Appeal No. UKEAT/0026/19/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 1 November 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MS P O'NEILL — APPELLANT

JAEGER RETAIL LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR TRISTAN JONES (of Counsel) Instructed by: Advocate (formerly Bar Pro Bono Unit)
For the Respondent	MR PARAS GORASIA (of Counsel) Instructed by: Gateley Plc Ship Canal House 98 King Street Manchester M2 4WU

SUMMARY

JURISDICTIONAL POINTS – Extension of time: - just and equitable

The Claimant's claim form, containing complaints of discrimination, was presented a little over two months out of time, assuming, in her favour, that she might be able to establish a continuing act in relation to all of the allegations that she raised.

The Employment Tribunal accepted that the Claimant genuinely, but erroneously, thought that, having told the ACAS EC officer about her complaints, and obtained an Early Conciliation Certificate, there was nothing else she needed to do to in order to present her claim. The Certificate was obtained at the end of December 2017, and the extended primary time limit expired on 30 January 2018. She approached the ACAS EC officer again in mid-February 2018, and only then, the Tribunal accepted, understood that she should also have submitted a claim form to the Employment Tribunal, and was now out of time to do so. It was also only when she later spoke to someone else in ACAS, that she appreciated that she could still seek to put in a late Employment Tribunal claim, and then finally did so.

The heart of the Tribunal's decision concerned why the Claimant had not approached ACAS again until mid-February 2018, and whether she ought to have appreciated sooner that something might be wrong, and taken some further pro-active step. In that regard, the Claimant relied on the state of her mental health as relevant, and in particular, on a GP's letter of June 2018. The Tribunal accepted that various personal circumstances, including bereavements, had had a significant impact, but did not consider that the GP's letter showed that her mental health had had a material impact beyond mid-January 2018 at the latest.

The Tribunal had properly directed itself as to the law, and taken a careful and well-structured approach to its fact-finding and overall decision. The EAT should only intervene if the decision was, in some material sense, perverse. However, on a fair reading of the GP's letter, it was not a proper conclusion that it offered the Tribunal no assistance at all on the state of the Claimant's mental health beyond the period up to mid-January 2018. That conclusion had significantly affected the Tribunal's decision, which therefore could not stand. The matter would be remitted for a re-hearing of the question of whether it was just and equitable to extend time. It would be important for the Tribunal, at the re-hearing, to have the benefit of sight of all the relevant contemporaneous medical evidence that might be available, whatever it might or might not show, in particular, the GP's records, and not just the letter.

HIS HONOUR JUDGE AUERBACH

Background and the Employment Tribunal's Decision

1. This is an appeal by the Claimant in the Employment Tribunal ("the ET") against the decision of Employment Judge Franey dismissing her claims brought under the **Equality Act 2010** ("EqA") against her former employer, the Respondent, because they were out of time. There was and is no dispute that the claim form was presented outside of what may be called the primary time limit, as extended to take account of the impact of the ACAS early conciliation process. The challenge is to the Tribunal's decision that it was not just and equitable to extend time up to the date when the claim form was presented.

2. The Claimant was a litigant in person in the ET. At the hearing which considered the time points she represented herself. The Respondent was represented by a solicitor, Mr Hills. The Claimant also prepared her own notice of appeal, but at a Preliminary Hearing in the Employment Appeal Tribunal ("the EAT") she had the advantage of being represented under the ELAAS scheme by Mr Jones of counsel, and amended grounds of appeal drafted by him were permitted by Choudhury J to proceed to a full appeal Hearing. The Claimant has today been represented again by Mr Jones; the Respondent by Mr Gorasia of counsel.

3. The hearing in the ET took place on 15 October 2018. The Judge gave an oral decision on the day and written reasons followed. The Tribunal identified that the claim form was presented on 3 April 2018. The complaints were of age, disability, and sex discrimination. They concerned events during the Claimant's employment as a sales advisor from November 2016 until 2 September 2017 when she was dismissed. It appears that she transferred into the

A Respondent's employment in about June, following the previous owner of the business having become insolvent.

B 4. The ET considered that the precise scope of the allegations of discriminatory treatment was not wholly clear, but the Claimant had confirmed at the Hearing that the last matter of which she complained was her dismissal. For the purposes of what he had to decide the Judge assumed in her favour that she might establish a continuing act, so that the primary time limit in C respect of all her claims would have expired on 1 December 2017. The Judge had various documents before him, and he heard oral evidence from the Claimant. Although she had not prepared a witness statement this was elicited in-chief from her and she was cross-examined.

D 5. The Judge cited the relevant part of section 123 of the **2010 Act**, and from authorities well-known to practitioners: **British Coal Corporation v Keeble and Others** [1997] IRLR 336, **Robertson v Bexley Community Centre** [2003] IRLR 434, **Chief Constable of** E **Lincolnshire v Caston** [2009] EWCA Civ 1298, and **Department of Constitutional Affairs v Jones** [2007] EWCA Civ 894. There is, rightly, no criticism of his summary of the law. The Judge then set out his findings of fact. I can for the most part summarise these, though some F passages need to be cited in full.

6. The Claimant was dismissed during the course of a probation review meeting on 2 G September 2017. She was shocked. She had no idea about Employment Tribunals or time limits. However, she had heard of ACAS, and she telephoned them within a few days of her dismissal. She was upset and did not at that point properly explain what she wanted. They H suggested that she contact the Citizens Advice Bureau ("the CAB"), which she did, and made an appointment. She also spoke to the Equality Advisory and Support Service, but they did not

advise her about Employment Tribunals or time limits. The Claimant had an unhappy experience at an unsuccessful job interview in September. The Judge also found that the Claimant is an internet user, not for shopping but for research and pursuing her interests. The Claimant visited the CAB in late September, but was not able at that time to see the employment law advisor.

