Neutral Citation Number: [2025] EAT 1

Case No: EA-2022-001132-NLD
EA-2023-000067-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 03 January 2025

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT
MR NICK AZIZ
MR STEVEN TORRANCE

Between :

THE BRITISH COUNCIL

Appellant

- and -

MR P SELLERS

Respondent

- -
- -

Jane McCafferty KC and Spencer Keen (instructed by Mills & Reeve LLP) for the **Appellant**
Robert Lassey (instructed by Advocate) for the **Respondent**

Hearing dates: 12 & 13 November 2024
- -

JUDGMENT

SUMMARY

Unfair dismissal – re-engagement – section 116 ***Employment Rights Act 1996***

Having upheld the claimant's complaint of unfair dismissal, the employment tribunal ("ET") subsequently ordered that he should be re-engaged. The respondent appealed.

Held: allowing the appeal

The issue of contributory conduct having been withdrawn by the respondent, the ET had erred in nevertheless proceeding to determine whether or not the claimant had actually committed the misconduct alleged; that was not a requirement of section 116(3)(c) **Employment Rights Act 1996** and went beyond the ET's function (observations of Rimer LJ at paragraph 31 **Muschett v HMPS** [2010] IRLR 451 applied). The ET had been entitled to reject the respondent's case on practicability in relation to events post-dating the claimant's dismissal (relating to his continued occupation of his work accommodation and to potential redundancies within the respondent). The real issue for the ET was whether re-engagement was likely to be practical, given the respondent's stated belief that the claimant had misconducted himself such that he could no longer be trusted in its employment. In this regard, however, the ET had wrongly held that it was irrational for the respondent to hold that belief based on the report of an independent external investigator. In reaching this conclusion, the ET had substituted its view as to what could constitute a "fair" investigation and as to what conclusion was to be reached as a result of such an investigation. That view seemed to be informed by the ET's own conclusion regarding the claimant's conduct and its finding that the respondent could not rationally rely on the independent investigator's report was perverse.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. These appeals raise questions regarding the approach an Employment Tribunal ("ET") is to take when determining whether to make an order for re-engagement on a claim of unfair dismissal under the **Employment Rights Act 1996** ("ERA").

2. In giving this judgment, we refer to the parties as the claimant and respondent, as before the ET. This is our unanimous judgment on the respondent's appeals against the following decisions of the London Central ET (Employment Judge G Hodgson, sitting alone): (1) the re-engagement order promulgated on 26 September 2022 (as amended under the slip rule on 14 November 2022), after a remedy hearing on 5-8 September 2022; and (2) the further decision, promulgated on 23 December 2022, reached after a preliminary hearing on 20 December 2022, concerning the terms of the re-engagement order. The claimant appeared in person before the ET and at all earlier stages in the appeal proceedings, but was represented before us by Mr Lassey of Counsel, acting *pro bono*, instructed by Advocate. The respondent was represented before the ET by Mr Keen of Counsel, who is now led by Ms McCafferty, King's Counsel. We record our thanks to all the representatives who have assisted us in this appeal, but are particularly grateful to Mr Lassey for taking on a late brief, *pro bono*, with such skill and diligence.

The factual background

3. The respondent is a non-departmental public body, incorporated by Royal Charter; it is the United Kingdom's international organisation for cultural relations and educational opportunities, and operates in over 100 countries, liaising closely with the British Embassy. The claimant had been employed by the respondent from 1 September 1990; with effect from 1 September 2014, he had held the post of country director for Italy. The country director role is the most senior within each country the respondent operates, and the claimant was responsible for all aspects of the respondent's operation in Italy, and for developing and maintaining strong relationships with key stakeholders.

4. On Sunday 16 December 2018, the claimant and his wife hosted a daytime social gathering at

their flat in Rome, which was attended by an employee of the British Embassy in Italy, "ZZ". After the event, ZZ made a complaint to the Embassy, alleging inappropriate behaviour by the claimant; it was ZZ's contention that, when she went to leave, the claimant, in the course of kissing her goodbye, had kissed her on the side of her mouth or on her lips, and placed his hands on her breasts, rubbing down in a sexual manner. Although accepting that he had kissed ZZ's cheeks, in the normal Italian way, the claimant has at all times denied this allegation of inappropriate conduct.

5. Following an investigation and a disciplinary hearing, on 7 May 2019, the claimant was dismissed for gross misconduct. His appeal against that decision was rejected and a later submission of further evidence, from a Ms Marziota, countersigned by her husband Mr Gerace, was met with a refusal to re-open the matter.

The ET liability decision

6. On 8 September 2019, the claimant presented a claim to the ET, in which he contended he had been unfairly dismissed. The full merits hearing of that claim took place from 17-23 November 2021. By its reserved judgment promulgated on 22 December 2021, the ET upheld the claimant's case on liability.

7. In reaching its decision, the ET, adopting the approach laid down in **BHS v Burchell** [1980] ICR 303, found the claimant was dismissed because the relevant decision-taker genuinely believed he had touched ZZ's breasts in a sexual manner. The ET considered, however, that this belief was unreasonably derived from an overly narrow view, not supported by a reasonable investigation, and found that the appeal process had failed to rectify those deficiencies. In addition, although recognising that, generally, it might not be unfair to ignore a request to re-open a dismissal decision post-appeal, the ET considered this case was an exception: the claimant had felt constrained by confidentiality at earlier stages, and the respondent's policy allowed for the possible re-opening of an appeal. The ET expressed the view that, if Ms Marziota's evidence had been accepted, there was "*no rational basis for believing that the dismissal would not have been set aside*" (ET liability, paragraph 7.112).

8. In giving its decision on liability, the ET made the following observations as to the further

hearing that would then need to take place on remedy:

> "7.119 I am conscious that it is necessary to have a remedy hearing. The question of a Polkey deduction and any deduction for contributory fault has been left to the remedy hearing. When considering contributory fault, I will need to decide whether any action of the claimant contributed to his dismissal. I anticipate that will involve deciding whether the claimant committed the alleged sexual assault. As this is a question of fact, it may be appropriate to hear further evidence. It may be necessary to hear from witnesses. The respondent may choose to call ZZ."

Events post-dating the ET's liability decision

9. Having received the ET's judgment on liability, the respondent took the decision to instruct an external, independent investigator to re-investigate these matters. In giving evidence to the ET, the respondent's chief operating officer, Mr Williams, explained (at paragraph 18 of his statement):

> "... Members of the Executive Board involved in decision making around this case were very concerned by the [ET's] conclusion that the original internal investigation into the allegations against Mr Sellers had been inadequate, characterised by serious oversights, unreasonable assumptions, procedural errors and a failure to consider all available and necessary evidence. Although two internal investigations had resulted in the finding that the alleged misconduct had occurred, and both decision makers had an honest belief that it had, due to the flaws in the investigation process the Judge had determined that that belief was unreasonable. This raised a great deal of concern for the organisation."

10. Mr Williams had then gone on to state (paragraph 19 of his statement):

> ".... there was concern that the Tribunal may order the British Council to reinstate Mr Sellers and award him damages in circumstances where he may have been guilty of sexually assaulting a member of the British Embassy. ... Had the investigator concluded categorically that there was no evidence of the misconduct, and the allegation of sexual assault could not be upheld, the British Council would have taken steps to consider reinstatement in a suitable role as we would have had evidence with which to address any internal or external concerns raised about Mr Sellers' potential future conduct. ..."

11. An independent barrister, Mr Jack Mitchell, was instructed to carry out the re-opened investigation. Mr Mitchell's instructions included a copy of the ET's liability decision, in which the relevant part of Ms Marziota's statement was set out; he was, however, also instructed to interview Ms Marziota and Mr Gerace. More generally (as stated in the opening section of his subsequent report), Mr Mitchell considered he was to conduct a fresh investigation, speaking to all witnesses who had previously provided evidence, along with others who had been identified who had not previously

spoken to the respondent, and to seek to obtain additional evidence to further substantiate or disprove matters. In his report, Mr Mitchell referred to also having been asked to consider new evidence, said to be provided by an individual who "*knew of colleagues who had suffered similar treatment*" by the claimant. In fact, it seems this evidence was not forthcoming and Mr Mitchell stated that he had disregarded this information, expressly recording this was "*irrelevant to the issue I have to determine*".

12. In carrying out his investigation, Mr Mitchell spoke to 13 individuals, including ZZ; he also reviewed documentary evidence, including additional material provided by ZZ. Although Mr Mitchell sought to speak with the claimant and his wife, they declined his invitation, both relying on their previous interviews. Mr Mitchell was also unable to interview Ms Marziota and only spoke briefly to Mr Gerace: having made contact, an arrangement to talk could not proceed as Ms Marziota was giving birth (Mr Gerace communicated this to Mr Mitchell by telephone), and a subsequent attempt to contact the couple was unsuccessful.

