Neutral Citation Number: [2025] EAT 5

Case No: EA-2022-001190-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 January 2025

Before :

JUDGE J KEITH
MISS NATALIE SWIFT
MISS EMMA LENEHAN

- -

Between :

MRS B. SRITHARAN

Appellant

- and -

(1) DELOITTE LLP

(2) MR P. GOOCH **Respondents**

- -
- -

MR R. KOHANZAD (instructed directly) for the **Appellant**.
MR B. WILLIAMS (instructed by **TLT Solicitors**) for the **Respondents.**

Hearing dates: 8 and 9 January 2025

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JUDGMENT

- -

SUMMARY

UNFAIR DISMISSAL AND RACE DISCRIMINATION

The Employment Tribunal erred in failing to explain adequately why aspects of a process under which the appellant was to be considered for an alternative role thereby avoiding her dismissal, and which were found to discriminatory, did not result in the process of her dismissal being unfair.

The Employment Tribunal further erred in failing to consider whether the burden of proof had shifted, when the appellant had named a specific comparator who successfully applied for the alternative role, of a different ethnicity, and the respondent chose to adduce no evidence in relation to the recruitment of the comparator, notwithstanding the appellant's evidence as to her suitability for that role, for which she was not even interviewed.

JUDGE J KEITH, MISS NATALIE SWIFT & MISS EMMA LENEHAN:

1. These reasons reflect the full oral judgment which we gave to the parties at the end of the hearing. In this judgment, when we refer to documents, we do so by reference to three bundles with which we were provided at the hearing. The first is a core bundle, where we refer to the page references as 'x/CB'. The second is a supplementary bundle and we refer to its page references as 'x/SB' and, where we have referred to legal authorities in a third bundle which comprises relevant case law, we have referred to standard case citation. We refer to the respondents individually as "R1" and "R2" respectively.

Background

The ET's decision under challenge

2. The appellant appeals against the judgment of the Employment Tribunal sitting in London Central, chaired by Employment Judge Emery with members, Ms Keynes and Mr McLaughlin (hereinafter, the 'ET'). In its judgment sent to the parties on 12th September 2022, the ET considered the following claims: direct race discrimination, victimisation, indirect disability discrimination, discrimination arising from disability, failures to make reasonable adjustments and a claim of unfair dismissal.

3. As recorded at the beginning of the judgment, at page 59/CB, the ET dismissed all of the claims against R2. It dismissed all of the claims against R1 except two claims of discrimination arising from disability by reference to specified issue numbers [5.1.10] and [5.1.13].

4. We adopt the summary of the case outlined by Her Honour Judge Tucker, in her decision of 11th January 2023, when considering the appellant's Notice of Appeal to this Tribunal. As she noted, the appellant had worked for R1 for a period of about three and a half years. Her

role/job title was that of Technical Director. She worked in R1's cyber security team. R2 was the head of the privacy team.

5. Difficulties arose between the appellant and R1. She launched a grievance, was unwell and went on sick leave. She was dismissed in November 2021. R1 asserted and the ET found that this was for some other substantial reason, namely an irretrievable breakdown in her relationship with colleagues and there being no prospect of a suitable alternative role within the business being found for her to work in.

6. There was also a dispute between the parties that, from January 2020 onwards, the appellant was disabled by reason of stress and anxiety. The respondents did not accept that they had relevant knowledge of the appellant's disability from that point in time. However, the ET concluded that 'the respondent' – and that is in the singular – had constructive knowledge of her disability from March 2020 onwards, at paras [453] to [455], 142-143/CB. The appellant was absent on sick leave from 21st May 2021. The ET found that this was a disability-related absence.

7. Of the claims which the ET concluded were well-founded, the first concerned the appellant's application for alternative roles in or around July/August 2021. She was rejected for that role without an interview. Another internal candidate was appointed. The successful candidate was white. A partner, 'CP', had provided misleading information to the appellant about the recruitment process for the role. On the one hand, the ET found that the appellant had not informed HR that she had applied for the role, which made it more difficult for R1 to intervene as the role was based in the US. On the other hand, whilst other reasons contributed, the ET found that R1's failure to clarify what was happening with the role and to intervene on the appellant's behalf, which was contrary to what the appellant was told would occur, was unfavourable treatment contrary to **Section 15** of the **Equality Act 2010** (paras [489] to [511], 147/148CB).

8. A second allegation which the ET concluded was well-founded was in respect of R1's failure to refer the appellant to R1's permanent health insurer. R1 delayed in making the referral, the result of which was that the appellant did not have access to health support which was a feature of the PHI policy, including counselling, and the appellant considered that, had she had the support, she would have had greater support in returning to work with R1 (paras [507] to [511], 149/CB).

The appellant's grounds of appeal

9. We do not recite the litigation history in detail except to say that, following a Preliminary Hearing before His Honour Judge Beard and a further amendment to the grounds, he granted permission on amended grounds of appeal dated 12th October 2023 and lodged on 21st November 2023, which "will stand in substitution for all grounds lodged previously" (236/CB).

