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Case No: EA-2020-000194-AT
EA-2020-000217-AT
EA-2020-000253-AT
EA-2020-000451-AT
EA-2020-000659-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 01 June 2022

Before :

HIS HONOUR JUDGE AUERBACH
MR N AZIZ
MR A D A HAMMOND

- -

Between :

MR I LAING **Appellant**

- and -

BURY & BOLTON CITIZENS ADVICE **Respondent**

- -
- -

Mr M Singh for the **Appellant**
The **Respondent** did not attend and was not represented

Hearing date: 31 March 2022
- -

JUDGMENT

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Summary

PRACTICE AND PROCEDURE

VICTIMISATION

The claimant in the employment tribunal was dismissed after a short period of employment. The respondent's case was that it had done so because of a large number of incidents, in a short space of time, in which he had badly undermined, upset or been rude to a number of colleagues.

The claimant, acting as a litigant in person, complained that he had been stereotyped as a sexually-aggressive black man, and dismissed because of both race and sex. He also claimed that he had complained, in a conversation and then an email, about the conduct of a female colleague towards him being over-personal in a manner that he considered amounted to harassment related to sex, so that he had done protected acts, and that his dismissal was an act of victimisation.

At a preliminary hearing an employment judge made deposit orders in respect of the direct sex and race discrimination claims. He did not err by so doing. At the full merits hearing, the tribunal erred by proceeding on the basis that it did not have the power to consider an application to extend time for paying the deposits retroactively. **Sodexho Limited v Gibbons** [2005] ICR 1647 applied. However, on further consideration the tribunal properly concluded that that application was unmeritorious.

The tribunal also ultimately did not err in its final approach to the question of whether four of the claimant's former colleagues should be required to attend the hearing under witness orders.

The tribunal in its reserved decision held that the claimant had not, in fact and law, made protected disclosures in a conversation with a manager, and then an email to her the next day. It also held that, in any event, if that was wrong, such disclosures were not the reason for dismissal.

Some lack of detail in the reasoning of the tribunal on these two points would not, by itself, have led to the challenge to those decisions being upheld. Nor did the fact that the respondent's counsel was a member of the same chambers as the part-time judge give rise to an appearance of bias, or need to have been disclosed by the judge. A challenge to that effect was therefore not upheld. Nor were any

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of the claimant's criticisms of the judge's conduct of the hearing as unfair to him upheld.

However, the claimant also complained of the extent to which the tribunal's decision dwelt on his conduct as his own representative during the hearing, the strong language that the tribunal used to describe this, and the way in which it drew on this in support of its conclusions on the substantive issues. He also drew on remarks made by the lay members when commenting on issues in the appeal that had been raised with them by the EAT. The EAT rejected the claimant's suggestion that he had been stereotyped (subconsciously or otherwise) by any member of the tribunal. However, standing back and considering these features in the round, the fair-minded informed observer would conclude that there was a real risk that the tribunal's view of the claimant's difficult and challenging behaviour during the course of the hearing had engendered an antipathy towards him which had unconsciously influenced the tribunal's collective decision on the two critical issues raised by the victimisation complaint. Those issues were therefore remitted for rehearing before a freshly-constituted tribunal.

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HIS HONOUR JUDGE AUERBACH:

Introduction

1. We will refer to the parties as they were in the employment tribunal, as claimant and respondent. We will start with a summary of the litigation history in the employment tribunal.

2. The claimant was employed by the respondent as an immigration adviser from 20 May 2019 until his dismissal on 4 June 2019. On 10 June he presented a claim form, acting as a litigant in person, raising complaints of direct sex and race discrimination and victimisation. A claim of breach of contract was later withdrawn. The complaints were defended. Initially the respondent was represented by its CEO, Richard Wilkinson.

3. In briefest summary, the respondent's case was that the claimant had been dismissed principally because of a number of incidents of rude and standoffish behaviour towards colleagues, undermining of colleagues whom he was shadowing during his early days in the job, and also in view of his expressions of dissatisfaction that he was not getting the type of work that he had hoped for. This behaviour was reported by his immediate manager, Gail Lyle, to her superior, Mr Malcolmson, who reported it to Mr Wilkinson, who decided that the claimant should be dismissed. The claimant's case was that he had been abruptly dismissed because he had made complaints to Ms Lyle of harassment related to sex against a colleague, Rebecca Potts-Jacobs, therefore amounting to victimisation, and because of his own race and sex, therefore amounting to direct discrimination.

4. There was a preliminary hearing ("PH") on 13 September 2019 before EJ Holmes. The judge clarified the issues, gave directions and listed a full merits hearing for 17 – 20 February 2020.

5. In his original claim form the claimant identified one claimed protected act for the purposes of his victimisation claim. Following that PH he applied to add a further claimed protected act. A proposed amended response was then tabled by solicitors who came on record for the respondent.

6. A further PH took place before EJ Franey on 2 January 2020. He permitted the claimant to amend the claim of victimisation to add the further protected act, and to amend the direct race discrimination claim to rely on his being of Jamaican heritage in addition to being black. He also

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ordered the claimant to pay two deposits of £10, as conditions of continuing with the complaints of direct race and direct sex discrimination. The claimant was required to pay the deposits within 21 days of the order being sent to him. The order was sent on 9 January. Accordingly, the deposits were payable by 30 January.

7. On 8 January 2020 the claimant applied for a witness order in respect of an employee of the respondent, Ismail Varachhia. On 27 January an order was made by EJ Franey requiring Mr Varachhia to attend the full merits hearing on day two, 18 February. However, Mr Varachhia emailed the employment tribunal on 5 February objecting. That was considered by acting REJ Warren, upon whose direction the tribunal wrote to Mr Varachhia (copying in the parties) on Friday 14 February informing him that the witness order had been suspended, he did not need to attend on 18 February, and the matter would be further discussed at the outset of the hearing on 17 February.

8. Also on 14 February the claimant emailed a letter to the tribunal applying for witness orders in respect of three former colleagues: Ms Potts-Jacobs, Emma Davies and Charlie Smythe. He had not paid the deposits ordered by EJ Franey, and in the same letter he stated that this was an oversight for which he apologised, and he applied for a retroactive extension of time to pay the deposits.

9. The full merits hearing opened on Monday 17 February 2020 before Employment Judge Grundy, Mr T D Wilson and Dr E Cadbury. Unfortunately, it began late, as the administration had sent the judge to the wrong hearing centre. At the start of the hearing the tribunal dealt with the following matters, in respect of which it gave an oral decision. First, it decided that it did not have jurisdiction retroactively to extend the claimant's time for paying the deposits. It thereupon declared that it had no jurisdiction in respect of the direct sex and race discrimination claims and that they were struck out by means of the claimant's failure to pay the deposits in time. Secondly, the tribunal declined the claimant's applications for witness orders in respect of Ms Potts-Jacobs, Ms Davies and Ms Smythe. Thirdly, the tribunal declined to revisit the earlier decision of acting REJ Warren suspending the witness order that had been granted by EJ Franey in respect of Mr Varachhia.

10. The tribunal then began hearing the claimant's witness evidence in relation to the

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victimisation claim that afternoon.

11. On the evening of 17 February the claimant wrote to the Regional Employment Judge ("REJ"). He alleged apparent bias on the part of EJ Grundy and applied for her to be replaced by a male judge. He also applied for reviews of the decisions that day in respect of time to pay the deposits, and hence the dismissal of the direct discrimination claims, and of the decisions relating to witness matters. That letter was referred by the REJ to the Grundy tribunal. On day two, 18 February, it heard the claimant's applications for recusal of the judge (although he resiled from his original request that she be replaced by a male judge) and to revisit the witness matters. It refused them all.

12. The hearing of evidence in relation to the victimisation claim continued. On day four the claimant applied for the whole tribunal to be recused. The tribunal refused that application. Evidence was completed on day four. Written submissions were subsequently tabled.

13. The Grundy tribunal subsequently produced written reasons in respect of the oral decisions given during the course of the hearing. It also in due course promulgated its reserved written judgment and reasons in respect of the victimisation claim, which it dismissed. That judgment also included a second paragraph discharging the witness order in respect of Mr Varachhia.

