

Neutral Citation Number: [2025] EAT 156

Case No: EA-2023-001029-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 October 2025

Before:

HIS HONOUR JUDGE AUERBACH

Between:

MS C O'BRIEN

Appellant

- and -

CHESHIRE AND WIRRAL PARTNERSHIP NHS FOUNDATION TRUST

Respondent

Sapandeep Singh Maini-Thompson (Direct Access counsel) for the **Appellant**

Charlotte Davies (instructed by Hill Dickinson LLP) for the **Respondent**

Hearing date: 9 October 2025

JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION; UNFAIR DISMISSAL

The employment tribunal found one of four complaints of failure to comply with the duty of reasonable adjustment to be meritorious but had to consider whether it was just and equitable to extend time in respect of it. It erred because it considered that question by reference to the wrong complaint. The matter was remitted to the tribunal to consider that question by reference to the right complaint. This decision also considers the potential application of the various sub-provisions of section 123 **Equality Act 2010**, concerning when time begins to run in respect of a complaint about a failure to make an adjustment which it would have been reasonable to make.

The tribunal found that the claimant was fairly dismissed by reason of conduct. But in so concluding it failed to take into account its own factual findings about the implications for her ability to defend herself in the disciplinary process, of the respondent's delay in raising the alleged conduct with her. The matter was remitted to the tribunal to consider afresh the implications of those findings for the question of whether the dismissal was fair or unfair, taking also into account the relevant provisions of the *ACAS Code of Practice 1* (2015).

HIS HONOUR JUDGE AUERBACH:

Introduction and Factual Background

1. The claimant in the employment tribunal was employed by the respondent as a ward manager. Her employment began in 2009. Following a disciplinary procedure, she was dismissed on 30 March 2021. Thereafter, she pursued an employment tribunal claim raising a number of complaints. The matter came to a full merits hearing at Manchester before Employment Judge Phil Allen, Ms A Jackson and Mr S Khan. All of the complaints, save for that of wrongful dismissal, failed. This appeal relates to the tribunal's decisions to dismiss: (a) one of the particular complaints of failure to comply with the duty of reasonable adjustment; and (b) the complaint of unfair dismissal.

2. The reason why the claimant was dismissed, as given by the respondent and found by the tribunal, was because she was found, on certain occasions during a period from September to December 2018, to have failed to work her weekly contracted hours, and, on one occasion, to have claimed overtime for hours that she had not worked.

3. The claimant's line manager was the Head of Clinical Services, Joy Fenna. At paragraphs [39] to [41] the tribunal said:

“39. It was Ms Fenna's evidence that, in around January 2019, she was told that other members of staff were not happy with having to sort out staffing issues on the ward that the claimant managed. She said that she was told that this arose because the claimant was not around at the start of her shift. She referred to two occasions when she was made aware that the claimant was not on the ward at the time when she should have been working. The Tribunal was not provided with any document which recorded the issue being raised at the time. The disciplinary investigation report did not address or document (at least clearly and save for an interview with Ms Fenna) the issues which had led to the investigation and who raised them about what. In answering questions at the Tribunal, Ms Fenna explained that one of the people who raised issues was Mr Woodward (the ward manager on the other ward), who had raised issues with the matron. When he was asked about this when giving evidence, Mr Woodward could not recall any such issues being raised with (or by) him.

40. Ms Fenna did not speak to the claimant at the time about the issues which had been raised.

41. It was Ms Fenna's evidence that she had sought advice from a member of HR who had said she should undertake a fact-finding exercise. It was also her evidence that once she had done so and it was identified as a potential fraud issue, she was advised that she should not speak to the claimant about what was being investigated. It was Ms Fenna's evidence that the matter was considered as being a potential fraud investigation from January to March 2019.

The Tribunal was not provided with any documents which detailed any exchanges about the fraud investigation or the need for the claimant not to be told about it.”

4. At [42] the tribunal identified that Ms Fenna’s fact-finding investigation began on 2 January 2019. This included considering CCTV records, electronic shift rosters and the electronic records of when the claimant’s fob had been used to access parts of the site, including her ward, albeit the latter would not have captured her coat-tailing a colleague. At [61] the tribunal recorded that Ms Fenna’s evidence was that the time window of September to December 2018 had been used, because the issue had been raised with her in about December 2018. In the course of [106] the tribunal said that the issues were first raised with Ms Fenna in December 2018 or January 2019.

5. At [44] to [46] the tribunal said this:

“44. In late March 2019 the claimant suffered a serious health issue which resulted in her requiring an operation and, as a result of which, she told the Tribunal she had nearly died. The claimant was absent from work on ill health grounds from 31 March 2019 until September 2019. It was clear that the ill health event had a serious impact upon the claimant. The claimant’s evidence was that, even after her return to work, it also had an impact upon her memory and ability to recall events.

