Neutral Citation Number: [2026] EAT 129

Appeal Nos: EA-2022-000091-JOJ,
EA-2024-000593-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 August 2026

Before :

ANDREW HOCHHAUSER KC
DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

MR M JAROSINSKI **Appellant**

- and -

NESTLE UK LTD **Respondent**

The Appellant appeared in person
Ms Rebecca Thomas (instructed by Eversheds Sutherland (International) LLP) for the **Respondent**

Hearing date: 14 October 2025

JUDGMENT

SUMMARY

Practice and procedure

Should the Employment Tribunal (the "**ET**") have approached a reconsideration solely on the basis of an application made in 2022 (the "**Reconsideration Application**"), when at the date of the reconsideration, it was known that no separate ET3 had been presented for a second claim? Construing the Case Management Order. Finding that the ET was not dispensing with the need for an ET3 to be served in the second claim but instead permitting both the first and second claims to be defended in a compendious response in accordance with Rule 16(3) of the ET Rules 2013, then in force. Alternatively, by his conduct prior to and at the hearing, the Appellant had waived his right to complain of the same and/or was estopped from so doing.

Further, the Reconsideration Application itself raised no issue as to the validity of the response in the second claim. It was not an error for an ET not to address issues which are not raised as part of a reconsideration application or arising from the ET Decision. That position is compounded in the present case where the EJ was considering the Reconsideration Application on remission from the EAT where it had been expressly ordered that the EJ was not to consider any correspondence which post-dated the Reconsideration Application.

Unfair Dismissal; remedy; Polkey reduction; contributory fault

The ET found that the Appellant had been unfairly dismissed on procedural grounds only but made no compensatory or basic award on the basis that the Appellant had contributed 100% to his dismissal and there was a 100% chance that he would have been dismissed had a fair procedure been followed. Had the ET erred in law in relation to those findings? Had the ET failed properly to explain why the 100% deduction was applied in respect of both the basic and compensatory award elements and why, when it recorded procedural failings, was there a 100% prospect of dismissal?

Held:

1. When the ET judgment was read in its entirety it satisfied the tests laid down in **Nelson v BBC (No.2)** [1979] IRLR 346 and **Steen v ASP Packaging** UKEAT/23/13;

2. The ET was entitled to adopt a similar approach to the reduction of the basic award as it did to the compensatory award. Similar considerations came into play. It is only if there was a divergence that a detailed explanation would be expected;

3. The ET had not erred in law in making a 100% Polkey reduction. The reasoning was that the Appellant was unrepentant in his adverse views of his managers and if he had been given the chance to prepare and make representations at a disciplinary hearing, it would not have made a difference given his intransigent perception of his managers and how he had been treated to that date. The ET formed the view that he would not have departed from his earlier views. In doing

so, the ET looked at the way he had behaved at the hearing and his maintenance of those hostile and insulting views towards his managers;

4. There was no element of "double counting" in the ET doing this – see **Wilkinson v Driver and Vehicle Standards Agency** [2022] EAT 23. Making a 100% Polkey deduction on the basis that had there been a fair procedure, the result would still have been a dismissal because the Appellant would not have said or done anything differently, given his earlier and subsequent conduct, is not the same as making a 100% deduction for the contributory misconduct itself.

MR ANDREW HOCHHAUSER KC:

Introduction

1. This matter has had a complex procedural history to say the least.

2. The Appellant, Michal Jarosinski, was employed by the Respondent, Nestle UK Ltd, from 1 April 2009 to 16 December 2020, when he was dismissed with immediate effect. In the last eight years of his employment, he was employed as a Quality Assurance Technician.

3. He has presented two claims to the Employment Tribunal, Midlands (East) Region (the "**ET**"). On 12 June 2020, the Appellant made a complaint of racial discrimination - in claim number 2601914/2020 (the "**First Claim**"). By an ET3 Response, which contained Grounds of Resistance, sent to the ET on 20 July 2020, the Respondent resisted that claim.

4. On 8 February 2021, the Appellant presented a second claim – Claim number 2600301/2021 ("the "**Second Claim**"). This complaint included claims for compensation for unfair dismissal, race discrimination and claims for notice pay, holiday pay and "other payments".

5. Prior to the date for filing a response to the Second Claim, on 2 March 2021, after hearing representations from the parties, Employment Judge ("**EJ**") Clark made an order that both claims be heard together. The reasons he gave were that the claims "*appear to give rise to common or related issues of fact and law and it is in accordance with the overriding objective that they are heard together*." He also made further directions as follows:

> *"Keep the Preliminary Hearing on 15 March 2021. Both claims to be considered. Stay order for presenting ET3 until the hearing. Order to be made at that hearing for ET3 to be filed and served in respect of all claims."*

6. The preliminary hearing took place before Employment Judge ("**EJ**") Brewer on 15 March 2021. Both parties were represented by Counsel. By paragraph 8 of the Case Management Orders (the "**Brewer CMO**"), under the heading "**ET3s**", the Respondent was ordered to "*file with the Tribunal a single response which shall incorporate an amended response in case 2600301/2020 and a response in case 2601914/2021"*.[1] No objection was made by Counsel for the Appellant to that order at that time, nor was the necessity for a separate ET3 to be filed raised in the Second Claim and the order was not appealed. The Respondent thereafter filed a single document entitled "Respondent's Amended Grounds of Resistance". It covered both the First and Second Claims and on 9 July 2021 EJ Butler ordered "*The copy of the updated grounds*

[1] The wrong years appear to have been ascribed to the case numbers of the First and Second Claims. It should have read "*an amended response in case 2601914/2020 and a response in case 2600301/2021."*

of resistance are accepted and copies are attached for the claimant." There was no objection made by the Appellant thereafter to that document, nor was it suggested at any of the four further case management hearings or the hearing of the consolidated claims that the Respondent should have filed a further proforma ET3 in relation to the Second Claim in order to be able to defend the claims raised therein.

7. Following the further case management hearings, the Appellant's consolidated claims were heard by EJ Ayre, sitting with members, Mrs Barrowclough and Mr Goldstone via CVP over 9 days between 15 and 25 November 2021. At that hearing, as at the hearing before me, the Appellant was acting in person, and the Respondent was represented by Ms Rebecca Thomas of Counsel.

8. A decision was sent to the parties on 5 January 2022 (the "**ET Decision**"). The claim for notice pay was dismissed upon withdrawal. The complaints of racial discrimination, harassment and victimisation were dismissed. The ET found that the Appellant had been unfairly dismissed on procedural grounds. It went on, however, to find that the Appellant contributed 100% to his dismissal through his conduct and that there was also a 100% chance that he would have been dismissed, had a fair procedure been followed. Accordingly, no basic or compensatory awards were made.

9. In the ET Decision, the ET found:

> *"314. The claimant was dismissed due to a total breakdown in the relationship between the claimant and the respondent…Through his behaviour, the claimant had made the working relationship untenable.";*
>
> *"315. In the circumstances, we find that there had been a fundamental and irretrievable breakdown in working relationships and in trust and confidence. We find that the claimant was dismissed for some other substantial reason, and that the respondent has proved a fair reason for dismissal;*
>
> *"…322. We also find however that there was a 100% chance that the claimant would have been dismissed had a fair procedure been followed. The claimant was unrepenting in his views about Ms Muthana and Mr Peplow, and about the way in which he perceived he had been treated. He maintained those views in the Tribunal hearing and would not, in our view, have departed from them at a formal dismissal meeting.";*
>
> *"323. We also find that the claimant's conduct, in making the accusations that he did about his managers and others in the respondent's organisation, and his behaviour towards Mr Peplow and Ms Muthana over a lengthy period of time was culpable and blameworthy. He showed a total lack of appreciation and recognition for all of the steps that were taken to support him.";*

> *"324. This behaviour directly caused the respondent to dismiss him. We therefore make a 100% finding of contributory conduct…"*

10. By an application dated 18 January 2022, the Appellant sought a reconsideration of the ET's decision and made an application for costs (the **"Reconsideration Application**").

11. By a notice of appeal received by the Employment Appeal Tribunal (the "**EAT**") on 16 February 2022, the Appellant appealed the ET's Decision in respect of the consolidated claims (the "**2022 Appeal**"). No point was taken in that notice of appeal in relation to the failure to serve a separate ET3 in the Second Claim.

12. On 13 May 2022 the Reconsideration Application was refused by EJ Ayre. The Appellant appealed that decision by a Notice of Appeal dated 30 June 2022 (the "**First Reconsideration Appeal**"). The Appellant was given permission to appeal and the Respondent conditionally cross-appealed.

