EMPLOYMENT TRIBUNALS

Claimant:	**Ms D Njoroge**
Represented by:	**did not attend**
Respondent:	**London School of Hygiene and Tropical Medicine and others**
Represented by:	**Ms A Palmer, counsel**
Before:	**Employment Judge Hodgson**

Held – 16 November 2020 at London Central Employment Tribunal

JUDGMENT

1. The claim of ordinary unfair dismissal, pursuant to section 94 Employment Rights Act 1996, is dismissed.

Orders and Directions

Made pursuant to the Employment Tribunal Rules of Procedure 2013

1. The claims that may proceed are set out in the list at Appendix 1.

2. The case management hearing listed for 24 November 2020 is vacated.

Unless orders

3. **Unless the claimant on or before 18 December 16:00 discloses to the respondent her GP notes by sending copies of the same, the allegation that she is disabled shall be struck out without further notice or warning.**

4. **Unless the claimant on or before 16:00, 18 December 2020 complies with her obligation to disclose to the respondent those documents in her possession that are relevant to the issues in this case by sending both a list of documents and copy documents all claims shall be struck out without further notice or warning.**

REASONS

Introduction

1. There are four claims before the tribunal: claim one, 2204179/2019, issued on 17 September 2019; claim two, 2204481/2019 issued on 21 October 2019; claim three, 2205098/2019, issued on 26 November 2020, and claim four, 2205211/2019, issued on 5 December 2019. A 12-day full merits hearing was due to start on 16 November 2020. Unfortunately, little, if any, progress has been made in this case and the full merits hearing could not proceed. The issues had not been defined, the claimant had not provided any disclosure, the claimant had not provided her medical notes, nor had she, adequately, set out her allegation of disability.

2. The full merits hearing was converted into a three-day public preliminary hearing, in order to consider a number of outstanding matters and preliminary issues. The claimant failed to attend the hearing and for the reasons which I will come to, the preliminary hearing proceeded in her absence.

Procedural history

3. On 28 November 2019, the claimant was directed, by letter, to state why the unfair dismissal claim should not be struck out, as it appeared that she did not have two years qualifying service.

4. The claims came before EJ Spencer on 2 March 2020. I am told there was an attempt to clarify the issues, and the claimant was asked to confirm what facts, as set out in her claim forms, were put forward as specific claims. Whilst that process, I understand, was extensive, it did not lead to clarity. EJ Spencer vacated the final hearing listed to start on 11 June 2020 and set the claims down for a final hearing, with a provisional time estimate of 12 days. It was implicit that she treated the claims as if they were to be heard together, it is not clear to me if a formal order had been previously made.

5. EJ Spencer identified six matters to be dealt with at a preliminary hearing which in summary were as follows: whether the ordinary claim of unfair dismissal should be struck out or an amendment allowed for the claims to proceed under section 103A or 104 Employment Rights Act 1996; whether a restricted reporting order should be made; the question of disability; whether any of the alleged complaints are the subject to legal privilege; general case management, including the finalisation of the list of issues; any further applications. General directions were given to allow the matter to be prepared for the final hearing.

6. Whilst there is reference to considering amendment, no application to amend has been made, as far as I am aware, by the claimant at any time. Instead, the claimant was ordered to provide, by 4 April 2020, information concerning a possible automatic unfair dismissal claim and I presume it is envisaged that would form the basis of any application to amend.

7. The basis of any alleged disability is not apparent from her claim form. At the hearing before EJ Spencer, the claimant referred to fibroids. The claimant was ordered, by no later than 11 May 2020, to provide a signed statement setting out the nature of the physical impairment and the effect on day to day activity. In addition, she was ordered to supply copies of her GP notes by 11 May 2020. No formal application to amend was made, or granted at that stage, although it was envisaged that the fibroids constituted the alleged impairment.

8. Disclosure was to take place by 11 May 2020. A timetable was set out for production of the final bundle. Witness statements were to be exchanged by 5 October 2020.

9. It is the respondent's position that the claimant failed to provide any particulars concerning any section 104, or section 103A claim adequately or at all. The respondent wrote to the tribunal and on 16 April 2020 EJ James directed the respondent send the claimant "a set of straightforward questions, in order to obtain further information from the claimant about her claims or proposed claims." The respondent made a further request on 7 May 2020 which the claimant has not responded to.

10. On 11 June 2020, EJ Elliott conducted a further case management discussion. She noted there were outstanding applications, as identified by EJ Spencer, which she recorded and clarified. She noted, in addition, the first respondent now requested the claims to be dismissed against the individual respondents and that there was an application for a deposit order.

11. The respondent reported the claimant had failed to provide clarification and comply with orders. In particular she had failed to provide a disability impact statement and had failed to comply with orders for disclosure of her medical records; the provision of a schedule of loss; clarification of any automatic unfair dismissal claim; or disclosure of documents.

12. EJ Elliott noted the claimant had applied for a postponement of the hearing on the grounds she needed to take legal advice; the application was refused. EJ Elliott noted that orders must be complied with and that the claimant should be able to take legal advice, given the lockdown had been eased. The case management orders of EJ Spencer were confirmed with some variations and an open preliminary hearing was listed for 26/27 August. The timetable was varied in part.

