Appeal No. UKEAT/0277/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 November 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MS M SWEENEY APPELLANT

MERSEYSIDE COMMUNITY REHABILITATION COMPANY LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PARAS GORASIA (of Counsel) Instructed by: Direct Public Access
For the Respondent	MS DEBBIE GREENAN (of Counsel) Instructed by: BPE Solicitors LLP St James House St James Square Cheltenham GL503PR

SUMMARY

PRACTICE AND PROCEDURE – Case management

PRACTICE AND PROCEDURE- Admissibility of evidence

The Claimant brought multiple complaints to the Employment Tribunal, including of harassment related to disability and failure to comply with the duty of reasonable adjustment, in relation to what she said was her excessive workload during a particular period of her employment. Her claimed excessive workload was also said to be one of the things contributing to a cumulative breach of the implied duty of trust and confidence, on which a complaint of constructive unfair dismissal was founded. Those complaints all failed.

The Claimant appealed. Ultimately the only grounds permitted to proceed to a Full Hearing in the EAT all related to the Tribunal's decision to refuse an application to admit a document into evidence, made during closing submissions at the Hearing before it. The document was a print-out, which the Claimant had in her possession, showing information about her caseload on a particular day falling during the window to which those complaints related ("the Caseload Document"). The EAT had stayed the appeal to allow a reconsideration application to be made. Upon reconsideration the Tribunal had considered the Caseload Document and its implications, but, having done so, had affirmed its original decisions.

Held: The Tribunal had erred in its decision not to admit the Caseload Document into evidence. Had the Tribunal not already done so, the EAT would have remitted the matter to the same Tribunal to consider the implications of the document. The Claimant's counsel's submission that there should still be a remittal, but to a differently constituted Tribunal, was not accepted. As the Tribunal had properly considered the significance of the Caseload Document, in its reconsideration decision, no remittal was required, and the appeal was simply dismissed.

HIS HONOUR JUDGE AUERBACH

1. I will refer to the parties as they were in the Employment Tribunal, as Claimant and Respondent. The Claimant is a probation officer and was formerly employed by the Respondent. Her original employer, from 2001, was the National Probation Service. Her employment transferred to the Merseyside Probation Trust in 2008 and then to the Respondent on 1 June 2014. Following her resignation in March 2015, which took effect on 2 April, the Claimant presented a claim to the Employment Tribunal. She claimed unfair constructive dismissal, whistleblowing detriment, and she brought various complaints under the **Equality Act 2010** by reference to the protected characteristic of disability.

2. The Claimant relied on two disabilities, being her visual impairment and colitis. It was accepted that she was, at all times, disabled by reference to her visual impairment, and the Tribunal found that she became disabled by reason of colitis from 21 August 2013. Although I do not need to go into much detail, I do need to say a little more about the Claimant's visual impairment. It is severe, affecting, in particular, her central vision, and she is registered blind. At work, she required the assistance of specialist software and hardware adaptations and a support worker. In her conduct of this litigation in the Employment Tribunal and the EAT, she has been dependent on volunteers to assist her in various ways.

3. There were claims of failure to comply with the duty of reasonable adjustment, with most of which this appeal is not concerned. The Tribunal found that there was a small standing adjustment made to the Claimant's workload in terms of the size of case load she was expected to handle. However, there were issues about whether, at certain times, she was overworked, in particular, in the time window of around 11 weeks between when she returned from a period of

sickness absence on or around 19 January 2014, to when she went off sick again on 24 April 2014, an absence from which, in the event, she never returned to work before resigning.

4. Specifically, it was claimed that a manager, Ms Kuyateh, had allocated to the Claimant more than 60 cases during that 11-week period, and that this amounted to harassment related to disability. There was, also, in respect of the same factual allegation, a complaint of a breach of the duty to make reasonable adjustments, in particular, because that level of allocation was said to have placed the Claimant at a substantial disadvantage compared with non-disabled colleagues. This alleged treatment was also said to have contributed to a breach of the implied duty of trust and confidence on which the constructive unfair dismissal claim was based.

5. The matter came to a Full-Merits Hearing on 6 to 17 February 2017. The Claimant appeared in person. The Respondent was represented by Ms Grennan of counsel. The Claimant had some lay assistance and support at trial. The Tribunal – Employment Judge Horne, Ms F Crane, and Mr B Bannon – gave an oral Decision on the last day of the Hearing. It upheld two complaints of failure to comply with the duty of reasonable adjustment, and it later on went on to make an award of compensation in that regard; but it dismissed all of the other complaints, including, in some cases, because they were out of time.

6. The particular overlapping complaints of harassment and failure to comply with the duty of reasonable adjustment, to which I have referred, were dismissed as out of time on the basis that it was not just and equitable to extend time, having regard to what the Tribunal was able to find about what had occurred. The claim of constructive unfair dismissal also failed. The written Judgment was sent to the parties on 3 March 2017. Written Reasons were requested. These were initially produced but required some correction, and the corrected version was sent

to the parties on 29 June 2017. Those Reasons ran to 66 pages. Because of the limited scope and nature of this appeal, I can pass over much of the content. However, I set out the following passages, which concern or touch upon matters raised by this appeal.

7. First, in the course of a general overview of the evidence, the Tribunal said this

> **"56. There were some factual issues that were hard to resolve because the evidence in relation to them was vague. One example relates to the events of March and April 2014. We had a vivid picture of cases passing between the Respondent and the National Probation Service in batches and that it was a difficult time for everybody. What we found much more difficult was to find at what point in time, if any, the claimant was overworked, or when, if at all, Ms Monteith knew about that state of affairs. It was hard to find whether Ms Monteith should have done more to secure additional resource to take the claimant's cases from her and, if so, at what point. Another, linked, area of factual dispute was whether Ms Kuyateh compounded the problem by allocating work unfairly. Evidential difficulties included the following:**
>
> > **56.1. The respondent relied on a computerised workload management tool which appeared to indicate that the claimant was handling only 40% of her expected workload. This did not fit with anybody's impression of the amount of work that the claimant was being required to do. It appeared to be based on the number of cases that the claimant had at a particular time, rather than the work that was involved in handling them. In particular, it did not appear to take account of the substantial additional work caused by a high turnover of cases.**
> >
> > **56.2. The claimant asked for permission – at a very late stage of the hearing – to rely on documentary evidence that was not in the bundle. This might have indicated the number of cases that the claimant had at a particular time, but would not have shown how much work was required to be done on them. In any event, because of the disadvantage to the respondent, we refused permission for the claimant to rely on them.**
> >
> > **56.3. The claimant's evidence in relation to these matters appeared inconsistent to us: each time she referred to a sequence of new cases allocated to her and being taken away, the numbers were different.**
> >
> > **56.4. Miss Monteith's evidence was vague and lacking in detail. This was not surprising. Not only were the events nearly 3 years ago, but, in the meantime, Ms Monteith had gone on maternity leave and was still on maternity leave at the time of giving her evidence.**
> >
> > **56.5. The responsibility for allocating additional resources lay with Ms Goodwin, but the claimant did not ask her any questions about it.**
>
> **57. Another evidential question for us was what to make of the absence of Ms Kuyateh. Her alleged conduct was at the heart of many of the allegations of harassment, yet the respondent had not called her as a witness. Having heard all the evidence, we decided it would not be appropriate to draw any inference adverse to the respondent from Ms Kuyateh's absence. Ms Kuyateh does not work for the respondent and it appeared to us that she would be unlikely to have attended voluntarily."**

8. Further factual background relevant to this appeal were set out as follows:

> **"60. As is well known, Probation Officers work with offenders. Amongst many other things, they assess the risk of reoffending and write reports for courts within the criminal justice system. Some reports, known as Short Delivery Reports, require tight turnaround times imposed by the court. Reports are also required to be prepared quickly when an offender is in custody.**

> **61. The Probation Service recognises different categories of risk. For our purposes, the critical distinction was between Tier 4 cases, on the one hand, and Tiers 1 to 3 on the other.**
>
> **62. The respondent operates under a contract with the National Offender Management Service ("NOMS"), an agency of the Ministry of Justice. Broadly speaking, under the terms of the contract, the respondent manages "low risk" offenders within Tiers 1 to 3. The higher-risk (Tier 4) offenders are managed by the National Probation Service.**
>
> **63. Prior to 2014, management of both low-risk and high-risk offenders was the responsibility of Merseyside Probation Trust ("the Trust"). That organisation, founded in April 2008, replaced the Merseyside Area of the National Probation Service."**

9. Further on, the Tribunal came to events following the Claimant having begun, in January 2014, a phased return to work from sickness absence. After describing how a support worker needed to be found on her return, and funding arrangements put in place for that, the Tribunal continued:

