EMPLOYMENT TRIBUNALS

Claimant: Miss T Brangman

Respondent: NCO Europe Limited

Heard at: Liverpool **On:** 30 September 2020

Before: Employment Judge Horne, sitting in public

Representatives
For the claimant: In person
For the respondents: Mr S Langton, counsel

Judgment was sent to the parties on 7 November 2020. The claimant has requested written reasons for the judgment. The following reasons are accordingly provided:

REASONS

The disputed decisions

Overview

1. At a hearing on 30 September 2020, I decided that the claimant's claim should not be struck out. I refused the respondent's application for a deposit order. I also made number of disputed decisions about amendments to the claim and about other aspects of case management. Some of these decisions were decided against the claimant. I set them out in a judgment sent to the parties on 7 November 2020. Others were referred to in a case management order ("the CMO") sent to the parties the same day.

Amendment decisions

2. The amendment decisions were summarized in paragraphs 4 to 6 of the CMO in this way:

> "
>
> 4. The claimant said that she would like me to read her witness statement dated 12 July 2021 before attempting to clarify the basis of her claim. After a number of failed attempts, the witness statement was successfully e-mailed to the tribunal and I read it in full. The witness statement is 27 pages long and refers to many events taking place over

the entire period of her employment. Most of them were not mentioned in the claim form.

5. During the course of a long discussion about how the claimant put her case, she indicated that she wished to pursue every factual allegation in her witness statement as a complaint of discrimination. She also indicated that she wished to pursue those allegations as complaints of harassment and victimisation. For the purposes of her direct discrimination complaint, she told me that it was her case that she was treated less favourably than all the other employees who worked at AT&T.

6. I refused the claimant permission to expand her claim in this way. The complaints that were allowed to proceed were based on the factual allegations contained in the claim form, the claimant's Schedule of Less Favourable Treatment (at page 35 of today's bundle) and her Comparators document (page 34), as clarified by the claimant in her answers to my questions at today's hearing."

3. That paragraph needs to be read alongside paragraphs 2 to 5 of the judgment, which state:

" 2. The claimant may pursue the allegations of direct race discrimination, within the meaning of sections 13 and 39 of the Equality Act 2010, as set out in the case management order sent separately to the parties. To the extent that the claimant requires permission to amend her claim in order to pursue those allegations, permission is granted.

3. The claimant additionally has permission to amend her claim in order to pursue a single complaint that she was harassed on 28 May 2020 within the meaning of sections 26 and 40 of the Equality Act 2010, as set out in the case management order sent separately to the parties.

4. Any other complaint requires an amendment to the claim, which is refused.

5. In particular, the tribunal refuses the claimant's application to amend her claim to include:

[5.1] any complaint of victimization within the meaning of sections 27 and 39 of the Equality Act 2010 arising out of the alleged facts set out in the claimant's witness statement dated 12 July 2020;

[5.2] any complaint of direct discrimination arising out of the alleged facts set out in the claimant's witness statement, except for the complaints mentioned at paragraph 2 above;

[5.3] any complaint of harassment arising out of the alleged facts set out in the claimant's witness statement, except for the complaint mentioned at paragraph 3 above; and

[5.4] any complaint of "retaliation"."

The witness decision

4. Another disputed case management decision was described at paragraphs 17 and 18 of the CMO, which speak for themselves.

> 17. The claimant raised the subject of two witnesses. Both still work for the respondent. It is not the respondent's intention to call those witnesses. The claimant asked me to order the respondent to call them. I explained to the claimant that I would not make that order. It is for the respondent to decide which witnesses to call. I also explained to the claimant that if the respondent chooses not to call witnesses who could give relevant evidence, the claimant may comment on that fact at the final hearing. She may ask the tribunal to draw inferences adverse to the respondent. (In other words, she can ask the tribunal to hold it against them when it comes to finding the facts.)
>
> 18. The claimant has an opportunity to call these witnesses herself. It is up to her to approach them. The respondent's counsel suggested that she write to the witness either at their work address or at the address of the respondent's solicitors. If such a letter is received at either address, the respondent will pass the request on to the witness."