The claimant was to supply a disability impact statement by 31 July 2020. The respondent was to provide further disclosure by 30 June 2020. The claimant was to reply to the question set out in the email of 7 May 2020 by 21 August 2020.

13. On 28 July 2020, the claimant sent an email stating that she had sought medical evidence from her GP. Her email does not specifically say she had requested her medical notes, as she was required to do. At the end of the email there is an impact statement and that records the claimant has had fibroids in her uterus since 2011, and that she has had numerous operations. It sets out the difficulties she has faced and states, by way of an example that it prevents her from sitting for prolonged periods without severe back pain which leads to a dependence on heavy painkillers and consequential headaches, lack of concentration, and lack of sleep.

14. On 8 September 2020, the respondent wrote to the tribunal raising a number of issues. The respondent alleged that the claimant was in breach of orders and had not supplied a medical records and had not clarified any application to amend. It is also apparent the claimant had not complied with her obligation to disclose documents. It was noted that the preliminary issues, as identified by EJ Elliott, had not been resolved.

15. On 21 October 2020, REJ Wade listed a case management hearing for 24 November 2020. The letter did not deal with the full merits hearing. On 11 November 2020, EJ Elliott directed there be a preliminary hearing to determine the matters due to have been heard on 26 and 27 August. The hearing would take place on 16, 17, 18 November. By a further letter of 11 November 2020, EJ Elliott directed that days one, two, and three of the full merits hearing be converted into an open preliminary hearing in public. It is implicit that the full merits hearing would not proceed.

16. On 12 November 2020, the claimant applied for an adjournment of the open preliminary hearing to the week of 23 November. She set out a number of grounds which can be summarised as follows: insufficient notice had been given; she did not have reliable internet connection; she was a litigant in person who had been affected by the pandemic; the case should be transferred to another tribunal, as the case was not being treated fairly or efficiently; she needed to seek legal advice; and that it was reasonable for her to make the application at short notice. It did not say that she was unable to travel to London. It did not explain why the claimant had not been able to prepare adequately for the hearing, having regard to the fact that the matter had been listed for a full merits hearing, and the open delivery hearing had been adjourned from August. This application was not dealt with prior to the hearing before me.

<u>The hearing - 16 November 2020</u>

17. The claimant failed to attend the hearing on 16 October 2020. I requested the tribunal telephone her in an attempt to clarify matters. Neither I nor the clerk was unable to identify a telephone number. It did not appear that her telephone number was set out in on any claim form. I reviewed the correspondence I had available, but was unable to identify any telephone number. it was not possible, therefore, to contact her by phone.

18. At the hearing, I received documents. In particular, I received an opening note from the respondents' counsel and a bundle of documents. Further correspondence, including the claimant's application to adjourn was added to the bundle at the hearing. I requested a number of documents, including counsel's opening note, the chronology, and the draft issues sent to my second the judiciary account, which exists only for the purpose of receiving documents when requested. I requested that the claimant be copied in.

19. I considered with the respondent the claimant's application to adjourn. The application was opposed. Counsel indicated the respondent's solicitor had written to the claimant prior to the hearing informing her that she should attend, as despite her application to adjourn, no adjournment had been granted.

20. I refused the application to adjourn. There is no automatic right to adjourn. I considered whether sufficient notice had been given. The final hearing had been listed on the direction of EJ Spencer and the claimant had received notice. It is not uncommon for final hearings to be converted to preliminary hearings when it is not possible to proceed with the final hearing. Conversion does not invalidate the original notice and is permitted by rule 48. I am satisfied that the conversion is in the interests of justice and that neither party has been materially prejudiced.

21. The matters to be dealt with at the open preliminary hearing had been identified first in March by EJ Spencer and thereafter in June by EJ Elliott. The claimant had had ample time to prepare, and to take legal advice. Preparation should have been completed by no later than the end of August 2020. Whilst conversion had occurred at short notice, the actions of the claimant had been the main reason why the full merits hearing could not proceed. It was apparent that she remained in breach of tribunal orders. She had not provided information as requested. It was not clear that she was actively pursuing the claim. Her application fell far short of stating that she could not attend for any medical reason. I had no doubt that the claimant, in common with many others, experienced anxiety, but there was no specific reason why she could not attend the hearing in person. Moreover, steps had been taken by the tribunal to undertake risk assessments and to ensure, as far as practical, social distancing designed to minimise any risk of transmission of the Covid-19 virus. It was apparent from this

letter, and from previous documents, that the claimant objected to the matter proceeding in London Central employment tribunal, at all. This appeared to be part of the reason for the claimant failing to attend.

22. In the circumstances, I was not satisfied that the claimant could not attend. She remained in breach of orders. She had had ample notice. I did not accept that she was unable to prepare adequately for this hearing. She had had ample opportunity to take legal advice. It appeared she may not have attended because she fundamentally objected to the matter proceeding in London Central employment tribunal. Further adjournments would lead to expense and wasted costs for the respondent. There would be delay. Adjournment would prevent any progress being made in identifying the issues in the claims, when there has been a significant lack of progress in any event. I refused the application to adjourn and I considered each of the open preliminary hearing points.