> **"151. Mrs Churchill was due to begin a secondment to another organisation in February 2014. Ms Gail Aindow was appointed as the claimant's interim line manager. The evidence as to when, precisely, line management responsibility transferred is a little vague. Of one thing, however, we are satisfied. On 13 February 2014, whatever the formal reporting structure was at that time, Mrs Churchill met with the claimant to discuss adjustments. The claimant said that she would use 14 days' annual leave to complete her phased return, which would finish on 24 February 2014. They agreed that the claimant would "liaise" with the employment agency and "progress recruitment" of a support worker. By that time, the claimant had completed her OASys-R and N-Delius training. She reported that she was "able to navigate both systems with little difficulty". Up to that point, the claimant had been undertaking non-operational activities. They agreed that they would "commence the allocation of cases and reports on a phased basis".**
>
> **152. The claimant did not object to being given any new cases or ask for the start of the phasing-in period to be delayed until after her support worker had started work.**
>
> **153. The claimant's support worker, Ms Adele Barlow, started work on 5 March 2014. Prior to her arrival, Ms Barlow was unfamiliar with the probation services and with the Trust's computer systems. At some point – we are not sure when – Ms Barlow received training in the Trust's IT systems. To a large extent, Ms Barlow learned on the job.**
>
> **154. We do not know when, precisely, the claimant first started to take on new cases. It is likely to have been, at the latest, a few days before 5 March 2014.**
>
> **155. In early March 2014, Miss Monteith took over from Ms Aindow as the Claimant's line manager. Ms Monteith had been back at work from maternity leave for about a month and was herself trying to cope with the changes to the service. Nobody briefed her about the claimant's individual circumstances. In particular, nobody told her that the claimant had a medical condition that was aggravated by stress, or that she had just completed a phased return to work.**
>
> **156. As we have already discussed, the evidence about the extent of the claimant's workload is unreliable. We know about the number of cases at given points in time, but not how much work they required. The only thing we can be sure of is that the Trust was in a state of flux. The allocation of cases bordered on the chaotic. This was because cases were being passed back and forth between the National Probation Service and the Trust in anticipation of the forthcoming split in the service. Allocation was based on level of risk, which was dynamic, changeable over time, and about which Probation Officers could, and did, reasonably disagree. As the assessment of risk changed in relation to a particular case, so did the organisation that was supposed to be dealing with it.**
>
> **157. We have no specific evidence about how Ms Kuyateh allocated new cases and to whom. Generally, cases would be passed between organisations and allocated to Probation Officers in**

batches. This was the same for all Probation Officers including the claimant. We cannot find any evidence of a deliberate attempt to give the claimant an increased workload compared to her colleagues. In coming to this view we have looked at Ms Kuyateh's behaviour generally, including the two comments in January 2014 that offended the claimant. Our opinion is that we could not conclude from those comments that Ms Kuyateh was unfairly distributing work. We also took into account Mr Kayani's evidence to Mrs McK evitt that the claimant's case load was the same as that of her colleagues. For the same reasons as with the 2013 distribution of work, we found it difficult to make findings without hearing from Mr Kayani and Ms Kuyateh. Had the claimant brought her claim before June 2014, it is much more likely that the respondent would have been able to secure their attendance.

158. The ebb and flow of cases involved additional work for everybody. Ms Monteith vividly described how team members – not just the claimant - were "crying under the pressure". But it affected the claimant particularly. This was not because of her visual impairment. One factor was the claimant's cautious approach to risk. She would not take a colleague's risk assessment at face value, but would familiarise herself with the details sufficiently in order to carry out her own assessment."

10. Further findings on this subject were as follows:

"161. On 4 April 2014, Miss Monteith e-mailed Ms Goodwin appealing for additional resources. She outlined the case loads of various officers in her team and stated that some of the claimant's current work would need to be reallocated, otherwise her case load would reach 79 cases. Other team members' cases were roughly around the 50 mark. Ms Goodwin replied that staff would have to get used to a higher case load, with less work to do on each case, and that if additional resources were required, Ms Monteith would have to write a business case for Mr Quick. A further e-mail from Miss Monteith on 10 April 2014 put the Claimant's case load at 50 cases. This was in step with her colleagues.

….

164. On 22 April 2014, Miss Monteith and the claimant met to discuss the claimant's ongoing cases. The meeting did not go according to plan. The claimant told Miss Monteith that she was no longer in a position to work with her caseload comfortably, that she did not know the offenders or the risks involved in managing them. Some cases had had little or no risk assessment done on them and she had a high number of cases with domestic violence or child protection issues. She did not want any more cases over the next few weeks and was considering handing in her notice. It is the claimant's case that she was told to "do no more work with children at risk". What is more likely in our view is that she was told that would not be allocated new cases.

165. Following the meeting, Miss Monteith summarised the meeting to Ms Lea. She also gave an update to Ms Goodwin. The claimant had 40 cases and, in Miss Monteith's opinion, could not be allocated any more. In terms of simple numbers of cases, the claimant had fewer than many of her colleagues. The claimant e-mailed Mr O'Doherty (her NAPO representative) the same day, indicating that she would be "resigning from the trust today" as her position had become "untenable" and that her practice was currently "unsafe". Mrs Evans emailed the claimant, also that day, to suggest a meeting to discuss her reasonable adjustments.

166. On 23 April 2014, the claimant suffered an anxiety attack at work, with symptoms of colitis. On 24 April 2014 the claimant went back on sick leave and never returned to work. Her first fit note, dated 24 April 2014, stated "work related stress".

…..

169. Miss Monteith e-mailed Mrs Evans on 13 May 2014, stating that the claimant's case load had been "always around the 50 mark" and had not been "unrealistically high"."

11. Further on, the Tribunal referred to the Claimant's email letter of resignation and what it found were her actual reasons for resigning:

> **"224. On 3 March 2015 the Claimant resigned. In a long e-mail to Mrs Stott, she set out her Reasons. Amongst the Reasons were:**
>
> > **224.1. Alleged failure to comply with her requests for information "evidencing criminality at a corporate level".**
> >
> > **224.2. Conducting a "campaign" against her for raising issues.**
> >
> > **224.3. Being "marginalised, victimised and discriminated against throughout my employment".**
> >
> > **224.4. Forcing her to work for the CRC – "a company that I would ever choose to work for or with, based on the publicised misuse of public money, … I would have no confidence that these organisations would act in the interests of offenders and staff who work front line…"**
> >
> > **224.5. The grievance investigation "attempted to place blame solely on one management issue when it was evidence that the manager was acting at the direction of the senior management team…"**
> >
> > **224.6. Being refused the right to record the 2 July 2014 meeting;**
>
> **225. We pause here to record our findings about the claimant's actual reasons for resigning. They were overwhelmingly reasons for which the respondent was entirely innocent:**
>
> > **225.1. The claimant did not want to work for a private company. She had no confidence that such an organisation would act in the interests of members of the public. She thought they were "making money on the backs of crimes and victims". That was not the respondent's fault: it was a consequence of central government policy.**
> >
> > **225.2. She resigned in response to her perception that she was continuing to be bullied. That perception was unfounded because it was made clear to her on 25 February 2015 that she would no longer have any day-to-day contact with Ms Kuyateh.**
> >
> > **225.3. She resigned in response to her mistaken perception that the organisation was "using her disability as a weapon to attack her". She may genuinely have believed that this was the case, but the respondent did not do anything to substantiate that belief.**
> >
> > **225.4. She resigned because of her health. It cannot in our view be said that the state claimant's health in March 2015 was caused by any act or omission of the respondent. She resigned in response to what occurred at the 25 February 2015 meeting and the way she mistakenly thought that Rosie Goodwin had treated her.**
> >
> > **225.5. The claimant resigned partly in response to her surprise at being told that a private company, Purple Futures, was the preferred bidder for the CRC, and her unfounded belief that Mrs Stott had lied to her in December 2014 about their identity.**
> >
> > **225.6. There was another very important reason for resigning. During the course of the Hearing, the claimant indicated that she did not want to discuss it in public. With the parties' consent, we agreed to hear it in private. It related to the effect of her workplace concerns on her family life. It came to a head just before she resigned. It was not the claimant's fault, but nor was it the fault of the respondent.**
> >
> > **225.7. A small part of her reason for resigning was the delay in receiving the grievance report. This may have been on her mind at the time of resigning, but it was not the thing that finally made her decide to leave. She had had the grievance outcome for nearly 2 months by the time she resigned."**

12. Regarding the particular complaint of harassment related to disability with which I am concerned, the Tribunal set out its conclusion as follows:

> **"310. The allocation of cases to the claimant, extended over the period from late February to 22 April 2014, when she was told that no new cases would be allocated to her. It was not part of any course of conduct extending into a later period. We do not think it is just and equitable to extend the time limit. This is because of our difficulties in finding facts as to precisely what case load the claimant had compared to her colleagues and how Ms Kuyateh allocated the new cases.**
>
> **311. If we were wrong in our conclusion about the time limit, we would find that Ms Kuyateh did not disproportionately allocate new cases to the claimant. We were struck by Ms Monteith's description of a service in flux and the way in which everybody was feeling the strain. Cases were allocated to and withdrawn from individual Probation Officers in batches. There was nothing from which we could conclude that the claimant was singled out for specially unfair treatment and nothing about the allocation of work (so far as we were able to make findings about it) that would make it reasonable for the claimant to think that her dignity was being violated or that an intimidating, hostile, offensive, degrading or humiliating environment was being created for her. We do not think that the comments made by Ms Kuyateh in January 2014 support an inference that the claimant was being unfairly allocated new cases."**

