Neutral Citation Number: [2024] EAT 40

Case No: EA-2022-000948-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 March 2024

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

WORCESTERSHIRE HEALTH AND CARE NHS TRUST
Appellant and Respondent to Cross-Appeal

- and –

ANGELA ALLEN
Respondent and Cross-Apeallant

- -
- -

James Jarvis (instructed by Herefordshire and Worcestershire Health and Care NHS Trust - Legal Services) for the **Appellant**
John Horan (instructed by Rowberry Morris Solicitors) for the **Respondent**

Hearing date: 27 February 2024

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JUDGMENT

SUMMARY

Age Discrimination, Disability Discrimination

The Employment Tribunal erred in law in upholding a complaint of age related harassment and in concluding that the complaints of discrimination that succeeded constituted conduct extending over a period. A cross-appeal was rejected.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of the Employment Tribunal, Employment Judge Miller sitting with members, dated 20 June 2022. The hearing took place in two tranches in January 2020 and March 2022. The claimant brought a large number of complaints of age and disability discrimination. The claimant succeeded in a small number of those complaints. I am considering limited challenges to the determinations of the Employment Tribunal in the appeal and cross-appeal that were permitted to proceed to a full hearing. The challenges are to findings in respect of harassment, direct discrimination and whether there was conduct extending over a period. I will consider the relevant law and then the challenges to the findings of the Employment Tribunal that were permitted to proceed in chronological order.

The Law

2. The Employment Tribunal directed itself as to the law, including the burden of proof by reference to section 136 **Equality Act 1010** ("**EQA**") and **Igen Ltd v Wong** [2005] ICR 931 and conduct extending over a period by reference to section 123 **EQA** and **Commissioner of Police of the Metropolis v Hendricks** [2002] EWCA Civ 1686, [2003] I.C.R. 530.

3. Discrimination in employment is provided for by section 39 **EQA**:

> 39 Employees and applicants
>
> (2) An employer (A) must not discriminate against an employee of A's (B)— …
>
> (c) by dismissing B;
>
> (d) by **subjecting B to any other detriment**. [emphasis added]

4. Direct discrimination is defined by section 13 **EQA**:

> 13 Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, **because of** a protected characteristic, A treats B less favourably than A treats or would treat others. [emphasis added]

5. Harassment in employment is provided for by section 40 **EQA**:

> 40 Employees and applicants: harassment

> (1) An employer (A) must not, in relation to employment by A, harass a person (B)—
>
> (a) who is an employee of A's; …

6. Harassment is defined by section 26 **EQA**:

> 26 Harassment
>
> (1) A person (A) harasses another (B) if—
>
> (a) A engages in **unwanted conduct related to a relevant protected characteristic**, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

7. Whereas direct discrimination must be **because** of a protected characteristic, harassment need only be **related to** a protected characteristic. This was a matter considered by HHJ Auerbach in **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and another** [2020] IRLR 495:

> as the passages in *Nailard* that we have cited make clear, **the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question**. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.
>
> Nevertheless, **there must be still, in any given case, be some feature or**

> **features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question**, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, **the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic**, as alleged. **Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon**, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.

8. In **Unite the Union v Nailard** [2018] EWCA Civ 1203, [2019] I.C.R. 28 the Court of Appeal considered whether an Employment Tribunal was correct to hold that a trade union had subjected an employee to sex related harassment by failing properly to investigate a grievance in which sex discrimination was alleged. Underhill LJ noted that, as with direct discrimination, there are some circumstances in which the treatment inherently constitutes harassment, such as the use of sexist language, but there are other circumstances in which it is necessary to consider the mental processes of the alleged harasser.

9. It is important to note that it is the "conduct" that must be "related to" the protected characteristic. Thus, if it is asserted that a failure properly to investigate a grievance alleging discrimination constitutes harassment it is not sufficient that the grievance was related to the protected characteristic, the failure properly to investigate the grievance, which constitutes the conduct, must be related to the protected characteristic. Accordingly, it will generally be necessary to consider the mental process of the person who considered the grievance and decide whether the failure to investigate was related to the protected characteristic, such as if the person considered that protection of the protected characteristic is of no importance and so did not treat the grievance as seriously as other types of grievance would have been treated. In **Nailard** Underhill JL held that the Employment Tribunal had erred in failing to consider the mental process of the alleged harasser:

> I agree with the appeal tribunal that the reasoning of the employment tribunal was flawed. It found the union liable on the basis of the acts and

> omissions of the employed officials without making any finding as to whether the claimant's sex formed part of their motivation.