13. The 2022 Appeal was deemed not to be properly instituted within the time limit because the Appellant had not included a copy of the ET3 form in relation to either claim. The Appellant appealed the Registrar's refusal to grant an application for an extension of time (the "**Extension of Time Appeal**"). The Appellant's appeal was heard by HHJ Auerbach on 28 September 2023. Once again, the Appellant appeared in person, and the Respondent was represented by Ms Thomas. It was here that the absence of an ET3 in the Second Claim was considered for the first time, and the Appellant maintained in two affidavits dated 19 October 2023 and 17 October 2024 that HHJ Auerbach:

> *"pointed* [sic] *that assumption that the combined GORs ordered by EJ Brewer during PH in March 2021; do not in any way exempt Defendant from compliance with ET Rules of Procedure and submission of ET3 for Unfair dismissal.".*

The Appellant has stated that he became aware of the procedural irregularity for the first time only when it was pointed out by HHJ Auerbach.

14. The Extension of Time Appeal was allowed in respect of the Second Claim only. There is no judgment in the hearing bundle, simply a copy of the Order. The judgment was delivered orally, but an attempt by the Appellant by an email dated 27 October 2025 to the EAT to secure a transcript of what was said by the learned judge was unsuccessful, because no HMCTS audio recording could be located. When the judge was asked to provide a written judgment in December 2025, by a letter dated 2 January 2026 sent by the Registrar at his direction, he indicated that because of the passage of time, it was not practically possible now to produce a written judgment.

15. In that letter of 2 January 2026, HHJ Auerbach stated that:

> *"…What I can note is that the appeal related to a decision concerning two tribunal claims, one begun in 2020 and one begun in 2021. At that time the EAT's Rules of Procedure required that the documents to be served on the EAT in order to institute an appeal from a judgment included "a copy of any claim and response in the proceedings before the employment tribunal or an explanation as to why either is not included.*
>
> *It appears that, in this case, within the time limit for instituting an appeal, of 16 February 2023, the Appellant provided to the EAT the grounds of resistance document relating to both claims, but no ET3 forms, and no explanation for why none were provided. Upon this being raised by the EAT's administration, the Appellant then, on 18 February 2023 (two days after the time limit expired), provided the ET3 form for the 2020 claim, and the explanation that there was no separate ET3 form for the 2021 claim.*
>
> *I note that the Registrar refused to extend time entirely, but I partially allowed the appeal from her order, refusing an extension of time for the appeal in respect of the 2020 claim, but granting an extension of time in respect of the 2021 claim.*
>
> *I can infer from this that I considered that, for the purposes of what I had to decide ,there was a material difference between the first claim, in respect of which there was an ET3 form, which was only provided out of time, and the second claim, in respect of which there was no separate ET3 form, and this fact was subsequently explained.*
>
> *I have had my attention drawn to the minute of a subsequent hearing in the employment tribunal on 23 January 2024 before REJ Swann. Reference is made there to the hearing before me, including to an affidavit of the claimant, that was put before REJ Swann, which, as described there, gave an account of things said at the hearing before me. I have not seen that affidavit. But, in any event, I am not at this distance in time able to comment on the account described there."*

16. On 23 October 2023, the 2022 Appeal was rejected at the Rule 3(7) Sift by the then President, Eady J. She gave detailed reasons for doing so. On 25 October 2023, the Appellant then applied for a Rule 3(10) hearing. In his application, the Appellant stated:

> *"This is mainly and predominantly in light of decision being made without consideration of interim application and affidavit that HHJ Auerbach assessed and granted time extension on. HHJ Auerbach made annotation i [sic] the case file, to allow sieving judge to review those*
>
> *documents, however, this appears to be missed."*

17. On 24 October 2023, HHJ Keith heard the First Reconsideration Appeal and the Respondent's

cross-appeal. Both parties were represented by Counsel. Both succeeded. The EAT held that the reconsideration exercise had not been properly conducted to the detriment of both parties and remitted the Reconsideration Application to the ET to be decided by an EJ, other than EJ Ayre, under the Rule 72(1) of the relevant ET Rules of Procedure, which were contained in the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the "**ET Rules 2013**"), rather than the matter proceeding straight to a hearing under Rule 72(2) of the ET Rules 2013. HHJ Keith gave an oral judgment, which was then reduced to writing. His Order provided at paragraph 5:

> *"The Employment Judge considering the application under Rule 72(1) shall not consider any correspondence which post-dates the reconsideration application."*

18. Subsequent to the Order of HHJ Keith , on 26 October 2023 the Appellant made an application to strike out the Amended Grounds of Resistance in relation to the Second Claim under Rule 37 of the ET Rules 2013 (the "**Strike Out Application**"). I have not seen that document. It was not in the Hearing Bundle, but from paragraph 11 of the later Case Management Summary, referred to at paragraph 19 below, it appears that the Appellant not only wanted to strike out the Second Claim, but the entirety of the Respondent's Amended Grounds of Resistance on the basis that as there were joint grounds of resistance, which also covered the First Claim, the defence in that claim should also be struck out.

19. On 23 January 2024 there was a Case Management hearing before REJ Swann to deal with the further consideration of the Reconsideration Application and also the Strike Out Application to which the Respondent by now objected. At paragraphs 11 and 12 of the Case Management Summary, the REJ recorded:

> *"11… There was also before me today a second matter being an application lodged by the Claimant originally dated 26 October 2023 (subsequent to the aforesaid Judgment of Judge Keith) requesting that the response grounds of resistance lodged for the second claim i.e., the 2021 claim be struck out. Further that as that had been lodged as an amended joint grounds of resistance, to cover the first claim (i.e., the 2020 claim) as well, that should also be struck out. The basis for the application being that the Respondent failed to lodge a form ET3 with the Employment Tribunal in accordance with rules 16 and 17 of the Employment Tribunal Rules in respect of the 2021 claim. That this amounted to a fundamental procedural failing on the part of the Respondent which required a strike out and that a default judgment for both claims should now be made in favour of the Claimant.*
>
> *"12. I had previously sought written comment from the Respondent to the*

application which said comments set out the Respondent's objections to the same maintaining in principle that there was no jurisdiction for the Tribunal to consider such a strike out application. That there had been an outcome determination reached by Judge Ayre and her panel members based on the amended grounds of resistance as long ago as 2022. That there had been no objections raised by the Claimant to the lodging of an amended response as requested by the Respondent at a Preliminary hearing before Employment Judge Brewer that took place on 15 March 2021 and no order made that the Respondent should at that time a lodge a formal ET3. That there had been no subsequent objection raised by the Claimant to the amended grounds of resistance lodged until the application for strike out referred to above. This was therefore the second matter before me for case management purposes today…

17. In turning next to the extant rule 37 application that I refer to above I then set out the background (see below) as I understood it from reading the various correspondence and pleadings before me which the parties confirmed.

18. That a consolidation of the claim having been made at the aforesaid Preliminary hearing before Employment Judge Brewer an order was made that the Respondent should on or before 19 April 2021, file with the Tribunal a single response which should incorporate an amended response for both the 2020 claim and a response to the 2021 claim as noted in Judge Brewer's case summary at paragraph 39. Judge Brewer records that at the date of the Preliminary hearing the Respondent had not yet filed a response to the 2021 claim having previously been given leave to file a single combined response incorporating an amended response to the first claim and a response to the second claim on a date to be fixed. He notes that he has now fixed that date. There is nothing recorded therein about the need or otherwise to file a formal ET3 form to the 2021 claim along with the amended grounds of resistance referred to above. The amended response having been subsequently lodged by the Respondent in accordance with the order, this was subsequently relied on as part of the pleadings at the final Hearing before Judge Ayre and

19. The issue as confirmed by both parties, came to light at a hearing before His Honour Judge Auerbach in respect of appeals lodged by the Claimant to both the 2020 claim and the 2021 claim in regard to the question of timeliness. HHJ Auerbach indicated that in respect of the 2021 claim, on the information supplied to him by the parties, that the Respondent in failing to lodge a formal ET3 form had fundamentally failed to comply with the Rules of Procedure of the Employment Tribunals (see particularly as referred to above rule 16 and 17). Having considered the timeliness question, (the full details of which I need not go into within this summary), HHJ Auerbach ordered that the appeal regarding liability in respect of the 2020 claim be dismissed as being out of time but allowed the 2021 claim on the question of liability to proceed. He was also in his various comments aware of the reconsideration issue which was proceeding separately by way of appeal at the EAT.

20. Having determined on the question of time that the 2021 claim could proceed it then came before the President of the Employment Appeal Tribunal, Mrs Justice Eady. As part of the sift process, Eady J having considered the appeal lodged in respect of the 2021 claim reached the conclusion that there was no reasonable prospect of success and therefore dismissed the appeal.