10. We set out below the ten grounds of appeal. They were headline grounds and Mr Kohanzad supplemented these with a skeleton argument and oral submissions. For the respondents, we considered their Answer at 244/CB onwards, the skeleton argument drafted by Mr Williams and Mr Williams's submissions. We should say at the outset that we agree with Mr Williams's submission that there was a certain degree of shift between the grounds on which permission had been granted and those argued and that also during the hearing, without criticism of Mr Kohanzad, who did not draft the grounds, when we asked him specific questions about elements of the grounds, having taken instructions, he withdrew certain parts of the grounds of appeal.

Ground (1)

11. The appellant argues that the ET erred in law and was perverse in its findings on whether R1 imposed the provision, criterion or practice ('PCP') set out at paras [4.1.1], [6.1.4] and

[6.1.6], making contradictory findings. By way of explanation, these paragraphs are issues rather than the ET's findings. Those issues are as follows:

12. At para [4.1.1]:

> **"4.1.1 holding SOSR meetings which place employee's roles in jeopardy and adjourn those meetings in an open ended fashion with little rationale, information or certainty given to the employee regarding the relevant investigations, the length of the process, or the likely next stage."**

13. Next is para [6.1.4]:

> **"6.1.4 Not engaging with all recommendations of grievance outcomes, occupational health and medical practitioners, including phased return to work and mediation for employees with grievances."**

14. The third relevant issue is para [6.1.6]:

> **"6.1.6 holding SOSR meetings which place employee's roles in jeopardy and adjourn those meetings in an open ended fashion with little rationale, information or certainty given to the employee regarding the relevant investigations, the length of the process, or the likely next stage."**

15. The ET's findings in relation to each issue are as follows:

16. Issue [4.1.1] – the ET's findings on this issue, at paras [456] to [459, 143/CB were:

> **"456. There are two PCPs in this allegation – (1) holding an SOSR meeting (ii) a delay in that process.**
> **457. We accepted that the 1st respondent has a practice of holding SOSR meetings where it considered that the relationship had irretrievably broken down.**
> **458. We do not accept that the delay in this process amounted to a PCP. Instead it was one off situation which arose because of the factual circumstances as they rose.**
> **459. One of the reasons there was a delay in the process was because the claimant was seeking other roles. Meetings were properly adjourned to consider issues that the claimant was raising, including the CPO role. We do not consider that a delay to this process can amount to a PCP."**

17. Next, on issue [6.1.4], the ET found at para [515], 150/CB:

> **"515. This is not a PCP. The respondents did engage, she was offered a**

> **phased return to work, she was offered and the respondents did engage with mediation; it was her decision not to attend with the partners concerned. The failure to Mr Brown to attend was an individual and one–off decision by one Director. This was not a PCP. This allegation fails."**

18. Finally, on issue [6.1.6], at paras [517] to [521], 150-151/CB, the ET found:

> **"517. We accept that the 1st respondent has a policy of holding SOSR meetings where it concluded that her relationships had irretrievably broken down. And we accept that this may involve adjourning meetings to assess further, to investigate, or to assess (for example) alternative roles.**
> **518. We accepted therefore that this amounts to a PCP. We also accepted that this amounts to a substantial disadvantage, as it could and did lead to her loss of job. At this time the respondent knew the claimant was disabled. We also accepted that the 1st respondent knew that the claimant was at a substantial disadvantage by virtue of her ill health having to go through this process.**
> **519. The adjustment sought is not having open ended SOSR processes; providing the Claimant with detailed information about the investigations being undertaken which affect her future; providing a certain timetable.**
> **520. We concluded that in the circumstances that this was not a reasonable adjustment. The process was adjourned because of the claimant's repeated grievances and because the 1st respondent sought to find out about other roles. A process on a fixed–timetable cannot be practicable as the timetable also suggest that the process is prejudged. We concluded that the claimant was provided with all the detail necessary to understand what was going on during this process.**
> **521. Accordingly this allegation fails."**

The appellant's position on ground (1)

19. Mr Kohanzad submits that the ET erred in formulating what was the same PCP in different ways in relation to three issues. In relation to the indirect discrimination claim, the ET had separated out the claim into two limbs, holding that the SOSR meeting amounted to an application of a PCP, whereas the delay was not an application. However, when applying the same PCP in relation to reasonable adjustments claims, the ET accepted that R1 had a policy of holding SOSR meetings and that this may involve adjourning meetings to assess further. It could not be correct for the same PCP to be reformulated and applied in two different ways.

20. A second aspect of ground (1) was that the ET had erred at para [458] in concluding that the

adjourning of a meeting was not the application of a PCP because it was a one–off situation. That was contrary to the principle in the Court of Appeal decision of **Ishola v Transport For London** [2020] ICR 1204. Mr Kohanzad referred us to para [38] of that case for the proposition that a one–off act could connote a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It does not mean it is necessary for the PCP or practice to have applied to anyone else, in fact, if it carried with it an indication that it will or would be done again in future if a hypothetical similar case arises. Mr Kohanzad accepted that although a one–off decision can be a practice, it is not necessarily one.

21. The question for the ET ought to have been whether a similar decision would have been applied in future to similarly situated employees. The ET further erred at para [459] in concluding that delay could not amount to a PCP because there was good reason to adjourn. That was not the proper question, which was whether the adjournment amounted to a PCP.

