Neutral Citation Number: [2026] EAT 12

Case No: EA-2022-001441-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 January 2026

Before :

HIS HONOUR JUDGE JAMES TAYLER
MRS RACHAEL WHEELDON
MR STEVEN TORRANCE

- -

Between :

Ms S Pal

Appellant

- and –

Accenture (UK) Ltd

Respondent

- -
- -

Elaine Banton (instructed by Kilgannon & Partners LLP) for the **Appellant**
Katherine Eddy (instructed by Lewis Silkin LLP) for the **Respondent**

Hearing date: 9 December 2025, Chambers 10 December 2025

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JUDGMENT

SUMMARY

Unfair Dismissal, Disability Discrimination

The Employment Tribunal erred in law in assessing a **Polkey** reduction by applying an incorrect counterfactual. Dismissal for reasons related to capability, some other substantial reason and **Polkey** reductions considered. The Employment Tribunal also failed properly to analyse whether the claimant, who has endometriosis, was a disabled person at the material times, and whether she had been subject to discrimination because of something arising in consequence of disability.

HIS HONOUR JUDGE JAMES TAYLER

The Issues

1. This appeal raises issues about the correct approach to:

1.1. a **Polkey** reduction where an employer breaches its procedures

1.2. assessing the likelihood of a fair dismissal where the employer adopts an "up or elsewhere" or "progression based performance model"

1.3. determining whether a person is disabled, in this case because of endometriosis

The Judgment appealed

2. The appeal is from a judgment of Employment Judge Baty, sitting with members. The hearing was held from 3 to 12 May 2022 and there was a Chambers discussion on 7 July 2022. The judgment was sent to the parties on 8 July 2022.

The facts

3. We take the facts primarily from the judgment of the Employment Tribunal and some limited documentation referred to in the judgment.

4. The respondent is a global professional services business. The claimant commenced employment with the respondent on 24 August 2009 as an Analyst. She was promoted to Consultant on 1 March 2011 and Manager on 1 September 2013. The next step would have been to become a Senior Manager.

5. The claimant's revised contract of employment when she was promoted to Manager included the following provision as to her duties:

> 1. Duties
>
> 1.1 You will provide your services to the Company (and to any Accenture Affiliate as directed by the Company) in the capacity of Manager, or in such other capacity, and undertaking such duties, as the Company may reasonably require from time to time.
>
> 1.2 You shall devote your full time, attention and skill to your duties of employment during working hours. You shall not do anything at any time which is contrary to the best interests of the Company or any Accenture Affiliate, or omit to do anything at any time which is necessary in order to act in the best interests of the Company or any Accenture Affiliate. You shall faithfully and diligently perform such duties and exercise such powers consistent

> with them as may from time to time be assigned to you by the Company or any Accenture Affiliate.

6. The respondent is divided into five divisions, one of which is Financial Services ("FS"), which itself is divided into practice groups, one of which is Talent & Organisation ("T&O"). During the relevant time Andrew Young was the Practice Lead for the UK FS T&O practice group, in which the claimant worked.

7. The Employment Tribunal noted that the respondent's profit is derived from charging clients for work done by its consultants and that its commercial success depends on having as many of its consultants as possible working on chargeable client projects, which depends to a significant extent on client relationships. There is nothing surprising about that.

8. The Employment Tribunal described the respondent's progression based performance model:

> 40 … it expects its employees to be demonstrating continuous development towards the next level of seniority in the career model and to be already demonstrating performance at that level before they are promoted. A failure to demonstrate continuous improvement constitutes underperformance for internal purposes. This means that, even if an employee is performing at the level of the position they currently hold, if they do not within a reasonable period demonstrate the skills to be promoted to the next level up, they are deemed to be underperforming. In those circumstances, they may (if appropriate) move to other areas within the respondent or leave the respondent either, as is common, through their own volition, or more rarely, as in the case of the claimant, through being dismissed.
>
> 50. This "up or elsewhere" performance model is standard in the consulting industry. It is clear from the respondent's internal documentation and is well known to its employees. Whilst the claimant's evidence as to her own awareness of this process varied, she at times acknowledged that she was aware of it. Notwithstanding that, we find that it is inconceivable that someone with around 10 years' experience at the respondent, as she had by the time of her dismissal, would not be fully aware of this model. Accordingly, we find that the claimant was indeed fully aware of it.

9. The Employment Tribunal held that the requirement for continuous development is "time-based" and that the respondent would expect promotion from Manager to Senior Manager to take around 3-4 years. The respondent makes adjustments for absences for sabbaticals and family leave. The adjusted period is referred to as "time at level". Sickness absence may, depending on the circumstances, be taken into account when assessing performance generally.

10. The Employment Tribunal held that time at level was a "key metric", but staff may be

dismissed prior to exceeding the expected time at level or be retained despite having exceeded the expected time at level.

11. Performance is assessed twice a year, at the respondent's mid-year and year-end, when a "talent outcome" is assigned. Lack of continuous improvement towards the next level, or gaps in performance at an employee's current level, constitutes underperformance. If an employee is underperforming, they may be given a "Not Progressing" talent outcome which is a "signal to employees that they need to significantly improve their performance and their demonstrable progress towards the next level without delay". In other words, the direction of travel is "elsewhere". Employees who receive a Not Progressing talent outcome often resign and move on to other employment. The Employment Tribunal stated that a lot of support and training is provided to employees to help them develop and perform.

12. The Employment Tribunal explained the respondent's performance expectations:

> Performance expectations
>
> 63. The respondent has a clear set of performance expectations at each level, which are explained through training, discussions with Career Counsellors and Practice Leads, and in a range of documents available on the respondent's internal portal. The competencies which the respondent expects to see at each level are therefore clear.
>
> 64. Broadly speaking, Managers are expected to lead client engagements or large work streams of bigger programmes, by managing the client, the team and the project delivery to plan, while staying on track with budget, quality and client expectations. As part of delivery, Managers are expected to bring good content expertise in their area of practice specialisation. It is particularly important for Managers to develop strong client relationships and client "stickiness" (i.e. an ability to become a trusted adviser with a client and to be sought out by them for further work).
>
> 65. As noted, the next progression step for the claimant would have been promotion to Senior Manager. Some of the key points of readiness for someone operating at a Senior Manager level would be: building and sustaining more senior client relationships; originating/generating client opportunities and selling work; proactively supporting larger deal pursuits; leading larger client engagements; leading large (often global) engagement teams; shaping and leading complex client delivery; and leading areas of practice specialisation internally and out into the market.
>
> 66. Managers also have an annual chargeability target. These were: 86.9% for the 2017 performance year; 86.8% for the 2018 performance year; and 84.7% for the 2019 performance year.

> 67. The respondent expects its staff to meet those targets as a minimum and promotion ready candidates typically exceed them in some way. Most Managers would achieve at least 90% chargeability, and some up to 108% (which is the normal maximum using an eight-hour working day). Below target chargeability would only be acceptable if someone had been asked to support a prolonged period of (non-chargeable) business development work, such as a large bid, that had resulted in a significant sale of work.
>
> 68. Chargeability levels are, however, adjusted for sickness absence and other time out of the business, so employees are not disadvantaged by this.
>
> 69. Low chargeability in general typically means that someone will not be promoted, since they are not economically contributing to the business and are not getting the client facing development they need. Furthermore, an individual's chargeability is inevitably affected by underlying factors, including the consistency of their performance on client projects, their ability to build and maintain strong client relationships, their proactivity and their internal network and relationships. High performers are typically in demand and have high chargeability, usually finding their own roles.
>
> 70. In addition, although there is no formal sales target for Managers or Senior Managers, sales plays a key role in the growth of the respondent's business and as such the respondent also expects Managers aspiring for promotion to Senior Manager to have a track record of having developed and sold work.

