IN THE COURT OF APPEAL (CIVIL DIVISION) Appeal Court Ref: 2012/3336
ON APPEAL FROM
THE EMPLOYMENT APPEAL TRIBUNAL Claim No. A2/2012/3336
B E T W E E N:

AA VAUGHAN

Claimant

- and -

LONDON BOROUGH OF LEWISHAM & OTHERS

Respondent

APPELLANT'S SKELETON ARGUMENT
FOR PERMISSION TO APPEAL

Preamble
There is a set of documents before the Court which consists of two bundles (B1- Core bundle & B2- Supplementay bundle). The Indexes are contained at the front of my bundles. References in the format - [B?. xx . x] in this skeleton are to [bundle. page. paragraph] in bundles 1 and 2.

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) **[B1. 483]**. The Honourable Judge Peter Clark), at a hearing on 25 October 2012 and in an order communicated to me on 31 October 2012 **[B1. 482]**, dismissed my appeal against the decision of an Employment Tribunal (ET) **[B1. 363]** dated 2 March 2012.

2. 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 review application and the

ET's decision on the review application are at **[B1. 418 & B1. 480]**. My EAT Notice of Appeal is at **[B1. 427]**, my Court of Appeal Notice's are at **[B1. 491 & 525]** and my Grounds of Appeal is at **[B1. 499]**. My 'Party Details' form **[B1. 522]** was sent to the Court via e-mail on 22 December 2012 **[B1. 523 & B1. 524]** and delivered by hand on 27 December 2012.

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's of Appeal to the EAT and EAT skeleton argument, which are mainly errors of law. More than one authority has sometimes been cited in support of a given proposition in order to evidence the arguments placed before the EAT. The EAT, in dismissing my appeals, 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, see **[B2. 468. 110 – 116]** of my EAT skeleton.

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 material 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.

3.3 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

3.4 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- also see **[B1. 427. 11D, 36 & 75,]** of my Notice of Appeal.

3.5 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 and 14 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 and EAT's decision, in respect of article 6(1) and article 14 in respect of the EAT's decision. It is important that the court should hear full argument on these points.

Perversity

3.6 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

3.7 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.

The 'Stayed' Claim

3.8 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 **[B2. 467]**. The outcome of that ET case will depend heavily on justice in this case.

The Cost Order

3.9 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 substantive decision and a detailed cost assessment hearing is due to take place in the High Court on 18 March 2013 **[B2. 465]**. The enforcibility of that cost order will depend heavily on justice in this appeal.

'Meek' Compliancy

3.10 Clear and adequate reasons for the decision were not given by both the ET and EAT. The EAT failed to apply established principles and it erred in holding that the ET's decision was adequately reasoned and the EAT's own decision was also inadequately 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 the Court of Appeal can and should review and overturn the findings. There were material errors of law. The decision of the Employment Tribunal 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 Employment Appeal Tribunal failed to correct this error. Indeed the

Employment Appeal Tribunal apparently failed to appreciate the errors of law complained of in the my Notice of Appeal and skeleton arguments which led to a substantial injustice to me.

5 The chronology of events for my EAT appeal is at **[B2. 468. 3a – 3kk]** of my EAT skeleton. This Court of Appeal skeleton argument will proceed on the basis that the reader is aware of them. I broadly repeat the arguments advanced before the EAT. At the heart of these submissions remains the contention that both the ET and the EAT fell into the trap which involves errors of law, namely that they failed to identify correct legal tests and misapplied legal tests and the omission of the ET and the EAT to the substance of my evidence/submissions.

Submissions

Meek Complaint

6 The essential facts in this case are set out in my ET written submissions **[B1. 2. 3- 3.260]**, under *'The proposed findings in fact'*. These findings were not disputed see **[B1. 363. 122 – 123]** and **[B1. 86]** of my Notice of Appeal. The cast list is at **[B2. 302]** and **[B2. 52]** – *top of the schedule of claims*.

