SKELETON ARGUMENTS FOR THE 3(10) HEARING on 22.07.08

1. JURISDICTION OF THE EAT

This appeal is made under the Human Rights Act 1998 and the Industrial Tribunals Act 1996 s21(1). It is therefore within the jurisdiction of the EAT.

2. The relevant sections of the Human Rights Act 1998 Act are 6(1), 6 (2), 6(3), 7(1), 7(6).

Section 6 (1) of the 1998 act states: *'It is unlawful for a public authority to act in a way which is incompatible with a Convention right. '*

Section 6 (2) of the 1998 act states: *Subsection (1) does not apply to an act if—*
(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

Section 6(3) of the 1998 act states: '*In this section "public authority" includes-(a) a court or tribunal..*

Section 7 (1) of the 1998 act states: '*A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may- (a)……(b)rely on the convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.'*

Section 7(6) of the 1998 act states: '*In subsection (1)(b) "legal proceedings" includes- (a) proceedings brought by or at the instigation of a public authority; and (b) an appeal against the decision of a court or tribunal.'*

3. Section 21(1) of the Industrial Tribunals Act 1996 states:
21 Jurisdiction of Appeal Tribunal
(1) An appeal lies to the Appeal Tribunal on any question of law arising from any decision of, or arising in any proceedings before, an industrial tribunal under or by virtue of— ….

4. The Court of Appeal has defined in *British Telecommunications v Sheridan [1990] IRLR 27* what are the questions of law that the EAT has jurisdiction for:
'*The EAT can interfere with the decision of an Industrial Tribunal if they are satisfied that the Tribunal have misdirected themselves as to applicable law, or if there is no evidence to support a particular finding of fact, since the absence of evidence to support a finding of fact has always been regarded as a pure question of law. The EAT can also interfere if the decision is perverse.'*

A similar definition has been given by the EAT in *East Berkshire Health Authority v Matadeen [1992] IRLR 336,* where it stated:
The EAT can allow an appeal against the Tribunal's decision if, first, there is an error of laws on the face of the of the decision, a misdirection or an misapplication of the law; secondly , if there is a material finding of fact relied upon by the Tribunal in the decision which was unsupported by any evidence or contrary to the evidence before them; and thirdly , if there is a finding or perversity.

Perversity is a free standing basis in law, on which the EAT can interfere with the decision of an Industrial Tribunal. A decision is perverse if it is *a conclusion that offends reason or in one to which no reasonable Industrial Tribunal could come.* or *'the decision was so outrageous in this defiance of logic or of accepted standards of industrial relations that no sensible person who had applied his mind to the question and with the necessary experience*

could have arrived at it.

5. GROUNDS FOR THE APPEAL [1]

GROUND 1: There has been a breach of the human rights act 1998. The relevant sections of the 1998 act are 1, 6 and 7. Section 1 of the 1998 act puts into effect articles of the European Convention on Human Rights. The relevant article of the Convention states

Article 6 (1) : *'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by and independent and impartial tribunal established by law. Judgment shall be pronounced publicly .....'*

6.

> Having a fair hearing implies that both parties are given the opportunity to present their evidence and legal arguments and the submission of both parties are given full consideration.
>
> Having a fair and public hearing implies that the hearing and its outcome is fair and is seen to be fair. However the written justification for any decision is not simply supposed to create the perception that the decision is fair, what is written ought to honestly reflect the facts of the case and the legal basis of the decision.
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> Inadequate or misleading reporting in the written judgments may conceal errors and unfairness in the decisions. It can also compromise the fairness of subsequent appeals since what is reported in a previous judgment is used as the basis for further legal deliberations.

7. In relation to these rights, I have found that some of the Chairmen dealing with my case have not always listened to what I said and have not read what I have written. The evidence and argument supporting my case have not been reported accurately in the subsequent judgments.

8. These problems started at the stage of case management and led to a chain of 4 case management hearings and 2 appeals to the EAT before the merits' hearing. The net outcome of case management was that my initial complaint was mutilated. This affected in particular the specification of the protected acts which compromised the chances of success of my complaint for victimisation (under s2 RRA, s4 SDA). Although I insisted that my 1999 and 2001 grievances ought to have been added to the 2003 ET proceedings as protected acts, they were not added. The same applied to the protests I made after the 2003 ET proceedings.

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[1] Text describing points of law is underlined.

Throughout this document the numbers appearing in [ ] are the page numbers in the bundle for this hearing. These page numbers appear in the column of the index of that bundle under the heading 'Page #'. To facilitate comparisons of the references made here and those made in the ET judgment, the 'Grounds of Appeal' and the 'Appendix', the index of the bundle for this hearing includes the references appearing in those 3 documents in a column under the heading 'Old Page #'. The numbers listed in that column correspond to the page numbers of the bundle used for the merits' hearing.

The protected acts are an integral part of a complaint of victimisation. The outcome of the complaint depends, among other things, on the protected acts. Discarding protected acts specified by the Claimant, for no good reason and against the expressed objections of the Claimant and his / her protests that this will affect the chances of success of the complaint, is arbitrary and inconsistent with having a fair hearing.

More details for the above have been recorded in paragraphs 5-16 of the document 'Grounds of Appeal' [67] and the skeleton arguments of the 2007 EAT hearing [237]. The judgments of the 2005 and 2007 EAT hearings are included in the Authorities bundle.

9. The Human Rights Act 1998 was breached again during the merits hearing of the present case. In reaching the 11.02.08 judgment of that hearing the ET left out substantial evidence supporting my case and introduced facts that were inconsistent with the evidence. Had the evidence before the Tribunal been described reasonably accurately, any reasonable person would see that the decisions reached by the ET were unfair.

10. Having considered s6(2) of the Human Rights Act, I submit that there is no provision of primary legislation on account of which the above breach of that act could not have been prevented.

