Case No: EA-2020-000732-BA (previously UKEAT/0123/21/BA)

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 December 2021

Before :

HH JUDGE SHANKS

(sitting alone)

- -

Between :

Dr T Piepenbrock **Appellant**

- and -

London School of Economics and Political Science

Respondent

- -
- -

Appellant in person (assisted by his son Garry)
Paul Michell (instructed by Pinsent Masons) for the **Respondent**

Hearing date: 30 November 2021

- -

RESERVED JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE, SEX DISCRIMINATION

The Appellant brought ET claims against his former employer in January 2015. In December 2015 he brought High Court proceedings covering similar ground and the employment tribunal proceedings were stayed from January 2016 to November 2019.

In April 2020 the Appellant made a substantial application to amend his claim, raising, among other things, new claims of sex discrimination and harassment which themselves related back to November 2012. Most of the application (including that part related to those new claims) was refused by the EJ.

The EAT found that the EJ had wrongly considered that these new claims added little or nothing to the existing claims but found that, even if this error had not been made by the EJ, he would properly have reached the same result and refused permission for the required amendments, given his findings that the new claims could and should have been brought at the outset and that allowing the amendments would involve significant hardship to the employer.

JUDGE SHANKS:

Introduction

1. This was an appeal by the claimant, Dr Piepenbrock, against one particular aspect of a case management decision of Employment Judge Hodgson sitting in London Central which was sent out on 28 July 2020. That decision followed the hearing of a substantial application made by Dr Piepenbrock to amend the details of the claim he had brought in the employment tribunal against his former employer, the London School of Economics, over five years before on 26 January 2015. The appeal was allowed to proceed by HH Judge Auerbach on 8 June 2021 following a rule 3(10) hearing; as set out below Judge Auerbach's order carefully identified the single point which he described as "just" arguable.

Dr Piepenbrock and the hearing of the appeal

2. Dr Piepenbrock describes himself in his skeleton argument at para 8 as a " … 56-year-old autistic and disabled former award-winning academic and 'internationally renowned economist'…"

3. It is plain that he has been suffering psychological difficulties involving depression and anxiety since 2012 which he considers to be the responsibility of the LSE. According to a letter from an NHS clinical psychologist dated 22 May 2017 to which he referred me, at that stage he was continuing to present with a chronic and severe "major depressive disorder" with occasional panic attacks and sleeping problems. The psychologist's opinion was that his difficulties would continue and possibly increase while legal proceedings were continuing and that the legal proceedings were a "powerful maintaining factor" such that he was not likely to benefit from any psychological treatment at that stage; she stated that she was therefore closing his file "for now" and expressed the hope that the legal process would not take much longer so that Dr Piepenbrock could move forward with his life.

4. In June 2019 following a request by him for a diagnostic assessment to consider whether he had Asperger's Syndrome, an autism spectrum condition, he was formally diagnosed as " … presenting with differences and difficulties that meet the criteria for a diagnosis of Asperger's Syndrome … [and] … a DSM-5 diagnosis of Autism Spectrum Disorder, without intellectual or language impairment …" He drew my attention to the particular difficulties identified by the psychologist in his letter dated 26 June 2019, which include: difficulties in using, receiving and understanding non-verbal communications; a strong tendency to focus on his own thoughts and interests rather than those of others and to talk at length about these; a strong need to stick to detailed rules and avoid "doing the wrong thing" as far as possible; a preoccupation with detail; a strong tendency to see things in "black and white" terms and to be rigid in his opinions and struggle to see another's perspective if it differs from his own; and an inability to tolerate wrongdoing of any kind and to let go of and move on from unresolved wrongs, which can lead to long-term adverse consequences. That inability explains, in the psychologist's view, the extent to which the legal proceedings and the events which led to them have preoccupied and distressed him and his driving need to continue to seek a resolution thereof. Dr Piepenbrock's autism and its effects on him were central to the arguments he sought to make in his appeal and he referred to them frequently during the appeal hearing.