21. Part of the appeal documentation lodged by the Claimant at the EAT consisted of two affidavits and attached documents. The second affidavit which is dated 19 October 2023 specifically amongst other submissions makes reference to the discussion that took place at the aforesaid timeliness hearing before HHJ Auerbach. This affidavit records that Ms Thomas was asked to clarify whether or not the Respondent Nestle had been exempted from the submission of an ET3 for the unfair dismissal claim. Ms Thomas confirms according to the affidavit that to her knowledge it was not and that HHJ Auerbach commented that the assumption that combined grounds of resistance ordered by Judge Brewer in the Preliminary hearing in March 2021 did not in his purported view in anyway exempt the Respondent from compliance with the Rules of Procedure and submission of an ET3 in respect of the second claim (the 21 claim). According to the documentation before me this affidavit together with the first affidavit sworn in September making other submissions were part of the appeal process that should have been before Eady J at the rule 37 consideration. One of the grounds of appeal being as per the second affidavit that the combined response for both claims should be struck out because of the failure to lodge an ET3 and the liability judgment be overturned. It is agreed between the parties that there is no reference within the reasons for dismissal of the appeal given by Eady J as to the said affidavits or the procedural matter itself concerning the ET3.

20. Given that there was a pending Rule 3(10) Application on the 2022 Appeal, which overlapped with the Strike Out Application, REJ Swann took the view that

> *"22…I outlined to the parties my provisional view that it would be inappropriate for the Employment Tribunal to hear the rule 37 application until a determination has been made about the rule 3(10) application given that it deals with the same substantive element concerning the failure to lodge an ET3 in regard to the 2021 claim that is now before the Employment Tribunal…*
>
> *25…it was the Claimant who has raised this fundamental procedural issue as a point of appeal to the EAT for their determination, it is a matter that is now within a higher Court than the Employment Tribunal and I confirmed to the parties that despite the above submissions I remained of the view that it would not be in the interests of justice to in anyway fetter or influence the determinations that need to be made by the EAT in respect of the rule 3(10) application in this respect."*

21. He therefore ordered that the Strike Out Application be stayed pending the outcome of the 3(10)

determination.

22. The Reconsideration Application came before EJ Hutchinson on 21 February 2024, who considered the application on the papers. By a decision sent to the parties on 21 March 2024, he dismissed the application on the grounds that he was satisfied that there was no reasonable prospect of the original decision being varied or revoked (the "**Second Reconsideration Decision**") . The Appellant then appealed that decision by a notice of appeal (number EA-2024-000593-JOJ) dated 1 May 2024 (the "**2024 Appeal**") .

23. To add to the confusion, it appears that the Appellant may have submitted two appeals in similar terms around this time. The other notice of appeal, given the number EA-2024-000553-JOJ, was separately sifted by John Bowers KC, sitting as a Deputy Judge of the High Court, on 20 May 2024. He refused permission on the basis that "*this appeal comes close to having no legal merit at all*" (the "**Bowers Order**"). The Appellant sought to challenge this by way of a notice of appeal dated 20 May 2024 entitled as an appeal against a Registrar's Rule 3(7) decision. It appears to have been treated as a Rule 3(10) application.

24. On 3 July 2024 the then President of the EAT, Eady J, ordered that that the 2024 appeal be set down for a Preliminary Hearing in accordance with section 4.3 of the EAT Practice Direction 2023 at which only the Appellant was to be heard, to be listed alongside the Rule 3(10) hearings of the 2022 Appeal and the Bowers Order.

25. On 6 August 2024 the Rule 3(10) and Preliminary Hearings were heard by HHJ Beard. He granted limited permission to appeal only in relation to the following:

   (1) **The 2022 Appeal** – There was only one permitted ground relating to the ET decision that the Appellant (1) contributed 100% to his dismissal and (2) that a Polkey deduction of 100% should apply. The learned Judge stated:

   > *"I considered that it was arguable that the ET had failed to explain in respect of (1) why a total deduction should apply to both the basic and compensatory award elements and (2) why when it recorded procedural failings there was a 100% prospect of dismissal."*

   (2) **The 2024 Appeal** – Grounds 1 and 2.

   The learned Judge said:

   > *"…these deal with a number of arguments but all arise out of one point: this is whether the EJ should have considered the fact that an ET3 had not been presented in accordance with the 2013 ET rules. The ET Judge approached the*

> *reconsideration solely on the basis of the original application made in 2022. It was known by the stage of this decision that there had been no ET3 for the second claim. It seemed to me that it was reasonably arguable that, as the presentation of an ET3 is a prerequisite condition for defending a claim, that this should have been approached by the judge as part of the reconsideration decision."*

26. In fact, the Ground 2 goes somewhat further. It maintained that:

> *"ET did not have jurisdiction (legal authority) to hear my case or make a decision to ignore the Strike out application."*

27. Given that permission was granted in respect of Grounds 1 and 2 in their entirety, I will consider the complaint that ET should have dealt with the Appellant's Strike Out application and should not have adjourned it pending the outcome of the Rule 3(10) application.

28. Since Grounds 1 and 2 of the 2024 Appeal go to the jurisdiction of the ET to entertain the defence in the Second Claim, I will consider that first.

Grounds 1 and 2 of the 2024 Appeal

The Appellant's submissions

29. The Appellant submitted that the failure to serve a valid ET3 in the Second Claim cannot be dismissed as a technicality but strikes at the core of the Tribunal's authority to accept and consider the Respondent's defence to the claim.

30. He submitted that the absence of a valid ET3 constitutes a fundamental jurisdictional defect under Rules 16 and 17 of the ET Rules 2013, which provided:

> *"16 (1) The response shall be on a prescribed form and presented to the tribunal office within 28 days of the date that the claim form was sent by the Tribunal…*
>
> *(3) A response form may include the response to more than one claim if the claims [give rise to common or related issues of fact and law or if it is otherwise reasonable for the responses to be made on a single response form]*[2]*.*
>
> *17(1) The Tribunal shall reject a response if –*
>
> *(a) it is not made on the prescribed form; or*
>
> *(b) it does not contain the following information –*
>
> *(i) the respondent's full name;*
>
> *(ii) the respondent's address;*
>
> *(iii) whether the respondent wishes to resist any part of the claim*
>
> *(2) The form shall be returned to the respondent with a notice of rejection*

[2] The wording in brackets was the wording substituted on 8 October 2020 by The Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure)(Amendment) Regulations 2020.

explaining why it has been rejected. The notice shall explain what steps may be taken by the respondent, including the need (if appropriate) to apply for an extension of time, and how to apply for a reconsideration of the rejection."

31. Looking at the Brewer CMO, the Appellant contended that it was plain from the heading "**ET3s**" that it was clear that the Respondent was required to submit ET3 forms for both claims. Its failure to do so amounted to a breach of that order and Rule 16 of the ET Rules of Procedure 2013, which is mandatory.

32. The Respondent never sought any exemption from filing an ET3 in the Second Claim, nor did it seek an extension of time in which to serve an ET3.

33. The Appellant further submitted that HHJ Auerbach rejected any suggestion that the ET3 in the First Claim, which related to a claim made during his employment, was sufficient to cover the Second Claim, relating to unfair dismissal. The same approach was adopted by REJ Swann, who confirmed that the Rule 37 strike out, issued on 23 October 2023, on the basis of a procedural failure to file an ET3, was a live issue pending the Rule 3(10) determination. ET3s are claim-specific.

34. He contended that the ET should have dealt with his Strike Out application and granted it instead of postponing its consideration pending the outcome of the Rule 3 (10) determination. He contrasted the Respondent's lenient approach in relation to the alleged failure to comply with the Rule 16, with the strict procedural compliance it required of the Appellant, when dealing with his applications for an extension of time.

35. He submitted that the failure to file a valid ET3 deprived him of the opportunity to have the Respondent's defence rejected at the outset, that he has been prevented from obtaining a default judgment, deprived of compensation to which he was entitled and this has meant that he has been subjected to prejudice and the stress of years of litigation.

36. The appeal should therefore be allowed and the defences to both claims dismissed, since there were combined Grounds of Resistance and the defence to the First Claim should fall with that of the Second Claim.

The Respondent's submissions

37. In summary, Ms Thomas submitted that the 2024 Appeal should be dismissed for the following reasons:

    (1) There was no breach of Rule 16 of the ET Rules 2013 in the way the Respondent responded to the Second Claim; or

(2) If there was a breach of the Rule, in the absence of a rejection of the response, the respondent was properly allowed to defend the proceedings; and

(3) Even if there was a breach of Rule 16 it was not an error for the EJ not to address this as part of the Appellant's Reconsideration Application.