11. **MY REQUEST TO THE EAT** regarding the breach of the Human Rights Act.
I ask that the EAT take whatever action can undo the unfairness done to me because of this breach. This request specifically includes the correct definition of the protected acts and correction of the decisions taken at the merits' hearing. If the latter requires a re-hearing of the case, I ask that the EAT orders a re-hearing. If it is necessary to refer the matter to the Court of Appeal or a superior court, I ask the EAT to do so. Failing that I ask for a declaration of incompatibility with the Convention Human Rights.

12. **GROUND 2:** The decisions of the ET rely on findings of fact. Several material findings of fact are wrong in law which makes the subsequent decisions relying on them wrong in law.

The most common error with respect to the findings of fact is that the ET made findings of fact by failing to consider or even mention evidence that was significant and relevant, or were not supported by the evidence, or were inconsistent with the evidence.

I have identified the above error on numerous instances throughout the ET judgment. However due to the expressed reluctance of the EAT to hear evidence (discussed in letters [63], [123], [127] and [129]), I have limited this appeal to only a few instances.

13. In addition to the above errors there are a few instances where the ET reached conclusions that are perverse, ie that no reasonable tribunal would have reached on the basis of the evidence before it.

14. I discuss the specifics of the errors mentioned above in the context of the individual decisions that were affected by these errors, under Grounds 4, 5, 6 below. I have supplied full particulars of the matters relied on. These can be found in the Appendix to this Notice titled 'FINDINGS OF FACT IN THE JUDGMENT OF 11.02.08' [83].

15. **GROUND 3:** There were irregularities in the proceedings and judgment of the merits hearing that defy the rules of Natural Justice. These are as follows:

16. **A. Unfair appointment of chairman for the merits' hearing**

On 12.05.07 I wrote to the Regional Chairman of the Tribunals at Croydon and explained that the way the Tribunal Chairmen, Ms Spencer and Mr Zuke, had dealt with previous case

management of my case was unfair and in breach of the overriding objective [245A]. I asked that these Chairmen are not appointed to chair the merits' hearing of my case and if possible to transfer my case out of Croydon.

In a letter dated 17.05.07 [245B], the Regional Chairman, Mr John Warren, refused to transfer the case out of the region. As for the allocation of the Chairman of my case hearing, he said this was up to him. There were subsequently two occasions on which there was an appointment of a chairman for the merits' hearing of my case. On both occasions the very persons I had objected to were appointed. I am told that for the hearing planned for 19.06.07 Mr Zuke was appointed as the chairman. When that hearing was postponed for 7.11.07, Ms Spencer was appointed to chair the merits' hearing.

I say that the handling of my request in this instance was irregular and unfair.

17. **B. The ET refused to allow my witness Ms L Fredrics to testify**

This refusal was made on the grounds that I proposed her as a witness late and she did not have direct knowledge of my case**.** (Paragraph 29 of the ET judgment [7].) I applied to have this witness accepted and submitted her brief witness statement on the first day of the merits' hearing. I could not have done that earlier because I did not know about Ms Fredrics till a few days prior to that date.

The testimony of this witness [246] was relevant as she was a former employee of the Respondents and could testify about the victimisation she was subjected to in retaliation to her grievance and complaint to the ET by the same manager of the Respondents who victimised me for similar reasons. In that respect Ms Fredrics' testimony was relevant. It was against the interests of justice to prevent her from testifying. That was especially so since I had no witness other than myself.

18. **C. Inequitable treatment**

The ET did not afford me equitable treatment insofar as it did not consider or even mention extensive material evidence supporting my case. This error is raised under Ground 2. What I wish to draw the attention of the EAT to, here, is the extent and multitude of instances where this error occurred, which amounts to an irregularity in the proceedings.

19. In accordance with section 11 of the Practice Direction I have supplied particulars of the above allegations. These particulars can be found in the Appendix to this Notice [83].

20. **GROUND 4:** Errors In Law In The Finding Of The Complaint For Unfair Dismissal

A - Reasons for the dismissal

In reaching its decision the ET has asked the following questions:

a) 'What was the reason for the dismissal?'
   The ET accepted the answer of the Respondents that the reason was because of my conduct, because I consistently refused to follow a reasonable management instruction.
b) 'Was the management instruction that I change my home working reasonable?'
   The ET decided that it was.

21. I submit that the ET erred in law in answering these questions. The errors outlined below affected both answers.

22. **Error 1**: I submitted that the true reason for my dismissal was harassment and victimisation. The evidence in support of my claim that my dismissal was engineered is overwhelming yet it has been for the most part not been considered, which is an error in law.

The mistreatment started as soon as I submitted a formal complaint in my 1999 appraisal about the lack of resources for research and career development. The retaliation that followed my 1999 grievance, included a bogus disciplinary hearing to intimidate me into dropping my grievance and a trap for my dismissal through the offer of a sabbatical [147], [148], [162], [149], [152],[154], [156], [158].

The bogus disciplinary has not been mentioned anywhere in the judgment. As for what the ET wrote in paragraphs 34 and 37 about the offer of the sabbatical, it is not only inconsistent with the evidence and argument presented by the two parties, it also appears to arbitrarily impose the ET's own view that management dictates what research should be done. This view is inconsistent with the evidence and the widely known practice in universities with respect to academic freedom, made a legal right by the Education Reform Act of 1988 s202. Academics decide on their own research, they are not told by management what to research.

Particulars and details of the evidence that was not considered by the ET or was inconsistent with the ET findings are given in paragraphs 2-22 of the Appendix [84].

23. The harassment that started in 1999 did not stop. This led me to submit a further grievance in 2001 [164], [170], [166]. I was pressured again, both by the Personnel Director (E Lanchbery) and by the Vice Chancellor (P Scott), to withdraw my grievance and when I refused the Respondents decided to dismiss me [165], [180].

    My dismissal was planned to take place after the appeal hearing with the 14.06.02 Governors ([183], [184]). The only reason why I was not dismissed at that time was because the Vice Chancellor hesitated as a result of the severe criticisms the Governors voiced privately against my management. The VC decided to postpone my dismissal, wait for 6 months and then 'take action' [184, 185]. My dismissal is the outcome of this 'action', only delayed because of the litigation I undertook against the Respondents in the mean while. None of this highly relevant evidence has been considered or mentioned in the ET judgment.

