Appeal No. UKEAT/0188/18/JOJ

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 January 2019

**Before**

**HIS HONOUR DAVID RICHARDSON**

**(SITTING ALONE)**

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MS A KOUCHALIEVA — APPELLANT

LONDON BOROUGH OF TOWER HAMLETS — RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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| For the Appellant | MR RAD KOHANZAD<br>(of Counsel) |
| For the Respondent | MS IJEOMA OMAMBALA<br>(of Counsel)<br>Instructed by:<br>London Borough of Tower Hamlet<br>Legal Services<br>Town Hall Mulberry Place<br>5 Clove Crescent<br>London<br>EC14 2BG |

**SUMMARY**

**PRACTICE AND PROCEDURE – Case Management**

**DISABILITY DISCRIMINATION – Reasonable adjustments**

The Employment Tribunal did not err in law either (1) in the way in which it dealt with an existing list of issues or (2) in the way in which it addressed a reasonable adjustments claim.

**HIS HONOUR DAVID RICHARDSON**

1. This is an appeal by Ms Antoaneta Kouchalieva ("the Claimant") against a Judgment of the Employment Tribunal ("ET") sitting in London (East) (Employment Judge Prichard, and members Mrs Everett and Ms Long) dated 31 October 2017. By its Judgment the ET dismissed complaints of unfair dismissal and disability discrimination which the Claimant brought against her former employers, the London Borough of Tower Hamlets ("the Respondent").

2. Following a hearing under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993**, two grounds were permitted to proceed. The first relates to the list of issues which had been worked out at a Preliminary Hearing and agreed between the parties. The ET said that some issues had not been pursued; and the question arises whether this was an error of law or led the ET into an error of law. The second relates to a particular finding of failure to make a reasonable adjustment. The question is whether the ET sufficiently analysed and understood the issue before reaching its conclusion.

3. I will first set out the background facts; then summarise the ET's overall reasoning; then turn to these two grounds.

**The Background Facts**

4. The Respondent is responsible for a service known as the Tower Hamlets Transport Service. It is available to take children to their schools if they have physical disabilities or learning difficulties sufficient to warrant a statement of special educational needs. The service operates buses in the morning to take the children to school and in the afternoon to return them home. Some schools specialise in physical difficulties. Many of the children who are transported

to and from these schools will be wheelchair users. Other schools specialise in learning difficulties, such as ADHD; these children will not usually be wheelchair users but they may exhibit challenging behaviours. Another school specialises in children with auditory problems. These are less likely to be wheelchair users or to exhibit challenging behaviours.

5. The Claimant was employed as a Passenger Assistant on the service from 28 August 2007. During her employment she developed physical impairments to her health. These were defined as joint hypermobility, spondylosis, osteophytes and osteoarthritis. They particularly affected her hands and neck. The problems worsened considerably with the passage of time.

6. Over the period in question occupational health reports recommended adjustments. To begin with, it was recommended that she should avoid clamping and releasing wheelchairs. Later, the recommendations widened. She should avoid any work, which inherently involved repetitive forceful manipulation.

7. As time went by manual handling of most kinds became difficult for her; even the use of a computer keyboard was almost impossible. By December 2015 the occupational health advice was that she was currently unfit for the Passenger Assistant role taking into account its inherent physical demands. In April 2016 a doctor noted that she was coping with work which did not involve gripping. She had come to an informal arrangement with a member of staff in the same vehicle for that member of staff to cover the duties with which she struggled. There is no doubt that the Claimant's disability by 2016 and 2017 was considerable. Her daughter, whose evidence the ET accepted and whom the ET commended, spoke to the extent of the Claimant's problems in day-to-day life.

8. During her period of employment with the Respondent, the Claimant had worked on a number of different bus routes. The Respondent attempted to make changes to assist her with her disabilities as they developed. It is not necessary to describe them all in this Judgment.

9. I will pick up the story in 2016. By this time, the Claimant was on a run where she was coping with her duties only by reason of the informal arrangement with another member of staff. The run involved manual handling which she wished to avoid. I shall return to this later.

10. In September 2016 the Respondent moved her to a different route; the Culloden School for children with auditory problems who were less likely to have a need for any manual handling. The ET described this move as a good idea, showing sensitivity to the problems the Claimant had. The Claimant, however, was aggrieved by this change of route, which involved a longer tube journey for her to get to work. She insisted that she could and should work on a route to Cherry Tree School. The Respondent did not agree. The school was a boys' school and the boys exhibited challenging behaviour, including violence to each other and violence to staff. The Respondent regarded this route as quite unsuitable for a person with the Claimant's disabilities.

