Neutral Citation Number: [2023] EAT 140

Case No: EA-2021-000937-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 November 2023

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

THE NO. 8 PARTNERSHIP **Appellant**

- and –

MS MAXINE SIMMONS **Respondent**

- -
- -

Joseph England (instructed by DWF LLP) for the **Appellant**
No attendance by or on behalf of the **Respondent** (not participating in the appeal)

Hearing date: Thursday 19 October 2023

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30 on 08.11.2023

SUMMARY

Constructive unfair dismissal – associative disability discrimination (section 13 Equality Act 2020) – practice and procedure

The claimant pursued claims of constructive unfair dismissal and of direct associative disability discrimination, relating to the respondent's refusal to grant her time off for her dependent father under section 57A **Employment Rights Act 1996**. In considering the claim of direct discrimination, the Employment Tribunal ("ET") constructed hypothetical comparators without first giving the parties the opportunity to give evidence or make submissions on the hypothetical circumstances envisaged. The ET also found that the reason for the refusal of section 57A leave was the respondent's unwarranted misinterpretation of the section and that one of the decision-makers was dismissive of the care that aged parents required. Having found that the respondent had thus discriminated against the claimant, the ET concluded that this meant that it had breached the implied term of trust and confidence, which had also been breached by the respondent's failure to personally communicate with the claimant before reaching any decision.

The respondent appealed.

Held: allowing the appeal

By failing to afford the parties the opportunity to address its hypothetical comparisons (in evidence or submissions), the ET had adopted an unfair procedure. The comparators thus constructed were also flawed as they failed to provide a like-for-like comparison for the purposes of section 23 **Equality Act 2010** and, in the case of the second case, relied on a comparison with an individual sharing the same protected characteristic as the claimant. Moreover, given its finding as to the respondent's reason for refusing section 57A leave, it was perverse of the ET to conclude that this was because of the claimant's father's disability. That conclusion was also perverse given the ET's further finding that one of the respondent's partners would have treated any carer of an aged parent (regardless of disability) in the same way.

Having allowed the appeal against the finding of discrimination, this also undermined the ET's

reasoning on constructive unfair dismissal. The alternative basis for that conclusion was, however, also flawed as the ET had failed to apply the correct test when determining whether there had been a breach of the implied term of trust and confidence (per **Malik v BCCI SA (in compulsory liquidation)** [1997] ICR 606, HL) and had failed to provide an adequate explanation of it finding that a breach arose from a failure of personal communication.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. This appeal raises questions as to the approach of the Employment Tribunal ("ET") when making findings of constructive unfair dismissal and of direct associative discrimination. The case also demonstrates the problems that can arise in attempting to construct hypothetical comparisons absent evidence or representations from the parties relevant to an ET's chosen comparators.

2. In giving this judgment, I refer to the parties as the claimant and respondent, as below. This is the respondent's appeal against the judgment of the London Central Employment Tribunal (Employment Judge Paul Stewart, sitting with lay members Mr Soskin and Mr Allwright on 8 and 9 April 2021; "the ET"). I understand that the ET gave its decision orally at the end of the hearing, subsequently sending out the written judgment and reasons on 2 June 2021. By that judgment, the ET upheld the claimant's claims of constructive unfair dismissal and of direct discrimination by association. The respondent appeals against the ET's decision on both claims.

3. Mr England, of counsel, appears for the respondent, as he did below. The claimant was represented by her husband before the ET, but has not sought to participate in the appeal proceedings, although she does not concede the appeal.

The Facts

4. The respondent is a private dental partnership, based in Chelsea, London. The claimant is a dental nurse, who worked for the respondent from 27 March 1990 until she resigned on 26 June 2020. Her home is in Edenbridge, Kent.

5. For some 18 years before the events leading to her resignation, the claimant had worked part-time. This followed the birth of her daughter, and saw her reduce down from full-time working to, initially, one day a week, increasing to two days a week in February 2016.

6. On 23 March 2020, the respondent's dental practice was shut down due to the Covid-19 pandemic. The claimant and all other staff were paid in full until the end of March 2020 and then

placed on furlough as of 1 April 2020.

7. On 20 May 2020, the respondent's practice manager, Ms Rudman, emailed all staff to inform them of plans for re-opening the practice; as from 26 May 2020, it was planned to re-open for emergency treatment. The claimant responded to Ms Rudman the same day, asking for further information and stating that she had "*grave concerns*" about commuting to work. As Ms Rudman was aware, the claimant had an elderly father and was particularly concerned about the potential transmission of Covid-19. Ms Rudman responded, also the same day, expressing the hope that the claimant was keeping well and "*your dad is doing ok with all this going on*".