The respondents' position on ground (1)

22. Mr Williams reminded us that we should consider the ET's decision as a whole and the ET had already made a finding that the delay was not an application of a PCP:

> **"459. One of the reasons there was a delay in the process was because the claimant was seeking other roles. Meetings were properly adjourned to consider issues the claimant was raising, including the CPO role. We do not consider that a delay to this process can amount to a PCP."**

Having done so, it was unnecessary for the ET to repeat this analysis in relation to reasonable adjustments claims. There was no contradiction in the ET's findings and its permissible focus had been shifted to consideration of the legitimacy of the SOSR meetings.

23. In relation to the **Ishola** point, Mr Williams referred to a number of paragraphs in the judgment, where this point was reiterated. In relation to paragraphs [458] to [459] 143/CB,

as elsewhere, the ET was unarguably conscious that a one-off incident could amount to a provision or criteria. The ET had referred not only to the one-off situation, but the factual circumstances as they arose, which was explained more fully at para [459].

Conclusions on ground (1)

24. We deal with each aspect of ground (1) in turn. On the formulation of the PCP, we do not accept that the ET erred in formulating the PCP in a different way, reaching contradictory findings. As Mr Williams pointed out, the PCP itself is lengthy and what the ET did at para [456], which potentially benefitted the appellant, was to consider what was at the heart of the PCP, namely holding the SOSR meeting and the question of delay. Having considered and rejected that the delay was an application of a PCP, it was not necessary for it to have repeated this again at paras [517] to [521].

25. We reach this conclusion applying the general principle when considering our appellate jurisdiction, judgments need to be read as a whole and not in isolation in relation to any suggested inconsistency. The wording, for example, at para [517] did not amount to an acceptance that delay was a PCP, in contrast to the earlier conclusion that it was not. Had the ET intended to have made such a finding, it would have said so.

26. In relation to the **Ishola** point, we remind ourselves of the further principle that an ET can be assumed to have considered relevant legal principles unless the adequacy of the reasonings is so opaque that it is not possible to discern this. The wording at paras [458] to [459], which Mr Kohanzad challenged, does not rely upon there being a one-off situation to reject the PCP. This is to take that phrase out of context, where it clearly says that it arose as part of factual circumstances, and those factual circumstances are explained more fully in para [459].

27. This is a case where the ET considered the state of affairs in the **Ishola** sense. By way of context, Mr Williams had also referred to paras [515] and [516], 150/CB, where the ET had

similarly considered a state of affairs and which had included at para [516] that it was a unique situation, with no alternative roles and where the ET had referenced a particular circumstance.

28. Neither aspect of ground (1) discloses any error of law.

Ground (2)

29. This challenge is that the ET had erred in law or was perverse by finding that the claim of discrimination arising from a disability set out at para [5.1.8] of the ET judgment both succeeds and fails.

30. As before, the reference to para [5.1.8] is, in fact, to it as an issue of discrimination arising from disability, contrary to **Section 15 EqA.** Para [5.1.8], 66/CB sets out the issue as:

> "**March to July 2020. R1 ignored C's requests for an OHA to support her deteriorating disability."**

31. The ET's findings are at paras [483] to [485], 147/CB:

> **"483. We accept that there was a delay in getting an OH appointment from March to June 2020. We accept that there is a link between her sickness absence and the requirement to attend OH and that the delay is therefore in consequence of her disability.**
> **484. The reason for the delay was down to a failure in HR. But the reason is irrelevant to the issue. The respondent has not argued that there is a legitimate aim for this issue.**
> **485. Accordingly, the failure to progress the OH appointment arises in consequence of her disability. This claim succeeds."**

32. In contrast, the ET had dismissed all claims except issues [5.1.10] and [5.1.13] (59/CB).

33. We can deal with this ground briefly. Both representatives referred us to para [532], 152/CB:

> "**Time**
>
> **532. We accepted that the two allegations which succeeded are in time. The updated claim was sent to the tribunal on 30th September 2021 and the CPO**

role occurred in July/ August 2021."

The appellant's position on ground (2)

34. Mr Kohanzad submitted that it was clear that the ET had simply forgotten about the third allegation, which had also succeeded. Had, in fact, the ET considered whether the third claim was out of time and there were issues as to whether to extend time or whether there was a continuing act, it would have said so and it could not safely be assumed that it was in the ET's mind.

The respondents' position on ground (2)

35. Mr Williams submitted that it was tolerably clear that the ET had regarded issue [5.1.8] as being out of time. He pointed to the period of this claim, namely from March to July 2020, when the amendments to the claim to add the claims of discrimination arising had not been made until the following year.

Conclusions on ground (2)

36. We have no hesitation in concluding that the ET erred in law in purporting to dismiss a claim which it had apparently accepted and stated as having succeeded. We accept Mr Kohanzad's submissions, which are that the only straightforward reading of the parts of the judgment we have cited is that the claim had indeed succeeded. Had the ET intended to have regarded the issue as one that it did not have jurisdiction to consider because it was out of time, then it would have said so.

37. We were informed by the representatives that the ET had been asked to reconsider whether this was an error and, without criticism of the ET, as we do not know the circumstances, we

understand that there has been no response, but, in any event, we are satisfied that the apparent dismissal of this claim on the first page of the judgment amounts to an error of law. We pause to note that there have been no findings as to whether this claim was within time or not.