13. Regarding the associated complaint of failure to comply with the duty of reasonable adjustment, the Tribunal set out its conclusions as follows:

> **"355. The allocation of new cases to the claimant extended over a period which ended on 22 April 2014. It did not form part of any ongoing state of affairs which lasted beyond that date. Unless the time limit were to be extended, the last day for presenting the claim would have been 21 July 2014. The claim is over a year out of time.**
>
> **356. We have already dealt with the claimant's Reasons for delay. We found in this case that the biggest impediment to extending the time limit was the effect of the delay on the cogency of the evidence. We have set out in paragraphs 56 and 156 the difficulties in finding relevant facts and the extent to which the delay has contributed to those difficulties. These facts, to our mind, lay at the heart of the issues in relation to PCP6. In particular, it was hard for us to assess whether it would be reasonable to have to adjust the claimant's workload without a clear picture of what her workload actually was at any point in time. It was also unclear at what point Ms Monteith or Ms Goodwin could reasonably have been expected to know that the claimant's workload was stressful to a point where it risked aggravating her colitis. We did not know exactly when the claimant's support worker became fully trained, so as to remove one aspect of the disadvantage caused by PCP6. For those Reasons we do not think it would be just and equitable to extend the time limit."**

14. The Tribunal's conclusions in relation to constructive unfair dismissal were as follows:

> **"364. We have recorded the claimant's reasons for resigning at paragraphs 225 and 225.5 above. With one exception, those reasons were entirely innocuous.**
>
> **365. The exception was the delay in providing the grievance outcome. The delay could have contributed, in some small way, to the undermining of trust and confidence. This was only a small part of the claimant's reason for resigning. By itself, this delay was nothing like the sort of conduct that could demonstrate an intention to abandon and altogether refuse to perform the contract. Although the delay was amongst the claimant's reasons, it was not what the claimant regarded as the "final straw".**
>
> **366. For those reasons would find that the events that actually made the claimant finally decide to resign were incapable in law of amounting to a "final straw". She did not therefore resign in response to a fundamental breach of contract and was not constructively dismissed.**

367. We have considered, for good measure, the claimant's allegations, set out in our list of issues, which did not actually feature in the claimant's reasons for resigning. One of these included her belief that the grievance had not addressed anything except for the bullying by Ms Kuyateh. Even if this had been among the claimant's reasons for resigning, we would not have found that it could have damaged the relationship of trust and confidence. Mrs McKevitt did in fact spend some time addressing matters that went beyond allegations of bullying. To the extent that Mrs McKevitt did not fully address every point, we would find that she had reasonable and proper cause. The claimant's grievance was not easy to follow and the claimant declined invitations to assist the investigation by providing documents.

368. In case we are wrong in our analysis of the final straw, we have looked back through the claimant's employment for the last episode of conduct that could have damaged the relationship of trust and confidence. Aside from the delay in the grievance, we could find nothing after January 2014. In our view, the last things we could find that might be said to have damaged the relationship of trust and confidence were the remarks made in January 2014 by Ms Kuyateh to the claimant. In the intervening time, the claimant affirmed the contract by working until 23 April 2014. Remaining employed on sick leave between 23 April 2014 and 3 March 2014 also affirmed the contract due to the sheer length of the delay. The Claimant was pursuing her grievance during most of that time, but her conduct did not demonstrate that her pursuit of the grievance was the only reason why she was remaining in employment. When her grievance was upheld in respect of Ms Kuyateh's behaviour, and day-to-day contact with Ms Kuyateh was eliminated, the Claimant resigned anyway.

369. If the claimant ever had the right to resign and claim to be constructively dismissed, she had well and truly lost it by March 2015. In any event, as we have found, she did not resign in response to any breach of contract. Her complaint of unfair dismissal therefore fails."

15. The Claimant appealed. On initial consideration of the Notice of Appeal, His Honour Judge Shanks directed that it be further considered at a Preliminary Hearing. That Preliminary Hearing came before His Honour David Richardson on 25 April 2018. One of the matters he considered concerned what came to be referred to as the Caseload Document. I need to say a little more about that document now. It is in tabular format, listing the cases allocated to the Claimant at the particular point in time when they were printed out. There were 34 of them. It does not have a date on it, but there is no dispute that the date fell during the 11-week period to which these particular complaints related. More specifically, it cannot have been before 17 February 2014, which is the latest start date given for any case on the schedule. The Tribunal, in its reconsideration Decision, to which I will come, made a finding that it was produced in the window after that date and before 5 March 2014, when the Claimant's support worker arrived, having regard to her evidence that it related to a period before that event.

16. There is also no dispute that this particular document was printed out by the Claimant, on the day in question, from the systems at work. In hard copy, it runs just into three pages,

with the last two rows on page three. For each case, it shows: a risk - green, amber, or red – which is the risk of re-offending; the name of the offender; date of birth; gender; type of sentence received, such as a suspended sentence, community order, immediate custody, and so on; the length of custodial sentence or community order; the start date; the Tier, being 1, 2, 3, or 4; the team, and the role.

17. There is also no dispute that, at page 868 of the Tribunal's bundle was a hard copy of a poor, effectively illegible, image of the first page of the same three-page document; and that that image had been supplied by the Claimant to the Respondent's team during the course of the Employment Tribunal litigation. When I refer to the Caseload Document, I mean the full three-page legible printout. On day nine of the 10-day hearing, after the close of evidence and the oral closing submissions of Ms Grennan for the Respondent, the Claimant, in the course of *her* oral closing submissions, referred to her case load, and to a document relating to it. The Tribunal asked her to clarify what document she meant. Ms Grennan drew attention to page 868 and asked whether that was the document she had in mind. The Claimant explained that she had with her a hard copy of the three-page Caseload Document and, after being given further time, she found that hard copy and applied for it to be admitted into evidence. After hearing argument, the Tribunal refused the application. What the Tribunal said about that decision in its written Reasons is contained in paragraph 56.2 which I have already cited.

18. Returning to the initial consideration of the Notice of Appeal by His Honour David Richardson, he directed that the Respondent provide some further background evidence in relation to the Caseload Document and associated matters, which its solicitors did in a letter of 30 May 2018. Upon further consideration, he then directed a Full Hearing of paragraphs 11, 12, 18 to 21, and 24 to 28 of the grounds of appeal, all other grounds being dismissed by him. I

note, also, that the Claimant did subsequently seek clarification relating to one other paragraph, which His Honour David Richardson confirmed had not been permitted to proceed.

19. All of the paragraphs which he permitted to proceed to a Full Appeal Hearing challenged the Tribunal's decision at the Full-Merits Hearing to refuse to permit the Claimant to introduce the Caseload Document into evidence, and the Tribunal's failure to consider its contents. Specifically, the relevant paragraphs of the notice of appeal read as follows:

> **"11. The tribunal refused to accept into evidence an original document, on the grounds that it was new evidence even though it was clearly not new. It had been listed as Item 303 Caseload February 2014 page 868 in the paginated index of the bundle which had been compiled by the Respondent's solicitor Mr Tim Gofton. I believed it was in the bundle but the Respondent's barrister objected claiming it was new evidence.**
>
> **12. The tribunal failed to ensure equality of arms because it knew that I was registered blind and would not have been able to check the bundle. It knew also that a witness had changed her evidence about my caseload after she had become aware that I had produced the original document.**
>
> **….**
>
> **18. This is a point of law because the overriding objective was prevented and the following is relevant: *Ladd v Marshall* [1954] 1 WLR 1489, having regard to the overriding objective, i.e.:**
>
> **19. *10.3.1. the evidence could not have been obtained with reasonable diligence for use at the Employment Tribunal hearing*; my caseload document had already been provided several times in a legible format and also it could have been printed at any time by the Respondent because it was stored on the GSI (the Government Secure Intranet system).**
>
> **20. *10.3.2 it is relevant and would probably have an important influence on the hearing*; I had referred to my caseload at various times throughout the hearing and no-one at the Tribunal had at any time until the last afternoon said the document was either missing or illegible. The Lay Member specifically asked to see it on the last day and the Tribunal adjourned briefly for me to locate it so were open to accepting it.**
>
> **21. *10.3.3. it is apparently credible.* My caseload document was compiled by the Respondent's own employee, a caseload allocator.**
>
> **….**
>
> **24. My caseload document was also a factual document generated from the Government Secure Intranet made not by me but the Respondent's own caseload allocator.**
>
> **25. It was unreasonable for the Tribunal not to allow it into evidence for the following reasons:**
>
> **26. One of the Lay Members of the Tribunal had specifically asked to see the caseload document during my final oral submissions on 17.02.17, the last afternoon of the Hearing.**
>
> **27. The Tribunal adjourned for about 10 minutes in order to give me time to locate my original copy, which I did but on their return the Respondent and the Tribunal refused it to be allowed into evidence, even though the Respondent had been in possession of it for approximately nine months.**
>
> **28. The document was not lengthy, it was only a list of cases with brief details re sentencing, area, and risk level so there with as no reason to disallow it on the grounds of time constraints. Anyone could read it within a few minutes to see:**

a. The period to which it referred.

b. The number of cases allocated to me.

c. Assessment of level of risk (ie Tiers 1-4, with 4 as the highest risk)."