10. Section 120 **EQA** provides for complaints of unlawful discrimination in employment to be made to the Employment Tribunal

> 120 Jurisdiction
>
> (1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—
>
> (a) a contravention of Part 5 (work);

11. The time limit for a claim of discrimination is provided by section 123 **EQA**:

> 123 Time limits
>
> (1) Subject to section 140B 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.
>
> (3) For the purposes of this section—
>
> (a) **conduct extending over a period** is to be **treated as done at the end of the period**;

12. In **Commissioner of Police of the Metropolis v Hendricks** [2002] EWCA Civ 1686, [2003] I.C.R. 530 Mummery LJ held of the predecessor legislation that referred to "an act extending over a period":

> 52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period". I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the appeal tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaint that the commissioner was

> responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.

13. The respondent submitted that conduct extending over a period must as a matter of law all relate to the same protected characteristic. I am not persuaded by that argument. For example, if a person took against a woman because of her race and sex and demonstrated this by sometimes making comments that were sexist, sometimes racist and sometimes both racist and sexist; I can see nothing in the language of the relevant provisions that would prevent the entire course of the racist and sexist behaviour constituting conduct extending over a period. Similarly, I cannot see any reason why conduct extending over a period cannot involve a number of different types of prohibited conduct, such as a mixture of harassment and direct discrimination. It may be more difficult to establish that there has been discriminatory conduct extending over a period where the acts that are said to be linked relate to different protected characteristics and different types of prohibited conduct, but there is no absolute bar that prevents there being conduct extending over a period in such circumstances.

14. Where it is necessary to consider the mental process of an alleged harasser if it is decided that the treatment was because of the protected characteristic that will be sufficient to establish that it was related to the protected characteristic. Where the conduct constitutes harassment it cannot also found a claim of direct discrimination as a result of section 212 **EQA** that provides:

> 212 General interpretation
>
> (1) In this Act— … "detriment" does not, subject to subsection (5), include conduct which amounts to harassment;

15. Section 136 **EQA** makes provision for the burden of proof in discrimination claims:

> 136 Burden of proof
>
> (1) This section applies to any proceedings relating to a contravention of this Act.

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

16. The approach to the burden of proof in discrimination claims was considered in **Igen Ltd (Formerly Leeds Careers Guidance) and Others v Wong** [2005] ICR 931:

> (1) Pursuant to section 63A of the 1975 Act, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the claimant. These are referred to below as "such facts".
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
>
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
>
> (5) It is important to note the word "could" in section 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
>
> (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.
>
> (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
>
> (9) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the employer.
>
> (10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
>
> (11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
>
> (12) That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

17. In **Martin v Devonshires Solicitors** [2011] ICR 352 it was noted by Underhill J (P):

> 38. The tribunal does not in the passage which we have set out at para 18 above, or anywhere else in the reasons, refer explicitly to either section 63A of the 1975 Act or section 17A(1C) of the 1995 Act, which provide, in terms too well known to require setting out here, for the so-called "reverse burden of proof", or to the decision of the Court of Appeal in *Igen Ltd (formerly Leeds Career Guidance) v Wong* [2005] ICR 931 , which gives guidance on the effect of those provisions. Mr Stephenson submitted that that showed that the tribunal had "failed to deal properly with the

> burden of proof" and had "failed to have due regard to the guidance in *Igen Ltd v Wong*".
>
> 39. This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination — generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head—"the devil himself knoweth not the mind of man" (per Brian CJ, YB Pas 17 Edw IV f1, pl 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law.

