Neutral Citation Number: [2022] EAT 9

Case No: EA-2021-000439- RN

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 January 2022

Before:

His Honour Judge James Tayler

- -

Between:

LIVERPOOL HEART AND CHEST HOSPITAL NHS FOUNDATION TRUST

Appellant

- and –

DR MICHAEL POULLIS

Respondent

- -

- -

SIMON GORTON QC (instructed by **Weightmans LLP**) for the **Appellant**
JAMES BOYD (instructed by **Gateley Plc**) for the **Respondent**

Hearing date: 6 January 2022

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JUDGMENT

SUMMARY

Practice and Procedure

The employment judge failed to identify a material change of circumstances that would allow his decision to "cancel" the listing of a preliminary hearing to consider a deposit order application. The appeal was allowed. Discussion of whether it is correct to treat the question of whether there has been a material change of circumstances as "jurisdictional", the care to be taken in listing preliminary hearings and the possibility of so doing on a provisional basis.

His Honour Judge James Tayler

Introduction

1. This is an appeal against the decision of Employment Judge Robinson made at a preliminary hearing for case management held on 10 February 2020 refusing to fix a preliminary hearing to consider the respondent's application for a deposit order, or orders ("the deposit order application"), sought on the basis that the claimant's claims had little reasonable prospect of success.

Pleading the claim

2. The claimant was employed by the respondent as a cardiothoracic surgeon from 1999 until his summary dismissal by letter of 18 October 2019.

3. By a claim form submitted to the employment tribunal on 14 February 2020 the claimant brought claims that he had been wrongfully and unfairly dismissed, including that the dismissal was automatically unfair being for the reason, or principal reason, that he had made protected disclosures. He also asserted that he had been subject to detriments done on the ground that he had made protected disclosures.

4. Mr Gorton in his skeleton argument notes that the claim form ran to 45 paragraphs and referred to matters starting in 2015. On the respondent's calculation 8 protected disclosures were asserted that were said to have resulted in 15 detriments, and finally the claimant's dismissal.

5. The respondent asserted in its response that the claimant was dismissed for admitted improper completion of documentation.

6. The grounds of claim appended to the claim form were professionally drafted and, on my reading, despite requiring some clarification, set out the basis of the claims in a manner that should have allowed the matter to be brought to trial without requiring an abnormal amount of case management, particularly having regard to the relatively straightforward nature of the respondent's primary defence. In a letter sent with the response, the respondent sought additional information contending that it was required to clarify the claims.

7. On 7 May 2020 the claimant submitted a second claim form, primarily asserting a post dismissal detriment.

8. Working co-operatively, in accordance with the overriding objective, the parties should without too much difficulty have been able to clarify the issues so that any necessary application for amendment could be made at the first preliminary hearing for case management. The risk of the pleadings becoming ever more convoluted could have been avoided. If a preliminary hearing for case management ends with a party being sent away to provide additional information this generally should be seen as a failure. It almost always is the start of a process of expansion of the pleaded case, often resulting in applications for amendment and/or strike out which rarely advance the overriding objective. An employment judge cannot make a success of a preliminary hearing for case management if the parties do not co-operate. The parties in accordance with their duty to assist in the application of the overriding objective should do all that they reasonably can to seek to ensure that the issues can be identified and any applications for amendment be determined at the first preliminary hearing for case management, which in many cases should be the only one necessary. The overriding objective is advanced by focusing on the core issues in claims and, particularly in discrimination and public interest disclosure claims, by bringing them to a hearing without excessive interlocutory wrangling. Where the turn is taken in the direction of repeated particularisation of the pleaded case, and numerous preliminary hearings for case management are held, the parties and the employment tribunal are rarely the winners.

Case management

9. A preliminary hearing for case management was held by Employment Judge Buzzard on 21 May 2020. EJ Buzzard recorded:

> 13. After a brief discussion with the parties the claimant's representative agreed that the particulars of claim are lacking specific details in a number of areas. For this reason, the claimant's representative agreed that further particulars, broadly in line with those requested by the respondent in their letter of 12 March 2020, should be provided. …

> 15. After some discussion it was agreed that, when providing particulars, the claimant would do this in the format of a composite grounds of claim document, including the claims raised in both ET1s. The respondent would then present a composite full defence to the claims raised. The grounds of claim would be accepted as an amendment to the claimant's First Claim.

10. Where it is accepted that a claim requires clarification this should be provided before the preliminary hearing for case management whenever possible.