11. The Claimant was absent from work continuously from September 2016 onwards. The Respondent operated its sickness absence management procedure. In reliance on occupational health advice, it found that she was not fit for the duties of a Passenger Assistant. The Respondent said it was not feasible that she should be unable to complete any manual handling duties in the long term because this was a primary requirement of the Passenger Assistant role. A period was allowed for redeployment from 30 January to 21 April 2017 in case any suitable vacancy arose. The Respondent dismissed the Claimant with effect from 21 April 2017.

**The ET's Overall Reasons**

12. On 8 March 2017, prior to her dismissal, the Claimant brought ET proceedings complaining of disability discrimination. The details given were in narrative form followed by an assertion that the complaints were of direct disability discrimination, failure to make reasonable adjustments and harassment.

13. On 15 May 2017 a Preliminary Hearing took place before Employment Judge Gilbert. She listed out the issues which arose from the existing complaints, recognising that a further complaint of unfair dismissal and disability discrimination would soon be brought.

14. On 25 June 2017 the Claimant brought a second set of ET proceedings complaining of disability discrimination and unfair dismissal. The parties then agreed an updated list of issues which took account of both sets of proceedings. I will return to this list later in its Judgment.

15. The ET hearing took place over three days in September 2017. The Claimant represented herself. The Respondent was represented by Ms Omambala who also appears today. Witness statements had been prepared and a bundle exchanged. The ET took time for consideration and delivered a Reserved Judgment dated 31 October 2017.

16. I think it is helpful before turning to the grounds of appeal to give an overview of the ET's Reasons. They are in four sections.

17. The first section runs from paragraphs 1 to 89. It consists mainly of factual findings. However, there are digressions relating to the issues to be determined (see paragraphs 23, 35 to

37 and 39) and paragraphs which prefigure what might more normally be found in the ET's conclusions (for example, paragraphs 54, 75, 83 and 89).

18. The second section deals with unfair dismissal. The ET found the reason for dismissal was long-term absence on sick leave and the dismissal was fair and reasonable (see paragraphs 90 to 95).

19. The third section is headed, "**Disability Discrimination Equality Act 2010**." In this section, the ET dealt with time limit issues concerning the disability discrimination claims. It found that all pre-dismissal complaints were out of time (see paragraphs 96 to 100). In this context, the ET again commented on the list of issues (see paragraph 100), and I will return to this.

20. The final section is headed, "The 4 types of disability discrimination." In it the ET dealt in four paragraphs with what it described as "the dismissal itself". It found that the dismissal was neither direct discrimination, harassment nor discrimination arising from disability. It dealt finally with the question whether the Respondent ought to have made a reasonable adjustment by allocating the Claimant to the Cherry Tree route. This paragraph, paragraph 104, is the subject of the second ground of appeal.

## Ground 1: The ET's Treatment of the Issues

### The List of Issues

21. The list of issues began with issues relating to the Claimant's disability. By the time of the ET proceedings it was common ground that the Claimant was disabled in the ways set out in that list. The list then went on to deal successively with harassment, direct discrimination and

discrimination arising from disability. The following specific conduct or treatment in addition to dismissal itself was set out in each case:

> **"2.1.1 From late 2010 early 2011 promising and then failing to move the Claimant to the Cherry Tree bus;**
>
> **2.1.2 Forcing the Claimant to work on the bus at the back of the bus where she had to stoop each time she moved forwards to assist pupils from 2010 to 2015;**
>
> **2.1.3 Requiring the Claimant to work on a longer route with increasing numbers of children thereby increasing the manual handling;**
>
> **2.1.4 Requiring the Clamant, if she was sitting at the front of the bus to turn around and face the children;**
>
> **2.1.5 Not allowing the Claimant to keep her belongings in the not in use fridge on the bus used by the driver**
>
> **2.1.6 Not allowing the Claimant to stow her belongings on a vacant seat but requiring her to stow them under the bus seat**
>
> **2.1.7 Referring to the Claimant as a bully;**
>
> **2.1.8 Failing to investigate a complaint made buy [sic] the Claimant about being referred to as an animal because she did not believe in God;**
>
> **2.1.9 Telling the Claimant she could not claim overtime for attending an out of hours meeting at Blackwall depot;**
>
> **2.1.10 On two occasions the Claimant was late due to difficulties with the central line and the Respondent deducted 2 hours from her wages."**

22. In addition, under the heading of "Discrimination arising from disability" there was listed "Forcing the Claimant to work with colleagues who bullied her".