7 The ET acted in breach of the rules of natural justice. The ET did not reject the key factual foundation of my case, However, it then proceeded to construct a different case for me and founded its decision on a different version of the facts than I had advanced. It is clear from the ET's decision that 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.

8 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.

Insufficient Analysis and Reasons

9 The ET erred in law by failing follow binding authorities- **[B2. 468. 90 – 109]** of my EAT skeleton arguments. At **[B1. 363. 122]** of the ET's 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 evidence set out in it).

9.1 The ET failed to 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. It was perverse of this Tribunal not to have addressed, and indeed to have disregarded, these fundamental points of evidence, and that, without proper consideration of those points of evidence, (which the ET failed to make findings on), their conclusion was perverse- see **[B2. 468. 23]** of my EAT skeleton arguments: The EAT did not address this point.

9.2 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 **[B1. 427. 76- 85 & 103]** of my Notice of Appeal and **[B2. 468. 22- 23, 36 – 43, 113, 117 & 178]** of my EAT skeleton. 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 **[B1. 2. 344 - 573]**, **[B1. 427. 70]** of my Notice of Appeal and **[B2. 468. 21, 26 & 32 –33]** of my EAT skeleton.

9.3 It is clear that the entire grievance procedure was just a sham and was never intended to provide me with any redress, as set out **[B1. 2. 73u]** of my ET written submissions. The ET erred in law in failing to condemn the investigation, as set out in **[B2 468. 26g]** of my EAT skeleton.

9.4 The ET also ignored the Respondents' numerous breaches of its own equal opportunities policy. In my view this was material legitimately to be taken into account in deciding whether had established a prima facie case of discrimination on racial grounds. ***Anya v. University of Oxford and another*** [2001] EWCA Civ 405, at para 378, it was held that, '*when equal opportunities procedures are not followed when they should have been it may point to the possibility of conscious or unconscious racial bias having entered the process*': see **[B2. 468. 208]** of my EAT skeleton arguments: The EAT did not address this point.

9.5 In the premises the making the ET's decision was "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: see **[B2. 468. 26]** of my EAT skeleton arguments.

The supporting evidence

10 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 **[B2. 307. 46 – 47 & 65]**. The ET failed to look at the totality of the evidence: **[B1. 2. 101 - 102]** of my Notice of Appeal and **[B2. 468. 25 & 26h]** of my EAT skeleton arguments.

10.1 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, **[B1. 427. 90]** of my Notice of Appeal and **[B2. 468. 18, 20, 23, 41 & 205]** of my EAT skeleton arguments and my supplementary witness statement **[B2. 307]** and **[B2. 307. 42 – 43]** of that statement specifically in relation the the supporting evidence as a whole. In discrimination cases, oral evidence is of particular importance, and the ET failed to attach adequate weight to this.

10.2 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 **[B1. 2. 344 - 573]** see my ET submissions. At **[B1. 363. 113]** of the ET Judgment it states:

> ***'Although these proceedings relate to events up to the 30 December 2010, in line with the Order from the EAT, we have considered documents beyond this point up to the Claimant's return to work to see if they shed light on matters that occurred up to 30 December'***.
>
> 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. The oral evidence provided no support for the ET's adverse conclusions.

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

11 Credibility was clearly an issue in this case- see the ET judgment **[B1. 363. 26 – 31]** under, '*Witnesses and the Evidence*', **[B2. 468. 26d, 51, 65, 151, & 179 – 182]** of my EAT skeleton and **[B1. 427. 71 –75, 89 , 91 & 198]** of my Notice of Appeal.

11.1 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. In ***Arrow Nominees Inc v Blackledge*** [2000] C.P. Rep. 59, paragraphs 34 – 62 and 74 – 79, the Court of Appeal allowed the appeal on the basis that the respondent's production of fraudulent documents led to a substantial risk of injustice, had been such that he should have been deprived of the right to pursue his case, and made it impossible for the parties to be placed on an equal footing, that it had added significantly to the costs of the proceedings, and that it had occupied a great deal of the court's time to the detriment of other litigants- see paragraphs **[B2. 468. 44- 46]** of my EAT skeleton arguments: The EAT did not address this point.

