Neutral Citation Number: [2024] EAT 180

Case No: EA-2022-001021-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 November 2024

Before :

THE HONOURABLE MR JUSTICE BOURNE

- -

Between :

MS SUE KEMSLEY

Appellant

- and –

CAMBRIDGESHIRE COUNTY COUNCIL

Respondent

- -

JAMES WILLIAMS (acting pro bono on a **DPA basis**) for the **Appellant**
OLIVER LAWRENCE (instructed by **Pathfinder Legal Services**) for the **Respondent**

Hearing date: 6 November 2024

- -

JUDGMENT

SUMMARY

SEX DISCRIMINATION, PRACTICE & PROCEDURE, AGE DISCRIMINATION, HARRASSMENT, & VICTIMISATION

Where most of an Employment Tribunal's written reasons were copied from the Respondent's witness evidence or written submissions and there was no reference to the contents of the Appellant's witness evidence or written submissions, on the facts of this case the EAT was unable to conclude that there had been a proper judicial evaluation of the issues.

A finding that none of a large number of incidents amounted to a detriment for the purpose of a victimisation claim under section 27 of the Equality Act 2010 was insufficiently reasoned, not least where the Respondent had conceded that several of the incidents did amount to detriments.

The Employment Tribunal also failed to state its ruling on (1) a contention by the Appellant that a manager of the Respondent had victimised her by dismissing her under the influence of "tainted information" from another employee, (2) a contention that an offensive email amounted to harassment on grounds of sex, where the alleged harasser on one or more other occasions referred to the Appellant's sex in a way she found derogatory (having also erred by finding that she did not see the email, when there was uncontested evidence that she did) and (3) contentions of fact by the Appellant which were relevant to her claim of age discrimination.

Topic Numbers: 4, 8, 29, 32, 33

THE HONOURABLE MR JUSTICE BOURNE:

Introduction

1. This is an appeal from a decision of the Employment Tribunal (EJ Postle sitting with lay members) ("the ET") dated 4 August 2022, dismissing the Appellant's claims. An application for reconsideration was dismissed on 7 February 2023. I will now summarise the background facts as the ET found them. Some of those facts remain in dispute and, as will be seen below, this case is to be remitted to a differently constituted ET which unfortunately will have to consider the facts anew and make its own findings.

2. The Appellant was employed by the Respondent from February 2007 as a data inputter for its Archives Service. She was one of two part-time data inputters (the other was a Miss Mintram) who were recruited to carry out work in preparation for the Service to move to new premises in 2008, and initially they were therefore given fixed term contracts. For various reasons the move did not actually happen until 2019. The fixed term contracts were renewed and by about 2010 the two data inputters found themselves on permanent contracts.

3. During some periods of her employment the Appellant was line managed by a Mr Anderson. There were aspects of his behaviour which she found objectionable and the ET found that their working relationship had broken down by November 2014. On 29 March 2018 she indicated in an email to the Archives Manager, Mr Akeroyd, that she would raise a grievance (alleging discrimination) if she had to be line managed by Mr Anderson. In her claim she relied on this as a protected act for the purposes of section 27 of the Equality Act 2010 ("the 2010 Act"), on the ground that she had made an allegation that Mr Anderson had contravened the 2010 Act by reference to her protected characteristic of sex. The Respondent admitted in its Response that it was a protected act.

4. In an email dated 12 July 2018 to an HR Manager, Ms Patrickson, Mr Akeroyd indicated that the two data inputter roles would come to an end in the summer of 2019 when the planned move of the Archive department finally took place. Ms Patrickson replied on the same day, confirming that they had talked about the posts and that there was a reduced requirement for the two employees to carry out work and considered various redundancy scenarios.

5. Mr Akeroyd received an email from Mr Anderson on 10 August 2018, suggesting that the data inputter roles were no longer required and expressing concerns about the Appellant's behaviour and her work. Other emails to and from HR and from the Assistant Director, Christine May, refer to the difficult relationship between the Appellant and Mr Anderson. Thereafter, a formal consultation was launched on 20 June 2019, setting out proposals including the move to the new Cambridgeshire Archive Centre at Ely and the removal of the two data inputter posts, along with those of four fixed-term packaging assistants.

6. The Appellant submitted a response on 4 July 2019, stating that her role of data inputter had been mis-represented in the consultation document and that much of her recent work was unrelated to the move. After further discussions, Ms May concluded that both of the data inputters' roles still consisted of data entry and that the fact of the Appellant carrying out some other tasks did not change the nature of her employment. She also noted that the

particular budget that funded the two data inputter roles would no longer be available once the archive service moved to the new building. The two data inputters and the packaging assistants were placed under formal Notice of Redundancy on 31 July 2019.

7. On the same date the Appellant submitted an appeal, contending that it was not a genuine redundancy situation, she had been victimised and data input had been only a small proportion of her work in recent years. However, on 5 August Ms May advised her that this did not meet the criteria for a redundancy appeal. On 17 September there was a meeting between the Appellant, a Ms Harriman of HR and Ms May. It covered the redundancy and Mr Anderson's behaviour, and the Appellant's belief that there was a link between her making a complaint about Mr Anderson and her being made redundant. Nothing was resolved at the meeting. The Appellant's employment ended on 30 October 2019.

8. The Appellant brought ET claims. These, as amended at case management stage, were for unfair dismissal, victimisation on grounds of her protected act, direct age discrimination in the form of the dismissal and harassment relating to sex in the form of an offensive email from Mr Anderson to Mr Akeroyd describing the Appellant as "sour and bitter".

9. By her victimisation claim the Appellant alleged that various incidents, set out in a long list of issues, amounted to detriments inflicted on her by Mr Anderson, Mr Akeroyd and/or Ms May because of her protected act.

10. The Respondent submitted that most of the allegations against Mr Anderson involved "ordinary exchanges between colleagues who happen to have a difficult relationship", and that only four of them were actually allegations of anything amounting to a detriment. It denied that any of the allegations against Mr Akeroyd amounted to a detriment. It did not deny that the three allegations against Ms May (bracketing the Appellant with a particular co-worker in the pre-redundancy consultation, not considering her appeal and dismissing her) amounted to detriments.

