Neutral Citation Number: [2022] EAT 10

Case Nos: EA-2021-000654-OO
EA-2021-000801-OO
EA-2021-000803-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 November 2021

Before:

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

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Between:

COMMERZBANK AG	**Appellant**
- and -	
MS J RAJPUT	**Respondent**

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\- -

Mr D Craig QC & Mr M Waseem of Counsel
(instructed by GQ Littler) for the **Appellant**
Ms S Clarke of Counsel (instructed by Aly & Hulme Associates) for the **Respondent**

Hearing date: 10 November 2021

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JUDGMENT

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SUMMARY

PRACTICE AND PROCEDURE

The ET refused to direct that there be a preliminary hearing to determine whether a remitted tribunal hearing (due to commence next week) was bound by the factual findings of the original tribunal. The respondent appealed.

Held, allowing the appeal, that the ET had erred in refusing to direct that there be a PH. It is clear that the question of what facts remained binding on the tribunal hearing the remitted matter would have to be determined in advance of that hearing; otherwise the parties would not be able to prepare. In reaching the decision that it did, the ET clearly failed to take into account relevant matters and reached a decision outside the ambit of decisions where reasonable disagreement was possible.

The EAT clarified that the tribunal at the remitted hearing was not bound by any of the factual findings made by the original tribunal in respect of those claims where the appeal was allowed.

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THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT):

Introduction

1. I shall refer to the parties as the claimant and the respondent, as they were below. This appeal is primarily concerned with the scope of a remitted hearing that is due to commence next week. The respondent contends that the Employment Tribunal ("ET/the tribunal") has failed to clarify the scope of the remission and ought to have listed a preliminary hearing in order to do so, the particular issue being what findings of fact from the original tribunal still stand. The respondent contends that the failure to do so prior to the remitted hearing makes it impossible to prepare meaningfully for that hearing. The tribunal has stated that the scope of remission can only be determined by the full tribunal hearing the case, not by a judge sitting alone in advance.

Background

2. The background to this matter, which arises out of incidents going back to 2016, is quite convoluted. Both parties have, in their skeleton arguments, set out a detailed summary of that background. The following summary is derived from both.

3. The claimant was employed by the respondent in its compliance division. She issued a claim for sex and maternity discrimination on 12th September 2017. The basis of her sex discrimination claim related to the failure to properly consider her for the Head of Markets role, which became available in July 2015, and the treatment of one her male colleagues as a senior member of the team. The maternity discrimination claim related to her treatment during her maternity leave and an allegation that her work had been transferred to a junior whilst she was on such leave.

4. The claims were heard by the Central London ET, Employment Judge Tayler (as he then was) presiding. The claim was heard between 7th and 14th March 2018, and the decision was sent to the parties in writing on 22nd March 2018. The claimant succeeded in her claims of sex

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discrimination and harassment in part, and maternity discrimination. The following acts were found to constitute direct sex discrimination due to gender stereotyping:

i) Mr Whittern, one of her colleagues, being treated as a senior member of the team by Mr Niermann, Head of the Division;

ii) The appointment of Mr Whittern as point-person/Acting Head by Mr Niermann;

iii) The failure by Mr Niermann to fairly consider the claimant's application for the Head of Markets compliance role.

The tribunal also found that there were repeated denials made to the claimant that Mr Whittern had been elevated to the role, and this constituted harassment on the grounds of sex which involved gender stereotyping.

5. At a remedy hearing which took place on 3rd and 4th October 2018, the claimant was awarded compensation in the sum of £185,719.38. The respondent appealed the decision of EJ Tayler. In respect of the sex discrimination and harassment claims, it was argued that it had not been part of the claimant's case that the decisions were based on stereotypical assumptions.

6. The matter came before Soole J, sitting in the Employment Appeal Tribunal ("EAT") in April 2019. Soole J handed down his judgment on 28th June 2019. The appeal was allowed in respect of the findings made by the tribunal in respect of the discrimination and harassment claims that had succeeded below. An appeal in respect of the maternity discrimination claim was dismissed. I shall come back to the terms of the EAT's Judgment in due course.

7. The EAT made an order, following its judgment, in the following terms:

> "1. The Appeal in respect of the direct sex discrimination and sex harassment claims be allowed to the extent that they succeeded below
>
> 2. The matter be remitted for rehearing to a differently constituted Employment Tribunal
>
> 3. The Appeal in respect of maternity leave discrimination be dismissed
>
> 4. The Employment Tribunal Judgment in **UKEATPA/0240/19/RN** is set

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aside and the rule 3 (10) hearing on the 4th day of July 2019 in respect of the Remedy Judgment is vacated."