45. During the period of absence Ms Fenna decided not to commence a formal disciplinary investigation whilst the claimant was absent, because she was off on long-term absence.

46. In an occupational health referral form of 17 July 2019 (S37) Ms Fenna stated “no” in answer to a question asked about whether there was a grievance, disciplinary or investigatory process underway and was specific advice needed about fitness to attend a meeting. When asked about this, Ms Fenna explained that the formal disciplinary investigation had not commenced.”

6. At [47] the tribunal found that the claimant returned to work on the basis of a phased return on 16 September 2019 and took some annual leave following her return. At a meeting on 7 October 2019 she was informed that a formal investigation would be undertaken in relation to the allegations that she had failed to work her weekly contracted hours and claimed for overtime not worked. Thereafter, a different investigation manager was appointed in respect of the formal investigation.

7. The tribunal set out in some detail the course of events during 2020, including the reasons for delays at various points. The claimant was interviewed on four occasions: in March, June, July and September 2020. The tribunal stated at [59] that the interview notes showed that she did not provide

explanations for the specific occasions when she was identified as not having been on the ward, but did provide some general reasons, such as taking breaks and making and taking calls from home.

8. An investigation report was produced, dated 13 November 2020. That led to disciplinary charges and a disciplinary hearing held on 15 and 30 March 2021. The tribunal noted at [69]:

“In addressing the allegations, the claimant highlighted that she had maintained throughout the investigation that it was impossible for her to answer specific questions about what occurred on a specific date two and a half years later, as to the reason why the time may have been what it was.”

9. At the end of day two of the disciplinary hearing, the claimant was dismissed in respect of the two charges that were upheld, which I have described. Two other allegations were not upheld. An appeal to the Appeal Sub-Committee of the respondent’s board was unsuccessful.

The Tribunal’s Decision

10. In the course of its consideration of the complaint of unfair dismissal, the tribunal identified at [104] that it “did have some concerns about the process followed”. The first was described thus:

“a. At the outset of the process, the issue was not first addressed informally as the respondent’s procedure says it would (albeit for matters which were not gross misconduct). On a practical level, when it was brought to Ms Fenna’s attention that the claimant might not have been on the ward on two occasions when she should have been, the respondent did not first approach the claimant and ask her where she had been and why that was the case? That would have enabled the claimant to have responded when memory of the days involved was fresh.”

11. At [106] the tribunal considered the contention that the overall delay in the disciplinary process, measured from the time window to which it related, of September to December 2018, to the decision to dismiss, in March 2021, had rendered the dismissal unfair. The tribunal broke down the overall period, identifying the different causes of delay at each stage. Of the first stage it said this:

“a. The issues were first raised with Ms Fenna in December 2018 or January 2019. The fact finding commenced (as recorded in the document recording access to CCTV records) on 2 January 2019. Between the commencement of that fact finding and the claimant’s ill health absence on 31 March 2020, the process was delayed for two reasons: because the fact finding was being undertaken; and because the matters were being considered by the fraud investigators and the advice given to Ms Fenna was that the claimant should not be informed whilst that fraud investigation was considered. The Tribunal was not provided with the evidence to explain which part of the initial three month period resulted from which of those reasons. The Tribunal considered that the loss of the opportunity to speak to the claimant during this three month period was significant and did mean that the claimant was not given the opportunity to address any allegations at a time when she could have recalled the reasons

for her attendance in work at the particular times being investigated. The subsequent period of ill health meant that the loss of that opportunity was more significant, but nonetheless the three months initially taken to fact find and awaiting a decision regarding the fraud investigation was not addressing the matter promptly”.

12. The tribunal continued:

“b. From 31 March 2019 the claimant was absent on ill health grounds. As the claimant emphasised, this period of illness was very significant. It was Ms Fenna’s evidence that she decided not to progress with the formal procedure while the claimant was absent due to her health.”

13. The tribunal worked through the reasons for delay in relation to each further phase of events up until the date of dismissal. It also considered the further time taken to determine the appeal. A number, though not all, of the periods of delay were reasonable. The tribunal continued:

“107. In the light of the delay the Tribunal considered very carefully the claimant’s submission that the delay in and of itself rendered her dismissal unfair. The delay was certainly significant. The respondent’s representative in his submissions acknowledged that the process certainly took longer than anyone would have liked (but he submitted there were explanations and reasons for it). Had there been no explanation for the over-all significant total delay, the Tribunal would have found the dismissal to have been unfair as a result. However, the Tribunal noted that (as explained) there were valid explanations for significant periods of it, including the period due to the claimant’s ill health and the period due to Covid. The Tribunal has noted the impact that the delay had upon the claimant’s ability to address the allegations and recall her reasons for attending at the times in question. Some of the delay which most contributed to that, was due to the claimant’s ill health. The Tribunal has concluded, on balance, that the delay did not in and of itself render the dismissal unfair in this case where nine months of the delay/time taken was explained by Covid and the claimant’s ill health. It was unfortunate that the issues were not raised with the claimant before her lengthy period of ill health absence commenced in March 2019.

