Neutral Citation Number: [2022] EAT 182

Case Nos: EA-2021-SCO- 000130-SH

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 8 December 2022

Before :

MICHAEL FORD KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

MR EDI VEIZI	**Appellant/Cross-appeal Resondent**
- and –	
GLASGOW CITY COUNCIL	**Respondent/Cross-appeal Appellant**

- -

Ayoade Elesinnla of Counsel (instructed by Strand Solicitors) for the **Appellant/Respondent**
Stephen Miller, Solicitor Advocate of Clyde & Co (Scotland) LLP for the **Respondent/Appellant**

Hearing dates 23 and 24 November 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The claimant brought claims of unfair dismissal, race discrimination and victimisation following his dismissal by the respondent. During the course of his evidence, the claimant made an application for recusal of the tribunal on grounds of bias. The tribunal refused that application and set out written reasons for several decisions it had made in the course of the hearing. The claimant appealed against seven aspects of the tribunal ruling, relating to matters such as amendment of pleading, the evidence to be given, a response to a request for further information, admissibility of documents, and the evidence given by the claimant.

The appeal was dismissed on all but one ground. The tribunal was not required either to accept the respondent's application to amend its pleading in its entirety or to reject it in its entirety: there is no inflexible rule that a tribunal cannot disallow part of an amendment and make consequential changes to the text of a proposed amendment. The tribunal was entitled to admit a document on the precautionary basis that it might be relevant, and it did not display apparent bias in listening to a recording on a disputed matter about the claimant's evidence. The tribunal was entitled to find that the respondent was not prevented from giving evidence on the dismissing officer's state of mind in sending some e-mails when it had not expressly pleaded that matter: pleadings should set out the essence of a party's case, not every fact and matter of evidence in support.

The appeal was allowed on one ground, where the tribunal had rejected the respondent's application to amend an answer given in response to an order to provide further information. The tribunal had disallowed the application because it would prejudice the claimant but, in conflict with the basis for that decision, had indicated that the respondent could nonetheless present evidence to that effect. It had also failed to consider the prejudice to the respondent if the changed answer were not permitted.

Michael Ford KC, Deputy Judge of the High Court

Introduction

1. This is an appeal against a judgment of the employment tribunal (Employment Judge Gall, P O'Hagan and J McCaig) sent to the parties on 17 November 2021. In its judgment the tribunal (the "ET") refused the Claimant's application that it recuse itself and also gave written reasons for various procedural rulings it had made during the hearing.
2. The appeal was brought by the appellant in a notice of appeal sealed on 17 December 2021. Permission to bring the appeal was given by Judge Bowers KC, sitting as DHCJ, in an order of 17 January 2022, who gave permission to appeal on all grounds. The respondent brought a cross-appeal, received on 11 February 2022, on two grounds and these were also allowed to proceed to a full hearing by HHJ Tayler in an order of 4 April 2022.
3. I shall refer to the parties as the claimant and respondent, as they were before the Tribunal.
4. Before me, the claimant was represented by Mr Elesinnla, who also appeared in the ET, and respondent was represented by Mr Miller, who did not appear in the ET.

ET Decision and its Background

5. At present the ET has made no findings of facts, but some background is necessary to understand the appeal.
6. The claim form was received on 2 July 2019. According to the amended particulars of claim, the claimant was employed as Temporary Accommodation Development ("TAD") Officer from 14 January 2001 until he was dismissed for gross misconduct with effect from 5 April 2019. He was responsible for managing the respondent's properties so that temporary furnished flats could be brought into service for homeless people. The claimant, who is of Albanian national origin and British nationality, brought claims of unfair dismissal, race discrimination and victimisation.

7. The history which led to the claim is outlined in the amended particulars of claim at paragraphs 7 and following and in the amended "Paper Apart" attached to the respondent's response. In brief, the claimant was suspended and later investigated because of allegations that he had been letting out "void" flats, double ordering white goods (such as washing machines) which were necessary for occupation of the flats for his own personal gain, and using his council e-mail for personal purposes. This led to an investigation report and a hearing on two charges only that he had (i) misused his Council e-mail account and (ii) double-ordered white goods for personal gain.

8. The ET has made no findings of fact but some stages in the procedure which led to the claimant's dismissal are relevant to this appeal. In particular:

   (1) In around May 2018 an initial audit or investigation of the flats for which the claimant was responsible was conducted by Ms Paterson, the claimant's line manager and a Team Leader of TADs, assisted by another Team Leader, Ms Miller.