8. The claimant sought to appeal the EAT's judgment, including the remission to a different tribunal. Her application for permission to appeal to the Court of Appeal was dismissed in September 2019. In June 2020, the claimant brought a second claim against the respondent and against Société Générale. In December 2020, EJ Glennie ordered a substantive preliminary hearing in respect of that claim, to determine, amongst other matters, jurisdictional matters in respect of time limits and whether there was a TUPE transfer of the claimant's employment from the respondent to Société Générale and, if so, when and whether the second claim should be heard with the remitted claim.

9. Those matters came before EJ Hodgson at a substantive preliminary hearing between 18th and 21st May 2021. EJ Hodgson decided to revoke a number of the orders made by EJ Glennie and did not determine the TUPE issues or the jurisdictional issues on time. That revocation was the subject of an appeal which was allowed to proceed to a full hearing following the sift by Bourne J in August 2021. In September 2021, at a further four-day preliminary hearing, EJ Hodgson decided that he would determine those issues, after all, and he has now done so. The grounds of appeal in respect of his revocation of the order of EJ Glennie have, therefore, fallen away.

10. Also, at the May 2021 preliminary hearing, EJ Hodgson considered whether the second claim should be consolidated with the remitted claim. He decided that it should not. There is no appeal against that determination. In his reasons for that determination, EJ Hodgson set out a number of views in relation to the remission of the first claim, which appeared to indicate that the judge recognised the importance of clarifying the scope of the remitted hearing before that hearing took place (see paras. 5, 26, 51 and 63 of the May 2021 decision).

11. It should be said that the parties are not in disagreement as to the scope of the remitted issues; these were recorded at para. 53 of EJ Hodgson's reasons and are as follows:

"a. Allegation 1 - that the claimant was not appointed to or fairly considered for the

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Head of Markets role. It being the claimant's case that she was a senior compliance officer and was deputy of Head of Markets [Compliance]. Kevin Whittern was a Senior Compliance Officer in the same team, and was allowed to represent the team to Stephen Niermann by reporting on behalf of and back to the team over a period of May/June 2015 to April 2016, and continuing to 2017 when he reported to Jon Dyos. …

b. Allegation 2 The appointment of Mr Whittern as point person/acting head (direct sex discrimination). The claimant's case is that Kevin Whittern was appointed as the point person/acting Head of Markets [Compliance] by Stephen Niermann from a date at some time between 10 July 2015 and 12 August 2015, and there was a failure to appoint the claimant as acting head. …

c. Allegation 3 Failure to fairly consider the claimant's application for Head of Markets (direct sex discrimination). The claimant's case is that she made an application for the role of Head of Markets and attended an interview on 2 October 2015. Jon Dyos was offered the role on 15 December 2015, it being her case that Stephen Niermann had decided not to give the claimant the role before going through the interview process. …

d. Allegation 4 - Repeated denials to the claimant that Mr Whittern had been elevated (sexual harassment). It is the claimant's case that Stephen Niermann Jon Dyos repeatedly denied that Kevin Whittern was allocated to the role as deputy Head of Markets by saying it was not a deputy head role but was an informal role between June/July 2015 to [March 2018]. These denials were made orally and the last time the claimant raised this issue in writing was 21 May 2017."

12. As I have said, it is not in dispute that those were the remitted issues; what is in dispute is the extent to which the Tayler Tribunal's findings of fact stood, continue to stand or should be set aside for the purposes of the remitted hearing. The respondent made clear, in correspondence

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with the tribunal, and in further submissions, that the findings in the claimant's favour of maternity discrimination and the findings dismissing the other claims stood and were binding, and that these were, in effect, *res judicata*. But the respondent's position was that none of the other findings of the Tayler Tribunal could stand. Its submissions at the time were that:

> "As a matter of fundamental fairness, it is respectfully submitted that a fresh hearing means just that, a hearing untainted by any findings of fact made by the original tribunal. That is all the more so in circumstances where it is clear that the Tayler Tribunal made strong adverse conclusions about the Respondent and about its witnesses. The tribunal's findings of fact were clearly tainted and unreliable, both as to the facts found and as to the facts not found, i.e. it is inevitable that when constructing a judgment the tribunal will focus on those facts which support the summation and omit facts which do not, not least because they will be irrelevant, or at least less relevant, or less pertinent to the decision.
> Thus where a case is remitted to the same tribunal, it is recognised that that tribunal will be able to make use of its existing knowledge of the case and notes of evidence, see for example, **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 at 45. But where a case is remitted to a different tribunal, the tribunal must start again, see for example **Heritage Home Care v Mason** UKEAT/0273/14, **Elliott v Dorset County Council** UKEAT/0197/20 per His Honour Judge Tayler:
> "The matter will have to be considered entirely afresh … proportionality and the need to make swift progress on this case favours remission to a new tribunal which will also have the benefit of looking at the matter afresh without any baggage from the previous hearing.""