13. Mr Mitchell provided his report, of some 700 pages, to the respondent on 5 August 2022. It was his conclusion that ZZ had been telling the truth when she alleged there had been sexual touching of her by the claimant on 16 December 2018.

14. Mr Mitchell's report was sent to the respondent's global network director, Mr Walker, for consideration. Mr Walker did not question any substantive part of the report, or the process by which it was obtained. By his decision of 20 August 2022, Mr Walker determined that the finding of gross misconduct against the claimant would be upheld; in his evidence to the ET at the remedy hearing, Mr Walker explained his reasoning as follows (set out at paragraph 8 of his statement):

> "Having reviewed and considered Jack Mitchell's revised investigation report and supporting documents in detail I concluded that his findings were supported by the evidence and that the allegation in question amounted to an act of gross misconduct, one that I believed to be a serious example of "unwanted conduct which is intended to, or has the effect of, violating an individual's dignity" under the British Council's Bullying and Harassment Policy ...."

15. Meanwhile, the claimant had remained in his apartment in Rome and a dispute arose as to the continuing provision of that accommodation. The respondent commenced legal proceedings against the claimant in Italy but these were later withdrawn with the claimant's consent (the respondent paying

the claimant's costs). Ultimately, it appears that the flat was re-possessed because the landlord (who was not the respondent) took action. An issue was also raised about the claimant delaying returning artwork that had been loaned to him, albeit there was no suggestion that he had intended to keep it permanently. The ET accepted the claimant's account of these events, as follows:

> "The Respondent [is] ... correct in saying that I stayed in the apartment after my dismissal. I stayed because I understood that housing would continue to be provided until the matter went to the Employment Tribunal. The Respondent themselves, in their Counter Schedule of Loss ... confirms this. I received no communication about alternative arrangements or about repatriation and was surprised to be taken to court over this matter. The artworks mentioned ... are incidental, part of the fixtures and fittings of the apartment. I submit that my behaviour was in good faith in terms of my expectations of my rights. The litigation went through the courts and was settled. The [respondent] requested me to allow them to withdraw and agreed to pay my costs .... As far as I was concerned, the situation was resolved amicably. Indeed, the Respondent confirms there are situations where current or serving employees are involved in litigation with [it].... I submit that this is part of a normal process and does not have to result in any loss of trust or confidence on either side." (claimant's submission; ET remedy paragraph 54)

16. It was also the respondent's case that, during the period since the claimant's dismissal, there had been a process of re-organisation, which had seen a 21% reduction in posts at the level of country director and had led to an on-going programme of voluntary redundancies, with the possibility of competitive selection for the remaining posts and compulsory redundancy for those who were unsuccessful.

The remedy hearing and the respondent's position on re-engagement

17. At the remedy hearing, it was common ground that the claimant's losses would be in excess of the statutory cap. The claimant, however, confirmed that he wished to pursue a claim for re-engagement and, as it would not be possible to consider that issue *and* all matters relevant to any compensatory award, it was agreed the ET should proceed to first address the question of re-engagement.

18. Although the respondent's pleaded case had originally included a submission that "*the claimant contributed substantially to the dismissal by his conduct ...*", at the outset of the remedy hearing, the respondent confirmed that it was no longer pursuing that argument, explaining:

> "... it does not rely on any of the evidence, in this case, to advance a positive

> case that the Claimant caused or contributed to his dismissal in any way. The Respondent relies upon the evidence to show that its concerns about the Claimant's conduct were genuine and rational and make it impracticable to re-employ him." (see the respondent's response to the questions posed by the ET, recorded at paragraph 11 of the remedy decision)

19. On the question of practicability, it was the respondent's case that, given the findings of both its internal investigations and in the Mitchell report, there was a genuine, and rationally based, loss of trust and confidence in the claimant. Reliance was also placed on the dispute that was said to have arisen with the claimant relating to his continued residence of the apartment in Rome and failure to return the respondent's artworks. It was further said that a re-employment order would not be practicable as the reduction in available posts meant this would result in overmanning.

The ET's approach to the Mitchell report and its decision on re-engagement

20. Addressing first the respondent's decision to instruct Mr Mitchell to re-investigate ZZ's allegations, the ET concluded that:

> "35. ... the main purpose of the commissioning of the Mitchell report was to avoid paying damages and to resist an application for reinstatement. I find it was not requested as part of a genuine attempt to rectify previous errors."

21. The ET recorded its concerns that the initial terms of reference provided to Mr Mitchell had included additional matters, forming no part of the original case against the claimant. Finding that the question why new and prejudicial assertions of misconduct were included in the instructions had not been explained, the ET concluded:

> "... on the balance of probability, the assertions were included to suggest a pattern of behaviour. They were included in a deliberate attempt to prejudice the ultimate findings. They seriously undermine any suggestion there was a true attempt to address previous deficiencies. The redaction of the information is unjustified and significant. The inclusion of such unsupported new allegations is at odds with the respondent's assertion that there was a genuine attempt to investigate further."

22. Acknowledging that there was no basis for thinking other than that Mr Mitchell had produced his report in good faith, the ET nevertheless held that he did so within a constrained timetable and with limited and distorted information; observing he had not sought any comments from the claimant nor did it appear he had given weight to the written statements of the claimant and his wife. In this regard,

the ET did not consider that the claimant could be criticised: he had engaged with the original investigation and process, and further investigation was outside any procedure, at a time when the claimant was no longer an employee:

> "40. ... No reasonable employer would have expected the claimant to participate in a further internal procedure, which formed no part of the respondent's normal policies, in circumstances where the central issue under consideration was before the tribunal. I find the respondent knew at all times that there was no prospect of Mr Mitchell interviewing the claimant or his wife and knew that the information on which Mr Mitchell could base his opinion would inevitably be incomplete."

23. The ET also noted that Ms Marziota's statement (countersigned by her husband) had not been sent to Mr Mitchell; it considered that omission was:

> "42. ... significant and not explained, particularly given my judgment emphasised the importance of that evidence."

24. As for the decision taken by the respondent on receipt of the Mitchell report, the ET considered the evidence given by Mr Walker, but concluded that:

> "52. ... Mr Walker, simply accepted the finding of Mr Mitchell. During the course of his evidence, he conceded that there were difficulties with the report and the potential key evidence had not been considered. He did not consider those obvious deficiencies at the time, despite being tasked to reach his own decision."

25. Given this finding, the ET went on to consider what would have happened had Mr Mitchell said the conduct alleged by ZZ had not occurred, continuing:

> "... Mr Walker would have accepted that finding. I am satisfied that he placed reliance wholly on the Mitchell report. It follows that Mr Walker did not hold an independent view that the claimant had committed misconduct. He was prepared to accept an appropriate and proper finding of a proper investigation. There is no suggestion before me that any member of the senior leadership team of the respondent has, independently, formed the view that the claimant committed a sexual assault. The only direct evidence I have is from Mr Walker, and he relied wholly on the report. As I am satisfied that he would have accepted a finding that the claimant did not commit the sexual assault, I am not satisfied that he has formed an intractable view that the claimant committed the misconduct. I have no reason to believe that the respondent's managers, should it now accept that there are deficiencies in the process, will maintain the view the claimant committed the alleged sexual assault; however, the evidence I have is limited, but I have no doubt that Mr Walker has an open mind."

26. Given this context the ET rejected Mr Williams' evidence that there were continuing concerns

about reinstating the claimant because of the effect that might have on stakeholders and others:

> "53. ... that reservation is in the context that there is no specific finding that he did not commit the misconduct which could be communicated to the world at large. That was the position before this hearing."

27. Separately, the ET dismissed the concerns raised regarding the litigation in Italy:

> "55. The evidence before me demonstrates that reinstatement would be considered based upon the findings of the Mitchell report. There is no suggestion that such consideration would be contingent upon any matter relating to the Italy litigation. There is no evidence to suggest that the Italy litigation was a significant consideration. There is no evidence in support of the contention that the Italy litigation fundamentally damaged mutual trust and confidence, such as to be relevant to any claim of reinstatement of engagement. ..."

More particularly, referring to paragraph 19 of Mr Williams' witness statement, the ET found:

> "33. ... on the balance of probability, that had the Mitchell report concluded that the claimant had not sexually touched Ms ZZ, re-engagement was considered a possibility. There is no suggestion it would have been considered impracticable. There is no suggestion that there were any concerns about the litigation in Italy being a reason to refuse reinstatement."

28. The respondent had also questioned whether the claimant could be re-engaged given the on-going restructuring. The ET found, however, the suggestion that there were many more individuals chasing positions than there were positions available was "*speculation*"; considering the claimant's position, it concluded:

> "60. The last assessment the claimant received was that he "exceeded expectations." It is unclear whether he would have been reappointed as a country director Italy. His tenure had expired, and it may not have been extended. There is at least a possibility that he would have applied for and accepted another role. I do not need to consider in detail what jobs are currently available. It is common ground that there are positions available which would be suitable for the claimant and to which he could be appointed. There is no suggestion that they will not remain available in the foreseeable future during the period any re-engagement will take effect. Mr Williams speculates about whether the claimant would succeed in a competitive appointment. However, I do not consider that to be relevant to my decision at this stage."