108. Taking account of all the matters addressed, the Tribunal found that the respondent did follow a reasonably fair procedure. The issues identified with the procedure were not so significant as to otherwise mean that the dismissal was unfair (considering and applying the test as it is set out in section 98(4) of the Act).

14. It was not disputed that at all times the claimant was a disabled person as a result of PTSD, anxiety and depression. There were four complaints of failure to comply with the duty of reasonable adjustment. The tribunal first considered the merits of each of them before considering time limits. It is the outcome of the second complaint which is the subject of this appeal, but, for reasons that will become apparent, I need also to consider the tribunal’s reasoning in relation to the first complaint.

15. The background to the first complaint was that in February 2018 Ms Fenna’s predecessor had informally agreed to the claimant working her weekly hours over four days a week instead of five.

In September, Ms Fenna indicated that she wanted the claimant to resume working a five-day week. The claimant responded with a flexible-working request. That was refused on 28 November 2018 and the claimant was told that her normal Monday-to-Friday pattern would resume on 31 December. The claimant appealed, but that was rejected on 17 January 2018, though Ms Fenna did subsequently agree to vary her daily start and finish times.

16. Against that background, the first PCP relied upon by the claimant was the requirement to work full-time hours across a five-day week. The tribunal found that that PCP was applied and did place the claimant at a substantial disadvantage compared to a person who did not have her disability. It also considered that the respondent knew, or ought to have known, of that disadvantage. However, the tribunal concluded that the adjustment which would have alleviated the disadvantage, which would have been to allow the claimant to work her hours over four days, was not one which it was reasonable to expect the respondent to make. That was essentially because the tribunal accepted the respondent's case that patient-safety and cover considerations precluded it.

17. The second PCP relied upon was described as being "using a formal procedure to investigate allegations of insufficient hours being undertaken." The tribunal found that that PCP was applied. As to the issue of disadvantage, the tribunal said:

"136. The substantial disadvantage which it was said followed from the application of the formal procedure PCP, was recorded at paragraph 4(ii) of the further particulars (56). What was said was that the use of the formal procedure meant that there was considerable delay before the claimant's version of events was ever sought, which prejudiced her ability to defend herself by virtue of her difficulty in recalling things. The Tribunal did find that the fact that the informal procedure was not initially followed and that the claimant was not asked about events much sooner than she was, did place her at a substantial disadvantage in recalling things (than others without a disability) due to the impact which her disability had upon her longer term memory and ability to recall matters. The delay would have impacted upon anybody's ability to recall why they had not been on the ward at the relevant time, but the disadvantage was more significant for the claimant with her disability or disabilities."

18. The tribunal also found that the respondent knew, or ought to have known, of this disadvantage. One of the two adjustments contended for by the claimant was not one which would have alleviated the disadvantage. However, as to the other, the tribunal said:

“145. The adjustment which the Tribunal found, which was one which would have avoided the disadvantage and which it was reasonable for the respondent to have made, was to have used the informal procedure at the start of the process and to have discussed any issues with hours with the claimant immediately after they were identified, or at least shortly after the matters had been identified and the hours had been worked (when the claimant would have had a greater chance of being able to recall why she had not been on the ward at the relevant times). At some time between the issues being identified at the start of January 2019 and the start of the claimant’s ill health absence at the end of March 2019, the Tribunal found that it would have been reasonable for the respondent to have raised with the claimant the occasions when it was said that she was not on the ward when she should have been. That would have been a reasonable adjustment which would have avoided the disadvantage suffered.”

19. The other two reasonable-adjustment complaints failed on their merits.

20. The tribunal then turned to the issue of time limits. I will set out this passage in full:

“146. Having found that there was a breach of the duty to make reasonable adjustments, the Tribunal then considered issue one in the list of issues as it applied to that breach. As that was the only discrimination found, it could not be part of a continuing course of conduct with any other events. The decision to refuse the claimant’s flexible working request was made (at the latest) in the appeal decision on 17 January 2019. That was the date when the respondent failed to comply with its duty to make reasonable adjustments. At the very latest, the last breach of the duty would have been prior to the claimant starting her extended period of sickness absence in March 2019. The claim was entered at the Employment Tribunal on 28 June 2021. The claim was entered at least two years and three months later. The claim was not entered in the period of three months required (even when any extension for ACAS early conciliation between 10-12 April 2021 was taken into account).

