Neutral Citation Number: [2024] EAT 130

Case No: EA-2022-000822-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 August 2024

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

Between :

MR J PARNELL

Appellant

- and -

ROYAL MAIL GROUP LTD

Respondent

- -
- -

Harry Sheehan (instructed pro bono) for the **Appellant**
Christopher Milsom (instructed by Weightmans LLP) for the **Respondent**

Hearing date: 25 and 26 June 2024
- -

JUDGMENT

SUMMARY

Practice and procedure - previous findings by an earlier Employment Tribunal - list of issues

Unfair dismissal - reasonableness of dismissal given earlier finding of failure to make reasonable adjustments

Disability discrimination - failure to make reasonable adjustments - unfavourable treatment because of something arising in consequence of disability

The claimant had brought some 31 Employment Tribunal ("ET") claims, which had been divided into two time periods, each determined by a different ET. The first ET had dismissed all but two claims, finding that the respondent had failed to make reasonable adjustments in (i) failing to review an earlier finding of bad faith, and (ii) failing to remove a two-year warning. Considering events over a later period, the second ET dismissed all the claimant's claims. The claimant appealed in respect of the dismissal of his claims under sections 15, 20 and 21 **Equality Act 2010** ("EqA") and his claim of unfair dismissal.

Held: dismissing the appeal

The second ET had had appropriate regard to the findings made by the first ET but had been required to reach its own decision on the evidence before it in relation to the relevant events during the period with which it was concerned. In so doing, the second ET had permissibly found that, at that stage, there would be no efficacy in expunging the two-year warning (which had expired); that this would not, therefore, have been a reasonable adjustment at the relevant time; and that there were no reasonable adjustments that could have been made that would have enabled the claimant to return to work. As for the claimant's claim under section 15 **EqA**, the second ET had failed to provide an adequate explanation for what seemed to be its finding that the claimant's dismissal (and rejection of his appeal) had not amounted to unfavourable treatment. It had also failed to demonstrate that it had applied the correct approach to determining whether the "*something*" that had led to the claimant's dismissal had arisen in consequence of his disability. The second ET had, however, gone on to consider the question of objective justification and had permissibly found that any unfavourable treatment was a proportionate means of achieving a legitimate aim. The appeal against the decision on the section 15 **EqA** claim therefore failed. The challenge to the decision on the claimant's unfair dismissal claim was put on the basis that the second ET had failed to properly take into account the findings of the first ET; in particular, as to the impact of the respondent's failure to make reasonable adjustments on the claimant's actions relevant to the reason for his dismissal. The second ET was, however, bound to consider the reasonableness of the decision to dismiss at the time it was taken; doing so, it had permissibly found that the position had moved on from that being considered by the first ET.

The Honourable Mrs Justice Eady DBE, President

Introduction

1. This appeal concerns claims of disability discrimination brought under sections 15, 20 and 21 **Equality Act 2010** ("EqA") and of unfair dismissal, considered by an Employment Tribunal ("ET") in circumstances in which earlier claims of disability discrimination involving the same parties, but relating to prior events, had previously been determined by a different ET. The relevance of the first ET's findings is a question at the heart of this appeal, albeit that it is also said that the second ET's decision reveals errors of approach in relation to the claim under section 15 **EqA** and the complaint of unfair dismissal.

2. In giving this judgment I refer to the parties as the claimant and respondent, as below. This is my ruling on the claimant's appeal against the decision of the ET sitting at Liverpool: Employment Judge Shotter, sitting with Ms Pennie and Mr Partington, over some eight days in February and March 2022; "*the Shotter ET*". The Shotter ET was concerned with ten claims filed by the claimant between May and November 2020; by its decision ("*the Shotter decision*"), sent to the parties on 16 May 2022, it dismissed all the claims before it. The claimant had previously presented some 21 earlier claims, which were heard by the ET sitting at Manchester (Employment Judge Johnson, sitting with Mrs Clover and Mrs Ramsden, over nine days in October 2020, with a further two days in chambers in November and December 2020; "*the Johnson ET*"). The reasoned judgment in respect of those claims was sent out on 28 July 2021 ("*the Johnson liability decision*").

3. Initially considering this matter on the papers, Judge Keith was unable to see that it raised any arguable question of law; subsequently, after a hearing under rule 3(10) **EAT Rules 1993**, at which Mr Sheehan appeared for the claimant under ELAAS, Her Honour Judge Tucker permitted the appeal to proceed on amended grounds, subsequently permitting a further amendment to be made on the claimant's application.

4. The claimant previously acted in person but has had the benefit of advice and representation from Mr Sheehan, acting *pro bono*, since the rule 3(10) hearing. The respondent has been legally represented throughout, albeit Mr Milsom did not appear below.

The claimant's employment - the relevant history

5. The claimant was employed by the respondent as a postman/driver, from 7 June 1999 until his

dismissal on 12 June 2020. From at least January 2012, the claimant suffered anxiety and depression, which had a significant impact on his ability to carry out normal day-to-day activities.

6. On 17 May 2017, the claimant made a bullying and harassment complaint relating to his then manager, Ms Baillie, going back some three years. The complaint was investigated by a Ms Nevins but not upheld. Acknowledging that the claimant had suffered episodes of anxiety and stress, Ms Nevins nevertheless concluded he had made his allegations in bad faith, and recommended that conduct proceedings should be pursued. That decision was upheld on appeal.

7. From 3 January 2018, the claimant was off work on sick leave; he did not return.

8. Following the dismissal of his appeal, and given the finding that the claimant had made allegations of bullying and harassment in bad faith, misconduct proceedings were pursued; after a meeting on 17 April 2018, the claimant was issued with a two-year serious warning; that decision was also upheld on appeal.

9. On 14 August 2018, the claimant lodged his first ET claim; he would go on to lodge a total of 31 claims.

10. In October 2018, a performance coach, Mr Kelly, sought to work with the claimant, explaining that his continued absence was untenable and inviting him to a meeting to discuss whether he intended to return to work. The claimant, however, was resistant to Mr Kelly's overtures as the removal of the two-year warning (outside Mr Kelly's remit) was a sticking point for him in terms of his return to work.

11. The claimant went on to raise a grievance in respect of the management of his sickness absence (including against Mr Kelly). Although the claimant's grievance included an issue about the two-year warning that was not something that was addressed by the respondent under this process (the outcome letter being sent to the claimant on 25 April 2019), or in the subsequent appeal (determined in or about September 2019).

12. After the claimant had raised his grievance, and while that process was underway, the management of the claimant's sickness absence was taken over by others. On 17 June 2019, the claimant was invited to an interview to discuss his continuing absence but his focus was on the on-going grievance appeal, and he did not want to engage with a parallel process.

13. On 2 January 2020, the claimant raised a second bullying and harassment complaint. That was investigated by an independent casework manager, Mr Walker, but dismissed on 17 March 2020. The

claimant's subsequent appeal, considered by an independent case manager, Ms Tebbutt, was also dismissed, in April 2020.

14. Meanwhile, on 16 March 2020, the respondent had organised a meeting for the claimant to attend with another manager, Mr Smith, referred to as a "*SOSR [some other substantial reason] meeting*". At that meeting, Mr Smith offered that the claimant could return to "*work in any office, any role and any shift*", pointing out that the claimant's two-year warning would expire on or around 24 April 2020; the claimant was concerned, however, that the warning should be withdrawn, identifying this as a barrier to his return.

15. On 15 April 2020, a quality and customer business partner, Mr Briggs, wrote to the claimant, stating that the position was untenable, and raising the question whether the claimant would return to work, saying that consideration was being given to his continued employment. The claimant was invited to a meeting to discuss possible adjustments to support his return, but he declined to attend, emailing an eight-page response in which he accused Mr Briggs of harassment. Acknowledging that the respondent did not know when he might return to work, the claimant said he intended to do so once the barrier of the false allegation against him had been removed. Although Mr Briggs agreed that their meeting might take place on a later date, the claimant continued to decline to meet until (as he put it) the respondent had completed all internal procedures.

16. Ultimately, by a letter sent to the claimant on 12 June 2020, Mr Briggs referred to the claimant's failure to attend two meetings he had tried to organise, and said he had reached the decision that the claimant should be dismissed. Mr Briggs explained that the claimant's absence for over two years was "*unsustainable*", that the respondent could have no confidence that he had any intention of returning to work or of co-operating with management in the future, and that he (Mr Briggs) had concluded there had been an irretrievable breakdown of trust and confidence, and there was nothing the respondent could do to facilitate a return to work.

17. The claimant appealed against that decision, and attended an appeal hearing before an independent case work manager, Ms Rees, on 28 July 2020. Having allowed the claimant to add to his grounds of appeal, and having carried out an investigation of her own, Ms Rees ultimately communicated her decision to the claimant on 21 October 2020 in a 68-page report, which explained why the appeal was unsuccessful.

The ET proceedings - an overview

The Johnson ET

18. The Johnson ET was concerned with claims relating to events during the course of the claimant's employment from 2015 to early 2020; these included allegations of bullying and harassment relating to Ms Baillie and complaints regarding the misconduct proceedings leading to the two-year serious warning. It was the claimant's case that these matters gave rise to acts of direct disability discrimination (section 13 **Equality Act 2010** ("EqA")), unfavourable treatment because of something arising in consequence of disability (section 15 **EqA**), a failure to comply with a duty to make reasonable adjustments (sections 20 and 21 **EqA**), harassment (section 26 **EqA**), and victimisation (section 27 **EqA**).

19. At the outset of the Johnson decision, reference was made to the further ET claims the claimant had filed (ultimately determined by the Shotter ET), noting as follows:

> "1. ... It is understood that proceedings have been presented to the Tribunal by the claimant relating [to] a complaint of unfair dismissal. However, the unfair dismissal proceedings are being dealt with separately and the findings of fact or decision in this case do not relate to any complaints brought by the claimant outside of the claim before the Tribunal today."

In fact the further claims raised complaints of disability discrimination as well as unfair dismissal.

20. In its liability decision, the Johnson ET determined that the respondent was (or should have been) aware that the claimant was disabled by reason of anxiety and depression from January 2012. It went on to find there had been a failure to make reasonable adjustments in respect of the respondent's failure to remove the two-year serious warning from the claimant's record and to review Ms Nevins' misconduct investigation; it otherwise dismissed the claimant's claims.

21. A remedy hearing took place before the Johnson ET on 30 June 2021. By its decision, promulgated on 28 July 2021 ("*the Johnson remedy decision*"), the claimant was awarded compensation for loss of earnings from 5 July 2018 until 4 January 2020, and a sum of £22,000 for injury to feelings, including £2,000 by way of aggravated damages due to what the Johnson ET found to be behaviour by the respondent that "*made the situation worse due to inactivity and insensitivity*" (Johnson ET, remedy decision paragraph 28).

