

Neutral Citation Number: [2026] EAT 47

Case No: EA-2023-001460-NK

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 March 2026

Before :

MRS JUSTICE HEATHER WILLIAMS DBE

Between :

MR SAIDALI KHAKIMOV

Appellant

- and -

**AMOVA ASSET MANAGEMENT UK LIMITED
(FORMERLY "NIKKO ASSET MANAGEMENT EUROPE LIMITED")**

Respondent

Dilfuza Kasimova (non-legal representative) for the **Appellant**
Andrew Smith (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the **Respondent**

Hearing dates: 17 & 18 February 2026

JUDGMENT

SUMMARY

The claimant appealed the London Central Employment Tribunal’s (“ET”) rejection of his claim for disability related discrimination under section 15 **Equality Act 2010** in relation to his dismissal and his claim for unfair dismissal. The ET concluded that his dismissal was not because of the “something arising” identified in the agreed list of issues. The ET also rejected a re-formulation of the “something arising” advanced by the claimant’s counsel in closing submissions. The ET found, in the alternative, that even on counsel’s re-formulation, whilst section 15(1)(a) would then be satisfied, the respondent had established that the dismissal was a proportionate means of achieving a legitimate aim.

The EAT dismissed the appeal. The ET had applied the correct test, as set out in **Pnaiser v NHS England** [2016] IRLR 170 EAT, in concluding that the requisite causal link between the claimant’s dismissal and the “something arising” was absent. The ET correctly considered the respondent’s subjective reason/s (conscious and subconscious) for the dismissal and reached a permissible conclusion. Furthermore, the ET was entitled to rely on the list of issues as identifying the “something arising” and to reject counsel’s belated re-formulation. Counsel had indicated at the start of the multi-day hearing that the list of issue was agreed. The document had been the subject of lengthy correspondence, preliminary hearings and an attempted appeal, during which this point had never been raised; counsel first articulated it during closing submissions after the evidence had concluded. There was no basis to disturb the alternative conclusion that the claimant’s dismissal was a proportionate means of achieving a legitimate aim or the finding that his dismissal was within the band of reasonable responses; these were amply supported by the ET’s factual findings and its detailed reasoning. Insofar as the dismissing officer had made concessions during cross-examination, there was nothing to indicate that the ET had failed to take these into account and the concessions were far from rendering the ET’s conclusions perverse.

Permission to add a further ground of appeal was refused as an inadequate explanation had been given as to why it was raised so late in the day and, in any event, it was not fairly arguable.

MRS JUSTICE HEATHER WILLIAMS:

Introduction

1. I will refer to the parties as they were known below.
2. This is an appeal from the reserved liability judgment of the London Central Employment Tribunal (Employment Judge AM Snelson, Members Ms M Foster-Norman and Ms S Aslett) (“the ET”) promulgated on 7 November 2023. The ET dismissed various claims upon the claimant’s withdrawal and concluded that the remaining claims were not well-founded. The majority of the claims had been presented out of time, so the ET had no jurisdiction to consider them. Claims for disability related discrimination under section 15 **Equality Act 2010** (“**EqA 2010**”) and for unfair dismissal were dismissed on their merits. The hearing before the ET took place between 2 – 18 October 2023 (with agreed breaks to accommodate the claimant’s disability) and the ET then deliberated in chambers on 19-20 October 2023. The claimant was represented by counsel, Simon John. The appeal is limited to the ET’s rejection of the section 15 **EqA 2010** claim in so far as it related to the claimant’s dismissal (“the section 15 disability dismissal claim”) and its rejection of the claim for unfair dismissal.
3. The claimant commenced employment with the respondent, a global asset management organisation, in Tokyo on 1 April 2009. On 1 January 2013, he transferred to the respondent’s London office in the role of Offshore Funds Manager. In July 2017, he was promoted to Product Management Director (UK). His long-term sickness absence commenced on 17 April 2019. His employment with the respondent was terminated on 13 January 2021. At the time of the ET proceedings, the respondent was known as Nikko Asset Management Europe Ltd.
4. By a claim form presented on 17 May 2020, the claimant brought various **EqA 2010** claims based on the protected characteristics of race and disability. He also brought claims for detrimental treatment on ‘whistle-blowing’ grounds, holiday pay and other outstanding sums (“the First ET Claim”). After his dismissal, he presented a second claim on 19 January 2021 containing further **EqA 2010** complaints and a complaint of unfair dismissal (“the Second ET Claim”). For the purposes

of his disability discrimination claims, the claimant relied upon a diagnosis of Functional Neurological Disorder (“FND”). On 29 April 2021, the respondent conceded that the claimant had been affected by this condition since 17 April 2019 and that it at all times amounted to a disability.

5. At the rule 3(10) hearing on 21 November 2024, HHJ Auerbach permitted Grounds 1 and 2 in the Notice of Appeal to proceed. He decided that a number of other points raised on the claimant’s behalf were unarguable, as he set out in his Summary Reasons. Ground 1 alleges that the ET failed to take account of concessions made by Mrs Marks, the respondent’s dismissing officer, during her evidence. The claimant says that in light of these concessions, the ET’s findings were perverse in respect of both the unfair dismissal claim and the section 15 disability dismissal claim; and the ET failed to have regard to these concessions and made findings that were inconsistent with them. HHJ Auerbach indicated that insofar as a contention in para 15 of the grounds concerning Mrs Marks’ allegedly negative attitude towards the claimant was raised as a stand-alone ground, it was unarguable. There are two parts to Ground 2. Ground 2A alleges that on its restrictive interpretation of the claimant’s case, the ET erred in its approach to the “something arising” from disability and in deciding whether that “something” was a material influence on the decision to dismiss him. The ET had proceeded on the basis of the “something arising” identified in the parties’ list of issues, namely the claimant’s difficulty in thinking in multiple layers and dealing with unclear responsibilities and uncertainty about his allocated roles. Ground 2B alleges that the ET’s reliance upon this aspect of the list of issues involved too narrow and unrealistic a view of the “something arising” and that the ET should have found that the claimant’s FND condition rendered him unfit for work and incapable of performing his role and that this was the reason, or a reason, for his dismissal.

6. By letter dated 30 January 2026, the claimant applied to amend his grounds of appeal to add a Ground 3 (“the Amendment Application”). The respondent opposed this application. By my order of 12 February 2026, I directed that the Amendment Application could be made at the substantive appeal hearing, with paras 11 – 13 of the letter of 30 January 2026 treated as the proposed addition to the Notice of Appeal. Proposed Ground 3 (which I will refer to as Ground 3, as a shorthand)

contends that there was a serious procedural irregularity and/or material unfairness in that the ET determined the section 15 disability dismissal claim on the basis of a distorted list of issues in terms of the things arising in consequence of the claimant’s disability (as set out at para 6(a) of that document). As I foreshadowed in this order and as I confirmed at the outset of the hearing, I heard the parties’ arguments relating to Ground 3 on a provisional basis, with a view to deciding whether to grant permission to amend the grounds of appeal and, if granted, whether to uphold Ground 3, as part of my reserved judgment also addressing the merits of Grounds 1 and 2.

7. By my order of 12 February 2026, I also dismissed the claimant’s appeal from the Registrar’s order of 23 January 2026 directing that the bundle supplied by the respondent was to be used as the Core Bundle at the appeal hearing and a 637 page bundle supplied by the claimant was to be treated as a Supplementary Bundle. My reasons were set out in the order and it is unnecessary for me to repeat them here.

8. At the claimant’s request and in light of his disability, I permitted a number of adjustment to the hearing process, in particular: I allowed the claimant’s wife, Ms Kasimova (who is not legally qualified) to conduct the advocacy on his behalf; I permitted Ms Kasimova to take breaks between her submissions on the different grounds of appeal and a further break before she began her Reply; I allowed Ms Kasimova to pause and consult with the claimant as much as she wished to during her submissions; I made a point of speaking slowly and clearly and using (as much as possible) non-technical language and I reminded Mr Smith to do likewise; I permitted Ms Kasimova to work from the Supplementary Bundle when addressing me even though it did not comply with the Employment Appeal Tribunal’s Practice Direction and even when she was referring to documents that were also in the Core Bundle and I encouraged Mr Smith to give the page references for the Supplementary Bundle as well as to the Core Bundle during his submissions.

The material circumstances

9. As the ET noted at para 6 of its Reasons, the dispute had “a tortuous and disproportionately

expensive procedural history”. It had been listed for trial three times and at least seven Employment Judges (“EJ”) had been involved in managing it and adjudicating on interlocutory issues. It is necessary for me to refer to the list of issues aspect of the procedural history in some detail.

The pleaded claim and the list of issues

10. First, I will set out the way that the claimant pleaded the disability discrimination claims and the unfair dismissal claim in the Second ET Claim. He said that as a result of a series of discriminatory acts by the respondent over an extended period of time “I fell ill on 17 April 2019 and subsequently became disabled”. He complained that the respondent had failed to make reasonable adjustments for him and had discriminated against him and harassed him, including in “their biased way of conducting an occupational health assessment”. The claimant said that “when I refused to submit to any such harassment, the Respondent ended my contract of employment without notice on 13 January 2021” (para 1). The claimant made a number of specific complaints about direct disability discrimination at paras 8-9. He then described his disability in the following terms at para 10:

“Since April 2019 and to date, I have suffered from consistent pain/pressure/noise at the back of my head (diagnosed as Functional Neurological Disorder), sleep disorder and abdominal pain (Irritable Bowel Syndrome (inconclusive)), which is a combination of physical and mental impairment that has a substantial and long-term adverse effect on my ability to carry out normal day-to-day-activities.

I feel constantly tired, struggle with falling asleep and sleeping uninterrupted hours in mutual causation with head and abdominal pain. As a result I cannot concentrate to such extent that any active thinking (such as thinking deeper or real-time) put significant strain on me. I also experience short-term loss or aggravation of balance and senses due to periodic glitches at the back of my head. I am taking an antidepressant and going to cognitive therapies which seem to only marginally assist me with my day-to-day-activities. I am scared to drive, do not even feel confident in going out on my own, cannot enjoy most of the personal and family activities that I used to enjoy, let alone doing a paid work. For example it takes me 10-20 times more time than before to structure sentences as in this document and sometimes I simply cannot formulate what I want to say and need assistance.

I believe I was at all material times since April 2019 disabled within the [EqA 2010] definition...”

11. Paras 16 – 19 appeared under a section headed “Description of new legal claim – Unfair and Discriminatory Dismissal”. The claimant alleged that the respondent had influenced, if not instigated, the refusal of his claim by the respondent’s permanent health insurance provider in order to apply maximum economic pressure on him. He said that the respondent continued their discrimination and harassment throughout 2020 by making repeated demands for him to attend occupational health assessments, whilst refusing to make any adjustments to support his return to work or to pay his salary. He alleged that following the respondent’s “categorical refusal to make any such adjustments and their failure to force me to submit to their continuous harassment and accept their terms” the respondent had terminated his employment.

12. A later section of the document was headed “Victimisation by HR continued for prior grievances and discrimination HR on disability grounds (section 27(1) EqA 2010; Section 13 EqA 2010; Section 15 EqA 2010)”. Allegations in this section included that the respondent had disregarded his health and pressurised him to attend a face-to-face grievance hearing. The section ended as follows:

“64. The Respondent continued discrimination and harassment throughout 2020 with repeated demands for my attending the occupational health assessment under their arrangement/influence, whilst refusing to make any adjustments to support my recover to work or pay me salary at least whilst I was complaining against the decision of insurance provider to Ombudsman...the Respondent actually instigated the refusal of my insurance claim in order to apply maximum economic pressure and make me accept their terms.

65. Following the Respondent’s failure to force me to submit to their continuous harassment and accept their terms, the Respondent ended my contract of employment without notice on 13 January 2021.”

13. As these extracts show, the claimant’s Second ET Claim did not clearly articulate how the section 15 disability dismissal claim was put. This is of relevance when it comes to considering the significance that was attached to the list of issues.

14. At the respondent’s request, the claimant provided Further Information in relation to the Second ET Claim. In this document he said his dismissal was “first and foremost, a direct discrimination against my disability” and that his dismissal on capability grounds was “an

orchestrated pretext”. He contended that the respondent had failed to make reasonable adjustments “in order to accommodate my difficulties arising from my disability (S15 per **EqA 2010**), specifically my difficulty to deal with unclear responsibilities and all potential scenarios of trust and mischief etc”. Again, there was no clear articulation of how the claimant put his section 15 disability dismissal claim.