29. Turning to the question of contributory fault, the ET first asked what the conduct in issue was , holding:

> "88. ... There can be no doubt about this. It is the alleged sexual touching at the party on 16 December 2018, ..."

and going on to direct itself as follows:

> "... In order to consider whether any conduct contributed to dismissal, it is first necessary to consider whether it happened at all."

30. Observing that contributory fault had not been decided at the liability hearing (on the contrary, it had been expressly reserved to the remedy stage), the ET noted that the respondent had had a clear opportunity to adduce evidence to establish what had actually happened. In this regard, it rejected the suggestion that it would not have been appropriate for the respondent to call ZZ to give evidence, noting that she had been contacted for the purposes of Mr Mitchell's investigation.

31. The ET further rejected the submission that the claimant had not given relevant evidence:

> "91. ... His evidence has been consistent and to the effect he did not commit the sexual assault."

32. Having regard to that testimony, and the other evidence available to it, the ET accepted the claimant's account, referring to various inconsistencies it considered arose on ZZ's reported testimony. It further considered the statement of Ms Marziota and Mr Gerace was important and corroborated the claimant's evidence. On the balance of probabilities, the ET concluded that the alleged sexual assault did not occur.

33. As for whether it would be practicable for the claimant to be re-employed, the ET noted that the claimant had accepted that it had been necessary for the post of country director for Italy to be filled after his dismissal. Thus accepting that it would not be appropriate to order reinstatement to the specific role, the ET concluded that it was, however, practicable for the claimant to be re-engaged.

34. On the question of the restructuring and the potential consequential redundancies, the ET considered the position to be far from clear, finding that the respondent's argument was one of expediency, which was not a proper reason to refuse to make an order for re-engagement. Moreover, the fact that the respondent might prefer to appoint someone else could not be conclusive, not least as it was in a position to accommodate the movement and re-positioning of displaced employees, for example by assigning them to specific projects.

35. As for the contention that there was a loss of trust and confidence, reminding itself that it must

not substitute its own view, and that its finding could not displace any belief held by the respondent that the claimant had committed the misconduct, the ET was not satisfied it had heard from all relevant decision-takers, or that all, or the majority, of the respondent's senior managers had formed the view that the claimant was guilty of that misconduct. Going on, in any event, to consider whether the view maintained by the respondent was genuinely held, based on rational grounds, while accepting that commissioning the Mitchell report did not mean the respondent did not believe the claimant had committed the misconduct, the ET found it demonstrated that the respondent accepted that it was not rational, reasonable, or appropriate to maintain a belief based on a fundamentally flawed investigation. As for what would have been necessary "*to have a fair investigation which could lead to a reliable finding of fact*", the ET stated:

> "130. ... the investigator should be competent and independent; the person accused must be able to participate fully; the investigator should have access to all relevant evidence; there should be a reasonable expectation that all relevant witnesses should participate; all relevant evidence should be identified; and a rational decision should be reached."

36. Accepting that Mr Mitchell was competent and "*transparently independent*" (ET remedy, paragraph 130), the ET, however, concluded:

> "136. There are proper grounds to doubt Mr Mitchell's ultimate conclusion. ... the material on which he based his conclusion was seriously limited and inadequate. ... As well as the other difficulties ..., it was clear the Mitchell report suffered from a systemic bias, as the claimant's evidence could never be properly considered. In that sense it was inevitable that the second investigation would be even more problematic and flawed than the first. ....
> 137. Relying on the report shows serious irrationality. The rationale, as advanced, is that it was inappropriate to rely upon a flawed initial investigation, but it was appropriate to rely on the Mitchell report because it was underpinned by a proper investigation. Even on a cursory consideration, that argument is unsustainable. It relies on an assertion that the further investigation avoided the pitfalls of the first investigation. It did not. Further, the claimant was wholly excluded from the process, which sought to introduce new and unsubstantiated allegations. He could not be expected to participate. Relevant evidence was not obtained. There were obviously inconsistencies in Ms ZZ's account. Her apparent failure to disclose information to the original investigation was not addressed. The Mitchell report did not remedy the failures of the original investigation. Instead, it created an artificial situation which wholly excluded the claimant. It is irrational to rely on such investigation."

In these circumstances, the ET did not accept the respondent had a genuine belief based on rational

grounds, and, therefore, that it had "*genuinely and reasonably lost confidence in the claimant*" (ET remedy, paragraph 138).

37. On that basis, the ET determined that it was practicable for the respondent to comply with an order for the claimant's re-engagement.

38. As for the terms of the re-engagement order, the ET specified that, by 26 October 2023, the claimant was to be re-employed by the respondent at "*senior country director level or equivalent*"; it did not, however, set out the amounts that would be payable to the claimant as required by section 115(2) **ERA**, but instead provided further directions for the determination of such sums in the absence of agreement by the parties.

Events following the remedy hearing and the preliminary hearing on 20 December 2022

39. Subsequent to the remedy hearing, by email of 8 September 2022, the respondent submitted that it had not had the opportunity to address the ET on the benefits that might be due under an order for re-engagement. In the closing paragraphs of its remedy decision, the ET made clear its view that this would not prevent a re-engagement order being made (and complied with), although the parties could apply for further directions. The respondent does not accept that view is correct, but, after a further hearing on 20-21 September 2022, the ET ruled that lack of specificity in this regard would, in any event, be remedied by any award made under section 117 **ERA**. In its decision on this issue (promulgated 23 December 2022), the ET then stayed any consideration of remedy under section 117 pending the progress of the respondent's appeal before the EAT.

The relevant legal principles

The statutory framework

40. Chapter II of Part X of the **Employment Rights Act 1996** ("ERA") provides that a complaint of unfair dismissal may be presented to an ET, which shall, if it finds the complaint well-founded, first explain to the complainant the potential orders for reinstatement or re-engagement that the ET may make pursuant to section 113 (read together with sections 114 to 116). If the complainant wishes, the

ET will first consider making such an order (section 112(3)); if no order is made under section 113, however, the ET must proceed to make an award of compensation, calculated in accordance with sections 118 to 126 **ERA** (section 112(4)).

41. What is meant by an order for reinstatement or re-engagement is defined by sections 114 (reinstatement) and 115 (re-engagement) **ERA**. Relevantly, for present purposes, section 115 provides:

> "(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, ... in employment comparable to that from which he was dismissed or other suitable employment.
> (2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including— (a) the identity of the employer, (b) the nature of the employment, (c) the remuneration for the employment, (d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement, (e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and (f) the date by which the order must be complied with.
> ..."

42. Section 116 **ERA** then provides as follows:

> "116. Choice of order and its terms
> (1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account- (a) whether the complainant wishes to be reinstated, (b) whether it is practicable for the employer to comply with an order for reinstatement, and (c) where the complainant caused or contributed to some extent to his dismissal, whether it would be just to order his reinstatement.
> (2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.
> (3) In so doing the tribunal shall take into account- (a) any wish expressed by the complainant as to the nature of the order to be made, (b) whether it is practicable for the employer ... to comply with an order for re-engagement, and (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.
> (4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.
> ..."

In determining whether to make a reinstatement or re-engagement order, section 116 thus provides that the ET must take into account three matters, which can be conveniently summarised as follows: (a) the complainant's wishes; (b) practicability, and (c) contributory fault. At this stage, there is a neutral burden of proof: these are issues for the ET itself to resolve, having regard to the circumstances of the case before it.

The complainant's wishes

43. The first mandatory consideration under section 116 **ERA** thus relates to any expression of view by the complainant: whether they wish to be reinstated (section 116(1)(a)), or as to the nature of any re-engagement (section 116(3)(a)). In respect of the former, although a complainant might want to be re-employed, it may well be they would not wish to be reinstated to their former job; this would be an obviously relevant consideration mitigating against reinstatement. Section 116(3)(a) is phrased more widely: assuming the employee does not wish to be reinstated, or the ET has determined not to make such an order, the ET is required to have regard to any wish expressed by the complainant as to the nature of a re-engagement order. That might be relevant to a number of matters; from whether the ET should make such an order, to the particular terms it might direct. Of course, a complainant might not express any view about these matters, but, if they do, this is something the ET is required to take into account.

