Appeal No. UKEAT/0031/18/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 May 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR M ANDRUHOVICS — APPELLANT

SAPIENT LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MAKSIMS ANDRUHOVICS (The Appellant in Person)
For the Respondent	MR EDWARD KEMP (of Counsel) Instructed by: Lewis Silkin LLP 8th Floor, Southgate House Wood Street Cardiff CF10 1EW

SUMMARY

PRACTICE AND PROCEDURE - Amendment

PRACTICE AND PROCEDURE - Case management

UNFAIR DISMISSAL - Automatically unfair reasons

The Claimant, who had less than two years' service, had sought to pursue claims of unfair dismissal and discrimination before the Employment Tribunal. In resisting an application to strike out his claim of unfair dismissal, the Claimant had asserted that he had been dismissed for an automatically unfair reason under section 104 **Employment Rights Act 1996**; he also applied to amend his claim to add a complaint of victimisation. The ET concluded that the facts relied on by the Claimant could not support a claim under section 104 (he was relying on allegations of breaches of the **Equality Act 2010** which were not included within the provisions covered by section 104 **Employment Rights Act 1996**); it duly struck out his claim of unfair dismissal. The Claimant appealed against that ruling, contending that it was apparent that the matters he had raised in relation to his claim of victimisation would also have supported a protected disclosure automatic unfair dismissal complaint under section 103A **ERA**, something the ET should have proactively identified given that the Claimant was acting in person. Separately, the Claimant's discrimination claims proceeded to a Full Merits Hearing before another ET but were rejected on their merits and the Claimant's appeal in that regard was dismissed by the EAT.

On the Claimant's appeal in respect of his unfair dismissal complaint.

Held: dismissing the appeal

The ET had determined the case before it. It had not sought to anticipate any or all other potential causes of action that might have been said to possibly arise from the facts asserted by the Claimant, but that was not its role and it did not err in law in the assisting the Claimant, as a litigant in person, in the limited way that it did. In any event, the Claimant's case as to the

reason for his dismissal was ultimately considered but rejected after a Full Merits Hearing before a different ET. The point taken on appeal had thus been rendered academic.

HER HONOUR JUDGE EADY QC

Introduction

1. The appeal in this matter questions to the approach to be taken by an Employment Tribunal ("ET") in the identification of the particular claims before it, specifically in defining the way in which a claim of automatic unfair dismissal was being pursued.

2. In giving 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 London (East) ET (Employment Judge Ferris sitting alone on 27 February 2017), sent to the parties on 13 March 2017. Representation below was as it has been on this appeal. By its Judgment, the ET struck out the Claimant's claim of unfair dismissal on the basis that it did not have jurisdiction to hear that claim, given that the Claimant did not have the requisite two years' qualifying service. The Claimant's remaining claims under the **Equality Act 2010** ("EqA") were permitted to proceed but were ultimately dismissed after a Full Merits Hearing before a different Employment Judge (Employment Judge Goodrich sitting with lay members; "the Goodrich ET"). Although the Claimant sought to challenge that decision, his appeal was rejected by the Employment Appeal Tribunal ("EAT") (His Honour Judge Shanks) on the papers as being totally without merit; albeit, I understand that the Claimant is now seeking to appeal the EAT's decision in that regard to the Court of Appeal

3. The current appeal against the ET's strikeout Judgment was originally framed far more broadly but, after a hearing under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993** ("EAT Rules") before The Honourable Mrs Justice Slade DBE on 19 January 2018, was permitted to proceed on one ground only, namely:

"whether the Employment Judge should have considered the facts advanced to him as the reason for dismissal as falling within section 103A Employment Rights Act 1996 ("ERA") as a possibility, notwithstanding that the Claimant had advanced his case under section 104(1)(b)."

4. I note for completeness that the Claimant's preferred language is Russian and a Russian/ English interpreter was arranged by the ET for final hearing of his discrimination claims. In pursuing his appeal before the EAT however, the Claimant has conducted both this and the earlier Rule 3(10) Hearing himself, with perfect use of English and no apparent failure of comprehension.