18. In **Hewage v Grampian Health Board** [2012] UKSC 37, [2012] ICR 1054 Lord Hope of Craighead DPSC having considered **Igen** and **Madarassy v Nomura International plc** [2007] EWCA Civ 33; [2007] ICR 867 held:

> The points made by the Court of Appeal about the effect of the statute in these two cases could not be more clearly expressed , and I see no need for any further guidance . Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* (para 39), it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination . But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

19. I considered the authorities in this area in **Field v Steve Pye and Co. (KL) Limited and Others** [2022] EAT 68, noting that:

> 41. It is important that employment tribunals do not only focus on the proposition that the burden of proof provisions have nothing to offer if the employment tribunal is in a position to make positive findings on the evidence one way or the other. If there is evidence that could realistically suggest that there was discrimination it is not appropriate to just add that evidence into the balance and then conduct an overall assessment, on the balance of probabilities, and make a positive finding that there was a non-discriminatory reason for the treatment. To do so ignores the prior sentence in *Hewage* that the burden of proof requires careful consideration if there is room for doubt.

42. Where there is significant evidence that could establish that there has been discrimination it cannot be ignored. In such a case, if the employment tribunal moves directly to the reason why question, it should generally explain why it has done so and why the evidence that was suggestive of discrimination was not considered at the first stage in an *Igen* analysis. Where there is evidence that suggests there could have been discrimination, should an employment tribunal move straight to the reason why question it could only do so on the basis that it assumed that the claimant had passed the stage one *Igen* threshold so that in answering the reason why question the respondent would have to prove that the treatment was in no sense whatsoever discriminatory, which would generally require cogent evidence. In such a case the employment tribunal would, in effect, be moving directly to paragraphs 10-13 of the *Igen* guidelines.

43. Although it is legitimate to move straight to the second stage, there is something to be said for an employment tribunal considering why it is choosing that option. If at the end of the hearing, having considered all of the evidence, the tribunal concludes that there is nothing that could suggest that discrimination has occurred and the employer has established a non-discriminatory reason for the impugned treatment, there would be no error of law in just answering the "reason why" question, but it is hard to see what would be gained by doing so, when the tribunal has already concluded that there is no evidence that could establish discrimination, which would result in the claim failing at the first stage . There is much to be said for making that finding and then going on to say that, in addition, the respondent's non-discriminatory reason for the treatment was accepted.

44. If having heard all of the evidence, the tribunal concludes that there is some evidence that could indicate discrimination but, nonetheless, is fully convinced that the impugned treatment was in no sense whatsoever because of the protected characteristic, it is permissible for the employment tribunal to reach its conclusion at the second stage only. But again it is hard to see what the advantage is. Where there is evidence that could indicate discrimination there is much to be said for properly grappling with the evidence and deciding whether it is, or is not, sufficient to switch the burden of proof. That will avoid a claimant feeling that the evidence has been swept under the carpet. It is hard to see the disadvantage of stating that there was evidence that was sufficient to shift the burden of proof but that, despite the burden having been shifted, a non-discriminatory reason for the treatment has been made out.

45. Particular care should be taken if the reason for moving to the second stage is to avoid the effort of analysing evidence that could be relevant to whether the burden of proof should have shifted at the first stage. This

> could involve treating the two stages as if hermetically sealed from each other, whereas evidence is not generally like that. It also runs the risk that a claimant will feel that their claim that they have been subject to unlawful discrimination has not received the attention that it merits.
>
> 46. Where a claimant contends that there is evidence that should result in a shift in the burden of proof they should state concisely what that evidence is in closing submissions, particularly when represented

The relevant complaints

20. In broad overview, the respondent undertook a restructuring exercise. The respondent contended that the claimant had accepted a role at a lower grade. The Employment Tribunal found this was not the case and there was no proper basis for the respondent to believe that the role had been accepted by the claimant. The claimant became unwell and was eventually dismissed purportedly because of her ill health absences. The Employment Tribunal held that the principle reason was redundancy but also that the reliance on her ill health absences was discrimination because of something arising in consequence of disability.

The medical referral

21. When the claimant was referred to occupational health, her manager, Tracy Furlow, ticked a box on the referral form querying whether ill health retirement would be appropriate. The Employment Tribunal held that this constituted age related harassment:

> 403. Ticking a box on the respondent's occupational referral form on 19 February 2017 asking the OHP to comment upon the claimant's 'retirement due to ill health'
>
> 404. It was not disputed that this happened. In our view, the claimant has shown facts from which we could conclude that this decision was because of the claimant's age. It is inconceivable, in our view, that Ms Furlow would have ticked the box had the claimant been substantially younger. The respondent submitted that a question about ill health retirement was inherently unconnected with age. Ill health retirement is available despite age rather than because of it. And in any event, they say, the claimant could not have been granted ill health retirement because she was already over retirement age.]
>
> 405. We reject the respondent's submissions. The key part of the phrase