23. The list then addressed reasonable adjustments. The PCP in issue was whether the Respondent required manual handling on routes where the Claimant worked. Her disadvantage was said to be that she could not work with passengers requiring wheelchairs, could not work in low-height buses or in larger buses carrying large numbers of children if seat belt adjustment or harness adjustment was required. The reasonable adjustment contended for was a transfer to the Cherry Tree route.

24. The list dealt finally with unfair dismissal. It did not deal with time issues at all (whereas the list at the Preliminary Hearing had done so); but they plainly arose as regards the first set of ET proceedings.

The ET's Reasons

25. In its Reasons the ET dealt with the list of issues in the following places. Firstly, in the course of its long opening section, it said the following in paragraph 25:

> **"25. A list of issues was drawn up between the parties, as often. However, the way this hearing has played out, and in the written witness statements, some of those issues have not been touched upon. We have to assume those issues have not been pursued, and therefore have disappeared."**

26. It returned to the matter in paragraph 37:

> **"37. There are 10 alleged acts of disability discrimination dating from 2010 to approximately 2015 as far as we understand the evidence. It is remarkable at this hearing, and in preparation of the witness statements compiled for the hearing, the claimant has devoted almost no time at all to those earlier issues which are anyway a long way outside the jurisdictional time limit. She did not even raise a grievance until 20 April 2016, a year before her dismissal. She maintains it was February 2016 by email, but because it was not headed "grievance", the respondent did not treat it as such."**

27. It is then necessary to turn to the section where the ET dealt with time limit issues. In paragraph 96 it said:

> **"96. Turning to the disability discrimination complaints. As earlier stated all the pre-dismissal [sic] are out of time, and some substantially out of time as far back as 2010. In the tribunal's view this is a paradigm case where it is not just and equitable to extend time."**

28. The ET went on to give Reasons for this conclusion in paragraphs 97 to 100. It is important to read paragraph 100:

> **"100. As stated there were several incidents that simply were not touched on during evidence or in the witness statements e.g. failing to investigate a complaint made by the claimant about being referred to as "an animal because she did not believe in God". This happens to have been a complaint against Amina Noor. We did not hear about it. It seems that the process of "agreeing" a list of issues was a waste of time. This, and other detriment complaints, has not been pursued."**

Submissions

29. On behalf of the Claimant, Mr Kohanzad submits that the ET erred in law in failing to address the case by reference to the agreed list of issues. He accepts that the Claimant did not mention many of these issues in her witness statement, although he points out that she did mention some. However, he says that the ET was not entitled to conclude that the issues were not being pursued without actually confirming with the Claimant that this was the case. The overriding objective requires the ET, so far as practicable, to ensure that the parties are on an equal footing.

30. In his skeleton argument and in his oral submissions, he argued that the ET's approach should be as follows.

31. Firstly, if at any stage during the proceedings the ET realises that the unrepresented Claimant has failed to address a particular issue or issues either written or oral evidence, the ET should raise the matter with the Claimant and ask them whether they intend to abandon the claim. If the ET followed the agreed list of issues, then it will generally be obvious by the end of the Claimant's evidence if an issue has not been addressed.

32. Secondly, if the Claimant does not wish to abandon that part of the claim, they should be invited either to provide a witness statement addressing the issue(s) or to give oral evidence on the matter (allowing for an adjournment if necessary). Whether a witness statement or oral evidence is preferable will be case and circumstance dependent.

33. Thirdly, if at any stage during the proceedings the Respondent realises that the unrepresented Claimant has failed to address a particular issue(s) the Respondent should bring the matter to the Claimant's attention and to the ET's if the matter has not been remedied

satisfactorily. Mr Kohanzad makes it plain that no criticism is made of the Respondent in this case.

34. On behalf of the Respondent, Ms Omambala submits that the ET was under no duty to raise specifically with a litigant every issue which the litigant has not pursued during the hearing. The ET at a final hearing had a general power to regulate its own procedure; see Rule 41 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("ET Rules"). The list of issues is a case management tool not a pleading. It delimits the issues but does not require an ET to determine all of them or stick slavishly to them. The ET was entitled to proceed in the way it did. In any event, it was plain that the allegations were out of time and the ET did not consider it just and equitable to extend time.

