Neutral Citation Number: [2024] EAT 195

Case No: EA-2022-000565-RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 December 2024

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

MS K KALER

Appellant

- and –

INSIGHTS ESC LIMITED

Respondent

- -
- -

Andrew Edge (instructed by Free Representation Unit) for the **Appellant**
Heather Platt (instructed by direct access) for the **Respondent**

Hearing date: 15 and 16 October 2024

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE - POSTPONEMENT

DISABILITY DISCRIMINATION

The claimant in the employment tribunal was dismissed for the given reason of conduct, in particular for sending a number of emails over an issue in relation to her pay that were said to be abusive, threatening and harassing. She brought **Equality Act 2010** complaints, by reference to the disability of Autistic Spectrum Disorder (ASD), in relation to her dismissal (under section 15 – discrimination arising from disability) and alleged directly discriminatory or harassing treatment during employment and post-dismissal victimisation. By the time of the full merits hearing in 2022 the tribunal had found that the claimant did have ASD.

In a reserved decision arising from that hearing the tribunal dismissed all of the **Equality Act** complaints. The claimant appealed.

A ground of appeal which asserted that the tribunal had failed, at the start of the full merits hearing, to treat the claimant fairly, having regard to her ASD, by not allowing her to give evidence last, and in relation to matters to do with the hearing bundle, did not succeed.

Over the weekend following the completion of her evidence the claimant had applied for a postponement of the remainder of the tribunal hearing on the basis that she was not well enough to carry on. She did not join at the start of the hearing on the Monday and the tribunal refused that application. However, after the claimant later joined, but then had an ambulance called, the tribunal adjourned to the next morning, indicating that if she renewed her application then, she would need to provide supporting medical evidence.

The next morning the tribunal considered a further application from the claimant, but again refused to postpone. In particular it concluded that it was not supported by medical evidence, and that all the evidence was that, if it did postpone, the situation would repeat itself again in six months' time. Having regard to the prejudice to the respondent and its witnesses of postponing, and the fact that the events in question were already four years ago, it refused the

renewed application and went on to conclude the hearing in the claimant's absence.

The following week the claimant sent in a letter from her GP indicating that she had had a panic attack or meltdown on the Monday and needed a further two weeks to recover. The judge considered this letter but concluded that the tribunal's previous reasons for not postponing still applied.

A perversity challenge to the tribunal's decisions on postponement failed. Even if the claimant had become unfit to continue with the hearing because of her ASD and/or mental ill health, the tribunal permissibly concluded that the situation was likely to repeat itself at any resumed hearing. Notwithstanding the impact on the claimant's right to a fair trial, taking account of what the tribunal considered to be the impact on the respondent and its right to a fair trial within a reasonable time, the perversity threshold was not surpassed. The judge permissibly decided that the GP's letter did not affect that conclusion.

The grounds of appeal also challenged the tribunal's decision to dismiss the section 15 complaint in relation to the dismissal. In this respect the tribunal erred in concluding that the respondent was not on constructive notice that the claimant might have ASD. But it did not err in concluding that the conduct for which she was dismissed was not something arising in consequence of her ASD. In any event, the tribunal properly concluded that, even if the claimant's conduct *was* something arising in consequence of her ASD, that conduct was so serious and egregious that the decision to dismiss her for it was in any event justified.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. I will refer to the parties as they were in the employment tribunal. The respondent is a special school for children with social, emotional, behavioural and mental health needs. The claimant is an English teacher. Having previously worked for it in 2013, she worked for the respondent on a consultancy basis from January 2017. From 1 September 2017 she was employed as Assistant Vice Principal. In December she resigned by giving notice to take effect at the end of January. However, during the notice period she was summarily dismissed with effect on 3 January 2018 for the given reason of conduct.

2. The claimant brought **Equality Act 2010** complaints by reference to disability. The disability relied upon was Autism Spectrum Disorder (ASD), specifically, what used to be called Asperger's Syndrome. She complained that there had been a number of incidents of treatment during her employment that amounted to direct discrimination or harassment related to disability. She also complained that her dismissal was discrimination arising from disability (section 15), of failures to comply with the duty to make reasonable adjustments, and that, following her dismissal, actions had been taken by the respondent amounting to victimisation. She also complained of unlawful deduction from wages and wrongful dismissal. It appears that whistleblowing complaints were later dismissed upon withdrawal.

3. The claims were defended. A full merits hearing began in July 2019. The tribunal heard first an issue as to whether the claimant was a disabled person, deciding that she was not. On the claimant's application the remainder of that hearing was then postponed.

4. In October 2019 the claimant began a second claim, against the respondent, four of its employees, and its representative at the July 2019 hearing. An application by the respondent to strike out that claim was heard by EJ Grewal on 13 January 2020. The claimant departed the hearing part way through. The tribunal went on to decide that it did not have jurisdiction

to hear some complaints and struck out the remainder.

5. Returning to the first claim, the claimant successfully appealed against the July 2019 decision on the disabled-status issue. At a remitted hearing in February 2021 the tribunal decided that she was a disabled person, by reason of Autistic Spectrum Disorder (ASD). The matter was subsequently listed for a 7-day full merits hearing from 2 to 10 February 2022.

6. That hearing, at London Central, conducted by CVP, came before EJ Grewal, Mr A Adolphus and Ms J Cameron. The claimant was in person. The respondent was represented by Ms Platt of counsel. Applications by the claimant, following the completion of her evidence, for the remainder of the hearing to be postponed, were refused. The tribunal completed hearing the respondent's witnesses and its closing submission, and then its deliberations in chambers, concluding these on 9 February 2022. In its written reserved decision, sent on 16 May 2022, the tribunal dismissed the **Equality Act** and breach of contract complaints. It upheld the wages complaint in respect of the first three days of January 2018.

7. The claimant appealed. At a rule 3(10) hearing at which Mr Edge of counsel appeared as her ELAAS representative, HHJ Shanks permitted five amended grounds, drafted by Mr Edge, to proceed to a full appeal hearing. At that hearing before me, Mr Edge appeared again for the claimant, instructed by FRU. The claimant also at points added some submissions and read to me a statement of her own. Ms Platt of counsel, who had appeared in the tribunal, appeared again for the respondent, instructed by direct access. HHJ Shanks had directed the appeal to be heard before a judge and two lay members, but one of the assigned members had, for personal reasons, become unavailable. After a discussion of the options, and both counsel having taken instructions, both parties wished to proceed with the hearing of the appeal before me sitting alone; and in all those circumstances I so directed.

8. The five amended grounds of appeal before me challenged the tribunal's refusal of the

claimant's postponement requests, contended that it failed to make sufficient adjustments to the hearing arrangements in certain respects, and challenged its substantive decision dismissing the complaint of discrimination arising from disability in relation to the dismissal.

9. Pursuant to HHJ Shanks' directions, statements had been obtained from the claimant and then the two lay members of the tribunal. There was no statement from EJ Grewal as she had since retired. I had regard to these statements in so far as they assisted my more detailed understanding of how, factually, events unfolded at the hearing in the tribunal. I disregarded passages in the lay members' statements that amounted to the offering of additional reasoning in support of the tribunal's decisions.

Events at the employment tribunal hearing

10. The tribunal's decision included, materially, the following account of events at the hearing. At the start adjustments to take account of the claimant's disability were discussed. The tribunal had before it the reports of two Clinical Psychologists: Charles Parkes, who had diagnosed the claimant's ASD, of 12 August 2019; and Dr Rita Lacerda, who referred to ASD and also to depression and anxiety, of 29 September 2020. A draft list of issues and some points of clarification of certain complaints were discussed. The tribunal also said this:

> "**13 The Claimant objected to the admission of 21 pages of documents that had been sent to her on 6 January 2022 on the grounds that they had been sent late. We noted that relevant documents often emerged after disclosure had taken place. The number of documents was relatively small and the Claimant had had them for about a month before the hearing started. We said that we would look at them when we did our reading and, if they were relevant, we would admit them.**
>
> **14 The Claimant wanted the Respondent's witnesses to give evidence first. The Respondent objected to that course. The normal order in discrimination claims is for the claimant to give evidence first because she bears the burden of proof. There was nothing in the Clinical Psychologist reports to indicate that giving evidence first would be more stressful for the Claimant than cross-examining the Respondent's witnesses first. Both are equally stressful and difficult for a litigant in person. We were also concerned that if the Respondent's witnesses gave evidence first, and the Claimant then raised matters in evidence which she had not put to them (not uncommon among litigants in person) then a number of the Respondent's witnesses might need to be recalled to deal with that evidence. We decided that the most efficient**

> **way to deal with the hearing, and one that would not put the Claimant at any disadvantage, would be for her to give evidence first."**

11. The tribunal asked Ms Platt to give the claimant a list of topics that she intended to cover in cross-examination, and the order in which she would raise them; and she was told to ensure that she kept her questions short and avoided legal jargon. The tribunal also said this:

> "**16 We also told that parties that we would have breaks every hour and that the Claimant was free to ask for a break at any other time if she needed a break. We also told the Claimant that we would ensure that there was a break between her concluding her evidence and starting cross-examination of the Respondent's witnesses. I explained to the Claimant the process that would be followed by the Tribunal in the course of the hearing."**

12. The tribunal spent the remainder of day one reading. Ms Platt sent the claimant the list of cross-examination topics. On day two the claimant was cross-examined. Breaks were given as and when requested by her. The hearing finished at 4pm, with her cross-examination to continue the next day. The respondent indicated what its witness running order would be, when it came to its turn.