    The ET present their account of these matters in paragraphs 38-43 of the ET judgment [9]. In addition to the evidence left out, some of the findings of fact are contradicted by the evidence and some of what is written implies perverse reasoning on the part of the ET. More details about these errors by the ET, can be found in paragraphs 32-52 of the Appendix [91].

24. The Respondents' conduct in the circumstances is consistent with the unreported ET case # 2301349/99 '*Oldfied v Kingston University', 2000* (see Authorities bundle), where the same officers of the Respondents (E Lanchbery and P Scott) pressured Mrs Oldfield to withdraw her allegations of harassment and bullying against her line manager. When Mrs Oldfield refused she was given the ultimatum 'resign or get sacked'. For comparison see E Lanchbery's view in [165]. In Mrs Oldfiled's case she resigned, in my case I got sacked. Mrs Oldfied succeeded in her ET complaint for unfair constructive dismissal.

25. It is very significant that the campaign to retaliate, harass and dismiss me predated the institution of the home working restrictions on the pretext of which I eventually got dismissed. The failure of the ET to consider the evidence surrounding the ongoing plans to dismiss me is consistent with the failure of the ET to establish the causal link between the ongoing campaign to harass, retaliate and dismiss me and my 2004 dismissal.

26. **Error 2**: The nearest the ET came to establishing a causal link between my protests and grievances and the mistreatment I was subjected to appears in paragraph 97 of the ET judgment where the ET makes references to my management's perception that I was difficult to manage and my management feeling frustrated as a result. This is consistent with the comments throughout the ET judgment. (See paragraphs 37, 38, 41, 62). Paragraph 41 in specific says that management saw me as a 'thorn in their side' and that accounted for the wish and plans to dismiss me.

27. This points to another error in law on the part of the ET that I explain below.

    The substance of my ET complaint was what I stated in paragraph 196 of my written submissions :
    '*My dismissal was **the final outcome** of a continuing and prolonged course of conduct of victimisation and harassment by the Respondents against me. This conduct involved breaches of the law, breaches of university procedures, and my contract, breaches of the ACAS code of practice, bullying, undermining me, insulting me before others, raising false accusation and initiating disciplinary action against me, over-monitoring, nit picking, unjustified criticisms. What motivated this conduct was **retaliation** for my grievances and for the legal action against the Respondents. The aim of this conduct was to dismiss me or drive me to resign. I have already described the history of the mistreatment I suffered. … The mistreatment I was subjected prior to my dismissal amounts to a fundamental breach of contract entitling me to resign and claim unfair constructive dismissal.* '

28. The document titled 'Harassment' [170] that I submitted with my 2001 grievance and several other communications, such as [142], [147], [190], [213], [210], [226], [228A], [229] show that I expressed my concerns and objections about the refusal of the Respondents to properly implement the appraisal procedure[2] and their Personal Harassment policy and Grievance procedure, the abuse of the disciplinary procedure[3], the guidelines for the determination of duties [4], refusal to allow me annual leave I was contractually entitled [5], false and unfounded accusations and criticisms, nitpicking, over-monitoring, disrespectful treatment, conspiring to dismiss me, victimisation and overall treatment that undermined their obligation to maintain trust and confidence.

    In other words, these communications relate to failures by the Respondents to do what they were legally bound to do, that was to carry out their obligations under my employment contract and the law.

    These communications led to mistreatment and my dismissal. To give an example, the Respondents were asked to give further and better particulars of Paragraph 47 of the Amended Response that specifies the alternative reason for my dismissal. In paragraph 8 of these particulars the Respondents explicitly specified my letters to the Vice Chancellor [228A] and the Chairman of the Governors, J Cope [210, 226], as grounds for my dismissal. The relevant part of the '*Respondents' Further and Better Particulars ..*' reads :
    '*(The Claimant) sought to act outside the terms of the Respondents disciplinary procedure, inter alia, by seeking to correspond with the Vice Chancellor in inappropriate terms at inappropriate times during the process (during February 2004 to August 2004). In addition, in or around April 2004 …., the Claimant sought to involve the Chairman of the Board of Governors, including in a letter dated 7 April 2004 written in aggressive terms,'*

29. According to s 47B of the ERA 1996, mistreating me because of these communications is against the law, and dismissing me makes the dismissal unfair (under s 103A, ERA 1996). The ET have thus misdirected themselves in the applicable law.

30. **Error 3 :** I describe below the errors in the findings of fact that make the finding (in paragraph 94 of the judgment) that the instruction that I comply with the home working restrictions [195] was **a '*reasonable instruction*'** wrong in law.

31. In paragraph 50 of the judgment, the ET state that they rejected my claim that the instruction that I comply with the home working restrictions was in breach of my contract or in any case

[2] an express term of my contract (paragraph 4 of the Statement of Particulars [134]).
[3] an express term of my contract (paragraph 12 of the Statement of Particulars [136]).
[4] an express term of my contract (paragraph 4 of the ANNEX TO ACADEMIC STAFF CONTRACT [139]).
[5] is an express term of my contract (paragraph 8 of the Statement of Particulars [133]).

a unilateral variation of the terms of employment without proper justification and consideration of the evidence. Particulars of this error appear in the Appendix to this Notice, under the heading: '**Unilateral Variation of the terms of employment / contract**' (59-68) I provide details of these errors [98].

The question of the reasonableness of the instruction to change my home working is closely linked to other findings of fact, one of which deals with **the reason why the home working restrictions were introduced**.

32. In an attempt to justify the reasonableness of their instruction and the subsequent fairness of the dismissal, the Respondents explained the reason for introducing the home working restrictions. (See paragraphs 35, 37 of the Respondents' written submissions [251].) They relied on the cases *Hollister v National Farmers Union [1979] ICR 542* and *Bowater Containers v McCormack [1980] IRLR 50.* Both cases involved consideration of the fairness of a dismissal based on refusal to accept an alteration in terms and conditions. The Respondents claimed they '*had sound business reasons for introducing the policy'*. The Respondents outlined these business reasons in paragraph 13 of the amended response [252] and based their defence on these reasons.