The Relevant Factual and Procedural Background and the ET's Decision and Reasoning

5. The Claimant is an IT specialist who was employed by the Respondent for just under three weeks, from 5 to 21 September 2016. He sought to pursue claims before the ET relating to his employment and dismissal. In his form ET1, he stated he was bringing claims of unfair dismissal and of sex and sexual orientation discrimination. In his detailed grounds of claim, the Claimant then referred to the conduct and comments of another employee of the Respondent, a Ms Power, which he said gave rise to issues which he then sought to resolve in a meeting with Ms Power on 19 September. It was after that that he was dismissed.

6. Given the Claimant's limited period of employment, this case was listed for a Preliminary Hearing to determine whether the complaint of unfair dismissal should be struck out as the Claimant had insufficient qualifying service to bring such a claim. Before that Preliminary Hearing, the Claimant completed the ET's *pro forma* case management agenda form, in which he identified his claims as follows: "*Automatically unfair dismissal. Sex discrimination. Sexual orientation discrimination*"; he further stated, however, that he wished to make an application to amend "*to add victimisation to his claim*".

7. By Order of 14 February 2017, the ET directed that the Claimant should provide further information about his claim, relevantly: "*If the unfair dismissal complaint is being pursued the Claimant is to set out the basis of the complaint*".

8. By letter of 14 February 2017, the Claimant stated his objection to the striking out of his unfair dismissal claim observing as follows:

> **"I object of striking out the complaint of unfair dismissal because**
>
> - **subsection (3) of section 108 (Qualifying period of employment) of the Employment Rights Act 1996 (ERA) states: "Subsection (1) does not apply if - (g) subsection (1) of section 104 (read with subsections (2) and (3) of that section) applies"**
> - **subsection (1) of section 104 of ERA states: "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee -**
> **(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or**
> **(b) alleged that the employer had infringed a right of his which is a relevant statutory right"**
> - **statutory right which Respondent had infringed is relevant statutory right provided by subsection (1) of section 13 (Direct discrimination) of chapter 2 (Prohibited conduct) of the Equality Act 2010 (EA) which states: "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others"**
> - **…**
>
> **The claim of unfair dismissal brought by me to the Employment Tribunal is on the grounds of discrimination of sex and sexual orientation/sexual harassment which is an exception to [the] two year service rule."**

9. The ET recorded its understanding of how the Claimant was putting his claim of unfair dismissal, and also its explanation for then striking out that claim, at paragraphs 1 to 4 of the Judgment under challenge, as follows:

> **"1. The Claimant made a claim for unfair dismissal.**
>
> **2. I have struck out the claim for unfair dismissal on the ground that the Tribunal does not have jurisdiction to hear it. The agreed dates of the Claimant's employment were from 5 September 2016 to 21 September 2016. Therefore the Claimant has less than two years service and cannot bring a claim for simple unfair dismissal.**
>
> **3. The claimant has also asserted a claim for automatic unfair dismissal. In a letter dated 14 February 2017 from the Claimant objecting to his claim for unfair dismissal being struck out, he contended that section 108(3) ERA 1996 says that the qualifying period does not apply in certain cases. He relied in that letter as he does today on section 104(1) of the ERA:**

> **"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee -**
>
> > **(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or**
> >
> > **(b) alleged that the employer had infringed a right of his which is a relevant statutory right."**
>
> **4. Section 104(4) identifies the relevant statutory rights for the purpose of the section and it does not include statutory rights under the Employment Act. Accordingly the Claimant's case which is that he was dismissed because of discrimination cannot be the basis of a claim for unfair dismissal."**

Subsequently, by letter of 12 April 2017, the ET clarified that the reference to "**Employment Act**" at paragraph 4 was an error; it was intended to be a reference to the **EqA**.