8. On or about 2 June 2020, Ms Rudman 'phoned the claimant, inviting her to state her preference for returning to work. The claimant emailed on 3 June, raising her concerns about returning to work as she had increasing caring needs for her 87–year old father, explaining that he:

> **"Is becoming worse through Dementia and lives some distance from me. He is very vulnerable given his age and also has a number of health issues. We are endeavouring to ascertain if he can be moved in to care but this, in the current circumstances is proving a very long and drawn out process."**

The claimant stated that her preference would be to continue to be furloughed until the end of September, observing:

> **"This would allow me to continue to support my father in his difficult position over the coming weeks and hopefully by then he will have been admitted into care more locally to me. I'm hoping this may help the practice also as it will reduce the number of nurses having to social distance etc."**

9. Ms Rudman replied on 4 June 2020, explaining that the respondent was faced with an immediate and imperative need to try to revive its business and now needed to resume its (lower risk) orthodontic services "*as soon as possible*"; as such, it was unable to agree to extend the claimant's furlough. The claimant responded the same day, saying she had carefully considered what the respondent had said and would be willing to return to work one day a week. As the ET noted:

> **"13. This response was against a background whereby the Claimant knew that one of the two orthodontists that she worked for was on maternity leave thus she perceived that going to one day a week would allow her to continue providing nursing services to the remaining orthodontist as before."**

10. On 8 June 2020, however, Ms Rudman again wrote to the claimant, stating that her request to work one day a week "*would not be logistically possible*", going on to say:

> **"We would of course be very happy for you to continue with us on a two day per week basis, as you have done over the last 4 years. We are however aware, that this may not be possible for you given the circumstances you describe."**

Ms Rudman concluded by asking that the claimant "*give the matter some thought*" and let the respondent know her position by the end of the week.

11. As the ET found, that response upset the claimant, who emailed around 20 minutes later, as follows:

> **"I am disappointed that the partnership will not support me at this very difficult time for me personally. I fully appreciate that it would have led to some potential logistical difficulties, however I have always over the many years I have worked at No.8 done my best to support the practice ... It is sad that when I am faced with such circumstances in having to care for my elderly vulnerable father in the short term, that the partnership would not support me through this difficult period.**
> **I feel as if you have placed me in the position of having to consider my position of employment with No.8. Could you please provide me by return with a copy of my contract of employment and also provide me with an explanation of the logistical issues my working only one day a week would have caused."**

12. Ms Rudman sent the claimant a copy of her contract and, ten days after the claimant's email, forwarded a letter, which stated that keeping the claimant on furlough would be a breach of the scheme and that the respondent needed her to return to her contracted hours, explaining:

> **"We are trying to get the business back up and running. There are already additional costs to the practice in relation to PPE and reduction in appointments to allow for more decontamination time between patients. We need all dentists to be working their contracted hours in order to ensure the business makes sufficient income to cover these costs. As such we need all staff to be working their contracted hours to support the dentists at this time. We therefore cannot afford to reduce your hours.**
> **We have considered whether we can hire a nurse for one day a week. However, it would be extremely difficult to recruit a suitable person at this time, for just one day. Also, we need someone urgently and recruitment of a suitable person takes time, not to mention the recruitment and training costs that would need to be incurred in doing this. The practice therefore cannot agree to reduce your days to one day per week"**

The letter concluded:

> **"The practice therefore expects you to return to work on Thursday 25 June 2020. This should give you sufficient time to make the necessary arrangements for your father for the additional one day per week.**
> **I would be grateful if you could confirm by 12 pm on Monday 22nd June that you will be returning to the practice to work 2 days a week.**
> **I must make you aware that you have a right to make a request for flexible working. I**

> **attach our flexible working policy. You can make this request at any time and we will consider the request in line with our legal obligations. However, until such request has been dealt with you are still contracted to work 2 days per week."**

13. The claimant sought legal advice at this stage and, on 22 June 2020, solicitors acting for the claimant wrote to Ms Rudman in the following terms:

> **"Our client explained to you that she is a carer for her 87-year-old father who has advanced dementia. She explained that he is vulnerable and that she has been trying to place him in a care home; however given the current pandemic it was proving impossible to organise this with social services at the current time. Our client requested that she continue to be furloughed until the end of September to allow her to make arrangements for her father's care. On 4 June 2020 you turned down this request and despite further correspondence you on this matter have not altered your stance including a request for unpaid leave. Despite acknowledging that even by returning to work one day a week she would be increasing her father's risk of catching Covid-19, she put forward a compromise of returning to work one day a week. Again you declined her request.**
> **Whilst we recognise that you have a business to run and in the absence of agreeing to retain our client on furlough, we would like to take the opportunity to remind you of our client's statutory right to take a 'reasonable' amount of unpaid time off work to take 'necessary' action to deal with particular situations affecting their dependants as set out in sections 57A and 57B of the Employment Rights Act 1996 (ERA 1996). Given the current pandemic, we consider that it would be reasonable for our client to take this time as unpaid dependent's leave or compassionate leave and we ask you to reconsider this. Our client accepts that furlough may not be appropriate if there is work to be done. If our client is able to get a place in care for her father earlier than the end of September then she will inform you.**
> **Furthermore due to the risks associated with aerosol generating procedures in dental practice our client has to take her father's vulnerability into account and reasonably believes that by returning to work that her father may be in serious and imminent danger and therefore whilst she had proposed returning to work one day a week clearly this will cause risks and having reflected she would therefore like to delay her return to work until the end of September by which time she will have been able to put in place arrangements for her father's care. This should make it easier to get someone to fill her place two days a week rather than one and if she takes unpaid leave this should also minimise the cost.**
> **In addition we would point out that the Equality Act 2010 introduced the concept of discrimination by association. Our client is clearly looking after her disabled father and the refusal of her reasonable requests could be direct discrimination on the grounds of disability.**
> **Given our client's many years of loyal service and commitment to her work, she is very disappointed by the practices' response to her reasonable requests in the circumstances and your lack of understanding of the very difficult situation in which she finds herself."**