Practicability

44. The second matter the ET is required to take into account is whether it is practicable for the employer to comply with an order for reinstatement or re-engagement (other than that the latter might require the ET to consider practicability in relation to a successor or associated employer, this obligation is expressed in identical terms for either type of order). "*Practicable"* in this context means the employee's reinstatement or re-engagement is not merely possible but is capable of being carried into effect with success: **Coleman v Magnet Joinery Ltd** [1975] ICR 46, at p 52B-C, approved by the Court of Appeal in **Kelly v PGA European Tour** [2021] ICR 1124, per Lewis LJ at paragraph 8. Under section 116, the ET is inevitably making a prospective judgment – on a neutral burden of proof - as to the practicability of compliance. A further opportunity to consider this issue can arise if an order is made but the employer fails to comply; in those circumstances, section 117 **ERA** provides for an award of compensation and for the making of an additional award unless the employer can satisfy the ET (applying the civil standard of proof) that compliance with the order was not practicable (section 117(4)).

45. Practicability is a question of fact for the ET, to be determined at the date when it is making the order, which may require it to deal with circumstances that are different to those that prevailed at the date of dismissal. Determining practicability requires, however, a real world assessment of that which is practical, not simply that which is possible: **Rao v Civil Aviation Authority** [1992] ICR 503 EAT at p 513 (affirmed by the Court of Appeal at [1994] ICR 495), and it has been seen as "*contrary to the spirit of the legislation*" to make an order for re-instatement (or re-engagement) which would result in a redundancy process or significant overmanning (**Cold Drawn Tubes Ltd v Middleton** [1992] ICR 318 EAT), albeit that this will always be a question to be determined on the specific facts of the case in question (hence the decision of the EAT in **Highland Fish Farmers Ltd v Gavin Thorburn and anor** UKEAT/1094/94, upholding the ET majority decision in that case).

46. Moreover, although it is undertaking an objective assessment, the ET must keep in mind that the relationship has to work in human terms, considering the question of re-employment from the perspective of that particular employer (**Kelly v PGA**, per Underhill LJ at paragraph 69). Although this is often phrased as an issue of trust and confidence (whether that is on the part of the employer, see **Central & North West London NHS Foundation Trust v Abimbola** UKEAT/0542/08, or the employee, see **Northman v London Borough of Barnet (No. 2)** [1980] IRLR 65), the real point is that it is unlikely to be practicable to order that an employee returns to work for an employer where such confidence is absent (again see per Underhill LJ in **Kelly v PGA**). Where an employer genuinely and rationally believes it can no longer have confidence in the complainant as one of its employees (whether that is because of the view it has formed about the complainant's ability to do the work, or because it believes they have acted in a way that means they can no longer be trusted), that will be a relevant consideration in determining practicability: **United Lincolnshire Hospitals NHS Foundation Trust v Farren** [2017] ICR 513 EAT at paragraph 40; approved by the Court of Appeal in **Kelly v PGA**. It will not, however, be sufficient for the employer to simply assert a lack of confidence: practicability will not be determined on the basis of emotion, assertion, or speculation, and the ET will scrutinise whether the stated belief is genuinely and rationally held (**Farren**, paragraph 42). That said, the focus at this stage is not on the process by which a particular decision was reached, but on the material before the ET, which will enable it to assess whether re-employment is likely to be effective.

47. Applying this test of practicability, where the employer genuinely believes that the complainant has acted in such a way that their re-employment is not tenable, that belief is not to be disregarded simply because it was founded upon a flawed investigation; after all, given that the ET has already held the dismissal was unfair, it is highly likely it will have found that the employer failed to carry out a reasonable investigation. Thus, in **Wood Group Heavy Industrial Turbines Ltd v Crossan** [1998] IRLR 680, accepting that the finding of unfair dismissal was predicated on there having been insufficient investigation into the alleged misconduct (taking and dealing drugs at work), the EAT nevertheless ruled that, given the employer's genuine belief in the substance of the allegations, it was not practical to order Mr Crossan's re-engagement:

> "... It may seem somewhat incongruous that where a tribunal goes on to categorise the investigations into the belief as unfair or unreasonable, nevertheless, the original belief can found a decision as to remedy and the practicality of re-engagement, but it is inevitable to our way of thinking that when allegations of this sort are made and are investigated against a genuine belief held by the employer, it is difficult to see how the essential bond of trust and confidence that must exist between an employer and employee, inevitably broken by such investigations and allegations can be satisfactorily repaired by re-engagement or upon re-engagement. We consider that the remedy of re-engagement has very limited scope and will only be practical in the rarest cases where there is a breakdown in confidence as between the employer and the employee. Even if the way the matter is handled results in a finding of unfair dismissal, the remedy, in that context, invariably to our minds will be compensation."

48. In **Crossan**, the nature of the misconduct in issue was plainly a relevant consideration: if the employer genuinely believed that the employee was taking and dealing drugs at work, it is hard to see how it would be practical to require him to be re-employed. Where, however, reliance is placed on what is said to be a breakdown in relations, the position may be more nuanced. Thus, in **Oasis Community Learning v Wolff** UKEAT/0364/12, the EAT upheld an order for re-engagement where, notwithstanding the employer's view of Mr Wolff's previous intemperate behaviour, the ET had been entitled to consider that re-employment into a different part of the organisation, dealing with different managerial personnel, was likely to be effective. More generally, the question of practicability is not to be answered by reference simply to the views of the relevant dismissing officer; the ET is required to assess the practicability of re-employment from the perspective of the employer, the views of which

may not be represented by one particular manager. As Her Honour Judge Tucker observed at paragraph 99 **London Borough of Hammersmith v Keable** [2022] IRLR 4, EAT:

> "In our view, it does not automatically follow, particularly in an organisation as large as the Council, that because the dismissing officer ... genuinely believed that the Claimant had been guilty of misconduct, that the Council, as an employer, had lost trust and confidence in him. ..."

49. Context will, however, always be key. In **ILEA v Gravett** [1988] IRLR 497, the EAT considered it was of little relevance to the question of practicability that the employer (the largest education authority in the country) had a vast variety of posts into which Mr Gravett could be fitted: any of those posts would inevitably mean Mr Gravett would be involved in the care of young children and, given that ILEA genuinely believed him guilty of alleged sexual offences involving a 13 year old girl, re-engagement was not a practical option.

Contributory fault

50. By sub-paragraph 116(3) (c) **ERA**, it is further provided that the ET shall take into account:

> "where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms"

(there is an identical requirement under sub-paragraph 116(1)(c) (dealing with reinstatement), albeit that does not require the ET to go on to consider the terms of the order).

51. In the present case, the ET appears to have understood that, under sub-paragraph (c), it was required to make a finding as to whether the claimant had, as a matter of fact, caused or contributed to his dismissal:

> "78. ... I am required to consider whether the claimant contributed to his dismissal ..."

Going on to hold that:

> "83. Withdrawing a positive case of contributory fault does not relieve the tribunal of its duty to consider contributory fault. ..."

And characterising this as an:

> "95. ... obligation to consider contributory fault."

52. We do not, however, agree that is what sub-paragraph (c) requires. In our judgement, while it is plainly correct that, in considering whether to make a reinstatement or re-engagement order, the ET

is bound to take into account any finding of contributory fault, this provision does not require it to make such a finding. That, we consider, is clear from the wording of sub-section (c): the mandatory requirement comes after the comma; it is only where the complainant has caused or contributed to the dismissal (so: if, but only if, that fact has been established) that the ET is required to take that into account in determining whether it would be just to order re-engagement.

53. In many cases, a finding of contributory fault will already have been made by the ET at the liability stage (indeed, it is a matter for the ET whether to determine the issue at that stage or when considering remedy: **Iggesund Converters Ltd v Lewis** [1984] IRLR 431). If so, sub-paragraph (c) requires that the ET should then have regard to that finding when deciding whether to make an order for re-engagement (and on what terms). In other instances, this will be a matter that has been put in issue on remedy, such that it is a dispute the ET must determine prior to deciding whether it should order re-engagement; if the ET then determines that the claimant engaged in blameworthy conduct causing or contributing to his dismissal, this will (by virtue of sub-paragraph (c)) be a mandatory consideration in deciding whether to order re-engagement. Where, however, no such finding was made at the liability stage, and it is not a point taken by either party, we cannot see that sub-paragraph (c) requires the ET to take on an inquisitorial role to determine whether there has been contributory conduct which it would be required to take into account in deciding whether to make a re-employment order.

54. In reaching our view as to the correct construction of sub-paragraph (c), we acknowledge that, when assessing compensation under section 123 **ERA**, it has been held that, if the ET has made a finding that the complainant had caused or contributed to the dismissal, then - whether or not the issue of contributory fault had been raised by the respondent - it would be bound to apply section 123(6): **Swallow Security Services Limited v Millicent** UKEAT/0297/08, at paragraph 27. Section 123(6) **ERA** provides:

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

55. In **Swallow**, it was held that the "*trigger*" for the obligation imposed by section 123(6) was the ET's earlier finding of "*causative and blameworthy conduct*", notwithstanding that that was a finding

made when applying **Polkey** (**Polkey v AE Dayton Services Ltd** [1987] UKHL 8) and the respondent (not legally represented before the ET) had not raised the issue of contributory fault. In that case, when considering the application of **Polkey**, the ET had found that, notwithstanding the employer's contrived reason for dismissal (which had led to the finding that it was unfair), the claimant's conduct had been such that a fair dismissal might have been justified in any event. In such circumstances, the EAT was clear:

> "27. ... if in the course of their deliberations, a Tribunal concluded that there had been such causative and blameworthy conduct, the Tribunal would be bound to apply section 123(6), whether the issue of contributory fault had been raised by the employer or not. The Tribunal are statutorily required to do so. ..."

