Appeal No. UKEAT/0194/14/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 13 October 2014

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

BRITISH GAS SERVICES LIMITED APPELLANT

MR D BASRA RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS OLIVIA-FAITH DOBBIE (of Counsel) Instructed by: Messrs Pinsent Masons LLP Solicitors 1 Park Row Leeds LS1 5AB
For the Respondent	MR DAVINDER BASRA (The Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE - Amendment

PRACTICE AND PROCEDURE - Bias, misconduct and procedural irregularity

DISABILITY DISCRIMINATION - Disability

At a final hearing on 3 March 2014 in a claim of disability discrimination the Employment Tribunal suggested to the Claimant that he amend his claim and gave permission to do so to include a new claim for victimisation and two new claims of disability discrimination. The time for bringing claims in respect of these claims had long expired and the proceedings had commenced in May 2013. The hearing had already been adjourned on one occasion and was fixed for three days.

The Claimant was a litigant in person. The parties were ready for the final hearing and there was medical evidence and an impact statement from the Claimant as to the substantial or long term adverse effect of his disability (chronic insomnia) on ability to carry out normal day to day activities.

The Decision to allow the amendments was reversed because:

(a) Permission for the amendment was granted without the Employment Tribunal having required it to be formulated and particularised before deciding whether to grant permission and rejecting the Respondent's request for particulars to be provided before deciding whether to grant permission.

(b) No explanation was given as to the delay in seeking permission as the relevant facts were known to the Claimant when proceedings were commenced.

(c) The amendment necessitated an adjournment and an extension of the hearing to five days. The Respondent now needed to call more witnesses thus extending the hearing.

(d) The Employment Tribunal had taken an irrelevant and incorrect consideration into account, namely that the Respondent should somehow have sought confirmation from the Claimant that he did not wish to make claims beyond those in the ET1.

The decision to direct a further medical report was unnecessary because it was no longer necessary for a Claimant to prove that he suffered from a clinically well-recognised illness and there was sufficient evidence of the substantial or long term adverse effect of the Claimant's disability.

Late adjournments are to be avoided if at all possible. Hearing times are a precious commodity, not to be squandered by late adjournments. They cause expense and inconvenience to the parties and cause prejudice to the working of the Employment Tribunal system.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal from an order of the Employment Tribunal at Leicester dated 3 March 2014. It was an order of Employment Judge Ahmed, who sat with lay members. The hearing was listed as a three-day final hearing. Instead of proceeding with a final hearing the Employment Tribunal allowed an amendment to the claim form to add a complaint of victimisation and two further complaints of disability discrimination under section 15 of the **Equality Act 2010**. The Tribunal went on to direct a further medical report on the issue as to whether the Claimant suffered from a physical impairment. The case was to be relisted for hearing over a five-day period. The matter came before HHJ Richardson on the sift on 14 May 2014. He referred the matter to a Full Hearing of the appeal, with which I am now dealing. I would note that on 5 February 2014 HHJ Eady gave Judgment in another appeal from Judge Ahmed at Leicester Employment Tribunal, the facts of which were remarkably similar to those in the present case. It may well be, however, that as the transcript of her extempore Judgment was not posted until some time in early March that it was not available to Employment Judge Ahmed on 3 March.

2. Let me say now something about the factual background. In May 2011 the Claimant began work with the Respondent as a Customer Services Advisor. He claims that he has suffered from chronic insomnia, to the Respondent's knowledge, and that this insomnia affected his thinking, concentration and alertness. There is an occupational health report of 17 April 2012, which suggests that the Claimant's condition, which was not defined, was made worse by early starts on Saturdays, and consideration should be given to changing the start time on

Saturdays only. It was considered that the Claimant's condition was not currently covered by the **Equality Act**.

3. On 28 May 2012 the Claimant was discovered, it is said, to have used incorrect media codes on over 100 occasions and was given a verbal warning and told that a repeat would lead to a finding of gross misconduct and possible dismissal. The Claimant then received refresher training and monitoring. The significance of the failure to provide adequate information to customers in the giving of wrong media codes was that the Respondent, acting through the Claimant, could cause a customer to pay a wrong price. Also providing wrong information about products that were offered that he was selling could amount to a breach of FCA rules, thereby exposing the Respondent to the risk of heavy fines.

4. There is a further occupational health report of 20 September 2012, suggesting that the Claimant could return to work with adjustments, amending his duties and his workload, but there was no mention of a change of hours or shift pattern. It also noted that he was unlikely to be regarded as disabled. I do not have the full facts and I assume from the terms of this report that the Claimant had been absent from work at about this time.