14. As the ET recorded, the following day, the claimant saw a photograph on the respondent's Instagram page, showing one of the orthodontists for whom she worked alongside a colleague who normally worked full-time for a dentist who had not returned to work. On the same day, 23 June 2020, the respondent replied through its solicitor, stating that the claimant had never asked for unpaid leave and otherwise responding as follows:

> **"My client accepts for the purposes of this section that your client's father is a dependant.**

> **However, whilst my client appreciates that his health may have deteriorated, he has not suddenly fallen ill. …. I have advised my client that section 57A is therefore not applicable in these circumstances.**
> **In any event, the purpose of section 57A is to allow time off to make alternative care arrangements in an emergency situation. That is not the case here. Your client has been aware since 2 May that the practice was starting to reopen and from 22 June that she was required to return to work. She therefore has had sufficient time to put in place the necessary arrangements to care for her dependant. Also, she had offered to work one day a week; one therefore assumes that she was able to put in place arrangements on this day and it is unclear as to why those arrangements cannot be utilised for two days. Alternatively, why she is unable to put in place other arrangements for one day.**
> **Finally, section 57A only allows for a reasonable amount of time off to make alternative care arrangements. It is not reasonable to expect my client to grant time off until September 2020."**

15. For its part, the ET disagreed with this analysis, noting that section 57A(1)(b) **Employment Rights Act 1996** ("ERA") allows for time off where the reason is to take such action necessary to make provision for care of a dependent who is ill, which it considered was the appropriate provision in the circumstances outlined in the claimant's request.

16. On 25 June 2020, the claimant received a WhatsApp message from a colleague, saying that she had heard that the claimant was not coming back to work.

17. The next day, the claimant wrote a letter of resignation, explaining that the last message from Ms Rudman before the lawyers' letters had been unfriendly and had left her with no option but to seek legal advice; she continued:

> **"7. The bottom line was that had I taken 2 weeks summer leave, I was in fact only asking for 10 days away from work to care for my father between now and the end of September. As I advised, if his care had been sorted earlier, I would have been happy to return before then. I accept this would have caused inconvenience to the practice but as can be seen on the practices Instagram site, other nurses have been able to cover working with Sarah this week and I believe arrangements are already in place for the next couple of weeks, clearly anticipating that I am not returning.**
> **8. Probably what saddens me the most is the fact that no one has had the courtesy or taken the time to call me to discuss my predicament to ascertain whether there were any other options we could explore. I know you will have considered my requests carefully on a number of occasions which I am grateful for, but to have no personal contact or indeed any degree of flexibility shown in your stance is quite frankly unacceptable. I have been desperately worried, stressed and concerned about my father and the acute deterioration in his mental state. Added to this, only last month our family lost my father-in-law. No one has shown any concern for my personal well-being in such a difficult time and to receive such a strongly worded communication from you last week was the last straw. I had naively hoped for some support in my request for temporary emergency care leave from my employer. I am saddened to say that after 30 years' service, your actions and stance have left me with no other option but to tender my resignation with immediate effect. This is in order to protect myself from the continued stress and worry you have put me under over the last few weeks and to protect my vulnerable father."**

18. Four days later, on 30 June 2020, two of the respondent's partners and Ms Rudman, on behalf of the respondent, signed a short email accepting the claimant's resignation.

The ET's Decision and Reasoning

19. Considering first the claimant's claim of constructive unfair dismissal, the ET noted (paragraph 38) that the respondent had refused to grant the claimant emergency care leave, declined her request to work one day a week as "*logistically not possible*", failed to try to identify a short-term solution to her care difficulties, and notified her by email of 18 June 2020 that she needed to confirm by 22 June that she would be back at work on 25 June, working her pre-furlough two days per week.

20. The ET concluded that those actions amounted to a breach of the implied term of trust and confidence, explaining that it reached that decision for two principal reasons:

> **"39. … Firstly, there was no attempt by the Respondent to contact its employee of 30 years standing to discuss and to understand her request better. The claimant had an expectation that the Respondent would contact her personally before any decision was taken. We consider such an expectation on the part of such a long-serving employee was justified.**
> **40. Second, there was a statutory duty placed on the Respondent not to discriminate against the Claimant because of an associative protected characteristic. … [W]e considered the treatment afforded to the Claimant was direct discrimination by association. It seems to us that it is an essential component of the maintenance of the relationship of trust and confidence that ought to exist between employer and employee is the absence of discriminatory treatment of the employee."**

21. The ET rejected the respondent's submission that it should find that it had reasonable and proper cause for so acting, holding:

> **"41. … In our view, direct discrimination by association is inconsistent with there being reasonable and proper cause for a breach of that implied term."**

22. The ET was satisfied that the claimant had resigned in response to the respondent's breach and concluded that her actions could not be construed as amounting to an affirmation of the contract. In the circumstances, it found the claimant had been constructively dismissed and, as the respondent accepted that there could be no *prima facie* fair reason for dismissal, upheld her claim of unfair dismissal.