The Appeals

14. The claimant presented three notices of appeal, acting as a litigant in person. Following consideration by judges variously on paper and at hearings before HHJ Shanks and HHJ Tayler (at the latter of which Mr Singh of counsel appeared for the claimant under the ELAAS scheme), the overall outcome was that amended grounds were permitted to proceed to a full hearing challenging the following decisions:

(1) EJ Franey's decision making the deposit orders;

(2) Acting REJ Warren's decision suspending the witness order in respect of Mr Varachhia;

(3) the Grundy tribunal's decisions that it could not extend time for payment of the deposits, thereupon striking out the direct race and sex discrimination claims, and maintaining the

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strike-outs on day two;

(4) The Grundy tribunal's refusal to make witness orders in respect of Ms Potts-Jacobs, Ms Davies and Ms Smythe, and its refusal to reopen that decision on day two;

(5) The Grundy tribunal's decision not to require the attendance of Mr Varachhia, its refusal to reopen that decision, and its discharge of the witness order in respect of him; and

(6) The Grundy tribunal's dismissal of the complaint of victimisation.

15. The original grounds of appeal advanced by the claimant made allegations of what we will call procedural impropriety. In that connection, and pursuant to an order of HHJ Tayler, the claimant tabled a witness statement of 15 June 2021. That order allowed for the respondent then to table a statement in response, but it did not do so. However, pursuant to that order, written comments were obtained from the three members of the Grundy tribunal. Although not directed, or permitted, by HHJ Tayler's order, the claimant then filed with the EAT a further witness statement in reply.

16. The claimant was represented at the hearing of these appeals by Mr Singh, who tabled a skeleton argument and made oral submissions. The respondent did not concede that any of the appeals was meritorious. But it decided not to appear, or be represented, at the appeal hearing, and not to submit any skeleton argument. The hearing was conducted fully remotely by MS Teams and concluded without difficulty. We reserved our decision.

Deposit Orders

17. We will start with the challenge to the making of the deposit orders.

18. Rule 39(1) **Employment Tribunals Rules of Procedure 2013** provides at (1) – (4):

> "**(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.**
>
> **(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.**

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> **(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.**
>
> **(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21."**

19. In his reasons EJ Franey noted that in **Van Rensburg v Royal Borough of Kingston-upon-Thames**, UKEAT/0096/07, 16 October 2007, the EAT (Elias P) held that, in deciding whether to make a deposit order, the tribunal may have regard to the prospects of a party establishing at trial the facts necessary to make good their case, and that the test of "little reasonable prospect of success" is not as rigorous as the strike-out test of "no reasonable prospect" in what is now rule 37. He cited the following observation in **Van Rensburg** at [27]:

> **"It follows that a tribunal has greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."**

20. The judge referred also to the observation of Mummery LJ in **Madarassy v Nomura International Plc** [2007] ICR 867 to the effect that the bare facts of a difference in status and a difference of treatment between a complainant and a comparator would not without more be sufficient to shift the statutory burden of proof in respect of a direct discrimination claim.

21. The judge continued:

> **"5. In relation to direct race discrimination, I noted that the claimant initially suggested that his comparator was Ms Potts-Jacobs, but when it was pointed out to him that she was also black he suggested that he relied on a hypothetical comparator, and also that he was relying not solely on the fact that he is black, but on the fact that he is of Jamaican parentage. He said that Ms Potts-Jacobs is of African parentage. This was not something previously raised. I explained that the burden of proof will not shift to the respondent simply because of the claimant is black / of Jamaican parentage and is treated less favourably than a different person. There has to be "something more" to suggest that being black or being of Jamaican parentage has had a material influence on the decision to dismiss him. I invited him to identify what that was. In reply he said that he had come in as a solicitor accredited as an immigration lawyer and only been there a couple of weeks before he was told that allegations were made against him, and he believed there had been a stereotypical view taken that as a black person he would be sexually aggressive. He referred to the McPherson report on institutional racism and to unconscious discrimination, and suggested that it was significant that the respondent had not even followed its own policies on the probationary period. He**

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> **was unable, however, to point me to any factual evidence which supported his contention that his race played any part in the decision to terminate his employment. I accept that overt evidence of discriminatory intent is very rare, but I think that his direct race discrimination claim has little reasonable prospect of success without something more than those broad assertions.**
>
> **6. In relation to the direct sex discrimination complaint, the claimant seeks to compare himself with Ms Potts-Jacobs but it seems to me unlikely that the Tribunal will conclude that she was in the same material circumstances (as required by section 23) if it is established that concerns about his behaviour had been raised by others. I note that the email on 4 June 2019 from Mr Malcolmson which provided reasons for dismissal did refer to colleagues having raised concerns about the claimant's behaviour, even though those concerns were not in the same terms as later put in the amended response form. I also took into account the claimant's suggestion that it was significant that the respondent referred to the staff who complained about him being female. Even taking these matters into account it seemed to me that without some evidence that his sex was a factor in the decision, his case has little reasonable prospect of success. The tribunal is likely to conclude that a woman about whom such complaints were made would have been dismissed too."**

22. There were two main strands to the challenge to the deposit orders.

23. First, Mr Singh submitted that, while the threshold for making a deposit order is not as stringent as that for a strike-out order, a deposit order is still a serious step, which may act as a significant deterrent to a party. It is also essential, where the complaints are of direct discrimination, that the tribunal have fully in mind the relevant authorities concerning complaints of that type. He referred to **Tree v South East Coast Ambulance Service NHS Foundation Trust**, UKEAT/0043/17/LA, 4 July 2017, in which the EAT highlighted that, just as when considering a strike-out order, the tribunal must keep in mind, when considering ordering a deposit, that, if there is a core factual conflict, it should properly be resolved at a hearing; and the importance of engaging with how the claim is being advanced, so as to satisfy itself that there is a proper basis for doubting the likelihood of the claimant establishing the essential facts to support his claims.

24. In this case the claimant was alleging that he had been the victim of unconscious stereotyping, as the only black man in his group, as a sexual aggressor. But the tribunal made no reference to authorities, such as **Nagarajan** [2000] 1 AC 501, which discuss the phenomena of stereotyping and unconscious discrimination, and the need to proceed with particular caution in such cases. In concluding that there was little reasonable prospect of the claimant making good his factual case, the

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tribunal had neglected that the respondent, in its own response, had asserted that it was "female staff" who it said felt uncomfortable in his presence, and that the email confirming his dismissal referred to issues of "building rapport with colleagues and team work", which could be seen as a clue to the possibility that he had been unconsciously stereotyped as "not one of us".

25. Mr Singh also submitted that the judge had failed to take on board the potential significance of the claimant's claim that the respondent had not followed its own policy in respect of addressing issues that might come up during a probation period. A failure to follow such a policy, if so found, might support an inference of discrimination, but the tribunal had not taken that into account.

26. The second strand of the challenge to the deposit orders related to what Mr Singh said was the late stage of the litigation at which they were made. He accepted that the rule permits the tribunal to make a deposit order at any PH. But he highlighted the observations of the EAT in **Hemdan v Ishmail** [2017] ICR 486 at [10] and [11], that the purpose of a deposit order is to identify "at an early stage" claims with little prospect of success, and to discourage the pursuit of those claims, and not "to make it difficult to access justice or to effect a strike out through the back door."

27. In this case the orders were made on 2 January 2020. By the time they were served, they required the claimant to pay the deposits by 30 January. The trial was due to open on 17 February. The respondent was, at the same hearing, made the subject of an unless order, requiring it to produce by 31 January medical evidence to support its explanation for late compliance with earlier case management orders. But in the meantime witness statements were due on 24 January. Mr Singh submitted that the net effect was to put undue pressure on the claimant in relation to these claims, and that the timing would not serve the intended purpose of a deposit order, as described in **Hemdan**.

28. Our conclusions in relation to the appeal against the deposit orders are as follows.

29. First, it is plainly right that, in assessing the prospects of success of a given complaint, the *underlying* substantive law is the same, whether the tribunal is considering whether such a complaint has no reasonable prospect of success, or little reasonable prospect of success. It is therefore right that, when considering whether to make a deposit order in relation to a complaint of discrimination,

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the tribunal must keep in mind the particular need for care in evaluating such claims, including, as relevant, the discussion in the authorities about the phenomena of unconscious discrimination and stereotyping, and about cases in which there are core disputes of fact.