The transcript decision

5. Paragraphs 19 and 20 of the CMO said this:

"

19. The claimant wishes to rely on things said during a conversation which she audio-recorded. As directed by the tribunal's letter of 22 June 2020, she has sent a copy of the digital audio file to the respondent's solicitors. It is her position that, now that she has taken this step, the audio files are now admissible.

20. The respondent asked me to order that the claimant produce a written transcript of all the parts of the conversation on which she relies. The claimant objected. Having heard both parties' arguments, I decided to order the transcript."

6. The orders themselves were in these terms:

"

1. These case management orders relate to audio-recording evidence.

2. "Audio-recording evidence", in these case management orders, means evidence about anything said during an audio-recorded conversation. (Evidence is audio-recording evidence whether it is given in a witness statement, or in oral evidence, or by playing any audio-recording to the tribunal or by any other means.)

3. If the claimant wishes to rely on any audio-recording evidence, she must comply with paragraph 4.

4. By 4pm on 25 November 2020, the claimant must:

4.1 prepare a written word-for-word transcript of all the parts of the conversation on which she relies, together with enough of the conversation to give a reasonable amount of context to the words spoken; and

4.2 deliver a copy of the transcript to the respondent.

5. It will be for the tribunal conducting the final hearing to decide whether or not the audio-recording evidence is admissible.

6. When deciding whether or not the audio-recording evidence is admissible, the tribunal will have regard to the extent to which the claimant has complied with paragraph 4."

7. Paragraph 16 of the CMO also recorded my decision to refuse the respondent's application for a deposit order.

The reconsideration applications and reconsideration judgment

8. On 1 and 2 October 2020, the claimant wrote a number of e-mails which I treated as reconsideration applications. In a reconsideration judgment sent to the parties on 13 March 2021, I refused all those applications under rule 72(1) of the Employment Tribunal Rules of Procedure 2013. The judgment was accompanied by detailed reasons. Regrettably, the reconsideration judgment was delayed because it took five months for the file to be referred to me. My reconsideration judgment recorded an apology for this administrative error.

9. These reasons should be read alongside the detailed reasons for the reconsideration judgment. As will be seen, I wrote that judgment based on my belief that the claimant had not requested written reasons for the judgment or order.

Request for reasons

10. In an e-mail on 6 April 2021, the claimant made reference to an earlier e-mail which she said she had sent on 7 November 2020. Her quotation from that e-mail included the following passage.

"

> The claimant writes to request written reasons for the Judgments that have been set out by Judge Horne in paragraphs 6, 16, 17 and 20 in compliance with reasons for disputed decisions in paragraph 21 of the Case Management Summary.
>
> In addition to those decisions, The Claimant would like to request written reasons for all decision that have been made in the Judgments by Judge Horne."

11. If this e-mail was indeed sent on 7 November 2020, the tribunal would be required under rule 62 to provide written reasons. I have checked the hard copy file and the tribunal's e-mail inboxes. I have asked the administrative staff to carry out the same exercise. There is no record of the claimant's 7 November 2020 e-mail ever having been received.

12. Nevertheless, in view of the delays that have already occurred through no fault of the claimant, it appears to me that the most straightforward thing to do now is to provide the reasons and leave undecided the question of whether or not the claimant complied with rule 62.

Scope of these reasons

13. The claimant has requested reasons for all the contested decisions I made, including those which were favourable to her. She has specifically asked for me to explain in writing why I did not order her to pay a deposit.

14. I have decided to give priority to writing my reasons for those decisions that went against the claimant. The overriding objective requires me to try to avoid delay for all parties, including parties to other cases. Preparing reasons for successful parties means that judges have less time overall, which results in delays in other parties receiving decisions and reasons. Whilst all parties are entitled to reasons for all disputed decisions, it helps to achieve the overriding objective if priority is given to letting unsuccessful parties know why they have lost, even if it means that successful parties have to wait much longer for a document explaining why they won.

15. Accordingly, these reasons are confined to the disputed decisions specifically identified and quoted above. The parties have a further 14 days to request reasons for other disputed decisions, but should not assume that those reasons will arrive in time for the final hearing.

