Neutral Citation Number: [2025] EAT 88

Case No: EA-2021-SCO-000119-DT

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street Edinburgh EH3 7HF

Date: 13 June 2025

Before :

JUDGE BARRY CLARKE

- -

Between :

MISS SHIRLEY OKEZE **Appellant**

- and –

CYGNET HEALTHCARE LIMITED **Respondent**

- -
- -

Miss Shirley Okeze, the **Appellant**
Mr Stephen Hughes (instructed by Gregsons Solicitors), for the **Respondent**

Hearing date: 13 March 2025
- -

JUDGMENT

SUMMARY

Practice and Procedure

An Employment Tribunal, having partially upheld a complaint of race discrimination, did not err when deciding to adjudicate the matter of remedy at the same time. Observations made on split hearings and lists of issues.

Judge Barry Clarke:

Introduction

1. This appeal raises the issue of whether it was appropriate for an Employment Tribunal (Employment Judge Sangster, sitting with non-legal members), having upheld a claim, to proceed to deal with remedy in circumstances where one of the parties now asserts being unready to do so. I shall refer to the parties as they were before the ET, as claimant and respondent.

2. The claimant was professionally represented before the ET, but she represented herself at this hearing. I allowed her to do so via video link. The respondent was represented by Mr Hughes. He attended in person. He had also appeared before the ET.

Background

3. The respondent is a large company providing health and social care services to vulnerable young people and adults. The claimant was on its bank of support staff. She was engaged to work at the Wallace Hospital in Dundee. It is a specialist high dependency complex care unit. She started on 13 June 2019 but the respondent terminated her engagement only seven weeks later. The reasons it gave for so doing concerned her conduct and performance.

The claim before the ET

4. The claimant disputed the respondent's reason for ending her engagement. She instructed solicitors. On 29 November 2019, they presented an ET1 claim form on her behalf. They remained with her throughout the entire proceedings before the ET.

5. The statement of claim attached to the claimant's ET1 asserted that the dismissal was wrongful, that the respondent had subjected her to disability discrimination (by reference to anxiety and depression) and to race discrimination (by reference to her Nigerian national origin), and that it had not fully paid her wages. The box of the ET1 form, by which individual claimants can indicate

the remedy they are seeking, was left blank. The accompanying statement only referred to unpaid wages of £648.

6. The respondent filed an ET3 response form resisting the claim in full. It said that it had terminated the claimant's engagement because of complaints from staff and service users, her refusal to engage with her manager, and her excessive use of her mobile phone while on duty.

Case management by the ET

7. For reasons that will become apparent, I must spend time explaining how the ET managed the case to a full hearing.

8. The ET convened multiple preliminary hearings on a range of topics. The first was held on 14 February 2020. Ahead of this hearing, the parties were sent the standard agenda template. Completion of the template is voluntary but, when done, it can be very helpful. It invites comments on aspects of the case and the remedy sought if a claim succeeds. By this agenda, parties are also invited to supply a draft list of issues.

9. The respondent provided a draft list of issues in a three-page document dated 7 February 2020. It sought to divide the claim into seven topics. They bore the following titles: race discrimination; disability discrimination; failure to make reasonable adjustments; discrimination arising from disability; wrongful dismissal; unlawful deduction from wages; and jurisdiction. In respect of race discrimination, the only issue noted was whether the respondent had terminated the claimant's employment because of her national origin. The document was plainly in draft form; it contained question marks to indicate its writer's uncertainty on some points.

10. The list of issues did not include a topic headed "remedy". This would not be at all unusual at this stage. This is because remedy is covered in a separate part of the standard agenda template.

11. At paragraph 9 of the note following the preliminary hearing on 14 February 2020, the judge recorded the agreement of the claimant's solicitor that the respondent's draft list of issues could be "adopted".