147. The Tribunal therefore needed to determine whether or not it would be just and equitable to extend time. Neither party particularly relied upon, or emphasised, any matters about this in their submissions. Having considered all of the circumstances, the Tribunal did not find that the claim was entered within such further period as it considered to be just and equitable. In making that decision the Tribunal, in particular, took account of the following:

- a. The length of the delay, which was significant;**
- b. There was no evidence given of any reason for the delay, save for the fact that for some of the period the claimant had periods of ill health and it was self-evident that the claimant would have found issuing a claim earlier to have been stressful;**
- c. The claimant had trade union support at her flexible working meeting and appeal meeting, as well as at subsequent meetings. The claimant could have accessed support and advice from the RCN;**
- d. The claimant did raise numerous issues with the respondent within the period of the delay, including raising formal complaints and grievances;**
- e. The claimant is an intelligent person who held a senior management position. She would have been more capable than many others to find information about Tribunal time limits (information which is readily available);**
- f. The prejudice of not extending time for the claimant was significant because she will not be able to have Judgment entered for her in an otherwise meritorious claim and she will not recover a remedy as a result;**
- g. For the respondent there is some prejudice in the delay because recollections reduced over time; and**

h. Time limits are there for a good reason and an extension should be the exception and not the rule.

148. The Tribunal found that, taking into account all of the factors but particularly in the light of the significant delay in the claim being entered, it was not just and equitable to extend time (even though the factor listed at (f) above was a significant one to be weighed in the balance)."

21. As is apparent, that reasoning refers to the *first* complaint – relating to the flexible working issue – whereas it was the *second* complaint – relating to the informal-process issue – that succeeded. The tribunal's summary of the outcome of the reasonable-adjustment complaints at [149] did correctly identify that the *second* complaint was in principle found meritorious, but stated that it was out of time and it was not just and equitable to extend time.

22. The relevant paragraph in the judgment was as follows:

"2. The Tribunal would have found that the respondent failed to comply with its duty to make reasonable adjustments by not using the informal procedure and discussing the issue with hours with the claimant prior to commencing a formal investigation, which would have addressed a substantial disadvantage which the claimant suffered related to her disability arising from the practice of using a formal procedure without first discussing the issue with her. However, as the breach of the duty occurred in January 2019 (and at the latest by 31 March 2019), the Employment Tribunal did not have jurisdiction to consider the claim as it was not brought within the time required and it was not brought within such further period as the Tribunal found to be just and equitable."

The Grounds of Appeal, Discussion, Conclusions

23. I turn to the grounds of appeal that were live and pursued before me. The first ground relates to the decision to dismiss the reasonable-adjustment complaint relating to the informal-process issue. This ground contends, first, that the tribunal erred because, when considering the time point, it did so with reference to the wrong complaint. It then contends that the tribunal erred (a) in its analysis of when time began to run and (b) in its reasoning as to whether it was just and equitable to extend time.

24. Ms Davies acknowledged, as she must, that the tribunal, in the relevant passage, wrongly referred to the flexible-working issue. But she contended that it did not automatically follow that it considered the wrong adjustment when identifying the date of the relevant act or omission, and/or that its factual findings, in any event, supported the conclusion that time began to run in respect of

this complaint no later than March 2019. Therefore, even if I upheld this part of this ground, I was in a position to say that this was, in fact, the only possible right answer to the question of when time began to run, applying the law to the facts, so that there would be no need to remit that issue.

25. On this particular aspect my conclusions are as follows.

26. First, the reference at [146] to the flexible-working request was not a mere error of expression. The substantive reasoning there related to that issue, as can be seen from the reference to the date on which the flexible-working appeal was refused. The implicit logic behind placing the latest date of breach as being prior to the claimant's start of sickness absence at the end of March 2019 would also, as Ms Davies agreed in argument, appear to be that she was not required to work a five-day week thereafter. That was because it was found that, following her return from sickness absence in September 2019, she worked at a different location, in a different role, where the local manager agreed she could work a four-day week. Further, the substantive reasoning at [147(c)] referred to the claimant having had trade-union support at her flexible-working and appeal meetings, showing again that the tribunal was substantively considering the wrong complaint. The fact that the tribunal referred to the correct complaint in the summary at [149], and in the judgment, does not affect the fact that the substantive reasoning on the time point was with respect to the wrong complaint.

27. Mr Maini-Thompson contends that, had the tribunal correctly analysed the position with respect to the correct complaint, it would or should have concluded that time began to run, at the very earliest, only when the formal investigation began, which was in October 2019. He relies also in this regard on the findings that, during the claimant's ill health absence, between March and September 2019, Ms Fenna decided not to commence a formal investigation; and that when, during that absence, Ms Fenna completed an OH referral form, in July 2019, she answered "no" to a question as to whether any grievance, disciplinary or investigation process was under way. He says that all points to the conclusion that no decision was taken about a formal investigation until October.