   (2) Following an investigation by the Respondent's Corporate Fraud Team, in around July 2018 Mr Robertson, the Community Homelessness Manager, conducted an investigation into the allegations against the claimant.

   (3) The disciplinary hearing which led to the claimant's dismissal was chaired by Mr McBride, the respondent's Head of Adult Services (Homelessness, Addiction and Criminal Justice Services), between 4 and 5 April 2019. It was Mr McBride who summarily dismissed the claimant for gross misconduct.

9. In his amended particulars of claim the claimant set out various particulars in support of his complaint of unfair dismissal, focussing above all on the investigation (paragraph 68). He repeated those allegations in respect of his complaint of race discrimination and added two other complaints (paragraph 69). He also made specific allegations of victimisation (paragraph 70). In its amended Paper Apart, the respondent denied that the claimant was

unfairly dismissed (paragraph 53) and contended that the claimant would have been dismissed in any event and or should have compensation reduced for contributory conduct (paragraphs 54-55). It also denied race discrimination and victimisation (paragraphs 57-63).

10. After numerous orders made at preliminary hearings relating to the matters such as amendment, disclosure of documents and provision of information, the hearing began on 18 October. It was listed for 16 days. There were no witness statements, and the claimant gave his evidence in chief and was cross-examined. In the course of the hearing the ET made numerous oral rulings on procedural matters, some of which are relevant to this appeal.

11. At a point where the claimant's cross-examination had not yet completed, on 1 November Mr Elesinnla, for the claimant, indicated that he would be making an application that the ET recuse itself on grounds of bias. That led to a written submission from Mr Elesinnla and a response from the respondent's representative, Ms Ross, on 8 November.

12. The ET refused the application for a recusal, for the reasons set out in its written judgment. In response to a request from Mr Elesinnla, it also set out written reasons for seven case management decisions on which it had earlier given oral reasons. Several of those decisions are the subject of this appeal, and I deal with them in detail under the particular grounds. In light of the indication that the claimant was to appeal the ET's rulings, the ET decided to sist or stay the claim for seven weeks (ET judgment paragraphs 164-166). According to the latest correspondence which I was shown, the claim has now been sisted pending the outcome of this appeal.

The Grounds of Appeal

13. In the grounds of appeal, various aspects of the ET's decisions are criticised as tending to show bias, as well as amounting to errors of law owing to procedural irregularities or perversity. I do not accept Mr Miller's argument, which he quickly abandoned, that

permission was only given by Judge Bowers QC on some grounds only. Read fairly, and correctly, it is clear he gave permission for all seven grounds to proceed.

14. Neither party referred me to any cases on the principles for bias, which are well-known. In particular, apparent bias will arise where the fair-minded and informed observers, knowing all the relevant circumstances, would conclude there was a real possibility that a tribunal was biased: see **Porter v Magill** [2002] 2 AC 377 per Lord Hope at [103]. In addition, interim decisions on procedural matters are generally not susceptible to challenge on appeal unless they are made outside the tribunal's powers, do not reflect guiding legal principles or are unlawful on **Wednesbury** grounds.

15. Neither party presented any affidavit evidence of the facts which occurred before the ET and, in the event, neither party referred to any notes of the hearing. The errors of law, if there are any, are to be detected from the Tribunal's reasons alone, supplemented by any points based on the facts of the hearing about which there was no disagreement.

16. It is against that background that I consider the individual grounds of appeal

17. **Ground 1**. This is a challenge to the decision of the ET to allow an amendment to paragraph 26 of the Respondent's Paper Apart annexed to ET3. The point arose following Mr Elesinnla asking the claimant questions in his evidence in chief about some documents relevant to the investigation conducted by Mr Robertson. The documents related to a flat for which the claimant was responsible and included notes of orders of white goods. The claimant's evidence was to the effect that written notes on the documents showed, for example, he had in fact cancelled orders for some of the white goods which he was accused of stealing, meaning that he had not in fact double-ordered the goods.

18. It seems that Ms Ross objected to this line of questioning on the basis that no specific allegation had been pleaded by the claimant that he had not in fact double-ordered the goods. In response, Mr Elesinnla contended that the exiting pleading was sufficient and that these

documents had been ignored or altered in Mr Robertson's investigation, so that his investigation was inadequate or based on incorrect facts: see ET reasons at paragraphs 38-41.

19. After hearing submissions on the matter, the ET decided that the claimant had not adequately pleaded that he had not in fact double-ordered goods or that Mr Robertson had ignored, overlooked or altered documents, meaning that an amendment was necessary. It also became clear that the claimant wished to contend that the investigation of Mr Robertson was discriminatory. After hearing submissions, the ET allowed the claimant to amend paragraph 68(12) of his pleading to include a specific allegation against Mr Robertson and permitted the questioning to proceed. It therefore allowed him both to plead that Mr Robertson's investigation was unreasonable and discriminatory and to lead evidence on the matters relevant to his questioning: see paragraphs 54-56.

