Appeal No. UKEAT/0160/18/OO

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDINGS, 7 ROLLS BUIDING FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 21 June 2019

Before

HER HONOUR JUDGE EADY QC

MR C EDWARDS

MRS M V MCARTHUR BA FCIPD

MR P MEFFUL — APPELLANT

MERTON AND LAMBETH CITIZENS ADVICE BUREAU — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR ANDREW WATSON
(of Counsel)
Direct Public Access

For the Respondent

MR BERNARD WATSON
Legal Consultant
Instructed by:
Peninsula Business Services Ltd
The Peninsula
Victoria Place
2, Cheetham Hill Road
Manchester
M4 4FB

SUMMARY

UNFAIR DISMISSAL – Reason for dismissal including substantial other reason.

UNFAIR DISMISSAL – Automatically unfair reasons

VICTIMISATION DISCRIMNATION – Dismissal - Other forms of victimisation

DISABILITY DISCRIMINATION – Disability - Disability related discrimination

The Claimant was disabled by reason of a shoulder impairment. He was dismissed by the Respondent, purportedly by reason of redundancy. In bringing ET proceedings relating to his dismissal, the Claimant contended that the suggestion that this was a redundancy was a sham: there had been no diminution in the Respondent's need for employees to carry out the kind of work he had been employed to do – work to be carried out by the new position of Business Manager; the real reason for his dismissal was his disability or something arising therefrom (the time he had taken off on sick leave) or was a protected disclosure or protected act.

The ET accepted, contrary to the Respondent's case, that (i) the Respondent had knowledge of the Claimant's disability, and (ii) he had made a protected disclosure and performed a protected act when pursuing a grievance in November 2011. Given the Respondent's concession that the Claimant should have been allowed to trial the Business Manager role, the ET found the dismissal was unfair, although it still concluded that redundancy had indeed been the reason for the dismissal and the Claimant had not been dismissed because of his disability, or something arising therefrom, or for a reason related to his protected disclosure or protected act. In reaching that decision, the ET took into account the Claimant's failure to cross-examine two of the Respondent's witnesses and his failure to put a positive case to those witnesses as to real reason for his dismissal. The Claimant appealed.

Held: *allowing the appeal*

The ET had held that the Respondent's concession – that the Claimant ought to have been permitted to trial the Business Manager position (as suitable alternative employment) - was not

relevant to the question as to the real reason for the dismissal; it was seen as only going to the broader question of fairness. The ET had, however, failed to engage with the Claimant's case that the redundancy exercise relating to his position was a sham – his work would continue to be undertaken by the new Business Manager. The ET had not demonstrated that it had tested the Respondent's reasons for dismissal in the light of the statutory definition (see section 139 **Employment Rights Act 1996 –** "the ERA 1996") and had made no finding as to who had taken the decision to dismiss, and when. Specifically, the ET had failed to engage with the question whether the Business Manager position was in fact substantially the same as the Claimant's post, such as to counter the suggestion that there was a diminishing need for employees to carry out work of the particular kind the Claimant was employed to do. Even if it had concluded that the position was not really the Claimant's role, the fact that the Respondent had not permitted the Claimant to trial the role - when it was conceded before the ET this should have been done – raised the question whether this was really by reason of his protected act, his protected disclosure or because of his disability (whether directly or under section 15 **Equality Act 2010**). As for the Claimant's failure to cross-examine the Respondent's witnesses, this could not be said to be material given the ET had rejected their evidence in respect of their knowledge of the Claimant's protected disclosure and had found that the Respondent had known (whether directly or constructively) of the Claimant's disability; although the Claimant had not put a positive case as to the reason for his dismissal to either of these witnesses, that did not detract from the fact that the burden of establishing the reason (for the purpose of section 98 **ERA 1996**) lay with the Respondent.

HER HONOUR JUDGE EADY QC

Introduction

1. The key question raised by this appeal is whether the Employment Tribunal ("the ET") made proper findings as to the reason for the dismissal. This is our unanimous Judgment on this question, in which we refer to the parties as the Claimant and Respondent, as below.