5. The hearing was held remotely, with me and my clerk in a court room at the Rolls Building but all other parties to the proceedings elsewhere; there was no objection to this course and it was plainly in the interests of justice given current circumstances. At times during the hearing and in an email I have seen which was sent to EJ Hodgson on 1 December 2021 Dr Piepenbrock has complained that I "refused to make any reasonable adjustments" for his autism and disability. He has not, however, identified any specific adjustments that ought

to have been made and I would point out that I took account of his particular circumstances in a number of ways: (a) although I was informed at the outset that his 18 year old son, Garry, would speak on his behalf, I allowed him to intervene and speak for himself frequently and for the two of them to address me more or less as a team without raising any objection; (b) I allowed him considerable leeway by rarely responding to what could have been regarded as rudeness and disrespect in the way he addressed me at times; and (c) when he asked for a break at around mid-day, I immediately agreed to that course (although I confess that the opportunity for a break was not unwelcome). I am satisfied that notwithstanding his difficulties Dr Piepenbrock was able, with the assistance of Garry, to put his case forward in its best possible light; at least, that is, until about 3.15 pm when I turned at the end of the hearing to deal with an application by the LSE for an anonymisation/restricted reporting order in relation to the colleague who the judge referred to in his judgment as Ms D.

6. At that stage matters got somewhat out of control with the parties trying to speak over each other and Dr Piepenbrock became quite agitated and left the room where he and Garry were attending the hearing, stating that he was suffering an "autistic meltdown". After considering the matter with Mr Michell for a short period, I decided the best course was to adjourn the hearing and to allow both parties to make further representations on the RRO application in writing and to rule on it as part of this written judgment (which decision could also be considered a reasonable adjustment in light of Dr Piepenbrock's autism and psychological state). In the event the LSE provided further written submissions in accordance with my direction on 7 December 2021. Dr Piepenbrock sought and obtained an extension of time for his written submissions from 14 to 17 December 2021 but in the meantime provided a 5 page "executive summary" document which (at para 6) drew my attention to EAT rule 23(5) and stated that unless I felt able to dismiss the application without a hearing he requested the opportunity to advance oral argument before a decision is made.

7. While it may be argued that rule 23(5) relates to the narrow specific powers to grant an RRO contemplated by rule 23 rather than the wider jurisdiction based on the authorities the LSE relies on and/or that Dr Piepenbrock has already been given an opportunity to advance oral argument at a hearing, I have decided that it would be appropriate to arrange a further hearing at which the parties can advance oral argument on the issue and will so order. However, given that the final hearing of the case in the employment tribunal is, I understand, now listed for 28 February 2022 I consider it is important that this judgment is promulgated straightaway. I will therefore issue this judgment before deciding the RRO issue in anonymised form for the time being and I will make a temporary order preventing disclosure of Ms D's identity in the meantime.

Relevant facts

8. Dr Piepenbrock was employed as a Fellow in the Department of Management at the London School of Economics from 1 September 2011. In May 2012 his contract was extended to 2 September 2014.

9. In November 2012 Dr Piepenbrock was in the US delivering lectures and seminars. He was accompanied by Ms D, who had been a student of his and was also employed by the LSE. Following various events which I need not explore, Ms D made a complaint of sexual harassment against Dr Piepenbrock. It is his case that her allegations were false and malicious and that Ms D was herself guilty of stalking and sexually harassing him and ultimately exposing herself to him on 12 November 2012, an incident which led to him severely reprimanding her and terminating their working relationship on 15 November 2012.

10. On 19 November 2012 there was a meeting between Dr Piepenbrock and Gwyn Bevan, his department head. On 23 November 2012 Mr Bevan emailed Joanne Hay, the department

administrator, about the meeting stating as follows:

> **I did not say the matter was closed but that I wanted to hear his side of the story**
>
> **…**
>
> **His version of the story was that [Ms D] had become dependent on him and became hysterical when it looked as if he was leaving her.**
>
> **He mentioned three episodes …**
>
> **This is the gist of our conversation – which gives a very different account from that of [Ms D] …**

Dr Piepenbrock says that in the course of his meeting with Mr Bevan he filed a formal grievance against Ms D in accordance with LSE procedures (see: para 60 of his application to amend in the ET at p33 of the EAT Supplementary Bundle).

11. Dr Piepenbrock was on long-term sick leave with anxiety and depression from 12 December 2012 and did not return to work thereafter. His contract of employment was not renewed when it expired on 2 September 2014.