22. There have been no appeals against the Johnson ET decisions.

The Shotter ET

23. The claims before the Shotter ET also raised complaints under the **EqA**, relating to the claimant's

second complaint of bullying and harassment, the absence management process that led to his dismissal, his dismissal and the subsequent appeal. In general terms, it was the claimant's case that these matters gave rise to acts of direct discrimination (section 13), discrimination because of something arising in consequence of disability (section 15), indirect discrimination (section 19), failure to make reasonable adjustments (sections 20 and 21), harassment (section 26) and victimisation (section 27). In addition, the claimant complained of unfair dismissal under the **Employment Rights Act 1996** ("ERA"). The claimant's appeal against the Shotter decision relates to his claims under sections 15, and 20 and 21 **EqA** and to his complaint of unfair dismissal.

24. Descending into the way the claimant's case was put before the Shotter ET in more detail, it is relevant to note that, within his pleadings, the claimant had stated that he was seeking to complain of the respondent's refusal to make the reasonable adjustment of removing the two-year serious warning, explaining that his disability meant that he would be unable to live with the warning in the same way as "*a normal person*" (see paragraph 60 of the details attached to the form ET1 in case no. 2403561/2020, and paragraphs 10 and 18 of the details attached to the form ET1 in case no. 2409041/2020). The respondent's pleadings demonstrate that it understood that the two-year warning featured as an issue in the case, although it addressed that issue in its response to the claim under section 15 **EqA**, rather than as part of the reasonable adjustments complaint. This was, however, not a matter that subsequently featured in the list of issues, initially drawn up at a preliminary hearing on 16 November 2020, when the parties were directed to consider the list carefully to make sure of its accuracy (and, if not, to promptly notify the ET). Moreover, at a later preliminary hearing, on 17 December 2021, it seems that both parties confirmed that the list included all relevant issues.

25. On 25 November 2021, the claimant applied to the ET for the respondent's response to be struck out, on the basis that he had succeeded (before the Johnson ET) in his claim that the respondent had failed in its duty to make reasonable adjustments to remove the two-year warning, asserting that, had it done so:

> "I could 100% made a successful to return to work ... [and the respondent's failure to do so made it] impossible for me to return to work which ultimately led to my dismissal" (Shotter decision, paragraph 8).

26. The Shotter decision makes clear that it understood that what the claimant had said in his application for a strike out encapsulated his position at trial, observing that this was:

> "8. ... a marked changed of emphasis from the claimant's agreed list of issues which

> did not include a complaint that the respondent continued to breach its duty to make reasonable adjustments contrary to section 20 & 21 Equality Act 2010 insofar as it relates to the failure of the respondent to remove the 2-year serious warning from the claimant's record and to review Ms Nevin's investigation."

It is, however, also recorded that the list of issues was re-visited at the outset of the hearing, as the evidence progressed, and before oral submissions (Shotter decision, paragraph 9), and that, at the start of the hearing, the claimant had amended the list of issues in respect of the unfair dismissal claim, but not in respect of the claim of failure to make a reasonable adjustment. That said, the Shotter ET went on to observe:

> "10. The issues listed were amended further to reflect the conversation that took place between the parties at the outset of this hearing, and the claimant's reliance on the expired serious warning in the unfair dismissal complaint. The issues relating to discrimination as agreed by the parties previously were confirmed by both to reflect the issues in the case, and there was no indication from the claimant that he wished to add to those issues, including the section 20-21 Equality Act 2010 ("EqA") complaint. It became apparent when the claimant was asking questions on cross-examination that he believed the 2-year serious warning remained a barrier to his return to work and whilst this in *[sic]* not a specific issue in the agreed list, the parties were put on notice prior to submissions that the Tribunal would deal with it having heard the evidence and submissions."

27. As for the claimant's claim under section 15 **EqA**, the list of issues recorded that the "*something arising*" in consequence of the claimant's disability was that "*he made complaints about his treatment as a disabled person*".

28. Also within the preliminary paragraphs of the Shotter decision, it was recorded that it was common ground that it was bound by the judgment and findings of fact of the Johnson ET:

> "6. ..., and accordingly we have had to circumvent the difficulties caused by two different Tribunals hearing allegations that are linked within a factual matrix. This Tribunal has been careful not to return to the events which took place prior to January 2020 but still had in mind the background against which the new allegations set out in an additional 10 separate complaints can be made sense of."

29. For reasons set out in its reserved judgment (see further, below), the Shotter ET went on to dismiss all the claimant's claims before it.

Relevant findings made by the Johnson ET

31. The Johnson ET upheld the claimant's complaint of discrimination due to a failure by the respondent to comply with its duty to make reasonable adjustments in two respects: (1) in failing to remove the two-year serious warning from the claimant's record, and (2) in failing to review Ms Nevin's investigation. In support of his appeal against the Shotter decision, the claimant places particular reliance on the following findings of

the Johnson ET:

31.1 It was unreasonable to conclude that the claimant had raised his May 2017 bullying and harassment complaint in bad faith, warranting a two-year serious warning (paragraph 66); the claimant felt that he was being punished for something he had been encouraged to do (paragraph 157 c).

31.2 When the claimant continued to challenge the warning, the respondent considered it was unable to investigate the matter further, which the Johnson ET found was "*all very process driven*", did not "*explore what the real issue was*" (paragraph 82), and "*no doubt exacerbated the claimant's anxiety and belief that management were closing ranks*" (paragraph 93), such that he had developed a heightened sense of grievance as a result (paragraphs 155 c and 157 c)

31.3 There was a provision, criterion or practice ("PCP") in place whereby the respondent failed to re-open the claimant's complaint; the respondent had a practice of treating each procedure as being self-contained, and the claimant could not bring a grievance to have this process re-opened (paragraph 153 f).

31.4 There was also a PCP in place whereby the two-year serious warning imposed during the conduct process would be maintained without review (paragraph 153 g).

31.5 These PCPs placed the claimant at a substantial disadvantage as they increased his anxiety and depression (paragraph 155 b); the two-year serious warning put him at a substantial disadvantage as:

> "155 c. ... he was unable or unwilling to take a pragmatic view as to its implications and that it would conclude in relatively short period of time. His disability meant that this warning became the focus of his sense of grievance with the respondent and this exacerbated his impairments arising from this disability, ..."

31.6 The respondent ought to have known that these PCPs placed the claimant at a substantial disadvantage because he articulated them in his grievance and as part of the SOSR process (paragraph 156).

31.7 It would have been a reasonable adjustment to remove the two-year warning, and to have reviewed Ms Nevin's investigation; but for that warning, the claimant would have returned to work; reviewing the investigation and removing the warning would have enabled the respondent to manage the claimant back into the workplace (paragraphs 157 c, e and i); it was on that basis that the Johnson ET went on to award the claimant compensation for loss of earnings to 4 January 2020.

The Shotter decision

Relevant findings of fact

32. In the early part of its decision, the Shotter ET recorded a number of findings made by the Johnson ET (see paragraphs 22-27, Shotter decision), going on to observe:

> "28. These were a *[sic]* key findings, which the parties confirmed in respect of the J&R [judgment and reasons] 2020 generally, bound this Tribunal at the second liability hearing. However, the Tribunal has borne in mind the fact that neither party were aware of the outcome during the events which unfolded from January 2020 through to appeal dealt with by Rebecca Rees. The parties were in litigation; the claimant a litigant in person capable of dealing with a multitude of claims and the Tribunal processes, including hearings. The claimant believed he was right and the respondent wrong in its defence that no unlawful discrimination had occurred."

33. The Shotter ET then set out the following findings (in mis-numbered paragraphs) relating to the claimant's approach to his employment in light of the on-going litigation:

> "15. ... At this liability hearing the claimant described how difficult and stressful he found the litigation, so much so that he believed it was a reasonable adjustment for the respondent not to press him for a return to work in 2020 [in] order that he had time to prepare for the trial in October 2020. The Tribunal found the litigation which included a substantial number of different claims was an insurmountable barrier to the claimant returning to work, and it would have made no difference to his prospects of returning had the respondent removed the 2-year serious warning from the claimant's record or review Ms Nevin's investigation by the beginning of 2020. Ms Nevin's investigation was renewed *[sic]* as recorded below, by a number of managers, but the claimant was unable to accept the result because he did not trust the managers or the respondent against a backdrop of repeated litigious allegations and assertions sent to a number of managers and the claimant's conviction that he was going to win his case at trial.
> 29. The claimant believed the respondent was hiding the evidence necessary for his trial, he wanted it to reinvestigate the events prior to and following the issuing of the 2-year serious warning and remove it as evidence that he had done no wrong and should succeed in the litigation and so the Tribunal found. The respondent was defending the discrimination allegations and the actions of various managers through the entire process of hearings and appeals including the events of 2020, denying the actions alleged were discriminatory. The claimant did not understand that the respondent legitimately may protect its position in the legal proceedings and can take reasonable steps to do so. The claimant was unable to extract himself from the consequences of the litigation, ignoring his contractual obligation to attend work and fuelling his all-consuming distrust of the respondent and managers within and outside the litigation which commenced on 14 August 2018 when the first claim was issued through to the additional complaints and the current proceedings on 28 May 2020 and this liability hearing."

34. Referring to the claimant's second bullying and harassment complaint, of 2 January 2020, the Shotter ET noted that this had been raised in the knowledge that his claim involving the managers in question had been listed for trial in October 2020; it found that:

> "16. ... the claimant was attempting to litigate by correspondence and internal meetings in the knowledge of an imminent trial. He was capable of sending lengthy detailed communications coherently setting out his arguments and there was nothing to stop him from having discussions with managers about a future return to work

> and the adjustments he required in order to do so."

35. In considering the investigation undertaken by Mr Walker in relation to this complaint, the Shotter ET further concluded that:

> "22. ... whatever adjustments the respondent carried out, and even had it complied with all of the claimant's demands, the claimant believed managers had intentionally treated him "out of hatred" because he was disabled, it was a "hate crime," they wanted him out of the organisation was through "psychological abuse and hate" and he would not have returned to work in any capacity."

36. As for the SOSR meeting with Mr Smith on 16 March 2020, the Shotter ET found there had been an impasse: notwithstanding Mr Smith's assurance that the two-year warning would shortly expire and would no longer be on his record or taken into account, and his offer to make any reasonable adjustments, inviting the claimant to return to work in any office, any role and any shift (Shotter decision, paragraph 31):

> "32. ... The claimant wanted the respondent to admit they had got it wrong, the 2-year serious warning expunged despite its imminent expiration and the ongoing litigation around which these complaints were central. In short, the claimant was litigating and had no intention of returning to work whatever was offered to him."

37. The Shotter ET further noted that, although Ms Tebbutt's decision (dismissing his appeal against the rejection of his second bullying and harassment complaint) had referred to her concern that the claimant's relationship with the respondent had broken down:

> "46. ... The claimant was totally unconcerned with the possibility that there may be a breakdown in the employment relationship because he did not value that relationship, ..."