11. The hearing took place over 6 days in January 2022. The ET deliberated in chambers on 23 February 2022. The written reasons were signed on 4 August 2022 and were sent to the parties a week later, some 6 ½ months after the last day of the hearing. By its decision the ET dismissed all the claims.

12. In relation to victimisation, it found that there was no evidence that Mr Anderson knew of the protected act consisting of her emails on 29 March 2018 or knew that these contained an allegation of discrimination relating to a protected characteristic. It also found that none of the allegations against Mr Anderson were genuinely of detriment. Instead they were "interactions between the Claimant and Mr Anderson showing that both parties disliked each other, but it could not reasonably have been said that this had disadvantaged the Claimant".

13. As for Mr Akeroyd, the ET similarly held that none of the allegations were of detriments. Instead these were "acts by Mr Akeroyd who was conflict averse and simply doing his job". It also found that there was no evidence that Mr Akeroyd was motivated by any protected act by the Appellant. In that regard the ET also said that it could not make such a finding against him because the allegation of motivation had not been put to him in cross-examination.

14. As for Ms May, the ET found that she did not know about the protected act until the meeting on 17 September 2019, which post-dated all the alleged detriments.

15. The single allegation of sexual harassment by Mr Anderson, by sending an email to Mr Akeroyd describing the Appellant as "sour and bitter", was rejected because (1) the Appellant did not see it and (2) it was not related to sex.

16. The allegation of age discrimination was rejected because (1) it was not put to the Respondent's witnesses in cross-examination and (2) it was clear to the ET that the only reason for the dismissal of the Appellant, along with her much younger colleague, was redundancy, and that the subsequent recruitment of a new (and younger) Archives Assistant after the dismissal was irrelevant to the claim because the Appellant was not an Archives Assistant.

17. In respect of unfair dismissal the ET found that there was thorough and meaningful redundancy consultation from about a year before the event, with which the Appellant did not engage. It ruled that the redundancy was genuine and the process was fair.

18. By her grounds of appeal (with some paraphrasing) the Appellant contends that:

    1. The ET gave inadequate reasons, these being copied almost entirely from the Respondent's witness statements and closing submissions.

    2. The ET's decision was perverse in that it was based almost entirely on the Respondent's witness statements and closing submissions.

    3. The ET erred in finding that the Appellant was not subjected to detriments (other than dismissal) for the purpose of section 27 EA 2010, in particular where this had been conceded by the Respondent.

    4. [this ground was dismissed on withdrawal]

    5. The ET failed to decide an issue of whether Ms May, who was not aware of the protected act, in deciding to dismiss the Appellant was influenced by her colleague Mr Akeroyd, who was aware of it.

    6. The ET made a perverse finding that the email describing the Appellant as "sour and bitter" could not have amounted to harassment related to sex because the Appellant did not see it, as the email was in fact provided to her in response to a data subject access request.

    7. The ET made a perverse finding that Mr Akeroyd never told Mr Anderson about the protected act and therefore that there was no prima facie case of victimisation by Mr Anderson.

    8. The ET wrongly decided that the fact that the Appellant was not an archives assistant meant that the Respondent's failure to consider her for a new role of archives assistant could not amount to age discrimination.

The inter-relationship between the grounds of appeal

19. The Appellant is represented on this appeal by James Williams of counsel, acting pro bono. I am grateful for his assistance. He relies on grounds 1 and 2 to found a submission that no part of the ET's judgment can stand and that the case must be remitted in its entirety to a differently constituted ET.

20. Mr Williams' key submission on this appeal is that the ET's decision was copied almost entirely from the Respondent's evidence and submissions, and it made no reference to the Appellant's submissions and almost no reference to her evidence. I shall return to the detail of that submission under grounds 1-2 below.

21. When ordering this appeal to proceed to a full hearing, HH Judge Tayler commented that grounds 3 and 5-8 "are sufficiently arguable to progress as they are to an extent interrelated to the two principal grounds as being dependent on findings of fact made by the Employment Tribunal and the extent to which the claimant's evidence and submissions were considered".

22. Mr Williams submitted that grounds 3 and 5-8 are examples of how the ET's incorrect approach of adopting the Respondent's submissions and ignoring the Appellant's submissions, which are the subject of grounds 1 and 2, led it into error on specific significant issues in the case.

23. Having considered all the grounds, I believe it will be most helpful to set out my conclusions on grounds 3 and 5-8 first, and then to move to my conclusions on the over-arching grounds 1 and 2.

Ground 3

24. Section 39(4) of the 2010 Act provides:

> "(4) An employer (A) must not victimise an employee of A's (B)—
> …
> (d) by subjecting B to any other detriment."

25. Victimisation is defined by section 27:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act."

26. Throughout these proceedings the Respondent has accepted that, applying section 27(2)(c) and (d), the Appellant carried out a protected act when she emailed Mr Akeroyd on 29 March 2019, stating that she would raise a grievance of discrimination on grounds of sex "if she was forced to work with Richard Anderson".

27. It was therefore necessary for the ET to decide whether she was subjected to any "detriment" and, if so, whether it was because of the protected act.

28. It is common ground that a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage, but that an unjustified sense of grievance alone is not enough to establish detriment.

29. It is also common ground that, to establish liability, the Appellant would have to show that the protected act was a reason for the treatment, but not that it was the only or principal reason for it. That, however, is a separate issue from the nature of a detriment.

30. In its closing submissions to the ET, the Respondent admitted that the following were allegations of detriments:

    (1) An email from Mr Anderson to Mr Akeroyd on 5 April 2018, calling for the Appellant's dismissal and accusing her of, for example, creating an unpleasant situation for other workers.

    (2) An email from Mr Anderson to Mr Akeroyd on 10 August 2018, again proposing the deletion of the Appellant's role, criticising the time taken by her to get work done and describing her as "sour and bitter" and as having a lack of ability.

    (3) In an angry exchange on 28 August 2018, in the presence of another worker, Mr Anderson told the Appellant that she had serious psychological problems to address and should see a psychiatrist.

