IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM

THE EMPLOYMENT APPEAL TRIBUNAL

B E T W E E N:

AA VAUGHAN

Claimant

- and -

LONDON BOROUGH OF LEWISHAM & OTHERS

Respondent

APPELLANT'S GROUNDS OF APPEAL

INTRODUCTION

1. I, the Appellant/Claimant, Ms Ayodele Adele Vaughan of CENSORED, make this application, pursuant to section 27 of the Employment Tribunals Act 1996 and paragraph 21.3 of the Practice Direction (Employment Appeal Tribunal – Procedure) 2004, for permission to appeal to the Court of Appeal against the Judgment of the Employment Appeal Tribunal (EAT), sent to me on 29 November 2012 **[see attached]**.

2. The Honourable Judge Peter Clark), at a hearing on 25 October 2012 and in an order communicated to me on 31 October 2012, **[see attached]**, dismissed my appeal against the decisions of an Employment Tribunal (ET) dated 2 March 2012. The EAT upheld the ET's decision which dismissed my claims for disability discrimination, race discrimination and PIDA detriment, after a hearing between 9 January and 2 February 2012, by a judgment sent to the parties on 2 March 2012. The EAT form- N460 is also attached.

The Issues

3. For the avoidance of doubt, I seek permission to appeal to the Court of Appeal on all those grounds set out in my Notice of Appeal to the EAT and EAT skeleton argument, which are mainly errors of law. It is submitted that the EAT, in dismissing my appeal, did not deal adequately, or in some cases at all, with those grounds of appeal. However, the principal grounds on which I now rely in this application for permission to appeal to the Court of Appeal are as follows:

Compelling Reason

3.1 The proposed appeal would raise some important point of principle or practice and/or there is some other compelling reason for the Court of Appeal to hear appeal. The case concerns issues of multi discrimination spanning several years by more than one employer, in the context of the transfer of employment. It also deals with human rights and public interest issues which raise fundamental issues of law, and the effective public access to the court, and therefore justice, equality of arms and right to a fair hearing.

3.2 The basis on which the ET's decision has been upheld by the EAT is also relevant when the Court of Appeal is considering whether there is a compelling reason to hear an appeal from the EAT's decision, i.e. the incorrect findings that there were no errors of law, the failures to consider particular pieces of evidence, including 'fresh evidence', failing to adduce the Employment Judge's notes of evidence and where the hearing before the ET had been so unfair that there had, in effect, been no proper hearing prior to the hearing before the EAT. There were serious errors of procedure in the ET and EAT which undermines the propriety of what took place.

3.3 The above was capable of evincing a different result to that reached by the ET and EAT, then the findings of the ET relating to the lack of merits of my discrimination complaints and its findings on credibility shall necessarily come to grief. The ET and EAT failed to apply the necessary considerations of fairness, equitableness, balance of convenience, and the overriding objective.

3.4 There are also the issues of the effect of my health, the outcome on the 'stayed' case and the outstanding appeal on the ET's extreme cost order. It is necessary to hear this appeal

in order to avoid real injustice. The circumstances are exceptional and make it appropriate to reopen the appeal and no alternative effective remedy is available. It is strongly arguable case that the ET and the EAT erred and when combined with the severity of the consequences for me can amount to a compelling reason- see ***Uphill v BRB (Residuary) Limited*** [2005] EWCA Civ 60 (paragraphs 18 – 25).

Natural justice:

3.5 The context is the question of a Claimant's right to a fair hearing, improving and protecting the integrity of our judicial system, society and democracy, defending/protecting the legal system and making justice more accessible to all, the efficacy of which the court should be astute to protect. The approach of the ET and EAT tends to undermine the efficacy. In my view, the decisions of the ET and EAT constitutes an interference with my Article 6 and 14 rights.

3.6 It's clear that natural justice does require that the European Convention for the protection of Human Rights and Fundamental Freedoms in the Article 6 is adhered to and as such I respectfully requests that the Court of Appeal grant my permission to appeal under section 4(2) of the Human Rights Act 1998 a Declaration of Incompatibility with the ET's decision, in respect of article 6(1). It is important that the court should hear full argument on this point.

Perversity

3.7 The issues arise on the basis of the perverse facts found by the ET (which were also the product of erroneous reasoning) and the arguments put to the ET and EAT. I believe that there is a real prospect of persuading the Court of Appeal that the ET and EAT erred in law. Findings of fact may be challenged only if there is sufficient foundation to argue that those findings were both: (i) demonstrably unfounded or erroneous; and (ii) capable of having affected the outcome {***Krasniqi v Secretary of State for the Home Department*** {[2006] EWCA Civ 391}. I believe that the standard is reached and that questions of fact therefore acquire a legal dimension.