13. I will set out in full the tribunal's account of events on the succeeding days.

> "**21 On 4 February we started at 10.05 a.m. The Claimant said that she had had a difficult night and had not gone to bed until 6 a.m. She asked if it was alright for her to drink orange juice. I said that it was and that she should ask for a break whenever she needed one. At 10.40 the Claimant said that she needed to swear and she did. She said "for fuck's sake" and "I don't give a fuck" and "I don't care if there is a judge sitting in the room" etc. I said that we would have a 10 minute break. At 10.50, when we came back I said that if the Claimant wanted a longer break we could break until 2 p.m. The Claimant said that she did not want a break. She wanted to continue so that she could finish. She wanted to be able to relax. We had another break at 11.28 until 11.45. At 12,40 the Respondent's counsel said that she had another 45 minutes of cross-examination. I gave the Claimant the choice of a short break or a long lunch break until 2 p.m. The Claimant said that she preferred a short break. We had a break until 1 p.m. and the Claimant's evidence concluded at 1.43 p.m. 4 February was a Friday. We adjourned at 1.43 until 10 a.m. the following Monday, when the Claimant was to start cross-examining the Respondent's witnesses. The Claimant, therefore, had a break of 2.5 days before concluding her evidence and starting her cross-examination.**
>
> **22 The Claimant did not attend the hearing on 7 February. She had sent a number of emails to the Tribunal over the weekend which were passed on to us on Monday morning. They were as follows:**

a. On 5 February at 15.44 the Claimant sent an email in which she set out matters that she wanted to add to her evidence after the conclusion of her cross-examination. Further information was added in an email sent at 21.55 the same day.

b. On 5 February at 22.13 she sent an email that she wanted to make an application to amend her claim. It was not clear what claims she wanted to add, but they included claims that had been struck out.

c. On 6 February at 15.48 the Claimant sent an email in which she asked for the Respondent to be struck due to abuse of process, leave to amend her claim to add claims further claims of "emotional and economic abuse" and for all her original claims to be reinstated. She also requested a postponement of the rest of the hearing on the basis of her applications and because of "a severe deterioration" of her health between Thursday morning and then. She said that she was "in the middle of a meltdown" and she thought that it would last at least a week. She also requested that the Respondent be ordered to pay £50,000 to her immediately, not as compensation, but so that she could get a full-time carer. She said that she thought a postponement of six months would give her time to recover and also to collect the rest of the evidence which the Respondent along with others had hidden from the Tribunal.

d. On 6 February at 22.59 the Claimant sent an email to our clerk which was headed "Protected disclosure – this is a whistleblowing disclosure." In that email she stated, among other things,

> ***"I have become so ill that I am now non-verbal. I can only communicate in text and images and I am finding text difficult now.***
>
> ***I can speak but it is so overwhelming and traumatic repeating myself I cant do it anymore. I've been saying the same things and reliving the trauma every day for four years to hundreds of people. I have lost faith in the whole of humanity now."***
>
> ***"I can't explain the abuse anymore and will let a solicitor take over as soon as I can find one."***
>
> ***I'm pressing criminal charges and maximum penalty is 10 years prison."***

23 We decided that the statement made in the Claimant's first email would be admitted as evidence given in re-examination. The Respondent did not object to that. We did not consider that the Claimant had put forward any valid grounds for striking out the Response. We could not consider the Claimant's application to amend her claim to add complaints of emotional and economic abuse because we do not have jurisdiction to consider any such claims. We do not have the power to reinstate claims that have been dismissed just because a party asks for that. We considered the Claimant's application to postpone the case. The application was made in the middle of a part-heard hearing. The acts of which the Claimant complained had taken place between September 2017 and May 2018. It was nearly four years since the claim had been issued. The Claimant had not produced any medical evidence to demonstrate that she was not well enough to continue with the hearing. It was not in the interests of justice or in accordance with the overriding objective for there to be any further delays in this case. Having considered all the above circumstances, we decided not to adjourn the hearing but to continue with it.

24 Two of the Respondent's witnesses – Ms Quartey and Ms Ramshaw – gave

evidence and we then had a short break. After the break the Claimant joined the hearing. She did not have her camera on or speak but posted messages in the chat room. The messages said that she was "in the middle of a meltdown" and "struggling to speak." There were also the following messages "I'm asking my neighbour to call 999", "If that is the only way you will accept I'm unwell I have to call regency services" [sic] and "Cam somebody call them for me okease." [sic] I told the Claimant that the Tribunal could not call the Emergency Services for her. The Claimant's neighbour told us that he had called the Emergency Services and they were waiting for an ambulance. We adjourned the hearing at 11.30 to 10 a.m. the following morning. I told the Claimant that if she wanted to apply for a further adjournment on the following day it would have to be supported by medical evidence that she was not well enough to continue the hearing, the reason for that and an indication of when she would be well enough to continue.

25 The following day (8 February) the Claimant sent an email at 9.32 and said that she was waiting for her GP to call her. She said that she believed that she was still in a meltdown. Most of her email was unintelligible. She sent a copy of the form that had been given to her by the Emergency Services. It recorded what the Claimant had told them about her medical conditions which was that she had Autism, PTSD, ADHD and EFD and that she was "suffering from emotional trauma, in meltdown, nonverbal, not sleeping, not coping". There was no evidence before us that the Claimant had ever been diagnosed as having PTSD, ADHD or EFD. They recorded their recommendation as,

> ***"Crew called Crisis team who advised can make self-referral on 0300 300 0065.***
>
> ***Crew called GP who advised will call pt's friend Fares later today to make app for telephone consultation. GP to call tomorrow re home visit."***

26 We treated the Claimant's email as an application to adjourn the hearing for an indefinite period of time. The Respondent opposed the application. We considered the application. There was very little medical evidence in support of the application. The paramedics who had attended the previous day had not provided the Claimant with any treatment and had not taken her to hospital. There was no evidence that she had made a self-referral. There was no evidence from a medical practitioner that the Claimant was unfit to attend the hearing, no diagnosis and no prognosis. There was nothing in Mr Parkes' report about the Claimant having "meltdowns" as part of her Autism Spectrum Disorder. There was no evidence of when, if ever, the Claimant would be well enough to conclude the hearing. The case was already four years old and we were in the middle of the hearing. The Respondent is a small employer. The case had been time consuming and stressful for the Respondent's witnesses. Any further would delay would add to their stress and to the costs that they had already incurred. There was a real risk that a fair hearing would no longer be possible within a reasonable period of time if the case were to be adjourned. The Claimant had left in the middle of previous hearings. If the Claimant was not able to conclude the hearing four years after the case started, one could not be confident that she would be able to do so in six months' time. All the evidence indicated that we would find ourselves in a similar situation in the middle of a part-heard hearing in six months' time. It was also questionable whether there could be a fair hearing if there was a six month gap in the evidence in the case. The balance of justice lay in favour of proceeding with the case and providing a conclusion so that both sides could move on. We had heard the Claimant's evidence and she had had the opportunity in cross-examination of her to respond to the points that the