13. The Employment Tribunal stated that employees are expected to demonstrate "proactivity" in managing their own performance and in developing their skills and career. Staff receive regular feedback and are expected to seek feedback themselves.

14. Staff members are assigned a Career Counsellor. The Career Counsellor assigned to the claimant was Monica Juneja. A talent outcome is initially recommended by the Career Counsellor but is then subject to group discussion and moderation in what the respondent calls a "talent discussion". Each practice group holds talent discussions for each seniority level within the practice group. The talent outcomes are comparative. The Employment Tribunal held that the UK FS T&O practice group was very high performing and so the claimant "would have needed to really "stand out" to be identified as ready for promotion as compared with her peers". After talent discussions, provisional talent outcomes are reviewed by HR for consistency and to check for any "bias".

15. The Employment Tribunal identified these concepts adopted by the respondent, including continuous development, time at level, talent outcomes, performance expectations and feedback without identifying the documents in which they are set out, or whether they were contractual. We

were informed that there was voluminous material before the Employment Tribunal. No doubt there was, but it would have been helpful to know its status.

16. The Employment Tribunal reached generalised conclusions about the claimant's credibility; stating that she was not "a reliable witness of fact", that her evidence was "demonstrably exaggerated" and that it placed "little reliance on the evidence which the claimant gave except when it is backed up by contemporaneous documentation". The Employment Tribunal made similar, but positive, generalised findings about the respondent's witnesses:

> 159. By contrast, we found the witnesses for the respondent straightforward. They answered the questions put to them. Their evidence was consistent in all material respects with each other, with their witness statements and with the contemporaneous documents. We did not, therefore, have any concerns about the reliability of their evidence.

17. Generalised findings on credibility are rarely a particularly useful tool for resolving specific issues of fact about which there is relevant evidence. It is nearly always better to assess the evidence relevant to the issue and reach a determination on balance of probabilities. Even if a witness is unreliable about some matters it does not mean that they are not telling the truth about the issue to be determined. Witnesses who have generally been reliable on most issues may be mistaken about others.

18. The Employment Tribunal noted that the claimant maintained that there were no significant issues with her performance, whereas it concluded that significant concerns had been raised in the years preceding her dismissal. That said, the claimant had been employed by the respondent for 10 years and was promoted twice.

19. On 26 September 2018, the claimant informed Mr Young and Ms Juneja that she had to have an urgent operation to remove two ovarian cysts. The claimant was diagnosed with endometriosis. The claimant was subsequently off sick for about a month after the surgery. The claimant returned to work full time on 30 October 2018 of her own volition, against Occupational Health advice, which was that she should come back on a phased return. The respondent's Occupational Health company produced a report after an assessment on 23 October 2018:

> As detailed in your referral **Miss Pall has been absent from work since 26/09/18 after having an ovarian cyst removed. Ovarian cystectomy refers to the removal of an ovarian cyst while preserving the ovary. She explained today that the cysts were only recently diagnosed after suffering constant abdominal pain for around a month, scan showed a large 7.5 cm on the left ovary and a smaller one on the right.** She underwent surgery to remove these on 01/10/18. The surgery was unremarkable and was carried out by keyhole methods, although it was noticed during this that Miss Pal has endometriosis.
>
> **Today Miss Pal felt generally unwell with fatigue and abdominal pain; she was acutely unwell last week with heavy bleeding and pain.** She has been reviewed by her surgeon and he is pleased so far with her progress. **Miss Pal still reports lower abdominal pain, general fatigue, and limited energy levels.**
>
> **In my clinical opinion Miss Pall is not yet fit for work. She is making good progress in her recovery but still has some residual symptoms common in recovery from this type of surgery. Miss Pal is keen to return to work,** however I have advised her to be cautious in her expectations of recovery. To support miss pall back to work if operationally feasible I would suggest a phased return to work over 6 weeks and would suggest the following. …
>
> In response to your specific questions not already addressed; **I do not foresee any adjustments or restrictions to role other than support with the phased return to work** and off peak travel. I am hopeful that a return to work can be achieved in the next few weeks. **Miss Pal may continue to be fatigued and this could potentially impact on performance — however the phased return to work should help minimise any impact on performance at work**.
>
> The terms of the disability provision of the Equality Act 2010 are unlikely to require consideration as the symptoms have not been present the prerequisite full year. [emphasis added]

20. At a talent discussion on 6 August 2018, the claimant's end of year performance was rated as "Not Progressing". The claimant was told her rating in November 2018, in accordance with what the Employment Tribunal found was the respondent's usual practice.

21. The claimant had a second period of sickness absence, related to the surgery required because of her endometriosis, from 24 November 2018 to 8 January 2019.

22. After another Occupational Health assessment on 14 January 2019 a further report was provided:

> As detailed in your referral Miss Pal is currently absent from work recovering from a surgical procedure, I note from the referral and previous Occupational Health report that you are aware of the details of Miss Pal's surgery.
>
> Miss Pal informs me she is making progress with her recovery however she continues to experience abdominal pain at times. Miss Pal has also been found to have some

> vitamin/mineral deficiencies for which she is receiving prescribed medication from her General Practitioner (GP). Miss Pal informs me at present she is experiencing a poor sleep pattern.
>
> Miss Pal informs me at present she is completing light everyday tasks however she is not carrying heavy shopping. Miss Pal informs me at present she is able to walk for up to 20 minutes, longer than this exacerbates her fatigue.
>
> I understand from Miss Pal she has been taken off the project she was working on prior to her sickness absence and she reports she is unsure what project or for what client she will be working when she returns to work.
>
> In my clinical opinion Miss Pal is fit to return to work however due to her ongoing symptoms and to assist with her recovery I feel she would benefit from the following temporary adjustments.
>
> I suggest a phased return to work to help facilitate her recovery while she regains her physical stamina: …
>
> I would advise that weekly 1:1 meetings with management are arranged during the phased return in order for Miss Pal to gain support and to ensure that she is coping with her duties and hours before these are gradually Increased.
>
> I suggest a meeting be arranged with management/HR and Miss Pal prior to her return to work to discuss what role/client/project she will be assigned upon her return to work in order Miss Pal is made aware of the expectations of her role. If Miss Pal is fully informed of the above she is likely to feel less worried and anxious regarding her return to work and this will assist her recovery.
>
> I am hopeful Miss Pal will make a good recovery from her surgical procedure and once she returns to work she is likely to be able to once again offer reliable service and attendance. I do anticipate Miss Pal's performance to be significantly affected once she has completed her recovery.

23. An eight-week phased return to work was agreed, which covered the period from 9 January 2019 to 4 March 2019.

24. Mr Young met with the claimant on 31 January 2019. Ms Juneja also met with the claimant on 4 February 2019. The Employment Tribunal stated that the meetings were held to make sure that "the talent actions and feedback provided in November 2018 and over the previous years were clear for the claimant". The Employment Tribunal held that the claimant "was told exactly what the problems were and what she was expected to do in order to rectify them."

25. On 13 March 2019, the claimant was seen by Mr Emeka Okaro, a Consultant Obstetrician and Gynaecologist, who reported:

> It was a pleasure to see Sanju once again in my clinic. She has largely been well since I last saw her with a regular cycle. However recently she experienced an episode of left-sided pain which is somewhat better but still present.
>
> I scanned her today. ... Her right ovary was normal and her left ovary contained a 3cm recent endometrioma.
>
> We discussed these findings. Quite understandably, she is very disappointed by the recurrence of the endometrioma. I have asked her to repeat the liver function tests today along with vitamin D. She will start the oral contraceptive pill with her next period which is due in a week or so and she will take four packs in a row then come back and see me three months from now. I am optimistic that we will be able to not just control her symptoms but manage the cyst conservatively with the pill. ...