30. Nevertheless, the "little reasonable prospect" test *is* less stringent than the "no reasonable prospect" test, and the fact that the complaint is one of discrimination does not mean, by itself, that there could be no proper basis for making a deposit order, just as there may sometimes be a proper basis for striking out such a complaint. However, as **Van Rensburg** stresses, the tribunal does need to identify a proper basis for concluding that the likelihood of success is below the deposit threshold.

31. In the present case, while the judge did not specifically refer to the authorities, or the points that they make, about the phenomena of unconscious discrimination or stereotyping, we do not for that reason infer that he did not have them in mind. These authorities, and their essential points, are very well-established and familiar to employment tribunals. Furthermore, the tribunal plainly did have in mind the claimant's case that he had been the victim of stereotyping. It referred to it in terms. The judge also observed there that he accepted "that overt evidence of discriminatory intent is very rare". We do not doubt at all, therefore, that the judge appreciated that, *if* conduct as alleged by the claimant were found at trial to have occurred, that *would* be unlawful direct discrimination.

32. However, did the judge sufficiently engage with the claimant's case as to the evidential or factual basis for his complaints? We keep in mind that the task of assessing the prospects of success fell to the judge, not to us, and that, bearing in mind in particular the evaluative nature of the test that he had to apply, we must allow him a due margin of appreciation.

33. The claimant relied upon a passage in the disciplinary policy indicating that concerns about performance or conduct arising during the probationary period would be explored with the employee, setting out areas for improvement. There was a factual dispute about whether any such issues had ever been discussed. The judge noted, in the course of paragraph [5], that the claimant suggested that it was significant that the respondent "had not even followed its own policies on the probationary period." He continued: "However, he was unable to point me to any factual evidence which supported

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his contention that his race played any part in the decision to terminate his employment."

34. Mr Singh submitted that this showed that the judge did not consider the possibility that a failure to follow applicable policies, if established at trial, might be relied upon to support an inference of discrimination. However, we consider that to be an over-literal reading. A more natural reading is that the judge understood the claimant's point, but considered that this point, together with the invocation of the phenomenon of stereotyping, were by themselves a weak (though not unarguable) basis for a direct race discrimination claim, in the absence of any other factual feature or evidence on which the claimant sought to rely as supporting an inference that the dismissal was because of race.

35. Similarly, in relation to the sex discrimination complaint, the judge noted that the claimant had referred to the respondent highlighting that the colleagues who had complained were female, and the differences between how those concerns had been described in the post-dismissal email, and later in the response to the claim. But the judge continued that "without some evidence that his sex was a factor in the decision" his case had little reasonable prospect of success. Again Mr Singh submitted that the judge had wrongly failed to consider that these features might contribute to the claimant's case that his sex had (along with his race) been a factor in his treatment, even if he could not point to a valid actual comparator. But again, it appears to us that the fairer reading is that the judge considered that these features, without more, provided only a weak (though not unarguable) basis for the claim.

36. The judge plainly understood the claimant's case that he had, however, been stereotyped as a predatory black man, that discrimination is rarely overt, and the other matters that the claimant said he would rely upon in support of an inference. While the claimant highlighted that all the complainants against him were women, a dismissal for behaviour or attitudes that were regarded as sexist would not, in law, amount to treatment because of sex (see: **Serco Limited v Redfearn** [2006] ICR 1367 at [43] and [46]). The claimant had also, at the same hearing, when it was pointed out that Ms Potts-Jacobs, who he relied upon as a comparator, is black, amended his race discrimination claim to rely also on his Jamaican heritage; and the judge was entitled to evaluate the claim put that way.

37. Bearing in mind the margin of appreciation that we must allow to the tribunal, we do not think

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it was an error for it, having explored with the claimant, and duly considered, how he sought to advance his direct discrimination claims, to assess them as being not unarguable, but as having little reasonable prospect of success. This strand of the challenge to the deposit orders therefore fails.

38. Turning to the timing point, as Mr Singh was bound to acknowledge, the rule permits a deposit order to be made at any PH, which could be held at any stage of the litigation. Further, the discussion in **Hemdan** of the purposes of a deposit order was in the context of the issue in that appeal focussing on the right approach to the setting of the *amount* of a deposit. It cannot be understood as ruling out the possibility that, in a given case, a deposit order made at a late stage in the litigation might properly serve a legitimate purpose. The permutations of how litigation may unfold are far too multi-variate for it to be possible to state any hard and fast principles about that.

39. That said, we see some general force in the proposition that, when deciding whether to order a deposit, or how long to allow for payment (which the current rule leaves entirely at the discretion of the tribunal) there may be cases where the potential for interaction with other directions or features of the timetable going forward is a relevant feature which ought to be taken into account. But in this case we do not think that the features of the timing relied upon by Mr Singh meant that the orders were robbed of their potential utility, or that there was undue pressure on the claimant. A minimum of 21 days to decide whether to pay the deposits was certainly enough. The delay in promulgating the orders meant that in fact he had longer to do so. There was utility to both sides in the question of whether the direct discrimination complaints remained live being resolved in advance of the trial. The tribunal was not obliged to allow the claimant some further period to decide, after the unless order had timed out and witness statements had been exchanged.

40. For these reasons, the appeal in respect of the making of the deposit orders fails.

Extension of time to pay the deposits

41. We turn to the Grundy tribunal's decisions on the question of extension of time for compliance with the deposit orders. In its reasons for its day-one decision, the tribunal referred to the wording of

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rule 39(4), which we have already set out. It stated at paragraph [8]:

> **"The rule is mandatory. The Tribunal has no jurisdiction to hear the claim of a complaint of direct race discrimination and no jurisdiction to hear the claimant's complaint of direct sex discrimination. There are no grounds to extend time."**

42. Mr Singh, however, referred to **Sodexho Limited v Gibbons** [2005] ICR 1647 in which the EAT held that a deposit order could, as a matter of the tribunal's powers, be the subject of revocation or variation, including an extension of time for payment, notwithstanding that the time originally set for payment has expired. While that case was decided by reference to earlier rules of procedure, the reasoning and outcome on this point appear to us to hold good in relation to the current rules.

43. In this case, therefore, the tribunal had the power to grant a retroactive extension of time to comply with the deposit orders. So the first order of business should have been to consider the claimant's application for it to do so, as, had the tribunal allowed the claimant more time to pay the deposits, and had he then done so, then the possibility of a strike out would have fallen away.

44. The decision in **Sodexho v Gibbons** deals, masterfully, with a number of highly technical and complex points of procedure. The outcome on this point is not intuitively obvious, and this authority was not, it would appear, drawn to the tribunal's attention. But whilst we can therefore readily see how it fell into error on this point, the Grundy tribunal did therefore indeed err in failing to recognise that it had the power to grant the application, and hence in failing to consider doing so.

45. However, when considering the application to review its decision on this point, on day two, the tribunal, at paragraph [24] of that decision, referred to the claimant's explanation for having failed to pay the deposits on time that this was an "oversight" due to personal circumstances relating to his child, and associated stress. The tribunal referred to him being an articulate and intelligent professionally qualified person, and to the clear information about payment that came with the deposit orders. It concluded that this was "not a compelling reason to alter its previous decision."

46. We therefore invited Mr Singh's submission on the proposition that, even if it did (as we have now found) err on the **Sodexho** point, the tribunal did then in any event effectively consider the merits of the extension application on day two, and properly rejected it on its merits. Mr Singh argued that

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the tribunal failed to give sufficient consideration to the claimant's explanation for the non-payment, or to explain its conclusion that it did not find that explanation "compelling". Further, he submitted, the tribunal needed to consider the overall balance of justice and injustice if the application were either granted or refused. The explanation for why the deadline was missed was only one factor.

47. We are not persuaded by those submissions. It was not for the Grundy tribunal to revisit the merits and implications of the original deposit orders, as such. A date for compliance had also been set when they were made, and the onus was on the claimant to persuade the tribunal that circumstances or developments since they were made justified the date originally set being revisited and extended. The tribunal had the power to do this, but the interests of certainty in litigation, and justice to both sides, mean that the focus was properly on the explanation offered by the claimant, which it was for the Grundy tribunal to evaluate. The tribunal fairly described the nature and limited extent of that explanation in this case. It was fully entitled to consider that it was not sufficiently compelling to justify allowing the claimant more time to pay. That decision did not require further elaboration.

