Neutral Citation Number: [2023] EAT 151

Case No: EA-2021-000798-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 December 2023

Before:

HIS HONOUR JUDGE SHANKS

RACHAEL WHEELDON
ANDREW HAMMOND

- -

Between:

IONEL ION

Appellant

- and –

(1) CITU MANUFACTURING LTD
(2) CHRISTOPHER THOMPSON

Respondents

- -
- -

ANDREW EDGE (Free Representation Unit) for the **Appellant**
GARETH PRICE (instructed by Haddletons) for the **Respondents**

Hearing date: 14 and 15 November 2023

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE, RACE DISCRIMINATION, WHISTLEBLOWING

The claimant was a Romanian national. He was a conscientious worker. He was dismissed with others on 1/5/20, ostensibly for redundancy. The ET accepted that he was selected because of the respondent employer's perception that he was disruptive, based on his failure to comply with company values which focussed on teamwork.

Claims of race discrimination and whistleblowing were dismissed by the ET following a seven day hearing.

The claimant's appeal succeeded and the whole case was remitted to be heard by a fresh ET on the grounds:

(1) The ET had not properly applied section 136 EqA 2010: they should have identified the facts giving rise to an inference of race discrimination, recognised that the onus had passed to the respondents under section 136 to prove on the basis of cogent evidence that the dismissal was in "no sense whatsoever" because of the claimant's nationality and "grappled with" significant evidence pointing towards discrimination.

(2) The ET had failed to make clear findings of fact in relation to the alleged protected disclosures relied on or analysed whether they were indeed protected disclosures and, if so, what their effect on the respondent was: given the nature of the reason relied on for the dismissal it was not sufficient in this case simply to say that the claimant had not proved that the reason or principle reason for the dismissal was protected disclosure(s).

(3) There were serious material procedural irregularities in the course of the hearing in that (a) the quality of the Romanian/English interpretation was not good enough and the ET had failed to address the issue properly until the fourth day and (b) there were a significant number of occasions when the EJ intervened to prevent questioning of the respondent's witnesses in relation to culture and values which were relevant to the issues in the case.

HIS HONOUR JUDGE SHANKS:

Introduction

1. This is an appeal by the claimant, Mr Ion, against a judgment of the employment tribunal sitting in Leeds (EJ Lancaster, W Roberts and P Northam) dismissing all his claims against his former employer (except for a modest claim for holiday pay) following a seven day hearing in May 2021. After a rather involved procedural history in the EAT, the appeal was set down for a full hearing by Judge Stout after a rule 3(10) hearing on 8 March 2023 on five grounds identified and helpfully elaborated in her reasons at pp 88/9 of the appeal bundle.

2. Mr Ion's wife, Ms Nafornita, represented him before the ET. In the EAT Mr Edge has argued the appeal for him pro bono through the Free Representation Unit. We are grateful for his helpful submissions, and of course for those of Mr Price who also appeared for the Respondents below.

The factual background

3. The first respondent, CITU, is a property developer and construction company based in Leeds. It states that it is "accelerating the transition to zero-carbon cities". The Second Respondent, Christopher Thompson, was its managing director.

4. Mr Ion is a Romanian national and has limited English. He is a qualified and experienced joiner by trade. He was a direct employee of CITU from 3 December 2018 until his dismissal which took effect on 31 July 2020. At that stage he was in his early 40s.

5. Mr Ion worked at a development site in Leeds called Climate Innovation District as a joiner. He was part of a team led by Lee Burgin. The team was consistently high performing, completing plots quicker than other teams on site. There was no criticism of Mr Ion's work

and it seems clear that he was a conscientious and ambitious worker. It appears that he often raised concerns and ideas which he considered would help the company, although these were not always well received and some may not have been consistent with the stated zero-carbon aims of the company. Particular examples of matters of concern he raised which were considered by the tribunal related to the need to protect timber on site from the rain, the playing of loud music by fellow workers and access to the site by an ambulance.