7. It took several weeks to get an appointment, but the Claimant eventually saw the CAB employment law advisor on 30 November 2017. At that meeting:

> **"20 ….. He advised her of her right to bring a claim in the Employment Tribunal, but explained to her that she needed to go to ACAS first and that she was almost at the end of the time limit for doing so. In his presence she telephoned ACAS and initiated early conciliation. She gave full details to ACAS of how she had been treated. The fact that early conciliation began that day was confirmed by ACAS in a certificate at page 54. The early conciliation period lasted until 30 December when the certificate was issued by email to the claimant."**

8. The Judge continued that the Claimant had a difficult December, including an incident in which her car was damaged and for which she had to make a claim, which she found it very difficult to deal with, and a debilitating bout of flu. She also, very sadly, suffered three family bereavements in short succession. The last of these was on New Year's Eve, and the funerals were very difficult for her**.**

> **"23. Accordingly, although the claimant received the ACAS certificate by email on 30 December 2017, she did not consider it until a few days into January 2018. The effect of the ACAS certificate was that the last date for lodging her claim within time was extended to 30 January 2018.[1] However, I accepted her evidence and found as fact that she thought that by contacting ACAS she had done all she needed to.**
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> **24. As a result the claimant was expecting to hear from the Tribunal about the progress of her case. Her friend, Karen, would ask her what was happening with the case from time to time. Eventually the claimant became concerned enough to contact ACAS again in mid-February 2018. She spoke to the conciliation officer, Mr Murphy. It became apparent that there was a form she should have filled in and that there was now a time limit problem.**
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> **25. She escalated the matter to his manager, David, and managed to speak to him at the very end of March 2018. He talked her through the procedure and explained how she would have to lodge her Tribunal claim online. She had problems doing the form online and it took most of a day to get it done with some help from ACAS. That was on 3 April 2018."**

9. After summarising the submissions, the Judge went through the factors mentioned in the **Keeble** case and, "other factors of relevance here". As to the length of delay, the effect of early conciliation was that time expired on 30 January 2018. The claim was therefore presented over two months later. As the primary limitation period, apart from early conciliation extension, was three months, this was, said the Judge, a significant period. The Judge continued:

> **"30. I accepted the claimants evidence that she was not aware of her legal rights until she saw the employment law adviser at the CAB who explained the position and made sure she rang ACAS whilst she was in a meeting with him. Initiating early conciliation "stopped the clock".**
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> **31. After the certificate was issued on 30 December 2017, and time started to run again, the claimant was struggling with her loss of confidence following two unsuccessful job applications, a period of illness due to flu, and most significantly three bereavements in her family in a short space of time. The letter from her GP in June 2018 confirmed that she was suffering from depression and not able to function properly or to deal with filling in forms, although the letter was silent as to when that began and how long it lasted.**
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> **32.However, I was satisfied that the real reason she did not pursue her claim by the end of January 2018 was that she did not realise that once ACAS issued her certificate she still had to lodge a Tribunal claim herself. She was under the misapprehension that she had done everything she needed to do by contacting ACAS to start early conciliation and by giving ACAS all the information about how she had been treated at work. Even though her friend Karen asked her what was happening, it was not until late February or early March that she contacted the conciliation officer at ACAS, Mr Murphy. That was about two months after the early conciliation certificate was issued. The misapprehension was corrected, and following escalation to his manager, David, the claim was presented in early April 2018."**

10. As to the impact of the delay on the evidence the Judge said this:

> **"33. This case turns on evidence about events in late 2016 and early to mid-2017. The details of the claim which the claimant has provided on the claim form and in subsequent correspondence raise a number of instances of what the claimant considers to be discriminatory treatment or harassment on the shop floor. It is unlikely there is any written record, as no formal grievances were pursued at the time. The claimant said in submissions that she does have a log of these matters but there is no basis for thinking the respondent's witnesses kept a log in the same way.**
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> **34. The claimant also says that where she was sent written records of meetings they were not accurate. There is therefore likely to be an important and substantial conflict of primary fact as to what happened. It follows that the fact that the claim has been delayed is likely to have a significant impact on the ability of witnesses to recall matters."**

11. The Judge accepted that the Claimant had acted promptly in first speaking to ACAS and then going to the CAB, but was hampered by the CAB employment law advisor being much in

demand. Once she did see him she acted promptly in initiating early conciliation. He continued:

> **"36. Similarly, once the claimant had the position about lodging a claim explained to her at the end of March by David from ACAS she acted very promptly at that stage.**
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> **37. Even so, there was a failure to act promptly, in my judgment, after the early conciliation certificate was issued at the end of December 2017. The claimant assumed (wrongly) she had done all she needed to do, but still did not take any steps to contact ACAS (or research its website) to check that for at least six weeks and possibly almost two months, despite queries from her friend, Karen, about what was happening."**

12. On the question of steps to get to professional advice the Judge said:

> **"38. The claimant did seek advice from the CAB but did not get proper informed advice until 30 November 2017. Similarly, with ACAS it appeared that the position was clear to her only after she escalated matters to the manager David at the end of March 2018."**

13. As to the medical position, the Judge said this:

> **"39. The GP letter from June 2018 (page 34) supported the claimant's case in that it confirmed the flu in December, the three bereavements at that time, and that the claimant was left down and depressed, unable to carry out normal duties and had a lot of difficulties dealing with forms and communicating with people There were some physical problems which added to the stress overall.**
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> **40. Even so, during December the claimant was able (with difficulty) to take steps to sort out the consequences of the damage to her car in the car park and also to attend the interview for a job in December. The GP letter was not specific as to the period for which these difficulties lasted. it said nothing, for example, about how the claimant was by late January 2018."**

14. Beginning a section headed: "Decision" the Judge accepted how difficult the events of December were, and that this was still affecting the Claimant into January; but, he continued, she had not shown that she was, "unable to take action until late March". The medical evidence was not specific about when she was affected, and there were other aspects of life that she dealt with in that time.