I contested this defence and claimed that the home working restrictions were introduced for me as a means of harassment. I supported these claims with extensive evidence and argument. (See the relevant written submissions [253].)

33. The ET was apparently unable to accept the Respondents' reasons. The ET claimed instead that the introduction of the home working restrictions was prompted by problems with my attendance pattern (paragraph 96 of the judgement). This finding is inconsistent with the evidence and thus wrong in law. Particulars can be seen in paragraphs 55-58 of the Appendix to this Notice '**My home working had caused no problems and was consistent with the rules and practice'** [96].

Consequently the Respondents have no defence for having unilaterally changed the terms and conditions of my employment.

34. The ET has also relied on the finding of fact that the home working restrictions were even handed and applied to all staff, save where there were circumstances that justified an exception. The ET also stated that 'other staff were content to comply' with the home working restrictions (paragraph 96 of the ET judgment).

These findings of fact are wrong in law as they are inconsistent with the evidence that shows that the home working restrictions were not enforced on any one else but me. Full particulars can be found in paragraphs 69-73 of the Appendix to this Notice, under the heading: '**Discriminatory enforcement of the home working restrictions exclusively on me'** [100].

35. **B - Potentially unfair constructive dismissal**

The ET has relied on a finding of fact that is described in paragraph 97 of the judgment where they say that '*the Claimant could have remained in employment had she chosen to comply.'* This finding is wrong in law because it is inconsistent with the evidence.

Even if somehow I did not get dismissed on 13.08.04, it is very likely that I would have resigned and claimed constructive dismissal, as I was reaching the point where I could no longer tolerate the mistreatment I was subjected to. This is evident by what I wrote to the secretary of the University when on 20.9.04 I withdrew my appeal against my dismissal by explaining that '*my working life has become intolerable and my repeated attempts to have this problem addressed have been in vain.'* [233A]. There is also evidence that as a result of this mistreatment I was subjected to, I suffered from depression. Had I resigned, I would

have a strong claim for unfair constructive dismissal.

36. **C - Lack of procedural fairness**

The ET failed to address my claim that my dismissal was procedurally unfair, that I discussed in paragraphs 201-213 of my written submissions. In the process of engineering my dismissal, the Respondents committed numerous breaches of contract, breaches of their own procedures and of the ACAS code of practice. Such conduct cannot be said to be procedurally fair. I attached with my submissions lists of the relevant breaches.

37. To give a specific example: The disciplinary hearings leading to my dismissal were conducted by the very people who had conspired to dismiss me, R Davis, E Lanchbery, J Morris and P Scott. The decision to dismiss was not therefore taken impartially, which is a clear breach of procedural fairness.

38. Another example: The Chairman of the Governors to whom I submitted a grievance that my line managers, Personnel Director and the Vice Chancellor were conspiring to dismiss me, refused to intervene and address my grievance.

This refusal was in breach of rule of the ACAS code of Practice that says :
' In the course of a disciplinary process, an employee might raise grievance that is related to the case. If this happens, the employer should consider suspending the disciplinary procedure for short period while the grievance is dealt with. Depending on the nature of the grievance, the employer may need to consider bringing in another manager to deal with the disciplinary process. In small organisations this may not be possible, and the existing manager should deal with the case as impartially as possible.'
Further particulars are given in paragraphs 109-113 of the Appendix to this Notice under the heading: '**My 2004 grievance to the Chairman of the Governors'** [110]**.**

39. A third example: I requested that the Vice Chancellor clarifies the question:
"*... whether according to the university's rules and practice the pattern/place of work such as mine, constitutes grounds for dismissal. As I already explained in my letter of 10/7/04, I believe that an employer is legally bound* ***to clearly communicate what constitutes grounds for dismissal.*** *Such information ought to be widely communicated and be equitably applied to all members of staff.*
I ask that a ***clear response*** *be given to my request for the clarification described above. My decision will depend on this response. The same applies to my action against the university in order to assert my rights. I expect to receive a clear response to my request for clarification soon after I return from my annual leave on 10 August 2004. If the university states that my refusal to change my established pattern/place of work will constitute grounds for dismissal, then I request that the university also provides an explanation, in writing, as to why this treatment is not afforded to the rest of the University. After all a pattern/place of work such as mine has always been and still is common practice throughout the University."*
See [229],[231].
The VC refused to answer this question. He instead proceeded to decide my dismissal by holding a hearing on his own. This conduct is procedurally unfair. More details can be seen in the paragraphs 117-123 of the Appendix to this Notice under the heading: '**Refusal of the Respondents to clarify grounds for dismissal'** [112]**.**

40. **MY REQUEST TO THE EAT** with respect to the Unfair Dismissal claim.
    a) I ask the EAT to accept my appeal and reject the finding of the ET with respect to this complaint.
    b) If the EAT are inclined to replace the finding of the ET with a finding of their own that my dismissal was unfair with no contributory fault on my part, I ask that it does so and orders that appropriate remedy be determined in a remedies hearing.

c) Otherwise, I ask that the EAT orders a rehearing of this complaint by a differently constituted Tribunal at a Tribunals' site other than Croydon.

41. **GROUND 5 :** Errors in law in the finding for the complaint of **victimisation.**

A - Paragraph 101 of the ET judgment.

What is written in paragraph 101 invites criticism as to its relevance and correctness.

42. **Allegations that my home working had caused problems.**

To start with the ET reiterates in paragraph 101 their earlier finding of fact that my attendance pattern had been an issue. What the ET has written on this matter, in paragraph 46, implies that I was at fault by working as I did. As I have already explained this finding of fact is wrong in law because it is not supported by the evidence and in fact it is inconsistent with the evidence. Particulars in support of this claim appear in paragraphs 55-58 of the Appendix under the heading '**My home working had caused no problems and was consistent with the rules and practice'** [96].

