



**IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH**

5

**Judgment of the Employment Tribunal and Case Management Orders in  
Case No: 4102480/2020 (V) (being Determination of the Outstanding Element  
of the Claimant's Application for Leave to Amend)**

10

**Issued Upon Resumption of Consideration of the Application Following  
Expiry of the Further Period Allowed for the Provision of Directed Further  
Specification of the terms of the Proposed Amendment dated 24<sup>th</sup> September  
2020 and received by the Tribunal in terms of paragraph (First) of its  
Judgment of 27<sup>th</sup> September/4<sup>th</sup> October 2021 ("the Received Proposed  
Amendment")**

15

**Employment Judge J G d'Inverno**

20

**Mr A O Abioye**

**Claimant  
represented by  
Mr S Chihuri,  
legally qualified  
practitioner**

25

**West Lothian Council**

**Respondent  
Represented by  
Ms K Graydon, Solicitor**

30

35

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is:

40

**(First)** That the outstanding element of the claimant's Application for Leave to Amend in terms of the "Received Proposed Amendment", is refused; the same being that part of the application seeking leave to amend in a complaint of Direct Discrimination (under section 13 of the Equality Act

2010) and in the terms set out under the bullet pointed heading “• **Direct Discrimination s.13**” and in the two paragraphs which follow thereafter in the document designated by the Tribunal as the “Received Proposed Amendment”.

5

### **Order of the Employment Tribunal**

**(Second)** That the claimant’s residual complaint of having been subjected to Harassment related to his protected characteristic of Race, in terms of section 26 of the Equality Act 2010,

10

- (a) is appointed to a Final Hearing on its Merits; to which
- (b) there is reserved for determination, after the evidence has been heard, the Preliminary Issue of Jurisdiction (by reason of asserted Time Bar), which is focused in respect of that claim;
- (c) the Final Hearing to proceed before a full Tribunal chaired by any Employment Judge, in conventional “In Person” form, and commencing at 10 am on dates to be afterwards fixed and notified by the Tribunal in the three month listing window April/May/June 2022; and,
- (d) **Directs that date listing stencils be issued to parties’ representatives in that regard forthwith.**

15

20

25

**(Third)** Parties’ representatives are ordered to liaise regarding the exchange of documents; and the respondent’s representative to compile, intimate and lodge with the Tribunal, in paper form, a Joint Bundle of Documents to be referred to at the Final Hearing, together with sufficient copies for the Tribunal’s use, in accordance with the following timetable:-

30

- (a) Not later than 42 days prior to the commencement of the Final Hearing (“the Hearing”) the respondent’s representative to send to the claimant’s representative, a list of the documents which

35

he proposes including in the Joint Bundle on behalf of the respondent;

5 (b) Not later than 28 days prior to the commencement of the Hearing the claimant's representative to send to the respondent's representative such additional documents as he wishes included in the Bundle on the claimant's behalf;

10 (c) Not later than 14 days prior to the commencement of the Final Hearing the Joint Bundle, in its then anticipated final form, to be in the possession of both parties' representatives for Hearing preparation purposes;

15 (d) Not later than 3 clear working days prior to the commencement of the Final Hearing the Tribunal copy bundles to be lodged with the Tribunal.

20 **(Fourth)** Orders the claimant's representative to send to the respondent's representative and to copy to the Tribunal, not later than 28 days prior to the Final Hearing, an updated Schedule of Loss; and Orders the respondent's representative, not later than 15 days prior to the Final Hearing, to send to the claimant's representative, and to copy to the Tribunal, a Counter Schedule of Loss.

25 **REASONS**

30 1. The Tribunal's Judgment of 27<sup>th</sup> September, sent to parties on the 4<sup>th</sup> of October 2021, ("the 4<sup>th</sup> October 21 Judgment") determined and allowed to be received and form part of process, those terms of the Proposed Amendment for the Claimant, dated 24<sup>th</sup> September 2020, which the Tribunal considered were compliant with the requirements of its Orders of 25<sup>th</sup> March 2021. The proposed amendment, in the terms so received, was designated by the Tribunal in its Judgment as "**the Received Proposed Amendment**". It was the claimant's application for leave, to amend in the terms so received and

designated, which was before the Tribunal for determination at the second day of Open Preliminary Hearing (“OPH”).