12. The judge also ordered the claimant to provide a schedule of loss by 28 February 2020 and the respondent to provide a counter schedule by 20 March 2020. The order stipulated that the schedule of loss should set out the following:

> *"(a) what the claimant seeks by way of remedy if the claim succeeds;*
> *(b) whether the claimant was a member of an occupational pension scheme;*
> *(c) how much is sought by way of compensation in respect of each complaint with a detailed explanation of how each sum is calculated;*
> *(d) details of benefits received;*
> *(e) a summary of jobs applied for, details of any interviews attended or jobs obtained, details of any self-employment including when that commenced and details of all income and profit whether from temporary, casual or permanent employment or self-employed work;*
> *(f) details of any other efforts made by the claimant to mitigate her loss*."

13. Through her solicitors, the claimant provided a schedule. In totality, it said this:

> "*In terms of the Vento guidelines, the claimant submits that this claim is within the middle band of the scale (£8,800-£26,300). The amount estimated is £10,000.*
>
> *The claimant has been in receipt of her student bursary as she is currently enrolled at the University of Dundee studying Social Work. The claimant has continued to make applications for further employment, however has been unsuccessful in her attempts.*
>
> *The claimant was not part of a pension scheme. The claimant accepts having received one week's notice pay*."

There were no attachments or further details.

14. The respondent produced a counter schedule on 20 March 2020, which included this comment: "*The claimant has provided no details of any loss of earnings. For the avoidance of any doubt the respondent denies that the claimant is entitled to any loss of earnings*."

15. The ET held a preliminary hearing on 8 December 2020 in which it decided that the claimant was not, in law, a disabled person. This led to the dismissal of the complaint of disability discrimination. Through her solicitors, the claimant withdrew her complaint of wrongful dismissal. This left standing only her complaints of race discrimination and unauthorised deduction from wages.

16. A further preliminary hearing for case management purposes took place on 15 February 2021. This resulted in an order for the claimant to particularise her complaint of race discrimination. Through her solicitors, she identified eight separate acts and omissions, each being categorised as

direct discrimination. They included the respondent's decision to end her engagement, the provision of inadequate support, a failure to investigate her concerns, and provision of an inaccurate reference to a prospective alternative employer.

17. The judge at the preliminary hearing on 15 February 2021 also made directions for the final hearing. He did not direct that liability and remedy would be split. To the contrary, he said this at paragraph 14 of his order: "*A copy of the claimant's schedule of loss should be included within the joint bundle of documents for ease of reference at the final hearing*". That schedule was unchanged from the one the claimant had provided a year earlier. It still did not identify, let alone itemise or quantify, any financial loss.

18. In due course, the tribunal's administrative staff sent the parties a notice of hearing. This notice, dated 13 May 2021, listed the hearing for 13 to 15 September 2021. Paragraph 2 of the notice said this (with my added emphasis): "*We have set aside three days for its full disposal, <u>including remedy if appropriate</u>*". The notice reminded parties of the need to ensure that all the witnesses needed for the hearing were aware of the date and time. The mode of hearing later shifted to video.

The full hearing before the ET

19. By the time of the full hearing, the issues in the claim had very substantially narrowed and bore almost no resemblance to the list of issues dated 7 February 2020. The claimant withdrew her complaint about wages at the outset. As a consequence, the only remaining head of claim before the ET was direct race discrimination, concerning the eight alleged acts and omissions that the claimant had particularised earlier in 2021. As for the schedule of loss, it had not been updated.

20. Before embarking on the evidence, the ET sensibly made an effort to ensure that the parties were agreed about the reduced ambit of the claimant's claim. Referring to the document containing the claimant's further particulars, the ET recorded this at paragraph 11 of its subsequent judgment: "*It was agreed at the start of the hearing that this document encompassed all of the claims being brought*". I have not been shown that document, but at paragraphs 12 to 14 of its judgment, the ET

listed the eight alleged acts and omissions under the hearing "*Issues to be determined*". There was no express reference in those paragraphs to remedy as a live issue if any part of the claim were to succeed.

21. The parties and witnesses gave their evidence in chief orally, as is commonplace in Scotland. The claimant led no evidence on financial loss and provided no documents relevant to such loss. All the ET had to go on was the aforementioned schedule of loss referring to her injured feelings and her enrolment as a student. After evidence, the ET heard submissions from the professional representatives for both parties. I will return later in this judgment to what was said about remedy.