10. Returning to the Preliminary Hearing on 27 February 2017, the ET went on to identify the other claims that the Claimant was pursuing under the **EqA**. Relevantly, in recording the way the Claimant was putting his claim of victimisation, the ET identified the Claimant's complaint in this regard as follows:

> **"8. As to the claim for victimisation, the protected act relied on allegedly took place in a face-to-face conversation between the Claimant and Lisa Powers which the Claimant says took place on 19 September 2017. For the purposes of identifying the protected act I recite the note which I took from the Claimant who said the following in answer to my questions:**
>
> > **"I told her at that meeting that she had asked me to sit side by side with her. Subsequently I had said to her that I didn't want to get married. A few days later I said to her do you want me still to sit side by side with you? And she had said no. Then I told her that I'd had to ask for a PID number as she would not provide one to me. It had been procrastination rather than a refusal. In answer to that point Ms Powers told me "OK so what". In the end I got it from my line manager Shaun O'Donnell very easily when Lisa Powers was absent. At the meeting I also explained to her that I was not a womaniser and that I had no intent to have any personal relationship with anyone that I met at work. I told her that I'd been sexually harassed by a female at a previous employer who had taken action against the female. In response to these points Lisa Powers just said "OK". I said that I didn't want a conflict and I said what if something similar happened here? Ms Powers said to me that she or Ms Jan Swain would take action."**
>
> **9. Two days after that alleged conversation the Claimant was dismissed and he contends that this was a detriment as a result of the protected act in which he identified sex discrimination and the risk of sex harassment by his employer. The letter delivered to the Claimant at about 5pm on 21 September by Ms Millie Feldman of the Respondent's Human Resources Department dismissed the Claimant with some notice money in lieu of seven days notice. The letter's opening paragraph, a copy of which was shown to me during the course of the hearing, refers boldly to an allegation of inappropriate conduct impliedly by the Claimant as the reason for dismissal."**

Submissions

The Claimant's Case

11. Accepting that an ET is not under any obligation to advise a litigant in person on the nature of an amendment, to initiate an amendment of its own accord, or act of its own motion to re-label complaints, the Claimant contends an ET is nevertheless under an obligation to correctly understand the case from the parties' presentation. In this regard, he relies on the following passage, from the judgment of Ralph Gibson LJ in **Sheridan v British Telecommunications plc** [1989] EWCA Civ 14:

> **"Misunderstanding or misapplying facts may … amount to an error of law where the Tribunal has got a relevant undisputed or indisputable fact wrong and has then proceeded to consider the evidence and reach further conclusions of fact based upon that demonstrable initial error. Such may be an error of law because the Tribunal is required by law to consider the case in accordance with agreed or undisputed facts. …"**

12. The Claimant notes that subsequently in its Judgment the ET specifically recorded that he was contending he had been dismissed because of what he had raised at the meeting on 19 September, which had amounted to a protected act. Having thus correctly identified that the Claimant was complaining of suffering a detriment as a result of the protected act, the Claimant contends the ET then erred in failing to find this was also related to the claim of automatic unfair dismissal. This was not requiring the ET to step into the arena to find a potential amendment for the Claimant nor was it necessary for him to formally amend; he had already said he was complaining of having been automatically unfairly dismissed and the factual basis for that complaint had been made clear. It was simply requiring the ET to determine the case before it. If the Employment Judge considered he had received insufficient help from the Claimant as a litigant in person, he was required to do his own homework (see the judgment of Rimer LJ at paragraph 31 in **Muschett v HM Prison Service** [2010] IRLR 451 CA).

13. The Claimant also contends that he was suffering from post-traumatic stress disorder and had difficulties in concentrating at the Preliminary Hearing before the ET. He further makes the point that his amendment was raising no new factual allegations and should therefore have been allowed by the ET, see **Queensway Surgery v Jayatilaka** UKEAT/0046/11. While Slade J did not specifically permit a ground of appeal to proceed which stated that the Claimant was in a difficult psychological state, she did however record the Claimant's argument before her as follows:

> **"25. … he is now saying that the same factual basis for his argument on unfair dismissal - namely that he was dismissed for what he had said to a Lisa Power in a meeting with her on 19 September 2016 could on his contention be properly characterised as a protected disclosure and therefore should have benefited from the relaxation given to claims under section 103A relating to protected disclosure.**
>
> **…**
>
> **32. … having regard to the fact that the Claimant was unrepresented and was he says in a difficult psychological state and distressed, English not being his first language, it is just arguable that if the same set of facts could lead to a categorisation falling within section 108(3)(ff) so that section 103A comes into play, which is the relaxation in relation to dismissal on grounds of a protected disclosure, then there may be an arguable ground of appeal."**