11.2 ***Robson v Inland Revenue Commissioners*** [1998] IRLR 186 EAT, paragraphs 5 - 7: This demonstrates that the perjured evidence of the Respondents' is sufficient on its own for the case to be decided in the appellant's favour- see **[B2. 468. 48]** of my EAT skeleton arguments. 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- **[B1. 363. 110]**, as did the respondents' own Counsel, who asserted in his closing written submissions that Deborah Francis was the Managing Director of Careers and Employability, (a small section of my work place/CEL), **[B2. 401. 10]**. He then contradicted himself by applying to Deborah Francis the title of Managing Director of the entire company that I worked for **[B2. 401. 34]**, the evidence showed that she was not **[B2. 2, B2. 14. 8, B2. 26. 20 & B2. 435 - 455]**. The Respondents' did not deny the perjury allegation **[B2. 431 – 434]**.

11.3 In the case of ***Levy v Marrable & Co Ltd*** [1984] I.C.R. 583 it was held that it is the duty of the ET 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:

"What is our duty in those circumstances? We think the principle involved is the following: where there has been a conflict of evidence at the hearing before an industrial tribunal on a significant issue of fact, then the industrial tribunal's finding (i.e. their acceptance or rejection of such evidence) must be made plain one way or the other. Express words are not necessary. That is clear from Union of Construction, Allied trades and Technicians v. Brain [1981] I.C.R. 542, and in particular the judgment of Donaldson LJ at p.551. But the language must be sufficiently full and clear to make it possible for anyone to tell from a reading of the decision as a whole whether the members have believed the relevant witnesses or not. Failure by the industrial tribunal to provide that indication, expressly or by reasonably clear implication from the overall language of their decision, amounts to an error of law: see Alexander Machinery (Dudley) Ltd v. Crabtree [1974] I.C.R. 120, 122. This principle has not, we think, been affected - indeed it derives implicit support from - the recent decision of the Court of Appeal in Varndell v. Kearney & Trecker Marwin Ltd [1983] I.C.R. 683. Application of that principle to the circumstances of the present case has driven us to the conclusion, on the grounds already indicated, that the industrial tribunal failed to make it sufficiently clear, on a plain reading of their decision as a whole, whether they accepted (and if so to what extent) or whether they rejected the evidence on the one side or the other. Thereby they fell into an error of law which it is our duty to redress."

as is cited in ***Greenwood v NWF Retail Ltd*** (2011) UKEAT/0409/09/JOJ.

11.4 The Respondents' perjured themselves regarding this issue **[B2. 377.47, B2. 397. 28, B2. 415. 1, 23, 32 & 42 & B2. 420. 67]**. Benjamin Craig contradicted himself on this issue **[B2. 420. 90]**. 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. It made contradictory findings as to who was the Managing Director of CEL at **[B1. 363. 110]** and **[B1. 363. 151]**, the latter finding was not based on any evidence and therefore constitutes a perverse finding. The ET neither set out the competing factual contentions nor indicated how they had been resolved- see **[B2. 468. 63]** of EAT skeleton arguments: The EAT did not address this point.

11.5 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.

Perverse findings of fact: this impacted the burden of proof

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

The failure to take into account the oral evidence

13 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- see **[B1. 2. 344 – 573]** of my ET submissions: The EAT did not address this point.

13.1 The ET failed to properly deal with the oral evidence; it clearly did not make any adverse findings against the respondents' based on it and failed to explain why it did not in reaching its conclusions. The ET failed to consider the full content of witness statements- at **[B2. 468. 21]** and of oral evidence and it erred in law by failing to do so. In discrimination cases, oral evidence is of particular importance, and the ET failed to attach adequate weight to this: The EAT did not address this point.

