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Case Nos: EA-2022-SCO-000034-SH
EA-2022-SCO-000046-DT
EA-2022-SCO-000091-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street, Edinburgh EH3 7HF

Date: 22 January 2025

Before:

THE HONOURABLE LORD FAIRLEY

Between:

MS CAROL MCMAHON

Appellant

- and -

AXA ICAS LTD.

Respondent

- -
- -

Mr Simon John (instructed by McGrade & Co) for the **Appellant**
Mr David Reade K.C. (instructed by Burness Paull LLP) for the **Respondent**

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Hearing dates: 28-29 August 2024

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JUDGMENT

SUMMARY

Deductions from wages – PHI scheme
Practice and procedure – amendment of claim – scope of "wages"
Practice and procedure – strike out – disability discrimination

The appellant brought a claim of disability discrimination which, after a lengthy period of delay, was ultimately struck out on the ground that a fair hearing of it was no longer possible. The appellant appealed the strike-out order (the first appeal).

The appellant also brought a claim for unlawful deductions from wages based upon a PHI scheme operated by the respondent. Following her dismissal, she sought to amend the deductions claim to include wages she submitted were due in respect of a period of around 9 years after her employment had ended. The amendment application was refused *inter alia* on the basis that it had little prospect of success. The appellant appealed that decision (the second appeal).

The deductions claim in respect of the period when the appellant was still employed by the respondent proceeded to a full hearing. It was successful, on the merits, but the appellant arged that the tribunal had erred in law in its interpretation of the PHI scheme by failing to take account of overtime payments and salary increases that she would have received had she remained able to work. She also argued that the tribunal had erred in its approach to a contractual annual 5% increase to benefit payable under the scheme by treating that increase as a fixed amount rather than as a percentage of the benefit being paid at the end of each year (the third appeal).

The respondent cross appealed in the deductions claim. It argued that the full extent of the resondent's contractual duty under the PHI scheme was simply to maintain a policy of insurance. That was not an obligation to pay wages on the basis of which a claim for unlawful deductions could competently be brought.

Held:

1) The tribunal had had not erred in concluding that the PHI scheme gave rise to an obligation on the respondent to make payments to the appellant which, whilst her employment was ongoing, fell within the definition of "wages", and the cross appeal was accordingly refused;
2) The tribunal had not erred in concluding that the payments due under the scheme should be calculated only on the basis of basic salary, excluding overtime and salary increases that might have been received had the appellant remained at work. It had, however, erred in its reasons in concluding that the 5% annual increase was fixed sum based upon the amount of benefit paid in the first year of entitlement. Instead, the 5% increase should be applied to the amount of benefit being paid at the end of each year when entitlement continued, but as this did not affect the tribunal's judgment, it could be dealt with by the tribunal when it assessed remedy, and thethird appeal was therefore refused;
3) The tribunal had not erred in refusing the application to amend, and the second appeal was also refused;
4) The tribunal had erred in striking out the disability discrimination claim on the ground that a fair hearing was not possible. Before doing so, it should have permitted the appellant to focus the disability claim (as it had been agreed at a case management discussion she would be allowed to) and thereafter heard evidence on the extent to which the quality of evidence about such a clam, as so focussed, would have been diminished by the passage of time. The first appeal was therefore allowed. The strike out order was quashed, and the disability discrimination claim was remitted to the tribunal to to determine that aspect of the strike out application anew.

The Honourable Lord Fairley:

Introduction

1. The appellant was formerly employed by the respondent, AXA ICAS Limited. It was previously known as ICAS Limited. The appellant's employment commenced on 24 January 2000 and ended with her dismissal on 12 September 2013. These three appeals are the latest instalment in a long-running litigation following that dismissal.

2. The first appeal relates to a Judgment dated 31 March 2022 striking out a claim of disability discrimination on the basis that a fair hearing of it was no longer possible. The third appeal, which is also the subject of a cross-appeal, relates to a Judgment dated 29 July 2022 in the appellant's claim for unpaid wages for the period between May 2011 and 25 June 2013, the latter date being the date of her ET1 claim form. That claim concerns a PHI scheme which was operated by the respondent. The second appeal relates to an interlocutory case management order of 12 April 2022 refusing the appellant permission tointroduce a further claim based upon the same PHI scheme in respect of the period from 25 June 2013 onwards.