15. The Judge continued:

> **"42. In my judgment despite those medical issues there was delay in going to ACAS in the New Year once the certificate was issued. This was due to a misapprehension that the claimant had done all she could. However, I accepted Mr Hills' submission that the employment law adviser at the CAB ("Brian") must have advised her of the need to lodge a Tribunal claim after early conciliation ended. He was an employment law specialist. Unfortunately, it is clear that the claimant genuinely had not properly**

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> **understood the position. That was an error, but her chance to correct it was missed in January 2018 when she could have made steps to find out whether she needed to do anything further. To that extent the claimant bears responsibility for the fact this claim has been presented out of time.**
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> **43. In addition, this is a case where the delay will have an impact on the cogency of the evidence. If time is extended the witnesses will be asked to recall incidents that happened in late 2016/early 2017. I appreciate that by her delay in early 2018 the claimant has added only two months to the overall passage of time, but that is not an insignificant period. Consequently, the delay has had an adverse impact on the ability of the respondent to defend itself fairly.**
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> **44. Taking into account all these factors, and applying the lest set out in the legislation, I decided the claimant had failed to show it would be just and equitable to extend time. Even acknowledging the very difficult circumstances affecting her in late 2017 and early January 2018, the claimant was responsible for the claim being lodged late, and the delay has adversely affected the respondent's chances of defending itself fairly against her allegations. As a consequence, the claims were dismissed."**

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The Grounds of Appeal and the Arguments

16. The focus of this appeal shifted somewhat during the course of the Hearing today. The points raised by the amended grounds of appeal came under two broad headings. First, there was a group of points engaging with the Tribunal's consideration of the reasons why the Claimant did not present her claim form sooner than she did. Secondly, there was a challenge to the Tribunal's approach to the question of what might be called the forensic prejudice caused to the Respondent by the delay in presenting the claim form. The points raised, and Mr Jones' principal arguments in support of them, were as follows.

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17. I take first the points concerning the Tribunal's approach to the reasons for the delay in presentation. There were perhaps five strands here. First, said Mr Jones, the Tribunal erred in holding that the Claimant should have taken steps in January 2018 to find out whether she needed to do anything more to initiate her claim, given that it had accepted that she believed at that point that there was nothing more that she needed to do. That was an inconsistent finding, and it was wrong to say that she, "bears responsibility" for not doing so.

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18. Secondly, the Tribunal erred in relying on its holding that the medical evidence did not establish that the Claimant was, "unable" to take action in late February or early March, and that she was able to deal with other aspects of her life at this time. The error was twofold. First, it failed to grapple with the point that the cumulative effect of events on the Claimant's state of mind affected the likelihood that it would have occurred to her in January or early February to check whether anything might be amiss. Secondly, the natural reading of the GP's advice was that she, the GP, was describing the various difficult events to which that advice referred, as having had an ongoing effect on the Claimant over a period of months, continuing right up to when the GP wrote the letter in June 2018. Although it might be inferred that these effects would not have been as strong at the end of that period as they were at the beginning, the Judge's focus was indeed on the early period, particularly up until mid-February, when the Claimant contacted the ACAS early conciliation officer again. It was wrong, said Mr Jones, to infer that the GP's letter cast no light on that period beyond mid-January at the latest. Mr Jones referred in this regard, although it is fair to say only because he suggested that it offered an analogy, to **Watkins v HSBC Bank Plc** [2018] IRLR 1015.

19. Thirdly, insofar as the Tribunal relied on the finding that the Claimant's friend had raised queries with her, that was irrelevant, given, once again, that the Tribunal had found that the Claimant thought that she had done all she needed to do to initiate her claim. The grounds of appeal also queried whether the Judge was right to find that the Claimant's friend had made enquiries of her from time to time, rather than just once, but in oral submissions Mr Jones indicated that that point was not, as such, pursued.

20. Fourth, insofar as the Tribunal considered that the Claimant ought to have researched the position online, that was again inconsistent with its finding that she believed that she had

done all she needed to do. In written submissions Mr Jones said that the Tribunal had also failed to take account of evidence that the Claimant had had problems with her laptop during a certain period. However, having clarified his instructions from her at this hearing, he accepted that this was not something that she had mentioned at the original hearing before the ET.

21. In his skeleton argument lodged for this Hearing Mr Jones applied to add a fifth point, being that the Tribunal had erred in finding that the CAB advisor, "must have told the Claimant that she would need to take a further step of presenting a claim" after she got the ACAS certificate, when there was no evidence to that effect. Indeed, the Claimant's evidence was that she thought that ACAS was part of the Employment Tribunal. Mr Gorasia did not object to this point being raised, as such, at the Hearing before me. He was able to respond to it.

22. The second aspect of the appeal argued that the Tribunal erred in holding that the delay in presenting the claim was liable to have a significant impact on the ability of witnesses to recall matters and the cogency of their evidence. If presented on time, the claim would have covered events four to fourteen months previously. When it was in fact presented it covered events six to sixteen months previously. The most significant alleged matters complained of were in the more recent period of the employment. The potential impact of the delay was marginal. The Tribunal's conclusion was not based on any specific evidence.

23. The main points raised in the Answer and in Mr Gorasia's submissions were as follows. First, by way of general submission, the authorities establish that what factors are relevant to the exercise of the discretion, as to whether or not to extend time in this jurisdiction, turn on the particular facts of the case; and the carrying out of the balancing exercise was a matter for the appreciation of the Tribunal. In a case such as this, where the Tribunal has not erred in

directing itself as to the law, the EAT could only interfere if the Tribunal's decision was in the formal sense in some respect perverse. Here, the Tribunal had not taken account of any irrelevant factors, and it had reached permissible conclusions on each factor which it properly considered to be relevant. It had properly conducted the weighing and balancing exercise. This appeal was an impermissible attempt to re-argue the Claimant's case.

24. In relation to the Tribunal's conclusion to the effect that the Claimant had failed to present her claim as promptly as she could and should have, the Tribunal was entitled to have regard to the totality of the evidence, and its overall findings relevant to that question. The decision should not be subject to pernickety criticism and unrealistically detailed deconstruction. See: **Fuller v London Borough of Brent** [2011] ICR 806 and **ASLEF v Brady** [2006] IRLR 576.