43. **The timing of the introduction of the home working restrictions**

In my 2003 ET complaint I complained about the mistreatment I suffered since 1999 in retaliation for my protests and grievances. In my submissions for the present ET complaint I discussed this mistreatment under the heading '*A HISTORY OF HARASSMENT and RETALIATION'*. I concluded that '*it is very hard to believe that the same people who retaliated against me for protesting or putting grievances to the University throughout the period 1999-2003 would not retaliate against me for having taken legal action in 2003 and possibly planning to take further legal action in the future.'*

44. The ET say, in paragraph 101, that
    a) '*..most of the Claimant's instances of alleged victimisation arise out of the efforts made by management to enforce policy that she work at the university four days a week.'* [6]
    b) The policy in relation to home working had been enforced in November 2002

45. It is not clear whether the ET suggest that because the home working restrictions were introduced before the 2003 proceedings, that was a significant factor why they rejected the argument that victimisation took place after the 2003 proceedings. If these comments by the ET were to be taken as a valid argument against my complaint of victimisation, then I have several objections.

46. Firstly, independently of the fact that the home working restrictions were instituted on 25.10.02, it is the enforcement in 2004 and the subsequent dismissal in 2004 that are (among other things) the detriment I complain about in the present complaint of victimisation. This detriment post dates the 2003 proceedings.

47. Secondly, the enforcement of the home working restrictions is not the only detriment I suffered. Some of the detriment I suffered, such as my dismissal, relate to the enforcement of the home working restrictions, however that does not preclude a finding that the decision to dismiss me was influenced significantly by the protected act. For example, I claimed that the actual dismissal would have been prevented if it was not for the refusal of the Governors to intervene and address my grievance in 2004. That refusal was largely due to the protected act. (See the Appendix under heading '**My 2004 grievance to the Chairman of the**

[6] That is not true. There are several other acts of victimisation instances of victimisation that are unrelated to the above efforts. However the efforts to enforce the home working restrictions are significant because they amount to a detriment on their own right, but also because they relate to my dismissal which is a very significant detriment.

Governors (paragraphs 109-113 [110]))

48. My third objection points to a potentially serious error in law which could set a precedent that goes against the spirit of the law on Victimisation (s4 SDA, s2 RRA). I will elaborate.

    The introduction and the enforcement of the home working restrictions took place in late 2002 and was part of the victimisation I complained about in my earlier, 2003, ET complaint. This victimisation continued after the completion of the 2003 proceedings.

    In some circumstances it is reasonable to consider a complaint to the ET as an extended process normally starting with complaints to the employers first and then with a formal complaint to the ET. In fact current legislation requires that a complainant does not submit a formal complaint to the Tribunal unless he / she has complained to the employer first.

49. Suppose an employee submits a complaint to his employer before the matter is formally put to the ET and the employer retaliates against the employee by mistreating him. Suppose that the employer continues the same mistreatment of the employee after the completion of the Tribunal proceedings. The fact that the mistreatment started early, before the formal complaint to the ET, cannot justify its continuation after the completion. It cannot surely be used as a defence against a complaint for the victimisation that follows the completion of the ET proceedings. That is precisely what the Respondents have done in my case and the ET has accepted their defence.

50.

> If such a defence were acceptable, that would imply that the SDA and RRA offer protection for acts of victimisation only if the victimisation starts after the formal complaint but do not offer protection if the victimisation starts as soon as the grievance was made to the employer. That is wrong in law as it goes against the spirit of the law on Victimisation and

51. **Introduction of unacceptable comparators.**

    In paragraph 101 the ET specify the question they asked themselves as follows: '*The question is, how would the Respondent have treated another member of the academic staff who refused over a period of time to comply with the working away policy, but who had not brought proceedings against the university alleging unlawful discrimination. '*

    There are several errors in law with the construction of this question.

52. To start with, the wording implies that the ET' specification of the comparator was '*another member of the academic staff who refused over a period of time to comply with the working away policy, but who had not brought proceedings against the university alleging unlawful discrimination.*'

    This hypothetical comparator is different to the ones I specified. The Tribunal have given no justification for substituting my comparators with another comparator, while at the same time refusing to make comparisons with my comparators. In addition, the specification of the hypothetical comparator implied by paragraph 101 is unacceptable because it is wrong in law, as I explain below.

53. The part of the specification that says '*who had not brought proceedings against the university alleging unlawful discrimination*' is acceptable. However the rest is not acceptable because, incorporating the refusal to comply with the working away policy, in the specification of the comparator makes the specification more complex and, in any way, it is a matter to be taken into account at the next stage when the Tribunal has to consider why the

employer afforded the employee less favourable treatment.

This matter has been examined by the House of Lords. There is a finding on this precise matter in the case ***Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830***. HH Lord Nicholls of Birkenhead describes in paragraphs 25 and 26 the above question and concludes in paragraph 27 that '*The statute is to be regarded as calling for a simple comparison between the treatment afforded to the complainant who has done a protected act and the treatment which was or would be afforded to other employees who have not done the protected act.'*

54. It was particularly important for the Tribunal to follow the above guidance in the present case because I alleged that asking me to comply with the home working restrictions, against my will, was part of the unfavourable treatment I complained of in the context of victimisation.

If we were to explicitly specify the unfavourable treatment in the question described in paragraph 101, then the question the ET asked would become: *did the Respondent ask to comply with the working away policy, another member of the academic staff who refused over a period of time to comply with the working away policy, but who had not brought proceedings against the university alleging unlawful discrimination.'*

The obvious answer to that is YES, since no member of staff would refuse to comply with the home working restrictions if he was not asked to comply with these restrictions. This question cannot be used to establish whether victimisation took place because by its construction the question will always evoke an affirmative answer (implying no victimisation took place), even if the true reason for the unfavourable treatment was the protected act.

In conclusion the question in paragraph 101 that the ET addressed is wrong in law.

55. **B - Failure to explain the reasons for the less favourable treatment between my comparators and me.**

In my written submissions I specified several instances of unfavourable treatment. For the purposes of this appeal I will focus on the unfavourable treatment that involved the enforcement of the home working restrictions and my dismissal.