23. Turning to the claim of discrimination by association, the ET noted that it was conceded that

the claimant's father had Alzheimer's disease. It found that the respondent had been wrong in its refusal of the claimant's request for time off for dependants under section 57A **ERA**, as subsection (1)(b) of that provision entitled the employee to a reasonable amount of time off to make arrangements for the provision of care for a dependent who is ill. In the circumstances, the ET concluded that the basis for the respondent's refusal of the claimant's request for emergency leave had been:

> **"49. … an unwarranted interpretation of the section."**

24. The ET noted that the question it then had to answer was whether that amounted to less favourable treatment. Recording that the claimant had not identified a named comparator, the ET then went on to consider the position in relation to a hypothetical comparator, observing that this must be "*a comparison in respect of which there must be no material difference between the circumstances relating to each case*" (section 23 **Equality Act 2010**). In this regard, the ET carried out its task by adopting the following analysis:

> **"51. We have compared the case of the Claimant to two hypothetical comparators, one being an employee who has a child attending school and the other being an employee whose spouse or partner has cancer.**
> **52. We considered both hypothetical comparators to have made a request under section 57A for time off work. The former required time off in order to take action which is necessary because of the unexpected disruption in the arrangements made for the care of the child that has come about because the school had closed because of the lockdown measures which have been taken as a result of the Covid 19 pandemic. The latter required time off to provide assistance to the dependant to attend hospital chemotherapy appointments.**
> **53. In neither case could we envisage this employer refusing the request. In the former case, we derive assistance to how the Respondent might have treated the request by the way in which employers throughout the country had to accept disruption to their workforce by reason of the closure of schools. In the latter case, we derived assistance from the evidence that Mr Eoin O'Sullivan [one of the partners in the respondent] gave to the Tribunal. Speaking of the reopening of the dental practice in the early summer of 2020, he said at paragraph 14 of this statement:**
>
> > **I cannot remember an exact date, but I recall that the majority of the services offered by the Dental Practice were open by the middle of June 2020. By this time, almost all Dentists were back working with their Dental Nurses apart from the Orthodontist and Maxine. There was one other member of staff (a receptionist) who was not back at that point because they had a medical condition and had been medically advised to shield.**
>
> **54. The fact that allowance had been made for the receptionist not to return to work because they had a medical condition and had been medically advised to shield suggested strongly to us that time off would have been granted to an employee seeking it for the purpose of providing assistance for a dependent's chemotherapy appointments."**

25. Given its conclusion in respect of the comparisons it had hypothesized, the ET considered

that also meant that it should assess the claimant to have been treated less favourably. In this regard, it again referred to the evidence of Mr O'Sullivan:

> **"55. … we were assisted by what appeared to us to be a rather dismissive approach on the part of Mr O'Sullivan to the question of the care that aged parents required. Several times, he referred to his mother who is in her nineties and appeared to suggest that everyone with such an aged parent had to make arrangements for their care in their own time. We concluded that the reason the Claimant was treated less favourably was because of her father's disability."**

26. On that basis, the ET further upheld the claimant's claim of direct discrimination on the associative basis of her father's disability.

The Relevant Legal Principles

Constructive Dismissal

27. Section 94 of the **Employment Rights Act 1996** ("ERA") provides that an employee has the right not to be unfairly dismissed. Section 95 then defines what is meant by "*dismissed*" for these purposes, relevantly providing that:

> **"1) For the purposes of this Part an employee is dismissed by his employer if …**
> **(*c*) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

28. As defined by section 95(1)(a), the termination of the employee's contract of employment thus becomes a constructive dismissal, something that is to be determined applying a contractual analysis. As Lord Denning MR explained in **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221, at p 226 A-C:

> **"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."**

29. A claimant contending that they have been constructively dismissed must thus demonstrate: (1) that there was a fundamental breach of contract on the part of the employer; (2) that that breach caused the employee to resign; and (3) that they did not delay too long before resigning, such that they might be said to have affirmed the contract. In the present appeal, the point in issue is that at (1): whether the ET erred in concluding that the respondent had acted in fundamental breach of the claimant's contract.

30. When considering whether there has been a significant breach of contract for these purposes, although no express term may have been breached, it would be open to the ET to find that the employer has acted in breach of an implied term of the contract of employment. In the present proceedings, the claimant relied on the implied term of mutual trust and confidence, as confirmed by the House of Lords in **Malik v BCCI SA (in compulsory liquidation)** [1997] ICR 606, HL, which requires that an employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

31. For completeness, I note that section 57A **ERA** provides (relevantly) that an employee is entitled to be permitted by their employer to take a reasonable amount of time off during their working hours in order to provide assistance to a dependent in certain circumstances (subsection (1)(a)), or to make arrangements for the provision of care for a dependent who is ill or injured (subsection (1)(b)). Where it is contended that an employer has unreasonably refused to permit an employee to take time off as required by section 57A, a complaint may be presented to an ET, as provided by section 57B **ERA**. No such claim had been made in these proceedings but the respondent's refusal to grant the claimant "*emergency care leave*" had been identified as one of the matters relied upon by the claimant in support of her contention that she had been constructively dismissed.

Discrimination

32. Direct discrimination is defined by section 13 of the **Equality Act 2010** ("EqA") as arising

when:

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

33. In the case of **Coleman v Attridge Law** Case C-303/06 [2008] ICR 1128, the European Court of Justice held that "*associative discrimination*" on the grounds of disability was unlawful; that is, where the complainant is found to have suffered less favourable treatment not because of a protected characteristic that she possessed herself but because of that protected characteristic possessed by someone with whom she was associated (in **Coleman**, the employee's disabled child). When the Coleman case returned to the United Kingdom, it was held that domestic legislative protection against discrimination (relevantly, at that time, pursuant to the **Disability Discrimination Act 1995**) must, therefore, be interpreted so as to extend to discrimination by association (see **EBR Attridge LLP (formerly Attridge Law) and anor v Coleman** [2010] ICR 242 EAT).