> **Respondent wanted to make. Having taken into account all those matters, we refused the application to adjourn.**
>
> **27 We then proceeded to hear from the rest of the Respondent's witnesses and the Respondent's closing submissions. We reserved our decision and the Tribunal deliberated for the rest of that day and the following morning.**
>
> **28 The Claimant continued to send emails to the Tribunal. We agreed exceptionally to consider one of them (the Respondent did not object to that). The case concluded on the morning of 9 February 2022 when the Tribunal's deliberations concluded.**
>
> **29 On 15 February 2022 the Claimant sent the Tribunal a letter from her GP dated 14 February 2022. The GP wrote,**
>
> > ***"Kuldeep suffered an acute panic attack on Monday 7th February 2022, which was caused by the pressures of the Employment Tribunal Hearing and her being Autistic so she was not well enough to participate in the hearing from 7th to 10th February 2022.***
> >
> > ***Kuldeep has suffered similar meltdowns previously where she is overthinking and overwriting and cannot switch her brain off. Since this is the worst one, I have issued diazepam on prescription to be used in emergency only.***
> >
> > ***In my opinion Kuldeep needs the rest of the month to recover but should be well enough to continue once she has recovered from the meltdown, and wants to continue.***
> >
> > ***It is requested that the Employment Tribunal Hearing to consider the effect her disability has on her mental well-being, during the hearing process and that adjustments are made for that."***
>
> **30 I did not consider that there was anything in that evidence to lead to a variation or revocation of our decision to adjourn the hearing. As I have said earlier, there is no reference in Mr Parkes' report to the Claimant having meltdowns or panic attacks as part her ASD. There was nothing in the GP's letter to indicate that the pressures of a resumed Tribunal hearing would not have the same effect again on the Claimant. He had not embarked on any treatment for her to ensure that. It was not clear from the GP's letter whether he/she had seen the Claimant or just spoken to her on the telephone. It appeared that the GP was simply repeating what the Claimant had relayed to the GP about her condition. The reasons for not adjourning on 8 February (see paragraph 26 above) still applied. The GP's letter did not change our concerns set out in that paragraph.**

The Facts

14. I take the following summary of the underlying facts from the tribunal's decision.

15. The respondent school was set up by Barbara Quartey, who is its principal. The claimant worked as a supply teacher from March 2013. In June 2013 she emailed Ms Quartey

that she was "going through the process of being diagnosed. I believe that I have Asperger's syndrome and have been advised that I should tell my employer that I consider myself to a have a disability." She might sometimes need things clarified in more detail. "I am also very literal and can come across as rude, however this is not my intention." Later in June the claimant had a disagreement with a colleague and left at short notice. In September she emailed Ms Quartey apologising for the way she had left and saying: "I have been dealing with my Asperger's and can now deal with situation much better."

16. From January 2017 the claimant worked for the respondent as an English teacher, on a consultancy basis. In May 2017 there was a reference to a hospital visit for a knee problem.

17. In June 2017 the claimant applied for one of two Assistant Vice-Principal posts. She did not indicate that she had any disability or required any adjustment. Her application was successful and she started in the role on 1 September 2017. She was line managed by Ms Quartey and Zoe Wilson (by the time of the hearing she was Zoe Ramshaw). On 21 September the claimant sent them some documents she had written four years earlier about theories on autism. She wrote: "It was shortly after I realised that I was highly likely that I was an aspie!"

18. In September the claimant emailed the Senior Management Team complaining about named members of staff. She also sent a further email to Ms Quartey and Ms Wilson which was very critical of a particular programme, which she said she would not be comfortable rolling out. There followed another email that was very critical of her fellow Assistant Vice-Principal. There followed another email in which she proposed a new structure in which she would have a Vice-Principal, rather than an Assistant Vice-Principal, role.

19. Ms Quartey and Ms Wilson spoke to the claimant and explained that some of her actions were unacceptable. At no stage did she say that she had Asperger's, was disabled, or was seeking adjustments, because of Asperger's or any other mental health condition.

20. At the end of November 2017 the claimant's birthday was celebrated at a weekly staff meeting. The claimant asked a teacher, Ms Poullos, to pick up a cake for her.

> **"The Claimant often referred to herself as "Aspie" in conversations with Ms Poullos. Ms Poullos bought two cakes for the Claimant. One of them said 'Happy Birthday Kaler' and the other one said 'Happy Birthday Aspie'. The Claimant was not offended by it as it was a name that she jokingly used for herself. Over forty colleagues signed the Claimant's birthday card. Only two used the name 'Aspie' for her."**

21. From Friday 1 December 2017 the claimant texted that she was sick. She later emailed that she was contemplating resigning. The following week she reported that she had "full on flu" and was off for the whole week. Following her return on Monday 11 December she met with Ms Wilson and another Senior Manager, Ms Jess, and then with Ms Wilson and Ms Quartey. There was no mention of Asperger's. In a follow-up email she indicated that she was looking for another job and planned to leave by Easter. However, on Wednesday 13 December she sent an email resigning, giving notice to take effect on 31 January 2018.

22. On Thursday 14 December the claimant reported an incident in which two students had pushed past her and she had "landed on her bad leg". In further communications she said that she had gone to hospital. Later she emailed that she had been advised to stay off her feet for at least a week, and would not attend work the next day or the following week. She said that she would self-certify as there were only three days left. The tribunal observed: "That was not correct as the SLT was expected to attend until the end of that week."

23. That day a colleague complained that on 21 November the claimant had texted him "I love u babe" and "I wanna fuck", saying that he had been too embarrassed to report it earlier.

24. Ms Quartey emailed accepting the claimant's resignation effective on 31 January 2018. The claimant submitted a report relating to the 14 December incident.

25. I will set out the next few paragraphs of the tribunal's reasons in full:

> "**81 At 6.22 p.m. on the same day the Claimant sent an email to all the staff at the school, the subject of which was "Your rights! Important to read!" She said that if Ms Quartey ever tried to deduct their pay because they had been absent sick they needed to know that she could not do that without notifying them in writing before hand and that if they were required to phone into work every day before a certain time they were entitled to full pay. That was not correct; the contract made it clear that they would be paid only statutory sick pay for any absences provided they met the qualifying conditions. She continued, "She has tried to take 7 days off my wages. That's what you get for working your back side off for her and coming in with a broken leg! Great professional work ethic this is. TRIED to ruin my Christmas. Any way, I am informing my union, investors in people and OFSTED of all the failings of the school." At the end of the email, the Claimant put the words "former Insights slave and now free spirit" in brackets after her name.**
>
> **82 The Claimant sent two further emails to Ms Quartey after 7 p.m. about her pay. In the first one she said, "The money has not cleared my account yet. I have everyone's individual email addresses and I knew you would swiftly block me. I will keep staff informed of how you treat me so you can't do it again. It would be prudent to just hurry up and pay me!" In the second one she said, "assuming we won't reach a settlement that I think I will agree to, I think staff should know exactly what kind of company they work for and how you operate. I think all outside agencies should know. You have just pushed me too far!"**
>
> **83 On 23 December at 10.35 the Claimant sent an email to all the staff at their personal email addresses. She said that they had had time in the holidays to block her work email but not to sort out her pay. She said of her managers, "Big grown people you know, behaving like this! Shocking. Shameful. Scandalous." She described the school as "a scam that robs the most vulnerable students of their only chance in life" . She accused the SLT of bullying staff and using the money that was paid by local authorities for their own personal benefit rather than that of the pupils.**
>
> **84 At 10.51 the Claimant sent an email to Ms Quartey in which she said, "You should pay me, it would be less embarrassing." At 11.10 she sent Ms Quartey another email which was copied to all the staff at their personal email addresses. In that email, she said, "You should be ashamed of yourself Barbara! You do all this in the name of GOD! Don't you dare! Just admit you do it for yourself … we all know anyway! Everyone in your school thinks of you exactly as I do. That's what you have done with your life. Built up a huge scam to rob poor vulnerable kids. All alone. The future. Sad. If my mother was like you, I'd feel so much shame!!!! You know I worked hard, everyone knows I worked hard. You just couldn't handle working with someone who actually knew what they were doing as opposed to your PE teacher Vice Principal. So you took the cheap shot and took 7 days sick pay off during Christmas. Classy!"**

26. Also on 23 December Ms Jess sent the claimant an extract from the staff manual relating to sick pay entitlement and asked her to stop sending inappropriate emails to other staff. The tribunal continued:

> **"86 The Claimant responded that she was entitled to full pay. Her response**

included the following comments,

> **"Barbara needs to pay me quickly. I have several concerns which I will raise with staff individually unless I am paid full pay for December in December"**
>
> **"I also want to speak to some of the parents that come to drop their children off. I have some concerns that I want to share with them."**
>
> **"If I don't get a suitable response to this email by tomorrow, I will be forwarding this email to staff so that they can see how the school really operates.**
>
> **I will continue to send emails and make phone calls until the matter is closed in a way that is satisfactory to both parties.**
>
> **She has tried to ruin my Christmas and leave me without funds. This is pure nastiness. Her staff will find out exactly what kind of person they work for and the local authorities will be forced to investigate once I tell them my concerns. There is always the newspapers! I could just copy them in on my emails."**

87 A little while later the Claimant sent an email to Ms Quartey in which she said,

> **"You can choose to pay me or not. If you pay me, you lose a bit of money. If you don't, then you will just have to accept that you will have a few investigations going on and you will lose face with your staff who are secretly loving it because they have wanted to say these things to you for years.**
>
> **If I get paid what is owed and fair, I will walk away. If I don't, then I will make sure that if I'm not getting my money, then I'm definitely going to make you work hard for yours!**
>
> **You don't own my mouth. You either pay for it or you don't have any control over it. That is it. You can't have your cake and eat it. Money=silence, no money=no obligation to be silent. Your call entirely."**