With respect to this treatment the ET had to make findings as to whether I was treated less favourably than my comparators and if so, what were the reasons. The correct approach would have been for the ET to examine what explanation, if any, the Respondents gave for treating me less favourably than the comparators. In the absence of any explanation or if the explanation was not credible or satisfactory the ET should have inferred that victimisation took place.

56. In paragraph 263 of my written submissions I specified 6 comparators. I wrote
' *I would like to use as comparators the two colleagues in the School of Mathematics (Dr M Joy and Dr D Tsaptsinos) who were working from home as I did. Ms Caroline Potter from the Music Department at Kingston University who worked at home 2-3 days a week. I would also like to use a 4th hypothetical comparator from the Faculty of Science but not from the School of Mathematics. A 5th hypothetical comparator was from the Faculty of Technology at Kingston University. A 6th hypothetical comparator was from the Business School at Kingston University. I assume that the hypothetical comparators worked from home as I did. All these comparators did not do any of the acts described in RRA 1976 s.2(1)(a,b,c,d) or in SDA 1975 s.4(1)(a,b,c,d).*'

57. The conclusions of the ET based on the comparisons in the treatment afforded to my comparators and me and to the reasons for any differences in treatment are presented in

paragraph 102 of the ET judgment.

58. **Comparisons with Dr Joy and Dr Tsaptsinos**

The home working restrictions were enforced in the School of Mathematics but were waived for all members of that School who worked at home, other than me. These members were Dr Joy and Dr Tsaptsinos. I named them as comparators.

59. I submitted that the fact that these two comparators were not asked to adhere to the home working restrictions, while I was, was evidence that victimisation took place as there was no good reason for the different treatment. These comparators worked at home as I did but did not get dismissed as I did. In the circumstances the correct question that the ET ought to have asked is: Were the reasons given by the Respondents for the different treatment, genuine, relevant and justified? The ET have erred in law because they have not addressed this question. I will elaborate.

60. The ET rejected my submission and accepted the explanation given by the Respondents, as to why these two comparators and I were treated differently. The justification of the ET involves findings of fact that simply acknowledge that the circumstances of the 2 comparators were different to mine (but not necessarily different in a way that could justify the difference in treatment).

61. To be specific, I argued that the criteria used to waive the home working restrictions for my colleagues but not for me was 'designed' so as to differentiate them from me. The criteria simply consisted of what my 2 colleagues did, but I did not do. The purpose was to make my home working a breach of the rules without inconveniencing or irritating other members of the School of Mathematics, which was the only school where these restrictions were enforced.

62. The ET stated in paragraph 102 of the judgment that the home working restrictions were waived for Dr Joy and Dr Tsaptsinos because they '*..had given genuine reasons for the need to work from home..'* However this is irrelevant in explaining the difference in treatment, as I had also given genuine reasons for the need to work at home that were similar to those of my colleagues. A claim to the contrary is contradicted by the evidence. The ET accepted (paragraph 52 of the judgment) that the reasons all three of us gave for the need to work from home were the travel time and avoiding interruptions while working at the university (The reasons given by all 3 are shown on [197],[198],[199, 201, 205].)

63. In the findings of fact the ET has highlighted some differences between what my colleagues and I did as well as some similarities. However there is no finding in the ET judgment that the differences between my colleagues and me amounted to a justified reason why I was treated less favourably by being prevented to work at home. And in any event there is no explanation as to why such a finding is at all reasonable, even if one were to assume that such a finding is somehow implied in the judgment.

For example, Dr Tsaptsinos and Dr Joy had research students, I did not. Why was that given as a reason why they were permitted to work at home while I was not? Any reasonable person would have thought that having research students requires being at the university not at home.

64. In addition to the above error, the ET failed to consider the material evidence that proves that the explanation given by the Respondents for treating me less favourably was not genuine and the Respondents could not have believed it.

More specifically, as I discussed in paragraph 175 of my written submissions, Professor Morris admitted during cross examination that if he used for Dr Lucas the same criteria he

used to waive the home working restrictions for Dr Tsaptsinos and Dr Joy, he would have waived the restrictions for Dr Lucas as well. However, according to R Davis' witness statement, Dr Lucas was the very person whose home working caused the problems that allegedly prompted R Davis to introduce the home working restrictions.

This evidence corroborates my claim that the criteria used to waive the home working restrictions were simply 'designed' as a means of discriminatory enforcement of the home working restrictions on me and they were not consistent with the problem that the home working allegedly aimed to solve.

65. In addition to the above errors I submit that no reasonable tribunal would have accepted the Respondents' explanation on the face of the evidence before it.

66. Particulars of the evidence associated with the errors in the findings of fact about the comparisons with Dr Joy and Dr Tsaptsinos can be found in paragraphs 69-73 of the Appendix to this Notice, under the heading: ***'Discriminatory enforcement of the home working restrictions exclusively on me)'*** [100]**,** and paragraphs 74-76 under the heading ***'Perjury and falsification of document by the Respondents'*** [101]**.**

67. **Comparisons with Ms Potter.**

The ET refused to make comparisons with Ms Potter for no good reason. The ET claimed that it *'heard no evidence about her.'* This is untrue. During the hearing, in November 2007, I specified Ms Potter from the Music Department as a comparator and said that she worked two to three days a week at home and she was not dismissed. I confirmed that Ms Potter was indeed a comparator in the last day of the hearing on 07.01.08

I clearly specified Ms Potter as a comparator in my written submissions. The Respondents had the opportunity to respond to these submissions in writing and orally. They offered no explanation as to why I was dismissed while Ms Potter was not dismissed. Given the absence of explanation for the difference in treatment, the ET were obligated by law to infer that victimisation took place. The ET misapplied the law by not doing so.