26. The claimant did not provide the report to the respondent at the time.

27. At the mid-year talent discussion on 21 March 2019. The claimant was rated as "Not Progressing". The claimant was not told at the time in accordance with the respondent's "usual policy".

28. The claimant obtained an internal chargeable role on 8 May 2019. The Employment Tribunal held that it had been agreed that the claimant would return to a London Based role:

> 115 … As part of the phased return, the respondent had agreed with the claimant that her first client role following her return would be in London (in order to limit travel). However, there was plenty of support for her to find London based roles and, as the division in which she worked was financial services, at least 90% of the client roles and work done were London-based.

29. The claimant worked with Karen Newman who thought that her performance was good. The claimant was over 100% "chargeable" and was given positive feedback by Ms Newman.

30. Nonetheless, the Employment Tribunal held that the claimant's chargeability was low overall:

> 118. The result of this was that, even including the internal chargeable role which the claimant took on 8 May 2019, by the time of the decision to terminate the claimant's employment, her chargeability for the 2019 financial year was around 32.7% which, when adjusted for her sickness absence and phased return, equated to around 60%. This was well below her 2019 chargeability target, which was 84.7%.

31. On 3 June 2019, Ms Juneja told the claimant that her mid-year 2019 talent outcome from 21 March 2019 was "Not Progressing".

32. On 6 June 2019, the claimant was invited to a meeting to discuss her performance and advised that "subject to our discussions at this meeting, there is a possibility that you may be dismissed".

33. The meeting was originally scheduled for 10 June 2019. It was delayed at the claimant's request and took place on 3 July 2019.

34. The Employment Tribunal held:

> 126. During the meeting, the claimant raised her periods of sickness between late September - October 2018 and late November - early January 2019 and her phased return. She did not raise her sciatica, asthma or any ongoing impact of her endometriosis after her phased return to work and did not at any time suggest that her possible termination of employment was as a result of race discrimination.

35. At the end of the meeting the claimant was told that she was to be dismissed, which was confirmed in a brief letter sent that day.

36. The claimant's last day of employment was 17 July 2019. The respondent made a payment in lieu of notice.

37. The claimant appealed on 10 July 2019. Ugo Ojike, a Managing Director, was appointed to hear the appeal. The appeal hearing took place on 11 September 2019. The claimant asserted that the respondent had failed to follow the Disciplinary and Appeals Policy. The respondent accepted that it was the applicable policy. The claimant asserted that she had debilitating symptoms from her endometriosis. Ms Ojike was sufficiently concerned to raise the issue with HR before finalising her decision. However, there was no referral to Occupational Health and the matter does not appear to have been investigated any further.

38. By letter of 11 November 2019, Ms Ojike informed the claimant that her appeal was dismissed.

The unfair dismissal complaint

39. The Employment Tribunal analysed the reason for dismissal, straying into consideration of the general fairness of the progression based performance model:

> 216. **The respondent has clearly proven that there were considerable performance concerns in relation to the claimant and that it was for those reasons that it dismissed her.**

> 217. We have seen a huge amount of compelling evidence that that was the case. A lot of it is set out in our findings of fact above which we do not repeat here. However, in summary: the claimant received a "Not Progressing" rating in two consecutive performance periods; her chargeability was low; she was not originating new work; there were serious concerns about her style, and her leadership behaviours and her client relationships; and she showed a lack of "client stickiness" and indeed proactivity in finding client roles (which in turn had an impact on her chargeability). **She was not even consistently performing at "Manager" level whereas, under the respondent's progression based model, what she needed to be doing was showing that she was ready for promotion to the next level (Senior Manager), which she was not doing. Under the respondent's progression based model, not demonstrating readiness for promotion is underperformance.**
>
> 218. **For the avoidance of doubt, the respondent is absolutely entitled to use the progression based model which it does. Although the claimant did not appear to be challenging that, Ms Banton in her opening note criticised the dismissal, amongst other things, on the basis that the claimant's performance was "judged against Senior Manager and not Manager". It is not clear whether she is suggesting that the respondent did so mistakenly, which suggests a misunderstanding on her part of how the progression based model operates**, or whether she is suggesting that the respondent did so intentionally but that that system is essentially unfair. **We feel that we should therefore emphasise that, as it is (as a matter of law) for the employer to set the standard asked of employees, the respondent is entitled to operate this system. It is, in addition, a model which is widely used throughout the consultancy industry and one which is logical and reasonable given the need to retain the very high standards expected by the respondent and its clients and to maintain the "pyramid structure" which the respondent has**. Ms Banton's criticism of that system, if indeed she was criticising it, is therefore not accepted.
>
> 219. We also note that a not inconsiderable amount of time was spent by the claimant and Ms Banton at this tribunal suggesting that the two "Not Progressing" outcomes were undeserved. **To be clear, there are no allegations before this tribunal relating to the award of those "Not Progressing" outcomes. In the context of the unfair dismissal complaint, we remind ourselves of the principles in *Davies v Sandwell*; it is not our function to determine whether or not these warnings should or should not have been issued but simply to apply the statutory test of reasonableness** to determine whether the warning was a circumstance which a reasonable employer could reasonably take into account in its decision to dismiss the claimant. It clearly was reasonable to take those warnings into account given the reasons for them. However, whilst it is not our function to look behind the reasons for those warnings, we in any case add that, from the considerable evidence that we have seen, those warnings were justifiably given in the light of the performance concerns about the claimant which led to them. [emphasis added]

40. The Employment Tribunal referred to the reason for the claimant's dismissal being her "performance". We take it that the Employment Tribunal considered that the respondent had a potentially fair reason for dismissal that related to the claimant's capability.

41. The Employment Tribunal held that, as was accepted by the respondent, the relevant policy

was the "Disciplinary and Appeals Policy" which stated:

> This policy includes Disciplinary procedures for issues of misconduct, attendance and **performance**, **and performance when managed through a Performance Improvement Plan**. [emphasis added]

42. The Employment Tribunal noted:

> **… the policy outlines a five stage procedure: investigation; disciplinary hearing; adjournment; decision; and appeal**. The claimant says that this was not followed in relation to her dismissal. Ms Ojike did not allow this ground of appeal. **The last four stages were certainly followed**: there was a hearing chaired by Mr Young; that hearing was adjourned; Mr Young then gave a decision; and the claimant appealed. **It is correct, however, that there was no investigation in the sense of a formal disciplinary investigation; instead, there was continuous performance assessment of the claimant over a long period of time, including two "Not Progressing" ratings.** That process is perhaps equivalent to (and in the context of a performance dismissal, far more relevant than) a formal investigation and **we do not criticise Ms Ojike for reaching the conclusion which she did that all five stages were complied with and that the performance management process was the equivalent of the investigation; however, it does sit awkwardly with the wording of the policy which looks designed more for disciplinary than performance matters.** [emphasis added]

43. The Employment Tribunal also noted:

> On a similar issue, which was raised by Ms Banton at this tribunal although not, as far as we can see, at the appeal stage, the policy states:
>
> "Procedure for Disciplinary Hearing;
>
> (a) The Disciplinary Panel (appointed above) will be convened and chaired by someone more senior than the employee and will consist of;
>
> Chairperson (not previously involved)
>
> HR Advisor (not previously involved)…"