88 At 16.34 on 23 December Ms Wilson sent the Claimant a letter inviting her to a disciplinary hearing on 2 January 2018. The Claimant responded that she was too ill to attend. She said that she had not sent anything abusive and was within her rights to let staff know what was happening and that she would continue to do so. She said,

> **"You are a bully Zoe and I will make sure everyone you work with knows it…**
>
> **Your conduct is illegal! Bullying! Bullying! I'm not backing down at all. The longer you all play games, the more information I will give to staff to help empower them against your regime!"**

A little later she sent Ms Quartey an email in which she said,

> **"Everyone knows what you are really like Barbara, everyone is laughing about it! It is so nasty to do what you did but what do you expect, I don't know why I ever thought you were decent and fair! I**

> **should have known from the last time I worked for your slave plantation!"**

89 On Christmas eve the Claimant sent a large number of emails to Ms Quartey and Ms Wilson and to all the staff. In one of the emails to Ms Quartey and Ms Wilson she said,

> **"That's where being a nasty Scrooge gets you! I bet your staff are going to love seeing your faces first day back! Enjoy your huge wage packet this month whist you rob the less fortunate. You will get you comeuppance next year! Stuff your disciplinary, stick it you know where."**

She said to all the staff,

> **"I don't care about the disciplinary because I don't believe in the fear culture they have created in the school and am taking a public stand for the better of everyone! We are the people! They think they can control people by scaring them about references. Well I don't give a flying hoot about their reference because I am good at what I do and will have no problem securing work. Independent schools are known for taking the absolute **** with staff! Most mainstreams just ignore their references because they know the people running them could never last a day in a mainstream."**

The Claimant sent Ms Poullos a text message in which she said that she had supported her and helped her get a big pay rise. She continued,

> **"You thought you would just shit on me. Loads of people were telling me all along. I could have made all that public and they would be horrible to you. But I'm going to give you a chance to explain why you snaked me. If you don't explain, I will go public."**

90 On 26 December the Claimant sent Ms Quartey an email in which she said, among other things,

> **"Zoe [Wilson] just kept picking at me all the time because she was scared for no reason. I didn't want her job. I wanted Geoff's! Anyway, what the biggest shame is that had you allowed me to apply for the VP role it wouldn't have ben like this. You and me would have been flying as a team… Zoe felt unnecessarily threatened and started to bully me. She is really very rude and condescending the way she speaks to people. It's really offensive. She should have embraced my good qualities and I hers. We could have smashed it as a team, but she wanted me to be below her not the same as her… From the moment she realised I was able she went for me, I couldn't take it… Its really not nice when you work as hard for your boss as I did and you get what I got just because you are ill. I could never work for someone that doesn't even care if I am dead or alive as long as their work gets done. That's really unfair and nasty. What horrible employer does that?"**

91 The emails sent by the Claimant were on any analysis unprofessional, deeply offensive, insulting, threatening and some of them clearly blackmailing. If the Claimant had genuine safeguarding concerns she was perfectly within her rights to raise them through the appropriate channels. However, to threaten to do so if she was not paid what she wanted to be paid (although she was not contractually entitled to it) cannot be anything other

> **than blackmail. She was demanding money with threats to make trouble for the Respondent if the money was not paid. They would have been distressing to many of the recipients. In her evidence to the Tribunal the Claimant vacillated between accepting that her emails were inappropriate but that they were attributable to her autism and stating that what she said was the truth.**

27. On 1 January 2018 the claimant emailed that she would be self-certifying sickness absence from 3 January for seven days. Ms Wilson replied that 2 January was a working day for senior leadership, and the claimant was expected to attend the disciplinary hearing. The claimant replied that she was not physically fit to do so.

28. On 2 January the hearing went ahead, chaired by Ms Jess. The tribunal wrote [93]:

> "**It was said that the content of the emails and texts had contained abusive, unacceptable, unprofessional and blackmailing language about the school and staff members. She had continued sending these emails after the school's position regarding sickness pay entitlement had been explained to her and she had been requested to stop sending distressing emails to staff. After her work email account had been disabled she had continued to contact staff by using their personal email addresses and telephone numbers. Ms Jess concluded that the Claimant's conduct amounted to gross misconduct. It was not in dispute that the Claimant had sent the emails and the content spoke for itself. Ms Jess concluded that her conduct had brought the school into disrepute, she had shown no respect for the Principal, her line managers and her colleagues; She had used inappropriate language and had been very unpleasant in her emails and text messages; she had harassed her managers and her peers; her conduct had been unacceptable and could put the school in breach of its regulatory requirements. She decided that she should be dismissed immediately without notice."**

29. The decision was communicated in a letter of 3 January 2018. It was said that the claimant would be paid until the end of January; but that did not in fact happen. The claimant was informed of her right of appeal, which she did not exercise. The tribunal's findings about the aftermath included the following. The respondent contacted the police, who took statements from staff about the claimant's emails, then visited her and, in the tribunal's words issued her with "harassment orders". The claimant submitted a document raising safeguarding concerns about the respondent to various bodies, including four local authorities which, following investigation, found her complaints to be unfounded.

30. The respondent complained to the regulator about the claimant's conduct, referring to her various emails from September 2017 onwards, the text messages of a sexual nature to her colleague, and her December 2017 emails. After an investigation in which the claimant's responses were sought the regulator concluded that there was no realistic prospect of a prohibition order being imposed. The tribunal observed at [105] that there was nothing in the regulator's report to indicate that the claimant "had said in her defence that she had sent the emails in December 2017 because she suffered from Asperger's syndrome."

The Grounds of Appeal – Grounds 1 and 5 – Discussion and Conclusions

31. Ground 5 contends that, in certain respects, the tribunal at the outset failed to make sufficient adjustments, in particular in relation to the order of witnesses, and matters to do with the bundle, having regard particularly to the claimant's ASD. Ground 1 challenges the tribunal's refusal of her successive applications, following the completion of her evidence, for the remainder of the hearing to be postponed. I consider these grounds first.

32. In **Phelan v Richardson Rogers Limited** [2021] ICR 1164, at [64] – [73] I concluded from an extensive review of the authorities that there is a doctrinal difference between the approach of the EAT to these two types of challenge. A decision on a postponement application can only be challenged on perversity or so-called *Wednesbury* grounds. Whether the hearing arrangements were fair, including whether they sufficiently accommodated the impact of a disability, is an objective question for the appellate court, although, even there, an issue as to whether the tribunal took sufficient steps to *investigate* the issue of what adjustments might be needed should be considered by a *Wednesbury*-type approach.

33. I consider ground 5 first, because it relates to what happened on day one of the tribunal hearing. During the course of the appeal hearing Mr Edge abandoned some strands of ground 5. The challenge that was maintained, in so far as this ground raises points distinct from those related to the postponement issue raised by ground 1, related to two aspects.

34. First, the claimant wanted the respondent's witnesses to give evidence first. This had been raised by her in emails prior to the start of the hearing. For reasons that it gave at [14] of its decision, the tribunal declined this application, and directed that the claimant should give evidence first. Mr Edge submitted that this was unfair because the claimant had specifically said in her emails (at least one of which the panel had seen) that, on account of her ASD, she would find being cross-examined particularly distressing, and it would be difficult for her to process the experience. That would in turn impact on her ability to prepare to cross-examine the respondent's witnesses, if not given a week's break to recover first.

35. Mr Edge submitted that the claimant was in the best position to judge the effect that cross-examination was likely to have on her, and, set against her concerns, none of the tribunal's reasons for refusing her request were compelling. The experience of litigants who did not have ASD was not relevant. It would be open to the tribunal to allow the respondent to recall a witness after the claimant, to address some additional issue arising from her evidence, if that would be the fair thing to do.

36. I am not persuaded by this strand of ground 5. That is having regard to the following. First, the tribunal was not wrong to consider how severe the impact of cross-examination on the claimant would be, on account of her ASD, *over and above* the distress which might be expected to be experienced by any litigant or litigant-in-person. Secondly, the tribunal in coming to its decision was entitled to consider to what extent the claimant's request was supported by any medical or specialist evidence. Thirdly, the claimant had indicated in correspondence that she had prepared her cross-examination of the respondent's witnesses by reference to their witness statements. So she would not be starting with a blank sheet.

37. Nor do I agree that the tribunal's stated concerns about the difficulties, to which experience does show that reversing the usual running order can give rise in a case of this

type, did not deserve weight. In addition, importantly, at the start of the hearing, adjustments that might be needed in respect of the claimant giving her evidence were discussed. This included not just frequency of breaks, but the tribunal on its own initiative asking Ms Platt to send the claimant a list of topics that she intended to cover, and in what order, as well as to frame her questions in a way that took account of the claimant's ASD.