The ET's judgment

22. Having heard evidence and submissions, the ET produced a 23-page written judgment. This was sent to the parties on 28 September 2021. The judge is to be commended both for the concision of the judgment and for the speed with which she produced it. By that judgment, the ET unanimously upheld the claimant's complaint of direct race discrimination in respect of two of the eight detriments: the failure to investigate her concerns and the provision of an inaccurate reference. It rejected the claimant's assertion that the termination of her engagement had been discriminatory, so there could be no financial loss in that regard. The inaccuracy in the reference arose from the fact that it had wrongly stated that there was an ongoing investigation into the claimant's conduct. As a result, a prospective employer withdrew an offer of a job that it had made to the claimant.

23. I will not further summarise the ET's judgment on liability, as its findings are unchallenged.

24. In respect of remedy, the ET awarded the claimant the sum of £3,000 (plus interest) for her injured feelings. It awarded her no compensation for financial loss arising from the provision of an inaccurate reference. The reason for this approach was explained in the final paragraph of its judgment as follows:

> "*The claimant did not lead evidence to establish any financial loss. No financial loss was reflected in the schedule of loss lodged and included in the joint bundle of productions. This simply made reference to an award for injury to feelings and stated that the claimant was in receipt of a student bursary and had been unsuccessful in her attempts to secure alternative employment. In these circumstances, the Tribunal*

declined to make any further award."

The ET's refusal to reconsider

25. On 12 October 2021, through her solicitors, the claimant applied for the judgment to be reconsidered. The application contended that the award for injured feelings should have been £7,000 and that she should have been awarded financial loss of about £23,500. It was not clear how the solicitors had calculated the latter figure. Attached were documents said to evidence the loss.

26. The ET refused the application on 29 October 2021. On the matter of the claimant's financial loss, its decision said this:

> *"… the documents attached to the application for reconsideration were not included in the bundle prepared for the final hearing or introduced into evidence … No explanation has been provided as to why the documents attached to the application for reconsideration and referred to within it were not introduced into evidence during the course of the hearing. It has not been asserted that the documents attached to the application for reconsideration could not have been obtained with reasonable diligence for use at the original hearing. The claimant did not give evidence in relation to the matters asserted … No explanation has been provided as to why she did not do so. In these circumstances, and having regard to the public interest requirement that there should, where possible, be finality of litigation, the Tribunal is not satisfied that it is necessary in the interests of justice to reconsider the judgment*."

The appeal to the EAT

27. From this point, the claimant became a party litigant. According to her notice of appeal, she sought to challenge the following decisions by the ET: "*hearing bundle, judgment, appeal to reconsider*". From the attached grounds, it seemed that the claimant sought to appeal only the ET's judgment on remedy. There has been no cross-appeal by the respondent on either liability or remedy.

28. It has taken some time for this matter to reach a full hearing before the EAT. There was an appeal against an order of the registrar, at which the claimant persuaded Lord Fairley that time should be extended for her to bring this appeal. The appeal was then rejected on its merits at the sift stage by HHJ Beard. Following a subsequent rule 3(10) hearing, where the claimant was supported by SEALAS, Eady J permitted the claimant to proceed with two amended grounds of appeal. Both relate

to the ET's decision to proceed to adjudicate upon remedy as part and parcel of the same hearing. Both assert an error of law in the form of a material procedural irregularity causing an unfair hearing.

29. By the first ground permitted to proceed, the claimant contends that it was an error of law for the ET to decide remedy in circumstances where remedy was not properly before it. Put simply, remedy was not on the list of issues – either the document dated 7 February 2020 or in the summary at paragraph 12 to 14 of the ET's judgment – and so it should not have been considered. The claimant was not prepared for it to be considered. It is contended that, where a list of issues had been agreed, the ET should have followed that list unless the interests of justice required a departure. Reference is made to the Court of Appeal authorities of **Parekh v London Borough of Brent** [2012] ECWA Civ 1630 and **Scicluna v Zippy Stitch Ltd** [2017] EWCA Civ 1320. It is said that the claimant was entitled to rely upon the list as an exhaustive account of the matters to be determined at the hearing.