15. On 4 October 2021, a Preliminary Hearing took place before EJ Spencer via the cloud video platform. As the EJ’s “Summary of the Hearing” records, this hearing was listed because the respondent applied for the ET to assist the parties in agreeing a list of issues. EJ Spencer explained why she had decided to proceed with the hearing in the claimant’s absence. The respondent had prepared a detailed draft list of issues attempting to identify all of the various claims and the ET also had the benefit of the claimant’s written comments on this document. There was a table setting out the areas of dispute and the EJ worked through each of these. She noted that the claimant had not applied to amend his claims and, accordingly, the question was whether the list of issues fairly reflected the pleaded claims, together with any further details that could properly be regarded as further particulars rather than amendments to his claim. At para 8, the EJ said:

“In relation to the claim under section 15 of the Equality Act ‘discrimination arising from disability’, the Respondent had sought clarification of the ‘something arising’ from his disability. It appeared to me that the Claimant had identified this in the amendments which he had made to the Respondent’s list of issues (which was sent to him in June) as his ‘difficulties in dealing with unclear responsibilities in all potential scenarios of trust and mischief’. It is not a very clear formulation, and it would assist the Claimant’s case if he could clarify this.”

16. EJ Spencer’s order recited that the list of issues was set out in the accompanying Schedule. The list itself was a detailed, 13-page document. The claimant was asked to add clarification to this list in two respects. The first related to the section 15 **EqA 2010** claim and the point raised in the EJ’s para 8. Para 6(a) of the list of issues said:

“Did the following thing(s) arise in consequence of the Claimant’s disability:

- i. The Claimant’s difficulty to deal with unclear responsibilities and all potential scenarios of trust and mischief. [Claimant to

particularise]”

17. The claimant took issue with various aspects of EJ Spencer’s formulation of the list of issues. On 16 March 2023, his appeal to the EAT was dismissed by Michael Ford KC, sitting as a Deputy Judge of the High Court: [2023] EAT 38. The Deputy Judge observed that EJ Spencer appeared “to have taken great care to analyse carefully which claims should be included in the list of issues and which should be excluded”. The claimant was represented by counsel at the appeal. No issue was taken with EJ Spencer’s formulation of para 6(a) of the list of issues and, in particular, it was not suggested that the “something arising” that was relied upon was the claimant’s FND condition, in turn rendering him unfit for work and incapable of performing his role (whether from April 2019 or otherwise).

18. Prior to the EAT appeal hearing, the claimant had made an unsuccessful application to the ET to amend the list of issues, by letter dated 13 October 2021. He did not suggest at this stage either that para 6(a) of the list should be more broadly formulated.

19. The claimant provided the particulars for para 6(a) of the list of issues in an undated letter which appears at pages 70-71 of the Supplementary Bundle. He subsequently refined and set out his proposed wording as follows:

“Did the following thing(s) arise in consequence of the Claimant’s disability:

i. The Claimant’s difficulty to deal with unclear responsibilities and all potential scenarios of trust and mischief. The Claimant asserts that his disability makes it difficult to think in multiple layers, deal with unclear responsibilities and uncertainty of his allocated roles. The uncertainty is compounded when misrepresentation takes place.”

20. A Preliminary Hearing was held before EJ Hodgson on 9 September 2022, which the claimant attended. The EJ rejected the claimant’s contentions that the list of issues prepared by EJ Spencer should be varied (Schedule A, paras 2.5-2.8). EJ Hodgson addressed the two outstanding matters identified in EJ Spencer’s list of issues. He said at para 2.9.1:

“Paragraph 6(a)(i) of EJ Spencer’s list of issues has been clarified by the claimant as follows:

“The claimant asserts that his disability makes it difficult to think in multiple layers, deal with unclear responsibilities and uncertainty of his allocated roles. The uncertainty is compounded when misrepresentation takes place.”

21. Para 3.4 of EJ Hodgson’s order provided that “the clarification as detailed above shall be incorporated” in the list of issues and that the respondent was to file an amended list of issues reflecting this clarification.

22. On 13 September 2022, the respondent filed the amended list of issues with the ET. The text of para 6(a) followed the wording quoted in EJ Hodgson’s para 2.9.1 and did not include the first sentence that had appeared in EJ Spencer’s List of Issues and in the claimant’s submitted wording (“The Claimant’s difficulty to deal with unclear responsibilities and all potential scenarios of trust and mischief”). It is this omission that forms the basis of Ground 3. It is accepted that the claimant did not raise any objection at the time.

23. The version of the list of issues that the respondent submitted on 13 September 2022 was the version that was before the ET at the liability hearing. The ET referred to the list of issues at para 9 of its Reasons, saying:

“At the start of the hearing before us, there were some brief exchanges about the list of issues (in particular, Mr John tentatively suggested that it might have wrongly omitted a complaint of failure to make reasonable adjustments), but in the end no ruling was required of us as, having taken his client’s instructions, he unequivocally confirmed his agreement that it fairly identified the matters for determination. For convenience, a copy of the document (hereafter, ‘the Lol’) is appended to these Reasons. It can be seen that large parts of it are struck through. This reflects the fact that, at an early stage of the hearing and again after the evidence had been completed, the Claimant withdrew various elements of his pleaded case. As will be explained in due course, that left only one point of controversy about the shape and scope of the case, namely a disagreement which arose in closing submissions about the proper interpretation to be given to the ‘something arising’ element of the discrimination arising from disability claim.”

24. I will return to the disagreement that arose in closing submissions, but for present purposes I emphasise that at the outset of the hearing Mr John confirmed that the list of issues “fairly identified the matters for determination”. This list identified the issues arising in respect of the section 15 EqA

2010 claim at para 6 as follows:

- “a. Did the following thing(s) arise in consequence of the Claimant’s disability:
- i. The claimant asserts that his disability makes it difficult to think in multiple layers, deal with unclear responsibilities and uncertainty of his allocated roles. The uncertainty is compounded when misrepresentation takes place.
- b. Did the Respondent treat the Claimant unfavourably as follows:
- i. In around April to May 2019 Elizabeth Marks refused the Claimant’s request to conduct his grievance in writing rather than by way of a standard hearing;
 - ii. Elizabeth Marks did not contact the Claimant for the first 6 months of his long-term sickness absence, which commenced on 17 April 2019;
 - iii. Elizabeth Marks and Steve Worrall mishandled the Claimant’s Group Income Protection (“GIP”) application between August and September 2019 by..[three particulars were then given];
 - iv. From December 2019, Elizabeth Marks and Steve Worrall pressurised the Claimant to attend an Occupational Health assessment with a consultant of their choice; and
 - v. The Claimant was dismissed on 13 January 2021.
- c. If so, was this because of something arising in consequence of the Claimant’s disability (as identified in 6(a) above)?
- d. If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?..” [The aims relied upon by the respondent were then set out.]

25. The list identified the issues in relation to the unfair dismissal claim at paragraph 9. The first issue was whether the claimant was dismissed for a fair reason. The respondent contended that his dismissal related to his capability to perform work of the kind which he was employed to do. The second issue was whether the respondent had acted reasonably in treating that reason as a sufficient reason for dismissing him.

26. At the end of closing submissions, the ET asked counsel to submit an amended list of issues indicating the claims that the claimant had withdrawn during the course of the hearing. Accordingly, Mr Smith (counsel for the respondent) prepared a version of the list of issues with the abandoned claims struck through. He emailed it to Mr John on the afternoon of 19 October 2023. In response,

Mr John raised a query about one part of the list that is unrelated to this appeal. Mr Smith clarified the point in his response and asked if Mr John was now content for him to submit the list to the ET. Mr John replied, “Yes please submit the revised LOI”.

The hearing

27. The ET heard oral evidence from the seven witnesses listed at para 11 of its Reasons, including the claimant, Steve Worrall, the Head of Global HR and Elizabeth Marks, Head of HR (EMEA). In addition, the ET had a seven-volume agreed bundle of documents (para 12). At para 32, the ET observed that the evidence had been extensive, it had had regard to all of it, but it was not its function to recite an exhaustive history or to resolve every evidential conflict; rather it would set out the facts it found that were essential to its decision.

The ET’s Reasons

The legal framework

28. The ET addressed the legal framework in relation to the section 15 **EqA 2010** claim at paras 16-18. It set out the terms of section 15 (para 71 below) and then a passage from para 31 of the judgment of Simler J (as she then was) in **Pnaiser v NHS England** [2016] IRLR 170 EAT (“**Pnaiser**”) (para 72 below), noting that this had been approved by the Court of Appeal in **City of York Council v Grosset** [2018] IRLR 746 (“**Grosset**”). The ET said that the Court of Appeal in **Grosset** had also held that the defence under section 15(1)(b) involved an objective approach; that a ‘range of reasonable responses’ approach was inapplicable and the ET must make its own assessment. At para 30, the ET gave an uncontroversial summary of the applicable legal principles concerning the unfair dismissal claim.

The relevant events

29. The ET then set out its factual findings. The claimant was promoted to the post of Product

Management Director (UK) in July 2017, following a restructuring. He reported locally to Mr Ikegaya, EMEA Head of Product and Marketing and functionally to Mr Yeo, the International Head of Product Development and Management (para 34). At this time, the claimant held the title of Vice President. With effect from 1 April 2018, he was promoted to a Senior Vice President (paras 51-57). A new Head of Product role was created, to which Mr Yik, the then Head of Product Management (Asia excluding Japan) was appointed (paras 80-81 and 85). This involved Mr Yik joining the London Product Team. The view was taken that the claimant should have a reporting line to Mr Yik, who would in turn report to Mr Yeo (para 82). The claimant “did not take the news of Mr Yik’s secondment well. He felt the new post should have been offered to him and that he was a stronger candidate than Mr Yik”. He also considered that the new reporting structure involved a demotion for him (para 88). The respondent rejected the claimant’s proposal which involved reversing the proposed changes so that Mr Yik would report to him, rather than the other way round (para 88). After he was advised that the decision would not be reversed, the claimant raised a formal grievance about Mr Yik’s appointment on 5 April 2019 (para 90). Then on 17 April 2019, the claimant commenced a period of sick leave from which he did not return (para 91).

30. At paras 97-100 of its Reasons, the ET dealt with the handling of the claimant’s grievance. This was the alleged unfavourable treatment referred to para 6(b)(i) of the list of issues (para 24 above). The ET found that Mrs Marks had accommodated the claimant’s wish for the grievance to be conducted in writing. The decision-maker, David Cruise, did not uphold the grievance (para 100).

31. The ET next addressed the alleged unfavourable treatment at para 6(b)(ii) and (iii) of the list of issues.

32. At para 103, the ET rejected the proposition that Mrs Marks had not contacted the claimant during the first six months of his sick leave. In deciding that the contention in para 15 of the grounds of appeal was unarguable (para 5 above), HHJ Auerbach referred to the ET’s findings in this paragraph:

“103. In relation to the Claimant’s complaint that Mrs Marks failed to contact

him during the first six months of his sickness absence, we record the following findings. He returned his work mobile phone shortly after his sick leave began. Mrs Marks tried to reach him on his personal mobile phone but he did not answer her calls. He told her not to contact him on his personal email account, but she did have frequent contact with him via his work email address, much of which was concerned with the second grievance and the question of a GIP claim. Mrs Marks's emails were polite and supportive. On occasions she asked after the Claimant's health and wished him a prompt recovery."

33. The ET then turned to the Group Income Protection Scheme ("GIP Scheme"), noting it was backed by an agreement with an insurer, Zürich. Employees were contractually entitled to the benefits of the scheme, subject to its rules and qualifying conditions. The benefits were intended to compensate employees for loss of income in the event of long-term incapacity to work extending beyond an initial period of six months, during which the claimant had the protection of the respondent's sick pay scheme (para 104).

34. In light of the way that Ground 1 was argued, it is necessary to set out the ET's findings on this aspect of the claim fairly fully:

"105. The Claimant complains that, in August and September 2019, Mrs Marks and Mr Worrall mishandled the GIP claim made on his behalf. A claim was submitted to Zürich on 30 August 2019. The 'fit notes' were sent in support. The Respondent had no other evidence to supply. The Claimant provided it with no medical evidence at the time or at any material point thereafter. In fact, despite repeated requests, he did not disclose his medical evidence to the Respondent until 21 April 2021, and then only pursuant to an unless order of the Tribunal.

106. Following a call with the Claimant on 27 September 2019, Zürich rejected the GIP claim on the basis that 'work-related stress' was not covered under the policy. In a separate communication a representative of Zürich informed Mrs Marks that the Claimant had been 'quite guarded' during the call but had confirmed that his absence from work was 'work-related'. In an email to Mrs Marks of 30 September 2019, the Claimant confirmed that he had told Zürich that his medical issues resulted from workplace stress.

107. Mrs Marks asked Zürich to provide a formal response to the claim, which followed on 3 October 2019. In summary, this document stated that the Claimant's absence from work was 'situational' rather than reflecting an inability to perform the work for which he was employed and that he could perform such work for another employer."

35. The ET then rejected the claimant's claim that Mrs Marks had misrepresented his medical

condition to Zürich (para 108). On 16 October 2019, the claimant raised a grievance about the respondent’s handling of the GIP claim. The grievance was not upheld and the claimant’s subsequent appeal was dismissed (para 112). Mrs Leen replaced Mrs Marks during the 12 months from 18 October 2019 whilst she was on maternity leave. On 29 October 2019, the respondent, through Mrs Leen, appealed against Zürich’s refusal of the GIP claim. Mrs Leen observed that it would be helpful for Zürich to see the claimant’s medical records if he was willing to release them (para 115). The claimant then released his medical records to Zürich on 13 November 2019, but the appeal was rejected on 20 November 2019 (para 116).