13. The claimant's position was that all findings of the Tayler Tribunal (save for the findings that the claimant was discriminated against on the basis of stereotypes or stereotypical assumptions about women, as set out in paras. 183 to 185 of the Tayler Tribunal's reasons), were binding. It appears that EJ Hodgson did not take any action in respect of those representations, nor did he respond to the respondent's request to list a case management hearing to deal with them.

14. The claimant applied to amend her claim so as to add complaints that the acts of discrimination were discriminatory on the grounds that the relevant decision-maker held stereotypical assumptions about women. That application was refused by EJ Hodgson after a telephone hearing on 30th July 2021. In doing so. EJ Hodgson made a number of observations about the scope of the remission which, again, appeared to recognise the importance of determining which of the factual findings of the Tayler Tribunal would be binding on the new tribunal hearing the remitted claim.

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15. At para. 124 of EJ Hodgson's reasons, he stated as follows:

> "124. However, there is a practical difficulty. If a party wishes to call further evidence, it will be necessary to examine the scope of that evidence, having regard to the scope of remission, in order to consider whether it should be permitted. In my view, the best way of dealing with this is to require the parties to produce, in advance, any further evidence they think is appropriate. Moreover, if any party wishes to cross-examine the witnesses who have previously given evidence, it would be appropriate to apply for a witness summons and to seek their recall. The purpose of providing the evidence in advance, and potentially having witnesses available for cross-examination, is to ensure that the hearing can proceed. If that preparation is not undertaken, it is likely that the remitted hearing will be ineffective. There has already been considerable delay, and it is not in the interests of justice to permit yet further delay."

It would appear from those remarks that the judge, at that stage, recognised the fundamental importance of clarifying which facts would remain binding on the tribunal prior to the hearing commencing. Consistent with those observations, the judge directed the parties to make any further applications as to clarification of the remitted hearing (amongst other matters) by 19th August 2021, with directions as to responses to those applications and skeleton arguments.

16. Taking up that invitation, the parties did, in fact, make further applications: the respondent applied for listing of a one-day preliminary hearing as a matter of urgency, to determine "what findings of fact from the [Tayler Tribunal] stand". The respondent also requested that an employment judge be urgently allocated to hear the remitted claim, given that EJ Hodgson had expressed the view that these issues must be determined by the tribunal that hears the case. At that stage it had been understood that EJ Hodgson had not been allocated to hear the remitted claims himself. By letter dated 23rd September 2021 from Regional EJ Wade, it transpired that EJ Hodgson was, indeed, the judge allocated to hear the case and that he would, therefore, determine the applications that had been made.

17. However, far from that prompting decisions on these matters of fundamental importance, the judge sent a decision to the parties on 8th September 2021 refusing the respondent's application for a preliminary hearing. This time the judge's reasoning was that this was a matter for the full tribunal, i.e. with judge and lay members, and that it would not be appropriate for him to deal with the matter in advance, sitting alone:

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> "25. The order sought at paragraph 14 envisages that I make a ruling, by myself, as a process of case management, on what findings of fact contained in the Tayler judgment, as remitted, are binding on a tribunal which hears that remitted claim. Such a ruling would fundamentally affect the rights of both parties to rely on findings of fact. It is common ground that at least some of the findings of fact are binding. To the extent that there is a dispute, it concerns which findings of fact are binding, and which are not.
> 26. To resolve what facts remain binding, it is necessary, first, to finally determine what matters have been remitted. Whilst I have sought, at some length, to assist the parties with this, and whilst I have set out my understanding, that provisional ruling remains subject to any submissions by the parties. The determination of the scope of remission is for the tribunal that hears the remitted claim. It is for that tribunal, as a tribunal, to determine what claims have been remitted. When that process has been undertaken, it will be necessary for the tribunal to understand, having regard to the reason for remission, what effect it has, if any, on all or any of the findings of fact of the Tayler tribunal. Put simply, the tribunal that hears the remitted claim must decide which of the findings of fact are disturbed, and which are not.
> 27. It is possible that all of the findings of fact remain binding. I have previously noted that the remission appears to revolve around matters treated as facts by the Tayler tribunal, but for which there was no evidence, or at least there was a failure to properly identify the contention that stereotypes exist and put the contention to any witness. It appears the EAT found that the Tayler tribunal either directly relied on those erroneous facts or drew impermissible secondary inferences. However, none of that, necessarily, undermines the findings of fact made by the Tayler Tribunal legitimately based on the evidence presented.
> …
> 30. I have considered whether determining what facts are binding could be some form of the preliminary issue. I find that preliminary issues can incorporate matters of evidence and findings of fact. For example, there may be a dispute as to whether certain evidence is admissible. It may be appropriate for a ruling on admissibility to be made prior to a hearing. The effect may be, ultimately, to determine the claim. That would be a preliminary issue.
> 31. Specific discrete facts are often found by way preliminary issue, for example, the date of dismissal. Whilst those facts may be disputed, they can be resolved at a preliminary hearing, by way of a preliminary issue, by a judge sitting alone. However, the more ingrained the disputed facts are with the issues in the case, the less suitable is the matter for resolution as a preliminary issue. In this case, what facts remain binding at the remitted hearing cannot be excised, as some form of preliminary issue, from the main determination of the claim. What facts remain binding is fundamental to the resolution of this claim and should not be dealt with as a preliminary issue.
> 32. It follows from what I have said that the order sought at paragraph 14 of the application is not one which can be determined as a matter of case management, and it is not one which should be determined as a preliminary issue. It must be determined by the final tribunal."