11. EJ Buzzard made provision for a preliminary hearing in the following terms:

> 3. A preliminary hearing before an Employment Judge sitting alone was listed to take place on 26 November 2020 starting at 10:0Oam or as soon as possible afterwards. The time estimate for the hearing is one day. The preliminary hearing will consider the following issues, to the extent that they remain in dispute between the parties at that date:
>
> > 3.1 Were any of the claimant's claims presented to the Tribunal outside the primary time limit for presentation of claims, and if so should time be extended to permit the claim to fall within the jurisdiction of the Employment Tribunal to consider;
> >
> > 3.2 Did any of the acts that the claimant relies on as protected disclosures amount to a protected disclosure; and
> >
> > 3.3 Should the claimant be required to pay a deposit in respect of any of his claims on the basis that he has little reasonable prospect of that claim proceeding, and if so what deposit should be ordered.
>
> 4. The respondent shall confirm to the claimant and the Tribunal by no later than 9 October 2020 which of the above issues the respondent asks the Tribunal to consider at the preliminary hearing. To the extent that consideration of any issues requires the consideration of evidence (documentary or witness) orders for the preparation of that evidence prior to the preliminary hearing at set out after this note. ...

12. On the face of it, the listing of the preliminary hearing was contingent upon the respondent writing to the employment tribunal by 9 October 2020 stating which, if any, of the applications it wished to pursue.

13. At paragraph 25 EJ Buzzard stated:

> 25. The respondent at this time intends to pursue an application that one or more the claimant's claims should be made subject to a deposit order. In advance of the listed preliminary hearing the respondent will provide a cogent explanation of the grounds upon which any such application is pursued.

14. Accordingly, the respondent was required not only to state that they wished to pursue an application for a deposit order but also to set out cogently the grounds upon which such an order was sought.

15. The deposit order issue appears to have been lost in disputes about the pleadings. Having asked for more information the respondent got it. On 11 September 2020 the claimant served a document described as amended grounds. To the respondent's consternation this now ran to 96 paragraphs and, on their calculation, asserted 14 protected disclosures and 34 detriments. The claimant then sent a second version of this document on 24 September 2020, which added a further alleged protected disclosure. The respondent challenged what they saw as an expansion, rather than clarification, of the claimant's case.

16. On 9 October 2020 the claimant formally applied to amend the claim in accordance with the latest iteration of the grounds of claim. The respondent did not write to the employment tribunal by 9 October 2020 stating which of the three potential applications it sought to pursue at the preliminary hearing, or provide the cogent grounds that would support the deposit order application. Mr Gorton contended that this would have been premature pending the finalising of the pleadings.

17. The preliminary hearing that had been fixed for 26 November 2020 was converted into a preliminary hearing for case management to deal with the pleadings. Employment Judge Robinson allowed some of the proposed amendments but not others. He provided for a further iteration of the grounds of claim to be produced by the claimant by 14 December 2020, after which the respondent was required to serve a fully pleaded response, whether it agreed that the pleading provided by the claimant complied with the Order or not.

18. EJ Robinson obviously thought it was time for the pleading issues to be resolved so that the claim could progress. EJ Robinson noted:

> 7. It is an unfortunate feature of this case that the parties have not been able to complete the pleadings, especially as this matter has been set down for trial by EJ Buzzard for August 2021. The parties are aware of the length of time it takes to now list hearings

> and as time goes by memories will fade and it will be difficult for witnesses to remember important events.
>
> 8. The claimant made an application to amend his ET1 on 9 October this year. I have allowed the amendment, in part, and, in particular, allowed the claimant to raise the issue of the alleged post dismissal referral to the GMC as a detriment. I have not allowed the amendments where the claimant suggests that those comments are merely for background information. The other amendments adding to the disclosures, detriments and giving more detail of the events leading up to the claimant's dismissal from the Trust, I also allow.
>
> 9. So that the respondent's solicitor understands my thinking with regard to these orders and their relationship with previous orders and directions, I require the respondent to put on record its defence in line with the situation as it stands on 14 December when the updated ET1 is presented, not as it was in May this year. Without the pleadings being closed this litigation cannot move forward.

19. Mr Gorton provided a note at the preliminary hearing for case management in which he stated the respondent's intention to pursue the deposit order application after the pleadings had been finalised. Mr Gorton contends that while the respondent could have sought a deposit order on the basis that the unfair dismissal claim had little prospect of success irrespective of the state of the claimant's pleaded case (because the claimant had been dismissed for admitted misconduct), further arguments based on the nature of the asserted protected disclosures and resultant detriments required clarification of the claimant's case.

20. On 14 December 2020 the claimant produced a fourth iteration of the claim form with an attached schedule. This did not satisfy the respondent. The respondent contends that there were now 17 protected disclosures and as many as 60 detriments. The ongoing issues with the pleadings resulted in a further preliminary hearing for case management before EJ Robinson on 10 February 2021.