36. Mrs Leen asked Zürich whether there was a means of pursuing the GIP claim further and was told she could make a formal complaint. Although the claimant “made it clear in vehement language that he was not prepared to authorise a further appeal and regarded the decision of 20 November 2019 as final”, Mrs Leen did submit a complaint on 22 January 2020 (para 117). Zürich rejected the complaint, stating it was “the unresolved workplace issues...that are the barrier to him returning to work, not an underlying medical illness preventing him from undertaking his duties” (para 118). Mrs Leen encouraged the claimant to complain to the Financial Ombudsman Service (“FOS”). Although declining the respondent’s offer of some financial support, the claimant did make a complaint to FOS, which was rejected by an adjudicator on 16 November 2020 and on 13 July 2021 the Ombudsman affirmed that decision (para 119).

37. The ET next turned to the issue raised by issue 6(b)(iv), namely the allegation that the claimant had been pressurised to attend an Occupational Health Assessment. Again, it is necessary to quote fairly fully from this part of the ET’s decision:

“121. As we have mentioned, Mr Worrall suggested to the Claimant on 8 October 2019 that an OH referral should be made. At that point, Zürich had rejected the GIP claim and the Claimant’s right to company sick pay was about to run out. The Claimant did not respond to the suggestion.

122. On 21 October 2019 Mrs Leen took up the subject of OH, proposing that an appointment be made.

123. On 25 October and 11 November 2019 Mr Cruise repeated to the Claimant that the proposal remained live and explained why an OH referral was likely to be beneficial for all concerned.

124. On 4 December 2019 Mrs Leen proposed an OH review with a consultant OH practitioner, Dr Ryan, on 11 December 2019...

125. On 13 and 18 December 2019 Mrs Leen wrote again to the Claimant explaining that there was nothing unusual or unreasonable about the request for an OH review and that he had no reason to be mistrustful of an entirely standard process.

126. The Claimant did not engage and the proposed OH assessment by Dr Ryan did not happen.

127. In a further attempt to move matters forward, Mrs Leen proposed that the Claimant be permitted to select three independent OH practitioners from whom the Respondent could choose one, alternatively that the Respondent select three practitioners from whom the Claimant could choose one. The Claimant was not willing to take up this suggestion, apparently on the ground that a doctor chosen in this fashion might not be impartial.

128. On 30 December 2019 Mrs Leen proposed a third-party review through Zürich. The Claimant rejected the idea.

129. On 6 January 2020 Mrs Leen mooted the appointment of two OH doctors in sequence, one appointed and paid for by the Claimant and one by the Respondent. Again, the suggestion was dismissed by the Claimant.

130. On 10 January 2020 Mrs Leen proposed the simultaneous appointment of two OH practitioners, one by the Claimant and one by the Respondent, with a view to there being two assessments on the same day. Again, the Claimant dismissed what was proposed.

131. Mrs Leen was still not defeated. On 17 January 2020 she wrote to the Claimant proposing that an OH practitioner be selected by HCA Healthcare, an organisation of occupational health providers. She also repeated her request for the Claimant’s medical notes and records. Again, the Claimant rejected the proposal relating to the OH referral, declaring that all the Respondent’s requests were ‘unacceptable’ and that it had ‘all the information from [my] GP including the ‘sick notes’ ...’ In fact, as he well knew, the ‘fit notes’ constituted the only GP material held by the Respondent.

132. On 21 January 2020 Mrs Leen wrote again to the Claimant stating that, regrettably, the parties had reached an impasse. She asked him, if he changed his mind, to provide whatever medical information he might have and in particular the material which he had already given to Zürich, pointing out (again) that the only medical evidence in the Respondent’s possession was the set of fit notes and that it was ‘incredibly difficult’ for it to decide how to proceed. Again, the Claimant refused to engage on the subject of the OH referral or in relation to disclosure of medical or evidence.

133. Mrs Leen sought the Claimant’s engagement on both topics in September and October 2020, again without success.

134. Following her return from maternity leave, Mrs Marks did likewise in her email of 24 November 2020, reminding the Claimant that the Respondent held no medical evidence other than the ‘fit notes.’”

38. The ET noted that the capability process began the same day (24 November 2020), with Mrs Marks inviting the claimant to attend a meeting to discuss his ongoing absence, his fitness to return to work and anything else that might be done to facilitate that return and explicitly stating that the capability process might end in dismissal (para 135). The first meeting took place by video conference on 11 December 2020. The claimant maintained the position that he was unwilling: to undergo an OH assessment by a doctor from the HCA network; to let the respondent know the identity of any OH practitioner he selected before delivery of their report; to allow the respondent any contact with his chosen OH practitioner; or to divulge any medical evidence to the respondent (paras 136-137). The respondent invited the claimant to attend a second capability meeting, but he declined to do so (para 138).

39. Having given the matter further consideration, Mrs Marks decided to terminate the claimant’s employment, with payment in lieu of notice (as provided for under his contract). Her letter of 13 January 2024 set out the following reasons:

“As it stands, we have no independent medical information on your current conditions or prognosis (in fact we are not even fully aware of what those conditions are, save that you have told us that one of them is FND), what adjustments (if any) we can take to facilitate your return to work nor when you are likely to be fit to resume your duties. We had hoped we could work with you to find out the answers to these questions so that we could then make an informed decision on your future employment with Nikko. However, you made it clear in your most recent letter that you are unwilling to co-operate with what we consider to be a reasonable process.

As you have now been absent for almost 21 months and there is no evidence that you will be able to return to work in the near future, I have taken the difficult decision to terminate your employment on the ground of ill-health capability. In reaching this decision, I have taken into account that your entitlement to company sick pay has expired and that our claim to Zürich on your behalf for income protection cover was unsuccessful. I have been unable to give meaningful consideration to the issue of whether you might be able to carry out

an alternative role, primarily because it is not possible for me to do so in the absence of visibility around your medical condition(s).”

40. The claimant declined to pursue an appeal after he was informed that he would not be reinstated pending the outcome of the appeal (para 140). The ET made the following finding in relation to the impact of the claimant’s absence:

“141. By the time of the dismissal, the Claimant’s extended period of absence had had a serious impact upon the Respondent’s business. It had placed a considerable strain upon Mr Yik, who had been required to perform the functions of two roles more or less single-handedly. It had also delayed the growth plans which had been the very rationale for the creation of the Head of Product post and the attendant structural changes.”

The claimant’s disability and the respondent’s knowledge

41. Turning to his disability, the ET summarised the claimant’s account of the effects of his FND as follows (with the references to particular paragraphs of his statement omitted):

“143. In his witness statement...the Claimant summarises his main symptoms. These include ...‘consistent pain/pressure/noise’ at the back of the head, ‘sleep disorder and abdominal pain’ and ‘constant fatigue’. He describes...‘any real-time or multi-layered cognitive act’ or active physical movement as putting substantial strain upon him and aggravating his pain. He states ‘I am not allowed to drive, cannot enjoy most personal and family activities that I used to enjoy, let alone doing any paid work. I do not even feel confident in going out on my own.’ He characterises his condition as chronic and fears that it may be permanent. His case before us...is that he has been since April 2019, and remains, ‘incapacitated, i.e. unable to do any work or activity which involves active thinking and/or active physical movement.’ In so far as his evidence states facts about his condition (rather than expressing opinions), it is unchallenged and we accept it.

42. The ET then referred to para 6(a)(i) of the list of issues (para 24 above), indicating “we accept that the condition involves a significant impairment of cognitive functions” (para 144). The ET noted that the Respondent was not made aware of the claimant’s diagnosis of FND until it received the claim form in the First Claim on 7 October 2020. Prior to that time, the respondent only had the ‘fit notes’ supplied by the claimant’s GP, which referred variously to abdominal pain, headaches, stress, sleep disorder related to work stress, work-related stress and anxiety. None of the ‘fit notes’ referred to FND or to any significant mental health and/or neurological condition (paras 146 and 176). The

claimant had repeatedly refused the respondent’s requests for medical evidence and had only disclosed his medical records on 21 April 2021, four months after his employment had ended (para 173). In the circumstances, the ET found that the respondent was not aware of the claimant’s condition of FND before 7 October 2020 (para 177). However, the respondent was fixed with knowledge (actual or constructive) of the claimant’s FND and thus of his disability as of 7 October 2020 (paras 180-183).

The “something arising”

43. The ET’s approach to the nature and scope of the “something arising” is the subject of Ground 2B. The ET addressed this at paras 184-188 of its Reasons. It began by recalling the terms of para 6(a)(i) of the list of issues (para 24 above). The ET then observed:

“The case so advanced seems, on its face, unpromising - certainly where one reads the most significant instance of ‘unfavourable’ treatment (dismissal) alongside this formulation of the ‘something arising’. But its general meaning is clear. It conveys a complaint of a series of allegations of unfavourable treatment all of which are said to have been applied to the Claimant because of his difficulty with complex reasoning and managing uncertainty about his responsibilities and roles.”

44. The ET noted that in his closing submissions, Mr John had “very deftly” sought to amend the list of issues in relation to the section 15 disability dismissal claim so as to rely on a repacked “something arising”. The ET quoted this passage from Mr John’s written closing submissions (which referred to para 6(a)(i) of the list of issues):

“That attempted formulation, whilst not incorrect, was made by [the Claimant] when a litigant in person and when under an acknowledged mental disability. The tribunal is invited to take a fair and sensible approach to the full extent of the ‘*things arising*’ from the disability which led to the unfavourable treatment of dismissal. It is submitted that the actual features of [the Claimant’s] condition are quite plainly the ‘something arising’ causing his inability to work.”

45. The ET noted that the respondent had opposed this attempted re-formulation and summarised Mr Smith’s submissions (at para 186) as follows:

“The LoI had been constructed by the Tribunal on the basis of the ‘pleadings’

and representations of both parties in the course of an inordinately lengthy case management process. The Claimant’s attempt to vary it had been refused by the Tribunal and that refusal had been upheld by the EAT. And at the start of the trial before us, through his counsel, he had abandoned any residual ambitions to widen, or alter in any way, the scope of the case as defined in the LoI. It would be unjust and contrary to principle to allow him in closing argument to advance a new case.”

46. The ET indicated that it preferred Mr Smith’s submissions, saying at para 187:

“The Tribunal has performed its proper function of defining the dispute in the light of the formal documents and the contributions from both sides. It was not its function to advise the Claimant as to how to put his case. The ‘something arising’ ultimately settled upon and adopted by the Tribunal was not logically incoherent or obviously unsustainable. It would have been open to the Claimant to rely on more than one ‘something arising’ but he did not elect to do so. He is a conspicuously articulate and intelligent individual and the statutory language is not complicated. Moreover, long before instructing Mr John, he had had the benefit of legal advice, certainly when his appeals were pending in the EAT. He appears to have raised no complaint before the EAT about the formulation of the ‘something arising’ in the LoI, and if we are wrong about that any complaint on the matter found no favour with Michael Ford KC. At the start of the hearing before us the only doubt about the LoI mooted on behalf of the Claimant was as to whether it was defective in not including a complaint of failure to make reasonable adjustments. But, as we have noted above, on instructions Mr John abandoned any such submission. The hearing then proceeded on the basis of common ground that the LoI properly defined all claims and issues for decision. By that point, at the very latest, the Tribunal was entitled to treat the scope of the case as settled and firmly decline any further attempt to reopen the question. In our judgment, it would be unjust to the Respondent and contrary to the interests of justice and the overriding objective (which have at their heart the need to ensure finality and proportionality in all stages of litigation) to entertain Mr John’s submission. For these reasons, we refuse it.”

47. The ET went on to find that the “something arising” identified in para 6(a)(i) did arise from the claimant’s disability, having regard to its findings concerning his FND condition and the effects upon him (para 188).

The alleged unfavourable treatment

48. Between paras 189 – 208 the ET rejected the allegations of unfavourable treatment set out at para 6(b)(i)-(iv) of the list of issues. As the ET had indicated in its earlier findings of fact, Mrs Marks had not refused to conduct the claimant’s second grievance in writing (para 30 above); and she had

made ample contact with him during the first six months of his absence (para 31 above). Mrs Marks did not deliberately delay the start of the GIP process, nor did she misrepresent the claimant’s medical condition to Zürich and there was no failure by anyone on behalf of the respondent to take up the claimant’s challenge to Zürich’s decision to reject his claim (paras 33-36 above and also paras 194-201 of the ET’s Reasons).

49. The ET then turned to issue 6(b)(iv), the complaint that the claimant had been pressurised in relation to an OH assessment, concluding:

“204. On the strength of our primary findings above, we are satisfied that no unfavourable treatment is established. We consider that the Respondent’s approach was entirely reasonable and that, unfortunately, the Claimant’s was anything but.