38. Similarly, when declining to meet with Mr Briggs in April 2020, the Shotter ET considered that, by his insistence that the two-year warning be removed before he could return to work, the claimant was continuing to litigate by correspondence:

> "52. ... it was clear he would not consider the possibility of any return to work until his demands were satisfied, despite the fact that they were being litigated on, both parties held a different view of the case and the trial was imminent."

It continued:

> "56. The parties had reached an impasse. The respondent was entitled to discuss with the claimant his return to work outside the events that had given rise to the litigation. The claimant wanted to control the entire process to benefit his litigation and emailed a 6-page letter on the 21 April 2020 to a number of recipients including Christopher Briggs, the union and the respondent's solicitors "please can you pass this to the judges to see the unwanted discrimination" .... This communication was part of the litigation as far as the claimant was concerned, and he did not address the possibility that Christopher Briggs was acting in good faith by attempting to discuss with him what adjustments would be needed for the claimant to be able to return to work."

39. The Shotter ET concluded that the claimant rejected Mr Briggs' genuine efforts to have an open dialogue with him because (as it found):

> "66. ... the claimant was intent on getting the 2017 bullying and harassment investigation reinvestigated and overturned in his favour and this remained the case throughout the relevant period leading to the first final hearing as it was "proof" of discrimination for the trial.
> ...
> 68. ... The claimant remained obsessed with proving his case, and his argument that he was not refusing to go to the meeting but deferring it was not supported by the evidence, and so the Tribunal found. The claimant was refusing, even if he chose to use the word "deferring" as he gave no end date in the future as to when the meeting could take place; it was open-ended in the same way as the possibility of the claimant returning to work was."

40. Turning to the decision to dismiss the claimant, the Shotter ET found that Mr Briggs:

> "74. ... held a genuine belief that there was a irretrievable breakdown of trust between the claimant and his employer. He did not believe there is anything the business can do to facilitate a return to work."

It was further satisfied that regard had been had to the claimant's disability:

> "77. ... the claimant was offered reasonable adjustments that one rarely sees in the Employment Tribunal, namely any job, anywhere and any shift throughout the organisation, and he gave the claimant time to come around to the idea of having a meeting before it became clear to him the meeting would never take place. ..."

Summarising its conclusion as to Mr Briggs' reason for his decision, the Shotter ET found:

> "78. Christopher Briggs took the view that dismissal was the only option on the grounds that the relationship breakdown was irretrievable and the claimant was "unlikely to return to any form of work…in the foreseeable future…and had been given every opportunity to participate in my review…taking the decision to deliberately not partake in this review…this is a further indication that the employment relationship has broken down and that you have no intention of returning to work for Royal Mail"."

Agreeing that:

> "79. ... it was obvious the claimant was never going to return to work as there had been a total breakdown in the relationship underlined by the manner in which he conducted the litigation ..."

41. Similarly, in relation to the claimant's appeal against dismissal, the Shotter ET concluded that:

> "109. The appeal hearing was thorough and objective, falling well within the bands of reasonable responses open to a reasonable employer dealing with the claimant and his grounds of appeal. Rebecca Rees missed nothing out of any note, and painstakingly dealt with the claimant's points of appeal. Her conclusions fell well within the bands of reasonable responses, the claimant failing to offer any information or hope of a return to work in the future that would enable the dismissal decision to be overturned. The claimant's position had become more and more entrenched, and Rebecca Rees acted reasonably when she decided the trust and confidence had been irretrievably lost by the claimant, and the dismissal should not

> be overturned."

The Shotter ET's conclusions and reasoning

Unfair dismissal

42. Considering first the claimant's claim of unfair dismissal, the Shotter ET found that the principal reason for the dismissal was "*a breakdown in employment relations/trust and confidence*", which amounted to some other substantial reason such as to justify the claimant's dismissal. In reaching that conclusion, the Shotter ET was satisfied that the dismissal (and the refusal of the appeal against that dismissal) was:

> "147. ... because the working relationship had broken down to such an extent that the claimant would never return to work, and the reason was not down to the part played by the claimant in breaking down that relationship ..."

43. The Shotter ET considered whether the two-year warning played any part in the respondent's decision, either in respect of the claimant's dismissal or in the rejection of his appeal, concluding that it had not:

> "150. ... The decisions by Christopher Briggs and Rebecca Rees are assessed in the light of the information before them at the time; and the [Johnson ET] trial ... had not taken place, and judgment had not been given before they reached their decision. The consensus by managers was that it was not possible to re-hear the circumstances around which the claimant had been issued with a 2-year serious warning on his file which by January 2020 was due to expire. The respondent believed during the relevant period that setting aside the 2-year serious warning was not a reasonable adjustment, and as at January 2020 onwards the Tribunal concurred with this view on the basis that the claimant would still not have returned to work, for the reasons further explained below.
> 151. During the relevant period from January 2020 the respondent's managers genuinely believed the claimant was unreasonable in insisting the 2-year serious warning was taken off his file after it had expired and had no effect, which the claimant (who was supported by his union throughout) was aware of. The Tribunal did not find the claimant's evidence that he did not understand the effect of its expiry on future misconduct credible, ..."

44. In considering whether the respondent's conduct had prevented the claimant from returning to work, the Shotter ET was clear that it had not:

> "154. ... A number of managers, including Mr Briggs, actively encouraged the claimant to return to work even to the extent of offering him any job he wanted in any place of work with any manager. It was open to the claimant to start work with what was in effect a clean sheet, putting the expired 2-year serious warning behind him in the knowledge that managers had left the business and he need not ever work with them again. He chose instead to litigate, as was his right, using internal correspondence and meetings as a mechanism to build up the case which he was convinced would succeed. Despite the issues being the subject matter of litigation facing imminent trial, and the respondent's right to defend the claims, the claimant wanted to ensure he had sufficient evidence to win his case ..., and at no stage did the respondent prevent the claimant from returning to work. In short, the claimant

did not want to return to work and placed barriers to ensure that he did not."

45. The Shotter ET further found that the respondent had acted reasonably in dismissing the claimant given the clear evidence of an unsurmountable breakdown in the working relationship:

> "155. ... The claimant was unable [to] move away from the litigation and preparation of his case based on his belief that a miscarriage of justice had taken place when he was issued with a 2-year serious warning and the aftermath including the alleged criminal actions of managers. He had no trust in managers or the respondent, evidenced by the aggressive emails verging on rudeness at times, the number and extent of the emails sent to managers, covertly recording meetings with managers to be used as evidence in the litigation, threatening individual managers with litigation unless they complied with his requests and copying the Tribunal in an attempt to pressurise the respondent into compliance. In oral evidence the claimant admitted he had a habit of sending 9 emails in response to each email received from the respondent, which he attributed to his disability and the respondent's actions in causing the anxiety that resulted in his behaviour. The claimant did not attribute his actions to his attempt to gather evidence for his trial, which was apparent from his communications. The claimant was unable to understand the effect his behaviour had on work relations coupled with his refusal to take part in any return to work discussions, and the appearance given was that he did not trust the respondent and could not return to work over a substantial period of time, although the Tribunal has limited its findings to the period January 2020 onwards as agreed with the parties."

Direct discrimination - detriment

46. Although not the subject of this appeal, it is relevant to note the Shotter ET's conclusions on the claimant's complaint of direct disability discrimination in relation to his dismissal and the rejection of his appeal. The Shotter ET accepted these were detriments, but was not persuaded the claimant was thereby treated less favourably (finding any hypothetical comparator in his position, save for his disability, would have been treated in the same way), or that (in the alternative) the reason for his treatment was the claimant's disability:

> "161. ... had the claimant shown a genuine willingness to consider returning to work in his dealings with Christopher Briggs and Rebecca Rees, the outcome may well have been different. The claimant believed the respondent from 2017 targeted him when it found out he was disabled and from that moment he believed managers put pressure on him to resign, and it was impossible for the respondent to dislodge this suspicion which became more entrenched as the litigation progressed and the claimant became intent on proving his case through internal processes to guarantee his success at trial. .... The claimant's dismissal and unsuccessful appeal against dismissal arose in consequence of the respondent's response to the claimant's actions and behaviour ..., and this would have been the same response to an employee who no longer had trust in the respondent or its managers, and who was not disabled with anxiety and depression."

The claim under section 15 **EqA**

47. Addressing the claim brought under section 15 **EqA**, the Shotter ET first considered whether the

claimant's dismissal, and the rejection of his appeal against dismissal, amounted to unfavourable treatment, stating its conclusion on this question somewhat ambiguously as follows:

> "163. ... the Tribunal found ... the claimant's dismissal on 12 June 2020 and dismissal of his appeal on 2 November 2020 theoretically amounted to unfavourable treatment, but in the specific circumstances of the claimant's case the dismissal did not constitute unfavourable treatment."

48. In any event, the Shotter ET went on to consider whether the claimant had established that "*there was something that arises in consequence of his disability*", concluding that he had failed to do so:

> "165. ... The claimant put down his behaviour to the anxiety caused by the respondent's discriminatory actions, despite the fact that he was capable of conducting litigation, attend hearings and meetings and coherently communicate orally and in writing with the respondent, yet was unable to take part in any discussion about his return to work with adjustments. The Tribunal accepts the claimant's argument that he had made legitimate complaints about his treatment as a disabled person over a lengthy period of time and his behaviour, for example, of sending nine emails in response to one communication from the respondent could possibly be attributable to his anxiety in ensuring he had all the evidence needed for a successful trial. There is no doubt the claimant was anxious about proving his case and succeeding on the issue of liability, and the way he went about trying to obtain that evidence had a significant influence on his actions including the lack of trust he had in the respondent which was an insurmountable bar to any return to work. The claimant's action *[sic]* were underpinned by his lack of distrust *[sic]* in managers and the respondent business which culminated in his refusal to discuss a return to work and he showed no inclination for a return sometime in the foreseeable future, even with substantial adjustments being offered. This was the cause of the dismissal and there is no satisfactory evidence that this was something which arises in consequence of the claimant's disability."

Noting that the **ECHR Employment Code** states that the consequences of a disability "*include anything which is the result, effect or outcome of a disabled person's disability*", the Shotter ET nevertheless:

> "166. ... was not satisfied that the breakdown in the employment relationship and loss of trust on the part of the claimant was a consequence of his disability ..."

49. In any event, the Shotter ET would also have found that the required causal link was not made out, reasoning:

> "166. ... Having considered the conscious and/ or unconscious mental processes of Christopher Briggs and Rebecca Rees the Tribunal was unable to establish the causative link between "something" and the unfavourable treatment. The claimant's behaviour was part of their decision-making process in that he had refused to agree a way forward out of the impasse, discuss a return to work and have trust in the respondent going forward, and it is this that prompted the dismissal. The claimant's failure to engage with Christopher Briggs and the respondent in a constructive way was a result of the breakdown in trust and confidence between the parties, this was not "something" that arose in consequence of the claimant's disability, described by the claimant as having made complaints about his treatment as a disabled person."