38. At the preliminary hearing on 15th March 2021 EJ Brewer under the heading "ET3s" ordered that the respondent shall file with the Tribunal a **single response which shall incorporate** an amended response in case 2600301/2020 and a response in case 2601914/2021." (emphasis added)

39. Paragraph 3.1 of the Respondent's Amended Grounds of Resistance stated:

> *"The Tribunal is respectfully referred to the response dated 20 July 2020 and amended 5 November 2020 filed in claim no 2601914/2020 (the "Original Response"), which set out the background of the Claimant's employment with the Respondent up to the date of 2 June 2020 and responded to the Claimant's claims for discrimination which formed the basis of that claim. The Tribunal is requested to read this document alongside the Original Response."*

40. It can be seen from this wording that the Respondent expressly referred to the Response dated 20th July 2020, which is the ET3 in the First Claim. The ET3 form itself incorporated the Grounds of Resistance at Box 6.1. Further, at paragraph 3.3, it recorded that "*this response*" was filed pursuant to "*being granted leave by the Tribunal to file one consolidated response*". The Brewer CMO and the Respondent's approach was clearly consistent with Rule 16(3) of the ET Rules 2013, which provided:

> *"A response form may include the response to more than one claim if the claims give rise to common or related issues of fact or law or if it is otherwise reasonable for the responses to be made on a single response form."*

41. That Amended Response was accepted by the ET, and no issue was raised by the Appellant or any of the EJs the case came before thereafter. To interpret the Response in any other way would be to impose a wholly artificial severing of the ET3 form from the incorporated Grounds of Resistance to take a technical point in an attempt to defeat a claim that has been fully defended.

42. Insofar as any reliance is placed upon the Court of Appeal decision in **Sud v. London Borough of Ealing** [2011] EWCA Civ 995, which had been referred to at the hearing before HHJ Auerbach on 28 September 2023, it is wrong to do so. In that case the Court of Appeal considered the position where two claims had been considered together by the ET in practical,

if not technical terms, concluding that there were two separate claims before the ET. The **Sud** case has subsequently been distinguished by the EAT in **Shah v. Home Office** [2024] EAT 21, at [14]-[15], in circumstances where the claims had been formally consolidated by the Tribunal. In the present case the Tribunal expressly noted at paragraph 4 of the judgment that the claims had been consolidated.

43. In **Sainsbury's Supermarkets Limited v. Clark** [2023] ICR 1169 the Court of Appeal considered an appeal concerned with the operation of Rules 10 and 12 of the ET Rules 2013 in circumstances where the EC Certificate number entered on the claim form related to a certificate that did not name all the individuals on the claim form.

44. Bean LJ gave the only reasoned decision, with which Nugee and Asplin LJJ agreed. At paragraph 42 of his judgment, Bean LJ considered the position if a claim was not rejected and stated:

> *"If the tribunal staff reject a claim under Rule 10 or an employment judge rejects it under Rule 12, the claimant may seek reconsideration on the basis that either the decision to reject was wrong or the notified defect can be rectified: see Rule 13(1). But if no such rejection occurs it is not in my view open to a respondent to argue at a later stage that the claim should have been rejected. The respondent's remedy is to raise any points about non-compliance with the Rules in their form ET3, or in appropriate cases at a later stage, and to seek dismissal of the claim under Rule 27 or apply for it to be struck out under Rule 37."*

45. If the Respondent were wrong in its primary position, Ms Thomas submitted in the alternative that the position in relation to Rule 17 of the ET Rules 2013 must be analogous to the position in relation to Rules 10 and 12 as set out in paragraph 42 in **Clark** above. Further, to treat it any other way would be to deprive the Respondent of the provisions of Rule 19 of the ET Rules 2013, which allowed for reconsideration of a decision to reject a response due to a breach of Rule 16 on the basis that the defect could be rectified.

46. At the outset of his Judgment in **Clark,** Bean LJ noted that it was worthwhile to stand back and look at the broad picture, describing the issue taken at [3] as *highly technical applications lacking any substantive merit*'. The Respondent submitted that the same could well be said of this appeal.

47. In the further alternative, Ms Thomas relied upon the provisions of Rule 21 of the ET Rules 2013, which provided:

> *"21.—(1) Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a*

> *reconsideration is outstanding, or where the respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.*
>
> *(2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone…*
>
> *(3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge.*

48. The wording of Rule 21, cited above, makes plain that even where a response has been rejected, it does not follow that a claimant automatically succeeds in his complaint or that a respondent can never take part in the proceedings thereafter.

49. Here, there was no rejection of the defence in the Second Claim. The amended Response was accepted on 9 July 2021, and no application or issue was raised either by the Appellant or the Tribunal pursuant to Rule 28 of the ET Rules 2013. At no point prior to the final hearing and judgment of the Tribunal was any issue raised by the Appellant about the issue of a Second Claim response or any strike out application on that basis pursuant to Rule 37. It is noted that the Appellant did not issue a strike out application at the Tribunal until 26 October 2023.

50. Ms Thomas also submitted that there was no error in EJ Hutchinson's approach to the remitted Reconsideration Application.

51. At the time of the Reconsideration Application and the Second Reconsideration Decision, Rule 1(3)(b) of the ET Rules 2013 defined a judgment as

> *"being a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines—*
>
> *(i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs);*
>
> *(ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue)."*

52. The sole ground for reconsideration under Rule 70 of the ET Rules 2013 is "*where it is necessary in the interests of justice*" to do so. On reconsideration the tribunal may confirm the original decision, vary it or revoke it. Under the provision of Rule 70, if revoked it may be taken again.

53. In considering whether it is in the interests of justice to reconsider a decision, the tribunal has a broad discretion, but it must be exercised having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation, see **Outasight VB Ltd v. Brown** [2015] ICR D11, EAT. The tribunal must give effect to the overriding objective, set out in Rule 2 of the ET Rules 2013, including the matters specified in (a) to (e) therein.

54. The fact that the employment tribunal can *only* reconsider a decision if it is necessary to do so in the interests of justice was emphasized in the EAT case of **Ebury Partners UK Ltd v. Mr. M Acton Davis** [2023] EAT 40. HHJ Shanks observed at [24]:

> *A central aspect of the interests of justice is that there should be finality in litigation. It is therefore unusual for a litigant to be allowed a 'second bite of the cherry' and the jurisdiction to reconsider should be exercised with caution. In general, while it may be appropriate to reconsider a decision where there has been some procedural mishap such that a party had been denied a fair and proper opportunity to present his case, the jurisdiction should not be invoked to correct a supposed error made by the ET after the parties have had a fair opportunity to present their cases on the relevant issue.*

55. The Respondent submitted that a decision not to reject the Response was not a judgment which in itself would be capable of reconsideration, because it was not a matter capable of finally disposing of a claim. The ET were not asked to consider any issue as to the validity of the Respondent's response in the course of the final hearing and accordingly the issue formed no part of its judgment.

56. Further the Reconsideration Application itself raised no issue as to the validity of the response in the Second Claim. It is not an error for an ET not to address issues which are not raised as part of a reconsideration application when determining whether it has any reasonable prospects of success. That position is compounded in the present case where EJ Hutchinson was considering the application on remission from the EAT where it had been expressly ordered that the EJ was not to consider any correspondence which post-dated the Reconsideration Application. At the time that Order was made on 24 October 2023, the Appellant was aware of the potential issue regarding the ET3, it having been raised by HHJ Auerbach at the hearing on 28 September 2023. Ms Thomas said it was unclear how it is said EJ Hutchinson was necessarily aware of the issue of compliance with Rule 16 in any event.

Discussion and conclusion on Grounds 1 and 2 of the 2024 Appeal

57. I begin by adopting the observations at Bean LJ in the **Clark** case, that this is a highly technical

appeal. Here there has been a full hearing of both claims on the merits, lasting some 10 days. At all material times the Appellant has been in no doubt of as to the nature of the defences raised to both his claims. Evidence was called and the case was fully argued. The Appellant failed in all respects. Now he wants to administer a "knock-out" blow and have a retrospective victory substituted by default. That is hardly an attractive stance.

58. On 2 March 2021, EJ Clark ordered that there be a stay of the presentation of the ET3 in relation to the Second Claim until the Preliminary Hearing on 15 March 2021 and stated that "*Order to be made at that hearing for ET3 to be filed and served in respect of all claims*." This raises the question, what exactly did EJ Brewer order on 15 March 2021? Under the heading "**ET3s** , the words he used were:

> *"…the respondent shall file with the Tribunal a single response which shall incorporate an amended response in case 2600301/2020 and a response in case 2601914/2021."*

59. Looking at the wording of Rule 16(3) of the ET Rules 2013, set out at paragraph it was certainly possible for the response to include a response to more than one claim if the claims "*give rise to common or related issues of fact and law or if it is otherwise reasonable for the responses to be made on a single response form".*

60. EJ Clark clearly thought that the provisions of Rule 16(3) had been satisfied, when he stated in his reasons that the claims "appear to give rise to common or related issues of fact and law and it is in accordance with the overriding objective that they are heard together." There is no requirement for there to be a formal consolidation for this to happen, although paragraph 4 of the ET Decision stated that consolidation had taken place.