"ill health retirement" is "retirement". The purpose of granting ill health retirement is for access to a pension. It is obvious, in our view, that most people automatically and naturally associate receipt of a pension with an older person. We emphasise that we just do not believe that Mrs Furlow would even have considered the possibility of ill health retirement for someone much younger than the claimant. The fact that Mrs Harrad and Mr Bagnall knew that the claimant could not access ill health retirement is irrelevant. The question for us is whether Mrs Furlow knew and/or was thinking about that when she ticked the box and we conclude that she did and/or was not.

406. The claimant has therefore shown facts from which we could conclude both that the decision to tick the ill health retirement box was because of her age and, in so far as it relates to harassment, related to her age. For the same reasons, we find that it was unconnected with disability.

407. Mrs Furlow gave a number of inconsistent explanations for her decision to tick the box throughout the period from the claimant's initial complaint about it up to the final hearing which we will not repeat. The respondent has failed to provide evidence to show that the decision to tick the box was in no way related to the claimant's age.

408. We also find that this was detrimental treatment and unwanted conduct. It is perfectly clear from the evidence given by the claimant – at the tribunal and from her initial complaints about it – that she was upset by this decision. In the particular circumstances, we find that any reasonable employee would be. It was not an unjustified sense of grievance, but a genuine and legitimate concern about how the claimant had been treated or, more accurately, how she believed she was perceived, by the respondent.

409. As is clear, we find that the question about ill health retirement would not have been asked about a younger person. Subject to our decision about time limits and the effect of s112 Equality Act 2010 the claimant's claim of direct age discrimination on this point is made out.

410. In respect of the claimant's claim of harassment, we must consider whether the conduct – the act of ticking the box enquiring about ill-health retirement – have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

411. We conclude that it was not the purpose of Ms Furlow to do that – we have heard no evidence that it was. However, it did have that effect. The claimant said on many occasions that it left her feeling as if she was

> regarded as old. She said she had never felt like that before. A one off incident can amount to an act of harassment if it is sufficiently serious. From the claimant's perspective, it was serious. We find that it created for her an offensive and degrading environment to the extent that she ultimately went off sick (although we do not find at this stage that there was a legal direct causal relationship between the act in question and the claimant's illness).
>
> 412. We are required to consider whether, having regard to the claimant's circumstances, it was objectively reasonable for the conduct to have that effect. We find that it was. We are mindful of the warning by the EAT not to encourage a culture of hypersensitivity, but we think that although one person might brush such an act off, another person might react in the way that the claimant did and both reactions are reasonable.
>
> 413. As we have made clear, we do not accept the respondent's attempts to dismiss the comment as unrelated to age. It is obvious why someone would conclude it was – as not only the claimant, but the occupational health adviser also did. In the particular circumstances where the claimant reasonably perceived her job to be at risk because of the restructure exercise, her age, her long service, and that there was no objective justification for Mrs Furlow to ask the question that she did, it was reasonable for the claimant to perceive the effect of this as offensive and degrading.
>
> 414. For these reasons, (and subject to our decision about time limits below) we find that the claimant's claim of harassment related to age on this allegation is made out.
>
> 415. As the detriment relied on (ticking the ill health retirement box) amounts to an act of harassment, it cannot, therefore, also under s 112 Equality Act 2010 amount to an act of direct discrimination and the claimant's claim that this act amounts to direct age discrimination is unsuccessful.

22. That finding is not subject of a ground of appeal that was permitted to proceed. The Employment Tribunal found that the unwanted conduct that caused the offensive and degrading environment was because of the claimant's age and, therefore, was related to it.

