Appeal No. EA-2019-000762-AT
(previously UKEAT/0188/20/AT)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 May 2021
Judgment handed down on 23 September 2021

Before

JUDGE BARRY CLARKE

(SITTING ALONE)

P2CG LIMITED — APPELLANT

MR M DAVIS — RESPONDENT

JUDGMENT

(FULL HEARING)

APPEARANCES

For the Appellant	MR BRUCE CARR (One of Her Majesty's Counsel) and MS TALIA BARSAM (of Counsel) Instructed by: Addleshaw Goddard LLP Milton Gate 60 Chiswell Street London EC1Y 4AG
For the Respondent	MR CRAIG RAJGOPAUL (of Counsel) Instructed by: Edwin Coe LLP 2 Stone Buildings Lincoln's Inn London WC2A 3TH

SUMMARY

DISABILITY DISCRIMINATION

The Employment Tribunal upheld two of the Claimant's complaints of direct disability discrimination: the Respondent's decision to dismiss him and the refusal by two of its founding directors to acknowledge his ill health.

The Respondent appealed the ET's judgment on six grounds: (1) a failure properly to apply the statutory burden of proof by giving no or inadequate consideration to the non-discriminatory reason put forward by the Respondent for the dismissal and/or inadequacy of reasons for concluding that the Respondent had not discharged the burden once it had shifted; (2) a perverse (in the sense of irrational) conclusion about why one of its directors had altered an email that was disclosed to the Claimant, which was material to the drawing of adverse inferences; (3) a perverse (in the sense of irrational) conclusion about when the Claimant was diagnosed with type 1 diabetes, which was relevant to fixing the Respondent with knowledge of the same; (4) inadequacy of reasons for its conclusion that the Respondent had knowledge of the Claimant's diagnosis of type 1 diabetes before dismissing him; (5) a perverse (in the sense of unsupported by evidence) conclusion about the Respondent's knowledge that type 1 diabetes was a disabling condition; and (6) a serious procedural irregularity, in the form of a breach of the rule in **Browne v Dunn**, in concluding that two of the Respondent's directors had colluded to deny knowledge that the Claimant was unwell and did so in order to disguise the role that his diagnosis of type 1 diabetes had played in the decision to dismiss him.

All six grounds dismissed.

JUDGE BARRY CLARKE

Introduction

1. I refer to the parties as they were before the Employment Tribunal ("ET"), as Claimant and Respondent.

2. This was the full hearing of the Respondent's appeal from the judgment of the London Central ET (Employment Judge Glennie, Ms Breslin and Ms Jaffe). The Respondent was represented before the ET by Ms Barsam, who was led by Mr Carr QC before the EAT. The Claimant was represented before both the ET and the EAT by Mr Rajgopaul.

3. The Respondent is a company formed in 2013 to provide project and programme management services to clients. It places consultants with clients and charges a daily rate for their services. Its three founding directors and shareholders were Mr Peel, Mr Knight and Dr Rawling. They had employed the Claimant, Mr Davis, in a previous business, and he was recruited to the Respondent as a Business Development Director on 16 February 2015. On 4 August 2016, the Respondent gave him notice of the termination of his employment for the stated reason of poor performance. The Claimant's employment ended on 4 September 2016. He presented a claim to the ET alleging discrimination and harassment by reference to type 1 diabetes (and it was type 1 diabetes, rather than diabetes more generally or type 2, on which he relied for this purpose).

4. The relevant causes of action are set out at Sections 39 and 40 of the Equality Act 2010 ("EA"). Section 39(2) EA provides that:

> **An employer (A) must not discriminate against an employee of A's (B)—**
> **…**
> **(c) by dismissing B;**
> **(d) by subjecting B to any other detriment.**

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5. Section 40(1) EA provides that:

> **An employer (A) must not, in relation to employment by A, harass a person (B)—**
>
> **(a) who is an employee of A's …**

B

6. The Claimant complained of five types of conduct prohibited by the EA: direct disability discrimination (Section 13); discrimination arising from disability (Section 15); indirect disability discrimination (Section 19); a failure to comply with the duty to make reasonable adjustments (Section 21); and harassment related to disability (Section 26). The Respondent resisted the claim.

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The hearing before the ET

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7. The case the parties put forward for determination, as it developed from the originating pleadings, was complex. Following case management by the ET, an agreed list of issues emerged. It extended to seven pages, involving five causes of action split into multiple alleged detriments. Those issues included: six acts said to constitute direct disability discrimination; the same six acts said to constitute discrimination arising from disability; five alleged provisions, criteria or practices ("PCPs") resulting in 12 types of disadvantage placing the Respondent under a duty to make three reasonable adjustments, where the failure to make those three adjustments amounted to further discrimination; four further PCPs said to result in ten disadvantages constituting indirect disability discrimination (in the event not pursued); and seven acts of alleged harassment related to disability. There was some overlap between the detriments pursued in respect of each cause of action. Further, the ET had to determine the extent of the Respondent's knowledge, at the material time, of the Claimant's disability.

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8. An Employment Tribunal will seek to determine the issues that the parties have put before it, subject to its statutory jurisdiction and what can be achieved by robust case management. This particular hearing had a wide compass, demonstrated by the amount of material the ET had to

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consider. The ET's judgment does not identify the size of the bundle, but references in this appeal suggest it contained at least 1,500 pages spread across five lever-arch files. Nine days were allocated to the hearing. The ET heard evidence from nine individuals, seven of whom were challenged in cross-examination. Mr Carr QC told me that the Claimant's witness statement included 65 pages of evidence on the subject of his performance alone.

9. The hearing did not proceed smoothly for reasons explained in the ET's judgment. The Respondent disclosed material midway during the hearing, and the ET acceded to an application by Mr Rajgopaul for an adjournment so that it could be properly analysed and witnesses recalled. Unfortunately, one of the non-legal members became ill on the date set aside for the resumed hearing. The parties could not reach consensus, for the purposes of Section 4(1)(b) of the Employment Tribunals Act 1996, about continuing in her absence. The resumption of the hearing was therefore put back further. The delay was compounded by the limited availability of the parties and the need for written submissions.

10. So it was that, very regrettably, a hearing commencing on 5 September 2017 ended up occupying 11 days of tribunal time over nearly two years. Seven of those days were spent with the parties, with a gap of 13 months between day 6 and day 7. The final four days involved deliberations between the judge and non-legal members, with a gap of three months between day 10 and day 11. A reserved judgment was eventually sent to the parties on 21 June 2019.

The ET's judgment

11. The ET rejected all the Claimant's complaints save for two of the alleged acts of direct disability discrimination pursued by reference to Section 13 EA. The two complaints it upheld were, firstly, the Respondent's decision to dismiss the Claimant and, secondly, the refusal by two

of its founding directors, Mr Peel and Dr Rawling, to acknowledge his ill health. (It is relevant to note in passing that Dr Rawling is not a medical doctor.)