205. The Claimant did not at any time dispute the appropriateness of obtaining an OH assessment. The difficulty throughout resulted from his insistence on dictating terms under which such an assessment might be arranged with which the Respondent could not reasonably have been expected to agree...[The ET then referred to its earlier findings as to the claimant’s position at the capability meeting on 11 December 2020.]...The central purpose of an OH assessment is to secure independent medical evidence to assist an employer to discharge its functions and obligations appropriately in light of an employee’s medical condition and its consequences. No employer could reasonably be asked for a referral to be conducted on its behalf by a practitioner over whose selection it had no control and with whom it was prohibited from communicating. The Claimant supplied no justification for the bizarre procedure upon which he was insisting. Nor could he.”

50. The ET went on to say that Mrs Leen’s and Mrs Marks’ efforts to persuade the claimant to agree to an OH assessment had been expressed in courteous language and had rightly made the point that it was in his interests to cooperate (para 206). Insofar as pressure was applied to the claimant it was necessary, proportionate, practical, rational and “entirely unobjectionable” (paras 206-208).

51. Accordingly, the only unfavourable treatment the claimant established was his dismissal (para 6(b)(v) of the list of issues). The ET next considered whether the claimant was dismissed because of the “something arising” identified at para 6(a)(i) of the list of issues (para 211), rejecting this proposition for the following reasons:

“212. ...There is no basis for supposing that Mrs Marks rested her decision to dismiss on her perception of the Claimant’s cognitive functions and/or any uncertainty he might feel about his functions and responsibilities. She did not have any reason to doubt his cognitive capacity or to wonder whether he was clear about his functions and responsibilities. Moreover, she had no reason to turn her mind to these questions. They did not arise. She dismissed the Claimant on capability grounds. The main factors on which her decision was based were that he had been away from work for an extended period; there was no apparent prospect of that period coming to an end; his long-term absence had prejudiced the Respondent’s business and threatened, if continued, to cause it further prejudice; and the Respondent had not been provided with any evidential basis on which to consider any alternative to dismissing him on capability grounds.”

52. Accordingly, the section 15 disability dismissal claimed failed (para 213).

53. The ET went on to consider whether the result would have been the same if it had accepted Mr John’s approach to the “something arising”. The ET said that on this basis it would have found that the unfavourable treatment (dismissal) was because of the “something arising”. The ET observed there was nothing between the parties on this, as it was agreed that the reason for the claimant’s dismissal was the fact he was judged to be medically unfit to perform his duties (para 215). This meant the outcome turned on whether the respondent had shown that the treatment (dismissal) was a proportionate means of achieving a legitimate aim pursuant to section 15(1)(b) (para 215).

54. The ET accepted three legitimate aims held by the respondent: managing its resources in an efficient and effective manner; employing employees in roles which they are capable of performing (and not continuing to employ employees in roles which they are not capable of performing); and providing an efficient and effective service (para 216). The ET concluded that the dismissal was, in all the circumstances, a proportionate means of achieving these aims for the following reasons:

“217. ...(1) At the time of the decision to dismiss, the Claimant had been absent from work for a very long time – almost 21 months. (2) His contractual right to sick pay had long since expired. (3) The GIP application, appeal and complaint had been fully considered and determined, as had the related (second) internal grievance and appeal and the two-stage FOS complaint. (4) Neither at the time of the capability hearings, nor in the proceedings before the Tribunal, was it any part of the Claimant’s case to argue that his dismissal would be, or was, unlawful as being in breach of his contract (for example by virtue of contravening an implied term of the sort recognised in *Aspden v Webbs Poultry and Meat Group (Holdings) Ltd* [1996] IRLR 521 HC). (5) Despite numerous requests to do so, the Claimant had refused to provide any medical evidence to the Respondent or

to answer questions concerning his medical condition. (6) Despite the sustained efforts of Mrs Marks and Mrs Leen, the Claimant had unreasonably refused to engage with their proposals aimed at agreeing arrangements for an OH referral, with the result that the Respondent was denied the opportunity of an independent assessment of his condition and how any return to work might be achieved. (7) There was no realistic possibility of the Claimant returning to his role save, perhaps, on terms, to which the Respondent could not possibly agree, involving reversing the structural changes of March 2019 and restoring his status and reporting lines as they had stood immediately prior to that date. Self-evidently, he had no right to dictate terms to his employer and there was no question of the senior management entertaining what he proposed. (8) Absent medical evidence or any OH input, it was not practicable to inquire whether any alternative role might be suitable for the Claimant. (9) The Claimant’s absence had caused prejudice to the Respondent’s business and would inevitably cause increasing prejudice the longer it continued. (10) The Claimant was made aware that the capability process might lead to dismissal. (11) The Claimant made no practical contribution at the first capability meeting. (12) The Claimant declined to attend the second capability hearing.”

55. The ET then considered an argument which “seems to have been raised for the first time during the trial before us” that in light of the revelation of the claimant’s FND diagnosis on 7 October 2020, the respondent was at fault and acted unlawfully in proceeding to dismiss him without first: (a) unilaterally resuscitating or renewing the GIP claim or (b) prompting or encouraging the claimant to take such steps (“the Zürich reversion option”). The ET noted that it was argued that this failure defeated the respondent’s case on proportionate means and entitled the claimant to succeed on the unfair dismissal claim. However, the ET rejected this argument, explaining:

“219. Although the argument was attractively presented by Mr John, we are clear that it must be rejected, for numerous reasons. We start with proposition (a). As was common ground throughout, membership of the GIP scheme was a contractual benefit which it was open to the Claimant to invoke or not, as he chose. It would not have been proper for the Respondent (let alone its legal duty) unilaterally and without his authority to press Zürich with a fresh claim on his behalf..

220. Proposition (b), while, unlike (a), not obviously wrong in principle, is, in our view, clearly unsustainable given the relevant facts and circumstances. We have a number of grounds. (1) The Respondent had been aware since 20 November 2019...that the Claimant had, on 13 November 2019, supplied his medical records to Zürich (although he had declined to make any disclosure to the Respondent). (2) The Respondent had been given no reason to suspect that the disclosure, extending to a date many months after the start of the Claimant’s sick leave, might not fully and accurately document his medical condition. (3) The first claim form referred to the FND as having started in April 2019 and was

not worded in such a way as to suggest that the diagnosis was recent at the date of issue of the claim form (17 May 2020). Rather, the wording suggested that the diagnosis had followed shortly after the onset of the condition. (4) The Claimant’s behaviour after 17 May 2020 had not been consistent with the diagnosis having been recent on that date. If it had been recent, it would have been natural for him to draw attention to it at the time, as relevant to the Respondent’s management of his ill-health absence generally and/or to Zürich’s treatment of the GIP claim and. He did not do so. (5) Nor did he, at any time up to his dismissal, say or suggest to the Respondent that Zürich had been, or might have been, unaware of his FND. (6) In the circumstances, the natural inference from the Respondent’s perspective was that Zürich had been in possession of the medical evidence, including that relating to the FND, by 13 November 2019. (7) On 16 November 2020, before the commencement of the capability procedure, the Respondent had been made aware of the FOS adjudicator’s decision rejecting the Claimant’s complaint. There was no reason for Mrs Marks to doubt that the Claimant had put before the adjudicator any evidence which might help his complaint. That evidence could reasonably be assumed to include medical evidence (if any) generated *after* the medical records were disclosed to Zürich on 13 November 2019. (8) In the course of the capability process, it was open to the Claimant at any time to raise the question of the diagnosis and its timing...and argue that they warranted revisiting the GIP claim, but he did not do so. On the contrary, at no point between the failure of the GIP appeal in November 2019 and the dismissal did he signal any departure from his line unequivocally stated in correspondence with Mrs Leen that the Zürich claim was closed and he would not contemplate pursuing it further. (9) As we have recorded, the Claimant had consistently and repeatedly (before and after 7 October 2020) refused to provide the Respondent with *any* medical evidence or to co-operate to enable it to commission evidence through an OH referral, and there was no realistic prospect at the time of the dismissal that his attitude on that matter would change. (10) In all the circumstances, throughout the period from her return to work (in mid-October 2020) up to the dismissal, Mrs Marks had no reason to consider pausing the capability process in order to initiate a further examination of the Claimant’s condition or its implications.”

56. When it came to address the unfair dismissal claim, the ET bore in mind the findings of primary fact and the conclusions it had already expressed in respect of the section 15 **EqA 2010** claim.

It then explained that the unfair dismissal claim failed for the following reasons:

“248. What was the reason or principal reason for dismissal? We are quite satisfied that it was the perception of Mrs Marks that the Claimant was not medically capable of performing his role and there was no practicable alternative to dismissing him on capability grounds. That was a reason relating to capability and, as such, a potentially fair reason to dismiss.

249. Did the Respondent act reasonably or unreasonably in treating the reason as a sufficient reason to dismiss? Given that we have found that, had the question arisen, the Respondent would have made out a good defence under the 2010 Act, s15(2), it seems to follow almost inevitably that, with no burden either way, it

must succeed in resisting the unfair dismissal claim. In any event, for the reasons given above in respect of the claim under s15, we find that the decision to dismiss, taken by Mrs Marks at the end of a fair process, was reasonable and fell very comfortably within the range of permissible options open to her in the circumstances.”

The proceedings before the EAT

The grounds of appeal

57. I turn to the grounds of appeal in more detail. Ground 1 relates to the dismissal of the unfair dismissal claim and to the alternative finding on the section 15 disability dismissal claim that the respondent’s had established the section 15(1)(b) justification defence. Ground 2 relates to the ET’s primary basis for rejecting the section 15 disability dismissal claim, namely that it had not been shown that the reason for the dismissal was the “something arising” that the claimant relied upon.

58. Ground 1 alleges that the ET erred in law and/or arrived at a perverse conclusion in finding that the claimant had not been unfairly dismissed as his dismissal fell within the range of permissible options and in determining that his dismissal was not discriminatory within the meaning of section 15 EqA 2010. The claimant says that the ET failed to have regard to concessions that Mrs Marks made in cross examination and made findings that were inconsistent with those concessions. He contends that Zürich’s basis for refusing the GIP claim was plainly erroneous in light of his FND diagnosis which rendered him unfit for work and eligible for GIP. The respondent’s failed to revert to Zürich or to address with the claimant the prospect of him reverting to Zürich, after learning of the FND diagnosis, in circumstances where granting GIP would have likely avoided a dismissal. This is the argument that the ET rejected at paras 219-220 of its Reasons (para 55 above).

59. The relevant concessions that Mrs Marks is said to have made were listed as follows:

- a. that the claimant’s condition and state of mind meant he was probably not in a state to think clearly and best represent his own interests – that he was vulnerable;
- b. that she did not have reason to believe that Zürich had the FND diagnosis before them or had considered it;

- c. that there was no technical reason why the matter could not be put before Zürich to reconsider granting GIP;
- d. that the claimant was likely to be more forthcoming about his FND diagnosis with Zürich that he had been in relation to proposed occupational health engagement with the respondent (and in respect of which he had voiced concerns of partiality, manipulation and lack of transparency); and
- e. in the circumstances, “it was an oversight not to have reverted to Zürich or prompted the claimant to consider doing so”.

60. Ground 1 also asserts that Mrs Marks did not disagree with the following propositions in cross-examination:

- a. that the FND diagnosis was inconsistent with Zürich’s refusal of GIP; and
- b. that the granting of GIP would have avoided a dismissal.

61. Ground 1 alleges that the ET’s reasoning in para 220 of its Reasons was based “only on unevidenced theoretical speculation about the mindset of the dismissing officer” and was “irreconcilable” with these concessions. The claimant notes that the ET did not mention these concessions in its reasoning and contends that if the concessions had been properly considered “it would not have been reasonably open to the Tribunal to have found as they did” as the concessions were not consistent with a finding that the dismissal was within the band of reasonable responses, nor that it represented a proportionate means of achieving the aims identified.

62. Ground 2A asserts that even on the narrow view of the “something arising” taken by the ET, it was an error of law / perverse not to accept that this was a cause of the dismissal. The claimant says the caselaw has established that there only needs to be a “loose” or “some kind of connection” for the statutory test to be met; **Hall v Chief Constable of West Yorkshire Police** [2015] IRLR 893 (“**Hall**”), EAT and **Risby v London Borough of Waltham Forest** EAT 0318/15 (“**Risby**”) are cited in this regard. Further, that even on the “something arising” identified in the list of issues, the

claimant’s difficulties with complex reasoning plainly arose from his disability and were, at the very least, a loose or more than trivial cause of his inability to work which was, in turn, the cause / a cause of his dismissal.

63. As I have foreshadowed, Ground 2B contends that the ET took an unduly narrow view of the “something arising” in this case. The claimant alleges that the ET failed to consider his unchallenged evidence that his FND condition included psychological and physical symptoms which rendered him unfit for work and thus incapable and that, in turn, his inability to return to work had led to his dismissal. In these circumstances, the ET’s approach at para 187 of its Reasons (para 46 above) was unrealistic and unfair to the claimant. It failed to give any or due consideration to the fact that throughout the litigation he was a person with a serious condition involving cognitive difficulties that amounted to a disability and for whom English was not his first language and that he had run the litigation himself until close to the trial.