Public Interest

3.8 Today's whistleblowers face a harsh reality. As I well know, those courageous enough to blow the whistle often do so at considerable personal cost. The ET's and EAT's decision will discourage employees from coming forward and raising concern over workplace malpractice, with a view to defending the wider public interest.

3.9 I had been led to believe that the aim of whistle-blower legislation is to ensure that those workers who speak out in the public interest are protected, and thereby encouraged, by de-stigmatising whistleblowing, contributing to a change in the prevailing culture and providing a real alternative to silence.

3.10 The case involves material errors of legal principle, some of which have wider significance in relation to the proper protection of whistleblowers which both the ET and EAT failed to have due regard to this fact. It is submitted that the ET and EAT failed to take a broad judgment taking account of the public interest involved. There is a clear and demonstrable point of significant wider public interest in the case. This case, which, on its own particular facts, can be said to bring benefits to a section of the public, i.e. persons other than the individual bringing the proceedings. In my view the issues are of sufficient importance to merit an authoritative and fully reasoned ruling by the Court of Appeal.

3.11 The Court's rulings don't reach people one at a time. This case is about safeguarding the masses. It is essential, therefore, that the court, who is presumably seeking to encourage whistleblowers, recognises the importance of protecting public sector employees and people like myself - a vulnerable disabled, unrepresented and unemployed Claimant. It is a measure of the advancement of any society how it treats it's most vulnerable. Detrimental action taken against whistleblowers should always be regarded as a very serious breach of discrimination legislation.

The 'Stayed' Claim

3.12 There were three consolidated claims, for, race discrimination, disability discrimination and PIDA detriment. Part of the third claim, (claim number 2300254/2011B),

was ‘stayed’ and that claim is due to be heard in September next year. The outcome of that ET case will depend heavily on justice in this case.

The Cost Order

3.13 There is an extreme cost order for £92,000 which remains in force as a result of the EAT’s decision to uphold the ET’s decision and a detailed cost assessment hearing is due to take place in the High Court on 18 March 2013. The enforcibility of that cost order will depend heavily on justice in this appeal.

‘Meek’ Compliancy

3.14 Clear and adequate reasons for the decision were not given by the ET and it failed to apply established principles, it was adequately reasoned- see ***M v Wiltshire County Council Tribunal*** [2006] EWHC 3337 Admin, (paragraphs 30, 33, 36, 38 - 39, 43 & 47).

4. PRAYING FOR LEAVE TO APPEAL SHOWS that my appeal has good prospect of success and the Court of Appeal can and should review and overturn the findings. There were material errors of law. The decision of the ET in coming to the conclusion that I had not been subject to disability discrimination, race discrimination and PIDA detriment was perverse and no reasonable Employment Tribunal properly considering the evidence and directing itself according to the law could have reached that decision. The EAT failed to correct this error.

GROUNDS OF APPEAL

Meek Complaint

5. The essential facts in this case are set out in my ET written submissions under *'The proposed findings in fact'*. These findings were not disputed **[B1. 363. 122 – 123]**.

6. It is clear from the ET's decision, when properly analysed, that the error of the Tribunal was not strictly a failure to give reasons, but rather a failure properly and fairly to deal with my case. My case was never properly identified. As a result of that failing, it was simply never engaged with. I believe the ET mis-stated the law, mis-applied the law and failed to make the necessary findings to address my case.

7. The ET's decision suffered from a deficiency of reasoning which amounted to an error of law. The decision failed to comply with ET rule 30(6) and was not Meek compliant. The EAT therefore erred by upholding the decision.

8 Insufficient Analysis and Reasons

8.1 The ET erred in law by failing follow binding authorities. At **paragraph 122** of its judgment under the heading 'Submissions', the ET states that it has read the claimants' submissions and considered the relevant authorities and gives no detail on how it applied the law, (particularly the authorities cited by me and in relation to the oral evidence set out in it).

8.2 The Tribunal did not make essential findings of fact, including for the purpose of considering whether or not the supporting evidence, post-December 2010 shed any light on my claims and the EAT did not address this point. In my view there was evidence from which the ET could make detailed findings of primary fact about the supporting evidence, for example, my employer's decision to include copies of both my ET1's and pleadings (over 100 pages) and copies of e-mail correspondence between myself and it, (which together totalled over 145 pages), in its referral to an independent occupational health consultant. This act clearly demonstrated the Respondents' motivation, showing that the I was discriminated against because she brought legal proceedings for discrimination- **see my supplementary witness statement dated 9 January 2012**.

