

Neutral Citation Number: [2026] EAT 133

Case No: EA-2025-SCO-000093-AW

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh, EH3 7HF

Date: 7 September 2026

Before:

ANDREW BURNS KC
DEPUTY JUDGE OF THE HIGH COURT

Between:

MS JACQUI MCLEAN

- and -

VALLOUREC OIL & GAS UK LTD

Appellant

Respondent

David James (instructed by Miller Samuel Hill Brown LLP), for the **Appellant**
Deborah Miller, Shepherd and Wedderburn LLP, for the **Respondent**

Hearing date: 27 August 2026

JUDGMENT

SUMMARY

DISCRIMINATION ARISING FROM DISABILITY; UNFAIR DISMISSAL; POLKEY

The Claimant was a financial assistant, who worked from home because of a mobility-related disability. She was dismissed for redundancy. The ET upheld her complaint of unfair dismissal for lack of consultation but dismissed claims of direct disability discrimination and discrimination arising in consequence of disability under section 15 **Equality Act 2010**. It further concluded that she would have been dismissed in any event, affecting whether she suffered any compensable loss.

Allowing the appeal, the EAT held that the ET had erred in dismissing the section 15 claim. The ET found that the burden of proof shifted to the Respondent but accepted its contention that the Claimant had been dismissed because it believed she was incapable of performing an alternative role. On the ET's findings, that belief only arose after the dismissal decision had already been taken as the alternative role only became vacant during the notice period. The ET therefore relied upon a factor which could not logically have been an operative cause of the dismissal when finding that the Respondent had discharged the burden of proof. It reached a conclusion inconsistent with its findings of fact. The EAT substituted a finding that the section 15 claim succeeded.

The EAT also allowed the appeal against the ET's **Polkey** findings. Although the Respondent had pleaded **Polkey**, the issue was neither included in the agreed list of issues nor raised for determination at the liability hearing. The parties were not given an opportunity to address it in circumstances when evidence and submissions could have affected what was essentially a 100% **Polkey** reduction. The ET's determination of the issue therefore breached principles of natural justice. The question of **Polkey** was remitted to the same ET at the quantum hearing.

ANDREW BURNS KC, DEPUTY JUDGE OF THE HIGH COURT:

1. This is an appeal against the judgment of an employment tribunal (“ET”) sitting in Glasgow on 3 to 5 June 2025, Employment Judge Campbell sitting alone. The Judgment, sent to the parties on 16 June 2025, held that the Claimant’s claims for unfair dismissal succeeded, but that her disability discrimination claims under s.13 and 15 of the **Equality Act 2010** failed and were dismissed.
2. The Claimant appealed by a Notice of Appeal dated 28 July 2025. By order dated 20 October 2025 His Honour Judge Beard permitted two grounds of appeal to this full hearing.
3. The appeal arises out of the redundancy and dismissal of the Claimant who was a homemaker for reasons relating to her mobility disability. The first question is whether the ET erred in finding that the Respondent discharged the reversed burden of proof with evidence that the reason for dismissal was its belief that the Claimant was not capable of performing an alternative role. The second ground is whether the ET erred by making **Polkey** findings without giving the parties an opportunity to address it on that issue.

Findings in Fact

4. The ET made findings in fact. The Respondent operated oil and gas pipe sales, service and former manufacturing facilities in the UK. The Claimant was employed by the Respondent from 28 October 2019 until 11 April 2025. She worked as a Financial Assistant (or Accounts Assistant), principally carrying out invoicing and debt collection functions. She worked permanently from home after a flexible working request in September 2021. The Claimant suffered from fibromyalgia, a disability which restricted her mobility and made commuting and office working difficult. She was able to perform her duties effectively from home and that this arrangement caused no operational difficulties for the Respondent. She was in a finance team comprising a Finance Director (who worked in France), a Finance Manager, a Finance Accountant, a Financial Controller and the Claimant as the Financial Assistant.

5. In early 2024 the Respondent's parent group required cost reductions and organisational restructuring. The Respondent's management proposed closing its manufacturing operations, ceasing production activities, consolidating remaining operations in Aberdeen, closing its Bellshill and Bridge of Don facilities, and making approximately 23 employees redundant. The proposal was announced to employees on 30 August 2024.