21. EJ Robinson set out the background. He criticised the parties' representatives for a failure to advance the overriding objective:

> 8. It is unfortunate that it has taken so long for the pleadings to be completed. On the last occasion I dealt with this matter l asked for the claimant's solicitors to lodge their final version of the ET1 by 14 December 2020 and they have done so. I accept that that document is the definitive version of the claimant's claims subject to two issues. Firstly, that protected disclosure five is excluded as a claim, on the basis that that is merely background information and, secondly, that the claimant's solicitors (as per the

> direction below) will number the detriments in order to help the respondent's solicitors understand the claim. However, both Mr Gorton and Mr Williams, on behalf the respondent, accepted that there are now 16 protected disclosures and 66 detriments pleaded. All that is needed is for the claimant's solicitors to number those detriments in the schedule and cross reference them to the appropriate ET1 paragraph. That will satisfy the respondent's legal team.
>
> 9. The ET3, which the respondent was asked to lodge with the Tribunal and the claimant's solicitors by 29 January 2021, is short and to the point and will need enlarging upon now that the amendment application has been granted. The directions below deal with that point also.
>
> **10. I urged both sets of legal representatives to now assist each other in the preparation of this litigation. So far the parties have disagreed over so many matters that the overriding interest has not been best served. [my emphasis]**

22. Such criticism should not be disregarded. It must be uppermost in the representatives' minds in progressing this matter to the hearing listed in the autumn of 2022.

23. EJ Robinson directed the production of a final iteration of the grounds of claim, principally numbering the detriments, without any further changes of substance, after which the respondent was required to provide a fully particularised response. EJ Robinson was asked to provide written reasons for granting permission for the amendment of the claim. He noted the history of the applications:

> 33. Turning now to the question of the amendment of the ET1 I accepted the amendment on 26 November 2020 and gave full oral reasons then. I was not asked for full written reasons after that hearing. I agreed with Mr Gorton that I would revisit the orders I made but did not expect a request today for full reasons with regard to the amendment already accepted by me.
>
> 34. However, in the same way that I accept this litigation is important to the claimant, it is also of importance to the respondent and some of the respondent's witnesses. Consequently. I agree to providing my reasons for allowing the claimant's amendment.
>
> 35. On the basis that I was being asked to reconsider my November ruling, I gave oral reasons to the parties today and 1 now give my written reasons.

24. EJ Robinson explained his reasoning for allowing the amendment. Fundamentally, he considered that the case remained essentially that originally brought with additional detail provided as a result of the respondents' requests:

> 39. **The claimant was dismissed in November 2019 and issued his initial**

> **proceedings on 2 February 2020. There have been four versions of the claimant's ET1. That number suggests the pleadings have been radically altered. <u>They have not</u>.** The final version, which I had before me today, is that version in the hearing bundle at pages 106 to 137. It sets out 17 protected disclosures and 66 detriments. However, the detriments are clearly defined and that pleading has attached to it a schedule which assisted me in understanding the claimant's claims and therefore must have assisted the respondent in order for it to understand what claims it is facing. As an overview for the purposes of this ruling I can say that that the ET1 relabels and elucidates the allegations which originally were set out in the claimant's first ET1. The claimant's first application is clear in pleading that the claimant made a series of protected disclosures to the Trust and to the CQC between 2015 and 2017 and up to his dismissal. The claimant disclosed, he says, evidence of the Trust's mismanagement and misdemeanours within the surgery department up to 18 September 2019. The claimant was dismissed one month after that date. The claimant has, since the issue of proceedings, discovered more about what was going on behind the scenes at the Trust with regard to the issues he raised and therefore he has been able to put more meat on the bones of his original application. I accept that he has added to the number of disclosures with the inevitable increase in the number of detriments but, in essence, they are all the same type of allegation. At the November hearing I indicated that clarity was needed in the ET1 and that background information, which had been included in later versions of the claimant's ET1, should be taken out. The claimant's legal representative has acceded to my request and done what was requested of him. Most importantly, the schedule attached to the ET1 is clear and the respondent therefore knows exactly what claims it has to face, the number of protected disclosures and the details of the detriments. …
>
> 43. Ultimately, all the claimant has done by amending his application is given the respondent a clear indication of all that went on between 2013 to 2019 in this department and because of his disclosures he believes he has suffered detriments. **There are no new claims and the legal issues remain the same. [my emphasis]**

25. The granting of the amendment was also the subject of one of the original grounds of this appeal. That ground was dismissed on the sift by HHJ Auerbach. I have dealt with it in some detail because it is of importance in considering the background to the manner in which the outstanding deposit order application was dealt with.