38. The second discrete matter raised by this ground relates to the bundle. The tribunal at [13] set out how it addressed the claimant's concern that a small number of documents had recently been added to the bundle. The ground does not in fact challenge *that* decision, as such, which in any event appears to me to have been fair, given the limited number of additional documents, that the remainder of the first day would be for reading, and that the tribunal also indicated that it would also review these additional documents as to relevance.

39. The ground complains that the tribunal failed to address the claimant's concerns that the respondent had failed timeously to provide her with a complete or correct copy of the hearing bundle. During the course of the hearing before me, respective counsel attempted to piece together the precise sequence of events. What is clear to me is that, as directed at a case management hearing in September 2021, the respondent had restructured and reordered the bundle that had been used at an earlier stage. The claimant was sent an electronic version, and, after an initial failed attempt, a hard copy was successfully delivered to her on around 6 January 2022. The respondent also revised page cross-references in all of the witness statements to match the new bundle, and provided a table of contents which showed which page each document in the new bundle had occupied in the original bundle.

40. Emails sent by the claimant in the run-up to the hearing indicated that she was having trouble locating some documents in the new bundle, and believed documents were missing. From the notes of the tribunal member, Ms Cameron, it appears that the claimant's concerns about the restructuring of the bundle *were* discussed at the start, as well as the matter of the

few entirely new documents referred to in the written reasons.

41. Ms Platt told me that during the course of the tribunal hearing three more pages were added to the bundle, which the claimant had correctly identified were missing. Had the claimant asked for a destination table showing where documents in the old bundle were to be found in the new bundle, one could have been provided. Although the claimant told me during the appeal hearing that the hard copy of the new bundle provided in January 2022 did not match the electronic copy of the new bundle provided in September 2021, that specific concern does not appear to have been spelled out to the tribunal or the respondent at the time. Having regard to all of that, I am not persuaded that the tribunal unfairly failed, on day one, to address any issue relating to the bundle that it ought to have addressed.

42. I turn to the challenge to the tribunal's decision on the successive applications to postpone. I have already set out the relevant passages in the tribunal's reasons.

43. The approach to be taken to such decisions, in particular where the application is made on grounds of ill health, is well-trodden ground in the authorities, and some of the relevant considerations were also captured in Guidance issued by the President of Employment Tribunals in England & Wales in 2013. The key Court of Appeal decisions are **Andreou v Lord Chancellor's Department** [2002] IRLR 728, **Teinaz v Wandsworth Borough Council** [2002] ICR 1471 and **O'Cathail v Transport for London** [2013] ICR 614. Less often cited but also pertinent is **Riley v Crown Prosecution Service** [2013] IRLR 966.

44. In **Teinaz**, giving the leading judgment, Peter Gibson LJ said:

> **"20. … … Every tribunal or court has a discretion to grant an adjournment, and the exercise of such a discretion, going as it does to the management of a case, is one with which an appellate body is slow to interfere and can only interfere on limited grounds, as has repeatedly been recognised. But one recognised ground for interference is where the tribunal or court exercising the discretion takes into account some matter which it ought not to have taken into account: … …. The appellate body, in concluding whether the exercise of discretion is thus vitiated, inevitably has to make a judgment on whether that matter should have been taken into account. That is not to usurp the function of the lower tribunal or court: that**

is a necessary part of the function of the reviewing body. Were it otherwise, no appellate body could find that a discretion was wrongly exercised through the tribunal or court taking into account a consideration which it should not have taken into account or, by the like token, through failing to take into account a matter which it should have taken into account. Although an adjournment is a discretionary matter, some adjournments must be granted if not to do so amounts to a denial of justice. Where the consequences of the refusal of an adjournment are severe, such as where it will lead to the dismissal of the proceedings, the tribunal or court must be particularly careful not to cause an injustice to the litigant seeking an adjournment. … …

21. A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. That litigant's right to a fair trial under Article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment.

22. If there is some evidence that a litigant is unfit to attend, in particular if there is evidence that on medical grounds the litigant has been advised by a qualified person not to attend, but the tribunal or court has doubts as to whether the evidence is genuine or sufficient, the tribunal or court has a discretion whether or not to give a direction such as would enable the doubts to be resolved. Thus, one possibility is to direct that further evidence be provided promptly. Another is that the party seeking the adjournment should be invited to authorise the legal representatives for the other side to have access to the doctor giving the advice in question. The advocates on both sides can do their part in assisting the tribunal faced with such a problem to achieve a just result. I do not say that a tribunal or court necessarily makes any error of law in not taking such steps. All must depend on the particular circumstances of the case. I make these comments in recognition of the fact that applications for an adjournment on the basis of a medical certificate may present difficult problems requiring practical solutions if justice is to be achieved."

45. In **Phelan**, after reviewing the foregoing and other authorities, I drew out these points.

"**74. In cases where a medical postponement is sought, the appeal Court may, and should, still intervene, on proper *Wednesbury* grounds, including if the Tribunal below has overlooked a relevant consideration, taken into account an irrelevant one, or struck the balance in a way that no reasonable Tribunal properly conducting the exercise could have done. On this, the authorities establish a number of further important guiding principles.**

75. First, where the application is to postpone a trial or other Hearing, the outcome of which may dispose of the claim, or some other material substantive issue in the case, the applicant's Article 6 and common law rights to a fair trial will be engaged. Because of the serious consequences of refusing a postponement, it should, in such cases "usually" be granted. If what sits on the other side of the scales is simply the inconvenience and cost to the other party of the matter going off, then any Tribunal properly carrying out the balancing exercise would be bound to grant the application, and a decision not to do so is liable to be overturned, applying *Wednesbury* principles. That is the point of Peter Gibson LJ's dictum in Teinaz. Because of what is stake for the applicant in such cases, a

> **failure properly and fairly to appraise the medical evidence with due care will also vitiate the exercise of the discretion, as was found to have occurred in both Teinaz and Solanki.**
>
> **76. However, as the foregoing authorities also plainly establish, the potential impact on the other party's fair trial rights, and the wider public interest, do also fall to be placed in the scales on the other side, and, if sufficiently weighty in the given case, may be properly found to tip the balance against the grant of the application. That is the point of Mummery LJ's observations in O'Cathail, especially at [47], and Longmore LJ's closing observation in Riley.**
>
> **77. In most cases, such as those involving a sudden accident or short-term illness, the balance will clearly and obviously point in favour of granting the application, and it may, indeed, not be opposed. With many illnesses or injuries, the likely timescale for recovery can also be stated, and assessed, with some confidence; and the decision for the Tribunal is, again, unlikely to be a difficult or controversial one. But cases concerning mental ill health, by way of prolonged or recurring stress, anxiety, and/or depression (often associated with the litigation or its subject matter, itself), perhaps tend to dominate the authorities, because they often involve (or are said to involve) features that potentially have weightier implications for the other party's rights to a fair trial within a reasonable time scale, and/or wider public interest considerations.**

46. In this case ground 1 contends that the tribunal failed to consider the serious detrimental effect that refusing a postponement would have on the claimant's right to a fair trial. The tribunal is said to have focussed entirely on the prejudice a postponement would have on the respondent, and so failed to carry out a proper balancing exercise. It is said to have failed to have regard to a number of relevant considerations, being, in summary: (a) that the need for the postponement was caused by the claimant's ASD; (b) that not postponing would undermine her right to a fair trial; (c) that a short adjournment would have enabled her to provide supporting medical evidence; (d) that the prognosis indicated that all that was required was a two-week postponement; (e) that in those circumstances the prejudice to the respondent in postponing would be minimal; and (f) that at a resumed hearing all that would be needed would be cross-examination of the respondent's witnesses and closing submissions.

47. The ground also specifically contends that, in a number of respects, to which I will come, the tribunal erred in its consideration and analysis of the evidence of the GP's letter, which was sent in by the claimant on 15 February 2022.

48. In order to reach a conclusion on this ground it is necessary to start by going back over how events in this regard unfolded.

49. The claimant's first application was raised in her emails over the weekend following the completion of her evidence. This was addressed in the tribunal's reasons in the second part of [23]. When the remote hearing began on the Monday morning, and the claimant had not joined, the judge indicated that the application was not supported by medical evidence and then asked whether the respondent wished to apply to strike out the claim. Ms Platt indicated that it did not, and wanted the hearing to continue with the respondent's witnesses being called. The tribunal then began hearing the first of the respondent's witnesses.

