Appeal No. UKEAT/0121/20/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On Tuesday, 19 January 2021

Before

THE HONOURABLE MRS JUSTICE EADY

(SITTING ALONE)

MR O OGEDEGBE — APPELLANT

ADT FIRE AND SECURITY PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR O OGEDEGBE (The Appellant in Person)
For the Respondent	MS R EELEY (of Counsel) Instructed by: Eversheds Sutherland LLP 70 Great Bridgewater Street Manchester M1 5ES

SUMMARY

PRACTICE AND PROCEDURE

Practice and procedure – claim – whether ET failed to address all claims made by the Claimant

The Claimant had made a complaint of race discrimination against the Respondent, relating to a recruitment exercise in January 2018. At a case management Preliminary Hearing, the ET identified the Claimant's claims to be limited to two acts (both occurring on 4 January 2018): (1) the removal of his name from the list of candidates; and (2) the Respondent's failure to expressly invite him to attend the interview day. The Claimant did not dissent from the ET's list of issues and never asked for it to be amended. At the Full Merits Hearing, the ET accepted the Respondent's explanation for both (1) and (2) and dismissed the Claimant's claim. The Claimant applied for a reconsideration of the decision but that was refused. The Claimant appealed.

At a Rule 3(10) hearing, the EAT dismissed the grounds of challenge set out in the Claimant's Notice of Appeal but was persuaded (pursuant to the submissions of an ELAAS representative assisting the Claimant that day) to permit a new, amended, Ground to proceed to a Full Hearing. By the amended ground, it was argued that the ET had erred in law by failing to identify and determine a further claim of race discrimination made by the Claimant, relating to the Respondent's treatment of him when he attended the interview day on 5 January 2018 and its failure to offer him a position after his interview.

Held: dismissing the appeal

The ET had not erred in determining the claim before it. Although the Claimant's Particulars of Claim had described the events of 5 January 2018, he had not suggested that these gave rise to additional grounds of claim; on the contrary, the Claimant had expressly stated that the act of race discrimination had occurred on 4 January 2018 (when the Respondent removed his name from the list of candidates and failed to invite him for interview); the Claimant's description of events of 5 January 2018 simply provided further context, it did not identify any further alleged acts of race discrimination. This was consistent with the Claimant's pre-action correspondence,

in which he had expressly disavowed the suggestion that he was complaining of the failure to offer him a position, and made clear that his complaint related to what had happened on 4 January 2018. There was no error in the identification of the issues at the ET case management Preliminary Hearing or in the ET proceeding on the basis of that list of issues at the Full Merits Hearing: no further matter of complaint shouted out from the Particulars of Claim in this case, which was distinguishable from **Mervyn v BW Controls Ltd** [2000] EWCA Civ 393. It was also relevant that the Claimant had not suggested that the ET had failed to deal with any aspect of his claim in his application for reconsideration and had not addressed this point in his Skeleton Argument for the Full Hearing of his appeal. As the Claimant volunteered in oral submissions, the point raised by the amended Ground of Appeal had been identified for the first time by ELAAS counsel assisting the Claimant at the Rule 3(10) hearing.

It was not the role of the ET to seek to identify possible further claims for the Claimant arising out of events on 5 January 2018, when he had never sought to suggest that those events constituted acts of race discrimination, and it had not erred in law in determining the case the Claimant had pursued before it.

THE HONOURABLE MRS JUSTICE EADY

Introduction

1. This appeal raises the question whether an error of law arose from what is said to have been a failure to address a claim made in the pleaded case, albeit one that was not identified in a list of issues drawn up at an earlier stage in the proceedings.

2. In this Judgment I refer to the parties as the Claimant and the Respondent, as below. This is the Full Hearing of the Claimant's appeal against a Judgment of the Employment Tribunal ("the ET") sitting at Watford (Employment Judge Smail, sitting with lay members Mr Sutton and Ms Bury, on 20 May 2019), sent out to the parties on 31 May 2019, with Written Reasons given on 1 July 2019. By its Judgment, the ET dismissed the Claimant's claim of race discrimination.