48. We conclude that, while the tribunal erred, in failing to take on board that it had the power to grant an extension retroactively, it did, in fact, on day two, consider whether there was sufficient reason to grant an extension. It is clear from [24] that, had it not made that error, the tribunal would have decided not to grant the extension, which is a decision that it would have been properly entitled to reach. The challenge, therefore, to the overall outcome, being that the claimant was not allowed more time to the pay the deposit orders, so that the direct discrimination claims stood dismissed, therefore fails.

Witness Orders – Ms Potts-Jacobs, Ms Smythe, Ms Davies

49. We turn to the matter of witness orders relating Ms Potts-Jacobs, Ms Smythe and Ms Davies. In his original written application for such orders the claimant set out the background, as follows.

50. At the PH in September 2019 these three individuals had been among the witnesses who Mr Wilkinson had indicated that the respondent would be calling. Unsigned statements from each of

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them were included in the documents bundle tabled by the respondent in December. The claimant had written to the respondent's solicitors repeatedly during January 2020 asking them to confirm which witnesses it would be calling, but that question had not been answered. The respondent's solicitors had then served signed witness statements for Mr Wilkinson, Ms Lyle and Mr Malcolmson; but Ms Lyle's statement also exhibited the unsigned "statements" of these three individuals as appendices. The claimant had written again to the respondent's solicitors on 14 February complaining that the position was unclear, asking for confirmation of whether these three would be attending as witnesses, and stating that they were required to attend, as their evidence was disputed, and that, if this was not confirmed, he would seek an order. The respondent's solicitors had then replied that it would not be calling these three as witnesses, and the claimant thereupon made his application.

51. In its day-one decision, the Grundy tribunal made the following points. First, as the sole live complaint was now of victimisation, the matter now had a more limited factual matrix, which did not require the attendance of these three people as witnesses. Secondly, the claimant had only applied the working day before the hearing, and, were they now to be ordered to attend, it would require a disproportionate amount of time to consider their evidence, and would likely lead to the hearing that week being adjourned. Thirdly, it appeared that what these individuals would say would in fact be contrary to his case. Considering also the overriding objective, the application was refused.

52. There were two main planks of the challenge advanced by the claimant in this area. First, it was said that the tribunal was wrong not to grant the witness orders. Secondly, it was said that, having refused the orders, the tribunal then unfairly permitted the claimant to be cross-examined by reference to the unsworn "statements" of these three individuals, and unfairly relied on the accounts given in those statements in its findings when deciding the victimisation complaint. It occurred to us that it might be said that the second plank went beyond the scope of the original grounds of appeal as such; but having considered the relevant notice of appeal, and the record of the orders made by HHJ Shanks, it appeared to us that this was within scope of the grounds that he permitted to proceed.

53. We take first the refusal of the witness orders (and the refusal to revisit that decision on day

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two). Mr Singh argued, citing **Dada v Metal Box Company Limited** [1974] ICR 559, that the orders should have been granted, as these individuals had relevant evidence to give, regarding the claimant's alleged poor conduct on various occasions, and the orders were plainly necessary to secure their attendance. He submitted that no other consideration was properly regarded as relevant.

54. However, **Dada** is not, and could not be, a definitive statement of the only considerations which could be relevant to a tribunal's consideration of whether to grant a witness order. Pertinently here, in a given case, the litigation history and timing of an application may also be relevant. In this case, it appears to us that the claimant, as litigants in person often do, perhaps misunderstood certain aspects of practice and procedure in this area. The first is that a party is not obliged to disclose, or commit to, who its witnesses will be, prior to service of witness statements. The second is that the fact that an opponent decides not to call an individual who a party considers has relevant evidence to give, does not entitle that party to require that they be brought under a witness order, and then cross-examined by them. Rather, a party who obtains a witness order will generally not be permitted to cross-examine that witness, unless the tribunal exceptionally grants them permission to do so.

55. Strictly, therefore, the respondent was doing nothing wrong by not informing the claimant who its witnesses would be, in advance of the actual service of witness statements. However, it is perhaps not hard to appreciate why he was uncertain about the position, given the litigation history that we have described. That background might have been argued to be relevant to the timing of the claimant's application, although there was still a delay following service of the respondent's witness statements, before the claimant followed up on the issue on the working day before the hearing.

56. But in any event we consider that the tribunal did not err in refusing these requests. The starting point is that what the tribunal had to decide was what influenced the mind of Mr Wilkinson, in agreeing to Mr Malcolmson's recommendation that the claimant be dismissed. The respondent's case was that he decided to do so, because of the various reports about the claimant's conduct, principally emanating from these three individuals, which were passed up the management chain to him (and that his decision was not influenced by the claimant's allegations against Ms Potts-Jacobs).

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57. We agree with Mr Singh that the evidence of these three, as the principal complainants, could not be said to be wholly irrelevant to an assessment of what, factually, Ms Lyle, then Mr Malcolmson, and then Mr Wilkinson were in fact told about the claimant's alleged behaviour. Had the respondent elected to call any of them as witnesses itself, in support of its case, it would have been entitled to do so. But the respondent's decision not to call as witnesses individuals who, on its case, would, had it done so, have given evidence assisting it, was a matter for it.

58. It was open to the claimant to seek witness orders himself. But if it appears to the tribunal that the evidence which a person in respect of whom an order is sought could give, is unlikely to assist the case of the party seeking the order, and/or likely, rather, to assist that of their opponent, then that is something that may be properly regarded by the tribunal as pointing against the grant of an order, having regard to the general rule against a party being permitted to cross-examine their own witness. That was the view that this tribunal plainly took when refusing the application on day one.

59. Mr Singh referred to the fact that, in its day-two decision, the tribunal also relied on the claimant's submission that part of Ms Smythe's "statement" appeared to support his case, as a further reason to refuse an order for her. We agree with Mr Singh that this strand of the day-two reasoning was, as such, not sound. But the one phrase in the statement on which Mr Singh told us the claimant relied – Ms Smythe referring to Ms Potts-Jacobs and the claimant having "started working together in an office with people who were well established" – was part of a passage which continued: "It seems to me entirely normal that she would try to form a friendship with him, given that they were both new and didn't know anyone else. She had also openly spoken about her husband and children in the office in Iain's presence." That appears to us to be a tenuous thread; and the tribunal was fully entitled to conclude that the statement as a whole supported the respondent, not the claimant.

60. We therefore conclude that the Grundy tribunal did not err in law in declining to make these witness orders (nor in declining to revisit that decision); and indeed would not have been obliged to grant them, even had the claims of direct discrimination by dismissal remained live before it.

61. We turn, then, to the second aspect of the challenge in this area, being the complaint that the

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tribunal unfairly permitted the claimant to be cross-examined by reference to the statements of these three individuals, and unfairly relied upon them in its substantive decision.

62. The statements took the form, taking them at face value, of an email from Ms Smythe to Ms Lyle of 7 June 2019, and *Word* documents giving first-person accounts of Ms Davies, and Ms Potts-Jacobs. None was signed. In her witness statement exhibiting these documents Ms Lyle stated that each of them was asked, following the claimant's dismissal, to prepare a statement in relation to their respective dealings or interactions with him. She stated that in each case the contents reflected matters that she was told orally about prior to the dismissal, and discussed with Mr Malcolmson, save for certain matters that she had not known about, referred to in passages which she had highlighted.

63. These documents could potentially be viewed, or used, in two different ways. First, Ms Lyle was, in her own statement of evidence to the tribunal, effectively adopting them (excluding the highlighted portions) as capturing accurately what she said she had been told orally by these individuals, prior to the claimant's dismissal, and had then shared with Mr Malcolmson. Viewed in that way, the relevant passages in these documents embodied *her* evidence *as to what she had been told*, in the same way as if she had used the same words in the body of her witness statement.

64. But these statements could also, potentially, have been sought to have been relied upon in a second, different way, as evidence of the truth of the accounts which they contained, that is, as accounts coming direct from the individuals themselves (in further support of Ms Lyle's account of what she had been orally told pre-dismissal, being itself true). As such they were hearsay, as the individuals themselves had not been called. Rule 41 of the **2013 Rules** provides that employment tribunals are not bound by any rule of law relating to the admissibility of evidence before the courts. This means that a party is not precluded from relying upon hearsay evidence. But such evidence must still be evaluated fairly, having regard to the circumstances in which the statement was made, any issues as to its reliability or authenticity, and that the maker has not attended as a witness, so that there will have been no opportunity for their account to be tested by cross-examination.