68. **Comparisons with the 3 hypothetical comparators**

The ET compressed the 3 hypothetical comparators into 1 and made a statement that was apparently intended to show that there was an acceptable explanation for the difference in treatment. This statement appears in paragraph 102 of the judgment and says, '*we conclude that the same steps would have been taken'* The '*same steps'* is a reference to the reviews and criteria used to waive the home working restrictions for my Mathematics colleagues Dr Joy and Dr Tsaptsinos.

69. The above statement is evasive and is in any case contradicted by the evidence :
    a) The 3 'hypothetical comparators' were not that hypothetical insofar as home working such as mine was common practice in the university, so these 3 comparators existed in reality and not just hypothetically. These comparators were members of schools other than the school of Mathematics.
    b) The criteria used by the Respondents in order to waive the home working restrictions for my Mathematics colleagues (Dr Tsaptsinos and Dr Joy), differentiated their circumstances from mine. Independently of whether this criteria was valid or not, it did not necessarily apply to every member of academic staff in the university that worked at home.
    c) In order to *'take the same steps'* for the hypothetical comparators (as the ET stated in paragraph 102) the Respondents would have to specify criteria according to which they could justify waiving the home working restrictions for the hypothetical comparators but

not me. It would be very difficult to come up with criteria that could differentiate my circumstances from those of every person in the university who worked at home as I did.

d) In any case the Respondents did away with such a potentially impossible task by limiting the enforcement of the home working restrictions just to the school of Mathematics. This proves that while the hypothetical comparators were not treated as unfavourably as I was (ie they were neither restricted from working at home nor dismissed for doing so) the reason for this difference in treatment was not because the Respondents had taken *' the same steps'* or any steps that could explain the difference in treatment. The finding of fact that appears in paragraph 102 in relation to this matter is not consistent with the evidence.

70. In addition to the above error, I submit that it is up to the Respondents to supply an explanation for the difference in treatment. The Respondents offered no explanation as to why I was treated less favourably than the 3 hypothetical comparators.

In fact the Vice Chancellor was specifically asked to clarify this matter. Before I was dismissed I asked '*If the university states that my refusal to change my established pattern/place of work will constitute grounds for dismissal, then I request that the university also provides an explanation, in writing, as* ***to why this treatment is not afforded to the rest of the University. After all a pattern/place of work such as mine has always been and still is common practice throughout the University.'*** [229]. The Vice Chancellor refused to answer this question both before my dismissal and later during cross examination at the hearing of this case.

71. The ET have thus misdirected themselves in the applicable law (a) by not admitting the failure of the Respondents to give an explanation as to why I was treated less favourably than the hypothetical comparators and (b) by not inferring that victimisation took place.

72. Details about the evidence that contradicts the findings of the ET are given in the Appendix to this notice under the headings:
'Discriminatory enforcement of the home working restrictions exclusively on me' (69-73)***, 'Perjury and falsification of document by the Respondents'*** (paragraphs 74-76 [101])***, 'The plan to set me up for dismissal through the enforcement of the home working restrictions'*** (paragraphs 77-80 [102])***, 'Refusal of the Respondents to clarify grounds for dismissal'*** (paragraphs 117-123 [112])**.**

73. **C - Failure to consider evidence linking the unfavourable treatment to the protected act. The refusal of the Governors to address my grievance.**

I submitted that the decision of Mr Cope, the Chairman of the Board of Governors, not to address my 2004 grievance [210, 226] was crucial to my dismissal and was influenced by having instituted the 2003 proceedings.

74. The ET has not justified why it rejected the above submission. The ET wrote in paragraph 71 of the judgment that '*the facts and background to the complaint'* did not suggest that the refusal was influenced by the protected act. Given that the ET have left out material evidence about the campaign to harass, retaliate and dismiss me, the above finding cannot be relied on. Similarly the terse description in paragraphs 70, 71 leaves out key evidence.

To give a clear example, in paragraph 70 the ET has supposedly given a summary of the key points I raised in my letter to J Cope. (That letter can be found on page [210] of the present bundle.) The ET failed to mention that I informed J Cope of the conspiracy by my management to dismiss me and sent him copies of the documents that I acquired through the subject access request proving that. This failure is relevant because I had argued (paragraphs 290-296 of my written submissions) that normally if the Governors had received a grievance and documented proof about a conspiracy to dismiss a member of staff, they would have intervened. However they refused to intervene in my case. [222, 227] The decision not to

intervene was substantially influenced by the 2003 proceedings.

The ET have also failed to mention my formal grievance to the Governors [226] and the subsequent letter by J Cope refusing to address this grievance with the reasons he gave for that refusal [227]. As for paragraph 71 it offers no justification for the ET's finding. The finding that the ET proceedings did not influence my dismissal is therefore wrong in law because the ET failed to consider material evidence and failed to justify their decision.

75. In the alternative, I say that no reasonable Tribunal, having examined all the relevant evidence, would have reached such a conclusion. In accordance with PD 2.6 full particulars can be found in the Appendix to this Notice, under the heading: ***'My 2004 grievance to the Chairman of the Governors'*** (paragraphs 109-113 [110])**.**

76. **Further links to the protected act.**
The ET have also failed to examine my argument and evidence that my references to the 2003 proceedings and the fact that I would not hesitate to take further proceedings if necessary, substantially influenced the decision to dismiss me. I argued that this amounted to victimisation.

Among other proof I pointed to the fact that the Respondents have explicitly specified in their Further and Better particulars several of my protests and references to the 2003 proceedings as alternative reasons for the dismissal. As I discussed earlier, under Ground 4, these communications include my letters to the Chairman of the Governors J Cope [210, 226]

The failure of the ET to address this argument and the supporting evidence amounts to an error in law.

77. **MY REQUEST TO THE EAT** with respect to the complaint of Victimisation.
   a) I ask the EAT to accept my appeal and reject the finding of the ET with respect to this complaint.
   b) I submit that this matter can be finally determined by the EAT on my favour on the basis of what has been presented here. I therefore ask the EAT to replace the finding of the ET with a finding of their own that Victimisation as defined by s4 of the SDA and s2 of the RRA took place and order that appropriate remedy be determined in a remedies' hearing.
   c) In the event the EAT feel unable to decide this issue in my favour without a further hearing, I ask that the EAT orders a rehearing of this complaint by a differently constituted Tribunal at a Tribunals' site other than Croydon.