And further observed:

> **"34. … the factual allegations made by the Claimant for his claim for unfair dismissal are the same whether categorised under Employment Rights Act section 104(1)(b) or section 103A, but the difference in their categorisation makes a material difference as to the qualifying period in order to entitle the Claimant to bring his claim. … the factual basis of the claim for unfair dismissal supported consideration of a claim under section 103A of the Employment Rights Act and that having regard to the fact that the Claimant was unrepresented and had other difficulties, it is arguable that the Employment Judge should have considered the same factual position under section 103A and that if he had, that the claim would have been permitted to proceed and that he erred in failing to do so. …"**

I have set out those passages from Mrs Justice Slade's Judgment on the Rule 3(10) Hearing on this appeal as they succinctly set out the points made by the Claimant in his submissions before me.

14. The Claimant has further anticipated that an objection might be taken that he had not identified that he was disclosing *information,* as opposed to merely making an allegation in the

A conversation he was relying on as a protected disclosure. He points out that, in **Kilraine v London Borough of Wandsworth** UKEAT/0260/15 at paragraph 30, Langstaff J warned ETs against too readily distinguishing between the making of an allegation and the disclosure of information (as to which, see **Cavendish Munro Professional Risks Management Ltd v Geduld** UKEAT/0195/09). The Claimant further observes that he was not sure whether Ms Power had sexually harassed him, and the purpose of the meeting on 19 September 2006 was to find out if she had realised what she had done; he was thus not making an allegation, but bringing information to Ms Power's attention.

The Respondent's Case

15. The Respondent observes that an ET does not have an inquisitorial function and has to be seen to be impartial; it can neither advise a litigant in person on an amendment nor initiate one, see **Drysdale v Department of Transport (Maritime and Coastguard Agency)** [2014] IRLR 892 CA at paragraph 49 and **British Gas Services Ltd v Basra** UKEAT/0194/14 at paragraph 50. The logic of the Claimant's case was that an ET would be obliged to consider and advise a litigant in person in respect of every cause of action that might potentially arise from the pleaded facts of its own volition; that would be unworkable and go far beyond an ET's duty to assist a litigant in person in the formulation and presentation of their case.

16. In the present case, the Claimant had applied to amend his claim to include a complaint of victimisation under the **EqA** (see his case management agenda for the Preliminary Hearing); he had never articulated his amendment in terms of adding a protected disclosure or whistleblowing complaint in respect of his dismissal. That was fatal to the appeal. It was not an error of law for the ET to fail to consider an amendment not raised by a party, see **Basra**.

A The ET's determination of the application to amend what was before it fell well within the **Drysdale** guidelines.

B 17. In any event the protected disclosure that the Claimant now relies on - namely his conversation with Ms Power on 19 September - was considered by the Goodrich ET at the subsequent Full Merits Hearing of the **EqA** claims and the following findings of fact were made:

C
> **"115. The Tribunal does not find that the Claimant's protected act played any part in his dismissal. We so find because, at the point Ms Feldman decided to dismiss the Claimant and notified him of his dismissal, the Claimant's protected act was to have expressed a fear of sexual harassment at work based on his previous experience. He had not suggested that he had experienced any sexual harassment from the Respondent. His allegations about this only came after he had been dismissed. It appears to the Tribunal unlikely that a generalised comment about previous experience causing anxiety would have led to the dismissal of an employee with valuable skills that they had just decided to appoint. Additionally, Ms Power's response to the Claimant's concern was an appropriate one, namely to encourage him to speak to the Respondent's human resources adviser, Ms Swain."**

D

18. Given that the Claimant's appeal against that Judgment was rejected as being totally without merit, that finding stood and was fatal to the present appeal, notwithstanding any application for further permission to appeal to the Court of Appeal. Even if the victimisation claim had also been categorised as a claim under section 103A **ERA**, the ultimate outcome would have been the same; the claim would have been dismissed.