5. In August 2012 he raised a grievance. In October 2012 a Mr Johan Bulger was appointed as his manager. Mr Basra maintains that Mr Bulger was the subject of a grievance in which he had complained of bullying by Mr Bulger. A further grievance was raised by the Claimant on 1 January 2013. On 7 February 2013, after further concerns with the Claimant using wrong product codes and providing inaccurate information to customers, there was a further disciplinary hearing and he was dismissed for gross misconduct. His ET1 was lodged on 2 May 2013. In it he made a claim of unfair dismissal and a claim for disability discrimination in

relation to one allegation of failure to make reasonable adjustments. The ET3 is dated 4 June 2013.

6. A Preliminary Hearing took place by telephone on 8 August 2013. The hearing was before Employment Judge Solomons. Mr Basra was in person, and the Respondent was represented by a solicitor. It was noted by Employment Judge Solomons that there was an issue as to whether the Claimant did in fact have a condition that qualified as a disability under the **Equality Act 2010** and there was an issue, therefore, whether the Claimant qualified as being disabled.

7. The Claimant's medical records were ordered to be disclosed. A report was directed from his GP and he was to provide a disability impact statement. It was directed by the Employment Tribunal that, unless the issue of disability was conceded by the Respondent on 4 October 2013, that was an issue that fell to be decided at the Full Hearing on 3 March together with all other issues, and there should be no Preliminary Hearing to determine the matter.

8. I note that the reference in the order is to whether or not the Respondent disputes the issue of disability as a whole. No distinction is drawn between whether the Claimant had the appropriate condition and whether as a result of that condition he suffered the appropriate adverse effect on his ability to carry out normal day-to-day activities. It is common ground that the Respondent did not concede the issue of disability either in part or in whole. The Claimant was permitted to add a further claim under section 15 of the **Equality Act 2010** of discrimination at work. He maintained that errors at work had been caused by his disability, and his dismissal therefore related to his disability.

9. Issues relating to the "time limit", which I shall come to in a moment, were reserved to the final hearing. I observe at this point that there is no time point as such on an application to amend. While it is correct of course that, where a Claimant seeks to bring a claim for discrimination out of time, he must satisfy the Tribunal that it is just and equitable to permit him to do so. Similarly, where he wishes to make an application for unfair dismissal out of time, his time can only be extended if it had not been reasonably practicable for him to commence proceedings within the appropriate period. However, the authorities make it clear that the addition of such claims out of time by amendment does not require the Claimant to satisfy either the just and equitable test or the reasonable practicability test, and therefore it is difficult to see how the issue of the so-called time point could be reserved to a Full Hearing. It is also to be noted that, although the Claimant was given permission to amend, at no time was he asked to produce a formulated claim. Permission was given in the absence of a formulated claim, and so far as I am aware, because I asked about the matter today, there is still no such formulated claim.

10. All that the Employment Judge had before him was a claim form, with the briefest of narrative. The Claimant informs that he was dismissed for using wrong promotional codes in issuing products to customers' accounts. He was asked to identify the issues that he defined as discrimination and all that he wrote was:

> **"I suffer with insomnia which the company were aware of. I requested an adjustment to my shifts so that I would start later and not be so tired at work. My requests were never granted by management."**

11. So at that stage the only material before the Employment Tribunal was that very brief passage in the ET1. I am told that the Employment Tribunal on 8 August heard oral representations and it was that that enabled the Employment Judge to give permission to the Claimant to add a further claim under section 15. I would pause here to mention a matter which

I will have to return to, that the Employment Tribunal in my opinion fell into significant error not only in relation to reserving the time limit but in granting permission to amend in a vacuum so as to speak without any direction for there to be a properly formulated and particularised claim. One of the drawbacks of taking such a course is, as has happened in the present case, that there is still no such particularised claim.

12. On 17 October 2013 the Defendant's solicitors sent an e-mail to the Employment Tribunal making clear that the Respondent continued to dispute the issue of disability. There is clearly some correspondence that I have not seen, but I draw attention to page 45 where the Respondent, having stated that it continues to dispute the issue of disability, having reviewed the medical information provided by the Claimant's GP and his impact statement, did not consider the Claimant had satisfied the definition of disabled person for the purposes of the **Equality Act**. The waters were somewhat muddied by the fact that the Respondent went on to give certain reasons, and they were limited to the question of whether or not there was an adverse effect rather than whether or not there was a disability. It suggested that there was no adverse effect on the Claimant's day-to-day activities. The effect was not substantial, and any effect was not long-term. It did not specifically refer to impairment issues but it is quite clear from that that the issue of disability was still in issue.

13. The Employment Tribunal e-mailed back on 29 October to the effect that "the issue of disability will be determined at the full hearing." There is no suggestion in the e-mail that it was believed that the only matter for consideration at the hearing would be that of adverse impact.