    (4) On 16 November 2018 Mr Anderson told the Appellant that her new top was "revolting".

31. Among the many allegations against Mr Anderson, another which has been frequently referred to is that on 21 June 2017 he picked up her backpack and threw it down on a table. That, however, was not admitted to have amounted to a detriment for the purposes of section 27.

32. In respect of Mr Anderson, in words very largely originating from the Respondent's submissions, the ET said:

> "48. The Tribunal, when considering the list of the detriments, took the view that the allegations against Mr Anderson do not amount to allegations of detriment. Particularly, (following the list of issues):
>
> [there follows a list of the 4 allegations referred to at [30] above]
>
> 49. The Tribunal repeats, an unjustified sense of grievance cannot amount to a detriment. Most of the alleged detriments are interactions between the

> Claimant and Mr Anderson showing that both parties disliked each other, but it could not reasonably have been said that this had disadvantaged the Claimant. The Tribunal were of the unanimous view that they were ordinary exchanges between colleagues, at work, who have a different relationship."

33. It is notable that the four instances which the Respondent conceded did refer to detriment were now described as "particularly" being examples of what was not detriment.

34. The allegations against Mr Akeroyd included incidents in which the Appellant said that, in internal communications about the impending redundancy, he misrepresented the nature of her work, omitting information about tasks which were not connected with the forthcoming move of premises. As to these, again in words largely taken from the Respondent's submissions, the ET said:

> "50. Dealing with the allegation against Mr Akeroyd, the Tribunal notes that the Claimant did not put the allegation that Mr Akeroyd subjected her to any detriment because of a protected act, if this is correct therefore, it would not be open to the Tribunal to find that Mr Akeroyd treated the Claimant in the way that he did because of her protected act.
>
> 51. Even if that were wrong, none of the allegations against Mr Akeroyd can amount to a detriment, these being (following the List of Issues):
>
> [there follows a list of the 11 allegations relied on.]
>
> 52. Again, the Tribunal were of the unanimous view that these were acts by Mr Akeroyd who was conflict averse and simply doing his job. There is no evidence that they were motivated by the fact that the Claimant had done a protected act."

35. The allegations against Ms May include a failure to consult the Appellant properly about the nature of her work, deciding to dismiss her for redundancy and ruling that her appeal against that decision was not valid and need not be entertained.

36. The ET, again in wording largely originating from the Respondent (though some clerical errors have crept in, particularly in [55]), said:

> "53. With regard to the allegations against Miss May, the last victimisation allegation takes aim at the redundancy process and the redundancy decision and they are as follows, (using the List of Issues):
>
> [the 3 allegations are set out]
>
> 54. The Tribunal is clear that Miss May did not know about the Claimant's protected act until their meeting on 17 September 2019. Concerns were, for the first time, raised at this meeting between the parties (page 478) by which time all the alleged detriments had already taken place.
>
> 55. Insofar as the Claimant's allegation that she should not have been bracketed with Miss Mintram in the redundancy process, the Claimant whilst working in the Shire Hall, whereas Miss Mintram was working from home. It is clear the

> Claimant's employment as it went on, was allocated data entry tasks which were perhaps more complicated than those that were given to Miss Mintram.
>
> 56. The fact of the matter remains, data entry remained. The Claimant's job title remained throughout her employment and at no time during her employment was the status of her job or title amended.
>
> 57. Miss May found that the Claimant had not presented a valid redundancy appeal as it did not fit the criteria required to launch an appeal, page 462. Notwithstanding this, Miss May held the meeting with the Claimant on 17 September in order to address the concerns contained within the Claimant's appeal document, pages 409- 412.
>
> 58. Finally, it was patently clear the Claimant's position was always tied to the move of the Archives Service. In the documentary evidence Mr Akeroyd spelt it out on several occasions long before the Claimant's protected act. The Claimant's position was funded from a different costs centre to, that of the Archives Team, namely the Archives Service Development Fund. The funding of the Claimant's position came to an end when the Archive Service moved to its new site.
>
> 59. The Claimant's dismissal, therefore, had nothing to do with any protected act."

37. Mr Williams submits that the ET's conclusion – that none of the allegations against Mr Anderson, Mr Akeroyd or Ms May amounted to allegations of detriment – was perverse and is further evidence that the ET simply ignored the Appellant's case. Many of the relevant incidents, such as the sending of particular emails, indisputably happened, so the explanation cannot be a rejection of her evidence about them. The statutory concept of a detriment is a simple one. Many if not all of the specified incidents obviously fall within it, and four of them had been conceded.

38. Both parties' counsel also cited the well-known requirements stated by Bingham LJ in *Meek v City of Birmingham District Council* [1987] IRLR 250 CA:

> "It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsmanship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises; and it is highly desirable that the decision of an Industrial Tribunal should give guidance both to employers and trade unions as to practices which should or should not be adopted."

39. The Respondent was represented here, and below, by Oliver Lawrence of counsel. In response to ground 3, he points out that the ET was not bound by concessions that the Respondent made, and that the Appellant fully argued her case before the ET made its decision. He also contends that if ground 3 does reveal any error, the error made no difference to the outcome because the ET also found, in any event that the protected act, was not a reason for the infliction of any detriments.

40. As to the matters conceded in the Respondent's closing submissions, it is true that an ET is not bound by one side's concession on a matter like this. But if a represented party makes a clear concession, it is hard to see how the ET's decision to reject the concession could be *Meek*-compliant without containing any explanation of why the concession was judged to have been wrongly made.

41. More fundamentally, however, in my judgment, the ET was obviously wrong to decide that none of the allegations was an allegation of detriment. The definition of detriment is a wide one and not difficult to satisfy. The notion that none of the relevant matters could reasonably be viewed as being to the Appellant's disadvantage is incomprehensible.

42. That applies particularly to many of the allegations against Mr Anderson to which I have referred above. On the material before the ET, it is difficult to see how calls for the Appellant to be dismissed, or personal insults addressed to her, were not detrimental.