50. As **Teinaz** indicates, the starting point is that the onus is on a party seeking a postponement on grounds of ill health to demonstrate that they are not well enough to attend. Particularly where the party says that they are not mentally well enough to attend, that will usually require medical evidence. In this case, the tribunal had Dr Parkes' diagnostic report from 2019, and the letter from Dr Lacerda from 2020, relating to the claimant's ASD, and these included references to its effects on her executive function, and to anxiety and depression. But these did not address the current tribunal proceedings, still less the events leading up to her application. At this point the tribunal had no other medical evidence. Applying a *Wednesbury* approach, it was entitled to conclude, as it did, that the claimant had not produced any medical evidence to demonstrate that she was not well enough to continue.

51. That said, there are two related areas of potential concern at this point. First, it is true, as Ms Platt pointed out, that the claimant's weekend emails began by maintaining that there were missing documents, and that a postponement was needed for the respondent to provide them, and the claimant to then have a period of time to consider them before starting to cross-examine its witnesses. However, by the end of the Sunday she was conveying, by the language and content of her emails, if taken at face value, that there had been a breakdown in her ability

to cope and engage, and that she now needed a postponement in order to recover.

52. Secondly, these emails had come over a weekend, and the tribunal was considering them first thing on the Monday. In one of her emails the claimant had written that she would contact her doctor after the weekend to get a sick note if required. The tribunal does not appear to have considered the option at this initial point of alerting the claimant to the fact that it considered that specific medical evidence was needed, and adjourning, if only for a short period, to allow her an opportunity to get it.

53. But in the event the matter did not end at that point. As the written reasons record, after the first two witnesses had been completed the claimant did join the hearing, and then had an ambulance called. But before she departed the hearing, the tribunal conveyed to her that it was at that point adjourning until the next morning, and that, if she renewed her postponement application then, she would need to produce medical evidence addressing the specific aspects that it identified.

54. Mr Edge noted that the tribunal did not cite any of the authorities or the 2013 Presidential Guidance in its decision. But this is in practical reality a familiar recurring area of employment tribunal work, and what matters is in substance the approach that the tribunal took. I agree with Ms Platt that, in alerting the claimant to the need for medical evidence, and what it needed to cover, the tribunal was in substance plainly following those authorities and that Guidance. Mr Edge submitted that an adjournment only to the next morning allowed insufficient time for the claimant to obtain written medical evidence. However, at that point she was seeking immediate medical care; and I do not think it was outside the range of permissible options for the tribunal at that point to adjourn until the next morning.

55. I move on, then, to the start of the next day, Tuesday 8 February 2022. At that point the tribunal had received from the claimant a further application to postpone, and a copy of

the ambulance service report. Ms Platt had tabled her written submission opposing that further application (which cited the 2013 Guidance). The tribunal's reasons for refusing it were again embodied in its later reserved decision at [26].

56. In those reasons the tribunal properly considered the ambulance report, noting that the claimant had not been treated or gone to hospital. It was also entitled to view it as reflecting what the claimant had told the ambulance crew upon arrival. It correctly noted that it had no evidence that she had diagnoses of PTSD or ADHD. While Mr Edge correctly submitted to me that the Parkes report referred to the impact of the ASD on her executive function, the tribunal correctly noted that it did not have evidence of a distinct additional diagnosis of EFD. While the ambulance report noted that the Crisis team had advised that the claimant could make a self-referral, the tribunal correctly noted that there was no evidence that she had done so. While the crew had spoken to the GP, who was to arrange a telephone consultation and a home visit, the claimant had indicated in her emails that she was waiting to hear from the GP.

57. The tribunal overall correctly noted that it had no evidence from a medical practitioner at that point, stating specifically that the claimant was unfit to attend, why, or with a prognosis for her fitness to attend. As I have discussed, the tribunal was also reasonably entitled to conclude that the Parkes report did not support what had happened over the weekend and on the Monday being simply explained by the fact that the claimant had ASD, as such.

58. The tribunal also properly took into account that it was nearly four years since the employment had ended, and the prejudice to the respondent and to its witnesses, that it described in its reasons, of postponing. It also properly considered, as such, what the prospects were, if it did postpone, of the claimant being able to see through the later resumed hearing, and of there being a fair hearing within a reasonable period of time. That was a factor to which the tribunal was entitled to attach significant weight. While the ground of appeal refers to the fact that at a resumed hearing the claimant would not have to give her own evidence

again, the tribunal cannot have failed to appreciate that; and I cannot say that, for that reason, it was unreasonable for it nevertheless to have considered, on all the information it had, that the situation was likely to repeat itself at any resumed hearing.

59. This ground of appeal, and Mr Edge in argument, contended that the tribunal simply failed to take into account a further, and crucial, relevant consideration, being the prejudice to the claimant's right to a fair trial, of not postponing, particularly given that she had not cross-examined any of the respondent's witnesses. As to that, as I have said, I have no doubt that this tribunal understood the approach which the authorities and the 2013 Guidance indicated it should take. I note also that it specifically referred during the concluding part of [26] to where the balance of justice lay. I also agree with Ms Platt that the tribunal cannot be supposed to have overlooked that the claimant had not cross-examined the respondent's witnesses, which the claimant had also herself stated in her application that she wanted to do.

60. Importantly, the tribunal also referred to having heard the claimant's evidence, and noted that she had had, when she was being cross-examined, the opportunity to respond to the points the respondent wanted to make. This shows that, in taking this further decision, it did apply its mind to what stage the hearing had reached, and the extent to which she had been able to put forward her evidence and arguments in support of her case thus far. The ground also relied upon the claimant not having had the opportunity to make any further closing submission, whether orally or in writing. But I note that the tribunal had allowed the statement made in her first weekend email to stand as the equivalent of further evidence in re-examination, and also later agreed to take into account her email sent at 12.32 on 8 February (which set out a series of points about the alleged events that she wanted considered). Once again this shows that the tribunal gave attention to how matters stood in relation to this aspect.

61. Standing back, I am therefore satisfied that the tribunal did consider what the impact on the claimant would be, if it refused this further application and the hearing completed

without her further participation; and that it carried out the required balancing exercise. But it had to consider the rights of *both* parties to a fair trial within a reasonable time period; and it permissibly concluded that the matters it identified falling on the other side of the scales, to which it properly attached significant weight in this case, pointed against postponing.

62. Pausing there, I note again that, as the authorities establish, even a party who has produced clear and undisputed medical evidence that they are not fit enough to participate in an *entire* hearing, as scheduled, is not automatically entitled to a postponement. In some cases (as happened in **O'Cathail** and **Phelan**), particularly where the future prognosis is uncertain, and the events at issue go back some years, the tribunal may properly conclude that the balance weighs against putting off a resolution of the litigation. I remind myself, again, that the EAT can only interfere in a decision of this type on perversity grounds. For reasons I have stated, I am not persuaded that this tribunal did not, in principle, take the right approach to this decision; nor that it overlooked to take into account a relevant consideration; and, applying a *Wednesbury* approach, it was reasonably open to it to conclude, as matters stood on 8 February, that the balance of justice was against postponing the hearing.

63. Mr Edge submitted that, even if so, the GP's letter of 14 February, which was tabled by the claimant on 15 February, should have been regarded as a game changer.

64. The precursor had been that, later in the preceding week, the claimant had emailed a fit note of 9 February, referring to "autism spectrum disorder, anxiety depression and acute panic attack", certifying her not fit to work until 28 February. She had also emailed evidence of a referral (in December) to NHS psychiatric health services, and that the GP had prescribed her diazepam. The GP's letter of 14 February 2022 was then emailed by the claimant on 15 February and referred to the judge. I note that no point was raised by the grounds, or argued, as to whether it was appropriate for that letter to be considered by the judge alone in the first instance. I therefore express no view about that. The grounds, and Mr Edge, however, raised

a number of points about the judge's substantive response to it, as later set out in the tribunal's reserved written reasons at [30].

65. First, it is said that the GP's letter specifically stated that the claimant had not been fit enough to participate in the hearing from 7 – 10 February. It also stated why, being that she had suffered an acute panic attack on Monday 7 February, caused by the pressures of the tribunal hearing and her being autistic. The letter also, it is said, gave a prognosis, stating that she needed the "rest of the month" to recover and "should be well enough to continue" once she had recovered. Further, the letter was not, submitted Mr Edge, like those which tribunals sometimes see, which merely expressly report what the patient has told the GP, or asked for. The judge had no basis to so depict it. Rather, on its face it stated the GP's own view. Further, argued Mr Edge, the judge was in no position to second-guess the GP's expert medical opinion. He relied, in this regard, on passages in the discussion by the EAT in **Pye v Queen Mary University of London** UKEAT/0374/11, 23 February 2012.

66. Putting it all together, Mr Edge submitted that this letter provided what the tribunal had been looking for: a medical advice addressing fitness to participate, diagnosis and prognosis. Given that the opinion was that the claimant needed only the rest of the month – that is, at that point two more weeks – to recover, the conclusion should have been that the risk to a fair hearing, and prejudice to the respondent, of postponing, now looked very different, and could not outweigh the prejudice to the claimant of not being allowed the further chance to cross-examine the respondent's witnesses and make a closing submission thereafter.