3. Pursuant to an Order made by HHJ Auerbach, subsequent to an oral hearing under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993** ("the EAT Rules") on 19 March 2020, this matter was permitted to proceed to a Full Hearing on the basis of one, amended, ground of appeal as follows:

> **"Whether the ET erred in law in its failure to identify and address that the Claimant was seeking to pursue a claim of race discrimination regarding the fact that he had attended the assessment day for appointment to the sales role with the Respondent but had not been appointed following that assessment. The Claimant will rely in this regard on the decision of the Court of Appeal in *Mervyn v BW Controls Ltd* [2000] EWCA Civ 393."**

HHJ Auerbach otherwise dismissed the Claimant's Grounds of Appeal.

4. At the Rule 3(10) hearing before HHJ Auerbach, the Claimant was represented by Counsel acting under the Employment Law Appeal Advice Scheme ("ELAAS"); he had, however, appeared in person before the ET, as he does today. The Respondent was represented before the ET by its solicitor but now appears by Ms Eeley of Counsel. Due to the continuing

need to reduce transmission of the Covid-19 virus, this hearing has taken place remotely by telephone. It was initially due to take place by MS Teams, but the Claimant was unable to access the hearing by those means. The conversion of the hearing to take place by telephone was agreed between the parties and enabled the hearing of this appeal to take place without undue delay and thus to do justice in this case. This, however, remained a public hearing, which could be accessed as directed by the information included in the cause list.

The Background

5. The Respondent is a company that provides security services. In late 2017/early 2018, it used a recruitment agency, Recruitment Answers, to assist in the selection of candidates for the employment of salespersons within ADT Alarms, part of the Respondent's business. Recruitment Answers had put forward a list of candidates for interview, which included the Claimant's name, but on 4 January 2018, the Respondent removed the Claimant's name from the list and did not extend any invitation to him to attend the interview. It was the Claimant's case that this amounted to less favourable treatment because of race; specifically, because he was black and/or of Nigerian origin.

6. At a preliminary case management hearing before Employment Judge Heal, sitting alone on 2 November 2018, it was recorded that the issues between the parties that fell to be determined by the ET were as follows:

> **"4.1 Had the Respondent subjected the Claimant to the following treatment falling within section 39 *Equality Act*, namely**
>
> **4.1.1 the Respondent removed the Claimant's name from the list of candidates put forward by the Respondent's recruitment agency for interview;**
>
> **4.1.2 the Respondent did not invite the Claimant to come for interview.**
>
> **4.2 Had the Respondent treated the Claimant, as alleged, less favourably than it treated or would have treated the comparators? The Claimant relies on the following comparators, who are all the other candidates with 'white names' who were kept on the list (the**

> **Claimant said that all the other candidates on the list were white), or, alternatively, he relied on a hypothetical comparator. The Respondent says that not all of the candidates were white.**
>
> **4.3 Has the Claimant proved facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of his race?**
>
> **4.4 If so, what is the Respondent's explanation…? … The Respondent says that the Claimant was put forward by the agency when the Claimant had applied for a role a year before. In that circumstance the Respondent's internal-recruitment employee removed the name from the list. The Claimant says that he had never replied to the Respondent for a job in the past."**

7. In the summary of the case management discussion it was explained, at paragraph 3, that:

> **"These issues decide *authoritatively* what the case is about. They show the parties what their evidence should cover. They help the Tribunal to decide what evidence is relevant, and they determine matters to be covered by the final decision."** [emphasis in the original]

8. The Respondent accepted both that it had removed the Claimant's name from the list and that it had not offered the Claimant an interview. It contended that these acts were unrelated to race. It explained that it engaged a "talent acquisition specialist", Ms Victoria Elliott, who had identified that, in or around August 2017, she had received an application from the Claimant for a sales vacancy that had been made too late for the relevant assessment date. She said that, when she had telephoned the Claimant to advise him of this, she had found him to be abrupt and rude, and, although she had invited the Claimant to make contact with her if he was interested in pursuing the opportunity, he did not telephone her back. The Claimant disputed Ms Elliott's account but the ET accepted her evidence, finding that she had recognised the Claimant's name and was aware that the Respondent already had his CV on file, which was why his name was removed from the recruitment agency's list - the Respondent thus avoided being exposed to a commission fee in relation to a candidate where it already had the necessary information. The ET also accepted that Ms Elliott had genuinely found the Claimant to be rude and direct in how he had expressed himself in her telephone conversation with him and that had been the reason for the failure to extend an invitation to the Claimant to attend for an interview.