44. The Employment Tribunal stated:

> 149. **Mr Young (the "Chairperson") had of course been previously involved in performance managing the claimant. Furthermore, Ms Wintle ("HR advisor") had been previously involved amongst other things in discussing whether or not to invite the claimant to the meeting on 3 July 2019. The respondent was therefore in breach of its policy.** However, we reiterate **that this appears to us to be because the policy is tailored to misconduct issues rather than performance management; it is not as a matter of fairness inappropriate that a manager who has been involved with performance managing an employee should be the one who takes the decision to dismiss that employee and in many cases it will be entirely appropriate for that to be the case.**
>
> 150. Although **the policy states that *"the Company reserves the right to depart from the policy in appropriate circumstances…"*, we do not consider that the flexibility of that**

> **provision extends to disregarding core terms about the make up of dismissal panels; if this wording permits that, then one might as well not have a policy at all as it would enable an employer to depart from pretty much any term of it as it saw fit.** [emphasis added]

45. The Employment Tribunal held that the dismissal was unfair for the following reasons:

> 236. **The claimant was not specifically made aware of the fact that the respondent was using this procedure prior to the appeal hearing. Having said that, the procedure was available to the respondent's employees** so, whilst it would of course have been far better if the respondent had specifically told the claimant in advance of the meeting of 3 July 2019 with Mr Young that this procedure would apply, the fact that it is there for all employees to see does not in itself render the dismissal unreasonable or unfair. In any event, it was clear by the appeal stage that this was the procedure which the respondent was using so, looking at the overall fairness of the dismissal process as a whole, the claimant was not prejudiced in a way which rendered the dismissal unfair by the respondent not specifically telling her in advance of the 3 July 2019 meeting that this was the procedure which would apply.
>
> 237. However, as we noted in our findings of fact, **the policy used by the respondent appeared tailored to misconduct dismissals and not to performance dismissals (even though it was stated to apply to performance issues as well).** Consequently, in many areas, what was actually done did not fit comfortably with the provisions in the policy. **We reiterate that we do not consider that the process which the respondent used in dismissing the claimant was unfair in itself; rather that it did not fit in with its policy. We have noted the awkwardness of the five stages of the policy being compared with the process used in relation to the claimant's performance dismissal** and **in particular the "investigation" stage prescribed by the policy, which envisages a misconduct style investigation; whilst the way that the respondent managed the claimant's performance over the lengthy period prior to the dismissal was not unreasonable, it is something of a stretch to describe it as an "investigation". Furthermore, the composition of the people at the meeting at which the claimant was dismissed, whilst not unreasonable in the context of the claimant's performance dismissal, was clearly outside the terms of the policy and was therefore a clear breach of that policy.**
>
> 238. **We are surprised, given that the respondent is a large and well resourced employer, that this discrepancy between policy and practice exists. Going forwards, we think that the respondent would be well advised to put in place for performance dismissals a policy which actually reflects the approach it takes (which, as we have found, was not in itself unreasonable).** However, **employees are entitled to know the process that applies to them in dismissal situations, be they conduct or performance dismissals, and the claimant can therefore be forgiven for any confusion on her part in the non-alignment of the process actually used with the terms of the policy. We therefore consider that that non-alignment was not only unreasonable but also renders the dismissal unfair.** [emphasis added]

46. While not quite as clearly expressed as it might have been, we have concluded that the Employment Tribunal decided that the dismissal of the claimant was unfair because the respondent did not comply with the Disciplinary and Appeals Policy in not conducting the mandated type of

investigation and because Mr Young and Ms Wintle had been "previously involved".

47. We do not consider that the summary the Employment Tribunal gave undermines that assessment:

> 244. We appreciate that there have been a lot of points which we have had to cover on the issue of reasonableness. However, in summary, **on only one point (the specific breach of the respondent's disciplinary/performance policy) do we consider that there was a failure which rendered the dismissal unfair** [emphasis added]

48. While the summary referred to the dismissal being unfair on "one point", the "specific breach" of the Disciplinary and Appeals Policy; we concluded that on a fair reading of the judgment there was one point, that the Disciplinary and Appeals Policy was breached, albeit that it was breached in the two respects identified in the fuller reasoning.

49. Having found that the dismissal was unfair, the Employment Tribunal decided that there should be a 100% **Polkey** reduction:

> 239. However, we are in no doubt that, **had the respondent used a policy which properly reflected the otherwise reasonable approach that it took in the dismissal, the claimant would have been dismissed fairly at the same time in any event. We therefore make a reduction of 100% to the compensatory award under the principles in *Polkey***.

Ground 1

50. In the first ground of appeal the claimant asserts:

> Ground 1; Unfair Dismissal 100% Polkey Reduction
>
> 1. The finding of a 100% Polkey reduction at paragraph 239 of the judgment constituted an error of law inconsistent with the ET's findings on unfair dismissal. The tribunal found that not having an investigation by independent managers as per the written procedure, tailored to misconduct rather than capability, rendered the dismissal unfair. **The ET should have considered whether an independent investigation carried out by different managers to Mr Andy Young and Ms Emily Wintle would have led to a different outcome**, *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274, EAT (Langstaff P).
>
> 2. The ET should have at least considered under Polkey whether longer/additional time would have been required to carry out the process should an independent manager have reviewed the Claimant's performance and timeline of events. **The Tribunal erred as it could not be 100% sure that the Claimant would still have been dismissed or dismissed at the same time as she was actually dismissed had the decision been taken by independent managers following an investigation.** [emphasis added]

51. A **Polkey** deduction can only be made where the employer establishes that it would, or might

have, fairly dismissed the claimant if it had the opportunity to correct the error that rendered the dismissal unfair. Because it is necessary to consider whether the respondent would, or might have, dismissed the claimant fairly, we will start with the relevant law about unfair dismissal, before analysing the assessment of compensation, that can include the **Polkey** reduction.

Unfair dismissal

52. Section 98 of the **Employment Rights Act 1996** ("**ERA**") provides, so far as is relevant:

> 98.— General.
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is **for the employer to show**—
>
> (a) the **reason** (**or**, if more than one, the **principal reason**) for the dismissal, and
>
> (b) that it is **either a reason falling within subsection (2)** or **some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held**.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the **capability** or qualifications of the employee **for performing work of the kind which he was employed by the employer to do**,
>
> (b) relates to the conduct of the employee,
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (3) In subsection (2)(a)—
>
> (a) "**capability**", in relation to an employee, means his capability assessed by reference to **skill, aptitude, health or any other physical or mental quality**, and
>
> (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) **the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee**, and

> (b) shall be **determined in accordance with equity and the substantial merits of the case**.

53. The starting point is the factual reason for the dismissal. Representatives of respondents when asked the reason for dismissal often say it was "conduct" or "capability". Those are potentially fair reasons, but the factual reason for dismissal, or if more than one the "principal" reason, must be determined before deciding whether it falls into one of the potentially fair categories. In **University of Exeter v Plaut** [2024] EAT 159, I put it this way:

> 31.The Employment Tribunal must first consider whether the respondent has established what, as a matter of fact, was the reason, or principal reason, for the dismissal. In a misconduct case, at this stage the respondent must establish what the employee did that resulted in dismissal. If an employee is dismissed for stealing money from a till, the reason for the dismissal is the theft of the money. The Tribunal then considers whether the reason established is one of the potentially fair reasons for dismissal. Dismissal for theft of money is potentially fair because it is a reason that relates to the conduct of the employee.