67. My conclusions on this aspect are as follows.

68. First, as is discussed in a number of the authorities, where medical evidence is produced, directly addressing the issues relevant to the context of the current proceedings and the postponement application, the tribunal needs to engage with it, and consider it with care.

If it concludes that it has reservations about the weight that the clinician's assessment of the individual's current fitness can be accorded, or the confidence that it can place in the clinician's prognosis for the future holding good, these need to have a proper reasoned basis. However, that does not mean that the tribunal is simply bound uncritically to defer to the clinician's view. I do not think the EAT in **Pye** meant that, and, as Ms Platt noted, nor was that the approach of the Court of Appeal, when considering a later strike-out decision in that same case ([2017] EWCA Civ 1820). While the tribunal should also be careful not to attempt its own medical assessment of the individual's mental state, based purely on how they have presented to it, it is entitled to draw appropriately on relevant past experience in the litigation.

69. The GP's letter did state in terms that the claimant had had a panic attack on 7 February, and had been unfit to participate in the hearing from 7 – 10 February. This was medical evidence that the tribunal had not previously had. But the critical question for the tribunal, in relation to the balancing exercise, was then as to the future prospects for the hearing both resuming *and* successfully concluding within a reasonable timescale.

70. Mr Edge's criticism of the judge's observation that it appeared that the GP was just repeating what the claimant had said has given me some pause. But it was not wrong of the judge, as such, to note that this short letter did not, for example, explain the extent of the consultation and what examination or assessment had been carried out, in addition to the GP drawing upon what he knew of the claimant's past diagnosis and medical history, and her report of recent events in the course of the tribunal hearing.

71. The GP's letter stated his opinion that the claimant needed the rest of the month to recover from the "panic attack" that she had had on Monday 7 February. But as [30] of the reasons identified, when it came to assessing what the future might hold, if the tribunal did postpone, the specific and critical concern was as to the likelihood of *recurrence* of what had happened at, or during, any resumed hearing. Notwithstanding her reservations expressed in

the final sentences of [30] about the basis on which the GP had formed his views, the judge, in terms, did also consider what assistance the content of this letter might offer on that issue.

72. In that regard I note that the letter stated that the panic attack the previous week was caused by the pressures of the tribunal hearing and the claimant being autistic, and that she had suffered similar such "meltdowns" previously, but that this was the "worst one". While the GP had prescribed diazepam "for emergency use" the letter also referred to the claimant being "on the waiting list for psychiatric support" (which she herself had also confirmed and evidenced). The GP, to repeat, also considered that the severity of this episode was such that the claimant would need, overall, three weeks from the start of it to recover. In light of all of that, I cannot say that it was not reasonably open to the judge to conclude that there was nothing in the letter to indicate that the pressures of a resumed tribunal hearing would not have the same effect again on her, and she would likely not complete it.

73. Nor do I consider that the judge acted unreasonably in not concluding that the hearing could be relisted to resume after the end of February with no significant disadvantage to the respondent. The tribunal's previous concerns about the impact on the respondent, and on its witnesses, of having to take part in a further hearing, would still, it appears to me, have held good. Nor do I agree with Mr Edge's submission to the effect that, as the reserved decision was not promulgated until 16 May, the postponement sought could readily have been accommodated. That date casts no light on when, as well as the claimant, the three members of the tribunal, and the respondent's witnesses and counsel, could have been got together for further hearing days. Whether or not harking back to the claimant's original request, the six-month scenario envisaged by the tribunal was certainly not implausible.

74. Ultimately I have therefore concluded that the tribunal did not fail to take into account any relevant consideration, nor does this ground surmount the high bar of a pure perversity challenge. Ground one is therefore dismissed.

The Grounds of Appeal – Grounds 2, 3 and 4 – Discussion and Conclusions

75. The section 15 complaint about the dismissal failed because the tribunal concluded that the respondent did not have actual or constructive knowledge of the claimant's ASD, in any event the conduct for which she was dismissed was not something arising in consequence of that disability, and in any event the dismissal was justified. Each of these conclusions was, by itself, fatal to this claim. Grounds 2, 3 and 4 challenge each of them in turn.

76. Section 15(2) provides that the prohibition in section 15(1) does not apply if the putative discriminator, A, "shows that A did not know, and could not reasonably have been expected to know, that B had the disability." The tribunal concluded that lack of both actual and so-called constructive knowledge was shown in this case.

77. Ground 2, Mr Edge acknowledged, focused its challenge on the conclusion that the respondent lacked *constructive* knowledge of the claimant's ASD. That conclusion is said to have been erroneous or perverse having regard to:

(1) The defence requiring an employer to establish that it has done all it could reasonably have been expected to do to find out whether the employee was disabled;

(2) A number of findings of fact, in light of which the tribunal should have concluded that the respondent was, in this case, obliged to make further enquiries.

78. As to the law, the relevant principles are well-established in the authorities. They were captured by Eady J in **A Ltd v Z** [2019] IRLR 952 at [23], including, relevantly:

> **"(3) The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.**
>
> **… …**
>
> **(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the Code, which (relevantly) provides as follows:**
>
> **"5.14 It is not enough for the employer to show that they did not know that the**

> **disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.**
>
> **5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."**
>
> **(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v TC Group [1998] IRLR 628; SoS for Work and Pensions v Alam [2010] ICR 665.**
>
> **(7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code."**

79. The relevant passage in the decision of the present tribunal is as follows:

> **"108 We considered first whether the Respondent knew or could reasonably have been expected to know that the Claimant had ASD/Asperger's Syndrome in 2017. The Claimant was first diagnosed as having ASD in August 2019, twenty months after her employment terminated. The Claimant first worked for the Respondent from March to June 2013. In her application form at that time she stated that she did not consider herself to have a disability or any other medical condition that might affect her ability to do her job. The comments made in her reference about her interpersonal skills and relationships indicated strongly against her having ASD/Asperger's Syndrome. In June 2013 the Claimant told Ms Quartey that she was in the process of getting a diagnosis as she believed that she had Asperger's Syndrome. She ceased working for the Respondent very soon after that and did not say anything more about what the outcome of the process had been. In an email on 13 September 2013 she said that she had been dealing with her Asperger's and could deal with situations much better.**
>
> **109 The Claimant did not work again for the Respondent until January 2017, 3.5 years later (other than a couple of days in 2016). She did not at that stage say anything about what the outcome of the diagnosis had been. There is no reason why Ms Quartey would have recalled at that stage the email the Claimant had sent her 3.5 years earlier. The Claimant did not at any stage, while working for the Respondent on a consultancy basis in the first half of the year, tell the Respondent that she had ASD or Asperger's Syndrome and did not give the Respondent any basis for thinking that she might have it. When the Claimant was given the job description for the Assistant Vice-Principal role in June 2017 she did not inform Ms Quartey or anyone else that she would need adjustments made because she had ASD/Asperger's Syndrome. On the contrary in her application form she claimed that she able to communicate effectively, was a natural problem solver and a logical thinker who could think on the spot. She did not at any stage while she was in that role says that she had Asperger's or that she needed any adjustments made because of that. There were two references to Asperger's during her four months of employment. The first was in the email that she sent to Ms Quartey on 21 September 2017 in which she enclosed documents that she had written four years earlier shortly after she had realised that it was "highly likely" that she was an**

> **"aspie". The second was that in conversations with Ms Poullos she referred to herself as "Aspie" and hence that appeared on her birthday cake which would have been seen by other employees. We do not accept that her other colleagues used that name for her. We do not accept that on the basis of those two references and what the Claimant had said about trying to get a diagnosis four years earlier the Respondent could reasonably have been expected to know that the Claimant had ASD or Asperger's Syndrome, especially when there was evidence which clearly indicated the contrary. We concluded that in 2017 the Respondent did not know and could not reasonably have been expected to know that the Claimant was disabled because she had ASD or Asperger's Syndrome."**

80. This passage, in my judgment, shows that the tribunal in principle took the right approach, considering whether there was anything factually known to the respondent at the relevant time which ought reasonably to have put it on notice of the possibility that the claimant might have ASD, such that it ought reasonably to have attempted to look further into it. However, it is contended that the tribunal's conclusion was *perverse* having regard in particular to the following factual findings:

(1) That in 2013 the claimant informed Ms Quartey that she was going through a process of diagnosis of possible Aspergers; and had sent a further email referring to Asperger's in September 2013;

(2) That an email sent by the claimant in 21 September 2017 referred to her having come to the realisation that it was "highly likely that I was an aspie."