30. If that ground of appeal succeeds, remedy would need to be reopened entirely, covering both financial loss and injured feelings, and with the possibility of adducing further evidence in respect of each. As already noted, the only part of the claim (as upheld) that could have led to financial loss was the respondent's provision of an inaccurate reference.

31. By the second ground, the claimant contends that it was an error of law for the ET to fail to determine an application by her representative for the issue of financial loss arising from the inaccurate reference to be dealt with on a later occasion. This assertion derives from paragraph 45(e) of the ET's judgment, where it is recorded that her representative "*was unclear on whether the claimant also sought compensation for financial losses and sought … to reserve the claimant's position in relation to this*". That is said to indicate that the ET had before it an application for financial loss to be held over to a later occasion and which it did not decide.

32. If that ground of appeal succeeds, the only matter to be reopened would be the extent of the claimant's financial loss.

Submissions

33. The claimant did her best to explain to me her position in respect of the narrowed grounds of appeal, but it was clear that she wanted to address me on the matters outside the scope of her appeal. That is as an understandable impulse. I bear in mind that the claimant was represented by solicitors throughout the ET proceedings and by a SEALAS volunteer at the rule 3(10) hearing before the EAT. This has been the first time that she has advocated for herself.

34. I mean the claimant no discourtesy in observing that her skeleton argument ranged across a variety of mostly irrelevant topics. These included the feasibility of incurring loss by reason of a withdrawn job offer following an inaccurate reference (which was not in dispute), the extent of the unauthorised deductions from her wages (a complaint that had been withdrawn), and the size of the award for injured feelings (which was not part of her appeal). Her oral submissions, when they did focus on the revised grounds of appeal, essentially amounted to a reiteration of her position that the ET's decision to proceed with remedy caught her by surprise, and an assertion that, if she had received a fair hearing, she would have been able to secure significantly higher compensation. I have decided to focus my attention on the revised grounds as prepared by the SEALAS volunteer at the rule 3(10) hearing. They properly articulate her position before the EAT.

35. Mr Hughes put his points in reply succinctly: (a) the material before the ET and the parties demonstrates that remedy was indeed to be addressed as part and parcel of the same hearing; (b) at no stage had the claimant asserted any financial loss to merit compensation; (c) the parties delivered their closing submissions to the ET on this basis that remedy would be addressed there and then; (d) the claimant's subsequent application for reconsideration (when the claimant was still legally represented) took no issue with remedy having been dealt with there and then; (e) the claimant's solicitor, having indicated during closing submissions that she wished to address the ET on the issue of financial loss, did not pursue the point when the ET reminded her that it had heard no evidence on the matter; and (f) the claimant's solicitor made no application to reserve the claimant's position, because no further hearing was in anticipation.

36. Before addressing the two grounds of appeal, I think it would be helpful to discuss two topics,

namely split hearings and lists of issues.

Discussion: split hearings

37. In the Employment Tribunals in Scotland, the general understanding among professional representatives is that liability and remedy will be dealt with at the same hearing unless there is an order that they be split and considered separately. The situation is not much different in England and Wales. Such an approach plainly serves the efficient administration of justice. It would impede the effective listing of all cases if tribunals routinely "parked" the remedy stage to a later occasion. Administrative staff would have to find slots where the parties and the judge (and non-legal members if sitting) were free to reconvene, which would slow the delivery of justice for the parties in the case, as well as other parties waiting their turn. A respondent might become insolvent in the meantime, which would reduce the likelihood of an effective remedy for a successful claimant. It is also a good discipline for parties to prepare for remedy at the same time as they prepare for liability. This is because a better understanding of the value of a claim at an early stage is more likely to encourage the parties to settle their dispute before they incur significant cost.

38. This default is not enshrined in the rules. At the time of the ET hearing in this case, rule 57 of the **Employment Tribunals Rules of Procedure 2013** defined a final hearing as one where the ET "*determines the claim or such parts as remain outstanding following the initial consideration … or any preliminary hearing*", and it noted that there may be "*different final hearings for different issues (for example, liability, remedy or costs)*". Rule 55 of the **Employment Tribunal Procedure Rules 2024** is in identical terms. It simply empowers the ET, should it wish or need to do so, to split up the component parts of liability, remedy and (more rarely) costs.