20. It seems that as a result of this issue, the respondent then applied to amend paragraph 26 of its Paper Apart because, it seems, its instructions now were that Mr Robertson did not see all the documents prepared by the Corporate Fraud Team. The ET dealt with this point at paragraphs 57-68. It set out the proposed amendment from the respondent at paragraph 59:

> "The relevant original paragraph, and proposed amendment, were in these terms:-
>
> Original opening paragraph 26:-
>
> *'The Corporate Fraud team collated the information gathered as part of their investigation and provided it to Alan Robertson on or around 12 July 2018. This included information about duplicate ordering of white goods and evidence of someone living in poverty with which the claimant was dealing.'*
>
> Proposed amended opening paragraph 26:-
>
> *'The Corporate Fraud team collated the information gathered as part of their investigation. It was intended that the information be provided to HR for passing to Allan Robertson on or around 12 July 2018. It appears that a small number of documents were omitted from the documents provided to Mr Robertson in error. It is denied that any such omission rendered the investigation of the Corporate Fraud team or of Mr Robertson unreasonable, discriminatory or an act of victimisation. The information gathered by the Corporate Fraud team included information about duplicate ordering of white goods and evidence of someone living in a property with which the claimant was dealing.'* "

21. After referring to the familiar principles in **Selkent Bus Co Ltd v Moore** [1996] ICR 836 and

expressing its concern that the respondent was changing its stance, the ET decided to allow only part of the amendment. As it stated at paragraph 61:

> "As a result of its deliberations the Tribunal came to the view that it would allow the proposed amendment in part, refusing parts of it. Specifically, it refused permission to amend to include sentences 2 and 3 of the proposed amendment. Those sentences read:-
>
> '*It was intended that the information be provided to HR for passing to Allan Robertson on or around 12 July 2018. It appears that a small number of documents were omitted from the documents provided to Mr Robertson in error.'* "

22. The ET took this course because, as it stated at paragraph 62, it did not accept the reason given by the respondent for the lateness of the application. That reason was, I was told by Mr Miller, that a person within the respondent had been absent for a long time so that the facts on which the amendment application were based had only recently come to light.

23. As a consequence of the ET's decision not to permit the respondent to include the first two sentences, an adjustment to the fourth sentence was necessary in the interests of grammar and sense (see paragraph 62). The ET said:

> "The amendment as permitted therefore meant that the start of paragraph 26 read:-
>
> *'The Corporate Fraud team collated the information gathered as part of their investigation. It is denied that the investigations of the Corporate Fraud team or Mr Robertson were unreasonable, discriminatory or an act of victimisation. The information gathered by the Corporate fraud team included information about duplicate ordering of white goods and evidence of someone living in a property with which the claimant was dealing.'* "

24. A point then arose whether the permitted amendment had enabled the respondent to make a *volte face*, and excise the part of the original pleading which contended that the information from the Corporate Fraud team had been passed to Mr Robertson. The ET addressed that point at paragraph 66, saying that "when this was raised at the hearing, the respondents confirmed through Ms Ross that they did not dispute that Mr Robertson had received the papers on or around 12 July 2018". As a result of that assurance, the amended form of paragraph 26 in the pleading was allowed to stand.

25. The first argument under this ground of this appeal is that the fair-minded and informed observer would conclude from the amendment permitted by ET that it was biased: an allegation of apparent bias. I do not accept that argument. The ET may have been rather exacting in the approach it took, of requiring amendments to pleadings, but its reasons indicate it applied a similar approach to each party. It allowed the claimant's amendment to plead a claim relating to Mr Robertson and to lead evidence in support of the revised allegations. The informed observer would note, too, that the ET rejected the respondent's explanation for the delay in making the amendment and refused to allow the respondent to obtain the full amendment that it sought. The ET also sought an assurance from Ms Ross that the respondent would not seek to use the amendment to dispute its original allegation, that Mr Robertson had received the documents from Corporate Fraud, a further step to ensure fairness to the claimant. In all the circumstances, I do not consider the fact that the ET engaged in a process of deciding how the amended pleading was to proceed as being sufficient to demonstrate apparent bias.