9. The ET further considered that there was no basis for saying that the Respondent's decision related to race or nationality, in particular that it was because the Claimant had a name that indicated he was Nigerian and/or likely to be black and that was why Ms Elliott gave the instruction for the removal of his name (which was the Claimant's contention). The ET observed (see paragraph 9):

> **"[…] we have seen the successful list of candidates, we see there are three Asian names there, and we know that one of the successful candidates was a black male from Zaire […]."**

10. The Claimant applied for a reconsideration of the ET's Judgment, but that was refused (see the ET's decision, communicated by letter of 1 July 2019). Relevantly, the reconsideration application did not include any complaint that the ET had failed to address any of the claims made by the Claimant.

The Claimant's Case

11. As I have recorded, the Claimant's appeal was permitted to proceed on a new ground of appeal, identified for the first time at the Rule 3(10) hearing before HHJ Auerbach. By that ground, it was said that the ET had failed to identify and address that the Claimant was seeking to pursue a claim of race discrimination regarding the fact that he had attended the assessment day for appointment to a sales role with the Respondent but had not been appointed following that assessment.

12. In the Particulars of Claim attached to his form ET1, the Claimant explained that he had been told on 4 January 2018 that his name had been removed from the list of candidates. He complained: "*The offence of direct discrimination was committed by ADT on the 04/01/2018*".

13. The Claimant went on to explain, however, that, when he had contacted the Respondent about this, he had been advised to attend for interview in any event, "*to see what happens*". The Claimant said he had then spoken to the Respondent's hiring manager, Mr Aaron Scott, to say that he would attend the interview on 5 January 2018, to which he said Mr Scott had responded, "*Okay*". The Claimant's Particulars of Claim then continued:

> **"When I arrived at the premises for the interview on the 05/01/2018 the receptionist checked the name on her list for the interview that day and told me my name was not on the list. I told her that I had spoken to Aaron Scott, and she told me to go inside at 10.00 am along with the other applicants who were waiting at the reception room.**
>
> **"At this point it was obvious to me that I had just come to waste my time by coming to the interview, which I was told earlier by ADT Fire and Security not to attend.**
>
> **"I did not feel welcome at the premises because I was an uninvited guest. Although I took part in all the activities of the assessment my mind was convinced that since my name was not on the list of applicants for the interview I was officially not going to be recognised as one of the applicants inside that assessment room for the interview to be considered for a job vacancy.**
>
> **"At the interview assessment room there were other applicants who came for the interview through Warren O'Connor, and they were all white. … it was at this point that I was asking myself why ADT Fire and Security decided to remove only my name from the list of applicants that was sent to ADT Fire and Security by Warren O'Connor for the interview. Why did ADT Fire and Security not ask Warren O'Connor remove one of the other, white, applicants' names from the list, why a black man … I was the last person to be attended to for the one-to-one interview with Aaron Scott and another manager on that day. It was during this time that Aaron Scott told me that he had just printed my CV some few minutes ago, but he never showed me a copy of my CV which he said he had just printed out … I don't know if in fact he had seen my CV. Aaron Scott told us all inside the assessment room that at the end of the interview he was going to tell us individually the result of the interview on that same day, 05/01/2018, or latest the following Monday, 08/01/2018. As expected I did not hear from Aaron Scott on the 05/01/2018 or on the 08/01/2018.**
>
> **"So, I phoned Aaron Scott on Monday, 08/01/2018, and left a message on his voicemail inviting me to phone me about the result of the interview. Aaron Scott did not phone me, but I phoned him again, on Tuesday, 09/01/2018, and he did not answer the phone. So, I did not leave any message on his voicemail this time.**
>
> **"On the 09/01/2018 I wrote a letter of complaint to Mr Andy Bennett, the managing director, but I never received any response from him. This was when I had to contact the Employment Tribunal and ACAS.**
>
> **"Mr Warren O'Connor confirmed on the email he sent to me on the 15/01/2018 that several job applicants whose names were on the same**

> **list as my name which he submitted to ADT Fire and Security for the interview were offered employment by ADT Fire and Security and they started work on the 15/01/2018. I contacted ACAs on the 19/01/2018, and it was only after ACAS had contacted the ADT Fire and Security about my query that ADT Fire and Security sent me a letter, dated 01/02/2018."**