23. I raised with the respondent my concern that, despite there being four claims, two previous preliminary hearings, and substantial correspondence, the issues in this claim remained fundamentally unclear. I noted that the respondent had provided to the claimant a draft list of issues which had not been accepted by the claimant, albeit it is the respondent's position that she has failed to adequately set out her reasons for objecting and has failed to provide clarification. I understand this draft had been prepared following the first hearing.

24. The respondent’s draft list of issues identifies numerous potential allegations of discrimination, harassment, and victimisation. There appeared to be in the order of thirty separate allegations outlined, albeit many of them are unclear and lack particularisation. In addition, there are at least twelve references to job applications about which it appears the claimant may be alleging some form of discrimination. There are thirteen respondents.

25. I noted that the lack of clarity was causing serious difficulty in this case. Until the issues were finalised, it was not possible to know with sufficient certainty the claims that needed to be met by the respondents and this was fundamentally undermining the possibility of a fair hearing.

26. The matters before me on the open preliminary hearing were as follows:

    a. Whether the claim of ordinary unfair dismissal should be struck out.
    b. Whether the claimant should have leave to amend to include a section 103A or section 104 Employment Rights Act 1996 claim.
    c. Whether there should be a restricted reporting order.
    d. Whether the claimant was a disabled person.
    e. Whether there are matters subject to legal privilege which should not be referred to the proceedings.

f. Finalisation of the list of issues.
g. The respondent's request to dismiss all claims against all individual respondents.
h. Whether any deposit order should be made.

27. I will deal with each in turn. I will start with the issues in this case, as finalisation of the issues is fundamental to a fair hearing.

28. Before considering the issues, it is necessary to set out the legal principles at some length.

Relevant law

29. It is necessary to consider in some detail what is the nature of and purpose of a list of issues: what is the responsibility of the tribunal, and what is the right approach?

30. I remind myself of the overriding objective. Cases must be dealt with fairly. This involves the fair participation of both parties. Moreover, it is necessary to deal with a claim to ensure the following: the parties are on an equal footing; the case is dealt with in a way which is proportionate to the complexity and importance of the issues; unnecessary formality is avoided; delay is avoided; and expense is saved.

31. A tribunal should eschew negative pleading battles between parties. As far as possible, unhelpful and unnecessary satellite litigation should be discouraged. That said, a respondent must know the case it is to answer.

32. It is for the claimant to set out the case in a relevant statement of case. (I shall refer to the claim forms and any statements of case generally as the pleadings.) Therefore, it is for the claimant to plead the case properly in the first instance. It is common, particularly when individuals are not represented, for there to be deficiencies in the initial documentation. Those deficiencies are sometimes addressed by what are generally referred to as further and better particulars. It is important to recognise that, rather than being a necessary part of the pleadings process, the use of further and better particulars is a remedial response to a failure of process.

33. It is frequently the case that further and better particulars, when provided, identify new facts. The addition of facts will normally require an amendment, see **Selkent Bus Company Limited v Moore** 1996 ICR 836. However, the overriding objective tells a tribunal to avoid excessive formality. Where neither party takes specific objection to a new fact, it is included as part of the claim without the need for a formal amendment. This reflects a pragmatic approach; it is not a right. Care should be taken to prevent the remedial process of further and better particulars from circumventing the exercise of a tribunal's discretion to

grant amendments. In short, the process of providing further and better particulars may be a pragmatic way of rectifying a deficiency in a pleading.

34. The issues are a distillation of the pleaded case. It is a way of identifying what are the causes of action, and what are the specific factual allegations that are said to be some form of detrimental treatment which are to be determined in the action. Care should be taken to ensure the identification of issues does not circumvent the exercise of a tribunal's discretion to grant amendments.

35. In **Land Rover v Short UK** EAT 496/2010 before, Mr Justice Langstaff, the EAT confirmed that where a dispute arises about the issues, it is for the tribunal to make a ruling. In **Price v Surrey County Council and another**, UK EAT 450/2010, Lord Justice Carnworth confirmed that the tribunal must exercise control over the form of the issues, even if agreed by the parties. In that case, the issues were described as a confused amalgam of factual allegation and major issues. The tribunal should not simply accept the issues provided by the parties, even if the parties agree them between themselves. It is part of the tribunal's role to exercise control over the way in which the issues are presented.

36. The point was re-emphasised by Langstaff P in the case of **Chandhok v Tirkey** EAT 190/14.

> **17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.**

> **18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.**

37. When further and better particulars are needed, the question of amendment is engaged. Amendments may be minor or major. Three broad types are often identified. First, amendments that seek to put a new label on existing facts. Second, amendments to a cause of action already pleaded that add detail to an existing allegation or add a closely related allegation essentially relying on the facts. Third, amendments which add new factual allegations or new causes of action which require some expansion of, or change to, the factual basis of the original claim.

38. Simple relabelling, or clarification of an allegation, may be seen as a minor matter and cause no objection. The addition may be consented to without an express order. Adding new allegations that require new facts and may be seen as a major change, and formal amendment may be desirable.