38. Ground (2) discloses an error of law.

Ground (3)

39. This ground is that the ET erred by failing to consider the question of justification in relation to the claim of indirect disability discrimination.

40. In terms of the ET's findings in relation to indirect discrimination, the ET had rejected three allegations as amounting to PCPs: issue [4.1.1] (the delay point) and issues [4.1.2] and [4.1.3], which it is unnecessary to recite. The relevant findings were at para [459], [461] and [464], 143-144/CB.

41. However, in respect of the remaining PCP, the ET had gone on to accept that having an SOSR meeting would be a disadvantage to a person with a disability, at para [466], that the appellant suffered that disadvantage, (para [467]), and, at para [468], that there was a PCP that put the appellant to a particular disadvantage. Despite having referred to the law requiring justification of potentially indirect discriminatory acts (see the ET's discussion on justification at 115 to 119/CB), the analysis of indirect disability discrimination apparently ends there.

The appellant's position on ground (3)

42. The appellant's position is a simple one. She says that the ET failed to address the question of justification, moving straight on to the next claim.

The respondent's position on ground (3)

43. The respondent accepts that there is no express reference to justification, but it is implicit from the totality of the judgment that the ET found the holding of the SOSR meeting to be necessary, proportionate and legitimate. This was clear from the ET's conclusions on the claim of unfair dismissal at paras [529] to [531], the record of serious performance issues at para [346], poor interactions with colleagues at para [350], a breakdown in relationships at para [400], including a fundamental breakdown with members of her team at para [402], and finally rejection of mediation and an unwillingness to work with colleagues at para [443].

44. The respondent submits that we should be slow to conclude that the ET had not considered justification where, on the facts as found, the appellant had rejected mediation and was unwilling to work with her colleagues. Her dismissal was inevitable, and her wider serious allegations had been dismissed. Indeed, Mr Williams argues that it would have been perverse had the ET concluded that indirect discrimination was not justified.

Conclusions on ground (3)

45. We are conscious that the ET referred itself correctly to the law on justification. We also bear in mind the need to read the judgment as whole. However, we do not accept that it is possible to infer that the ET had considered and resolved the issue of justification. This is not answered by Mr Williams's submission that the appellant's dismissal was a *fait accompli*. This is in part for reasons relating to grounds (7) and (10), for reasons that we will come on to discuss, but, in any event, the question of proportionality is nuanced assessment requiring the balancing of various factors, which was absent from this judgment.

46. Mr Williams's reliance on factors in favour of justification arguments may well be points which support justification, but what is missing is the final analysis and the weighing up of those factors against any countervailing factors. Ground (3) discloses an error of law.

Ground (4)

47. The appellant argues that the ET erred by failing to consider whether the alleged PCPs at issues [6.1.4], [6.1.5] and [6.1.10] were provisions or criteria.

48. We have already recited the ET's findings on issue [6.1.4]. Turning to issues [6.1.5] and [6.1.10], the issues were:

> **"6.1.5, Moving the claimant or employees in her position to a new assignment outside the business, and which have no turnover building capacity, when returning to work from sickness absence**," and,
>
> **"6.1.10, Paying employees enhanced pay to avoid utilising the benefits for employees available under the permanent health insurance scheme and not consulting with employees about taking this action or the PHI entitlement at all."**

49. In relation to issue [6.1.5], the ET found:–

> **"516. We accept that the 1st respondent did this. However, it is not a PCP, this was a unique situation based on the fact that the claimant was in dispute and was refusing to work with senior members of her team. There were no other alternative roles. A one–off unique situation in this particular circumstances cannot amount to a PCP and this allegation fails."**

50. In relation to issue [6.1.10], the ET found:–

> **"525. We did not accept that the 1st respondent has a PCP of avoiding PHI benefits by paying enhanced pay. The decision to pay the claimant in full pay had nothing to do with what was we concluded an administrative and one–off error in failing to inform the claimant she may be entitled to counselling via this benefit. This was not a PCP."**

The appellant's position on ground (4)

51. Mr Kohanzad began by saying that the ground in relation to [6.1.10] was not pursued. However, he maintained the challenge to the reasons on [6.1.5] and submitted that the question the ET ought to have asked itself was whether the respondent would have done something similar to other employees.

The respondent's position on ground (4)

52. This is a further instance of the **Ishola** challenge in ground (1) and, just as ground (1)

disclosed no error, this ground also should be dismissed.

Conclusions on ground (4)

53. We reject this ground for the same reasons as ground (1). The ET had referred to the particular circumstances and, in its judgment, had clearly considered not only the one-off nature of this claimed PCP, but also whether it was indicative of a status of affairs when referring to the particular circumstances. We have already dealt with issue [6.1.4] in ground (1) and this ground discloses no error of law.

Ground (5)

54. The appellant submits that the ET erred by failing to consider the adjustment contended for at issue [6.10.10] of the ET's judgment.

55. The ET's findings, namely on the issue of paying employees enhanced pay and not consulting them, are at para [525], 152/CB, which we do not repeat again.

The appellant's position on ground (5)

56. Mr Kohanzad began with detailed submissions as to how this reasonable adjustment related to a PCP, but abandoned that position as it became apparent that both he and we were unable to make any sense of them. Instead, he relied upon the ET's reasoning as to the adjustment relating to not consulting with employees about the availability of permanent health insurance (issue [6.1.10]). Mr Kohanzad argued that it was not entirely clear that the adjustment for this had been the adjustment at [6.10.10,] 69/CB, namely referring the appellant at an early state to permanent health insurance support. The ET had not engaged with this.