50. If wrong in its analysis of these questions, the Shotter ET nevertheless went on to consider the

question of justification for the purposes of section 15(1)(b) **EqA**. Concluding that the respondent had demonstrated that the claimant's dismissal, and rejection of his appeal, had been proportionate means of achieving a legitimate aim, it explained:

> "167. ... The legitimate aim was the requirement for regular and reliable staff attendance, and employees who are on long-term sickness absence to do all they can to meet with managers with a view to discussing reasonable adjustments leading to a return to work set against a background of occupational health advice. It was legitimate for the respondent to dismiss the claimant taking into account the claimant had been continuously absent since 3 January 2018 through to termination with no foreseeable prospect of a return to work during which period the respondent employed someone to carry out the claimant's role pending his return with additional costs arising from the claimant's absence as set out in the dismissal letter. Initially the claimant confirmed he was not prepared to return back to work whilst the 2-year Serious Warning remained live, yet it remained an issue after expiry of the warning together with a raft of additional demands that were unrealistic and unachievable, for example, the respondent investigating a criminal hate crime. The claimant was aware from meetings held in 2019 he would need to return to work, and in 2020 that return to work was supported with various adjustments offered and rejected by the claimant in the knowledge that the respondent was regulated by a Universal Service Obligation that relies on regular and reliable staff as duties cannot be fulfilled when staff are on indefinite sick leave.
> 168. ... The Tribunal took the view that there were no less discriminatory measures available to the respondent given the impasse and breakdown in the employment relationship.
> 169. With reference to the issue has the respondent shown the treatment was a proportionate means of achieving a legitimate aim, the Tribunal found on the balance of probabilities, the respondent has made out its defence on justification. It was clear matters had reached a head; the 2-year serious warning the claimant objected to was expired and the impasse could not be bridged because of the claimant's lack of trust in the respondent and/or managers and the breakdown in the working relationship coupled with a fervent belief on his part that he was right, the respondent wrong and he was going to succeed in the litigation which was used by the claimant as leverage. The claimant's attempt to produce evidence from meetings held outside the litigation process by which he could prove his case was disruptive. The claimant was subsumed by the litigation; he was embroiled in over 20 cases and in the Tribunal's view the litigation clouded his judgment. In short, the claimant was anxious to prove his case and prepare for the trial in October 2020 at any cost, even to the extent of losing his job which he believed he could also litigate over. ...
> 170. The respondent spent a long time attempting to resolve the impasse, The Tribunal did not accept that the respondent should have waited until (a) it had acceded to all of the claimant's demands including a criminal investigation (which it could not carry out), (b) until the litigation had finished (which would have been October 2021/March 2022 when the claimant last attended work for the respondent in January 2018) and (c) after the litigation give the claimant a period of time in which to recover. These were all lesser measures sought by the claimant, but they would not have achieved the respondent's legitimate aim of managing an employee's absence when that employee had lost trust and confidence in it, the managers he dealt [with] and would not work for it again in the foreseeable future. The claimant's refusal to take part of any discussions about his return to work and his loss of trust had negatively affected his relationship with any manager that dealt with him, and impacted on the respondent's financial and operating costs as confirmed in the dismissal letter which were not disputed by the claimant. It was not possible to accommodate the claimant's unreasonable demands and taking into account the factual matrix set out above, including length of the claimant's absence,

> the breakdown in trust and confidence and unlikelihood that the claimant would ever return to work, whatever job was offered to him, leads the Tribunal to conclude that the dismissal was a proportionate means of achieving a legitimate aim."

Reasonable adjustments

51. The Shotter ET did not accept the claimant's case in respect of the PCPs that he said placed him at substantial disadvantage but was in any event clear that there were no reasonable steps that would have been effective in preventing any such disadvantage in any event; as it explained:

> "183. ... In the claimant's case the adjustments ... suggested ... would not have effectively resulted in the claimant returning to work. Based on the evidence before it, the Tribunal found there was no real prospect whatsoever of the claimant ever returning to his duties, whatever adjustment was made (including expunging the 2-year serious warning), and it was not reasonable for the respondent to make the adjustments the claimant listed in accordance with section 20(3) –(5) of the EqA, even had there existed a relevant PCP or physical feature that substantially disadvantaged the claimant, which there were not. Had the claimant's appeal succeeded and he was reinstated, this would not have resulted in a return to work in the foreseeable future taking into account the total breakdown in the employment relationship and lack of trust and confidence the claimant had in the respondent and its managers, and so the Tribunal found on the balance of probabilities. ..."

The legal framework

The Equality Act claims

52. Both the Johnson and the Shotter ETs were concerned (relevantly) with claims brought under section 15, and sections 20 and 21 **Equality Act 2010**. An issue arises on this appeal as to the ET's approach to section 15 **EqA** and it is therefore necessary to consider the constituent elements of that provision at this stage. The issue relating to the reasonable adjustments claim concerns the ET's approach to the way the claimant's case was advanced rather than its analysis of sections 20 and 21 **EqA**; accordingly, the consideration of those provisions is far shorter.

53. Thus first addressing section 15(1) **EqA**, this provides:

> "(1) A person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

54. In a claim under section 15, the ET must identify: (i) what (if anything) was the unfavourable treatment; (ii) what was the reason for that unfavourable treatment; (iii) whether that was something arising in consequence of the claimant's disability; and (iv) whether the alleged discriminator has been able to demonstrate that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

Guidance on the proper approach to such a claim was provided by Simler J (as she then was) in **Pnaiser v NHS England and anor** [2016] IRLR 170 EAT, as follows:

> "31. ...
> (a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, ...
> (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act ..., the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
> (e) ... However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
> (f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
> ...
> (i) As Langstaff P held in *Weerasinghe* [*Weerasinghe v Basildon & Thurrock NHS Foundation Trust* [2016] ICR 305 EAT], it does not matter precisely in which order these questions are addressed. ..."

55. Considering what was meant by "*unfavourable*" treatment, in **Williams v Trustees of Swansea University Pension and Assurance Scheme** [2018] UKSC 65, [2019] 2 All ER 1031, Lord Carnwath (with whom the other Justices agreed) held that:

> "27. …in most cases ... little is likely to be gained by seeking to draw narrow distinctions between the word unfavourably in s15 and analogous concepts such as disadvantage or detriment found in other provisions, nor between an objective and a subjective/objective approach. While the passages in the [EHRC] Code of Practice ... cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section."

56. The Supreme Court in **Williams** approved the approach of the Court of Appeal in this regard ([2018] ICR 233); specifically, the observation of Bean LJ, as follows:

> "42. In the leading cases ... the 'treatment' complained of has been an act which itself disadvantages the claimant in some way. ..."

57. Whether or not treatment is "*unfavourable*" will be a question of fact for the ET to determine. Although a low threshold, by analogy with the approach to "*detriment*", it will not simply be established because the complainant considers that they should have been treated better (*per* Bean LJ at paragraph 43 **Williams**). On the other hand, whether or not treatment is unfavourable is a matter to be judged taking into account the relevant circumstances of the complainant (see, by analogy, **Keane v Investigo and ors** UKEAT/0389/09, **Berry v Recruitment Revolution** UKEAT/0190/10, and **Garcia v The Leadership Factor** [2022] EAT 22). In the normal course, however, a dismissal will meet the relevant test; as His Honour Judge David Richardson observed in **T-Systems Ltd v Lewis** UKEAT/0042/15:

> "23. ... Save possibly in the very rare case where an employee for some reason wishes to be dismissed, dismissal will always be unfavourable treatment for the purposes of section 15."

58. As for the question of causation under section 15 **EqA**, in **Sheikholeslami v University of Edinburgh** [2018] IRLR 1090, the EAT held that this requires investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found; if the "*something*" was a more than trivial part of the reason for the unfavourable treatment, then stage (i) is satisfied: the actual disability does not need to be the cause of the unfavourable treatment but it needs to be "*a significant (or more than trivial) influence*" so as to amount to "*an effective cause of the unfavourable treatment*" (**Pnaiser** paragraph 31(b)). The second issue is a question of objective fact for an ET to decide in light of the evidence: "*arising in consequence*" can describe a range of causal links, albeit the more links in the chain between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection (**Pnaiser** paragraph 31(d) and (e)).

59. Where a claimant has established the constituent elements required under section 15(1)(a) **EqA**, the onus is on the employer to demonstrate that the treatment in question is not to be treated as amounting to discrimination because it was a proportionate means of achieving a legitimate aim (*per* section 15(1)(b)).

This is sometimes referred to as showing "*objective justification*", because, in assessing whether an employer is able to justify its unfavourable treatment of the claimant, the ET is required to apply an objective test (see **Hensman v Ministry of Defence** UKEAT/0067/14, adopting the approach to justification laid down in **Hardy and Hansons plc v Lax** [2005] EWCA Civ 846, [2005] ICR 1565, and **City of York Council v Grosset** [2018] EWCA Civ 1105, [2018] IRLR 746), albeit that it must assess the proportionality of the impugned treatment at the time it takes place.

60. Turning to the claim of disability discrimination due to a failure to make reasonable adjustments, the duty to make such adjustments arises under section 20 **EqA**, which (relevantly) provides that there is a requirement:

> "(3) ... where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

61. Section 21(1) **EqA** then provides that a failure to comply with a section 20 requirement is a failure to comply with a duty to make reasonable adjustments.

62. As Lord Toulson observed at paragraph 83 **FirstGroup Ltd v Paulley** [2017] UKSC 4; [2017] IRLR 258, the concept of "*reasonable adjustments*" for these purposes is "*intensely practical*", requiring an objective assessment of how the step(s) proposed would have been effective to enable the disabled person to work, albeit that it will suffice if there was a prospect of the disadvantage being alleviated even if the adjustment in question would not have been completely effective (**Griffiths v Secretary of State for Work and Pensions** [2017] ICR 160 CA).