28. Mr Maini-Thompson also contended that time may have, in fact, begun to run even later. This was based on the tribunal's findings that, following the delivery of the investigation report in November 2020, the claimant asked for a second manager to review the investigation. A second manager did so and expressed the view that the matter should be addressed informally. The respondent then sought the view of a third manager, who considered it should be dealt with formally. In January 2021 the respondent then decided to proceed formally. Mr Maini-Thompson submitted that, in light of that sequence of events, it was arguable that time did not begin to run in respect of this complaint until late 2020 or early 2021.

29. My conclusions on this aspect are as follows.

30. Section 123 **Equality Act 2010** provides, relevantly, as follows:

“(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

...

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”

31. It is important to keep in mind that the cause of action created by sections 39(5) and 20 to 22 of the **2010 Act** arises, not from the application of the PCP, but from the failure to comply with a relevant requirement (see section 21(1)). The relevant requirement in this case was that in section

20(3), being a requirement, where the PCP puts the disabled person at a substantial disadvantage, as defined, to take such steps as it is reasonable to have to take to avoid the disadvantage.

32. I was referred to a number of authorities which have considered the relevant provisions of section 123 and its predecessors. These authorities usefully highlight features of the architecture of the section and how its provisions operate and might apply to the facts of a given case. But each case does turn on the application of the words of the statute to its own facts, which may require a very close and careful consideration of the particular nuances of the factual features of the case in hand.

33. In the present case the pertinent findings and conclusions were, in particular, the following. First, at [104(a)], that the respondent did not, at the outset, address the issue informally. Ms Fenna did not approach the claimant when it was first brought to her attention that she might not have been on the ward on two occasions. Had she done so, that would have enabled the claimant to respond when memories were fresh. Similarly, at [106(a)] the tribunal found that the loss of the opportunity to speak to the claimant during the three-month period prior to the commencement of her ill-health absence was significant, because she was not given the opportunity to address any allegations at a time when she could have recalled the reasons for her attendance in work at the particular times. Although the subsequent illness made that loss of opportunity more significant, nonetheless what happened in the first three months was, the tribunal found, a failure to address the matter promptly.

34. Although those findings were made in the context of consideration of the unfair dismissal complaint, they clearly bespeak the tribunal's view that the crucial period during which the claimant should have been spoken to informally, was immediately following the issue coming to Ms Fenna's attention, and, in any event, within those first three months.

35. The further findings made, when the tribunal specifically turned to the reasonable-adjustment complaint in relation to this aspect, are to the same effect, and harked back to those earlier conclusions. At [136] it referred, when identifying the substantial disadvantage, to the fact that the

formal procedure was not initially followed, and that the claimant was not asked about events much sooner. At [145] the tribunal also made clear findings as to the adjustment that the respondent ought reasonably to have made. This was that it should have used the informal procedure at the start of the process, and discussed any issues with the claimant immediately after they were identified or, at least, shortly after they had been identified, and at some time between when they were identified and the start of the sickness absence in March. That is the adjustment which the tribunal found would have avoided the disadvantage suffered. The natural reading is that the tribunal considered that doing it any later than that would have been too late to have ameliorated the disadvantage.

36. That reading and analysis is not affected by the tribunal's findings that Ms Fenna decided not to commence the formal procedure while the claimant was on sick leave. That is for three reasons. First, the natural reading of that is that, once her investigations of CCTV, shift rosters and electronic fob records, and the fraud investigator's work, had been completed, Ms Fenna *would* have then proceeded to commence a formal investigation, but only did not do so because the claimant was off long-term sick. In the autumn, following her return and a period of leave, the process got under way. I do not agree with Mr Maini-Thompson's reading, that Ms Fenna had put off deciding *whether* to move to an informal process or not while the claimant was off sick. The finding is clear at [45] and [46], that she decided to put off *commencing* the formal investigation while the claimant was off sick, not that she put off deciding whether to have one. That is also reinforced by the finding at [106(b)].

37. Secondly, it is hard to see in what sense the PCP could be said to have continued to be applied during the claimant's sickness absence, as she could not have been informally spoken to during that period. Thirdly, in any event, the issue is not: during what period the PCP was, or continued to be, applied; but as to the period during which the respondent should reasonably have made, but failed to make, the adjustment. That period came to an end once it had, in the tribunal's view, clearly become too late for the making of the adjustment to have the effect of ameliorating the disadvantage.

38. Thirdly, for the same reason, the consideration, post the November 2020 report, of whether to proceed thereafter by way of a formal or informal process, has no bearing on this issue, because, on the tribunal's findings, by then it had long since become too late for the making of the adjustment to have any capacity to ameliorate the disadvantage associated with the disability.