The respondent's position on ground (5)

57. Mr Williams says that the ET had rejected the core claim that the respondent had paid the appellant full pay in order to trigger the appellant's entitlement to PHI benefits. That finding,

has not been the subject of an appeal and the inadvertent consequence of paying full pay was reflected in the findings at paras [252-253], 102/CB.

58. He argued that there was no error where the ET had rejected the existence of the PCP. In addition, there had to be some kind of link between the reasonable adjustment relied on and the PCP, but, in the event, the existence of a PCP had been rejected.

Conclusions on ground (5)

59. We had concluded in relation to ground (1) that the ET had been entitled to reject the existence of a PCP, for the reasons set out at para [525]. On that basis, there was no error in failing to consider the claim of reasonable adjustment, namely of an earlier referral to the respondent's insurers, as the PCP was not applied. This ground is also dismissed.

Ground 6 - withdrawn

60. The appellant had argued that the ET had erred by failing to consider whether the respondent had applied PCPs which gave rise to the duty to make reasonable adjustments. As will be apparent, this ground was a general proposition, and whilst Mr Kohanzad began by making narrower submissions, we do not recite either his skeleton argument or oral submissions or the respondent's position because, as with an earlier ground, when we explored them with Mr Kohanzad, he said that they were not relied upon as they did not add anything to the other grounds. He confirmed that we did not need to address ground (6).

Ground (7)

61. The appellant argues that the ET had erred by failing to consider its findings of discrimination when assessing whether the appellant's dismissal was unfair for the purposes of the Employment Rights Act 1996.

62. The ET's findings on unfair dismissal are at paras [526] to [531]:

> **"526. We concluded that the claimant's dismissal was fair for the following reasons.**
> **527. We concluded that the 1st respondent had a genuine belief that the claimant's relationships with her colleagues in Privacy had irretrievably broken down, and that the reason for this breakdown was the claimant refusing to accept her performance as in any way at fault, instead believing (wrongly) she was the victim of discrimination, and because she was seeking sanctions against Partners and refusing to take part in an (albeit imperfect) mediation process.**
> **528. Noting all the investigations which occurred on grievances, and the claimant's own explicit statements about the relationship with colleagues, we concluded that this genuine belief was reached after a lengthy and detailed analysis by multiple partners of what had actually occurred.**
> **529. We also concluded that the SOSR process was a reasonable process – it was within the range of responses of a reasonable similarly sized and resourced employer; overall the 1st respondent engaged in exhaustive and detailed processes.**
> **530. We accepted that the respondents failed in the CPO process in failing to chase up the application. But we concluded that this did not affect the fairness of the dismissal: mistakes can be made, the aim is not a perfect process, and this failure was one which was caused in the main by the failure of the claimant to provide any details about this role until the decision was being made on the hire.**
> **531. We accepted that the respondent reasonably concluded that the irretrievable breakdown was so significant that there was no role for her to undertake, that there was no other alternative but to dismiss. Even with the HR's failure with the CPO role, the claimant's dismissal was still within the range of reasonable responses.**

The appellant's position on ground (7)

63. The ET had made findings of discrimination arising in consequence of the appellant's disability on issues [5.1.8], [5.1.10] and [5.1.13] specifically that R1 had ignored requests for an occupational health assessment to support the appellant's deteriorating disability, not having done anything prior to the appellant's rejection for the Chief Privacy Officer role, when she raised it on 7th July 2021. Mr Kohanzad accepted that the window of default was brief but reiterated that it nevertheless existed between when the appellant raised the issue on 7th July 2021 and when she was subsequently rejected for the role on 16th July 2021. He reiterated the ET's findings on issue [5.1.13], specifically a delay in accessing support under permanent health insurance.

64. **Section 98(4) ERA 1996** required consideration of all the circumstances and, whilst not all acts of discrimination necessarily relate to the process by which dismissal may be reached and the reason for it, the issues here plainly did. Mr Kohanzad asked, by analogy to a redundancy situation, whether it could really be suggested that a failure to follow up in a redundancy situation a potential job vacancy, did not matter to the fairness of a dismissal. The other two factors, he added, were just as relevant. Mr Kohanzad added that, although the ET had referred to the CPO role at para [530], there had been no recognition of its own findings of discrimination arising in connection with that role.

65. One of the claims which had succeeded was that at para [492], 48/CB, where the respondent's failure to clarify what was happening with the CPO role and to intervene on the appellant's behalf was unfavourable treatment. She had been told that this would be done, and it was not done. In that sense, the appellant had been misled, deliberate or otherwise. The appellant maintained that it was deliberate.

The respondent's position on ground (7)

66. The respondent argues that it does not follow that, because there was discriminatory treatment, the appellant's dismissal was unfair and there have been cases where precisely that finding has been reached, see **Amnesty International v Ahmed** [2009] ICR 1450.

67. The ET had concluded at para [502], 148/CB, that it was likely that the appellant's CV had been considered and rejected, and the successful candidate was in the process of being offered a role.