3. The cross appeal has a bearing upon both the second and third appeals and it is logical to consider it first.

The cross appeal

The claim for unpaid wages

4. The appellant commenced a period of sickness absence on 20 September 2010. She did not return to work at any time thereafter. On 25 June 2013, whilst she was still employed by the respondent, she brought a claim under section 13 of the **Employment Rights Act 1996** ("**ERA**") for the period from May 2011 to the date of presentation of her claim.

5. The appellant maintained that her contract of employment gave rise to an entitlement under a PHI scheme operated by the respondent to 75% of her normal earnings (including overtime) whilst

her absence continued. She also claimed that "normal earnings" meant the notional total amount of salary and overtime that she would have received (including any salary increases) had she remained at work. Finally, she claimed that scheme conferred a contractual entitlement to have the normal earnings figure increased each year by adding 5% to the amount previously paid.

6. The claim was resisted by the respondent. It maintained that the contract of employment did not create any direct right to payment at all. Instead, it created only an obligation on it to maintain in force a policy of insurance capable of providing payments to the appellant in the event of long-term sickness absence. That obligation was not one that could competently form the basis of a claim under section 13. Alternatively, if the contract did confer a direct right to payment, the amount due was fixed at the point when entitlement under the PHI scheme first crystalised, subject only to a fixed annual increase of 5% of that amount for as long as benefit continued to be payable.

The relevant documents

7. The tribunal found that the contract of employment was constituted by an offer letter from the respondent to the appellant dated 5 January 2000 which was signed by the appellant to signify her acceptance of it on 15 January 2000. The letter referred to the appellant's contracted hours being 30 per week, but noted that she "may also be requested to work Saturday and Sunday on a rostered basis for additional payments". Section 7 of the letter referred the benefits to which the appellant would become entitled after a 6-month probation period. These included a PHI scheme described as "The Sun Alliance Permanent Health Insurance Scheme". No further details of the benefits were set out in the letter, but the letter encouraged the appellant to "make an appointment with the Director of Human Resources, who will advise you in more detail of the schemes and provide you with the appropriate documents."

8. The appellant was also provided with an Employee Handbook. The employment tribunal was provided with a 1998 and 2005 edition. The claimant had received both. Each version of the handbook encouraged employees to read it, "as it forms part of your contract of employment together with your

offer letter".

9. The 1998 version of the handbook was given to the appellant at the start of her employment. A section entitled "Permanent Health Insurance Scheme" stated:

> This scheme enables employees to be paid a proportion of salary if, at the end of a specified period of absence caused by illness or injury, they are still unable to work. The benefits paid under the scheme are secured by a policy effected with the Sun Alliance, the premiums of which are paid entirely by ICAS. Further details on the scheme will be given on request from the Director of Human Resources. All staff are eligible on completion of a successful 6 month probationary period.

10. The 2005 version of the handbook was also given to the appellant. Again, it was stated to form part of her contract of employment together with her offer letter. So far as material, it stated:

> **Group Permanent Health Insurance Scheme**
>
> The scheme enables employees to be paid a proportion of salary if, at the end of a specified period of absence, caused by illness or injury, they are still unable to work. The benefits under the scheme are secured by a policy effected with UNUM the premiums of which are paid entirely by ICAS. Further details on the scheme will be given on request from the Human Resource Department. All staff are eligible to apply for entry to the scheme after they have had their position confirmed by ICAS following the satisfactory completion of a 6 month probationary period.

11. Following the successful completion of her probationary period, the appellant contacted the third respondent's Human Resources Department for further details of the benefits due under her contract. She was sent a two-page document ("the HR document") with no covering letter. So far as material, the HR document stated:

> Group Permanent Health Insurance
>
> All permanent employees (contracted to 16+ hours per week) and who have completed their 6 month probationary period are eligible and are aged between 16 – 65.
>
> A proportion of normal earnings are paid during a long term absence as a result of incapacity to work.