39. For simple relabelling, further and better particulars are unlikely to be needed. Further and better particulars may be a useful tool when facts need clarification, but it is important to recognise the limitation of the process lest it add to the uncertainty and divert the parties and the tribunal into thinking that the claim be found elsewhere than in the pleadings. To understand the limitation of the use of further and better particulars, it is necessary to understand that lack of clarity in the original pleadings comes in three main varieties which I will refer to as categories.

40. Category 1: First, there may be a clear cause of action identified, such a as direct discrimination, but the allegations given may lack clarity. For example it may be alleged that a person complains of a specific failure to promote or alleges specific offensive words had been used. Here there would be specific allegations of fact said to constitute specific detriment. In such cases, the process of further and better particulars may properly be said to be a clarification of an existing allegation. It may be necessary to give additional details of the specific promotion in question – when was it advertised, when did the claimant apply, and who gave the refusal. It may be necessary to give further

details of the specific offensive words identified – when were they used, by whom, and where.

41. Category 2: Second, there may be some general allegation which does not identify a specific occasion or identify a specific detriment. For example if a claimant refers generally to failure to promote over a period of time or refers in general to abusive words, it may be reasonable to say there has been a failure to identify any specific allegation of detriment at all. Here there is no specific detriment capable of clarification. The claimant may have some specific fact or facts in mind, but it is difficult to see how it could be said that any further and better particulars are expanding on some specific allegation, as none is identified.

42. Category 3: Third, there may be a more general allegation that goes little further than saying I was discriminated against or treated badly. In such situations the claimant is advancing his or her own general conclusion and it is not possible to even guess at what specific allegations, if any, are relied on. Here there is no identified detriment capable of particularisation.

43. For category 1 (adding detail to a specific allegation), it can properly be said that further and better particulars may be clarifying an existing allegation. The position is less clear for category 2 and category 3, as the new facts may give rise to new allegations of discrimination or new causes of action, or both. This involves an addition of claims: not a clarification.

44. Details added in a category 1 case may be seen as important but minor amendments, and hence why formal amendment may not be required. If further and better particulars are used in relation to the second and third categories identified, it cannot be said that any pleaded detriment is being further particularised. If further and better particulars are allowed for those two categories, there is a serious risk that there will be a dramatic expansion of the claim. Moreover, the new particulars may be inadequately particularised themselves. If allowed to proceed, the result can be a poorly particularised claim ranging over numerous allegations. This can lead to a hearing which has inadequately identified issues, which cannot be properly case managed, and which may last days or even weeks longer than is necessary. It is because of this real danger that a tribunal should be cautious to prevent the necessary process of amendment being circumvented.

45. The tribunal should take care not to view the claim in an unduly restrictive way. As a general principle, the tribunal must consider the whole of the claim form. The tribunal should not take an unduly restrictive view, particularly when an individual has presented a claim without the benefit of legal advice or assistance. However, when looking at allegations of discrimination, the tribunal can reasonably look to see whether there are specific factual allegations identified in the

claim form. It is appropriate to avoid unnecessary formality, and it should be recognised that it is often difficult for litigants in person to understand complex legal points. However, identifying specific factual allegations does not involve any legal complexity; the requirement is obvious and can be readily understood. Where discrimination is alleged, frequently claimants have no difficulty identifying the specific allegations of detriment: those facts are often painful, memorable, and documented.

46. For allegations of discrimination, it is necessary for the tribunal when deciding a case to determine a number of specific points. In the case of direct discrimination and harassment, the first question to be asked is whether the particular factual allegation is made out. This point was addressed at paragraph 9 in **Anya v University of Oxford and another** 2001 IRLR 399, CA (per Sedley LJ)

> **9 This reasoning has been valuably amplified by Mummery J in Qureshi v Victoria University of Manchester (EAT 21 June 1996), a decision which Holland J in the present case in the Employment Appeal Tribunal understandably described as 'mystifyingly unreported'. It is therefore worth quoting at length from Mummery J's judgment.**
>
> > **'On the basis of (a) those authorities, (b) the experience of the members of this tribunal and (c) the experience of the parties, the advisers and the tribunal in this case, we tentatively add the following observations and thoughts to the guidance in Neill LJ's judgment in King v The Great Britain-China Centre [1991] IRLR 513 -**
> >
> > **The complainant**
> > **The industrial tribunal only has jurisdiction to consider and rule upon the act or acts of which complaint is made to it. If the applicant fails to prove that the act of which complaint is made occurred, that is the end of the case. The industrial tribunal has no jurisdiction to consider and rule upon other acts of racial discrimination not included in the complaints in the originating application. See Chapman v Simon [1994] IRLR 273 at paragraph 33(2) (Balcombe LJ) and paragraph 42 (Peter Gibson LJ). …**
> >
> > **The issues**
> > **As the industrial tribunal have to resolve disputes of fact about what happened and why it happened, it is always important to identify clearly and arrange in proper order the main issues for decision eg:**
> >
> > **(a) Did the act complained of actually occur? In some cases there will be a conflict of direct oral evidence. The tribunal will have to decide who to believe. If it does not believe the applicant and his witnesses, the applicant has failed to discharge the burden of proving the act complained of and the case will fail at that point. If the applicant is believed, has he brought his application in time and, if not, is it just and equitable to extend the time…**

47. What is clear is if the factual allegation is not made out, then the claim will fail at that point.

48. It is important the claimant gives, as far as is practicable, the detail of the specific allegations. For example, the claimant may complain that particular words were used. In such a case, those words should, as far as is practicable, be identified. Moreover, the claimant should, if practicable, give details of when it occurred, who was present, and importantly, whether there were any witnesses. Those details should be made plain. Equally, if the claimant cannot give that detail, the claimant should confirm that, and be bound by it. Difficulty arises when the claimant seeks to set out a claim in the most general terms, for example by simply suggesting someone was aggressive or acted inappropriately, and then seeks to add the detail, if at all, by evidence at some later time.