54. In **Croydon Health Services NHS Trust v Beatt** [2017] EWCA Civ 401, [2017] ICR 1240, Underhill LJ considered the factual reason for dismissal by reference to the classic exposition in **Abernethy v Mott, Hay and Anderson** [1974] ICR 323:

> 30. What tends to be treated as **the classic expression** of the approach to identifying the "reason" for the dismissal of an employee for the purpose of section 98 and its various predecessors is the statement by Cairns LJ in *Abernethy* …, that**: "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."** As I observed in *Manchester College v Hazel* [2014] ICR 989 , para 23, Cairns LJ's precise wording was directed to the particular issue before the court, and it may not be perfectly apt in every case; **but the essential point is that the "reason" for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision—or, as it is sometimes put, what "motivates" them to do so**: see also *Co-operative Group Ltd v Baddeley* [2014] EWCA Civ 658 at [41]. [emphasis added]

55. One of the potentially fair reasons for dismissal is capability. It is important to note the definition of this potentially fair reason is one that "relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do". That begs the question; what kind of work was the employee employed by the employer to do? That takes us to the familiar definitions in section 230 **ERA**:

> 230.— Employees, workers etc.

> (1) In this Act "*employee*" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "*contract of employment*" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing. …
> (4) In this Act *"employer",* in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
>
> (5) In this Act *"employment"* —
>
> > (a) in relation to an employee, means … employment under a contract of employment, and …
>
> and *"employed" shall* be construed accordingly.

56. This suggests that "the work of the kind which he was employed by the employer to do" is assessed by reference to the contract of employment.

57. There is remarkably little authority on this point. A case in the Scottish Industrial Tribunal was reported in the Industrial Relations Law Reports; **Woods v Olympic Aluminium Co Ltd** [1975] IRLR 356. Mr Woods was employed as an Assistant Accountant. He was dismissed because he lacked "management ability". The Employment Tribunal, chaired by D A Anderson, held his dismissal was not for the potentially fair reason of capability:

> The question was therefore whether the applicant did lack management ability and, if so, whether this was a sufficient reason for dismissing him. It is possible that he did not have in him the stuff of which captains of industry are made, and the Tribunal were prepared to accept that there was some foundation for the belief that he could not get on with all the others in the company. However, the Tribunal also felt that there was probably some ground for the applicant's view that he was having pressure put on him. Doubtless there were faults on both sides. T**o some extent, therefore, the applicant may well have lacked management ability of the more dynamic and senior type. But this was not what he had been employed for. He had been engaged as an assistant accountant**, and t**here had been nothing in his contract of employment about management ability**. **There was no real hard evidence to show that he was lacking in 'the capability or qualifications ... for performing work of the kind which he was employed by the employer to do', as required by the Act.** [emphasis added]

58. This decision of a Scottish Employment Tribunal is not binding on us, but is of persuasive value. The lack of authority may show that it was uncontroversial that capability was to be assessed in relation to the work that the employee was employed to do pursuant to the contract of employment.

59. It appears that the only EAT authority directly on the point is referred to in commentaries, but

a copy of the full judgment could only be recovered from the archive of the EAT. In **Plessey Military Communications v Brough** EAT 518/84, Mr Justice Popplewell held in respect of the equivalently worded predecessor provisions:

> The matter of law which is said to arise in this case is whether the phrase ''performing work of the kind which he was employed by the employer to do" means the actual work which he was doing at the time of dismissal or does it mean the work which he was contractually required to do at the time of dismissal.
>
> Mr. Keith of counsel, on behalf of the appellants, has submitted that it is what he is contractually required to do which is the proper interpretation of section 57(2)(a). With that submission, Miss Gaye on behalf of the applicant/respondent agrees.
>
> It may be a matter of some importance in other cases that this court should decide the interpretation of concessions by experienced counsel are of great assistance to the court but in the end the tribunal has to make up its own mind because a decision will be binding on other parties who are not party to the concession.
>
> We are satisfied that the concession is properly made and that the words themselves are only capable of being interpreted with reference to what has been described in argument as the "contractual position" and not the "functional position". Mr. Keith further submitted that the whole ambit, intention and purpose of the Act was not to limit the scope of the protection granted and accordingly, for that reason also, the phrase should be construed in the contractual sense and not in the functional sense. We accept the submissions and concession made and rule that section 57(2) the phrase "performing work of the kind which he was employed to do" refers to the contractual obligation, i.e. the work which he is contractually obliged to do.

60. The EAT went on to find that a contractual change in the claimant's job duties was to be inferred and so capability was to be assessed by the new work that he was employed to do rather than the old.

61. The authority may have become a little dusty, but we could only depart from another decision of the EAT if it was manifestly incorrect, which it manifestly is not.

62. Therefore, capability is assessed in relation to the work that the employee was employed to do pursuant to the contract of employment.

63. The consequence is that dismissal under an "up or elsewhere" progression model may not be for the potentially fair reason of capability, to the extent that the dismissal is because of a lack of readiness to be promoted to the next level. It is difficult to see how that would generally be a reason

that relates to the capability of the employee to do work of the kind which she was employed by the employer to do. It would appear to be a reason that relates to work that the employee would be employed to do, should she be promoted.

64. That said, assessing what work the employee was employed to do under the contract of employment is not always straightforward. Some contracts of employment may specify job duties or incorporate a job description. Other contracts of employment, such as the claimant's, may require the employee to undertake duties as are required from time to time. The contract may be varied expressly or by implication as the job develops. Relatively few jobs remain static over the years.

65. A contract of employment could specifically provide that the work the employee is employed to do includes demonstrating the ability for promotion after a period of time in the role.

66. But none of that means that capability, as a potentially fair reason for dismissal, is to be assessed otherwise than in relation to the work the employee was employed by the employer to do pursuant to the contract of employment.

67. It might be said that this has some counterintuitive consequences. If the employee's contract includes a requirement to undertake a particular type of work that the employee has never been required to do in practice, and the employee is dismissed because of an inability to undertake that type of work, the dismissal could be for the potentially fair reason of capability. While that might seem surprising, it is unlikely to occur often in practice and even where the potentially fair reason of capability is established, the dismissal would still be subject to the requirement on the employer to act fairly.

68. Alternatively, dismissal pursuant to an "up or elsewhere" model might be for the potentially fair reason of "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held".

69. The term "position" is less familiar than those related to the definition of "employee". Employment lawyers often consider the definitions in section 230 **ERA**, but much less frequently those in section 235 **ERA**:

> 235.— Other definitions.
>
> (1) In this Act, except in so far as the context otherwise requires—
>
> *"position"*, **in relation to an employee**, means the **following matters taken as a whole**—
>
> (a) his status as an employee,
>
> (b) the **nature of his work**, and
>
> (c) his **terms and conditions of employment**,

70. Clearly, the definition of "position" is wider than that of employee, and the related definitions; and can go beyond the terms of the contract of employment: **Duke v Reliance Systems** [1982] ICR 449, EAT and **Waite v Government Communications Headquarters** [1983] AC 714. There are many examples of dismissals, that have been found to be for some other substantial reason, that result from a refusal to agree to vary contractual terms. However, it will still be necessary to consider whether any such reason is such as to justify the dismissal of an employee holding the position which the employee held. That will require some consideration of the position held by the employee by reference to the statutory definition. What might justify the dismissal of an employee in one position might not justify the dismissal of an employee in another. For example, the expectations of flexibility might be greater in a senior rather than junior employee. The Employment Tribunal will also have to consider the fairness of any such dismissal.

Polkey

71. A compensatory award may be reduced pursuant to section 123(1) **ERA**:

> 123(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be **such amount as the tribunal considers just and equitable in all the circumstances** having regard to **the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer**. [emphasis added]

72. Compensation may be reduced insofar as it is just and equitable in all the circumstances, having regard to the extent to which the loss sustained was attributable to the actions taken by the employer. This can result in a "**Polkey** reduction", where it is determined that there is a likelihood, or certainty, that the employee would have been dismissed had her employer acted fairly. The

Employment Tribunal must assess whether the employer, rather than the Employment Tribunal, would have dismissed and whether the dismissal would have been fair.