Procedural history

16. By a claim form presented on 24 July 2019, the claimant indicated that she was raising the following complaints:

    (a) Unfair dismissal;

    (b) Race discrimination;

    (c) “Failure to adhere to Disciplinary Policies & Procedures”

    (d) wrongful dismissal; and

    (e) “defamation of character”

17. The claim form provided a brief history of events taking place on 28 May 2019 and explained why, in her view, she had been “fired without a valid reason”. There was no suggestion that anyone had in any way discriminated against her prior to 28 May 2019, or that she had been harassed at any time in relation to her race, or victimized because she had done a protected act,

18. A preliminary hearing took place on 18 October 2019 before Employment Judge Holmes. It appears that, at least by the time the ensuing case management order had been sent to the parties, the claimant had submitted a document headed, “Schedule of Less Favourable Treatment”.

19. On 29 November 2019, the claimant prepared a Schedule of Loss. The final heading of that document simply stated, “Harassment”. Underneath that heading, the claimant that she was “claiming for a sum that the tribunal sees fit”, but did not provide any further detail. The respondent submitted a Counter-schedule of Loss, in which it took the point that the proposed harassment complaint was out of time. The claimant responded to the respondent’s counter-

schedule. The final section of her response was headed, "Retaliation and Harassment". Underneath, the claimant added a statement that she had been "advised by Employment Judge Holmes that I have the option to submit new claims to add to my existing claims."

20. There is no record of EJ Holmes having given the claimant open-ended permission to add new allegations to her claim. I find as a fact that he did not do so. It would be an extraordinary thing for an employment judge to do. He may have informed the claimant that she could present a new claim if any further act of discrimination occurred. No such claim has been presented to my knowledge. It is also possible that he told the claimant that she might be able to *apply for permission* to add new complaints to her existing claim. But that would not in any way restrict my discretion as to whether or not such permission should be granted.

21. Following the hearing, the complaint of unfair dismissal and the claim for damages for breach of contract were both struck out. Judgment to that effect was sent to the parties on 19 November 2019. An accompanying case management order required the claimant to set out further particulars of her discrimination complaint. Possibly in response to this order, and possibly at an earlier stage, the claimant submitted a document headed "Discrimination Comparators".

22. The Schedule of Less Favourable Treatment and the Comparators document are best read together. Between them, they describe a number of incidents taking place on 28 May, 4 June and 14 June 2019. One of the incidents on 28 May 2019 was described in the Schedule as "harassment". The factual allegation was that Ms Bouzazia had stood close behind the claimant and asked her to hand over her handwritten notes. For convenience, I will refer to this allegation as "Allegation 6a" to match the number I subsequently gave it in the CMO.

23. There followed a period of correspondence between the parties and the tribunal. The respondent alleged that the claimant had not provided further particulars of her claim as she had been ordered to do. By this time, the deadline for exchanging witness statements had passed. The claimant had not sent her witness statement to the respondent. Another area of dispute related to an audio recording. The claimant indicated that she wished to rely on things that had been said during a conversation which she had secretly recorded. The respondent objected.

24. The correspondence was considered by EJ Holmes, who caused a long letter to be written to the parties. The letter was dated 22 June 2020. EJ Holmes commented on the claimant's Comparators document, observing that "the implication of the document is that she is bringing only direct discrimination claims". In relation to the audio recording, EJ Holmes' letter said this:

> "Finally, there is the separate matter of the claimant's application for the admission of audio recordings. This includes an application for the non-disclosure of such evidence prior to the hearing and an invitation to the Employment Judge to listen to the audio. Employment Judge Holmes has not, and will not, consider such evidence. The principle of all hearings is that each side is aware of the evidence relied upon by the other side. Save in exceptional cases of national security, a Tribunal will not consider evidence that has not been disclosed to other party. If,

therefore, the claimant wishes to pursue the admission of this evidence, she must disclose it to the respondent."

25. The claimant prepared a witness statement dated 12 July 2020 and sent it to the respondent the following day.

26. Relevantly for the purpose of these reasons, the witness statement alleged:

    (a) That during her job interview on 25 April 2019, Ms Jurczyk and Mr Bhatt mocked her and made derogatory comments;

    (b) That, during her employment prior to 28 May 2019, various colleagues treated her badly on approximately 46 occasions; most of the allegations were levelled at the trainer, Emma Winstanley, with other allegations being made against colleagues such as "Miguel" and "David";

    (c) That much of this behaviour consisted of things said and done during face-to-face conversations;

    (d) That, in her appeal against dismissal, she had made a complaint of discrimination, defamation and various breaches of procedure; and

    (e) That various inappropriate things had been said and done by Mr Middleton during the appeal meeting. It was not suggested that Mr Middleton's reason for behaving in that way was because the claimant's appeal had included a complaint of discrimination. In fact, much of Mr Middleton's alleged misconduct of the meeting was expressly linked to other points that the claimant had been making, such as breaches of procedures. Nor was there any suggestion that anybody had done anything at any time in the belief that the claimant might do a protected act in the future.

