Neutral Citation Number: [2023] EAT 55

Case No: EA-2021-000627-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 February 2023

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MR O RAHMAN	**Appellant**
- and -	
FORD RETAIL LIMITED t/a TRUSTFORD	**Respondent**

- -
- -

Ms Esther Godwins (solicitor) (of AQ Archers Solicitors) for the **Appellant**
Ms Iris Ferber (counsel) (instructed by Integra Legal Limited) for the **Respondent**

Hearing date: 1 February 2023

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The claimant presented a claim form raising a number of complaints of direct race discrimination. Subsequently, in response to a direction from the tribunal, he tabled a further information document, raising a number of new matters, but made no application to amend at that point. At a later stage solicitors came on record for him and made an application to amend to add complaints of victimisation, relying on the contents of the earlier further information document. That application was refused.

The tribunal erred in so far as it failed to consider whether the further information document had included factual allegations to the effect that the claimant had done the protected acts that he now sought to rely upon in his proposed victimisation claim. Even if that document had included such factual allegations, permission to amend would still have been required, and was not bound to have been granted; but this was a relevant factor, and the tribunal erred by failing to consider and address it when determining the application to amend. Had it considered this, the tribunal could only have properly concluded that that information document did include such factual allegations. The matter was remitted to the tribunal to consider the application to amend afresh on that basis.

HIS HONOUR JUDGE AUERBACH:

1. This appeal relates to a decision taken by EJ Goodrich sitting at East London Hearing Centre at a case management hearing conducted in March 2021, whereby he decided that the claimant required permission to amend his claim in order to pursue complaints of victimisation, in addition to live complaints of direct race discrimination; and he refused the claimant permission to amend.

2. The relevant background and chronology is this. The claimant was formerly employed by the respondent as a sales agent from about 2011. At a time when his employment was still continuing, in January 2020, he presented a claim form acting as a litigant in person. His claim referred to alleged treatment of himself and his partner, who also worked for the respondent, Christina McIntyre, who at that time also brought her own claim.

3. The narrative in box 8.2 of the claim form referred to the claimant having raised issues about the respondent's approach to the management of a personal relationship having developed between him and Ms McIntyre, and to his having raised with HR that the approach they were taking was different from the approach that they had taken when Ms McIntyre was formerly in a relationship with another colleague. Paragraph 8.2 referred to various alleged treatment and plainly raised complaints that the claimant has been adversely treated because of his race. There was some further narrative in the additional information box in paragraph 15. There were further allegations in the claim form, the gist of which was that adverse treatment of the claimant because of his race was an example of a wider problem affecting others as well.

4. By the time the response was entered in February 2020, the claimant's employment had come to an end, it appears because he asked for, and was granted, voluntary redundancy in the context of a redundancy exercise. The claims were defended. Of her own motion, it would appear, EJ Russell made a case management order, directing both the claimant and Ms McIntyre to provide additional

information or particulars about their complaints in the run-up to a listed case management hearing due to take place in May. That order stipulated that the further particulars should be of the complaints alleged in the claim form, and limited to that.

5. In a document tabled in the run-up to that hearing, the claimant and Ms McIntyre set out various particulars and allegations running to some 16 or 17 pages. That was the so-called further information document. By the time that document was tabled, any new complaints that it contained would, had they been presented as freestanding complaints on the same date, have been out of time.

6. The May case management hearing came before EJ Burgher. Both claimants were in person. The respondent was represented by a solicitor. Judge Burgher's minute sets out that he considered in detail with both claimants the lengthy narrative further information document, as well as their claim forms, as part of a process of seeking to clarify and establish precisely what their complaints were. His minute included a list of issues coming out of that discussion, including, in the case of the claimant, particulars of his various specific complaints of direct race discrimination. At that stage, the full merits hearing had been listed for May 2021 and the judge extended the time estimate for it.