Confidentiality

23. The Employment Tribunal dismissed a complaint that an accusation of breaching confidentiality was discriminatory:

> 393. Accusing the claimant of breaching confidentiality when she raised with Tracy Furlow that she had provided inaccurate information.
>
> 394. We have found that this did happen, and that **Ms Furlow's reaction to the incident was not wholly reasonable**. We have found that the reason for Ms Furlow's response is that she was irritated and defensive. This allegation is out of chronological order in the list of issues. In fact, the allegation was made in a letter dated 28 March 2017 from Ms Furlow to the claimant. **This was after the occupational health referral in February 2017 and after the claimant had raised an allegation of age discrimination at the meeting on 2 March 2017**.
>
> 395. In our judgment, **this accusation was not related to the claimant's age** or disability. (The claimant was not disabled at this time). **The claimant has not produced sufficient evidence from which we could conclude that this unjust criticism was because of the claimant's age and neither (in so far as it is relevant for the purposes of the harassment claim) is there any link at all to *disability***. It was, we have found, **more likely borne out of frustration** at the claimant. [emphasis added]

24. Although the Employment Tribunal referred to there being no link to disability at paragraph 395, I consider that this must be a reference to age, as the Employment Judge had noted in the previous paragraph that the claimant was not disabled at the time. This finding is challenged in the first ground of cross-appeal. Mr Horan, for the claimant, asserted that the Employment Tribunal failed to apply the **Igen** guidance, in particular by failing to require that the respondent disprove discrimination by providing cogent evidence. It is asserted that the Employment Tribunal merely decided that it was "more likely" that the reaction was borne out of frustration.

25. While the reasoning is brief it has to be seen in the context of a very lengthy judgment dealing with a myriad of allegations. Reading the judgment as a whole it is clear that the Employment Tribunal clearly had in mind the two stage approach to the burden of proof. I consider that the Employment Tribunal decided that this complaint failed at the first stage because it saw no evidence to suggest the treatment was because of or related to age. Once the complaint failed at the first stage there was nothing improper in the Employment Tribunal concluding that there was an alternative non-discriminatory reason for the treatment. The Employment Tribunal was entitled to determine the

alternative reason without requiring cogent evidence that showed that the decision was in no sense whatsoever because of, or related to, age because the complaint had already failed at the first stage. The finding about the alternative reason for the treatment was part of the tribunals overall analysis of the case. It was not necessary for the Employment Tribunal to make that finding, but it was not an error of law to do so. The first ground of cross-appeal fails.

Banding

26. The Employment Tribunal rejected a complaint about a reduction in the claimant's hours and band. That is the subject of the second ground of cross-appeal. The Employment Tribunal held:

> 416. Reducing the claimant's banding from Band 4 to Band 5 and her hours from 37.5 to 18.75 on 15 May 2017 by placing her in the Band 4 IT Data position.
>
> 417. In our judgment, **this act was not related to either age or disability in any way**. The respondent was, for some reason, wholly unable to accept that the claimant was in fact redundant from 31 January 2017. In truth, we do not know why. We have found that the respondent did not genuinely believe that the claimant had accepted the Band 4 role. However, we have heard no evidence that links the decision to attempt to force the claimant into a role she repeatedly rejected was related to her age or disability in any way. In any event, we have found that the claimant was not disabled at this point. We think it was most likely because the respondent did not want to dismiss anyone for redundancy.
>
> 418. The respondent had a policy of redeploying people following the restructure exercise. We heard that it did that for many of the staff affected by the 2016 exercise including, for example Ms Osborne who ended up taking a lower banded role. The policy of wanting to avoid redundancies is often admirable, but not if it results in the circumstances described at length above.
>
> 419. **We have considered whether the fact of the il-health retirement question, which we have found is age discrimination was sufficient to link the acts. We conclude that this is sufficient to reverse the burden of proof**. We could conclude that, in light of the discriminatory act, the decision to change the claimant's role was, at least in part, to persuade the claimant to retire thereby avoiding the need to dismiss the claimant and make her redundant. It is obvious, we think, that such a thought process would not apply to a younger person under normal retirement age.

> 420. **We think, however, that the respondent has shown a reason for the treatment which was not because of or related to age. The respondent successfully redeployed many other staff. We have concluded that the respondent had an informal "no redundancy" policy. They have only made one person redundant as far as the respondent's witnesses could remember**.
>
> 421. **The reason for the respondent's belligerence about the claimant's position, was not, therefore, because of or related to her age and nor was the decision to put her into a lower graded role on part-time hours**.
>
> 422. The claimant's claims of direct age and disability discrimination and harassment in relation to this allegation are unsuccessful. [emphasis added]