35. The parties referred me to authorities in which the status of a list of issues has been considered - in particular, most recently **Scicluna v Zippy Stitch Ltd & Ors** [2018] EWCA Civ 1320 where the earlier authorities were reviewed.

36. In **Scicluna v Zippy Stitch**, Longmore LJ summarised the function of a list of issues in ET litigation. He said the following at paragraphs 14 to 16:

> **"14. I agree with Ms Betts. Ever since the Woolf reforms, parties in the High Court have been required to agree lists of issues formulating the points which need to be determined by the judge. That list of issues then constitutes the road map by which the judge is to navigate his or her way to a just determination of the case. Employment tribunals encourage parties to agree a list of issues for just that reason and, if advocates are retained on both sides, it is right and proper for a list of issues to be prepared.**
>
> **15. In paragraphs 32-33 of *Land Rover v Short* (2011) UKEAT/0496/10/RN Langstaff J approved the submission of counsel that: -**
>
> > **"it was trite law that it was the function of an Employment Tribunal to determine the claims which the claimant had actually brought, rather than the claims which he might have brought and that accordingly the claimant was limited to the complaints set out in the agreed list of issues."**
>
> **So likewise must the respondent be limited to the defences set out in the agreed list of issues.**
>
> **16. In similar vein, Mummery LJ in *Parekh v London Borough of Brent* [2012] EWCA Civ 1630 (with whom Patten LJ and Foskett J agreed) said: -**

> **"31. A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimised. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see *Land Rover v Short* at [30] to [33]." "**

37. In this case there was such a list of issues. A professional lawyer preparing a witness statement prior to the hearing and conducting the hearing might well have framed the witness statement and argument by reference to the list of issues, or at the very least specifically explained to the ET why some issues were not pursued. The Claimant was, however, a litigant in person. She did not deal with some of the issues in her witness statement and argument. As the ET noted, the issues which were not addressed were ones arising early in the history.

38. I do not accept Mr Kohanzad's submission that the ET was, in effect, bound to intervene in order to ensure that the Claimant was aware that her case on these issues had not been properly put forward. Both rule 2 of the **Employment Tribunal Rules of Procedure 2013** (which sets out the overriding objective applicable to ET procedure) and rule 41 (which provides that the ET may regulate its own procedure and should conduct a hearing in the manner it considers fair) give the ET a wide discretion in the extent to which it intervenes to assist a litigant in person.

39. There can be dangers in too much intervention. It may encourage points to be pursued which litigant had no real intention of pursuing and it may lead to delay and cost for the opposite party. There can of course also be dangers in non-intervention if a litigant in person misses an important point which in fairness ought to be drawn to the litigant's attention. Considerations such as these lie behind the wide discretion given to the ET. Whether to intervene to assist a litigant in person is very much a matter for the ET. No point of law arises unless the ET exercises its case management powers or conducts the hearing in a way contrary to law by leaving out of

account something essential, or taking into account the irrelevant, or deciding the case in a way which is outside the parameters of reasonable disagreement.

40. In this case the issues which the Claimant had not addressed in her evidence were all issues dating back some time with obvious time limit problems. If the Claimant concentrated on the more recent and important issues, in all probability she was very wise to do so. I do not think the ET committed any error of law by not raising with her the older ones. It was acting in a way which was entirely within its powers.

41. I confess to being uncertain what the ET meant by paragraph 25 of its Reasons. If it meant, in effect, that it took the Claimant as withdrawing some issues, that would be an error; she had not withdrawn them or abandoned them. If it meant simply that she was not actively pursuing them that would be a conclusion it was entitled to reach. If it stood alone, paragraph 25 would be problematic because it could be read either way.

42. However, I consider that the ET's subsequent reasoning indicates quite plainly that it considered all the complaints in question to be out of time. Paragraph 96 states such a conclusion. Paragraph 100 says that there were incidents which were not touched on during the evidence or pursued. Again, that is not in itself an error of law and it is relevant to the question of whether all the claims prior to the dismissal were out of time. I, therefore, do not think in the end that there is any error of law in the ET's Reasons, although I consider that paragraph 25 is poorly expressed.

43. I would add that, if I had thought that there was an error of law in the ET's Reasons, I would still have declined to allow the appeal. To my mind the reasoning in paragraphs 96 to 100

shows quite plainly that it considered all the claims in question to be out of time and that it was not just and equitable to extend time. I do not think that that conclusion is vitiated by anything in paragraph 100.

