

Neutral Citation Number: [2022] EAT 68

Case No: EA-2021-000357-LA

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 5 May 2022

**Before :**

**HIS HONOUR JUDGE JAMES TAYLER**

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**Between :**

**MRS A FIELD** **Appellant**  
**- and -**  
**STEVE PYE AND CO. (KL) LIMITED and others** **Respondents**

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**Daniel Brown** (instructed by Excello Law) for the **Appellant**  
**Rad Kohanzad** (instructed by Peninsula Business Services Ltd) for the **Respondent**

Hearing date: 7 April 2022  
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**JUDGMENT**

## **SUMMARY**

### **DISABILITY DISCRIMINATION, UNFAIR DISMISSAL and TIME OFF**

The employment tribunal erred in law in dismissing claims of discrimination because of something arising in consequence of disability, victimisation, direct disability discrimination, and failure to make reasonable adjustments. Most significantly, the employment tribunal failed to analyse evidence that arguably was sufficient to shift the burden of proof. Authorities about asking the “reason why question” considered. The employment tribunal also erred in dismissing the claim of constructive dismissal.

## **HIS HONOUR JUDGE JAMES TAYLER:**

### **Introduction**

1. This is an appeal against the judgment of Employment Judge Postle, sitting with members, on 27, 28, 29 and 30 July 2020, and in chambers on 18 and 19 August 2020. The claimant brought claims of disability discrimination, victimisation, unfair dismissal, detriment for seeking a contractual variation pursuant to section 80F of the Employment Rights Act 1996 (“ERA 1996”) and detriment for taking time off pursuant to section 57A ERA. The judgment was sent to the parties on 12 January 2021.

### **The facts**

2. I have predominantly taken the facts from the judgment, but will also refer to some of the evidence that was before the employment tribunal but was not referred to in the judgment.

3. The first respondent is a general accountancy practice. The other respondents worked for the first respondent. The claimant commenced employment with the first respondent as an Accounts Assistant on 12 April 2016. The claimant was disabled by reason of arthritis, carpal tunnel syndrome and ankylosing spondylitis at the material times. The respondents admitted that the claimant was so disabled and that they knew this was the case.

4. On 11 June 2018, the claimant made what she described as a flexible working application:

I am making this request to help me because I have a disability.

My current working pattern is Monday to Friday 9am to 5.00pm, with half an hour for lunch.

I would like to start working from home as and when is necessary due to my disability needs.

These changes will assist me because I will be able to continue with my work duties from home, when I am unable to drive myself to the office due to chronic pain in my wrist(s) or neck. I will be able to be flexible with working hours at home, for example starting earlier and finishing later giving me more opportunity to have regular breaks.

5. The request was to work from home from time-to-time when the claimant's disability required.
6. The claimant's request was refused at a meeting on 21 June 2018 because it was said not to be in the best interests of the business.
7. On 9 August 2018 the claimant took time off work because her grandchild had gone missing for a short period. The grandchild then was cared for by the claimant for a few days. The extent of the respondent's knowledge about the reason for the claimant's absence is a matter of dispute, to which I will return.
8. The claimant told her line manager, Beth Meacham, that she would be returning to the office on Tuesday 14 August 2018. She was not able to do so because she had a flare up of her carpal tunnel syndrome and was signed off sick. The claimant did not return to work before the end of her employment.
9. On 24 August 2018, Mrs Pye, the third respondent, Company Secretary of the first respondent, wrote to the claimant raising alleged attendance and performance concerns for the first time.
10. The employment tribunal recorded at paragraph 19:

It is accepted what Mrs Pye said in a meeting on 29 November 2018, with the independent investigator looking into the claimant's grievance letter, that the email to the claimant of 24 August 2018 was prompted because Mrs Pye was irritated and annoyed by the claimant's attendance,

**"...she was winding me up something chronic... And yeah – lost my rag"**.  
(Page 267 of the Hearing Bundle)

Mrs Pye admitted in another interview with her advisers (page 405) reference to her email to the claimant of 24 August 2018,

**"I am not proud of it"** [emphasis added]

11. Thus, the employment tribunal held that a letter raising concerns about the claimant's attendance and performance had been sent because of absences.
12. The claimant made a written request for reasonable adjustments on 31 August 2018:

Subject: Reasonable Adjustment Request

I would like to make a request for all reasonable steps to be taken to alleviate the disadvantage I am facing. Due to the increase of flare ups I have due to my rheumatoid arthritis and carpel tunnel syndrome in my wrists, it has become difficult and sometimes impossible to drive myself to the office, which has resulted in taking time off on sick leave. Driving whilst having these flare ups can aggravate the joints, making them more painful and taking longer to recover. I'm due to have carpel tunnel release later in the year, which you are aware of, however I have been told by the surgeon, that this will not resolve and take away all the pain and issues that I have with my wrists. I am also unable to depend on public transport, due to the distance of the bus stops from home and to the office, which would have an impact on my hips, knees, feet and back, as I suffer with ankylosing spondylitis affecting my back, neck, knee joints and hip joints and also riddled with rheumatoid arthritis in all other joints. ...