6. Collective consultation took place with recognised trade unions between 30 August and 19 September 2024. The Claimant was invited to the collective briefing. The restructuring proposal involved the removal of both the Claimant's role and the Financial Controller role, with their duties being redistributed, principally to the Finance Accountant role. The Claimant's role was provisionally selected for redundancy.

7. The Claimant attended a first individual consultation meeting on 27 September 2024. She was informed that her role was at risk of redundancy and was advised of three vacancies, none of which were suitable alternatives. She challenged the redundancy proposal on the basis that her duties remained necessary. The Respondent explained that those duties would be absorbed into remaining roles. The Claimant asked whether she was disadvantaged because she worked from home, but was informed that this was not relevant at that stage.

8. A second consultation meeting took place by video on 15 October 2024. By that stage the decision had been taken and the Claimant was informed that her role would be removed and no suitable alternative employment had been identified. The Respondent confirmed that her employment would terminate on 20 December 2024. The dismissal decision was confirmed by letter dated 16 October 2024.

9. The Claimant appealed and a hearing took place on 5 November 2024 before the Respondent's managing director. The appeal outcome, issued on 7 November 2024, upheld the redundancy decision, found that the removal of the Claimant's role and redistribution of her duties to the Finance Accountant role were justified, that the process had been conducted fairly and that there had been no discrimination.

10. Following the appeal, Ms Stuart, the Finance Accountant, resigned. She had been on sickness absence and declined to relocate to Aberdeen. The Respondent decided to fill the resulting vacancy externally because the Respondent's Finance Director did not consider the Claimant capable of performing the Finance Accountant role. The Claimant was informed and a replacement was recruited to commence in January 2025. Until then the Respondent engaged a temporary worker and agreed with the Claimant to extend her notice period until April 2025 in order to maintain finance operations and provide a handover to the new Finance Accountant. The Claimant's employment accordingly continued until 11 April 2025, when her dismissal took effect.

Conclusions of the ET

11. The ET concluded that the reason for the Claimant's dismissal was redundancy within the meaning of section 139 of the **Employment Rights Act 1996**. The ET rejected the Claimant's contention that her disability or her requirement to work from home was the reason for dismissal, finding that the sole or main reason was redundancy and the dismissal formed part of a wider exercise aimed at reducing costs and restructuring the finance function.

12. The ET found significant deficiencies in the consultation process. The Claimant was not adequately informed about the proposed future structure of the finance team, the destination of her duties, or the rationale for the decisions affecting her role. By the time of the second individual consultation meeting, the decision to dismiss had effectively already been taken and there was little left upon which to consult meaningfully.

13. The ET found that although it accepted that the Respondent thought that the Claimant was incapable of carrying out the Finance Accountant role, this was not explained during the redundancy process. The ET did not make express findings about the selection pool or whether the Finance Accountant should have been in the same pool as the Claimant. However considering the redundancy process as a whole, the ET held that the Respondent had fallen short of the standard of reasonable consultation and information required by section 98(4) of the **Employment Rights Act 1996**. The

dismissal was therefore unfair.

14. In relation to direct disability discrimination under section 13 of the **Equality Act 2010**, the ET accepted that the Claimant was disabled by reason of fibromyalgia but held that there were no facts from which it could infer that she had been treated less favourably because of her disability. The ET found that those involved in the redundancy process knew only that the Claimant required home working because of restricted mobility and that her disability created no operational difficulty. The Respondent viewed her as a capable and diligent employee and there was no evidence that adverse treatment arose from her disability itself. The ET concluded that a hypothetical comparator who required home working for reasons unrelated to disability would likely have been treated in the same way. The direct discrimination complaint was therefore rejected.

15. Turning to the section 15 **Equality Act 2010** claim, the ET did not make a clear self-direction about the legal principles or test to be applied. It cited no case law. It accepted that the Claimant's need to work from home arose in consequence of her disability and that there were sufficient facts to require the Respondent to explain the reason for the unfavourable treatment. The Claimant believed she had been 'edged out' because she needed to work from home.