78. **GROUND 6 :** Errors in law in the finding of the complaint for **unlawful deduction of wages.**

In accordance with our contracts staff were entitled to 35 days of annual leave each leave year. According to the staff handbook a member of staff could carry over up to 5 days of leave from year to the next with the permission of the Vice Chancellor. I took 38 days of leave during the last leave year. The Respondents withheld from my final pay money alleging I took 3 days more annual leave than what I was entitled and I replied that I was entitled to 40. This led to my complaint for unlawful deduction of wages.

79. During the hearing I pointed to the documented evidence that proves that I was entitled to 40 days of annual leave including what I had carried over. It was then that Counsel for the Respondents claimed that I did not have permission to carry over leave from the previous year. This claim appeared for the first time, at the earliest, on the second day of the merits' hearing. There is nothing in the Respondents' witness statements about this matter.

80. The ET rejected my evidence, made under oath, that the practice was to automatically carry over up to 5 days of leave. The ET have written in paragraph 107 of the judgment:

'Given the clear policy in the staff handbook it was for the Claimant to establish in the balance of probabilities that the policy in the School of Mathematics was different to the policy set out in writing in the staff handbook……The Claimant has not established that the terms of the staff handbook had been varied either expressly or by custom and practice in the School of Mathematics.

I object to this statement on several grounds.

81. Leaving aside the fact that I gave no basis to the ET to consider me an unreliable witness, the ET failed to consider the following matters:
Independently of what is written in the staff handbook, it is unthinkable that in practice all the staff of the University who wanted to carry over leave would seek permission to do so from the Vice Chancellor. Furthermore it was confirmed during cross examination that nobody was ever refused permission to carry over up to 5 days annual leave. Having a practice where members of staff were given permission to automatically carry over up to 5 days of annual leave, is not inconsistent with the formal policy in the staff handbook and in fact it makes good sense.

82. As for the evidential burden of proof, this in the circumstances lies with both parties and not with me alone as suggested by the ET.

A relevant point is discussed under the heading ***'The Burden of Proof in Civil Proceedings',*** in paragraph 15.3 pages 359-363 of the book by Raymond Emson, '**EVIDENCE**', 1999, MacMillan Press.
"To ensure that the proceedings are fair to both parties it may be that the legal burden may be placed on the party best placed to discharge it."
So had the ET directed themselves correctly in law, they would have asked both parties to prove what they were best placed to prove.

83. On my part, I testified under oath what was the practice in the School of Mathematics, as I knew it, The practice was automatic carry over of up to 5 days. I was a witness who had direct knowledge of this matter. My evidence was not challenged and in any case the ET ought to have taken it as unchallenged.

84. I had not included documented evidence on this matter in the bundle because (as I said above) the Respondents brought up this matter up very late, and I had not anticipated at the time the bundle was prepared that Counsel for the Respondents would make such an unfounded claim.

However I have subsequently sought further confirmation about this matter from a colleague from the School of Mathematics, Dr Nigel Atkins, that appears on page [265] of the bundle. Dr Atkins has worked for the School of Mathematics for over 15 years and was the Deputy Head of the School. [7] He obviously had direct knowledge of the practice in the School of Mathematics for carrying over annual leave.

85. His 3.05.08 email confirms that the practice in the School of Mathematics was to automatically carry over up to 5 days of annual leave not taken in a given year to the next. His apparent uncertainty about the formal rules is proof of the fact that the rule in the staff handbook, never featured as part of every day life as no special procedures were involved in carrying over up to 5 days of annual leave from one year to the next.

[7] The School of Mathematics no longer exists. Shortly after I was dismissed the School of Mathematics merged with another school to form the Faculty of Computing, Information Systems and Mathematics.

86. On the Respondents' side there were 4 witnesses who submitted statements and appeared in person. All, or at least some, of these witnesses must have had direct knowledge of what was in practice the procedure that was followed in carrying over up to 5 days leave. One would expect that the Respondents' witnesses would have described this procedure. Yet none of these witnesses said orally or in writing anything about this matter. Any reasonable tribunal would have drawn negative inference from this conspicuous silence on the part of the Respondents' witnesses.

87. As for the finding of fact presented in paragraph 108, that my annual leave had not been authorised, this is inconsistent with the evidence. This matter was neither discussed during the hearing, nor submitted as an argument by the parties. It was wrong in law and highly irregular for the ET to come up with something like that after the hearing was over, when they were writing the judgment.

88. **In conclusion,** all the evidence before the ET showed that I was entitled to 40 days of annual leave during my last year. This is confirmed by further evidence [265].

    The ET have no direct knowledge of the practice in the school of mathematics. They rejected my 40 day entitlement of annual leave during my last year, on the basis of a speculation that given the rule in the staff handbook it was unlikely that the practice in the School of mathematics involved an automatic carry over. However such a speculation by the ET cannot be used to substitute the facts, as shown by the evidence.

    So the only finding open to the ET was that the Respondents unlawfully withheld wages from me for taking 38 days of annual leave. That is because I was actually entitled to 40 days.

89. **MY REQUEST TO THE EAT** with respect to the complaint of unlawful deduction of wages:

    a) I ask the EAT to accept my appeal and replace the finding of the ET with a finding of their own that the Respondents unlawfully deducted wages and to order that appropriate remedy be determined in a remedies hearing.
    b) I ask that the EAT clarify that any remedies determined for this complaint should be consistent with s13 of the ERA 1996. This is consistent with paragraphs 22-23 of the EAT judgement following the hearing on 28.03.07 that the claim for the deduction of wages in relation to my annual leave should be dealt with under section 13 of the ERA 1996.
    c) In the event the EAT feel unable to decide this issue in my favour without a further hearing, I ask that the EAT orders a rehearing of this complaint by a differently constituted Tribunal at a Tribunals' site other than Croydon.