7. An amended response was entered in June 2020. On 30 October 2020, solicitors newly acting for the claimants wrote to the tribunal. They attached a proposed amended list of issues and indicated that it was their case that this reflected either issues that had already been raised by the claimants, but not captured in EJ Burgher's list, or, insofar as permission to amend in respect of some of them was required, that they were seeking such permission.

8. Following that application, and it appears some further directions from Judge Burgher, the respondent's representatives wrote opposing the application and it was concluded that it should be determined at a further preliminary hearing. That was the hearing that came before EJ Goodrich on

1 March 2021. At that hearing the claimants were represented by Ms Godwins from their new solicitors, and the respondent by a solicitor, Mr Smith. Ms Godwins has appeared before me again today on the hearing of this appeal and Ms Ferber of counsel appears for the respondent.

9. Before I turn to the relevant parts of Judge Goodrich's decision, I need to say a little bit more about the materials that he considered, that are relevant to the limited scope of this appeal.

10. Firstly, as I have mentioned, there were the particulars given in the claimant's claim form. In box 8.2, he referred to his personal relationship with Ms McIntyre and to her having been promoted to team leader. He referred to the former colleague, who he described as a white male, with whom she had previously been in a relationship. He referred to a relationship policy which he said was "inflicted on myself and Christina whereby we were told we are not allowed to speak and our shifts changed to ensure we are both not on the same shift when another manager is not present". He referred to Ms McIntyre at the time being in the early stages of a high risk pregnancy. He continued:

> **"I questioned the HR department regarding this change as there are various other conflicts in the office that were not addressed in the same way and I asked why, when Christina was in a relationship with [the former colleague], she had the same shifts and they constantly spoke in the office and why now different rules have been applied to me. I was advised the policy was not in place but I have evidence, the company handbook, to say it was in place. The only difference between myself and [the former colleague] is I am a Bengali Muslim man."**

11. He went on to refer to there being other accounts of racism in the office and to treatment of which he complained.

12. In box 15, the further information he gave included this:

> **"When I was told I was not allowed to speak to Christina and work the same shifts, I asked the question to HR to which I was told to**

> **take a grievance to get this question answered, and this was dismissed also."**

13. He then gave a specific example of a white woman having been promoted, despite having never done the job of team leader, whereas a Pakistani Muslim man who had been doing it for some time was not offered an interview; and he also made an allegation of another colleague being stereotyped as a drug dealer because of his Caribbean background.

14. The particular paragraph relied upon in the additional information document that had been tabled in the run-up to the May 2020 hearing was paragraph 63. In the extended narrative leading up to it the claimant had referred to being called into a meeting in December 2019 in which a draft settlement agreement was tabled and a proposal made for the agreed termination of his employment on the basis of it, a compensation payment and his waiving any claims. In paragraph 63 he referred to this having been tabled on the basis that there was an issue about his conduct. He continued:

> **"Mr Rahman stated he does not trust the business because the policy that was applied to Ms McIntyre and Mr Rahman discriminated them and made their lives difficult and stressed Ms McIntyre throughout her high risk pregnancy. He was advised by Michelle Dulake to take a grievance to have his question answered as to why the policy was not applied to Mr Joe Collins and Ms McIntyre, whom she was in a relationship with him for eight years whilst working for the respondent. This question was avoided in his grievance and his grievance appeal and after his appeal when he stated his question was never answered and was told he had exhausted all internal procedures leaving him no choice, but to contact ACAS."**

15. Further on in the same paragraph he wrote:

> **"So because Mr Rahman raised these issues, the respondent decided this conduct was enough to warrant a threat of dismissal."**

16. In the list of issues in the proposed amended form, tabled by the claimant's new solicitors in October 2020, under the heading "Victimisation", and with a cross-reference to paragraph 63 of that

earlier document, the protected acts were identified as being emails to Ms Dulake sent in July 2019, complaining that applying the conflict at work policy to the claimant's relationship with Ms McIntyre was race discrimination, one of which was the grievance, and further protected acts at the grievance hearing and by way of the appeal against the outcome of the grievance.