61. In my judgment, EJ Brewer was not dispensing with the need for an ET3 to be served but instead permitting both the First and Second Claims to be defended in a compendious response in accordance with Rule 16(3), as had been envisaged by EJ Clark. I do not accept the Appellant's submission that it is plain from the heading "**ET3s**" that the Brewer CMO required the Respondent to submit ET3 forms for both claims. There was no suggestion made at the time by the Appellant's legal representative who attended the hearing before EJ Brewer that this was the position. There was no protest made at any time thereafter by or on behalf of the Appellant prior to the hearing of the claims that the Respondent had failed properly to comply with the Brewer CMO, the ET having accepted the document filed by the Respondent on 9 July 2021.

62. Furthermore, as the Respondent pointed out, paragraph 3.1 of the document served pursuant to that Order, entitled "Respondent's Amended Grounds of Resistance", as set out in full at

paragraph 39 above, referred to *"the response dated 20 July 2020 and amended 5 November 2020 filed in claim no 2601914/2020 (the "Original Response"),* and concluded by stating "*The Tribunal is requested to read this document alongside the Original Response*." The express reference to the "*response dated 20th July 2020"* is clearly to the ET3 in the First Claim, which incorporated the Grounds of Resistance at Box 6.1. Additionally, paragraph 3.3 of the document served noted that "this response" was filed pursuant to "*being granted leave by the Tribunal to file one consolidated response*". In these circumstances, I accept the Respondent's submission that the Brewer CMO and the Respondent's approach was clearly consistent with Rule 16(3) of the ET Rules 2013. I find that was a course that EJ Brewer was entitled to and did take when making the Brewer CMO.

63. It follows that I find that there was no breach of Rule 16 of the ET Rules 2013 in the way the Respondent responded to the Second Claim and there has been a validly served response to the Second Claim, as the ET accepted on 12 July 2021, after the Respondent's response was filed.

The Respondent's alternative case

64. If I am wrong on this first issue, I turn to the alternative case advanced by the Respondent, namely that, if there was a breach of Rule 16 of the ET Rules 2013, in the absence of a rejection of the response, the Respondent was properly allowed to defend the proceedings.

65. In my judgment, the acceptance by the ET of the Respondent's response filed pursuant to the Brewer CMO, and the failure of the Appellant to make any protest about its validity or to make a Rule 37 strike out application <u>before</u> the substantive hearing of the Second Claim, is a matter of some significance. Since such an application has not been made by the Appellant in a timely manner, it has deprived the Respondent of the benefit of provisions of Rule 19 of the ET Rules 2013, which, had it resulted in a rejection of the defence, would have allowed for reconsideration of a decision to reject a response due to a breach of Rule 16, on the basis that the defect could be rectified. Instead, the Appellant actively participated in the preparation for the hearing of the Second Claim and the hearing of the same and permitted the Respondent to go to the time and expense of preparing and fighting the Second Claim, on which it succeeded.

66. In such circumstances, in my judgment, by his conduct described in paragraph 65 above, the Appellant has waived his right to complain of the breach of the Rule 16 of the 2013 Rules. Further, given the change of position of the Respondent in reliance on the Appellant's conduct by actively participating in the preparation of the defence of both claims and defending the those claims at a lengthy hearing, together with the detriment that would be suffered by the Respondent in not being able to rely on Rule 19 now, the Appellant is now estopped by his

conduct from raising any breach of Rule 16 of the ET Rules 2013.

67. I would add that if the Appellant could have successfully brought a strike out application in relation to the Amended Grounds of Response, it would only have been limited to that aspect of it which related to the Second Claim, there being a valid ET3 in relation to the First Claim. Applying the provisions of Rule 21 of the ET Rules 2013, there would not have been an automatic default judgment in favour of the Appellant. Instead, an EJ would have to consider and apply the provisions of Rule 21(2) and (3), in determining what further steps should be taken, including the further participation (if any) of the Respondent in further hearings.

Should EJ Hutchinson have addressed the alleged failure to comply with Rule 16 in relation to the Second Claim when dealing with the Reconsideration Application?

68. Stated shortly, I accept the Respondent's submissions in this regard. The Reconsideration Application itself raised no issue as to the validity of the response in the Second Claim. The ET were not asked to consider any issue as to the validity of the Respondent's response in the course of the final hearing and, accordingly, the issue formed no part of its judgment.

69. Insofar as the matter was raised by the Appellant in his Rule 37 strike out application dated 26 October 2023, that application was not before EJ Hutchinson. He was considering the Reconsideration Application on remission from the EAT, where HHJ Keith had expressly ordered that he was <u>not</u> to consider any correspondence which post-dated the Reconsideration Application.

70. In my judgment, there was no error of law in the approach taken by EJ Hutchinson.

Did REJ Swann err in law in postponing consideration of the Appellant's strike out application pending the outcome of the Rule 3 (10) determination?

71. In my judgment, REJ Swann was perfectly entitled to make this case management decision, and it discloses no error of law on his part. Further, had there been an adjudication on the Appellant's strike out application, I find that application would have failed for the reasons set out above.

The 2022 Appeal

72. I now turn to the permitted ground in relation to the 2022 Appeal, namely the challenge to the ET's finding that there was a 100% contributory fault on the Appellant's part and 100% Polkey reduction to be applied. As stated in paragraph 25(1) above, the basis on which HHJ Beard granted permission to appeal was because it was arguable that the ET had failed properly to explain why the total deduction was applied in respect of both the basic and compensatory award elements and why, when it recorded procedural failings, there was a 100% prospect of

dismissal.

The relevant legal principles

73. There was little dispute between the partes as to the relevant legal principles. Such differences as there were, were ones of emphasis, rather than principle.

74. The amount of the compensation for unfair dismissal to which an applicant shall be entitled is set out in s123(1) of the Employment Rights Act 1996 (the "**ERA**"), namely:

> *"...such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."*

75. Under s123(6) of the ERA:

> *"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

76. In **Nelson v BBC (No.2)** [1979] IRLR 346, the Court of Appeal set out three factors that must be present for the compensatory award to be reduced for contributory fault:

(1) The claimant's conduct must be culpable or blameworthy;

(2) It must have actually caused or contributed to the dismissal;

(3) The reduction must be just and equitable

77. In **Steen v ASP Packaging** UKEAT/23/13, the EAT held that an employment tribunal must consider the following four questions:

(1) What was the conduct which was said to give rise to possible contributory fault?

(2) Was that conduct blameworthy, irrespective of the employer's view on the matter?

(3) For the purposes of section 123(6), did the blameworthy conduct cause or contribute to the dismissal?

(4) If so, to what extent should the award be reduced and to what extent would it be just and equitable to reduce it?

78. In relation to the basic award, s122(2) of the ERA provides:

> *"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."*

79. The wording of the tests under s122(2) and 123(3) of the ERA are not identical, if a tribunal concludes that the dismissal was to any extent caused or contributed to by any action then it *shall* make a reduction to the *compensatory award*, the question then being what the proportion should be. In relation to the basic award s 122(2) does not require that the conduct caused or contributed to the dismissal. However, the requirement of culpable and blameworthy conduct applies equally to a reduction under the basic award.

80. Although there is no requirement for a Tribunal who decides to make a deduction for contributory conduct to make deductions in identical proportions, in **Royal Society for the Prevention of Cruelty to Animals v. Cruden** [1986] ICR 205 the EAT held that it was only likely to be in exceptional circumstances that the deductions under the headings of compensatory and basic award would differ. There is, however, an obligation on an ET specifically to consider whether there should be reduction of a basic award. A failure to do so will amount to an error of law - see the EAT decision in **Frew v Springboig St John's School** UKEATS/0052/10 at [30].