14. On 3 March 2014, that is some 13 months after the Claimant's dismissal, the parties came before Employment Judge Ahmed in Leicester. It was made clear by the Respondent in answer to a question from the Tribunal that the issue of disability was still alive, that medical evidence was complete in compliance with the directions. It appeared that the Employment Tribunal had not read the papers when the case was first called on and that it had apparently construed the e-mail from which I have quoted of 17 October as a concession by the Respondent of disability as such. Bearing in mind that the e-mail had been sent, if my mathematics is correct, about five months before, it is somewhat surprising that the point was just taken at this stage. If the Employment Tribunal had considered the evidence insufficient it might have ordered a Preliminary Hearing, but it did not. The Employment Tribunal pronounced itself dissatisfied with the medical evidence available. Having given permission to amend, which I shall come on to, it directed that further medical evidence should be obtained from an expert. Miss Dobbie, who appeared before the Tribunal as she appears before me today, submitted that there was sufficient medical evidence already and she opposed the further adjournment and suggested that the hearing should go ahead. The Employment Tribunal would not proceed, however, unless the Respondent conceded disability, which it was entitled to contest and in the event was unwilling to concede. The Employment Tribunal had before it an updated witness statement from Mr Basra. I have that witness statement in my papers. It is not dated, and it is unclear to me precisely when it was sent, but I assume that it was sent within a matter of weeks from the order.

15. I need to draw attention to one paragraph in particular. The paragraph has been numbered by Miss Dobbie as paragraph 36 because the original lacks paragraph numbers and she has numbered the various paragraphs sequentially. I read what it says:

> **"On October/November 2012 I was appointed another Manager by the name of Johan Bulger, The same manager I had previously mentioned in a grievance as someone who I felt was bullying me."**

16. The Employment Judge saw this as clearly raising an issue of victimisation. There is a further paragraph, which Miss Dobbie has numbered 38, in which Mr Basra refers to his manager, Mr Bulger, at a time when his insomnia had worsened, making comments to him such as "Get some sleep mate" and treating him as if he was stupid compared to others by saying things like "Wakey wakey" while grinning. This impressed Employment Judge Ahmed as amounting to an allegation of less favourable treatment under section 15 and he therefore suggested that, although he might not have appreciated it, Mr Basra was seeking permission to amend the claim to make such an allegation. I find it difficult to see how the allegation in that paragraph could be construed as an allegation of less favourable treatment. If it were anything, and I am not expressing a view on the matter, it could possibly amount to unwanted treatment on the basis of his disability under section 26(1) of the Act.

17. I now turn to the order. The Employment Tribunal referred to the grievances of August 2012 and 18 January 2013. I note that the grievance of 18 January 2013 post-dates the alleged victimisation. It is difficult, therefore, to see how it could have been a protected act. The Judgment at paragraph 6 refers to the relatively long history of the matter. It refers to the telephone case management discussion as which no issue as to victimisation had been raised:

> **"...nor did the respondent seek to ensure that no such issue was being pursued despite the fact they must have been aware that the claimant had lodged a grievance on 18 January 2013 in which not only had he used the word 'victimisation' but had also referred to the Equality Act in the same document. That was unfortunate as it may well have flushed out the matter at that point and further particulars ordered."**

18. I have to say I have extreme difficulty in understanding what the Employment Judge is suggesting. If he is suggesting that it is the obligation of an employer where there has been a long history in which an employee has raised grievances to go and ask the employee, if he brings proceedings, whether there are not further claims he wishes to bring which are not in the claim form, I venture to suggest that is wrong. The Employment Tribunal continued:

> **"7. In any event, it is now clear that at paragraph 35 of the Claimant's witness statement there is a victimisation complaint being pursued."**

19. I pause there for one moment. I have already referred to paragraph 35, and it certainly does not suggest to me at all that a victimisation complaint was being pursued. The Employment Tribunal then referred to paragraph 37, which again I have referred to, and these are suggested as amounting to an allegation of discrimination arising from disability under section 15:

> **"… that allegation was not identified at the case management discussion although on this occasion the respondent would have no reason to suspect such an allegation might be made.**
>
> **8. After the tribunal had some time to consider these matters, we raised them before the parties to seek their views. Effectively, although he may not realise it, what the Claimant was seeking was an amendment to his claim to add complaints of victimisation and a further allegation of the discrimination arising from disability. The immediate issue is therefore whether the claim should be amended to allow the Claimant to pursue those complaints so late in the day."**

20. I pause there to note for one minute that, whatever the Employment Judge may have thought the Claimant was doing, the Claimant certainly had not made any application to amend. It is not clear to me at all whether he was even asked if he wished to make such an application, because it looks rather as if the Employment Tribunal assumed that he did so and in due course gave him permission.