6. The tribunal found that in November 2019 Mr Burgin said to Mr Ion in the context of an issue as to who might stand in for him at a team leader meeting: "We could not have a foreigner leading a team of Brits" (see paras 18-20 of the judgment).

7. On 8 December 2019 Mr Ion had surgery for a long-standing sciatica issue and he was off work until 20 January 2020. On his return it was agreed that he would be on light duties for two weeks. The tribunal found that at the end of this period he appeared to be able to resume full duties including lifting plasterboards.

8. Mr Ion was placed on furlough on 26 March 2020 as a consequence of the pandemic. Shortly before that on 16 March he had identified a lack of cleansing facilities and tissues on site in a company-wide platform. Jonathan Wilson, a director, asked Mr Ion to remove the post because he considered that this " … was an inappropriate place to raise the issue and it could have been dealt with personally and by Mr Ion taking responsibility to try and source matters himself if necessary" (see para 33).

9. On 3 April 2020 Mr Ion wrote an email to Mr Thompson which we were not shown and which is not quoted by the tribunal but which they described as "running down the value and roles of others in the company and suggesting that he [Mr Ion] should take charge of the CID site

to impose his way of working and dismiss whoever he wanted … with a view to his achieving profits for the company that would justify a £200,000 salary for himself in some six months" (see para 36). The tribunal record that Mr Ion well knew that no employee (including directors) at the company was paid more than six figures and they found that the email concerned Mr Thompson who thought that what Mr Ion was saying was not in accordance with the objectives of the company or its values of teamwork and that he responded accordingly. We were told that Mr Ion gave evidence to the effect that the reason he had written his email was that he had been invited by Mr Thompson to write with ideas for improving the performance of the company: the tribunal do not allude to this evidence in the judgment or give any background to the writing of the email.

10. While the company was continuing to operate with a skeleton staff Mr Thompson decided that there should be a reduction in staff numbers. He charged Mr Wilson with the task of carrying out redundancies. The tribunal record that he also supplied Mr Wilson with the correspondence from Mr Ion to which we have just referred. Mr Wilson in turn instructed Mr Waterton and Mr Palfreyman to "identify employees who did not fit in with the cultural values of the company or in particular those who did not have what is called 'fire in the belly'" (see para 37). Mr Waterton and Mr Palfreyman made a short list of seven or eight people from the Leeds construction force which included Mr Ion.

11. Mr Palfreyman then approached team leaders including Mr Burgin. Mr Burgin was simply asked: "Is there anyone on your team you can do without?". He identified Mr Ion. The tribunal record that this selection was "because there were two joiners" in the team, the other being Lee Chilvers; Mr Chilvers was British and named as Mr Ion's comparator for the purposes of his race discrimination claim. The tribunal accepted that what was on Mr Burgin's mind when he selected Mr Ion was that he had a potentially "disruptive" attitude, particularly

because he made comments about how his work was superior and that he deserved more money. This was apparently contrary to the company's ethos of teamwork and paying everyone a similar amount.

12. The team leaders came up with five names in Leeds (all of whom were already on the short list), three of whom were not British, including Mr Ion. The list was put forward to Mr Wilson by Mr Waterton and Mr Waterton was required to justify the five as being at risk of redundancy. The final decision to approve the list was taken by Mr Wilson; the tribunal accepted his recollection that the key point in relation to Mr Ion was the "perceived element of disruption and disquiet in the team" (see para 39).

13. On 1 May 2020 the five on the list, along with five others from the company's Sheffield site, were told by Mr Waterton that they were being made redundant. They were given notice but there was no consultation of any sort. When Mr Ion wrote to Mr Thompson protesting about the decision to dismiss him Mr Thompson indicated (and the tribunal accepted) that it was not his decision but Mr Wilson's.