34. In determining, however, whether there has been less favourable treatment, section 23 **EqA** provides that there must be no material difference between the circumstances relating to each case. As Lord Scott explained in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11, [2003] ICR 337:

> **"110. … the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class. …"**

35. In some cases, the assessment required by section 13 **EqA** will involve the ET in a two-stage process: first, asking whether there was less favourable treatment, then secondly, to ask whether that treatment was because of the relevant protected characteristic. That, however, will not always be necessary (or appropriate); in particular, where there is no direct comparator, it can sometimes be impossible to decide whether there has been less favourable treatment without first determining the reason for that treatment – the "*reason why*". Thus, in **Shamoon**, Lord Nicholls observed:

> **"8. No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise**

> **to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.**
> **…**
> **11. … employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.**
> **12. The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the claimant. ...”**

36. As for the assessment of the “*reason why*”, this requires the ET to determine why the alleged discriminator acted in the way that they did: what, consciously or unconsciously, was their reason? That is a subjective question; the reason why a person acted as they did is a question of fact (see *per* Lord Nicholls in **Khan v Chief Constable of West Yorkshire Police** [2001] UKHL 48, at paragraph 29).

37. Where an ET does consider it appropriate to construct hypothetical comparators in order to determine the question of less favourable treatment, it must be astute to ensure that it is truly comparing like with like. That will generally be a question identified at an early stage, thus informing the list of issues in the case, and permitting the parties to address the hypothetical comparisons in their evidence and submissions. Where that is not done, however, the ET may not be in a position to make findings using those comparisons, either because it would have no evidential basis for doing so, or because it would be unfair for it to do so. As Ralph Gibson LJ observed in **Neale v Hereford and Worcester County Council** [1986] ICR 471 CA, at p 486E-F:

> **“… it would be unwise and potentially unfair for a tribunal to rely upon matters which occur to members of the tribunal after the hearing and which have not been mentioned or treated as relevant without the party, against whom the point is raised, being given the opportunity to deal with it unless the tribunal could be entirely sure that the point is so clear that the party could not make any useful comment in explanation.”**

38. In making this observation, I recognise that there may be cases where the ET’s construction

of the hypothetical comparator would (or should) have been obvious to the parties and can have given rise to no substantial prejudice, or where that part of the reasoning is properly to be characterised as peripheral to the decision reached. In such cases, as Ward LJ noted in **Stanley Cole (Wainfleet) Ltd v Sheridan** [2003] ICR 1449 CA (albeit there considering a failure to afford a party the opportunity to address authorities referenced by an ET in its decision):

> **"31. … the authority must be shown to be central to the decision and not peripheral to it. It must play an influential part in shaping the judgment. If it is of little or no importance and serves only to underline, amplify or give greater emphasis to a point that was explicitly or implicitly addressed in the course of the hearing, then no complaint can be made. If the point of the authority was so clear that a party could not make any useful comment in explanation, then it matters not that the authority was not mentioned."**

39. Even then, however, context will be everything, as Ward LJ continued:

> **"33. … It is … impossible to lay down a rigid rule as to where the boundaries of procedural irregularity lie, or when the principles of natural justice are to apply, or what makes a hearing unfair. Everything depends on the subject matter and the facts and circumstances of each case."**

40. In **City of London Corporation v McDonell** [2019] ICR 1175, at paragraph 50, the EAT provided some assistance as to how such issues are to be approached:

> **"…**
> **(b) Although it is open to the tribunal to make findings of fact not contended for by either party, where the tribunal's conclusion of fact is likely to be tantamount to a conclusion that there was bad faith on the part of a decision-maker or reliance upon an improper reason then it is likely to amount to a serious procedural irregularity for the tribunal to reach such a conclusion without giving that decision-maker an opportunity to respond…**
> **(c) Parties would usually be given an opportunity to make submissions as to the effect of a finding of fact not contended for by either party, although that would not apply where the legal effect of the findings of fact that are to be made is obviously and unarguably clear …"**

The Appeal and the Respondent's Submissions in Support

41. By its first ground of appeal, the respondent contends that the ET failed to correctly apply the law regarding whether there was a breach of the implied term of trust and confidence:

(1) In explaining the first basis for its conclusion, the ET had wrongly relied on the respondent's failure to contact the claimant to explain why the various acts (listed at paragraph 38 of its decision; paragraph 19 *supra*) amounted to a breach of the implied term (implicitly

acknowledging that the acts, of themselves, would not do so: they would need to be assessed in context, which would include the respondent's explanation for those acts). In so doing, the ET erred, as there was no coherent link between the acts listed at paragraph 38 and the failure to contact the claimant.

(2) In any event, the purported finding that the respondent had failed to contact the claimant was contradicted by the ET's earlier findings of fact. For example, in declining the claimant's request to work one day a week as "*logistically impossible*", the ET had found that the respondent responded within three working days and that there had been one 'phone call and three emails between the parties on the subject; as for the notification of 18 June that the claimant would need to confirm by 22 June that she would be back at work on 25 June 2020, the ET had found that had been preceded by one 'phone call and five emails between the parties on the subject.