21. The Employment Tribunal then turned to the submissions made by Miss Dobbie, who he said had made helpful submissions (that is always the kiss of death, is it not, Miss Dobbie?) in which she opposed the "application" to amend. Miss Dobbie submitted the Claimant had had the benefit of legal advice from the trade union, which had lodged the claim on his behalf. The application was being made late. There would be prejudice to the Respondent in that an amendment would require the proceedings to be adjourned, adding to the cost of the case as well as inconvenience to the Respondent's witnesses. If the amendment was granted, this would now be a much longer and more expensive case. Miss Dobbie argued the Claimant had

already had had the benefit of an amendment, which was raised at the case management discussion and was granted. He should not be granted any further amendments. The Employment Tribunal then referred to the leading authority of **Selkent Bus Company v Moore** [1996] IRLR 66 and stated:

> **"10. … The principal test is the balance of hardship. The hardship to the respondents is primarily in terms of expense and inconvenience. The hardship to the claimant is that he would not be able to raise allegations which are important to his case and may be deprived [of] a potential remedy."**
>
> **11. Having taken on board the respondent's objections we consider that the balance of hardship favours the Claimant … it seems to us that the Claimant, a litigant in person, is entitled to have these matters aired notwithstanding any technical issues."**

22. With very great respect to the Employment Judge I would not have thought that objections to permission being given to amend for the reasons put forward by Miss Dobbie could be regarded as simple technical reasons. However the Employment Tribunal went on:

> **"If the Claimant is not permitted the opportunity of ventilating these matters it is quite possible that some of his complaints of disability discrimination might result in injustice. Any injustice to the respondent is primarily one of expense but bearing in mind the size and resources of the organisation that is unlikely to have any significant impact. The respondent's main objection is really one of inconvenience. That is unfortunate but it is part and parcel of litigation. If the allegations now pursued are without any merit then at the end of the day the respondents can of course seek an order for costs under the usual principles."**

23. Again, I pause there for one moment. That might be described as somewhat disingenuous because the circumstances in which an order for costs can be made in an Employment Tribunal are limited and costs do not simply follow the event as they do under the CPR:

> **"So, injustice to the respondent can be remedied but it cannot be remedied if the Claimant is refused the amendment."**

24. The Employment Tribunal then noted that the claim form was lodged by the trade union but that Mr Basra maintained he had actually not received legal advice and that the claim form did not appear to have been professionally prepared.

25. The Employment Tribunal understood Mr Bulger was no longer in the Respondent's employ, but it was confident the Respondent would still be able to contact him if necessary. The Tribunal recognised that an amendment would inevitably result in an adjournment of hearing:

> **"14. … but we consider that this is outweighed by the need to ensure that the matters raised by the claimant, which are quite serious, need to be addressed. Although the respondents face an adjournment for matters raised in the claimant's witness statement for the first time, they are not entirely without some degree of responsibility. We have already indicated that a potential victimisation complaint could have been identified earlier. There were also … two other issues which have contributed to our decision."**

26. That was that additional documents had been added to the bundle, which were not in the bundle originally supplied to the Claimant. This seems to be a complete non-point because the documents were documents that had been disclosed to the Claimant, and it is commonplace for such documents to be added at a late stage to a bundle providing of course that the Claimant is not in any way taken by surprise.

27. There was a further issue relating to the amendment, and that related to the issue of disability:

> **"15 … At the case management discussion it appeared that all of the elements as to the definition of disability were in dispute, including the issue as to whether the claimant suffered from the physical impairment of chronic insomnia (the "physical impairment issue"). As a result the Claimant was ordered to supply his medical records, which he later did. After the respondents had an opportunity to consider those records, their representatives sent an email to the tribunal which clearly gave the impression that the impairment issue was no longer in dispute. They did not say so in as many words but by omitting any reference to the impairment issue whilst referring to the remaining parts of the disability definition, the impression given was plainly that physical impairment was no longer in dispute. What was seemingly only in dispute on a fair reading of their email was the issues of whether there was a long term adverse effect on the claimant's ability to carry out normal day to day activities. Consequently, it was directed that the disability issue would be dealt with at the final hearing."**

28. If one refers back to the earlier order, the earlier order was that unless disability in the home had been conceded, the issue of disability (which of course would include both the adverse effect and the impairment issues) would be dealt with at the Full Hearing. Miss Dobbie confirmed that the physical impairment issue was not conceded and therefore still needed to be

determined. If the Employment Tribunal had seriously considered that it had been conceded, one asks forensically why they were so ready to adjourn the matter.