26. The second argument under this ground is that the ET had no discretion to adjust an amendment proposed by a party: it either must allow an amendment in total or refuse it (and perhaps invite a further application on a re-worded amendment). Reliance is placed on **Margarot Forrest Care Management v Kennedy**, UKEATS/0023/10/B1, where the EAT allowed an appeal against an employment tribunal decision to permit a claimant to add a claim of dismissal on grounds of making a protected disclosure. The tribunal itself drafted the amendment and gave the respondent no opportunity to make submissions on it. Among other reasons for allowing the appeal, the EAT said this at [32]:

> "Where amendments of claims are concerned, the discretion conferred on an Employment Tribunal is to grant leave to a claimant to allow the claimant to amend the form ET1 in the terms that he or she proposes if appropriate: it is not a discretion for the Employment Tribunal to give themselves leave to amend the ET1 in whatever terms they think are best. Nor does an Employment Tribunal have a discretion so to amend without allowing the respondent the opportunity to make representations to the wording which the amendment will contain if leave is granted. For an Employment Tribunal to act in such a manner runs the risk of them appearing to have stepped outside the judicial role and acted as advocate for one party"

27. Those comments should not be read out of context and as laying down a rigid rule that no changes to a proposed amendment may be made by an ET when it is deciding whether to grant permission to amend. Changes may be necessary in order to ensure an amendment properly reflects what a party is seeking to allege, makes grammatical sense or is legally correct. They may also be necessary to ensure fairness to the other party: for example, to ensure that a pleaded allegation is sufficiently clear and can be properly understood, so that the other side knows the case it must meet. There is no express rule in the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** governing the exercise of the tribunal's discretion to make amendments or the procedure to be followed. The ultimate legal sources of the powers are rule 29, by which tribunals may make case management orders, and rule 40, by which they may regulate their own procedure. An inflexible rule that a tribunal can never itself make changes to the form of a draft amendment is liable to detract from the overriding objective of dealing with cases justly, to which tribunals must give effect when exercising their powers under the rules. That is especially important in a context where many parties are unrepresented. It also risks introducing undue formality into a procedure in which parties are often unrepresented, contrary to rule 41.

28. Here, the ET did not allow the full amendment proposed by the respondent and made a small adjustment so that the amendment it permitted made grammatical sense. In those circumstances, in my judgment, it did not exceed its powers under the rules and nor did it cross the line of acting as an advocate for one party so as to render the hearing unfair. Nor do I consider there is any sufficient basis for the submission that the ET failed to consider Mr Elesinnla's objections to the terms of paragraph 26 in its final form, when the ET's reasons refer to its considering these: see paragraphs 65-67.

29. Finally, in relation to the other arguments raised under this ground, the ET directed itself in accordance with **Selkent** (see paragraph 60), gave sufficient reasons for its ruling and, in light

of the broad discretion tribunals have in relation to such questions, took a decision it was entitled to reach.

30. In the first ground of the cross-appeal (numbered 5.1), which Mr Miller said was contingent on the appeal succeeding on ground (1), it is contended that the ET failed to take into account a relevant factor, namely that it was only when the claimant was giving his evidence that it was appreciated that there was a challenge to the documents which were before Mr Robertson. But, first, it was clear from the claimant's original pleading that there was a general challenge to the reasonableness of the investigation of Mr Robertson; and, second, Mr Miller accepted that this factor was not relied on by the respondent before the ET as a reason for permitting the amendment, so the ET can hardly be criticised for not mentioning it. For these reasons, I reject the respondent's cross-appeal relevant to this aspect of the ET decision.

31. **Ground 2**. This is a challenge to the ET's decision that the claimant's pleadings required amendment in order that the claimant could present evidence in chief about the documents relevant to the investigation conducted by Mr Robertson and which, he contended, showed that he did not in fact double-order white goods and that Mr Robertson's investigation overlooked some documents. It involves the same documents to which I have already referred, showing orders for white goods made at a flat for which the claimant was responsible which, it was said, demonstrated the claimant had not in fact double-ordered goods and supported the submission that Mr Robertson's investigation was inadequate.

32. The claimant criticised the investigation in general terms in paragraph 68(12) of the pleading and questions about whether the claimant in fact committed theft would be relevant to the contributory conduct pleaded by the respondent, suggesting that no amendment might be strictly necessary. But it is notable that the existing pleading did not state that the claimant had not double-ordered white goods and, on the contrary, implied that he had but this was normal practice in the department: see paragraphs 68(2)-(5) of the claimant's amended

particulars, stating for example that "the respondent failed to establish whether or not the claimant's double ordering was normal practice within the department". In those circumstances, I consider it probably fell within the scope of the ET's powers in such matter to require an amendment to the claim. But in any event the point is academic for the purposes of this appeal because the ET allowed the amendment and allowed the questioning to proceed.