43. At least some of the allegations against Mr Akeroyd are more debatable. However, the ET gives no reasons for concluding that they were not detriments. The reasoning goes straight to paragraph 52 which deals with the issue of motivation/causation, not detriment.

44. In the case of the allegations against Ms May, it is impossible to understand why dismissing the Appellant and rejecting her appeal were adjudged not to be detriments.

45. Overall, it may be that some of the allegations in the claim did not satisfy the test, but it is clear that a number of them did.

46. Whilst I cannot be sure why the ET strayed into error on this issue, the risk of such an error is logically increased in a case where a tribunal adopts one side's submissions and does not set out its own reasoning. In this case, when adopting the Respondent's case the ET would appear to have simply overlooked the fact that it contained the concession to which I have referred.

47. Ground 3 therefore has merit, subject only to the contention that the victimisation case was bound to fail on the causation ground. I return to that question at the end of this judgment.

Ground 5

48. As I have said, one of the Appellant's claims was that Ms May's decision to dismiss her was a detriment caused by her protected act. She maintained that claim even though it seems that Ms May did not know of the protected act.

49. The Appellant contended that this came about because Ms May was influenced by Mr Akeroyd, who did know of the protected act, thereby establishing a causal link. This, she says, is what is sometimes referred to as a "tainted information" case.

50. A tainted information argument succeeded in a claim for automatic unfair dismissal under section 103A of the Employment Rights Act 1996 ("ERA 1996"), *Jhuti v Royal Mail Group Ltd* [2019] UKSC 55, [2020] ICR 731. There the claimant's line manager, motivated by the fact that she had made a whistleblowing disclosure protected by section 47B of ERA 1996, placed her in a performance improvement plan. She went on sick leave, never to return.

Eventually a more senior manager who did not know about the protected disclosure dismissed her because she had not met required performance standards despite the improvement plan and was considered unlikely to do so in future. The Supreme Court decided that, where the line manager had deliberately hidden the real reason for moving to dismissal, namely the protected disclosure, behind a fictitious reason of poor performance, and a senior manager then adopted the fictitious reason in good faith, the protected disclosure was to be regarded as the company's real reason for the dismissal.

51. In her written closing submissions the Appellant said:

> "Dismissal as victimisation
> 16. Before my protected act there were references to the possibility of removing the posts of data inputter, but the protected act does not have to be the only or even the main factor in a detriment. Almost immediately after my protected act Mr Anderson called for my dismissal and this was taken up by Mr Akeroyd. The determination to dismiss me, rather than explore ways to mitigate the redundancy or have a meaningful consultation, were influenced I believe in a more than trivial way by my protected act.
>
> 17. Ms May did not know about my protected act until at least 1 July 2019 and possibly later, as Ms Harriman was not certain she shared my email with her [MH 15]. Mr Akeroyd was however influencing Ms May, in particular by giving her a misleading account of the nature of my role ("Christine spoke to Alan to clarify Sue and Michelle's roles and to understand the nature of work they were doing" [MH 19]). He was someone in the hierarchy of responsibility who had a hidden reason (my protected act) for my dismissal. [Royal Mail Group Ltd (Respondent) v Jhuti (Appellant) [2019] UKSC 55 paragraph 62]"

52. The list of issues at the ET and the Appellant's witness statement also contained references to Mr Akeroyd hiding the true state of affairs from Ms May.

53. The judgment does not refer to this argument at all.

54. Mr Williams submits that this contention was squarely before the ET and needed to be determined.

55. In response, Mr Lawrence submits that this ground goes nowhere, because the ET found, and was entitled to find, that in committing the allegedly detrimental acts (which included "hiding the reason why the Claimant refused to work with Mr Anderson in his email to Miss May on 14 June 2018") Mr Akeroyd was not motivated by the Appellant's protected act. In the ET's words, he was "conflict averse" and, in the words of the Respondent's closing submissions which the ET adopted, he was "simply doing his job". That being so, he submits, the ET was not obliged to engage with the speculation that Mr Akeroyd might have influenced Ms May.

56. Mr Lawrence adds a second reason to arrive at that conclusion, namely that the allegation of subjecting the Appellant to a detriment because of her protected act was not put by her to Mr Akeroyd in cross-examination.

57. Mr Lawrence further submits that the *Jhuti* approach in any event cannot be applied to claims under the 2010 Act, because of a ruling in *Reynolds v CLFIS (UK) Ltd and others*

[2015] EWCA Civ 439 that in a discrimination claim, the motivations of separate individuals must be considered separately.

58. Overall, he submits that this is an example of the need not to subject ET decisions to over-scrutiny, and that one should not assume that a tribunal did not consider every point which is not mentioned in its judgment.

59. It seems to me that the ET erred in law by failing to identify and determine a contention of fact and law which had been clearly and coherently advanced before it. Even if it had taken the view that *Reynolds* supplied a complete answer to the contention, that was precisely the sort of explanation which a judgment can and should contain.

60. Nor could the omission be justified or cured by reference to a failure to put the point in cross-examination. If an unrepresented party takes a point in closing submissions which they did not put to a witness in the witness box, that is a situation for the ET to case-manage. At the very least, reasons would be needed to explain why the situation could not be remedied in some way. It is not satisfactory for a tribunal simply to announce, as they did at [50] in respect of Mr Akeroyd's motivation, that "it would not be open to them" to make the finding sought by that party.

61. As in the case of ground 3, there remains the contention that the victimisation case was bound to fail on the causation issue and I return to that below.

Ground 6

62. By this ground, as I have said, Mr Williams argues that the ET simply overlooked the evidence when it said that the Appellant did not see the "sour and bitter" email and therefore rejected it as an act of harassment on grounds of sex. The uncontested evidence was that, following a DSAR request, she did see it.

63. Mr Lawrence responds that, on the harassment issue which was only tentatively advanced by the Appellant, the ET was entitled to make the findings of fact which it did.

64. I disagree. It seems to me that the ET failed to have regard to the evidence that the Appellant saw the email. This may have been another symptom of their adoption of material from elsewhere instead of formulating reasons of their own. The finding that the Appellant did not see the email was perverse.