2. This is the Full Hearing of the Claimant's appeal against the reserved Judgment of the London (South) Employment Tribunal (Employment Judge Elliott, sitting with members Ms Dengate and Ms Brown on 17-20 October 2017; "the ET"), sent out to the parties on 25 October 2017, by which the ET upheld the Claimant's claim for unfair dismissal under section 98 **Employment Right Act 1996** ("ERA 1996"), but dismissed his complaints of disability discrimination and victimisation (brought under the **Equality Act 2010** – "the EqA") and of automatic unfair dismissal because of a protected disclosure (section 103A of the **ERA 1996**).

3. The Full Merits Hearing before the ET took place following two earlier EAT Judgments in these proceedings that related to the question whether the Claimant was a disabled person for the purposes of the **EqA**. We do not need to revisit those earlier appeals; the hearing with which we are concerned proceeded on the basis that the Claimant was a disabled person by reason of a shoulder impairment.

4. The Claimant's current appeal was permitted to proceed to a Full Hearing after a hearing under **Rule 3(10) of the EAT Rules 1993** before His Honour David Richardson. It was at that hearing that Mr Andrew Watson first appeared for the Claimant, acting under the

Employment Law Advice and Assistance Scheme (ELAAS). The specific grounds that were then permitted to proceed are set out below.

The Background Facts

5. The Claimant worked for the Respondent from 19 January 2004 until 15 August 2012 as a Specialist Service Manager. He managed a specialised team of caseworkers and the Respondent's Legal Services Commission contacts. In his role, the Claimant was one of three members of the Respondent's senior management team, the other two being the Operations Manager and the Chief Executive. The Respondent had a board of trustees; at the relevant time this included Ms Tina Harris, Ms Pauline Dawkins and Mr Anthony Nicholas.

6. Prior to his employment with the Respondent, the Claimant was in a relationship with a Ms FP, who later became the Chief Executive of the Respondent. Neither the Claimant nor Ms FP were employed by the Respondent at the time of their relationship but it was the Claimant's case that, when they were both employed by the Respondent, Ms FP treated him unfavourably in a number of different ways because of the ending of the relationship.

7. In 2011, the Claimant raised a grievance regarding the way Ms FP was treating him. Contrary to the evidence led by the Respondent, the ET accepted that, at the grievance hearing on 17 November 2011, it was apparent that he was complaining of bullying and harassment by FP and had made a link between this and their past relationship. The ET accepted that this amounted both to a protected act, for the purpose of the Claimant's victimisation claim, and a protected disclosure, for the purpose of his whistleblowing claim.

8. On 16 December 2011, Ms FP went on sick leave and did not return until June 2012. She ultimately left the Respondent's employment on 31 December 2012. During Ms FP's absence on sick leave, the Respondent engaged an interim Chief Executive, Mr Stuart Davidson. He remained in that role until the end of June 2012.

9. The ET recorded that the Respondent was an organisation in financial difficulty. In December 2010 the staff had been put at risk of redundancy, although that redundancy exercise was never implemented. In late 2011 the Respondent failed two out of three key audits and was in a financial crisis, facing risk of administration or insolvency if it did not implement changes to its budget and carry out a restructure to address the multiple organisational failings.

10. In February 2012, Mr Davidson started a restructuring exercise and, on 10 February 2012, wrote to the Claimant about this. A consultation process followed and the Claimant attended a meeting on 12 March 2012, at which he suggested that he should either be assimilated into what was proposed to be a new position – that of Business Manager – or into the more junior position of Volunteer Development Manager. Specifically, the Claimant considered the Business Manager position would be suitable alternative employment because it amalgamated his position of Specialist Services Manager and that of the Operations Manager. He considered it unfair and unreasonable that he should have to undergo competitive selection for the Business Manager position.

11. During the consultation period, the Claimant was on leave in March and then went off sick in April 2012 and did not return until July. The ET accepted that the Claimant was off work for this period with a disability-related illness.

12. Further attempts were made to consult with the Claimant during this period and he was invited to attend for an interview for the Business Manager position. The Respondent considered, however, that the Claimant was failing to engage with the restructuring process. On 23 May 2012, Mr Davidson wrote to the Claimant informing him that he had not been shortlisted for either the Business Manager or the Volunteer Development Manager positions.