Unfair dismissal

63. By section 94 **Employment Rights Act 1996**, it is provided that an employee has the right not to be unfairly dismissed. Section 98(1) **ERA** makes clear that it is for the employer to show the reason (or principal reason) for the dismissal, and that this is a potentially fair reason for section 98 purposes. In this regard, by section 98(1)(b), a dismissal may be fair if it is for:

> "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

64. If the employer is able to demonstrate such a potentially fair reason, it is for the ET (applying neutral burden of proof) to determine whether, for the purposes of section 98(4), the employer acted reasonably in

dismissing for that reason. In carrying out the assessment required under section 98(4), that the reason for dismissal related to something originally caused by the employer does not necessarily mean that the dismissal was unfair, albeit that this fact might justify the ET to require the employer to demonstrate extra concern (to "*go the extra mile*") before implementing the decision to dismiss; see (in the context of a capability dismissal) **McAdie v Royal Bank of Scotland** [2007] EWCA Civ 806, [2007] IRLR 895, at paragraph 37, approving the decision of the EAT (Underhill P presiding) in that case (UKEAT/0268/06), and **Iwuchukwu v City Hospitals Sunderland** [2019] EWCA Civ 498, [2019] IRLR 1022. Ultimately, however, this will always require a fact-specific assessment for the ET. Thus, in **Rochford v WNS Global Services (UK) Ltd and ors** [2017] EWCA Civ 2205, the Court of Appeal rejected an argument that it had been wrong in law for the ET to find it had been reasonable for the employer to dismiss the claimant for his refusal to return to work when that would have required him to return to a different role, a requirement that the ET had found to constitute unlawful discrimination; as Underhill LJ observed:

> "22. It is clear that the Tribunal did not believe that the fact that the Appellant should have been allowed to return to his old role in full was a sufficient reason for him refusing to perform any part of that role. I cannot regard that as a perverse view on the part of the Tribunal. If the Appellant were right, it would have the consequence that he was entitled, in the context of a bona fide dispute, to refuse to do anything at all, notwithstanding that he was fit to work and receiving full pay, unless and until the Respondent yielded to his position on that issue, which was, as I have said, genuinely in dispute. The Tribunal was, in my view, entitled to regard that position as unacceptable, even though it found that the Appellant was in fact right on the issue in dispute. It is important in this connection to emphasise that the finding of discrimination which the Tribunal made was not based on direct discrimination, or on any kind of conscious or deliberate wrongdoing by the Respondent. It depended on a judgement about the justifiability of not allowing him to return straightaway to his full role as VSL after a long period off work, on which the Respondent's view, though held to be wrong, was not self-evidently so, and was not found to have been advanced in bad faith.
> 23. The Tribunal also said in terms that by the time the dismissal decision was taken the rights and wrongs of the dispute about the terms of the return to work could and should be distinguished from the question of whether the Appellant was entitled to do no work at all. As it put it ..., the situation had 'shifted away'. That was in my view a legitimate assessment. ... I do not accept that the fact that the Respondent had acted – or, more accurately, failed to act – discriminatorily against the Appellant, even in a closely related way, gave him an absolute right to refuse to work. Generally, the fact that one party to a contract has committed a prior wrong against the other, whether in the form of a breach of contract or tort or any other wrong, does not constitute an automatic solvent of his or her continuing obligations, and there is nothing special about discrimination in this regard. Acts of unlawful discrimination are not uniquely heinous: like other wrongs, they come in all shapes and sizes, and how it is reasonable to respond to them in any given case is a matter for the assessment of the Tribunal."

Defining the issues

65. Although ET proceedings do not involve formal "*pleadings*" as such, in defining the issues to be determined, the claim and the response will always provide the starting point and must set out the essence of the parties' respective cases (**Chandhok v Tirkey** [2015] ICR 527 EAT). In case managing the proceedings, the ET is afforded broad powers pursuant to rule 29 schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("ET Rules"), which provides:

> "The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. … the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice …"

66. In exercising its powers under rule 29, the ET must have regard to the overriding objective of the **ET Rules**, as provided by rule 2:

> "The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable— (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense."

67. Consistent with the overriding objective, as part of its case management of the proceedings, at (what should be) an early stage, the ET will generally seek to create a list of issues (preferably agreed by the parties), which will be intended to set the agenda for the trial; as Mummery LJ observed in **Parekh v Brent London Borough Council** [2012] EWCA Civ 1630:

> "31. A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: …"

68. Consistent, however, with the requirement to deal with a case fairly and justly, in **Parekh**, Mummery LJ went on to emphasise that:

> "31. … As the employment tribunal that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence …"

69. In determining whether to depart from an earlier case management order setting out the issues to be determined in the proceedings, pursuant to rule 29, the question for the ET is whether it is "*necessary in the interests of justice*" to do so. In **Mervyn v BW Controls Ltd** [2020] ICR 1363 CA, Bean LJ provided

guidance in this regard, as follows:

> "38. … what is 'necessary in the interests of justice' in the context of the tribunal's powers under rule 29 depends on a number of factors. One is the stage at which amending the list of issues falls to be considered. An amendment before any evidence is called is quite different from a decision on liability or remedy which departs from the list of issues agreed at the start of the hearing. Another factor is whether the list of issues was the product of agreement between legal representatives. A third is whether amending the list of issues would delay or disrupt the hearing because one of the parties is not in a position to deal immediately with a new issue, or the length of the hearing would be expanded beyond the time allotted to it."

Further advising:

> "43. It is good practice for an employment tribunal, at the start of a substantive hearing, with either or both parties unrepresented, to consider whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute between the parties. If it is clear that it does not, or that it may not do so, then the employment tribunal should consider whether an amendment to the list of issues is necessary in the interests of justice."

70. In allowing the claimant's appeal in **Mervyn**, it was ruled that, even where the claimant had expressly stated (during case management discussions) that she had not resigned but had been dismissed, the ET ought to have considered her case as encompassing an allegation of constructive dismissal, that being the claim that "*shouted out*" from the pleadings. In this regard, the Court of Appeal approved the approach of His Honour Judge Auerbach in **McLeary v One Housing Group Ltd** UKEAT/0124/18, in which it was found that the particulars of claim ought properly to have been treated as including a complaint of discriminatory dismissal; HHJ Auerbach observing that:

> "89. … where it is clear from a claim form and/or particulars of claim, that a lay claimant is saying, factually, I was subjected to discrimination in my employment and this drove me to resign, it is both proper, and incumbent on the Tribunal, to seek clarification of whether such a claim is intended."

71. Similarly, when **Mervyn** was before the EAT ([2019] UKEAT/0140/18) Laing J (as she then was), stated:

> "84. … the ET … [has] a duty, if it is obvious from the ET1 that a litigant in person is relying on facts that could support a legal claim, to ensure that the litigant in person does understand the nature of that claim. In addition, if the ET decides that the litigant in person has decided not to advance that claim, the ET should be confident that the litigant in person has withdrawn that claim advertently."

The approach of the EAT

72. The EAT's jurisdiction to determine an appeal from a decision of the ET lies only on "*a question of law*", see section 21(1) **Employment Tribunals Act 1996**. A challenge to findings of fact made by the ET

will only give rise to a question of law in very limited circumstances; as Ralph Gibson LJ observed in **BT plc v Sheridan** [1990] IRLR 27 CA:

> "Misunderstanding or misapplying the facts may, in my view, amount to an error of law where the Tribunal has got a relevant undisputed or indisputable fact wrong and has then proceeded to consider the evidence and reach further conclusions of fact based upon that demonstrable initial error. Such may be an error of law because the Tribunal is required by law to consider the case in accordance with agreed or undisputed facts. Where, however, the alleged misunderstanding of fact depends upon a decision of fact open to the Tribunal to make, and which it did make, then an attack on that finding cannot be converted into an error of law unless it can be shown that there was no evidence to support it, or that the conclusion was perverse."

And, as Sir John Donaldson MR cautioned in **Martin v Glynwed Distribution Ltd** [1983] ICR 511:

> "It is very important, and sometimes difficult, to remember that where a right of appeal is confined to questions of law, the appellate tribunal must loyally accept the findings of fact with which it is presented and where, as can happen from time to time, it is convinced that it would have reached a different conclusion of fact, it must resist the strong temptation to treat what are in truth findings of fact as holdings of law or mixed findings of fact and law. The correct approach involves recognition that Parliament has constituted the [employment] tribunal the only tribunal of fact and that conclusions of fact must be accepted unless it is apparent that, on the evidence, no reasonable tribunal could have reached them."

73. An appeal to the EAT does not, therefore, provide a means of re-litigating the facts; as such, a perversity challenge:

> "ought only to succeed where an overwhelming case is made out that the employment tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached:" per Mummery LJ in **Yeboah v Crofton** [2002] IRLR 634 CA

74. The limits to the EAT's jurisdiction are not confined to conclusions of primary fact; there is a similar need for appellate caution where the challenge is to the ET's evaluation of the facts, where respect is to be afforded to the entity that presided over the trial (and see the observations of Singh LJ in **London Borough of Lambeth v Agoreyo** [2019] ICR 1572 CA). More specifically, where Parliament has vested power in the ET to undertake an assessment of the primary facts it has found to determine whether a legal test has been satisfied, it is right that the EAT defer to the conclusion reached at first instance unless satisfied that the ET applied the wrong legal principle, failed to have regard to relevant factors or took into account something that was irrelevant, or reached a decision that is properly to be characterised as perverse.

75. As for the approach to be adopted to the reasoning of the ET, I remind myself of the guidance provided by Popplewell LJ at paragraphs 57-58 **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, [2021] IRLR 1016, to summarise: (1) the ET's decision is to be read fairly and as a whole, without focusing on

individual phrases or passages in isolation, and without being hypercritical (an ET is not sitting an examination; see *per* Singh LJ paragraph 42 **Sullivan v Bury Street Capital Ltd** [2021] EWCA Civ 1694, [2021] IRLR 159); (2) the ET is not required to identify all the evidence relied on in reaching its conclusions of fact, nor express every step of its reasoning in any greater degree of detail than that necessary to be **Meek**-compliant (**Meek v Birmingham City Council** [1987] EWCA Civ 7, [1987] IRLR 250); (3) it should not be inferred that a failure to refer to evidence means that it did not exist, or was not taken into account: what is out of sight in the language of the decision is not to be presumed to be out of mind; (4) when an ET has correctly stated the legal principles, an appellate court should be slow to conclude that it has not applied those principles, and should generally only do so when it is clear from the language used that a different principle has been applied to the facts found.

The grounds of appeal and the claimant's arguments in support

76. The claimant's appeal raises seven grounds: grounds 1, 2, 3, 4 and 7 relate to his claim under section 15 **EqA**; ground 5 to his claim of unfair dismissal; ground 6 to the failure to make reasonable adjustments claim. More generally, it is the claimant's case that the Shotter decision reveals a number of inconsistencies with that of the Johnson ET; his objections in this regard underpin grounds 2, 4, 5 and 6, which Mr Sheehan addressed at the outset of his submissions, before turning to grounds 1, 3 and 7.

77. Considering what are said to be inconsistencies between the two ET decisions, the claimant makes the point that the Shotter ET was required to give effect to the principle of *res judicata* (**Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd** [2014] AC 160); where an issue forming a necessary ingredient of a cause of action has been decided in previous litigation between the same parties, the doctrine of issue estoppel applies (**Virgin Atlantic** at paragraphs 17 and 22; **Arnold v NatWest Bank Plc** [1991] 2 AC 93 at p 105E). In the present case, it was agreed that the Shotter ET was bound by the "*judgment and findings of fact made in relation to [the] earlier claims*", so it had been unnecessary to discuss what points the respondent could re-open (Shotter decision, paragraph 6); notwithstanding this agreed position, the only references to the Johnson liability decision were at paragraphs 23-28, and there are no references to the Johnson remedy decision.