18. That decision, refusing to list a preliminary hearing to deal with the issues arising out of the remission, prompted an appeal by the respondent. That appeal was lodged on 10th September 2021, a mere two days after the judge's decision. Grounds of appeal were allowed to proceed

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on the sift by HHJ Beard and those are the grounds that come before me now.

19. It is helpful, perhaps, before dealing with the grounds in turn, to consider the order made by Soole J when remitting and the EAT's judgment in a little more detail as those are the matters that have given rise to the present state of affairs. The order, as I have said, provides that the matter be remitted for re-hearing to a differently constituted ET. The "matter" in this case may be understood to encompass the sex discrimination and sex harassment claims, in respect of which the appeal is allowed, but does not include the maternity discrimination claim, in respect of which the appeal was dismissed, or the other discrimination and harassment claims which were dismissed by the Tayler Tribunal.

20. The words in para. 1 of the order: "… to the extent that they succeeded below" appear to have caused some confusion, with the claimant contending that this means that only those specific points on which the judge was said to have erred (i.e. stereotyping assumptions), fell within the scope of the remission, with all other findings of fact remaining intact. Ms Clarke (who appears for the claimant) submits that, in the absence of any successful appeal challenging those findings of fact, the words, "… to the extent that they succeeded below", must mean that those findings of fact remain intact. I do not consider that to be a correct interpretation of the order. There were several sex discrimination and harassment claims; some succeeded before the Tayler Tribunal and some did not. The appeal against those that succeeded was allowed. However, the other decisions, dismissing the claims of discrimination and harassment, remained undisturbed. Where the order of the EAT states that, "The Appeal in respect of the direct sex discrimination and sex harassment claims be allowed to the extent that they succeeded below", it simply meant that the appeal was allowed in respect of those claims that had succeeded. There was nothing, in my judgment, to indicate that the appeal decision only affected a small part of those discrimination and harassment claims; namely, the question of the inferences to be drawn.

21. That this is a correct reading of the order is apparent from the terms of Soole J's judgment:

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"87. In the present case, it is clear that the Tribunal's decision on the sex discrimination and harassment cases did depend in substantial part upon the conclusion that the decision-taker Mr Niermann had acted upon the basis of stereotypical assumptions about women. In respect of the comparative treatment of Mr Whittern, the relevant stereotypical assumption was that women, unlike men, are too emotionally involved in office relations or politics. The conclusion that Mr Niermann acted on basis of such an assumption was held to be demonstrated by his description of the Claimant and Ms von Pickartz as 'divisive' (paras.179, 183, 184). As to the HOM role, the Tribunal concluded that the decision was influenced by the same stereotype; and also by an alleged assumption that it was a negative quality for women, but not for men, to put themselves forward for a position.
88. It is equally clear that no such case was put to the Respondent or its witnesses, whether on behalf of the Claimant or by questions from the Tribunal. The Claimant's case, including its closing submissions, did not include reference to these alleged stereotypical assumptions. Cross-examination included challenges to the credibility of the witnesses and their use of particular language (e.g. 'divisive', 'controlling', 'micromanaged' etc), in each case to challenge and test the evidence; and then to submit that the true inference was that the reason for the conduct was sex and/or maternity leave discrimination. Cross-examination on the latter did include the challenge that Mr Dyos was acting on discriminatory assumptions about a woman going on maternity leave. There is, of course a potential link between stereotypical assumptions about women on maternity leave and women generally. However, there was no other reference to the Respondent and its decision-makers acting on assumptions.
89. It is no criticism that the Claimant's case was presented as it was. The straightforward approach was taken of submitting that discriminatory inferences could properly be drawn from all the evidence, including that elicited in cross-examination. The references to stereotypical assumptions in respect of the sex discrimination/harassment claims first appeared in the Judgment.
90. In all the circumstances I conclude that it was unfair to reach these decisions without the Respondent, its representatives and witnesses being given the opportunity to challenge the existence of the stereotypical assumptions relied on by the Tribunal or their application to the decision-making of Mr Niermann. I also accept that the Tribunal's conclusion, that the assumption about emotional involvement in office politics was demonstrated by Mr Niermann's references to 'divisiveness', would itself have been open to question if the Respondent had been given the opportunity to do so.
91. In reaching these conclusions, I do not accept that the Tribunal's reliance on stereotypical assumptions can be dismissed as but a small part of a holistic decision. On the contrary, two of the identified assumptions were central to its reasoning in respect of the sex discrimination/ harassment claims. There is nothing in the critical paragraphs of the decision (183-185) which expressly states that any of the other suggested stereotypical assumptions, e.g. those said to be demonstrated by the language of 'controlling', 'obsessed with work', 'poor communicator' etc, influenced the decisions on these claims." (Emphasis added)