73. In **Hill v Governing Body of Great Tey Primary School** [2013] ICR 691 Langstaff J H held:

> A '*Polkey* deduction' has these particular features. First, **the assessment** of it **is predictive**: **could the employer fairly have dismissed** and, **if so**, what were **the chances that the employer *would* have done so?** The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though **more usually will fall somewhere on a spectrum between these two extremes**. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. **It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done.** Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the tribunal has to consider not a hypothetical fair employer, but **has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.** [emphasis added]

74. There must be an evidential basis for the predictive exercise of assessing whether to make a **Polkey** deduction and, if so, deciding the percentage; **Contract Bottling Ltd v Cave** [2015] ICR 146 in which Langstaff J (P) held:

> 21 I draw attention to these factors to place the assessment of a *Polkey* contribution in context, but also to demonstrate that it is inevitably an exercise about which there can be no absolute and scientific certainty. It is a predictive exercise. **Evidence is needed to inform the prediction. It is important that a tribunal should spell out, as best it can, what factors it takes into account in determining why it adopts a particular percentage.** However, there can be no legitimate ground for criticising a particular percentage unless it is manifestly less than or more than the percentage which might have seemed proper or unless it is simply unreasoned. This is because, of its very nature, justifying 20% rather than 25% (as the case may be, or some slightly higher or some slightly lower percentage) is not susceptible of detailed reasoning. It is, and has to be, a process of assessment. Part of my reasoning in setting out all the various factors which can intersect is to show how much a matter of art, as Mr Robinson-Young put it, this is rather than a matter of science. [emphasis added]

75. Despite the challenges involved, the Employment Tribunal should generally carry out the **Polkey** analysis if the necessary evidence is available: **Andrews v Software 2000 Ltd** [2007] IRLR in which Elias J stated that the onus is on the respondent, albeit that all evidence, including that from the claimant, can be taken into account in making the assessment.

76. The Employment Tribunal must be persuaded by the respondent that the claimant would or

might have been fairly dismissed by it, rather by some other putative reasonable employer.

77. In assessing the chance of a fair dismissal HHJ Peter Clark suggested in **Whitehead v The Robertson Partnership** EAT/0331/01 that the Employment Tribunal must consider the elements of a fair dismissal. Building slightly on his analysis that involves considering whether the respondent has shown that, had it not acted unfairly, it might or could have established:

77.1. a factual reason, or principal reason, for dismissal that it would have relied on

77.2. if so, that the reason, or if there would have been more than one, the principal reason would have been a potentially fair reason

77.3. If so, that it would have dismissed for that reason

77.4. If so, that it would have acted reasonably in treating that reason as a sufficient reason for dismissing the employee

Analysis of ground 1

78. Claimants who have succeeded in complaints of unfair dismissal, but have their compensation substantially reduced by application of the **Polkey** principle often express surprise, contending that the employer appears to have been given two bites of the cherry. While that concern may be understandable, it is not a fair criticism because a **Polkey** reduction is designed to ensure that compensation is just and equitable in all the circumstances and is limited to such loss as is attributable to action taken by the employer. It is an attempt to avoid overcompensation where the employer can establish that dismissal would, or might, have occurred if it had the chance to put the error right.

79. But the Employment Tribunal must decide, on the evidence presented, what the employer in front of it would have done. Ms Eddy, Counsel for the respondent, asserted that the Employment Tribunal must assume that the employer would not have done the thing that was found to be unfair and it followed that a 100% **Polkey** reduction should be applied.

80. We do not accept that is correct. The Employment Tribunal found that the dismissal was unfair because the respondent did not comply with its policies. A **Polkey** reduction is to be assessed on the basis of what the employer would, or might, have done had it had the opportunity to remedy that

defect.

81. If an employer gave evidence that it would not be prepared to refrain from the action that made the dismissal unfair if it were to take the decision again, it cannot be just and equitable to assess compensation on the basis that it would have done so. That is not assessing what the employer would have done but what the Employment Tribunal would have done. That would not be a just and equitable basis upon which to limit compensation. It really would be allowing a second bite of the cherry, taken by the Employment Tribunal rather than the employer.

82. The Employment Tribunal applied a counterfactual in which rather than complying with the Disciplinary and Appeals Policy, the breach of which the Employment Tribunal found to be unfair, the respondent would have introduced a new policy that would have mirrored the process that the respondent had applied. There is nothing in the judgment that demonstrates that the respondent led any evidence that it would have introduced such a new policy or had done so by the time of the Employment Tribunal hearing.

83. Accordingly, we have concluded that the Employment Tribunal erred in law in its assessment of the **Polkey** reduction by analysing what it would have done rather than looking to the respondent to prove what it would have done had it had the opportunity to correct its error.

84. Because there was no evidence that the respondent would have introduced a new capability policy that accorded with the process that it had applied and the Employment Tribunal did not find that this was a case in which the dismissal was fair notwithstanding the breach of procedure, the analysis on remission will have to be about what would or might have happened had the respondent complied with the requirements under the Disciplinary and Appeals Policy to undertake an investigation and have independent decision makers. The Employment Tribunal will have to analyse what would or might have happened had the policy been complied with, including the chance, if any, of this employer fairly dismissing the claimant having regard to:

84.1. whether the respondent would or might have decided to dismiss the claimant

84.2. if so, what would or might have been the factual reason or principal reason for

dismissal – if the dismissal related to the claimant's performance by reference to her contractual work at the time of dismissal **and** also to her likely ability to undertake contractual work on promotion (if that potential for promotion was not already an element of her contractual work), which would have been the principal reason for dismissal

84.3. whether such a reason or principal reason would or might have been for a potentially fair reason, applying the above analysis of capability and some other substantial reason

84.4. if so whether the respondent would or might have acted fairly in dismissing for that reason or principal reason, including what any further investigation might or would have established about the effect that the claimant's medical condition had on her performance

Ground 2

85. The claimant asserts that the Employment Tribunal erred in law in finding that the progression based model was fair.

Can the claimant appeal on this basis

86. The respondent contends that the claimant cannot pursue this ground because she succeeded in her unfair dismissal complaint and appeals lie only against orders of the Employment Tribunal rather than reasons: **Harrod v Ministry of Defence** [1981] ICR 8 at 11H – 12A.

87. We reject that analysis. The decision that the progression based model was fair was not part of the reasoning why the dismissal was unfair, it was a component of the rationale as to why a 100% P**olkey** reduction should be made. On remission the Employment Tribunal will have to decide whether the respondent would have applied the progression based model and if so the chances that the respondent would have fairly dismissed on application of that procedure.

88. In **Dziedziak v Future Electronics Ltd** UKEAT/0270/11/ZT Langstaff J, held in relation to whether an appellant who had succeeded in an unfair dismissal complaint could reopen the reasoning in respect of the dismissal when an appeal about a **Polkey** reduction succeeded:

> In a number of respects the appeal itself is somewhat curious. It seeks in the first two grounds of appeal to challenge the decision as to unfair dismissal, but this decision was favourable to the Claimant. Ms Crasnow, in the course of her well thought out and researched

submissions, and for whose presence, appearing pro bono as she does, we are very grateful, argues that it should be no bar to the Claimant raising the points she does that she is attacking much of the Tribunal's reasoning rather than the result. Ms Cunningham, in opposition, argues that it is simply not permissible to appeal the reasons for a decision; it is the decision or order that is the true subject of an appeal.