- 5 2. In its Judgment of 4<sup>th</sup> October 2021, at paragraph **(Sixth)** thereof, the Tribunal refused the application for leave to amend for the purposes of adding a complaint of Indirect Discrimination and insofar as it related to the terms of the Received Proposed Amendment appearing under the heading “*Indirect Discrimination s.19*”.

10 **Procedural History**

3. At the conclusion of the OPH the Tribunal, considered that the terms of the residual part of the Received Proposed Amendment, that is that part seeking leave to amend to introduce a complaint of Direct Discrimination in terms of section 13 of the Equality Act 2010, continued to be so lacking in specification as to:-

- 20 (a) fail to provide the respondent with fair notice of the case which was to be met,
- (b) failed to place the Tribunal in a position to consider the effect of the proposed amendment on the claim and on existing and future case management; but also,
- 25 (c) considered that the potential existed for resultant hardship were the amendment to be refused on that ground alone and,
- (d) that the possibility of providing the directed and outstanding specification remained in existence.

30

4. In those circumstances, the Tribunal,
- (a) In terms **(Second)**, **(Third)**, **(Fourth)** of its Judgment, allowed to the claimant a further and final opportunity to provide the

missing specification, in order that the same, once received, might inform the consideration and application of the balance of relative injustice and hardship test and,

5 (b) at paragraph **(Fifth)** of its Judgment, made provision for the resumption of consideration, and the determination, of the remaining element of the application for leave to amend in the light of such further specification as was provided.

10 5. Otherwise at the continued Open Preliminary Hearing, the Tribunal heard the claimant in oral evidence as to:-

15 (i) why the complaints which are the subject of the proposed amendment were not timeously given notice of in the initiating application when first presented, or alternatively added to it within the primary statutory period allowed;

(ii) why the application to amend was not made at an earlier date;

20 (iii) why it was made on the 24<sup>th</sup> of September 2020; and

(iv) as to the whole circumstances of the lateness; and

25 (b) heard parties' representatives in relative additional submissions only, that is submissions which had not already been made and recorded at the conclusion of the first day of Open Preliminary Hearing and which arose out of either:-

30 (i) the terms of adjustment (further particularisation) received and made to the proposed amendment and, incorporating the called for specification in accordance with the Tribunal's Case Management Order **(First)** of 25<sup>th</sup> February 2021 or,

- (iii) the oral evidence of the claimant in relation to the matters set out at sub-paragraph 3(a) above

5 6. The Tribunal made Findings in Fact, set out at paragraphs 85 to 160 of the 04 October 21 Judgment, restricted to those which the evidence presented supported and which were necessary to the determination of the Preliminary Issues before it. Those findings included, at paragraph 135 in respect of its jurisdiction in terms of section 123(1)(b) of the EqA, and insofar as the same was focused by the application for leave to amend, a finding in the following  
10 terms:-

(a) *“135. In the circumstances presented and, in the event that upon a consideration of other relevant factors, the Tribunal were to otherwise conclude that the balance of injustice and hardship  
15 lay in favour of allowing amendment, it would be just and equitable, in terms of section 123(1)(b) of the Equality Act 2010 that the Tribunal extend the time limit for the presentation of claims in terms and in respect of those parts, if any, of the adjusted proposed amendment”* [the “Received Proposed  
20 Amendment” as further adjusted in terms of the Tribunal’s Order set out at paragraph **(Third)** of its 4<sup>th</sup> October 21 Judgment] *“in respect of which the Tribunal otherwise grants leave to amend.”*

(b) and, at paragraph 163 of its Consideration and Disposal  
25 concluded and determined:- *“Thus the issue of time bar, per se, does not operate to exclude the Tribunal’s jurisdiction in respect of the proposed amendment”.*

30 7. The Tribunal’s Judgment of 4<sup>th</sup> October 21, which remains undisturbed, left outstanding for determination here and upon consideration of such specification directed by the Tribunal as was ultimately provided by the claimant, only the issue of whether leave to amend, in terms of the Received Proposed Amendment, should be granted to add a section 13 EqA complaint of Direct Discrimination.

8. The Note attached to the 4<sup>th</sup> October 21 Judgment sets out at length; the Findings in Fact made, the submissions of parties and the Tribunal's reasoning, all of which informed its Judgment in respect of the matters determined in it. Those, findings, note of submissions and reasons are not reiterated here. Rather, that Note of Reasons and those Findings in Fact (as attached to the Judgment of 4<sup>th</sup> October 21) are referred to for their terms and are incorporated by reference into this document, for reasons of brevity. They should be read in conjunction with the Tribunal's Judgment, of today's date and its disposal of the remaining element of the application for leave to amend.