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The Claimant in Reply

19. The Claimant takes issue with how the Respondent runs its argument. He says that its points about making an amendment are completely irrelevant: he was not applying to amend to add a whistleblowing case but was relying on the same facts as had already been set out in his ET claim. The most important point he was making was that he was pursuing a complaint of automatic unfair dismissal and he had clearly stated it was his contention that he had suffered a

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detriment as a result of the conversation on 19 September, which he had identified as a protected act; see as recorded at paragraph 9 of the ET's Decision on the Preliminary Hearing.

20. He also objects to the Respondent's suggestion that a final determination has been made on the issue of the reason for his dismissal by virtue of the decision of the Goodrich ET. Although the EAT may have ruled that his appeal against that Judgment was totally without merit, he was pursuing an application for permission to appeal to the Court of Appeal and so there had not been finality in that regard.

The Relevant Legal Principles

21. The right to claim unfair dismissal is conferred by statute. In order to bring such a claim a complainant must meet the relevant statutory requirements. Section 94(1) **ERA** provides "*An employee has the right not to be unfairly dismissed by his employer*" but, by section 108(1) it is provided that "*Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination*". Section 108(3) allows, however, so far as relevant:

> **"(3) Subsection 1 does not apply if -**
>
> **…**
>
> **(ff) section 103 applies,**
>
> **(g) subsection (1) of section 104 (read with subsections (2) and (3) of that section) applies,**
>
> **…"**

22. In pursuing his appeal, the Claimant has contended that his case in fact fell within section 104(1) **ERA**, which provides as follows:

> **"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee -**
>
> **(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or**

> **(b) alleged that the employer had infringed a right of his which is a relevant statutory right."**

23. Section 104(4) defines a relevant statutory right for these purposes as follows:

> **"(4) The following are relevant statutory rights for the purposes of this section -**
>
> **(a) any right conferred by this Act for which the remedy infringement is by way of a complaint or reference to an employment tribunal,**
>
> **…"**

Although reference is also made to other statutory provisions, none include the right to bring proceedings for sex discrimination, harassment or sexual orientation discrimination, harassment or victimisation - all falling under the **EqA**, which is not included within the provisions to which section 104(4) **ERA** refers.

24. In his skeleton argument for his Rule 3(10) Hearing before the EAT and at that hearing itself, Slade J recorded that the Claimant had:

> **"20. … changed the categorisation of the basis of a complaint, which he said was relevant to the issue considered on the Preliminary Hearing. He contended that the relaxation of the qualifying period of two years provided in section 108 of the [ERA] applied because he had made a protected disclosure. Section 103A, which is one of the exceptions to the two-year qualifying period, provides as follows:**
>
> **…"**

25. Section 103A of the **ERA** is another exception to the two-year qualifying period; it provides as follows:

> **"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."**

26. A protected disclosure is defined by section 43A of the **ERA** as:

> **"… a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."**

27. Section 43B then provides (relevantly):

> **"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following -**
>
> **…**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
>
> **…"**

28. As for the obligations upon an ET in terms of the identification of the claims it is to determine, it is not in dispute that, in accordance with an ET's general case management powers and consistent with the overriding objective, an ET will provide such assistance to litigants as maybe appropriate in the formulation and presentation of their case. That said, as was observed by Rimer LJ in **Muschett v HM Prison Service** (referring back to his earlier ruling on this issue in **Lemas & Another v Williams** [2009] EWCA Civ 360 at paragraph 58):

> **"30. …**
>
> > **"58. … It is for the litigant himself to decide what case to make and how to make it, and what evidence to adduce and how to adduce it. It is not for the judge to give directions or advice on such matters. It is not his function to step into the arena on the litigant's side and to help him to make his case. …"**
>
> **31. Those observations were made in the context of a challenge to a decision of a circuit judge but I consider that essentially similar considerations apply to employment judges. … Their function is to hear the case the parties choose to put before them, make findings as to the facts and to decide the case in accordance with the law. … Of course an employment judge, like any other judge, must satisfy himself as to the law that he must apply to the instant case; and if he assesses that he has received insufficient help on it from those in front of him, he may well be required to do his own homework. But it is not his function to step into the factual and evidential arena."**

