Appeal No. UKEAT/0221/17/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 February 2018
Judgment handed down on 23 March 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR K HUSSAIN — APPELANT

UPS LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING - TELEPHONE HEARING

APPEARANCES

For the Appellant	MR KAMRAN HUSSAIN (The Appellant in Person)
For the Respondent	MR DANIEL NORTHALL (of Counsel) Instructed by: DLA Piper UK LLP 1 St Peter's Square Manchester M2 3DE

SUMMARY

PRACTICE AND PROCEDURE - Striking-out/dismissal

Practice and procedure - strike out - claims of constructive unfair dismissal and disability discrimination

The Claimant was seeking to pursue claims of constructive unfair dismissal and disability discrimination before the Employment Tribunal but the particulars of his claims could not be discerned from his ET1. After the Claimant had been given the opportunity to explain his complaints - both in writing and orally before the ET - the ET concluded that the claims had no reasonable prospect of success and ruled that they should be struck out. The Claimant appealed, arguing that the ET had failed to properly understand his case on constructive dismissal: he was complaining of a failure to assign him light duties and that was a matter that went both to his claims of disability discrimination and constructive unfair dismissal, as he had resigned in response; the ET, further, should not have struck out claims of discrimination and constructive unfair dismissal without hearing evidence and making relevant findings of fact.

Held: dismissing the appeal

Having given the Claimant a number of opportunities to clarify his case, it was apparent that he had not sought to rely on the failure to assign him to light duties as a reason for his resignation and, thus, as part of his complaint of constructive unfair dismissal. The ET had not erred by considering the question of strike out on the basis of the claim the Claimant had articulated (and not some other) and it was not suggested that it had erred in striking out the case that the Claimant had actually particularised before the ET. More generally, although the power to strike out claims - in particular, of discrimination and constructive unfair dismissal - was to be used sparingly, the ET had here assumed the facts in the Claimant's favour and, on that basis, had been entitled to conclude that the claims had no reasonable prospect of success.

HER HONOUR JUDGE EADY QC

Introduction

1. In this Judgment I refer to the parties as the Claimant and Respondent, as below. This is the Full Hearing of the Claimant's appeal from a Judgment of the Birmingham Employment Tribunal (Employment Judge Self, sitting alone on 1 February 2017; "the ET") sent to the parties on the 17 February 2017, by which the ET struck out the Claimant's claims of unfair constructive dismissal and religious and disability discrimination as having no reasonable prospect of success.

2. The Claimant appeared in person below as he does today. The Respondent was represented before the ET by a solicitor, but today appears by Mr Northall of counsel. At the Claimant's request he attended the hearing of this appeal by telephone. Mr Northall attended for the Respondent in person.

3. The hearing before me only started once telephone contact had been made with the Claimant and he had confirmed that he could hear everyone in Court. I then explained the issues that I would need to determine and the procedure that would be followed. The Claimant acknowledged that he understood, and he then proceeded to make his submissions on the appeal. Once he had done so, I started to hear from Mr Northall for the Respondent. At one point the Claimant interrupted to say he could not hear a particular submission and so I asked Mr Northall to speak up, which he did, and no further issues were raised. Unfortunately, at approximately 12.10pm the telephone connection went dead at the Claimant's end. An attempt was made to immediately call the Claimant's number, but there was no response and eventually the call went through to voicemail. I left a message explaining to the Claimant what had

happened, and that I would be adjourning the hearing for a short while to see if we could again make contact with him, but if I had no explanation as to why he could no longer attend, the hearing would then resume and would have to proceed in his absence. That is ultimately what took place - a further call to the Claimant also being left unanswered and going through to voicemail, with a further message being left for him, but with no response from the Claimant.