81. The Appellant also relied upon the EAT decision of **Lewis v Governing Body of Tai'rgwaith Primary School** [2022] EAT 16 in this regard. In that case the grounds of appeal asserting that there had been a failure properly to carry out a separate consideration of the two heads of awards failed. HHJ Barklem stated at [28]:

> *"It is true that paragraph 56 is pithy, and that did cause me some initial concern. However, on a fair and careful reading it is evident that the ET had very much in mind the principles set out in* ***Steen****. Each of the four questions is answered in the paragraph, and the separate considerations which are required to be given as between the basic and compensatory awards correctly set out. I agree with Mr Walters that the case law is such that similar deductions from both heads of award is the norm, and it would normally be only when there is a divergence that a detailed explanation would be expected. Paragraph 56 cannot be read in isolation. It encapsulates the ET's detailed reasons for reaching the conclusions that it did. It cannot be said that the reasons for the separate decisions that each award should be reduced by 100% cannot be gleaned from the ET's reasons read as a whole. For that reasons*[sic]*, grounds 1 and 5 also fail."*

82. In **Steen**, Langstaff J stated at [17]:

> *"17. It needs to be emphasised that a finding that a claimant is 100% responsible for his dismissal and that it would be just and equitable to reduce compensation by that amount, and a finding that for the same reasons presumably it would be just and equitable to reduce the amount of the basic award to nil, is an unusual finding. It is however a permissible finding: see the decision of the Employment Appeal Tribunal in Lemonious v Church Comrs (unreported), a judgment handed down on 27 March 2013 by a panel presided over by Langstaff J, President."*

83. At [18]-[24] of the judgment in **Steen,** the EAT addressed the question of the particular need to give reasons for the finding of a reduction of 100%, because it is an exceptional course – see **Sulemanji v Toughened Glass Ltd** [1979] ICR 799 and **Allen v Queen Mary University London** UKEAT/0265/15 at [26] . However, at [24], Langstaff J said:

> *"It is therefore all too often an error of law that a tribunal simply states its conclusion as to contributory fault and the appropriate deduction for it without dealing with the four matters which we have set out earlier in this decision. We add for the comfort of Tribunals that there is no need to address these matters at any greater length than is necessary to convey the essential reasoning. Of its nature a particular percentage by which to reduce compensation, if that is how the tribunal seeks to address the word "proportion" in section 123(6) , or by a particular fraction, if that is how the tribunal wishes to address it, is not susceptible to precise calculation, but the factors which help to establish a particular percentage should be, even if briefly, identified. As the cases we have cited show, this is all the more so where compensation is entirely extinguished by that which the tribunal concludes a Claimant actually did which was blameworthy and which made it in its view just and equitable to reduce both the basic award under section 122(2) and separately the compensatory award under section 123(6)."*

84. This is reflective of the classic proposition of Bingham LJ in **Meek v. City of Birmingham District Council** [1987] IRLR 250 in relation to the extent to which a tribunal has to give its reasons. In **Royal Society for the Protection of Birds v. Croucher** [1984] ICR 604 at 609-610, the EAT stated:

> *"We have to remind ourselves also of the important principle that decisions are not to be scrutinised closely word by word, line by line, and that for clarity's and brevity's sake industrial tribunals are not to be expected to set out every factor and every piece of evidence that has weighed with them before reaching their decision; and it is for us to recall that what is out of sight in the language of a decision is not to be presumed necessarily to have been out of mind. It is our duty to assume in an industrial tribunal'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; and that has been well-established by the decisions of the Court of Appeal in Retarded Children's Aid Society Ltd. v. Day [1978] I.C.R. 437 and in the recent decision in Varndell v. Kearney & Trecker Marwin Ltd. [1983] I.C.R. 683."*

85. Additionally, in **Polkey v AE Dayton Services Ltd** [1987] UKHL 8, [1987] ICR 142 the House of Lords held that the compensatory award may be reduced or limited to reflect the chance that the claimant would have been dismissed in any event and that the employers' procedural errors accordingly made no difference to the outcome.

86. In **Wilkinson v Driver and Vehicle Standards Agency** [2022] EAT 23, the EAT, Lord Fairley, sitting alone, held at [54] that, whilst a tribunal is always competent to make both **Polkey** and contributory fault deductions, (see **Rao v Civil Aviation Authority** [1994] ICR 495):

> *"…if that course is to be taken, it is necessary clearly to explain why both deductions are being made and what is the basis for each. Importantly, it is also necessary to avoid any element of double-counting of the same factors in a way which is unfairly detrimental to the Claimant* (**Rao**; **Granchester Construction (Eastern) Limited v. Attrill** EAT 0327/12; and **Dee v. Suffolk County Council** EAT 0180/18).*"*

The Appellant's submissions

87. The Appellant submitted that from an analysis of paragraphs 314-325 of its Decision, the ET appeared to have made a reduction to the basic award on account of his conduct purely as a matter of course on a seemingly automatic basis. That was an impermissible approach.

88. From a proper reading of paragraphs 317, 319 and 320 of the ET Decision, it is clear that the ET found that:

    (1) the Appellant was not given the opportunity to prepare for his dismissal meeting;

    (2) there was no process followed in dismissing the Appellant;

    (3) the determination had been made by the Respondent prior to the dismissal meeting.

89. Within these findings the ET did not make any determination that the fault lay 100% with the Appellant. The ET found fault with the Appellant's approach but did not determine that the fault was only with the Appellant. In **Ladrick Lemonious v Church Commissioners** [2013] UKEAT/0253/12, the EAT accepted that it could not be just and equitable for the reduction to be 100% if the dismissal was caused not only the Appellant's conduct but by other factors. On the basis of the Tribunal's findings, the Appellant submitted it was clear that there are other

factors that they consider relevant to his dismissal, some of those actions being that of the Respondent.

90. There is no evidence upon which the Tribunal could determine that a lesser sanction would not have led to the Appellant changing his approach or way in which he displayed any views he held and that a lesser sanction would have been what the Respondent would have adopted had it acted fairly. In **Whitehead v Robertson Partnership** EAT 0333/01, HHJ Richardson, stated at [19]:

> *"…The question is not whether if Dr Colville had conducted a disciplinary hearing, that hearing would have been fair, but whether if there had been a fair disciplinary hearing the result would still have been a dismissal."*

91. The Appellant contended that it is not determinative of the matter that he was found not to have modified his view "***at a*** *formal disciplinary hearing*" as per paragraph 322 of the ET Decision (emphasis added). Rather, the test is what would have happened post the implementation of a lesser sanction after a formal disciplinary hearing i.e. when the Appellant had had the chance to reflect.

92. He criticised the ET for taking into account the Respondent's view that he "*showed a total lack of appreciation and recognition for all of the steps that were taken to support him*" [paragraph 322 of the ET Decision] and submitted that this was contrary to stages 2 and 3 of **Steen**. Further, the views held by him at the ET hearing were not determinative as the ET appeared to have found at paragraph 322, nor was this a sufficient basis on which to form a conclusion, because by this stage he had already been dismissed on an undeniably unfair procedural basis. Additionally, the ET failed to take into account any mitigating factors, including his length of service, his clean formal disciplinary record and his exemplary attendance record, which the **Frew** decision at [26] shows should have been taken into account.

93. When considering the Polkey reduction, the Appellant submitted that the ET had to look at the chances of the actual employer, rather than a hypothetical reasonable employer, dismissing the employee which has to be assessed. This required consideration of the Respondent's likely thought processes and the evidence that would have been available to it. Accordingly, the Appellant submitted that it was not open to the Tribunal to find that, given how well it deemed the Respondent to have treated the Appellant, that the Respondent would have moved straight to dismissal as the ultimate sanction. As such this represented a misapplication of **Wilkinson v Driver and Vehicle Standards Agency** [2022] EAT 23. In short, it was contended that, even in gross misconduct cases, it is not inevitable that dismissal would fall within the range of

reasonable responses and be the outcome - see the Court of Appeal decision in **Brito-Babapulle v Ealing Hospital NHS Trust** UKEAT/0358/12. In essence, the Tribunal used their opinion of how the Appellant presented in respect of purportedly unrelenting views to determine that the Appellant would have been dismissed in any event. This was not information that the Respondent would have had at the time of the dismissal, having never given the Appellant the opportunity to address the reasons for his dismissal. Neither was it indicative of how he may have acted in the dismissal meeting had he understood that his job was at risk. He contended that the ET made "a leap into the unknown".

94. The ET should have set its reasoning out in full and failed to do so. Instead, it summarily stated that because he had views about two colleagues, he would have been dismissed fairly.

95. The Appellant also contended that the ET also erred in not avoiding any element of double-counting of the same factors when making a 100% *Polkey* deduction and a finding of 100% contributory fault. The Appellant contended that the natural reading of paragraphs 322-323 of the ET Decision show that this is indeed what the ET did, and as such **Wilkinson (**above) and **Samuel Smith Old Brewery (Tadcaster) v Marshall and another** UKEAT/0488/09 have been misapplied. The ET did not explain how the different tests applied in making their determination. In **Singh v Glass Express Midlands Ltd** 2018 ICR D15, the EAT indicated that even allowing for the fact that the ET had found a claimant to be entirely responsible for his dismissal, it should have proceeded to carry out the further assessment as to whether it was just and equitable to reduce his compensatory award for unfair dismissal to nil. Although it might be said that the ET had already concluded that the Appellant's conduct merited a reduction in the basic award under S.122(2) ERA, **Steen** made clear that it is not inevitable that the percentage reductions in respect of the basic and compensatory awards should be the same. It was not permissible simply to move from an explanation of its approach to the Polkey reduction and dealing with the issue of mitigation to a sweeping conclusion that '[*t]he actions of the claimant caused his dismissal and it is just and equitable to reduce his compensatory award to nil'*.

96. The Appellant therefore submitted in conclusion that the 2022 Appeal be allowed and that he should be given the opportunity to argue that having been being found to have been unfairly dismissed, his case did not meet the draconian sanction of having all compensation wiped out in its entirety.