> Benefit is payable following a continuous period of incapacity of at least 26 weeks whilst a member of the scheme.
>
> Paid monthly in the form of salary commencing one month after the waiting period.
>
> Benefit is monthly 1/12 of 3/4s of the individual's scheme salary less State Benefit.
>
> Increased by 5% on each anniversary of commencement of payment for as a long as benefit continues to be payable.
>
> Contributions are paid in full by ICAS – no cost to the employee.

12. The HR document did not define the either of the terms "normal earnings" or "scheme salary". The appellant was not given a copy of any insurance policy.

The Employment Tribunal's decision

13. The tribunal found that the appellant's contractual entitlement under the PHI scheme was contained in (i) the offer letter of 5 January 2000; (ii) the handbook as it existed from time to time; and (iii) the HR document. It noted that nothing provided to the appellant suggested that her entitlement under the scheme was conditional upon an insurer accepting liability. In particular, there was nothing in the documents to suggest that it would be open to the respondent to refuse to pay under the scheme if an insurer declined to provide cover in a particular case. The tribunal concluded that, on a proper construction of the contractual documents, the situation was not one where the employer was simply agreeing to arrange and pay the premiums on a policy of insurance:

> "Rather, objectively viewed…the employer has set up a scheme which would pay to staff who meet the conditions a proportion of their salary which is (or may be) funded…by an insurance policy." (para 154)

14. The tribunal noted that some terms – including "normal earnings" and "scheme salary" – were

not defined, but did not consider such absence of definition made the contract as a whole unworkable. It construed the expression "normal earnings" as meaning the amount payable for "normal hours" under the contract. It therefore rejected the appellant's submission that the expression "normal earnings" included overtime. It interpreted the expression "scheme salary" as meaning "the initial sum when the entitlement was triggered". It found that the same 5% annual uplift ought to be applied annually to that base figure and that the final entitlement in each year would therefore be 75% of that increased amount less any state benefit received.

Summary of the respondent's submissions

15. Senior counsel for the respondent / cross-appellant submitted that the only documents that were contractual in effect were the letter of 5 January 2000 and the staff handbook. Each of those documents expressly stated that they were part of the contract of employment. By contrast, the HR document contained no such stipulation and was not contractual in effect.

16. Neither the offer letter nor the handbook contained sufficient detail about the scheme to permit any conclusion to be drawn that the respondent had undertaken a direct obligation to the appellant to pay benefit. Rather, the natural reading of those documents was simply that the respondent undertook to procure and maintain a policy of insurance which would provide such benefit to the appellant in the event of long-term incapacity. This was clear from the reference to the insurance policy and from the way that the benefit was described in the contract.

17. An obligation to provide an insurance policy was not, however, an obligation to pay "wages" as that term is defined in section 27 of the **Employment Rights Act 1996**. The employment tribunal had accordingly erred in law in holding that the claimant's complaint of unlawful deductions from wages in terms of section 13 was competent.

Summary of the appellant's submissions

18. Counsel for the appellant submitted that relevant contractual documents comprised the engagement letter of 5 January 2000, the staff handbook, and the HR document. The latter was incorporated into the contract by reference. Objectively construed, the language of those documents was of entitlement to a benefit in the form of payment of wages by the employer.

19. Had the employer wished to limit its liability or make it subject to the rules of a policy of insurance, such limitations would have needed to be clearly expressed. No such limitation appeared in this contractual documentation. The fact that the employer had chosen to secure its liability by procuring an insurance policy did not alter the nature of the employer's underlying obligation to pay.

Decision in the cross appeal

20. The employment tribunal was correct to conclude that the engagement letter of 5 January 2000 and its acceptance by the Claimant on 15 January 2000 created the contract of employment between the parties. The handbook and the HR document were both incorporated into that contract by reference. In particular, the HR document was incorporated by the references in both the engagement letter and the handbook to further details of the PHI Scheme being available on request from the third respondent's HR Department. Such a request was made by the appellant, and she was then provided with the HR document.