39. Mr Maini-Thompson argued that the tribunal had not set a longstop or cut-off date for the continuing adverse impact of the delay on the claimant's recall. The sense of its decision was simply that, the longer matters went on, the worse her ability to recall became. But the issue in respect of this complaint was not the general impact of the passage of time on recollection, such as would apply to anyone, but the particular additional impact on the claimant's recall on account of her disability. Of course, the tribunal could not sensibly have picked a bright line date on which the possibility of ameliorating that impact by raising matters informally with the claimant suddenly disappeared overnight. But the clear sense of the decision is that, because of her disability, it was particularly crucial to speak to the claimant as soon as possible, and that any chance of ameliorating the impact of her disability on her recollection had certainly gone by the end of March.

40. Mr Maini-Thompson did not specifically contend that there was conduct extending over a period beyond the end of March 2019, within section 123(3)(a). In any event, in light of the analysis I have set out, I conclude that the findings of fact point to the conclusion that there was not. It also seems to me that the tribunal found as a fact that Ms Fenna, albeit on advice, made a conscious and positive decision, following the issues having been raised with her in January 2019, not to speak to the claimant at that time or pending completion of her fact-finding exercise and the fraud investigation. The tribunal, at [40] and [41], recorded her evidence to that effect. It did not in terms say there that it accepted it, but nor did it say otherwise. In any event, at [106(a)] it accepted that she was *advised* not to inform the claimant, and at [121] it found that the claimant was not informed *because* that was what Ms Fenna was advised to do. All of that bespeaks a conclusion, not that the

question of whether to inform the claimant at that point was never considered, but that a conscious decision was taken not to inform her.

41. All of that being so, I agree with Ms Davies that, for section 123(3)(b) purposes, there was a factual finding that the respondent had decided, in January 2019, not to informally consult with the claimant, and so the conduct of failing to do so would fall to be treated as occurring then.

42. I also agree with Ms Davies that, even if that is wrong, and that provision did not apply, then, for the purposes of section 123(4)(a), the tribunal found as a fact that the respondent had done an act inconsistent with informal consultation by the end of March 2019. That is because, as I have said, the tribunal clearly found that a decision had been taken to move into informal process by the end of March, albeit that this was not put into effect at that point because of the claimant's sickness absence. That being so, if section 123(3)(b) did not apply, so that section 123(4)(a) then fell to be considered and applied, then time began to run at the end of March 2019. That being so, the final potential alternative scenario in section 123(4)(b) would not fall to be considered in this case.

43. For these reasons I conclude that, had the tribunal applied its mind to the correct complaint, it would have been bound to conclude, applying the words of the statute to the facts found, that time began to run at the latest when the claimant went off on sick leave at the end of March 2019.

44. Pausing there, I therefore agree with Ms Davies that, although the tribunal erred by considering this issue with respect to the *wrong* complaint, there is no need to remit the question of when time began to run in respect of the *right* complaint, for further consideration, as such.

45. I turn to whether the tribunal erred in its consideration of just-and-equitable extension. Ms Davies rightly submitted that the authorities emphasise the broad discretion which tribunals have in making such decisions. It is not, for example, a proper ground of challenge that a party disagrees with the amount of weight that the tribunal afforded to a relevant consideration. She also submitted that if (as I have) I accepted that the tribunal had, albeit for the wrong reasons and coincidentally,

arrived at the right date from which time began to run, then it had not erred in taking that as the starting point when judging the extent to which the complaint was out of time.

46. Mr Maini-Thompson said that the tribunal had erred by referring, at [147(b)], merely to “periods of ill health”, which did not reflect its acceptance at [44] that what happened in March 2019 was a serious health issue leading to an operation, as a result of which the claimant said she had nearly died, and more than four months’ sickness absence. However, I agree with Ms Davies that what the tribunal said at [147(b)] was not factually incorrect, and showed that it had taken this aspect into account. Nor do I agree that it should be inferred that the tribunal failed to take account of the potential interaction of this absence with her mental-health disability.

47. Mr Maini-Thompson said that, while the tribunal had referred, at [147(f)], to the claimant suffering the prejudice of not succeeding in a meritorious complaint were time not to be extended, it had not gone on to indicate how it weighed that in the balance. But it is clear that it did take this into account, and that it considered that this was outweighed by other factors on the other side of the scales. The tribunal also specifically said at [148] that it took that view, even though the loss to the claimant was a significant one to be weighed in the balance. That was explanation enough.

48. Finally, Mr Maini-Thompson submitted that the tribunal had failed to consider when the claimant might reasonably have been expected to appreciate the disadvantage that she had suffered through not being informally consulted at the outset. On the tribunal’s findings of fact, she was not even aware of any conduct issue at all until she was spoken to in October 2019. Mr Maini-Thompson submitted that the tribunal failed to consider that it would have taken time for her thereafter to come to appreciate the significance of her not having been spoken to sooner, as the formal disciplinary investigation and later process unfolded during the course of 2020 and into 2021.