8.3 The ET failed to make findings of fact on all the principal submissions made and it is submitted that omitting to set out the legal principles and key submissions has led to a consequent error of law and incorrect and incomplete finding of fact. The ET erred by

misunderstanding the evidence, leading it to make a crucial finding of fact unsupported by evidence and contrary to un-contradicted evidence, i.e. the oral evidence which emerged through cross-examination and as set out in my ET written submissions.

8.4 The ET also failed to adequately consider the inadequacy of the respondents' internal investigations, which included the fact that my employer could not apply their own policies to the respondents'- non-CEL employees, (who they were allegedly investigating) **[at paragraph 28 - 31]** of my EAT skeleton. Non-CEL staff had their own separate policies and procedures, which could only be implemented and applied by their own employer. This line of questioning is evidenced in my ET submissions **[at paragraph 449]**.

8.5 There is evidence that Sue Ely perjured herself in relation to this issue **[at paragraph 8.1c]** of the respondents' response to the equality form questionnaire, which was also put before the EAT- (see the EAT core bundle index) and **[paragraph 431a]** of the my ET witness statement. It is important to point out that the Respondents' grounds of resistance dated 15 December 2010 at **[paragraph 9]** and 2 February 2011 at **[paragraph 4d]** contradicted this and stated that CEL had control over HR advisers at **[paragraph 9]**.

8.6 Benjamin Craig also gave evidence under oath that management did not have control over HR staff at **[paragraphs 3.255 – 3.257]** of my ET submissions. It follows that if my former employer did not have any control over non-CEL staff, then the grievance procedure was fundamentally flawed. Anthony Marshall had no control over BED's HR staff (Adam Buckby, Ruth Johnson and Paul Kelly) or CEL managers Beverley Bannister and Benjamin Craig, yet he investigated my grievance against them. Amanda Duckett had no control over non-CEL employees, yet she investigated the my grievances and appeals in relation to non-CEL staff.

8.7 Deborah Francis was not a CEL employee, and had no control over Anthony Marshall, yet she investigated my appeal in relation to this, (at the same time that she was making decision with regards to my ET claim [see paragraph 3.209 of my ET submissions. This fact was not mentioned by the ET in its judgment, even though it formed part of my claim/allegations of discrimination and detriment. All of the above was set out in my EAT skeleton **[at paragraphs 28 – 31]**.

8.8 In its judgment the ET concluded that the respondents' investigations were reasonable and that the respondents' were entitled to reach the conclusions that they did- see **[paragraphs 142, 149 & 158]**. The ET found no issue at all with the investigation process.

8.9 In the premises the ET's decision was therefore "Wednesbury" unreasonable and/or irrational and/or perverse and an unfair determination of her civil rights under schedule 1 article 6(1) of the Human Rights Act 1998.The ET came to conclusions on an inconsistent and false basis and by an inconsistent and false process of reasoning.

9 *The supporting evidence*

9.1 The ET stated that it was agreed that the supporting evidence would be looked at for the sole purpose of determining whether the respondents' operated a discriminating regime. This is false, as is evidenced by my opening submissions and my supplementary witness statement. This evidence was damning, hence the Respondents' attempt to supress it by removing it from the trial bundle, which the EAT ordered them to put back in on 5 January 2012- **see the EAT order**. The ET failed to look at the totality of the evidence.

9.2 The ET erred in law by failing to consider add adequate weight to my supporting evidence (dated January – February 2011) and the supplementary witness statements and oral evidence, for the purposes of determining whether it shed any light on my claims. In discrimination cases, oral evidence is of particular importance, and the ET failed to attach adequate weight to this. For example, the ET failed to make any primary findings of fact about the Respondents' witnesses reactions to my disability/medical condition and make inferences from those facts to support my claims

9.3 The ET erred by not giving full weight to the numerous damaging admissions made by the Respondents on the witness stand, and by not immediately finding for me on those issues. The ET does not say whether or not the evidence (including the oral evidence), did shed light on matters, what evidence it reviwed and why that evidence was rejected.

10 *The failure to take into account and add weight to the Respondents' alleged perjured evidence*

10.1 Credibility was clearly an issue in this case. A person will be in contempt of Court if he presents a deliberately false statement of case, witness statement, (under CPR part 31). The Court can also dismiss a claim or defence if there has been a deliberate destruction or falsification of evidence.

10.2 It was shown the Tribunal erred in law by preferring the evidence of the Respondents on the basis of a reason which should not have given any weight nor taken into account at all, particularly in light of the fact that the ET contradicted itself with regards to the issue of whom was Managing Director- at **paragraph 110** of its judgment, as did the respondents' own Counsel, who asserted in his closing written submissions.