The rule 3(10) hearing

64. I have already referred to aspects of the Summary Reasons given by HHJ Auerbach at the rule 3(10) hearing (para 5 above). He allowed Ground 1 to proceed “strictly on the footing that [the paragraphs in the grounds of appeal listing the concessions] are accurate as to the evidence of Mrs Marks”. HHJ Auerbach observed that he had misgivings about Ground 2B, but he was “just persuaded” that it should be permitted to proceed. HHJ Auerbach also listed a series of points that Ms Kasimova had advanced at the hearing which he considered were not arguable. This included the following contentions: the ET erred in failing to take account of Mrs Marks’ communications with Zürich and with others which showed her antipathy towards the claimant and her haste to move to dismissal; dismissal was premature as the respondent was at that point proposing to seek an unless order in the first claim in relation to the disclosure of medical evidence; and criticisms about the respondent’s ill health procedure.

The respondent’s Answer

65. In relation to Ground 1, the respondent’s Answer disputed that some of the alleged concessions had been made by Mrs Marks; and in any event, there were no concessions made which precluded the ET from making the findings or reaching the conclusions that it did or which rendered the claimant’s dismissal discriminatory or unfair.

66. In relation to Ground 2A, the Answer contended that the ET had properly applied the relevant legal principles and that there was no perversity or error of law in the ET’s rejection of the claimant’s claim that he was dismissed because of the “something arising” identified in para 6(a)(i) of the list of issues.

67. As regards Ground 2B, the respondent said that the ET was right to refuse Mr John’s attempt to reformulate the case on “something arising” at such a late stage of the trial. The claimant had chosen to formulate his case on the basis identified in the list of issues. The claimant had the benefit of legal advice and representation for the earlier EAT appeal and for the trial. The respondent had proceeded on the basis of the agreed list of issues and the ET was entitled to decide the case on that basis.

68. The respondent also advanced a cross-appeal, contending that the ET’s statements in para 215 of its Reasons (para 53 above) regarding the hypothetical satisfaction of section 15(1)(a) **EqA 2010** if it had permitted the re-formulation of the “something arising”, were wrongly premised on a supposed agreement between the parties on this issue, were perverse and were insufficiently reasoned. In particular, the ET had wrongly elided two issues: (i) that the claimant was dismissed on grounds of capability in circumstances where he had been medically certified as unfit to attend work for a lengthy period; and (ii) whether his absence from work was something that arose in consequence of the specific disability which he relied on.

The order of 21 February 2025

69. By his order sealed on 21 February 2025, HHJ Auerbach directed: (i) that the cross-appeal be

heard with the claimant’s appeal on Grounds 1 and 2; and (ii) that the claimant was not required to submit a further Reply, having already set out his opposition to the cross-appeal in an email of 3 January 2025. In the same order, HHJ Auerbach made provision for obtaining the EJ’s notes of Mrs Marks’ cross-examination, as the parties had been unable to agree a note of her evidence. EJ Snelson duly provided his notes and the parties agree that these take precedence as the record of what was said in evidence: **Aberdeen Steak Houses Group v Ibrahim** [1988] IRLR 420 at para 20.

The application to amend the grounds of appeal

70. Ground 3, as set out in the claimant’s letter of 30 January 2026, is that there was a serious procedural error and/or material unfairness, in that the ET determined the section 15 disability dismissal claim on a distorted framework because the ordered “trust / mischief” limb was missing from the version of the list of issues it relied upon. Ground 3 asserts that this missing aspect was “central to the disability mechanism explaining the [claimant’s] conduct”, so that the ET’s evaluative reasoning was reached without proper engagement with the claimant’s case. The ET thereby failed to address the claimant’s pleaded case in circumstances where there was no order authorising the version of the list of issues that was used by the ET. The respondent opposed the Amendment Application for the reasons set out in a letter dated 9 February 2026.

The legal framework

Section 15 EqA 2010

71. Section 15 **EqA 2010** provides (so far as is material):

- “(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 be expected to know, that B had the disability.”

72. In **Pnaiser**, Simler J (as she then was) comprehensively analysed the meaning and effect of section 15(1)(a) as follows:

“31. In the course of submissions I was referred by counsel to a number of authorities including *IPC Media Ltd v Mil-lar* [2013] IRLR 707, *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14/RN, [2015] All ER (D) 397 (Jul) and *Hall v Chief Constable of West Yorkshire Police* [2015] IRLR 893, as indicating the proper approach to determining s.15 claims. There was substantial common ground between the parties. From these authorities, the proper approach can be summarised as follows:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The ‘something’ that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A’s motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises...

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is ‘something arising in consequence of B’s disability’. That expression ‘arising in consequence of’ could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) ...However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that ‘a subjective approach infects the whole of section 15’ by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, ‘discriminatory motivation’ and the alleged discriminator must know that the ‘something’ that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of *Weerasinghe* as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the ‘because of’ stage involving A’s explanation for the treatment (and conscious or unconscious reasons for it) and the ‘something arising in consequence’ stage involving consideration of whether (as a matter of fact rather than belief) the ‘something’ was a consequence of the disability...”

73. As Simler J explained in this paragraph, section 15(1)(a) requires consideration of two distinct causation questions. The ET must assess the reason why the alleged discriminator treated the claimant unfavourably. Accordingly, where the unfavourable treatment complained of is dismissal, the focus will be on the reason for this dismissal. As Simler J addressed in para 31(b) and (c), this is a subjective question and the focus is on the conscious or subconscious thought processes of the alleged discriminator. The second question concerns whether the reason that has been identified is “something arising in consequence” of the claimant’s disability. As Simler J explained at para 31(d) and (f) this is an objective, factual question that does not depend upon the thought processes of the alleged discriminator. I emphasise this distinction between these two questions because, as I will return to when I come to the analysis stage, Ms Kasimova’s submissions on Ground 2A confused the two. In para 31(g) Simler J reinforced the distinction between the two questions.

74. In para 31(i) Simler J clarified that it does not matter in which order the two causation questions are addressed. This point was also made by Langstaff J (President) at paras 26-27 of **Basildon & Thurrock NHS Trust v Weerasinghe** [2016] ICR 305.

75. At para 42 of **Hall**, Elisabeth Lang J (as she then was) observed that it would suffice if the

reason for the unfavourable treatment was a “significant influence” on the unfavourable treatment or a cause which is not the main or the sole cause, but is nonetheless an effective cause of the unfavourable treatment. Ms Kasimova also referred me to para 17 of **Risby**, where Mitting J said that “all that had to be established was that the claimant’s conduct arose in consequence of his disability”. However, at this point the Judge was addressing the objective causation question, namely the causal relationship between the “something arising” and the claimant’s disability.

76. The correct approach to section 15(1)(b) EqA 2010 was discussed by HHJ Eady QC (as she then was) in **South Warwickshire NHS Foundation Trust v Lee** UKEAT/0287/17/DA. She observed that the statutory provision requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer (para 31). She said that the exercise required of the ET was the same as that identified in **Hardy & Hansons plc v Lax** [2005] ICR 1565 CA (“**Hardy & Hansons**”) (in relation to a claim of indirect discrimination under the then Sex Discrimination Act 1976), where Pill LJ said:

“32. ...I accept that the word ‘necessary’ used in *Bilka-Kaufhaus [GmbH v Weber von Hartz]* [1987] ICR 110 is to be qualified by the word “reasonably”. That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word “reasonably” reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal...is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary.”

77. Burton J referred to **Hardy & Hansons** in his judgment in **British Airways v Starmar** [2005] IRLR 862, noting that the test is an objective one and that the “decision of the respondent and its business reasons will be respected, but they must not be uncritically accepted” (para 33) (see also paras 54 and 58 of **Grosset** (cited by the ET; para 28 above)). Burton J went on to consider the role of the appellate court (the EAT) on an appeal challenging a tribunal’s conclusion as to the proportionality of the means adopted by the respondent. He agreed with Pill LJ’s observation in

Hardy & Hansons that the power and duty of the ET to pass judgment on the alleged justification “must be accompanied by a power and duty in the appellate court to scrutinise carefully the manner in which its decision has been reached...nevertheless the test for interference by an appellate court will still be one of perversity” (para 34). This was confirmed by Eady J in **Pitcher v Chancellor Masters and Scholars of the University of Oxford** [2021] IRLR 946 at para 118 (“**Pitcher**”).

78. Mr Smith drew my attention to the Supreme Court’s recent discussion in a non-employment case, **Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs** [2025] UKSC 93, [2026] 1 All ER 93 (“**Shvidler**”) as to the role of the appellate court when a conclusion on proportionality is challenged on appeal. The Court reviewed the authorities and identified two different approaches: in some cases the appellate court treated its role as confined to a review of the first instance decision, whereas in others the appellate court made its own assessment of the proportionality of the measure in question. The cases established that the former approach was likely to be appropriate; the latter had to be justified by the presence of special factors. Relevant considerations would include: the extent to which the assessment also affected other cases; the nature of the measure; whether legislation / proposed legislation was challenged as incompatible with rights under the European Convention on Human Rights; and the extent which it was important for society for the issue to be resolved (paras 142-149 and 162). The present circumstances plainly fall on the “review” side of the line and there is nothing in **Shvidler** that undermines or throws doubt on the EAT authorities I have cited indicating that a perversity test applies.

Perversity and failure to take account of relevant evidence

79. Eady J’s judgment in **Pitcher** summarised the position where perversity is relied upon as a ground of appeal:

“119. Where an appeal is pursued on the ground of perversity, it is clear that there is a high hurdle to clear; as Mummery LJ held in *Yeboah v Crofton* [2002] EWCA Civ 794, [2002] IRLR 634 CA, there must be an ‘overwhelming case ... that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached’. It is

not open to the EAT to find perversity simply because it might have reached a different decision to that of the ET; even if it has ‘grave doubts’ it must proceed with ‘great care’ (*Yeboah*, para [93]). Furthermore, the ET’s role as the relevant fact finding tribunal is to be respected (see *Associated Society of Locomotive Engineers and Firemen Brady* [2006] IRLR 576 EAT, per Elias J at para 55), and its reasoning read as a whole (*DPP Law Ltd v Greenberg* [2021] EWCA Civ 672, [2021] IRLR 1016, per Popplewell LJ at para [57]). In *Meek v City of Birmingham District Council* [1987] IRLR 250, the Court of Appeal explained that an ET must provide a ‘sufficient account of the facts and of the reasoning’ to enable an appellate decision maker to ascertain whether any question of law arises (such reasons being ‘*Meek-compliant*’) but, consistent with *Union of Construction Allied Trades and Technicians v Brain* [1981] IRLR 224 (at 228), [1981] ICR 542 (at 551) CA this need not be a comprehensive or detailed analysis of all the facts and law but must ‘tell the parties in broad terms why they lose or, as the case may be, win’.

120. More generally, while a party may appeal on the basis that there was no evidence to support a particular finding (this would be an error of law, see *Piggot Brothers & Co Ltd v Jackson* [1991] IRLR 309 at para 17, [1992] ICR 85 at para 17), the EAT cannot interfere on the basis that there was insufficient evidence or that the ET gave inappropriate weight to particular evidence.”

80. It is well-established that a tribunal is not obliged to recite all the evidence it has taken into account and that the EAT will not presume that a particular piece of evidence was not weighed by the ET simply because it is not expressly mentioned in the ET’s decision. As Waite J said at para 27 in **The Royal Society for the Protection of Birds v Croucher** [1984] IRLR 425, “It is our duty to assume in an [ET’s] favour that all the relevant evidence and all the relevant factors were in their minds, whether express reference to that appears in their final decision or not”.

Procedural irregularity

81. In order for an appeal to succeed on the basis of a procedural irregularity, it must be shown that this amounted to a serious procedural irregularity and the EAT must be satisfied that it would be “unjust” to allow the decision of the ET to stand: **NHS Trust Development Authority v Saiger** [2018] ICR 297 (“**Saiger**”) at paras 80 and 82.

Amending the grounds of appeal

82. The approach to be taken to applications to amend grounds of appeal was addressed at para

86 in **Khudados v Leggate** [2005] ICR 1013 (“**Khudados**”). The EAT has a “broad and generous discretion” in order to achieve the overriding objective of dealing with cases justly. HHJ Serota set out a non-exhaustive list of considerations to be taken into account in determining whether or not an amendment should be allowed, as follows:

“(a) Whether the applicant is in breach of the Rules or Practice Direction; in our opinion compliance with the requirement ... that an application for permission to amend a notice of appeal be made as soon as the need for amendment is known, is of considerable importance. The requirement is not simply aspirational or an expression of hope. It does not set a target but is a requirement that must be met in order to advance the efficient and speedy dispatch and conduct of appeals.

(b) Any extension of time is an indulgence and the appeal tribunal is entitled to a full honest and acceptable explanation...

(c) The extent to which, if any, the proposed amendment if allowed would cause any delay. Clearly proposed amendments that raise a crisp point of law closely related to existing grounds of appeal, or offering limited particulars that flesh out existing grounds, are much more likely to be allowed than wholly new grounds of perversity raising issues of complex fact and requiring consideration of a volume of documents, including statements and notes of evidence...