Preliminary hearing on 30 September 2020

27. By this time, the case had already been listed for a further preliminary hearing in public. The purpose of the preliminary hearing was to consider whether or not the claim, or any part of it, should be struck out. This was the hearing before me on 30 September 2020.

28. My reconsideration judgment sets out much of what went on at the hearing and I do not repeat it here. As I have mentioned, the claimant sought to have every allegation in her witness statement included in her claim as a complaint of discrimination, harassment, victimization and "retaliation".

Relevant law

Overriding objective

29. Rule 2 of the Employment Tribunal Rules of Procedure 2013 sets out the overriding objective of dealing with cases fairly and justly. The overriding objective includes, where practicable, placing the parties on an equal footing, saving expense, and dealing with cases in ways that are proportionate to the importance and complexity of the issues. Tribunals must seek to achieve the overriding objective in the exercise of any powers given to them under the rules.

Importance of amendments

30. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.

31. In *Chandhok v. Tirkey* UKEAT0190/14, Langstaff P observed:

> 17. ….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. ...
>
> 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.

32. In *Ali v. Office for National Statistics* [2005] IRLR 201 the Court of Appeal emphasised that, in deciding whether a particular complaint has been raised in a claim form, the tribunal should examine the document as a whole. Merely ticking a box alleging discrimination by reference to a protected characteristic may not be sufficient to raise a complaint of such discrimination if the underlying facts cannot be ascertained from the narrative.

33. In *Amin v Wincanton Group Ltd* UKEAT/0508/10/DA, HHJ Serota QC distinguished between a claim that is "pleaded but poorly particularised" and a *Chapman v. Simon* case, where the complaint is not pleaded at all. In the former case, the claimant is not required to amend the claim. The lack of proper particulars does not affect the tribunal's jurisdiction. The remedy in an appropriate case would be to strike out the relevant part of the claim. It is, HHJ Serota observed, "clearly undesirable that important issues in Employment Tribunal proceedings should be determined by pleading points".

34. In relation to unrepresented claimants, tribunals must not be overly technical in their application of the *Chandok* approach. Where the claim form is capable of being read as including allegations (for example of constructive dismissal, or of dismissal on a different day), and the parties have attended the hearing prepared to deal with those allegations, the tribunal should ordinarily permit those allegations to be argued (*Aynge v. Trickett t/a Sully Club Restaurant* UKEAT/0264/17 at paras 10 and 13). If the claim form cannot bear that interpretation, consideration should be given to an amendment (para 14).

Permission to amend

35. Rule 29 gives the tribunal wide case management powers. These include the power to allow a party to amend their claim, although that power is not expressly included.

36. Guidance as to whether or not to allow applications to amend is given in the case of *Selkent Bus Company v. Moore* [1996] IRLR 661. The following points emerge:

    (a) A careful balancing exercise is required.

    (b) The paramount consideration is that of comparative disadvantage. The tribunal must balance the disadvantage to the claimant caused by refusing the amendment against the disadvantage to the respondent caused by allowing it.

37. The following factors identified in *Selkent* may help the tribunal to conduct that balancing exercise:

    (a) The tribunal should consider whether the amendment is merely a re-labelling of facts already relied on in the claim form or whether it seeks to introduce a wholly new claim. (Technical distinctions are not important here: what is relevant is the degree of additional factual enquiry needed by the claim in its amended form: *Abercrombie & Ors v Aga Rangemaster Ltd* [2013] EWCA Civ 1148).

    (b) Where the amendment raises substantial additional factual enquiry, the tribunal should give greater prominence to the issue of time limits and whether or not the relevant time limit should be extended.

    (c) The tribunal should have regard to the manner and timing of the amendment.