17. All of those materials were before EJ Goodrich. In his lengthy and detailed decision, he starts by setting out the background, which I have also set out. He refers to the submissions of the parties and to the **Selkent** guidance (**Selkent Bus Co Ltd v Moore** [1996] ICR 836). There is also a section concerned with an issue about whether evidence relating to the meeting at which the settlement agreement had been tabled, should or should not be admitted, about which I am not concerned.

18. Having summarised the competing submissions and directed himself as to the law, the judge went on to consider the applications to amend. He noted that the claimants' pleaded case was set out in their claim form, but what was set out in the further information document might require permission to amend, although claimants acting in person would not necessarily appreciate the distinction between further information about claims already made and new allegations or new claims. He noted that a list of issues is not the same as a party's pleaded case, although it should reflect it. He relied on the contents of the minute of Judge Burgher's hearing for what had taken place there; and observed that it was part of what a judge would do at such a hearing to set out what he understands the parties' cases to be, ensuring so far as practicable, that they are on an equal footing.

19. The judge noted that the respondent's solicitor had not made clear his position in response to Ms Godwins' submission that all the new issues, insofar as they were new, were referred to in the further information document. He said that he had therefore gone back through the parties' pleaded cases, reading the claim form, responses and further particulars, the list of issues produced by Judge Burgher and the amended responses.

20. Further on, the judge observed that the further information document contained a great deal of information than was given in the claim forms. He considered the issue of time limits, which could be taken into account, but said that he was not making a decision as to whether a particular complaint was within time or, if out of time, whether time limits should be extended. At paragraph 63 he observed that the application to amend the list of issues was made over five months from the date of the preliminary hearing record from Judge Burgher's hearing, having been sent to the parties, and months after the respondent had submitted its amended ET3 response.

21. At paragraph 64 the judge said he had identified that there was prejudice to one party or the other of various kinds, whichever way he decided. The prejudice to the respondent of a decision in the claimants' favour, included that they might have to take further instructions, look for further documents, or speak again to witnesses in order to amend their witness statements. He then observed:

> **"If I were to refuse leave to add to the list of issues, the claimants would potentially be denied being able to bring what might otherwise be successful claims and to bring claims for which they have given details, either in their claim forms or in the further information they supplied and, until they obtained legal representation they were representing themselves."**

22. He referred also to the overriding objective and the imminence of the full merits hearing listed to take place in May of that year.

23. The judge then worked through each of the items raised in the list of issues as proposed to be amended, both in relation to Ms McIntyre and then in relation to Mr Rahman. Specifically in relation to the proposed new victimisation complaints, he said this at paragraph 93:

> **"Proposed issue 8 seeks to add victimisation complaints to the direct race discrimination complaints and refers to a number of contended for protected acts. These protected acts contended for are not referred to in the ET1 claim forms and change the basis of**

> **the existing claim. Having in mind the late application to change the list of issue, I do not allow them."**

24. The grounds of appeal that have come to the hearing before me today solely relate to the decision in respect of the victimisation complaints. In summary, it is said that there were three errors. Firstly, the judge erred by concluding that the claimed protected acts were not effectively raised or pleaded in the claim form. Secondly, the judge erred by having not considered, or, if he did consider, not having stated what his conclusion was, about whether the protected acts were effectively raised in the additional information document read with the claim form, and/or that he should have concluded that they were. Thirdly, the judge is said to have erred by failing to take into account, when referring to the lateness of the amendment application, the particular reasons put forward as to why it was made so late, being, in summary, that the claimants had hitherto been litigants in person and that, for various reasons, they had struggled to find someone to represent them hitherto.