16. The ET decided that the burden shifted to the Respondent. In paragraph 46 of its judgment, the ET said:

"The onus therefore shifted to the respondent to answer the section 15 claim. However, it was able to do so with the evidence which it led and which was accepted by the tribunal. This was that the claimant was simply not believed to be capable of undertaking the revised Financial Accountant role. That belief was not to do with her inability or unwillingness to relocate to Aberdeen or work in the office there, but because she did not have the experience required of the role with the exception of the parts of her own role which would be incorporated within it. Although the respondent did not establish that it was absolutely essential that the holder of the role either be qualified as a chartered accountant or working towards that, the requirement was based on the types of skills the holder of the role would need. Ms Stuart met that requirement and so did her replacement, but the claimant did not. The claimant may have been right when she asserted that she could have acquired at least some of the skills with training, but the respondent genuinely did not think so. It was not obliged to put that to the test. In short therefore, the claimant was unfavourably treated by being dismissed but the evidence suggested more strongly that it was based on experience and qualifications and not any physical limitations."

17. The complaint of discrimination arising in consequence of disability accordingly failed.

18. In its conclusions the ET said that even if the Respondent had provided more information about the proposed finance structure at an earlier stage and afforded the Claimant a more meaningful opportunity to make representations and propose alternatives, the Respondent would still have concluded that she was unable to perform the remaining Finance Accountant role. The ET considered that the Respondent genuinely regarded the Claimant as lacking the skills, experience and qualifications required for that role and would therefore have reached the same substantive outcome of dismissal. The ET also found her home working would have been a factor in being dismissed in any event, saying at paragraph 49:

“...There may have been discussion about whether she would relocate to Aberdeen. She would have said no, as she confirmed in evidence, and would have argued for the role being performed remotely from her home. The respondent would have insisted that with a smaller team of two, the holders of the finance roles needed to be office based so as to work more effectively with each other and colleagues in other teams. This was the evidence of Mr Graham. The respondent would have been entitled to take that view. And it would be largely academic as she was considered unable to perform the role in terms of skills, experience and qualification.”

19. The Claimant’s employment had been extended by approximately four months beyond the original termination date in order to provide cover during the absence of the Finance Accountant and to assist with the handover to her replacement. The ET considered it difficult to identify any realistic scenario in which a fair consultation process would have resulted in the Claimant remaining employed for longer than she in fact did. It concluded in paragraph 51:

“Therefore, although this hearing was not concerned with calculating remedy, the tribunal’s finding is that despite the claimant’s dismissal being procedurally unfair she would have been fairly dismissed no later than she actually was. This necessarily affects whether she has any claimable losses.”

Grounds of Appeal

20. Ground 1 states: “...the Tribunal erred in its approach to the question of whether her dismissal arose in consequence of her disability. The Tribunal’s findings in relation to the Claimant’s

unfair dismissal claim make clear that the consultation with the Claimant was inadequate and by the point of the second meeting there was little left on which to consult because the decision had been made (see paragraphs 34 – 39). At that time, the post of Finance Accountant was not vacant. The Claimant’s suitability or experience to take up that post was not in issue, and, as the Tribunal found, not something that was actually explained or discussed at the time. It is argued therefore that this could not have been the operative factor in the Respondent’s mind when making the decision to make the Claimant redundant. The Tribunal erred in focusing its decision on the Respondent’s position as to why it said the Claimant could not do the Finance Accountant post, when the question is whether the decision to dismiss was due to something arising in consequence of disability. The decision to dismiss the Claimant had been made previously and was not made only in relation to whether or not the Claimant could or could not have taken up the Finance Accountant post, given there are other options the Respondent could have considered, but it was found not to be open to other alternatives.

21. Ground 2 was not permitted to proceed. Ground 3 appeals:

“...the findings of the Employment Tribunal at paragraphs 49 – 51 of the judgment ... that she would have been dismissed in any event no later than she was and that she should effectively therefore not be entitled to any compensation for loss of earnings.” On the basis that the hearing was on liability only and “...this point was not one which it was contained in the list of issues as to be decided at this hearing (which list is set out at paragraph 7 of the judgment), and the Claimant did not understand that this was an issue on which the tribunal would be making a finding.”