23. In general terms, on this point Ms Cunningham is in our view correct. It is right that once a decision has been made in favour of a party upon the issue that is contentious, the process of reasoning by which that result is reached cannot be appealed by the individual in whose favour the ultimate conclusion is. But that is a general proposition. Here, we have to take into account, as it seems to us, that the Notice of Appeal, though redrafted with the assistance of Ms Crasnow, was essentially the product of a self-represented party. We note the decision of the Court of Appeal in the case of *Williams v The Home Office* [2005] EWCA Civ 1648 , in which there are two pertinent paragraphs in the Judgment of Maurice Kay LJ. They read:

> "32. The final ground of appeal relates to the finding that the decision not to extend sick leave on full pay until Mrs Williams was well enough to return to work […] was an act of unlawful discrimination. The complaint is that having found discrimination the Employment Tribunal ought not to have put a terminal date on its consequences because that is, more appropriately, a matter for the remedies hearing which is yet to take place.
>
> 33. There was some debate as to whether it is open to Mrs Williams to appeal this part of the Tribunal decision because it is the part in which she succeeded. For my part, I see no technical difficulty when there remains the live issue of remedy. The decision of the Employment Appeal Tribunal in *Harrod v Ministry of Defence* [1981] ICR 8 is readily distinguishable. […]"

24. Ms Crasnow, for obvious reasons, relied upon those words. What followed is, however, also instructive:

> "33. […] However I do not consider that there is merit in this ground of appeal. It was inevitable that the Employment Tribunal was going to concern itself with the facts […] because it was central to Mrs Williams' case that she had been well enough to return to work [at a particular date] albeit on a phased basis."

25. In the light of the general principle, as we have expressed it, and in the light both of *Harrod* and *Williams*, we have approached the appeal as essentially being related to the decision made by the Tribunal under the head of *Polkey*. The point being raised is effectively that the findings of a Tribunal in reaching a conclusion as to unfair dismissal would ordinarily be the basis upon which the Tribunal would then proceed to determine whether or not there should be a reduction in the overall level of compensation by reason of the chance that there may not have been a dismissal had the unfairness been remedied. Those facts, however, might be contentious for very good reason. On an appeal at any rate it ought to be open to the Appellant to revisit those findings of fact if an appropriate case is shown. Accordingly we should examine in this case the third ground of appeal, which does relate

clearly to *Polkey*, in the light not just of the facts as found by the Tribunal but the facts as any Tribunal properly directing itself should have found them to be.

89. Nor would there be any issue of estoppel arising from the consideration that the Employment Tribunal gave to the fairness of the up or elsewhere progression model because it was not the legal foundation or justification of its conclusion: **Hill v Governing Body of Great Tey Primary School**.

90. On remission, the Employment Tribunal will have to consider whether applying its procedures properly the respondent would or might have applied the up or elsewhere progression model and if so whether that would have formed the basis of a potentially fair reason for dismissal before going on to consider whether any dismissal would have been fair having regard to our analysis above. To that extent ground two succeeds.

Ground 3

91. By ground 3 the claimant challenges the findings of the Employment Tribunal that the claimant was not disabled by reason of her endometriosis, and that even if she was the respondent did not have the requisite knowledge, the claimant's dismissal was not because of something arising in consequence of the claimant's endometriosis, and that the claimant's dismissal was a proportionate means of achieving a legitimate aim.

The statutory tests

Disability

92. The protected characteristic of disability is defined by section 6 of the **Equality Act 2010** ("**EQA**"):

> 6 Disability
>
> (1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
>
> (2) A reference to a disabled person is a reference to a person who has a disability.

93. In **Goodwin v Patent Office** [1999] ICR 302, Morison J analysed the predecessor provision in the DDA 1995 into four components, at p308 B-C:

> 3. Section l(l) defines the circumstances in which a person has a disability within the meaning of the Act. The words of the section require a tribunal to look at the evidence by reference to four different conditions. (1) **The impairment condition**. Does the applicant have an impairment which is either mental or physical? (2) **The adverse effect condition**. Does the impairment affect the applicant's ability to carry out normal day-today activities …, and does it have an adverse effect? (3) **The substantial condition**. Is the adverse effect (upon the applicant's ability) substantial? (4) **The long-term condition**. Is the adverse effect (upon the applicant's ability) long-term?
>
> Frequently, there will be a complete overlap between conditions (3) and (4) but it will be as well to bear all four of them in mind. **Tribunals may find it helpful to address each of the questions but at the same time be aware of the risk that disaggregation should not take one's eye off the whole picture.** [emphasis added]

94. When considering the adverse effect condition consideration should be given to section 212 **EQA** which defines the word "substantial":

> 212 General interpretation
>
> (1) In this Act— …
>
> **"substantial" means more than minor or trivial**; … [emphasis added]

95. Specific provision is made by paragraph 5 of Schedule 1 **EQA** where medical treatment has ameliorated the effect of the condition:

> 5 Effect of medical treatment
>
> (1) An **impairment is to be treated as having a substantial adverse effect** on the ability of the person concerned to carry out normal day-to-day activities if—
>
> (a) **measures are being taken to treat or correct it**, and
>
> (b) but for that, it would be likely to have that effect.
>
> (2) "**Measures" includes, in particular, medical treatment** and the use of a prosthesis or other aid. [emphasis added]

96. When considering the long-term condition reference should be made to paragraph 2 of Schedule 1 **EQA**:

> 2 Long-term effects

> (1) The effect of an impairment is long-term if—
>
> (a) it **has lasted for at least 12 months**,
>
> (b) it is **likely to last for at least 12 months**, or
>
> (c) it is **likely to last for the rest of the life of the person affected**.
>
> (2) If an impairment **ceases to have a substantial adverse effect** on a person's ability to carry out normal day-to-day activities, **it is to be treated as continuing to have that effect if that effect is likely to recur**. [emphasis added]

97. The question of whether a person is disabled is to be assessed at the date of the asserted discrimination: **McDougall v Richmond Adult Community College** [2008] ICR 431.

98. The term likely means that it "could well happen" rather than it is "more likely than not" to happen: **SCA Packaging Ltd V Boyle** [2009] ICR 1056. The mere fact that something has recured previously does not necessarily mean that it is likely to recur again: **Sullivan v Berry Street Capital Ltd** [2021] EWCA Civ 1694.

99. The Employment Tribunal directed itself clearly and concisely on the legal definition of disability.

The decision of the Employment Tribunal on disability

100. Having formed an extremely adverse view as to the claimant's credibility, the Employment Tribunal effectively ignored the claimant's impact statement. The Employment Tribunal stated:

> 169. Endometriosis is a common condition, which affects many women. The exact number is not known. This is because many women have endometriosis without symptoms, or with mild symptoms, and are never diagnosed.

101. This unattributed statement was irrelevant to the case of the claimant who had significant symptoms and underwent surgery. The Employment Tribunal summarised the medical evidence, which we assume it accepted.

102. The Employment Tribunal's consideration of the asserted disability of endometriosis was very brief:

> 252. Again, there is **no dispute that the claimant had endometriosis**. However, the evidence indicates that **the reason why the claimant was absent from work was because she was recovering from surgery**; this is what is reflected in the medical

> evidence. Whilst **we have no doubt that the symptoms she suffered during this period were very unpleasant**, the claimant has **not proven that her endometriosis (as opposed to her need to recover from the surgery) has an ongoing substantial adverse effect**. For this reason, the claimant **has not proven that such an effect has lasted or is likely to last more than a year**.
>
> 253. We do not, therefore find that the claimant was at any stage disabled by reason of her endometriosis, including at the point at which she was dismissed. [emphasis added]

Analysis

103. Despite the correct self direction as to the law, we have concluded that the reasoning is wholly inadequate to demonstrate that the Employment Tribunal properly analysed the evidence to consider whether the claimant was a disabled person. There was significant medical evidence from Occupational Health and Mr Emeka Okaro. The Employment Tribunal should have at least considered whether it accepted some of what the claimant stated in her impact statement about the effects endometriosis had on her ability to carry out normal day-to-day activities, notwithstanding the negative view it formed as to her reliability generally. Her evidence that she was affected by endometriosis was supported by the medical evidence.