68. The lack of referral to occupational health had been a significant period of time before the appellant's dismissal, with the referral having, in fact, been made by mid-2020.

69. The ET had found that the consequences of enhanced pay resulting in a delay in the PHI referral had been an administrative error by the time of the appellant's dismissal. Mr

Williams suggested that the ground was being reshaped as a perversity challenge or to the sufficiency of weight placed on particular facts.

Conclusions on ground (7)

70. On the one hand, we bear in mind that the ET had expressly considered the CPO recruitment process at para [530], as "mistakes can be made". However, we accept the challenge that the ET failed to consider that this was not merely a mistake, but that the recruitment process involved a discriminatory act by which, innocent or otherwise, the appellant had been misled.

71. We also bear in mind the ET's findings at para [508], 149/CB, that the breakdown in the relationship had, in the ET's view, nothing to do with her sick leave and was because she was unable to accept that she had not been discriminated against. In fact, as the ET has found, she had been discriminated against. Even though an ET may attach less weight to the occupational health referral and entitlement to PHI benefits, as to which we express no view, these were acts of discrimination and, in the analysis, the ET's reasons do nothing to engage with those findings of discrimination.

72. In the circumstances, ground (7) discloses an error of law.

Ground (8)

73. The ET erred by reaching contradictory findings as to whether providing the appellant with detailed information as to her PHI entitlement and about alternative roles would be reasonable adjustments.

74. Mr Kohanzad confirmed, when we sought clarification, that only the PHI issue was relied upon. He argued that there were contradictory findings when comparing para [507], 149/CB and the failure to make a PHI application, which was found to be discrimination arising, and the ET's conclusion that an administrative error in failing to inform the appellant that she may

be entitled to counselling was not a PCP at para [525], which meant that the reasonable adjustments claims failed.

75. We do not recite para [525] again. However, we do recite para [507], which states:–

> **"507. The 1st respondent accepts that there were failures to make a PHI application, and the respondent says that this is because of the number of sickness absence HR people dealing with her. This was, because she was off sick, it is linked to her disability."**

The appellant's position on ground (8)

76. Mr Kohanzad submitted that the ET did not address whether the respondent had failed to consult with the appellant about her PHI entitlement and the ET's rejection of this as a PCP was inconsistent with it being an act of discrimination.

The respondent's position on ground (8)

77. There was no inconsistency, as the ET rejected the full allegation about a deliberate delay and instead, when the delay in the PHI referral was considered through the lens of a reasonable adjustment claim, the ET did not accept that there was a PCP as alleged. The analysis of the 'reasonable adjustments' PCP was fact-specific.

Conclusions on ground (8)

78. We are satisfied that, merely because there was a finding of failures in making the PHI application linked to the appellant's disability for the discrimination arising claim, which was a detriment, it does not follow that there was a provision, criterion or practice in failing to inform the claimant of the PHI entitlement; i.e. the state of affairs in the **Ishola** sense which would generate an obligation to make reasonable adjustments. In simple terms, the findings are not inconsistent. One is a detriment. The other is an issue of a provision, criterion or

practice. This ground discloses no error.

Ground (9)

79. The ET erred by reaching contradictory findings as to whether the respondent's human resources colleagues checked on the status of the appellant's application diligently in relation to the direct race discrimination claim (issue [1.2.22]) and the **Section 15 EqA** claim (issue [5.1.10]). The ET identified the issues as follows:

> "**Direct race discrimination, Equality Act 2010**
>
> **Issue 1.2.22: "July to August 2021. C applied for alternative suitable role and rejected for that role without interview, despite appointing an internal candidate. Christopher Powell (a board level partner), when asked about this role, informed C that he could not identify the hiring manager for this role when that cannot have been reasonably true. CP misleadingly informed C that they were investigating the matter in circumstances where R had already acted upon the matter and offered the role to another internal colleague [Hypothetical comparator]."**

80. Next, in relation to the claim of discrimination arising from disability, issue [5.1.10], the ET identified the issue:

> **"Issue 5.1.10: "July to August 2021. C applied for alternative suitable role and rejected for that role without interview, despite appointing an internal candidate. Christopher Powell (a board level partner), when asked about this role, informed C that he could not identify the hiring manager for this role when that cannot have been reasonably true. CP misleadingly informed C that they were investigating the matter in circumstances where R had already acted upon the matter and offered the role to another internal colleague."**

81. On issue [1.2.22], the ET found at paras [406] to [412], 136/CB:

> **"406. The claimant applied and received an acknowledgement her application was received. Unfortunately, the claimant did not tell her managers or HR who were involved in her situation that she had applied. The application was handled in the US and only one person in the UK, a HR employee liaising with the US, was aware of her application,**
> **407. When she did tell her managers and HR, immediate enquiries were made, and HR were reassured that the vacancy was still open. Very shortly after, the claimant received her rejection.**
> **408. The claimant's case is therefore based on the argument that**