12. The ET's accompanying reasons described the outcome in more nuanced terms. For example, the ET said that the Claimant's contention that his dismissal was an act of discrimination arising from disability was "potentially engaged", but it indicated that it was unnecessary to make a ruling in that regard because it had upheld the principal contention that it was an act of direct discrimination. The ET described the lengthy analysis needed for the multi-faceted reasonable adjustments claim as redundant and unrealistic in circumstances where it had concluded that the dismissal was directly discriminatory. The thrust of its conclusion was expressed pithily towards the end of the judgment (paragraph 136.5):

> **The reality of the case, on the Tribunal's findings, is that the Respondent (primarily in the person of Mr Peel) moved virtually directly from learning of the Claimant's disability to dismissing him.**

13. The Respondent appeals against the ET's decision to uphold two complaints of direct discrimination. There has been no cross-appeal by the Claimant against the dismissal of the other parts of his claim. Six of the Respondent's grounds of appeal have survived to this full hearing following a rule 3(10) hearing before HHJ Barklem. Those grounds mostly allege perversity and inadequacy of reasoning, so it is necessary to spend some time looking at the ET's reasoning.

14. At its starkest, this was a case about whether the Respondent's decision to dismiss the Claimant, for the stated reason of poor performance, was significantly influenced by learning that he had type 1 diabetes.

15. The Claimant contended that the diagnosis of that condition was relevant because his work necessitated extensive client entertainment; the accompanying culture, more colourfully

described in his ET1 claim form and disputed by the Respondent, was that it involved significant consumption of alcohol. The Claimant contended that his condition caused tiredness and digestion complications which hindered his ability to maintain the expected levels of travel and entertainment. Although the Respondent conceded by the time of the hearing that the Claimant was a disabled person by reference to type 1 diabetes, it denied knowing that he was a disabled person at the material time. It also put forward his poor performance as a valid and non-discriminatory reason for dismissing him.

16. The ET described its approach to the task before it in the following terms (at paragraphs 15 and 16 of its judgment):

> **(15) There were very extensive disputes of fact, including disputes as to whether or not particular documents were genuine. Each party maintained that the other was presenting substantial quantities of false evidence. The Tribunal has not attempted to address every point of difference between the parties, including some stark issues of fact, but has concentrated on those which assist us in resolving the issues to be determined.**
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> **(16) Both counsel made submissions about the overall credibility of the witnesses, submitting (naturally) that their own witnesses were credible while the other party's were not. As will be explained, the Tribunal found the evidence of witnesses on both sides of the case to be unreliable on different matters. We did not conclude that either the Claimant, or the Respondent's witnesses, were to be preferred in general terms. We made findings as a matter of probability according to the evidence on the various individual aspects, taking into account the relative degree of plausibility of each party's evidence, and such assistance as could be gained from contemporaneous documents.**

17. As this extract makes clear, the ET eschewed a "winner takes all" approach to credibility and reliability. There were many aspects of the Claimant's account that the ET rejected, most of which related to the date on which he told the directors about his tests for, and diagnosis of, type 1 diabetes. The ET made clear that it did not see its function as determining every point where the parties happened to disagree. As a matter of general principle, this approach has much to commend it. In complex multi-day hearings of this type, making findings on every point of factual

dispute for its own sake is to be discouraged; an ET can legitimately limit the ambit of its findings to those points of factual dispute that are necessary to decide the issues arising for determination.

18. The ET started its factual findings by noting the nickname given to Mr Peel, Mr Knight and Dr Rawling as the Respondent's founding directors: "the three amigos". It found this nickname significant, in that it showed that they worked closely together and were likely to share information and confide in one another. The ET further found that "Mr Peel tended to take the lead in general, and did so in relation to matters concerning the Claimant" (paragraph 19).

19. A matter that was hotly contested before the ET, and which features in this appeal, was an email dated 30 June 2015 sent to Mr Peel from an important client of the Respondent. That email was critical of an error made by a member of the Respondent's team that had apparently led to a £60,000 overcharge. The version of that email disclosed by the Respondent, and referred to in Mr Peel's witness statement, specifically named the Claimant as the author of that error. However, following a subject access request addressed by the Claimant to the client in question, it emerged that the Claimant's name was not in the original email. It had been added subsequently by Mr Peel. Given the importance of the ET's approach to this issue to its judgment overall, I shall set out its analysis in full. In this extract, "ML" is the author of the email from the client.

> **(25) … When asked about this in cross-examination, Mr Peel agreed that the inclusion of the Claimant's name gave the impression that ML was criticising him specifically. He also accepted that he had altered the email so as to include the Claimant's name. Mr Rajgopaul put it to Mr Peel that he had done this for the purposes of the present case, in order to give the impression that [the client] wanted the Claimant removed from the account, with a view to bolstering the Respondent's contentions about the Claimant's performance.**
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> **(26) Mr Peel denied this. His explanation was that he forwarded the email to Dr Rawling, and that he made the alteration in order to indicate to him that, although ML said that an error had been made by the team, in fact the error had been the Claimant's. His answer to the question why, in that case, he had not simply sent a separate email to Dr Rawling saying this, was that he did not know.**
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> **(27) The Tribunal concluded that Mr Peel had altered the email for the reason suggested by Mr Rajgopaul. His explanation did not, ultimately, make sense.**

> **Altering the email and then forwarding it to Dr Rawling did not tell the latter that ML was saying that the team had made an error, but that he (Mr Peel) knew or believed that the error was the Claimant's. It gave the impression that ML was saying that the error was the Claimant's. It was also revealing, in the Tribunal's judgment, that in his original witness statement Mr Peel had relied on this email without referring to the alteration … We concluded that Mr Peel had written this in the hope that the point would not be noticed.**

20. Continuing with the theme of performance, the ET found that there was, during 2015, "some degree of dissatisfaction with the level of business that the Claimant was generating, although not obviously such as to point to disciplinary proceedings or a formal warning" (paragraph 32). Although the ET accepted that "Mr Peel probably did say that he was not satisfied with the sales made by the Claimant", it found that his description of this as a verbal warning was "to exaggerate its significance" (paragraph 34).

21. The ET also rejected the Respondent's account that it gave the Claimant a further verbal warning at a Board meeting on 6 April 2016 (paragraph 50).

22. By the time of a performance review meeting on 8 June 2016 involving the Claimant and the three founding directors, the ET accepted that Mr Peel had become critical of his performance (paragraph 54.1). Dr Rawling sent the Claimant a written warning for unsatisfactory performance the following day, 9 June 2016, which concluded in these terms: "You now have 6 weeks in order to recover the position and get your performance heading back towards your target. If you do not make the necessary performance improvements we will consider further disciplinary action, up to and including dismissal" (paragraph 55).

23. The Respondent's case was that it had no knowledge of the Claimant's disability when it decided to dismiss him, while the Claimant's case was that it had known of his condition since March 2016. The ET rejected both contentions. It accepted that the Respondent had no such

knowledge when it held the performance review meeting on 8 June 2016 (paragraph 54.5) and when it sent the written warning the following day (paragraph 57), although it decided that Mr Peel knew that the Claimant was undergoing "tests" by 23 June 2016 (without knowing what they were for; see paragraphs 69.3 and 73). The ET records that the Claimant received a diagnosis of type 1 diabetes on 11 July 2016 (paragraph 75), to which I return below. Furthermore, because "he was not making any secret of it", the ET held that his diagnosis was probably discussed at a one-to-one meeting with Mr Peel on 13 July 2016, or else Mr Peel would have heard of it from another director (paragraph 86). In any case, the ET concluded that it was "inconceivable" that Mr Peel would not have known of the Claimant's diagnosis by the time of a meeting on client premises on 3 August 2016 (paragraph 93). As the ET found, this was the day before Mr Peel convened an *ad hoc* Board meeting where it was resolved to give the Claimant notice of the termination of his employment (paragraph 94).