22. It is clear from the EAT's rejection of the contention that the tribunal's reliance on stereotypical assumptions can be dismissed as but a small part of a holistic decision, that the EAT considered that issue to be interwoven with the other issues that the tribunal needed to determine. At para.

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92, the EAT goes on to state:

> "92. I also do not consider it relevant that there is no challenge to the Tribunal's self-directions of law nor a perversity challenge to the primary findings of fact. The central appeal is that it was unfair to reach a decision on a basis which gave the Respondent and its witnesses no opportunity to challenge (a) the validity of the general assumptions which the Tribunal held to prevail or (b) the conclusion by way of inference that its decision-maker Mr Niermann was influenced in his conduct by such assumptions; and that, given the Tribunal's particular focus on these, the overall result might have been different if that opportunity had been provided. That challenge is well-founded."

23. Ms Clarke sought to rely upon this passage as underlining the point that the primary findings of fact were not to be disturbed. However, it seems to me that the passage, in fact, means the opposite and that it is no answer to the error of law on the part of the tribunal and, therefore, the unreliability of its decision, that there was no challenge to the findings of fact. The unfairness that is apparent in failing to give the respondent and its witnesses an opportunity to challenge the assumptions on which the decision was based, still remains.

24. Finally, at para. 94 of the judgment, Soole J states as follows:

> "94. I therefore conclude that the appeal in respect of the direct sex discrimination and sex harassment claims must be allowed; and that, to the extent that they succeeded below, those claims must be remitted for a fresh hearing. In circumstances where the Tribunal evidently reached strong adverse conclusions about the Respondent and its witnesses, I think it clear that the remission must be to a freshly constituted tribunal. This is just the sort of case which gives rise to the 'second bite' risks identified in **Sinclair Roche & Temperley v Heard &Anor** [2004] IRLR 763. For the reasons given earlier, the appeal in respect of maternity leave discrimination is dismissed."

25. That it is the whole of those claims that is to be remitted, and not just a few questions relating to the inferences to be drawn, is made clear by that passage and two features of it, in particular. The first is the EAT's conclusion, that the "claims must be remitted for a fresh hearing". The use of the word "claims" without any qualification is, in my judgment, telling; it means those claims of sex discrimination and harassment which had succeeded below; there is nothing to indicate that only part of those claims was to be remitted, or that only certain questions relating to those claims were to be remitted. As I have said, the only support that the claimant is able to muster for the argument that the scope of the remitted hearing was somewhat narrower is

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derived from the words, "… to the extent that they succeeded below", which also appear in para. 94 as they do in the order. For reasons already explained, those words do no more than distinguish between those claims of discrimination and harassment which succeeded and those which failed before the Tayler Tribunal. The reference to there needing to be a fresh hearing provides further support for this view.

26. I agree with the submissions made by Mr Craig and Mr Waseem (who appear for the respondent), that a fresh hearing (if directed) will, *generally*, mean just that; a hearing that considers the matters afresh with no limitation imposed by the findings of the previous tribunal. I emphasise the word "generally" because that will not always be the case: there can be instances in which a fresh hearing could be directed in respect of a certain aspect of a claim, or in respect of a limited number of issues relating to that claim. However, if that is the case, the terms of the order and/or the judgment would, ordinarily, make that clear. There is no such limitation here and, in fact, the terms of the judgment to which I have just referred make it clear that the stereotypical assumptions aspect of the decision is not something that can simply be hived off for another judge to determine, relying on the facts (or the primary facts) found by the Tayler Tribunal.

27. I was referred to various authorities by Mr Craig. These include **ILEA v Gravett** [1988] IRLR 497, **Heritage Homecare Ltd v Mason** UKEAT/0273/14 and **Elliott v Dorset County Council** [2021] IRLR 880. Whilst passages in those judgments to which my attention was drawn support the submission that, in those cases, a direction that there be a fresh hearing meant starting the hearing from scratch, I do not consider that any general rule can be laid down that, whenever the term "fresh hearings" is used, it must have that effect. Each case will depend on its own facts and on the specific terms of the EAT's judgment. But, as I have said, in this case the terms of the judgment and the order are clear that the direction that there be a fresh re-hearing meant that the tribunal hearing the remitted matter would have to start from scratch.