4. Returning to the issues raised by the appeal, this matter had been permitted to proceed to Full Hearing on amended grounds after a hearing under Rule 3(10) of the **Employment Appeal Tribunals Rules 1993** before The Honourable Lady Wise. Specifically the points thus allowed to proceed were as follows:

(1) whether the ET misdirected itself in law by failing to understand the basis of the Claimant's claim: (a) that there was a failure to make reasonable adjustments and/or discrimination arising from disability by the Respondent in not providing the Claimant with light duties up to his resignation in May 2016; and (b) that the Claimant resigned in response to those failures;

(2) whether the ET misdirected itself in law by failing to take account of the case of **Anyanwu v South Bank Students' Union** [2001] ICR 391 striking out claims of discrimination and constructive unfair dismissal when there were factual matters that remained in dispute.

5. The Respondent resists the appeal, essentially relying on the ET's reasoning.

The Procedural Background and the ET's Decision and Reasoning

6. The ET proceedings arose from the Claimant's claim lodged on 26 August 2016 in which he asserted that he had been unfairly constructively dismissed and discriminated against

because of his religion, and discriminated against because of his disability. In a non-pejorative way the ET described the difficulty in determining the precise issues arising from those claims given the way in which the Claimant's case had been drafted; as it records, "*The Claim Form could be considered a start point and no more*" (paragraph 5).

7. The Respondent's response had been lodged on 27 October 2016 and a case management Preliminary Hearing was then listed for 23 November 2016. In the run-up to that hearing the Claimant sent a substantial number of emails to the ET attaching various documents. By way of example, the ET describes how he sent some 25 emails over one weekend in November.

8. In any event, on 23 November 2016, the matter came before Employment Judge Wynn-Evans, and there was then extensive discussion as to how the Claimant was putting his claims. Given, however, that the Claimant was self-represented, rather than holding him to points made in that discussion, it was directed that by 11 January 2017 he should provide further and better particulars in writing in response to some specific itemised questions. The ET's Order in that regard was sent to the parties on 13 December 2016 and the questions the Claimant was to address were contained in a schedule to that document. Notwithstanding the assistance provided to the Claimant by the ET on that occasion, there continued to be what is described as "*a drip feed*" of documents sent by the Claimant to the Respondent and the ET "*on varying levels of relevance and with some duplication*" (paragraph 11).

9. Doing the best it could in terms of actually identifying what his claims were, the only particulars the ET was only able to see had been provided were those set out in a handwritten letter of 16 January 2017, received on 17 January 2017, in which the Claimant had said:

> **"I have sent the evidence to Jenna Clarke (the Respondent's solicitor). I have attached the document UPS did bully me and did not give me chocolate box in 2015 for Christmas and my accident at work place was covered up, making their own story up." (ET's Judgment paragraph 11)**

10. The ET considered that document might be said to have identified two causes of complaint: the Christmas chocolates issue and a cover up of an accident at work. It could not see, however that the Claimant had thereby complied with the first question identified in the schedule to the ET's Preliminary Hearing Order, that is as to how he was saying he had been constructively dismissed by the Respondent. It further noted that the letter of 16 January 2017 had been received out of time.

11. As for whether the Claimant was disabled for the purposes of the **Equality Act 2010** ("EqA"), the ET identified a number of documents he had provided relating to appointments for a range of medical conditions, but none of those assisted in establishing whether or not the Claimant was disabled. Again the ET was unable to see that the Claimant had complied with the requirements of the earlier Preliminary Hearing Order, specifically providing the details identified at question 4 of the schedule. Moreover, the information in question had again not been provided within the timeframe of the ET's Order.

12. The Respondent had indicated that it would wait a short while before making any application to strike out, but on 16 January 2017 it made that application under Rule 37 Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, specifically contending that the Claimant's claims should be struck out as:

> **"a) Had no reasonable prospect of success;**
>
> **b) The proceedings had been conducted unreasonably;**
>
> **c) There had been material non-compliance with previous case management orders;**
>
> **d) It was no longer possible to have a fair hearing." (ET's Judgment paragraph 1)**

13. In considering that application at the hearing on 1 February 2017, Employment Judge Self took the view that the "*primary mischief that needed to be remedied was for there to be a clear and unequivocal understanding of the factual and legal issues the Claimant wished to lay before the Tribunal*" (paragraph 17). If that could be achieved, Employment Judge Self considered it possible that a fair hearing could still take place, a position the Respondent accepted. The hearing, therefore, proceeded with the ET seeking to understand from the Claimant the basis on which he had put his claims.