10.3 I was not cross-examined by the respondent about my assertion that Deborah Francis' was not the Managing Director. The ET also failed to question me regarding this. Deborah Francis' own evidence in relation to this point was untested in re-examination and the ET failed to ask any questions on this specific point. It follows if there are disputed facts, as would have been identified by the ET following submissions of parties, it is under an obligation to determine them if they are relevant to the decision, as they were.

10.4 Had this issue been canvassed by the ET with the parties there was a possibility that it would not have made the finding and that this would have then impacted adversely on the Respondents' credibility.

10.5 In the case of ***Levy v Marrable & Co Ltd*** [1984] I.C.R. 583 it was held that it is the duty of the Employment Tribunal to articulate why it had reached a conclusion on disputed factual matters; see the judgment of Waite J at 587D-H at paragraph 38 of the judgment. The ET made no reference at all in its judgment to this issue that was clearly in dispute. The ET neither set out the competing factual contentions nor indicated how they had been resolved.

11 *Perverse findings of fact: this impacted the burden of proof*

11.1 The ET failed to make findings of fact on all the principal submissions made and that it omitted the legal principles and key submissions, which led to a consequent error of law and incorrect and incomplete finding of fact

11.2 The ET erred by making crucial findings of fact unsupported by evidence and contrary to un-contradicted evidence, i.e. the oral evidence which emerged through cross-examination and as set out in my written submissions.

11.3 There was a failure by the ET to adopt an analytical approach to the evidence and to explain where they were finding that a prima facie case had not been made out and on what basis. An example of this is the inadequacy of the respondents' investigation and breaches of their own equal opportunities policy, this was material and should have been taken into account in deciding whether I had established a prima facie case of discrimination on racial grounds- see ***Anya v. University of Oxford and another*** [2001] EWCA Civ 405, at para 378.

12 *The failure to take into account the oral evidence*

12.1 There is hardly any reference at all by the ET in its judgment to anything said by I and the respondents' witnesses during cross-examination, even though I spent over 25 hours cross-examining the respondents' witnesses.

12.2 At **paragraph 123** of the ET's judgment, under the heading '*Conclusions*', the ET's judgment states that it has considered my submissions, but it gives no further detail on the conclusions drawn from it, (particularly in relation to the oral evidence set out in it). That is insufficient as reasoning. The ET failed to comment on whether or not it was persuaded by any of the submissions. It does not say what those submissions were, and if it wasn't, why they were rejected.

12.3 In relation to my attempts to return to work, it is clear from the evidence that the decisions and comments made by the Respondents' regarding this issue was based on assumptions that were made about my particular mental health condition, rather than on

the basis of up-to-date medical evidence about the effect of my illness on my ability to do my job. I believe that the comments made by the Respondents' during cross-examination indicated their tendency to discriminate against employees with a mental health condition, yet no references to these comments were made by the ET and no inferences made.

12.4 The ET failed to consider the full content of witness statements. It erred in law in failing to do so. In discrimination cases, oral evidence is of particular importance, and the Tribunal failed to attach adequate weight to this.

13 *The failure to make any reference to the 5 questionnaires and 5 responses*

13.1 ***R Plettell v British Aerospace (Operations) Ltd*** [2001] UKEAT 446/2007 [paras 14, 16 & 20]: The ET failed to grapple with the inferences from the questionnaire responses. There were no findings of fact made in relation to the questionnaires or the respondents' responses. I carefully and painstakingly analysed the questionnaire responses in great detail, highlighting the sections where the responses were evasive, equivocal and obstructive and the inaccuracies, inconsistencies and contradictions with the pleaded case and evidence. However, the ET made no reference to the 5 questionnaire response at all. They were simply ignored. The ET failed to make any findings in relation to this and that these findings were essential for the purpose of assessing the fairness/reasonableness of the internal investigation, the implementation of procedures and the credibility of the respondents'.

13.2 At **paragraph 94** of the ET judgment it states:

'The Claimant contends that the responses to the Questionnaires were evasive and equivocal'.

However, the ET failed to make any findings of fact in relation to this. It identified a fact but did not state how it resolved the issue.

The ET's failure to apply correct legal principles to its findings of fact

14 The ET failed to apply the correct legal principles to its findings of fact. The following are examples of this: **a)** The ET's acceptance of the Respondents' perjured evidence and the failure to give it due weight, when considering the Respondents' credibility and **b)** The failure to make inferences from the failure of the individual respondents'- Marcus Watson and Alexander Khan to attend and give evidence, even though the respondents' had indicated that they would be calling them as witnesses.