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

14 ***Plettell v British Aerospace (Operations) Ltd*** [2001] UKEAT 446/2007, paragraphs 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 **[B2. 63. 511 – 571]** of my ET witness statement. However, the Tribunal 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'.

14.1 At **[B1. 363. 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 EAT did not address this point.

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

15 The ET failed to apply the correct legal principles to its findings of fact: **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.

15.1 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 Tribunal should have considered an inference of discrimination.

15.2 In ***Wisniewski (A Minor) v Central Manchester Health Authority*** [1998] EWCA Civ 596 **[paragraphs 23 - 24]**, Brooke LJ considered the relevant authorities and derived the following principles:

- ***'In certain circumstances, a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.***
- ***If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.***
- ***There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference. In other words, there must be a case to answer on that issue.***

- ***If the reason for the witness' absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his absence or silence may be reduced or nullified.'***

See **[B2. 468. 26d]**- The EAT did not address this point.

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

16 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: The EAT did not address this point.

16.1 The ET failed to give adequate consideration to the drawing of inferences in relation to the numerous breaches by the respondents' **[B2. 2. 96 a-p, 319]** of my ET submissions and **[B2. 63. 20 – 21, 102, 232, 245 – 246, 251 & 255, 259 a - p]** of my ET witness statement: 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': also see **[B2. 468. 53 a-g]** of my EAT skeleton. The EAT did not address this point.

16.2 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.

The failure to take into account Codes of Practice

17 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 ET must take into account any relevant provision. The ET failed to take into account ***Ali v Pindersfield Hospital NHS Trust*** [1997] UKEAT184/97, page 1 and as set out in **[B1. 2. 73q]** of the my ET submissions and **[B2. 468. 54]** of my EAT skeleton arguments: The EAT did not address this point.

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

18 See **[B1. 2. 600]** of my ET submissions and **[B2. 468. 7, 85, 92, 118, 137, 143, 147 & 162]** of my EAT skeleton.

18.1 The Respondents' pleadings **[B2. 10, B2. 42 & B2. 43e]** 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 **[B2. 4. 81u, B2. 6. 101 – 104 & 99 -100]**. At **[B1. 363. 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***'.

18.2 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 **[B2. 379, B2. 384, B2. 389 & B2. 411]**, particularly Beverley Bannister's, who was the senior manager that allegedly passed my expenses form onto HR to process **[B1. 2. 3.59, 3.65 & 494 & B2. 63. 149 & 165]**. The Respondents' also evaded the question of the credit monitoring payment in its questionnaire response **[B2. 63. 550]**.

18.3 The findings of the ET in relation to these issues were not the subject of any evidence. It was not "fair play" for the ET to decide the case against me on points which the Respondents' had not raised or argued and given me an opportunity to address it in evidence. It was, grotesquely unfair and an error of law on the part of the ET. 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.

18.4 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: The EAT did not address this point.

The ET's failure to apply the correct legal tests

The question of harassment and unconscious discrimination

19 The ET failed to consider whether the treatment in question was consciously or unconsciously motivated on racial grounds. The EAT did not address this point.

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

20 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 **[B2. 468. 102]**. Indeed there was no express finding in relation to disability related discrimination/ discrimination arising from disability: The EAT did not address this point.

Inadequate assessment of witnesses

21 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.

21.1 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.

21.2 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 - see **[B2. 468. 8]** of my EAT skeleton arguments: The EAT did not address this point.

The question of 'reasonable adjustments'

22 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- see ***Stenning v Jarman and London Borough of Hackney*** [200] EAT/1288/99, paragraphs 22 & 24 - 25 and ***Marks and Spencer v Martins*** [1998] IRLR 326, paragraphs 7, 17 – 18 & 21. Also see **[B2. 468. 15, 26c, 49, 53g]** of my EAT skeleton arguments: The EAT did not address this point.