I would like you to consider the following reasonable adjustments;

- For myself to be able to work from home as and when necessary
- A different keyboard that's suitable for those who suffer with arthritis, carpel tunnel, Tendonitis etc.
- A different computer mouse that's suitable for those who suffer with medical conditions, such as those mentioned above.

13. The claimant was away on holiday from 3 to 16 September 2018. While on holiday she sustained an injury following a fall that caused her to extend her absence from work. On 14 September 2018, the claimant sent an email to the respondent:

Unfortunately I will be unable to attend the meeting you have organised for Tuesday 18th September 2018 as I won't be able to return to work until Monday 1st October the earliest.

This is due to a bad fall whilst on holiday, where we had to come back from holiday early to get my Knee and hip replacement looked at at King's Lynn hospital, as I had fallen on these joints with the knee taken brunt of the fall. Please see attached a sick note covering the period 12th September to 1st October 2018.

14. On 8 October 2019 what was described as an 'informal welfare meeting' was held at the claimant's home. The meeting was conducted by an employment consultant, Mark Silvey. The initial part of the meeting was recorded. After the recording stopped, Mr Silvey asked the Claimant how much she would require to resign, and made her an offer of £2,000. Despite the fact that it was specifically referred to in the claimant's closing submissions, the employment tribunal did not record

the following comments made by Mrs Pye, about the decision to offer the claimant money to leave the respondent's employment, when she was asked about the issue during the grievance investigation meeting on 29 November 2018:

CP: And then somebody said I could call her into work, pending, she said, I could call her into work to go through health issues, and she declined it. And without-, I said, oh, they said, oh, you could do occupational health, and I went, **or you can do something else, ... we'll do occupational health. And I said, "Ooh, to be honest, I really don't." And they said, "You don't really want her any more to come back, do you?" And I went, "No, I don't want her back. I'll be honest with you." And they said, "Well, we can send out a gentleman, or a person to see her on a welfare visit, who basically will do that for you and make her an offer. And the-, and he will say you need to go and talk to somebody and take advice ."** He said, "And you may wonder why we told you to get independent advice," he said, "Because we say that, because **the independent advice normally says to them, well, look, it's quite clear. If you don't accept this and you go back to work, they're going to be on your case, and they're going to monitor, and they're going to actually get you out through whatever.**"

Yeah, yeah.

CP: So, I said, oh. So, he said, "That's what you do. Tell us your lowest offer, tell us your highest offer and we'll go out and we'll do that for you." And then it didn't- [emphasis added]

15. The claimant commenced early conciliation on 2 November 2018.
16. The claimant submitted a grievance on 21 November 2018. The employment tribunal recorded that:

On 21 November 2018, the Claimant raises a grievance ... in which she raises a number of issues about working from home and the refusal in June to her flexible working request. She complains about the email from Mrs Pye of 24 August 2018 containing performance and attendance issues and about the welfare meeting on 8 October 2018 with Mr Silvey and the offer to terminate her employment. In that grievance she suggests she is being treated less favourably, in particular,

*"There has been no attempt to make any adjustments since I started working there on 12 April 2016, this has had a big impact on my mental and physical health."*

17. The employment tribunal found as a fact that Mrs Pye decided to gather statements about the claimant's performance from other staff members because the claimant had submitted her grievance:

In response to the grievance, Mrs Pye did gather a number of statements from staff, particularly Mrs Stollery, Ian Threlfall, Morgan Langham, Sharon Page and Steve Pye ... which appear to be in relation to what Mrs Pye describes as,

*“In relation to Andrea’s performance that had previously been brought to my attention”.*

18. The employment tribunal did not refer to Mrs Pye’s answer, set out in the claimant’s closing submissions, when asked in cross-examination why she has sought statements from the claimant's colleagues:

In cross-examination, R3 conceded that **‘no - I would not have asked for statements if the Claimant had not raised a grievance or made a request for reasonable adjustments’**. That is tantamount to an admission of victimisation. [emphasis added]

19. That quotation from the cross-examination of Mrs Pye was not said to have been challenged at the employment tribunal by the respondent, and was not challenged in this appeal.