It further continued:

> "... in any case before the Tribunal in which the facts are such that a finding of contributory fault may appropriately be made, the Tribunal are bound to consider the issue, raise it with the parties, and decide whether there has or has not been contributory fault and whether a deduction from contribution should be made...."

56. As is common ground before us, the wording of section 123(6) is largely the same as section 116(3)(c) **ERA**, and it is clear that a finding of causative blameworthy conduct (see **Nelson v BBC** (No. 2) [1980] ICR 110) will act as the trigger for the mandatory duty imposed in either case: **Boots Company plc v Lees-Collier** [1986] IRLR 485 EAT. In **Swallow**, although, applying **Polkey**, the ET was concerned with a different test, it had made the necessary finding of fact as to the complainant's blameworthy conduct. In those circumstances, whether or not the respondent had raised the question of a reduction for contributory fault, the ET was thus required to reduce the compensatory award by such proportion as it considered just and equitable, having regard to that finding. The same point can be made in relation to the case of **Kelvin International Services v Stephenson** UKEAT/1057/95 (relied on by the claimant), which concerned the predecessor provision to section 116(3)(c) **ERA**, where the ET had found there were reasonable grounds for the employer's belief in dishonesty: that earlier finding of blameworthy conduct, going to the decision to dismiss, was sufficient to engage the mandatory obligation imposed by statute.

57. We do not, however, understand the decisions of the EAT in either **Swallow** or **Kelvin International** to be going further, requiring the ET to take on a proactively inquisitorial role where the

issue of contributory fault has expressly been withdrawn. There may be good reason why parties in ET proceedings do not wish the question of contributory fault to be determined: whether that question is being considered under section 116(3)(c) or 123(6) **ERA**, the ET's conclusion represents a finding of fact as to what actually happened, not simply what the employer thought had happened; in some cases, that is not a finding that the parties will necessarily want the ET to answer (not least as it might be a live issue in other proceedings, brought in a different jurisdiction). In this regard, we consider that the observations of Rimer LJ at paragraph 31 **Muschett v HM Prison Service** [2010] IRLR 451, hold true in relation to the role of the ET:

> "...Their function is to hear the case the parties choose to put before them, make findings as to the facts and to decide the case in accordance with the law. The suggestion that, in the present case, the employment judge committed some error of law in failing to engage in the sort of inquiry that [counsel for Mr Muschett] suggested is, in my judgment, inconsistent with the limits of the role of such judges ..."

The approach on appeal

58. The EAT's jurisdiction to determine appeals from ET decisions is limited to questions of law (section 21 **Employment Tribunals Act 1996**). Due respect is to be given to the findings of fact made by the first instance tribunal, to its evaluation of those facts and the inferences it has drawn from them (see per Kitchin LJ (as he then was) at paragraphs 114-117 **FAGE UK Limited and anor v Chobani UK Limited and anor** [2014] EWCA Civ 5). Where an appeal is pursued on the basis of a perversity challenge, the appellant will face a high burden: as Mummery LJ observed at paragraph 93 **Yeboah v Crofton** [2002] IRLR 634:

> "Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision that no reasonable tribunal, on a proper application of the evidence and the law, would have reached. Even in cases where the appeal tribunal has 'grave doubts' about the decision of the employment tribunal, it must proceed with 'great care', British Telecommunications PLC v Sheridan [1990] IRLR 27 at para 34."

59. When determining whether or not to order reinstatement or re-engagement, the ET enjoys a particularly wide discretion (per **Abimbola** at paragraph 15); specifically, where the appeal is against an ET's assessment of practicability, the challenge for an appellant will be all the more pronounced; as

the EAT emphasised at paragraph 15 **Clancy v Cannock Chase Technical College and anor** [2001] IRLR 331:

> "Of all the subjects properly to be left as the exclusive province of an employment tribunal as the "industrial jury", few can be more obviously their territory than the issue of "practicability" within … s.116(3)(b) ERA."

60. Where the ET is making an order for re-engagement, that wide discretion also extends to the terms of the order, where considerable flexibility is afforded (see Simler J (as she then was) at paragraph 7 **British Airways plc v Valencia** [2014] ICR D29 [2014] IRLR 683, EAT and per Underhill J (as he then was) at paragraph 39 **Oasis v Wolff**). Moreover, a degree of latitude has been afforded to ETs in remedying the terms of a re-engagement order where these were not sufficiently clear; thus, in **Electronic Data Processing Ltd v Wright** [1986] ICR 76, the EAT agreed that an ET could subsequently specify the place of work where that had been omitted from the original order.

61. We further recognise that the ET is given a wide case management discretion under rule 41 of schedule 1 **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("ET Rules"), which expressly includes the ability to determine the timing and sequence in which issues are decided. That said, contrary to the claimant's submission, we are not persuaded that the ET's case management discretion means that it is entitled to make an order for re-engagement that fails to comply with the requirements of section 115: an ability to decide on the sequence in which issues are to be determined, even when coupled with a degree of latitude to clarify omissions at a subsequent stage, does not, in our judgement, mean that an ET can simply choose not to include the matters it is mandated to specify in its order pursuant to section 115(2) **ETA**.

62. As for a challenge made on the basis of a failure to put a point at trial which then informs the ET's conclusions, the question is whether the irregularity complained of intrinsically taints the entirety of the trial or the decision reached; see the discussion at paragraphs 67-68, and 83-85 **Stuart Harris Associates v Goburdhun** [2023] EAT 145.

The appeal and the respondent's submissions in support

63. By its composite grounds of appeal, the respondent contends as follows:

63.1 **Ground 1**: the ET misdirected itself and/or applied the wrong legal test(s) when deciding re-engagement was practicable for the purposes of section 116(3)(b) **ERA**.

63.2 **Ground 2**: the ET misdirected itself in concluding that it was obliged to decide whether the claimant had in fact committed the misconduct alleged for the purposes of section 116(3)(c) **ERA**.

63.3 **Ground 3:** the ET made factual findings of deliberate misconduct/bad faith without giving the respondent the opportunity to respond, and/or reached perverse findings regarding the effect(s) of the Italian litigation and/or the respondent's on-going redundancy process on the issue of practicability for the purposes of section 116(3)(b) **ERA**.

63.4 **Ground 4:** the ET reached a perverse decision in finding that re-engagement was practicable for the purposes of section 116(3)(b) **ERA**.

63.5 **Ground 5:** The ET erred in promulgating an order which did not comply with the provisions of section 115(2) **ERA**, and/or in seeking to reconstruct that order at a later date.

Ground 1 – wrong legal test

64. Under the first ground of appeal, the respondent contends that the ET: (1) applied the (wrong) test of industrial fairness or reasonableness instead of the (right) test, which required it to consider the rationality of the respondent's genuine belief (see **Farren** and **Kelly v PGA**); (2) substituted its own view on the misconduct for the respondent's belief that it no longer had trust and confidence in the claimant; alternatively, (3) there being no dispute over the genuineness of the belief held by the two senior managers who gave evidence for the respondent, (and the ET having found at the liability stage that the respondent held a genuine belief in the misconduct), the ET misdirected itself that it was required to be satisfied that "*all or the majority of the relevant senior managers"* (remedy decision, paragraph 123) had also formed the view that the claimant had committed the sexual assault alleged; and/or (4) had misdirected itself as to the applicable legal test to be applied to re-engagement in circumstances of redundancy or overstaffing (see **Cold Drawn Tubes**).

Ground 2 – finding the claimant innocent

65. By this ground, the respondent contends that the ET erred in its interpretation of section 116 (3) **ERA** in concluding that it was obliged to decide as a fact whether the claimant was innocent of the misconduct alleged, when neither party advanced a case that the claimant had caused or contributed to his dismissal, and the respondent had expressly stated that it did not seek to prove as a fact that the claimant had committed the misconduct, such that the ET was neither required nor permitted to decide this issue.