Taking an irrelevant matter into account

23 At **[B1. 363. 176]** of its judgment the ET takes into account an irrelevant matter regarding my employers OH referral **[B2. 427. 88.dd B2. 2. 173 - 175 & B2. 43a-e]**, (also **see my grounds of appeal**).

23.1 The Equality Act makes it clear that an employer should give consideration to suggestions that employee makes regarding what might alleviate his work problems, which was also held in the case of ***Fu v London Borough of Camden EAT*** [2001] IRLR 186, paras 21 & 24 - 25. This area is dealt with in the Employment Code para 6.24 which states: '*There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage*'.

23.2 The ET also failed to take into account ***Leeds Teaching Hospital NHS Trust v Foster*** [2011] UKEAT/0552/10/JOJ, at para 17, also see **[B2. 468. 175]** of my EAT skeleton arguments: The EAT did not address this point.

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

24 The failure to make any comparisons or any proper comparisons- also see ***Stenning v Jarman and London Borough of Hackney*** [2001] EAT/1288/99, paragraphs 22 & 24 – 25 and ***Marks and Spencer v Martins*** [1998] ICR 1005; [1998] IRLR 326, paragraphs 7, 17 – 18 & 21. The ET failed to deal with a hypothetical comparator, as was set out in my pleadings and schedule of claims **[B2. 51]**. Also see **[B1. 2. 6l, 6m, 33e, 90 – 91, 170, 199 – 202, 207 – 208, 288 – 300, 332]** of my ET submissions, **[B2. 63. 349, 387 – 388, 400, 602, & B2. 307. 52, 54]**

of my ET witness statements and **[B2. 468. 12, 26b, 101 & 167]** of my EAT skeleton arguments: The EAT did not address this point.

The question of detriment

25 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. See ***Burton v. De Vere Hotels Ltd*** [1997] ICR 1, (per Smith J. at page 7, p10 A B): 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- see paragraphs **[B2. 468. 17, 19, 26h, 50, 52, 77, 93 – 97, 101, 104 & 107 – 109, 138, 142]** of my EAT skeleton arguments: The EAT did not address this point.

25.1 Also see ***Cumbria County Council v Carlisle-Morgan*** UKEAT/0323/06/CEA; [2007] IRLR 314, paragraph 29: 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" me, 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: The EAT did not address this point.

The interest of justice

26 ***Prentice v Hereward Housing Association and Another*** [2001] EWCA Civ 437 [paragraphs 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: see paragraphs **[B2. 468. 55]** of my EAT skeleton arguments. 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- see paragraphs **[B2. 468. 3jj, 27 – 31, 58 – 88 & 155]** of my EAT skeleton.

The Cost Order

27 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 **[B2. 458]**, therefore it is paramount that the ET's and EAT's decision on the dismissed claims be overturned.

27.1 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 will still be unable to pay the reduced amount because of my circumstances.

The Severe Impact on my Health

28 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.

Alleged Violation of Article 6 Rights

29 It is submitted that there have been breaches of my right of access to court under Article 6. 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; **b)** the failure to take into account the supporting evidence post-December 2010 and make findings of fact in reltion to this and **c)** the acceptance of the Respondents' defence to a number of my allegations, which has not been set out in the respondents' pleadings or witness statements **d)** the material errors of law set out in this skeleton which individually and comulatively amount to procedural irregularities and an unfair hearing- see the ***Tanfern Ltd v Cameron Macdonald*** [2000] 1 WLR 1311 at [30].

29.1 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 and EAT had a duty to satisfy these requirements, however, they both failed to give this issue any consideration to sec 6(6)- see **[B1. 427. 9d, 36, 75 & 80]** of my Notice of Appeal and **[B2. 468. 47, 114 –116]** of my EAT skeleton.

29.2 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).

29.3 I believe that there is a real possibility that consideration of the questionnaires and responses, supporting evidence, 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. I highlighted this fact at **[B2. 468. 191]** of my EAT skeleton. However, the EAT failed to address this. 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

30 Ultimately the decision under review is that of the Employment Tribunal, 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. 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.