28. The second aspect of the judgment of Soole J which makes it clear beyond peradventure, in my

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view, that the tribunal on the remitted hearing is not to be bound by any of the findings of fact made by the Tayler Tribunal relating to the sex discrimination and harassment claims in respect of which the appeal is allowed, is the fact that the remittal was to be to a freshly-constituted tribunal. The reason given for that was that the Tayler Tribunal "evidently reached strong adverse conclusions about the respondent and its witnesses", and that this was just the sort of case that gives rise to the "second bite" risks identified in **Sinclair Roche & Temperley**. This was not just a reference to the tribunal's view of Mr Niermann but, evidently, of *other* witnesses. The implication is that the findings that formed the foundation of the tribunal's conclusion (that there was discrimination and/or harassment) were to be revisited by a fresh tribunal. If those findings are to remain undisturbed, with only those relating to the inferences being drawn to be revisited, then there would have been little justification in remitting to a freshly constituted tribunal.

29. Ms Clarke submitted that even where a large proportion of the facts were to remain undisturbed, there could be good reason for remitting to a fresh tribunal as there might be concern about the original tribunal departing from the inferences which it drew first time around. However, the criticisms made by the EAT of the tribunal in this case, it seems to me, go beyond the limited exercise involved in drawing inferences and included the fact-finding on the part of the tribunal more generally. In my judgment, the combination of the need for a fresh hearing and that such hearing be before a freshly-constituted tribunal leads to only one conclusion; namely, that the new tribunal is not bound by any of the findings of fact relating to those claims in respect of which the appeal was allowed.

30. There was also a submission that the absence of a perversity challenge by the respondent means that it is not correct to set aside all of the findings of fact made by the first tribunal simply because of an error of law identified in respect of the 'reason why' question. However, an error of law, if found to exist, can undermine the whole of a tribunal's conclusion in respect of a particular claim, even if that error is, on the face of it, confined to a smaller part of the reasoning

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process. In a discrimination case, in particular, where a holistic view of the evidence is often the best approach to take in deciding whether any inferences are to be drawn, the potential for the erroneous part of the analysis to infect the whole of the tribunal's decision is more apparent.

31. The EAT can remit a matter to be heard afresh, even if there is no challenge to the underlying findings of fact. If that were not the case then, as Mr Craig submits, many (if not most) appeals on a question of law, would have to be accompanied by a challenge on perversity grounds to all of the underlying findings of fact. I have not been taken to any authority to suggest that that would be a sensible, reasonable, or proportionate approach to take. I was taken to a number of passages in the judgment of the Tayler Tribunal which, Ms Clarke submits, demonstrate that many of the underlying facts were not in dispute. However, for reasons I have already set out, it would be very difficult, in my judgment, to attempt to 'hive off' the issue or the 'reason why' question from the findings of fact more generally. Furthermore, to do so would, potentially, not address the perception of unfairness. In this regard it is relevant that, as Ms Clarke accepts, some of the findings to which I was referred arose out of cross-examination. It is likely that, in re-exploring the 'reason why' question, the scope of the cross-examination may be more broad and that the answers elicited may be slightly different or contain additional detail that may not have been considered relevant on the first occasion.

32. The drawing of inferences is a task that is based on the primary findings of fact. A fresh tribunal, after a fresh hearing, might well reach findings which repeat some of those made by the original tribunal. However, there is no certainty that they would; aspects of the evidence may emerge differently if there is reliance on stereotypical assumptions, and that could alter the primary findings of fact, at least to some extent. The inferences that are then drawn, could be quite different. Ms Clarke stated that that difficulty could be addressed by the claimant agreeing not to pursue the stereotypical assumptions aspect of the case. However, how the case is to be presented is, of course, a matter for the claimant and her advisors, but it does not seem to me that a decision not to pursue the case on that basis would necessarily mean that a fresh tribunal,

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whose approach is not tainted by the errors of the original tribunal, would reach precisely the same conclusions.

Grounds of Appeal

33. With those conclusions as to the meaning and effect of the EAT‘s Judgment and order out of the way, I turn to the grounds of appeal. The principal ground of appeal concerns the refusal to list a preliminary hearing today to deal with the issue as to which facts continue to bind the tribunal. I note, of course, that the decision as to the listing of a preliminary hearing is a case management decision, in respect of which the tribunal has a very broad discretion. It is well-established that the EAT will only interfere with case management decisions on what are, essentially, **Wednesbury** grounds, where the discretion available to the tribunal was exercised under a mistake of law or principle or under a misapprehension as to the facts, or that took into account irrelevant factors, or failed to take into account relevant matters, or where the conclusion reached was "outside the generous ambit within which a reasonable disagreement is possible" (see **Nurani v Merseyside Tech Ltd** [1999] IRLR 184 CA). The issue, therefore, is whether EJ Hodgson, in reaching the decisions that he did, failed to take into account relevant factors, took into account irrelevant factors, or reached a decision that was "outside the generous ambit within which a reasonable disagreement is possible".