12. On 11 March 2013 Morgan Cole LLP, Dr Piepenbrock's then solicitors, wrote to the LSE's HR director. The letter (which is at pp 344-347 of the Supplementary Bundle) stated that he remained unwell due to the LSE's harassment, bullying and discrimination and that he continued to find it difficult to deal with them in person. The writer stated that he had advised Dr Piepenbrock that his treatment amounted to a breach of the implied term of trust and confidence and unfair dismissal in relation to any non-renewal of his appointment. The letter continued:

> **I have also advised him that the assumption of guilt in relation to evidently malicious harassment accusations would, on current information, amount to sex discrimination,**

given that a female colleague in this situation would not have been punished in such a manner.

13. By letter dated 19 July 2013 the LSE informed Dr Piepenbrock that Ms D's allegations were found to be "not proven" and that no disciplinary procedures would be invoked against him.

14. After his employment had ended on 2 September 2014, Dr Piepenbrock brought a claim in the employment tribunal against the LSE on 26 January 2015. The details of claim were drafted by Jennifer Danvers of counsel. There were claims for victimisation, discrimination arising from disability (based on the anxiety and depression) and unfair dismissal. The details of claim contained the following paragraphs:

> **9. In … November 2012, Ms [D] … made an untruthful and therefore unjustified allegation of sexual harassment against the Claimant.**
>
> **10. In … December 2012, as a result of the way the allegation was handled by the Respondent, the Claimant developed anxiety and depression causing him to commence long-term sick leave on 12 December 2012. For the avoidance of doubt the Respondent's actions in causing the Claimant's injuries are not the subject of these proceedings but are to be the subject of separate civil proceedings which will be commenced in the High Court. None of the facts and matters giving rise to the Claimant's injuries are relevant to these proceedings and are therefore not pleaded.**
>
> **…**
>
> **22. Proceedings have been issued in this case in order to preserve the Claimant's position on limitation. However, in light of the potential overlap in remedy as between the High Court claim and this claim, the Claimant applies that this claim be stayed whilst the Claimant proceeds with the Pre-Action process in the High Court claim.**

15. In relation to the claim for victimisation a series of protected acts were pleaded in para 13 solely by reference to letters and emails starting with the letter from the solicitors dated 11 March 2003 and at para 14 it was stated that because of those protected acts Dr Piepenbrock had been subjected to a series of detriments by the LSE including, at para 14.1, the following:

> **Failing, between 11 March 2013 and the present, to investigate, or investigate timely and/or properly, the complaints/grievances made by the Claimant, either directly or through his wife, in the above correspondence or any other correspondence between 11 March 2013 and November 2014.**

There was no reference anywhere in the claim form to a grievance presented on 19 November 2012.

16. The LSE filed detailed Grounds of Resistance to the claims on 10 March 2015 but indicated at para 67 that they agreed to the requested stay.

17. High Court proceedings were started on 10 December 2015 and the employment tribunal proceedings were stayed by agreement on 5 January 2016.

18. On December 2017 Dr Piepenbrock was provided with a copy of Mr Bevan's email of 23 November 2012 by way of disclosure in the High Court case. It is his case that he should have been supplied with it long before 2017 pursuant to numerous subject access requests under the relevant data protection legislation.

19. The High Court trial took place in July 2018. Dr Piepenbrock was represented by leading and junior counsel and solicitors experienced in bringing claims based on psychiatric injury. The claims were dismissed in a judgment dated 5 October 2018 (which I have not seen, although Dr Piepenbrock has referred to various findings which are adverse to Ms D). Dr Piepenbrock mounted an unsuccessful appeal which was only finally disposed of in

December 2019.

20. On 20 November 2019 the stay of the employment tribunal proceedings was lifted in spite of Dr Piepenbrock's objections.

21. Following the lifting of the stay, the LSE applied to strike out Dr Piepenbrock's claims on 30 January 2020. That application was refused by EJ Hodgson in a decision sent out on 9 April 2020. At that stage the employment tribunal matter was listed for a 15 day final hearing to start on 23 November 2020.