14.1 In ***Lynch v Ministry of Defence*** [1983] NI 216 it was held that if a party to proceedings failed to call a witness who might have been expected to be called and whose evidence might have been available to the Court or Tribunal, then the Employment Tribunal should have considered an inference of discrimination. ***Wisniewski (A Minor) v Central Manchester Health Authority*** [1998] EWCA Civ 596, paragraph 23 - 24, also supports this argument.

15 *General inferences: The ET failed to give adequate consideration to the drawing of inferences*

15.1 The ET failed to give adequate consideration to the drawing of inferences in relation to the extensive inconsistencies, inaccuracies and contradictions between the respondents' witness statements and oral evidence, the pleadings, written correspondence and questionnaire responses and the respondents' alleged perjured evidence.

15.2 The ET failed to give adequate consideration to the drawing of inferences in relation to the numerous breaches by the respondents': Data protection breach, Health and safety breaches, breaches of the grievance policy/procedure, breach of trust and confidence, breach of my privacy/confidentiality, breaches of the sickness absence policy & the persistent failures to make reasonable adjustments'.

15.3 The Court of Appeal is in as good a position as the ET to draw inferences and make judgments on probability on the basis of them.

16 *The failure to take into account Codes of Practice*

16.1 If any provision of such a Code appears to a tribunal or court to be relevant to any question arising in the proceedings, it has to be taken into account. Under the DDA 1995 s53(6) an Employment Tribunal must take into account any relevant provision, as was set out in my ET submissions at **paragraph 73q**.

17 *The acceptance of the Respondents' defence to three of my allegations, even though I had not been made aware of this defence before the hearing and it had not been set out in the respondents' pleadings or witness statements*

17.1 Under the philosophy of the CPR, it is important to remove any element of ambush from the litigation and ensure that each party knows the case he has to meet.

17.2 The Respondents' pleadings failed altogether to address the complaints made about Sasha Chaudri, the failure to make the credit monitoring payment and all the complaints made about Paul Kelly.

17.3 At **paragrapgh 152** of the ET judgment it states:

'***The Respondents' were unable to say whether or not the payment had been made but their counsel informed us that if payment had not been made they would rectify this***'.

17.4 The Respondents' failed all together to address these allegations in its ET3 pleadings, yet they were allowed to rely on this defence at the hearing. No reference was made to it at all by any of the Respondents' in their witness statements. The ET was not entitled to take into account the evidence of the Respondent on these matters and that it was a significant departure from the Respondents' pleaded case, without notice, and it caused me great prejudice. I believe that this also constituted a procedural irregularity.

17.5 I raised this issue during the PHR process **[at paragraph 38]** of my PHR written submissions & **[at paragraph 25]** of my PHR witness statement, both dated 26 October 2012. However the ET failed to address this issue, rejecting my application for further

information and written answers **[at paragraphs 39 - 43]** of the ET's order dated 25 July 2011 and the Respondents' still failed to address these issues before the main hearing took place. This documentation was also put before the EAT- see the EAT supplementary index.

17.6 The ET made findings of fact that enabled my case to be dismissed on a basis that I had not foreseen or prepared for. A party must be made aware before the full hearing of the essence of the defence being put forward. ***Hereford and Worcestershire County Council v Neale*** [1986] IRLR 168, states that a party should know the case it had to meet, see Ralph Gibson LJ having said at page 175.

17.7 I was thereby denied the opportunity of being in a position to know the details of the Respondents' defence to my prejudice and of being able to make adequate or full representations in rebuttal thereby. Justice did demand the giving of such an opportunity.

<u>The ET's failure to apply the correct legal tests</u>

18 *The question of harassment and unconscious discrimination*

18.1 The ET failed to consider whether the treatment in question was consciously or unconsciously motivated on racial grounds.

19 *Applying the burden of proof wrongly or not applying it at all*

19.1 It is unclear what burden of proof was applied to my claims, including direct race and disability discrimination, disability related discrimination/discrimination arising from disability and harassment under the DDA/EA etc- see **[paragraph 102]** of my EAT skeleton. Indeed there was no express finding in relation to disability related discrimination/ discrimination arising from disability etc.

19.2 An employer cannot justify any less favourable treatment of a worker for a reason related to his/her disability, unless s/he has already made any reasonable adjustments that are required. It is clear from the evidence that my employer persistently failed to make

reasonable adjustments. The ET failed to address this issue and concluded that my employers actions were reasonable, even in light of this persistent failure. This also links in with the ET's assessment of the facts which I have also challenged).