20. The claimant’s grievance was heard by Paul Baker, an HR Consultant. Mr Baker met with the claimant on 29 November 2018. The claimant complained that reasonable adjustments had not been made for her and about the offer to terminate her employment on 8 October 2018, as was recorded in the claimant's closing submission in the employment tribunal:

**‘they don’t want me back. They want me out... They’re not making any reasonable adjustments’**

21. Mr Baker also interviewed Mrs Pye. In addition to the comments I have referred to above, in the claimant’s closing submissions in the employment tribunal the following comments were set out that were not referred to in the judgment:

**‘heaven knows what they’re going to think upstairs’**

**‘I’m playing devil’s advocate here, so why did she apply for the job with us?... she knew where she had to travel, and that she had to go upstairs and where the office was’**

**‘what happens if all of the staff decide they want to work from home?’**

22. On 23 November 2018, Mrs Pye wrote to the claimant offering to make adjustments including: working from home as and when necessary; modified IT equipment; and relocation to the ground

floor. The variation was to be reviewed after 4 or 6 weeks.

23. The employment tribunal noted that:

It was to be a temporary variation and to be reviewed in 4 to 6 weeks in relation to the working from home. There was further reassurance that if the Claimant was struggling with the working arrangements at any time, she could inform the Respondents immediately and not wait until a review meeting.

24. The claimant declined an offer of an appointment with occupational health towards the end of November 2018.

25. On 12 December 2018, the claimant resigned, relying on the complaints about her treatment she had raised in her grievance and asserting that there had been a failure to make reasonable adjustments.

26. The claim form was received by the employment tribunal on 15 January 2019. Before the hearing started on 27 July 2020 a list of issues had been agreed. Insofar as is relevant to this appeal, it set out the legal components of the claims of discrimination because of something arising in consequence of disability, victimisation, direct disability discrimination and detriment for taking time off pursuant to section 57A ERA. The same detriments were asserted in all of those claims. The detriments were set out in a schedule attached to the list of issues, as follows:

1. From 22/06/18 onwards - Refusing to permit C to work from home ‘as and when necessary’ due to her disability.
2. 26/07/18 - R2 humiliated C in front of colleagues
3. 24/08/18 - Alleging performance issues and/or raising attendance concerns in a letter to C while she was on sick leave
4. 08/10/18 - Offering to terminate the Claimant’s employment
5. On/around 28/11/18 - The Respondents invited the Claimant’s colleagues to make written criticisms of her
6. 30/11/18 - Indicating in a letter that any flexibility to enable the Claimant to work from home when her disability required it would be temporary and/or stating that the Claimant would be expected to work towards a ‘*return to your full duties as set out in your contract*’

27. The employment tribunal dismissed all of the claimant’s claims for reasons I will consider



later.

28. The claimant appealed by a Notice of Appeal sealed by the Employment Appeal Tribunal on 16 February 2021. The appeal was considered by HHJ Auerbach on the sift. By an order sealed 30 June 2021 he permitted a number of grounds to proceed raising issues about the following subjects: ground 1, reasonable adjustments; grounds 4 and 6, discrimination because of something arising in consequence of disability; ground 14, victimisation; grounds 15(a), (c) and (d) burden of proof; ground 16, detriment for time off pursuant to section 57A ERA; and, grounds 17 to 20, constructive dismissal.

29. I suggested to Counsel that I might consider grounds 15(a), (c) and (d) concerning the burden of proof first because there was some overlap with, or possibly knock on consequences for, the other grounds of appeal.

30. I am grateful for the clear skeletons and concise submissions of Mr Brown and Mr Kohanzad.

### **Burden of proof**

31. Grounds 15(a), (c) and (d) are in the following terms:

15. In respect of the Equality Act 2010 claims, it was argued that there were facts sufficient to shift the burden to the Respondents, in accordance with s.136 Equality Act 2010. The ET failed to address that argument and/or erred in law by failing to apply s.136 Equality Act 2010 in light of the following matters:

a. its finding that the letter alleging performance concerns on 24 August 2018 was sent because the Third Respondent was irritated and annoyed by the Claimant's absence [19]; ...

c. the content of an agreed transcript of a meeting between the Third Respondent and Human Resources on 29 November 2018 in which the Third Respondent stated (inter alia):

i. **'I don't want [the Claimant] back. I'll be honest with you';**

ii. **'I'm playing devil's advocate here, so why did the Claimant apply for a job with us';**

iii. **'she knew where she had to travel, and that she had to go upstairs and where the office was';**

iv. **'I think to myself, what happens if all of the other staff decide they want to work from home';**