Dr Piepenbrock's application to amend

22. On 24 April 2020 Dr Piepenbrock with the assistance of his wife submitted his application to amend the details of claim. The application itself ran to 230 pages. Among other things, he sought to add 13 new respondents (including Ms D, Ms Hay and Mr Bevan) and to introduce new claims for direct discrimination and harassment based on sex, disability, race and religion, for indirect discrimination based on disability and a failure to make reasonable adjustments, and for personal injury. The relevant paragraphs of the draft amended details of claim for the purposes of this appeal are as follows:

> **13. The Claimant claims that the Respondent directly discriminated against him based on multiple protected characteristics:**
>
> **…**
>
> **13.2. Sex (eg the Respondent's (sic) refused to investigate the male Claimant's … grievance against … [Ms D] … - the comparator being that the Respondent immediately investigated the grievance of a female employee, [Ms D] against the male Claimant)**
>
> **…**
>
> **19. The Claimant claims that the Respondent harassed him based on multiple protected characteristics:**

> **…**
>
> **19.2. Sex (eg … the Claimant was treated less favourably because … the Respondent failed to investigate the Claimant's grievance against [Ms D] …)**
>
> **…**

23. There was a two day telephone hearing on 17 and 18 June 2020 at which Dr Piepenbrock and his wife represented him and Mr Michell represented the LSE. EJ Hodgson sent out a thorough and detailed decision on 28 July 2020. The judge allowed some (clarificatory) amendments but refused the application to join the 13 new respondents and to add the new claims. He found: (a) that none of the new claims appeared to post-date the presentation of the claim form in January 2015 and that they were therefore "significantly out of time" (para 155), although he clearly had in mind, but did not expressly consider, the possibility of time being extended (see para 177); (b) that Dr Piepenbrock had chosen not to bring claims which could have been brought at the outset in 2015 (para 158); and (c) that, even taking account of the stay, there had been considerable delay on his part after its imposition (para 161-176). In relation to the proposed amendment in para 13.2 of the draft amended details of claim the judge said this at para 183:

> **183. Paragraph 13.2 lacks particularisation, as noted. The detriment alleged appears to be that the grievances of Ms D … were investigated whereas the claimant's was not. The claimant could have brought this claim originally. There is no adequate explanation for why [he] did not do so. For the reasons that I have given, the nature of this claim remains unclear. The claimant has, to the extent that it is pleaded, a claim that failure to deal with his grievances was an act of victimisation. It appears that this claim adds little or nothing to that which already exists. The claimant suffers no hardship if I refuse. The respondent would face uncertainty, and it is unclear what evidence would be needed. The hardship to the respondent is significant. I refuse the application.**

The judge did not expressly address the part of paragraph 19.2 which I have identified above

when considering paragraph 19.2 at paras 205-210 of the judgment but it seems to me that what he said about paragraph 13.2 in para 183 must apply equally to that part of paragraph 19.2.

24. On 11 August 2020 Dr Piepenbrock sought a reconsideration of EJ Hodgson's decision in a 27 page document. In relation to paras 13.2 and 19.2 of the draft amended details of claim, he referred to the email of 23 November 2012 and the fact that, in spite of multiple earlier subject access requests, it had only been disclosed in December 2017 and stated that, if the LSE had complied with his SARs at the time and he had had the document, he would have filed the sex discrimination and harassment claims in the original details of claim (see para 6 at pp 252/3 of Supplementary Bundle); he also stated that the judge, in considering the question of delay in bringing these claims and his ability to make litigation choices, had treated him as "neurotypical" and failed to take proper account of the fact that he is a "disabled autistic" (see paras 7-12 at pp 253-255); he also put forward further proposed clarifying amendments which made clear that it was his case that his grievance against Ms D was made during his meeting with Mr Bevan on 19 November 2012 (see para 37 at pp263/4 and para 44 at pp265/6). By a decision dated 17 September 2020 the judge rejected the application on the basis that there was no reasonable prospect of his decision being varied or revoked; he pointed out at para 6 (on p48 of the Core Bundle) that there was a distinction between the facts on which a claim is based which enable an allegation to be made and evidence which might support a contention, and stated that Dr Piepenbrock was aware all along of the fact that his grievance had not been dealt with; and, in relation to Dr Piepenbrock's disability, he made the point that a disability may cause difficulty without meaning there is a lack of capacity and stated that it appeared from the papers that Dr Piepenbrock was able to identify claims he wished to bring and to understand and engage in the legal process.