65. However, Mr Lawrence submits that this nevertheless did not affect the outcome because of the ET's further finding:

> "62. The Tribunal also concluded, in any event, that such a comment is not related to the Claimant's sex. The word 'individual' refers to men and women equally. Either a man or a woman can be described as a sour and bitter individual. Therefore this comment does not relate to the Claimant's sex."

66. Those words were taken from the Respondent's closing submissions, but with the omission of some further words from the last sentence in the submissions which said:

> "Nor is there any feature of the context in which the comment was made which relates

it to the Claimant's sex."

67. The Appellant's written closing submissions to the ET put the point in this way:

> "39. In his email of 10 August 2018, which I saw on 19 July 2019, Mr Anderson referred to me as a sour and bitter individual. While definitely offensive, I would like to ask the tribunal to consider whether it is related to sex, bearing in mind that he also referred to me as 'that woman'."

68. That showed that the Appellant had recognised the potential difficulty of relating the comment to her sex, and she put forward a suggested connection. This referred back to her witness statement, which in turn referred to an email from another colleague, Ms Tang, to Mr Akeroyd in November 2018 in which she complained about Mr Anderson's behaviour to the Appellant including his calling her "that woman".

69. The unfortunate fact is that I do not know, and the Appellant does not know, whether the ET gave any thought to the merits or demerits of her point about the phrase "that woman". There may have been a straightforward answer to it – or not. All that was needed was for the ET to note the submission that was made and give an answer to it, but they did not. Therefore this part of the ET's decision, disposing of the discrete and free-standing statutory claim for harassment on grounds of sex, is not *Meek*-compliant.

Ground 7

70. An important answer to the claim that Mr Anderson was motivated by the Appellant's protected act is the assertion that he was never told about the protected act.

71. In its conclusions at [43]-[47], which are copied almost verbatim from the Respondent's closing submissions, the ET said that there was no evidence of knowledge on Mr Anderson's part. The Appellant had agreed in cross-examination that Mr Anderson never mentioned the protected act to her. Mr Akeroyd's evidence was that he was "fairly certain" that he did not tell Mr Anderson about it. The decision continues:

> "44. … Furthermore, the documentary evidence strongly supports Mr Akeroyd's recollection. The key email is the email in which Mr Akeroyd sent to Mr Anderson at 0933 on 5 April 2018 (page 276) one hour before he contacted the Claimant, to arrange a time of their one to one meeting the following day, in which some eight days had passed since the protected act.
>
> 45. The email reads as follows.
>
> *"Hi Richard, for your info HR have advised me that I can have line manager Sue directly until Kevin's replacement starts (Sue asked for this)".*
>
> 46. The clear implication is that this is the first time that Mr Akeroyd had informed Mr Anderson of the Claimant's objection to Mr Anderson being her line manager. That objection appears to be the thrust of the protected act. It is clear, therefore, that Mr Akeroyd had not informed Mr Anderson of the protected act before 5 April 2018 and Mr Akeroyd gave evidence to that effect. Thereafter there would have been no reason for Mr Akeroyd to inform Mr Anderson of

> the Claimant's protected act because after his one to one meeting with the Claimant on 6 April 2018, Mr Akeroyd was under the impression that the issue had now "blown over" (page 267).
>
> 47. It is therefore correct that the oral evidence and documentary evidence demonstrate that Mr Akeroyd never told Mr Anderson about the protected act … … ".

72. Mr Williams submits that the email quoted at [45] is insufficient to support the ET's conclusion about it, at least without further reasoning.

73. Mr Lawrence retorts that this submission appears to ignore Mr Akeroyd's evidence.

74. Once again, the unattributed copying of the submissions reduces the confidence which can be had in the ET's finding. But that particular criticism could have been avoided if the relevant passage had merely begun with words such as "As the Respondent has put it …".

75. Meanwhile the content gives the appearance of a reasonably triangulated finding. It does not depend entirely on the quoted email, though that was described as "the key email". Rather the ET referred to the accumulation of (1) a lack of any positive evidence of knowledge by Mr Anderson, (2) the admitted fact that he did not mention the protected act to the Appellant, (3) Mr Akeroyd's evidence and (4) an email which is at least consistent with the Appellant's position not having been previously communicated to Mr Anderson.

76. In my judgment that finding was not perverse and, on the face of it, was sufficiently reasoned. That, however, is subject to the question raised by grounds 1-2 of whether this tribunal considers that the ET did conduct a proper judicial evaluation of the case, rather than merely adopting one party's case without proper consideration of the other side.

Ground 8

77. The Appellant claimed direct age discrimination in relation to the recruitment of an archives assistant shortly after her departure, on the basis that:

    1. the need to recruit was probably discussed before she left;

    2. she met all the criteria for the new role and had provided cover for archives assistants;

    3. of 17 recruits to such roles from 2007 to 2019, none was over 50, and two older archives assistants left in unfortunate circumstances; and

    4. in her witness statement she said that she had looked up the redundancy policy on the intranet and found an email address for redeployment and asked if she was on the list, but got a reply saying that the address was no longer in use. She was not even given a meeting with her line manager.

78. Under the heading Age Discrimination the ET said (in wording close, though not identical, to that of the Respondent's closing submissions):

> "63. This is advanced on the basis that the Claimant's dismissal was due to her age. The first point to make here was this was never put to the Respondent's witnesses that the Claimant was dismissed because of her age. It is clear to the Tribunal that the only reason for the Claimant's dismissal was redundancy, along with another Data lnputter who was 20 years younger than the Claimant. The suggestion that the Respondents recruited an Archives Assistant after the Claimant's dismissal from a younger age must be irrelevant to the claim for age discrimination, simply because the Claimant was not an Archives Assistant.
>
> 64. The Claimant, therefore, has failed to make out a prima facie case of age discrimination and that claim fails."

79. Later, under the Unfair Dismissal heading, the ET added:

> "70. The Claimant never sought any advice from the Respondents about the redeployment process and in fact the Claimant attended the 'redundancy notice' meeting, rather than engage or listen to Miss May and Miss Harriman, she simply decided in her words to, 'give them a piece of her mind', page 583.
>
> 71. … There was a redeployment process and the Claimant was simply not interested."