34. Mr Craig relies on six matters. Taking each one in turn, the first is that in refusing to list the preliminary hearing, the judge failed to take into account that the issue as to which findings of fact continued to bind the tribunal was one of fundamental importance. Mr Craig submits that without clarity as to that matter, the parties would be unable to prepare properly; they will not know which witnesses to call; what evidence is necessary; what disclosure to give; or which documents to include in the bundle. It is clear that the judge himself recognised the importance of the issue given that, in the May 2021 decision, he recognised the risk that the hearing would be ineffective if such preparation was not undertaken in advance of the hearing. In my

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judgment, that observation was correct.

35. This is a fundamental concern: it defines the shape of the case which is to be heard by the tribunal. Without knowing that shape, the parties will be in great difficulty in preparing properly for the hearing. Even though it is a remitted matter, as Ms Clarke reminds me, and the bundles and witness statements will already be prepared, the fact that the tribunal may be bound by previous findings of fact will necessitate considerable 'pruning' of those statements; alternatively, if they are not bound by such facts, as I have found to be the case, then the 'pruning' may be of a different nature; that is to say, excising those matters in respect of which there is no appeal or the appeal didn't succeed and perhaps adding matters such those dealing with aspects of the 'reason why' question it did not address first time around. This is a fundamental matter, relevant to the preparation of any hearing, and, to the extent that the tribunal failed to take it into account, it seems to me that it erred in law.

36. The second matter relied upon is that the judge wrongly considered that the dispute about the scope of the remission was narrow (see para. 9 of the judge's reasons sent to the parties on 30th July 2021 in respect of the listing of the claim). Clearly, as I have already described, the dispute was not a narrow one; the parties were diametrically opposed as to which facts could continue to stand or should be set aside.

37. The third point made by Mr Craig is that the judge was wrong to conclude that the issue was one that could only be dealt with or decided by a full tribunal; that is to say, a full tribunal including members. I see no principled basis on which the judge came to that view. Defining which issues are to be considered by a tribunal at a full hearing is plainly a case management matter which can, and usually ought, to be decided well before a full hearing at a preliminary hearing and can be decided by a judge alone and, indeed, by a judge different from the one who is allocated to the hearing itself. Determining questions of admissibility involves questions of law; the involvement of lay members is by no means necessary.

38. The fourth point made by Mr Craig is that the tribunal erred in thinking that this issue would

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have to be decided at an open hearing. I agree with Mr Craig's submissions that this appears to be a somewhat secondary concern. It appears that the parties were not invited to make submissions on the matter of whether it should be an open or private hearing, one way or the other. But, in any event, the judge's reasoning for disagreeing that an open hearing is appropriate is flawed. Schedule 1 of the **ET Constitution and Procedure Regulations 2013** (" the ET Rules") provides that:

> "53.—(1) A preliminary hearing is a hearing at which the Tribunal may do one or more of the following—
> (a) conduct a preliminary consideration of the claim with the parties and make a case management order (including an order relating to the conduct of the final hearing);
> (b) determine any preliminary issue;
> (c) consider whether a claim or response, or any part, should be struck out under rule 37;
> (d) make a deposit order under rule 39;
> (e) explore the possibility of settlement or alternative dispute resolution (including judicial mediation).
> ...
> (3) "Preliminary issue" means, as regards any complaint, any substantive issue which may determine liability (for example, an issue as to jurisdiction or as to whether an employee was dismissed)."

According to rule 56 of the ET rules:

> "56. Preliminary hearings shall be conducted in private, except that where the hearing involves a determination under rule 53(1)(b) or (c), ..."

39. The judge appeared to consider that, in this case, there was the determination of a preliminary issue which, therefore, had to be at an open hearing. Insofar as that was his reasoning, it was wrong because the determination as to which findings of fact from an earlier tribunal continued to bind the tribunal at a remitted hearing would not involve any determination of liability; it would simply be akin to identifying the issues to be determined and the evidence which might be relevant to that issue. In any event, that does not seem to me to be a sufficient or adequate basis on which to refuse to list a preliminary hearing to determine an issue as fundamental as this one, which could affect the parties' preparedness for the hearing.

40. The fifth point raised by Mr Craig is that which arises out of para. 6 of the tribunal's reasons, in which it is stated that the tribunal was:

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> "unaware of any application by the Claimant to adduce further evidence, whether by way of further documents or by way of witness statements."

As I have mentioned in the summary of the proceedings to date, there was such an application and, to the extent that the judge considered that there was not, it appears that he failed to take into account a relevant matter.