14. At some stage before Mr Ion's dismissal took effect three other joiners who had been retained gave notice but Mr Ion was not offered any of those positions as alternative employment. Mr Ion's position as recorded in his ET1 which is not referred to by the tribunal in their judgment is that he actually contacted the company when he saw they were recruiting joiners and was told without more that he could not apply for any current or future jobs at CITU and to stop contacting them.

15. Unsurprisingly the tribunal found that, if Mr Ion had had two years employment, a dismissal for redundancy would undoubtedly have been regarded as unfair on the basis that there was

no proper selection process, there was no consultation and he was not offered suitable alternative employment when it arose before his effective date of termination.

The tribunal proceedings

16. Mr Ion brought proceedings in the employment tribunal complaining about his dismissal and claiming race and disability discrimination. In his ET1 form he also complained that when he tried to report wrongdoing he got persecuted and in due course a claim for unfair dismissal under section 103A of the Employment Rights Act 1996 was also identified in the list of issues.

17. In the grounds of resistance attached to the ET3 form under the heading "The Claimant's dismissal" at paras 4-6 there is reference to the email of 3 April 2020 which is described as "a serious issue of misconduct". There is then reference to the fact that Mr Ion was told by Mr Waterton on 1 May 2020 that he was being given notice because of the economic downturn caused by Covid-19 but it is accepted that Mr Waterton did not refer to the issues of conduct and behaviour. It is then said that the decision to dismiss was in fact made both because of the economic conditions and Mr Ion's conduct and that, since he had been dismissed for those reasons, he could not be considered for re-employment.

18. As we say, there was a seven day hearing in May 2021. Mr Ion was provided with the services of an interpreter and represented by his wife who speaks good English. There were undoubtedly issues relating to the interpreter during the hearing and it is Mr Ion's case that his wife was prevented by the EJ from asking relevant questions in cross-examination of the respondents' witnesses: we will say more about those matters later as they form the basis for grounds of appeal 4 and 5 and give rise to factual issues which we must resolve.

19. It seems clear that the EJ took the view from the outset that the reason for Mr Ion's dismissal was redundancy: this is recorded by Mr Roberts, one of the members of the tribunal, in a statement prepared for the EAT where he says that the EJ explained this to Mr Ion before the hearing got going (see pp 101/2 of our bundle) and it is reflected in para 3 of the ET's judgment which states before there is any further analysis that Mr Ion "… was undeniably dismissed as part of a wider redundancy process" such that the claim was properly classified as one under section 105(6A) of the Employment Rights Act rather than section 103A. It was part of Mr Edge's case before us that the EJ took a narrow pre-conceived view of the case which influenced his conduct of the hearing.

20. Judgment was given orally at the end of the hearing on 14 May 2021. Written reasons were requested and delivered on 6 July 2021; it seems likely that they consist to a very large extent on a transcript of the oral judgment given at the hearing.

21. The tribunal found that there was a redundancy situation and that Mr Ion was selected for redundancy because he was disruptive in that he ran down colleagues and sought to promote himself which was contrary to the company's values. They rejected his claims that the reason or principal reason for his dismissal was whistleblowing and/or that it was materially influenced by his nationality. They also rejected his claim for disability discrimination on the basis that, although he was "disabled" because of his back problems during the relevant time after his return to work from his operation, he was able to work without any apparent limitation.

The appeal

22. Mr Ion's appeal has been allowed to proceed to a full hearing on the following five grounds which Judge Stout considered to be arguable:

(1) that in reaching its decision on race discrimination the tribunal failed to apply section 136 of the Equality Act 2010 properly and/or reached a perverse decision and/or failed to provide adequate reasons;

(2) that the tribunal had failed to address the issues raised by section 19 of the Equality Act 2010 in rejecting Mr Ion's claim for indirect disability discrimination arising from his sciatica (which the tribunal found to be a continuing disability in 2020);