27. The Employment Tribunal concluded that the burden of proof had shifted but the complaint failed at the second stage. The Employment Tribunal did not refer to "cogent" evidence or to the respondent establishing that the treatment was in "no sense whatsoever" because of, or related to, the claimant's age. I do not consider it is necessary that when considering every complaint that the Employment Tribunal must recite that wording. The annex to **Igen** sets out valuable guidance, but it is not a statute and should not be treated as such. The Employment Tribunal had specifically directed itself by reference to **Igen**. Reading the lengthy judgment as a whole, it is clear that the Employment Tribunal understood the task it had to perform. The Employment Tribunal specifically concluded "this act was not related to either age or disability in any way". While briefly reasoned, I do not consider that there was any error of law in the decision of the Employment Tribunal to dismiss this complaint. The second ground of cross-appeal fails.

The grievance

28. The Employment Tribunal held that the grievance was predetermined and constituted age related harassment. That determination is challenged in the first ground of appeal. The Employment Tribunal held:

> 427. Predetermining the outcome of the claimant's grievance on 18 January 2018;

428. **We have found that effectively the outcome of the claimant's grievance was predetermined.** There was no investigation into the allegations of age discrimination and members of the panel asked leading questions of the management reflecting their view of the case.

429. The grievance, in so far as it related to the complaint about the ill health retirement question, was based on an assumption that Mrs Furlow had made a mistake. It was not, therefore, properly considered and, in our view, there was no objective consideration by the grievance panel of this part of the complaint. Similarly, it was, or should have been, obvious that the claimant had not accepted the Band 4 job. Again, the panel did not consider this objectively, but adopted without objective analysis the management case that the decision to put the claimant in the job was in accordance with policy.

430. We have found that the claimant was disabled by this time. However, in our view the decision of the panel was not because of the claimant's age or disability. **We have not heard any evidence from which we could conclude that the approach of the panel was because of age or disability. In our view, it was conducted in the way it was because of the respondent's grievance policy.**

431. The claimant's claims of direct age and disability discrimination in relation to this allegation are therefore unsuccessful.

432. However, in our view, the outcome and the conduct of the hearing were clearly unwanted conduct from the claimant's perspective. The claimant's allegation of age discrimination was dismissed without any suggestion that it had been properly considered. The grievance letter wrongly stated that Ms Furlow had apologised to the claimant for the ill health retirement question. We have found that she did not.

433. By this stage, the claimant had been making a complaint about age discrimination for almost a year. We find that dismissing the claimant's complaint in the way that the grievance panel did violate the claimant's dignity. She was obviously, and it was obvious to the respondent, in a bad way and the grievance outcome appeared to make the claimant feel worse.

434. The claimant was entitled to have her complaints considered and investigated and they were not. It was therefore, in our view, objectively reasonable for the grievance outcome to have the effect of violating the claimant's dignity. Again, we have had regard to the imprecation by the EAT not to devalue harassment, but in our view the conduct of the respondent in predetermining, and not taking sufficiently seriously, the claimant's grievance, including about age discrimination, did have that

effect.

> 435. **This is also, in our view, related to age**. **One of the key complaints the claimant was making was about the age discrimination** – it has been a consistent complaint of the claimant throughout. The grievance panel did not even consider that **Ms Furlow might have, consciously or unconsciously, discriminated against the claimant because of her age.** They simply adopted the assumption that initially came from Nicky Pilgrim that the box on the referral form was a mistake.
>
> 436. To this extent, the decision was related to the claimant's age and for that reason, this allegation of harassment succeeds. [emphasis added]

29. The only connection the Employment Tribunal found between the claimant's age and the grievance process was that the grievance included an allegation of age discrimination. The Employment Tribunal did not identify anything that connected the claimant's age to the prejudgment of the grievance. It was the prejudgment of the grievance that constituted the "conduct" that had to be "related to" age. There was no use of ageist language that could have resulted in a conclusion that the prejudgment of the grievance inherently involved age discrimination. Accordingly, the Employment Tribunal was required to consider the mental process of the grievance panel. They had done so in rejecting the complaint of direct discrimination. The Employment Tribunal's rejection of the contention that the panel was influenced by the claimant's age in their approach to the grievance means that the age harassment claim was bound to fail. Nothing has been identified that could establish that the prejudgment of the grievance was related to the claimant's age. The first ground of appeal succeeds and, because there is only one possible outcome on the findings of the Employment Tribunal, I substitute a decision rejecting this complaint.