41. Finally, Mr Craig highlights the judge's direction that the issue as to which facts remain binding on the new tribunal should be considered at the commencement of the full hearing. For all the reasons under the first point highlighting the importance of determining this prior to the hearing, it cannot be right that that is a matter left to the first day of the hearing. The decisions taken on the determination of such a preliminary matter at that stage would affect what evidence the parties rely upon, which witnesses they need to call, and which documents are included before the tribunal. It is almost inevitable that taking the tribunal's approach would lead to the adjournment of the hearing at that stage with the consequential waste of resources and court time. To take that approach, when all parties were agreed a preliminary hearing was appropriate and where the judge himself had earlier indicated a preliminary hearing was appropriate, does appear to me to be a decision which falls "outside the generous ambit within which reasonable disagreement is possible".

42. For all those reasons the ground of appeal succeeds.

43. That leaves disposal. Before dealing with that, I should deal very briefly with the secondary ground of appeal as to the listing of the hearing next week. My decision on the principal ground of appeal means that the secondary ground of appeal is rendered academic. If it had been necessary to decide it, I would have rejected it. It seems to me that a listings decision such as this is very much one for the tribunal to take and, although there are some concerns about whether or not counsels' availability was taken into account, that availability in a long-standing case (in which a number of Counsel have come into and out of the picture) would not be a necessary or determinative factor. But, as I have said, the issue is academic in terms of disposal.

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The appeal is allowed. I have made clear in my judgment that the only findings of fact that are binding on the tribunal at the remitted hearing are the findings of discrimination that were upheld on appeal (those are at paras. 190 and 192 of the Tayler Tribunal reasons) and the findings on discrimination that were dismissed by the Tayler Tribunal (these are at paras. 186, 188-189, 191, 193, 195 and 197-199 of the Tayler Tribunal reasons).

44. Two further matters arise by way of disposal: the first is whether the hearing should continue to be listed for next week. Mr Craig submits that it would be unrealistic to expect the parties to be ready to proceed, even with the clarification that my judgment gives as to the scope of the hearing. Ms Clarke submits that there is no reason why the parties should not be in a position to be ready by next week, given that it is a remitted hearing where documents and witness statements, and so on, would already have been prepared and at which, at the very least, the principal witness, Mr Niermann, would have been given notice that he would be required at the hearing. Mr Craig acknowledges the delay that would be caused by not proceeding next week, but submits that this is not a case of just requiring Mr Niermann: there is the proposal to adduce the evidence of five witnesses (two of whom are no longer employed); witness statements would need to be edited; and a trial bundle would need to be trimmed as well. None of that work is done and parties are simply not ready for trial.

45. Whilst this would normally be a matter for the tribunal to determine, it seems that, in the circumstances of this appeal, I can express a view. I am persuaded by Mr Craig that the parties are not in a state of readiness. It is only seven days away from the hearing. Only now have the parties in this long-standing case been given any clarity as to the scope of the remitted hearing. Up until about an hour ago, the scope of the hearing could have involved anything from having to deal with just a few 'reason why'-type issues based on undisturbed primary facts, to starting from scratch and dealing with all primary facts relevant to the sex discrimination and harassment claims. As a result of my decision, the position is the latter. It is going to take, it seems to me, a considerable amount of work to ensure readiness and to ensure that the tribunal

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is not burdened by extraneous or irrelevant material for the determination of those issues. In exercise of the powers that the EAT has to deal with the matter on the disposal of an appeal in any way that the tribunal might have dealt with it, I direct that the hearing next week be vacated, and that there should be a preliminary case management meeting for the purposes of giving directions for a full hearing of the remitted claim. It is for that reason that the secondary ground of appeal is rendered academic.

46. The final point by way of disposal raised by Mr Craig is that the matter should not be remitted to EJ Hodgson. He submits that the judge has expressed trenchant views about the appropriate approach to remission, most obviously in his reasons dismissing the claimant's application to adduce new evidence, including that, essentially, all the findings of fact were binding and that there should be no further evidence. He submits that it would be inappropriate for him to hear the case at this stage.

47. Ms Clarke submits that whatever trenchant comments may have been made by the judge, they were not made in respect of any party or any witnesses and so are not such as to give rise to any perception of unfairness, which would be the usual basis on which a matter is not remitted to a particular judge.

48. Whilst there is some force in what Ms Clarke says, I have reached the view, in this case, that it would be better for the matter not to be remitted to same judge. In the course of the various case management hearings, wrong and sometimes conflicting views have been expressed as to the scope of the remitted case, most latterly that all the findings of fact were binding on the remitted tribunal and that there should be no further evidence adduced by either side. Given that that is the most recent expression of views from the judge, it seems to me that there is scope for legitimate concern that, notwithstanding the absence of any doubt as to the complete professionalism of the judge, it may be perceived to be difficult for the same judge to depart from that view and deal with the matter in the broader way that my judgment now dictates.

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