(3) That she had sent an email to the whole SLT on 22 September 2017 saying that she wanted two named employees disciplined, which she was told was inappropriate;

(4) That she had been given a birthday cake and a card referring to her as "Aspie".

(5) That she had sent an email on 1 December 2017 indicating that she was contemplating resignation because the job was making her "exhausted, stressed and ill";

(6) That she had sent messages to her colleague with inappropriate sexual content;

(7) That she had sent a string of emails between 22 and 27 December 2017 which strongly suggested that she was not well;

(8) That the respondent had itself when reporting the claimant on 12 January 2018 to the regulator, expressed a concern about the claimant's psychological state.

81. As to (1) the tribunal made a finding that Ms Quartey could not have been reasonably expected to remember the emails sent in 2013 some 3 ½ years later. That was a conclusion that the tribunal was entitled to reach.

82. As to (9) the expression, as cited by the tribunal, was "physiological state"; but I assume that this should have read "psychological" state, and the natural reading in context in any case is that this was what the respondent meant. However, I do not consider that it was perverse for the tribunal not to conclude that this concern should have put the respondent on enquiry as to whether the claimant's conduct might be indicative of ASD. Section 15(2) averts to actual or constructive knowledge of "the disability" which means the particular disability relied upon. Behaviour that may be said to put an employer on notice of the possibility of mental ill health or mental illness does not necessarily put them on notice of a neurological or developmental condition such as ASD. For reasons to which I will come, I do not accept that it was perverse not to conclude that the claimant's behaviour referred to at (3) and (5) – (7) above should have itself put the respondent on notice that she might have ASD.

83. That leaves the findings about the use of the word "aspie", by the claimant in September 2017, and in the cake and card. At [109] the tribunal concluded that this was not sufficient to found constructive knowledge of ASD "especially when there was evidence which clearly indicated the contrary." In the same passage the tribunal considered that comments in a reference in 2013 about the claimant's interpersonal skills and relationships were a strong indicator against ASD, and referred also to how the claimant described her skill set in her June 2017 application. The tribunal also plainly drew on its findings that at no point in 2017 or 2018 did the claimant seek any adjustment from the respondent on the basis of possible ASD. Nevertheless, the claimant's use of the term "aspie" to describe herself (whether or not an appropriate term) indicated that she was saying that she believed she had,

or might have, ASD. That, at least, put the respondent on notice of that possibility.

84. For this ground to succeed, however, I would also need to conclude that, being aware that the claimant might have ASD, the respondent also ought reasonably to have taken further steps to investigate whether she did. An issue then potentially arises as to whether that question needs to be considered, not in the abstract, but in the context of its consideration of her conduct and the possibility of disciplining or dismissing her for it. In the event, I do not think anything turns on that in this case, however, because, even if my reasoning so far should lead to the conclusion that ground 2 succeeds, I have concluded that both grounds 3 and 4 fail. I will turn then to explain why I have reached those conclusions on those grounds.

85. Ground 3 concerns the tribunal's conclusion that the conduct for which the claimant was dismissed was not, in any event something "arising in consequence" (s.15(1)(a)) of the claimant's ASD. That conclusion is said to be perverse, having regard to the medical evidence, which, it is said, expressly referred to the claimant's tendency to suffer "meltdowns"; and to her behaviour during the trial – which it is said plainly showed that her disability caused her to suffer from meltdowns and/or an inability to regulate her conduct.

86. Mr Edge relied on authorities such as **Sheikholeslami v University of Edinburgh** [2018] IRLR 1090 (EAT) which indicate that the "arising in consequence" test of causation may be satisfied by a looser connection than a single cause, and might involve a chain of causation that has more than one link.

87. Having set out the claimant's case on this point the tribunal continued:

> **"119 There was no medical evidence before us that between 22 and 27 December 2017 the Claimant had a "meltdown" or a "blow up". There was no medical evidence before us that one of the features of the Claimant's ASD was that she could in certain circumstances have a "meltdown" which would lead to them sending the kind of communications that the Claimant did. There is no reference to it in the report of Mr Parkes. There was no medical evidence that the Claimant had sent the communication because she had had meltdown because she had ASD. Therefore, we could not have concluded that she had behaved in that way in consequence of her disability. The articles produced by**

> **the Claimant did not provide us with much assistance. They are general and not specific to her. Furthermore, the Claimant's circumstances do not fit in with some of the features of meltdowns discussed in those articles. They say that a meltdown is not usually caused by one specific thing, the Claimant's conduct was caused by her not receiving her full pay on 22 December. The articles say that meltdowns cannot be stopped by giving the person their own way, the Claimant's emails seemed to say that if she received full pay the issue would be resolved. The articles say that after a meltdown the person often feels ashamed and embarrassed, there was no evidence of the Claimant feeling that way."**

88. As Ms Platt fairly submitted, not all people with ASD (or what used to be called Asperger's) have the same profile of behaviours or experiences. The tribunal had to decide the position in relation to *this* conduct of *this* claimant on the evidence before it. In reaching the foregoing conclusion the tribunal plainly specifically considered the evidence in particular of Mr Parkes' report, and also the general materials that the claimant had put before it, from both of which it had set out extracts at [106] and [107]. In particular, both articles referred to a "meltdown" as involving someone with ASD "temporarily" losing control, and made the other points noted by the tribunal at [127]. The Parkes report contained one reference to a "meltdown", being an example given by a friend of a visit to a coffee shop, when she was given a teapot and the claimant a cup "resulting in a great deal of distress."

89. I do not consider that the claimant's behaviour during the tribunal hearing, or in her emails sent during the hearing period, was such that the tribunal was bound to conclude that the very specific and different conduct for which the respondent dismissed her arose in consequence of her disability. Once again this is a perversity challenge facing a high threshold. Given in particular the content of the emails that the claimant sent between 22 and 27 December 2017, their number, and the overall period of days during which they were sent, and even taking account of Mr Edge's point about the latitude of the "arising in consequence test", I do not think it can be said that the tribunal's conclusion that this particular conduct was not conduct arising in consequence of the claimant's ASD was perverse.

90. Ground 4 concerns the tribunal's conclusion on justification. It said this at [121]:

> "**The legitimate aims relied upon by the Respondent were ensuring the appropriate levels of professionalism and conduct in the work place, maintaining respect and dignity in the workplace for all its employees and ensuring the health, welfare and safety of its employees. In circumstances where the Claimant had sent the emails set out at paragraphs 80 to 90 above to a large number of the Respondent's employees outside working hours and that she had continued to do so after she had been told to stop sending them and she had not thereafter not provided any explanation for her conduct, acknowledged that she should not have sent them or given any indication that she would stop, we would have concluded that starting the disciplinary process against her and dismissing her had been a proportionate means of achieving the Respondent's legitimate aims.**"

91. Mr Edge acknowledged in argument that the challenge to ground 4 in this respect is wholly parasitic on ground 2. That is, the only basis for ground 4 is the contention that, had the tribunal found that the respondent knew, or ought to have known, that the claimant had ASD, that actual or deemed knowledge in turn would have been bound to affect its approach to whether the decision to dismiss was justified. The tribunal's conclusion on justification was not challenged as being wrong in law for any other independent reason.

92. However, even if both ground and 2 and ground 4 had succeeded, the failure of ground 3 would still be fatal to the overall challenge to the substantive decision of the tribunal to dismiss this complaint. In addition, though I have concluded, in respect of ground 2, that the tribunal ought to have concluded that the respondent was on notice of the possibility that the claimant had ASD (and I have assumed that that may, alone, be sufficient to uphold ground 2), I do not uphold ground 4. That is for the following reasons.

93. First, the tribunal reached its conclusions on each of the necessary components of section 15 in the alternative. That is to say, as the tribunal itself set out at the start of [121], it considered how matters would have stood in relation to justification if it had found that the respondent *did* know, or constructively knew, that the claimant had ASD, and that the conduct for which she was dismissed *did* arise in consequence of it. Secondly, the features which led the tribunal to the conclusion that dismissal for the conduct was justified would still have held good. This is not a case where the factual scenario underpinning the reasoning, as to the

serious content and extent of the claimant's emails, the wide circulation of them, the impact of them on colleagues, the respondent's duty of care to her colleagues, and the claimant's defiant persistence even when urged to stop, would have been affected or any different.

94. In short the tribunal was properly entitled to conclude that, even if the respondent was on constructive notice that the claimant had ASD, and even if the conduct for which she was dismissed did, in the section 15 sense, arise in consequence of it, the conduct, and its effects, including on the claimant's colleagues, was so egregious and serious, that dismissing her for it was a proportionate and justified response.

95. For all of these reasons, the substantive challenge mounted by this appeal, to the tribunal's decision to reject the section 15 complaint relating to the dismissal, fails.

Outcome

96. The appeal is dismissed.