39. Although it post-dates the hearing in this case, presidential guidance on the preparation and use of witness statements in the Employment Tribunals in Scotland was promulgated on 3 August 2022. This observes (rather than stipulates) at paragraph 11.5 that *"the issue of remedy is routinely dealt with as part of a single final hearing rather than liability and remedy being considered at*

separate hearings". Preparation for a hearing in Scotland has long proceeded on that understanding, regardless of whether a case is simple or complex.

40. It has rightly been accepted in the amended grounds of appeal in this case that liability and remedy will typically be dealt with at the same hearing. Although there is no rule or presidential guidance elevating it to a requirement, it operates as a default for listing purposes. I consider that proposition to be so well known and understood by the employment law community in Scotland that I can take judicial notice of it.

41. Any ET is, of course, free to depart from that default position, usually after consulting the parties. It will do so where an alternative approach accords with the overriding objective. This may happen where, for example, the liability stage is complex, or where the remedy stage might independently give rise to areas requiring costly expert evidence, such as in respect of future pension loss. A split approach would usually be agreed at the case management stage. But circumstances may dictate that the decision to split is made later. For example, time pressures during the hearing, such as when the listing window has proved inadequate, may mean that there is no choice but to defer remedy to a later date. The ET may also be persuaded to defer remedy, after giving judgment on liability, where the parties have requested time to reach a settlement.

42. Elias LJ emphasised in **Salford Royal NHS Foundation Trust v Roldan** [2010] ICR 1457 that, where an ET decides to split liability and remedy, it should be clear about how evidence is to be given at each stage to avoid unnecessary duplication. A party who is unclear about whether they should adduce evidence on a particular point now (or leave it to a later hearing) should raise their concern with the ET. This sort of case management will not be needed where, in accordance with the default position, liability and remedy are not being split.

Discussion: lists of issues

43. For the purposes of this judgment, it is not necessary to conduct a detailed examination of the status of a list of issues. However, some uncontroversial observations can be made.

44. Lists of issues are *"one of the strongest weapons in the armoury of modern case management"* (as they are memorably described in **Harvey on Industrial Relations and Employment Law** at Division PI, paragraph 764) and a *"road map by which a judge is to navigate his or her way to a just determination of the case"* (**Scicluna**, paragraph 14, per Longmore LJ).

45. Mummery LJ considered their purpose at paragraph 31 of **Parekh**:

> "*A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list … As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence … case management decisions are not final decisions. They can therefore be revisited and reconsidered, for example if there is a material change of circumstances. The power to do that may not be often exercised, but it is a necessary power in the interests of effectiveness. It also avoids endless appeals, with potential additional costs and delays*."

46. A list of issues adds particular value where the parties' pleadings are a diffuse narrative, since they bring focus to the various elements that need to be satisfied for each individual claim or defence to be made out. That focus assists the parties in knowing what evidence they should adduce. It assists the ET in knowing each disputed point of fact and law requiring adjudication. Axiomatically, it is better for the list to be constructed earlier in the proceedings, through the process of case management and with appropriate collaboration and judicial intervention, rather than left to the start of a hearing.

47. A good list of issues does much more than list the legal complaints being made. Understood properly, the question "did the respondent unfairly dismiss the claimant?" is not an "issue". It simply asserts the head of claim provided for by statute. The same applies to the question "did the respondent subject the claimant to direct race discrimination?" Likewise, the question "what remedy should the claimant receive?" does little more than make the obvious point that an ET must decide this point in respect of any part of a claim that succeeds. A good list of issues will drill down, breaking these

questions into their component parts, by reference to the disputed facts in the case, while anchoring them to the elements of the relevant causes of action that are in play.