The appeal

25. Dr Piepenbrock appealed against EJ Hodgson's decision of 28 July 2020 on 8 September 2020. The notice of appeal was accompanied by a 34 page "skeleton argument" which at para 37 identified five amendments which he sought to uphold, namely direct discrimination on basis of sex (para 13.2 of the draft amended details of claim), harassment on basis of sex (para 19.2 of the draft amended details of claim), failure to make reasonable adjustments, the addition of four individual respondents (including Ms Hay and Mr Bevan) and an allegation of a lifelong disability by virtue of his autism (Asperger Syndrome). HH Judge Tayler decided that the notice of appeal disclosed no reasonable grounds and that no further action should be taken on it as set out in a detailed rule 3(7) letter dated 18 November 2020.

26. Following a rule 3(10) hearing on 8 June 2021 HH Judge Auerbach allowed the appeal to proceed on one ground only:

> **The Employment Judge erred in not giving any, or sufficient, consideration to the Appellant's case that he was seeking to add a new complaint of direct discrimination because of sex, or alternatively harassment related to sex, specifically in relation to an alleged failure to act on a grievance that the Appellant alleged was raised by him at the meeting on 19 November 2021, which proposed new complaint did not overlap with existing victimisation claims in relation to grievances he raised later on.**

Did the judge make the error identified by Judge Auerbach?

27. It is I think reasonably clear from Dr Piepenbrock's application to amend that it was his case in relation paras 13.2 and 19.2 of the draft amended details of claim that he had filed a formal grievance against Ms D on 19 November 2012 and that, in contrast to Ms D's complaint against him, this grievance had not been investigated, which amounted to sexual

discrimination or harassment (see: paras 60-81 at pp 32-38 and paras 191-197 at pp 83-85 of Supplementary Bundle).

28. It is right to say that EJ Hodgson does not specifically refer anywhere in his judgment to Dr Piepenbrock's case that he had made a formal grievance on 19 November 2012, although given the scale of the amendments he was considering, the length of Dr Piepenbrock's application document and the lack of particularisation in paras 13.2 and 19.2, he can perhaps be forgiven for that oversight.

29. It is also right that EJ Hodgson said at various points in his judgment, though somewhat tentatively, that there may be an overlap between these claims and claims of victimisation already made in the details of claim (see: paras 45 and 110 of the judgment). It appears there was some justification for this view, not least because Dr Piepenbrock's own application appeared to indicate that it was so (see paras 252 and 254 at pp99-101 of the Supplementary Bundle). However, in para 183 of the judgement EJ Hodgson seems to go rather further when he states that Dr Piepenbrock had an existing "claim that failure to deal with his grievances was an act of victimisation" and, in the next sentence, that the para 13.2 claim "adds little or nothing to that which already exists". It seems to me that the judge was clearly wrong to say that the para 13.2 claim added little or nothing to the existing claims for a number of reasons: (a) the existing victimisation claims related only to protected acts and detriments after 11 March 2013 (see: paras 13(1) and 14(1) of the details of claim at pp 125/6 of the Core Bundle) whereas the para 13.2 claim apparently related back to 19 November 2012; (b) a claim for direct sex discrimination is obviously different to a claim for victimisation; and (c) anyway a claim of victimisation based on a *failure* to act on a grievance is problematic in my view given that such a claim requires a detriment *caused by* the making of the grievance itself.

30. In the circumstances I consider that EJ Hodgson did make an error in para 183 of his judgment along the lines of that identified by Judge Auerbach. It is therefore necessary to consider the impact of this error on EJ Hodgson's decision to refuse the application so far as it related to the para 13.2 and 19.2 claims I am concerned with.

The consequences of the error

Failure to raise claim at the outset

31. In para 183, having noted that para 13.2 lacked particularisation and identified the nature of the proposed claim, EJ Hodgson stated first that Dr Piepenbrock could have brought this claim at the outset and had provided no adequate explanation for not doing so; it follows I think from the earlier findings in the judgment at para 158, that the judge's view was also that he had made a choice not to do so. In the course of this appeal Dr Piepenbrock has mounted a vehement challenge to those conclusions. I am not at all sure that the single ground of appeal identified by Judge Auerbach allows for such a challenge but both sides have addressed this issue at length so I have considered it.