49. If the claimant does not give the available detail, the respondent is unable to properly prepare. The respondent may be denied the chance to identify and call the relevant witnesses. The respondent may lose an opportunity to defeat the claim at the first stage by showing the circumstances alleged never occurred. Denying the respondent that opportunity is fundamentally wrong and denies the respondent its right to a fair hearing.

50. It is also important to identify the specific allegation because the next question the tribunal must ask is whether there is evidence which would turn the burden. If the respondent is not given adequate particulars of the matter said to amount to discrimination, the respondent may not be able to produce relevant evidence concerning the circumstances which would be relevant to the question of whether the burden turns.

51. It also follows that if the allegation is not adequately identified, the respondent will fundamentally be prevented from producing the relevant cogent evidence which may demonstrate a reason which is free from discrimination. Denying the respondent that opportunity is to deny the respondent a fair hearing. It follows that the claimant's withholding of such information about the allegations of discrimination is unfair and may deny a fair hearing.

52. When a claimant makes an allegation of discrimination, it is appropriate for a tribunal to ask whether the allegation is sufficiently clear so that it would be reasonable to say that the respondent is on sufficient notice such that the respondent can produce relevant cogent evidence disputing the circumstances, explaining the circumstances, and setting out an explanation. If the answer is no, it may not be possible to hold a fair hearing.

53. In the case of **Barts Health Trust v Kensington-Oloye** EAT 137/14 the tribunal's decision was overturned because it decided an allegation that had not been adequately set out in the issues. The respondent had not had a fair opportunity to meet the claim such that it could not be expected to produce the relevant evidence in support of its

explanation. At paragraph 33 His Honour Judge Richardson deals with some general propositions:

> **33. It is convenient to begin by saying a word about the function of a list of issues. This is an important feature of current employment practice and procedure especially in more complex cases such as this. In many cases before Employment Tribunals claim forms are prepared by litigants in person or else by lay or inexperienced representatives. It is common to see a narrative accompanied by a list of quite general allegations. Sometimes the narrative and the complaints can be very long and complicated indeed. Employment law, however, especially equality law and whistleblowing law, can be prescriptive and detailed; rightly so, for the allegations are serious ones for those who are implicated in them. Moreover unless allegations are carefully identified it is impossible to prepare properly for a hearing, identifying and calling the correct witnesses. It is therefore often essential to drill down from a lengthy narrative and a general set of complaints to identify specific legal complaints defined properly for an Employment Tribunal to adjudicate. It is therefore good general Employment Tribunal practice in a case of any complexity to hold a Preliminary Hearing to ascertain and define the issues, generally by agreement.**

At paragraph 43 His Honour Judge Richardson deals with the specific failure in the case:

> **43. I am not without sympathy for the position of the Employment Tribunal. The point concerning Miss McCrindle had been addressed only in the briefest of terms in a hearing almost entirely concerned with other matters. But if the Employment Tribunal was minded to make a finding on this issue, it was required to give a fair opportunity to the parties first. This would, to my mind, have involved consideration of the definition of a new issue following an application for permission to amend in accordance with the procedure suggested in Traynor.**

54. It follows that requiring clarification is not an exercise in pedantry: it is a necessary process to ensure equality of arms and fairness of treatment. If the respondent cannot identify the circumstances sufficiently so that evidence can be brought to dispute the circumstance, explain why the burden should not shift, or give an explanation then there can be no fair hearing. If the burden shifts, the tribunal is entitled to ask if the respondent has cogent evidence and if so, has it been produced. If the evidence is not produced, then the respondent will lose. It is fundamentally unfair to allow a case to proceed in a manner which prevents the respondent being able to identify that relevant explanation and evidence. Moreover, the identification of such evidence may be time consuming and expensive. The respondent must be given the detail that allows it to focus its resources on the relevant allegation. Failure to identify the allegations sufficiently leads directly to an unfair hearing.