24. The ET heard that the Claimant strongly objected to being dismissed when, as he saw it, he was ill; and, that when he confronted them about it, Mr Peel and Dr Rawling both denied knowing of his diagnosis. After analysing the parties' competing accounts and taking stock of its findings about the Respondent's knowledge (paragraphs 97 to 101), the ET concluded that "the most likely explanation for Dr Rawling and Mr Peel saying to the Claimant in the same terms that they had no knowledge of his ill health, when they did have knowledge of it, is that they had agreed to take this line should he raise it" (paragraph 103.5).

25. The ET also concluded that Mr Peel and Dr Rawling knew that type 1 diabetes had the features that would make it a disabling condition:

> **(105) … It is generally known that type 1 diabetes is a lifetime condition, and often has more serious consequences for the individual than does type 2 … In particular, individuals with type 1 are likely to require medication, including insulin, in order to control symptoms that would otherwise have a substantial adverse effect on**

their ability to carry out normal day to day activities. We find that Mr Peel and Dr Rawling would have known these things, and did know them.

The ET then summarised its factual findings on the issue of knowledge at paragraph 112:

(112.1) The first that anyone knew about his condition was on 9 June 2016 when the Claimant told Mr Knight that he was having tests, without specifying for what.

(112.2) From 15 June 2016 Dr Rawling knew that the Claimant had been having tests for potential diabetes. Mr Peel and Mr Knight would have known the same from soon after that date.

(112.3) All three knew of the Claimant's diagnosis of type 1 diabetes from a point after 11 July 2016, and certainly by 3/4 August 2016.

(112.4) Anyone who knew of that diagnosis would also have known that this is a lifetime condition and that, unless controlled by medication, it would have a significant effect on the individual's ability to carry out normal day to day activities. Anyone who knew of the diagnosis could reasonably be expected to know that it could give rise to disability.

26. After an analysis of the relevant law in respect of the burden of proof and direct discrimination, to which I refer below, the ET made the following further findings about the Respondent's decision to dismiss the Claimant:

(121) ...The Respondent, through Mr Peel in particular, has firmly denied that the Claimant's disability played any role in the decision. Indeed, Mr Peel (the primary decision maker) denied knowing of the Claimant's condition at the time. There was evidence in the form of the earlier criticisms of the Claimant's performance, and the written warning given on 8 June 2016 that (whether justifiably or not) Mr Peel was, for necessarily non-discriminatory reasons given his lack of knowledge of the Claimant's condition, dissatisfied with his performance. This dissatisfaction was sufficient for the Claimant's continued employment to be put at risk in the follow-up warning letter of 9 June 2016.

27. The ET thus accepted that the Claimant's performance was such that Mr Peel, then unaware of his disability, felt entitled to issue a written warning placing his employment at risk. The ET did not address whether that warning was justified, although it had already concluded that Mr Peel exaggerated when describing two previous discussions with the Claimant, in November 2015 and April 2016, as verbal warnings.

28. The ET concluded that the Claimant had made out a *prima facie* case of discrimination. It highlighted the following considerations and inferences as the basis for its conclusion:

> **(122.1) The Tribunal has found that, contrary to their evidence, the "three amigos", and Mr Peel in particular, knew that the Claimant had a diagnosis of type 1 diabetes at least by 3/4 August 2016. We infer that they (and Mr Peel in particular) have maintained this denial because they know that the Claimant's disability was a factor in his dismissal.**
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> **(122.2) The Tribunal has also found that Mr Peel and Dr Rawling adopted a common approach of telling the Claimant on 4 August 2016 that they had no knowledge of his ill health, when in fact they knew of the diagnosis. We infer that they did so because they knew that this was a factor in the decision to dismiss him, and that (in non-technical terms) it should not be.**
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> **(122.3) Mr Peel has embellished his account of being dissatisfied with the Claimant's performance from as far back as 2015. In particular, the Tribunal has found that he altered the email of 30 June 2015 … for the purposes of this litigation. We find that he did so in order to give the false impression that [the client] had been critical of the Claimant when they had not. We infer that he did so because he knew that the Claimant's disability had been a factor in the decision to dismiss, and that he felt that it was necessary to bolster the Respondent's case to the contrary.**
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> **(122.4) Additionally, we have found that Mr Peel has exaggerated his account of giving the Claimant warnings on 30 November 2015 and 6 April 2016. We infer that he did this in order to bolster the Respondent's case in a similar way to that found in sub-paragraph 3 above.**

29. The ET then concluded, based on these inferences, that it could properly find that the Claimant's disability significantly influenced the Respondent's decision to dismiss him. It therefore held that the burden passed to the Respondent to prove that the Claimant's dismissal was in no sense whatsoever because of his disability. Its conclusion was expressed in these terms:

> **(124) We found that the Respondent did not discharge this burden, essentially for the reasons that led us to conclude that we could properly make a finding of discrimination. The inferences that we have drawn cause us to find against the Respondent's explanation that the decision to dismiss was purely because of the Claimant's performance and was not influenced by his disability. On the basis of the inferences that we have drawn, the Tribunal finds that the Claimant's disability played some substantial part in the decision to dismiss him. We considered that, as a matter of probability, Mr Peel took into account the Claimant's disability as something that meant that his performance was unlikely to improve, or at least lessened the chances of that occurring.**

A This conclusion was amplified at paragraph 132.1, where the ET recorded that it had found "there was an assumption along the lines that the Claimant would be less capable of, or less committed to, doing his job, once his type 1 diagnosis was known".

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30. The ET noted at paragraph 125 that:

> **… what would have occurred in the absence of the discrimination is not something that has been canvassed so far, and remains at large as an issue in relation to remedies**.

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31. The ET upheld a second alleged act of direct disability discrimination, which was the refusal by Mr Peel and Dr Rawling to acknowledge the Claimant's ill health when he challenged them about the decision to dismiss. The ET had, of course, found that they did know of his

D condition. It concluded:

> **(126) … This does not, perhaps, add a great deal to the complaint that the dismissal was because of the Claimant's disability, as it was a part of the events surrounding the dismissal.**
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> **(127) However, to the extent that this can be regarded as a separate act from the dismissal, the Tribunal found that this also occurred because of the Claimant's disability. The Tribunal drew an inference in a similar way to those drawn above. We inferred that Mr Peel and Dr Rawling agreed to deny all knowledge of the Claimant's disability because they knew that it was, in truth, a factor in the decision to dismiss him.**

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The role of the EAT

32. Appeals to the EAT lie on a question of law. This means that a successful appeal must identify an error of law on the part of the ET or findings or conclusions that were perverse in the

G sense that they were irrational and/or unsupported by evidence. When assessing the Respondent's six grounds of appeal in turn, the Court of Appeal's recent judgment in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672 clearly describes the function of the EAT:

> **57. The following principles, which I take to be well established by the authorities, govern the approach of an appellate tribunal or court to the reasons given by an employment tribunal:**

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(1) The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. In *Brent v Fuller* [2011] ICR 806, Mummery LJ said at p. 813:

> **"*The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which a decision is written; focussing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid*".**

This reflects a similar approach to arbitration awards under challenge: see the cases summarised by Teare J in *Pace Shipping Co Ltd v Churchgate Nigeria Ltd* (The "PACE") [2010] 1 Lloyds' Reports 183 at paragraph 15, including the oft-cited dictum of Bingham J in *Zermalt Holdings SA v Nu-Life Upholstery repairs* Ltd [1985] 2 EGLR 14 that the courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration". This approach has been referred to as the benevolent reading of awards, and applies equally to the benevolent reading of employment tribunal decisions.