26. It was asserted by the respondent, and not disputed by the claimant, that towards the end of the hearing EJ Robinson stated that he had decided to "cancel" the listing of a preliminary hearing to consider the matters identified by EJ Buzzard at the preliminary hearing for case management on 21 May 2020. Mr Gorton unsuccessfully sought to argue against this decision. EJ Robinson was asked to give written reasons. The respondent no longer seeks a preliminary hearing to consider the time

issue or that of whether "any act relied upon by the claimant amounted to the making of a protected disclosure" but only complains about the decision not to list a preliminary hearing to consider the deposit order application. EJ Robinson's reasons on this issue were as follows:

> … In order to grant the application I must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim. I accept that I have to treat issues off disparity of treatment and whether a claimant, having admitted certain facts, can show that the dismissal was outside the band of reasonable responses (recognising the band is a wide one) with some caution. But this claim by Dr Poullis is not just an unfair dismissal claim. There is background to this claim which needs to be examined in full.
>
> 30. Having considered both the amended ET1 and the short ET3, served by the respondent, I see no proper basis for finding, at this stage, that the claims have little prospect of success. All the matters pleaded by the claimant are better dealt with before a panel of three. The respondent's legal team have suggested to me that the claimant's dismissal was so obviously fair that an unfair dismissal claim has little reasonable prospect of success. They may believe that, but that is also a triable issue especially as the claimant, amongst other matters, pleads that the sanction of dismissal was outside the band of reasonable responses. Dr Poullis has set out a continuing chain of events from 2013 to 2019 and it would be inappropriate to try to "salami" slice up his claims and order him to pay a deposit with regard to his whistle blowing detriments or his claim for unfair dismissal or indeed both. I see no prospect of a Judge making a deposit order.
>
> 31. So that there is no confusion, I confirm that I have heard no argument from either Mr Gorton or Mr Williams that the claims have no reasonable prospect of success.
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> 32. On balance, therefore, there is no benefit in having a preliminary hearing. The respondent's legal team have complained about the spiralling costs of this litigation. Another preliminary hearing would only increase the legal costs for both parties and to what end? I see no prospect of that 30 day hearing being shortened by adding a one day preliminary hearing to the schedule. It is at the respondent's solicitors' insistence that this matter will take 30 days in order to deal with all the detriments and the dismissal and both Mr Williams and Mr Gorton are emphatic that they will call at least 26 witnesses. All the claims of the claimant will therefore go to the full hearing in 2022.

27. EJ Robinson decided to "cancel" the preliminary hearing to consider the deposit order application primarily because he considered it did not have sufficient merit.

28. Two points have troubled me about the manner in which this appeal has been approached. Firstly, on one view the order of EJ Buzzard listed a preliminary hearing to consider the deposit order application subject to the respondent writing by 9 October 2020 stating which of their applications

they wished to pursue, and, in respect of the deposit order application, giving cogent reasons why the claims had little reasonable prospects of success. The respondent did not do so. It might respectably have been argued that as a result of the respondent's failure to pursue the matter, the order had lapsed. It is arguable that there was no general order that there would be a preliminary hearing to consider the deposit order application come what may, and that order could only be varied if there was a material change in circumstances (or for some other compelling reason of a type not asserted in this appeal). However, that is not the basis upon which the appeal has been defended and it was not the approach of EJ Robinson who considered he was "cancelling" a listing of such a preliminary hearing. Mr Boyd's contention for the claimant is that, without spelling it out, EJ Robinson had concluded that there was a material change of circumstances, being the completion of the pleadings. However, Mr Boyd asserts that the somewhat tentative fixing of the preliminary hearing is a factor that can be taken into account in assessing the materiality of any change in circumstances. I have approached the appeal on the basis upon which it has been advanced and defended.

29. Secondly, the reasons do not refer to Mr Gorton contending that the preliminary hearing could only be "cancelled" if there was a material change in circumstances. It has not been asserted by Mr Boyd that the respondent cannot argue this point because it was not advanced below. It was not entirely clear to me whether this was on the basis that it was accepted that the issue was raised or because Mr Gorton had to deal with the matter on the hoof at the preliminary hearing for case management, only having an opportunity to "push back" against the decision to "cancel" the preliminary hearing after it had been made. Accordingly, I accept the issue of the requirement for a material change in circumstances is properly in play in this appeal.

The law

30. Rule 29 ET Rules 2013 provides for the making and revision of case management orders:

> "29. Case management orders
>
> The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. Subject to rule 30A(2) and (3) the

> particular powers identified in the following rules do not restrict that general power. 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."

31. The power to vary, suspend or set aside an earlier case management order appears from the rule to be very broad, limited only to a requirement that to do so is in the interests of justice. The provision has been construed in a restrictive manner.

32. The EAT has taken its lead from the approach adopted in the civil courts, in particular to CPR Rule 3.1(7) that provides that "a power of the court under these Rules to make an order includes a power to vary or revoke the order".