20. His Honour David Richardson, however, also considered that the matter was one which might be thought suitable for an application for reconsideration; and so he stayed the appeal to allow the Claimant the opportunity, if she wished, to make such an application out of time. The Claimant, indeed, requested a reconsideration, which led to a further Hearing in the Employment Tribunal before the same panel on 7 and 8 February 2019. Again, the Claimant appeared in person and the Respondent was represented by Ms Grennan. At that Hearing, the Tribunal had before it, admitted and considered, the Caseload Document.

21. Judgment on the reconsideration application was sent to the parties on 18 February and written Reasons on 14 March 2019. In that further Decision, the Tribunal referred to the background, including the course of the appeal. When referring to evidence, it said this:

> **"15. On the first day of the reconsideration Hearing, the claimant asked to give oral evidence about the Caseload Document. She wanted to explain each case in detail and tell us how much work was required in relation to each. The Respondent objected. After having heard both sides' arguments, we decided not to allow the Claimant to give oral evidence. We explained our Reasons at the time. Written reasons for that Decision will not be provided unless a party makes a request in writing within 14 days of these reasons being sent to the parties."**

22. The Tribunal's summary of the grounds of the reconsideration application included this:

> **"16.1. The tribunal should have read the Caseload Document. When the Caseload Document is taken together with the other evidence presented during the original hearing, the tribunal's findings of fact cannot stand.**
>
> **16.6. The tribunal should have realised from the Caseload Document that Ms Kuyateh was allocating Tier 4 cases to the claimant even though, by then, a decision had been made that the claimant was aligned to the Community Rehabilitation Company (which was not contracted to handle Tier 4 cases).**
>
> **16.7. The tribunal was mistaken in its assessment of the claimant's oral evidence about her workload. In paragraph 56.3 of the Reasons we described her evidence as "inconsistent", adding that, "each time the claimant referred to a sequence of new cases allocated to her and taken away, the numbers were different". The claimant's argument on reconsideration is that we failed to appreciate that the claimant, when giving different numbers, was talking about different case allocations at different points in time."**

23. The Tribunal also identified that the Claimant raised issues about the fact that the Caseload Document, in the three-page legible form, had not previously been tabled in disclosure by the Respondent itself; and made submissions that adverse inferences against the Respondent should be drawn from that and other matters to do with the contents of the bundle. Other issues were also raised in the reconsideration application and considered by the Tribunal at the reconsideration Hearing and in its Decision, going beyond those strictly relating to the Caseload Document. But, in relation to the issues having to do with that document, having regard to the observations of His Honour David Richardson, the Tribunal considered them all, notwithstanding that the reconsideration application was out of time.

24. As to its approach, the Tribunal said this at paragraph 24:

> **"24. It is not in dispute that we should consider the Caseload Document. Clearly we cannot do so in isolation. Our task on reconsideration is to evaluate what difference, if any, the Caseload Document would have made to the Judgement. This exercise involves reminding ourselves of the other evidence relating to the claimant's workload from February to April 2014. We examine that evidence below, but before we do so, we think it helpful to deal with the remaining grounds for reconsideration."**

25. Further on, the Tribunal said the following:

> **"31. The Caseload Document shows that, in February 2014, the claimant's new cases belonged to a range of risk categories including Tier 4. The significance of Tier 4 is that, when the service split on 1 June 2014, all Tier 4 cases became the responsibility of the National Probation Service, with the respondent only taking on Tiers 1 to 3. It was well known in February 2014 that this would happen. By February 2014 the Claimant had been informed that she was aligned to the Community Rehabilitation Company rather than the National Probation Service and would not, from June 2014, have any further Tier 4 responsibility. We also know from the oral evidence that, in February 2014 Ms Kuyateh had some responsibility for allocating new cases amongst probation officers. Why, then, the claimant asks, was Ms Kuyateh giving the claimant Tier 4 cases when everyone knew she would shortly cease to have involvement with them? This is a good question, but it does not cause us to vary the Judgment. As we found, the service was in flux, with cases being passed back and forth. There were still over three months to go before the service split. It is quite possible that the Tier 4 cases would have been passed back to the National Probation Service by June 2014. It was not inappropriate to allocate Tier 4 cases to the claimant, who was well used to working within that risk category, provided that proper allowances were made for any additional workload that the higher risk category presented. Crucially, for the purpose of the harassment claim, the fact of allocation of Tier 4 cases to the Claimant still leaves us no closer to knowing how Ms Kuyateh treated the claimant compared to any of her colleagues. There is no evidence of how many Tier 4 cases her CRC-aligned colleagues were being given at that time.**
>
> **….**
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> **33. It is clear, having refreshed our memory from our notes of evidence, that the claimant did give different numbers of cases in relation to substantially the same time period. She can only**

have been referring to the time between late February 2014 (when she started to take on a case load) and 5 March 2014 when her support worker started. We had to take the discrepancy in the numbers into account when deciding on the extent to which we could rely on the claimant's oral evidence about workload, both during the time that she did not have a support worker and also at other times. That is not to say that we disbelieved the claimant. It is quite possible that the unreliability of her oral evidence was due to the passage of time."

26. Then, on the question of adverse inferences, the Tribunal said this:

"35. A preliminary hearing took place on 25 April 2018 before HHJ Richardson, who decided to adjourn the hearing. Part of the reason for the adjournment was to deal with a proposed ground of appeal based on procedural irregularity and bias. But at paragraph 3 of his reasons for adjourning the hearing, the Judge also observed:

"I would have expected the Respondent to have documents like the [Caseload Document], setting out the workload from time to time of an officer doing risk assessments. I am told by the appellant that both before and after 1 June the same computer system was in use. I should like an explanation from the Respondent as to whether the [Caseload Document] was disclosed by the Respondent; whether any workload documents of the kind to which the Appellant refers were disclosed; and if not, why a reasonable search did not result in the disclosure of these documents, bearing in mind that she had disclosed one to them."

36. The Respondent's solicitors provided an explanation by letter dated 30 May 2018. Relevantly, the letter read:

"The Caseload Document relied on by the Appellant is believed to have been prepared under the nDelius offender management software system used by the Merseyside Probation Trust … prior to the commencement of operations of the CRC on 1 June 2014 …

The nDelius system itself is owned by the National Offender Management Service … which is an executive agency of the Ministry of Justice…

The pre-June 2014 nDelius system itself was archived in the months following the creation of the CRC on 1 June 2014. The pre-June 2014 nDelius data was neither within the Respondent's possession or its control during the course of Tribunal proceedings.

It is also worth pointing out that nDelius is a real-time system, so the lack of a date attributable to the document is significant. The document is thought to show those cases allocated to the Appellant at the time the document was printed by the Appellant. It represents a snapshot at a given point in time without the context of showing which cases were transferred to, or away from the Appellant, or on which date. Because of this, even if it has access to the pre-June 2014 systems it would not impossible for the Respondent to recreate this particular document as at the date of disclosure."

37. As we have already mentioned, HHJ Richardson allowed the appeal to proceed so far as it related to the Caseload Document. His reasons included the following passage: "… I confess to some surprise that the respondent did not disclose computer generated documents indicating workload of this kind. The respondent's witnesses must have known that there were such documents; and I would have thought that management would need their own copies of them to track offenders and work.

A number of reasons have been given the nondisclosure by the respondent's solicitor… It is debatable whether any of these is convincing. (1) It is said that the system had been archived; assuming that it is so, archived material can be retrieved. (2) It is said that the system only generated 'real time' information. It is very difficult, with respect, to suppose that the system does not keep information about the SOs and allocation for offenders - it would seem to be critical information to have. (3) It is said that the respondent did not have access to this information (presumably because of the TUPE transfer). I find this difficult to understand - there seems to have been no difficulty obtaining other material pre-transfer."

38. The respondent was ordered to file its formal answer to the appeal. Its answer is dated 30 July 2018. It contained an explanation for non-disclosure of workload documentation. The explanation is essentially the same as the respondent's solicitors gave in their letter of 30 May 2018.