## v. 'heaven knows what they're going to think upstairs'

d. in relation to the matter of the Respondents asking the Claimant's colleagues to comment on her performance, the Third Respondent's evidence in cross-examination was that '**I would not have asked for statements if the claimant had not raised a grievance or made a request for reasonable adjustments**'. It was argued that that was tantamount to an admission of victimisation. [emphasis added]

32. In response to these grounds, Mr Kohanzad allowed himself an uncharacteristic rhetorical flourish. Mr Kohanzad said that no appellate judge in the Supreme Court, Court of Appeal or (even) the Employment Appeal Tribunal could conceivably allow these grounds of appeal. Doing so would make new law by establishing an absolute rule of law that primary facts such as there were in this case would always prevent an employment tribunal asking itself the "reason why" question. Mr Kohanzad suggested that this new rule of law would forever be synonymous with the names of the parties in this case. It would make the work of employment tribunals close to impossible. Mr Kohanzad doth protest too much, methinks. There will be nothing in my analysis of the burden of proof that involves any new law. All I will do is consider some well established principles and underline some of their, sometimes overlooked, subtleties.

33. **Hewage v Grampian Health Board** [2012] UKSC 37, [2012] ICR 1054 is often cited as authority for the proposition that in many cases the burden of proof has little to offer, and an employment tribunal may legitimately go straight to the "reason why" question. The employment tribunal may legitimately find as fact that the respondent had a non-discriminatory reason for the impugned treatment. That is correct, but the issue is more nuanced. It is probably best to start at the beginning.

34. It is long established that a protected characteristic need only have a material influence in detrimental treatment for discrimination to be established: **Nagarajan v London Regional Transport** [2000] 1 AC 501, 512H – 513B:

**Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision.** A variety of phrases, with different shades of meaning, have been used

to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. **If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.**” [emphasis added]

35. Section 136 EqA provides that:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

36. **Hewage** approved the approach to the burden of proof adopted in **Igen Ltd (Formerly Leeds Careers Guidance) and Others v Wong** [2005] ICR 931, although noting that such guidance was no replacement for the statutory wording. **Igen** no longer appears to be a ubiquitous component of employment tribunals’ directions as to the law, but remains of importance:

The revised Barton guidance

76. As this is the first time that the Barton guidance has been considered by this court, it may be helpful for us to set it out again in the form in which we approve it. In **Webster Burton J** (President) refers to criticisms made of its prolixity. Tempting though it is to rewrite the guidance in a shorter form, we think it better to resist that temptation in view of the fact that in practice the guidance appears to be offering practical help in a way which most employment tribunals and appeal tribunals find acceptable. What is set out in the annex to this judgment incorporates the amendments to which we have referred and other minor corrections. We have also omitted references to authorities. For example, the unreported case referred to in para (6) of the guidance may be difficult for employment tribunals to obtain. We repeat the warning that the guidance is only that and is not a substitute for the statutory language.

Annex

(1) Pursuant to section 63A of the 1975 Act, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against

the claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the claimant. These are referred to below as “such facts”.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that “he or she would not have fitted in”.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word “could” in section 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the employer.

(10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since “no discrimination whatsoever” is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the employer 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 sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

37. In some cases there may be no evidence to suggest the possibility of discrimination, in which case the burden of proof may have nothing to add. However, if there is evidence that discrimination may have occurred it cannot be ignored. The burden of proof can be an important tool in determining such claims. These propositions are clear from the following well established authorities.

38. In **Laing v Manchester City Council** Elias J (President), noted that it was not always necessary to go through the two stage test, but also stressed that evidence of discrimination should not be ignored:

76. **Whilst, as we have emphasised, it will usually be desirable for a tribunal to go through the two stages suggested in *Igen* , it is not necessarily an error of law to fail to do so.** There is no purpose in compelling tribunals in every case to go through each stage. They are not answering an examination question, and nor should the purpose of the law be to set hurdles designed to trip them up. The reason for the two-stage approach is that there may be circumstances where it would be to the detriment of the employee if there were a prima facie case and no burden was placed on the employer, because they may be imposing a burden on the employee which he cannot fairly be expected to have discharged and which should evidentially have shifted to the employer. **But where the tribunal has effectively acted at least on the assumption that the burden may have shifted, and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever.**

77. Indeed, it is important to emphasise that it is not the employee who will be disadvantaged if the tribunal focuses only on the second stage. Rather the risk is to an employer who may be found not to have discharged a burden which the tribunal ought not to have placed on him in the first place. That is something which tribunals will have to bear in mind if they miss out the first stage. **Moreover, if the employer's evidence strongly suggests that he was in fact discriminating on grounds of race, that evidence could surely be relied on by the tribunal to reach a finding of discrimination even if the prima facie case had not been established.** The tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the