13. On 28 May 2012, there was a Redundancy Panel Discussion which the ET found was attended by the Respondents' trustees, Mr Chapman, Mr Gold and Ms Dawkins with Mr Davidson attending as note-taker. For completeness we note that the Claimant does not accept that there was proper evidence that Ms Dawkins was present at this meeting. The ET, however, found that she was in attendance and we see no reason to go behind that finding (not least as it would be unnecessary to do so for the purpose of determining the issues raised by this appeal). The ET's findings in respect of that meeting are set out as follows:

> **"87 … They considered that the Business Manager role and the Volunteer Development Manager role were not comparable to the Claimant's role of Specialist Services Manager. They concluded that the respondent had made reasonable attempts bring the claimant to interview. They considered that the claimant had not demonstrated that he could fulfil the Business Manager or Volunteer Development Manager roles within a period of three months of redeployment. They concluded they were able to make reasonable adjustments and that the claimant's employment should be terminated.**
>
> **"88 … The Trustees found that the claimant had failed to supply evidence to defend the retention of his role or evidence to support his appointment to the two alternative roles. The note of the meeting said: "*The panel noted that PM was clearly attempting to intimidate by his behaviour toward the business in both email communication and general lack of engagement and that the threat to the business would not diminish by further attempts to sustain his employment while seeking his engagement in [the respondent's] redeployment and redundancy procedures. The panel considered they had no option but to dismiss [the claimant] from his employment… by way of redundancy and provide him with contractual notice from Monday 28th May 12.*""**

14. On 31 May 2012, the Claimant emailed Mr Davidson to say he anticipated being well enough to return to work on 1 July 2012. It was, therefore, decided that the dismissal decision should be suspended to allow the Claimant a final opportunity to present evidence to support his position within a redundancy interview. The Claimant in fact returned to work on 9 July

2012 and he attended an interview for the role of Business Manager on 25 July 2012 but was unsuccessful.

15. Before the ET, the Respondent conceded that the role of Business Manager should in fact have been offered to the Claimant on a trial basis. That was not, however, the Respondent's position at the time and, on 14 August 2012, the Claimant was issued with notice of redundancy, with a termination date 15 August 2012. The Claimant appealed against the redundancy decision and his appeal was determined by Ms Harris, who refused it.

16. In addressing the appeal stage of the process, the ET also included relevant findings going to the decision to dismiss, as follows:

> **"98. We also asked Ms Harris if she knew who made the decision to dismiss. She could only assume and she did not know who made the decision to dismiss. The claimant considered that the decision was made by Ms FP as she had sent the dismissal letter on 14 August 2012. We find that the decision was made by the redundancy panel on 28 May 2012. That decision was postponed to see whether the claimant would be successful in the interview for Business Manager.**
>
> **"99. We were not told by the respondent how they arrived at the final decision to dismiss, after the claimant had been unsuccessful at the Business Manager interview. We were not told whether it was the interviewers for that role, the Chief Executive who sent the dismissal letter, or whether it reverted to the decision makers of 28 May 2012. In any event we find that it was an inevitable outcome of the failure to secure the Business Manager's role. The appeal outcome letter said on page 476 that Ms Harris was confirming the decision taken by the redundancy panel, although Ms Harris was not able to tell the Tribunal this in evidence. There was no evidence of the panel being reconvened after the interview on 26 July 2012."**

17. The ET evidently also found the appeal process inadequate and rejected Ms Harris's evidence that she had carried out any sort of investigation.