19.3 The Tribunal failed to adequately consider the treatment I was subjected to in relation to the claim of disability-related discrimination, victimisation and the inference that there were grounds related to my disability for that treatment, see **paragraph 23** of my supplementary witness statement dated 9 January 2012.

20 *Inadequate assessment of witnesses*

20.1 The ET appears not to have taken proper advantage of having seen and heard the witnesses. Their findings simply represented a series of criticisms of me, some of which could not be said to be permissible criticisms to make and/or could not in any event legitimately lead to a finding that a prima facie case had not been established.

20.2 The ET failed to take into consideration the inconsistencies, inaccuracies and contradictions between the respondents' witness statements and oral evidence, the pleadings, written correspondence and questionnaire responses and the respondents' alleged perjured evidence.

20.3 Given this failure by the ET to address this, it was wrong to attach weight to the respondents' evidence and conclude that it should be preferred.

21 *The question of 'reasonable adjustments'*

21.1 The ET failed to determine whether any duty arose to make adjustments and consequently failed to decide whether or not any such duty was discharged. The ET failed to carry out the correct legal test for establishing whether or not the Respondents' applied a provision or practice which placed me at a substantial disadvantage.

22 *Taking an irrelevant matter into account*

22.1 At **paragraph 176** of it's judgment the ET states that my employer was entitled to seek clarification from its own medical advisers as to the appropriateness of my requests for reasonable adjustments. This is a matter that was irrelevant and should not have been taken into account. In the factual context, unreasonable and unnecessary, because as the respondents' made no mention of my requests for reasonable adjustments' in its referral to PHC - see **paragraph 173** of my EAT skeleton arguments.

22.2 The ET made perverse findings in relation to the issue of my return to work, for example, at **paragraph 175** of its judgment it stated that the respondents' were justified to withhold pay because it had good reason to believe that I was not fit for work and it had no evidence of my fitness for work and I was preventing them from obtaining such evidence. This was perverse and is not supported by the evidence- see **paragraph 172** of my EAT skeleton arguments.

23 *The failure to identify a comparator and the question of whether or not I did protected acts under the DDA 1995 and EA 2010*

23.1 The failure to make any comparisons or any proper comparisons. I highlighted the issue of less favourable treatement in my ET submissions at **paragraph 33e**, under 'issues'. The ET failed to properly deal with my allegation that the OH process was abused and that I was treated less favourably under the process because I brought legal proceedings (see my two witness statements, including my supplementary statement date 9 January 2012). The ET failed to deal with my allegation that I was unduly pressurised.

23.2 It failed to address the fact is that I was forced to (and complied with) two occupational health referrals before being allowed to return to work, (something which the respondents' admitted that no other employee had been subjected to)- see **paragraph 3.190 & 452** of my ET submissions. The ET also failed to deal with my compliant that

threats of disciplinary action still continued to be made by the Respondents' even after I complied. I brought all of this to the attention of the EAT- **see paragraphs 167 – 170 and 172 – 175** of my EAT skeleton argument.

24 *The question of detriment*

24.1 There were many deliberate failures to act by the Respondents' and when these are combined with detrimental acts, the case starts to build. The ET failed to give adequate consideration to this. The position on this authority is that an employer subjects an employee to a detriment if he causes or allows the detriment to occur in circumstances where he can control whether it happens or not.

24.2 During the Respondents' re-examination of Anthony Marshall (a senior member of Babcock's management), their Barrister, Mr Palmer reminded him of my- '*Do you agree that the CRB was handled badly and that she suffered a detriment?*' He asked him to answer the fullness of the question, whether I had suffered a detriment as a result of matters concerning the CRB process. Anthony Marshall's stated in response: '*she was obviously upset about the whole process, said it caused her stress, I don't disagree with her… yes*'. This was set out clearly in my ET submissions **[B1. 2. 3.169]**, (which was not refuted by the ET **[B1. 363. 122 – 123]**) and **[at paragraph 77]** of my EAT skeleton.

24.3 The ET never considered whether there were breaches of duty and if there were failures to implement procedures properly and it concluded that I had suffered no detriment, I was entirely unreasonable, I was the cause of the events and that the respondents' were entirely reasonable and not at any fault, as set out in **[B1. 427. 24 -25, 44 – 46, 49 – 50, 62, 102]** of my Notice of Appeal.

24.4 The fact that the respondents' did nothing at all to protect me against victimisation' was a detriment itself and thereby placed me at the risk of harassment. The respondents' did nothing to "look after" her, as required by any whistle-blowing policy. The respondents' admitted they did nothing because they did not believe that any discrimination was taking

place. The ET was therefore entitled to take the view that these matters amounted to detriments in law.