### **The Subsisting Requirement for Further Particulars/Specification**

9. At paragraph **(Second)**, **(Third)** and **(Fourth)** of the 4<sup>th</sup> October 21 Judgment the Tribunal again ordered the provision of the specification required to allow proper consideration of the remaining element of the application for leave to amend. The terms of Order **(Second)** called for the respondent to tender answers to the proposed amendment as first adjusted, the same to include calls for such further specification in relation to each of the incidents of Direct Discrimination founded upon by the claimant, and under the headings set out in the Tribunal's Order **(First)**(a)(i) to (vii) of 25<sup>th</sup> February 2021, the terms of which remained outstanding and as yet not complied with.

10. The terms of Order **(Third)** required the claimant to furnish the Tribunal and the respondent's representative within a further 14 days thereafter, that is within 42 days of the date upon which the Judgment was sent to the parties (4<sup>th</sup> October 2021), with the previously ordered and still outstanding specification; the same in the form of adjustment to the now received terms of the proposed amendment and;- *"to do so in relation to each alleged incident of direct discrimination, individually, while avoiding the use of generalisations and of the passive voice."*

11. Order **(Fourth)** allowed to the respondents a further period of 14 days thereafter within which to adjust the tendered answers in response thereto if so advised.

5 12. Order **(Fifth)** directed that the case file be brought up to the sitting Judge, together with any adjustments to the Received Proposed Amendment marked by the claimant and the adjusted tendered answers, for their consideration, and for determination of the final remaining element of the application for leave to amend.

10

### **Tendered Compliance**

13. By unsigned email dated 15<sup>th</sup> November 2021, the organisation representing the claimant sent an attachment to the Tribunal in tendered compliance with  
15 paragraph **(Third)** of the Tribunal's Judgment and Orders of 4<sup>th</sup> October 21.

14. The document attached to the email of 15<sup>th</sup> November 2021 was not compliant with the terms of the Tribunal's Order **(Third)** and it was not received by the Tribunal in compliance with that Order.

20

15. By Order dated 16<sup>th</sup> of November 2021 the Tribunal advised parties that:-

(a) The document did not provide the specification ordered.

25 (b) The document contained further arguments and contentions in relation to the original application to amend, upon which parties had already been heard and which the Tribunal's Order of 4<sup>th</sup> October 21 neither called for nor permitted.

30 (c) That the tendered document was not "received" by the Tribunal and;

(d) referred the claimant's representative, of new, to the terms of Order **(Third)**, gave further guidance as to the requirement and directed the claimant's representative to comply with the outstanding Order of 27<sup>th</sup>



September/4<sup>th</sup> October 2021 while extending the time for compliance by a further 7 days, until 4 pm on the 23<sup>rd</sup> of November 2021.

16. By email dated 18<sup>th</sup> November 2021 the claimant's representative wrote to the Tribunal and the respondent's representative stating, amongst other matters, that "*the request for specification is hereby rejected*".
17. The specification which had been ordered by the Tribunal in terms of its Order (**Third**) of 4<sup>th</sup> October 21 was not provided by the claimant prior to or as at the expiry of the extended period allowed for compliance, that is prior to and as at 4 pm on 23<sup>rd</sup> November 2021.
18. Against the above background the Received Proposed Amendment, which had not been further particularised in terms of the Tribunal's Orders, together with the respondent's tendered answers came before the Judge for resumption of consideration and determination of the outstanding element of the application for leave to amend.

## 20 **Discussion and Disposal**

19. As at the date of resumption of consideration of the remaining outstanding element of the application for leave to amend, the terms of the proposed amendment remained inadequately particularised and were lacking in specification to the extent that they failed to give fair notice of the case to which, if amendment were allowed in those terms, the respondent would require to answer. In particular:-

- (a) no specification was provided of when and where any of the individual events alleged were said to have occurred; and,
- (b) in respect of many of them there was, in addition, an absence of any specification of the persons at whose hands the conduct complained of was said to have occurred.

5 (c) The respondent would be unable to properly investigate the factual allegations which, with the exception of the averment “*Ewan was in the habit of referring to the claimant as a big Black man*” were new factual allegations.

10 (d) A fair Hearing could not be conducted in respect of the proposed new allegations, nor could they be adjudicated upon fairly and justly by the Tribunal.