(3) As for the second basis for its conclusion, this depended upon the ET's finding of discrimination, which was erroneous for the reasons provided under the second ground of appeal.

(4) The ET had also erred in its approach: only asking whether there was "*reasonable and proper cause*" after it had found there had been a breach of the implied term; that question was a necessary part of the determination of whether there had been a breach at all. The ET's erroneous approach thus required the respondent to justify what had already been found to be a fundamental breach, which diminished the importance of asking why the respondent had acted as it had, setting the bar for justification too high.

(5) Moreover, in finding there was no reasonable and proper cause, the ET had again relied on the finding of discrimination, which was an erroneous finding. The ET had, furthermore, failed to consider what was the reasonable and proper cause relied on.

42. By its second ground of appeal, the respondent says that the ET erred in its construction and application of a comparator for the purposes of the claim of direct, associative discrimination:

(1) In respect of the hypothetical comparator of "*an employee who has a child attending school*": (i) the comparator (who lacked precision in identification, even as to the age of the child the ET might have had in mind) would be in materially different circumstances to the claimant, as to the degree of vulnerability and danger caused by their attending work, the type and frequency of care, and the certainty of the need for care; (ii) the ET had then failed to consider any evidence specific to *this* employer, instead placing general reliance on how "*employers throughout the country*" might have acted; (iii) there had been a failure to consider the specific amount and frequency of time off sought by the claimant; (iv) such a comparator had not featured in any evidence, submissions, or discussion at the hearing before the ET (including in its oral reasons).

(2) In respect of the hypothetical comparison drawn with "*an employee whose spouse or partner has cancer*": (i) the comparison retained the protected characteristic (the association with disability: cancer being deemed to be a disability, see paragraph 6 schedule 1 **EqA 2010**), so could not be relevant for section 13 purposes; (ii) even if that was not the case, the comparator would be in materially different circumstances to the claimant, as to factors such as shielding, vulnerability, and frequency and type of care; (iii) in drawing the comparison, the only evidence considered by the ET related to a receptionist who had been medically advised to shield, which was materially different to the hypothetical comparator (and the claimant); (iv) again, the ET's finding was a general one, failing to consider the specific amount and frequency of the time off sought by the claimant; (v) similarly, such a comparator had not featured in any evidence, submissions, or discussion at the hearing before the ET (including in its oral reasons).

43. Thirdly, the ET had failed to correctly identify, consider and apply the issue of causation: (i) the ET had found a non-discriminatory motivation for the act complained of – the "*unwarranted interpretation*" of section 57A **ERA** – which contradicted the finding that there had been discrimination; (ii) although it had addressed the "*reason why*", it had not properly applied the

"*because of*" test or explained why it had found a discriminatory motivation: the evidence given by Mr O'Sullivan did not relate to a disability but instead presented an attitude about all "*aged parents*".

44. It is the respondent's case that the errors identified mean that the ET's decision cannot stand and its judgment must be set aside. The respondent contends that, on the ET's findings, it would be open to the EAT to substitute its own decision, dismissing both claims. Alternatively, if this matter were to be remitted for re-determination, given the time that has now passed, there would be no benefit in this matter being remitted to the same ET and, in any event, the fundamentally flawed nature of the finding of discrimination, which had pervaded its reasoning, meant that an entirely fresh hearing, before a differently constituted ET, was required.

Analysis and Conclusions

45. The claims before the ET were of constructive unfair dismissal and direct associative disability discrimination. Although it first addressed the constructive dismissal point in its reasons, the ET's decision in this regard was based, in part, on the conclusion it had reached on the discrimination claim and it is therefore convenient, at the outset, to consider the ET's decision relating to the claim pursued under section 13 **EqA**.

Direct Associative Discrimination

46. How the section 13 claim was being put had been considered at an earlier stage, at a case management preliminary hearing on 10 February 2021, when the relevant issues were identified, as follows:

> **"3.1 The basis of this claim is the Claimant's Father's … disability. He has Alzheimer's disease.**
> **…**
> **3.3 Did the Respondent refuse the Claimant's request for emergency care leave?**
> **The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.**
> **If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.**
> **The claimant has not named anyone in particular who she says was treated better than she was.**

3.5 If so, was it because of the Claimant's Father's disability?"

47. In initially considering the respondent's appeal, it had been unclear how the parties' cases might have been developed on the question of comparators, and this matter was listed for an all-parties' preliminary hearing to seek to resolve this point. The claimant did not attend that hearing or make any representations in relation to this question. Considering the information provided by the respondent, however, it was concluded that it indeed appeared that the hypothetical comparators relied on by the ET in its decision on the section 13 claim had not been raised by, or with, the parties prior to judgment. In returning to this issue at the full hearing of the appeal, I have considered the claimant's witness statements before the ET and the written submissions that were presented on her behalf at the end of the hearing. Having done so, I am unable to see that the claimant had sought to draw any comparisons, with either actual or hypothetical comparators, when pursuing her claim of direct associative discrimination.