(2) A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. To impose such a requirement would put an intolerable burden on any fact finder. Nor is it required to express every step of its reasoning in any greater degree of detail than that necessary to be *Meek* compliant (*Meek v Birmingham City Council* [1987] IRLR 250). Expression of the findings and reasoning in terms which are as simple, clear and concise as possible is to be encouraged. In *Meek*, Bingham LJ quoted with approval what Donaldson LJ had said in *UCATT v. Brain* [1981] I.C.R. 542 at 551:

> **"*Industrial tribunals' reasons are not intended to include a comprehensive and detailed analysis of the case, either in terms of fact or in law …their purpose remains what it has always been, which is to tell the parties in broad terms why they lose or, as the case may be, win. I think it would be a thousand pities if these reasons began to be subjected to a detailed analysis and appeals were to be brought based upon any such analysis. This, to my mind, is to misuse the purpose for which the reasons are given*."**

(3) It follows from (2) that it is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind. As Waite J expressed it in *RSPB v Croucher* [1984] ICR 604 at 609-610:

> **"*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*.**"**
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> **58. Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, 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. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload.**

The first ground of appeal

33. The Respondent's first ground of appeal was put in two ways. The Respondent's chief contention was that the ET misapplied the statutory burden of proof by giving no or inadequate attention to the non-discriminatory reason it put forward for dismissing the Claimant, namely his poor performance, and specifically no attention to his performance during the final period of his employment when he was the subject of a written warning about performance. The Respondent alternatively contended that the ET failed to give adequate reasons for concluding that it failed to discharge the burden of proof once it found that it had shifted from the Claimant. For his part, the Claimant answered that the ET undertook the correct analysis, properly applied the burden of proof and that its judgment was **Meek**-compliant.

34. At paragraph 114 of its judgment, the ET set out Section 36 EA:

> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

35. The ET then continued:

> **(115) In *Igen v Wong* [2005] IRLR 258 and *Madarassy v Nomura* [2007] IRLR 246, both decided under the previous anti-discrimination legislation, the Court of Appeal identified a two stage approach to the burden of proof. At the first stage the Tribunal would consider whether the facts were such that, in the absence of an explanation from the Respondent, it could properly find that discrimination had taken place. In *Madarassy* the Court of Appeal emphasised that this should be a finding that the Tribunal could *properly* make. There would have to be something (which might not in itself be very significant) beyond a difference in protected characteristic and a difference in treatment that would enable such a finding to be made. In the event that the Tribunal found the facts to be of this nature, the burden would be on the Respondent to prove that it did not discriminate against the Claimant.**
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> **(116) In *Ayodele v Citylink* [2018] IRLR 931 the Court of Appeal confirmed that this approach applied under the current legislation, and that the Tribunal can take account of evidence adduced by the Respondent (including any failure to adduce evidence) at the first stage.**

36. The ET further noted the following in respect of direct discrimination claims:

> **(119) As stated by Lord Browne-Wilkinson in *Nagarajan v London Regional Transport* [1999] IRLR 572 and as held by the Court of Appeal in *Owen & Briggs v James* [1982] ICR 618, it is not necessary for the treatment concerned to have occurred wholly or exclusively because of the discrimination complained of. The "because of" test is satisfied if the protected characteristic had a significant influence on the treatment.**

37. Mr Carr QC made no criticism of the ET's summary of the operation of the burden of proof, but instead criticised its application of the burden, at the second stage, to this case. In particular, he contended that the ET did not properly apply paragraph (12) of the guidance annexed to **Igen v Wong** [2005] IRLR 258. This is where the Court of Appeal stated that, when considering if a Respondent has discharged the reversed burden of proof, the ET is required "to assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [the protected characteristic] was not a ground for the treatment in question".

38. Did the ET's analysis take proper account of the competing "reason why" put forward by the Respondent for its decision to dismiss the Claimant? More technically, was it entitled to conclude, at the second stage, that the Respondent had failed to prove, on a balance of probabilities, that the treatment was "in no sense whatsoever" because of the Claimant's disability? Reading the ET's judgment as a whole and bearing in mind the Court of Appeal's reminder in **DPP Law Ltd v Greenberg** that a failure to refer to evidence does not mean that it was not taken into account, especially where the ET correctly stated the principles of law to apply, I have concluded that the ET's approach was properly open to it.

39. It is correct that the ET's judgment contained no findings of fact about how the Claimant performed in the period after he was presented with a written warning (for example, in terms of production of a sales recovery plan or achieving a sales target). Mr Carr QC contended that the ET simply identified the Respondent's explanation without evaluating the strength of it; the more powerful the substance of the Respondent's case of poor performance, he argued, the more it was likely to be able to discharge the burden of proof. However, the ET was not required to weigh up the extent to which performance predominated in the Respondent's rationale for dismissal; it was required only to consider whether the Respondent's decision to dismiss the Claimant was in no sense whatsoever because of his protected characteristic.

40. The ET found that Mr Peel had been critical of the Claimant's performance but that he had exaggerated those concerns to bolster the Respondent's case. It accepted that Mr Peel issued a written warning to the Claimant before knowing that he was disabled but, notwithstanding the evidence it heard on his performance, it concluded that Mr Peel moved virtually directly from learning of his disability to dismissing him, and that he did so because the disability meant the Claimant's performance was less likely to improve. I take this to mean that the ET viewed the

A Respondent's concerns about the Claimant's performance as legitimate, albeit embellished. Even so, the ET could permissibly conclude that the Respondent had failed to discharge the burden of proving that the dismissal was in no sense whatsoever because of the Claimant's disability. As a matter of principle, a dismissal can be on legitimate performance grounds, yet still be materially tainted by discrimination.

41. Mr Carr QC criticised the ET for deferring a proper consideration of the contribution of the Claimant's performance to his dismissal until the remedy hearing. In general terms, where liability and remedy have not been listed for determination at the same hearing, it can be helpful for an ET at least to address questions of contribution or **Polkey** at the liability stage. This is because doing so narrows the issues for factual and legal determination at the remedy hearing (for example, to pecuniary loss and mitigation efforts), reduces the length of the remedy hearing, and encourages settlement. To that extent, I accept that it would have been helpful for the ET to say more about what it considered would have happened to the Claimant in the absence of discrimination. However, I bear in mind that the ET adopted a list of issues prepared by professionally represented parties, and that contribution and **Polkey** considerations did not feature on that list. The ET simply described those considerations as "at large as an issue in relation to remedies". It will be open to the Respondent to contend at the remedy hearing that dismissal would have occurred within a short time afterwards in the absence of discrimination, just as it will be open to the Claimant to oppose that contention. The ET rightly directed that a further preliminary hearing for case management purposes was needed to ensure that the remedy hearing was conducted effectively. There has been no appeal against the ET's approach to split liability and remedy in this way, so I will say no more about it.