The ET's Decision and Reasoning

18. As already recorded, the ET accepted that, on 17 November 2011, the Claimant had made a protected disclosure and that his link between what he said was FP's bullying and harassment and their former relationship amounted to a protected act. The ET was also

satisfied that – contrary to the Respondent's case and to the evidence of its witnesses – the Respondent knew, or ought reasonably to have known, that the Claimant was a disabled person by reason of his shoulder impairment. The ET found, however, that the reason for the Claimant's dismissal was redundancy. It characterised this as a "finding of fact", reasoning as follows:

> **"114 ... Although the claimant did not accept that there was a genuine redundancy situation, in oral submissions he accepted that there needed to be a restructuring exercise and that his role should be deleted.**
>
> **"115. The claimant did not accept that was that there was no role for him to move in to. We find that the situation facing the respondent with audit failures and severe financial difficulties meant that the restructure was essential to its survival. The claimant accepts that his role should be deleted and we agree and find that there was a genuine redundancy situation. The fact that the respondent concedes that they should have redeployed the claimant into the Business Manager's role does not go to the issue of whether there was a genuine redundancy situation. It goes to the fairness of the redundancy process and the requirement to offer suitable alternative employment."**

19. The ET considered whether the Claimant was dismissed as an act of victimisation for raising his bullying and harassment complaint against FP at the 17 November grievance hearing. It concluded he was not; reasoning:

> **"153. The claimant chose not to cross-examine Ms Dawkins who was a witness who was both at the grievance hearing of 17 November 2011 and on the Redundancy Panel which made the initial decision to dismiss on 28 May 2012. The allegation that the dismissal was because of the protected act was not put to any of the Respondent's witnesses.**
>
> **"154. We have otherwise found no evidence to connect the protected act and the dismissal. Our finding is that the reason for dismissal was redundancy. The claimant accepted that there was a need for his post to be deleted and a need for a restructure. We find that in those circumstances the burden of proof did not pass to the respondent."**

20. The ET adopted the same reasoning in also rejecting the Claimant's case that he had been dismissed due to having made a protected disclosure (see the ET at paragraph 157).

21. The ET then went on to assess whether the dismissal was because of the Claimant's disability. It was again noted that this was not something the Claimant had put to the Respondent's witnesses; as the ET recorded:

> **"155 … The Claimant did not put to any of the respondent's witnesses that they dismissed him because of his disability or as a result of something arising from his disability, namely his lengthy sickness absences and the need for time off for treatment."**

The ET then continued:

> **"156. We find that had the respondent wished to dismiss the claimant because of his lengthy sickness absences, they had plenty of opportunity to manage the claimant within a capability process. Instead of this, they suspended the decision to dismiss, initially made on 28 May 2012, to allow the claimant time to undergo the interview for the Business Manager's role to see whether they could retain him in employment. Our finding is that had they wished to dismiss him because of his disability or because of his disability related absences, there was no need to afford him that opportunity. Just because the claimant has a disability and was dismissed does not automatically mean that there was disability discrimination and he has not discharged the initial stage of the burden of proof."**

22. Given the Respondent's concession that there was a role for the Claimant to move into – the Business Manager role – it appears the ET found his dismissal had been unfair (although it did not expressly state that was the case). Certainly, the ET went on to consider whether there should be any reduction under **Polkey** (**Polkey v AE Dayton Services Ltd** [1987] UKHL 8), but it found there should not. It also concluded that no deduction should be made by reason of the Claimant's conduct. Other issues going to remedy were then left for determination at a separate hearing.

The Appeal

23. At the earlier **Rule 3(10)** Hearing, HHJ Richardson permitted the appeal to proceed on the following grounds (we paraphrase):

(1). Ground one: to the extent that the ET's conclusions were influenced by the fact that the Claimant had not put his case to the Respondent's witnesses (see the ET at paragraphs 153, 155 and 157), this amounted to an error of law, given that: (i) the importance of putting his case was not explained to him; (ii) it had not been explained how the failure to put his case might be held against him; (iii) the Claimant was a litigant in person who could not be expected to know this.

We have characterised this as *"the procedural unfairness point"*.

(2). Ground two: the ET erred in concluding that the reason for the Claimant's dismissal was redundancy, having failed to make relevant findings (i) as to when the decision was taken; and (ii) who took that decision. The findings were also perverse and could not stand, given the ET's failure to give reasons for the rejection of the case put forward by the Claimant in his witness statement and opposing submissions.

The *"failure to make relevant findings of fact point"*.

(3). Ground three: in finding that the Claimant had been dismissed by reason of redundancy, the ET had failed to consider or apply the statutory definition of redundancy (section 139 **ERA 1996**) and/or engage with the Claimant's case in this regard; alternatively, it failed to give adequate reasons for its conclusion.