48. Where parties are professionally represented, those representatives bear the principal responsibility for ensuring that the list of issues is up to the job (**Yorke v GlaxoSmithKline Services Unlimited**, EA-2019-000962-BA EAT 0235/20, paragraph 51, per HHJ Tayler). Similarly, as the Court of Appeal noted in **Moustache v Chelsea and Westminster Hospital NHS Foundation Trust** [2025] IRLR 470, where a party is not professionally represented, the ET's arbitral role may require it to be more interventionist in exploring the scope of the case being advanced (paragraph 31, per Warby LJ). Where appropriate, such judicial oversight can improve a list of issues.

49. There have been plenty of appeals in recent years in respect of situations where it is said that an ET has failed to determine a matter included in a list of issues or has improperly departed from the list (see **Saha v Capita plc** UKEAT/0080/18, **McLeary v One Housing Group Ltd** UKEAT/0124/18, **Mervyn v BW Controls Ltd** [2020] ICR 1363, and **Bogdan v The Cabinet Office** [2024] EAT 177) or where it is said that the ET has failed to determine a matter that was not included in a list of issues but should have been, or was otherwise obvious from the original pleadings (see **Hassan v BBC** [2023] EAT 48, **Z v Y** [2024] EAT 63, and **Moustache**). There is no need for me to examine those authorities because this appeal purports to give rise to a different point: whether the ET should have adjudicated on remedy when that topic was not in the list of issues.

First ground of appeal

50. I set out above the full picture of the ET's management of the case, which was not apparent at the rule 3(10) hearing, because the context is highly relevant.

51. By the first ground of appeal, the claimant contends that it was an error of law for the ET to decide remedy in circumstances where remedy was not properly before it. That assertion presupposes either that the document dated 7 February 2020 had survived as the formal list of issues or that the summary provided by the ET paragraph 12 to 14 of its judgment was intended to serve a similar

purpose.

52. As for the document dated 7 February 2020, it is a mischaracterisation to suggest it remained the list of issues for use at the full hearing. It was adopted for use following the first preliminary hearing, despite some of its tentative content. It had been superseded and rendered irrelevant by the subsequent stages in the litigation: the dismissal of the disability discrimination complaint, the withdrawal of the wrongful dismissal complaint, the withdrawal of the unpaid wages complaint, and the particularisation of the race discrimination complaint. It is of no import that it contained no section indicating that the ET would also consider remedy if needed.

53. As for paragraphs 12 to 14 of its judgment, the ET was not therein setting out an agreed list of issues for the entire proceedings. To suggest otherwise is a misreading of this part of its judgment. As noted above, a formal list of issues is a case management tool. Where both parties are professionally represented, it is the fruit of a collaborative exercise between those representatives, influenced where appropriate by the interventions and oversight of a judge. By contrast, in this part of its judgment, the ET was simply identifying the remaining liability issues that required adjudication, reflecting the further particulars that the claimant had provided. This is what rule 63(5) of the **Employment Tribunals Rules of Procedure 2013** required it to do. This was an entirely sensible approach, given how much the ground had shifted since the original list was produced, rendering it obsolete. It was not the sort of formal agreed list produced through collaboration. The ET was not constrained to follow it (or unable to go beyond it) save where the interests of justice permitted a departure. I therefore reject that submission.

54. Judgments can always say more. The ET might have added a sentence to paragraph 14 of its judgment saying: *"For the avoidance of any doubt, if the claimant wins any part of her case, we will then consider the matter of remedy"*. That would be a counsel of perfection. Such a sentence would have been a statement of the obvious.

55. The error of law asserted by this ground of appeal is that it was a material procedural irregularity, causing unfairness to the claimant, for the ET to go on to decide remedy when remedy

was not on the list of issues. Because there was no formal list of issues, I have concluded that there was no such irregularity and no such unfairness. It is not necessary for me to consider whether lists of issues must explicitly include remedy; doubtless it would be good practice, but it will depend on the case. In the instant case, context really matters. The fact that remedy would be addressed at the final hearing alongside liability had been made explicit at the preliminary hearing on 15 February 2021 (when the judge directed that the bundle should include the schedule of loss) and, if any doubt remained, in the notice of hearing dated 13 May 2021. Moreover, the ET's order at the hearing on 14 February 2020, as to what was required in a schedule of loss, could not have been clearer. The respondent had raised the inadequacy of the claimant's schedule of loss on 20 March 2020, 18 months before the final hearing. A professionally represented claimant persisted to the final hearing with a schedule with no itemised or quantified financial loss and which only asserted her new status as a student. She could have put forward more evidence about her loss at that hearing. I hesitate to express myself so bluntly, but it was her ill preparedness rather than the ET's procedural irregularity which caused her not to do so.