49. On this aspect, I consider that the tribunal did err by failing to take into account, at least, that, on its findings, the claimant was not aware at all of there being any conduct issue before, at the

earliest, October 2019. So it could not have properly counted against her the fact that she did not raise a tribunal complaint before then. Ms Davies responded that this point did not have any purchase, because the tribunal had in any event found the overall delay to be “significant”, and, as the claim was not presented until June 2021, it could safely be inferred that it would have considered the delay from October 2019 to be determinative in any event. I do not agree. That is for the following reasons.

50. First, the tribunal, to repeat, considered the just-and-equitable extension issue by reference to the wrong complaint. That included taking into account, at [147(c)], that the claimant had trade-union support at her flexible-working and appeal meetings. While this was not specifically highlighted by Mr Maini-Thompson in his submissions, his general case was that the tribunal failed to consider that she did not know about the issue earlier than *October 2019*; but this passage shows that, because it considered the wrong complaint, the tribunal attached some weight to the claimant having had knowledge of the (wrong) issue as far back as *January 2018*, when her flexible-working request was turned down. Secondly, the tribunal did indicate that, while it considered the delay to be significant, it also considered that the loss of a meritorious claim was a significant one to be weighed on the claimant’s side of the balance, suggesting that it considered the balance to be a fine one.

51. Having regard to all of that, I cannot say that, had the tribunal considered the just-and-equitable extension question by reference to the correct complaint, and therefore, as it would have been bound to do, had it at least come to a different view about the earliest date on which the claimant might have been in a position to raise a tribunal complaint, it would have made the same decision.

52. For these reasons, this ground succeeds. The matter will have to be remitted to the tribunal to consider afresh whether it is just and equitable to extend time, having regard to all the relevant circumstances, taking into account that, in light of the findings of fact already made, time is to be treated as having run from not later than the end of March 2019, but also the findings of fact thus far made about what the claimant knew about the conduct allegations and when.

53. I turn to the second ground, which challenges the conclusion that the claimant was not unfairly dismissed. As permitted to proceed, this ground had two limbs, but Mr Maini-Thompson indicated that only the second of these was pursued. This is that the tribunal's decision was perverse having regard to its findings about the failure to carry out an informal process following concerns first coming to Ms Fenna's attention, and the provisions of the *ACAS Code of Practice 1* (2015) concerning the need to act promptly; and/or that the tribunal's conclusions in this regard were insufficiently explained. Mr Maini-Thompson relied particularly on the findings at [104(a)] and [106(a)]. He submitted that at [107] the tribunal failed properly to consider or follow through on the implications of these findings for the fairness of the dismissal. I have set out these passages earlier.

54. Ms Davies submitted that the discussion at [107] showed that the tribunal had grappled with the significance of the failure to pursue an informal process for the fairness of the dismissal, and had placed this in the context of the overall delay, some of which was also attributable to the claimant's ill health, which had most contributed to the adverse impact on her ability to recall her reasons for not attending at the times in question. That, she submitted, was a conclusion it was entitled to reach, and it was sufficiently explained.

55. My conclusions on this ground are as follows. The *ACAS Code*, at paragraph 4, says:

“... whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:

- **Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.”**

56. Paragraph 5 says:

“It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case.”

57. Ms Davies submitted that the tribunal had properly addressed itself to the question of the extent to which in this case different periods of delay could be laid at the respondent's door, and, if so, whether those delays were reasonable.

58. However, at [104(a)] the tribunal found that, had the issue been raised with the claimant informally when it first arose, that would have enabled her to have responded when memory of the days involved was fresh. In the preamble of [106], the tribunal then referred expressly to the requirement of the *ACAS Code* to deal with matters promptly. At [106(a)] it found that the loss of the opportunity to speak to the claimant during the initial three-month period, after Ms Fenna was made aware of the issues, was significant. Further, it said that, although the subsequent period of ill health meant that loss was more significant, nonetheless the three months initially taken to fact-find and awaiting the fraud decision was *not* addressing the matter promptly. The use of the word “promptly” was plainly a reference to the *ACAS Code*. I note, indeed, that in the passage relating to the question of remedy for wrongful dismissal, at [117], the tribunal confirmed in terms that it had found that, by not dealing with matters promptly, the respondent did not follow the *ACAS Code*.

59. At [107] the tribunal said that it had considered the delay very carefully. It also said that the “overall delay” was significant and that, had there been no explanation for the “overall delay” it would have found the dismissal to be unfair. However, it went on to say no more than that it “noted” the impact that the delay had on the claimant’s ability to address the specific times in question, and that *some* of the delay which most contributed to that was due to her ill health and the Covid period, and then that it was “unfortunate” that the issues were not raised with the claimant before her lengthy period of absence commenced in March 2019.