31 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 just 4 paragraphs. The EAT failed to record any of my submissions and failed to outline the facts of my case. The EAT also failed to state how it applied the relevant law and failed altogether to address my complaint about the unfairness of the ET hearing.

32 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 Employment Appeal Tribunal failed altogether to deal with my applications for ‘fresh evidence’. I made more that one application

for fresh evidence, at **[B2. 468. 58 - 89]** of my EAT skeleton arguments/ **[B1. 427. 92 – 95]** of my Notice of Appeal and via e-mail at **[B2. 586]** dated 7 September 2012 at 09:47.

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. 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.

34 The EAT failed to deal with my application to obtain the chairman's notes, **[B2. 468. 183, 214 & 215e]** of my EAT skeleton and **[B1. 427. 103 & 104d]** of my Notice of Appeal, even though it describes my appeal as a perversity appeal and it had my own notes of evidence **[B2. 592 - 594]**. This was clearly crucial to this case, as my appeal included an allegation that the ET's 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. At **[B1. 363. 28]** of the ET judgment, under the heading '*Witnesses and the Evidence*', it states:

'***Many of the Claimant's allegations never developed beyond the bald assertions made. She never really explained why the Respondents' explanations were not to be believed. When asked in cross-examination why the Respondents' action were only explicable as being on discriminatory grounds, the Claimant's stock reply was that there was no other explanation and she would simply refer back to the assertions made in her witness statement and pleadings without further expansion***.'

It was clear from the evidence, including my two witness statements **[B2. 63 & B2. 307]** and my own notes of evidence for counsel's cross-examinaion of me **[B2. 330]**, (that was taken by my friiend over the course of three days) and which were presented to the EAT **[B2.592]**-*bottom of the page*, that the ET's assessment of my evidence was incorrect.

35 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. Accompanying

my Notice of Appeal was a request for the Employment Judge's Notes of Evidence, a request made persuant to paragraph 7 of the EAT Practtice Direction. However, this was completely ignored. My own notes of evidence were put before the EAT **[B2. 330]**. It is important to note that in the EAT's N460 form **[B1. 1]** 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? It is not possible to consider whether any findings were perverse without the Employment Judge's Notes of Evidence.

36 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 **[B2. 468. 6]** of my EAT skeleton and **[B1. 427. 11a]** of my Notice of Appeal.

37 Notes of evidence were clearly necessary, particularly in relation to factual issues that only emerged clearly in cross-examination. The EAT erred in law by failing to deal with my application for notes of evidence and could not properly uphold the ET's finding absent a consideration of that evidence. This in itself was an error of law and constituted procedural irregularity/unfairness. The EAT should have recorded details of my application and its result.

38 I was severely criticised for presenting extensive evidence to the EAT, however, it is clear that it is not possible to mount a perversity challenge unless the EAT adduces the Chairman's notes of evidence and is provided with the evidence before the fact finder ET. This included more than 10 witness statements, my written extensive ET written submissions, my notes of evidence for the 20 day hearing and other crucial documentary evidence relating to the perversity challenge and Meek point. It is important to note that the EAT failed to review the full evidence that was put before it **[B1. 483. 8]**:

'For the purpose of these three applications, I was provided with a total of some 2,700 documents; that was totally unnecessary and really must not happen again. Fortunately, I had a day when an appeal settled and I was able to read approximately 1,000 pages'.

39 All the important facts that arose from this evidence were not to be found in the ET judgment. I submit that the EAT erred in law on all the points that the ET had erred and that this tainted the whole of EAT's analysis. In my view, read fairly, my evidence and my EAT skeleton arguments which were advanced to the EAT, were not given adequate consideration. Legal points must be considered in the context of the entirety of the proceedings, but this was not done. The EAT, as the ET had done before it, erred in law by failing to follow binding authorities which I set out in my submissions. ***Mowlem Technical Services (Scotland) Ltd v King*** [2005], at paragraphs 10 & 16, also makes references to the omission of the Tribunal to the substance of the appellants' evidence/submissions.