80. Mr Williams complains of a lack of reasoning, a lack of consideration of the Appellant's case on redeployment and a failure to case-manage any lack of cross-examination on this issue.

81. Mr Lawrence describes this as a "bare challenge" to defensible findings of fact.

82. In her written closing submissions the Appellant put forward her age discrimination case in 9 paragraphs over about 2 pages. She made the points I have mentioned above and responded to some points which had been made by Mr Akeroyd in evidence about her suitability for the new role. She invited the ET to compare her with a hypothetical comparator, being "a young person who had been working in the Archives for a considerable time and had an extensive knowledge of the records and of local history".

83. The ET had also received the Appellant's witness statement, which went into considerable detail about the work which she did at different times. She alleged that by the time of the premises move, her work no longer consisted of data inputting or work related to the move itself. She described the redundancy process as a sham [79] and said that nothing was done about any alternative to redundancy such as redeployment, and that there "was no attempt at meaningful consultation" [91]. She also said that Miss Mintram's role and hers were "entirely different" [91] and that their "roles should have been considered separately" [102]. She complained at [100] that her dismissal letter addressed her as "Mrs" and she felt that she would have been addressed by her preferred title of "Ms" if she had been younger.

84. For the same reasons as I gave at 60 above, I am not persuaded that a lack of cross-examination relieved the ET of the obligation to decide the issues which were before it.

85. Once again, the Appellant's evidence and submissions were not referred to in the ET's judgment. Although there was what appeared to be an evidence-based finding that the Appellant had not shown an interest in redeployment, which could explain why she was not

considered for one of the new roles, it seems to me that the reader cannot know why all of the Appellant's submissions were rejected. What was the flaw in her argument that she possessed all the skills of an archives assistant? Did she in fact have the attributes of her proposed comparator, other than youth? Was the forthcoming vacancy known at a time when she could have been told about it? If so, why was she not told? And, although the ET pointed out that the Appellant's younger colleague Ms Mintram was also dismissed, that could not answer all questions because there was evidence that her work circumstances were very different from those of the Appellant.

86. I bear in mind that the Appellant's claim of age discrimination was not straightforward. Even if all her points were accepted, the ET might still have found that she was overlooked because the Respondent no longer wished to employ her and not because of her age (although such a finding might have been of significance in the unfair dismissal claim, but that is not this ground of appeal).

87. Nevertheless, on this issue too I conclude that the *Meek* test is not satisfied. I know of no good reason why the ET did not set out the Appellant's arguments and give a reasoned response to each of them.

Grounds 1 and 2

88. With those conclusions in mind, I turn to grounds 1 and 2.

89. Mr Williams' key submission is that the ET's decision was copied almost entirely from the Respondent's evidence and submissions. To make that point good he and his client have carried out an analysis of the judgment. About 90 per cent of it was copied. Most of the rest was quoted from documents or legislation. In the judgment of 72 paragraphs over 15 pages, and with the exception of a few words here and there, the only parts written by the ET in its own words are the purely formal paragraphs [1]-[6] (which were excluded from the Appellant's 90 per cent calculation), the opening 13 words of [11][1], a sentence at [15][2], a sentence at [41] about the law on victimisation[3] and some paragraphs about unfair dismissal to which I return at paragraphs 106ff below.

90. Mr Williams relies on case law which establishes that it is bad practice for any court or tribunal simply to reproduce one party's submissions or evidence as its findings, at least without acknowledging that it is adopting that party's material, and without showing that it has also considered the other party's case.

91. Helpfully, both counsel agreed that the relevant principles are stated in *IG Markets Ltd v Crinion* [2013] EWCA Civ 587, where it was said that 94% of the judgment was taken directly from the closing submissions of one side's counsel. In the words of Underhill LJ:

> "16. In my opinion it was indeed thoroughly bad practice for the Judge to construct his judgment in the way that he did... I agree with [counsel for the Appellant] that appearances matter. For the Judge to rely as heavily as he did on … [the claimant's] written submissions did indeed risk giving the impression that he

[1] 11. "It is clear the claimant had an uneasy working relationship with Mr Anderson …".
[2] 15. "… But that was the end of the matter."
[3] 41. "… It would not be sufficient that the Claimant wanted a different line manager."

> had not performed his task of considering both parties' cases independently and even-handedly. I accept of course that a judge will often derive great assistance from counsel's written submissions, and there is nothing inherently wrong in his making extensive use of them, with proper acknowledgement, whether in setting out the facts or in analysing the issues or the applicable legal principles or indeed the actual dispositive reasoning. But where that occurs the judge should take care to make it clear that he or she has fully considered such contrary submissions as have been made and has brought their own independent judgment to bear. The more extensive the reliance on material supplied by only one party, the greater the risk that the judge will in fact fail to do justice to the other party's case - and in any event that that will appear to have been the case … .
>
> 17. However, to say that the judgment was defective, even seriously so, is not necessarily to say that there has been an injustice which requires the appeal to be allowed. The judgments in the three cases considered by this Court in *English* were very seriously defective, but the Court was able in the end, by careful analysis of the judgment in the context of the evidence and submissions made, to satisfy itself that the judge had in each case properly performed his or her judicial function. Likewise in this case, if it is possible to demonstrate that, whatever the first impression created by the way he constructed his judgment, the judge did in fact carry out a proper judicial evaluation of the essential issues and did not simply surrender his responsibility to counsel, then the judgment should stand. This involves no qualification of the principle that justice must be seen to be done; but in deciding whether that is so it is necessary, at least in a case like this, to go beyond first impressions."

92. Mr Williams relies not only on the fact of the judgment consisting of so much cut and pasted material, but also on the absence from it of any reference to the Appellant's witness statement (other than the purely formulaic paragraph 4: "In this tribunal we heard evidence from the claimant through a prepared witness statement.") or her closing submissions. Nor is there any reference to the credibility of any witness, or any reason for preferring the evidence of one witness over another on any dispute of fact.