22. Ground 3 also argues that the ET approached the **Polkey** issue wrongly focussing on whether the Claimant could have done the role of Finance Accountant – the potential alternative employment and not considering other options and failing to adopt the proper loss of a chance approach.

Submissions of the Parties

23. On Ground 1 the Claimant points out that at the time of the decision to dismiss on 16 October 2024 Ms Stuart the Finance Accountant had not yet resigned. Her job was ongoing and so nobody gave any thought to whether the Claimant could do her job. Mr James highlights that the ET found

that this issue arose later during the Claimant's notice period.

24. Mr James on behalf of the Claimant says that the ET's decision that the reason was her capability to the other role is a logical impossibility. It was impossible for the Respondent's reason to be its belief that she was incapable of performing the Finance Accountant role. The dismissal decision was confirmed on 16 October 2024 and this was substantially before the Finance Accountant resigned, her role became vacant and the Respondent decided to recruit externally after deciding that the Claimant was not suitable for that role. It could not have been an operative cause of the dismissal as the issue only arose later. The ET took into account something that was irrelevant as it was not and cannot have been a factor at the time. The Respondent therefore failed to discharge the burden raised by the Claimant that her need to work from home as a consequence of disability was a significant or material influence on the dismissal.

25. On Ground 3 the Claimant submits that the ET erred in making findings which effectively amounted to a 100% **Polkey** deduction particularly when it was not an issue for the liability hearing and without a fair opportunity to make submissions. Mr James also says that the ET's **Polkey** conclusion is dependent upon its error on the section 15 claim. He says that the ET made inconsistent findings that dismissal was irrelevant to homeworking yet in a hypothetical fair process, found the Respondent would have rejected continued homeworking and still dismissed her.

26. Ms Miller for the Respondent submits that the appeal impermissibly challenges findings of fact about the reason for the dismissal. The ET was entitled to conclude that the reason for dismissal was solely that the Claimant was selected for redundancy because her duties could be absorbed into the Finance Accountant role and because she lacked the skills, experience and qualifications required to perform that combined role. The Claimant was in a "pool of one" but her suitability for the Finance Accountant role was in fact considered at the time of dismissal because the restructuring proposal depended upon merging her duties into that role. The ET expressly rejected the suggestion that disability or homeworking played any part in the redundancy decision.

27. On **Polkey** Ms Miller submits that the ET was entitled to make findings as the Respondent

had pleaded reliance on **Polkey** and so the Claimant knew it was an issue even though it was not in the list of issues or raised by the ET at the hearing. She says that although the parties were not given an opportunity to address the issue, there was only one answer as the Claimant was redundant, lacked the qualifications and experience necessary for the only remaining role, so that a 100% **Polkey** conclusion was inevitable. The ET's observations concerning the Claimant's inability to relocate to Aberdeen as a home worker were unnecessary and irrelevant as the Claimant would not have been appointed to the redesigned role in any event.

Legal Principles

28. Section 15 of the **Equality Act 2010** deals with discrimination arising from disability and it provides:

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

29. The section requires a claimant to show both that there was something arising in consequence of disability and that any unfavourable treatment arose because of that something: **Pnaiser v NHS England** [2016] IRLR 170 at paragraph 31. It does not matter in which order these questions are addressed.

30. The question whether there is something arising in consequence is an objective test and question of fact to be assessed robustly in each case where 'arising in consequence of' can describe a range of causal links not only a proximate cause. The question whether it arose because of that requires an inquiry as to the decision maker's subjective decision-making process.

31. A tribunal must determine what caused the impugned treatment - what was the reason for it. The focus at this stage is on the reason in the mind of the alleged discriminator. There may be more than one reason or cause. 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 or cause. Motives are irrelevant – the focus is on the reason or cause. The proper approach was usefully summarised by HHJ Tayler in **Bodis v Lindfield Christian Care Home** [2024] EAT 65.