(3) that the tribunal failed to make the necessary factual findings in relation to the alleged protected disclosures relied on by Mr Ion and to consider whether the respondents' perception that he was disruptive and/or ran down colleagues and/or sought to promote himself above the team ethos was causally linked to such disclosures or properly separable from them;

(4) that the poor quality of the English/Romanian interpretation and the way the issue was dealt with by the tribunal materially impacted on the fairness of the proceedings;

(5) that the EJ unfairly prevented Ms Nafornita from cross-examining the respondents' witnesses in relation to the company's cultural values when the respondent was relying on Mr Ion's failure to fit in with those values as part of the reason for his dismissal or selection for redundancy and they therefore related to a central issue in the case.

Ground 1: Race discrimination

23. The claim that Mr Ion was dismissed because of his nationality was rejected by the tribunal in a short paragraph at the end of the judgment which stated:

> **52. … As we have expressed in the course of discussion and submissions it is potentially a concern when a respondent makes a decision based on compliance with cultural values. And as we have said the way that this redundancy was handled was in general terms unfair but, even if that were sufficient to pass the burden of proof to the respondent under section 136, we would in any event be perfectly satisfied that the real reason why the claimant was selected was indeed his perceived lack of compliance with the stated company values, which are not**

> **tainted by discrimination. Those values are focused on teamwork and not doing down your colleagues and that is where the claimant was perceived to fall short.**

24. Mr Edge referred us to the recent case of **Field v Steve Pye & Co** [2022] IRLR 948 in which HH Judge Tayler re-emphasises at paras [41] to [49] the importance of applying section 136 properly and of generally adopting the "two stage" approach in the guidance set out in the **Igen** case [2005] EWCA Civ 142, especially in a case where there is significant evidence suggestive of discrimination rather than, as the tribunal did in this case, proceeding direct to the "reason why" second stage. This ensures that the tribunal identifies the facts from which an inference of discrimination could be made and looks for cogent evidence which shows that the decision was in no sense whatever discriminatory and that they "grapple with" the evidence which points towards discrimination. If they fail to take this approach or to give an adequate explanation for not doing so, their conclusion will be considered "unsafe" by the EAT.

25. It seems to us that in this case the relevant facts for the purposes of section 136 were these:

(1) On 1 May 2020 the claimant was informed "out of the blue" without consultation that he was to be made redundant;

(2) When three joiners who were to be retained gave in their notice while the claimant was still employed and CITU were seeking to replace them the claimant applied for a job and was on his account (which the tribunal did not reject) simply told he could not apply for a new job with CITU;

(3) In response to his claim of race discrimination in the tribunal CITU stated at paras 4-6 of their grounds of resistance dated 3 September 2020 that the claimant's email of 3 April 2020 to Mr Thompson challenged their values and culture and that they believed this was a "serious issue of misconduct" which, along with the economic downturn caused by

Covid, was *the reason* for his dismissal and the decision not to re-employ him, although (as they admitted) it was not referred to at the time;

(4) It is hard to see how an email like this which was not publicised could really have been considered a "serious issue of misconduct," particularly if it was written, as Mr Ion maintained, in response to a specific invitation (as we say above, the ET did not make any finding about the background to the email);

(5) The case presented to the tribunal by CITU was that he was selected for redundancy in the circumstances outlined above;

(6) The criterion apparently laid down by Mr Wilson for the selection process was to identify employees "who did not fit in with the cultural values of the company"; those values were very nebulous, at no stage did the tribunal identify their source or analyse them and, as the tribunal recognised, it is a potentially a matter "of concern" when such values are put forward as a justification for a dismissal;

(7) The initial selection of the claimant was made by Mr Burgin in response to a request to identify anybody in his team that he could do without; Mr Burgin was the claimant's team leader and had made the comment to him in November 2019 that "we could not have a foreigner leading a team of Brits";

(8) Of the five people from Leeds put forward by team leaders to Mr Palfreyman and Mr Waterman (who corresponded with the five people already on their provisional list) three were non-British nationals. Again, the tribunal made no real analysis of this statistic but without more it is certainly suggestive of discrimination.