32. Dr Piepenbrock's position on the issue is set out most comprehensively in a witness statement dated 16 November 2021 prepared for use in the appeal to which, although it was almost certainly not admissible as such, no objection was raised by Mr Michell. The statement says as follows:

> **5. … I was not able to add sex discrimination to my ET1 because I did not have documentary proof that I had filed a grievance against the stalker on 19 November 2012, because the LSE unlawfully refused to comply with my multiple [SARs]. I was led to believe that without documentary evidence which could support a comparator for direct sex discrimination, solicitors' and barristers' professional rules would not allow them to**

> **file unsubstantiated claims and I also risked having my entire claim struck out, having to pay the LSE's substantial costs. I was led to believe that if documentary proof ever came to light while my ET was stayed during my High Court procedure, I would always be able to amend my ET1 claim.**
>
> **…**
>
> **9. If the LSE had complied with my multiple GDPR SARs and not illegally withheld critical documents at the time I filed my Employment Tribunal Claim on 26 January 2015, I would have with 100% certainty have included a claim for sex discrimination and sex harassment. I did not include a sex discrimination and harassment claim at the time because as a disabled autistic, I believed that I had no evidence that I had made a grievance, and therefore risked the strike-out of my claim and cost orders if I put forward claims with no evidence.**

33. It seems from what he says here that Dr Piepenbrock accepts that he did make a choice not to include the para 13.2 and 19.2 sex discrimination and harassment claims but that he had what he perceived to be a good reason for making that choice. Mr Michell makes a number of telling points in answer to this position:

(1) As shown by the letter of 11 March 2013 Dr Piepenbrock's lawyers clearly had in mind the possibility of a sex discrimination claim of some sort and it is highly unlikely that they would have advised him against such a claim based on different treatment as between him and Ms D if he had told them that he himself had made a grievance on 19 November 2012 just because there was at that stage no documentary evidence of his grievance being made, since such advice would plainly not be right. Although he was advised about the issues relating to waiver of privilege by Judge Auerbach at the rule 3(10) hearing (see p165 of Core Bundle) he has not sought to rely on any evidence from his then lawyers on the hearing of the appeal.

(2) Dr Piepenbrock's assertion that he believed he could not bring a claim without

documentary evidence to support it is not borne out by the documents he has put forward during his litigation against the LSE; for example: (a) at para 8 of the details of claim (p123 Core Bundle) he pleaded what he was told at a meeting on 20 August 2012 and at para 9 he asserted that what Ms D's allegations were untruthful without documentary evidence to support his case; (b) he says at para 33 in his witness statement for the employment tribunal that he informed the LSE that he had a history of depression without documentary evidence to support the allegation; (c) in his proposed amended details of claim there were new allegations made against Ms Hay which were not supported by documentary evidence; and (d) he says at para 62 of the application to amend that there were repeated references to the formal grievance presented on 19 November in the High Court particulars of claim (see: p33 of Supp Bundle).

(3) Perhaps most tellingly, Mr Bevan's email of 23 November 2012 does not in fact support his case that he made a formal grievance against Ms D on 19 November 2012 at all: it simply records what Mr Bevan says was his account of events in response to Ms D's complaints against him.

34. Taking these points into account I can only infer that Dr Piepenbrock's proferred explanation for not bringing the claims at the outset is not true and that the true position is either that in fact he did not make the formal grievance that he claims he made on 19 November 2012 or that he chose not to raise the issue at the outset of the employment tribunal proceedings for tactical reasons of his own related to his and/or his advisors' assessment of how the litigation should be run. Dr Piepenbrock suggested in the course of the hearing that as a "neuro-typical" man I am not able to understand how his (autistic) mind works and could not therefore properly reject his explanation for why he had acted in the way he did. It seems to me that I am entitled to draw inferences as to the state of mind of someone with autism if there is a proper basis for doing so, just as judges and juries draw inferences as to the state

of mind of all kinds of people every day. In any event, even if Dr Piepenbrock did fail to bring the claims at the outset because he believed he could not do so without documentary evidence, objectively speaking that belief was wrong and it is hard to see that it would be fair to the LSE to allow reliance on it in circumstances like these.

35. I therefore consider that the judge was fully entitled to conclude as he did that there was no adequate explanation for Dr Piepenbrock's failure to bring the new claims at the outset.