15 20. On the oral and documentary evidence presented, the Tribunal had reached the conclusion, set out at paragraph 135 of the Findings in Fact attached to its Judgment of 4<sup>th</sup> October 21, that it would be just and equitable, in terms of section 123(1)(b) of the EqA, to extend time in respect of those parts, if any, of the to be further particularised Received Proposed Amendment, in respect of which it allowed leave to amend.

20 21. It was accordingly of the issue of whether leave to amend should be granted in the persisting unparticularised terms sought, that the Tribunal resumed its consideration, and to which it sought to apply the balance of “injustice or hardship” test, on the basis of the available material, including its determination of the issue of time bar.

25 22. As the EAT confirmed in **Remploy Limited v J Abbott and others** UKEAT/0405/14, a Tribunal, before granting an application for leave to amend should have before it a properly particularised amendment absent which it will not be in a position to consider the effect of the proposed amendment, if granted, on the existing pleadings and the relative positions of parties and or on future case management. That was the position with which, in the instant case, the Tribunal was presented at the conclusion of the first day of OPH.

30 23. As observed by the Honourable Lady Wise in **Amey Services Limited and another v Aldridge and others**, UKEATS/0007/16, under reference to the

Honourable Lady Smith (as she then was) in **Newquest (Herald and Times) Limited v Keeping** [2010] UKEATS/0051, [at paragraph 23]:-

5                    *“Again, if there is known to be a problem with particularisation, as there was here, an opportunity could be given to remedy that before any decision is reached and a determination of the proposal to amend deferred. There is a clear inconsistency in allowing amendments at the same time as requiring them to be further particularised, but where outright refusal of an amendment would lead to undue hardship, I see no reason in principle why adjustment of the proposed terms of the amendments cannot take place prior to the determination being made, the focus of the arguments might then be on whether and in what time frame such refinement of the proposed amendments should be allowed but those arguments would take place before the single stage decision on the granting or refusal of amendment itself.”*

10

15

24. As is set out in the note of reasons attached to the Judgment of 4<sup>th</sup> October 2021, that was an analysis with which the Tribunal respectfully agreed and in circumstances where, in any event, a continued day of Hearing was required so that the evidence of the claimant, who had not been in attendance on the first day of the OPH, might be taken on the matters potentially affecting time bar.

20

25. That was the approach adopted by the Tribunal; providing the claimant with two subsequent opportunities to bring forward the necessary specification while at the same time, providing detailed guidance as to the requirement and ultimately, of its own initiative, extending the time limit for its provision.

25

26. The necessary specification was not provided in circumstances where the events reliance upon which it is sought to introduce by amendment related to matters which were all within the claimant’s knowledge. The claimant ultimately communicated to the Tribunal, unequivocally, in terms of the last paragraph of his representative’s letter of 18<sup>th</sup> November, a date still 5 days

30

within the extended period for compliance that; *“the request for specification is hereby rejected ...”*.

5 27. As noted at paragraphs 166 to 170 inclusive of the Reasons attached to the 4<sup>th</sup> October 21 Judgment, the explanation, advanced by the claimant in evidence, for his failure as at the second day of OPH and his continuing reluctance to provide specification relating to his complaints, was that there should be no requirement for him to provide detail of the type sought in advance of a Final Hearing but rather, that it was open to him to simply  
10 produce evidence to deal with generally alleged conduct and matters at a Final Hearing without providing any prior notice.

15 28. As set out by the Tribunal in those same paragraphs, that position is fundamentally misconceived. The rules of natural justice require that each party give the other fair notice of the case which they are to meet. That in turn requires that allegations be sufficiently specified and particularised to deliver that effect. The terms of the amendment as ultimately proposed, do not achieve that.

20 29. While the claimant’s historic ill health went, in part at least, to explain why that specification had not been provided as at the 6<sup>th</sup> of August 2021, ill health, even if assumed to be subsisting, does not provide a mechanism by which the requirement to comply with the rules of natural justice can be disapplied by or to a party. They can, at best, provide a basis for the exercise of  
25 discretion in extending time within which compliance may be made.

30 30. In the instant case matters have progressed beyond that stage with two further opportunities and an extension of time having been provided and the claimant ultimately declining to provide the specification required.