26. We are quite satisfied that, on the basis of these facts taken together and in the absence of any other explanation, the tribunal could properly have drawn the inference that the claimant was dismissed because of his nationality. Indeed, we consider that they established a pretty strong prima facie case. The onus of proof had therefore plainly passed to the respondents under

section 136. In those circumstances we consider that the tribunal ought to have identified these facts and expressly recognised that they caused the onus to pass to the respondents to prove on the basis of cogent evidence that the dismissal was in "no sense whatsoever" because of the claimant's nationality and, as Judge Tayler puts it, ought to have "grappled with" the significant evidence pointing towards discrimination.

27. We are satisfied that the tribunal did not take these steps and that this ground of appeal must therefore succeed. Although we acknowledge that tribunal judgments must be given a fair reading and that there are advantages to both extempore and brief judgments it is essential in our view that, when dealing with discrimination claims like this, tribunals demonstrate that they have applied section 136 properly. We do not consider, however, that the case is sufficiently clear cut for us to find that the tribunal's conclusion was "perverse" and to substitute a finding of race discrimination. Accordingly the matter will have to be remitted to the ET to be considered again.

Ground 2: Indirect disability discrimination

28. Mr Ion claimed that CITU failed to make "reasonable adjustments" in relation to his sciatica by requiring him, after the initial two weeks of light work in January 2020, to move heavy plasterboard again. The tribunal rejected this claim because he gave no indication after the two week period that he could not resume his full duties and the employer could not reasonably have been expected to know that he was disadvantaged by being required to do so (and therefore, we take it, to continue the reasonable adjustments which had been made on his immediate return to work) (see para 47).

29. The tribunal considered his claim of indirect disability discrimination at para 48 of the judgment. They said that it did "not add anything" to the reasonable adjustments claim and

that Mr Ion had not proved any "particular disadvantage in circumstances when he carried on working without protest".

30. Mr Edge says that, since the only basis for rejecting the "reasonable adjustments" claim was the employer's reasonable state of knowledge, it was wrong to say that the indirect discrimination claim added nothing, because a claim to indirect discrimination does not require any investigation of the employer's state of knowledge (except possibly, we note, at a later stage of the analysis if the employer seeks to justify the "PCP" under section 19(2)(d) of the Equality Act 2010). He also says the tribunal was wrong to say that he had not proved any "particular disadvantage" arising from the requirement to move heavy plasterboard, given that he was suffering from sciatica and there was continuing degeneration of his vertebrae during this period, as apparently disclosed by later medical evidence.

31. We accept Mr Edge's point in relation to knowledge. We have hesitated on the question whether the later medical evidence was such that the tribunal should have found that Mr Ion did suffer a "particular disadvantage" by being required to lift heavy plasterboard in early 2020, but there is no indication that the tribunal considered this question at all and, given our conclusions on the other grounds of appeal, we have therefore decided to allow this ground of appeal and remit the indirect disability claim to the ET along with the rest of the case.

Ground 3: Whistleblowing

32. Mr Ion relied on four protected disclosures set out in the list of issues at para 2.1.1 as being the reason or principal reason for his dismissal. Although there are references to them in the course of the tribunal's narrative, it cannot be disputed that they failed in the judgment to make clear findings of fact as to what Mr Ion said on the various occasions alleged or to analyse whether they amounted to qualifying disclosures and, if so, to consider their effect on

the employer whether singly or cumulatively. Rather, the tribunal at para 45 of the judgment simply said:

> **… there is no good evidence that they had any bearing on the decision [to dismiss] that was taken in the way we have described it being taken. What comes throughout the whole of that decision making process is the fact that the respondents rely on their perception of the claimant being disruptive. That is because of the way he ran down other colleagues and sought to promote himself above the team ethos …**