14. The Claimant also set out his account in his witness statement for the ET hearing, albeit that statement made clear the Claimant's submission as follows:

> **"2. … the only reason the Respondent removed my name from the interview list is because they saw that my name appeared to be of someone of Nigerian ethnic origin.**
>
> **3. The offence of direct discrimination was committed by the Respondent on 4th January 2018 when they removed my name from the interview list and told me not to come in for the interviews taking place on the 5th January 2018 …."**

15. In his Skeleton Argument for the purposes of this hearing, the Claimant has not focused on the Ground of Appeal permitted to proceed by HHJ Auerbach, but has reverted to the argument set out in his original Notice of Appeal. As I have already recorded, however, in HHJ Auerbach's Order, seal dated 20 March 2020, it was made clear that permission had been given solely in relation to the amended Ground of Appeal; at paragraph 2 of the Order it was then stated, "*All other grounds are dismissed*". It was therefore not open to the Claimant at this hearing to seek to resurrect those earlier Grounds of Appeal, previously dismissed by the EAT.

16. After I had asked the Claimant to address the amended Ground of Appeal (on which he had been granted permission), he made the following points:

(1) He referred me to the Respondent's response to his ET claim, where, at paragraphs 7 and 8 of its Grounds of Resistance (attached to the ET3), it said:

> **"7. The interview assessment day took place on 4 January 2018 [*sic*: *it was agreed it was on 5 January 2018*]. Throughout the day the Respondent noted that the Claimant did not participate well in the activities and had failed to demonstrate the qualities they were looking for the role. For this reason the Respondent decided not to offer a role to the Claimant."**

The Claimant said that the ET failed to find that explanation had been proved by the Respondent.

(2) Further, the Claimant said that, although he complained of events on 4 January 2018, he had not said that his claim was limited to the events of that day; it did not preclude a complaint relating to the interview day, and he had never suggested to the ET that he was limiting his claim in that way.

(3) The Claimant also referred to the fact that he set out particulars of the interview and assessment day in his grounds of claim (see above) and he said that he believed that the way he was treated was because of race (and he explained that he had spoken to other candidates on the day, who were less well qualified and had less experience than he did). He also told me that, although another candidate who was black was offered a role by the Respondent, that person did not take up the position because of race discrimination.

(4) The Claimant made the point that he is not a lawyer and was representing himself in the ET proceedings. He said that it was the barrister who had represented him at the Rule 3(10) hearing who had come up with the Ground that had been permitted to proceed, having spotted that this point had not been addressed by the ET.

The Respondent's Case

17. For the Respondent it was submitted:

(1) The ET had not erred. It had determined the claim as pleaded and as had been pursued by the Claimant throughout. The Claimant did not indicate at any stage that he wished to argue that the Respondent's failure to appoint him to the sales role was itself an act of direct race discrimination; on the contrary, he expressly disavowed such an allegation at all stages prior to the Rule 3(10) hearing. Further, in his Particulars of Claim, attached to his ET1, at box 8.2, the Claimant specifically asserted that, "*offence of direct discrimination was committed by ADT on 4 January 2018*". That was the day before the interview, and the Claimant did not complain of

discrimination arising out of the Respondent's decision as to who to appoint to the role after the selection day on 5 January 2018.

(2) The Claimant had the opportunity to clarify the position after the Respondent asked for Further Particulars of his claim of discrimination; he did not respond or assert that the failure to appoint him after interview was itself an act of discrimination.

(3) At the case management Preliminary Hearing, on 2 November 2018, Employment Judge Heal recorded the issues to be determined at the Full Merits Hearing, which did not include the failure to appoint the Claimant after the interviews on 5 January 2018.

(4) The issues were then recorded in the case summary, which stated that the ET had defined authoritatively what the case was about. The Claimant did not seek to challenge that record or ask the ET to vary or otherwise amend the list of issues thus identified.

(5) At the Full Merits Hearing on 20 May 2019, the Claimant did not attempt to pursue any argument that the failure to appoint him to a sales role after interview on 5 January 2018 was an act of discrimination.