The Respondent's submissions

97. Ms Thomas submitted that it was necessary to read the ET's reasons as a whole – see the **Lewis**

decision. Once this was done, the reasons for reaching the amount of the Polkey reduction of 100% and for a finding of a 100% contribution by the Appellant to his dismissal were clear.

The Polkey Reduction

98. Ms Thomas pointed to the identification of the Polkey issue at paragraph 56 of the ET Decision. In the conclusion section of the ET Decision, it had made the following key findings:

(1) Through his behaviour the Appellant had made the working relationship untenable [paragraph 314];

(2) The Respondent had taken considerable steps to try and repair the relationship, through meetings in 2019 and 2020, but the Appellant had refused to build bridges or put the past behind him. Instead, he maintained his position that he was right and refused to compromise. This put the Respondent in an invidious position. It had to take account not just of the Appellant's position, but also that of his managers, one of whom, his line manager, Ms Muthana, the Appellant had accused of being a "*two-faced snake*" and the other, Mr Peplow, the Respondent's Quality Assurance Manager, a "*sociopathic bully*", phrases which the Appellant stood by in his evidence to the ET [paragraph 200 and 314];

(3) In the circumstances, the ET found that there had been a fundamental and irretrievable breakdown in the working relationship and in trust and confidence. The reason for the dismissal was found to be "some other substantial reason" and the Respondent had a proved that was a fair reason for the dismissal [paragraph 315]

(4) Although the ACAS Code of Practice on Discipline and Grievance did not apply to dismissals for some other substantial reason, the Respondent was not absolved of following a fair procedure [paragraph 316]. Accordingly, he should have been told that the Respondent was considering dismissing, thus enabling him to prepare and make submissions at the meeting on 16 December 2020, at which he was dismissed [paragraph 317];

(5) However, the Appellant was unrepentant in his views about Ms Muthana and Mr Peplow Manager and the way in which he perceived he had been treated. He maintained those views in the Tribunal and would not have departed from them at a formal dismissal meeting [paragraph 322]

99. These key findings were supported by the earlier factual findings made earlier by the ET, which included the following:

(1) "We were struck by how the claimant appeared, on this and other occasions, to think that he knew better than his managers how to deal with the situation. When his managers did not take the action that he wanted them to take he would not let the issue drop." [paragraph 111];

(2) At paragraphs 120-121 of the ET Decision an example is given of an email exchange which took place in August 2018 between the Appellant and Ms Muthana. At paragraph 122 the ET found that:

> *"This exchange was, in our view, typical of the way in which the claimant responded to Ms Muthana, for whom he appeared to have no respect or consideration. He did not appear to recognise or accept that her role was to manage. On more than one occasion he challenged her authority publicly and was critical of her. This caused the relationship between the claimant and Ms Muthana to become very strained and Ms Muthana found it very difficult to manage him."*

(3) At paragraph 141 of the ET Decision, the ET found that on 14 March 2019 the Appellant made an allegation to Mr Heusler, the factory manager that he was being intimidated by Mr Allcock, who was employed as a Production Manager, and other managers. He produced no evidence in support of this allegation. He also wrote to Mr Heusler on 12 March 2019 stating his belief that "*his relationships with the head of department and his line manager [Ms Muthana] were damaged beyond repair."*

(4) At paragraph 154-155 of the ET Decision, in relation to the consideration by Mr Peplow of a PIP grievance lodged by the Appellant against Ms Muthana, the ET found that the approach taken by Mr Peplow was "*entirely reasonable*" and the allegation "*is a further example of the claimant being unwilling to accept management decisions or put things behind him.*";

(5) At paragraph 167 of the ET Decision, in relation to the Appellant's performance review for 2019 conducted by Ms Muthana, the ET recorded that Ms Muthana was extremely anxious going into this meeting. It was therefore agreed that she would be accompanied by a member of the Respondent's HR team, and that the Appellant would have his union representative present. It concluded:

> *"The fact that third parties were present during what was essentially a normal management meeting was in our view a strong indication that the relationship between Ms Muthana and the claimant had broken down. Ms Muthana was scared of the claimant given his behaviour towards her in the past."*

(6) Paragraphs 176-179 of the ET Decision referred to a meeting with the Appellant and senior management on 6 May 2020 which was intended to assist the Appellant to improve his performance. The meeting lasted an hour at the end of which the Appellant stated: *"We're going nowhere at the moment."* At paragraph 180, the ET concluded:

> *"Everyone in the meeting has invested their time and energy in supporting the claimant and trying to find a solution. Their intentions were entirely good. The claimant showed no appreciation whatsoever of this and was unwilling to move forward – yet again."*

(7) When hearing a grievance that the Appellant had brought against Mr Peplow about the latter's conduct during a call on 9 September 2020, Mr Drago, a Filing and Packing Production Manager, found that there was no evidence of wrongdoing, bullying or harassment towards the Appellant by Mr Peplow. Paragraph 202 of the ET Decision recorded that:

> *"Mr Drago was concerned by the amount of anger and resentment that the claimant held, and that the claimant had told him that his relationships with Ms Muthana and Mr Peplow had completely broken down. He formed the view that the claimant was now reacting to any interaction with Mr Peplow negatively, and that the relationships could not be fixed."*

(8) The Appellant appealed the dismissal of his grievance. It was heard by a Mr Favrin who was new to the factory. In his appeal, the Appellant "*accused Mr Peplow of acts of violence, alleged that the respondent was supporting the process of discrimination, harassment and victimisation at all levels of the organisation, and named a large number of people who he said were guilty of discrimination, including six members of the respondent's HR team and two union officials. He also referred to psychological violence and 'demanded' an investigation*." [paragraph 203 of the ET Decision];

(9) At a meeting with Mr Favrin, the Appellant told him that:

> *"...he thought the trust was broken, that there was a hostile working environment, and that the relationships and trust between himself and both Ms Muthana and Mr Peplow were broken beyond repair. He accused Ms Muthana of 'backstabbing' and referred to Mr Peplow as a sociopath, a bully and a psychopath….that he had been recording conversations and that there was 'no return' from the breakdown in his relationship with his line manager." [paragraphs 206-207 of the ET Decision];*

(10) Paragraphs 211-215 of the ET Decision dealt with Mr Favrin's decision in relation to the grievance appeal. He concluded that the Appellant's relationships with his managers were at a point where they could not be repaired, that whatever the Respondent did it would

not be able to repair the relationship, unless it did exactly what the Appellant wanted, and the situation would continue to escalate. In Mr. Favrin's view, the problem would not be resolved if the Appellant moved to a different department, because wherever he worked the same issues would arise. Mr Favrin believed that for the Appellant, the problem was the Respondent itself. He saw the covert recording of conversations as further evidence of the breakdown in trust and relationships;

(11) As can be seen from paragraphs 216-217 of the ET Decision, Mr Favrin decided to dismiss the Appellant due to the to the breakdown in relationships between the Appellant and his colleagues, in particular his managers. He decided to inform the Appellant of his dismissal after he had told him of the outcome of the grievance appeal. The Appellant was therefore invited to a meeting on 16th December. He was offered the right to be accompanied at that meeting. He did not know that the meeting would be a dismissal meeting;

(12) Paragraph 226 of the ET Decision recorded that the Appellant was offered a right of appeal from the decision to dismiss but did not exercise it.

100. Ms Thomas submitted that, looking at these findings, it is clear that the ET set out clearly their reasoning as to why had a fair procedure been followed there was there was a 100% chance that the Appellant would have been dismissed. In particular, as was made clear at paragraph 322 of the ET Decision, the Appellant was unrepentant about his adverse opinion of Ms Muthana and Mr Peplow. He had expressed the same view at the ET hearing, as he had at the grievance appeal hearing to Mr Favrin, as indeed he had done before that. The ET were entitled to reach the opinion that he would not have departed from those views at a formal dismissal hearing.

The 100% Reduction for Contributory Conduct

101. Ms Thomas submitted that the ET's reasoning as a whole explains their conclusion of 100% contribution. At paragraphs 261-263 of the ET Decision, the ET set out the separate statutory provisions for a compensatory award and a basic award and the three-fold test in the Court of Appeal decision in **Nelson**.

102. Paragraph 323 under "**Conclusions**" summarises the Appellant's "*culpable*" and "*blameworthy*" conduct on which the ET relied, namely making accusations against his managers and others within his organisation, which the ET found were unfounded and his behaviour towards Mr Peplow and Ms Muthana over a lengthy period of time, which is set out in detail earlier in its Decision. In her written submissions, Ms Thomas relied upon the findings at paragraphs 102, 122, 133, 196, 200, 203 and 223-225 of the ET Decision. The ET concluded

paragraph 323 by saying "*He showed a total lack of appreciation and recognition for all of the steps that were taken to support him*." , and at paragraph 324, the ET found: "*This behaviour directly caused the respondent to dismiss him. We therefore make a 100% finding of contributory conduct*."