33. Mr Price says in effect that it was sufficient to proceed in this way. This may often be the case, particularly as it is the claimant who bears the onus under section 103A or 105(6A) ERA of proving that protected disclosure(s) were the reason or the reason or principal reason for the dismissal or the selection for redundancy. But we consider that, in the circumstances of this case, the tribunal ought to have made more thorough findings of fact and given further consideration to the effect of any protected disclosures on the respondents. In particular, we consider that the tribunal's finding that the dismissal was based on a perception of a "disruptive attitude" called out for some detailed consideration of whether the true reason for that perception was the making of protected disclosures by Mr Ion. We also note that (on CITU's case at least) it was Mr Wilson who took the decision to dismiss Mr Ion and that it was Mr Wilson who, just a few weeks before that decision, on 16 March 2020 at the outset of the Covid-19 pandemic, had objected to Mr Ion raising a concern about lack of cleansing facilities and tissues on a company-wide post and had suggested that Mr Ion source them himself.

34. We therefore allow this ground of appeal and consider that the whistleblowing claim should also be remitted to the ET.

Ground 4: Interpretation

35. Ground 4 suggests that the poor quality of interpretation during the first four days of the hearing materially impacted on the fairness of the hearing and that the tribunal did not properly address the concerns raised by Mr Ion and Ms Nafornita about the interpretation.

36. We were helpfully referred to two cases in the immigration field concerned with problems with interpretation in the course of a tribunal hearing: **Perera v Secretary of State for Home Dept** [2004] EWCA Civ 1002 and **TS v Secretary of State for Home Dept** [2019] UKUT 00352 (IAC). It seems to us that the following principles can be derived from this case law:

(1) When a responsible representative expresses dissatisfaction about the quality of interpretation or the tribunal itself considers that such an issue has arisen, the tribunal should address the issue there and then.

(2) The tribunal should investigate the position and consider what (if any) steps need to be taken as part of its overall duty to ensure a fair hearing: this may involve, for example, deciding there is not really a problem or directing the advocates to make their questions shorter and simpler or asking a witness to slow down at one end of the spectrum, to aborting the hearing and starting all over again with a new interpreter at the other.

(3) If an appeal is brought based on problems with interpretation the appellate tribunal will give considerable weight to the tribunal's own assessment of the extent (if any) of any problems with the interpretation.

(4) Even if it is established that there may have been inadequate interpretation at a hearing any appeal is unlikely to succeed if there is nothing to suggest the outcome was adversely affected as a consequence: this would apply, for example, in a case where a claim failed for reasons unconnected with oral evidence which was being inadequately interpreted.

37. We have considered written statements and comments relevant to the interpretation issue from Mr Ion (at p93 and p119 of our bundle), EJ Lancaster (p99 and p138), Mr Northam (p100), Mr Roberts (p101), Mr Price (p104) and Ms Narfonita (p110). We also note what was being said on Mr Ion's behalf in in paras 1 and 2 of the claimant's final written submissions where the issue was raised clearly and forcefully (see p145 of our bundle). Based on this material we make the following findings of fact:

(1) There were real problems with the interpretation by the Romanian interpreter who had been arranged by the tribunal for Mr Ion and who acted during the first four days of the hearing. Ms Nafornita, who speaks both languages, was in the best position to say that this was so and we accept the thrust of her statement on the topic which contains a lot of detail and is cogent and persuasive. We reach this view giving due weight to the tribunal's own apparent initial assessment that there was no real issue.

(2) These problems led to misunderstandings, tension and frustration and a feeling on the part of Mr Ion that he was not able to participate properly in the case.

(3) It also led to problems of translation of questions asked of Mr Ion and of his answers to questions in cross-examination. Ms Nafornita's statement gives numerous instances of such problems and of resulting mistranslation in her statement, including cases where Mr Ion apparently answered "yes" to a question where the answer, if he had properly understood the question, would have been "no". We also noted that there were occasions where the tribunal refers in the judgment to a lack of clarity in Mr Ion's position which may be a symptom of this problem.