25. Dealing with each of the more specific strands of challenge in turn, first, the Tribunal did not wrongly place particular weight on its finding that the Claimant had missed her chance to correct her misunderstanding in January 2018. It was entitled to have regard to the totality of the evidence, and reached an entirely permissible finding about that. Secondly, the Tribunal was entitled to conclude that the evidence did not sufficiently explain why the Claimant was not able to take action sooner than she did. In particular, it was entitled to conclude that the medical evidence did not support the conclusion that she was still affected during the period after mid-January, by the aftermath of the earlier incidents to which it referred. Thirdly, the Tribunal was entitled to take into account the evidence that the Claimant's friend had asked her about what was happening with her case, as something that might have been thought to have reasonably caused her to reflect and take some proactive step to establish the position. Fourthly, the Tribunal had found that when she did contact the ACAS early conciliation officer

again, in around mid-February, the Claimant then became aware that there was a time problem, and that she needed to fill in a form, but she still did not attempt to do that until the end of March. Fifthly, the Tribunal was entitled to infer that the CAB advisor would have advised the Claimant about the need to take further action to lodge her claim after she got her ACAS early conciliation certificate.

26. As to the second basis of the appeal, there was no error in the Tribunal taking into account that the delay in presenting the claim was liable to have some impact on the cogency of the evidence. It was also correct, looking at the particulars of claim, that the complaints did go back as far as December 2016 and January 2017. The Tribunal simply put this into the scales in conducting an overall assessment, and it was entitled to do so.

27. Mr Gorasia also made a more general submission that, given that the Tribunal had weighed up a range of factors and was exercising a broad discretion, I could be confident that any small error would not have affected the overall outcome.

Discussion and Conclusions

28. Section 123 of the **2010 Act** provides that, subject in a case such as the present to an adjustment to take account of the impact of early conciliation, in accordance with section 140B, the time limit for presentation of a claim to the ET is three months or, "such other period as the employment tribunal thinks just and equitable." There is in this case, as I have noted, no dispute that the ordinary three-month time limit, as extended to take account of the ACAS early conciliation process, ended on 30 January 2018. The Tribunal therefore correctly proceeded on the basis, assuming the continuing act point in the Claimant's favour, that the just and equitable extension that she required was a little over two months.

29. As to the guiding principles in relation to the just and equitable test, there is a well-established body of authority familiar to practitioners in the field. As I have noted, there is no dispute, as such, that the Tribunal correctly directed itself by reference to the key authorities. I for my part cannot improve on the overview given in a decision mentioned by Mr Gorasia, that of Elisabeth Laing J in **Miller v The Ministry of Justice** [2016] UKEAT/0003/15, which I gratefully adopt:

> "10. There are five points which are relevant to the issues in these appeals.
> i. The discretion to extend time is a wide one: **Robertson v Bexley Community Centre** [2003] EWCA Civ 576; [2003] IRLR 434, paragraphs 23 and 24.
> ii. Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule (ibid, paragraph 25). In **Chief Constable of Lincolnshire v Caston** [2010] EWCA Civ 1298; [2010] IRLR 327 Wall LJ (with whom Longmore LJ agreed), at paragraph 25, put a gloss on that passage in **Robertson**, but did not, in my judgment, overrule it. It follows that I reject Mr Allen's submission that, in **Caston**, the Court of Appeal "corrected" paragraph 25 of **Robertson**. Be that as it may, the EJ in any event directed himself, in the first appeal, in accordance with Sedley LJ's gloss (at paragraph 31 of **Caston**), which is more favourable to the Claimants than the gloss by the majority.
> iii. If an ET directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, "perverse", that is, if no reasonable ET properly directing itself in law could have reached it, or the ET failed to take into account relevant factors, or took into account irrelevant factors, or made a decision which was not based on the evidence. No authority is needed for that proposition.
> iv. What factors are relevant to the exercise of the discretion, and how they should be balanced, are for the ET (**DCA v Jones** [2007] EWCA Civ 894; [2007] IRLR 128). The prejudice which a Respondent will suffer from facing a claim which would otherwise be time barred is "customarily" relevant in such cases (ibid, paragraph 44).
> v. The ET may find the checklist of factors in section 33 of the **Limitation Act 1980** ("the 1980 Act") helpful (**British Coal Corporation v Keeble** [1997] IRLR 336 EAT; the EAT (presided over by Holland J) on an earlier appeal in that case had suggested this, and Smith J (as she then was) recorded, at paragraph 8 of her Judgment, that nobody had suggested that this was wrong. This is not a requirement, however, and an ET will only err in law if it omits something significant: **Afolabi v Southwark London Borough Council** [2003] ICR 800; [2003] EWCA Civ 15, at paragraph 33.
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> 11. **DCA v Jones** was an unsuccessful appeal against a decision by an ET to extend time in a disability discrimination claim. The Claimant had not made such a claim during the limitation period as he did not want to admit to himself that he had a disability. At paragraph 50, Pill LJ said this:
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> > **"The guidelines expressed in Keeble are a valuable reminder of factors which may be taken into account. Their relevance depends on the facts of the particular case. The factors which have to be taken into account depend on the facts and the self-directions which need to be given must be tailored to the facts of the case as found. It is inconceivable in my judgment that when he used the word "pertinent" the Chairman, who had reasoned the whole issue very carefully, was saying that the state of mind of the respondent and the reason for the delay was not a relevant factor in the situation."**
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> 12. I should also say a little more about points 10(iii)-(v). There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses. As I understood their arguments, neither Mr Allen nor Mr Sugarman suggested that a lack of forensic prejudice to a Respondent was a decisive factor, by itself, in favour of an extension of time. But both argued, in slightly different ways, that the ET was bound in every case, in Mr Allen's phrase, "to balance off"