32. In **York City Council v Grosset** [2018] ICR 1492 the respondent dismissed the claimant because he showed a film which was the relevant “something” for the purposes of analysis. The Court of Appeal contrasted that with:

“*Charlesworth v Dransfelds Engineering Services Ltd* (unreported) 12 January 2017 (Simler J), in which the reason the claimant was dismissed was redundancy, so that no liability arose under section 15 of the EqA, even though the redundancy of the claimant’s job happened to be brought into focus by the ability of the employer to carry on its business in periods when he was absent from work due to a disability. In that case, therefore, the relevant “something” relied upon by the claimant was the claimant’s absence from work due to sickness, but he was not dismissed because of that but because his post was redundant.”

33. A tribunal may reduce the compensatory award to reflect the chance that the employee may have been dismissed in any case at some point (**Polkey v AE Dayton Services Ltd** [1988] ICR 142). A reduction (often, but not always, in percentage “loss of a chance” terms) should be made after the calculation of the employee's loss, credits for any payments on termination and mitigation.

34. The EAT can only interfere with findings in fact if they are perverse. This is a high threshold where there is 'an overwhelming case' made out that the ET reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached (**Yeboah v Crofton** [2002] IRLR 634).

35. The EAT must not comb through a set of reasons for hints of error and fragments of mistake or comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons (**Anya v University of Oxford** [2001] ICR 847). Where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal should be slow to conclude that it has not applied those principles and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. The

decision must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. The ET is not required to identify all the evidence relied on in reaching its conclusions of fact (**DPP Law Ltd v Greenberg** [2021] IRLR 1016).

36. A tribunal must observe natural justice and give parties an opportunity to comment on issues to be decided. **Neale v Hereford and Worcester County Council** [1986] ICR 471 held that it is:

“potentially unfair for a tribunal to rely upon matters which occur to members of the tribunal after the hearing and which have not been mentioned or treated as relevant without the party, against whom the point is raised, being given the opportunity to deal with it unless the tribunal could be entirely sure that the point is so clear that the party could not make any useful comment in explanation.”

37. This applies to a tribunal’s unannounced consideration of contributory fault or **Polkey** (see **Market Force v Hunt** [2002] IRLR 863) and is particularly important in the case of a party litigant (**Hasan v Tesco Stores** [2016] All ER (D) 201 (Jun)).

Discussion and Conclusions

Ground 1

38. The ET correctly identified the relevant issue as “...was this treatment because of something arising in consequence of her disability? The claimant relies on her restricted mobility and requirement to work from home as the ‘something arising’.”

39. In paragraph 41 the ET correctly held that the initial onus of establishing preliminary facts to support such complaints fell on the claimant. In paragraph 45 the ET found that she was treated unfavourably and had discharged the initial burden. The ET was satisfied that her need to work from home was ‘something arising in consequence of’ the disability. There is no appeal against any of those findings.

40. The burden therefore was on the Respondent to prove on the balance of probabilities, that the dismissal was in no sense whatsoever because of the need to work from home. The only matter put forward by the Respondent to discharge that burden was that “the claimant was simply not

believed to be capable of undertaking the revised Financial Accountant role.”

41. The ET accepted that explanation as recorded in paragraph 46 but also referred to it in paragraph 28 where the ET finds that the sole or main reason for dismissal was not the something arising from disability. However that draws on the same factual conclusion and does not itself answer the discrimination issue about whether the need to work from home was a material influence on the dismissal.

42. The ET’s findings about direct discrimination in paragraph 44 that there was no link to disability in any discernible way do not answer the section 15 question and do not assist. The ET found that the Claimant’s “disability in itself did not create any issues for the respondent”. Those findings are focused on whether there was evidence that the disability was a material influence on the dismissal decision, not whether the homeworking – the “something arising from” – played a part in the decision to dismiss.

43. The ET’s finding in fact about when the Respondent formed a belief (paragraph 20) suggests that this was first considered after Ms Stuart resigned. The ET says:

“Mr Favrichon took the decision to recruit externally for a replacement and did not believe that the claimant was capable of fulfilling the role. He emailed the finance team to tell them about Ms Stuart leaving and his intention to find a replacement. The claimant did not reply then, or at any other time, to suggest to him that she might like to be considered for the role, and that she believed she could perform it.”