33. In **Tibbles v SIG plc (trading as Asphaltic Roofing Supplies)** [2012] 1 WLR 2591, Rix LJ reviewed the authorities and drew out the following principles:

> 39. In my judgment, this jurisprudence permits the following conclusions to be drawn:
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> (i) Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR r 3.1(7) , there is in all probability no line to be drawn between the two. **The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion.** Whether that curtailment goes even further in the case of a final order does not arise in this appeal.
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> (ii) The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.
>
> (iii) It would be dangerous to treat the statement of these primary circumstances, originating with Patten J and approved in this court, as though it were a statute. That is not how jurisprudence operates, especially where there is a warning against the attempt at exhaustive definition.
>
> (iv) Thus there is room for debate in any particular case as to whether and to what extent, in the context of principle (b) in (ii) above, misstatement may include omission as well as positive misstatement, or concern argument as distinct from facts. In my judgment, this debate is likely ultimately to be a matter for the exercise of discretion in the circumstances of each case.
>
> (v) Similarly, questions may arise as to whether the misstatement (or omission) is conscious or unconscious; and whether the facts (or arguments) were known or

unknown, knowable or unknowable. These, as it seems to me, are also factors going to discretion: but where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate.

(vi) Edwards v Golding [2007] EWCA Civ 416 is an example of the operation of the rule in a rather different circumstance, namely that of a manifest mistake on the part of the judge in the formulation of his order. It was plain in that case from the master's judgment itself that he was seeking a disposition which would preserve the limitation point for future debate, but he did not realise that the form which his order took would not permit the realisation of his adjudicated and manifest intention.

(vii) The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation.

40. I am nevertheless left with the feeling that the cases cited above, the facts of which are for the most part complex, and reveal litigants, as in Collier v Williams [2006] 1 WLR 1945 , seeking to use CPR r 3.1(7) to get round other, limiting, provisions of the civil procedure code, may not reveal the true core of circumstances for which that rule was introduced. It may be that there are many other, rather different, cases which raise no problems and do not lead to disputed decisions. The revisiting of orders is commonplace where the judge includes a “Liberty to apply” in his order. That is no doubt an express recognition of the possible need to revisit an order in an ongoing situation: but the question may be raised whether it is indispensable. In this connection see the opening paragraph of the note in the White Book at para 3.1.9 (Civil Procedure 2012 , vol 1, p 60) discussing CPR r 3.1(7) , and pointing out that this “omnibus” rule has replaced a series of more bespoke rules in the RSC dealing with interlocutory matters.

41. Thus it may well be that there is room within CPR r 3.1(7) for a prompt recourse back to a court to deal with a matter which ought to have been dealt with in an order but which in genuine error was overlooked (by parties and the court) and which the purposes behind the overriding objective, above all the interests of justice and the efficient management of litigation, would favour giving proper consideration to on the materials already before the court. This would not be a second consideration of something which had already been considered once (as would typically arise in a change of circumstances situation), but would be giving consideration to something for the first time . On that basis, the power within the rule would not be invoked in order to give a party a second bite of the cherry, or to avoid the need for an appeal, but to deal with something which, once the question is raised, is more or less obvious, on the materials already before the court.

42. I emphasise however the word “prompt” which I have used above. The court would be unlikely to be prepared to assist an applicant once much time had gone by. With the passing of time is likely to come prejudice for a respondent who is entitled to go forward in reliance on the order that the court has made. Promptness in application is inherent in many of the rules of court: for instance in applying for an appeal, or in seeking relief against sanctions (see CPR r 3.9(1)(b)). Indeed, the checklist within

> CPR r 3.9(1) must be of general relevance, mutatis mutandis, as factors going to the exercise of any discretion to vary or revoke an order. **[my emphasis]**

34. The jurisprudence of the EAT has focussed on the circumstances in which a material change of circumstances would permit an order to be revisited. Material misstatement or other unusual circumstances that might merit reconsideration have not been a feature of the EAT case law, no doubt because such circumstances are unusual.

35. At paragraph 40 of **Tibbles** Rix LJ noted that many day-to-day case management directions may be varied, often without any disagreement. In civil litigation general case management orders are often made with liberty to apply. Case management is dynamic and this may result in preparatory orders evolving, often without any controversy, as a case moves towards a hearing.