25 *The interest of justice*

25.1 ***Prentice v Hereward Housing Association and Another*** [2001] EWCA Civ 437 [A26. paras 10, 26 – 27, 29 – 30 & 34 - 36]: The interest of justice requires a retrial where it is shown that the trial judge/tribunal was wilfully misled by the winning party.

25.2 This should also be applied to the ET's failure to cite, take into account and/or make inferences from the appellant's written submissions, the questionnaires and responses, the oral evidence, the respondents' failure to call two crucial witnesses (Marcus Watson and Alexander Khan) and the respondents' perjured evidence.

26 *The Cost Order*

26.1 The Court of Appeal should give serious consideration to the fact that an extreme cost order in excess of £92,000 was made by the ET as a result if the dismissed claims, therefore it is paramount that the ET's decision on the dismissed claims be overturned.

26.2 I was unemployed at the time that the cost order was made and I remain unemployed. Judge Balogun mentioned that up until recently I was earning £30,000 a year and stated that there is no reason to believe that I won't resume a career in my chosen field, at this level in the future. On the evidence this was a conclusion that the Tribunal was not entitled to reach. I set out clearly my inability to pay costs and although this was acknowledged by the Tribunal, it failed to take this into consideration, particularly in light of her poor prospects in finding future employment in my chosen career and at the same level of pay. This is set out in my written representations dated 16 April 2012 and in my oral testimony. A record of ill health, my unfair dismissal and the fact that I have had to take legal action against my former employer will clearly debar me from gaining further employment.

26.3 It is important to note that I have experienced lengthy periods of absence from work due to disability- my employment with the respondents' lasted 8 years and I have been unlawfully dismissed by them. It is on my work record that I have been dismissed for SOSR. Jobs in my current area of wok in the public sector are being cut and/or people are being asked to take pay cuts (the Tribunal also made reference to cuts in its judgment). This scenario does not suggest that there is the slightest possibility that I will be able to resume a career in my chosen field, at this level in the future. The Tribunal failed to take this into account.

26.4 Although the cost order has been set down for a full hearing in February next year, there is no guarantee that the order will be overturned. The EAT may upohold it or just reduce it, but I may still be unable to pay the reduced amount.

27 *The Severe Impact on my Health*

27.1 I have suffered acute stress and depression and my medical condition has further declined, having been signed off sick with depression since April 2012. I was unrepresented and in grave ill-health throughout the proceedings. The decision of the ET will clearly will affect the future beyond the current legal case, in the form of the severe impact that this will have on my future career prospects and my health.

27.2 It is clear that the ET's decision and the related cost order will saddle me with a crippling debt for years to come, which I am unlikely to be able to pay off and which will undoubtedly exacerbate my fragile mental health and prevent me from being able to make a successful recovery. I will be saddled with a huge debt that she will struggle to pay for years to come, which will severely exacerbate my already fragile mental state. It's clear that natural justice does require that the European Convention for the protection of Human Rights and Fundamental Freedoms in the Article 6 is adhered to.

28 *Alleged Violation of Article 6 Rights*

28.1 It is submitted that there have been breaches of my right of access to court under Article 6, which provides insofar as relevant as follows:

28.2 “In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

28.3 I was denied my article 6 right to a fair trial and it is submitted that the following factors engaged my article 6 rights in relation to securing access to the court:

a) The failure to take into account the respondents’ perjured evidence and the failure to allow the ‘fresh evidence’ and review application in relation to this; and

b) The failure to take into account the supporting evidence post-December 2010 and make findings of fact in raltion to this; and

c) The acceptance of the Respondents’ defence to three of my allegations, even though I had not been made aware of this defence before the hearing and it had not been set out in the respondents’ pleadings or witness statements.

d) The material errors of law set out in these Grounds of Appeal, which individually and comulatively amount to procedural irregularities and an unfair hearing.

28.4 I was not afforded parity with a represented party. It is submitted that the requirements of the HRA and Convention rights were not satisfied. The ET had a duty to satisfy these requirements, however, it failed to give this issue any consideration to sec 6(6).

28.5 As a result thereof the hearing was not "fair", in breach of schedule 1 article 6(1) of the Human Rights Act 1998. One may argue that the right of access to Court is not absolute. However, limitations on the right can be justified where they pursue a legitimate aim and are not so wide ranging as to impair the very essence of the right of access to court (see ***Ashingdane v. the United Kingdom***, 28 May 1985, 57, Series A no. 93; and Stubbings and Others v. the United Kingdom, 22 October 1996, 50, Reports 1996 IV).