55. When considering a claim, it is appropriate to consider what must be identified by a claimant before it can be said the claimant has brought a claim. The Court of Appeal's decision in **Housing Corporation v Bryant** 1999 ICR 123 is of assistance. **Bryant** was concerned with amendment, but the principles are of wider application. When a

claimant wishes to amend the claim, there is considerable onus placed on that party to make the application clear. **Bryant** emphasises the importance of clarity of pleading. In that case, the claimant alleged unfair dismissal and sex discrimination. The dismissal was not said to be an act of sex discrimination. All the claims of sex discrimination predated the dismissal and were out of time. Later, the claimant sought to allege the dismissal amounted to victimisation. It was clear that the fact of dismissal was pleaded, there was reference to sex discrimination, and there was reference to victimisation. However, the claim form did not specifically refer to the causal link of retaliatory victimisation as a reason for the dismissal. The mere fact that elements existed within the claim form did not mean the claim had been brought sufficiently identified; there needed to be the statement of causal connection. Buxton LJ put it as follows:

> **...it is not enough to say that the document reveals some grounds for a claim of victimisation, or indicates that there is a question to be asked as to the linkage between the alleged sex discrimination and the dismissal. That linkage must be demonstrated, at least in some way, in the document itself.**
>
> **..the words making the necessary causative link between the making of the complaint of discrimination and the dismissal were absent from the application. But if this is to be taken as a question of construction, as a matter of law, and not merely of the judgment and assessment of the Chairman, the absence from the document of any such linkage must be fatal: because the issue of construction is whether the document makes a claim in respect of victimisation.**

56. It follows that it if a claimant lists multiple facts and at some other point refers to a cause of action, such as direct discrimination, it cannot be assumed that the claimant is, at a later stage, able to say that any of the facts referred to are claims of direct discrimination. The tribunal must ask whether the wording of the claim form demonstrates the necessary statement of causal connection.

57. It follows that a number of principles can be discerned.

58. First, it is for the tribunal to take control of the issues, particularly when there is dispute. Second when there is dispute, the tribunal must resolve the dispute. Third, whilst informality must be encouraged, it has its limits. Informality should not be allowed to become unbridled licence. Fourth, it is not enough for there to be a set of facts, and a general assertion of some form of discrimination. For there to be a claim, the necessary causational link must be demonstrated by the pleading itself. Fifth, the tribunal should take great care not to be diverted into believing that the case is set out elsewhere than in the pleadings. Sixth, controlling the issues is important, as it is necessary to control cases so that they can be dealt with proportionately and do not take an unfair share of the tribunal's resources.

Discussion

59. I have considered the approach to the issues in this case. There have been two previous case management discussions in which the claimant has been invited to provide further particulars and to state which of various facts are said to constitute allegations. The respondent has endeavoured to reflect those discussions by the production of a draft list. The draft list remains disputed, incomplete, and for many allegations entirely unclear. Counsel for the respondents confirmed that the process of particularisation has failed. I agree with that submission.

60. I am reluctant to continue this process of particularisation. There are occasions when such an informal approach is appropriate and leads to clarity and the production of a sensible list of issues. There are also occasions when it simply leads to the proliferation of inadequately pleaded and uncertain claims.

61. Here I am invited to consider the respondent's list of issues and to take account of what is reported to have been said by the claimant at various case management discussions. It seems to me that I risk being diverted into believing that the essential case is to be found elsewhere than in the pleadings. I do not propose to continue that approach, which has proved itself to be, in this case, unhelpful. Instead, I have gone back to the pleadings and considered what is actually written. In particular, I will have regard to **Bryant** when considering whether claims are actually brought.

62. The first claim contains a long, discursive particulars of claim. There is a lengthy narrative which sets out numerous background matters. Towards the ends of the particulars, the claimant specifically addresses those matters which she is putting forward as claims of discrimination. That starts at paragraph 42 and appears to conclude at paragraph 45. In addition, there are some isolated paragraphs which appear to contain specific claims. I have noted that there are numerous factual matters set out. In considering which are put forward as acts of discrimination, harassment, and victimisation I have had regard to the pleading, and I have considered if the necessary causational link is pleaded. It is clear that for many of the facts there is no such link. For some of the facts, the link exists, and those are the matters that I have identified as specific allegations.

63. I have set out the issues as they appear to me at Appendix 1. In doing so, I have noted a lack of clarity in a number of the allegations. The claims contained in the issues, as set out, are the ones that may go to a hearing. Further detail and further claims may require an application to amend

64. I am conscious that the claimant may believe that there are claims that have been brought, but which I have failed to identify. The claimant

may apply to amend or vary the issues. I will consider any application and give an appropriate ruling. If no application is made promptly, a future tribunal may refuse to vary the issues as I have set out. Where appropriate I have indicated where in the particulars of claim an allegation is set out.

65. I should now consider the remaining applications that are before me in this open preliminary hearing.

The unfair dismissal claim

66. The claimant was employed on 24 July 2018 and her employment was terminated on 17 October 2019. In order to bring a claim of what may be termed ordinary unfair dismissal pursuant to section 94 Employment Rights Act 1996, it is necessary for the claimant to have sufficient service. Section 108(1) provides:

> **(1) 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.**
> **…**

67. No exception applies in this case.

68. This matter has been raised with the claimant since an early stage. It is listed to be determined at this preliminary hearing. The claimant has made no representations and has filed no evidence; she has given no explanation. It is clear that the claimant does not have the relevant qualifying period of employment and so the tribunal has no jurisdiction to hear the claim of unfair dismissal pursuant to section 94 Employment Rights Act 1996. The unfair dismissal claim is dismissed.