14. At this hearing I am only concerned with the claims of constructive unfair dismissal and disability discrimination; I am unable to see anything in Lady Wise's reasons for permitting this appeal to proceed that would support any view that the amended grounds of appeal permitted to proceed include any matter relating to the complaint of religious discrimination and the Claimant has not sought to suggest otherwise. I therefore set out the ET's record of how the Claimant put those matters:

> **"21. Constructive Dismissal Claim**
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> **The Claimant indicated that the following factors were the matters that had directly led him to resign.**
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> **a) The Claimant had been absent from work from 12 November 2015 following an accident at work. The Claimant complained that he had not been allowed to go home on that shift after the injury had been sustained.**
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> **b) Further the Claimant asserted that in various letters dealing with his sickness absence the date when he was injured was stated as being either 13 November or 16 November which was not correct and which he perceived was dishonesty on the Respondent's part. There were no financial ramifications of these different dates. I saw letters where these incorrect dates were put in.**
>
> **c) He complained that when he filled in an accident report on 16 November the signature was dated 16 November. His view is that it should have been dated on the date of the accident 12 November and in his view all of the above matters were attempts to cover up his injury.**
>
> **d) He was not allowed Trade Union representation at two welfare appointments in December but was allowed them in similar meetings in the New Year.**
>
> **e) He did not receive chocolates as other staff had done in December 2015.**
>
> **f) The Company had tried to / did impose a new job title on him in 2011.**
>
> **g) His Trade Union representative told him he could not go to a proposed welfare meeting on 6 May 2017 and the Claimant believed that it [was] because the Trade Union official had been warned off by the Company. He told me he had no evidence**

for that and would not be able to bring any evidence at any future hearing but that it was just a gut feeling.

h) He told me that because of all of the above matters culminating in the matter set out at (g) he had no trust and confidence in the Company and that is why he resigned.

…

23. Disability Discrimination

I asked the Claimant to tell me what medical conditions he was relying upon in respect of his disability claim. He told me that it was in relation to his left leg that he had injured in 2013 and from which he had had to have a rod inserted in his hip which had only recently been taken out. He told me that it had led him to have difficulty in picking up heavy items and had impacted upon his ability to run, walk and mobility issues generally.

24. He also told me about his shoulder injury which he had had since 2014/2015 and again stated that it made it more difficult to lift heavy or awkward items and to undertake certain movements with his shoulder.

25. He confirmed to me that although he had other medical conditions it was only the two conditions detailed above that he was asserting amounted to a disability. In particular he was not asserting that the injuries which he had sustained in the November incident amounted to a disability. I explained to the Claimant that much of the evidence he had produced did not necessarily assist him with regard to proving disability and what further information he would be able to gather to support his claim. The Claimant was quite clear that he had got all he could and that there was no more medical evidence that he would produce at any future hearing.

26. I then asked him as to what it was that the Respondent had done or had failed to do in relation to the disabilities he had outlined. From this point on the Claimant solely focussed upon his leg injury and ignored any issue to do with his shoulder. There was a single thing that he complained about and that was in 2013 the Respondent had failed to place him on light duties when he injured his leg. I asked him whether there were any more recent failures that he could think of and his response was that there weren't. He made it clear to me that the light duties point was not really an issue that had led to his decision to resign. He confirmed to me that he had no other factual complaints that he wished to pursue and that the matters he had outlined were those that he wished to pursue."