33. Mr Elesinnla also seeks to rely on the approach the ET took, of requiring an amendment to his pleadings, to support an allegation of bias. He draws attention to paragraphs 105 and 106 of the ET's reasons where the ET was critical of his narration of events made in the course of his recusal submissions. It seems the ET was faced with what it described as "extensive submissions" from both sides on the question of amending the claim (paragraph 42) and it ultimately granted the amendment, despite the opposition of the respondent (paragraph 53). In those circumstances, I do not consider the well-informed observer would consider the ET's approach showed apparent bias, and no case was pressed on actual bias.

34. **Ground 3**. In this ground the claimant contends that the ET erred in law, made a perverse decision and/or acted unfairly in the approach it took to an application by the respondent to alter and amplify its response to an order of the tribunal to provide further information. Once more some background is necessary to understand the appeal.

35. The issue related to the scope of the initial investigation conducted by Ms Paterson into the flats for which the claimant was responsible, referred to in paragraph 7 of the respondent's Paper Apart. After the claimant submitted a request for further information, by order dated 16 January 2020 the ET ordered the respondent to answer some questions about that investigation, including whether they had investigated any other TAD officers at the time (this was a question numbered 13aiv). The respondent's initial response was to give some details of their investigation, saying that after Ms Paterson noticed duplicate orderings at some of the claimant's flats, she and Ms Miller checked "other flat files for similar anomalies". In

response to the question 13aiv, the simple answer given was "No". In answer to a further question, 13aviii, the reason given for not investigating other TAD officers was that no concerns had been raised about other officers. This position was maintained in subsequent iterations of the responses.

36. By an e-mail of 12 October 2021 sent to the ET, the respondent sought to change the answers to the relevant questions. The details of the amended responses were set out in tracked changes. It was now said, in summary, that the check on flats carried out by Ms Paterson and Ms Miller had included approximately 200 flats in the South area, and issues were identified in relation to eight flats only, all of which were claimant's responsibility. The response to question 13aiv continued to assert "No" in reply to whether Ms Paterson and Ms Miller were reviewing other TAD officers but was now amplified to state as follows (bold and underlining on original).

> **"No**. In that Ms Paterson and Ms Miller were not reviewing any particular TAD officer but rather simply reviewing flats in the South area. The flats reviewed included the flats for which two other TAD Officers who were allocated to the South area along with the Claimant were responsible."

37. The respondent's application came before the ET. It treated the application as an application to "supplement the further and better particulars": see heading to paragraphs 31-37. The claimant opposed the application. It rejected the respondent's explanation for the delay and considered there was prejudice to the claimant if the addition was made (paragraph 36). It then said this at paragraph 37:

> "The Tribunal considered all relevant matters, including the interests of justice and the overriding objective. It decided, on balance, not to permit the additions proposed by the respondents. This was a decision taken after retiral and discussion. The Tribunal was however conscious that questions might legitimately be asked in evidence of Ms Paterson and Ms Miller as to the instructions given to them to investigate and as to what their investigation had involved. It appeared to be the respondent's position that the investigation carried out was wider than instructed. Evidence given in this area, as given and tested, would be weighed, enabling the Tribunal to decide what evidence it accepted in making its findings in fact on relevant matters"

38. The potential problem of what could or could not be put in evidence then came to prominence during the cross-examination of the claimant: see ET reasons, paragraphs 73-75. Ms Ross sought to ask a question based on what was now asserted by the respondent to be the actual investigation done by Ms Paterson. According to the ET, the question was "Ms Paterson did review files relating to flats and identified a number of your flats where goods had been ordered 2 or 3 times?" (ET, paragraph75). Mr Elesinnla objected that this was inconsistent with the ET's ruling on the response. Once more, the ET retired.

39. At paragraph 74 the ET decided, first, that the reference "in the pleadings to reviewing 200 flats was not an addition permitted by the Tribunal", but it noted the respondent's pleadings did mention that Ms Miller had done an investigation (see Paper Apart at paragraph 7), saying that her "evidence would appropriately relate to what she did and why". Its decision was that the question could be put to the claimant because "there was a foundation for it in the case as pled, notwithstanding the exclusion from the further and better particulars of the proposed information that 200 flats had been considered in the review of Ms Paterson and Ms Miller" (paragraph 75).