28.6 I believe that there is a real possibility that consideration of the questionnaires and responses, oral evidence and submissions may have led to a different result and the failure to consider them had led to a breach of natural justice. I am therefore of the view that I was not given a fair hearing. The Court must therefore consider whether the errors of law in the present case impaired the very essence of my right of access to court, particularly when combined with the severity of the consequences for me which has left me exposed to liability for extreme costs and the further decline of my fragile mental health.

Outcome of EAT Appeal

29 Ultimately the decision under review is that of the ET, which has been the focus of my submissions, however, whilst respect is given to the decision of the EAT; this too also deserves some level of scrutiny.

30 The EAT, in a judgment delivered by Judge Clark, reviewed only some of my skeleton/oral arguments and the authorities and concluded that the ET's judgment and reasoning were not in error. The EAT judgment was only 6 pages long. My skeleton arguments in relation to the substantive appeal ran to 116 pages, the EAT judgment deals with this in 4 paragraphs.

31 There is no mention in the EAT judgment how my perjury allegation was dealt with and my application to submit fresh evidence in relation to this. The EAT failed altogether to deal with my applications for 'fresh evidence'. I made several applications for fresh evidence, in my 'Notice of Appeal', in the context of my EAT skeleton arguments and via e-mail to the EAT dated 7 September 2012 at 09:48. I raised theses points again during the rule 3(10) hearing.

32 To deprive me of essential evidence which may have persuaded the ET an EAT about the merits of my discrimination claims and my worthy credibility, amounts to an error of law, or otherwise mis-application of the law.

33 It is clear that the Respondents' lied under oath. The fact that the Respondents witnesses were prepared to lie under oath and that the ET failed to review its decision on these grounds is a material fact that the ET and EAT and have failed to take into proper account.

34 It was perverse of the ET not to have taken account of this perjury of the Respondents and not to have given it due weight, when considering the Respondents' credibility. If no account is to be taken of the honesty and integrity of individuals who give perjured evidence under oath, it must raise the question of whether there is any legal force in asking witnesses to take the oath or affirm when giving their evidence to Employment Tribunals.

35 The EAT failed to deal with my application to obtain the chairman's notes, even though it describes my appeal as a perversity appeal. This was clearly crucial to this case, as my appeal included an allegation that the ET decision was perverse. Therefore the EAT would require access to all the evidence bearing on the alleged perversity and failure to make findings of fact on the oral evidence.

36 If it is intended to appeal upon the ground that there is no evidence to support the ET's findings the Appellant must take the necessary steps to obtain a Note of the Evidence. I did this, but my application was completely ignored. It is important to note that in the EAT's N460 form it stated that there was '*no prospect of the perversity hurdle being crossed*'. How could this conclusion possibly have been reached when the EAT failed to obtain the chairman's notes?

37 Further to this, in ***Autoclenz Ltd v Belcher & ors*** [2009] EWCA Civ 1046, the Court of Appeal stated the following: see [para 41] :

> ***'I accept Mr Brennan's submission that, at least as a general rule, it is not possible to mount a perversity challenge unless the court is provided with the evidence which was before the fact finder. However, it may be possible to mount such a challenge simply on the basis of the evidence recited and facts found in the judgment itself.'***
>
> It is clear that his would not have been possible in my case because I had argued that the findings of fact were incomplete, see **paragraph 11a** of my Notice of Appeal.

38 The EAT's failure to order the Employment Judge' notes of evidence in relation to what it describes as a perversity appeal, has had far-reaching consequences for me and will also have far-reaching consequences for other Claimants. There is no discussion in the EAT judgment about the perversity challenge accept to say that there was one. The Judgment does not state what specific evidence was reviewed in relation to this or the substance of my submissions. The EAT failed to comment on whether or not it was persuaded by any of the submissions. It does not say what those submissions were, and if it wasn't, why they were rejected. This is also the case in relation to the material errors of law I highlighted.

39 The EAT erred in law on all the points that the ET had erred and that this tainted the whole of EAT's analysis. The EAT failed to provide reasons to justify the decisions reached. The EAT wholly failed to grapple with the grounds set out in my Notice's of Appeal, and consequently failed to correct the errors of the Tribunal at first instance.

40 The proposed appeal satisfies the criteria for permission to appeal being granted. Further, the appeal satisfies the criteria for a hearing on paper alone, as a just and fair means and efficient use of resources between the parties and the Court itself.

Ayodele Adele Vaughan
19 December 2012