25. In summary, in response Ms Ferber reminded me that I was not myself considering the application to amend but whether the judge had erred in his decision upon it. She said that he had correctly first considered whether the complaints of victimisation, and specifically whether protected acts, were raised by the claim form. The claim form was at best ambiguous on this point and the judge had permissibly reached the view that it did not identify protected acts or a victimisation complaint. That being so, the judge properly considered that permission to amend was required.

26. Ms Ferber submitted in summary that the judge plainly weighed into the balance his consideration of the contents of the additional information document. Indeed, she submitted that the judge, having regard to what he said in paragraph 64, proceeded on the basis that that document *did* contain sufficient information about all of the complaints, as such; but he was not bound to grant permission to amend for that reason alone, and he properly decided not to in respect of these complaints for other reasons. He had also properly weighed in the balance the timing of the

application and the implications of that and the reasons for it.

27. My conclusions are as follows. Firstly, Ms Ferber is right that in principle the judge had to decide first whether a complaint of victimisation, and in particular alleging the doing of protected acts, was effectively factually raised in the claim form, even if not given those legal labels. If his conclusion that they were not cannot be successfully challenged, then the remaining grounds must rest on the challenge to his refusal of permission to amend. If, however, he erred in concluding that the complaints were not to be found in the claim form, and hence erred in concluding that permission to amend was required, then he will have erred by not allowing the complaints to proceed.

28. I do not consider that the judge erred by concluding that victimisation complaints, and in particular the making of protected acts, were not raised by the claim form. He properly reached that conclusion having regard to the fact that the clear and explicit thrust of the contents of box 8.2 and box 15 was that the claimant had been the victim of direct race discrimination, including the reference to a white male comparator and examples given of other non-white colleagues, said also to have been the victim of race discrimination in an office where, on his case, this was an endemic problem.

29. The references to the claimant raising the matter with HR, being told to raise a grievance, and then doing so, did not specifically indicate that it was his case that in raising the matter with HR and/or in pursuing the grievance, he had specifically, in one form of words or another, complained or alleged that the differential treatment that he said he had been the victim of, had something to do with his race. That was the complaint he was advancing *before the Tribunal*, but the claim form did not spell out that that was *also* the way he had advanced his complaint internally, and that it was part of his tribunal case that he had then suffered detriments for that reason *as well as* because of his race.

30. The judge properly concluded, therefore, that permission to amend was required.

31. In deciding whether or not to grant that application, the judge had to weigh up relevant considerations and overall to decide where the balance of justice or injustice lay in terms of the prejudice to either party of either granting or refusing the application, following the **Selkent** guidance. The judge set out a full and accurate chronological narrative of events leading up to the hearing. He was plainly cognisant of the fact that the claimant and Ms McIntyre had been unrepresented at the hearing before Judge Burgher and he had before him the amendment application letter by the claimants' new solicitors which referred to the difficulties the claimant said he had faced in getting representation before that point. He also acknowledged that the claimant might not have fully appreciated when he produced his further information document, the distinction between what was truly further particulars and what required an application to amend.

32. I do not think it can be said that the judge did not take all of the relevant circumstances relating to the timing and lateness of the application into account. These were factors to weigh into the balance but what weight to attach to them was a matter for the judge. I cannot say that these factors, alone or in combination, were so compelling that the judge erred by not treating them as decisive in the claimant's favour.

33. What that leaves, however, is whether the judge erred in failing to consider or conclude that the contents of the further information, read with the original particulars of claim, were sufficient to identify that the claimant was seeking to complain of victimisation and, in particular, sufficient to identify the protected acts relied upon, albeit that, if so, permission to amend would still be required.