40. Both parties challenge the decision taken by the ET. For the claimant, it is contended that the ET decision was wrong, perverse or unfair because it could not at once debar the changes to the further information because of prejudice to the claimant but then indicate it would allow questions to be asked of Ms Paterson (or the claimant) about the investigation the respondent asserted was undertaken. In ground 5.2 of the cross-appeal, where the respondent challenges this aspect of the ET decision, it was contended that the ET decision was perverse because, among other reasons, the ET did not consider the prejudice to the respondent of refusing the supplement to its original answer.

41. The discretion of the ET whether or not to allow the changes to the answers must be guided by the overriding objective. The overarching purpose of the provision of information is to

enable the other party to know in sufficient detail the case against him or her which he will have to meet. As part of its duty to deal with cases fairly and justly, a tribunal should consider the hardship to each side in allowing or refusing changes to answers or late answers.

42. While I recognise the broad area of discretion given to employment tribunals on interim rulings such as this one, in my judgment the ET did err in the approach it took. First, the prejudice to the claimant, which led the ET to refuse to allow the respondent to amend the answer in paragraph 36, was not identified by the ET but it was presumably that he would now face a different case from which he had come to meet, based on new facts and evidence (the ET did not appear to consider if that prejudice could be avoided by other procedural steps). It was inconsistent with the basis for that decision to indicate in paragraph 37 that the respondent could nonetheless give evidence in this area, with a risk of reproducing the very prejudice its ruling was meant to avoid. The consequence of this tension in the judgment was great uncertainty as to what evidence could and could not be presented. For example, when I asked Mr Miller if the ET ruling meant that Ms Paterson could lead evidence that she was asked to investigate 200 flats, he said that he could not say.

43. Second, as part of its task of acting fairly and justly, the ET should have weighed the relative hardship to *both* parties of allowing or refusing the respondent's application to change its answer, by analogy to the approach taken on amendment of pleadings. Nowhere in the ET judgment does it indicate, however, it considered the potential prejudice to the respondent of refusing its request to change its answer and consequently being unable to present evidence of what it said the investigation in fact involved. That, it seems to me, was a relevant factor to the exercise.

44. I therefore uphold both the appeal and cross-appeal against this aspect of the ruling. I do not accept that the decision was perverse and only one answer to the question before the ET was possible, as both the claimant and respondent contend but with opposite results. Nor do I

consider the ET's decision shows it acted in a biased manner against the claimant, contrary to ground (3)(e) of the grounds of appeal. On the contrary, the ET recognised the prejudice to the claimant in its decision and did not accept the respondent's explanation for the delay.

45. **Ground 4**. This is a challenge to the inclusion of a High Court judgment in the bundle of documents. This issue is dealt with by the ET at paragraphs 69-72. In summary, during his evidence in chief the claimant, for reasons which are not entirely clear to me at least, was asked if he knew a person called Mr Zefaj. It seems he gave some evidence that this person was a friend of his, that he did not know he had criminal associations and that he was now dead. In response, the respondents sought to add to the bundle a judgment in a criminal appeal, purporting to show Mr Zefaj was a criminal. Ms Ross said the document went to the claimant's credibility. The document, I was told, has not so far been put to the claimant in cross examination.

46. The ET decided to allow the document to be admitted, on the basis it might be relevant to credibility. It added at paragraph 71:

> "No decision has been, or was expressed as having been, taken as to the content of the High Court of Justiciary Judgment and what might or might not be the implications of evidence in this area. Those matters require to be addressed when the questions have been asked and evidence obtained."

47. I appreciate that, at first blush, it is hard to see how the High Court judgment could be of much relevance to the claimant's credibility. But I do not know exactly what was the claimant's evidence about Mr Zefaj or its relevance to his claim. In the circumstances I consider the ET was entitled to admit the document in the first instance but wait to decide at a later stage, depending on any questions asked, if it was in fact relevant. Such a pragmatic step is often taken by tribunals and courts, and it is often disproportionate to spend time debating the relevance of a document before it is known if it will even be deployed in evidence.

48. **Ground 5**. This ground relates to a decision of the ET to listen to a recording. This matter is explained at paragraphs 76-81 of the ET reasons. During the cross-examination of the

claimant he was asked if he had his form ET1 open in front of him; he said he did if he was asked to; Ms Ross then put to him that his representative, Mr Elesinnla, had asked him to keep it open. The relevance of this line of questioning is unclear but at that stage it seems Mr Elesinnla objected that he had not said this, and the two representatives began arguing about what had or had not been said to the claimant about his ET1.

49. Despite what might seem a very peripheral issue, the EJ decided to consult the recording of the hearing and found that Mr Elesinnla had asked the claimant to keep his ET1 open during his evidence-in-chief. It therefore proved of little assistance in resolving the debate between the representatives. As the ET noted, the relevance of this issue to its assessment of the evidence "remains to be seen" (paragraph 80).