> **between her informing her managers and the rejection, the respondents should and could have intervened further.**
> **409. We had no evidence on how or when application was considered in the US. There is no evidence that these who considered her application were aware of any events in her employment. We can only assume that her application was considered and rejected on its merits.**
> **410. We concluded that even if the 1st respondent had been able to better intervene in the hiring process, by the time there were involved the process was well advanced, the claimant's application had been rejected, and a hire into the role was imminent.**
> **411. This claim is based on a comparison of how a comparator would have been treated. Would the respondents have acted any differently towards a comparator, so that her application may have been further considered? We concluded no, HR were very quick to check on the status of the application, and before further action could be taken a decision had been made to reject the claimant and hire another. This would have been the same for the comparator.**
> **411. There was no less favourable treatment, and this allegation fails."**

82. On issue [5.1.10], the ET found, at paras [489] to [498], 147/CB:

> **"489. HR with knowledge of the claimant's disability got in touch with the UK liaison for the CPO role on 7 July, was told the role was still open, and then appeared to have done nothing prior to the claimant's rejection on 16 July 2021.**
> **490. We accepted that had the claimant informed HR dealing with her SOSR earlier, there may have been a better chance that the 1st Respondent could have intervened in the process. The 1st respondent accepts that it made failures in this process.**
> **491. The claimant was off sick from 21 May 2021, a disability–related absence.**
> **492. We concluded that the 1st respondent's failure to further clarify what was happening and intervene on behalf the claimant further was unfavourable treatment. The claimant was told that this would be done, and this was not done, to her potential detriment.**
> **493. What was the cause of, or reason for this treatment? Is a reason because she was on sick leave, something arising from her disability?**
> **494. We concluded that there were several factors for this delay. While we did not her from the HR manager responsible, we concluded that once it was found out that the role was still open, HR relaxed a little and did not pursue with any urgency.**
> **495. Another reason was that the claimant was refusing to return to her team and was, we concluded considered by the 1st respondent to be acting unreasonably in her approach. We also concluded that the claimant was acting unreasonably.**
> **496. But we concluded that there was a link between the claimant's approach to this matter and her sick leave; that her ill health and time off work was inextricably linked to her view that it was the respondents who were acting unreasonably. This impasse between the claimant and the respondent was responsible for her sick leave.**
> **497. We also concluded that because the claimant was off on sick leave, in circumstances she was in there was a perception that she was likely**

> **on her way out of the business. This also contributed to the failure to quickly intervene on the claimant's behalf in this process.**
> **498. Accordingly, we concluded that there were two factors related to the claimant's health which are linked to the failure to intervene in this application."**

The appellant's position on ground (9)

83. On the one hand, the ET found, when considering direct race discrimination, at para [407] that immediate enquiries were made, while at para [497], it found that a failure to intervene in relation to the complaint amounting to discrimination arising. In addition, at para [497], the ET found that there was a perception that the appellant was likely 'on her way out' of the business which contributed to the failure to intervene quickly. Mr Kohanzad also relied on the ET's findings that HR, having got in touch with the UK liaison for the CPO role on 7th July 2021, then did nothing prior to the appellant's rejection.

The respondent's position on ground (9)

84. The respondent says there was no inconsistency between the two sets of findings. The reference at para [407] to immediate enquiries being made and to the speed with which HR checked on the status of the application at para [411] reflected the composite findings that there had been an initial swift action, but a subsequent delay, which is referred to at para [489]. This appeared to be a perversity challenge for which permission had not been granted, rather than any genuine inconsistency.

85. Mr Williams emphasised that the findings should not be taken out of context where there are other findings at paras [224] to [226] and [228] to [230], which reflected the respondent's acceptance of disjointed processes. He added that part of the reason for the delay was that the appellant herself had not informed anybody involved in her case about her application for the CPO role, which was reflected in the ET's finding at para [490].

Conclusions on ground (9)

86. We focus upon the way in which the ground has been pleaded and permitted to proceed. There is no challenge on perversity or adequacy of reasons. Rather, the challenge is to contradictory findings. We are satisfied that Mr Williams's submissions are correct, namely that there were no such contradictions. Instead, the findings on race discrimination have been in the wider context of other findings and a reflection of the initially speedy response. This ground discloses no error of law on the basis of inconsistency in the two sets of findings.

Ground (10)

87. The ET had erred by failing to consider whether an adverse inference should be drawn from R1's failure to provide evidence in relation to issue [1.2.22], 63/CB.

88. The ET identified issue [1.2.22] as follows:

> **"1.2.22 July to August 2021. C applied for alternative suitable role and rejected for that role without interview, despite appointing an internal candidate. Christopher Powell (a board level partner), when asked about this role, informed C that he could not identify the hiring manager for this role when that cannot have been reasonably true. CP misleadingly informed C that they were investigating the matter in circumstances where R had already acted upon the matter and offered the role to another internal colleague. [Hypothetical Comparator]"**

89. The ET made findings at paras [406] to [412], 136/CB:

> **"406.The claimant applied and received an acknowledgement her application was received. Unfortunately, the claimant did not tell her managers or HR who were involved in her situation that she had applied. The application was handled in the US and only one person in the UK, a HR employee liaising with the US, was aware of her application.**
> **407. When she did tell her managers and HR, immediate enquiries were made, and HR were reassured that the vacancy was still open. Very shortly after, the claimant received her rejection.**
> **408. The claimant's case is therefore based on the argument that between her informing her managers and the rejection, the respondents should and could have intervened further.**
> **409. We had no evidence on how or when application was considered in the US. There is no evidence that these who considered her application were aware of any of the events in her employment. We can only**