39. The remarks of HHJ Richardson are not conclusively expressed. They appear carefully chosen so as to allow room for the EAT to reach a different conclusion after having heard full argument. Nevertheless, they carry the weight of an appellate body as well as their own persuasive logic. We ought therefore to consider them very carefully. In particular we have asked ourselves whether it would be appropriate in the light of those comments, to draw inferences adverse to respondent about what the claimant's workload actually was. Should we go further and conclude from the non-disclosure that the respondent was trying to cover up the true extent of the claimant's workload?

40. In our view, it would not be right to draw such inferences. The absence of any disclosed case allocation documents is capable of being explained by a deliberate attempt to hide the truth. But there are other possible explanations. We share HHJ Richardson's surprise that there is no enduring record of which probation officer was responsible for supervising an individual offender at a given point in time. If it became known that an individual had committed a serious offence or suffered serious harm whilst under the supervision of the Trust, investigating agencies would want to know the name of the probation officer who was supervising them at the relevant point in time. We would expect there to be an audit trail that would show the supervising officer was. But that does not necessarily mean that the Trust had to keep all iterations of the Caseload Document on its computer system. Nor does it mean that NOMS had to archive all of those iterations following the split in the service. The critical information about who supervised whom could have been retained in a different way, for example on the files of each individual offender. We also take into account that the respondent disclosed contemporaneous e-mails stating the number of cases that the claimant had in April 2014 (see, for example, Reasons paragraphs 161, 165, and 169). One of them, on 4 April 2014, appeared to support the claimant's case rather than that of the respondent. There is no evidence of the respondent having been specifically ordered to disclose those emails.

41. The lack of disclosure by the Respondent does not cause us to vary the Judgment."

27. In a later section headed, "Discussion of the evidence," the Tribunal said the following:

"52. We are left with the Caseload Document. We considered it carefully and reminded ourselves of the other relevant evidence in order to decide whether it would cause us to vary the relevant parts of the Judgment.

53. We started by examining the document itself and asking ourselves what it could tell us about the Claimant's workload:

53.1. It is clear from the Caseload Document that, at some point after 17 February 2014, the Claimant was responsible for 34 cases.

53.2. The breakdown of risk categories was as follows: 5 cases in Tier 4, one case in Tier 1, two cases in Tier 2 and the remainder in Tier 3.

53.3. Applying our limited knowledge of the criminal justice system, it appeared to us that, of the 34 offenders on the list, seven individuals might possibly have been - and probably were - in custody at the time the Caseload Document was generated. This fact was potentially relevant because Mrs Churchill's oral evidence to us was that where an offender was in custody, there was less work to do. Accordingly, we were confident that there was a substantial amount of work for the claimant to do.

53.4. We could fairly reliably find that the Caseload Document was generated before 5 March 2014, when the claimant's support worker started. This is because the claimant repeatedly told us during the original hearing that she had a number of cases without a support worker. During the course of the claimant's evidence, that number varied between 30 and 38. The number of cases in the Caseload Document – 34 – lay in the middle of that range. We thought the most likely explanation was that the Claimant had the Caseload Document in mind during her oral evidence and was reaching for the correct number.

53.5. The Caseload Document was therefore generated at a time when the Claimant was not only without a support worker, but also completing her phased return to

work. This meant that she would have fewer hours in the week to deal with her allocated cases than she would have had if she was working full-time.

53.6. The Caseload Document was merely a snapshot. It was common ground that cases were being allocated to probation officers and then taken away from them in batches. For all we know, the day after the Caseload Document was generated, the claimant's case allocation could have been significantly higher or lower.

53.7. There is nothing in the Caseload Document to suggest how the Claimant's case load compared with that of any of her colleagues.

54. We then reminded ourselves of Miss Monteith's evidence. Her witness statement said that the normal caseload was 60 cases. Her contemporaneous e-mails show that, on 4 April 2014, the claimant was at risk of having over 70 cases although it is unclear what number she actually had. On 22 April 2014, she had 40 cases and Ms Monteith asked that the claimant should not be allocated any more. She later e-mailed to say that the claimant's case allocation had always been around 50.

55. The claimant gave oral evidence about being allocated 60 cases over 11 weeks. She also gave the example of 19 cases being allocated to her, 10 being removed, and 19 more being given back to her. We were still of the view that, because of the inconsistency of her evidence about numbers, we had to treat the claimant's oral evidence about precise numbers with caution.

56. The claimant needed a support worker for carrying out prison visits and report writing. She did not need assistance with accessing information, as, by this time, she had been fully trained on how to use OASysR and nDelius with her own assistive technology. It is likely that, during the early stages of being responsible for cases, she would have had more reading to do and less in the way of reportwriting. We would expect the absence of a support worker prior to 5 March 2014 to have made the claimant's work more difficult, but not as difficult as it would have been had the support worker started at a later date."

28. As to the impact on the two complaints, the Tribunal said:

"57. Having reminded ourselves of the evidence and taken into account the Caseload Document, we made a further attempt to determine the issues in relation to the adjustments complaint (PCP6). Here are our conclusions:

57.1. In our view, we are still not a position to make a reliable finding as to whether the level of work prior to 5 March 2014 was such as to put the claimant in danger of aggravating her symptoms of colitis. We know that the workload was substantial, but was it more than she could cope with at that time? It is still hard to tell.

57.2. We know that the claimant was struggling with her workload in April 2014 and are able to find positively that, at that time, she was at least at risk of suffering an exacerbation of her colitis.

57.3. There is still very little evidence about what the claimant's workload was like during March 2014 after her support worker started. We have asked ourselves whether we can draw inferences, or adopt some other device, to bridge the gap in the evidence between 5 March 2014 and 4 April 2014. Could we find that the claimant was struggling with her workload during that time to the point that it risked aggravating her colitis? We decided that we could not make a positive finding about that. The reason is that we know that the claimant's general state of health, and her colitis in particular, was variable from week to week or even day to day. We do not know how her symptoms progressed during the period February to April 2014. Her health may have deteriorated. Just because something was a struggle for her in April 2014 does not necessarily mean that the same level of work would have been a struggle for her in February or March that year.

57.4. We are also still left guessing as to when the respondent was in a position where it could reasonably be expected to know that the claimant's workload risked aggravating her colitis. Again we are in a position to make a positive finding of fact that that state of affairs must have occurred by 4 April 2014. Based on Miss Monteith's evidence to us at the original Hearing, we find that, if she had been given a

proper handover, she could have been reasonably expected to know that, if the claimant was overworked, she might suffer symptoms of colitis. She was also in a position where she could reasonably be expected to know that the claimant was on a phased return and therefore had fewer hours in which to complete her work. What we still do not know, however, is when Ms Monteith was in a position where she could reasonably have been expected to know that the claimant was overworked. We have taken account that had Ms Monteith been given a proper handover she might have made proactive enquiries of the claimant and asked her how she was coping with the workload. At that point the claimant might have reported problems that she would not have volunteered in the absence of proactive questioning. Even taking that possibility into account, however, we do not think we can reliably find when it was that the claimant first started to feel overworked to the point where her health would be affected.

57.5. Unless we can make a finding about when the respondent first had constructive knowledge of the disadvantage, it is difficult for us to reach a conclusion about whether it breached the duty to make adjustments. If the duty was only triggered in April 2014, we would find that the duty was not breached. Ms Monteith acted expeditiously to try and get the claimant's workload reduced. She made an appeal for additional resources to Ms Goodwin and 12 days later when she met with the claimant she told the claimant that she was not going to be allocated any new cases (see Reasons paragraph 164). If the duty was triggered in February or March 2014, we would be more likely to find that the duty was breached, but because of the difficulties in finding the facts, we cannot say whether or not the duty arose at that time.

58. We therefore remain of the view that it is not just and equitable to extend the time limit in relation to the PCP6 complaint of failure to make adjustments.

Impact on harassment complaint

59. We have also looked again at our findings in relation to harassment. Does the Caseload Document, taken together with everything else, cause us to vary our findings that are relevant to the complaint of harassment, in particular the over allocation of cases to the Claimant in 2014 by Ms Kuyateh? We still, in our view, cannot reliably make findings about how Ms Kuyateh distributed work to the claimant compared to how she distributed it to others. We have taken into account, as we did at the previous hearing, that we have not heard from Ms Kuyateh or from Mr Kayani. Without those two important witnesses the picture is incomplete. One significant factor in their absence is the delay in bringing the claim. We remain of the view that it is not just and equitable to extend the time limit."

29. The Tribunal went on to conclude that there was no knock-on impact on the outcome in relation to constructive unfair dismissal, in particular, because, for reasons it gave, its findings about the Claimant's reasons for resigning and on the question of affirmation still stood.

30. The Tribunal therefore came to the conclusion that its original Decision to dismiss all these complaints (and another complaint of detrimental treatment for having made protected disclosures, which also featured in the reconsideration application, but which has not, Mr Gorasia confirmed, been a feature of this appeal) should stand.