38. The factors identified in *Selkent* should not be used as a checklist. What is required in every case is an analysis of comparative disadvantage: *Vaughan v. Modality Partnership* UKEAT 0147/20.

39. When deciding whether or not to grant permission, the tribunal can take into account the merits of the proposed complaint. It is no disadvantage to a claimant to be deprived of the opportunity to bring a hopeless case. Where, however, the proposed complaint was raised within the original time limit for bringing it, perceived weaknesses in the merits of the complaint should not ordinarily be a ground for refusing permission unless they would justify a decision to strike out the claim. This is because the complaint could have been raised in a separate claim form, in which case the grounds for striking it out would have been limited to those contained in rule 37. See *Gillett v. Bridge 86 Ltd* UKEAT 0051/17.

40. One of the claimant's proposed complaints is victimization. Section 27 of the Equality Act 2010 provides the following definition of victimisation, so far as it is relevant:

> "(1) A person (A) victimizes another person (B) if A subjects B to a detriment because –
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act-
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act."

Witness order

41. Rule 32 gives the tribunal the power to order a person to attend the tribunal to give evidence.

42. In *Clapson v. British Airways plc* [2001] IRLR 184, at paragraph 11, the EAT observed:

> "Tribunals should, in our judgment, be very cautious indeed before deciding to call a witness whom neither of the parties wishes to call… In ordinary circumstances, one would have thought that, where there was a disputed area of fact or where allegations had been made to witnesses for one party which had not been supported by evidence from the other party, that the tribunal would deal with the situation by simply drawing the inevitable adverse inference against the party who had not given evidence."

43. It will rarely be appropriate for an employment tribunal to use its power under rule 32 to call a witness whom neither party wants to call. See *Arnold Clarke Automobiles v. Middleton* UKEATS 0011/12, at paragraph 9:

> "Whilst it is of course appropriate for the Employment Judge and members to ask questions of witnesses for the purposes of clarification of evidence given in response to questions put in examination in chief or cross examination, that is as far as it goes. It is not for them to run the case for either party or to embark on the exploration of a case of their own making, both of which would plainly be risks if they were to decide on and call witnesses themselves."

44. Where a party fails to call a witness in relation to a relevant issue, the tribunal may draw an adverse inference from that failure. For a recent statement of that principle, see *Chief Constable of Merseyside Police v. Knox* UKEAT 0300/19.

Covert recording

45. There is no reason in principle why covert recordings cannot be admitted into evidence. Before admitting such evidence, the tribunal must decide whether or not it is sufficiently relevant. It is open to a tribunal to conclude (and circumstances similar to this case, unarguably right for the tribunal to conclude) that it is impossible to assess relevance until the claimant has provided a transcript. For these propositions, see *Vaughan v. London Borough of Lewisham* UKEAT 0534/12 per Underhill J at paragraph 22.

Conclusions – amendment decisions

Was an amendment required?

46. I decided that the claimant would need an amendment to her claim in order for her to pursue it in the way she wanted to pursue it.

47. I started by looking at the claim form as a whole. Any reasonable reader of that form would have thought that the claimant was saying that the discrimination started on 28 May 2019. The reader would not have detected any complaint of victimization or harassment.

48. I next examined the Schedule of Less Favourable Treatment and the Comparators document. Strictly speaking, these were not part of the claim form and would not help me interpret what complaints the claim form raised. But I considered the possibility that what the claimant was doing in those two documents was providing further detail of the claim, in the manner described in *Amin.* If that were the case, the claimant would not need an amendment in order to advance allegations set out in those two documents. That analysis does not help the claimant. Just as EJ Holmes did, I took the two documents to be setting out complaints of direct discrimination in relation to treatment that occurred from 28 May 2019 onwards.

Should permission to amend be granted?

49. I have considered whether or not to grant the claimant permission to amend. I deal with that question separately by reference to the different ways in which the claimant seeks to expand the claim.

Alleged contraventions prior to 28 May 2019

50. The claim in its amended form would involve an expansion of a large order of magnitude. It would introduce well over 40 brand new allegations, each of which would call for new and detailed findings of fact. They would involve Ms Winstanley having to answer a large number of allegations, whereas previously she faced none. Other colleagues would also be accused of discrimination and would need to be called as witnesses. The precise facts that would need to be found would be subtly different, depending on whether the legal complaint was one of discrimination, harassment or victimization. But for all of these complaints, the scale of the fact-finding challenge would be broadly the same.