(6) Included within the bundle of documents before the ET (and referred to at the Full Merits Hearing) was an email from the Claimant to the Respondent on 15 January 2018 in which he expressly stated: "*You don't understand my situation. I am not saying they are racist for not offering me the job ...*", before going on to make clear that his complaint was that his name had been removed from the list for interview.

(7) In Ms Elliott's witness statement, the Respondent's understanding of the nature of the Claimant's claim was also made clear when she stated (at paragraph 18): "*I am also aware that [the Claimant] did not say he had been discriminated against on the day of the assessment day or after, including not succeeding in securing the role ...*".

(8) Moreover, although the Claimant produced two witness statements in the ET proceedings, neither included an allegation that the decision not to appoint him was an act of discrimination;

rather, in both cases, the Claimant reiterated that the discrimination occurred on 4 January 2018, the day before the interview.

18. The Claimant's case was thus distinguishable from that in **Mervyn**. His case did not "shout out" a further claim of direct discrimination, and, for the ET to have added such a claim would have required it to step into the arena, to identify a case that had not been made by the Claimant. The list of issues from the case management Preliminary Hearing was not, and did not appear to be, deficient when compared to the original pleaded case, even when that was read together with the Claimant's witness statement and the documentary evidence. Furthermore, it could not be said that the additional point was an essential ingredient of the Claimant's claim, and the ET had to be careful not to invent a claim for the Claimant that he did not advance himself (see **Muschett v HM Prison Service** [2010] IRLR 451); to do as suggested by the amended Ground of Appeal would be tantamount to the ET drafting an application to amend itself, a course rejected by the EAT in **Margarot Forrest Care Management v Kennedy** UKEATS/0023/10.

The Relevant Legal Principles

19. In the case of **Mervyn v BW Controls Ltd** [2020] EWCA Civ 393, the Court of Appeal was concerned with a claim of unfair dismissal, where the ET had proceeded on the basis that the Claimant pursued the case as one of direct dismissal, albeit that the Claimant had originally stated that she was "*unfairly dismissed (including constructive dismissal)*". In **Mervyn**, at an earlier case management Preliminary Hearing, it had been recorded that the issues to be determined had been confirmed by the parties and that the Claimant clarified that "*she did not resign and that the Respondent had dismissed her by treating her behaviour as a dismissal*". At the Full Hearing, the ET found, however, that the Claimant had not in fact been dismissed, and held that, as "*she*

did not claim that any resignation had amounted to a constructive unfair dismissal", her complaint of unfair dismissal must fail.

20. Laing J (as she then was), presiding over the Claimant's appeal to the EAT, felt constrained to dismiss the appeal, although granting permission to appeal to the Court of Appeal on the basis that the outcome was unjust. She questioned: (1) the extent to which ETs should assist litigants in person in formulating issues, and (2) the circumstances in which an ET can depart from an agreed list of issues when one party is a litigant in person and the list of issues appears to be deficient when compared to the original pleaded case.

21. The Court of Appeal noted that Rule 29 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** provides that:

> **"The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. […] A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."**

22. Where a case management order sets out a list of issues to be determined at a Full Merits Hearing, and that list is either agreed or never challenged by the parties, it will generally be treated as determinative (see per Mummery LJ in **Parekh v London Borough of Brent** [2012] EWCA Civ 1630 and per Longmore and Underhill LJJ in **Scicluna v Zippy Stitch Ltd and Ors** [2018] EWCA Civ 1320). As observed in **Mervyn**, however, that is not to say that the list of issues cannot be revisited, not least as an ET case management powers permit an earlier order to be varied or set aside where that is necessary in the interests of justice (see the Judgment of Bean LJ, with whom Singh and Asplin LJJ agreed). It would not, however, be open to the ET to itself draft an amendment to the issue that was other than as identified by the Claimant, and without giving the Respondent the opportunity to make representations on that amendment (see the guidance as

provided by the EAT in **Margarot Forrest Care Management v Kennedy** UKEATS/0023/10, in particular at paragraphs 20, 21 and 30 to 32).