36. Before leaving this topic I should also mention that Mr Michell strongly challenged the notion that his clients had in some way deliberately hidden the crucial piece of documentary evidence in the face of Dr Piepenbrock's SARs. I accept Mr Michell's position on this for the following reasons:

(1) I have not gone into the details of the history of Dr Piepenbrock's SARs but in general it would seem to me quite possible for a large organisation to overlook a document like this without this being the result of a deliberate decision to hide it. Ms Hay and Mr Bevan apparently stated in 2016 when the issue was raised that they did not believe any such document existed (see page 385 of Supp Bundle): again, this is not particularly surprising three years after the event;

(2) The fact is that the email in question does not appear to damage the LSE's position; as I have said, it does not indicate that Dr Piepenbrock made a formal grievance which was ignored; it is therefore hard to see why it should have been deliberately hidden;

(3) Further, in any event, it was in fact disclosed by the LSE in 2017 as part of the disclosure process in the High Court proceedings.

For these reasons I reject Dr Piepenbrock's accusation that the email was deliberately hidden and not disclosed earlier by the LSE for nefarious reasons.

Relative hardship

37. Reverting to para 183 EJ Hodgson's judgment, having dealt with delay and the question of what the proposed sex discrimination claim added to the existing claims, the judge turned to the relative hardship if he refused or granted the proposed amendments. He first stated that Dr Piepenbrock would suffer no hardship if the amendment was refused. Given my conclusion that the judge was wrong to say that the sex discrimination claim added little or nothing to the existing claims, it must follow that the conclusion that Dr Piepenbrock would suffer no hardship if the amendment was refused was also wrong. In fact, the refusal of the proposed amendment prevents Dr Piepenbrock from bringing a claim which he wishes to bring based on his allegation that Ms D's complaints against him were treated differently to his complaints against her because of their respective sexes, the merits of which have not been investigated but which may have added something to those claims already being advanced.

38. The judge then stated that if the amendment was allowed the LSE would face uncertainty and that it was unclear what evidence would be needed and that the hardship to them would be "significant". He was undoubtedly right in that conclusion. He refers to the disproportionate impact on a respondent of allowing a new discrimination claim to be raised at para 226 of the decision. If these amendments had been allowed the LSE would certainly have had to investigate and produce evidence as to whether a grievance had been made by Dr Piepenbrock in November 2012 and how it had been dealt with (as well as how Ms D's complaint had been dealt with), and Mr Bevan and Ms Hay (as well as others) would no doubt have been expected to give evidence on the point (as was confirmed by Dr Piepenbrock's enthusiastic nodding when I suggested to Mr Michell that that would be the case).

Judge's conclusion

39. I have found that EJ Hodgson made an error in his assessment of the para 13.2 and 19.2 claims and was wrong to say they added little or nothing to the claims already made such that refusal of these amendments involved no hardship to Dr Piepenbrock. The question therefore arises whether this error was a "material error" or whether this is a case, as Mr Michell submitted, where the error could not have affected the result. Although the error was in itself of some substance, I am quite satisfied that, even if the judge had not made it, he would have quite properly reached the same result. I say this for the simple reason that he had found that the relevant amendments were lacking clarity and particularisation, that they involved claims which could and should have been brought five years earlier (and which related to events 7 ½ years earlier) and that allowing the amendments would involve significant hardship for the respondent. In those circumstances it seems to me that the only proper outcome of the application to amend was refusal, regardless of the potential additional value of the new claims. It is significant in this context that the judge refused permission to amend in relation to all the new claims which were mooted in the application to amend.

40. On that basis I would dismiss Dr Piepenbrock's appeal.

Disposal if appeal had been allowed

41. In the course of the hearing I asked Dr Peipenbrock whether, if I were to allow the appeal, he would want the matter remitted to the employment tribunal or whether he would agree to me as a judge of the EAT deciding the question whether the proposed amendments should be allowed. After some opportunity to reflect over lunch he stated that he would prefer that I decide the question since, as he frankly admitted, he intends to take the matter to the Court of Appeal and the Supreme Court so that they can consider how autistic litigants in person should be treated and he would therefore prefer to be challenging a decision at a higher level so as to get before those courts sooner.

42. Had I allowed the appeal and exercised the discretion whether to allow the amendments in question afresh I can say unequivocally that I would have refused the amendments for the reasons already set out above. Unlike the judge I would also have given consideration to whether it would be appropriate to extend time for the bringing of the new claims under section 123(1)(b) of the Equality Act 2010 and I would have concluded very firmly (basically for the same reasons) that the necessary extension of period could not be considered "just and equitable" in the circumstances.