65. The claimant's position appears to have been that, as these individuals had not been called (or

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required to attend) as witnesses – and indeed because he questioned the authenticity of the statements – no reference should have been made to them at all. It appears that, for this reason, he strongly objected to being asked *any* questions in evidence by reference to them. However, for reasons we have explained, it is not right that no questions at all should have been permitted. But the distinction between these being relied upon merely as conveying Ms Lyle's own evidence as to what she had been told before the dismissal, and being relied upon as first-hand evidence of what actually occurred, did need to be fairly observed.

66. Was that done? So far as the management of cross-examination is concerned, the tribunal at [45] referred to a submission from the claimant that he had been unfairly pressurised and bullied, which we can infer that it did not accept. A challenge on appeal to the fairness of the tribunal's management of cross-examination, would need to be supported by appropriate material. In this case we do not have any notes or other materials documenting any specific examples of questions put or exchanges between the claimant and the judge. Further, in their statements to the EAT, the judge and one of the lay members specifically address the allegation of undue pressure by the judge and reject it. We note also that, in her comments to the EAT, the judge says that cross-examination in a proportionate manner on these documents was permitted because this was "information relied upon" by "the witness [Ms Lyle]." She also acknowledges giving the claimant a warning when he declined to answer a question about his lack of qualifying service to claim unfair dismissal, but does not refer to doing so in relation to this matter. But in any event, it would not have been wrong, if she did so, for her to have given the claimant an appropriate warning that a persistent refusal to answer fair questions could lead to an adverse inference. Indeed, that would have been fair to him.

67. We therefore do not find any sufficient basis to uphold the claimant's criticism of the tribunal's management of his cross-examination by reference to these documents.

68. However, Mr Singh also submitted that the tribunal had relied upon the content of these statements in its substantive decision in a way which was unfair. As to that, in the course of its findings of fact the tribunal, at [11], made findings about the claimant's interactions with Ms Smythe.

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It identified that its evidential source was the email which she sent to Ms Lyle following the claimant's dismissal, and also quoted passages from it which it appears to have accepted as fact. At paragraph [12] the tribunal quoted a number of passages from the statement of Ms Davies. Again it appears also to have accepted the passages in the statement to which it referred, as factually true.

69. The evaluation of the credibility and reliability of hearsay evidence was a matter for the tribunal. There is no rule, for example, that it was *bound* to prefer the evidence of the claimant to the hearsay accounts of these individuals. The references to Ms Lyle's evidence about how and when these statements had been obtained, and about which parts reflected things that she had been told by the individuals concerned prior to the dismissal, shows that it was alive to that particular aspect of how they were relied upon. It would have been better had it also said something about the approach that it took to what weight to attach to these statements as hearsay evidence of what actually happened. But its failure to do so does not necessarily mean that it erred in that regard.

70. We would, therefore, not have upheld the appeal against the decision on the victimisation claim, on the basis of this strand of the challenge taken alone. But we will return to this aspect later in our decision, in view of the other aspects of the "procedural impropriety" challenge.

Witness Order – Mr Varacchia

71. We turn to the matter of the witness order in respect of Mr Varachhia. The background was that Ms Lyle, in her witness statement, referred to Ms Davies telling her about an occasion when the claimant had rudely expressed surprise to Mr Varacchia on being told that he (Mr Varacchia) was a solicitor. When he applied for a witness order the claimant referred to his belief that Mr Varacchia would contradict that account. When Mr Varacchia emailed the tribunal about the witness order, he referred to difficulties attending, to do with his family and half term; and he stated that he had had only very limited interaction with the claimant, and did not believe he had any relevant evidence to give in relation to the allegations of discrimination or the claimant's dismissal. Upon considering that email acting REJ Warren caused the 14 February letter to be written, which we have described.

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72. The Grundy tribunal said in their day one decision that they could do nothing about the matter, given acting REJ Warren's decision, and as they had not seen the correspondence nor any statement from Mr Varacchia. By the time of their day two decision, however, they had seen Mr Varacchia's email, and expressly referred to its contents, and their conclusion, having considered it, that it would be unnecessary and disproportionate to require him to attend.

73. Mr Singh submitted that it was unfair of acting REJ Warren to have "suspended" the witness order without permitting the claimant any opportunity to comment on Mr Varacchia's application to be excused. This was then compounded by the decisions of the Grundy tribunal. In particular, Mr Singh submitted that Mr Varacchia's account in his email, tended to support the claimant's case with respect to the allegation of rudeness; but the Grundy tribunal had failed to consider that.

74. Our conclusions on these matters are as follows.

75. First, it is unfortunate that Mr Varacchia's application, made on 5 February, was not put before a judge until so shortly before the hearing itself. No doubt that is why acting REJ Warren indicated that the matter would be considered on day one. That would have been an opportunity for the claimant to be heard. However, as Mr Varacchia was also excused from attending on the Tuesday, it is unfortunate that the letter did not also indicate that he *might* yet be required to attend on another day. Further, it is of concern that the Grundy tribunal disposed of the matter on day one without seeking to get sight of the correspondence, given that the starting point was that the claimant had originally been granted a witness order, and that acting REJ Warren had in fact put the matter over to that day.

76. However, upon the claimant's further application, they did revisit the matter on day two, when Mr Varacchia's email was considered. Mr Singh made the point that they did not mention the claimant's case as to why Mr Varacchia had relevant evidence to give. As to that, it is not clear to us whether the claimant himself raised his specific point about Ms Davies' report to Ms Lyle, with the Grundy tribunal. But, in our view, even taking that into account, the tribunal would have been fully entitled to conclude that it would not be necessary and proportionate to require him to attend, given this very limited reference to him. The tribunal did refer at [12] and [57] of its substantive decision,

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to Ms Davies' account of the claimant having been rude to Mr Varacchia, but noted that this was what was "reported" to Ms Lyle; so it does not appear to have attached disproportionate weight to it.

77. Ultimately, therefore, the tribunal properly concluded that Mr Varacchia should not be required to attend as a witness.

The Decision on the Victimisation Complaint

78. In its substantive decision, the tribunal found that neither of the communications relied upon amounted to a protected act; and that, in any event, the claimant had not been dismissed because of either of them. We have already discussed some points of challenge which impinge on that decision. We now turn to the remaining areas of direct challenge to that decision, both as erroneous in substance and on the basis of what we call procedural irregularity.

The challenge to the substantive reasoning

79. Mr Singh contended that the tribunal erred in its reasoning as to whether there were protected acts, and as to whether the claimant was dismissed because of a protected act.

80. The two claimed protected acts were what the claimant said in a discussion with Ms Lyle on 3 June 2019 and then his email to her of 4 June. In the email the claimant referred to the 3 June meeting. He stated that Ms Potts-Jacobs had caused him (himself using inverted commas) "harassment, alarm and distress". He gave an account of an episode of her pursuing him on to a train (the context being that they both commuted on the same service), and then having stood over him and interrogated him. We will call that the "train incident". He also wrote that she sought to undermine him and had crossed professional boundaries, and that he feared she would now make a malicious complaint against him. He referred to sections 2 and 3 **Protection from Harassment Act 1997**.

81. The tribunal observed that that email seemed to be some sort of pre-emptive strike. They concluded that it did not contain any allegation of something that would amount to a breach of the **Equality Act 2010**. We do not consider that to have involved any error of law. Whilst section 27 of the **2010 Act** makes clear that a protected act will include an allegation of contravention of that Act,

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whether or not express, the allegation still does have to be of conduct which, if true, would contravene *that* Act. (See: **Durrani v London Borough of Ealing** UKEAT/0454/12, 10 April 2013). An allegation of harassment contrary to the **1997 Act** does not inherently do that, in particular because conduct contravening the **1997 Act** does not have to relate to a protected characteristic, whereas harassment as defined in the **2010 Act** does. The tribunal properly concluded that there was no suggestion, express or implied, in the 4 June email, that the conduct complained of in that email, read alone (in relation to the train incident or otherwise), related to race or sex.