56. I expect that the ET would have intervened more to clarify what the claimant needed to do if she had been a party litigant. A few careful interventions along the way, checking whether she was going to say anything about financial loss, would probably have sufficed. They might have flushed out whether she wished to apply for remedy to be considered later. But no material irregularity arises where an ET declined to do so in a case where both parties had professional representation throughout; see **Yorke** and **Moustache**. Still less can its approach be categorised as a perverse one which no reasonable tribunal could have taken.

57. The first ground of appeal is therefore dismissed.

Second ground of appeal

58. By the second ground, the claimant contends that it was an error of law for the ET to fail to determine an application by her representative for the issue of financial loss arising from the

inaccurate reference to be dealt with on a later occasion.

59. Was such an application made? As I noted earlier in this judgment, this assertion derives from paragraph 45(e) of the ET's judgment, where it records that the claimant's representative *"was unclear on whether the claimant also sought compensation for financial losses and sought … to reserve the claimant's position in relation to this"*.

60. The claimant put no material before the EAT to substantiate the assertion that her representative had applied for financial loss to be dealt with separately. For example, there was no comment to that effect from her former solicitors.

61. Mr Hughes was able to assist the EAT, mindful of his professional duty to be truthful. He said, very fairly, that the ability of the claimant's representative to seek instructions from her during the hearing was hampered by the fact that all involved were participating remotely. When the claimant's representative was making submissions on the point of remedy, he said, it became clear that the claimant wished to speak with her. The ET granted a short adjournment for this purpose. When the hearing recommenced, the claimant's representative sought to introduce a claim for financial loss. There followed a discussion between the judge and the claimant's representative. The judge pointed out that the hearing had been listed for both liability and remedy, that there had been no quantification of financial loss in either the pleadings or the schedule of loss, and that the claimant had led no evidence on the point. At this, said Mr Hughes, the claimant's representative *"withdrew the motion"*. He said there was no application, even at that stage, for remedy to be hived off to a later stage.

62. Mr Hughes' account is consistent with paragraph 45(e) of the ET's judgment, save that the judgment does not explicitly record that the solicitor withdrew the contention that the claimant should be awarded financial loss. There is a sound reason for this: if the application was withdrawn, there would be no need for the ET to provide a reasoned response to it.

63. In testing whether such an application was pursued, considerable assistance can be found in the subsequent request for reconsideration submitted by the claimant's solicitors. I agree with Mr

Hughes that, if the claimant's representative had considered that the ET had failed to decide such an application, this point would have been front and centre of the application for reconsideration. But no mention is made of it. Instead, the request for reconsideration sought to articulate, after the event, why an award for financial loss should have been made. It was accompanied by new documentary evidence, without explaining why it had not been produced earlier.

64. The error of law asserted by this ground of appeal is that it was a material procedural irregularity, causing unfairness to the claimant, for the ET to fail to determine an application to defer consideration of financial loss to a later stage. In my judgment, the correct position is as Mr Hughes described it, namely that the representative made no such application and that she withdrew a submission that the claimant should have received financial loss. In such circumstances, and especially bearing in mind that both parties were professionally represented, the ET cannot be criticised for taking the approach it did. Its approach cannot be categorised as a perverse one which no reasonable tribunal could have taken. The same can be said of its refusal to reconsider.

65. A further point is made in the second ground of appeal, which is that the absence of such evidence of loss from the bundle corroborates the claimant's view that remedy was not to be considered on this occasion. However, I have explained in respect of the first ground of appeal why I have rejected that contention.

66. The second ground of appeal is therefore also dismissed.