44. This appears to be confirmed in the reconsideration reasons of the ET which say:

“Mr Favrichon told the claimant that he was going to recruit externally for the role, and that she did not suggest she would be interested herself. The claimant knew it was more senior, technical and well-paid.”

45. The ET says that it accepted that the role required qualifications that the Claimant did not have and preferred the Respondent’s evidence on that point. That is consistent with the employer considering the Claimant’s capability and qualifications at a time when it was considering who could replace Ms Stuart. That again suggests that this could only have been some time after the decision to dismiss and cannot have been at the time of the dismissal decision.

46. The ET noted at paragraph 38 that:

“it was the respondent’s position in the hearing that the claimant would not have been capable of carrying out the Finance Accountant role, whether through a lack of qualifications or experience or both, this was not explained to her during the process. She was told in her appeal meeting that it would not be fair or reasonable to ‘shift their responsibilities downward’ to the claimant and that ‘legally, roles can be assigned upwards but not downwards, so we couldn’t make the Financial Accountant redundant and reassign those responsibilities to you’

47. That suggests that although much was made on her inability to do the role during the ET hearing itself, the matter was not raised during the dismissal process and when raised after dismissal on appeal there was no consideration of whether the Claimant was capable of doing Ms Stuart’s role as the Respondent believed that roles could not be “assigned downwards”.

48. Ms Miller submits that the question of the Claimant’s suitability for the position of Financial Accountant was in issue at the time of the dismissal but just not recorded in the documentary evidence or expressly in the ET’s findings in fact. She pointed to references to ‘bumping’ in the appeal notes. However those notes show that the Respondent was talking about bumping or transferring the Claimant’s tasks to the more senior role with spare capacity. It does not show that the Respondent ever considered whether to bump Ms Stuart out to avoid dismissing the Claimant or suggest that the Respondent considered whether the Claimant could do Ms Stuart’s job.

49. Ms Miller’s references to the Claimant being in a pool of one also suggests that there was no need for the Respondent to consider whether she could do Ms Stuart’s role because she was not in the pool. This is not on all fours with the **Charlesworth v Dransfelds Engineering** case as the relevant “something” relied upon by the claimant is not the thing that precipitates the redundancy; the relevant something is a factor causing dismissal following the redundancy.

50. In my judgment the ET made findings that the Respondent considered the Claimant incapable of doing Ms Stuart’s role after she resigned and then confused the timeline by accepting that later reason as applying at the date of dismissal. That is inconsistent with its findings in fact and illogical. The ET judgment read fairly as a whole shows that the Claimant’s incapability to do the Financial Accountant role cannot have been any part of the Respondent’s reason for dismissing in

October 2024 as the issue of filling that role had simply not arisen yet. The ET took into account an irrelevant consideration and reached a perverse decision that no reasonable tribunal could have reached. I therefore allow Ground 1.

Ground 3

51. The List of Issues which was reproduced in the ET's judgment did not contain the **Polkey** issue and the Claimant had no notice that the issue would be considered and determined. The judgment states the list of issues was reproduced in the judgment "subject to some changes agreed" at para 3 and says at para 7 that it was adapted "to reflect matters as they stood at the beginning of the hearing". The ET recorded that the hearing would be about liability only at paragraph 5. The Respondent pleaded that it was taking the **Polkey** point but it was not discussed between the parties that it would be any part of the liability hearing. The Respondent accepted that neither party made submissions on **Polkey** as it was not raised by the ET.

52. That was a clear breach of natural justice. The ET should have given the parties notice that it was considering and determining the **Polkey** issue. The Respondent says that the outcome on **Polkey** was inevitable as she was in a pool of one and there was no alternative employment as there was no vacancy until Ms Stuart resigned. However my finding on Ground 1 means that there would have been more for the ET to consider when looking at whether dismissal was inevitable. Both parties could have made useful submissions and may have called more evidence. Crucially the Claimant could have submitted that she would not have inevitably been dismissed as a home worker and because she would not move to Aberdeen, as that would have been potentially discriminatory. There was a potential for the Claimant to make points on **Polkey** had she been given a chance. The outcome of a 100% chance of dismissal within the same 4 months was not inevitable. Deciding the issue without hearing from the parties was therefore a clear error of law. Ground 3 is also allowed.