42. I am unpersuaded by the Respondent's alternative submission that the ET's judgment was not **Meek**-compliant. The ET made powerful findings at paragraph 122 of its reasons. The Respondent may be aggrieved with those findings, but they make clear why it lost the complaint of direct disability discrimination.

43. The first ground of appeal fails.

The second ground of appeal

44. The Respondent's second ground of appeal, which is a perversity challenge, concerns the email dated 30 June 2015.

45. By way of context, it is worth noting that it was common ground before the ET that Mr Peel altered this email. The version the Respondent disclosed, and which Mr Peel discussed in his witness statement, was not the original. The question for the ET was why he did so. He was cross-examined about it. As noted above, the ET made a finding of primary fact that Mr Peel amended the email to give the impression that a client had specifically named the Claimant as responsible for a serious error, when in fact the email in its original form had not named him; and, further, that he did so to embellish the Respondent's concerns about the Claimant's poor performance. This was a significant finding. It formed the basis for the ET inferring, as a secondary fact, that Mr Peel acted in this way because he knew that the Claimant's disability was a factor in the decision to dismiss and he decided that its case needed bolstering to give the contrary impression.

46. Mr Carr QC described this finding as perverse. He contended that the ET ignored exculpatory evidence before it, in the form of metadata about the email, which supported Mr

Peel's case that his reason for amending the email was not to "dupe" the ET or the Claimant but to explain to Dr Rawling, when forwarding the email to him, that he believed the Claimant to be responsible for the error, and that he did so before the Claimant was dismissed and before litigation was contemplated. That being so, the ET drew a false inference. Mr Rajgopaul replied in terms that perversity is a high hurdle that, in this case, had not been surmounted.

47. The metadata in question was disclosed to the Claimant in the form of an attachment to a supplementary witness statement from Mr Peel, sent two working days before the start of the ET hearing, in which he apologised for any confusion caused by the alteration he had made. Before the EAT, Mr Carr QC described this metadata as a "complete answer" to the point on which the ET found against the Respondent.

48. The two-page document containing the metadata was before the EAT. It comprised three screenshots of the "Properties" tab of one or more emails. While not wishing to trespass into the fact-finding arena, I asked how it provided this complete answer; it did not seem obvious. The only date and time given on the face of this document was in relation to an email Dr Rawling had sent Mr Peel at 13:18:06 on 30 June 2015, not the email that Mr Peel had forwarded to Dr Rawling. The Respondent's notice of appeal contended that the Claimant did not dispute the exculpatory value of the metadata. However, Mr Rajgopaul made clear that its exculpatory value was hotly disputed before the ET and was still disputed.

49. This metadata was before the ET but not mentioned in its judgment. So, what did it make of it? There was no order for the Employment Judge to produce his notes, but Mr Carr QC and Mr Rajgopaul both referred to typed notes of their instructing solicitors of this part of the ET hearing. At the end of cross-examination and re-examination of Mr Peel on matters including the

metadata, the Employment Judge had, according to the Claimant's solicitors, said "Don't imagine we can work it out for ourselves". According to the Respondent's solicitors, the Employment Judge had said "It is disputed is [*sic*] whether that has been created for the purposes of litigation. If it is going to help then we need to be taken to it". These notes are to the same effect; they record the Employment Judge making clear to the parties that they would need to assist the ET by explaining the metadata's meaning.

50. It was common ground in the appeal that neither party placed before the ET any expert evidence on the metadata. I was shown extracts from their closing written submissions, and further written submissions in reply, which demonstrated only that they continued to disagree about the alteration to the email and who bore the burden of demonstrating the metadata's meaning. The Respondent contended in its submissions to the ET that the alteration had been satisfactorily explained, while the Claimant referred to "clear and unexplained anomalies".

51. The ET determined this hotly contested issue on the basis of the evidence it did have about the email. That included the fact that, in his first witness statement, Mr Peel had relied on the email without referring to the alteration he had made, which was prejudicial to the Claimant's case and supportive of the Respondent's case (albeit that he apologised when presented with the original by the Claimant's solicitors). That omission plainly called for an explanation from the Respondent, and which was in Mr Peel's supplementary statement. After listening to him being cross-examined on the matter, the ET rejected his explanation. That approach was open to it. I am unpersuaded that the ET erred by failing to refer to the metadata in circumstances where its exculpatory value was not explained to it. The ET's finding of fact on this point, and the inference it drew from it, was therefore not perverse.

52. I should add that I was not persuaded by Mr Rajgopaul's alternative submission that the ET's conclusions at paragraphs 25 to 27 of its judgment should be taken to have encompassed a finding that the Respondent additionally manipulated the metadata. However, that is a moot point. The Respondent's second ground of appeal fails for the reasons given.

The third ground of appeal

53. The Respondent's third ground of appeal, which is also a perversity challenge, concerns the issue of when the Respondent first knew that the Claimant was a disabled person (and this issue also features in its fourth and fifth grounds of appeal). This was not a case in which the Claimant argued that he was subjected to direct discrimination because of a perception that he was disabled, or because of an association with a disabled person. He claimed that he had been subjected to direct discrimination because of his type 1 diabetes. Axiomatically, the Respondent could not have subjected him to direct discrimination because of a protected characteristic it did not know him to possess.

54. As noted above, the ET rejected the Claimant's contention that the Respondent had knowledge of his condition from March 2016; indeed, it rejected his account that, on several occasions in the first half of 2016, he had told the directors about his condition. That lack of knowledge was the basis on which the ET dismissed most of his other complaints of discrimination. However, the ET decided that Mr Peel certainly did know by the time of a meeting with the Claimant on client premises on 3 August 2016, the day before he was dismissed. The ET rejected the evidence from the Respondent's directors that the Claimant had told them he was still undergoing "tests" at this time. The ET's rationale was based, among other things, on its assessment that it was improbable for the Claimant to refer to having "tests" when, by this time, he had received a firm diagnosis.

55. Mr Carr QC contended that this assessment was perverse, because it was contrary to an expert report supplied to the ET by a Dr Bodansky (who did not attend the hearing to be questioned). A copy of his report was before the EAT. In an opening section reviewing the medical documentation supplied to him, Dr Bodansky had noted the following:

> **4.10.2016: His diagnosis was given as 'diabetes mellitus ?LADA. He has a positive GAD antibody test (glutamic acid decarboxylase) result of 7 (normal <5). The clinic letter comments that the consultant "was not sure about the type of diabetes. With GAD antibody low positive, he may be going through a very slow process of beta cell destruction."**

In response to a question from the Claimant's solicitors ("What type(s) of diabetes was the Claimant diagnosed with and at what time(s)?"), Dr Bodansky had responded:

> **On 11.3.2016 he was diagnosed with diabetes because of an abnormally high glucose level of 26.5mmol/L. On 12.3.2016 he had urine ketones + + + . The diagnosis should have been probable type I diabetes, however the treating doctors were not sure. He was given a provisional, but not definite, diagnosis of type II diabetes and treated as such with tablets. The diagnosis was clearly left open pending further investigations. This is not an uncommon scenario.**
>
> **On 4.10.2016 his GAD antibody test was reported as positive which is compatible with and supportive of a diagnosis of autoimmune type I diabetes.**

Dr Bodansky continued his report with a comment that type 1 diabetes "goes on for months or years prior to the clinical presentation and diagnosis" and that, if the Claimant had not been given any treatment at all for diabetes when he presented in March 2016, "he would have become rapidly and progressively more unwell, probably with a fatal result".