21. On a proper construction of the contractual documents as a whole, the appellant's entitlement was to membership of the respondent's PHI scheme. Neither the reference in the contract to the existence of an insurer nor the name given to the scheme had the effect that the extent of employer's liability was limited to procuring and maintaining a policy of insurance. Rather, the HR document referred to the benefit being paid monthly "in the form of salary" once eligibility was established. Both iterations of the handbook referred to the employee being paid "a proportion of salary" following a specified period of absence due to illness or injury. The same section of the handbook stated, in each case:

> "The benefits under the scheme are secured by a policy effected with UNUM the premiums of which are paid entirely by ICAS"

The use of the words "secured by" is a strong indicator that the relationship between the respondent and the insurer was a collateral contract. Nothing in any contractual document between the appellant and the respondent limited entitlement to benefits under the scheme to sums paid under a policy of insurance or made such entitlement conditional upon third party approval. The tribunal was correct, therefore, to conclude that the contractual liability undertaken by the respondent was not simply to maintain a policy of insurance. Its contractual obligation to the appellant was to provide payments under the terms of the scheme. The cross-appeal therefore fails.

The third appeal

The appellant's submissions

22. The tribunal had erred in finding that the appellant's entitlement under the scheme was simply to a percentage of basic salary. The HR document referred to "normal earnings". The expression "normal earnings" included overtime. The appellant had given unchallenged evidence that she had in fact worked one weekend in every four and believed that she was required to do so.

23. The tribunal had also erred in finding that the 5% increase (or "escalator") on each anniversary of the commencement of entitlement was a fixed sum based only upon the benefit paid in the first year, rather than being based upon the actual salary which the appellant would have received had she remained fit for work, including any salary increases that she would have received.

24. Finally, the tribunal had erred in failing to apply the annual 5% increase (or "escalator") on a compound basis to the amount of benefit actually paid in the preceding year of entitlement.

The respondent's submissions

25. The reference to "normal earnings" was intended to mean no more than basic salary. It was

not intended to include additional payments for overtime. Whatever may have happened in practice, there was no contractual obligation on the respondent to offer overtime, nor was there any obligation to work overtime hours which may have been offered. In these circumstances the tribunal was correct to conclude that the ordinary and natural meaning of the term "normal earnings" was the contractual salary.

26. The tribunal had also correctly concluded that the scheme salary to which the annual uplift of 5% was to be applied was the sum that became payable when entitlement first accrued rather than the amount that the appellant would have been paid had she remained fit for work. To hold otherwise would be to reach a commercially absurd result in which the benefit actually paid could be a greater amount than would have been payable had entitlement accrued later in time and on a higher salary. On the appellant's construction, the benefit paid would progressively become more and more out of line with the salary that would have been paid had the appellant remained fit for work.

27. In any event, this aspect of the appeal was pointless because the appellant had failed to prove what overtime she had worked at the relevant time.

28. The tribunal was also correct to apply the 5% increase only to the amount of benefit paid in the first year of entitlement rather than on a compound basis.

Decision and reasons

29. The engagement letter drew a distinction between "salary" for a standard 30 hour week (Clause 6) and "additional payments" due in respect of weekend work (Clause 5). The staff handbook stated that the PHI scheme enabled employees to be paid "a proportion of salary." The term "salary" in the staff handbook did not include "additional payments". The expression "normal earnings" in the HR document was a reference to basic salary. I accordingly reject the appellant's arguments that "normal earnings" under the scheme included overtime.

30. The submission that "scheme salary" should be taken to mean a notional figure that the appellant would actually have earned had she remained at work is also unsound. Such a construction

would create multiple areas of uncertainty over issues such as what pay rises the appellant would have received, whether or not she would have been promoted and, if so, to what position. By far the more sensible conclusion is that parties intended the "scheme salary" to be fixed at the date when entitlement first arose, subject to the 5% annual increases to preserve its value in real terms over the period of entitlement. I therefore reject the appellant's argument that quantification of what was due under the scheme ought to be based upon a figure that included notional increases to basic salary on the hypothesis that she had remained fit for work. The expression "scheme salary" meant the basic salary which was being paid at the time when entitlement under the scheme first crystalised. Subject to the contractual provision for annual increases, the benefits payable under the scheme were 75% of that figure less state benefit.