The *"failure to give adequate reasons point"*.

24. At the heart of this appeal is the Claimant's contention that the ET erred in its finding as to the reason for his dismissal and that it was not a reason – specifically disability, protected act or protected disclosure – that was other than redundancy.

25. The Respondent resists the appeal. On the point raised by the first ground of appeal, the Respondent's answer includes the following assertion:

> **"… The claimant is an experienced litigator in his own name and has worked in the litigious environment for much of his employment. Indeed, advising such was his role in part for the CAB. He would be well aware of the need to cross-examine and was addressed about such by the learned employment judge in respect of a witness, never the less he chose not to cross examine."**

Additional Findings Relevant to Ground One – *the Procedural Unfairness Point*

26. The Claimant says that at the Full Merits Hearing the Respondent presented witness evidence from four witnesses and that, during the morning of the first day of the hearing, he had declared his intention of not cross-examining two of those – Ms Dawkins and Mr Nicholas.

27. The relevance of those witnesses to the proceedings was that Ms Dawkins had been on the panel which heard the Claimant's grievance on 17 November 2011 and she was also, the ET found, a participant in the redundancy panel discussion which took place on 28 May 2012. She was also on the panel which interviewed the Claimant for the Business Manager role on 25 July 2012. As for Mr Nicholas, he was present at the Claimant's return to work meeting on 9 July 2012 and sat on the interview panel with Ms Dawkins on 25 July 2012.

28. Given the Claimant's position in relation to these witnesses, the ET said it would read their statements on the understanding that he had not challenged that evidence.

29. In his affidavit in support of his appeal on this ground (provided pursuant to the earlier direction of His Honour David Richardson), the Claimant has stated that:

> **"(a) The importance of putting his case was not explained to him; (b) He was not told that it might be held against him; and (c) He was litigant in person and could not be expected to know this. This was a material error of procedure."**

30. The response then obtained from the ET provides the combined observations from the Employment Judge and Lay Members, as follows:

> **"7. The claimant worked at the CAB at a managerial level in an organisation that provides legal advice. He told the tribunal that it was not his first time in the ET, but he was not experienced like the respondent's representative. It is our observation that he was not the average litigant in Person."**
>
> **"8. At the start of the hearing he took time to correctly identify the issues. Paragraph 32 of our decision records that there were the witness statements of Ms Pauline Dawkins, Mr Anthony Nicholas – both former Trustees of the respondent. The claimant informed the tribunal at the outset of the hearing on the morning of day one he had no questions in cross-examination for them. Witness Mr Nicholas was present for the tribunal on the morning of day 1. We said that <u>as his evidence was not challenged</u>, we would read the statements and we**

> **would note that the Claimant did not challenge the evidence. We said in those circumstances it was not therefore necessary for Mr Nicholas to remain at the tribunal and he was released."**
>
> **"9. My note on the top of Mr Nicholas's witness statement. It says: *"C had no xx for this witness so he was not called. Evidence stood".* I believe I explained this to the claimant."**
>
> **"10. My notes of day 1 show the respondents' representative Ms Montaz. flagged up on day 1, for the benefit of the claimant as litigant in person that witness Ms Dawkins had heard his grievance. The claimant confirmed he had read the witness statement. He said he did not challenge what was said and knew that we would record this."**
>
> **"11. This goes to the fundamental question, of the reason for his dismissal. The tribunal considers that the claimant knew the importance of not challenging the evidence because this was addressed at the outset of the hearing. He had the opportunity to cross-examine Ms Dawkins and Mr Nicholas and chose not to do so."**
>
> **"12. Member Ms Dengate noted that at 3.09pm, I said to the Claimant "your job is to put the case to witness.""**
>
> **"13. Member Ms Brown: noted that I had a discussion with the Claimant about whistleblowing. Ms Brown's note says, *"Judge asked Claimant if he knew the act of whistle blowing had to show. Judge went to explain s43 of ERA 1996. There was a discussion about timetabling the witnesses. The Claimant said that he did not have any questions for either Nicholas or Dawkins'."*"**

31. Although also given leave to submit a response to the Claimant's affidavit, the Respondent has not done so; it relies on the response provided by the ET.