34. As to that, I agree with Ms Ferber that it is certainly clear that the judge understood that it was Ms Godwins' case that, if not in the original claim form or forms, the particulars of all of the matters that the claimant, and at that time Ms McIntyre, were seeking to introduce by their application, had been sufficiently set out, at least in the further information document; and that it was Ms Godwins'

case that this should weigh significantly in support of granting permission to amend, if required, notwithstanding that the application had not been made in that way until solicitors became involved. There are numerous references to that case and to the judge having read and considered various aspects of the additional information document. The judge, as I have described, went through each and every individual matter raised in the proposed amended list of issues for Ms McIntyre and for the claimant, determining in relation to each separately whether it should be permitted to proceed, either on the basis that it was covered in the original claim form or otherwise by amendment.

35. However, paragraph 93, which considers the proposed victimisation complaints, does not refer to the additional information document but only to the claim form and to the issues document. The judge says there that the protected acts contended for in the issues document, the specific emails for which dates are given, including the one that raised the grievance, what the claimant said at the grievance hearing and his appeal after the unsuccessful outcome of the grievance, are not referred to in the claim form. The judge was right about that and he was entitled to say that the issues document changed the basis of the existing claim, from that set out in the claim form. But the judge, as I have said, does not refer there to what he made of the additional information document in this regard.

36. Ms Ferber submitted that I can infer from paragraph 64, that the judge had proceeded on the footing that there were sufficient particulars of all the proposed new claims, including this one, in the issues document, as he said there that, if he refused permission to amend, the claimants would be potentially denied the ability to bring what might otherwise be successful claims for which they had given details either in their claim forms or in the further information they supplied.

37. However, I do not think I can draw that inference from that observation. That is a general observation about the potential prejudice to each party of either granting or refusing the application, describing the potential prejudice to the claimants, reflecting their case at its highest. It is not part of

any detailed analysis of the content of the claim form or the further information document with respect to each complaint. Rather, that is what follows over succeeding paragraphs and pages.

38. I also agree with Ms Godwins' submission that it is striking that, in relation to the judge's consideration of many of the other complaints, specific reference *is* made to the contents of the additional information document and to what extent it added to the information contained in the claim form relating to the complaint in question, or how closely related its contents were to those of the claim form, which were factors which the judge weighed in the balance, when deciding in relation to *other* complaints, whether to grant or refuse application to amend. If the judge did also consider the contents of the further information document in relation to claimed protected acts, paragraph 93 does not tell us what he made of it or how he weighed its contents in the balance. I consider that this was an error, as there was a failure either to take into account a relevant consideration or to show that he had and to indicate what conclusion he had come to about it.

39. What are the consequences? Ms Godwins submits that the judge would have been bound to conclude that paragraph 63 of the further information document did contain sufficient information to support the contention that the claimant had done protected acts when he raised his concerns about how his relationship with Ms McIntyre was being treated and pursued them by way of the grievance process. I agree. What paragraph 63 does, which the claim form did not do, is state in terms that the claimant had stated that he and Ms McIntyre were being discriminated against; and the clear sense is that that was part of his raising the matter with HR and part of the basis of his grievance and later his grievance appeal. Given the wider context of the claim form and the additional information document, making it clear that his underlying case was that the differential treatment was to do with race, any judge considering paragraph 63 would be bound to conclude that there were sufficient particulars there to indicate that the claimant was saying not merely that he had queried the treatment with HR and in his grievance process, but that he had advanced a case that it had to do with race.

40. However, I consider that on remission the tribunal will need, on that footing, then to give further consideration to whether the application to amend to introduce the victimisation complaints should be allowed, by reference to the documents and matters as they stood at the time when Judge Goodrich reached his original decision. Because only the protected act question was considered by Judge Goodrich, it is not a foregone conclusion that permission to amend is bound to be granted.

41. Ms Ferber submitted that, even if I did allow that the grounds of appeal were meritorious to some extent, as I have, and even if that might lead to a conclusion, either by me or by the tribunal on remission, that permission to amend to add the victimisation complaints should have been granted, I still would not need to remit, as such complaints would be bound in any event to fail on their merits. She relied on the fact that the complaints of direct discrimination have since been considered and determined as the result of a full merits hearing that took place in May 2021.