31. The commercially sensible construction of the contract was that the 5% increase was to be applied annually to the amount actually being paid at the end of each year. The increase was not, therefore, irrevocably fixed as a percentage of the amount of benefit paid in the first year. Rather, the annual increase was 5% of what was actually being paid at each anniversary. I accordingly accept the appellant's position on this point that the tribunal's analysis of this point in the final sentence of paragraph 247 was wrong to that limited extent.

32. This conclusion does not, however, necessitate any change to the tribunal's Judgment which did not directly address the issue of how the 5% increase should be applied and did not make an award of any specific sum. This issue can accordingly be dealt with on a remit to the tribunal to determine quantum. The third appeal is therefore refused.

The second appeal

Facts / reasons of the employment judge

33. As noted above, the claim presented to the tribunal in respect of deductions from wages related only to the period from May 2011 to 25 June 2012. That remained the position until 22 March

2022, when an application was made on behalf of the appellant to amend her ET1 to introduce the following paragraph in relation to the deductions claim:

> "This series of deductions started on around 28 May 2011, and has occurred on the 28th of each month thereafter, continuously to date, with the most recent unauthorised deduction in the series being made on 28 February 2022."

34. Within the same application to amend, the appellant acknowledged that her employment had ended on 13 September 2013 but averred that:

> "… notwithstanding my employment having been terminated, I have remained entitled to ongoing payment of wages since the termination of my employment, on the basis of the documentation referred to below and on the basis that my employer was not entitled to dismiss me in circumstances in which I am entitled to payment of wages as set out below."

35. The documentation referred to was the PHI scheme. In summary, the position which the appellant sought to advance in the proposed amendment, based upon **Aspden v. Webbs Poultry and Meat Group (Holdings) Limited** [1996] IRLR 521, was that her dismissal had been in breach of the implied term that she would not be dismissed on the basis of capability whilst she remined entitled to receive benefits under a PHI scheme. The proposed amendment did not, however, seek to introduce a claim for breach of contract. Rather, the appellant submitted that the breach of the implied term resulted in the effects of the dismissal being "negated" such that she continued to be entitled to payment of sums due under the PHI scheme. Those sums were said to be payable "in connection with" a contract of employment, and were thus "wages" in terms of section 27 of the **Employment Rights Act 1996**.

36. The application to amend was opposed. The employment judge who heard submissions upon the amendment application expressed difficulty with the legal basis for it:

> "The application is based on a proposition, unique in my experience, that notwithstanding a dismissal, there may still be a claim for unauthorised

> deductions from wages on an ongoing basis for the purposes of a section 13 claim. This is based on a contention that because the dismissal was in breach of contract the effects of the dismissal can be 'negated'"

37. The employment judge noted that the amendment did not suggest that the **Aspden** implied term rendered the termination of the contract void. It was accepted that the termination was effective. She considered that the new claim could only have been brought as a claim for breach of contract, but noted that the appellant expressly disavowed such a position in submissions about the proposed amendment.

38. Under reference to **Delaney v. Staples** [1992] 1 A.C 687, the employment judge concluded that a claim under section 13 **ERA** must relate to a payment due (or which had fallen due) under a subsisting contract of employment, and could not be brought in respect of a period of time after the contract had ended. She accordingly concluded that the amendment, as framed, had little prospect of success, was made significantly out of time and, if permitted, would significantly extend the scope of the legal and factual inquiry at the ultimate hearing. Having weighed those factors with the other **Selkent** considerations, she refused to allow the proposed amendment.

Summary of the appellant's submissions

39. The tribunal had erred in failing to recognise that it was within its inherent jurisdiction to determine all contractual terms, including implied terms, which bore upon a claim under section 13 **ERA** (ground 1). It should have held that the PHI entitlement was an entitlement to "wages" which crystalised upon the expiry of the 26 week period of incapacity and survived the termination of the contract. There was never any question of the employee "earning" future payments by providing future services under the contract. In terms of section 27 **ERA**, PHI benefit payments were clearly payable "in connection with" the qualifying employment and were thus wages for the purposes of section 13.