(d) Whether allowing the amendment will cause prejudice to the opposite party, and whether refusing the amendment will cause prejudice to the applicant by depriving him of fairly arguable grounds of appeal...

(e) In some cases it may be necessary to consider the merits of the proposed amendments...

(f) Regard must be had to the public interest in ensuring that business in the appeal tribunal is conducted expeditiously and that its resources are used efficiently.”

The list of issues

83. In **Moustache v Chelsea and Westminster Hospital NHS Foundation Trust** [2025] EWCA Civ 185, [2025] IRLR 470 (“**Moustache**”) the Court of Appeal reviewed the nature and scope of the ET’s duty to identify and determine issues in the proceedings where the parties have agreed a list of issues. Warby LJ, who gave the leading judgment, observed that it was helpful to approach the question with four general points in mind:

“33. First, proceedings in the ET are adversarial...In any given case the primary onus lies on the parties to identify...which claims they wish to bring and which answers they wish to advance.

34. Secondly, the issues raised by the parties are those which emerge clearly from an objective analysis of their statements of case. Identification of the issues

does not involve reference to other documents which do not have the status of pleadings and come later. Nor should the process be a complex or difficult one. As Eady, P said in *X v Y* [2024] EAT 63 [49] “That pleadings matter, including in Employment Tribunals, is not a novel or controversial point”. The EJ should not be expected to analyse a party’s case by reference to documents which come after the pleadings and do not have the same status, such as a witness statement, or by reference to submissions...

35. Of course, the contents of a statement of case must be analysed in their proper context but this does not require the ET to engage in an elaborate or complex interpretative exercise...

36. Thirdly, where a party seeks the ET’s ruling on an issue that emerges from an objective analysis of the statements of case (and falls within its jurisdiction) the ET has a duty to address that issue. This is the core function of the tribunal. That does not mean that the ET has to resolve every issue that is raised in a case. Sometimes a party will not press all the claims that have been pleaded; the ET is not obliged to address those which are raised but later abandoned: see *Mensah v East Hertfordshire NHS Trust* [1998] IRLR 531. And the ET needs only decide enough to reach a conclusion on the claims that have been pressed. Subject to these points, however, I would accept...that the ET does not have a discretion not to consider and determine a claim that has been brought before it.

37. Fourthly, however, the ET’s role is arbitral not inquisitorial or investigative. It must perform its functions impartially, fairly and justly, in accordance with the overriding objective, the law, and the evidence in the case. It may consider it appropriate to explore the scope of a party’s case by way of clarification. That may, in particular, be considered appropriate in the case of an unrepresented party. Whether to do so is however a matter of judgment and discretion which will rarely qualify as an error of law such that the EAT can interfere. The ET has no general duty to take pro-active steps to prompt some expansion or modification of the case advanced by a party where that might be to their advantage. These propositions emerge clearly from a series of decisions of this court and the EAT.”

84. Turning specifically to the extent to which a tribunal may confine its consideration to an agreed list of issues, Warby LJ said:

“40. A list of issues is not a pleading but a case management tool. The main purpose of such a document is to summarise the existing pleadings not to amend them. On the other hand, as *Mensah* shows, a party may conduct itself in such a way as to lose the right to have the ET decide a pleaded issue, thereby reducing the scope of the tribunal’s corresponding duty. An agreed list of issues is one way in which that could in principle be done. Such a list is, after all, an express agreement that the tribunal should conduct the proceedings in a particular way, and an invitation to the tribunal to do so. A tribunal will usually be entitled to confine its attention to the issues on the list. By way of exception, however, it may be necessary in the interests of justice to depart from even an agreed list.

There are at least two distinct categories of situation in which that may be so. The first is where a pleaded claim has been omitted from the list in circumstances that do not amount to abandonment of the claim. The second is where the claim has not been pleaded but the fundamental duty of fairness makes it necessary (that is to say, essential) that it should be raised and considered.”

85. At para 38 Warby LJ referred to the principles identified in **Drysdale v Department of Transport** [2014] EWCA Civ 1083 (“**Drysdale**”), as to the level of assistance that an ET may properly provide to litigants in the formulation and presentation of their cases. The level of assistance or intervention that is appropriate will depend upon the circumstances of each particular case, including whether the party is legally represented and the apparent level of competence and understanding of the litigant and/or his representative. The tribunal must at all times be, and be seen to be, impartial as between the parties. The determination of the appropriate level of assistance or intervention is properly a matter for the judgment of the tribunal hearing the case. The appellate court will not normally interfere with the tribunal’s exercise of this judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done / omitted to do, and which amounts to unfair treatment of a litigant.

The claimant’s submissions

Ground 2

86. I will begin with Ground 2, as this concerns the ET’s conclusions on the first limb of section 15 EqA 2010. I will first summarise the submissions that were made in relation to Ground 2A.

87. Ms Kasimova submitted that the ET asked the wrong question at paras 211-212 (para 51 above). She said that the ET set the bar too high, as the decision-maker did not have to expressly label the claimant’s cognitive difficulties as the reason for his dismissal. She went on to argue that the ET had erred in law in assessing what was in the decision-maker’s mind, as **Pnaiser** established that it was an objective test and that the causation chain could have several links. Ms Kasimova also

contended that the ET’s para 215 (para 53 above) was inconsistent with the conclusion reached in para 212 and this showed that the reasoning in para 212 was unsafe. She also suggested that the ET’s reasons did not coherently explain why the claimant’s case had failed on the section 15(1)(a) issue and that the ET had failed to integrate its earlier findings on the nature and effects of the claimant’s disability into its reasoning in para 212.

88. In relation to Ground 2B, Ms Kasimova submitted that the list of issues was an aid rather than a pleading and that it did not replace the claimant’s pleaded case. She said the articulation of a broader “something arising” was clear from the claimant’s pleadings and the ET had erred in law in slavishly following the list of issues. Furthermore, the ET erred in characterising the way that Mr John sought to put the case on “something arising” in his closing submissions as a re-formulation or an amendment (paras 44-46 above). In order to faithfully apply the terms of section 15(1)(a), the ET was duty bound to look broadly in identifying the “something arising” and in considering why the claimant had been dismissed. The employer’s operative reason for doing so was incapacity and this was a standard mechanism in disability discrimination cases where the unfavourable treatment relied on was dismissal. The ET acknowledged that if it had followed Mr John’s approach to the “something arising”, section 15(1)(a) would have been satisfied in respect of the claimant’s dismissal (para 53 above).

Ground 1

89. Ms Kasimova argued that the ET had failed to take account of material concessions made by Mrs Marks, in particular in relation to the acknowledged “oversight” regarding the Zürich reversion option (para 59 above). There was nothing in the ET’s reasoning that showed it had grappled with this centrally important evidence. In her oral submissions, Ms Kasimova also relied upon two additional alleged concessions, namely Mrs Marks’ acceptance that the claimant’s illness was genuine and her recognition that she should have started the OH assessment process at an earlier stage. She did not make reference to the other alleged concessions listed in the grounds of appeal (para 59

above), but when asked directly she indicated that she still relied upon these as well. Ms Kasimova also tried to argue that the ET had erred in failing to take account of contemporaneous evidence of Mrs Marks’ attitude towards the GIP claim and evidence that cast doubt upon whether the respondent had pursued this process genuinely and with a view to protecting the claimant. She also argued that the ET had failed to take account of the respondent’s failure to follow the three-step process for addressing workplace stress that Zürich had recommended. She said that all these areas of the evidence were capable of affecting the ET’s conclusions on section 15(1)(b) **EqA 2010** and on whether the claimant’s dismissal was outside of the band of reasonable responses. As I will address in the “Analysis” section below, and as I flagged to Ms Kasimova at the time, some of these points went well beyond the terms of Ground 1 and beyond the basis upon which HHJ Auerbach had permitted the appeal to proceed.

90. Ms Kasimova said that the respondent had practical agency that it should have used with Zürich to facilitate the GIP claim. If the GIP claim had been accepted, there would have been no financial burden on the respondent in retaining the claimant as an employee and, accordingly, this would have potentially avoided his dismissal and, as such, the ET was required to take account of this alternative. She confirmed the position that Mr John had taken before the ET, in that it was not alleged that the respondent was in breach of contract in terminating the claimant’s employment (see para 54 above).

91. Ms Kasimova also raised a number of other points that went well beyond the terms of Ground 1. To give a flavour, these included: that there was an unresolved tension between the optimistic narrative put forward by the respondent at trial and what had been said in the contemporaneous documentation; the respondent had acted unfairly in dismissing the claimant when it was in the process of obtaining his medical records in the First ET Claim; that there was no operational urgency for dismissing the claimant at the time when this occurred, as shown by the fact his replacement was not hired for a substantial period; and the indications were that the respondent had not genuinely

explored alternatives to dismissing the claimant.

Ground 3

92. As I have indicated earlier, Ground 3 is based on the proposition that it was a serious procedural irregularity for the ET to determine the section 15 disability discrimination claim on the basis of the “something arising” in the list of issues, when this omitted the “trust and mischief” element of the claimant’s formulation. Ms Kasimova emphasised the presence of these words in the list of issues drawn up by EJ Spencer (para 16 above), arguing that the subsequent removal of these words was unauthorised and that their removal could not have been validly agreed without this point having been specifically flagged to the claimant. She said it had not been included as a ground of appeal earlier because this omission had only been appreciated during their preparation for the appeal hearing.

93. Ms Kasimova submitted that this was not simply a cosmetic omission; the para 6(a)(i) wording that the ET relied upon involved a marked divergence from the way the claimant put his case. In turn, this meant that the ET viewed the claimant’s conduct through a distorted lens, treating the effects of his disability as unreasonable behaviour. In this regard, Ms Kasimova highlighted: the ET’s findings at paras 204-205 which, in turn, informed the rejection of the Zürich reversion option at para 220 (paras 49 and 55 above); the ET’s postscript at para 253; the ET’s rejection of Mr John’s formulation of the “something arising” at para 187 (para xx above); the ET’s findings in relation to date of knowledge; and para 234 concerning victimisation.

The respondent’s submissions

Ground 2

94. Mr Smith pointed out that the claimant would need to succeed on both Grounds 1 and 2 in order to overturn the ET’s dismissal of his section 15 disability dismissal claim.

95. In relation to Ground 2A, Mr Smith submitted that the ET gave a correct self-direction as to the applicable law at paras 16-18 of its Reasons and then posed the correct question at para 211. The

tribunal then provided a permissible and reasoned answer to this question at para 212 (para 51 above).

96. In relation to Ground 2B, Mr Smith contended that the ET was entitled to proceed on the basis of the list of issues, as the claimant’s counsel had expressed unequivocal agreement with it. Given the degree of involvement that the claimant had in the formulation of the list of issues, there was no unfairness involved. The claimant chose how he put his case on the “something arising” in the list of issues. The ET was right to regard Mr John’s approach as a re-formulation / attempted amendment and right to reject this for the reasons it identified in para 187 of its Reasons (para 46 above).

Ground 1

97. Mr Smith said there was no basis for concluding that the ET failed to have regard to the concessions relied upon (insofar as they were made). Mrs Marks’ evidence was “a world apart” from a concession which required the ET to find that the claimant’s dismissal was a proportionate means of achieving a legitimate aim or which required it to find that the respondent had acted unreasonably in dismissing him. He emphasised that Mrs Marks’ answers were expressions of opinion which fell to be considered against the factual matrix in its totality. He also pointed out that the respondent was not informed of the claimant’s FND diagnosis until 7 October 2020, whereas (as his skeleton argument confirmed), his diagnosis of FND was made on 24 January 2020, so the claimant would have been aware of this at a much earlier stage.

98. Mr Smith emphasised the high threshold for a perversity challenge to succeed. He submitted that the claimant was trying to challenge the ET’s overall evaluation of the evidence and the significance it had attached to particular pieces of evidence. This was not a permissible basis upon which to mount an appeal. The ET’s reasoning in paras 217 and 220 (paras 54-55 above) was detailed and compelling. The ET had directed itself correctly as to the applicable legal principles and the conclusions it arrived at were properly open to it.

Ground 3

99. Mr Smith contended that the claimant had not provided an acceptable explanation for the

lengthy delay in raising this ground. The respondent had been prejudiced in having to submit representations in response to the Amendment Application and if it had been raised in a timely fashion, the respondent would have had the opportunity of relying on additional material regarding the process by which the list of issues was prepared and agreed. In any event, there was no prejudice to the claimant in refusing him permission to amend as Ground 3 did not raise any fairly arguable point of law and, similarly, there was no public interest reason for granting the application. The ET was entitled to rely upon the agreed list of issues and the twofold **Saiger** test in respect of procedural irregularity was not met. There was no basis for the claimant’s assertion that the ET would or may have arrived at different conclusions if para 6(a)(i) of the list of issues had included the “trust and mischief” reference.