> the relative prejudice to the parties, and that, if the ET did not do so expressly, that was an error of law, even if there was, otherwise, no good reason to extend time.
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> 13. It seems to me that it is not necessary for me to deal with that bald submission, because, as I explain below, the EJ did, to the extent that he was required to, take into account prejudice to both sides. But if I had needed to, I would have rejected that submission. It is clear from paragraph 50 of Pill LJ's judgment in **DCA v Jones** that it is for the ET to decide, on the facts of any particular case, which potentially relevant factor or factors is or are actually relevant to the exercise of its discretion in any case. **DCA v Jones** also makes clear (at paragraph 44) that the prejudice to a Respondent of losing a limitation defence is "customarily relevant" to the exercise of this discretion. It is obvious that if there is forensic prejudice to a Respondent, that will be "crucially relevant" in the exercise of the discretion, telling against an extension of time. It may well be decisive. But, as Mr Bourne put it in his oral submissions in the second appeal, the converse does not follow. In other words, if there is no forensic prejudice to the Respondent, that is (a) not decisive in favour of an extension, and (b), depending on the ET's assessment of the facts, may well not be relevant at all. It will very much depend on the way in which the ET sees the facts; and the facts are for the ET. I do not read the decision of the EAT in **DPP v Marshall** [1998] ICR 518 (and in particular pages 527H-528G, which were relied on by Mr Allen and Mr Sugarman) as contradicting this approach; but if it does, I bear in mind that the observations relied on are from the EAT, and pre-date **DCA v Jones**."

30. The Tribunal also adopted, in principle, a sound and structured approach to its decision, making its findings of fact, then listing the matters that it found to be relevant in this case, whether drawn from the **Keeble** checklist or otherwise, and after considering how matters stood in relation to each of these in turn, standing back and coming to its overall conclusion. I agree with Mr Gorasia that in principle I should, therefore, only interfere with this decision if it was in some respect, in the legal sense, perverse.

31. I will consider in that light, first, the Tribunal's reasoning in relation to the factors which it took into account, in evaluating the reasons why the claim was not presented sooner than it was. Pivotal to the challenge on this aspect are, I think, two features. The first of these is the clear finding that the Tribunal accepted that the Claimant was genuinely labouring under a misunderstanding, and, having given ACAS full details of what she was complaining about, and obtained her early conciliation certificate, she believed that she had done all that she needed to do in order to initiate her claim. The second feature is the question of the impact which what may be broadly called her mental health, did or did not have on how events unfolded.

32. I consider, first, the aspect of the Claimant's misunderstanding about what she needed to do to initiate a claim. As a matter of pure logic, it is hard to resist Mr Jones' proposition that, if a complainant assuredly believes that they have *already* initiated a claim, then that would be bound to serve to explain, as such, why they did not then take further steps to do what they thought they had already done. However, it does not follow that it would be irrelevant to the Tribunal to consider, as part of the process of deciding whether it is just and equitable to extend time, how such a complainant had come to form such a belief.

33. Nor does it follow that it could not be relevant to consider whether, in all the circumstances, there nevertheless came a point when they could reasonably have been expected to take some further proactive step. In particular, the Tribunal is entitled to consider whether, in its view, at some point such a complainant should have reacted to the fact that they had heard nothing more from the body to which they thought they had presented their claim, whether by simply following up with some further enquiry of that body, or by checking whether their initial belief was indeed correct, and that everything was indeed in order, and that there was nothing more that they should be doing.

34. Those are generalised and, possibly, trite propositions. What views the Tribunal in the given case comes to about these questions will be highly sensitive to the facts of the case, all the more so where it is, as here, exercising an evaluative discretion. The general point, which Mr Jones did not really dispute, is simply that the fact that the Claimant genuinely believed, just after she had got to the end of the ACAS early conciliation process, that she need do nothing more to initiate her claim, did not, by itself, make considerations of such further questions in this case, as it were, off limits.

35. I turn, then, to the particular strands of challenge to this aspect, taking them in a slightly different order to that in which Mr Jones presented them. First, I do not think that it was wrong as such for the Judge to say, in paragraph 42, that the Claimant's chance to correct her error was missed in January 2018. It seems to me that he was simply referring to the fact that, in this case, following the issue of the ACAS early conciliation certificate, the effect of the relevant provisions was that the Claimant then had a further month – effectively the month of January – in which to present her claim in time. However, because of her error, she did not take any proactive steps, and so that window of opportunity was not used, which was why she had to seek an extension of time.

36. Secondly, I do not think it was a material error for the Judge to have observed that the CAB advisor, "must" have advised the Claimant of the need to lodge a Tribunal claim after early conciliation ended. It was never suggested that the Claimant has been wrongly advised at any point, whether by the CAB advisor or anyone else. The error or misunderstanding of the position was accepted as being solely hers. Further, I do not find it hard to understand why the Tribunal felt it could infer from what it did know – that the person the Claimant saw was the CAB's employment specialist, and that he told her about the need to go to ACAS early conciliation, and that he helped her actually to initiate it – that he was someone who would surely have appreciated the difference between ACAS and the Employment Tribunal, and that a further step would thereafter be needed; and that, if so, he would in all likelihood have told the Claimant that. I do not think that this was beyond the bounds of a proper inference to draw, on the balance of probabilities, from those primary facts. Further, in any event, the Judge was not relying on this inference to cast doubt on the Claimant's evidence that she did not understand the position. He accepted that she was genuinely under a misapprehension.

37. Nor do I think that the Judge saying that the Claimant bore responsibility for the claim having been presented out of time would, by itself, necessarily point to an error. That is, again, insofar as the Judge's point was simply that this came about because of her own mistake or misapprehension, rather than because she had been wrongly advised by someone else. Nor do I think that the Judge was wrong, as such, to have regard to the fact that the Claimant's friend enquired of her what was happening in relation to her claim. It was not wrong, as such, to give consideration to whether that enquiry ought reasonably to have prompted her to reflect on whether she ought to be concerned that she had not heard anything more, and to take some sort of proactive step to chase up or check the position, sooner than she in fact did.