Disposal

53. The Claimant points out that the Respondent has only put forward one potential reason and once that falls away it has failed to discharge the burden of proof. The Respondent seeks remission to the same ET but as there is no other potential reason for the ET to consider on remission, that would be a waste of time. The Respondent also says that objective justification was pleaded and would need to be determined on remission. However the pleading and List of Issues shows that its aims were to make redundancies due to challenging North Sea market conditions and the reduction of the UK's oil and gas activities. This is not arguable justification for a potentially discriminatory dismissal. Paragraph 49 of the judgment on **Polkey** considers the Respondent would have insisted that the team of two needed to be office based, but that does not take disability (or reasonable adjustments) into account and falls short of a potential justification defence which could be properly raised on remission.

54. The Respondent also points out that its knowledge of disability under s.15(2) **Equality Act 2010** was raised in its ET3 response form as a defence although it was omitted from the list of issues agreed at the outset of the hearing. The potential defence is that s.15 (1) discrimination “does not apply if [the Respondent] shows that [the Respondent] did not know, and could not reasonably have been expected to know, that [the Claimant] had the disability.”

55. The ET made findings in fact relevant to the Respondent's knowledge of the disability. In paragraph 5 it found that a flexible working request to work from home permanently was granted by the Respondent. That flexible working arrangement was linked to the disability and is likely to have given rise to actual or at least constructive knowledge of the disability. This is consistent with the finding at paragraph 44 that although the “individuals within the respondent involved in the redundancy process did not know the full details of her medical condition. It was more generally known that she needed to work from home because of restricted mobility.” The ET then goes on to find that “although that could have been enough for her to be treated a certain way because of her disability, the direct discrimination claim failed on other grounds. In circumstances where the ET found sufficient knowledge of the matters giving rise to the direct discrimination claim, it is difficult

to see how a defence under section 15(2) could arise.

56. I follow the approach of **Jafri v Lincoln College** [2014] IRLR 544 remembering that I should be robust and not timorous in its application. Once the Respondent's only suggested reason for reversing the burden of proof has fallen away there is only one realistic outcome and I do not need to remit this claim to the ET. I substitute a finding that the section 15 claim that the dismissal arose in consequence of the Claimant's need to work from home is upheld and succeeds.

57. In relation to the disposal of Ground 3, I must remit the **Polkey** assessment of what would have happened had there not been an unfair dismissal tainted by disability discrimination. The ET needs to assess what percentage chance there was of the Claimant retaining her role had the Respondent been prepared to permit her to continue to work from home and reorganised the duties of the finance team with the finance manager doing or supporting the Claimant on those tasks that she was (at least initially) unable or unqualified to do. Mr James says this must be a fresh tribunal but Ms Miller submits that it is proportionate and appropriate to remit to the same ET.

58. I have followed the approach taken in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. Proportionality suggests remission to the ET as the increased costs of a hearing before a fresh tribunal may be disproportionate to the amounts at stake. There has not been an inordinate passage of time - the ET should remember much about the case. There is no substantial risk of pre-judgment and I have not concluded that the first hearing was wholly flawed or completely mishandled. The ET made an illogical finding on one issue and expressly a premature view on **Polkey**, but the rest of the judgment is carefully considered. The ET will be able to take a professional approach and reconsider in light of the s.15 discrimination finding and an award which flows from that. It is not an impossible task to reassess **Polkey**. The ET may take a loss of a chance approach having regard to the Claimant's lack of qualifications and may be open to a finding that there was a prospect that, with appropriate support and training, she could have developed some of the skills required during her extended notice period. A wider reorganisation may have raised a chance of her retaining employment. It can then assess that chance in percentage terms in considering overall quantum. I

therefore remit the **Polkey** issue to the quantum hearing before the same ET.