Analysis and conclusions

Ground 2B

100. As I explained at para 86 above, it is logical to begin with Ground 2. I will first consider Ground 2B, namely the argument that the ET erred in law in declining to approach the section 15(1)(a) **EqA 2010** question of whether the reason for the claimant’s dismissal was “something arising” in consequence of his disability on the basis advanced by Mr John in his closing submissions, namely that the claimant’s FND condition rendered him unfit for work and incapable of performing his role.

101. For the following cumulative reasons, I consider that the ET was entitled to approach the section 15 disability dismissal claim on the basis that was set out in the list of issues:

- a. The list of issues had been agreed between the parties and it was unequivocally confirmed on the first day of the hearing by experienced counsel representing the claimant at the time (para 23 above);
- b. This was a case involving multiple causes of action, including claims of race discrimination and harassment, victimisation, detriment following whistleblowing, disability discrimination and unfair dismissal. The list of issues was 14 pages long and it

had been formulated by the detailed process I described at paras 15-21 above;

c. Although the claimant had (unsuccessfully) tried to amend the list of issues and to appeal aspects of the list drawn up by EJ Spencer, he had never argued that the identification of the “something arising” in para 6(a)(i) of the list was erroneous and that it should encompass his unfitness for work and/or incapability in performing his role (paras 17-18 above);

d. The claimant’s claim form and his further information did not clearly plead the section 15 disability dismissal claim (paras 10-14 above). By contrast, the list of issues set out the issues relating to this claim with clarity and specificity, placing the claim within the context of the relevant statutory framework;

e. This was not an instance where the list of issues failed to reflect the pleaded claim in relation to the section 15 disability dismissal claim. Although she relied upon the pleading, Ms Kasimova was unable to identify a passage in the claim form in the Second ET Claim (or in the further information) which articulated the claim in the way that Mr John subsequently sought to advance it;

f. Mr John first sought to advance the section 15 disability dismissal claim by reference to the “something arising” being the claimant’s unfitness for work and/or incapacity after all the evidence had been heard over multiple days at the stage of his closing submissions;

g. As Warby LJ emphasised in **Moustache**, the onus lies on the parties to identify the claims they wish to bring. The extent to which the ET seeks to explore a party’s case by way of clarification is a matter for its judgment and discretion, which will rarely qualify as an error of law (paras 83 and 85 above);

h. The tribunal will usually be able to confine its attention to the issues identified in an agreed list of issues: **Moustache** at para 40. Neither of the two exceptions identified by Warby LJ applied in this instance. This was not a situation where a pleaded claim had been omitted from the list of issues (para 84 above). Furthermore, given the claimant’s

extensive engagement with the preparation and finalisation of the list of issues (paras 15-20 above), given he was represented by counsel at the trial and given the very late stage when this point was first raised, the fundamental duty of fairness did not make it necessary (essential) for the ET to permit the claim to be considered on the basis Mr John now advanced. The claimant and those advising him had had multiple opportunities to add this to the list of issues at an earlier stage if that was the way he wishes his case to be put;

i. As the ET observed, the hearing had proceeded on the basis that the list of issues properly defined all claims and issues for decision. The ET were entitled to consider that it would be unjust to the respondent and contrary to the overriding objective to entertain Mr John’s re-formulation (para 46 above).

102. I do not accept Ms Kasimova’s submission that the way Mr John sought to advance the section 15 disability dismissal claim (by relying on the claimant’s unfitness for work and/or incapability as the “something arising” from his disability), did not constitute a re-formulation or attempted amendment of this claim. As it involved identifying a different “something arising” from that set out in para 6(a)(i) of the list of issues, it plainly was and the ET was correct to approach it on that basis.

103. The ET’s reasoning on this point at paras 186-187 showed a careful, case-specific and considered approach. The ET reached a permissible decision; indeed its reasoning was compelling. The claimant has not identified any error of law in the ET’s approach.

104. Ms Kasimova appeared to suggest that the terms of section 15 **EqA 2010** itself (as explained in **Pnaiser**) had the effect that the ET was duty bound to conduct a broad inquiry on the evidence before it to discern the “something arising” in consequence of the claimant’s disability. However, as Warby LJ explained in **Moustache**, that is not how litigation works. The onus lies on the parties to identify the case they wish to advance (para 83 above). The suggestion that in a case of this legal and evidential complexity the ET was under a duty to undertake a wider investigation into whether the statutory criteria was satisfied going beyond the ways that the claimant had put his case in the list of issues (or in his pleadings) is wholly unrealistic and unsupported by any authority. The fact that

absence from work has been identified as the “something arising” from the litigant’s disability in various other section 15 **EqA 2010** cases that Ms Kasimova cited is neither here nor there, when it was not the basis on which the claimant put forward his case in this instance.

Ground 2A

105. Having rejected the proposition that the ET erred in failing to permit the re-formulation relied upon by Mr John, I turn to consider Ground 2A, namely whether the ET erred in law in deciding that the claimant’s difficulty in thinking in multiple layers, dealing with unclear responsibilities and/or the uncertainty of his allocated roles was not a reason for his dismissal.

106. As I have already explained, the ET set out a correct self-direction regarding the section 15(1)(a) statutory elements at paras 16-18 of its Reasons (para 28 above). The ET then asked the correct question at para 211, namely whether the claimant was dismissed because of the “something arising” that was identified at para 6(a)(i) of the list of issues. Insofar as the claimant suggests that the ET wrongly believed that the “something arising” had to be the sole cause of the dismissal this would be quite inconsistent with the passage that the ET had cited from **Pnaiser**. It is apparent that the ET used the “because of” formulation in para 211 as a shorthand; just as in a direct discrimination claim, it does not mean that the alleged reason must be the only cause or even the main cause of the treatment in question.

107. As I foreshadowed at paras 72-73 above, Ms Kasimova is incorrect in submitting that **Pnaiser** decided that identifying the reason for the unfavourable treatment involved an objective assessment by the ET. Her argument confused the question the ET was considering at paras 211-212 (the reasons for the unfavourable treatment) with the objective test that is to be applied to the other section 15 causation question, namely identification of the “something arising” from the claimant’s disability. As I explained when referring to **Pnaiser**, determining the reason/s for the unfavourable treatment involves a subjective assessment of why the respondent acted as they did. Accordingly, the ET were correct to focus upon the reasons of the dismissing officer (Mrs Marks) in para 212 (para 51 above).

I agree with Ms Kasimova that there is no requirement for the alleged discriminator to explicitly state that the unfavourable treatment (here, dismissal) is because of the “something arising” that the claimant relies upon. As was explained at para 31(b) in **Pnaiser**, the tribunal must identify the reason/s that were a significant influence on the alleged discriminator’s actions, whether consciously or subconsciously. There is nothing in the ET’s para 212 that suggests it did otherwise than apply the correct approach.

108. Given the ET applied the correct legal test, the claimant can only challenge the ET’s factual conclusion at para 212 on the basis that it is perverse. However, it is plain from the ET’s earlier findings of fact and from its reasoning in para 212 that it reached a permissible conclusion having evaluated the material before it, in particular the evidence of Mrs Marks, the dismissing officer. None of the factors the ET identified in para 212 as influencing her decision to dismiss were the “something arising” set out at para 6(a)(i) of the list of issues.

109. There is nothing in Ms Kasimova’s point about para 215 of the ET’s decision being inconsistent with para 212. As the ET quite clearly explained, from para 215 it was addressing the conclusions that it would have reached if, contrary to its primary conclusion, it had permitted Mr John to rely on the re-formulated “something arising”. There is nothing unusual about a tribunal expressing its conclusions in the alternative in this way.

110. Ground 2A is not expressed as a reasons challenge, but in any event, the ET’s reasoning in paras 211-212, read as a whole with its earlier findings of fact, was clear and coherent and enabled the claimant to know why he had lost on this issue.

111. Furthermore, there is nothing to suggest that the ET was other than mindful of its earlier findings in paras 143 and 144 regarding the nature of the claimant’s disability (paras 41-42 above). The ET had found at para 188 that the “something arising” identified in para 6(a)(i) of the list of issues arose from the claimant’s disability (para 47 above). However, in para 212, the question for the ET was whether this had been a significant influence on Mrs Marks’ decision to dismiss.

112. Accordingly, the ET did not err in law in concluding that the section 15 disability dismissal

claim failed because the unfavourable treatment (the dismissal) was not because of the “something arising” identified in the list of issues.

Ground 1

113. As the appeal on Ground 2 fails, the ET’s conclusion on section 15(1)(a) stands. It therefore follows that Ground 1 cannot avail the claimant in relation to the section 15 disability discrimination claim, as the section 15(1)(b) justification defence does not arise for consideration. However, I will consider the section 15(1)(b) challenge for completeness and, in any event, Ground 1 also seeks to overturn the ET’s rejection of his unfair dismissal claim which Ground 2 does not affect.

114. To re-cap, Ground 1 alleges that the ET erred in law or arrived at a perverse conclusion in para 220 of its Reasons in failing to have regard to the concessions made by Mrs Marks when rejecting the contention that the respondent’s omission to explore the Zürich reversion option with the claimant rendered his dismissal unfair and disproportionate. There is no challenge to the legitimate aims identified by the ET (para 54 above).

115. As I foreshadowed during the appeal hearing, I will confine my substantive consideration of the Ground 1 submissions to the ground that was actually pleaded in the Notice of Appeal, as limited by HHJ Auerbach at the rule 3(10) hearing (paras 5 and 64 above).

116. A substantial part of the submissions advanced by Ms Kasimova went beyond those parameters. I will briefly identify those aspects, so that there is no misunderstanding. Ms Kasimova relied upon two concessions allegedly made by Mrs Monks that were not listed in the grounds of appeal (para 89 above). In any event the first of these cannot advance her argument, as the ET did not take issue with the proposition that the claimant’s condition was genuine and its findings proceed on that basis. The second of these additional alleged concessions is not open to her to advance in light of the ET’s unchallenged and unchallengeable factual findings, rejecting all of the claimant’s allegations regarding the way that the respondent handled the OH assessment process (paras 32, 37-38 and 49-50 above). As regards the other two matters which Ms Kasimova said the ET had not taken

into account: HHJ Auerbach rejected as unarguable the contention that Mrs Marks’ communications with Zürich showed antipathy towards the claimant and an attempt to hasten the process towards his dismissal (para 64 above); and the ET reached unchallenged and unchallengeable factual findings rejecting all of the pre-dismissal allegations of unfavourable treatment including those concerning Zürich (para 34-36 and 48 above). The submissions I have summarised at para 91 above went far beyond anything that was in the grounds of appeal. I note that HHJ Auerbach specifically decided that the contention that dismissal was premature was unarguable (para 64). The other submissions do not appear to have figured in either the grounds of appeal or in the oral arguments advanced at the rule 3(10) hearing. In short, the claimant, impermissibly sought to resurrect a host of arguments that had not found favour with the ET in a misguided attempt to re-argue factual conclusions that he disagreed with.

117. I turn to the alleged concessions. I will use the same lettering as in para 59 above, for ease of cross reference:

- a. The EJ’s notes indicate that it was put to Mrs Monks in relation to October 2019 (just before her maternity leave), that the claimant was “struggling – quite vulnerable” and she agreed “potentially – yes”. Accordingly, the grounds of appeal overstate the concession that was made, but Mrs Marks did agree that the claimant was potentially vulnerable at that stage;
- b. I can find no reference to this alleged concession in the EJ’s notes and Ms Kasimova did not refer to it or identify it in her oral submissions. Accordingly, I place no reliance on this;
- c. It is correct that Mrs Monks accepted there was no technical reason why the matters could not be put before Zürich to reconsider granting GIP (after the respondent learnt of the claimant’s FND condition). However, this does not advanced Ms Kasimova’s argument on Ground 1. Firstly, the ET found that it would not have been proper for the

respondent to have unilaterally done this and there is no appeal against that conclusion (para 219; para 55 above). Secondly, when the ET then proceeded to consider whether the respondent was at fault in not encouraging the claimant to take these steps, the ET’s detailed consideration (which I address below) proceeded on the premise that it was open to the respondent to take this step (para 220; para 55 above). The ET did not suggest that there was a technical reason why the respondent could not have done this;

d. The EJ’s notes indicate that when Mrs Marks was asked about her anticipation of the outcome of the claimant’s GIP claim as matters stood in September 2019, she said that she was always suspicious that he would not be covered, but that she “was hopeful C would show more than we had – sick notes ‘work stress’- and get through”. Accordingly, the alleged concession is an overstatement, Mrs Marks did not accept it was “likely” that the claimant would be more forthcoming about his diagnosis with Zürich than he had been with the respondent and her observation was not made in the context of the FND diagnosis (which the respondent only learnt of over a year later). I do not see how the hope that Mrs Marks held over a year earlier and prior to Zürich determining the GIP claim – a hope which, in the event, did not prove to be well-founded - could have any real bearing on the issue that the ET was addressing in para 220 of its Reasons. Moreover, the suggestion that this evidence, whether by itself, or taken with other aspects of Mrs Marks’ evidence, renders the ET’s conclusion in para 220 perverse is hopeless; and

e. Mrs Marks did accept that there was “probably an oversight”. I will quote the relevant passage from the EJ’s notes:

“Q. ...C alleges FND. So justification for refusing claim no longer seemed valid. So not occur to you should you go back to Zürich view open new claim etc

A. In a capability meeting – was attempted discussion – but C refused any info except for FND diagnosis

Q. That was all about OH. Not about FND as [possible basis for] GIP

A. GIP not [the] discussion. Launch pad would have been C sharing info

Q. But GIP and OH very different things. Why not say to C: if not [pursue OH route] why not revert to GIP?

A. Probably an oversight at that point. We were continuously trying to establish a dialogue. Zürich had...all med evidence

.....