51. In those circumstances it is particularly important to consider the statutory time limit. These allegations first appeared in the claimant's witness statement dated 12 July 2020. Even then, it would not have been apparent to the respondent that the claimant was seeking to include each allegation as a separate complaint requiring adjudication from the tribunal. Claimants commonly make witness statements referring to events that form part of the background. References to such events are not legal complaints in themselves. They are included in the

witness statement because, if the tribunal finds that they happened, those events might help the tribunal to find that the actual complaints succeed. It was not until 30 September 2020 that the claimant clarified that she was seeking to have all the matters in her witness statement included as part of the claim. If the claimant were to have presented a new claim form on 30 September 2020 in respect of the pre-28 May 2019 allegations, it would have been over a year out of time.

52. It is unlikely that a tribunal would be persuaded that it would be just and equitable to extend the time limit. The claimant did not give me a good reason for the delay. She just repeatedly asserted that the events stated in her witness statement happened and that she wanted them included in her claim. The delay has made it much harder for a tribunal to be able to determine these complaints fairly. Findings of fact will have to be based on the recollections of witnesses whose memories are bound to have faded.

53. Another way of looking at it is that, if the amendment is allowed, and the time limit is extended, the respondent will be at a very real disadvantage.

54. There is another disadvantage that would be caused in the event of this amendment being granted. This disadvantage would be felt by all parties to this case. Allowing such a large expansion of the claim would inevitably result in the hearing taking much longer. The longer a hearing is, the longer the delay before it can be heard. Tribunals must try to avoid delay where it is practicable.

55. In my view, these disadvantages very considerably outweigh any disadvantage that would be caused to the claimant if the amendment were refused. She can still refer to these events as background evidence, provided that she can demonstrate that they are sufficiently relevant to the complaints that I have allowed to go forward.

Harassment – Allegation 6a

56. In my opinion there is only a relatively slight disadvantage to the respondent in allowing the claimant to pursue Allegation 6a as one of harassment. When the claimant delivered her Schedule of Less Favourable Treatment, the respondent was alerted to the fact that the claimant considered that she had been harassed. I do not know precisely when the Schedule was delivered to the respondent, but it was before 18 October 2019. The conduct alleged by the claimant is the same as the allegedly-discriminatory less favourable treatment which was already part of the claim. The alleged connection between the conduct and the claimant's race is the same as for direct discrimination – namely that Ms Bouzazia allegedly treated the claimant that way because she is Bermudian. Only a small amount of additional fact-finding is required, namely the purpose or effect of Ms Bouzazia's alleged conduct. I do not consider that this is likely to be particularly hard for the respondent to deal with, bearing in mind that Ms Bouzazia has always known that she might need to explain the purpose of her actions, and the respondent has always known that the claimant would be likely to describe the effect on her feelings of the events of that day.

57. The balance of disadvantage favours allowing this particular allegation of harassment to proceed.

Harassment – remaining allegations

58. Under this heading I concentrate on the proposed allegations of harassment occurring on or after 28 May 2019, with the exception of Allegation 6a. In my view, permission ought to be refused. The main reason is that the application is made so late. The respondent would be put at a considerably greater disadvantage than is caused by the inclusion of Allegation 6a, because it could not have been expected to glean from the Schedule of Less Favourable Treatment that anything apart from Allegation 6a would be pursued as a complaint of harassment. Although the respondent knew from about 29 November 2019 that the claimant sought to bring a harassment complaint, it had no way of knowing what the allegations were other than Allegation 6a. It was not until 13 July 2020 that it could have known that all the discrimination allegations in the Schedule of Less Favourable Treatment were to be treated as harassment as well.

59. There is some additional fact-finding in relation to the harassment allegations – in particular in relation to the purpose and effect of the alleged conduct. In my view, the disadvantage to the respondent in having to deal with those factual issues, after such a long delay, outweighs the disadvantage to the claimant that would follow from refusing the amendment.