31. The Tribunal had flagged up that there had been an issue as to whether the Claimant should be permitted, at the reconsideration Hearing, to give oral evidence by reference to the Caseload Document, which it had declined to permit. It left the door open to an application for written Reasons in that regard, which the Claimant made. It then sent further Reasons to the parties on 28 March 2019. In summary, the Tribunal relied, in particular, on the fact that the Claimant had not, in her original application to admit the Caseload Document, sought to be permitted to give oral evidence in relation to it. It also accepted that, had she nevertheless been permitted to give some oral evidence in relation to it, this would have placed the Respondent at a disadvantage, because it would be in difficulty recalling its witnesses to give corresponding oral evidence. The Claimant had not provided a witness statement or given any advance warning that she wished to do this, and the Respondent would, in all likelihood, be in difficulty in locating individual case files and so forth as well, bearing in mind five years had now passed.

32. I should note that an issue was raised before me, as to whether the Tribunal's description of the Claimant as wishing to give evidence about *every one* of the cases on the schedule was accurate. The note made by her colleague (accepted as a fair record) shows that she volunteered, and wished, if permitted, to give evidence about the underlying facts of at least one of the cases, and she indicated that she was in a position, if permitted, to tell the Tribunal about more of them. The salient point, it seems to me, is that she wanted to give, if permitted, evidence about the underlying facts and background of one or more of the cases, going beyond what could be gleaned simply from looking at information on the schedule.

33. Following the completion of the reconsideration process, Her Honour Judge Eady QC, as she then was, directed that the stay be lifted, and that the matter should now proceed to a full Hearing of the grounds of appeal previously allowed to proceed by His Honour David

Richardson. She also directed that reference to the reconsideration Decision and the Reasons and additional Reasons for it could be made at the hearing of this appeal. I note that there was, and has been, no appeal from the reconsideration Decision itself.

34. Following this, the Respondent tabled an Answer to the live grounds of appeal. The matter was originally listed for a Full Appeal Hearing to take place on 8 August 2019. The Claimant was, at that point, still conducting the appeal in person with some lay voluntary assistance. In the run-up to the Hearing, I granted a postponement, essentially because I accepted that she and her assistants had run into difficulties with preparation, and she also had a very recent offer of representation from counsel, Mr Gorasia, but he was not in a position to represent on the then-listed date. The matter was re-listed for today.

35. Prior to the postponement, the Claimant, and Ms Grennan, who had again been retained to represent the Respondent, had tabled written skeleton arguments. In the circumstances, in further directions, Mr Gorasia was permitted to table a supplemental skeleton argument for the Claimant, which effectively replaced her previous self-drafted skeleton, and Ms Grennan a supplemental skeleton in reply. They both did that, and both of them have appeared before me at the Hearing today. I thank them both for the clarity of their submissions and their highly professional approach to them. I record my thanks also to the Claimant and her two colleagues who have come to the Hearing today and offered assistance and information at points.

36. In his supplemental skeleton, Mr Gorasia advanced arguments in support of the challenge to the Tribunal's original decision not to consider the Caseload Document or permit it to be introduced at the original Hearing. However, he also set out a number of grounds of challenge to the reconsideration Decision. Ms Grennan, in her skeleton, objected. She noted

that the Claimant had not appealed the reconsideration Decision, and said that she should not be permitted to introduce a challenge to it by way of argument on, or amendment to, this appeal. At the start of the Hearing today, I heard submissions and argument on this point, but, after a break and an opportunity to take further instructions, Mr Gorasia then indicated that he was no longer seeking to amend the grounds of appeal to introduce a challenge to the reconsideration Decision in its own right, nor to pursue those aspects of his grounds of appeal in that way.

37. However, during the course of the discussion, a different point was explored, regarding the purpose, and potential outcome of, the appeal against the original decision regarding the Caseload Document on the grounds that had been allowed to proceed by His Honour David Richardson. This arose from the fact that the thrust of all those grounds of appeal was to challenge the Employment Tribunal's original Decision not to admit the Caseload Document into evidence; but, further down the line, this was precisely what the Tribunal had in fact done at the reconsideration Hearing. This raised an issue as to what the purpose, practically, at this point, of this appeal might me.

38. Mr Gorasia's position was that the Tribunal did err in law in its original Decision not to consider and admit the document. It was his case that, if I had been hearing this appeal without there having been any reconsideration, and I had so found, then the proper course, applying the guidance in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, would have been to remit the matter to a differently constituted Tribunal to give further consideration to the implications of the Caseload Document, for the particular complaints on which it was said to have a bearing. He argued that, if I agreed with him about the original error, it followed that what I should *now* do was allow the appeal and remit the matter to a *differently* constituted

Tribunal to give further consideration to those questions, on the basis that the further consideration that had taken place by the *same* Tribunal as before, was not sufficient.

39. Ms Grennan's position was, firstly, that there had been no error of law, in the decision taken by the Tribunal at the original Hearing, because that was a proper decision that was open to it to take; but, secondly, that, even if there had been an error, and even if there had been no reconsideration by the time the EAT reached its decision, the only course that could and should have been adopted would have been to remit the matter for the implications of the Caseload Document to be considered by the same Tribunal. As that was exactly what had in fact happened when the reconsideration Hearing took place, it followed that, even there was an error of law in the original decision, it had been addressed, and the appeal should still be dismissed.

40. It was common ground between both counsel that, if I got to this point in my decision-making, of considering the **Sinclair Roche & Temperley** issue, I could and should have regard to any features relied upon about how the Tribunal handled this matter, both in its original Decision, and in the reconsideration Decisions that had, as a matter of fact, also been given.

41. I will turn, first, to the arguments on the substantive appeal. I summarise what seem to me to be the salient points of the arguments advanced by respective counsel.

42. Mr Gorasia's main points were as follows. The issue about how heavy a workload the Claimant did or did not have during the relevant time window, covered by the particular complaints to which I have referred, was plainly a relevant and important factual issue in this case, given that the Tribunal was faced with a degree of uncertainty about that, and was not entirely able to make conclusive findings of fact based on the existing written and oral evidence

to which it had, hitherto, been referred. See the discussion in particular at paragraphs 56 and 57 of its Decision.

43. Other parts of the original Decision were also relevant here, in particular, paragraphs 154 to 158 and 161. The Tribunal was dealing, here, with specific substantive complaints of harassment and failure to comply with the duty of reasonable adjustment in the very time window to which this document related, and there were potential knock on implications for the constructive dismissal claim as well.

44. A version of part of the same document was already in the bundle. There was no issue with the authenticity or accuracy of these documents, which had simply been printed out from the employer's electronic systems at the time; and no issue of admissibility or as to the potential status of the Caseload Document as contemporary documentary evidence, as such. The objection raised by Ms Grennan had simply been to the Claimant being permitted to adduce into evidence a complete and clear copy.

45. Mr Gorasia made clear, in submissions, that allegations made at an earlier stage, that the version appearing at 868 of the bundle had, in some way, been altered or tampered with, were not pursued. But it was a relevant consideration to ask why the Respondent had not itself taken steps, which the Claimant said it could have taken, to generate or obtain a document of this sort for disclosure and inclusion in the bundle. Any criticism levelled at the Claimant for not having checked sooner, as to whether the complete copy had found its way into the bundle, had to take proper account of the implications of her disability, on top of her status as a litigant in person.

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46. At the very least, said Mr Gorasia, the Tribunal should have looked at the document and explored whether it could or should be admitted, as such. It should have allowed submissions to be made in relation to that, further than it did, rather than effectively rejecting the application out of hand. The document did have some potential evidential value, in particular, showing the precise number of cases that the Claimant had on the date when it was printed, and showing how many of them were Tier 4 cases involving the offenders who presented the highest risk to the public, and, therefore, were the most serious and challenging in terms of the implications for her workload. That was also pertinent bearing in mind that there was an issue as to why she was continuing to be allocated Tier 4 cases at all, at a time when it was anticipated that they would no longer be handled by her following the transfer to take place on 1 June 2014.

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47. Finally, submitted Mr Gorasia, it was not clear what the disadvantage to the Respondent would have been, in the Tribunal merely admitting the document, considering it for its potential evidential value, and hearing submissions about that. It would not have taken very long to allow the parties to make those submissions.

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48. Ms Grennan's principal arguments for the Respondent were as follows. First, she reminded me of the overriding objective in Rule 2 and the Tribunal's power to regulate its own procedure at a Hearing in Rule 41. This was, essentially, a case-management decision during the course of a Hearing, and I should not intervene unless it was perverse in the legal sense, which, effectively, in this case, meant one that no Tribunal acting reasonably would have taken it in this way. She also referred me to **Harris v Academies Enterprise Trust** [2015] IRLR 208, where attention was drawn to the fact that the overriding objective does not involve merely consideration of the need to reach a decision which is fair to both sides, but other factors, including delivery of justice within a reasonable time. On the obligation to disclose, the test

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was not whether the evidence was relevant, but whether it was necessary in the sense of sufficiently relevant. She referred to **Vernon v Bosley** [1995] PIQR 337 and to the discussion, including drawing on **Vernon**, in **HSBC Asia Holdings BV v Gillespie** [2011] IRLR 209.