> **"16. … That clearly causes some difficulty in that there are no medical reports and the tribunal was not qualified to deal with that issue without expert evidence. Had the respondents made it clear, and the tribunal had understood the physical impairment issue was still live, it is likely further directions would have been given as to medical reports. It is highly unlikely that the disability issue would not have been left to be dealt with at the final hearing without further medical evidence."**

29. I refer back to the order at page 39, which is quite explicit. The Respondent is to notify the Tribunal by 4 October and the Claimant whether it still disputes the issue of disability:

> **"2.5 … If so [i.e if it continues to dispute the issue of disability] there will be no preliminary hearing to consider that issue but the Tribunal will determine the disability issue at the main hearing in this case."**

30. What is anticipated is what happened. The matter was listed for hearing without any separate Preliminary Hearing to deal with the issue of disability. It is therefore surprising that the Tribunal felt unable to deal with a matter that had been listed in accordance with its own directions. Be that as it may, the protected acts were not identified. And, as I have already indicated, one of the possible protected acts identified by the Employment Tribunal post-dated the alleged victimisation. There was no particularisation. The Respondent through Miss Dobbie asked the Tribunal to direct that the Claimant should that day produce his amendments, but the Tribunal declined to make such an order, but gave the Claimant 28 days to particularise the allegations which were the subject of the amendment. The case was adjourned for a five-day hearing at an unspecified future time, and there was an order for a further medical report. The particulars, which are undated, which have been provided by Mr Basra, I shall come on to later but I think it is fair to say that they raise matters of victimisation and discrimination that were not the subject of permission to amend or referred to in his earlier witness statement.

31. Miss Dobbie submitted in her first ground of appeal that the Employment Tribunal went astray in unilaterally instigating and granting permission to amend in the absence of an application. The Claimant never sought an amendment. There was no application to amend. The Employment Tribunal went on beyond asking if he wished to amend to add a claim for victimisation, but simply assumed that that is what he wanted and permitted him to raise a section 15 claim by amendment. The Employment Tribunal had no power to allow an amendment in the absence of an application, and authority for that proposition was to be found in the case of **Margarot Forrest Care Management v Kennedy** UKEATS 0023/10 and **Ladbrokes Racing v Traynor** UKEATS 0067/06. The Respondent was put in the position of having to respond to whether or not amendment should be permitted without the Claimant having given any evidence or addressed any arguments in support of an application to amend.

32. The second ground was that the Employment Tribunal had fallen into error in granting an amendment without requiring it to be formulated first and rejecting the Respondent's request for particulars before it decided to allow the amendment. The Further and Better Particulars, which I have already referred to, in fact allege six new section 15 claims, for which no permission had been granted, six new victimisation claims, and suggest that a further four witnesses will be required. The Respondent, until the Further and Better Particulars came, was in the dark as to what the alleged victimisation comprised of. What was the protected act?

33. The third ground is that the Employment Tribunal failed to take all relevant considerations into account and took irrelevant matters into account. Although it had referred to the decision in **Selkent**, it had failed to follow **Selkent**. It failed to take account of the fact that victimisation was a wholly new claim, both factually and legally. It could not be said to have arisen from the same facts as previously raised. No explanation was proffered by the

Claimant as to why the claims subject to the amendment were being presented so long outside the time limit and why he had not sought to make them earlier. I note that he had trade union advice. He had attended on the case management hearing when issues were discussed. And if he knew the facts giving rise to the claims he sought to make by amendment, why did he not raise them then? Although the Employment Tribunal considered that the prejudice was essentially cost and convenience, it failed to address a number of matters. These included the fact the Claimant needed to call more witnesses, thereby extending the length of the hearing, and it therefore caused business disruption. It caused the loss of three days of hearing time for which witnesses had been lined up and consequent disruption to the business. It caused further delay, and it might not be the case that Mr Bulger would be able to give evidence as he left the Claimant's employ. It was an irrelevant consideration that somehow the Respondent should have flushed out these possible causes of action itself. Although they were first raised in a witness statement, they should somehow have identified a possible victimisation claim earlier and thus in some way they were partly responsible for the late application to amend. I do not consider that a Respondent employer is under any obligation, having received a claim form, to consider what are the claims the employee could possibly bring and contact the employee and ask whether he wishes or intends to make such claims. If that is what the Employment Tribunal thought, in my opinion it is plain wrong.