42. As to that, it was common ground, and I had a copy of the tribunal's written reasons in my bundle, that at that hearing the tribunal had considered and determined complaints of direct race discrimination in respect of the same allegations of detrimental treatment that the claimant seeks to rely upon in his proposed victimisation claims. At paragraph 144 of its reasons the tribunal considered the first of these, being a complaint of direct discrimination about certain shortcomings in the process of investigating his grievance, which the tribunal found had indeed raised the issue of race. The tribunal described the approach to the handling of the grievance as perfunctory for reasons that it set out. It concluded that, given the paucity of the investigation, those concerned would have accepted management's account, regardless of race or the nature of the complaint. It continued:

> **"Whilst a fuller investigation undoubtedly should have been conducted, we have no comparative evidence to conclude that they both failed in this regard because it was C2 bringing the complaint or because the complaint alleged race discrimination."**

43. Ms Ferber submitted that this effectively addressed the victimisation complaint about the same treatment.

44. At paragraph 148 the Tribunal considered the subject matter of the second proposed victimisation complaint, but as a complaint of direct race discrimination. This concerned a Ms Smith having not permitted the claimant to take annual leave on a particular occasion and having directed that he should not have informal counselling. The tribunal said:

> **"…there is no suggestion that she had applied any discretion she had differently to others in similar circumstances … [the claimant's] race was not a factor in the decision to follow the emergency leave policy in this instance."**

45. Ms Ferber submitted that this again pointed to the conclusion that this conduct had nothing to do with any complaint by the claimant, because Ms Smith had not treated him differently to others in similar circumstances.

46. Finally, the third matter complained of was considered at paragraphs 149 and 150, which was to do with the claimant being pulled into the meeting at which the settlement document was tabled in December 2019 without having a union representative present, and other aspects of the way the meeting was handled. The tribunal considered that having two senior officers in what was described as an informal meeting and without a union representative present was a heavy-handed step. An attempt to mediate would have been more appropriate. But it continued:

> **"However, by the time this meeting was held there were continuing communication and relationship concerns that had to be addressed. The terse email correspondence from C2 to management was not a viable to leave unaddressed. The situation had to be managed, whilst there were a number of different ways this could have been done, we do not conclude that the way it was managed was on grounds of C2's race."**

47. Ms Ferber again submitted that these findings meant that the victimisation complaint, even if allowed to proceed on remission in relation to this aspect of matters, could not possibly succeed.

48. I do not agree with these submissions. Taking first the complaints about the convening and conduct of the December 2019 meeting, the tribunal has only decided in this decision that there was no direct discrimination in the handling of those matters. I do not think that that would preclude a finding of victimisation, and I note indeed that there is a reference to continuing communication and relationship concerns that had to be addressed. I make it clear that I am expressing no view about what that means beyond what it says, or as to the outcome of any victimisation complaint if it does come to be considered on its merits. That would be entirely a matter for the tribunal. All I say is that success for such a complaint cannot be ruled out by those findings.

49. In relation to the matter of the shortcomings in the grievance investigation, although the tribunal says that these failures were not because of race *or because of the claimant having alleged race discrimination*, there was no live victimisation complaint before it and it was not necessary to a determination of the complaints before it for the tribunal to make that further finding. As it was not a necessary finding, I do not think that the doctrine of *res judicata* or issue estoppel applies in relation to it. Ms Godwins also makes the point that Mr Maslen and Mr Stebbings were not cross-examined about victimisation. Once again, therefore, I do not think that this finding precludes a victimisation complaint, if considered on its merits, from succeeding, although again I express no view about those merits, which would be a matter for the tribunal to decide.