The Parties' Submissions

The Claimant's Case

32. Addressing the first ground of appeal, the Claimant relies on the following propositions of law: (1) any serious procedural irregularity amounts to an error of law when it "*vitiates the Judgment*" or it "*would be unjust not to allow the appeal*" (**NHS Trust Development Authority v Saiger & Ors** [2018] ICR 297 EAT); (2) it is a rule of evidence that: "*... a party should put to each of his opponent's witnesses in turn so much of his case as concerns that particular witness or in which he had a share… ,but, if he asks no questions he would generally be taken to accept the witness's account and would not be permitted to attack it in his final speech nor would he be allowed in that speech to put forward explanations where he has failed to cross-examine relevant witnesses on the point…*" (**Phipson on Evidence** 19th Edition,

paragraph [12-35]); (3) this will, however, not necessarily give rise to an error of law - that would depend on how it was applied by the ET (**Saiger** at paragraphs 97 and 99-102).

33. On the present case there was a question as to whether the Claimant's failure to cross-examine Ms Dawkins or Mr Nicholas was in fact material; the ET rejected their testimony, to the effect that the trustees had not known of the Claimant's protected act and protected disclosure, and found that the Respondent had knowledge – whether direct or constructive – of the Claimant's disability. If it was not material, the ET should not have seen this as a relevant factor. If it was, the ET ought properly to have explained the consequences to the Claimant and its failure to do so amounted to a serious procedural irregularity given the Claimant was a litigant in person.

34. Next turning to the failure to give adequate reasons point (ground three), the Claimant placed reliance on guidance in the case of **University of Manchester v Faulkner** UKEAT/0081/10 and UKEAT/0182/10 at paragraphs 24-27. He contends that the material referred to in the Claimant's witness statement at closing submissions was not referenced by the ET and this demonstrated a failure in its reasoning, per **Faulkner**. Although the Claimant had accepted that there needed to be a restructuring and allowed that his role should be deleted, that did not necessarily mean there was a diminution of need for employees to carry out work of a particular kind. Indeed, it was the Claimant's case that the new Business Manager role would be continuing the kind of work he was engaged in.

35. This fed into the failure to make relevant findings point (the second ground for appeal). The ET had not made clear findings as to when the decision was made or by whom. The initial decision might have been made by the redundancy panel on 28 May, but it was suspended and

A the ET noted that it was not told by the Respondent how it had arrived at the final decision (see paragraph 99). It was for the Respondent to prove what was operating on the mind of the relevant decision taker and it plainly had not done so. Furthermore, the ET needed to be satisfied that the test laid down at section 139 of the **ERA 1996** was met and it failed to demonstrate that it had engaged with this question. This was an error of law that went to the issue at the heart of each of the Claimant's claims: what was the real reason for his dismissal?

The Respondent's Case

36. On the first ground of appeal, the Respondent relies on the response from the ET. It contends that the Claimant not only knew what he was doing but had the benefit of a warning from the ET. He was an experienced litigator: not only had he been active in his own cases he had also acted as a representative for his wife in an ET claim, and was a CAB advisor to the public, dealing with matters such as this. There was no legal requirement on an ET to give a fuller explanation, nor was there any material breach of procedure.

37. As to the issues raised by the second and third grounds of appeal, the Respondent sought to rely on the ET's finding of fact that this had been a redundancy dismissal, contending that should have been sufficient to answer each of the Claimant's claims. In oral submissions, however, Mr Bernard Watson very fairly accepted that he was unable to point to any part of the ET's reasoning that would demonstrate that it had engaged with the question as to whether the Respondent had established that redundancy was the real reason for the Claimant's dismissal – whether it had shown that there was a diminution in the need for employees to carry out work that the Claimant had claimed he was employed to do at the CAB. Mr Watson further accepted that establishing the existence of redundancy situation was not the same as showing that the dismissal of a particular employee was by reason of redundancy. This, he conceded, seemed to be a lacuna in the reasoning, arising from the ET's apparent assumption that the Respondent's

concession that the Claimant should have been at least trialled in the Business Manager role only went to the question of the fairness of the dismissal and could not be relevant to the reason for that dismissal.