49. As the Respondent had explained in correspondence with the EAT, in its Answer and at the reconsideration Hearing, the document on which the Claimant wished now to rely was a print-out drawn from a live electronic record maintained by the Respondent's predecessor before the transfer of her employment to it took place. The imperfect copy in the bundle had been provided to the Respondent's team by the Claimant. The Respondent's team had sought a clean and clear copy from her during the course of the litigation, but this had not been provided. The Respondent disputed the relevance of the document, but had been content to include in the bundle, the version it had been given. It was not correct that this document, or one like it, had been in the Respondent's possession. The obligation of disclosure did not extend to it being obliged to make enquiries of its predecessor as to documents which might be in their hands, nor to the Respondent being obliged to compile and create documents in a form which it did not have in its possession as such. See **Carrington v Helix Lighting Limited** [1990] IRLR 6.

50. Ms Grennan submitted that the Tribunal had been very indulgent and supportive of the Claimant as a disabled litigant in person. Examples of this abounded in its Decision, including permitting her to reformulate her case in certain respects, including amendments and relabelling of claims as it proceeded. This application arose towards the end of day nine of the 10-day Hearing, when oral evidence had been completed and Ms Grennan had made her closing submission. As a matter of fact, before this point, the Claimant had never referred to the document in her written statement, her oral evidence, or, when cross-examining the

Respondent's witnesses; nor had she specifically referred to, or taken anyone to, the more limited version in the bundle.

51. Whilst the Claimant's case was that she had not appreciated, because of her disability, that the three-page version was *not* in the bundle, nevertheless, she had not sought to refer to it specifically at any point until this late stage of the Hearing. Had she done so, it would then have transpired that she was mistaken and, had that happened during the course of evidence, there would have been an opportunity for her to be cross-examined about it and, indeed, for the Respondent's witnesses to give evidence and/or be cross-examined about it. But that time had now passed. The Tribunal was entitled to take all of that into account, particularly against a background where there were six lever-arch files, and the Tribunal had stressed the need for the parties to draw its attention to the particular documents on which they sought to rely.

52. The Respondent did not accept that the document was relevant, or sufficiently relevant. It just showed the number of cases and very basic information about them, and not how much work was involved in each case. Furthermore, it was merely a snapshot of the Claimant's caseload on a given day. There was a wider picture of churn and fluctuation at this time. So, on the day after, or the day before, the caseload could have been higher or lower. It would have been difficult to hold the line, had the document been admitted and considered, so as to restrict the Claimant solely to making submissions and not purporting to give evidence in relation to it; and the late stage meant that Ms Grennan would have been in difficulty taking instructions on it. In short, whilst the Tribunal might have chosen to deal with the matter a different way, it could not be said to be perverse to have dealt with it in the way that it did.

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53. I come to my conclusions on this substantive issue. I am mindful that this was, indeed, in principle, the exercise of a case management discretion and the test to apply is one of perversity. In substance, though a number of paragraphs are cited, overall, the live grounds of appeal challenge the Employment Tribunal's decision not to admit into evidence and consider this document, as such. However, the challenge goes a little further. The reason why the Claimant wanted the Tribunal to admit the document, was so that she could make submissions about its intrinsic evidential value on its face, and to invite the Tribunal to make findings of fact which drew on the content of the document itself, and which, in turn, might then feed into its overall conclusions on the claims in question.

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54. My starting point is that I do consider that the document was arguably, potentially relevant to the issues raised by the complaints to which I have referred. Whilst the degree of relevance was for the appreciation of the Tribunal, and might have been argued to be limited, I consider that it should have been regarded as at least potentially relevant to some extent. Whilst it did not, by itself, contain evidence about what hands-on work the Claimant would have had to carry out in relation to each case, it did show the total number of cases that she had on the day when it was printed and how many of these were Tier 4, Tier 3, Tier 2, or Tier 1. This was part of what was in issue, as well as the ultimate question of her underlying workload. Though what it added might have been said to be limited, the document did arguably give some useful window on that question. In particular, it was highlighted in the Tribunal's Decision, as I have described, that the categorisation of a case as Tier 4, as opposed to Tiers 1, 2 or 3, and, therefore, presenting the highest risk that an offender might present to the public, might be said to be a proxy for how challenging and demanding the management of that offender might be.

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55. Further, this evidence related not just to an issue of general factual background, but to a specific window of time in relation to which the question of the Claimant's workload was an issue raised by substantive complaints. This was also an issue in relation to which the Tribunal had, itself, identified that there were limitations and uncertainties in terms of what it could conclude from the state of the other evidence it had; and it may be said that this evidence, at least arguably, offered it another piece to add to the incomplete jigsaw. There was also no basis suggested as to why its authenticity and accuracy, as such, might have been disputed.

56. Putting it all together, therefore, the Tribunal should have considered that this evidence at least crossed the **Gillespie** threshold of being sufficiently relevant. Secondly, the Claimant was, indeed, only seeking to be permitted to make submissions about what she might argue the document showed and demonstrated, as evidence on its face. She was not, in fact, asking to be permitted – at that original Hearing – to give further oral evidence, nor for any of the Respondent's witnesses to be recalled for cross-examination. Had the document, in fact, already been in the bundle, as the Claimant said she had believed that it was, arguably, she should have been permitted, merely to take the Tribunal to it and to make submissions about it. Allowing that would not have prevented the Tribunal from allowing Ms Grennan to make her points about what she would say was the very limited utility and evidential content of the document, in circumstances where no witness had given any oral evidence about it.

57. Ms Grennan fairly acknowledged during the course of argument today that, whilst the point had been made that there had been no oral evidence about it, and there would now be a practical problem with that, she did not specifically raise with the Tribunal concerns about her being able to make submissions about the document as far as it went, as such. Even if the Tribunal was entitled to take the view that the Respondent should not be criticised for not

having produced or disclosed the document in this form, the Claimant's position was that she thought that it was in the bundle and merely wished to refer to it and make submissions about it.

58. It seems to me that the Tribunal ought to have considered that there was at least potential prejudice to the Claimant, in not having the chance simply to make submissions about a document that could, arguably, be relevant. Although the Tribunal referred in its Decision to prejudice to the Respondent, it did not analyse what that prejudice was or how the Tribunal weighed it up. It is not clear why any such prejudice could not have been managed by simply allowing both parties to make short submissions about the evidential value of the document, including permitting Ms Grennan to make the point that there had been no witness evidence casting any further light on it, and that it was too late to adduce such evidence now. The Tribunal could then have made of all of that whatever it thought appropriate. There is also force in the submission that it would not have taken very long to allow those submissions to be heard, late though it evidently now was, on the afternoon of day nine of ten.

59. Ms Grennan raised, and she chose her words carefully, I think, a concern that this had been a challenging, wide-ranging, long Hearing, and one in which the Tribunal, she said, had worked hard to accommodate the Claimant, whose position had shifted in various ways. She said there would be a legitimate concern that, once the document was allowed in, it would be difficult for the Tribunal to ensure that the matter was contained and the Claimant did not start to stray into attempting to give evidence going beyond the making of proper submissions and so forth. However, whatever Ms Grennan's concerns at the time, the Tribunal did not say in its Decision at paragraph 56.2 that it had any such concerns. It confined its remarks to the question of the relevance of the document, and the question of disadvantage to the Respondent. In any event, even if the Tribunal did have concerns of that sort, it could have managed them by

simply taking a firm line on the question of confining the Claimant to submissions on the face of the document itself, and, of course permitting Ms Grennan to do, only, the same thing.

60. No doubt the Tribunal was confronted, at the very end of day nine of ten, and close to the end of closing submissions, with a decision that it had not anticipated having to take and that it perhaps did not find easy. But, given that there were two substantive complaints, in particular, in the very time window to which this document related, and that it should have been considered as of some potential evidential evidence and value, I consider that the Tribunal did err by not, at least, looking at the document, allowing it into evidence, and allowing some submissions to be made by each side in relation to it on the basis that the Tribunal could, then, come to its own conclusions about what material significance it had for the issues in question.

61. I do, therefore, conclude that the Tribunal erred in this respect, but I then come to the question of what the right course would be, in terms of remission, applying the guidance in **Sinclair Roche & Temperley**. The first consideration is as to what is at stake. Whilst, potentially, the outcome of the two complaints to which I have referred could have been at stake, they were overlapping. Further, the argument that the outcome of the constructive unfair dismissal claim was also at stake, whilst logically sustainable, is more of a stretch, given the Tribunal's overall findings about that claim, including the actual reasons why the Claimant resigned. I do not think this consideration would particularly point towards it being proportionate, or necessary, to remit to a different Tribunal. As to the passage of time, this case was heard getting on for three years ago, and it relates to events longer ago than that. However, the Tribunal produced a very detailed Decision, and I do not think the passage of time means that this same Tribunal would not have the advantage over a newly-constituted Tribunal, in terms of its recollection and grasp of the evidential material, factual issues, and so on.