**Ground 2: The Reasonable Adjustment Claim**

The ET's Reasons

44. The ET set out its conclusions on this question in paragraph 104 of its Reasons:

> **"104. Finally, does this demonstrate that the respondent failed to make a reasonable adjustment for the purpose of section 20 of the Equality Act 2010? The adjustment that the claimant was asking that she be allocated to the Cherry Trees run. In our view such an adjustment was absolutely not reasonable. Even the claimant's suggestion that she at least trial it on an unpaid basis as a supernumerary visitor was not a reasonable request despite indecisive evidence to the contrary given by Mr Ormsby, and contrary to the claimant's reliance on 5 November 2012 occupational health report the evidence shows that the respondent made several adjustments, attempting to do exactly what the claimant accused them of not doing. The respondent did not ignore HR advice, and did attempt to achieve reasonable adjustments." (Tribunal's emphasis)**

45. In reaching this conclusion the ET built on earlier findings. It is sufficient to quote paragraphs 54 to 55:

> **"54 The claimant, however, wished to resume working on the Cherry Trees route. This was her repeated request, to the exclusion of virtually all other issues at this hearing. It was an intransigent problem. The respondent was, and is, adamant (in our view, for good reasons) that such a placement was out of the question. The health and safety risks for the claimant, for her colleagues, for the driver and for the children themselves were far too great.**
>
> **55 The boys at Cherry Trees (they are all boys at this school), all had challenging behaviour and were typically diagnosed with ADHD. They could be, and were, violent - violent to each other, and violent to staff. Ms Parker described how a member of staff had been punched in the face by a boy this year."**

Similar findings are also made at paragraphs 73 to 75. It is not necessary to quote those paragraphs in this Judgment.

Submissions

46. Mr Kohanzad submits that the ET did not work through the issues concerning reasonable adjustments in the way which was recommended in **Environment Agency v Rowan** [2008]

IRLR 20 approved by the Court of Appeal in **Newham Sixth Form College v Sanders** [2014] EWCA Civ 734. He submits that the ET's conclusion in paragraph 104 is vitiated by that failure. The ET did not or may not have understood the nature of the Claimant's disadvantage. He submits that her disadvantage was her inability to cope with repetitive manual handling. That was not the same as being unable to restrain children on a bus. Her case is that the disadvantage did not extend to inability to restrain children on a bus.

47. Ms Omambala submits in response that there was really no issue at all about the PCP or the extent of the disadvantage. The real question was whether it was reasonable for the Respondent to have to put the Claimant on the Cherry Tree route. The ET dealt with this issue properly in its Reasons.

Discussion and Conclusions

48. It is without doubt a good discipline to address reasonable adjustment issues through the framework recommended in **Environment Agency v Rowan** working carefully through issues relating to PCP, the comparative disadvantage and then the alleged reasonable adjustment. In some cases a failure to do so will be or will lead to legal error. In this case, however, I do not believe the ET fell into legal error.

49. There was, in my judgment, no dispute as to the PCP in question. The PCP was manual handling. Manual handling was not to be construed restrictively. The Claimant herself gave an indication of the tasks which she considered she was being asked to do during a period in 2016, which indicates what she understood the position this way:

> **"6. From February 2016 until July 2016 I worked on a bus with fewer children. I no longer had to apply seat belts but there were other types of manual handling such as lifting heavy bags, helping pupils to get on and off the bus, handling pupil's possessions, stopping pupils from doing something etc. …" (Claimant's ET1)**

50. Nor is there any doubt that the PCP caused the Claimant substantial disadvantage. For the purpose of the list of issues, the Claimant had put forward three ways in which the PCP caused her substantial disadvantage. I have already summarised them. They were not necessarily the only ways in which the PCP caused her disadvantage as is shown by the passage which I have quoted from the ET1.

51. The real question was whether it was reasonable for the Respondent to have to make the adjustment of putting her on the Cherry Trees School run. The ET stated its conclusion on this issue in paragraph 104, building on earlier reasoning to which I have referred or which I have quoted. I do not think it fell into any error of law in so doing.

52. It is true that the Claimant considered that she would be able to manage the Cherry Trees School route. However, the Respondent was not bound to take the same view; and the ET's task was to adjudicate which was the correct view and whether in the circumstances it was reasonable for the Respondent to have to put the Claimant on the Cherry Trees run.

53. The ET decided that issue against the Claimant. I see no error of law in its reasoning on that point. I do not think it is affected by the failure of the ET to include at the beginning of paragraph 104 sentences about matters which were really not in issue.

54. For those reasons I conclude that the appeal must be dismissed.