Victimisation

60. Under the heading of victimization, I start by examining the disadvantage that the claimant would suffer if the amendment were refused. At this stage of the analysis it is relevant to consider the merits of the proposed complaint.

61. As the reconsideration judgment makes clear, the claimant had real difficulty in identifying any protected act that she had done. I looked at the claimant's witness statement for myself. I found one occasion on which the claimant allegedly did something that could come within the definition of a protected act.

62. As I have set out in the reconsideration judgment, and also at paragraph 26 of these reasons, there was nothing in the claimant's witness statement to suggest that any detrimental action in the handling of the appeal meeting was motivated by the fact that she had complained of discrimination. There was no hint that the respondent had subjected her to any detriment at any time because they believed that the claimant might do a protected act in the future.

63. Taking the claimant's witness statement at its highest, I thought it very unlikely that the claimant would succeed in her complaint of victimization, even if it were allowed to go forward. There would therefore be little disadvantage to the claimant in refusing the amendment.

64. I also think that there would be considerable disadvantage to the respondent if the complaint of victimization were to be allowed to proceed. Even assuming the claimant were to clarify her case in relation to what the protected act was, there would have to be a finding about whether or not the claimant did that act, and whether or not it motivated Mr Middleton to deal with the appeal in the way that he did.

65. Taking these respective disadvantages into account, my view is that the balance tips in favour of refusing permission to amend.

Retaliation

66. As I explained in the reconsideration judgment, the proposed complaint of "retaliation" takes the claim no further than the claimant's desired claim of victimization, which I have prevented the claimant from introducing.

Conclusions – witness decision

67. Before explaining why I made the decision in respect of witnesses, it is important to be clear about what that decision was, and was not. I did not refuse to allow the claimant to call the witnesses. Nor did I say that I would refuse to order the *attendance* of any witness so that the claimant could call them. What I decided was that I would not order the *respondent* to call witnesses.

68. There is very little more I need to add. The cases I have cited demonstrate that it is almost always wrong for the tribunal to call a witness whom the parties do not want to call. That being the case, it will only be in a very rare case that a tribunal can permissibly order a *party* to call a witness whom neither party wants to call.

69. In this case, the respondent does not want to call the witnesses in question. If the claimant wants to call them, she can call them. The respondent has offered to facilitate that process. If the witnesses are still unwilling to give evidence, she can apply to the tribunal for a witness order. Before doing so, she will need to explain, briefly, what evidence they would be likely to give, and how it is relevant to the issues that the tribunal will need to decide at the final hearing.

Conclusions – transcript decision

70. The claimant contends that she does not need to provide a transcript. Her argument, as I understand it, is based on EJ Holmes' letter of 22 June 2020. The claimant says that, in that letter, EJ Holmes gave her permission to rely on the audio recording subject to only one condition. That condition was the disclosure of "the evidence" to the respondent prior to the hearing. She has since disclosed the audio file to the respondent. Therefore, she says, the only condition of admissibility has been fulfilled and she should not be expected to provide a transcript.

71. It is clear to me that the claimant's argument is based on a fundamental misunderstanding of EJ Holmes' letter. He was not deciding the question of admissibility. Rather, he was telling the claimant that providing the evidence to the other side was a necessary first step. I interpret the letter in this way for two reasons.

72. First, it is the most natural literal reading. EJ Holmes stated, "If.. the claimant wishes to *pursue* the admission of this evidence, she must disclose it to the respondent." Disclosure was a condition of the claimant pursuing admissibility, not the determining criterion for whether admissibility would be granted.

73. Second, the claimant is effectively asking me to read the letter as a decision that is wrong in law. It was not open to EJ Holmes to admit covert recording evidence without first assessing its relevance: see *Vaughan,* above. As *Vaughan* also makes clear, a judge can insist that, before relevance can be assessed, the party relying on the recording will need to provide a transcript.

74. In my view, the overriding objective, as well as *Vaughan,* point clearly in favour of the claimant typing out all the parts of the conversation on which she relies, plus enough of the surrounding conversation to provide a reasonable amount of

context. Only then can the tribunal examine what was allegedly said, and set about deciding whether or not it is sufficiently relevant to the issues.

Employment Judge Horne
15 June 2021

SENT TO THE PARTIES ON
16 June 2021

FOR THE TRIBUNAL OFFICE