31. As set out at paragraph 170(b) of the Reasons attached to the 4<sup>th</sup> October 21 Judgment, an ultimate failure or inability to specify or particularise a complaint, or a potential complaint, such as to give the opposing party fair notice of the case which it has to meet, sufficiently in advance of the Final

Hearing, regardless of the reasons, and for the reasons of fair notice and of fairness already referred to, is likely, if not inevitably, to lead to such claims or potential claims not being admitted to probation; That is to say not being considered at an evidential Hearing which would have otherwise been fixed for the purposes of proving them.

5

32. As at today's date (the date of determination), the terms of the "Received Proposed Amendment", to which the outstanding element of the application for leave to amend refers, remain as fully described and analysed by the Tribunal at paragraphs 141 to 151 of the Findings in Fact attached to the 4<sup>th</sup> October 2021 Judgment; and the lack of specification identified and described in those paragraphs has remained unaltered in the period intervening from 4<sup>th</sup> October 21.

10

33. As recorded at paragraphs 152 to 159 of its previously made Findings in Fact,

15

(a) the terms of the proposed amendment in respect of which the outstanding element of the application for leave to amend falls to be determined, bears to introduce a new Head of Claim, namely a claim of Direct Discrimination in terms of section 13 of the Equality Act 2010, the Form ET1 giving notice only of a complaint of Harassment.

20

25

### **Were Leave to Amend be granted**

(b) The terms of the outstanding proposed amendment continue to be so lacking in specification as to fail to give the respondents fair notice of the claim which they would require to meet were leave to be granted;

30

(c) The claimant would enjoy little reasonable prospect of establishing such factual allegations as would be introduced by the amendment, for reason of their lack of specification and fair

notice giving rise to a right on the part of the respondent to object to what would be the lines of evidence which it would be necessary to pursue were they to be established;

5 (d) The effect of allowing leave to amend in the proposed terms would be to expand the scope of enquiry and the amount of time required to be allocated to it;

10 (e) (d) above would require the respondents to incur further costs and expend further resource;

15 (f) The effect of the granting of an amendment in those unspecified terms would be to require the respondent to attempt to prepare for and to meet, at Hearing, a case of which they had not received fair notice;

20 (g) A fair Hearing on such unparticularised averments nor could be held and nor could the Tribunal fairly determine the issues before it, insofar as founded upon them.

34. Were leave to amend not to be granted:

25 (a) The claimant would be entitled to pursue his complaint of Harassment, because of the protected characteristic of Race, in terms of section 26 of the Equality Act 2010;

30 (b) While that claim is itself the subject of a challenge to the jurisdiction of the Tribunal to hear it, by reason of asserted time bar, the determination of that Preliminary Issue having been reserved to a Final Hearing, its determination by the Final Hearing Judge would fall to be informed by the Findings in Fact already made, as to the reasons and principal reason for delay, which are set out in the Tribunal's Judgment of 4<sup>th</sup> October 21;

(c) If leave to amend were refused the claimant would be deprived of the opportunity to introduce and pursue a complaint of Direct Discrimination;

5 (d) The opportunity so lost, let it be assumed that leave to amend were to have been granted in the terms currently proposed, would be an opportunity of advancing a claim/claims which, for want of specification and fair notice, would enjoy little reasonable prospect of success.

10

35. The Tribunal would err in law were it to grant leave to amend in the unparticularised terms sought.

15 36. In all the circumstances of the case as currently presented, including the Tribunal's conclusion that the issue of time bar *per se* would not operate to exclude the Tribunal's jurisdiction in respect of the proposed amendment, the balance of injustice and hardship falls in favour of the remaining element of the application for leave to amend in a complaint of Direct Discrimination in the terms currently proposed, being refused.

20

### **Disposal**

37. The determination of the Tribunal is that the remaining element of the application for leave to amend is refused.

25

### **Further Procedure**

30 38. The matters set down for Open Preliminary Hearing having now all been determined, the claimant's residual complaint of section 26 EqA Harassment related to his protected characteristic of race, will progress to a Final Hearing on its Merits to which there is reserved for determination after the hearing of evidence, the Preliminary Issue of Jurisdiction by reason of asserted Time Bar; all as directed in terms of paragraph **(Second)** and **(Third)** of the Tribunal's Judgment and Orders of today's date.

Employment Judge: Joseph d'Inverno  
Date of Judgment: 09 February 2022  
Entered in register: 10 February 2022  
and copied to parties

5

**I confirm that this is my Judgment and these are my Orders in the case of Abioye v West Lothian Council and that I have signed the Judgment and Orders by electronic signature.**