38. However, what has given me much greater pause, and I think ultimately formed the heart of the arguments today, was Mr Jones' submissions on the question of the Judge's approach to the medical evidence, and the issue of the Claimant's state of mind in the relevant time window. There is also a subpoint that was explored in oral submissions, about that time window itself. Clearly, overall the Judge was concerned with an application to extend time up to when the claim was actually submitted, which was early April 2018. Mr Gorasia also accepted that the Judge was not troubled, as such, by the fact that, after the Claimant spoke to David of ACAS at the end of March, she had some further technical difficulties submitting her claim so that it did not go in until 3 April.

39. However, there was a difference before me as to the approach which the Judge took, in respect of the period of up to six weeks after the Claimant had spoken again to the ACAS early conciliation officer, up until when she did speak to David at the end of March. I should add that, although it is apparent that the Claimant was not able in evidence to give a precise date, and the Judge did not always put it in the same way, overall, he seems to have proceeded on the

basis that she first spoke again to the ACAS early conciliation officer in mid-February, or perhaps a little later.

40. Mr Gorasia submitted that the Judge had clearly found that, when the Claimant did get back in touch with the ACAS early conciliation officer, that was the point at which she realised that she should have taken a further step, of filling in and submitting some type of claim form, over and above her communications with ACAS, and that she was now out of time to do so. Whilst the Judge accepted that she did not realise that until that moment, he was not satisfied about why, after *that* point, she still failed to take the step of submitting her claim form until the end of March, after she spoke to the early conciliation officer's superior, David. That the Judge was not happy about her continued failure to submit her claim or attempt to do so, during that window, could be seen, submitted Mr Gorasia, from the following passage:

> **"41. Putting those matters together I accepted the claimant's evidence about how difficult December was. I accepted this was this still affecting her into January, but I also accepted Mr Hills' argument that the claimant had not shown that she was unable to take action until late March."**

41. Mr Jones disagreed. He submitted that, on a careful reading of the decision, it could be discerned that the Judge had understood from the Claimant's evidence, and found, that what happened in mid-February, when she spoke again to the ACAS early conciliation officer, was that he told her that she should have put in the Tribunal claim form already, and that she was now out of time to do so. She was at that point very unhappy, which was why she escalated the matter to his superior; but it was only when she eventually managed to speak to that superior – David – that it was *then* suggested to her that she still could, and should, put in a *late* claim form; and, with his guidance, she then did so. When she spoke to the early conciliation officer she thought she had simply lost her chance to pursue a legal claim entirely, which was why she

A complained about what had happened to his superior. It was only when she spoke to the superior that she realised that she still had the option of attempting to rely on a late claim form.

B 42. I agree with Mr Jones' reading of the decision on this point. It is apparent, in particular, from the Tribunal's observation that, when she spoke to the conciliation officer, in mid-February "it became apparent that there was a form that she should have filled in, and that there was now a time limit problem"; and the further use in paragraph 25 of the word, "escalated" to C the manager David; and the observation that she "managed" to speak to him at the very end of March – suggesting that despite efforts, she did not get to speak to him before then. It is also confirmed by the finding that he then talked her through the procedure, and explained how she D would have to lodge her Tribunal claim form online. That also hangs together with the Judge's conclusion, in paragraph 38, that "with ACAS it appeared that the position was clear to her only after she escalated matters to the manager David at the end of March 2018."

E 43. I agree with Mr Jones that this also explains why, in various other parts of the decision, the Judge focused his attention on the issue of why the Claimant had not been more proactive *prior* to contacting ACAS in mid-February. I should add that this reading of the decision, and F how it drew on the evidence which the Claimant gave, did seem to be supported by the manuscript notes of her evidence, though plainly not verbatim, taken by Mr Hills, a copy of which I had in my bundle. But I think that, even without recourse to those notes to understand G his reasoning, this is a fair, careful, reading of the words of the Judge's decision alone. The reference, in paragraph 41, to Mr Hills' argument that the Claimant had not shown that she was unable to take action until late March was, firstly, a summary of *his* argument, and, secondly, came in the context of a paragraph concerned with the Claimant's difficult *December*, and how H far the medical evidence did or not take her in relation to the aftermath of events in *that* period.

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44. I turn then to the evidence of the GP's letter. As to that, the Judge noted in paragraph 31 that, in referring to particular events in 2017, the letter, "confirms that she was suffering from depression and not able to function properly or deal with filling in forms"; but he observed that it was, "silent as to when that began and how long it lasted." Again, in paragraph 39 the Judge said that the GP's letter indicated that, after the flu and the bereavements, the Claimant was, "left down and depressed" and so forth; and in paragraph 40 that the GP was "not specific as to the period for which these difficulties lasted"; and that the letter said nothing about "how the Claimant was by late January 2018". It was this reading of that letter that fed into the Judge's conclusion in paragraph 41, that he accepted that she had not shown she was unable to take action until late March, drawing also on the fact that he found that she was able to deal with other aspects of her life in that time. That conclusion was in fact anticipated in paragraph 32 where the Judge, having considered there the medical evidence, stated:

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> **"32. However, I was satisfied that the real reason she did not pursue her claim by the end of January 2018…… was her misapprehension that she had done all she needed to do…."**

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45. In similar vein in paragraph 44 he stated that, even acknowledging the "very difficult circumstances affecting her in late 2017 and early January 2018", she was responsible for the claim being lodged late.

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46. Pausing there, it seems to me, reading these passages in the decision as a whole, that, in short, the Judge concluded that the evidence did not support the state of the Claimant's mental health being an appreciable or relevant factor at all, after about mid-January at the latest, and, therefore, not at all in the period from then until the eventual presentation of her claim form at the start of April. The critical period within that, in the Judge's estimation, was the period up until mid-February, when she contacted the ACAS officer again.

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47. The question on which counsel before me disagreed, is whether the Judge properly and permissibly came to that view on the evidence before him. As to that, certainly there is no simple rule of thumb or automatic assumption that could be made, about how bereavement, illness or other major adverse life events will affect the given individual. It is a matter for evidence and careful fact-finding in the given case. This was a difficult evaluative exercise, but it was for the Judge to carry it out as best he could. Medical evidence, like any other evidence, may, and should be, critically examined and evaluated by a Tribunal. Who has provided it? What information or records were available to the author? How directly does it address the specific issue of interest to the Tribunal? These may all be relevant considerations.