82. Turning to the 3 June meeting, it was not disputed that the context was that Ms Potts-Jacobs had raised and discussed with Ms Lyle, concerns about the claimant's alleged behaviour towards her. At that meeting Ms Lyle then raised such matters with the claimant. In his response he raised his own concerns about Ms Potts-Jacobs' alleged behaviour towards him, including in the train incident. It was his case that he specifically made an allegation of sexual harassment.

83. The tribunal, however, found, at [18], that the claimant "did not allege sexual harassment" against Ms Potts-Jacobs during that meeting. His interactions with Ms Potts-Jacobs were "odd". When setting out its conclusions on whether there was a protected act, at [49] and [50], the tribunal said that he was complaining about Ms Potts-Jacobs being in his view unprofessional because "she did not conform to his prescripts about how people should react and behave." It described the train-incident allegations as "bizarre", and added: "When heard by Ms Lyle she did not understand any of the complaints to be an allegation of harassment on the grounds of sex." The tribunal concluded that the claimant had attempted to give a particular emphasis, to fit the statutory criteria for victimisation, but had failed.

84. Mr Singh submitted that the tribunal erred by focussing on whether the claimant's allegations seemed to the tribunal to be credible, and on Ms Lyle's subjective understanding of what he had meant by what he had said. But it should have considered what it found that he had in fact said, and whether, viewed objectively, it amounted, expressly or impliedly, to an *allegation* of harassment related to sex (which, Mr Singh noted, can include harassment by effect as well as by purpose), as

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opposed to whether the allegation appeared to the tribunal to be credible, or well founded.

85. Our conclusions on this aspect are these. As a starting point, Mr Singh is right that the issue for the tribunal was whether, objectively assessing what it found the claimant *said*, he had, expressly or impliedly, *alleged* conduct that would (if it had happened) amount to harassment related to sex, however bizarre the tribunal might consider such an allegation to have been. We note here, for completeness, that section 27(3) provides that an allegation will not be protected if it is both false and in bad faith, but that later in its decision the tribunal acquitted the claimant of bad faith.

86. The tribunal cited section 27, and used its language in this part of the decision. It should therefore be assumed to have correctly applied it, unless it is apparent that it did not. Further, it did not need to recite all of the evidence in its decision. However, it did need to demonstrate that it had sufficiently engaged with the claimant's case. This was, in summary, that he had complained to Ms Lyle that Ms Potts-Jacobs had behaved in an over-familiar way, in terms of what was (in his view) appropriate as between an attached man and an attached woman, which was, in that sense, conduct related to sex (which need not be of a sexual nature), and which he felt to be harassing.

87. We note that Ms Lyle wrote in her statement that the claimant referred to his being in a relationship and Ms Potts-Jacobs being married. The tribunal also accepted her evidence that, when discussing why he objected to Ms Potts-Jacobs enquiring about what he had done at the weekend, he suggested that it might be a cultural thing, referring to him being a black man, and her a black woman. Mr Singh, as we have noted, also emphasised that harassment can occur by effect. However, that test is not wholly subjective. An allegation of harassment by effect does still need to be factually of behaviour that could reasonably be viewed as having one of the particular types of adverse effect listed in the definition of harassment in section 26 (which the tribunal also set out). In that sense, the tribunal's view of whether the claimant's view was a reasonable one was not necessarily irrelevant.

88. Drawing these threads together, we do not think, therefore, that it can be said that the tribunal was *bound* to conclude, on the evidence that it had, that the claimant had factually made an allegation of conduct that would, if it happened, amount to harassment within the section 26 definition.

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89. The tribunal found that, in any event, the claimant's dismissal was "wholly related to his own reprehensible conduct by his difficult behaviour" with colleagues and management. Mr Singh recognised that it made a proper finding of fact that, at the time when he took the decision to dismiss, Mr Wilkinson had not seen the claimant's email of 4 June. But, he submitted, it still erred in relation to its approach to whether the dismissal was, in the requisite sense, because of the claimant having made the allegations that he did on 3 June, bearing in mind that it found that, following her discussions with Ms Potts-Jacobs, and then the claimant, Ms Lyle then spoke to Mr Malcolmson, who in turn spoke to Mr Wilkinson, who decided to accept the recommendation that the claimant be dismissed.

90. Mr Singh submitted that the tribunal had not taken into account that victimisation will be established where the protected act materially influences the impugned decision – it does not have to be the sole or main reason. Just as the tribunal had (on Mr Singh's case) not properly focussed on whether the claimant had made an allegation that amounted to a protected act during the 3 June discussion, so it had not properly addressed itself to whether that allegation, reported up the chain during the course of that day, had materially influenced the decision to dismiss, even if that was also, or even mainly, influenced by what it called his reprehensible conduct and difficult behaviour.

91. As to this, our conclusions are these. The tribunal cited section 27, and, in various other places referred to the "because of" test. It did not identify that this test does not require the protected act to be the sole or main reason for the conduct complained of, but once again this is a very well-established point. Furthermore, the tribunal appears at [25] to have accepted Mr Wilkinson's evidence that he formed the view that the claimant had a difficult personality, had not formed positive relationships and had upset a number of people in a short space of time. We note also that it did specifically find at [51] that the claimant's dismissal was "wholly" related to his behaviour and conduct.

92. Pausing there, were the only grounds of appeal against the decision on the victimisation complaint, these challenges to these aspects of the substantive reasoning, on protected acts and reason for dismissal, we would not have upheld them. Though the reasoning could have been fuller and more detailed, there is no plainly erroneous self-direction as to the law, this is familiar legal territory

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and the tribunal's conclusions cannot be said to have been perverse. However, we need to consider the challenge to this decision in the round. We turn now, then, to the second basis on which it is advanced, namely by way of allegations of what we call procedural irregularity.

Procedural Irregularity

93. We use this term compendiously to include allegations both of bias/apparent bias and of unfair conduct of the hearing itself. But, as **Serafin v Malkiewicz** [2020] UKSC 23 at [38] explains, these are conceptually two different things (though they may overlap). The present appeal raises issues of both kinds. They are in, broadly, three areas, and we will take them in turn.

94. First, subsequent to the hearing and decision, the claimant discovered through his researches that Mr Searle of counsel, who appeared for the respondent, is a member of the same barristers' chambers as the judge, who sits as such part time. Mr Singh was bound to accept that it is well established that such a state of affairs does not ordinarily give rise to an appearance of bias applying the **Porter v Magill** [2002] 2 AC 357 test. See, e.g.: **Watts v Watts** [2015] EWCA Civ 1297; **Zuma's Choice Pet Products Limited v Azumi Limited** [2017] EWCA Civ 2133. Further, although Mr Singh noted that the authorities mention certain additional features that, if present, might make a difference, there were, it appears to us, no such features at all in this case.

95. However, Mr Singh submitted that, in the context of the claimant having applied for the judge to be recused, albeit for other reasons, this aspect fell into the category of something which she ought to have disclosed, so that the parties could make a submission about it if they wanted. He referred to a passage in **Jones v DAS Legal Expenses Insurance** [2004] IRLR 218, referring to the need for the judge, in certain cases of alleged conflict, to place "the full facts" before the parties.

96. We unhesitatingly reject that submission. The fact that Mr Searle was a member of the same barristers' chambers as the judge did not give rise to any apparent bias. The position is not grey. It is clear. There was therefore no reason for the judge to make a declaration about this, and indeed it would have been wrong to raise it, since it could not have formed the basis for any proper application

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for her to be recused. The fact that the claimant applied for her to be recused for other reasons makes no difference to that at all. The passage cited to us from **Jones** is of no application here.

97. Secondly, the claimant made various allegations about the conduct of the judge during the hearing being unfair to him. These were among the matters that the judge and members were asked to comment upon. We have already addressed the matter of his cross-examination by reference to the statements exhibited by Ms Lyle. He also complained of the judge's handling of his complaint about Mr Wilkinson "smirking" while he was giving evidence; of an incident when the judge asked him (the claimant) to stop aggressively pointing his pen at Ms Lyle when she was giving evidence; and of the judge over-intervening in his cross-examination of witnesses. He also complained that the respondent's counsel was permitted to advance the "disgraceful" allegation against him as a fellow professional, that he had a "warped and jaundiced" view of women.