104. Reading this brief passage it appears that the Employment Tribunal accepted that the impairment condition was met because the claimant had endometriosis. It is less clear whether the Employment Tribunal accepted that the adverse effect condition was met because of the distinction the Employment Tribunal drew between endometriosis "as opposed to her need to recover from the surgery". It is not clear whether the Employment Tribunal thought that the recovery from surgery was not an adverse effect arising from endometriosis that could be substantial or considered that this adverse effect was time limited and so the long-term condition was not met. If an employee is absent from work because of treatment for an impairment that generally is a substantial adverse effect on day-to-day activities. The Employment Tribunal only referred to absence from work, but did not analyse any other effects referred to in the medical evidence, such as inability to lift things. In finding that the claimant had not established the long-term condition the Employment Tribunal only stated that "the claimant has not proven that such an effect has lasted or is likely to last more than a year".

The Employment Tribunal did not consider the likelihood of recurrence, having regard to Mr Okaro's report. While the fact the endometriosis had already recurred did not mean that any effect of that impairment was necessarily likely to recur, that possibility required consideration. The Employment Tribunal also failed to consider whether the condition would continue to have substantial adverse effect on the claimant's ability to undertake normal day-to-day activities absent medical treatment. The issue of disability will have to be considered entirely afresh.

Discrimination because of something arising in consequence of disability

105. Section 15 **EQA** provides:

> 15 Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) **A treats B unfavourably because of something arising in consequence of B's disability**, and
>
> (b) **A cannot show that the treatment is a proportionate means of achieving a legitimate aim**.
>
> (2) Subsection (1) does not apply if A shows that **A did not know, and could not reasonably have been expected to know, that B had the disability**.

106. The employer must have knowledge, or reasonably would have been expected to have knowledge, of the components that make up the definition of disability: see **Stott v Ralli** [2022] IRLR 148 and the cases referred to therein.

Knowledge of disability

107. The Employment Tribunal held of knowledge/constructive knowledge:

> 263. As to endometriosis, both occupational health reports (and the claimant's sick certificates) suggested, in terms, that the claimant's symptoms were connected to her recovery from surgery. It is therefore unsurprising that the conclusion reached in the occupational health report was that the adjustments would only be temporary. Even if the claimant had, therefore, been disabled by reason of her endometriosis, the respondent did not have knowledge of it nor could it reasonably be expected to have such knowledge.

108. Because the Employment Tribunal erred in its approach to whether the claimant was a disabled person we consider that the Employment Tribunal did not properly assess whether the respondent had knowledge or constructive knowledge of disability. We also consider that our finding

on grounds 1 and 2 have knock on consequences for the constructive knowledge finding. If the respondent had complied with its policies there would have been an investigation and a decision made by independent managers during the course of which the claimant's medical condition should have been considered further, including the possibility of the respondent being provided with Mr Okaro's report, and considering further the likelihood of the claimant's condition recurring.

109. We accept the respondent's contention that the claimant cannot rely on what she said at the appeal for the purposes of knowledge or constructive knowledge. At the Employment Tribunal hearing the claimant applied to amend her claim to add a complaint of disability discrimination concerning the appeal. The application was refused and so the claimant had no disability discrimination complaint in respect of the appeal. Because the allegation has to be assessed at the date of the asserted discrimination, knowledge or constructive knowledge was to be assessed on the basis of what the respondent knew or should have known when the claimant was dismissed. However, the fact that the claimant raised ongoing symptoms at the appeal, suggests that she would have raised the issue had there been a full investigation and independent decision maker as required by the respondent's policies.

110. The Employment Tribunal held in respect of whether the claimant's treatment was because of something arising in consequence of disability:

> 273. It was not the claimant's conditions which meant that she was "unable to work to the requisite standard". Rather, it was a whole range of other issues unrelated to her conditions. The fact that she was "unable to work to the requisite standard" was not something arising in consequence of her disability.
>
> 274. As noted, the claimant had agreed a London restriction with HR which was to be a restriction on her first client role which the claimant was, in accordance with the phased return to work, due to begin at the latest by 4 March 2019. This was therefore a restriction which applied for a very limited period, especially in comparison with the much longer period of years which Mr Young looked at when considering the claimant's performance. In any event, because 90% of the respondent's clients in financial services are based in London, it was a restriction easily accommodated by the respondent. Furthermore, even for roles based outside London, the respondent can and will agree arrangements with the client to minimise the travel required or to deploy other members of the team to do the travel. However, it was the claimant's unwillingness to take on roles which stopped her from getting client roles, not this limited periodical travel restriction. Therefore, although the decision to agree this restriction arose from the claimant's recovering from her

> surgery, it was not what stopped the claimant from getting client work. Furthermore, it was, in any event, not one of the reasons why Mr Young dismissed her.
>
> 275. It is not true that the claimant was "unable to accept client facing work". In fact, it was her own case that she was looking for it. The reality was, however, that the claimant turned down lots of opportunities of her own volition; it was not, however, the case that she was unable to accept client facing work, due to her conditions or otherwise.
>
> 276. Similarly, it is not the case that the claimant was "limited in the work that she could do", whether due to her conditions or otherwise.

111. The Employment Tribunal failed to analyse whether in deciding to dismiss the respondent had some regard to the claimant's sick leave and her phased return to work in London as part of the claimant's post operative recovery, which arose as a consequence of her endometriosis. The things that arose in consequence of the claimant's disability need not have been the main, or even principal reason for dismissal, they need only have been an effective cause.

112. The Employment Tribunal held in the further alternative:

> 277. Finally, again for completeness' sake, we find that the respondent was justified in pursuing the legitimate aims identified at issue 16 of the list of issues, namely "ensuring high performance standards from its consulting staff, maintaining its pyramid structure, and being able to provide appropriately resourced, competitive, high quality services to its clients".
>
> 278. We accept that these aims are plainly legitimate and that the claimant does not appear to suggest otherwise.
>
> 279. In the circumstances and in the light of the serious performance concerns regarding the claimant, it was also plainly proportionate for the respondent to dismiss her in pursuit of these legitimate aims. To retain her, given the performance concerns, would drive a coach and horses through the respondent's policy of trying to ensure these legitimate aims.

113. It is hard to assess whether dismissal is a proportionate means of achieving a legitimate aim which involves balancing the discriminatory impact on the claimant as against the legitimate interests of the respondent, when the Employment Tribunal has concluded that the claimant was not disabled and was not subject to treatment because of something arising in consequence of disability. We have concluded that the fact that those determination have been overturned means that this brief assessment is unsafe and will have to be considered again once these issues have been determined; only then can the necessary rigorous balancing exercise be conducted. The assessment will to have to take into

account the likelihood of dismissal had the respondent complied with its own procedures and so conducted an investigation and had an independent decision maker.

The disability ground overall

114. We have concluded that the determinations that the claimant was not disabled and the alternative reasoning that she was not subject to discrimination because of something arising in consequence of disability cannot stand, so ground 3 is allowed.

Disposal

115. We have concluded that, having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, the remission should be to a differently constituted Employment Tribunal. The errors in the judgment were fundamental to the determinations. The Employment Tribunal made highly adverse comments about the claimant's credibility and relied on them to prefer the respondent's evidence to that of the claimant in all respects where there was any conflict, to the extent of totally disregarding what the claimant said in her impact statement. It is important that the claimant is confident that the remitted matters will be considered afresh.