15. Having heard how the Claimant was putting his claims, the Respondent stated that it was still pursuing its strike out application, on the basis that the Claimant's claims had no reasonable prospect of success. The ET's consideration of the Claimant's claims for those purposes is then set out, relevantly, as follows:

"28. The Claimant resigned on 10 May 2016 and he had been absent from work since the 12 November. He was not at work over that time. For the purposes of considering whether or not the Claimant has any prospects of success I will assume that the Claimant can prove that he was not permitted to go home after the injury as set out at 21a above. Whilst I accept that the dates of the injury are incorrect in certain letters that was since corrected and the correct date has been discussed many times. I can also see no issue with a document being signed on the day it is completed. (21b and 21c). There is no right to TU representation at welfare meetings but as soon as the Claimant requested such accompaniment it was granted. From what I have seen and heard the welfare meetings were appropriately conducted and focussed on exploring ways of getting the Claimant back to work in a safe manner and the Claimant indicated nothing to the contrary. The Claimant had no evidence to support his gut feeling as to why the TU rep could not attend in May but the Claimant was not forced to attend that meeting anyway in his representative's absence.

> **29. The imposition of a fresh job title in 2011 was some 5-6 years earlier and is ancient history. The Claimant did not receive chocolates because he was not at the function when they were handed out."**

16. Mindful of the fact-sensitive nature of claims before the ET and of the dangers inherent in the disclosing of claims before full consideration of the evidence tested under oath, the ET was unable to see that the Claimant's claims had any reasonable prospect of succeeding.

17. In respect of his constructive unfair dismissal claim, the ET reasoned as follows:

> **"32. I have concluded that the Claimant's constructive unfair dismissal claim does not have any reasonable prospect of success. I have considered the various elements that he has set out both individually and collectively and cannot see that he has come even close to demonstrating that there are any reasonable prospects of success.**
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> **33. He has had ample opportunity to set out his case and to provide evidence in support and he has palpably failed to set out the basis for why the Respondent by their conduct would have been in repudiatory breach of contract entitling him to resign. His complaints are either simply incorrect or are insufficient to come close to that threshold. If there were errors then they have been swiftly rectified or alternatively requests of the Claimant have been complied with and the Claimant accepted that was the case. I have set out the detail at 28 and 29 above. I dismiss that Claim."**

18. As for the disability discrimination claim, the ET allowed that the Claimant might be able to demonstrate that he met the definition of disability for the purposes of the **EqA**, but nonetheless concluded that:

> **"35. Having said that the only claim that the Claimant has in relation to disability is that he was not placed on light duties from 2013 which would be a section 15 EqA claim or a failure to make reasonable adjustments. From November 2015 the Claimant was not at work on account of another injury and so the issue of light duties did not arise after that date at all. It is abundantly clear that this claim would be out of time by a substantial period and the Claimant did not, despite being asked, put forward any rationale as to why it would be just and equitable to extend time.**
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> **36. In those circumstances I do not consider that the Claimant has any reasonable prospect of success in being permitted to proceed with that Claim on a time limit point and accordingly the Claim is struck out on that basis."**

The Relevant Legal Principles

19. The power to strike out an ET claim is provided by Rule 37 of Schedule 1 of the **2013 Rules**, which allows that an ET may strike out all or part of a claim on the basis that it has no reasonable prospect of success. This is, for example, to be contrasted with an ET's power to

order that an allegation or argument may only be pursued upon the payment of a deposit, which requires that the ET consider that the allegation or argument in question has little reasonable prospect of success.

20. In **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126 CA, Lord Justice Maurice Kay stated as follows:

> **"29. … It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. …"**

21. Guidance was further provided by the EAT in **Balls v Downham Market High School & College** [2011] IRLR 217 at paragraph 6.

> **"6. Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success … the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects." (Original emphasis)**

22. More specifically, in **Tayside Public Transport Co Ltd t/a Travel Dundee v Reilly** [2012] IRLR 755 CS, it was noted that in almost every case the decision in an unfair dismissal claim is fact-sensitive, and it was further observed that:

> **"30. … where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts …"**

23. And further, where there is a dispute as to the reason for the dismissal, it has been stated that it would be very rare indeed that the dispute could be resolved without hearing from the party or parties who actually made the decision (per Langstaff J in **Romanowska v Aspirations Care Ltd** UKEAT/0015/14 at paragraph 15).