48. I also agree with Mr Gorasia that it was not wrong, as such, for the Judge to take into account such evidence as he had about other things that the Claimant was able to deal with, such as her car accident claim, and to consider how that evidence did or did not help him to form an overall picture. He also had the advantage, albeit a further six months down the line, of seeing and hearing the Claimant give oral evidence in person.

49. However, I need to set out the full text of what the GP's letter of 11 June 2018 said.

> **"I am writing on behalf of this 57 year old lady who has been through a very very difficult time over the last few months. In December she had a very nasty bout of the flu which left her feeling extremely debilitated and she also suffered in fairly quick succession 3 bereavements. This has left her down and depressed and unable to carry out normal duties of her daily life. She has had a lot of difficulty dealing with forms and communicating with people. She also has physical problems. She has had 2 road traffic accidents in the past which have left her with problems with her neck and upper body and the stress that she has been under recently has caused a recurrence of her physical symptoms. She has also been getting extremely bad headaches. She has found carrying out her normal day to day life extremely difficult and anything that adds to her stress makes her find it really difficult to concentrate and action things. If there is anything further you need to know please do not hesitate to contact me."**

50. This letter, I observe, begins by saying that the Claimant, "has been through a very, very difficult time over the last few months." The GP then refers to the bout of flu and

bereavements in December, but also to other events, albeit without attributing a clear timeframe to them. Repeatedly, however, she uses the words, "has" and, "has had". The natural reading of this letter as a whole is, I agree with Mr Jones, that the GP is talking generally about a period of months, from the previous December up until around the time when the letter was written, and is describing how the Claimant has been, over that period generally. While it does not in any way break down that period, or refer to whether there has been any material change over those six months, it does not read as describing difficulties that are now – at the time of writing – firmly in the past. Rather, it describes difficulties that are, according to the writer, in some appreciable sense still continuing.

51. Mr Jones accepted that one could not spell out of this letter that the GP was of the view that these difficulties were still as bad in June 2018 as they had been in January. I note also that the letter does not actually say when, or when last, the GP, or someone from their practice, saw the Claimant. Nor, it appears, did the Judge have the benefit of seeing any specific GP records of any individual consultations, as to when they happened, or as to what the person who saw the Claimant recorded on any such occasion. However, I agree with Mr Jones that the natural reading of this letter is that the writer felt able to draw on some hard source to convey an up to date picture, which, one must infer, was based on some relatively recent last contact. In short, it was fair to infer that this letter would not have been written in the way that it was if, let us say, the Claimant had not, as of June, seen any GP at the practice at all for some months.

52. It must be stressed again that it was for the Judge to evaluate how the contents of this letter fed into his overall picture of the Claimant's mental health and state of mind in the period up to 3 April 2018. As I have said, the critical period appears to have been the period up to mid-February when she contacted the early conciliation officer again, as it appears to me that

A the Judge was indulgent of the fact that it took her some time thereafter to get hold of the conciliation officer's superior, and only then did she fully appreciate that she had the option of seeking to proceed on the basis of a late submitted claim. Focusing on that period up to mid-February 2018, the Judge appears to have taken a view that the letter did no more than describe the effect of the events up until the end of December 2017, without offering any assistance at all as to how long the aftermath of the events had some significant impact or continued. Certainly, he seems to have been of the view that it offered no assistance at all or evidence that such effects might have continued, beyond, at the latest, mid-January; so that there was a further period of inaction of about a month in relation to which it had no bearing.

D 53. I agree with Mr Jones that that is not a fair reading of the assistance which this letter potentially offered to the Judge. Nevertheless, says Mr Gorasia, the Judge had the benefit of drawing also on the Claimant's evidence. Mr Gorasia suggested this pointed to a contrast with the facts in the **Watkins** case, as the Judge plainly applied his mind to, and critically evaluated, this question. The Judge fully accepted that events up to the end of December were serious and had had some serious impact. Further, the Claimant's own submission, referred to in paragraph 27, had been that she was not in a fit state to deal with the Tribunal matter before mid-February, not that her mental state was relevant to why she was unconcerned that she had not heard anything prior to mid-February. Mr Gorasia submitted that the Judge was entitled, taking account of both the GP's evidence and the Claimant's own evidence, to reject her submission. He stressed again that this was a proper exercise of discretion by the Judge, who had engaged with this question; and his decision should not be subject to microanalysis by me.

H 54. I have found this point to be finely balanced. I do not think this issue really turns on the distinction that Mr Jones sought to draw, between whether there was evidence that the state of

A the Claimant's mental health had affected her capacity to engage with the question of taking further action, as opposed to the likelihood that she would have been concerned not to have heard anything prior to mid-February. On a natural reading of the Judge's description of her submissions this was not a distinction that the Claimant herself sought to draw. I am inclined to think that it is not a bright distinction in any event. If someone was in distress and in emotional turmoil to a sufficient degree, it might affect them in either or both of these ways.

C 55. The bigger and more troubling question is whether the Judge was entitled, in view of the contents of the GP letter, but taking account also of the fact that he heard evidence from the Claimant, to take the view that the Claimant's mental health in the aftermath of the events D described was not a factor *at all* after mid-January at the latest. As I have indicated, it is not, in my view, a fair reading of the GP's letter, that it offered no assistance on that question; and I also consider that the Judge's reading of the letter in that way played a significant part in his decision. He accepted that the Claimant had formed a genuine misapprehension, and that her E mental health *had* had a material impact up to mid-January at the latest; but not thereafter.