93. The latter point is significant, he submits, because even if many of the facts were not controversial, there were important factual disputes e.g. whether there was a true redundancy situation, the nature of the Appellant's role (data inputting, or other work which was still needed after the move), whether there was genuine consultation and whether any of Mr Anderson, Mr Akeroyd and Ms May were motivated to act in any way by her protected act.

94. Here, by contrast with *Crinion* (where the ET's judgment was upheld), Mr Williams submits that one cannot find in the judgment even fleeting references to the Appellant's submissions of a kind which could persuade this tribunal that a proper evaluation took place.

95. A number of significant passages have already been considered above. Mr Williams also addressed me about the ET's decision on the unfair dismissal claim, where there is somewhat more original material than in the rest of the judgment.

96. I shall return to that material below, but Mr Williams submitted that the original paragraphs contain much that is purely formulaic and also that even where the drafting is original, it consists entirely of an adoption of the Respondent's submissions or evidence (or relates

back to earlier paragraphs which were not original) and contains no reference to the Appellant's submissions or evidence.

97. More generally, while the Respondent relies on the judgment containing changes to a few words here and there, rather than copying its case verbatim, Mr Williams submits that those changes do nothing more than amplify the Respondent's case, for example by the addition of words such as "completely" or "patently" or of phrases such as "the tribunal were of the unanimous view that", and that they do not begin to cure the absence of any engagement with the Appellant's case.

98. Whilst the Respondent has contended that reference to the Appellant's closing submissions was not needed because these "did not engage with the key issues in the case" (Mr Lawrence's skeleton argument at [33]), Mr Williams submits that that is simply not correct, and that although the Appellant represented herself before the ET, her closing submissions were relevant and focused.

99. In response, Mr Lawrence relied on five over-arching submissions.

100. First, he submitted that the ET's judgment could not be criticised if it had not used so much of the Respondent's material. In other words, the objection is purely procedural and there was no substantive defect in the reasoning contained in that material.

101. His second submission was that, applying *Crinion*, the question raised by grounds 1 and 2 is whether, in fact, the ET engaged properly with the Appellant's case before rejecting it. There is no rule against adopting points made by one party, though it is good practice to acknowledge that that is what is being done. To answer the *Crinion* question, it is necessary to look beyond first impressions and to consider the detail.

102. Third, he submitted that upon a detailed examination the ET's reasons do contain sufficient original material to reveal a proper engagement. The copying was not verbatim. There were additions and some submissions were copied with significant parts omitted. The changes, even where consisting of just a word here and there, show that the ET must have worked through the material and considered what to adopt and what to omit.

103. Mr Lawrence noted that in *Crinion* and also in *Parker v MDU Services Ltd* (EAT 0113/17), judgments were upheld on appeal even though there had been only a few changes to the copied material. And in the present case, unlike *English v Royal Mail Group Ltd* (EAT 0027/08), where an appeal was allowed because the judgment merely reproduced one side's submissions, there is no confusion between findings of fact and submissions.

104. His fourth submission was that the ET was justified in using the Respondent's witness statements as a template for its findings of fact because (1) most of the facts were uncontroversial and (2) the central questions of fact were as to the reason or the motivation of the Respondent's employees for what they did, and the Appellant's witness statement could not and did not assist on those questions.

105. Fifth, Mr Lawrence submitted that the absence of any express reference to the Appellant's submissions did not show a lack of proper evaluation. It is well established from cases such as *Meek* and *Frame v Llangiwg Primary School* (EAT 0320/19), that a tribunal need not set

out everything that has been said or every step in its reasoning. An omission will not necessarily provide a ground of appeal. Instead, the question for the EAT is always whether the fact of an omission means that there has been an error of law or an unsustainable finding of fact. In this case, he submitted that the Appellant's closing submissions did not put forward any cogent arguments which the ET needed to address. She said very little about the reason for individuals' acts. She put forward her age discrimination claim by a "bare allegation of causation", with no proposition of fact that needed to be addressed. All her points on unfair dismissal had simple answers, and she put forward nothing to show that the allegedly harassing email was related to her sex.

106. I first consider the unfair dismissal claim.

107. The material parts of section 98 of the Employment Rights Act 1996 ("ERA") provide:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
> …
> (c) is that the employee was redundant, or
> …
>
> (4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.
> …"

108. At [65] the ET directed itself to section 98(4). As the reason relied on was redundancy, further requirements were identified from case law at [66]. This paragraph was written by the ET, not the Respondent, though it was a standard paragraph containing nothing specific to the present case:

> "66. There has to be adequate warning of the redundancy. There has to be meaningful consultation and the process adopted throughout must be a fair process and where appropriate a pool of candidates be considered for selection for redundancy."

109. The ET set out its decision in the following paragraphs, of which those quoted in italics were written by the ET and the rest were essentially taken from the Respondent's submissions:

> *"68. The Tribunal took the view that there clearly was meaningful consultation and warning of the redundancy. Indeed, the Claimant indicated that she knew some time before that her role as a Data lnputter was likely to be made redundant, a year or so before it took place. There were two Data lnputters, the Claimant and Miss Mintram, both were selected as requirements for them to carry out work they were employed in had ceased and they were no longer required after the move.*
>
> 69. The consultation process was clearly thorough and meaningful. The Tribunal noted that the Claimant patently failed to engage in that process. Particularly, she failed to attend the 'at risk' meeting on 20 June 2019, the Claimant being invited on 18 June 2019. The Respondents made an offer of a telephone meeting to the Claimant to which the Claimant did not reply. In fact the Claimant made it clear she did not wish to meet face to face or discuss anything by telephone with the Respondents, page 372. The Claimant then received the benefit of a written consultation response for the Claimant's feedback, the Claimant was then informed of redeployment status and was told how to access vacancies several times in the 'at risk' letter (page 777), in the email from Miss Harriman on 20 June 2019 (page 391) and in the 'redundancy notice' meeting and the 'redundancy notice' letter (page 442).
>
> 70. The Claimant never sought any advice from the Respondents about the redeployment process and in fact the Claimant attended the 'redundancy notice' meeting, rather than engage or listen to Miss May and Miss Harriman, she simply decided in her words to, "give them a piece of her mind", page 583.
>
> *71. The Tribunal were unanimous in the view, the process adopted for the Claimant's redundancy was an entirely fair process. There clearly was a genuine redundancy and the Claimant had adequate warning and consultation in circumstances where the Claimant did not wish to engage in such consultations. There was a redeployment process and the Claimant simply was not interested.*
>
> *72. The dismissal, by reason of redundancy, is therefore fair."*

110. I agree with the comments of Mr Williams on these paragraphs. The only original engagement with the facts was in two sentences in [68] and one sentence in [71]. Even in those sentences, there was no engagement with the contentions on which the Appellant had relied.