**employee has not raised a sufficiently strong case at the first stage. That would be to let form rule over substance.** [emphasis added]

39. In **Hewage** the Supreme Court drew on the analysis of Underhill J (President) in **Martin v Devonshires Solicitors** [2011] ICR 352:

38. The tribunal does not in the passage which we have set out at para 18 above, or anywhere else in the reasons, refer explicitly to either section 63A of the 1975 Act or section 17A(1C) of the 1995 Act, which provide, in terms too well known to require setting out here, for the so-called “reverse burden of proof”, or to the decision of the Court of Appeal in *Igen Ltd (formerly Leeds Career Guidance) v Wong* [2005] ICR 931, which gives guidance on the effect of those provisions. Mr Stephenson submitted that that showed that the tribunal had “failed to deal properly with the burden of proof” and had “failed to have due regard to the guidance in *Igen Ltd v Wong*”.

39. **This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination**—generally, that is, facts about the respondent’s motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else’s head—“the devil himself knoweth not the mind of man” (per Brian CJ, YB Pas 17 Edw IV f1, pl 2). **But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent’s motivation and what is in issue is its correct characterisation in law.** In the present case, once the tribunal had found that the reasons given by Mr Hudson and Mr Buckland in their letters reflected their genuine motivation, the issue was indeed how that was to be characterised and the burden of proof did not come into the equation. (Cf our observations in *Hartlepool Borough Council v Llewellyn* [2009] ICR 1426, 1448c, para 55.) [emphasis added]

40. In **Hewage** Lord Hope of Craighead DPSC; stated having considered **Igen** and **Madarassy v Nomura International plc** [2007] EWCA Civ 33; [2007] ICR 867:

**The points made by the Court of Appeal about the effect of the statute in these two cases could not be more clearly expressed, and I see no need for any further guidance.** Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* (para 39), **it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.** [emphasis added]

41. It is important that employment tribunals do not only focus on the proposition that the burden of proof provisions have nothing to offer if the employment tribunal is in a position to make positive

findings on the evidence one way or the other. If there is evidence that could realistically suggest that there was discrimination it is not appropriate to just add that evidence into the balance and then conduct an overall assessment, on the balance of probabilities, and make a positive finding that there was a non-discriminatory reason for the treatment. To do so ignores the prior sentence in **Hewage** that the burden of proof requires careful consideration if there is room for doubt.

42. Where there is significant evidence that could establish that there has been discrimination it cannot be ignored. In such a case, if the employment tribunal moves directly to the reason why question, it should generally explain why it has done so and why the evidence that was suggestive of discrimination was not considered at the first stage in an **Igen** analysis. Where there is evidence that suggests there could have been discrimination, should an employment tribunal move straight to the reason why question it could only do so on the basis that it assumed that the claimant had passed the stage one **Igen** threshold so that in answering the reason why question the respondent would have to prove that the treatment was in no sense whatsoever discriminatory, which would generally require cogent evidence. In such a case the employment tribunal would, in effect, be moving directly to paragraphs 10-13 of the **Igen** guidelines.

43. Although it is legitimate to move straight to the second stage, there is something to be said for an employment tribunal considering why it is choosing that option. If at the end of the hearing, having considered all of the evidence, the tribunal concludes that there is nothing that could suggest that discrimination has occurred and the employer has established a non-discriminatory reason for the impugned treatment, there would be no error of law in just answering the “reason why” question, but it is hard to see what would be gained by doing so, when the tribunal has already concluded that there is no evidence that could establish discrimination, which would result in the claim failing at the first stage. There is much to be said for making that finding and then going on to say that, in addition, the respondent’s non-discriminatory reason for the treatment was accepted.

44. If having heard all of the evidence, the tribunal concludes that there is some evidence that could indicate discrimination but, nonetheless, is fully convinced that the impugned treatment was in



no sense whatsoever because of the protected characteristic, it is permissible for the employment tribunal to reach its conclusion at the second stage only. But again it is hard to see what the advantage is. Where there is evidence that could indicate discrimination there is much to be said for properly grappling with the evidence and deciding whether it is, or is not, sufficient to switch the burden of proof. That will avoid a claimant feeling that the evidence has been swept under the carpet. It is hard to see the disadvantage of stating that there was evidence that was sufficient to shift the burden of proof but that, despite the burden having been shifted, a non-discriminatory reason for the treatment has been made out.