98. Having considered the statements of the judge and lay members to the EAT, and all of the material before us, we are satisfied that none of these allegations points to the hearing having been unfairly conducted. As to the alleged "smirking", as the tribunal recorded in its day-two recusal decision and final decision, the judge did not see it, but nevertheless asked all present to behave with decorum. As to pen-pointing by the claimant, the tribunal referred to this at [9] of its substantive decision, and the judge and lay members all said in their statements to the EAT that they saw this. It was proper for the judge to raise it, in fairness to the witness. The judge also rightly pointed out that the respondent's counsel's job was to articulate his client's case, however unpalatable to the claimant, and that his submissions should not be viewed as a statement of his personal opinion.

99. More generally, where the atmosphere is charged, as it plainly was in this case, it is part of the trial judge's job to manage the frictions and tensions that will arise. It is also often in the nature of things that a litigant in person (even one who is a qualified lawyer, as the claimant is) may find it harder to remain sufficiently detached, and/or need more guidance from the tribunal, than a professional representative, in order to ensure that cross-examination remains relevant, makes reasonable progress, and is conducted in an appropriate fashion. Management of this too is all part

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of the judge's job. If a litigant in person necessarily requires more guidance than a professional opponent, but does not welcome it, they may feel that they have been unfairly singled out; but the feeling does not by itself make it so.

100. We now come, however, to the last strand of the procedural impropriety challenge, which is mainly based on what the tribunal said about the claimant in a number of passages in its decision on the victimisation complaint, and the particular language that it used. We need therefore, first, to say something more about the structure of the decision, and the content at issue.

101. After opening sections dealing with the issues and the conduct of the hearing, the tribunal set out, at [6] to [29], its findings of fact and the essential chronology, from the claimant's application and interview, through to his dismissal, and the aftermath.

102. After describing the interview and appointment of the claimant, the tribunal continued:

> **"9. The claimant, whilst polite and co-operative at some moments, largely presented to the respondent and to this Tribunal as difficult, highly challenging and lacking in empathy. He did not accept criticism from his new employer at the time, interrupting, speaking over and undermining Ms Lyles as evidenced in the advice sessions she conducted which he had been asked to observe, (or if the Tribunal attempted to keep order, (for example when he was asked not to point his pen at Ms Lyle whilst she gave her evidence, he accused the Judge of lying)). He was often demonstrably arrogant and sometimes obnoxious within his presentation to the Tribunal. He was undoubtedly a very difficult individual to manage who did not wish to take direction from others.**
>
> **10. He perceives himself to be superior to others and of higher status, in part this may be due to his qualification as a solicitor since he showed his certificates to fellow employees without request. His skewed and uninformed perception would cause grave concern that he lacks the skills to perform the role to which he had been recruited as such a role would require understanding, sensitivity and good social skills. The respondent was rightly able to reach this conclusion about the claimant's social skills and interactions. Further the claimant's presentation as egotistical and with the air of superiority caused difficulties in his working relationships over a very short period of time."**

103. The tribunal then continued with its factual narrative of events and episodes from the claimant's first day of employment onwards, through to the events of 3 and 4 June, including the dismissal and the letter which followed it, then the gathering of statements by the respondent following the dismissal, and the presentation of the tribunal claim. The tribunal then continued:

> "**29. At the Tribunal hearing to the Judge and the members, the claimant presented as extremely egotistical and emphasized at every turn his qualification as a solicitor**

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> **and a perceived superiority. He believed he was being interrupted during his evidence when the reality was he was being encouraged not to repeat and re-visit matters the Tribunal already had cognisance of. Towards the end of his cross examination by Mr Searle he was threatening saying, " If you interrupt me again, when I'm giving an answer..... I'm giving you notice....." It was very much a situation of him trying to dominate and wishing to have his own way all of the time. At one stage his riposte was "Let me finish, do you think I'm someone from the street?" He sought to paint himself as a private person, whilst grandstanding and challenging at times and not wishing to conform to authority for most of the hearing. He seemed to have a fixation about others failing to be "professional". He was difficult to engage for much of the hearing and the applications and judgments meant that the hearing was very stop/ start. At the conclusion of the proceedings on day 4 he thanked the Tribunal for dealing with his case in what was at point a very polite manner."**

104. After dealing with the law and submissions, the tribunal turned to its conclusions. At [49] – [51] it set out its conclusions on the claimed protected acts, and that in any event the victimisation claim in relation to the dismissal failed on the question of causation.

105. The tribunal then continued as follows:

> **"52. The respondent was not in breach of its probation policy in dismissing the claimant nor in the circumstances did it breach its bullying policy and the Tribunal doubts the relevance of these matters to its ultimate decision regarding alleged victimisation but deals with them as the claimant raised them.**
>
> **53.The overbearing manner of the claimant was writ large to this Tribunal as it fell to assess him over 4 days and as it was to the respondent over less than 10 days in employment. It follows that any individual displaying his characteristics would be difficult to work alongside and impossible to manage. It is patently obvious at times he cannot rein himself in nor take direction and often responds alleging he is affronted whilst not seeing or understanding the offence he could be causing to someone else. An example was accusing the respondent's witness Mr Wilkinson of smirking and the when the Judge intervened to deal with the claimant's assertion he subsequently submitted it was insufficient to refer to "his perception", when in fact the point was the Employment Judge had asked everyone to act with decorum to diffuse the situation and in fact Mr Wilkinson, who seemed perturbed, sensibly moved to sit out of the claimant's eye line. However the claimant returned to complaining about it later in the hearing, despite Mr Wilkinson moving.**
>
> **54.The extent of the claimant's hostile animus to anything, which did not accord with his view for the majority of the time, was the Tribunal would observe and conclude very wearing and quite wearying. The Tribunal considers this must have been the experience of those working alongside him and trying to manage the claimant, both male and female, black or white."**

106. The tribunal went on, however, to reject the respondent's invitation to conclude that the claimant had made his allegations against Ms Potts-Jacobs in bad faith. It observed, at [55], that he "did make a pre-emptive strike not motivated by malice or in bad faith, but because of the claimant's own warped perceptions of his working environment." It was also invited to find that his views or

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behaviour were misogynistic. As to that, it said, at [59]: "Given his interpretations he may or may not hold misogynistic views the Tribunal cannot explicitly reach that conclusion even in the face of the recusal application made by the claimant in the first instance to seek a male Employment Judge."

107. Mr Singh submitted that the language and observations of the tribunal about the claimant's character and behaviour, in the course of this decision, were extreme and went beyond what was relevant or necessary to determine the issues in the case. The tribunal had also excessively dwelt on its view of his conduct during the hearing itself. Overall this gave rise to the appearance of bias, in the sense of the tribunal exhibiting a marked personal antipathy towards the claimant himself, rather than merely a dim view of the merits of his case. He particularly highlighted, in the passages that we have set out above, the use of the words and phrases: "sometimes obnoxious", "extremely egotistical", "perceived superiority", "overbearing", and "very wearing and quite wearying", in addition to other passages mentioned in the statement that the claimant had produced for the EAT.

108. Mr Singh also referred to the following passages in the lay members' responses to questions raised by the EAT. Dr Cadbury referred to the claimant's presentation in the hearing "which I think we accurately characterised as at times arrogant and obnoxious." Mr Wilson said this:

> **"From the outset it was obvious to me the claimant was the type of person who would appeal every decision he did not agree with and complain about the conduct of others if given the opportunity.**
>
> **The allegations contained within Mr Laing's statement therefore come as no surprise."**

109. Mr Singh said he did not contend that it was wholly off limits for a tribunal to draw on its observations of how a party had presented and behaved during the course of the trial itself. But this was an area where it needs to tread with real care, bearing in mind also that litigants in person will not always be at their best in such a setting, and the conduct of a representative is not evidence as such. He cited the summary of points approved by the Court of Appeal at [14] of **Ansar v Lloyds TSB Bank plc** [2007] IRLR 211. The language repeatedly used by the tribunal was so outspoken, and redolent of personal animosity, as to give rise to the appearance of bias, applying paragraph 11 of that guidance. It risked perpetuating the stereotyping of the claimant. He submitted that the

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observation made by Mr Wilson was particularly troubling, as it suggested that the claimant had, from the outset, been categorised as a certain "type of person", and so created the impression of a predetermined judgment having been formed at a very early stage in the proceedings, about the claimant himself.