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24. As for discrimination cases, it has been recognised that involving, as they do, an investigation as to why an employer took a particular step, they will generally (allowing for the exceptional case) dictate that the evidence needs to be heard and no summary decision taken as to the merits; see **Anyanwu v South Bank Students' Union** [2001] ICR 391 HL. In that case, which involved a complaint of race discrimination, Lord Steyn identified what might be described as the public policy reasons why discrimination claims should not be struck out:

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> **"24. … Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. …"**

Similarly, Lord Hope of Craighead stated:

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> **"37. … discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence. …"**

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25. Whilst, therefore, the ET retains the power to strike out discrimination claims or claims of constructive unfair dismissal, the case law makes clear that in such cases that power shall be exercised with far greater caution than in other less fact-sensitive types of claim.

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Submissions, Discussion and Conclusion

26. The first question raised by the appeal (as permitted to proceed to this hearing) is whether the ET mis-directed itself in law by failing to understand the basis of the Claimant's claim:

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(a) that there was a failure to make reasonable adjustments and/or discrimination arising from disability by the Respondent, in not providing the Claimant with light duties up to his resignation in May 2016; and

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(b) that the Claimant resigned in response to those failures.

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27. I am unable to see that it can fairly be said that the ET failed to understand how the Claimant's claim was being put in these respects. Having taken great pains to ensure that the Claimant had every opportunity to explain how he was putting his claims, Employment Judge Self expressly recorded his complaint, in respect of his claim of disability discrimination, that the Respondent had failed to place him on light duties after he had suffered injury to his leg in 2013. If the Claimant had felt reluctant to put his case at any earlier stage, he apparently overcame that reluctance before Employment Judge Self, who understood that, in respect of the disability discrimination claim, the Claimant was complaining of a failure to make reasonable adjustments in failing to provide him with light duties in 2013 and/or that that failure constituted unfavourable treatment arising from something that was in consequence of the Claimant's disability (his disability being his leg injury, and the "something arising" being his inability to take on heavy duties).

28. As for whether this had been a matter that caused the Claimant to resign, however, that was not how the ET understood the Claimant's case on constructive dismissal. The various matters that he had relied on in that regard all flowed from his accident at work on 12 November 2015 (see the ET at paragraph 21, set out above). Specifically, the ET recorded that the Claimant had made it clear that "*the light duties point was not really an issue that had led to his decision to resign*" (see paragraph 26, again, cited above). When the ET asked whether there had been any more recent failures in terms of reasonable adjustments that the Claimant could think of - other than the light duties issue - it recorded that "*his response was that there weren't*" (again, see paragraph 26).

29. Before me, the Claimant has said that the reason he resigned was because there was no reasonable adjustment. He was not feeling well. He had a letter from the employer asking him

to bring a fit note, but he was not ready to return to work. He was not fit enough to resume normal duties. The Respondent did not offer him light duties at all. He also complained about the name of the company, the Respondent's name was wrong, and he therefore did not say everything because of that. When I asked him what he had wanted to say, he told me that it was just that the Respondent had not made reasonable adjustments.

30. For the Respondent, however, it is observed, that the ET had allowed the Claimant time to explain his case at the hearing, notwithstanding the earlier opportunities he had been given to do this. It was entitled to consider the case as he had explained it, and not on some other basis. Doing so, it permissibly concluded that the claims - pursuing the facts in the Claimant's favour and taking his case at its highest - had no reasonable prospect of success.