103. Finally in their conclusions, the ET expressly stated that the 100% reduction applied to both the basic and the compensatory awards, as they were entitled to do – see **Royal Society for the Prevention of Cruelty to Animals v. Cruden** and the **Lewis** decisions referred to in paragraphs 80 and 81 above .

104. Given the analysis carried out above, the Respondent submitted that the three-fold **Nelson** test had been satisfied and there was no error of law in the ET's judgment.

Discussion and conclusion in relation to the 2022 Appeal

105. In addition to the passages from the ET Decision which have been relied upon by the parties, in my view it is also important to have regard to the following paragraphs of the ET Decision, because they put in context a number of the primary findings and inferences drawn.

Paragraphs 123 and 124 stated:

> *"123. We found Ms Muthana and Mr Peplow to be credible and honest witnesses, who treated the claimant with patience, respect and dignity. We were particularly impressed by what we heard during the covert recordings made by the claimant, when they did not know that they were being recorded and thought that they were alone with the claimant. Both of them came across during those conversations as professional, calm and reasonable, in the face of unreasonable behaviour (and, in the case of Mr Peplow, allegations of harassment).*
>
> *124. Where there is a conflict of evidence between the claimant and Ms Muthana and Mr Peplow we prefer their evidence to that of the claimant. It was clear to us that the claimant holds very strong views which he would not move from, and which in our view affected his recollection and interpretation of events. He was not willing to accept that there could be another version or interpretation of events than his own."*

106. I therefore turn first to the issue of contributory fault, to see whether looking at the ET Decision as a whole, the **Nelson** and **Steen** tests have been satisfied.

107. I accept that the concluding paragraphs of the ET Decision at paragraphs 322-324 are a very short summary and on their face alone do not appear to satisfy the requirements of the particularity required by the **Nelson**, **Steen** and **Wilkinson** decisions. I accept, however, the Respondent's submission, that it is necessary to read the ET Decision as a whole – see **Lewis**

at [28] and also **London Probation Board v Lee** UKEAT/0493/08, a decision of HHJ Hand QC, to which the Appellant referred. The Appellant accepted and indeed relied upon this point.

108. First – has the ET identified the conduct which has given rise to the possible contributory fault? There is no doubt that on a fair reading of the ET Decision the Appellant's "culpable and blameworthy conduct", defined in paragraph 264 by reference to **Nelson** and referred to in paragraph 323, is fully particularised in the earlier part of the ET Decision. Stated shortly, the ET found that the Appellant refused to accept the authority of his managers, in particular his line manger Ms Muthana and Mr Peplow. He conducted himself towards them in a wholly unreasonable manner over a period of years, to the extent that by January 2020 Ms Muthana was scared of him [paragraph 167]. At paragraph 122, the ET find that the Appellant "*appeared to have no respect or consideration.*" for Ms Muthana. The ET in essence found that the Appellant made their lives a misery. I set out here some examples. He thought he knew better than them how to deal with the situation and when they did not take the action he wanted, he would not let the issue drop and refused to put matter behind him and focus on the future. [paragraphs 111 and 155]. He made serious and offensive allegations against them which were unjustified [paragraphs 126 and 200]. He accused Mr Peplow of harassing him even though he was polite, calm and supportive of the Appellant [paragraph 196]. The relationship between with them was beyond repair, as the Appellant himself acknowledged on more than one occasion [paragraphs 141 and 207] and the ET found that this was solely the fault of the unreasonable behaviour of the Appellant [paragraphs 122, 133, 155, 178, 199, 200], in contrast to the behaviour of the Ms Muthana and Mr Peplow who treated the Appellant with patience, dignity and respect [paragraph 123, see also paragraphs 155, 180, 196].

109. Secondly, was that conduct blameworthy, irrespective of the employer's view of the matter? In its findings and reasoning referred to in paragraph 108 above, there is no doubt that the ET found that the Appellant's conduct was objectively culpable and blameworthy. That decision was reached irrespective of the Respondent's view on the matter.

110. For the purposes of section 123(6) of the ERA, did the blameworthy conduct cause or contribute to the dismissal of the Appellant? For the reasons stated succinctly in paragraph 323, the ET found that it did. To the extent that further detail is necessary, it is to be found in the earlier part of the Decision, culminating in the findings at paragraph 314 and 315.

111. To what extent should the award be reduced and to what extent would it be just and equitable to reduce it? The ET addressed this at paragraph 323 and 324 of the ET Decision. The ET found that the Appellant's behaviour over a lengthy period of time was culpable and blameworthy and

that behaviour directly caused the Respondent to dismiss him. They evaluated his conduct, having earlier referred to "*his length of service, his previous work in the quality role and his undoubted capabilities*" in paragraph 66 of the ET Decision and his exemplary attendance record at paragraph 188 of the ET Decision. Apart from the procedural errors on the part of the Respondent, to which I will turn when considering the Polkey ground of appeal, there is no criticism of the Respondent's staff at all. On the contrary, they are praised for their reasonable behaviour under trying circumstances [paragraphs 123, 155, 180 and 196]. Reading the decision in its entirety, I therefore reject the Appellant's submission that the ET did not find that the fault lay only with the Appellant. Applying **Ladrick Lemonious v Church Commissioners,** there were no other factors. Whilst it is correct that the ET did not say in terms in paragraph 324 that it would be just and equitable in all the circumstances to make a reduction of 100%, given its findings that he was solely to blame for the situation, and the express reference to "just and equitable reduction" requirement at paragraph 57 of the ET Decision, the earlier findings referred to at paragraphs 108-110 above and the conclusion at paragraph 323 of the ET Decision, it is clear that the ET regarded the reduction of 100% as a just and equitable reduction in all the circumstances.

112. Did the ET err in making the finding at paragraph 325 that the Appellant was not entitled to either a basic or a compensatory award? It is clear from the wording that they did consider the basic award, and they applied the 100% reduction to it. Did that amount to an error of law? In my judgment, it did not. There has not been a failure to mention the basic award, as in **Frew.** In **Royal Society for the Prevention of Cruelty to Animals v. Cruden,** the EAT held at that it was only likely to be in exceptional circumstances that the deductions under the headings of compensatory and basic award would differ. As HHJ Barklem said in the **Lewis** case at [28]:

> *"… the case law is such that similar deductions from both heads of award is the norm, and it would normally be only when there is a divergence that a detailed explanation would be expected. Paragraph 56 cannot be read in isolation. It encapsulates the ET's detailed reasons for reaching the conclusions that it did. It cannot be said that the reasons for the separate decisions that each award should be reduced by 100% cannot be gleaned from the ET's reasons read as a whole."*

113. In my judgment, it is not at all surprising that, given the earlier findings, the ET should have decided to adopt a similar approach to the reduction of the basic award as it did to the compensatory award. Similar considerations came into play. It is only if there was a divergence that a detailed explanation would be expected.

114. I therefore dismiss the 2022 appeal insofar as it relates to the 100% reduction in compensation

for both compensatory and basic award.

115. I turn therefore to the 100% Polkey reduction.

116. First, it is clearly a decision that the ET were entitled to reach – see the **Wilkinson** and **Rao** decisions.

117. Applying the **Whitehead** decision, at paragraph 322 of the ET Decision, the ET answered the correct question, namely, "if there had been a fair procedure would the result still have been a dismissal?"

118. Has the reason for the 100% Polkey reduction been satisfactorily explained? In my judgment it has. The reasoning is that the Appellant was unrepentant in his adverse views of Ms Muthana and Mr Peplow. If he had been given the chance to prepare and make representations to Mr Favrin, would it have had made a material difference, given his intransigent perception of them and how he had been treated to that date? The ET formed the view that he would not have departed from his earlier views. In doing so, the ET looked at the way he had behaved at the hearing and his maintenance of those hostile and insulting views towards his managers [see paragraph 200 of the ET Decision]. In my judgment, it was perfectly entitled to reach that conclusion on the evidence before them. They were not taking "a leap into the unknown", but evaluating his conduct at trial, taken in conjunction with his behaviour up until 16 December 2020. I reject the submission by the Appellant that such conduct is not indicative as to how he may have behaved had he known his job was in jeopardy. The ET were entitled to reach the conclusion that, on the balance of probabilities, it was.

119. There was no element of "double counting" in the ET doing this. Making a 100% Polkey deduction on the basis that, had there been a fair procedure, the result would still have been a dismissal because the Appellant would not have said or done anything differently, given his earlier and subsequent conduct, is not the same as making a 100% deduction for the contributory misconduct itself.

120. I therefore dismiss the ground of appeal based on the 100% Polkey reduction.

121. For the reasons given above, the appeal fails on all the grounds that were permitted to proceed to a hearing and is dismissed.