111. With that in mind, I return to Mr Lawrence's five propositions.

112. The first is incorrect. Although it is true that a court or tribunal is free to reproduce one party's material where it is efficient to do so, it is very bad practice to do so without stating that that is what is being done. A few words such as "As the Respondent submits, in terms with which we entirely agree …" might suffice by way of attribution. But the real problem in this case is not simply the copying of material. The problem is the use of that material for such a large part of the judgment and, above all, the absence of any reference to the Appellant's case.

113. In his second proposition Mr Lawrence correctly submits that this tribunal must look beyond first impressions and analyse the judgment in more detail to decide whether there was a proper engagement with the issues, though I note in passing that it is unsatisfactory for this tribunal to have to engage in that sort of activity. It is trite law that an Appellant is not usually allowed to subject an ET judgment to a fine-tooth analysis.

114. That more detailed analysis underpins Mr Lawrence's third proposition. I accept that this ET judgment is not a pure cut-and-paste, though a very large proportion of it is not original. The various tweaks to the wording do logically suggest that the ET gave some thought to those passages before adopting them in a final form.

115. That, however, is not the whole picture. The discussion of grounds 3 and 6 above, in particular, reveals surprising errors which reduce this tribunal's confidence in the process undertaken by the ET.

116. Moreover, the detailed analysis of the judgment does not allay my concerns about the absence of any reference to the arguments put forward by the Appellant on important issues. As I said in response to Mr Lawrence's first proposition, this appeal is not just about the cut-and-paste methodology.

117. As to Mr Lawrence's fourth proposition, I do not agree that the lack of factual dispute rendered it unnecessary for the ET to engage with the Appellant's evidence. Whatever the position in relation to the causation/motivation issue, I accept the submission of Mr Williams that there were the significant issues of fact identified at [93] above.

118. I turn to Mr Lawrence's fifth proposition, that the Appellant's closing submissions were not such as to require a specific response in the ET's judgment.

119. There are cases in which submissions drafted by litigants in person are of little or no assistance to an ET, or indeed are positively unhelpful. That can be because they are over-long, or irrelevant, or uninformed (or misinformed) as to the law, or intemperate in their language or in the contentions which they advance.

120. This is not such a case. Following the 6 day hearing in which the ET considered bundles totalling nearly 700 pages, the Appellant filed written closing submissions of 9 pages, addressing her 5 causes of action (dividing the victimisation claim into victimisation by dismissal and victimisation by other acts). The submissions were well laid out, with a heading for each cause of action. Each section, by and large, contained a reasonably focused summary of her case. The submissions were well and clearly expressed, in appropriate language. They showed an awareness of the legal elements of each claim. They cited the relevant statutory sections and two cases i.e. *Jhuti* (to which I referred above) and a case called *Talbot* which was relevant to the possibility of an ET drawing inferences in the absence of direct evidence of discrimination.

121. In my discussion of grounds 5, 6 and 8 above, I have already given details of passages in the Appellant's closing submissions which it seems to me were pertinent and which the ET should have addressed. Other examples would be easy to find.

122. I therefore have no hesitation in rejecting Mr Lawrence's fifth proposition. No doubt some passages in the Appellant's closing submissions were less focused or relevant than others, but the document judged as a whole put forward arguments which it was quite wrong to ignore.

123. Nor would I place this case in the category of those where one side's submissions are effectively answered by the other's. If that had been the case, the ET still could and should have explained what points the Appellant had made and how the Respondent had answered them.

124. Finally, I also agree with Mr Williams that even if the ET had adjudged the Appellant's closing submissions as not meriting a response, it could and should have said so, with reasons.

Conclusion

125. For the reasons set out above, grounds 1 and 2 succeed. The adoption of the Respondent's submissions and the absence of reference to the Appellant's submissions are such that I cannot conclude that there was a proper judicial evaluation of the essential issues.

126. I therefore accept a submission made by Mr Williams that it would not be right to uphold the ET's decision on the motivation/causation issue which is crucial to the victimisation claims. It is not safe to assume that that discrete part of the decision was properly made.

127. That means in particular that grounds 3 and 5 succeed despite the fact, as noted above, that those grounds would fail if the ET's decision on the motivation/causation issue were allowed to stand. In the case of ground 3 my conclusion is fortified by the lack of reasoning – and the complete lack of original reasoning – to explain why each incident was not detrimental.

128. I have already explained why grounds 6 and 8 also succeed.

129. My conclusion on grounds 1-2 also means that ground 7 succeeds. In the circumstances it is not safe to assume that the discrete finding that Mr Anderson was never told about the protected act was properly made.

130. The appeal therefore succeeds and the claims must be remitted for re-hearing by a differently constituted Employment Tribunal.

131. After a 6-day hearing below, that is a deeply regrettable state of affairs. As my judgment will have made clear, the decision on this appeal does not mean that any part of the claim will necessarily succeed and, win or lose, both parties will suffer considerable prejudice from having it tried twice instead of once.

132. Given the clear guidance in repeated cases against courts and tribunals simply repeating one side's evidence or submissions without attribution and without reference to the other side's case, it is surprising and disappointing that that error has occurred in this case. And both parties must have been especially disappointed to receive a judgment containing so little of the ET's own reasoning after the 6-month delay in the provision of the written reasons for the decision.