56. Mr Carr QC relied on the fact that Dr Bodansky's report described the Claimant as still undergoing tests as to whether he had type 1 or type 2 diabetes as late as 4 October 2016 (which, of course, was after his dismissal) to support a submission that no reasonable ET, having regard to that report, could have concluded that it was improbable that the Claimant was referring to "tests" in July and August; and, therefore, that no reasonable ET would have fixed the directors with knowledge, prior to the Claimant's dismissal, of a condition that remained uncertain.

57. Mr Carr QC criticised the ET for making no mention of Dr Bodansky's report in its judgment and for identifying, without a proper evidential basis, a "watershed" moment of 11 July 2016 when a firm diagnosis was made of type 1 diabetes. He contended that the ET erred in overlooking Dr Bodansky's report; if the ET had taken its contents on board, the only conclusion open to it was that the ongoing equivocal diagnostic position supported the accounts of the Respondent's witnesses as to what the Claimant was telling them. He contended that this error infected the judgment in other respects, because it was the foundation for an inference that Mr Peel and Dr Rawling knew of the Claimant's diagnosis but pretended that they did not.

58. Mr Rajgopaul replied that this attack on the ET's analysis was pernickety and hypercritical. He referred to significant evidence before the ET from which it could legitimately conclude that the Claimant received a firm diagnosis of type 1 diabetes on or around 11 July 2016. For example, the Claimant himself gave an account at paragraphs 148 and 188 of his witness statement as follows, referring to page numbers in the original bundle before the ET (and with my added emphasis):

> **(148) A hospital error delayed the ordering of GAD Antibody and C Peptide tests … which are conclusive as to whether a patient has type 1 or type 2 diabetes (page 1214) and how much of the pancreatic insulin beta cells remain functioning. However, I was advised at the hospital on 12 and 16 March 2016, that I was most likely to be type 1 (page 1213 — as recorded there, I was told that I may need insulin soon and may have Type 2 diabetes but that that seems less likely than Type 1) but they wanted to see how I reacted to the medication and to see the results of the GAD Antibody tests before starting me on insulin. These tests were ultimately not done until 3 May 2016 (page 1216) as I was not presenting typically as either type 1 or type 2 (page 1219). The GAD Antibody test results ultimately confirmed however, that I was type 1 (page 1221, 1222, 1226, 1262) …**
>
> **(188) … there was no suggestion of testing for a food allergy/coeliac, which only arose once I received the positive GAD antibody results in July 2016. The results were recorded in my GP records on 19 July 2016 (pages 1186 and 1221) but I was informed on 11 July 2016 by Dr Farhad Alli by telephone.**

Moreover, the bundle before the ET contained a letter from the Claimant's GP to a consultant dated 19 July 2016 saying, "This man has recently been diagnosed with Type 1 diabetes after positive GAD antibodies".

59. The ET did not refer to this evidence in its judgment either. However, applying **DPP Law Ltd v Greenberg**, a failure to refer to evidence does not mean that it was not considered in reaching the conclusions expressed in the decision, because what is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind. It is clear that there was evidence before the ET to support the conclusion it reached.

60. In my judgement, it was properly open to the ET to identify 11 July 2016 as the date of the relevant diagnosis and, thereafter, to prefer the Claimant's account of how he shared that news with the Respondent's directors, to reject the evidence of Mr Peel and Dr Rawling that he was still referring to "tests" until his dismissal, and to fix them with knowledge of the condition prior to the decision to dismiss. The third ground of appeal therefore fails.

The fourth ground of appeal

61. The Respondent's fourth ground of appeal is that the ET failed to give adequate reasons for its finding that Mr Peel, Dr Rawling and Mr Knight knew about the Claimant's diagnosis of type 1 diabetes prior to his dismissal.

62. I can deal with this point quickly. The ET explained why it attached significance to the "three amigos" nickname; in short, Mr Peel, Dr Rawling and Mr Knight were likely to share information and confide in one another, so that what one of them knew, so another was likely to know. The ET accepted that there had been discussions involving the Claimant and the directors

about investigations into the Claimant's health. The ET's finding at paragraph 86 that the Claimant and Mr Peel discussed his diagnosis on 13 July 2016 (that it "saw no reason why the Claimant should not have mentioned his diagnosis on this occasion, as he was not making any secret of it") might have been better expressed, but it was clear enough. The ET found that the Claimant personally told a different director who was also a friend. Reading its judgment as a whole, and bearing in mind that the ET had concluded that Mr Peel took the lead in such matters, it was open to it to conclude that it was "inconceivable" that Mr Peel was still unaware of the Claimant's diagnosis of type 1 diabetes by the time of the meeting on 3 August 2016 (either because of what the directors had heard from others, or from each other, or from the Claimant himself), which was the day before the Respondent dismissed him.

63. The ET resolved the conflicting evidence it heard by reference to what it considered probable and plausible, and, in my judgement, its reasons were **Meek**-compliant. The fourth ground of appeal fails.

The fifth ground of appeal

64. Whereas the Respondent's third and fourth grounds of appeal concerned the ET's finding that Mr Peel and Dr Rawling knew that the Claimant had type 1 diabetes, its fifth ground of appeal contended that the ET failed to consider if they also had knowledge of the relevant facts constituting his disability as identified by Section 6(1) EA, namely that it was a physical impairment with a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. It is contended that the ET erred by reaching a conclusion, expressed at paragraphs 105 and 112.4 of its judgment, about what was "generally known" about type 1 diabetes.

65. Pausing there, it is plainly not right to say that the ET failed to consider Mr Peel's and Dr Rawling's knowledge of disability. It expressly concluded at paragraph 105 that they would have known, and did know, that type 1 diabetes is a lifetime condition, requiring medication to control symptoms that would otherwise have a substantial adverse effect on the ability to carry out normal day-to-day activities. The point Mr Carr QC pursued before the EAT was that it was perverse for the ET to reach such a conclusion, as it was unsupported by evidence.

66. For his part, Mr Rajgopaul urged me not to approach this appeal as if it were a different case that had proceeded before the ET. A great deal of evidence was before the ET over many days, he said, on who among the Respondent's directors knew what and when, and it occupied much of its judgment. Mr Rajgopaul highlighted paragraph 54 of Mr Peel's witness statement, by way of example, where he said that he "had not noticed any outwardly evident symptoms which would lead [him] to suspect that [the Claimant] had the condition"; Mr Rajgopaul said that such an observation was hardly consistent with someone said to be ignorant of its impact. He also pointed out that, on three occasions, the Respondent's closing written submissions described diabetes as a "common" or "commonplace" condition.