40 The EAT erred in law by failing to follow binding authorities which I brought to it's attention under the heading, '*Relevant law'*- see **[B2. 468. 34 – 57]** of my EAT skeleton arguments and like the ET, it erroneously focussed its attention not upon my legal arguments, but on my refusal to accept the judgment. The EAT took too narrow a view of the circumstances and was wrong in arriving at the conclusion it did.

41 The EAT erred in law in not allowing the appeal and incorrectly asserted that it was solely '*an appeal on fact dressed up as a perversity appeal*' **[B1. 483. 14]**. The criticisms made of me by the EAT are without foundation. 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.

42 Applying my conclusions on the law to this judgment, I am driven to the conclusion that like the ET judgment, it too is not Meek compliant. It is inadequately reasoned to the extent that it is

erroneous in law. Plainly both the ET and the EAT failed to have regard to my legal submissions and there is evidence to show that they were not considered with care. The reference to the EAT at **[B1. 483. 8]**:

'…the so called skeleton arguments' and 'having read into the case as far as it seemed to me was necessary'

43 Clearly indicates that the EAT ignored my legal submissions and failed to take into account all of the material errors of law that I cited. This appears to be simply because they were too numerous to mention and too detailed- see above and **[B1. 483. 8]**:

'To give a flavour of the degree of detail and to which Ms Vaughan went into these appeals, her Notice of Appeal in the first appeal ran to 53 pages and her skeleton argument in that appeal alone ran to 116 pages'.

44 No account was taken of the fact that:

a) I tried to ensure as far a practicably possible to limit my evidence and ensure that my skeleton arguments were concise, however, this was extremely difficult due to the fact that the this is a very serious and complex public interest case, which has a large number of significant points in them, dealing with issues of discrimination, whistleblowing, involving more than 15 witnesses and three claims spanning over 3 years. The core bundle alone consisted of extensive pleadings, questionnaire and responses and applications, which in themselves were long and complex. Therefore, inevitably there would be much detail involved; and

b) I am not legally trained and unrepresented; and

c) I am disabled with a mental health condition which impairs my memory and concentration and ability to learn and understand, (which is exacerbated by this state of affairs). Unlike a legally trained person, I was unable to make full and effective oral arguments and as such, I was relying on my written submissions; and

d) There are serious issues at stake, namely:

- My future: As a result of the ET's decision to dismiss my claims, the ET made an extreme cost order against me for £92,000. It is clear that I will be saddled with a huge debt that I will struggle to pay for years to come, which will severely exacerbate my already fragile mental state. This will go on my record and my credit rating will be severely affected.
- My fragile mental health: The EAT is aware that I am disabled with a history of mental health problems (depression, anxiety, panic attacks, eating difficulties, fatigue and

insomnia) dating back to 2009. It was clear to the EAT that I was ill through-out the ET proccedings and that I had again been signed off by my GP with depression since April 2012, without any breaks. Throughout I have suffered acute stress and depression and the an exacerbation of my medical condition due to these proceedings, which began in April 2010; and

- 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 EAT should be astute to protect. The EAT's judgment tends to undermine the efficacy.

45 The issue of proportionality is dependent on the nature and gravity of what is at stake and the duty of the Court to protect the Defendants' Convention rights- in particular Article 6 and 14. Article 14 prohibits discrimination in access to the courts throughout the whole judicial system. The EAT should have considered it proportional for me to go in to the detail I did and adduce all the necessary evidence in order to protect and advance my case, protect my future and mental health and in light of the extreme cost order in excess of £92,000. It is clear that natural justice does require this.

46 In effect, the EAT failed to act in accordance with principles of "Natural Justice". The EAT clearly falied to adequately deal with all aspects of my appeal. This reduced my access to justice in such a way and an extent that the very essence of my right to a fair hearing was impaired. The fact that the EAT considered it disproportionate to read all of my legal arguments offends the principle of proportionality as applied by European Court of Human Rights in recent cases.