Ground 3 – procedural unfairness/perversity

66. By ground 3, the respondent submits that the ET acted contrary to natural justice and procedural fairness and/or arrived at a perverse decision, which was contrary to the undisputed evidence, in that it: (1) made serious adverse findings of deliberate misconduct/bad faith by the respondent without those matters having been canvassed by either the claimant or the ET, namely findings: (i) of a deliberate attempt to prejudice the findings of the external investigator, (ii) that the respondent knew that there was no prospect of the claimant being interviewed by the external investigator and that the investigator's opinion would therefore inevitably be incomplete; (2) recorded that there was "*no evidence that the Italy litigation fundamentally damaged mutual trust and confidence"* (remedy decision, paragraph 55) when: (i) the respondent had given evidence that the claimant's post-dismissal conduct in refusing to vacate the flat or return artwork had irreparably damaged trust and confidence, (ii) this evidence was not challenged by the claimant (or the ET), and (iii) the claimant accepted in cross-examination that he had to be evicted by force pursuant to a court order and had kept possession of the respondent's artwork until his eviction; and (3) dismissed the respondent's evidence that there were more individuals chasing jobs than there were positions as "*speculation"* (remedy decision, paragraph 58) when this evidence was unchallenged, (indeed the ET had prevented the claimant cross-examining the respondent's witness on this point, on the basis that this was something about which the claimant had no knowledge).

Ground 4 – Re-engagement was perverse

67. In pursuing this perversity ground, the respondent contends that no reasonable ET could have concluded that re-engagement was practicable on the basis of the findings of fact/undisputed evidence that: (1) the respondent held a genuine belief that the claimant had committed a sexual assault; (2) three investigations, the last conducted by an independent, specialist barrister (after reviewing more extensive evidence than was before the ET and interviewing, amongst others, the complainant), had concluded that the claimant had sexually assaulted ZZ; (3) post-dismissal, the claimant refused to vacate his flat or return the respondent's artwork until evicted by court order, and the respondent had given unchallenged evidence this had irreparably damaged trust; (4) there was already overstaffing and there would be redundancy processes in respect of the relevant roles.

Ground 5 – the promulgation of an incomplete order/the purported reconstruction of the order

68. This ground relates to both the remedy decision and the decision reached after the further hearing on 22 December 2022. It is the respondent's case that the ET acted contrary to natural justice and procedural fairness in deciding that it remained open to it to reconstruct or supplement paragraph 2 of the remedy order. Having promulgated a re-engagement order which failed to specify the matters relating to quantum required by section 115(2) **ERA**, the respondent contends that: (1) the ET mischaracterised its promulgation of such an order as something which it had been "*invited*" to do by the respondent, and that it was "*always envisaged"* that a re-engagement order would be made which was silent on the exact sums to be paid for the period from dismissal to re-engagement; (2) it had not invited or envisaged an order for re-engagement being promulgated which did not contain the specified matters relating to quantum (on the contrary, before the remedy decision was promulgated, by email of 8 September 2022, the respondent had made clear its objection to such a course).

The claimant's position

Ground 1 – wrong legal test

69. The claimant contends that, viewed correctly, any criticism the ET made of the Mitchell Report and/or any reference to reasonableness/fairness must be understood not as being to the ET's own view on the appropriateness of the respondent's belief, but as testing the respondent's evidence that it had *genuinely* and *rationally* lost trust and confidence in the claimant (per **Farren**, paragraph 42); a task it was well-equipped to perform. Moreover, the respondent's criticism of the use of the word '*reasonable*' was misplaced. In **Kelly v PGA**, Underhill LJ referred to the need "*for a reasonable basis*" for any lack of confidence; and in **Asda Stores Ltd v Raymond** [2018] UKEAT 0268/17, the EAT upheld the ET's decision because it "*was unreasonable on the part of the Respondent to refuse to re-instate the Claimant*". As for the ET's conclusion that it could not say whether all relevant managers held a genuine belief in the misconduct: although (at the liability stage) it had found the decision-makers had a genuine belief in the claimant's misconduct, under section 116(3)(b) the ET had to consider whether the respondent – as employer – had lost trust and confidence in the claimant (**Keable**, paragraph 99). The point, in any event, went nowhere, as the ET went on to make further, alternative findings on the issue of rationality.

70. As for the approach to the practicability in the event of overstaffing or redundancy: (1) **Cold Drawn Tubes** did not lay down a general rule, each case must inevitably turn on its own facts (see ***Highland Fish Farmers***); and (2) the evaluation of practicability was for the ET, and in this case it permissibly concluded that the picture was still "*developing*" and that the outcome was "*unpredictable*" and "*far from clear*".

Ground 2 – finding the claimant innocent

71. On this point, the claimant says the ET correctly understood that section 116(3)(c) **ERA** mandated it to make a determination on contributory fault, irrespective of whether that issue was raised by the parties (**Swallow**; **Kelvin International**); had that not been Parliament's intent, the wording of the provision could have made this clear. Given that requirement, the ET's judgment reflected a conscientious approach to the matters it was required to consider. In any event, if the ET did

err, it was difficult to see how this impacted on its other findings; whether or not it was correct to make its own assessment was immaterial to the outcome of the appeal.

Ground 3 – procedural unfairness/perversity

72. Accepting that the ET had found that the respondent had attempted to prejudice Mr Mitchell's findings (by including additional allegations within his terms of reference), the claimant says this must be seen in context: the additional allegations were not previously raised as part of the internal disciplinary proceedings, and, although Mr Mitchell had (properly) removed these matters from his investigation, the ET had questioned the respondent's witnesses as to why these matters were initially included, drawing permissible inferences from the unsatisfactory answers given. As for the ET's finding that the Mitchell report would inevitably be incomplete, that did not amount to an allegation of bad faith; it was an inference that the ET was entitled to draw. In any event, any procedural failings in these respects could not be said to be so serious as to undermine the validity of the ET's overall conclusions on practicability (see **Stuart Harris Associates**).

73. Turning to the challenge relating to the ET's conclusion regarding the Italian litigation, the claimant says the reasoning was clear: the ET was not saying there was no evidence on this issue, merely that it did not go to the question whether this had fundamentally damaged trust and confidence so as to be relevant to the question of the practicability of re-engagement. Similarly, the claimant contends the ET reached a permissible conclusion that there remained a significant degree of uncertainty over the scope of the redundancy exercise, such that it was entitled to find there was an element of speculation in the respondent's evidence in this regard.

Ground 4 – Re-engagement was perverse

74. Emphasising that issues of fact were for the ET (see per Kitchen LJ in **FAGE UK**), it is the claimant's case that the respondent's perversity challenge fails to surmount the high threshold required (see **Yeboah v Crofton**); in particular, given the wide discretion enjoyed by the ET when making a decision on reinstatement or re-engagement (**Abimbola**; **Clancy v Cannock Chase**).

Ground 5 – the promulgation of an incomplete order/the purported reconstruction of the order

75. It is the claimant's case that the ET was fully entitled to promulgate a remedy order that addressed re-engagement (paragraph 1) without also immediately specifying all matters relating to quantum (paragraph 2). That was entirely in keeping with the wide discretion afforded to ETs in deciding the terms of any re-engagement order (per **BA v Valencia** *and* ***Oasis v Wolff***) and with the ETs powers of general case management, which permit it to decide the sequence in which issues are to be determined (see rule 41 **ET Rules**). It was, moreover, not fatal if an omission in the order was the subject of subsequent clarification; see **Electronic Data Processing v Wright**.

Analysis and conclusions

76. In starting our analysis, we consider it is helpful to be clear as to the approach the ET was required to adopt to comply with the requirements of section 116(3) **ERA**. In considering the legal framework, we have already identified that this mandated the ET to take into account: (a) the claimant's wishes (as to which, there was no dispute: he wished to be re-engaged, recognising that he could not simply be replaced into his former role); (b) the practicability of re-engagement (for the ET to determine as a matter of fact); and (c) "*where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement ...*". We return to the question of practicability below but, in approaching the third requirement, as we have explained, we do not consider that sub-section 116(3)(c) mandated the ET to make a finding as to whether the claimant had caused or contributed to his dismissal; rather, it required that, *if* the ET had made such a finding (either at the earlier liability stage or because it was a point raised on remedy) it would then need to consider whether it would be just to order re-engagement.

77. In most cases, there will be no issue: the ET will already have made findings as to whether the complainant's conduct was, or was not, culpable, and as to whether that contributed to the dismissal. In cases such as **Swallow** and **Kelvin International**, the relevant finding will have been made at the

liability stage or when determining the issues relevant to any **Polkey** reduction. It is, however, for the ET to determine the sequence in which issues are to be addressed (rule 41 **ET Rules**; and see the observations in **Iggesund** relating specifically to the question of contributory fault), and it is possible that – as in the present case – this will be a question expressly reserved for the remedy stage. Even then, there will generally be no issue as to the scope of the ET's enquiry: the respondent will be asking that a finding be made as to the complainant's conduct, to support its case that no order should be made for reinstatement or re-engagement and/or for a reduction in any award of compensation. Whether determined as part of its liability decision, or in adjudicating upon the disputes raised at the remedy stage, to the extent that the ET has thus found the complainant engaged in culpable conduct that caused or contributed to the dismissal, sub-section 116(3)(c) requires that this is a matter that must be taken into account when deciding whether it would be just to order re-engagement.

