWCA Civ 15; [2003] ICR 800, paragraph 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see *Dunn v Parole***

> ***Board*** **[2008] EWCA Civ 374; [2009] 1 WLR 728, paragraphs 30-32, 43, 48; and** ***Rabone v Pennine Care NHS Trust*** **[2012] UKSC 2; [2012] 2 AC 72, paragraph 75.**
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> **19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the Respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).**
>
> **20. The second point to note is that, because of the width of the discretion given to the employment tribunal to proceed in accordance with what it thinks just and equitable, there is very limited scope for challenging the tribunal's exercise of its discretion on an appeal. It is axiomatic that an appellate court or tribunal should not substitute its own view of what is just and equitable for that of the tribunal charged with the decision. It should only disturb the tribunal's decision if the tribunal has erred in principle – for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant – or if the tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable: see** ***Robertson v Bexley Community Centre t/a Leisure Link*** **[2003] EWCA Civ 576; [2003] IRLR 434, paragraph 24."**

24. It appears clear to this tribunal that the authorities, including the **Robertson v Bexley Community Centre** case, in essence point to a requirement that irrationality or perversity is to be established before an appellate court interferes with the discretion of the Employment Tribunal. The words used by Leggatt LJ, taking account of matters that should not be taken account of or ignoring matters that should be considered are evocative of the decision in **Associated Provincial Picture Houses v Wednesbury Corporation** [1948] 1 KB 223. Such an approach is very similar, in our judgment, to the way in which the matter was dealt with in **Robertson v Bexley**, which also held that it is not the case that an extension should be granted automatically. In our approach to examining the exercise of that discretion **Yeboah v Crofton** [2002] EWCA Civ 794 has an analogous application here. Therefore, this is to be considered a high hurdle to cross when dealing with such matters.

25. In respect of ground 1, the Claimant is, in our judgment, asking this tribunal to engage in the kind of atomic-level analysis of the ET judgment. Paragraph 115 of the ET judgment reads as follows in full:

> **"The Claimant was suspended on 11 June 2018 following the period agreed not to contact her. Her suspension was directly related to the service user concern and the statement that EA had made on 30 April 2018 denying the rape and putting his version of events. For the process to be dealt with fairly, it was an appropriate step to take in the circumstances. We do not conclude that the Claimant's suspension was on grounds of the protected disclosure or because of the protected acts."**

It seems to us that, as was put by Mr Wyeth, simply adding the word "manner" into the description

used by the tribunal before the word "suspension" would in full deal with that argument.

26. We have in mind what was said by Griffiths J in paragraph 48 of the **Oxford Saïd Business School & White v Heslop**. It seems in the circumstances that that paragraph, albeit pithy in its terms, is setting out the reasons for the rejection of the complaint on suspension as a whole. To divide it down to the manner of suspension would have been unnecessary. This becomes particularly so in the light of the reconsideration response of Judge Burgher. He refers to paragraphs 106-108 of the ET judgment and there is clear wording in paragraph 108 where it says this:

> **"We accept that the Respondent could have adopted a more reflective and sensitive approach to the Claimant and been less process driven but do not consider that the *way* in which they dealt with the allegation was on grounds of the protected disclosure or because of the protected acts." (My emphasis)**

In the reconsideration judgment, Employment Judge Burgher refers back to those paragraphs 106-108 and the insensitive handling of the Claimant's complaints and said that it applies equally to the insensitive handling of the Claimant's suspension.

27. The ET, in our judgment, has set out the issue to be dealt with as part of the overall judgment. It has explained the law. The parties know that the reason for the suspension was because of the explanation given by EA and was in order for the Respondent to act fairly as between employees. The manner of suspension is dealt with in the use of the phrase *"it was an appropriate step to take"*. It was not necessary, in our judgment, to go any further but the reconsideration letter points out in paragraph 108 *"the way"* and relates that to any complaints. In our judgment, that means that the ground would require the appeal tribunal to start to engage in the kind of pernickety dismantling of a judgment that is deprecated in the authorities. On that basis, ground 1 of the appeal is dismissed.