67. I bear in mind that this hearing came before a full ET including two non-legal members appointed for their insights into, and experience of, workplace matters, which include diversity and inclusion issues arising from employing individuals with a range of protected characteristics such as disability. As Morison P expressed it in **Sogbetun v London Borough of Hackney** [1998] IRLR 676 (with added emphasis):

> **The Industrial Tribunals were set up to provide an industrial jury, whose function is to make judgments, subject to legal direction, about employers' conduct, based upon experience of the workplace … the respect for Industrial Tribunal decisions comes from a number of circumstances, including importantly, from the fact that cases are not tried by a judge or other legally qualified person alone but by a panel of three who can bring their collective wisdom to resolving the matters in issue. Each side of industry is represented on the panel, and the parties before them can**

> **be confident that their respective positions have been well understood and fairly assessed by people who have workplace experience. The Tribunal brings a collective good sense to the determination of employment issues.**

68. Once again, reading the ET's judgment as a whole, and bearing in mind the Court of Appeal's reminder in **DPP Law Ltd v Greenberg** that a failure to refer to evidence does not mean that it did not exist or was not considered, and taking account of the presence of non-legal members who brought their workplace experience to bear on the issues arising for determination, I am persuaded that it was open to the ET to decide that Mr Peel and Dr Rawling personally understood type 1 diabetes to be a disabling condition for relevant statutory purposes.

69. For completeness, I note that the Respondent's original ground of appeal contended that the nature and impact of type 1 diabetes was "not a matter that the ET could reasonably take on judicial notice". I heard no submissions on this point; the focus was, as stated above, on what Mr Peel and Dr Rawling knew personally and I have found that the ET's conclusion was not perverse. I will limit my observations to two points. First, it is far from clear whether the ET was in fact taking judicial notice of the nature and impact of type 1 diabetes; its use of the phrase "generally known" at paragraph 105 is vague. It was not suggested to me that the Claimant himself sought judicial notice of such facts. If the ET was intending to raise the matter of its own initiative, it should have alerted the parties to its thinking so that they had an opportunity to make submissions. However, as I have said, it is not clear that they were doing so. Second, and in any event, **Phipson on Evidence** (19th Edition) 3-02 recognises that judicial notice may be taken of matters that "may be noticed after inquiry, such as after referring to works of reference or other reliable and acceptable sources". That, I suggest, would extend to the impact of common conditions like diabetes in both its forms. Judicial notice is not limited to those matters that "are so notorious or so well established to the knowledge of the court that they may be accepted without further enquiry".

70. However, it is a moot point. For the reasons I have given, the fifth ground of appeal fails.

The sixth ground of appeal

71. The Respondent's sixth and final ground of appeal attacked the ET's judgment because of a serious procedural irregularity, concerning the ET's finding at paragraphs 103.5 and 122.2 of its judgment that Mr Peel and Dr Rawling had colluded to deny knowledge of the Claimant's disability on 4 August 2016. As we have seen, the ET's conclusion in this regard was the foundation of the Claimant's successful complaint that he was subjected to direct disability discrimination by the refusal of these two directors, when challenged, to acknowledge his ill health. It was also one of the inferences the ET drew when upholding the complaint that the Respondent's decision to dismiss the Claimant was an act of direct discrimination, alongside the further inference that they did so because they knew his disability "was a factor in the decision to dismiss him, and that (in non-technical terms) it should not be". Specifically, the Respondent contended that it was not open to the ET to make a finding of collusion when, it says, it was not put to either of the impugned individuals.

72. I pause to note that there has been no challenge to the ET's finding of fact that Mr Peel and Dr Rawling both denied knowing of the Claimant's ill health when challenged (paragraph 103.4); further, of course, the ET had also found (permissibly, I have decided) that they did know. There has also been no challenge to the ET's finding of fact that they replied with the same phrase – "absolutely no knowledge" (paragraphs 98-99 and 101-102). The Respondent's challenge was to the ET's inference of secondary fact that they colluded before doing so, and it was common ground in the appeal that the specific allegation of collusion was not put to them. (I briefly note that that Mr Carr QC abandoned the other matters mentioned under this ground at paragraph 16 of the Respondent's notice of appeal.)

73. In developing this argument, Mr Carr QC contended that no ET should make a finding as serious as conspiracy or collusion by inference alone and that, if the ET is contemplating such a finding, the matter should be put to the individuals concerned so that they may respond. In support of that contention, Mr Carr QC relied on the judgment of the EAT in **NHS Trust Development Authority v Saiger & others** [2018] ICR 297.

74. In **Saiger**, the ET had made a series of inferential findings about conversations it decided must have taken place between several individuals with a view to removing a candidate from a shortlist for interview. HHJ Hand QC analysed the so-called "rule in **Browne v Dunn**" (1894 R 67), a judgment of the House of Lords, and at paragraph 88 he quoted the following speech of Lord Herschell:

> **… I have always understood that if you intend to impeach a witness you are bound, while he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case; but is essential to fair play and fair dealing with witnesses … Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.**

75. Looking at the ET judgment under appeal in **Saiger**, HHJ Hand QC concluded that there had been a serious procedural irregularity. He further held as follows:

> **(99) … If conclusions of dishonesty are to be reached, it will usually be unfair to reach them unless the person likely to be condemned has had an opportunity to deal with them. If a tribunal is minded to reach a conclusion that is purely inferential and such a conclusion is neither obvious nor has it been advertised in that form at any point in the proceedings, then the tribunal must give the parties an opportunity to address the matter.**
>
> **(102) … When it is clear from the variety of written material that nowadays attends a civil trial or a hearing in the employment tribunal what the issues in a particular case are, it may not be necessary for each matter to be expressly put. Whether it would be erroneous for the tribunal to reach a particular conclusion in the absence of any particular matter being put will depend on the circumstances of the case. The extent to which there has been procedural unfairness is not**

> **necessarily a matter of simply scrutinising what actually was put. It will involve a consideration of all of the evidence, how the matter stood at the end of all of the evidence and what the parties and the tribunal should have recognised from that material was still in issue in the case. I do not accept that every failure to put every particular aspect of a case amounts to a serious procedural failure. The context may suggest that looked at overall it was perfectly fair, everybody knew where they were heading, what was at issue, what the case being put forward was and what the answer to it should be.**

76. In his reply, Mr Rajgopaul referred me to the Court of Appeal's recent judgment in **Ras Al Khaimah Investment Authority (RAKIA) v Azima** [2021] EWCA Civ 349. In that case, the High Court held that Mr Azima committed seriously fraudulent conduct against an investment fund. On appeal, Mr Azima contended that certain inferences drawn by the Deputy High Court Judge were impermissible as they had not been properly put to relevant witnesses. Before concluding that there was no unfairness on this point, the Court of Appeal examined the same extract in **Browne v Dunn** quoted above. It also highlighted other judicial analysis on the point. This included the Court of Appeal's judgment in **Howlett v Davis** [2018] 1 WLR 948 as to when a person bringing a personal injury claim lost qualified one-way costs-shifting protection on grounds of "fundamental dishonesty". In **Howlett**, Newey LJ said:

> **… where a witness's honesty is to be challenged, it will always be best if that is explicitly put to the witness. There can then be no doubt that honesty is in issue. But what ultimately matters is that the witness has had fair notice of a challenge to his or her honesty and an opportunity to deal with it. It may be that in a particular context a cross-examination which does not use the words "dishonest" or "lying" will give a witness fair warning. That will be a matter for the trial judge to decide.**

77. The Court of Appeal in **RAKIA** also highlighted the case of **Williams v Solicitors Regulation Authority** [2017] EWHC 1478 (Admin), in which Carr J referred to the rule in **Browne v Dunn** and said this at paragraph 73:

> **The rule is not an absolute or inflexible one: it is always a question of fact and degree in the circumstances of the case so as to achieve fairness between the parties. Civil litigation procedures have of course moved on considerably since the 19th Century. Witnesses now have the full opportunity to give their evidence by way of written statement served in advance, and then verified on oath in the witness box.**