Amendment

69. The possibility of amendment to include a section 103A claim and/or a section 104 Employment Rights Act 1996 claim has been raised. The claimant has been invited to provide clarification. There is no application to amend before the tribunal. There is no application to be determined. It is open to the claimant to apply at any time to include new claims. It is open to the claimant to apply to include a claim of automatic unfair dismissal whether pursuant to section 103A, or 104. If any application is made at any time, it will be considered on its merits. At present, there is no application for me to consider.

Privilege

70. I heard some submissions concerning the claimant referring to without prejudice discussions or meetings. There is no specific written application from any respondent. It was not possible to deal with this matter. If any respondent considers it necessary to exclude any allegation, or any evidence, on the ground of privilege, an application

should be made. It is important that the application is clear and precise, so that the claimant can understand it. The present position is unclear and unsatisfactory, I cannot resolve it.

Restricted Reporting Order

71. The open preliminary hearing was listed to consider whether there should be a restricted reporting order. I have been unable to identify any specific application. Counsel's opening note refers to a restricted reporting order and appears to identify, as the subject matter of the application, respondent five. A formal application must be made. I do not consider the approach to this application to be satisfactory. Evidence should be filed together with a skeleton argument. The relevant case law should be identified. At present, the application is too unclear for it to be considered or granted. An application may be made, if it is considered necessary.

The individual respondents

72. At the hearing, the respondent did not proceed with an application to dismiss the claim against all twelve individual respondents. It does appear that there are no specific allegations against a number of the individual respondents. This was the case even under the respondent's draft list of issues. It is appropriate that the respondents should now consider their positions having regard to the issues as identified and set out. The claimant is not entitled to proceed against any respondent against whom there is no specific allegation. It appears that is the position for the majority of the respondents. The respondents should consider their positions and should make a further application if it is considered appropriate. The claimant will then have an opportunity to deal with it adequately.

Deposit order

73. The respondents have not pursued before me an application for a deposit order, albeit that the respondents may make an application at any time. Any application for a deposit order must be in writing. It should identify each specific allegation or argument which is said to have little prospect of success. The claimant should note, if an application for a deposit is made, she may be expected to give details of her means, as the tribunal should take her means into account when making any order.

Other matters

74. It is clear that the claimant is in breach of a number of orders. She has failed to give disclosure; she has failed to disclose her GP notes.

75. With regard to the claimant's GP notes, I have considered her letter of 28 July 2020. She has not given any adequate reason for why she has

not disclosed those notes. The claimant has had time to disclose the notes and it would appear that she has not taken all reasonable steps to comply. I find that it is not possible for the respondent to respond adequately to an allegation of disability, unless it has access to her GP notes. The claimant must disclose those notes. As it is impossible for the respondent to have a fair hearing without them, it is appropriate that there should be a sanction. I have considered what would be the proportionate sanction. I have concluded that if the notes are not disclosed, the proportionate sanction would be to prevent the claimant from asserting that she is disabled. It is appropriate that the claimant should have time to comply, or to apply for an extension of time setting out the reasons for failure to comply with previous orders. By allowing 28 days from the date of this order, I am allowing the claimant sufficient time to deal with this order and to respond adequately.

76. The claimant has failed to comply with the order to serve her relevant documents. She was ordered to disclose relevant documents by EJ Spencer. It does not appear that she has given any or any adequate explanation for her failure. It is normally not possible to have a fair hearing where one party fundamentally fails to disclose relevant documentation. There is no basis for saying that this case is an exception. It is appropriate to allow a party time to comply. However, there have now been two case management hearings. Her failure to comply was considered at the second case management hearing. It has been referred to in correspondence. The claimant has given no adequate explanation.

77. Whilst the tribunal must always bear in mind that it is dealing with a litigant in person, all parties, including litigants in person, are expected to comply with tribunal orders. In the circumstances, and as disclosure is fundamental to the fairness of this case, failure to comply should lead to the claims being struck out. I have considered the appropriateness of an unless order. Again, I have given sufficient time to allow the claimant to either comply with her obligation or to apply to vary the timetable, and provide an appropriate explanation. However, as disclosure is fundamental for securing a fair hearing, a strike out for breach is proportionate, given the attempts already made to secure compliance. For the removal of doubt, the unless order applies the process. Provided the claimant discloses to the respondent those documents she considers to be relevant to the hearing, the unless order will be satisfied, even if there may be an argument that the disclosure is incomplete and the claimant remains in breach.

<u>Abuse of process</u>

78. I have noted that claims two, three, and four may be an abuse of process in part or in whole. To the extent the claimant seeks to bring as part of any later claim any claims which could have and should have been raised in an earlier claim, there may be an attempt to circumvent the need for amendment. Such an approach could be an abuse of

process. If there is an abuse of process the offending parts of the later claims may be struck out. However, the position is not sufficiently clear, and having regard to my consideration of the issues it is not a matter I need consider further at present. I should note that the respondents have not raised the potential abuse of process, albeit the respondents recognise that it may be arguable that an abuse of process has happened. However, preventing abuse of process is a matter of public policy, as it is necessary to ensure the orderly disposal of cases. If necessary, it will be considered further in due course.

Other matters

79. I note that the claimant has applied for the case to be transferred. That is not a matter for me, and I will refer her request to the regional employment judge.