28. The basis of the Claimant's argument in respect of ground 2 in effect relies on an analysis of the time limit issues that are dealt with between paragraphs 122 and 129 of the ET judgment, and in particular relating to paragraphs 126 and 128. The argument advanced is that, in the Claimant's terms, those paragraphs must relate to the issue of prejudice in the form as I have earlier described it. We are not convinced that this is necessarily so. The wording in paragraph 129 refers to a just and equitable decision and a conclusion that the balance of prejudice favours the Respondent. These two

concepts appear, by the use of the conjunction, to be separate matters which were considered by the ET in its overall approach. Further, paragraph 128, as Mr Wyeth has pointed out, does not necessarily connect with the issue of prejudice. On a particular reading, it can relate to issues of equity.

29. Prejudice in these types of cases has generally been argued to relate to the impact of the delay on a Respondent compared with the inability of a Claimant to pursue a complaint. However, in our judgment, that is better described as one of the potentially relevant elements to be put into the balance as is set out in the **Morgan** case. The wide discretion given to the ET is to find out whether it would be just and equitable to extend time. The ET may take matters of fact into account, such as the length of delay and the reasons for it and any prejudice caused. However, an ET's judgment is not limited to those factors, as is set out clearly in **Morgan**.

30. Ms Sole argued, quite eloquently, that the Respondent suffered prejudice prior to the expiry of the time limit expired because EA had already been dismissed. Because of that the Respondent suffered no additional prejudice when the presentation of the claim was made in September after the expiry of the time limit. However, that argument, if successful, would effectively limit the ET only to consider disadvantages caused by delay. In our judgment, that is plainly not a correct limitation of discretion. When considering the clear words of the statute and the wide discretion that is afforded within the statute to the tribunal, what is just and equitable may mean that the tribunal considers any disadvantage to any party in coming to its conclusions. As **Morgan** makes it clear that the delay and the reasons along with prejudice are almost always likely to be relevant and therefore would be expected to be taken account of, that does not mean that other matters are not relevant. A disadvantage in being able to present a case is likely to be relevant as part of a general exercise of deciding justice and equity. The fact that a disadvantage existed prior to the expiry of time limit does not mean that there is not a disadvantage.

31. In terms, the employment tribunal indicated in paragraph 124 that it recognised that this was a serious allegation, that the Claimant had been very unwell, hospitalised on several occasions, and those were matters which it obviously took into account as part of reasons for delay. But it balanced

against it the access to legal advice mentioned in April. Further, it considered that the Claimant had indicated she would consider going to a tribunal if unhappy with an outcome and, on 13 June, indicating that other options were to be considered. These findings show that the tribunal was taking account of matters which apply to questions of justice and equity but which result in no particular prejudice to the Respondent. In terms, there is no prejudice because the Claimant took legal advice; but it is nonetheless a proper part of the reasons taken in consideration as to reasons for delay. Reference is made to the Claimant attending further meetings in July but contacting ACAS over a month later. That again is a reference to delay and not specifically related to issues of prejudice. Health issues have been taken account of, reasons for delay have been taken account of and disadvantage to both parties has been considered by the ET.

32. Paragraph 126, in effect referring back to paragraphs 8 and 9, in our judgment, is critical of the Respondent rather than being critical of the Claimant. It seems more related to the Respondent advancing a positive case rather than simply seeking to ask the Claimant to prove her case. It is not, in our judgment, a criticism of the Claimant but simply factually indicating that the Claimant had not either brought EA as a Respondent so that EA was not available as a witness before the ET. Paragraph 126, whilst unfortunately structured in that it is a single sentence, properly sets out the fact that EA was not present for the hearing. When setting out that the Claimant did not name EA as a Respondent and that the Respondent has defended the claim in the absence of EA the ET is casting blame on the Claimant for that absence. When considering the judgment in the round, taking account of paragraphs 8 and 9, in not naming EA as a Respondent, what is being set out as being a disadvantage to the Respondent is that the Respondent "*has been unable to fully assess the reliability of the allegation as EA was too unwell at the time [that time being when the allegations were broached with him] and had been dismissed by them long before the claim was presented*".