78. By **ground 2**, it is said that, after agreeing to be bound by the Johnson ET findings, the Shotter ET reached a decision that was perverse/irrational by failing to apply those findings in the identification of the

"*something arising in consequence of the claimant's disability*" and in relation to the respondent's justification defence. Applying the Johnson ET findings, the Shotter ET: (i) should have concluded that the "*something*" arose in consequence of the claimant's disability; (ii) could not have found that removing the warning would have made no difference (that was inconsistent with the finding that the claimant would have returned to work but for the warning; Johnson liability decision paragraph 157 c.); and (iii) similarly, could not have concluded there were no less discriminatory means that would have achieved the respondent's legitimate aim. Relatedly, by **ground 4**, the claimant says the Shotter ET erred by failing to consider the possibility of the respondent achieving its legitimate aim by removing the warning in accordance with the findings made by the Johnson ET that: (a) but for the warning, he would have returned to work, and (b) by imposing a wrongful sanction on the claimant, failing to properly investigate his complaints, and failing to make a reasonable adjustment that would have ameliorated the claimant's anxiety, the respondent brought about a position whereby mutual trust and confidence was destroyed; the respondent could not have the benefit of a justification defence when its defaults - as identified by the Johnson ET - deprived it of the opportunity to take steps to remedy the situation.

79. **Ground 5** relates to the Shotter ET's conclusion that the claimant's dismissal was within the range of reasonable responses open to the respondent; the claimant says that was perverse and arose from a failure to properly consider the findings made by the Johnson ET. Specifically, the claimant says his dismissal must fall outside the range given that the Johnson ET had found he would have been able to return to work had the two-year warning been removed. By **ground 6**, the claimant contends that the Shotter ET erred by failing to address the Johnson ET's finding that there was a failure to make a reasonable adjustment by removing the two-year warning.

80. Separately, by **ground 1**, it is the claimant's case that the Shotter ET erred in law by failing properly to apply the test for whether the "*something*" arose in consequence of the claimant's disability. "*Arising in consequence of*" denotes a looser causal test than "*because of*", and the "*something*" may "*arise in consequence*" of a disability by a series of causal links (**Sheikholeslami** at paragraph 66; **Pnaiser v NHS England** [2016] IRLR 170 at paragraph 31). Referring to the Shotter ET's finding at paragraph 165, that:

> "There is no doubt the claimant was anxious about proving his case and succeeding on the issue of liability, and the way he went about trying to obtain that evidence had a significant influence on his actions including the lack of trust he had in the respondent which was an insurmountable bar to any return to work."

The claimant says that was a finding that encapsulated the following steps: (i) the claimant was anxious about proving his case, (ii) this caused him to try to obtain evidence, (iii) resulting in a lack of trust with the respondent, which (iv) was an insurmountable bar to a return to work; on those findings his claim should have succeeded; the Shotter ET erred by focusing only on the final causal link and not the series that led there.

81. In the alternative, by **ground 3**, the claimant says the conclusion that his dismissal was not "*because of*" the "*something arising*" was (i) perverse, given the finding at paragraph 165, and (ii) based on an overly precise and technical reading of the list of issues. The "*something arising*" identified at paragraph 3(a) of the list of issues was "*having made complaints about his treatment as a disabled person"*; but the Shotter ET's finding that the claimant's behaviour was "*part of [the respondent's] decision making process ... and it is this that prompted the dismissal*" (paragraph 166) was sufficient to demonstrate it was more than a trivial part of the reason for dismissal (*per* **Sheikholeslami**). Although a useful tool for case management, an ET is not required to adhere to the list of issues where "*to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence"* (**Parekh**, paragraph 31); it should not be elevated to the status of a pleading (**Z v Y** [2024] EAT 63 at paragraph 55); it does not require exceptional circumstances for an ET to depart from the list of issues even if agreed (**Mervyn v BW Controls**, at paragraph 38), and it does not amount to stepping into the arena for an ET to suggest there was an issue before it that it ought to decide (**Mervyn**, paragraph 45). Adopting this approach, the Shotter ET had made findings of fact that should have led to the conclusion that the breakdown of trust and confidence (which it found was the cause of the dismissal) arose in consequence of the claimant's depression and anxiety; in such circumstances, it would be contrary to the ET's core duty to dismiss a claim that should succeed purely because the precise wording of the list of issues did not marry with the facts it had found.

82. It is the claimant's primary case that the Shotter decision ought to be read as including a finding that his dismissal was unfavourable treatment; if that was not the case, by **ground 7**, the claimant contends (in the alternative) that the ET's finding that his dismissal/the dismissal of his appeal did not amount to "*unfavourable treatment*" was wrong and/or perverse and/or inadequately explained. In this regard, the claimant observes that the Shotter ET had found that his dismissal and the dismissal of his appeal were detriments; although the concepts of "*unfavourable treatment*" and "*detriment*" were not identical, little was to be gained by drawing narrow distinctions between them (**Williams**, paragraph 27). Moreover, dismissal is

almost always unfavourable treatment (**T-Systems**, paragraph 23, and **Equality Act 2010 Code of Practice** at section 5.7); it would only be in a truly exceptional case that it was not. Even if the Shotter ET had concluded that the claimant had not wished to return to work, that did not mean he did not wish to remain employed. To the extent it reached opposite conclusions to those it had reached for "*detriment*", the Shotter ET failed to apply the correct test for "*unfavourable treatment*", alternatively to explain why it had reached such apparently inconsistent conclusions.

The respondent's position

83. Before turning to the specific grounds of appeal, the respondent makes the following observations: (1) the Johnson ET proceeded on the express footing that its findings did not relate to any complaints outside the claim before it and reached no conclusions as to the legitimacy of the claimant's dismissal; (2) the Johnson ET rejected all 42 allegations of direct discrimination, which included the allegations at the heart of the first bullying and harassment complaint of 17 May 2017; (3) moreover, save for her finding of bad faith, Ms Nevins had been entitled to reach her decision, which was the same as the Johnson ET; (4) the Johnson ET similarly dismissed all other claims, save for two complaints of a failure to make reasonable adjustments, namely (i) the failure to remove the two-year warning and (ii) the failure to review Ms Nevins' investigation findings; (5) while the Johnson ET determined (and dismissed) complaints pursuant to section 15 **EqA**, it was not asked to decide whether the warning was "*something*" which arose in consequence of disability and did not do so; (6) given the diffuse nature of the claims before it, the Shotter ET was entitled to rely upon the earlier case management as clarifying the scope of the hearing; (7) the list of issues was agreed on 16 November 2020 (some five months after the claimant's dismissal), at the 17 December 2020 preliminary hearing the claimant sought to add three new issues, but not to allege continuing discrimination arising from the two-year warning, and he took no steps to amend the list of issues following the receipt of the Johnson liability decision.

84. Addressing **ground 1**, the respondent says the Shotter ET directed itself impeccably as to the law; as such the EAT should be slow to conclude there was any error in its application (**DPP v Greenberg**); particularly as "*something arising*" was a question of fact and evaluation for the ET. Moreover, the Shotter ET reached unimpeachable findings of fact: the "*sole*" and "*only effective reason*" for decisions taken by the respondent was the claimant's loss of trust; this manifested itself in the claimant's approach to the litigation

and the "*all-consuming distrust*" was the reason why no return to work could be contemplated. By the time of the claimant's dismissal, the Shotter ET was entitled to conclude that the two-year warning (long since expired) was a matter of background: it was one aspect of a wide-ranging claim, which gained retrospective significance because it was the sole claim which succeeded. The claimant's argument elided separate aspects of the causal test: even if the warning arose in consequence of disability, it played no part whatsoever in the respondent's decisions (**Basildon and Thurrock v Weerasinghe** [2016] ICR 305; **York City Council v Grosset** [2018] ICR 1492): the claimant's dismissal was in no meaningful sense because of the expired warning but because he had no desire to return to the workplace following over two years continuous absence.

85. As for **ground 2**, the respondent says it was incumbent on the Shotter ET to consider whether something arising from disability was an operative cause of dismissal; its conclusions on causation were in no way incompatible with, or fettered by, the Johnson ET, which was silent on issues pertaining to dismissal. Having proceeded on the express basis that it was bound by the findings of the Johnson ET, the Shotter ET was not precluded from reaching the conclusions it did. Specifically, the Shotter ET was able to consider how, with the passage of time, "*the claimant's position had become more entrenched*" (paragraph 109, Shotter decision), with: (i) the claimant being unable to accept the Johnson ET's adverse findings; (ii) there being no demonstrable impact arising from steps taken to review Ms Nevin's investigation; (iii) the expiration of the two-year warning on 24 April 2020 having done nothing to improve prospects of a return to work. The Shotter ET was also faced with reasons to question the claimant's credibility (his unsustainable divergence from agreed notes of meetings; the taking of covert recordings; the unsustainable evidence that he did not understand the effect of the expiry of the warning). Ground 2 was essentially a perversity challenge, falling short of the necessary threshold. The Johnson ET expressly refrained from reaching any decision as to the impact of the two-year warning at the point of dismissal; it did not consider any facet of the decision to dismiss, still less did it determine whether dismissal was justified at the time the decision was reached (and the ET's focus must be upon proportionality at the time of the alleged discrimination (**Jones v Post Office** [2001] ICR 805)). The Shotter ET was in no sense precluded from finding that, at the time of dismissal, there was no basis on which to conclude that the warning had any operative role; were it otherwise, an employer would be forever prevented from dismissing notwithstanding the guidance in **Royal Bank of Scotland v McAdie** [2008] ICR 1087.

86. In respect of **ground 3**, the respondent objects that the claimant did not seek to amend the list of issues as regards the two-year warning and the Shotter ET was entitled to conclude that unlimited shifting of the case mid-evidence was not in accordance with the overriding objective. Moreover, in view of its findings of fact, any such amendment would have had no material effect on its decision: "*it would have made no difference to the prospects of returning had the respondent removed the 2-year serious warning from the claimant's record*" (paragraphs 15 and 150-152, Shotter decision) notwithstanding the claimant had been offered "*reasonable adjustments that one rarely sees ..., namely any job, anywhere, and any shift throughout the organisation ...*" (paragraph 77); as such, there could be no room for concluding that dismissal was disproportionate.

87. Turning to **ground 4**, the respondent says this reveals a fundamental misunderstanding of the Shotter decision: the aim in question was management of absence with a view to a return to work, and this was to be considered at the time the decision to dismiss was taken, by which point the Shotter ET was entitled to conclude that the claimant had no desire to return to work and consequently there was no less intrusive means of achieving the legitimate aim.

88. As for **ground 5**, the respondent says this is unsustainable in view of, inter alia, **McAdie** and **DPP v Greenberg**: the Shotter ET was plainly entitled to conclude that dismissal was fair following two years of absence, the claimant's elaborate efforts to avoid meeting Mr Briggs, his unequivocal desire to avoid a return to work and (it follows) the absence of any prospect of a return in the foreseeable future.

89. Addressing **ground 6**: it is the respondent's case that it is unclear what more it is said the Shotter ET could or should have done.