56. Whilst he was entitled to have regard to the evidence he had about other things that she F was able to deal with, the Judge did not, it seems to me, weigh up that evidence along with the medical evidence about the state of her mental health, as being relevant to the period after mid-January. Rather, the Judge considered the contribution of the evidence about other things that G the Claimant was able to deal with, on the basis that any impact of her mental health in the period after mid-January could be discounted, having regard to his reading of the GP's letter. I do conclude, therefore, that the Judge's reading of the GP's letter and what it could contribute was not a fair one, and that this reading materially contributed to his overall decision. H

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57. I come to the second strand of the challenge. That concerned the Judge's approach to the impact of the delay of a little over two months in presenting this claim, on the memories of the Respondent's witnesses and the cogency of their evidence. This is plainly not a case where it was suggested that there was a particular difficulty, such as a witness having died or disappeared or become unavailable, or crucial documents having been lost. That is the sort of thing about which the Tribunal does need to have some specific evidence or information in order to take it into account. Nevertheless, the general effect of the delay on the quality of witness evidence was potentially a relevant consideration.

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58. As to that, the Judge carefully and fairly analysed the nature of the issues in this case, and the allegations that the Claimant was making. He came to a reasoned conclusion that the substantive issues were liable to be highly fact-sensitive and highly dependent on the Tribunal's appreciation of the oral evidence and recollection of witnesses. There is no challenge to that assessment as such. The Judge was, therefore, entitled as such to consider that the cogency of witnesses' recollection would be important in this case. I also do not think that the Judge necessarily had to hear from witnesses about that in order to make some assessment of its potential impact. I do not think it was wrong to apply a broad rule of thumb or common sense that, other things being equal, the more time passes, the more memory, including for details, fades. Nor was the Judge wrong to consider that the date of presentation of the claim, and the length of the ordinary limitation period, were significant factors. That is particularly because it is only once a claim has been presented, that a respondent can know for sure whether they will have to defend a claim at all, and what its extent will be, and hence from which witnesses statements will be needed, and covering what matters.

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59. This claim was, when first presented, painted with a fairly broad brush. But it could be seen that the Claimant was alleging that a number of incidents had occurred, covering the period going back almost to December 2016, and right up to the decision to dismiss her. The Judge was plainly aware of that. He was entitled to consider that a delay of two months could potentially affect witnesses' memories of one or more of the alleged incidents in a more than negligible way. This was indeed the main point which seems to have weighed on the Respondent's side of the scales, although the Judge would also have been entitled to attach weight to the fact merely that the Respondent would have to defend a claim that it would not otherwise have to defend. See further on that, the discussion in **Miller**. The Judge may have had that also in mind. But it seems to me that the principal basis for the decision not to extend time was the Judge's view that the Claimant had not presented a sufficiently compelling explanation for all parts of the period of delay in presentation, with the potential impact on the Respondent's witnesses' recollection being an added, but not the key, ingredient.

60. The Claimant's explanation for the delay, at its broadest level, revolved around two things: the fact that she had made a genuine mistake, and the impact of her poor mental health. The Judge accepted that she had made a mistake, but did not accept that this was by itself a sufficient explanation for why she had not been more proactive before mid-February; and he concluded that her mental health was not a relevant consideration beyond, at the latest, mid-January. As I have said, I do not think that conclusion was based on a fair reading of the GP's letter. His reading of it seems to have materially affected his view of the Claimant's inaction until mid-February, and in turn his view of the strength of the case for extending time on her side of the scales, and whether that was outweighed by the potential impact on the Respondent's witnesses' memories of a two-month delay.

61. Not without some hesitation I have, therefore, come to the conclusion that this decision cannot stand, and that I must remit the matter to the Tribunal to consider the question of whether to extend time afresh. I observe, so that it is entirely clear, that I am not saying that granting the extension is the only proper outcome that can be reached second time around. I am, therefore, not in a position to substitute my own decision to that effect. It will be for the Tribunal's appreciation on rehearing the matter to decide whether it is just and equitable to extend the time, having regard to all of the evidence presented to it next time around.

62. However, I do observe that it seems to me that it will be likely to assist the Tribunal, to have available to it, if possible, next time, not only the letter from the GP but all of the potentially relevant GP's notes. That is so that the Tribunal can have the best picture of what consultations with the GP took place, and when, during the relevant time period, at least from when the Claimant lost her job with the Respondent up until when she presented her claim. The Tribunal can then have the benefit of seeing what matters were recorded in the GP's notes on each occasion, and, hence, the best available contemporary medical evidence to assist it. That said, I stress again that its decision will, of course, need to be based on its findings drawing on all of the evidence that it will have before it next time around.

63. I indicated when I gave my decision earlier, that this matter will have to be remitted to the Tribunal effectively for an entirely fresh hearing on the question of whether it is just and equitable to extend time in this case. There is, therefore, no particular advantage to be gained by directing that this matter go back before the same Judge. It is not a case in which there is just a small amount of remaining work to be done, and given the passage of time since the hearing in the Employment Tribunal ("the ET"), now a year ago, even if it went back to the same Judge, his recollection would not be likely to be very fresh.

64. Both counsel, therefore, agree that this is not a case where I ought to direct that the matter must, if possible, go back to Judge Franey. What they disagree about is whether I should positively direct that it should be heard by a differently constituted Tribunal. Mr Jones has referred me to some strongly voiced criticisms which the Claimant made of the Judge in an application for reconsideration that was unsuccessful, including using the words, "bias" and, "prejudice". I should make it clear that I attach no weight to that at all. I appreciate that was how the Claimant felt when she wrote that application. But the fact that she felt that way does not, as such, provide any basis for me to say that there is any cause for concern, that the same Judge would do anything other than deal with this matter entirely professionally and objectively, if it came back to him. I should also make it clear that although I have concluded – and indeed it is at the heart of why I have allowed this appeal – that the Judge's reading of the GP's letter was not a fair reading, I also entirely accept that was his considered reading of it.

65. However, all of that being accepted, it seems to me, firstly, that it would be a tall ask of Judge Franey to expect him to put out of his mind the previous view to which he came. It is also important that, whoever wins or loses on this point second time around, they feel confident that the matter has indeed received an entirely fresh and untrammelled consideration. For those reasons I will direct that the matter be remitted to a differently constituted Tribunal.