62. This is not a case where it is alleged that there was any bias in the legal sense. It is, says Mr Gorasia, a case of a totally flawed decision. The Tribunal, he says, simply got this particular decision completely wrong. However, this was not a straightforward matter to decide. Although I have found that its decision on whether to admit the Caseload Document was, in the legal sense, perverse, it has to be set in the context of the overall approach of the Tribunal to its task, as reflected in its approach to the evidence, finding of fact, the law, and the way that it worked through the multiple issues to reach its conclusions in its Decision viewed as a whole. Set in that context, I do not think its error in not admitting this document, indicates that the implications of it could not, on remission, be safely considered by the same Tribunal.

63. I also do not accept Mr Gorasia's submission that a differently constituted Tribunal could deal with this matter readily and in a self-contained way, by confining itself to just looking at the impact of the document on the particular complaints concerned. The actual Tribunal, in its reconsideration Decision, very properly re-read witness statements, reminded itself of other pertinent aspects of the evidence, as well as re-reading its own original Decision. It plainly will, undoubtedly, have also drawn on its familiarity with the issues and the evidence that it previously heard. It would be a much bigger task for a fresh panel to, somehow, draw on the available written material, and then plug its Decision into the previous Tribunal's Decision.

64. I agree with Ms Grennan that all of those considerations therefore point towards the matter being remitted to the same Tribunal. However, the remaining consideration, on which Mr Gorasia really hung his hat, is the question of whether this Tribunal could be sufficiently relied upon to do its best to take a fresh look at the implications of this document for its previous findings, and not to be influenced even unconsciously by what is sometimes called confirmation bias. As to that, Mr Gorasia argued that there were a number of indications that

this Tribunal had very firmly made up its mind and, realistically, would be bound to come to the conclusion that its original Decision should not be disturbed.

65. It was common ground before me, I think correctly, that for the purpose of evaluating that aspect, I could and should have regard to any indications either way, that I might find whether in the original Decision, which would be the normal position in which the EAT finds itself when having to take a decision on remission, but also, in this case, since these were available to me, drawing on the contents of the reconsideration Decisions.

66. I turn to the particular features of those Decisions highlighted by Mr Gorasia. As to the original Decision, he referred to the Tribunal's finding, at paragraph 56.3, that the Claimant had given inconsistent evidence and that each time she referred to a sequence of new cases allocated to her and being taken away, the numbers were different. But such a comment does not necessarily imply that the Tribunal thinks that the witness is not giving her recollection to the best of her ability. I do not think there is any reason to read it as a pejorative comment. The Tribunal was simply making a point that, as a matter of fact, the figures that she gave were not always the same, and it could not be sure that her recollection was reliable and accurate. I do not think that can be said to show a closed mind in the requisite sense.

67. Mr Gorasia relied also on the Tribunal's conclusions in its original Decision that it could not make sufficiently firm findings of fact for these claims to be borne out and for it to be justifiable to extend time in relation to them. As to that, the Tribunal gave a reasoned explanation for its view, having regard to what it regarded as the limitations and uncertainties of the evidence. It did not use any intemperate or extreme language, which might suggest that it was doing anything other than assessing how this matter stood on the evidence before it.

68. Mr Gorasia referred, next, to the Tribunal's comment that the Claimant's application had been made at a very late stage. That could refer merely to the point in time, or to the substantive stage. But, either way, it seems to me to have been a fair comment, the application having been made on the afternoon of day nine of ten and at a stage when oral evidence, and, indeed, the Respondent's closing submission, had been completed. Next, Mr Goraisa referred to the failure of the Tribunal, when the application was made, to raise with the Respondent's team why no document of this sort had not been produced or disclosed by them. But the focus of consideration was that the Claimant had a document which *she* wished to put into the bundle; and I cannot see that, by not proactively embarking on that line of questioning of the Respondent, the Tribunal demonstrated a closed mind.

69. Next, in terms of the original Decision, Mr Gorasia referred to the Tribunal's remarks about the implications of delay on the quality and availability of evidence. Again, I am not persuaded that this showed that the Tribunal had a rigid view. It made factual observations about the amount of time that had passed and the potential impact on the recollection of witnesses such as Ms Monteith. It was a fact that Ms Kuyateh was no longer working as part of the team, and it was reasonable to wonder whether she would have given evidence voluntarily. Tribunals are also familiar with the potential implications of a witness being compelled to give evidence under a witness Order, for the quality of the evidence that they then do give.

70. I was somewhat troubled to be told that the Tribunal did not actually ask for the document to be passed up and did not look at a copy when deciding whether to admit it. However, the Tribunal clearly understood the general nature of the document from the evidence that it had heard, and it understood in general terms what was said to be the potential significance of it. That can be seen from its discussion in its Decision of, for example, the

significance of Tier 4 cases, particularly in the run up to the transfer. Although this aspect could and should have been handled differently, and, of course, I found that it was an error not to admit the document in substance, I did not think that this showed that the Tribunal would not be able to consider its implications without prejudgment, if directed to do so by the EAT.

71. Turning to the indications that might be gleaned from the reconsideration Decisions, Mr Gorasia highlighted the following aspects. First, there was the fact that the Tribunal had declined to permit the Claimant to give even limited oral evidence about the background of one or more of the cases referred to on the Caseload Document. It does seem to me, as I have indicated, that the issue here was whether she might be permitted to give evidence about the substance underlying one or more of those actual cases, not merely to explain, for example, what it meant for a case to be coded as Tier 1, 2, 3, or 4. It is clear from the Tribunal's Decision that it already understood what the significance of that coding was said to be.

72. The Tribunal was also right to say that, at the original Hearing, the Claimant had not been seeking to give further oral evidence by reference to that document and had not attempted to do so previously during the course of that Hearing. I cannot infer from the Tribunal holding that line at a reconsideration Hearing, that that showed a lack of disposition to consider the evidential implications of the document itself. Mr Goraisa refers to the Tribunal, in the reconsideration Decision at paragraph 51, saying that the Claimant, in her application, had taken issue with their findings about her reasons for resigning, that that had little to do with the surviving grounds of appeal, and that it would be very difficult to try and revisit those findings now. However, that was a fair comment, given the Tribunal's careful findings in its original Decision about what she wrote in her resignation letter, and what it believed were the circumstances that had, in fact, influenced her decision to resign.

73. Mr Goraisa said that it showed a closed mind that the Tribunal still referred, in paragraph 55, to the inconsistency in the Claimant's evidence about numbers, and said that it had to treat her oral evidence about precise numbers with caution. But this followed very careful consideration, and detailed and reasoned findings, in which it indicated that the Claimant appeared to be doing her best to draw upon her recollection of the figure that she would have known could be derived from the Caseload Document, but not getting it exactly right. I do not think it was excessive for the Tribunal to voice a concern as to whether she could recollect certainly and precisely, the numbers of cases that she had been allocated over an 11-week period in the spring of 2014. It seems to me to have been an entirely fair comment to have made, that it had to treat her evidence in that regard with caution.

74. I have also stood back and considered the cumulative picture; but I do not agree with Mr Gorasia that these features, whether taken solely or together, show that the Tribunal had a closed and determined mind and could not be relied upon to approach in good faith the consideration of the implications of this document, once directed by the EAT to do so. I also agree with Ms Grennan that, on the face of it, that is exactly what the Tribunal did do in the reconsideration Decision. It held a two-day hearing just to deal with this one matter. It demonstrated that it had thought carefully about the right way to go about its task, including what material it needed to re-read, and the need to put the document back into the context of the evidence it had received previously and its wider findings of fact. It set out, on its face, a detailed, conscientious and logical analysis of the potential implications of this evidence, for the findings it had previously made; and a reasoned set of conclusions as to why it considered that the previous outcomes of the complaints in question should still stand.

75. I well appreciate that the Claimant may have felt, and may still feel, even after hearing my Decision, that she did not receive a fully independent reconsideration by the Tribunal. However, what I have to decide is whether I consider that the Tribunal could have been trusted to do exactly that. I am satisfied, first putting aside the reconsideration Decisions, that it could be so trusted, having regard to the overall conscientiousness and thoroughness of its original Decision. I am also satisfied that that is exactly what the Tribunal in fact did, when faced with this very task, through the mechanism of a reconsideration application.

76. Though it did err in law, I therefore conclude that the proper course, had it not happened already, would have been to remit the matter to a Tribunal of the same constitution. Given that they, in fact, have already carried out that task at the reconsideration Hearing and in the Decisions flowing from it, it appears to me that, ultimately, the proper course now is therefore to dismiss this appeal. I think that Mr Gorasia accepts – though my Decision has not been the one that he sought – that, given my Decision, that is the correct outcome.