60. I do not think that describing that failure as “unfortunate” fairly reflected or engaged with the tribunal’s own earlier findings that it was “significant”, that raising the matter during that period would have given the claimant the chance to respond when her memory was fresh; and that it meant that she did not get the opportunity to address any allegations at a time when she could have recalled the reasons for her attendance at the particular times being investigated. It also found that the claimant herself made the point in the disciplinary hearing that throughout the investigation it had

been impossible for her to answer specific questions about what had happened so long ago; and it found that she was only able to put forward generalised explanations in the disciplinary process.

61. I conclude that, even disregarding the *ACAS Code* point, the tribunal erred because it failed properly to engage, at [107] and [108], with its own earlier findings about the seriousness, and significance to the claimant's ability to defend herself in the disciplinary process, of the failure to speak to her about the allegations promptly following Ms Fenna first having become aware of them.

62. The potential implications of these findings, for the issue of fairness, is then reinforced by consideration of the provisions of the *ACAS Code*. I note that, at [117] the tribunal considered, in the context of possible adjustment of compensation for wrongful dismissal, the provisions of section **207A Trade Union and Labour Relations (Consolidation) Act 1992**, which provide for a potential uplift to compensation where there has been an unreasonable failure to comply with the *ACAS Code*. It noted that, as a result of the delays, the claimant had remained employed longer than she otherwise would have, and that it had identified the reasons for some of the delay. It said that the respondent did not unreasonably fail to comply – apparently in any respect – but it did not explain how that conclusion was to be reconciled with its findings at [106(a)] about the failure to speak to the claimant “promptly” at the start of 2019. It went on to say that, even had it found an unreasonable failure to comply, it would not have found it just and equitable to increase the award for wrongful dismissal.

63. That overall reasoning may have been sufficient to support that particular decision in relation to compensation for wrongful dismissal, which has not been appealed by the claimant. But nothing in that paragraph addresses, or addresses adequately, the potential implications of the particular findings to which I have referred, for the question of whether the dismissal was or was not fair.

64. For all these reasons I uphold ground 2 and quash the finding that the claimant was not unfairly dismissed.

65. I have now heard further argument as to what consequential directions I should make.

66. In relation to the reasonable-adjustment complaint, both counsel agree, as do I, that the matter should be remitted to the tribunal to decide afresh whether there should be a just-and-equitable extension of time, on the basis that time began to run at the end of March 2019, and taking into account the implications of the findings thus far made about what the claimant knew, and when. Both counsel agree, as do I, that remission of that matter should be to the same tribunal panel, if practicable.

67. In relation to unfair dismissal, there must now be a fresh determination of liability. In particular, that will need to take properly into account the various findings already made by the tribunal, that I have highlighted, as to the implications of the failure informally to speak to the claimant about the issues following them first having been raised with Ms Fenna, for the claimant's ability to defend herself in respect of the disciplinary charges when, in due course, she faced them.

68. Mr Maini-Thompson invites me to conclude that this is a case where all the relevant facts have been found and, applying the law to those facts, the only conclusion that the tribunal could properly reach would be that this aspect rendered the dismissal unfair, so that I can, and should, substitute a decision to that effect and then send the matter back to the tribunal to consider remedy.

69. In **Jafri v Lincoln College** [2014] EWCA Civ 449; [2014] ICR 920 Underhill LJ observed at [47] that there are plenty of examples of a robust view being taken by the EAT on this type of question. Mr Maini-Thompson mounts a strong argument, having regard to the findings that the tribunal has already made, that I can take such a view in this case. Ms Davies reminds me that the question of whether a dismissal is fair or unfair on the given facts is one on which two different courts or tribunals can often properly disagree. It is also the case that, at the liability stage, a failure to comply with a relevant provision of the *ACAS Code* must be taken into account, but is not necessarily automatically fatal. I also cannot be entirely sure that there might not have been some other feature

of the evidence in relation to this matter that the tribunal might have taken into account, had it properly and squarely addressed itself to the implications of its earlier findings for this question.

70. I have decided, therefore, that I should stop short of substituting a decision of my own, that the dismissal was unfair. So I will remit that issue to the tribunal, but on the basis that its existing findings of fact, including the findings earlier in the decision, which I consider paragraph [107] failed properly to address or take on board, are a given, and must be considered relevant. It is common ground, and I agree, that this issue should also be remitted to the same panel, so far as available, and that, should the tribunal find the claimant to have been unfairly dismissed, it may also then need to consider, when deciding remedy, issues about contributory conduct, *Polkey* and/or *ACAS Code* uplift.

71. I have not been invited, and do not propose, to give any further directions about case management. I have not precluded the tribunal from making further findings, drawing upon the evidence it has already heard. Whether the tribunal considers that the matter can be dealt with by way of written submissions or at a further hearing and/or whether it, in any event, does or does not permit any further evidence to be adduced, will be matters for it to decide, obviously after having allowed a fair opportunity for the parties to make representations to it about all of that.