36. Case management is, perhaps, more of an art than a science. A wide variety of orders are made to prepare a case for hearing and there are myriad circumstances in which it might be thought appropriate to amend such orders, often by consent. The point was considered by Stanley Burnton LJ in **Serious Organised Crime Agency v Namli** [2011] EWCA Civ 1411 at paragraph 29:

> In my judgment, the exercise of the discretion must depend on the type and provisions of the order it is sought to vary or revoke and the circumstances in which it was made. It is one thing to seek to vary or to revoke, at one extreme, an order for summary judgment under Part 24, made after a disputed hearing, and at the other extreme a very different thing to apply to vary an order for the service of witness statements so as to extend time for compliance, in circumstances in which the delay in their service will have no effect on the trial date or otherwise prejudice the other parties. Final substantive orders must be distinguished from case management orders. Consent orders (which are not the same as orders made without argument that are uncontroversial when made), such as that considered in W.L. Gore & Associates GmbH v Geox SPA require special consideration. There is a spectrum, and stronger grounds, indeed exceptional circumstances, will be required at one end and relatively little at the other end. Part 52.17 may be regarded as a codification of the stringent requirements at one end of the spectrum in relation to orders made by the Court of Appeal.
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> 30. The essential difference, however, is between an appeal, when the material before the first instance judge is revisited, and an application for variation or revocation, when in general in relation to an order determining a controversy between the parties it is normally necessary to show at the very least a change in the circumstances assumed or found by the Court.

37. It is worth noting that in the civil jurisdiction there may be a power for the appellate court to

revisit the material before the lower court. An appeal to the EAT requires an error of law.

38. In the EAT the focus has very much been on the requirement for a change of material circumstances. In **Goldman Sachs Services Ltd v Montali** [2002] ICR 1251 a preliminary hearing was fixed by an employment judge to determine whether certain claims were time bared. The parties fully prepared for the preliminary hearing. At the preliminary hearing another employment judge decided that the limitation issues would better be considered at the full hearing. Referring to the overriding objective HHJ Peter Clark stated:

> 26. That, it seems to us, is the clearest possible indication that when exercising any power under the Rules, as here, the employment tribunal will follow the same principles as those spelt out in the CPR . In particular, in the present case, it will not reverse any earlier interlocutory order, which has dictated the parties' preparation of their cases, in the absence of a material change in circumstances.

39. The most often cited case on the variation of orders in the employment tribunal is now **Serco Ltd v Wells** [2016] ICR 768. The appeal concerned a decision to revoke an order fixing a preliminary hearing to consider whether the claimant had sufficient length of service to bring, inter alia, a claim of unfair dismissal. The Order was revoked on the basis that the agreement of a lengthy list of issues amounted to a material change of circumstances. HHJ Hand QC derived the following principles from the authorities:

> 43. In my judgment the following emerges from the above consideration of the Rules and authorities relating to the CPR and the Employment Tribunals Rules of Procedure:
>
> (a) The draftsmen of both sets of Rules must be taken to have drafted them with the same universal principle in mind, namely what I have described as finality and certainty of decision and orders and the integrity of judicial decisions and orders; this principle, as the authorities in both jurisdictions illustrate, usually directs any challenge to an order towards an appeal to a tribunal of superior jurisdiction and discourages seeking the same judge or another judge of equivalent jurisdiction to look again at an order or decision, save in carefully defined circumstances.
>
> (b) Although the only reference in either set of Rules to a "change in circumstances" is in a Practice Direction to the CPR and not in the CPR itself (and there is no explicit reference to a "material change in circumstances" in either), the principle, as it emerges from the authorities referred to above, is that before a judge can interfere with an earlier order made by a judge of equivalent jurisdiction there must be either a material change of circumstances or a material omission or misstatement or some other substantial reason, which, taking account of the warning Rix LJ gives against attempting

> exhaustive definition, it is not possible to describe with greater precision.
> (c) When it comes to long standing procedural principles such as this, unless the rubric of the Rules clearly indicates the contrary, that principle should be taken to have been in the mind of the draftsmen when the Rules were drafted and the Rules must be interpreted so as to take account of such a principle.
>
> (d) The draftsmen of the current Employment Tribunals Rules have used the expression "necessary in the interests of justice"; in my judgment that should be interpreted through the prism of the principle I have just articulated; variation or revocation of an order or decision will be necessary in the interests of justice where there has been a material change of circumstances since the order was made or where the order has been based on either a misstatement (of fact and possibly, in very rare cases, of law, although that sounds much more like the occasion for an appeal) or an omission to state relevant fact and, given that definitions cannot be exhaustive, there may be other occasions, although as Rix LJ put it these will be "rare" and "out of the ordinary".

40. In **Serco** HHJ Hand concluded that the agreement of the list of issues did not amount to a material change of circumstances:

> 46. In my judgment the list of issues cannot be regarded as a material change of circumstances. Indeed I cannot regard it as any real kind of change at all. It is true that it provides a more detailed analysis of the case but the case itself remains the same.