Q. In dismissal, had regard to the fact Zürich appeal (not) succeeded. You now had FND asserted. So had basis to argue...

A. Accepted oversight. Continuing discussions. But was reluctance.

Q. ...So basis for dismissing appeal no longer stood.

A. potentially oversight. But also had tried over time to see how could create environment view RTW.”

118. I return to this passage at para 119 below. I will refer to it as “the oversight concession” as a shorthand. I do not accept that the propositions listed at para 60 above were put to Mrs Marks. The respondent disputes this and there is nothing in the EJ’s notes that supports this having occurred.

119. The first argument that Ms Kasimova raised in relation to the oversight concession is that the ET failed to take this into account. I can see no basis for drawing this conclusion. Caselaw establishes that I am to assume that the ET took this into account; the sheer fact it was not mentioned explicitly is not to be taken as an indication to the contrary (para 80 above). The importance of the EAT adopting this approach is underscored by cases of this breadth and evidential complexity. The claimant’s claims involved multiple causes of action, events spanning several years, extensive documentation and eight witnesses giving oral evidence. It would be wholly impractical and unrealistic to expect the ET to recite every piece of evidence it had taken into account, as opposed to identifying its factual findings and then setting out the conclusions it reached on each issue accompanied by an explanation of its reasoning. The ET alluded to this at para 32 of its Reasons (para 27 above). In its lengthy para 220, the ET did explain why it rejected the contention relating to the Zürich reversion option. Indeed, the ET identified nine detailed reasons for doing so; leading to its conclusion at point (10) that up to the time of the claimant’s dismissal, Ms Marks had no reason to consider pausing the capability process.

It was not incumbent on the ET to also refer to every piece of evidence it had considered in arriving at this reasoning and this determination.

120. The second argument is that the ET’s rejection of the contention based on the Zürich reversion option was perverse in light of the oversight concession. As I have explained, an appeal will only succeed on a perversity ground if it is shown that the ET reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached (para 79 above). This is a high hurdle and the claimant’s submission does not come close to meeting it.

121. The ET had correctly identified the approach to take to the section 15(1)(b) issue (para 28 above). The ET’s reasoning in para 220 was thorough, cogent and careful. It was amply supported by its earlier findings of fact, which it engaged with throughout this paragraph. I do not accept that the reasoning was based on “theoretical speculation” as the claimant suggested. Ms Kasimova said that as it was an “obvious alternative to dismissal”, the ET was obliged to consider and evaluate the Zürich reversion option. However, that is precisely what the ET did in its para 220. The real complaint being advanced here is no more than a disagreement with the ET’s conclusion and/or the weight it attached to particular pieces of evidence.

122. The ET was entitled to view what Mrs Marks said regarding the oversight concession in light of the entirety of her evidence and the evidence as a whole. Additionally, as Mr Smith observed, Mrs Marks was not dealing with the Zürich claim during the year she was on maternity leave. Even in the passage in her evidence that the claimant relies upon, Mrs Marks expressed the understanding that Zürich (unlike the respondent) had received the claimant’s medical evidence and she emphasised that the respondent’s repeated efforts to engage with the claimant in relation to his medical condition had been unsuccessful. Placing that part of her evidence in context, as the ET pointed out in para 220: the claimant had consistently refused to provide his medical evidence (beyond the ‘fit notes’) to the respondent; there was no reason for Mrs Marks to doubt that the claimant would have put any medical evidence that supported his GIP claim before Zürich (and/or in support of his subsequent complaint

against its rejection); and the claimant had vehemently told Ms Leen that the GIP claim was closed and that he would not consider pursuing it further. Further, as the ET’s findings make clear, the respondent had gone to some lengths to assist and support the claimant with his GIP claim (paras 34-36 above). In short, the conclusion that the ET reached at para 220 was properly open to it and there were ample material and findings to support it.

123. There is a further point I mention for completeness. In **Awan v ICTS UK Ltd** [2019] IRLR 212 (“**Awan**”) Simler J, President (as she then was) explained that, although the courts should tread warily in this area, “a term may be implied into an employment contract (on the officious bystander or the business efficacy test) that ‘once the employee has become entitled to payment of disability income due under the long-term disability plan, the employer will not dismiss him on the ground of his continuing incapacity to work’” (para 55). She summarised the position in those terms having reviewed a number of authorities including **Aspden v Webbs Poultry Meat Group (Holdings) Ltd** [1996] IRLR 521 (“**Aspden**”). It appears that both **Aspden** and **Awan** were cited to the ET. However, as the ET recorded at para 217 of its Reasons, it was no part of the claimant’s case to argue that his dismissal amounted to a breach of an implied term of his contract and Ms Kasimova confirmed this position at the appeal hearing.

124. In light of the unassailable reasoning and conclusions set out in paras 217-220 of its Reasons, there was ample basis for the ET’s finding that the claimant’s dismissal (if it had adopted the reformulated “something arising”) was a proportionate means of achieving the respondent’s legitimate aims. There is no free-standing challenge to the finding that dismissal was within the band of reasonable responses and the ET was correct to find at para 249 that in this instance it followed from its earlier conclusions on the section 15(1)(b) issue that the claimant’s case on unfair dismissal also failed (para 56 above).

Ground 3

125. In considering whether to grant permission to amend the grounds of appeal to add Ground 3,

I have applied the approach identified in **Khudados**. I bear in mind that granting permission would not delay proceedings, as I heard the argument on a provisional basis at the substantive appeal hearing. I also consider that relatively modest prejudice would be suffered by the respondent if I were to permit the amendment to be made. This would be limited to the expense and inconvenience of having to deal with this additional point at short notice. However, the respondent was able to fully address Ground 3 at the hearing.

126. Nonetheless, I refuse the Amendment Application for the following reasons.

127. First, I am not satisfied that the EAT received a full and acceptable explanation as to why Ground 3 was raised so close to the appeal hearing or that the application was made as soon as the need for it was known.

128. Ms Kasimova said the application was made because the point came to the attention of her and/or her husband as they were preparing the bundle for this hearing. However, I note the following. The grounds of appeal were submitted as long ago as 19 December 2023, over two years before the application was made. They were prepared with the assistance of counsel who appeared for the claimant at the ET hearing. It is apparent from the expanded contentions that were (unsuccessfully) advanced at the rule 3(10) hearing on 21 November 2024, that the claimant and Ms Kasimova had reviewed the extent of the grounds of appeal and informally tried to add to them for the purposes of that hearing. The Amendment Application was only made on 30 January 2026, just over two weeks before the substantive appeal hearing began. At the same time, Ground 3 is premised on the foundation that the inclusion of the “trust and mischief” passage from the earlier version of para 6(a)(i) of the list of issues was fundamental to the claimant’s case. This sits uneasily with the proposition that no-one on the claimant’s side noted its omission during the period of over three years from the time when the list of issues was lodged with the ET on 13 September 2022 (para 23 above) and which included the lengthy hearing on liability before the ET or the stages in the appeal process I have referred to. This is all the more striking given the lengthy scrutiny that the list of issues had attracted from the claimant during the earlier stages of the proceedings (paras 15 -20 above). The 30

January 2026 application to amend gave no explanation at all as to why the amendment was being made at such a late stage and the explanation I was given by Ms Kasimova during the hearing was very brief. There was no indication as to who noticed the absence of “trust and mischief” in the agreed list of issues or as to the date when this occurred. The claimant’s bundle was lodged with the EAT on 19 January 2026, itself over a week and a half before the adjournment application was made. As the EAT observed in **Khudados**, regard must be had to the public interest in ensuring that business in the appeal tribunal is conducted expeditiously and resources used efficiently.

129. Secondly, and most significantly, I consider that Ground 3 is not fairly arguable, so that refusing the application is in the public interest and will causes no prejudice to the claimant.

130. The claimant has not identified any arguable serious procedural irregularity. As I have already concluded when considering Ground 2B, the ET was fully entitled to proceed on the basis of the list of issues that had been provided (para 101 above). The only distinction from the points I identified in relation to Ground 2B, is that for Ground 3 purposes the relevant version of the list of issues dated from 13 September 2022 (when the respondent sent it to the ET, copying in the claimant), rather than from the earlier hearing before EJ Spencer. The ET were told by counsel on the first day of the hearing that the list of issues was agreed and the ET was entitled to proceed on that basis. None of authorities considered in **Moustache** provide any basis for Ms Kasimova’s suggestion that it was incumbent on the ET to look back through the procedural history of how the list of issues came into being, identify any apparent changes to the wording of this 14 page document and then expressly confirm with the parties that any such changes were agreed.

131. Ms Kasimova also argued that the removal of the “trust and mischief” wording was contrary to EJ Spencer’s order and, as such, unauthorised. I do not accept that this is an arguable proposition. The wording of this part of the list of issues was in draft form following the hearing before EJ Spencer (para 16 above). The wording in para 6(a)(i) of the list of issues in the version filed by the respondent on 13 September 2022 reflected para 3.4 of EJ Hodgson’s order read with para 2.9.1 of his “Discussion” section (paras 20-21 above). Furthermore, the claimant then had ample time to review

the contents of this document before the commencement of the substantive hearing on 2 October 2023, at which his counsel indicated unequivocally that the document was agreed.

132. The “trust and mischief” wording did not appear in the ET1 in either the First ET Claim or the Second ET Claim. This phrase did appear in the further information that the claimant provided in relation to the second claim (para 14 above). However, in context, this appeared to be a summary (“my difficulty to deal with unclear responsibilities and all potential scenarios of trust and mischief etc”) and one that was not inconsistent with the subsequent distillation or amplification of this in the list of issues. As I noted earlier, the way the claimant put the section 15 **EqA 2010** claim was very unclear prior to the provision of the list of issues (paras 10-14 above). Furthermore, the material wording in the version of the list of issues that was before the ET did make reference to the claimant’s difficulties in dealing with unclear responsibilities and to his difficulties being compounded when misrepresentation took place. In the circumstances, I reject as unarguable, the claimant’s submission that the ET erred because his pleadings “shouted out” for the “trust and mischief” reference to be included in the list of issues.

133. For completeness, I indicate that I also consider it unarguable that the omission of the “trust and mischief” wording occasioned injustice to the claimant. No credible basis has been shown for the proposition that the ET would have arrived at a different decision on either the section 15 **EqA 2010** claim or the unfair dismissal claim if this wording had been included in the list of issues. I have explained in the previous paragraph why the absence of this wording did not give rise to a “marked divergence” between the way the claimant put his case and the way that the ET approached it. The only aspect of the ET’s reasoning that Ms Kasimova identified which bore on the outcome of these two claims was that contained in paras 204-205, which, in turn informed para 220. However, there is no appeal against the ET’s rejection of the allegation that the claimant was subjected to unfavourable treatment in being pressured in relation to the OH assessment, where paras 204-205 were a central part of that assessment. Further, as I have shown in my earlier summary of the ET’s Reasons, the conclusions there reached were amply supported by the ET’s earlier factual findings: see paras 37-38

above. In turn, the ET’s conclusion at para 220 (which I have considered in detail in relation to Ground 1) was supported by the nine reasons that the ET there identified, only one of which, reason (9) concerned the claimant’s non-cooperation with an OH assessment. Even taking the claimant’s case at its highest, the remainder of the extensive reasoning in both paras 217 and 220 would still stand.

134. The other passages in the ET’s Reasons that Ms Kasimova identified (para 93 above) did not assist her argument. The compelling reasons why the ET declined to proceed on the basis of Mr John’s reformulated “something arising” would not have been materially altered by the inclusion of the “trust and mischief” phrase in para 6(a)(i) of the list of issues. The ET’s findings about date of knowledge are not the subject of any challenge on this appeal and nor is the rejection of the victimisation claim. The ET’s “postscript” at para 253 expressing the hope that the claimant would learn “some lessons (however uncomfortable) about judgment and self-awareness” (and that the respondent would learn lessons to from the case) was just that.

135. Applying the test identified in **Saiger** (para 81 above), I therefore conclude that the claimant has not shown a fairly arguable case in relation to Ground 3.

Outcome

136. Accordingly, for the reasons I have identified, I reject Grounds 1, 2A and 2B of the claimant’s appeal and I refuse to grant permission to amend his grounds of appeal to add Ground 3. In the circumstances, I dismiss the appeal and the cross-appeal does not arise for determination.