29. In **Drysdale v Department of Transport**, having reviewed the authorities in respect of an ET's duties regarding litigants in person, Barling J identified six general 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 [times] 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."**

30. Turning more specifically to the question of an amendment to a claim, in **British Gas Services Ltd v Basra** HHJ Serota QC observed that an ET has no power to allow an amendment of an application and holding in general terms:

> **"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."**

As regards that particular case, the EAT went on to find that:

> **"55. … 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."**

31. Moreover, the ET's discretion as to whether or not to allow an amendment application must relate to the amendment that the party has proposed; it is not within the ET's discretion to give leave to amend the claim or response in whatever terms the party considers best, see per Lady Smith in **Margarot Forrest Care Management v Kennedy** UKEATS/0023/10:

> **"32. … Where amendments of claims are concerned, the discretion conferred on an Employment Tribunal is to grant leave to a claimant to allow the claimant to amend the form ET1 in the terms that he or she proposes, if appropriate; it is not a discretion for the Employment Tribunal to give themselves leave to amend the ET1 in whatever terms they think are best. Nor does an Employment Tribunal have a discretion so to amend without**

allowing the respondent the opportunity to make representations in response to the wording which the amendment will contain if leave is granted. For an Employment Tribunal to act in such a manner runs the risk of them appearing to have stepped outwith the judicial role and acted as advocate for one party. …"

Discussion and Conclusions

32. The question raised by this appeal relates to the ET's identification of the claim before it. Given the relatively informal nature of the process, and the number of self-represented or non-legally represented parties that appear before ETs, this is not always a straightforward task. It is the practice of ETs to provide such assistance to litigants "*as may be appropriate in the formulation and presentation of their case*", see **Drysdale** at paragraph 49(1). What is "appropriate" will, however, depend upon the circumstances of each particular case, although that is likely to include factors such as whether the litigant is represented or not, and their apparent level of competence and understanding. An ET thus has a wide discretion in terms of the assistance it may consider appropriate to provide to an unrepresented litigant.

33. There are, however, limits to what can be done in this regard, see the observations of Rimer LJ in **Muschett**, set out above. Specifically, in **Muschett** the Court of Appeal expressly rejected the submission that ETs were to engage in a broader inquisitorial function: the role of an ET is "*to hear the case the parties choose to put …, make findings as to the facts and to decide the case in accordance with the law*" (paragraph 31).

34. In the present case, at the Preliminary Hearing on 27 February 2017, the ET embarked upon the task of identifying and clarifying the claims pursued by the Claimant, assisted by reference to his ET1, by his completion of the *pro forma* agenda for case management directions, the content of his letter of 14 February 2017, and his oral representations at the hearing. Allowing that a non-legally represented party might not have a precise appreciation of

each potentially relevant statute provision, it is notable that the Claimant had not sought to say that he had been dismissed for making a protected disclosure or, rather more simply, for "whistleblowing" - labels that are commonly used both by lawyers and litigants in person alike.

35. The Claimant was however alive to the problem facing him in terms of his complaint of unfair dismissal. He was aware that it was being said that he could not pursue that claim because he did not have sufficient qualifying service. His answer to that was, however, not to point to section 103A **ERA** or, even more basically, to say that this was a whistleblowing or protected disclosure complaint and thus that the requirement of two years' service did not apply. He instead specifically nailed his colours to the mast of section 104(1) **ERA**, which protects against a dismissal for bringing or alleging a breach of statutory rights under the **ERA** and certain other legislative provisions but *not* the **EqA**.

36. The Claimant says it should have been apparent to the ET that he was confused, having told the ET that he was suffering from post-traumatic stress disorder, which he had said arose from his dismissal and was thus relevant to his claims, and also given that English was not his first language. As a litigant in person, he contends that he was entitled to expect the ET to assist him and to ensure he was on an equal footing with the Respondent, so far as that was practicable. He contends that it should have been apparent that the facts he was relying on for his victimisation claim - clarified by the ET at the same hearing and as recorded at paragraphs 8 and 9 of its Judgment - could equally form the basis of a claim under section 103A **ERA**.