47 The EAT failed to provide reasons to justify the decisions reached. The Employment Appeal Tribunal 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. Indeed, the Employment Appeal Tribunal clearly indicated that it did not discern from the Notice of Appeal or skeleton arguments any discrete or cogent allegations of error or law **[B1. 483. 14]**:

'***I do not accept that the Tribunal ignored authorities, on the contrary, it seems to me that they set out the correct legal tests in the course of their reasons***'.

And **[B1. 483. 15]**:

'***It seems to me that the Employment Tribunal carefully assessed the evidence over a long period of time, deliberated 5 ½ days on the detail of the matter, made clear findings of fact, correctly directed themselves as to the law and applied the law permissibly to their findngs of fact. In short I can see no basis in law for challenging the first substantive decision***'.

48 It is submitted, that as outlined, clear material errors of law and clear errors in the ET's analysis and reasoning were set out in the Notice's of Appeal, my skeleton arguments before the EAT and now in these grounds for permission to appeal to the Court of Appeal.

49 The issues of perversity overlapped with the 'Meek' principle and errors of law. The EAT erred in failing to accept these errors and this fact. The EAT erred in failing to accept that the appeal raised a Meek point. It is a basic function of an appellate court to decide a case on the grounds of appeal advanced by the appealing party. That was not what the EAT did in this case. The appeal was prepared by me as a Meek appeal and an error of law appeal, not just a perversity appeal. Therefore the EAT erred in law in treating it as if it was solely a perversity appeal, or as it put it **[B1.1483. 4]**:

'…this was really an appeal on fact dressed up as a perversity appeal'.

Conclusion

50 The EAT has the power to overturn a decision based upon a breach of natural justice if it can be shown that the breach was not simply technical and that the party concerned had suffered something which was 'seriously irregular and unfair' see ***Mayo Deman v Lewisham College*** [2003], however they did not do so. In my view that ET and EAT judgments are so bizarre and unfair that it is in the interest of justice for the Court of Appeal to review it.

51 If I am not successful in being allowed to appeal the decision of the ET and EAT, it will set a dangerous precedent and may lead to further injustices and also unduly restrict the proper development of the law. The decision in my case cannot be right in terms of basic natural

justice. I respectfully request that permission to appeal is granted by the Court of Appeal and I submit that it is in the greater public interest for the Court to also allow the 'fresh evidence' relating to the substantive appeal to be examined.

Orders sought

52 The proposed appeal satisfies the criteria for permission to appeal being granted. At the hearing of the appeal, the Court will be invited to enter judgment for me. In order to expedite the case in a fair and just way, I urge the Court of Appeal to:

a) Expedite this appeal, as the outcome of the hearing for the 'stayed' part of the case relating to the dismissed claims, (due to be heard in September 2013 **[B2. 586a-b]**), depends heavily on justice in this appeal and the detailed cost assessment hearing is due to be heard on 18 & 19 March 2013; and
b) Grant me permission to appeal the EAT's decision and allow my appeal on the ET's substantive decision; and
c) Allow the 'fresh evidence' relating to the dismissed claims and issue directions in relation to this; and
d) Provide directions as to the Employment Judge's notes of evidence; and
e) Issue an order preventing the Respondents' from enforcing the order of the lower court, in relation to the cost order, pending the outcome of the Courts' decision; and
f) Order that the ET postpone the 'stayed' part of the case which relates to the dismissed claims, (which has been listed for a three day hearing in September 2013), pending the outcome of the court's decision.
g) Order a retrial/remit the case to a fresh Tribunal for determination, including the full hearing for the 'stayed' element of claim number 2300245/2011.

STATEMENT OF TRUTH

I believe that the statements that I have made in this skeleton argument are true.

Signed

Ms Ayodele Adele Vaughan

27 December 2012