78. Finally, the Court of Appeal in **RAKIA** referred to the analysis of the Privy Council in **Chen v Ng** [2017] UKPC 27. In that case, the Privy Council held that there was unfairness in a judge's decision to disbelieve an explanation for a share transfer. Lord Neuberger and Lord Mance said this at paragraphs 52 and 55:

> **(52) In a perfect world, any ground for doubting the evidence of a witness ought to be put to him, and a judge should only rely on a ground for disbelieving a witness which that witness has had an opportunity of explaining. However, the world is not perfect, and, while both points remain ideals which should always be in the minds of cross-examiners and trial judges, they cannot be absolute requirements in every case. Even in a very full trial, it may often be disproportionate and unrealistic to expect a cross-examiner to put every possible reason for disbelieving a witness to that witness, especially in a complex case, and it may be particularly difficult to do so in a case such as this, where the Judge sensibly rationed the time for cross-examination and the witness concerned needed an interpreter. Once it is accepted that not every point may be put, it is inevitable that there will be cases where a point which strikes the judge as a significant reason for disbelieving some evidence when he comes to give judgment, has not been put to the witness who gave it.**
>
> **(55) At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimising costs in litigation, on the one hand, and the even more important requirement of a fair trial, on the other. Specific factors to be taken into account would include the importance of the relevant issue both absolutely and in the context of the case; the closeness of the grounds to the points which were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material to be put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and, in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds.**

79. In addressing whether the ET's finding about collusion between Mr Peel and Dr Rawling involved unfairness to them, I have noted the following seven points:

79.1 It was telegraphed from the very beginning of the proceedings that the Claimant was alleging that Mr Peel and Dr Rawling both denied knowledge of his ill health, when challenged by him. It was in the grounds of complaint attached to his ET1 claim form. At paragraph 40 of those grounds, the Claimant described an exchange with Dr Rawling on 4 August 2016, just after his dismissal, in these terms: "The Claimant expressed his shock and anger at the dismissal …

[Dr] Rawling then denied any knowledge of the Claimant's health issues, notwithstanding the specific discussions he had had with the Claimant …". At paragraph 42 of those grounds, the Claimant described a similar conversation the same day with Mr Peel, in which "Mr Peel also claimed that he had absolutely no knowledge of any health issues the Claimant had". At paragraph 44 of those grounds, he contended that their "refusing to acknowledge his ill health" was an act of direct disability discrimination.

79.2 That contention was a live issue at the commencement of the hearing. The list of issues before the ET included "refusing to acknowledge [the Claimant's] ill health as alleged in paragraphs 40 and 42 [of the grounds of complaint]". As this was a complaint of direct disability discrimination, it was, or should have been, obvious to the parties that, if the ET found that they had refused to acknowledge his ill health as alleged, it would then need to consider the reason why they did so.

79.3 This was a hearing in which there was an abundance of suggestions that, to adopt Lord Herschell's phrase, the parties' stories were not accepted. In the ET's words, "each party maintained that the other was presenting substantial quantities of false evidence" (paragraph 15). It is telling that, when analysing different accounts of whether the Claimant was exhibiting symptoms or changes of behaviour, the ET noted: "As with other evidential disputes in the hearing, each party was maintaining that the other's case on the point was completely wrong" (paragraph 43). There was also cross-examination of the Respondent's witnesses on matters of document fabrication and manipulation, one of which (in relation to Mr Peel's alteration of the email of 30 June 2015) the ET upheld. Put another way, alleged dishonesty was at the heart of the dispute with which the ET was confronted.

79.4 The possibility of collusion between the Respondent's main witnesses, to agree a "line" to take, was in plain sight throughout the hearing. This is not just because Mr Peel, Dr Rawling and Mr Knight were described as the "three amigos". It is also apparent from the ET's discussion of a drinks event following a Board meeting on 17 March 2016 (paragraph 39), the manifestation (or not) of the Claimant's symptoms (paragraph 45), whether the Claimant sent an email to Mr Peel, Dr Rawling and Mr Knight after his dismissal (paragraph 64) and whether the Claimant mentioned type 1 diabetes at a Board meeting on 23 June 2016 (paragraph 70). In respect of each of these occasions, the ET positively addressed, but then declined to find, collusion.

79.5 The ET was under pressure of time. As the ET explained in the preamble to its judgment, the nine-day allocation of time was reduced to eight days and the timetable was further threatened by problems of late disclosure. I have commented on the size of the hearing bundle. I was shown solicitors' notes of the hearing with examples of the Employment Judge seeking to expedite matters during Mr Rajgopaul's cross-examination of Mr Peel (appeal bundle page 199A-B: "EJ – getting anywhere; got general picture, don't think it will change by being put"; "EJ – ET won't hold against you if some point that hasn't been put. Don't struggle to cover every point").

79.6 Considering the evidence before the ET in the round, it is important not to lose sight of the fact that Mr Peel and Dr Rawling maintained their denial of knowledge of disability throughout: in the Respondent's response to the Claimant's claim; in their witness statements; when cross-examined; and through the Respondent's closing written submissions. The crucial primary facts about knowledge by the time of dismissal, as ultimately found by the ET, were repeatedly and consistently denied by them. It is implausible to suppose that, if further questions had been put to them in cross-examination about whether they had colluded in their denial with

a view to disguising the impact of the Claimant's diagnosis on their actions, they would abruptly have performed a *volte-face* and accepted that they had indeed colluded to that end.

79.7 Having permissibly made a finding of primary fact that Mr Peel and Dr Rawling had denied to the Claimant's face their knowledge of his ill health (thereby rejecting their evidence to the contrary), the ET was – as noted above – duty bound to consider the reason why they had done so. It is very common in discrimination cases that the "reason why" is inferred as a secondary fact. This, in my judgement, is what the ET did at paragraph 103.5; it sought an explanation for why Mr Peel and Dr Rawling had replied to the Claimant "in the same terms", attaching significance to its finding that they used an identical phrase. The ET sought the most likely and coherent explanation for why they did so. There were sufficient findings of primary fact from which the ET could legitimately draw the inference that Mr Peel and Dr Rawling had agreed in advance to reply in the same terms to disguise the influence of the Claimant's diagnosis on the decision to dismiss him.

80. Having regard to the seven points above, I am not persuaded that paragraphs 103.5 and 122.2 of the ET's judgment were unfair to Mr Peel or Dr Rawling, in terms of a serious procedural irregularity involving a breach of the rule in **Browne v Dunn**. I consider that this was a case where, in reality, everybody understood what was at stake and what the questions were getting at. Issues of dishonesty and collusion were sufficiently advertised. Accordingly, the sixth ground of appeal also fails.

Disposal

81. Notwithstanding clear and helpful submissions from Mr Carr QC on the Respondent's behalf (and I also express my gratitude to Mr Rajgopaul), I am unpersuaded that the ET's

judgment contains any of the errors of law identified. The Respondent's appeal is therefore dismissed. Minor infelicities of expression do not detract from the careful and balanced judgment produced by the ET following a long and hard-fought case. That case should now return to the ET so that, before remedy is decided, a further preliminary hearing can take place for case management purposes. If the remedy hearing is likely to take several days, the Regional Employment Judge may wish to consider offering the parties judicial mediation.