31. I bear in mind that the striking out of a claim is a draconian act and allow that it might be said to be incumbent on an ET to make sure it has properly considered all the material that might reasonably be taken to set out the Claimant's case. Here, however, the ET took pains to ensure that it had considered all the documentation the Claimant had sent in, and gave him full opportunity to explain what he was complaining about. For my own part, I have checked back at the content of the Claimant's ET1, and sought to ensure, when he was in telephone attendance at the hearing, that he had every opportunity to make his points. I was, in particular, conscious that the Claimant had suggested that he might not have told the ET everything he wanted to say, either because he considered the name of the Respondent was incorrect (as he told me) or because he was suffering health difficulties (as seems to have been suggested to Lady Wise at the Rule 3(10) Hearing). In any event, I asked the Claimant to tell me what else he would have said, and he repeated that the Respondent had not made reasonable adjustments.

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32. If a complaint of failure to make reasonable adjustments was at the heart of the Claimant's constructive unfair dismissal claim, it was, however, not the claim he explained he was making to the ET at any stage. I can see that this has become the focus since the Rule 3(10) Hearing, but an ET does not err, even on a strike out decision, in considering the case that is before it and not some other. Even allowing for the fact that the Claimant was representing himself, the point was not a difficult one to articulate: a Claimant can reasonably be expected to explain what, factually, is at the heart of their complaint. If the Claimant is saying that they left their employment because the employer failed to make reasonable adjustments and assign them to (relevantly) light duties, it is reasonable to expect that Claimant to say so (even if they do not actually use the term "reasonable adjustments"). Here, however, the Claimant did not say that he had left because of the background issue of light duties. On the contrary, he said he had left because he had not been allowed to go home after an accident at work on 12 November 2015; because there were incorrect dates given for that accident in correspondence from the Respondent; because his accident report form was dated 16 rather than 12 November; because he was not allowed trade union representation at welfare appointments; because he did not receive chocolates in December 2015; and because he felt his trade union representative had been "warned off". Not one of these reasons related to what he said (for the purposes of his disability discrimination claim) was a failure to assign him light duties in 2013.

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33. Turning then to the disability discrimination claim - in respect of which it *was* apparent that the Claimant was complaining of the failure to assign him light duties - the difficulty was that he had then been off work for an entirely different injury from November 2015, and any claim in that regard was therefore out of time. It is, further, not suggested that the ET did other than reach a permissible conclusion that it would not be just and equitable to extend time.

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34. Standing back from the detail, I ask myself more generally whether the ET mis-directed itself in law, by failing to take account of cases such as **Anyanwu**, by striking out the claims of discrimination and constructive unfair dismissal when there were factual matters that remained in dispute. That, however, was not this case. Here, the ET had allowed the Claimant considerable leeway in identifying his case, notwithstanding the opportunities he had already been given in this respect. It took pains to consider the earlier documentation he had provided, including the ET1, as well as the way in which he explained matters at the hearing. Having thus identified the matters of which the Claimant complained, the ET took the Claimant's case at its highest and assumed the facts in his favour. Doing so, it could not see that the Claimant had any reasonable prospect of success. There is no challenge to the ET's conclusions in this regard in respect of the matters the ET understood the Claimant to be relying on for his constructive unfair dismissal claim. It is, however, said that it failed also to have regard to the light duties point in respect of this claim. That, however, is not how the Claimant was putting his case on constructive unfair dismissal. The ET understood the light duties point in relation to the disability discrimination claim (which was out of time) and made sure - by asking the Claimant - whether this was a point that also went to his constructive unfair dismissal claim; he clarified it was not. As for the disability discrimination claim itself, the Claimant was relying on a failure to assign him light duties after an injury in 2013. He had, however, been absent from work from November 2015 due to an entirely unrelated injury. He had only lodged his ET claim in August 2016. It was undeniable that his disability discrimination claim was out of time and nothing has been raised that would begin to suggest the ET was wrong to conclude that there was no just and equitable basis for extending time.

35. In the circumstances, the ET proceeded on an entirely proper basis, and reached a conclusion that was open to it. For the reasons I have explained, I duly dismiss this appeal.