50. The basis of the ground of appeal is that, because the issue had and could have had nothing to do with the claimant's credibility as a witness, the only reason the ET could have had for listening to the tape was to challenge the credibility of the claimant's counsel, Mr Elesinnla. It is therefore relied upon to demonstrate that the ET was acting in a biased, improper or manifestly unfair manner.

51. Whether or not the claimant was instructed or asked to have his ET1 open during his evidence seems unrelated to his credibility or the issues in the case, making it hard to understand why such an irrelevant issue should be amplified by submissions and checking the recording. But I am seeing the matter from the distance of an appeal. I do not know the context of the exchanges between representatives or how strong their objections became. For example, according to Mr Elesinnla, he accepted that he had made the remark but "not in the context that the respondent alleged" (skeleton, paragraph (5)(a)) and he said Ms Ross insisted that the ET listened to the recording. According to the ET, Mr Elesinnla also asked at a later stage if they intended to listen to the recording (paragraph 81). It may be the ET suggested listening to the recording to resolve an unnecessary and over-inflated dispute between the

representatives.

52. No doubt it would have been preferable if the parties had accepted the matter was inconsequential, but an excess of caution on the part of a tribunal is not a procedural irregularity. In the particular circumstances before the ET, in which both sides seem to have pressed it to listen to the recording, I do not consider the approach it took in itself provides a sufficient basis for an inference of bias against the claimant or his counsel, whether actual or apparent.

53. **Ground 6**. This ground of appeal relates to paragraphs 82-85 of the ET's reasons. According to the notice of appeal, during the course of the claimant's cross-examination, Mr Elesinnla indicated to the ET that he wished to take instructions from his client about a potential appeal. After he decided to wait until the conclusion of the claimant's cross-examination, the ET stated that the respondent could reserve its position to cross-examination. This, it is said, reflects the partisan and unfair approach of the ET.

54. There is a mismatch between the ground of appeal and the ET decision. At paragraphs 82-85 the ET recorded that Mr Elesinnla asked to reserve his position on whether he would need disclosure of documents or further information as a consequence of the ET allowing the amendment to paragraph 26 of the respondent's Paper Apart. The ET took the view that, if so, it would potentially be appropriate for the respondent to respond to any such application. The ET therefore concluded "No ruling was made as to what would or would not happen from the point of view of either party when cross-examination was at the point where it had, on the basis, then known, concluded" (paragraph 85).

55. Nothing in paragraphs 82-85 of reasons, therefore, provides a foundation for the allegations in the notice of appeal, which relates to a different issue. The reasons provided by the ET do not, in my judgment, disclose any error of law or show it was acting in a partisan way. On the contrary, a practical problem arose and ET sought to address it in a fair-handed way. The

suggestion that each party might make comments at the end of cross-examination appears a reasonable one to take in the circumstances.

56. **Ground 7**. The seventh ground of appeal relates to the expected evidence of Mr McBride, who took the decision to dismiss the claimant for gross misconduct on the basis that he had found the allegations against the claimant proven. At paragraphs 68(16)-(18) of the claim form it is contended, in summary, that the claimant's dismissal was unfair because of (i) Mr McBride's perceived hostility to the claimant based on his Albanian nationality and (ii) Mr McBride had been involved in the investigatory state of the process and yet went on nonetheless to be involved in the disciplinary hearing. Those allegations were then relied upon to support a claim of race discrimination: see paragraph 69 of the amended particulars of claim.

57. The background to this issue arose during the claimant's evidence and is explained at paragraphs 148-151 of the ET reasons. During his evidence-in-chief the claimant was asked for his views on why Mr McBride had responded as he had in some e-mails from him, dated 1 and 2 April 2019. I was not shown the e-mails but there is reference to them in the claimant's amended particulars of claim at paragraphs 53-54. They were, I understand, to be relied on by the claimant to support a claim that Mr McBride was not impartial. Later, during the cross-examination of the claimant, Ms Ross put to him what Mr McBride was going to say about those e-mails when he came to give evidence. According to the ET, Mr Elesinnla then objected and said if Mr McBride was to give that evidence, it should have been pleaded by the respondent.

58. The ET decided against him for the reasons it set out in paragraph 150-151. In short, it decided that Mr McBride could give evidence about what was in his mind when he wrote the e-mails, without the matter being expressly pleaded. The ET would then assess all the evidence, including the content of the e-mails and the witness evidence of the claimant and Mr McBride

about them.