34. So far as the order for further medical evidence is concerned, Miss Dobbie submitted that the Decision was wrong in law and/or perverse. It was wrong to blame the Respondent for not making its position clear. The burden of proof rests on the Claimant to establish both the disability and the detrimental effect. There was no express concession, and the Employment Tribunal had itself directed that, in the absence of a concession, the issue of disability as a whole should be determined at the final hearing. It is wrong to say there was no medical

evidence because the bundle contained not only occupational health reports. It also contained GP notes and a report from the GP, and this was of course supplemented by the Claimant's impact statement. Both parties had attended the hearing ready to deal with the issue. There was no duty placed on an Employment Tribunal to obtain evidence or to ensure that the parties had provided sufficient medical evidence. That is the responsibility of the parties and my attention has been drawn to the decision of **McNicol v Balfour Beatty Rail Maintenance** [2002] EWCA Civ 1074, to which I shall refer shortly. I was also referred to the Decision in **City Facilities Management (UK) Ltd v Ling**, to which I have already referred, a Decision of the same Employment Judge, in which he had similarly adjourned a hearing and directed a further medical report.

35. The fifth ground of appeal suggests that the Employment Tribunal had elevated the issue of impairment into the need to prove a clinically well recognised illness. However the Employment Tribunal, in accordance with the decision in **City Facilities Management (UK) Ltd v Ling** UKEAT 0396/13 and the case of **J v DLA Piper UK LLP** [2010] ICR 1052, should have asked whether the Claimant's evidence as to the day-to-day effects of the condition amounted to an impairment.

36. The sixth ground was that the Employment Tribunal had fallen into error or had perversely made orders that frustrated the overriding objective. The orders undermined the principle of proportionality, avoiding delay and saving expense. The Schedule of Loss in the case, including £18,000 injury to feelings, was a modest £34,571. There was an increase in what was already unsatisfactory delay, causing further prejudice to the parties and to the public interest in having a speedy resolution of disputes and finality. It also placed a disproportionate financial burden on the parties and the Employment Tribunal system.

37. The Respondent seeks those orders be set aside and the matter be remitted for hearing before a different Employment Judge and also seeks an order for costs.

38. I pause there for one moment to refer to one other matter. I understand from Miss Dobbie that Employment Tribunals are encouraged to have targets in the listing of cases. This of course is the position in the courts with which I am familiar. The target in Leicester is a 26-week period from presentation of a claim to determination. Generally speaking, it would appear, that in a majority of these cases, this 26-week time limit is met. The 26-week time limit had already been exceeded when the case was listed for final hearing, and a result of the orders made on that occasion it was delayed further. I think it has to be made clear that throughout the legal system the public have concerns that the time taken to resolve cases had become unacceptable and delays are to be avoided at all costs and unnecessary adjournments similarly. If that is the position in the civil courts under the CPR and in family courts under the **Family Procedure Rules**, I see no reason why a more lax approach should apply in Employment Tribunals. Late adjournment not only cause delay and expense to the parties but also prejudice the Employment Tribunal system as a whole. Sitting time is wasted and other cases that could have been heard cannot be taken. Hearing times are too precious to squander by reason of late adjournments which are to be avoided if at all possible.

39. Section 6 of the **Equality Act 2010** provides as follows:

> **"(1) A person (P) has a disability if—**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.**
>
> **(2) A reference to a disabled person is a reference to a person who has a disability."**

40. Schedule 1 Part 1 of the **Equality Act**, paragraph 2, provides that the effect of an impairment is long-term if it has lasted for at least six months, is likely to last for at least six months or it is likely to last for the rest of the life of the person affected. If an impairment ceases to have a substantial effect on a person's ability to carry out normal day-to-day activities it is to be treated as continuing to have that effect if it is likely to recur.

41. It is important to bear in mind that it is no longer necessary in relation to mental illness to establish that the illness is a clinically well-recognised illness. As HHJ Eady put it, the meaning of "impairment" is unglossed by a requirement of clinical recognition.

42. I now turn to the overriding objective. The overriding objective in the **Employment Tribunal Regulations and Rules** and Schedules 1, 2, 3, 4 and 5 is to enable Tribunals and Chairmen to deal with cases justly. Dealing with a case justly includes, so far as practicable, ensuring parties are on an equal footing, dealing with the case in ways which are proportionate to the complexity or importance of the issues, ensuring it is dealt with expeditiously and fairly, and saving expense. The Tribunal of Chairman shall seek to give effect to the overriding objective when it or he exercises any power given to it or him by the Regulations or the Rules and Schedule 1, 2, 3, 4 and 5 or interprets these Regulations or any Rule in Schedules 1,2, 3, 4, and 5. The parties shall assist the Tribunal or the Chairman to further the overriding objective.

43. Miss Dobbie submitted that all relevant issues had been fully canvassed at the case management hearing which the parties attended, and the parties were apparently both ready for the issues to be determined as previously laid down and discussed at the telephone CMD.