90. As for **ground 7**, the Shotter ET had found that the claimant had a single-minded obsession with the litigation and lacked any willingness to even discuss a return to work; in these circumstances, it was entitled to conclude that dismissal was not unfavourable treatment (by analogy with **Keane**, **Berry** and **Garcia**).

Analysis and conclusions

The case before the Shotter ET

91. The large number of claims that had been lodged by the claimant, and the (understandable) case management decision that these should be divided and considered by two separate ETs, required both the Johnson and the Shotter ETs to maintain focus on the particular claims they were each tasked with deciding;

something it is apparent that both were careful to do. Relevantly, the Johnson ET was clear in limiting its findings to the matters before it, avoiding making any findings of fact in respect of the process leading to the claimant's ultimate dismissal. While the Johnson ET thus made findings in respect of the intervention in the claimant's case by Mr Kelly (in the autumn of 2018), and in relation to the management of his sickness absence going into 2019, it did not address any issues relating to that process involving either Mr Smith or Mr Briggs, and did not make any findings regarding the decision to dismiss or as to the subsequent rejection of the claimant's appeal against that decision. Equally, for its part, the Shotter ET was careful not to re-visit the earlier incidents dealt with by the Johnson ET, expressly limiting its findings to the period post-dating January 2020 (Shotter ET, paragraph 155).

92. The criticism made by the claimant is, however, that the Shotter ET failed to do that which all concerned had agreed it should do; namely, to treat itself as bound by the findings of the Johnson ET and to proceed on that basis. Specifically, the claimant relies on the Johnson ET's finding that the respondent's failure to review Ms Nevin's decision, and to remove the two-year warning, had exacerbated his anxiety and distrust of management and, given his disability, had placed him at a substantial disadvantage. As the Johnson ET had found that, as at the time of Mr Kelly's involvement, he was close to returning to work and would have done so had it not been for the failure to review the basis for the two-year warning, and had gone on to award loss of earnings up to 4 January 2020 by way of compensation for the respondent's continuing failure to comply with its reasonable adjustments duty in this regard, the claimant says it was inconsistent for the Shotter ET to fail to find the necessary links between his disability and his dismissal, and to go on to uphold the respondent's defence of justification.

93. The difficulty with the claimant's case in this regard is that it effectively requires the consideration of his claims to be frozen in time: for the respondent's decision-making process to be viewed, on a continuing basis, as bound not only by the Johnson ET's findings of fact in respect of the events that that ET had to consider but by its conclusions in relation to those matters projected forward for the future, even in respect of events about which it had received no evidence and had reached no conclusions. Such an approach would have improperly restricted the ability of the Shotter ET to carry out its function, and to make relevant findings on the issues it was required to determine, on the evidence presented before it. Accepting that the Johnson ET had found that the respondent's refusal to review Ms Nevin's investigation, or remove the two-year warning, had placed the claimant at a substantial disadvantage up to the start of 2020, and that,

up to that time, but for those failings the claimant would have returned to work, the Shotter ET was required to consider whether that was still the case in the months that followed, in particular, after the warning had expired in April 2020. In this regard, the Shotter ET was entitled to consider the evidence before it as to how the claimant had conducted himself in preparing for the trial before the Johnson ET, and how his behaviour impacted upon his dealings with managers, notwithstanding the various assurances he had been given both as to the expiration of the warning and as to the range of adjustments that could be made to facilitate his return to work. I do not accept that the Shotter ET was required to put to one side any view it might have reached as to events post-dating January 2020, and to treat itself as bound to hold that there was a continuing link between the earlier failure to review the two-year warning and the treatment of the claimant in relation to the decision to dismiss and the subsequent refusal of his appeal.

94. As for how the issues before the Shotter ET had been defined, there is force in the claimant's point that he had always linked his inability to return to work to the respondent's failure to remove the two-year warning. That was apparent from his pleaded case (in which he argued that, because of his disability, he was unable to live with the warning in the same way as "*a normal person*"), from his application for strike out (made in late November 2021, after receiving the Johnson liability decision), and from how he in fact ran his case before the Shotter ET (Shotter decision, paragraphs 8 and 10). To some extent, therefore, this was an issue that "*shouted out*" from various iterations of the claimant's case (*per* **McLeary**), but this was not how the claimant had sought to define his case when asked to contribute to the list of issues that the ET was to determine: the removal of the warning was not identified as an adjustment under the claim under sections 20 and 21 **EqA** (as detailed below, the adjustments particularised in the list of issues were focused on the respondent's procedures), and no link to the claimant's disability, and consequential inability to live with the warning, had been made in defining the "*something arising in consequence*" for the purposes of section 15 **EqA** .

95. As the respondent observes, given the complexity of the proceedings, it was not wrong for the Shotter ET, at the outset of the full merits hearing, to take the case management decision that the list of issues should not be further amended. To the extent that meant that it might disregard the claimant's case as to the link between his disability and the two-year warning, however, that would inevitably mean that the Shotter ET would fail to address a significant issue in dispute in the case before it (and see **Mervyn**). Ultimately I consider that the Shotter ET did in fact address this issue (it did not "*stick slavishly to the list of*

issues", per **Parekh**), and that its reasoning is not undermined by a failure to recognize a key point of dispute in the case; I can see, however, that it might have been more helpful for this point to have been articulated within the list of issues: the Shotter ET would not have been stepping into the arena by proactively adding an issue that was plainly a key part of the claimant's case (**Mervyn**, paragraph 45), and the respondent would not have been prejudiced by this recognition of a point that it had already identified for itself in its pleadings.

Reasonable adjustments

96. Turning to the specific claims the Shotter ET had to determine, it is convenient to first consider the claimant's complaint of a failure to make reasonable adjustments, brought under sections 20 and 21 **EqA**: if the ET's decision on this claim has to be set aside, that is likely to impact upon its reasoning on both the claims of unfair dismissal and as brought under section 15 **EqA**.

97. In formulating the list of issues, the adjustments identified by the claimant did not include the removal of the two-year warning, but were more focused on the respondent's procedures; thus, the proposed adjustments correlated to the PCPs he complained of, as follows: (i) senior managers ought to have engaged directly with the claimant about his complaint; (ii) the absence management procedure ought to have been used prior to instigation of the conduct procedure; (iii) the claimant ought to have been afforded a supportive return to work; (iv) the claimant should have been referred to occupational health; (v) the claimant's appeal ought to have been allowed. To the extent that the claimant had established any PCP (and the ET considered the only PCP was (i), the policy of senior managers not directly engaging with individual complaints), the ET did not accept that he had shown he had been put at a substantial disadvantage in comparison with persons who were not disabled, or that any adjustments would have resulted in his return to work. In reaching this conclusion, the Shotter ET did not limit itself to the adjustments identified in the list of issues, but expressly had regard to the claimant's complaint that the two-year warning ought to have been removed; even had this been done, the Shotter ET was clear: "*there was no real prospect whatsoever of the claimant ever returning to his duties, whatever adjustment was made (including expunging the 2-year serious warning)"* (Shotter decision, paragraph 183).

98. Whilst acknowledging that the Shotter ET thus referred to the two-year warning, the claimant contends this was not sufficient: first, it did not take into account the earlier finding of the Johnson ET; second, it failed to consider this as part of a staged approach to the question of reasonable adjustments that

was required. I do not consider, however, that these objections withstand scrutiny. Having expressly referred to the relevant findings of the Johnson ET at the outset of its decision (in particular, to the Johnson ET finding that the warning had "*placed the claimant at a substantial disadvantage in that he was unable or unwilling to take a pragmatic view of its implications ... His disability meant that this warning became the focus of his sense of grievance ... and this exacerbated his impairments*", and that the re-examination of Ms Nevin's decision "*was a reasonable adjustment that should have been made*"), I would not readily infer that the Shotter ET then failed to recall those findings when approaching its decision (*per* **DPP v Greenberg**). It was, however, considering the position at a different point in time, by which stage - as it permissibly found - there was no efficacy to expunging the two-year warning (which had, in any event, already expired), as that would have had no effect in securing the claimant's return to work. The duty to make reasonable adjustments is practical in nature (**FirstGroup v Paulley**); on the Shotter ET's permissible findings, there was no prospect of *any* adjustment - even the removal of the (by then expired) two-year warning - securing the claimant's return to work. No error of law arises from this aspect of the Shotter decision, and I duly dismiss ground 6.

Section 15 ***EqA***

99. Turning then to the claimant's claim under section 15 **EqA**, the first question that needs to be addressed is whether the Shotter ET made a finding that the respondent had treated the claimant "*unfavourably*". As I have already observed, the reasoning provided in this regard is somewhat ambiguous: stating that the claimant's dismissal (and the subsequent rejection of his appeal) "*theoretically amounted to unfavourable treatment, but in the specific circumstances of the claimant's case the dismissal did not constitute unfavourable treatment*" (Shotter decision, paragraph 163). For the respondent, it is contended that this should be taken to be a finding of no unfavourable treatment on the specific facts of the claimant's case; by analogy with the cases of **Keane**, **Berry**, and **Garcia** (all involving claimants who were complaining of discrimination in relation to applications for jobs they had never wanted), the Shotter ET had found that the claimant "*showed no inclination for a return sometime in the foreseeable future*" (Shotter ET, paragraph 165) and was entitled to hold that dismissal, in those circumstances, was not unfavourable.

100. As HHJ David Richardson observed in **T-Systems**, save in very rare cases, a dismissal will inevitably amount to unfavourable treatment for the purposes of section 15 **EqA**. The position of someone

who is in employment is very different to the putative applicant who makes claims of discrimination in relation to jobs for which they never wished to be appointed; I do not see the present case as analogous to **Keane**, **Berry** and **Garcia**. Moreover, even if an employee has no desire to actually return to the workplace, that does not mean to say that they would consider dismissal to be a neutral act: taking into account that employee's circumstances, it may well be that continuing in employment (even if unable or unwilling to return to work) would reasonably be viewed as more favourable treatment than having that employment brought to an end by dismissal.

101. In the present case, in its findings on the claim of direct discrimination, the Shotter ET had accepted that both the claimant's dismissal, and the rejection of his appeal, amounted to detriments. Even allowing for the possibility that a distinction might be drawn between being subjected to a "*detriment*" and being treated "*unfavourably*" (albeit that the Supreme Court in **Williams** considered it was unhelpful to seek to draw such narrow distinctions), if that was what the Shotter ET intended, it might reasonably be expected that it would have explained the relevant difference between the application of these concepts on the facts of this case. To the extent, therefore, that the Shotter ET held that the claimant's dismissal did not amount to unfavourable treatment, I would allow the appeal on ground 7: the Shotter decision does not provide an adequate explanation for why the detriment it found the claimant suffered by being dismissed (and in the rejection of his appeal against dismissal) should not also be considered to amount to unfavourable treatment for the purposes of section 15 **EqA**.