78. In the present case, whether or not the claimant had in fact committed the alleged misconduct (a sexual assault on ZZ) was a matter that had originally been put in issue by the respondent's response to the claim. The ET had accepted that it was the respondent's genuine belief in this misconduct that had caused the dismissal, but the claimant had at all times denied that he had engaged in the culpable conduct of which he was accused by ZZ. At the liability stage, the ET had, however, expressly *not* determined this issue, making clear that any decision on the question of contributory fault would fall to be made at the remedy stage, at which point, given that this would involve making findings of fact as to what had happened, the ET envisaged it might be necessary to hear further witness evidence, potentially including evidence from ZZ.

79. Prior to the remedy hearing, however, the respondent made clear that it no longer sought to allege contributory fault. Ms McCafferty has observed that various reasons might have informed the respondent's position, not least the difficulty of calling evidence from individuals (such as ZZ) who were not its employees and who were not based in this jurisdiction; whatever the reason for the stance adopted by the respondent, however, it had made clear that no positive case was being advanced that the claimant had caused or contributed to his dismissal in any way. As such, the question whether, as

a matter of fact, the claimant had actually committed the alleged misconduct was withdrawn from the ET; it still had to determine the issue of practicability, but whether or not the claimant was guilty of the alleged assault was no longer a point before it. In those circumstances, we cannot see that sub-section 116(3)(c) **ERA** was engaged: the ET had made no finding as to whether the claimant had caused or contributed to his dismissal, and was not being asked to do so; whether or not the respondent's position was for tactical reasons (and we can see there may well be entirely legitimate strategic considerations in determining whether or not to raise questions of contributory fault), the ET was not required to take any account of issues of contributory conduct for the purposes of section 116(3).

80. At the outset of the remedy hearing, however, it is apparent that the ET considered the respondent's position on contributory conduct to be problematic, requiring further written clarification in this regard. Notwithstanding that it was made clear that the respondent was not advancing any argument that the claimant's conduct had caused or contributed to his dismissal, the ET still took the view that it was required to determine this issue (see ET remedy, paragraphs 78, 83 and 95), going on to make its own findings on the evidence available as to whether or not the claimant had assaulted ZZ, and concluding that the alleged misconduct had not in fact occurred (ET remedy, paragraphs 96-107). Given our view as to what was required of the ET under sub-section 116(3)(c), we consider this was an error of approach: the ET's function was to determine the case the parties had chosen to put before it (per **Muschett**), which, in this instance, did not include any contention that the claimant had caused or contributed to his dismissal; sub-section 116(3)(c) **ERA** did not change that position, it simply was not engaged. To this extent, therefore, we uphold ground 2 of the respondent's appeal.

81. As Mr Lassey has, however, observed, after setting out its findings on the question of contributory conduct, the ET nevertheless went on to consider the question of practicability. Indeed, as the ET expressly reminded itself, the view it had reached as to whether the claimant had committed the misconduct in question, "*does not displace any belief held by the respondent's relevant employees*" (ET remedy, paragraph 118). The issue thus becomes whether the ET's erroneous decision to

determine a matter that was not before it is in any way material to its conclusion on re-engagement in this case.

82. Turning then to the ET's approach to the question of practicability for the purposes of sub-section 116(3)(b) **ERA**, we have first considered its findings in relation to the over-staffing issue and in respect of the Italian flat, and artworks, issue.

83. In relation to the question of practicability in the context of a potential redundancy situation, we acknowledge the guidance provided in **Cold Drawn Tubes**: it is unlikely to be practicable to require an employer to reinstate or re-engage a complainant where this would result in overmanning. In a sense the point is obvious: it is unlikely to be practicable to order re-employment if that would lead to a redundancy situation. The ET's assessment of this question will, however, always be context-dependent: practicability is to be determined on the particular facts of the case (**Highland Fish Farmers**). In the present case, we do not consider that the ET failed to heed the point made in **Cold Drawn Tubes**; it did, however, permissibly consider whether that really applied in this case. Having regard to the evidence from Mr Williams, the respondent's chief operating officer, the ET found this was a developing picture, such that it was speculation to suggest that there was overmanning in relation to the "*numerous roles for which the claimant may be suitable*" (see ET remedy, paragraphs 56-63). Although the ET may have limited the claimant's cross-examination of Mr Williams (on the basis that he was not in a position to challenge the respondent's evidence on the changes that had taken place since his dismissal), we are satisfied it reached a conclusion that was open to it on the basis of the evidence-in-chief. Certainly, Mr Williams' statement allowed for a finding that the position was developing: the call for voluntary redundancy had not closed, and, while there was a 21% reduction in country director posts, not all potentially suitable vacancies had been filled. Having reviewed the evidence available to the ET, we neither consider it erred in its approach, nor reached a decision that was perverse. We duly dismiss the grounds of appeal (under grounds 1, 3, and 4) relating to this issue.

84. As for the ET's dismissal of the respondent's arguments on practicability relating to the claimant's continued use of the Italian flat, and his failure to return the artworks that were located

within that accommodation, we consider that the grounds of appeal in this regard are answered by the finding that the claimant's account on these points was "*fair and accurate*". As the claimant has observed, the ET did not fail to have regard to the respondent's evidence on these points; it just did not accept that this demonstrated that these matters had fundamentally damaged trust and confidence. Given the limitations of the respondent's evidence in this regard (and we note the ET's observations at paragraph 54 of the remedy decision), it was entirely open to the ET to accept the claimant's account. Moreover, its conclusion cannot properly be described as perverse, given that the evidence before the ET was that the claimant's re-employment was to be considered based on the findings of the Mitchell report, without any suggestion being made that this was in some way contingent upon any matter relating to the Italian flat or the artworks. We similarly dismiss the grounds of appeal (pursued under grounds 3 and 4) relating to this issue.

85. Although the respondent had relied on the issues relating to overmanning and the claimant's continued occupancy of the Italian flat as going to the question of practicability, the main focus of its case under section 116(3)(b) **ERA** was on what was said to be the loss of trust and confidence arising from its concerns about the claimant's conduct, which made it impracticable to re-employ him. It was the respondent's case that, whether or not the claimant was in fact guilty of the assault alleged by ZZ (a point that the ET was not asked to determine), it held a genuine belief that he had misconducted himself, and, given the earlier internal investigations (at dismissal and appeal stages) and the conclusions of the Mitchell investigation, that belief was based on rational grounds.

86. In addressing this point for the purposes of the appeal, the parties were agreed: the test the ET was bound to apply was as set forth in **Farren**, as approved by the Court of Appeal in **Kelly v PGA**: considering the position from the respondent's perspective, did the respondent hold a genuine and rational belief that the claimant had engaged in conduct which had broken the relationship of trust and confidence? It was common ground that answering that question would not involve the application of a range of reasonable responses test (as if the ET was considering fairness for the purposes of section 98(4) **ERA**), but the ET was entitled to test whether the respondent's stated belief

was genuine and, if so, whether it was rationally held.

87. There was some argument before us as to the level of scrutiny this would allow, and as to whether the ET demonstrated that it had applied the wrong test when it stated that it was required to "*determine whether this employer has genuinely and reasonably lost confidence*" (ET remedy, paragraph 68): the respondent contending that this set the bar too low; the claimant pointing to similar language used by Underhill LJ in **Kelly v PGA** ("*any such lack of confidence must have a reasonable basis*") and by the EAT in **Asda v Raymond**. It seems to us, however, that the issue is really what the ET was intending by this reference. As both parties agreed, the task for the ET was not to apply a **Burchell** test of reasonableness (**British Home Stores Ltd v Burchell** [1980] ICR 303); rather, it was required to scrutinise the evidence adduced before it to support the contention that – projecting forward – re-employment of the complainant would not be practicable because the necessary trust was no longer there. If "*reasonably*" is understood to mean "*rationally*" (that is, based on reason, not simply emotion, speculation, assertion or caprice), we cannot see that there can be any objection to the ET's self-direction. The real issue for us is as to how the ET then went about its task, which was to undertake a real world assessment of that which was capable of being successfully carried into effect (**Coleman v Magnet**; **Rao v CAA**; **Kelly v PGA**). Notwithstanding the findings it had itself made as to the claimant's conduct, the focus of the ET's enquiry thus had to be on whether the claimant's re-employment was likely to work, something that would not be possible if the respondent genuinely believed, on rational grounds, that it could no longer trust the claimant.