44. I now turn to the relevant legal principles. I derive the following principles from the authorities on appeals from Employment Tribunals. These Decisions are entrusted to the discretion of the court of first instance. Appellate courts must recognise that in such Decisions different courts may disagree without either being wrong, far less having made a mistake in law. Such Decisions are essentially challengeable on what loosely may be called **Wednesbury** grounds, when the court at first instance exercised the discretion under a mistake of law, disregard of principle or under a misapprehension as to the facts, where they took into account irrelevant matters or failed to take into account relevant matters or where the conclusion reached was outside the generous ambit within which a reasonable disagreement is possible. If Employment Tribunals are firm and fair in the management of cases pre-hearing and in the conduct of the hearing, the Employment Appeal Tribunal should, wherever legally possible, back up their case management decisions and rulings.

45. In relation to the approach that should be taken to assistance of litigants in person I refer to the case of **Drysdale v Department of Transport** [2014] EWCA Civ 1083, to which I shall return after I have dealt with the authorities in amendment in cases such as this.

46. The authorities are helpfully collected by HHJ Eady in a case very similar on the facts: this case decided by the same Employment Judge, **City Facilities v Ling**, to which I have already referred. I derive the following from the cases. In exercising the discretion to grant an amendment, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. A significant matter will be whether the applicant seeks to add a new claim especially one that is out of time, in which greater scrutiny and reluctance to agree may be applied rather than allowing an amendment which arises out of facts already pleaded. When considering an

application for leave to amend a claim, the Employment Tribunal is required to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing. That involves it considering at least the nature and the terms of the amendment proposed, the applicability of any time limits and the timing and the manner of the application. Although delay itself is not a ground for refusing an amendment, it is always highly relevant.

47. When an application for amendment is made close to a hearing date, it will usually call for an explanation as to why it is being made then and was not made earlier, particularly when the new facts alleged must have been within the knowledge of the applicant at the time he presented his originating application. This does not mean that an amendment raising issues out of time is to be treated in the same way an application to extend time for presenting an application either on just and equitable grounds or on the grounds of reasonable practicability, as the case may be. In amendment cases, the test that is applied is the hardship test. It will involve, however, the Employment Tribunal considering the reason why the application was made at the stage when it was made. Why was it not made earlier? It requires the Employment Tribunal to consider whether, if the amendment was allowed, delay would ensue as result of adjournments, whether there were likely to be additional costs, whether because of the delay or because of the extent to which the hearing might be lengthened if the new issue was allowed to be raised, particularly if the costs were unlikely to be recovered by the party who incurs them. Delay may, of course, in an individual case have put a Respondent in a position where evidence relevant to the new issue is no longer available or was of lesser quality than it would have been earlier. The paramount considerations are the relative injustice and hardship involved in refusing granting an amendment or refusing to do so.

48. It is essential before allowing an amendment that it must be properly formulated, sufficiently particularised, so the Respondent can make submissions and know the case it is required to meet. In this regard, I refer to the decision of Mr Recorder Luba QC in **Chief Constable of Essex Police v Kovacevic** UKEAT 0126/13. It was the practice of the former President of the Employment Tribunal, Burton J, in cases where he granted permission to amend not to allow the advocates to leave the building before producing at least a manuscript draft. That has also always been my almost invariable practice: I always ask advocates not to leave the court building without leaving a written document draft for approval, if they wish to amend.

49. I want to turn now to the question of medical evidence. I bear in mind that it is no longer a requirement that there has to be a clinical recognition of the Claimant's impairment. As a general rule expert evidence on the question of impairment is not required or even desirable because of the delay and the cost that may be entailed. In the **Ling** case the Claimant was ready to give evidence to support her contention that she suffered from an impairment. She had supplied her GP records to corroborate her case. HHJ Eady considered that, in those circumstances, it was not necessary for there to have been a direction for further expert evidence. Even allowing for some ability to take on a more inquisitorial role than might otherwise be the case, it is not the Employment Tribunal's duty to proactively seek further medical evidence. In this regard I draw attention to the guidance of the Court of Appeal in the case of **McNicol v Balfour Beatty** [2002] ICR 1498. Evidence from the Claimant and the Claimant's GP as to the long-term effect of his insomnia would enable the court to determine the issue and it would provide sufficient evidence of impairment. There is no need, therefore, for there to be specific evidence directed to the question of impairment.

50. So far as offering assistance the Employment Tribunals should assist litigants in person to formulate their case and offer some guidance as to how to do so. It might properly ask a litigant if he or she might wish to amend his or her claim, but it is not appropriate for an Employment Tribunal to advise on an amendment or to initiate one, in order not to appear partial. Also an objective bystander might think that, if a Tribunal has proposed a certain course by way of amendment, it might be partial to treating its own suggestion with favour.