40. The tribunal had further erred in interpreting **Delaney v. Staples** as precluding a claim for

post-dismissal PHI payments from being made under section 13 (ground 2). **Delaney** established that wages were consideration for work done. The PHI payments were consideration for work done up to the point when eligibility under the scheme crystalised. It is in the nature of PHI payments that, whilst they remain due, services cannot be rendered under the contract of employment. The respondent should not be able to rely upon its own breach of the **Aspden** implied term to defeat a legitimate claim for wages. **Delaney** had concerned a claim for wages in lieu of notice. Its ratio does not, therefore, apply to claims for PHI benefit.

41. Finally, the tribunal had erred in concluding that allowing the amendment would significantly extend the scope of the legal and factual inquiry (ground 3). There was no legal or factual complexity as to the appellant's eligibility for PHI payments, nor was there any dispute that she had been dismissed on the basis of capability.

Summary of the respondent's submissions

42. This was an appeal against the exercise of a discretion with which the appeal tribunal should not readily interfere. The tribunal had been invited to approach the amendment application on the basis of the **Selkent** principles and had done so. Its approach could not be seen to contain any error of law.

43. In particular, the employment judge had been correct in her assessment of the incompetence of an application under section 13 **ERA** made in respect of a period of time after the underlying contract of employment had come to an end. She was correct to express doubts as to how the claim could properly be articulated other than as a claim for breach of contract. The appellant's reliance upon **Aspden** was misconceived.

44. The employment judge had been correct to apply the dictum of Lord Browne-Wilkinson in **Delaney** that:

> "[I]f a payment is not referable to an obligation on the employee under a subsisting contract of employment to render his services it does not…fall

within the ordinary meaning of the word wages."

45. The appellant's argument – that despite the termination of her employment, the respondent was under an ongoing obligation to pay her a monthly sum under the PHI scheme – was wrong. In any event, section 27(2)(e) of the **ERA** expressly excluded from the definition of wages "any payment to the worker otherwise in his capacity as a worker".

Decision and reasons

46. The employment judge was correct to conclude that the argument that parties had contracted for sums of salary to continue to be due under the contract of employment even after that contract had been terminated was unlikely to succeed. She was similarly correct to doubt the proposition that the **Aspden** term "negated" the effect of termination of the contract.

47. Whilst there are limited situations where rights and obligations under a contract of employment are capable of enduring beyond the termination of the employment relationship – restrictive covenants being an example – that will only be so where parties have clearly contracted for that to be the case, either expressly or by necessary implication. That was not the position here in relation to payment of benefits under the PHI scheme. On the contrary, eligibility to receive benefits was expressly confined to "employees" (staff handbook) and "permanent employees" (HR document).

48. Even on the hypothesis that termination of the appellant's contract of employment in September 2013 was a breach of the **Aspden** implied term, it does not follow that the effects of such termination should simply be ignored. The claimant's remedy in that scenario was not to sue for payment under the contract. Rather, the appropriate remedy was that of damages for breach of contract.

49. The employment judge was also correct to conclude that the term "wages" under Part 1 of the **ERA** was confined to sums which had fallen due under a subsisting contract. That was consistent

with **Delaney v. Staples**. The only respect in which the proposed amendment related to sums that had become due under such a contract related to the limited period of just over 2 and a half months between the presentation of the ET1 on 25 June 2013 and the effective date of termination on 13 September 2013. Sums due under the PHI scheme between those dates were still "wages" for the purposes of section 27 of the **ERA**. The application to amend was, however, only presented on 22 March 2022, some 8 years after the expiry of the primary time limit. The employment judge correctly self-directed on **Selkent**, including on the relevance of time limits as a **Selkent** factor, and no error of law is apparent in her approach.