41. I have considered the analysis at paragraphs 44 and 45 of the judgment in **Serco** in which HHJ Hand referred to the question of whether there has been a material change of circumstances as being "jurisdictional". It seems to me that this analysis was not necessary for the determination of the appeal, because HHJ Hand found that there was in reality no change of circumstances, so that the comments may best be seen as being obiter, despite HHJ Hand referring to it as a critical issue:

> 44. This leaves the critical issue, so far as this appeal is concerned, as to whether this is all a matter of the exercise of discretion. In **Tibbles v SIG plc (trading as Asphaltic Roofing Supplies)** [2012] 1 WLR 2591 , para 39 Rix LJ said, in relation to the distinction between "jurisdiction" and "discretion": "there is in all probability no line to be drawn between the two". This takes "discretion" a very long way but in my judgment it does not support Mr Blackwood's submission that whether or not an order should be varied or reversed is all a matter of discretion and, therefore, no matter how much I might disagree with Judge Parkin, I can only ask whether his characterisation of the arrival of a substantial list of issues as a "material change in circumstances" was

> outside "a wide ambit within which generous disagreement is possible" or whether he had "reached a decision that is so outrageous in its defiance of logic that it can be described as perverse" (see paras 1–2 of **Harris v Academies Enterprise Trust** [2015] ICR 617). Rix LJ refers at para 39(i) of **Tibbles** to "a principled curtailment of an otherwise apparently open discretion" and it seems to me that if the concept is not to become too elusive (I might say slippery) it requires a degree of fixity that makes the "curtailment" capable of objective assessment in objective terms.
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> 45. As I observed at para 29 above, para 31 of the judgment of the Court of Appeal in **Thevarajah v Riordan** [2014] CP Rep 19 seems to me absolute in its analysis. I cannot detect in it anything of the scrutiny of an exercise of discretion as suggested by Langstaff J in paras 1–2 of Harris . To my mind Richards LJ approached the suggested change in circumstances in **Thevarajah** objectively and absolutely and concluded that the subsequent disclosure could not be described as a material change in circumstances on any basis. He was definitely not asking whether such a conclusion was within the ambit in which reasonable disagreement is possible. **I therefore incline to the view that whether or not a subsequent event amounts to a material change in circumstances is, as Rix LJ put it, a matter of "jurisdiction" and not a question of the exercise of discretion. In other words I would hold that whether or not there has been a change of circumstances and whether or not that change is material is a matter to be decided from an objective standpoint and by asking whether the circumstances changed and whether that matters not from the point of view of a band of reasonableness but from the point of view that either the factual matrix can support that view or it cannot. [my emphasis]**

42. It is clear that determination of an application to revisit an order of the employment tribunal does not involve an exercise of discretion that is at large. It is, as HHJ Hand noted, subject to what Rix LJ described in **Tibbles** as a principled curtailment of an otherwise apparently open discretion. It seems to me that the principled curtailment is that exercise of the power will generally require a material change of circumstances or some other unusual circumstances, subject to the observation of Stanley Burnton LJ in **Tibbles** as to the wide variety of orders and the spectrum of the degree of oversight required. However, it does not seem to me that the principled curtailment of the circumstances in which an order may be varied, generally requiring a material change of circumstances, means that this is usefully described as being a matter of "jurisdiction" rather than the principled exercise of a discretion. Rix LJ doubted that there was a useful distinction to be drawn between the two, but later in the judgement he analyses the matter as the exercise of a discretion, as did Stanley Burnton LJ in **Namli**.

43. The underlying principles are that judges should not, in effect, hear an appeal against their

own decisions, or those of a judge at an equivalent level, and that there should be finality in litigation so that, particularly where a party has taken significant steps and/or expended costs in reliance on an order, they should not find that it has been altered absent a material change in circumstances. If, objectively, there has been no change of circumstances it clearly would be an erroneous exercise of discretion to vary an order on the basis that there has been. However, whether a change of circumstances is material may depend very much on the history of the litigation. If a judge on appeal to the EAT considers that there had been a change of circumstances but would be inclined to conclude that it was not material, but accepts that there is room for a divergence of views and that the approach adopted by the employment judge did not fall outside the range of reasonable analysis, I find it hard to see how it would be correct for the EAT to intervene on the basis that the decision of the employment judge involved an error of law. However, for reasons I set out below, I have concluded that the matter does not require determination in this appeal. I mention my misgivings about this passage in **Serco** because it is so regularly quoted and may require consideration in an appropriate appeal, particularly as the comments appear to me to be obiter.