45. Particular care should be taken if the reason for moving to the second stage is to avoid the effort of analysing evidence that could be relevant to whether the burden of proof should have shifted at the first stage. This could involve treating the two stages as if hermetically sealed from each other, whereas evidence is not generally like that. It also runs the risk that a claimant will feel that their claim that they have been subject to unlawful discrimination has not received the attention that it merits.

46. Where a claimant contends that there is evidence that should result in a shift in the burden of proof they should state concisely what that evidence is in closing submissions, particularly when represented, as Mr Brown did in this case.

47. In this case the matters raised at grounds 15a, c and d clearly suggested that there could have been discrimination because of something arising in consequence of disability, victimisation, a failure to make reasonable adjustments (prior to the letter sent by the respondent on 23 November 2018) and, possibly, direct disability discrimination.

48. Strangely, the employment tribunal only referred to the burden of proof in the section of the judgment setting out the law under the heading “direct discrimination”. The following passages in the judgment considered the comparative exercise when considering claims of direct disability discrimination.



49. Other than that, there was no consideration of the burden of proof at all. The employment tribunal did not state whether it accepted that the facts relied upon by the claimant in the submission prepared by Mr Brown established that there could have been discrimination. The employment tribunal did not say anything about its decision not to apply the two stage **Igen** test, or state with any real clarity why it decided that there had been no discrimination. This fundamental failure to grapple with significant evidence that suggested there could have been discrimination means that the determinations that there was no discrimination because of something arising in consequence of disability, victimisation, a failure to make reasonable adjustments and/or direct disability discrimination is unsafe. Either the law has not been properly applied or the employment tribunal has failed to give any explanation of how it has been applied. In the terms of ground 4(a) the employment tribunal failed to address the claimant's argument that there were facts sufficient to shift the burden of proof. The employment tribunal erred in law in failing to apply s.136 Equality Act 2010, or, at the very least, to explain why it had not.

**Discrimination because of something arising in consequence of disability**

50. Grounds 4 and 6 of the Notice of Appeal assert:

4. The ET found that there was no evidence of the Claimant experiencing difficulty in attending the Respondents' office prior to 13 August 2018 and that the Claimant's absence following 13 August 2018 had nothing to do with her disability [89-90]. Those findings were perverse or, alternatively, findings the ET was not entitled to make for the following reasons:

a. the Respondents had conceded (without any temporal Limitation) that the Claimant's absence and the difficulties she experienced in relation to attending the office arose in consequence of her disability [87];

b. the ET had found that on 11 June 2018 the Claimant made a request to work from home, as and when her disability prevented her from travelling to the office [78];

c. the ET had found that on 21 June 2018 there was a meeting at which the Claimant explained that the reason for her request was that she is unable to drive herself to the office due to pain in her wrist and neck [79];

d. the ET had noted that the Claimant experienced a flare up of her carpal tunnel syndrome (disability) after 9 August 2018 [15-16] and the hearing bundle contained fit notes dated 13 and 24 August 2018 respectively,

indicating that the Claimant was not fit for work because of carpal tunnel;

e. it was not put to the Claimant that she did not experience difficulties attending the office prior to 13 August 2018;

6. In light of Grounds 4 and/or 5 above, the ET ought to have found that the Claimant's absence and/or difficulties in relation to attending the office arose in consequence of her disability. Accordingly, the ET erred by failing to apply the test in s.15 Equality Act 2010 to each of the six matters complained of by the Claimant (set out in the Schedule to the List of Issues). It simply failed to address the issues.

51. I consider that these grounds are largely made out. Fundamentally, the respondent had conceded in its closing submissions that:

The Respondent accepts that the Claimant's absence and the difficulties she experienced in relation to attending the Respondent's office arose as a consequence of her disability.

52. The employment tribunal appears to have noted this concession stating:

87. The Respondents accept that the Claimant's absence and the difficulties she experienced in relation to attending the Respondent's office arose as a consequence of her disability.

53. The finding at paragraph 89 was inconsistent with this:

There was no evidence that the Claimant was experiencing difficulty in attending the Respondent's office prior to 13 August 2018.

54. The employment tribunal did not inform the claimant that it was preposing to go behind the respondent's concession. In the circumstances, the employment tribunal's conclusion that there had "been no unfavourable treatment because of something arising in consequence of the Claimant's disability" is unsafe.