59. The first aspect of this ground of appeal is that the ET's decision was inconsistent with authorities, such as **Chandhok v Tirkey** [2015] ICR 527, requiring that the parties must set out the "essence of their respective cases" in the pleadings (Langstaff J at paragraph 17). Despite referring to **Chandhok** at paragraph 145 of its reasons, it is argued that the ET failed to apply it.

60. I do not accept that submission. The pleaded case for the claimant only stated what was said in two e-mails of 2 April. In giving evidence about Mr McBride's state of mind in writing those e-mails - evidence which might be thought to be rather conjectural - Mr Veizi went beyond the claimant's pleaded case, as the ET recorded at paragraph 148. Owing to that evidence, it was entirely proper of Ms Ross to put to the claimant what would be Mr McBride's evidence on the point, in part to give the claimant an opportunity to comment on it in the absence of witness statements.

61. **Chandhok** only requires the parties to set out the "essence" of their case in the pleadings and not every fact and evidential matter in support of it. Even the more formal procedure in the civil courts only requires a concise statement of facts in the particulars of claim, and prolix pleadings can all too easily lead to disproportionate cost and time, both for parties and tribunals. The amended Paper Apart set out the "essence" of the respondent's case on unfair dismissal, race discrimination and victimisation. I consider the ET was entitled to decide that the respondent was not required specifically to set out in its response Mr McBride's state of mind in writing the e-mails referred to in the amended particular of claim in order to put his likely evidence to the claimant in cross-examination (and nor, it follows, is Mr McBride precluded from presenting that evidence himself).

62. The second argument underpinning ground (7) is that the decision of the ET not to require the respondent to amend its pleadings was biased or procedurally irregular because it was

inconsistent with the approach the ET required of the claimant. It required him to amend his pleading to refer to the allegations against Mr Robertson, it is submitted, whereas it was more generous to the respondent. I do not accept that submission. In light of my conclusions on grounds (1) and (2), I consider there is no sufficient basis for saying that the circumstances were comparable and so the difference in treatment was unjustified. The different reasons it gave for different decisions, some favouring the claimant and some the respondent, would not indicate bias to the informed observer.

Disposal

63. My conclusion is that ground (3) of the appeal and ground 5.2 of the cross-appeal are allowed, but the other challenges to the ET decision are dismissed. The question of whether the respondent should be permitted to amend its answers to the order to provide further information should be considered afresh by an employment tribunal, taking account of all relevant factors including the relative hardship to each party of allowing or refusing the change and whether practical steps can be taken to reduce or eliminate it.

64. Mr Miller submitted that, unless the appeal were upheld on grounds of bias, the matter should return to the ET. Mr Elesinnla argued that if any ground were upheld, the matter should be remitted to a different tribunal. He drew attention to paragraphs 104 to 106 of the ET decision where, it is said, the ET made clear it did not accept his narration of events but did accept the narration given by Ms Ross. In those circumstances, he argues that the lack of confidence of the ET in him as an advocate will inevitably impact on the ET's view of the claimant's case, making it unfair for the case to return to the same tribunal.

65. I have considered the factors in **Sinclair Roche v Heard** [2004] IRLR 763. First, a considerable amount of evidence has been heard already and it will add to the parties' expense, time and inconvenience if it has to be repeated. Second, there has been significant delay but

the decision was only just over a year ago. Third, while it is clear from the ET decision that Mr Elesinnla made very strong criticisms of the ET (see, e.g., paragraph 103), the ET was prepared to set those aside as "hyperbole" and it dealt with the application in measured terms in its conclusions (paragraphs 153-163). I am not persuaded there is a real risk of partiality or bias and I consider the ET should be able to deal with the case professionally and fairly. In those circumstances, I consider the matter should be remitted to the same ET.

66. There is one final matter I should address. It became increasingly obvious during the appeal that the hearing before the ET was difficult and at times there were very extensive submissions from the representatives on matters which often seemed rather peripheral, to say the least. For example, according to Mr Elesinnla, there was about four hours of argument on the question of amending the respondent's pleading. Even if the allegations against the claimant were serious, the factual questions for the ET do not appear particularly extensive, since they are restricted to the process which led to the claimant's dismissal. The hearing has already spent many days on the claimant's evidence, when he was suspended from an early stage in the process, and his evidence is still not completed. To avoid the same procedural arguments derailing the hearing in future, it may be sensible for there to be an early case management hearing, setting out a clear time-table for the remainder of the hearing, including specifying the time to be spent in questioning each witness and reminding the parties of their duty to assist the tribunal in achieving the overriding objective. But this is, of course, a matter for the ET to determine.