88. Before undertaking any assessment as to whether there was a rational basis for the respondent's stated belief in the claimant's misconduct, however, the ET (having referred to the case of **Keable**) raised the question whether it had heard from "*all or the majority of the relevant senior managers*" such that it could be satisfied that this was, in fact, a belief that should be attributed to the respondent (ET remedy, paragraph 123). The ET had received evidence from the respondent's global network director, Mr Walker, and from its chief operating officer, Mr Williams, who had both testified that, given the (internal and Mitchell) investigation findings that he had behaved in the way alleged by

ZZ, the respondent's trust and confidence in the claimant had irretrievably broken down. Notwithstanding that testimony, the ET considered this might not represent a final view. The ET's chain of reasoning in this respect appears to have been as follows: the commissioning of the Mitchell report demonstrated that the respondent accepted it would not be rational to maintain a belief based on a fundamentally flawed investigation (as the ET had previously found was the position with the respondent's internal investigations); if, however, the Mitchell investigation was also fundamentally flawed, the respondent could similarly be expected not to maintain its belief in the claimant's conduct based on that report (ET remedy, paragraph 128); and, as it was "*inevitable that the [Mitchell] investigation would be even more problematic and flawed",* reliance on the Mitchell report was irrational (ET remedy, paragraph 136).

89. We consider there are a number of problems with this reasoning. First, we are unable to see any basis for the suggestion that the testimony of Messrs Walker and Williams should not be taken to represent the view of the respondent. As a body incorporated by Royal Charter, the respondent's position was inevitably going to be represented by its senior employees. Mr Walker and Mr Williams were the relevant senior officers of the respondent, and there cannot reasonably have been any expectation that "*all or the majority of the relevant senior managers"* would have been called to give evidence at the ET remedy hearing. Secondly, we consider the ET's approach suggests a misconception as to the applicability to the present case of the reasoning of the EAT in **Keable**. Accepting that there may be cases involving a large employer when it would be wrong to assume that a finding of misconduct by one manager would necessarily mean that all other managers – and thus the employer as a whole - had lost trust and confidence in the complainant, that will always depend on the context and, in particular, on the nature of the misconduct in question (and see our earlier discussion relating to the decisions in **Crossan**, **Oasis v Wolff**, and **ILEA v Gravett**). In the present case, there was no suggestion that different senior managers within the respondent might have taken a different view as to whether the claimant could continue to be employed notwithstanding a belief that he had misconducted himself in the way that had been alleged. If it was genuinely believed that the claimant

had sexually assaulted an employee of the British Embassy, there was no basis for thinking that any relevant senior manager within the respondent would have considered it possible that he could nevertheless be re-employed.

90. Turning to the latter part of the ET's reasoning, and, more generally, to its assessment of the Mitchell report as the basis for the respondent's belief, we first note the ET's finding as to what it characterised as an attempt to prejudice the investigation "*by supplying irrelevant prejudicial information*" (ET remedy, paragraph 131). The respondent complains this criticism is unfair as this was not a matter on which it was given proper forewarning. Given, however, that there was plainly some enquiry of the respondent's witnesses as to why additional (new) matters had initially been included in Mr Mitchell's instructions, we are not persuaded that any substantive unfairness arose, but, in any event, we cannot see that this finding ultimately impacted upon the material conclusions reached by the ET; even if there was some irregularity in this respect, it did not taint the final decision on re-engagement (see **Stuart Harris Associates**). The respondent raises a similar complaint relating to the ET's finding that "*No reasonable employer*" could have expected that the claimant would have engaged with the Mitchell investigation, and "*there could be no rational reasonable belief that the claimant would participate*" (ET remedy, paragraphs 132-133). While we consider there is merit in the respondent's concerns regarding these findings, we do not think this arises from some form of procedural irregularity as to whether the point was properly raised below; in our judgement, the ET's findings in this respect reveal a more substantive error in its approach to its task.

91. In reaching its conclusion that the respondent could not rationally rely on the conclusions of the Mitchell report, the ET considered: (1) that "*Inevitably, the exclusion of the claimant would lead to a distorted process*" (ET remedy, paragraph 133) and this amounted to "*a systemic bias*" (ET remedy, paragraph 136), and (2) that there were other failings in relation to the identification and obtaining of the relevant evidence (ET remedy, paragraphs 134-135), such that the material on which Mr Mitchell based his conclusions "*was seriously limited and inadequate*". We are, however, troubled by these findings, which seem to us to evince a substitution of the ET's view for that of both Mr Mitchell and

the respondent. In our judgement, the ET's reasoning suggests that it was approaching this as a **Burchell** exercise, testing the reasonableness of an investigation (and whether it fell within reasonable parameters), rather than focusing on the rather more straightforward question as to whether the respondent held a genuine and rationally based belief.

92. Indeed, the way in which the ET saw its task is made clear at paragraph 130:

> "It is appropriate to stand back and consider what is necessary to have a fair investigation which could lead to a reliable finding of fact. Relevant considerations may include the following: the investigator should be competent and independent; the person accused must be able to participate fully; the investigator should have access to all relevant evidence; there should be a reasonable expectation that all relevant witnesses should participate; all relevant evidence should be identified; and a rational decision should be reached."

93. The ET was not, however, required to judge the fairness of the Mitchell investigation, still less to set parameters for what that might necessitate. The issue for the ET was whether, as a matter of fact, re-engagement of the claimant was likely to be practicable in circumstances where the respondent had accepted the report of a "*competent ... and ... transparently independent*" (ET remedy, paragraph 131) external investigator, concluding that the claimant had sexually assaulted an employee of the British Embassy at a social function. While there had been no criticism of the claimant (or his wife) in declining to be interviewed by Mr Mitchell, it was incorrect to state he had been excluded: Mr Mitchell had invited the claimant to be interviewed and he had chosen not to participate in that way. The ET's finding in this respect suggests that, once the claimant had been dismissed (after which the ET considered he could not reasonably be expected to participate in any investigation initiated by the respondent), the *only* way the respondent could form a rational view as to whether it could (or could not) have confidence in re-engaging the claimant would be by accepting the finding of the ET as to whether ZZ's allegations were true. That, however, would be to substitute the ET's view for that formed by Mr Mitchell and, in turn, by the respondent; it would be to impose the ET's assessment of what was required of any investigation, when the question was simply whether the belief held by the respondent was rational.

94. The ET's approach also failed to acknowledge the inadequacies in its own investigation of this matter. It, too, had not heard from Ms Marziota or Mr Gerace, or other potential witnesses to the incident, and it had never heard from ZZ (who was not the respondent's employee and who was based outside the jurisdiction). Moreover, the ET's criticisms of the Mitchell investigation failed to engage with the material that had been considered. In finding that there had been a failure to put the Marziota/Gerace statement before Mr Mitchell, the ET apparently ignored the fact that he had been provided with the original liability decision, which incorporated the relevant part of that statement. As for the criticisms made of ZZ's evidence, this seems to have ignored Mr Mitchell's lengthy interview with ZZ and all the materials that he reviewed relating to the account she had given. More generally, the ET failed to have regard to the evidence before it (set out at the start of the Mitchell report) as to Mr Mitchell's understanding of his terms of reference and the efforts he made to speak to the witnesses who had previously provided evidence, to others who had been identified but had not spoken to the respondent, and to seek additional evidence to further substantiate or disprove matters. In our judgement, having set the parameters for what it considered would constitute a "*fair investigation*", the ET's findings make clear that its assessment as to whether there was a rational basis for the respondent's belief was very much informed by the conclusion it had itself reached as to the claimant's culpability.

95. Putting to one side the ET's own view as to whether the claimant had misconducted himself as ZZ had alleged, it accepted that it was not possible to "*wholly discount the possibility that an internal investigation, even at the stage when this was undertaken, could not found grounds for a rational belief in the misconduct*" (ET remedy, paragraph 129), acknowledging that Mr Mitchell was "*transparently independent*" and holding that it "*may be arguable that he came to an appropriate conclusion based on the material before him*" (ET remedy, paragraph 136). Taking those findings as the starting point, we consider it was perverse for the ET to conclude that it was "*irrational to rely on such investigation*" (ET remedy, paragraph 137). In reaching this view, we bear in mind the high threshold for a finding of perversity (per **Yeboah v Crofton**), the deference that is to be afforded to the first instance tribunal's

evaluation of the evidence (per **FAGE UK**), and the considerable discretion afforded to an ET when determining the issue of practicability (**Abimbola**; **Clancey v Cannock Chase**). We are, however, satisfied that the ET in this instance lost sight of the fact that practicability had to be determined from the perspective of the respondent and it was perverse to find that that perspective could not rationally be informed by the conclusions of the Mitchell report.

96. On that basis, we must allow this appeal and set aside the ET's order for re-engagement. Given our conclusion in this regard, it is unnecessary for us to address the final ground of appeal, and the second ET decision under challenge. As we have already indicated, however, allowing for the flexibility afforded as to the sequence for the determination of particular issues, and as to the terms of a re-engagement order, we do not consider it was open to the ET to fail to specify the terms that it was required to set out pursuant to section 115(2)(b) **ERA**.

97. If the parties are unable to agree the terms of the order on disposal of this matter, they should provide concise written representations on this, and any consequential issues or applications, to be filed and served at least two working days before the proposed date for hand-down; written submissions in this regard should be no more than four sides of A4.