50. That leaves the complaint about the conduct of Ms Smith in relation to the annual leave application and the associated matter, and the application or not of the emergency leave policy. Once again, I do not think I can say that the findings in relation to that necessarily preclude a successful complaint of victimisation, if considered on its merits. Although the tribunal says there is no

suggestion that she had applied any discretion she had, differently to others in similar circumstances, that was in the context of a direct race discrimination complaint. I do not have all the evidence or the facts before me and I cannot be sure that the tribunal might not have come to a different view of a victimisation complaint; and again, the witness will not have been cross-examined on that basis.

51. Once again, I express no view as to the merits of the complaint, if it does fall to be considered. I am merely addressing Ms Ferber's submission, that if the victimisation complaints are upon remission allowed to proceed, these parts of the decision arising from the full merits hearing that was held in May 2021 necessarily preclude their success.

52. I will therefore remit the matter to the employment tribunal on the footing that the additional information document did in substance include a factual allegation that the claimant had, in his communications with HR, and then in his internal grievance and grievance appeal, made an allegation in substance of race discrimination, regarding the treatment of himself and Ms McIntyre of which he complained. The tribunal will need to consider afresh in light of that, whether the proposed amendment in the form tabled by the draft amended list of issues attached to the October 2020 letter, to introduce a complaint of victimisation in that respect, should be granted. If the tribunal's decision is to grant the amendment, then the merits of it will need to be considered and determined.

(**After further submissions**)

53. I have heard further argument on other matters relating to the terms of remission.

54. Ms Ferber contended that it was desirable, if possible, for the application to amend to be considered on remission by Judge Goodrich. Ms Godwins did not dissent, but was concerned as to whether that might lead to undue delay or difficulty; and it was suggested that Judge Burgher, who

was involved in the matter before, might also be well-placed to deal with it expeditiously. In light of our discussions, I will direct that remission be to Judge Goodrich if practicable, if not, to Judge Burgher if practicable, and if not to any other judge as directed by the regional employment judge.

55. It was common ground that I do not need to give, and arguably it would be inappropriate for me to give, any direction as to the panel that should or should not consider any victimisation complaint in respect of which, second time around, application to amend is granted. In that event, submissions can of course be made to the employment tribunal about that.

56. So far, I have indicated that the application to amend should be freshly considered on the basis that the additional information document tabled in the run-up to the May 2020 case management hearing, did factually allege that, in his communications with HR, his grievance and grievance appeal, the claimant had done a protected act or acts by reference to raising an issue of race discrimination. I will also direct that, for the purposes of such fresh consideration, the tribunal should disregard the outcome and findings resulting from the full merits hearing of the direct race discrimination claims that took place in May 2021. For the avoidance of doubt, I will also direct that the amendment application upon remission be considered solely by reference to the complaints of victimisation relating to the allegations referred to in the draft amended list of issues at paragraphs 8.2.1, 8.2.3, 8.2.4 and 8.2.6, as there was no challenge to Judge Goodrich's refusal, for other reasons, to allow the amendment by reference to other allegations in the amended list of issues.

57. Ms Ferber submitted that I should not otherwise restrict the tribunal insofar as it may be argued upon remission that it should take account of other things that may have occurred or changed since Judge Goodrich considered this application first time around in March 2021, such as potential changes with respect to witness availability. Ms Godwins expressed a concern that if this were allowed, such considerations might weigh more heavily against the application being granted.

58. I agree that it is possible that factors such as witness availability may have changed in a way that will affect the weight that the judge would attach to them second time around compared with how matters would have looked in March 2021. Not to permit the judge to give consideration to such factors would, it seems to me, be unrealistic and potentially productive of injustice. I do not assume that such factors, if any, would necessarily weigh in favour of the respondent rather than the claimant. What will not change is the substantive basis of the application, the date on which it was made and the history up to the point when it was made. I will therefore not impose any further restriction on the tribunal's consideration of the amendment application next time around, in addition to those I have identified. Of course, that will not prevent the parties from making whatever submissions they wish to the tribunal, about relevant factors and how they should be weighed in the balance.