51. In the **Drysdale** case to which I have referred, the Court of Appeal quoted Sedley LJ in the case of **Gee v Shell UK** [2002] EWCA Civ 1479:

> **"While plainly there cannot be one rule or legal principle for litigants in person and another for those who are represented … it does not follow that an employment tribunal is entitled to treat every party as if it had the strength of advice and representation which, for example, Shell (UK) Limited enjoyed in this case. Inexperienced lawyers may not be a match for experienced ones; lay representatives may not be a match for lawyers; some lawyers may not be a match for a clever litigant in person or an experienced lay representative. The tribunal's job, precisely because it cannot guarantee equality of arms, is to ensure equality of access to its processes for sometimes disparately powerful parties. This involves making a careful appraisal, case by case of the parties and their respective capabilities. It must also, however, involve ultimate equality of treatment, so that whoever presses on with a doomed case after due warning faces the same risk on costs."**

52. Simon Brown LJ added that the all-important dividing line was between, on the one hand, robust, effective and fair case management and, on the other, inappropriate pressure and unfairness:

> **"Given the obvious need for "robust and effective case management" which might sometimes positively require a costs warning, there must be a wide margin of appreciation (a substantial area of discretionary judgment) open to the tribunal as to when and in what terms the warning should be given."**

53. I also refer to paragraph 49, in which the Court of Appeal derived principles as follows:

> **"(1) It is a long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case.**
>
> **(2) What level of assistance or intervention is "appropriate" depends upon the circumstances of each particular case.**
>
> **(3) Such circumstances are too numerous to list exhaustively, but are likely to include: whether the litigant is representing himself or is represented; if represented, whether the**

representative is legally qualified or not; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.

(4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all time be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.

(5) The determination of the appropriate level of assistance or intervention is properly a matter for the judgment of the tribunal hearing the case, and the creation of rigid obligations or rules of law in this regard is to be avoided, as much will depend on the tribunal's assessment and "feel" for what is fair in all the circumstances of the specific case.

(6) There is, therefore, a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/ omitted to do, and which amounts to unfair treatment of a litigant."

54. In **Radakovits v Abbey National plc** [2010] IRLR 307 at paragraph 24 there is a helpful dictum of Elias LJ:

> **"… there is no legal obligation on the tribunal to assist litigants in person or those who appear before them without legal representation, and tribunals will quite properly want to guard against appearing to be partial to one side. But a tribunal can quite properly, and without descending into the arena, explain to a party the issue they have to determine and explain why, for example, that party may be prejudiced if he fails to give evidence. It is possible that was done in this case and we are not criticising the tribunal if they did so. Of course the tribunal must say nothing at all about the evidence he should give in order to sustain his case or anything of that kind (as opposed to the questions they have to consider), but it is a proper function for a tribunal dealing with unrepresented litigants to give them appropriate assistance so that they can understand the implications of a decision they need to take."**

55. In my opinion what the Employment Tribunal did in this case in initiating amendments which had not been asked for went beyond what was permissible and, albeit what the Employment Tribunal did might be characterised as being in pursuance of its case management jurisdiction, in my opinion it was exercised wrongly without regard to the limitations placed on what it was able to do for an unrepresented party.

56. I have had the benefit of reading a brief document from Mr Basra, and Mr Basra has made it clear that he did not wish to make any oral submissions but would certainly wish to reserve his right to renew his application to amend (if that is what it was). It follows that I shall now give my conclusions. Broadly I accept the submissions made by Miss Dobbie. In my opinion the Employment Tribunal went beyond giving permissible assistance. I have serious

doubts whether it could properly have construed paragraph 35 of the witness statement as an unpleaded victimisation claim. It allowed amendments in two regards without requiring a formulated amendment at the time and before considering whether or not to give permission. It did not give adequate consideration to the delay in making the application because there was no explanation at all given by the Claimant as to the reasons for the delay, which were by this time quite significant. The Employment Tribunal does not appear to have given adequate consideration to the added expense caused by the amendments leading to a further adjournment, the need to provide for five rather than three days of further hearing and the significant delay to a case which was already the subject of unacceptable delay. In those circumstances the appeal will be allowed.

57. There are two matters which I wish to raise. The first matter is this. No particulars as yet have been given in relation to the first application to amend. I will give directions in that regard, if both parties agree, to avoid this matter still being capable of causing further issues in due course.

58. The order will be that Mr Basra will supply Further and Better Particulars of the amendments for which he was given permission on 8 August 2013 by 4pm on 10 November. Could I ask you Miss Dobbie, your solicitors are to write and remind Mr Basra of that date and explain that he needs to produce the same kind of particulars he has in relation to the August amendments? The order must also record that the court has made clear to Mr Basra that nothing in this order prevents Mr Basra from making a further application if he wishes to amend his case. He may do so by letter to the Employment Tribunal or he can do so at the hearing, but I wish to make it clear to him that if he wishes to make the additional claims that Employment Judge Ahmed allowed, he is not precluded from doing so.