55. I consider that ground 4 is made out, save that I do not accept that it is correct to state that the employment tribunal held that the claimant's absences following 13 August 2018 had nothing to do with her disability. The tribunal held that some of her absences after 13 August 2018 were for reasons other than her disability. The questions of whether the absence occasioned by the claimant's fall while on holiday were also related to her disability, which was not expressly considered by the employment tribunal will require reconsideration on remittal. I also do not accept that it was necessarily the case

as asserted at ground 6 that the employment tribunal “ought to have found that the Claimant's absence and/or difficulties in relation to attending the office arose in consequence of her disability”. That too will be a matter for consideration on remission.

### **Victimisation**

56. Ground 14 of the Notice of Appeal asserts:

14. The ET found two protected acts [115] but it failed to address whether, because of either of those protected acts, the Claimant was subjected to the detriments set out in the Schedule to the List of Issues

57. The employment tribunal dealt with the victimisation claim briefly:

115. The Claimant also seems to rely on 11 June 2018 written request for reasonable adjustments, i.e. working from home, and 31 August 2018 making formal requests for reasonable adjustments. The Tribunal accepts they are protected acts; indeed, the grievance of 21 November 2018 was regarding the handling of the request for reasonable adjustments.

116. It is difficult to understand what the Claimant advances as the specific detriment in making the request or in the handling of the grievance. As following meetings in October and the communication in November, the Claimant was granted all her requests for reasonable adjustments. Where is the detriment? The grievance was dealt with, it may not have been the outcome the Claimant required, but it was dealt with. There was no detriment. Claims for victimisation are simply not made out.

58. The employment tribunal accepted that the claimant had done protected acts and then concluded that they were not the reason for treatment that the claimant did not rely on as the specific detriments. The detriments the claimant relied on were as set out in the annex to the list of issues. This ground of appeal is made out.

### **Detriment for taking time off pursuant to section 57A ERA**

59. Ground 16 of the Notice of Appeal asserts:

Detriments for having time off: perversity and/or failure to address the issues

16. The ET's conclusion that the claim under s.57 Employment Rights Act 1996 could not succeed as the Respondents were not aware that the Claimant had taken time off to care for her grandchild [124] was perverse in light of the ET's earlier finding that the Claimant had informed the Respondents' Beth Meacham that she needed urgent leave to make arrangements for the care of her granddaughter (who had been placed into her care by Social Services) (15-16). It follows that the ET erred by failing to address whether, because she exercised rights under

s.57 Employment Rights Act 1996, the Claimant was subjected to the detriments set out in the Schedule to the List of Issues.

60. The employment tribunal made the following findings relevant to this complaint:

15. On Thursday 9 August 2018, the Claimant having received calls initially from her daughter to say her granddaughter had gone missing, then spoke to her Manager Beth Meacham about the occurrence. Ultimately, the grandchild was found, the Claimant was clearly upset by the whole episode and had to make urgent arrangements for the care of her grandchild, as it would appear temporarily the grandchild had been placed in the Claimant's care by Social Services. In the end the granddaughter was returned to the care of the Claimant's daughter on the following Monday evening.

16. At the time of the above incident the Claimant had informed Beth Meacham she would need urgent leave to deal with the episode and would be returning to the office on Tuesday 14 August 2018 the following week. However, it would appear in the meantime, the Claimant has a flare up of her carpal tunnel syndrome and was signed off sick.

61. The reference in paragraph 16 to the claimant informing Ms Meacham that she needed leave to deal with "the episode" might be read as referring to the time that the claimant needed to care for her granddaughter or the consequences of her having gone missing more generally. The employment tribunal's later conclusions suggest it was the latter:

120. Here this is advanced on the basis that the Claimant had time off for her daughter / grand daughter between 9 and 13 August 2018. As a result of that, did the Respondent subject the Claimant to one or more detriments because she had time off?

121. It is clear that the Respondent had not been informed of any Emergency Order from Social Services in relation to the Claimant's absence on 9 – 13 August 2018. That document was only provided during the course of disclosure.

122. What the document informed the Respondents of on 9 August 2018, was that the Claimant's grandchild had gone missing and seemingly before the Claimant left the office, informed the Respondents that her grandchild had now been found. ...

124. In any event, it is the case that the Respondents were not aware that the Claimant had taken time off to care for her grandchild and therefore the alleged acts complained of could not have occurred simply because the Claimant had taken dependent's leave. This claim is simply not made out.

62. The employment tribunal did not refer to the fact that in a complaint pursuant to section 47C

ERA of detriment done on the ground of having taken dependants leave pursuant to section 57A ERA it is for the employer to show the ground on which any act, or deliberate failure to act, was done, by operation of section 48 ERA. This point was not raised in the Notice of Appeal. In the final analysis I do not consider this was an issue that turned on the burden of proof. I consider the employment tribunal concluded that at the relevant time the claimant had not taken time off to care for her granddaughter. In the circumstances, I can see no error of law in the employment tribunal dismissing this complaint. This ground of appeal fails.