Continuing act

30. The Employment Tribunal found that the dismissal of the claimant, which took into account disability related absence, was an act of discrimination because of something arising in consequence of disability. That finding is not challenged in this appeal. The Employment Tribunal concluded that the dismissal was part of conduct extending over a period that was linked to the age discrimination complaints that succeeded in respect of the box on the occupational health referral raising the

possibility ill health retirement being ticked and the prejudgment of the grievance:

> 516. Subject to our decision on time, we have upheld the following allegations of discrimination:
>
> 517. Ticking a box on the respondent's occupational referral form on 19 February 2017 asking the OHP to comment upon the claimant's 'retirement due to ill health'
>
> 518. Harassment related to age
>
> 519. Predetermining the outcome of the claimant's grievance on 18 January 2018;
>
> 520. Harassment related to age
>
> 521. Dismissing the claimant on 22 May 2018.
>
> 522. Discrimination because of something arising in consequence of disability
>
> 523. Only the last incident is within the primary time limit. The first question to ask, therefore, is whether the first two incidents form part of a continuing course of conduct with each other and/or with the dismissal. Were they, or any of them, part of an ongoing state of affairs?
>
> 524. This is not a case where there are allegations of institutional discrimination, or a campaign of harassment. **However, all of the issues arose from the change management process and the removal or proposed removal of the claimant's job**.
>
> 525. She was initially off sick with stress which she attributed at least in part to the restructure. This prompted the occupational health referral with the ill health retirement question. From the claimant's perspective, the impact of the continuing change management and the respondent's continued failure to deal with her grievance to her satisfaction exacerbated her illness. The claimant's evidence that we have accepted is that her health worsened following communications about her job in February 2018.
>
> 526. Although the incidents are separated in time and we have found most of the intervening events not to be discriminatory, **in our view these three incidents are intrinsically linked with each other. In reality, and from the claimant's perspective, everything from the November 2016 meeting has been linked and a continuation of a process and actions**

> **by the respondent.** This culminated in the claimant's discriminatory dismissal.
>
> 527. **In our judgement, therefore, all of these actions are part of a continuing course of conduct – there was an ongoing state of affairs relating to the change management, the ill health retirement question and the claimant's illness and latterly disability. All of these issues were inextricably linked.**
>
> 528. The last incident of discrimination, being the claimant's discriminatory dismissal, was in time and it was the last in a series of events forming a continuous course of conduct. The tribunal therefore has jurisdiction to hear these allegations of discrimination. [emphasis added]

31. This determination is challenged in the second ground of appeal. The Employment Tribunal found that the events were linked because they all arose in the course of the implementation of the restructure. However, for there to be conduct extending over a period there must have been ongoing discriminatory conduct. It is not enough that incidents are linked and that later events would not have occurred but for the earlier events, there must be something in the conduct that involves continuing discrimination. In **Hendrix** Mummery J referred to the possibility that "the commissioner was responsible for an **ongoing situation or a continuing state of affairs *in which female ethnic minority officers in the service were treated less favourably***". He referred to an ongoing situation or a continuing state of affairs that was discriminatory.

32. Those who decided to dismiss the claimant had nothing to do with the decision to tick the ill health retirement box in the medical referral. There was a substantial gap between these two events and they involved different types of prohibited conduct, two different protected characteristics and decisions by different people. While none of those factors precluded the possibility of there being conduct extending over a period, it would have been necessary for the Employment Tribunal to clearly identify what the continuing discriminatory conduct was. The Employment Tribunal did not identify anything that could establish a continuing discriminatory state of affairs.

33. The second ground of appeal succeeds. I substitute a finding that the two complaints that have succeeded did not form part of conduct extending over a period. That is the only possible

determination on the basis of the facts found by the Employment Tribunal. That leaves open the possibility that the time limit might be extended beyond three months on just and equitable grounds.

34. That issue will be remitted to the same Employment Tribunal. Most of the findings of the Employment Tribunal have not been challenged in this appeal or have been upheld. The Employment Tribunal took great care over the judgment and should be able to determine this issue on the basis of limited further evidence and submissions. Remission to the same Employment Tribunal is likely to save expense and is appropriate in this matter.