Discussion and Conclusions

38. The issues the ET had to determine had been clarified and summarised at paragraph 18 of its Judgment, as follows:

> **"a. What was the reason for dismissal, was it because the claimant made a protected disclosure or was it for redundancy?**
>
> **b. Was the claimant victimised by being dismissed because he had done a protected act, namely his complaint of being bullied and sexually harassed.**
>
> **c. Was the claimant dismissed because of his disability (direct discrimination) or because of something arising from his disability (section 15 claim)."**

39. The starting point for the ET was, therefore, to determine the reason for the Claimant's dismissal. That went not only to the first question raised by the unfair dismissal claim but was also at the heart of the Claimant's claims of automatic unfair dismissal by reason of a protected disclosure, of victimisation and of direct disability discrimination and/or discrimination because of something arising from his disability.

40. The Claimant's case was clear: his dismissal for redundancy was a sham. He recognised that there needed to be a restructuring exercise within the Respondent, and that his role should be deleted (see the ET at paragraphs 114-115), but contended that the need for employees to carry out work of the kind he was employed to perform had continued in the guise of the Business Manager role. His case was that the failure to put him into this position did not just go to the broader question of fairness; it went to the very reason for his dismissal and whether redundancy was the real reason.

41. The Respondent says that there was a finding of fact by the ET to this effect that cannot be challenged on appeal. It accepts, however, that the ET's reasoning does not demonstrate any engagement with the Claimant's argument going to this fundamental question as to the real reason for his dismissal.

42. On the Claimant's claim of unfair dismissal, it was for the Respondent to establish the reason for dismissal and that it was a reason that was capable of being fair for the purposes of section 98 of the **ERA 1996**. That was so notwithstanding the fact that the Claimant was himself putting forward alternative reasons for why he had been dismissed. More specifically, in relation to his claim of having been automatically unfairly dismissed by a reason of having made a protected disclosure (section 103A **ERA 1996**), the approach the ET was to follow was that laid down by the Court of Appeal in **Kuzel v Roche Products Ltd** [2008] EWCA Civ 380, [2008] IRLR 530, that is: (1) has the Claimant shown that there was a real reason as to whether the reason put forward by the Respondent was not the true reason? (2) if so, has the employer proved its reason for dismissal? (3) if not, has the employer disproved the section 103A reason advanced by the claimant? (4) if not, dismissal is for the section 103A reason.

43. As for the Claimant's claims of victimisation and disability discrimination, the ET was bound to apply the burden of proof as provided by section 136 of the **EqA**. It held, however, that the burden did not shift to the Respondent because it had found the reason for the dismissal was redundancy.

44. The ET's conclusion as to the Respondent's reason for dismissal was thus central for each of the claims it had to determine.

45. The determination of the question, what was the real reason for dismissal, will be for the ET; it will need to find, as a matter of fact, what was in the mind of the relevant decision maker at the relevant time. In the present case, the Respondent had not explained how the final decision to dismiss was taken; the ET surmised was that this was the inevitable outcome of the Claimant's failure to secure the Business Manager role. Given, however, that the Respondent had conceded that the Claimant should have been permitted to trial the Business Manager role, the ET needed to address the question why that was not done. Of course, the Respondent's case had changed over time and the ET may well have accepted that, at the time the decision was taken, the relevant decision taker genuinely considered that no such obligation arose. To test that, however, would have required the ET to engage with the Claimant's case: he was arguing that, even at that time, it should have been apparent that the Business Manager role was sufficiently similar to his position that he should have been given this post without having to compete for it.