____
Employment Judge Hodgson

Dated: 18 November 2020

Sent to the parties on:

18/11/2020.

……………………………………………..
For the Tribunal Office

Appendix 1

Claim one -2204179/2019

1. Set out below are the claims as they appear in the first claim, and which have either been struck out, or which may proceed. Where necessary, reference is made to the internal paragraph numbering of the claimant's particulars of claim.

2. Unfair dismissal. (Whist this is pleaded it cannot proceed as it dismissed at the hearing on 16 November 2020).

3. There are allegations of direct discrimination (D), harassment (H), and victimisation (V). Not all the allegations are put as direct discrimination, harassment, and victimisation. I have indicated, in brackets, the nature

of each allegation and the nature of the protected characteristic relied on.

a. Allegation one: by dismissing the claim (D - race, and V). It does not appear this is alleged as an act of disability discrimination. (See paragraph 34.)

b. Allegation two: by the alleged comments of Dr Vigneri and Dr Massett stating that they felt unsafe (H - race, and V). The claimant relies on the comments to the claimant at a mediation in July 2019, as reported by Dr Massett. (See paragraphs 44 and 12.)

c. Allegation three: by Ms Cartledge on a date and in a manner not specified, refusing to score the claimant's application (which appears to relate to “roles of Departmental manager on two, unspecified, occasions). Whilst it is clear the claimant wishes to add her as a respondent, it is less clear the nature of the claim, but it appears to refer to D - race and V. (See paragraph 38.)

d. Allegation four: by Mr Kalim’s behaviour (D -sex, and H - sex). (see para 23). The claimant fails to set out which specific aspects of Mr Kalims's behaviour are in issue. This is an allegation that should be clarified, and it may require amendment. It is unclear whether the claimant relies on alleged sexual advances. If is so, what are the advances, when did they occurred, and in what circumstances. It is unclear whether the claimant simply complains of his failure to acknowledge her complaint, but she does not say on what date, and in what circumstances. (See paragraphs 16, 22, and 23.)

e. Allegation five: by failing to deal adequately with the claimant's grievance of 21 August 2020 (D - race, V). It appears that this allegation is brought against Dr Lee and three broad allegations are identified (see paragraph 43). There are three allegations which may proceed as follows: failure to consider the grievance properly; failure to follow the grievance procedure; failure to hold a grievance. Numerous assertions are made in the body of the particulars of claim many of which are general and lack detail. For any specific facts to be included as allegations of discrimination, it will be necessary to apply to amend.

f. Allegation six: by the respondent (I presume the first respondent, but he claimant may wish to clarify by amendment) refusing to shortlist the claimant for a number of posts (D - race, and V). (See paragraphs 42 and 40.) The claimant identifies four roles: the estate's project officer (PSS – PMO – 2019 – 03); programme administration manager (DOE – TPTS – 2019 – 01); head of admissions (DOE – RE G – 2019 – 02); and admissions

manager (DOE – RE G – 2019 – 03). The claimant may not rely on any further roles without amendment.

4. It appeared the claimant relies on a protected act for the purposes of victimisation. The only protected act which appears to be identified adequately is the grievance of 21 August 2019 (see paragraphs 19 and 43.) The claimant may rely no other protected act without amendment.

5. The claim form refers to discrimination arising from disability. There is no discernible claim of discrimination arising from disability.

6. There is no other allegation of disability discrimination set out in the claim form. It is possible the claimant alleges the dismissal was an act of direct disability discrimination. She should clarify.

7. The claim form fails to set out any allegation of disability. The claimant may, subject to any further application from the respondent, rely on the allegation that she has fibroids as constituting the disability as set out in her letter of 28 July 2020 If the respondent requires a formal amendment, it should set out its position.

Claim two - 2204481/2019

8. Claim two appears to contain one new allegation. The allegation is against Dr Kadiyala and concerns the claimant's application for project coordinator (EPH – DPH – 2019 – 20). The allegation appears to be that she was not shortlisted and that a number of scores were changed. It appears to be an allegation of direct discrimination (race) and possibly victimisation. It may proceed.

9. There is reference to a further post – ANH Academy co-director (EPH – DPH – 2019 – 22). It is unclear what is intended. It does not appear to be a claim that may not proceed without clarification and/or amendment.

10. If the claimant believes that the claims in claim two have not been identified adequately, she will need to apply for a variation of the issues.

Claim three -2205098/2019

11. The claimant alleges breach of contract (failure to pay notice) and failure to pay wages. Neither claim is sufficiently particularised and will need to be clarified, albeit the claims have been made.

12. There is further reference to job applications and refusals and/or alterations of scores being acts of direct discrimination and victimisation. It is not possible to identify whether these roles postdate

either the first or second claim. No such allegations may proceed without clarification and amendment.

<u>Claim four - 2205211/2019</u>

13. This appears to be a repetition of claim two and it is not clear any new claims are identified. If there are any new claims which have not been brought, or could not have previously been brought, the claimant should seek to identify them.

NOTES

1. Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

2. Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

3. You may apply under rule 29 for this Order to be varied, suspended or set aside.

4. Written reasons will not be provided for any decision unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.