(4) The matter was raised on many occasions during the first four days of the hearing by Ms Nafornita and Mr Ion himself (see in particular Mr Northam's comments at p100 and EJ Lancaster's comments at p138 which more or less accept that was the position although he says he had no notes of specific issues being raised).

(5) The issue was not "satisfactorily resolved" early on as EJ Lancaster suggested in his first set of comments at p99. And when it was raised thereafter he did not engage properly with the issue (see para 16 of Ms Nafornita's statement at p116).

(6) On day 4 of the hearing there was an outburst from Mr Ion (described by Ms Narfonita at para 17 on p116) and the interpreter no longer felt able to act.

(7) Once the matter had been brought to a head in this way EJ Lancaster adjourned for the day at about 3 pm and a new interpreter was obtained for the following day who acted for the rest of the hearing. Mr Ion and Ms Narfonita reported no further problems.

38. On the basis of those findings we regrettably have to find that there was in this case a material procedural irregularity in that the interpretation was inadequate in a way which may well have caused real prejudice and certainly gave rise to a sense of unfairness and inability to properly participate on the part of Mr Ion and that the tribunal did not deal with the problem as they should have by investigating and taking appropriate action as soon as possible.

Ground 5: Restricted cross-examination

39. In relation to this ground of appeal we had regard to the following:

(a) Mr Ion's statement starting at p92 at para 9 which says he was prevented from asking questions about the respondent's values and other matters and at para 30 where he says he was prevented from asking Mr Burgin about statements that he was not a good cultural fit in the team;

(b) EJ Lancaster's comments in response at p99 where he says: "I necessarily intervened … to prevent inappropriate [or] irrelevant questioning, but the Claimant was not prevented from putting the material parts of his case";

(c) Mr Price's comments at p105 that "… the Tribunal had had cause to interrupt

[questioning] many times [before Ms Nafornita became upset and tearful] – often due to there being constant questioning about whether there was a genuine redundancy situation, something which was not in issue."

(d) Mr Ion's statement at p125: this was not a very satisfactory statement since it was apparently made in fluent English and referred to him preparing and asking questions himself, although it is plain that it was Ms Nafornita who would have formulated and asked the questions. However, the statement lists nearly 100 questions which are said to have been disallowed by EJ Lancaster (see paras 3, 4 and 7); although we doubt that so many questions can have been disallowed, we are satisfied that a substantial number were and we note a number of specific occasions where the statement refers to questions being disallowed at paras 6, 7.19, 7.33 and 7.36/7.

(e) In his comments in response at p139 EJ Lancaster says only that he had three notes of occasions where he intervened to prevent questioning; he notably does not suggest that these were the only occasions when he intervened; he does not address the specific occasions we mention above; and one of the notes relates, we were told, to the background to the all-important email of 3 April 2020 which the respondent relied on as showing that he was not in tune with the company's values.

40. On the basis of this evidence we conclude that there were a significant number of occasions when EJ Lancaster intervened to prevent questioning in relation to culture and values which were relevant to the issues in the case. This may have resulted in part from the view he had taken early on in the case that the reason for the dismissal was redundancy and/or from his understandable desire to limit questioning in what must have been a difficult and stressful case to deal with. But we are bound to conclude that it amounted to a material procedural irregularity in the hearing.

Conclusions and disposal

41. We consider that grounds 4 and 5, certainly in combination, amounted to a serious and material procedural irregularity in the hearing which prejudiced the claimant's case and which fatally undermined the fairness of the hearing.

42. We are unanimously of the view that, in view of these irregularities along with the legal errors identified in grounds 1, 2 and 3, there can only be one outcome in this case: the appeal is allowed in full and the whole matter is to be remitted to a freshly constituted employment tribunal to hear again.