23. In **Mervyn** the Court of Appeal went on to consider the position in relation to a litigant in person, Bean LJ setting out the guidance to be derived from the relevant case law, as follows:

> **"39. In *Mensah* [*Mensah v East Hertfordshire NHS Trust* [1998] IRLR 531] Gibson LJ encouraged tribunals 'to be as helpful as possible to litigants in formulating and presenting their cases. It is always good practice for Industrial Tribunals to clarify with the applicant (particularly if appearing in person or without professional representation) the precise matters raised in the IT1 which are to be pursued and to seek confirmation that any others so raises are no longer pursued'. However, Peter Gibson LJ went on to find that an ET is not under a 'duty to hear every allegation in the originating application unless so abandoned, the Industrial Tribunal being bound to act of its own motion even if the applicant does not put forward evidence to make good the application nor argues in support of it'. This is because:**
>
> **'It must be for the judgment of the particular Industrial Tribunal in the particular circumstances of the case before it whether of its own motion it should investigate any pleaded complaint which it is for the litigant to prove but which he is not setting out to prove.'**
>
> **40. In *Muschett* [*Muschett v HM Prison Service* [2010] IRLR 451]the claimant submitted that, since he was a litigant in person, the employment judge should have helped him to unearth relevant facts to help him make his case. Rimer LJ rejected this view of the function of employment judges at 31:**
>
> **'It is not their role to engage in the sort of inquisitorial function that Mr Hopkin [counsel for the claimant] suggests or, therefore, to engage in an investigation as to whether further evidence might be available to one of the parties which, if adduced, might enable him to make a better case. Their function is to hear the case the parties choose to put before them, make findings of as to the facts and to decide the case in accordance with the law. The suggestion that, in the present case, the employment judge committed some error of law in failing to engage in the sort of inquiry that Mr Hopkin suggested is, in my judgment, inconsistent with the limits of the role of such judges as explained by this court in *Mensah* […] (see paragraphs 14 to 22 and the cases there cited by Peter Gibson LJ). Of course the 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 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.'**
>
> **41. In the recent EAT case of *McLeary v One Housing Group Ltd* UKEAT/0124/18/LA, Judge Auerbach said:**
>
> **'I have also considered whether it might be said that it would not be appropriate for the Tribunal, as it were, to invite a claimant to add a**

> **wholly new complaint. Indeed, it would not. However, what was necessary here, starting with the Case Management hearing, was simply to *clarify* the substance of what the claimant was saying and the claims that she was seeking to bring. A margin of appreciation should indeed be allowed to the Judge below, as to how such matters are managed; but when, as in this case in my judgement, it shouts out from the contents of the Particulars of Claim that it is being alleged that there have been a number of acts of disability discrimination that have, along with other acts, contributed to an undermining of trust and confidence that has driven an employee to resign, and the employee is effectively a litigant in person and has no professional representation, this is a matter that should, at the very least, be raised at the Case Management Preliminary Hearing so that clarification can be sought."**

24. In Ms Mervyn's case, the Court of Appeal concluded that it had indeed "*shouted out*" from the contents of the Particulars of Claim attached to the ET1 that "*she was alleging that had been constructively dismissed*" (see the Judgment of Bean LJ at paragraph 42). In addition, as Asplin LJ observed (paragraph 50):

> **"This is not a case in which in amending the list of issues, the tribunal would have been inviting a completely new complaint. Far from it. Just as in *McLeary* […], in this case the contents of the ET1 and ET3 shouted out that constructive unfair dismissal was being claimed in the alternative.**
>
> **51. Although it would have been most convenient and appropriate had the matter been clarified at the case management hearing, in the circumstances of this case, there was nothing to prevent the tribunal from making the amendment. Obviously, the tribunal must take care not to step into the factual and evidential arena and not to be perceived as favouring one party over another. However, in order to do justice to all parties, it is equally important, where at least one of those parties is unrepresented, to clarify the issues which arise on the pleadings and to seek to confirm whether any and, if so, which claims have been conceded."**

Discussion and Conclusion

25. Ultimately the answer to this appeal can be given fairly shortly: the ET did not err in determining the claim that was before it rather than a different case, which was never articulated by the Claimant. Although the Particulars of Claim provided in the ET1 explained what had happened at the interview day on 5 January 2018, the Claimant did not say that he was complaining that how he was treated that day - or the failure to offer him a position after his interview - amounted to race discrimination. His description of what took place on 5 January

2018 was, rather, set out as part of the context, confirming the fact that his name had been removed from the list of candidates the previous day and supporting his argument that this had put him at a disadvantage, because he had not been expected at the interview as a result. What the Claimant had repeatedly made clear was that this complaint was about what had taken place on 4 January 2018: the removal of his name from the list of candidates and the failure to then expressly invite him to attend for interview the next day. In his correspondence with the Respondent the Claimant expressly disavowed any complaint of race discrimination arising out of the failure to actually offer him a job; it was the prior removal of his name from the list of candidates for the interviews that he considered to constitute an act of unlawful discrimination.