102. The next question is whether the ET also erred in its approach to defining "*the something arising in consequence*" of the claimant's disability. There is a degree of overlap in the claimant's arguments under grounds 1, 2 and 3 in this regard; it is the claimant's case that "*arising in consequence*" connotes a looser causal test than "*because of*", and, allowing that the "*something*" may "*arise in consequence of disability*" by a series of causal links (*per* **Sheikholeslami**, paragraph 66; **Pnaiser**, paragraph 31), the Shotter ET ought to have found the requisite causal nexus: (i) because that necessarily followed once it was accepted that it was bound by the findings of the Johnson ET (ground 2), and/or (ii) because that was the conclusion that followed from the Shotter ET's own findings at paragraph 165 (ground 1). The claimant further contends (ground 3) that, given its findings at paragraph 166 of its decision, the Shotter ET ought to have found that his treatment was because of the "*something*" and only avoided that conclusion by its overly precise and technical application of the list of issues.

103. Proceeding on the (alternative) basis that the claimant's dismissal (and rejection of his appeal) amounted to unfavourable treatment, in asking what was the reason for that treatment (the first of the questions identified in **Sheikholeslami**, and see **Pnaiser** paragraph 31(b)-(c)), the Shotter ET found that it was due to the breakdown in the working relationship, which was such that the claimant would never return to work (paragraph 147, Shotter decision), and that it was a consequence of the respondent's response to his actions and behaviour (paragraph 161), which were underpinned by his distrust in managers and culminated in his refusal to agree a way forward, to discuss a return to work, or to have any trust in the respondent (paragraphs 165-166). Given those findings, the issue the Shotter ET had to determine (the second question identified in **Sheikholeslami**, and see **Pnaiser** paragraph 31(d)-(f)) was whether the "*something*" that had caused the respondent to act as it had - in summary, the breakdown in the working relationship arising from the claimant's lack of trust - had arisen in consequence of the claimant's disability (his anxiety and depression).

104. Although the Shotter ET concluded that there was "*no satisfactory evidence that this was something which arises in consequence of the claimant's disability*" (paragraph 165), it is unclear how it arrived at that conclusion. In particular, I note that the Shotter ET stated that it accepted that aspects of the claimant's behaviour might have been connected to his anxiety, and that such behaviour had a significant influence on his actions, including his lack of trust in managers, and culminating in his refusal to discuss a return to work (again, paragraph 165). Allowing that the causal nexus between the "*something*" and the particular disability might be established by more than one link (**Pnaiser** paragraph 31(d)), and that the "*something*" need not be the sole or main reason for the unfavourable treatment but simply needed to be a more than trivial influence (**Pnaiser** paragraph 31(b)), I consider there is force in the claimant's contention (essentially, ground 1) that the Shotter ET erred in its approach to this part of its determination.

105. In reaching this view, contrary to the claimant's assertion by ground 2, I do not accept that the findings of the Johnson ET necessarily meant that the Shotter ET had been bound to find the relevant causal link: as I have previously observed, it was considering events at a different time and in a different context. Although the Johnson ET had found that the procedural response at the time of the events before it had "*no doubt exacerbated the claimant's anxiety and belief that management were closing ranks*" (Johnson liability decision, paragraph 93) and that, at that stage, his "*disability meant that [the two year warning] became the focus of his sense of grievance with the respondent and this exacerbated his impairments arising from this*

disability" (paragraph 155 c), the Shotter ET was considering the position at a different time, when the warning had expired and when management had been entirely open to considering any possible adjustments that would permit the claimant to return to work.

106. I am equally not persuaded that the Shotter ET restricted its consideration by slavishly sticking to the list of issues (the claimant's contention by ground 3). Although referring to the "*something*" as set out within that list (within the last sentence of paragraph 166), it is apparent from paragraphs 165-166 (and from the Shotter decision taken as a whole) that regard was had to what the Shotter ET had itself found to be the reasons for the impugned treatment. Its error lay in failing to allow for the possibility that the requisite causal nexus might be established by a series of links between the "*something*" and the claimant's disability, and/or in failing to consider whether this might have had a more than trivial influence on the relevant decisions; it did not err by limiting its consideration to the single matter the claimant had identified in the list of issues.

107. Having accepted that the Shotter ET fell into error in its approach to the issues of causation under section 15 **EqA**, I do not consider that adopting the correct approach would necessarily have meant that it would have found for the claimant on this point. As the decision makes clear, it is apparent that the Shotter ET did not accept that the claimant's relevant conduct was entirely explained by his disability. In particular, the Shotter ET had been able to see how the claimant had behaved in relation to the on-going proceedings, and it plainly saw his behaviour in his dealings with the respondent as explicable as a result of his obsession with the litigation (as distinct from any anxiety connected with that litigation); see, for example, the Shotter decision, at paragraphs 15, 29, 16 (mis-numbered, appearing at page 16 of the Shotter Decision*)*, 32, 46, 56, 68, 147, 151, 154, 155, 161 and 165. Accepting that the distinction might not be entirely clear-cut, I am not persuaded that the Shotter ET's findings must mean that its rejection of a causal connection was perverse. If the Shotter decision had stopped at this point, my inclination would have been to remit the section 15 claim for reconsideration on this issue. Ultimately, however, given the conclusion I have reached on the question of justification, I am satisfied that this is unnecessary.

108. I turn therefore to the claimant's challenge to the Shotter ET's finding on the question of objective justification (ground 4), by which it is contended that the respondent's "legitimate aim defence" could not succeed given that the claimant's dismissal resulted from the failure to make reasonable adjustments that would otherwise have enabled his return to work. In this regard, the claimant again places reliance on the

findings of the Johnson ET, in particular to the effect that the removal of the two-year warning would have been "*a discrete and effective act*" (Johnson liability decision, paragraph 157 e) and that, but for the existence of that warning, the claimant would have returned to work (paragraph 157 c). It is his case that the existence of the two-year warning remained an issue for him during the entirety of the period being considered by the Shotter ET, which it had to address taking into account the earlier finding of the Johnson ET.

109. Assuming that the claimant was to be taken to have established that his dismissal (and rejection of his appeal) amounted to unfavourable treatment because of something arising in consequence of his disability, the question for the Shotter ET was whether the respondent had shown that that treatment was a proportionate means of achieving a legitimate aim. Having identified the legitimate aim as being the respondent's requirement "*for regular and reliable staff attendance, and employees who are on long-term sickness absence to do all they can to meet with managers with a view to discussing reasonable adjustments leading to a return to work ...*" (Shotter decision, paragraph 167), the Shotter ET went on to consider whether the claimant's dismissal was a proportionate means of achieving that aim. In so doing, it permissibly had regard to the fact that the claimant had been continuously absent from work since 3 January 2018, with no foreseeable return, during which period the respondent had had to employ someone else to cover his role (with the additional cost that incurred). As for the two-year warning, the Shotter ET found that:

> "167. ... Initially the claimant confirmed he was not prepared to return back to work whilst the 2-year Serious Warning remained live, yet it remained an issue after expiry of the warning together with a raft of additional demands that were unrealistic and unachievable, for example, the respondent investigating a criminal hate crime. ..."

Going on to record:

> "169. ... It was clear matters had reached a head; the 2-year serious warning the claimant objected to was expired and the impasse could not be bridged because of the claimant's lack of trust in the respondent and/or managers and the breakdown in the working relationship coupled with a fervent belief on his part that he was right, the respondent wrong and he was going to succeed in the litigation which was used by the claimant as leverage. The claimant's attempt to produce evidence from meetings held outside the litigation process by which he could prove his case was disruptive. The claimant was subsumed by the litigation; he was embroiled in over 20 cases and in the Tribunal's view the litigation clouded his judgment. In short, the claimant was anxious to prove his case and prepare for the trial in October 2020 at any cost, even to the extent of losing his job which he believed he could also litigate over. ..."

110. In the light of the Shotter ET's findings, it cannot be said that it erred in concluding that removal of

the two-year warning would have remained the "*discrete and effective act*" that the Johnson ET had found, or that such an act would then have resulted in the claimant's return to work. As I have already explained (see above, under "*reasonable adjustments*"), the Shotter ET was considering the position at a different point in time to the Johnson ET, and had reached the entirely permissible conclusion that, by the stage of the decisions with which it was concerned, there was no longer any efficacy in expunging the two-year warning (which had by then already expired), as that would have had no effect in securing the claimant's return to work. Having considered whether the respondent might have taken any other step, so as to reduce or mitigate the impact on the claimant, the Shotter ET was clear that none of the lesser measures identified by the claimant would have achieved the legitimate aim (Shotter decision, paragraph 170). Carrying out the requisite balancing exercise (*per* **Hardy and Hansons v Lax**), and assessing the proportionality of the impugned treatment at the time of the decisions in issue, the Shotter ET's conclusion on justification cannot be faulted. Ground 4 of the claimant's appeal must therefore be dismissed, which is fatal to his challenge to the Shotter decision on his claim under section 15 **EqA**.

Unfair dismissal

111. I turn finally to the appeal against the Shotter ET's rejection of the claim of unfair dismissal. By ground 5, the claimant argues that the finding that his dismissal was within the range of reasonable responses open to the respondent was perverse and arose from a failure to properly engage with the findings of the Johnson ET.

112. For the reasons I have already explained, I do not accept the premise of the claimant's argument in this regard: the Shotter ET had to determine the question of reasonableness as at the time of the decision to dismiss, which was some months after the last events considered by the Johnson ET. During the course of 2020, subsequent to the period with which the Johnson ET was concerned, the two-year warning had expired and the respondent had made clear to the claimant that this would no longer be on his record or be taken into account (something which the Shotter ET was satisfied that the claimant understood). The respondent's managers (Mr Smith and Mr Briggs) had also made clear that any reasonable adjustments would be considered to enable the claimant to return to work. As the Shotter ET found, however, the claimant no longer placed any value in his relationship with the respondent, refused to engage with any discussions regarding his return to work, and had become subsumed by his litigation. The position that faced Mr Briggs

when making the decision to dismiss the claimant was not the same as that being considered by the Jones ET; the Shotter ET did not err in assessing the question of reasonableness as at the time the decision was taken.

113. I am equally not persuaded by the further point made by the claimant, to the effect that the Shotter ET ought to have had regard to the fact that the reason for the claimant's dismissal related to the respondent's earlier failings (as found by the Johnson ET). Allowing that it is arguable that "*equity and the substantial merits of the case*" might require an ET to have regard to an earlier failure to make a reasonable adjustment, which then impacted upon an employee's behaviour in a way relevant to a subsequent decision to dismiss (by analogy with the commentary in **McAdie**, and **Iwuchukwu**), I do not consider any error is demonstrated by the Shotter decision in the present case. As in **Rochford v WNS Global Services**, the situation the Johnson ET was considering in its finding of a failure to make a reasonable adjustment had "*shifted away*", and the Shotter ET was entitled to reach the conclusion it did when considering the position at the time of the decision in issue.

Disposal

114. For the reasons provided, the claimant's appeal is dismissed.