Conclusions

44. Having considered the manner in which the decision to "cancel" the preliminary hearing was taken by the employment tribunal, the grounds of appeal, and the response, I accept that the appeal must be assessed on the basis that to vary the order of EJ Buzzard (that upon the respondent making an application cogently setting out their grounds there would be a preliminary hearing to determine the deposit order application) EJ Robinson would have had to decide that there had been a material change of circumstances, although I accept the claimant's contention that he would have been entitled to take into account the somewhat tentative nature of the order providing for such a preliminary hearing. I have concluded that it is clear from the reasons of EJ Robinson that the question of whether there had been a material change of circumstances was not considered by him. The claimant's contention is that it is implicit in the reasoning that EJ Robinson concluded that the increased clarity

of the claimant's pleaded case constituted the material change of circumstances. However, as is clear from the extracts quoted above, EJ Robinson concluded that while there was more detail in the later iterations, the essential basis of the claim had not materially changed. More importantly, EJ Robinson did not state this was the basis for revoking the order that there be a preliminary hearing. EJ Robinson concluded that the deposit order application did not have a reasonable prospect of success. If there was no material change in circumstances, that difference of opinion with that of EJ Buzzard could not be a material change of circumstance allowing for the cancellation of the preliminary hearing. In the absence of EJ Robinson identifying a material change in circumstances, I cannot see that the order that the preliminary hearing be cancelled can stand. The respondent should have had reasonable notice that consideration was being given to cancelling the fixing of a preliminary hearing to determine the deposit order application before the decision was taken. The respondent should have had an opportunity to make submissions before the employment tribunal made the decision, rather than merely having an opportunity to try to push back against a decision that had already been made.

45. I have next considered what should be the consequence of my determination. EJ Buzzard required that the respondent should write stating whether it wished to pursue the deposit order application and give cogent grounds in advance of any preliminary hearing. The respondent did not do so, merely indicating in the notes provided for the preliminary hearings before EJ Robinson that it intended to pursue such an application. Accordingly, I have decided that the matter should be remitted to the employment tribunal after which the respondent should, within 14 days of the seal date of the order allowing the appeal, write to the employment tribunal stating whether it intends to pursue the deposit order application and, if so, setting out concisely its cogent grounds for so doing. The respondent must have regard to the overriding objective and the admonition that the parties have not sufficiently done so previously in this litigation. The respondent should consider with care whether such an application is proportionate and, if so, whether it can be limited. Within 14 days of the receipt of any such application the claimant is to state whether it is contended that there has been

a material change of circumstance that should result in a variation of the order of EJ Buzzard and, if so, state what it is asserted to be. Thereafter, if it is asserted that there has been a material change of circumstances an employment judge can determine whether that is the case and whether it is still appropriate to fix a preliminary hearing to consider the deposit order application. If it is not asserted that there has been a material change in circumstances a preliminary hearing to consider deposit order application will necessarily have to be fixed. Having had regard to the very clear views expressed by EJ Robinson as to the merits of the deposit order application, I consider that it would be inappropriate for him to deal with either the question of whether there has been a material change of circumstances or to consider any deposit order application. Other than that, I consider that the allocation of an employment judge to deal with the remainder of case management and the hearing of the claim will be a matter for the Regional Employment Judge.

46. This case provides another example of problems that can arise where a preliminary hearing is fixed on the basis that there may be applications that merit consideration at such a hearing. At a preliminary hearing for case management it may be too early properly to determine whether a preliminary hearing will be in accordance with the overriding objective. Too commonly a preliminary hearing is fixed by one employment judge when it is not yet clear whether it is appropriate, leaving the judge at the preliminary hearing with no choice but to go ahead and determine the matters that have been fixed, even if the employment judge is of the opinion having considered the material available more fully it is not a good idea, because a material change of circumstances cannot be pointed to that would permit revisiting the order of the judge who originally fixed the preliminary hearing. Where at a preliminary hearing for case management it appears that a future preliminary hearing may be appropriate, or that there are a number of applications that it may be appropriate to determine at such a preliminary hearing once pleadings have been finalised and/or the nature of the applications have been clarified, it may be appropriate to provisionally fix a preliminary hearing but to provide for the subsequent determination of whether the preliminary hearing will proceed and/or

what applications will be determined after the pleadings have been finalised and/or the applications have been set out in full. In such circumstances, I do not consider it is good practise simply to order that the preliminary hearing will determine such applications as the parties, or one of them, advances, but there should be a provision for the matter to be considered by an employment judge to decide whether a preliminary hearing is appropriate and, if so, what applications are to be determined, having full regard to the overriding objective. Determination of whether a preliminary hearing will be held, and what applications will be determined, should be in the control of the employment judge, not the parties. There may also be circumstances in which a judge considers that a preliminary hearing would be appropriate if brought on speedily but that the potential for saving of time and/or cost would diminish as the matter proceeds towards a hearing. A situation should be avoided in which the holding of a preliminary hearing was in accordance with the overriding objective at the time it was fixed, but thereafter ceases to be so, but the employment tribunal is powerless to vacate it. It may be appropriate to make it clear in the order that the preliminary hearing is fixed for a specific date and that if it is not conducted on that date the order will lapse so that it would be necessary for the application to be renewed before consideration is given to re-listing a preliminary hearing. It is also always important that the employment tribunal seeks to avoid time and expense being incurred in preparation for an application that does not proceed. The employment tribunal and the parties should never lose sight of the overriding objective.