26. Similarly, the Respondent's reference to events at the interview day, set out under the heading "*Background*" in the Grounds of Resistance attached to its ET3, did no more than narrate the history; it did not confirm any understanding that the Claimant was making a claim of race discrimination in this regard. Indeed, the Respondent went on to ask for Further Particulars of the Claimant's claim, because it did not understand how the case was put. In the event the Claimant did not provide any Further Particulars, and clarification of his case was left to the case management Preliminary Hearing, which took place before Employment Judge Heal on 2 November 2018.

27. Even if it had been open to the Claimant to rely on matters he had set out relating to the events of, and any decision taken on, 5 January 2018, no claim of race discrimination in this regard shouted out from his pleaded case. On the contrary he had identified the act of discrimination as having occurred on 4 January 2018, and had confirmed that was his case in his witness statements in the ET proceedings.

28. At the case management Preliminary Hearing on 2 November 2018, Employment Judge Heal thus entirely fairly summarised the issues for determination arising from the Claimant's pleaded case. She also explained the consequences of having identified those issues, which were to "*authoritatively*" set the agenda for the Full Merits Hearing. The definition of the issues to be determined identified the relevant evidence to be adduced: that relating to the question of comparison and to any explanation for less favourable treatment which might be found; the definition of the issues at that case management hearing was thus significant for the future conduct of the proceedings. At no stage, did the Claimant seek to question the issues that were identified, or ask that the identification of the issues be amended in any way to include any further complaint. Similarly, at the Full Merits Hearing, the Claimant did not seek to correct the issues to be determined by the ET, although the Respondent had made clear that it understood that he was making no complaint about the selection process carried out on 5 January 2018 (see Ms Elliott's witness statement, referenced above). Even in his application for reconsideration, the Claimant did not seek to suggest that the ET had failed to identify and address any part of his claim.

29. The reality, as the Claimant has made clear this morning, is that Counsel acting *pro bono* under ELAAS, coming to this matter afresh at the Rule 3(10) hearing, considered that it might be arguable that the ET had failed to engage with the events of 5 January 2018. Those events had been described in the Claimant's ET1, albeit no actual complaint had been identified in relation to them; indeed, the Claimant had previously expressly rejected any suggestion that he was making a complaint in relation to the selection exercise on 5 January 2018.

30. I acknowledge the very real difficulty that an ELAAS representative faces when coming into a case late in the day, at a Rule 3(10) hearing, without having been present at the ET hearing

and having had no prior involvement in the proceedings below. That, however, should not permit the identification of a claim that was never articulated before the ET. There remains an obligation on the Appellant to make sure that no one (and in that I include both the advocate acting under ELAAS and the EAT Judge at the Rule 3(10) hearing) is misled, whether inadvertently or otherwise, as to how the case was put below.

31. The amended Ground of Appeal in this case was signed off by ELAAS counsel, but it was still the Claimant's appeal, and it should have been made clear to him that he took ownership of the Ground that was being advanced on his behalf. In the present case, it was particularly notable that the amended ground raised a point that had not been identified by the Claimant in his application for reconsideration, and it was not one that he sought to rely on in his written Skeleton Argument for today's hearing. It was, however, the only point that HHJ Auerbach had permitted to proceed to a Full Hearing and that the Respondent was thus required to address.

32. Having fully considered the material put before the ET before reaching the Judgment under appeal, and having regard to how the Claimant's case was articulated at all stages of the ET proceedings, I have no hesitation in finding that no error of law arises in this case. The issues had been correctly identified by Employment Judge Heal at the earlier case management Preliminary Hearing, and the ET at the Full Merits Hearing did not err in determining the case pursued by the Claimant before it. There never was any other case other than that considered and rejected by the ET. For all those reasons, this appeal is dismissed.