110. Our conclusions on this aspect follow.

111. In **Serafin** at [38] the Supreme Court assumed, without deciding, the following to be a fair definition, in this context, of bias: "Bias means a prejudice against one party or its case for reasons unconnected with the merits of the case." Whether there is a real possibility of bias falls to be judged through the eyes of the fair-minded and informed observer, described in **Porter**, and whose characteristics and knowledge have been elaborated upon in other authorities.

112. In the present case the apparent bias is said, in this strand, to be evidenced not by things said by the judge during the hearing, but, principally, by things said in the course of the tribunal's decision. That being so, it is important at the outset to make the following general points.

113. It is for the tribunal, as part of its adjudicative and fact-finding task, to assess the evidence, including the credibility and reliability of the evidence of the witnesses. Further, when articulating a decision a judge or tribunal has, as necessary to resolve the issues in the given case, to make findings about what people have said, how they have behaved and why. That may require it to state frankly its conclusions about an individual's character and behaviour. There should be no place for merely gratuitous insult or unkindness. But tribunals must be free to say what they need to say in their decisions, in the appropriate words in which they judge that they need to say it, without fear or favour. It is part of their job when giving their reasons to speak as they find. While to embark on a hearing with a closed mind would be unfair, the decision, after the evidence and submissions are over, is the very place where the tribunal must come to judgment. A challenge founded on personal criticism of a party that is part of the content of the decision itself therefore faces a particularly high hurdle.

114. A feature of the present case, however, is that Mr Singh highlighted the tribunal's remarks, in its decision, about the claimant's behaviour in the course of the hearing itself. As to that, in cases

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where an individual is accused of having behaved in a certain way in the workplace, and appears to the tribunal to have behaved in the very same way in front of its eyes, it is not necessarily always wrong to take any account of this at all when adjudicating the substantive issues. But great care and caution is required, particularly where what is being referred to is the conduct of a party as their own representative. How a party behaves as a representative is not itself evidence of how they behaved in the workplace. Further, as the *Equal Treatment Bench Book* puts it (Chapter 1, para.16), a litigant in person may "lack objectivity and emotional distance from their case." So, we observe, it may be unsafe to assume that how they behave as their own representative in a hearing gives a reliable picture of how they behaved in the workplace.

115. In the present case, the theme permeating the respondent's case was that the claimant is an individual who has certain character traits, beliefs, and ways of interacting with others, that expressed themselves in persistently and repeatedly bad behaviour towards colleagues, that led to his dismissal. His case was that he had been subjected to what he called an attempt to undermine him personally and, indeed, a form of racial stereotyping. Though a qualified lawyer, he was acting in person. It is clear that, during the course of the hearing in the employment tribunal, he challenged a number of the tribunal's rulings, and the tribunal felt the need, on a number of occasions, to give him guidance or warnings, to which he was not receptive, or which he simply did not accept. Matters of that sort were properly recorded and documented in the tribunal's decisions, as such.

116. But even taking all of that into account, we do find some cause for concern in the content of this decision, having regard to three related features, and the overall impression created. The first is that there are indeed repeated references to the way the claimant behaved during the course of the hearing, including when wearing the hat of representative, not just when giving evidence. The second is that some of the language, including phrases highlighted by Mr Singh, is indeed particularly strong and personalised. The third is that there is an intermingling at several points, of the tribunal's assessment of how he behaved in the workplace and how he behaved before the tribunal, for example at paragraphs [9] and [10], which are interposed into the chronological narrative and blend findings

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about the claimant's behaviour in these two contexts, and at [54] where the tribunal appears to draw directly on his behaviour in the hearing in support of its view of how he must have behaved in the workplace. Again at [57] the tribunal refer to his behaviour in the workplace exhibiting "a fundamental inability to accept direction as witnessed by the tribunal".

117. Because the live complaint was of victimisation, even if the tribunal concluded that the decision to dismiss was mainly influenced by Mr Wilkinson's belief about how the claimant had behaved towards colleagues, that would not, of itself, preclude a finding, if there *was* a protected act on 3 June, that this also materially influenced the decision to dismiss. But the foregoing combination of features of the tribunal's reasoning risks creating the impression in the mind of the fair-minded informed reader that the tribunal may, even if unconsciously, have allowed the very poor impression created upon it by the claimant's conduct in the course of the hearing to drive their conclusions.

118. That observer would also, nevertheless, take into account that the tribunal recorded in its decision that it took a number of positive steps to allow the claimant some latitude as a litigant in person. It also specifically addressed the risk that it might be influenced by his having made recusal applications, and the contents thereof; and it did not accede to the respondent's invitations that it find that the claimant had acted in bad faith, and to pronounce on whether he held misogynistic views. The tribunal may therefore be said, in relation to these aspects, to have taken care not to allow itself to be influenced by any antipathetic feelings engendered by the claimant's behaviour during the hearing.

119. However, as noted, Mr Singh also placed particular reliance on the remark of the lay member Mr Wilson, in comments to the EAT which we have earlier cited. The three members of the EAT have carefully reflected on the impact which that might be said to have on the fair-minded and informed reader. That observer would, it seems to us, know, and take into account, that, at the very start of the hearing the claimant did make a number of applications, and after the tribunal's day-one rulings all went against him, wrote to the acting REJ overnight applying for the judge to be replaced, and that there were instances during the course of the hearing of his resisting proper direction or

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guidance from the judge, and that there was a further recusal application later in the week.

120. To be quite clear, against that backcloth, we do not consider that the fair-minded informed observer would entertain any concern at all about the possibility of there having been some form or subconscious stereotyping on the part of any member of the tribunal. Rather, the natural reading of the lay member's remarks is that they are an unvarnished comment on these features of the claimant's actual conduct from the outset, and during the course, of the four-day hearing.

121. However, what the three members of the EAT considering this appeal have concluded is that the fair-minded and informed observer, reading the decision in the round, and taking account of all the features that we have described, would be left with a concern that there was a real possibility that the way in which the claimant behaved from the very outset of the hearing, engendered, unconsciously, a lack of sympathy for him and his case, which gave rise to a form of unconscious confirmation bias, resulting in a final collective analysis of the key issues of whether what was said on 3 June amounted to a protected act, and, if so, whether it materially influenced the decision to dismiss, that was less rigorous and disciplined than it needed to be.

122. With real regret we feel bound also to conclude that that observer would consider that such concerns are not allayed by the particular comments of the lay member on which Mr Singh placed particular reliance, but that they chime with those concerns. Nor would that feeling be assuaged by the fact that the comments of all three tribunal members fully address and answer the claimant's criticisms of the tribunal's conduct and management of the hearing itself, as we have described.

123. To repeat, it appears to us that it was the claimant's own conduct, and the behaviours that he exhibited, during the course of the hearing before the tribunal that led to this effect. As we have described, we reject his particular criticisms of the way in which the judge managed the hearing and particular incidents during the course of it. That was not unfair to him. But it is perhaps when a litigant in person has behaved particularly challengingly during the course of a hearing, that the members of the tribunal need to be particularly on their mettle to ensure that they do not allow this to influence their reasoning process on the critical issues when it comes to their decision. It seems to us

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that, standing back, the fair-minded and informed observer would conclude that, unfortunately, there was a real possibility that that is what happened in this case.

124. For this reason we have concluded that the tribunal's substantive decision on the victimisation complaint is not safe, and the appeal against it must be allowed.

Outcome

125. Accordingly, the overall outcome of these appeals is as follows:

(a) The appeal against the deposit orders fails. The Grundy tribunal's ultimate conclusion that the claimant's application for more time to pay was not meritorious stands, and hence the dismissal of the direct race and sex discrimination complaints stands.

(b) The ultimate conclusions that Mr Varacchia, Ms Potts-Jacobs, Ms Davies and Ms Smythe were not required to attend as witnesses at the hearing of the victimisation complaint stand.

(c) The substantive decision of the Grundy tribunal dismissing the victimisation complaint is quashed.

126. As we have noted, it cannot be said that only one decision on the victimisation complaint was possible. Accordingly, we cannot substitute our own decision. Rather, the matter must be remitted to the employment tribunal for fresh hearing and determination of the victimisation complaint. In light of our decision, we will direct that the rehearing should be before a different panel of judge and members.

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