33. It seems to us that the ET decided that there was a disadvantage to the Respondent in dealing with the claim arising out of those matters. That disadvantage arises from EA not being available. The disadvantage arises because of the way in which the Respondent could then approach the material

and information it might use for its defence. In our judgment, the fact that the disadvantage might or might not have changed if an earlier claim had been made is not necessarily relevant. What might have happened is purely speculation, because it did not happen and because the claim was not made earlier. What matters is that the claim was late and therefore the ET was then required to draw conclusions as to what would impact upon the Respondent and what would impact upon the Claimant in deciding what was just and equitable in considering an extension of the time limit. There was a disadvantage to the Respondent which the ET was entitled to take account of. It can be put this way: did the Respondent have a disadvantage because EA had been dismissed in May and had been too unwell to provide material to it? Yes, there was a disadvantage. Could that be described in the usual terms of prejudice if the time limit had not expired? No as no such question would be considered at that stage. It was nonetheless a disadvantage and the wide discretion given to the tribunal meant that it was a disadvantage that became a relevant consideration after the expiry of the time limit. It was a disadvantage that impacted upon the Respondent's ability to conduct proceedings and therefore a matter the ET could take into account. If it was relevant, then, in our judgment, it would be wrong of this tribunal to try and engage with the relative weight that was applied by the ET to the considerations in favour of each party. The weight given to factors is peculiarly a matter for the ET. The ET has all of the facts, all of the submissions and all of the evidence before it.

34. Paragraph 128, which was also criticised, appears to us to point to the tribunal considering matters of equity. The ET sets out:

> **"The Tribunal also had regard to the Respondent's relationship policy when considering whether to exercise our discretion to extend time. The Respondent did not know anything about the prior relationship between EA and the Claimant. Therefore, the Respondent had no opportunity to try and manage the relationship at work or consider the ramifications of any relationship breakdown."**

35. If the judgment is read in the round, the ET is pointing out that, on its findings, the Claimant had not disclosed, for whatever reason, the relationship with EA when it would have been reasonable for her to do so. Whilst it might be overstating matters to specifically relate this to the clean hands principle of equity, it does again, in our judgment, clearly refer to the disadvantages to the Respondent that arose because of that failure. In our judgment, the ET was not, as was advanced by Ms Sole,

effectively blaming the Claimant for the assault, but was instead considering the overall position of both parties in the round and the disadvantages that the parties had in presenting their respective cases. It was a relevant matter, therefore, to the exercise of discretion in terms of justice and equity.

36. We have already indicated that we did not consider that this issue strictly related to the issue of the balance of prejudice between the parties. However, the clear conclusion in the judgment, read as a whole, is that the Claimant did not act entirely in an open manner with the Respondent. Because of that reticence there were disadvantages which impacted upon the Respondent. This is particularly so in that the relationship policy would have meant that one or other of the Claimant and EA would have been moved to a different working environment had the relationship been disclosed. That the Claimant had maintained a position which underplayed the relationship that she had with EA and the disadvantages that that gave in respect of dealing with the case again are matters of weight for the ET. They are clearly relevant disadvantages to be taken account of and we say once more that we cannot properly, following the judgment in **Morgan** and the authorities to which it refers, delve into the minutiae of weight in the exercise of discretion.

37. In our judgment, the ET took account of matters which it was entitled to take account of, it took account of those matters which **Morgan** points out would normally be matters considered and it weighed those matters in the balance. In terms of the way in which the judgment is expressed, it deals with the law, it ties in the application of the law to facts that it has found and it explains why it is not exercising its discretion in the Claimant's favour.

38. The Claimant raises the fact that she also had established this serious allegation and this should be part of the balancing exercise. Mr Wyeth referred to the logical fallacy of that argument. However, that is an argument that we do not consider we need to engage with. It is clearly the case that this was a matter taken into account by the ET, as can be seen in the first sentence of paragraph 124. As already indicated, we do not consider it is appropriate for the EAT to engage in matters of weight. In our judgment, both grounds of the appeal should be dismissed.

39. In those circumstances, the matters that were raised in respect of a cross-appeal were reliant

on the appeal being successful. Therefore, they no longer need to be considered and are therefore dismissed.