### **Reasonable adjustments**

63. Ground 1 of the Notice of Appeal asserted:

1. In dismissing the failure to make reasonable adjustments claim, the ET held that, as at 30 November 2018, the Respondents were prepared to accommodate all of the Claimant's requests [32, 78-84]. However, it was argued that the failure to make reasonable adjustments claim crystallised before 30 November 2018 (s.123(4) Equality Act 2010) in light of, inter alia, the refusal of the Claimant's 11 June 2018 request to work from home [10], the further request made on 31 August 2018 [20] and the offer to terminate the Claimant's employment on 8 October 2018 [28, 100]. The ET failed to address the argument that the failure to make reasonable adjustments claim had crystallised before 30 November 2018.

64. The employment tribunal accepted that the claimant made a request for reasonable adjustments on 21 June 2018 and on 31 August 2018. The employment tribunal accepted that it was not until 30 November 2018 that the respondent agreed the adjustments requested by the claimant, at least on a trial basis. This was because the employment tribunal found that "she continued to work at the office without difficulty until 9 August 2018". However, as is the case for the discrimination because of something arising in consequence of disability claim, this is inconsistent with the concession made by the respondent that "the difficulties she experienced in relation to attending the Respondent's office arose as a consequence of her disability". The fact that a person is able to attend a place of work does not mean that they cannot suffer a substantial, in the sense of being more than minor or trivial, disadvantage in so doing. I consider that the employment tribunal failed properly to analyse whether a failure to make reasonable adjustments had occurred in the period before the respondent agreed to make the adjustments requested by the claimant.

## **Constructive dismissal**

65. Grounds 17 to 20 asserted:

17. In light of the Grounds above, the ET's judgment on unfair and/or discriminatory constructive dismissal cannot stand.

18. Further or alternatively, the ET's finding that the Claimant never raised or pursued the offer to terminate her employment on 8 October 2018 [129] is perverse in light of the following evidence which was before the ET:

a. the Claimant raised a grievance on 21 November 2018 which expressly referenced the offer to terminate her employment on 8 October 2018 [28];

b. the Claimant raised the offer to terminate her employment on 8 October 2018 in a further letter dated 27 November 2018; and/or

c. the offer to terminate the Claimant's employment was raised in a grievance meeting on 29 November 2018

19. Further or alternatively, in deciding that the offer to terminate the Claimant's employment was not repudiatory, the ET failed to address the specific circumstances of this case, it was not adequate for the ET to simply state its view that making an offer to terminate employment is not unusual [129]. Alternatively, the ET's conclusion that the offer to terminate the Claimant's employment was not repudiatory is not supported by adequate reasons.

20. It is denied that the ET found that the Claimant affirmed the contract following any breach but, alternatively, it misdirected itself by considering that the issue of affirmation turns on the question of how much time passed following the breach [66, 129] when the question is not one of time in isolation but whether the employee has demonstrated that she has made a choice to affirm the contract. The ET failed to consider the fact that the Claimant had raised a grievance, commenced early conciliation on 2 November 2018 [27-28], did not attend work during the period and/or was unwell.

66. Mr Kohanzad accepted that if the discrimination grounds of appeal succeeded the appeal in respect of the constructive dismissal claim was almost certain to succeed. On the above determinations about the discrimination grounds of appeal I consider that the constructive dismissal claim necessarily must be determined afresh.

67. In addition, it is correct, as asserted at ground 18 of the appeal, that contrary to what was stated by the employment tribunal, the claimant did raise the issue of being made an offer to leave employment after 8 October 2018: in her grievance on 21 November 2018, in her letter of 27

November 2018 and at the grievance meeting on 29 November 2018. I also consider that holding that an offer to terminate is not unusual does not provide an answer to the contractual question of whether such conduct is repudiatory. Finally, I accept that the employment tribunal erred in deciding in the circumstances of this case that the mere effluxion of time was sufficient to establish affirmation: see for example **Chindove v William Morrisons Supermarket Plc** UKEAT/0201/13/BA.

### **Disposal**

68. The appeal is allowed on grounds 1, 4, 6, 14, 15(a), (c) and (d) and grounds 17 to 20.

69. The case will be remitted to be determined by a differently constituted employment tribunal because, having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763:

- a) It is important to avoid further delay, which could be caused by awaiting the availability of the same employment tribunal;
- b) The matter requires determining almost entirely afresh, so there would be no saving of cost or time in remitting it to the same employment tribunal; and
- c) The errors in dealing the case were fundamental.