48. I would not, however, necessarily consider that to be fatal to the ET's attempt to assess the question of less favourable treatment by constructing hypothetical comparisons. That possibility had been identified at the earlier case management stage and was plainly a course that it was envisaged might be adopted at the full merits hearing. The difficulty that arises from the ET's judgment is that the hypothetical comparisons that were then used were not first discussed with the parties, who were thus denied the opportunity to address those comparisons either in evidence or submissions. Given that the ET's findings in relation to the two comparators it constructed were material to its reasoning on the section 13 **EqA** claim, which then fed into the ET's decision on the constructive unfair dismissal claim, this cannot be said to be a merely peripheral matter (**Stanley Cole (Wainfleet)**). More than that, however, as the finding of unlawful discrimination is akin to a finding of reliance upon an improper reason, these were matters upon which the respondent ought to have been given the opportunity to respond (**McDonell**). In the circumstances, this gave rise to an unfairness in the procedure adopted by the ET (**Neale**).

49. As well as being unfair, however, the course adopted by the ET was unwise given that the hypothetical comparators it went on to construct failed (notwithstanding its self-direction as to the correct legal test) to satisfy the need for a like-for-like comparison that section 13 **EqA** requires (see section 23 **EqA**).

50. The first example hypothesised by the ET related to the carer of a school-age child. The ET's reasoning fails to specify the age of the child in question (a material omission), but, in any event, obvious difficulties would arise in seeking to draw a comparison between this individual and the circumstances of the claimant: on the one hand, it would be unlikely that the carer would have the same shielding concerns, impacting upon their ability to commute and attend the workplace; on the other, (depending on the age of the child) it might simply be impossible for that carer to leave their child at home, even for one day a week. Even if a workable comparison could be designed, however, this would need to be tested against how *this* respondent would have been likely to have responded to such circumstances, as to which the ET had no evidence as the point had not been identified prior to its written judgment.

51. As for the second hypothetical comparator – the individual providing assistance to a spouse/partner undertaking cancer treatment – this fails at a more basic level given that the comparator would also share the protected characteristic of associative disability (cancer being a deemed disability under the **EqA**). Even if this was not fatal to the comparison, the ET would have also needed to consider questions of relative vulnerability, and as to the frequency and the type of care needed in each case. Moreover, although the ET did refer to the respondent's evidence when considering its likely response in this hypothetical case, the example it then relied on was materially different to both the hypothetical comparator and to the claimant: a receptionist (so, not carrying out the same skilled role as the claimant) who had been medically advised to shield, was not in the same position.

52. I have considered whether it might nevertheless be said that the ET's decision could stand, notwithstanding the errors made in relation to the comparisons it sought to draw in this case. It is

right that I keep in mind that, in cases where there is no immediately obvious direct comparator, it can be appropriate to simply focus on the question why the respondent acted as it did: its reason for the treatment in issue (see per Lord Nicholls in **Shamoon**, *supra*). I have, therefore, gone on to consider the next stage of the ET's reasoning, where it considered whether the less favourable treatment relied on was afforded to the claimant because of her father's disability.

53. The less favourable treatment in this case had been identified at the earlier case management preliminary hearing as the refusal of the claimant's request for emergency care leave. The ET had addressed this at an earlier stage in its reasoning, finding that "*the basis for the refusal was an unwarranted interpretation of the section*" (that being a reference to section 57A **ERA**). Considering the evidence before it, which might shed further light on the respondent's subjective reason for that refusal and "*unwarranted interpretation*" (ET paragraph 49), the ET referred to the testimony of the partner, Mr O'Sullivan, which it considered to demonstrate "*a rather dismissive approach … to the question of care that aged parents required … [appearing] to suggest that everyone with such an aged parent had to make arrangements for their care in their own time.* " (ET paragraph 55).

54. Having thus set out the ET's findings as to the respondent's reason for refusing the claimant's request for leave, and as to the possible underlying motivation demonstrated by Mr O'Sullivan's evidence, I am unable to see how the ET then arrived at the conclusion that this demonstrated that the reason the claimant had been treated less favourably was because of her father's disability. Certainly the ET's reasoning does not disclose any proper basis on which it could be concluded that the respondent's "*unwarranted interpretation*" of section 57A **ERA** was because of any association between the claimant and her disabled father (as opposed, for example, to it being due to the advice the respondent had received from its solicitor). As for Mr O'Sullivan's evidence, the ET's record in that respect would suggest that he would have responded to the claimant's request in the same way, whether or not her father had been disabled. On the basis of the ET's findings relevant to this issue (which have not been the subject of any challenge on appeal), I am therefore unable to see any proper basis for its conclusion that the respondent's treatment of the claimant amounted to direct associative

disability discrimination.

Constructive Dismissal

55. I turn then to the claim of unfair constructive dismissal and the ET's conclusions in this regard. To the extent that the decision on constructive dismissal was dependent upon the ET's finding of direct discrimination, for the reasons I have set out, it cannot stand. On one view, that must be fatal to the finding of constructive dismissal, given that the ET appears to have given this aspect of its reasoning equal weight when reaching its decision in this regard. In any event, however, I consider there are errors in the ET's approach to the question whether there had been a breach of the implied term more generally, which would also render its decision on constructive dismissal unsafe.

56. As the respondent has observed, having listed the various matters relied on by the claimant as giving rise to a breach of the implied term of trust and confidence (refusing to grant the claimant emergency care leave; declining her request to work one day a week; failing to try to identify a short–term solution to her care difficulties; notifying her by email of 18 June 2020 that she needed to confirm by 22 June that she would be back at work on 25 June, working her pre-furlough two days per week), the ET did not find that these actions, of themselves, breached the implied term. Rather, the ET reasoned that these matters gave rise to a breach of the implied term of trust and confidence because there was no attempt to contact the claimant personally, to try to understand her request better, before making any decision.