37. I do not consider that the ET lost sight of the fact that the Claimant was representing himself and that English was not his first language (indeed, I note that the Employment Judge proactively gave a direction for a Russian-English interpreter to be made available to assist the

Claimant at the Full Merits Hearing of his **EqA** claims, where he would inevitably have to give evidence and face the possibility of cross-examination). It is also apparent that the Employment Judge did not simply take his understanding of the Claimant's complaints from the written documentation but allowed the Claimant time to explain how he was putting his case, and took care to record that in his Judgment. Yet further, the ET was aware the Claimant was saying that he had suffered from post-traumatic stress disorder - it referred to the possible need for future directions to be given in this regard at paragraph 12 of its Judgment. All that said, however, the ET was faced with a conspicuously intelligent litigant, who very clearly understood the significance of making a complaint of automatic unfair dismissal (specifically in relation to the right to bring an unfair dismissal claim without two years' service) and thus the need to articulate the relevant prohibited reason for dismissal relied on. Yet more, this was a litigant who had very clearly particularised how he was putting his complaint of automatic unfair dismissal - having been ordered by the ET to do so - and had expressly referred to having made an allegation of an infringement of a statutory right, clearly identifying the relevant statutory provisions on which he had chosen to rely.

38. Although, therefore, it is possible to see how the Claimant *might* have put his case (as articulated for the purpose of his victimisation claim) as falling under section 103A **ERA**, the simple fact is that he did not do so. He specifically chose to identify his unfair dismissal claim as falling under section 104 and not section 103A **ERA**. Even allowing for a potential unfamiliarity with the statutory provisions - although such an assumption would seem to be contradicted by the Claimant's own documentation and statements to the ET - he did not say that he thought the real reason for his dismissal was the fact that he had blown the whistle on a potential act of sexual or sexual orientation harassment, in breach of a legal obligation, or that he had disclosed information which was of a potential breach of a legal obligation.

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39. A party, even if a litigant in person unfamiliar with ET procedures, can reasonably be expected to state that which is at the heart of their complaint. Here, the Claimant had apparently done precisely that: claiming that he had been dismissed because he had alleged that the employer had breached one of his rights under the **ERA**. If that was not the Claimant's complaint, but he was really contending he had blown the whistle on conduct that could have given rise to a breach of a legal obligation, he could reasonably have been expected to have said so. He did not.

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40. In those circumstances I am unable to see that the ET erred in law. It determined the case before it. What it did not do was to seek to anticipate any or all other potential causes of action that might have been said to possibly arise from the facts asserted by the Claimant. Whilst it might have been possible to carry out that exercise and see a possible case under section 103A **ERA** (which is why Slade J saw a reasonably arguable point arising in this case on the Rule 3(10) Hearing), to have undertaken that task of its own initiative would have required the ET to descend into the arena, taking on an inquisitorial role to investigate the potential claims open to the Claimant. That was not the ET's task and it did not err in law in retaining its role as impartial adjudicator of the arguments presented before it.

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41. Even if I was wrong about this however, I agree with the Respondent that the point is ultimately an academic one. The Claimant's case on the facts did go forward to a Full Merits Hearing and his assertion as to the reason for his dismissal being informed by the discussion on 19 September 2016 was rejected by the Goodrich ET. In his written submissions for today's hearing the Claimant made various detailed objections to the Goodrich ET's findings adverse to his case, but his appeal against that Judgment was dismissed by the EAT as being totally

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without merit. Although he is seeking permission to appeal that ruling to the Court of Appeal, at this stage he is thus bound by those findings, as am I.

42. I am thus satisfied that the ET in this case did not err in law. In any event, the claim the Claimant now seeks to assert would have been bound to fail given the findings made at the Full Merits Hearing of his **EqA** claims. For those reasons, I therefore dismiss the appeal.