46. The Claimant's submission in this regard was plain. It put the question whether this was really a redundancy dismissal at the heart of the case. For the dismissal to have been by reason of redundancy, it was not sufficient for the ET to simply find there was a redundancy situation. It had to determine whether redundancy – as defined by section 139 of the **ERA 1996** – was the real reason for the Claimant's dismissal. That is, whether his dismissal was wholly or principally by reason of the fact that the requirement of the Respondent's business for employees to carry out work of the particular kind he was employed to perform had ceased or diminished, or was expected to do so. The mere fact that the new role had been given a different title would not necessarily have meant that there had been a reduction in the need for employees to carry out work of the kind carried out by the Claimant. On his case this was a sham; a case, he says, that was supported by what subsequently happened – that is, that the role

of Business Manager reverted back to that of Service Manager. Even if, however, there was a diminution in the requirement for employees to carry out work of this type, the Claimant argued that the failure to allow him to try out the Business Manager role, and thus avoid dismissal, was for a prohibited reason (disability, protected act or protected disclosure): even if there was a redundancy situation that impacted upon the need for employees to do the kind of work he was employed to do, that was not the real reason for his dismissal.

47. We cannot see that the ET engaged with these issues. Rather, it appears that the ET took the Respondent's concession on the Business Manager role to mean that it could simply find the dismissal was unfair without properly engaging with the questions raised as to the real reason for that dismissal. Although the ET apparently held it against the Claimant that he did not challenge the Respondent's witnesses Ms Dawkins and Mr Nicholas – seeing that as material to its finding that his dismissal was not be the reason of protected disclosure and was not victimisation or disability discrimination - we cannot see that this would have allowed the ET to avoid its own obligation to determine the reason for dismissal. In particular, we note that the ET had itself rejected the evidence of those witnesses (expressly in the case of Ms Dawkins; by implication in relation to Mr Nicholas' evidence), to the effect that they had not known of the Claimant's protected disclosure and protected act. It had further rejected the Respondent's case that it did not have requisite knowledge of the Claimant's disability. In those circumstances, a real question would have arisen as to the weight that could be attached to the witness's denials that these matters had not impacted upon the decisions they had made. In these particular circumstances, we find it hard to see the relevance of the Claimant's decision not to cross-examine these witnesses. Certainly, that is not made apparent to us from the ET's reasoning.

48. We acknowledge that the ET's conclusions in respect of the disability discrimination claims are expressed somewhat more fully, but we are unable to find that this overcomes the lacuna in the ET's reasoning relating to the determination of the real reason for dismissal.

49. In the circumstances, we are bound to allow this appeal on grounds two and three and it is unnecessary for us to reach any conclusion on ground one.

Disposal

50. This is a case that has had an unfortunate history, with two previous appeals having come before the EAT. It is obviously regrettable that, some 7 years after the Claimant's dismissal, these proceedings remain ongoing. We do not consider, however, that we can avoid remitting this case back to the ET once again, to determinate the key question raised by the Claimant's claim: what was the real reason for his dismissal?

51. To determine that question, the ET will need to decide who made the decision and when. It will need to keep in mind that the existence of a redundancy situation is not determinative of the question whether the Claimant was dismissed by reason of redundancy. That question will need to be answered in accordance with the statutory definition and in light of the ET's determination as to what was in the mind of decision taker/s at the relevant time. More particularly, the ET will need to engage with the question whether the Business Manager position was so similar to the Claimant's post as to counter the suggestion that there was any diminution in the need for employees to carry out work of that particular kind. Even if the ET considers that the posts were not so similar, it will need to determine why the Respondent decided that the Claimant should not be permitted to trial the Business Manager role (and thus avoid dismissal), when it was accepted before the ET that this should have been done. Was this

by reason of the protected act or the Claimant's protected disclosure or did it amount to disability discrimination?

52. Having thus defined the scope of the remission, it was common ground between the parties that there would be no reason for ET to revisit the other findings of fact.

53. As for the question whether the remission should to the same or a differently constituted ET, we have had regard to the guidance provided in **Sinclair Roche Temperley v Heard & anor** [2004] IRLR 763 and we do not consider that there is any reason why this should not return to the same ET. We do not consider the ET has reached a considered view as to the real reason for dismissal and there is no reason to think it would do other than approach this task with an open mind on the questions that remain to be determined. There has been no suggestion that the ET has demonstrated partiality or bias or that this was a totally flawed decision. Furthermore, given the time that has passed since the events with which this case is concerned, it is important that this matter should be remitted and reconsidered as soon as possible; something we consider will be more easily achieved by remission to the same ET.