50. The second appeal is therefore refused.

The first appeal

Procedural background

51. In addition to her claim for unpaid wages, the appellant brought a claim of disability discrimination. That claim was poorly specified, but related to acts which were said to have occurred before the termination of her employment.

52. It is not necessary to rehearse the entire procedural history of that claim other than to note that a significant period of time elapsed during which the appellant attempted to appeal an earlier strike out of a different claim for protected belief discrimination to the Employment Appeal Tribunal, then to the Court of Session and ultimately to the European Court of Human Rights. In parallel with that procedure, some efforts had been made by the employment tribunal to make progress with the claim for disability discrimination, but ultimately that had also been sisted (stayed) between August 2018 and late 2020.

53. In November 2020, the respondent made the application for strike out which is the subject of this appeal on the basis *inter alia* that, due to the passage of time, it was not possible for there to be a fair hearing of the disability claim. The application was also based upon the proposition that the

appellant had conducted the proceedings unreasonably.

54. Little progress seems to have been made thereafter until a case management preliminary hearing was held on 8 October 2021. At that hearing, it was common ground that the disability claim would require further specification before it could proceed. The note of the preliminary hearing on 8 October 2021 also records, however, that it was agreed that it would be proportionate to determine the strike out application before the claimant incurred the further expense of providing further specification of the disability claim.

55. A hearing on the strike out application took place over three days on 17, 19 and 21 January 2022. The appellant gave evidence. No evidence was led for the respondent. The employment judge noted the substantial procedural history of the case and summarised the law in relation to strike out on both of the grounds advanced. She carefully considered the terms of the disability claim as it was then set out in the claim form. Having done all of these things, she rejected the submission that the claimant had behaved unreasonably but concluded that a fair hearing of the disability claim was not possible, and there were no steps which could be taken to achieve a fair trial. She accordingly struck out the claim on that latter basis.

56. Within the employment judge's reasons for reaching the decision that a fair trial was not possible she said:

> "166….I am concerned that there are so many allegations, some specific but many in general terms, and almost all of which are said to have taken place 12 or 13 years ago. The events which are so vivid to the claimant will not have the same importance to the large number of other potential witnesses…
>
> 167. I agree with the respondents that witnesses' recollection of what happened will inevitably be diminished after 13 years and the respondents will be prejudiced in their attempts to defend the claim as a result. I appreciate that the claimant herself has a very strong recollection of what happened and that she says that she has documents that will support what she says. However the tribunal will not simply have to consider whether any factual allegation occurred. It will also have to consider why any incident occurred…
>
> 171. I have considered whether there are steps that can be taken through case

> management which will make it possible to have a fair trial period one possibility could be an order that the allegations should be further particularized and the respondent then allowed to amend their response. It might also be possible for the claimant to provide a detailed witness statement of all the allegations and then the respondent could approach witnesses to see whether they are, in fact, able to remember the events in question.
>
> 172. However, I do not think either option is realistic or proportionate. The allegations are numerous and wide-ranging, in many cases generic in nature and largely relate to 2009 to 2010. It is not clear who the witnesses would be. There appear to be 17 individuals named by the claimant as involved in the events. These include 15 individuals identified by the claimant as having discriminated against her (or harassed or victimised her). There may, of course, be other witnesses who were present and who the respondent could have spoken to and perhaps called as witnesses had the case come to a hearing closer in time to the events.
>
> 173. I consider that the nature of the case is such that it is simply not possible for the respondent to present as detailed a defence now as they may have presented at the time period that is aggravated by the fact that the majority of the individuals have left their employment but it is mainly due to the passage of time."

Summary of the appellant's submissions

57. There were two errors of law in the decision to strike out the claim. The first arose from the fact that it had been agreed at the case management preliminary hearing on 8 October 2021 that the strike out application should be determined before the claimant was required to incur the further expense of providing further specification of the disability claim. To the extent that the decision to strike out the disability claim then took into account the poor specification of it, that was unfair.