57. The first difficulty with that finding is that there is no explanation as to the link apparently drawn by the ET between the matters relied on by the claimant and the further finding of an absence of personal contact. It might be inferred that the ET was seeking to say that it was the way that the respondent had dealt with these various matters that gave rise to the breach of the implied term in this instance, but that is not set out. Relatedly, there is also an absence of explanation as to why the various contacts that had been made with the claimant (as recited by the ET in setting out the relevant history) did not amount to the required personal contact in this context. For the respondent it is said

that there is a contradiction in the ET's reasoning in this respect. That might be right, or it might be that there is simply a failure of explanation. In either event, I agree with the respondent that the reasons provided do not enable it to understand why it lost on this point.

58. I also consider the ET erred in its application of the relevant test when seeking to determine whether there had been a breach of the implied term. The question it had to answer was whether the respondent had, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between it and the claimant (per **Malik**). Without, however, asking itself whether the respondent might have had "*reasonable and proper cause*", the ET moved straight to its finding that there had been a breach of the implied term. Although it is right to note that the ET subsequently considered the question of "*reasonable and proper cause*" (ET paragraph 41), that was (1) *after* its finding of breach, and (2) still failed to engage with the respondent's reasons (as explained in its contemporaneous correspondence with the claimant). The ET's reasoning on this issue was limited to its assertion that "*direct discrimination by association is inconsistent with there being reasonable and proper cause for a breach of that implied term*"; that, however, demonstrated no engagement with any reasons relied on by the respondent as to why it considered it had reasonable and proper cause for its conduct (including its communications with the claimant).

Decision and Disposal

59. For the reasons I have set out above, I have concluded that the ET's decisions on both the section 13 **EqA** claim and the complaint of constructive unfair dismissal cannot stand. The respondent's appeal must be allowed and the ET's judgment set aside.

60. In the event that its appeal should be allowed, the respondent has urged that I should substitute my own finding that the claims should be dismissed. Acknowledging the limitations on the EAT's jurisdiction in this regard, it is said that, nevertheless, (1) it is apparent that the ET's findings as to the contacts that were made with the claimant could only lead to one conclusion on the constructive

dismissal point, and (2) the ET's conclusion as to the respondent's reason for refusing the section 57A leave must mean that the section 13 claim should be dismissed.

61. In considering the respondent's submissions, I have reminded myself of the guidance provided in **Jafri v Lincoln College** [2014] EWCA Civ 449, in particular (per Laws LJ):

> **"21. … It is not the task of the EAT to decide what result is "right" on the merits. That decision is for the ET, the industrial jury. The EAT's function is (and is only) to see that the ET's decisions are lawfully made. If therefore the EAT detects a legal error by the ET, it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been. In neither case is the EAT to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from findings made by the ET, supplemented (if at all) only by undisputed or indisputable facts. Otherwise, there must be a remittal."**

62. On the question whether the claimant was constructively dismissed, the errors of law I have found are essentially two-fold: (1) a failure to apply the correct legal test, and (2) a failure of explanation. Although I have allowed that it is possible that there are (as the respondent contends) some inconsistencies in the ET's findings, I cannot be sure that this demonstrates that the conclusion on breach is perverse as opposed to inadequately explained. In the circumstances, this is a matter that must be remitted to the ET.

63. The position is, however, different in relation to the claim under section 13 **EqA**. There are inherent difficulties in pursuing a claim of disability discrimination (associative or otherwise) under section 13, where the treatment in issue is a refusal to allow time off for dependents under section 57A **ERA**: inevitably, most of the comparisons that one might seek to draw would also tend to involve individuals who share the same association with the protected characteristic of disability (as the ET's second hypothetical comparison demonstrated). Moreover, in the present case, when turning to the reason why, the ET provided an answer that did not suggest any associative discrimination: on its face, the respondent's "*unwarranted interpretation*" of the statute had no link with the claimant's father's disability. To the extent that the ET went further, to look at the respondent's underlying motivation, its finding suggests only that Mr O'Sullivan would have responded to the claimant's request in the same way, whether or not her father had been disabled. On the section 13 claim,

therefore, I do find the ET's decision to have been perverse: absent its errors of law, and on the factual findings it had made, the only permissible conclusion must be that this claim must be dismissed.

64. Having found that the claim of constructive unfair dismissal must be remitted to the ET, I have further considered whether that should be to the same or a different panel (applying the guidance laid down in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 EAT). Given the time that has passed, I can see no obvious advantage in terms of time or costs in remitting this matter to the same panel. More than that, however, I do consider that the decision reached in this matter was fundamentally flawed such that it would not be appropriate to remit the case to the same ET. I therefore remit the claimant's claim of constructive unfair dismissal to be re-heard before a differently constituted ET.

65. My order in this matter will therefore be that:

(1) The appeal is allowed and the ET's judgment is set aside.

(2) In respect of the claim under section 13 **EqA**, I substitute a decision that this claim is dismissed.

(3) In respect of the claim of constructive unfair dismissal, this is to be remitted to a differently constituted ET for re-hearing.