> **assume that her application was considered and rejected on its merits.**
> **410. We concluded that even if the 1st respondent had been able to better intervene in the hiring process, by the time they were involved the process was well advanced, the claimant's application had been rejected, and a hire into the role was imminent.**
> **411. This claim is based on a comparison of how a comparator would have been treated. Would the respondents have acted any differently towards a comparator, so that her application may have been further considered? We concluded no, HR were very quick to check on the statue of the application, and before further action could be taken a decision had been made to reject the claimant and hire another. This would have been the same for the comparator.**
> **412. There was no less favourable treatment, and this allegation fails."**

The appellant's position on ground (10)

90. The appellant had expressly relied upon the person who was given the job as her comparator, a white man called Graham McKay. The respondent had provided no evidence as to Mr McKay's application. There was no evidence on his treatment and why his application was preferred to the appellant's. The ET had failed to consider that failure as a matter which may shift the burden of proof and, contrary to para [409], the absence of evidence was not a neutral consideration.

91. It was inappropriate for the ET to simply assume that the appellant's application had been rejected on merits, so the ET had erred on two bases; one, in failing to recognise that the absence of evidence could shift a burden and, two, by assuming a non-discriminatory rejection of the appellant's job application. The appellant's case had been specifically that she had been discriminated against on the grounds of her race. The challenge was not perversity, but as to whether the ET had considered – the appellant said not – whether the burden of proof had shifted.

The respondent's position on ground (10)

92. The ET did not find anything suspicious in the respondent's evidence relating to a search for an alternative role and there was nothing to suggest that it was not alive to its ability to draw adverse inferences. Evidence which had been adduced was that the recruiting entity was

separate from Deloitte UK and the ET had rejected the bulk of the appellant's claims.

93. Mr Williams characterised this as a shifting of sands and of "sour grapes". We queried with Mr Williams whether he accepted, having appeared below, that the issue of the comparator had been identified, as we noted that this was at para [225], page 61/SB, where the appellant alleged in her witness statement:

> **"I was rejected twice despite the fact that I was ideally suited for the role. The role was given to a white man with lesser experience than me. I was not even given the opportunity to interview for the role even though I had reached out to Recruitment and she was fully aware of my application."**

94. He accepted that it had.

Conclusions on ground (10)

95. We have no hesitation in concluding that the ET erred in its analysis by failing to consider whether the burden of proof had shifted. We accept that it is ultimately a decision for the respondent as to what evidence it chose to adduce, but only it could explain why the comparator succeeded in the application.

96. The appellant had given specific witness evidence as a former Chief Privacy Officer herself as to why, at the very least, her application merited an interview or, in her words, she was ideally suited to the role, and this point, which was central to appeal, was simply never considered on the basis that the burden of proof may have shifted. We are, therefore, satisfied that the ET's conclusions on this issue are not safe and cannot stand.

97. This is even more so where the ET had correctly identified itself on the law, at 107/CB. It had cited **Ladele v London Borough of Islington** [2009] EWCA Civ 1357 and had noted that it is incumbent on a Tribunal that seeks to infer or decline to infer discrimination from the surrounding facts that it has set out in some detail what those relevant factors are. Whilst the ET had undoubtedly reminded itself correctly of the law, we are satisfied that, in this regard,

it failed to apply that law.

Preservation of the ET's findings

98. We turn to consider which of the ET's findings of fact should be preserved. We accept that, in many respects, the appellant's claims were not accepted and that the challenges before us were also narrowed down. Rather than identify which findings are preserved, we have considered what findings are undermined by the errors, and so we confirm that all of the ET's findings are preserved with the following exceptions: paras [408], [409], [410], [411], [412], [505] and [526] to [531].

Disposal

99. We consider finally how consideration of the appellant's claim should be remade.

The appellant's position on disposal

100. For the appellant, Mr Kohanzad requested a differently constituted Tribunal, without criticism of the professionalism of the ET, although he pointed out that the appellant had made a complaint to the original Employment Judge about which we emphasise we knew nothing before the start of this hearing and as to which we make no criticism of the conduct or professionalism of the ET in any way.

101. We pause to add that there was no allegation of bias or professional impropriety before us and, therefore, that is not a factor on which we have placed any weight. However, he also referred to the importance of our decision on ground (7) in relation to the ET's conclusions on the claim of unfair dismissal, and in relation to ground (10), and the consequential risk of what is referred to as the so-called 'second bite' (see: **Sinclair Roche & Temperley v Heard** [2004] IRLR 763).

The respondent's position on disposal

102. For his part, Mr Williams says it was not so clear cut. He points out that there is no suggestion of any bias or impropriety by the ET. If remaking were before a freshly constituted Tribunal, there is a risk it would have to hear all of the evidence again. The errors were discrete, and there was no suggestion that the ET would have forgotten the evidence. A different Tribunal would not assist the appellant, as some of the findings were in her favour.

Decision on disposal

103. Our decision is to remit remaking to a differently constituted Tribunal. While most of the ET's finding are preserved, the issues requiring remaking are particularly critical, particularly in relation to the unfair dismissal claim, on which there is a real risk of a 'second bite'. The freshly constituted Tribunal can do so, bearing in mind that many of the claims have been dismissed and that such dismissal is not affected by our decision.