58. Secondly, the conclusion that the quality or cogency of the evidence available to the tribunal was based upon speculation rather than upon evidence. In **Daly v. Northumberland and Tyne and Wear NHS Foundation Trust** UKEAT/0109/16, Simler J (as she then was) had held that such an approach was not open to the tribunal, stating:

> "…it was not open to the tribunal to make this unsupported assumption in the absence of evidence. If there was material that entitled the tribunal to conclude

> that a fair trial could not take place, it was incumbent on the tribunal to identify that material but in the absence of such material it was not open to the tribunal to make an assumption that a fair trial would not be possible absent proper foundation for it."

59. That principle was particularly relevant where, as here, the appellant had not been given a final opportunity to refine and focus the pleadings about the disability case. Only after that had been done would it be possible to make any informed assessment of what witnesses and other evidence might be needed. Once that had been done an evidence-based assessment could then be made of the extent to which the respondent would be placed at a disadvantage at trial.

60. What should have happened prior to any final decision being taken on the strike out application was a procedure of the type referred to in para. 171 of the tribunal's reasons. The reasons given for not following that procedure (at para. 172) illustrated why the decision to deal with the strike out application in advance of an opportunity to provide further specification of the claim was wrong.

Summary of the respondent's submissions

61. By the date on which the strike out application was heard, the events to which the disability claim related had all occurred more than 8 years previously. Some extended even further back to 2009.

62. The tribunal had correctly applied its own experience of litigation. This was the correct approach (**Peixoto v. British Telecommunications plc** UKEAT/0222/07 at para 48). A tribunal ought to be able to bring to bear its own experience on the issue of diminished memory of witnesses caused by the passage of time.

63. Correctly, the tribunal had directed itself that delay was not, in itself, sufficient to conclude that there could not be a fair trial. The tribunal has also considered whether steps short of strike-out might be available as an alternative, but had concluded that such steps were unrealistic (para 172). That was a conclusion that was open to the tribunal and one which was obviously correct and sensible.

Decision and reasons

64. I have considerable sympathy with the conclusion reached by the employment judge, and I agree with the respondent that experience of litigation suggests that the memory of witnesses will have faded to some extent through the passage of time. That is a phenomenon recognisable to any judge who has heard evidence in claims of a historical nature.

65. The correct question, however, as focused in the passage from Simler J in **Daly**, is whether the extent to which the quality of the evidence has been diminished by the passage of time is so severe that a fair trial is no longer possible. To answer that question, a number of other questions must first be considered. These would include:

a) What, precisely is the claimant's case?
b) Who are the witnesses needed by the respondent to answer that case?
c) What recollection of the material events do those witnesses have?
d) What contemporaneous documents or other sources of evidence are available which bear upon the case and the respondent's defence of it?

66. A significant problem arose in the present case from the decision at the case management preliminary hearing on 8 October 2021 to delay the provision of further focus and specification of the disability discrimination case until after the strike out hearing. Whilst the intention behind that decision was to save the claimant from incurring additional – and possibly unnecessary – cost, the practical effect of it was to make it impossible for the judge at the strike out hearing to make a fully informed and evidence-based assessment of any of the above questions.

67. I therefore agree with the submission for the appellant that the tribunal erred in striking out her disability discrimination claim before it had fully considered those questions and reached conclusions about them that were based upon evidence. A procedure of the kind referred to at paragraph 172 of the tribunal's reasons should first have been attempted with a view to bringing further focus and specification to the disability claim before any final decision to strike it out was

taken.

68. The first appeal accordingly succeeds, and I will set aside the strike out order and remit the strike out application for determination anew of the issue of whether or not a fair hearing of the disability discrimination claim remains possible. It is not necessary for that issue to be remitted to the same tribunal. Equally, however, there is no reason why the same tribunal could not hear it.

Summary of conclusions and disposal

69. In summary:

a) the cross appeal is refused;

b) the third appeal is refused, but the claim under section 13 **ERA** is remitted to the tribunal to determine quantum as directed in this Judgment;

c) the second appeal is refused; and

d) the first appeal is allowed, the strike out order of 1 March 2022 is set aside, and the application to strike out the disability discrimination claim on the ground that a fair hearing of it is not possible is remitted to the employment tribunal to proceed in accordance with the directions in this Judgment.