Case no. 2305015/2021
2301487/2022

EMPLOYMENT TRIBUNALS

Claimant: **Ms S Spencer**

Respondent: **London & Quadrant Housing Trust**

Heard at: **London South Employment Tribunal**

On: **09.05.2023**

Before: **Employment Judge Dyal**

Representation:

Claimant: **in person**

Respondent: **Mr Baker, Counsel**

CONFIRMATION OF DISMISSAL OF PARTS OF CLAIM

An Unless Order was sent to the parties on 10 January 2023. There was material non-compliance with parts of it. The following legal heads of complaint have been dismissed under Rule 38:

(1) Automatic unfair dismissal (s.103A Employment Rights Act 1996)
(2) Public interest disclosure detriment (s.47B Employment Rights Act 1996)
(3) Direct disability discrimination (s.13 & 39 Equality Act 2010)
(4) Victimisation (s.27 & 39 Equality Act 2010).

JUDGMENT

1. No further matter is struck-out.
2. No complaint of sex discrimination is pleaded in either claim form.

ORDERS

1. The following orders are made to ensure the claims are properly prepared for the final hearing which is already listed to take place on 27, 28, 29, 30 November and 1 December 2023.

Schedule of loss

2. The claimant must by 09/06/2023 send to the respondent a Schedule of Loss in relation to claim 2.

   Note about the schedule of loss: A schedule of loss is a document that sets out what the claimant considers the tribunal will award in compensation if the claim is successful. It is important that this document sets out both the amount claimed and the detail of how it has been calculated. There are many websites that give assistance on how to value your claim, see here for example.

Disclosing documents

3. By 09/06/2023 the claimant and the respondent must send each other a list of all documents they have relevant to the matters identified in the list of issues. This includes documents relevant to financial losses and injury to feelings where appropriate.

4. If the claimant or the respondent want copies of any documents on the other party's list, they must ask the other party for them by 16/06/2023. The copies must then be provided within seven days of the request. Note about documents: Documents include recordings, emails, text messages, social media and other electronic information. You must disclose all relevant documents you have in your possession or control. A relevant document must be disclosed whether it supports your case or is against it. A document is in your control if you could reasonably be expected to obtain a copy by asking somebody else for it. Documents relevant to remedy must also be provided.

File of documents

5. By 30/06/2023, the claimant and the respondent must agree which documents are going to be used at the hearing.

6. The respondent must prepare a file (sometimes known as a 'bundle') of those documents with an index and page numbers.

7. The claimant must inform the respondent whether she wishes to have a copy of the bundle by either a hard copy paper bundle or an electronic pdf digital bundle or both. The respondent must then send a copy of the bundle to the claimant by 22/03/2023 in the format(s) requested.

8. The claimant and the respondent must both bring a copy of the file to the final hearing for their own use. The respondent must bring four paper copies of the bundle to the first morning of the hearing.

9. No later than two working days before the start of the hearing, the respondent must send an electronic pdf version of the file of documents to the Tribunal office for the Tribunal to use.

Witness statements

10. The claimant and the respondent must prepare witness statements for use at the hearing. Everybody who is going to be a witness at the hearing, including the claimant, needs a witness statement.

11. The claimant and the respondent must send each other copies of all their own witness statements by 21/09/2023.

12. The claimant and the respondent must both bring copies of all the witness statements to the hearing for their own use.

13. The Respondent must also bring four sets of spare copies of all witness statements – three for the tribunal and one for the witness table.

14. No later than two working days before the start of the hearing, the respondent must send electronic pdf versions of all the witness statement to the Tribunal office for the Tribunal to use.

A witness statement is a document containing everything relevant to the issues to be determined by the Tribunal of which the witness has good knowledge and can tell the Tribunal about. Witnesses will not be allowed to add to their statements unless the Tribunal agrees. At the hearing the Tribunal will read the witness statements. Witnesses may be asked questions about their statements by the other side and the Tribunal. Witness statements should be typed if possible and using no less than a 12 point font. They must have paragraph numbers and page numbers. They must set out events, usually in the order they happened and using headings where appropriate. If the witness statement refers to a document in the file it should give the page number. They must also include any evidence about financial losses and any other remedy the claimant is seeking.

REASONS

Introduction

1. This claim came before me today for a Preliminary Hearing (PH). The agenda for the hearing was originally set by Employment Judge Beale at the PH of 14 December 2022 as follows:

    a. determine the issues in the two consolidated claims;
    b. determine any remaining strike out applications made by the Respondent;
    c. determine any application for a deposit order made by the Respondent;
    d. make case management orders in preparation for the Final Hearing.

2. However, at that PH, Employment Judge Beale made a detailed Unless Order and in the intervening period between the last PH and this one a dispute has arisen as to whether or not the Claimant complied, and if so to what extent, with that order:

    a. the Claimant's answer to the Unless Order was sent in correspondence attached to an email of 17 March 2023 ('the Answer');
    b. the Respondent set out its position in relation to the Answer in an email of 14 April 2023. In essence, that the Claimant had materially failed to comply and the claim should be struck-out.

3. Mr Baker submitted that I should simply approach the hearing by analysing whether any cause of action was pleaded in the claim forms. His submission was that not a single cause of action was pleaded and that the claims should therefore be struck-out.

4. I decided that it would be an error for me to effectively ignore the Unless Order and move straight to approaching the case in the way Mr Baker suggested. Before considering his application it was incumbent on me to determine whether there had been compliance with the Unless Order and in the event of material non-compliance the consequences.

5. Dealing with the Unless Order took up about half of the hearing. I invited Mr Baker to speak first and the Claimant second. The Claimant was keen to address me before Mr Baker spoke to give context to the case. I considered it preferrable to hear from the Respondent first so the Claimant could hear its points and respond to them all. I asked the Claimant to make a note of the points she wished to make and then make them all when I heard from her.

6. I announced my decision in relation to the Unless Order after the lunch break. It was as per the confirmation set out above except that at that time I said that the complaint of s.103A unfair dismissal had not been dismissed. I then attempted to produce a list of issues in consultation with the parties.

7. It was relatively straightforward to identify the complaints of direct race discrimination, harassment related to race/disability and other payments.

8. However, we spent about 1 hour and 15 minutes attempting to identify the putative public interest disclosures (that was in addition to the 2 hours spent on the task at the last PH). Even after that investment of time it became clear that we were nowhere near completing the task. In explaining what she said the protected disclosures were the Claimant had added numerous disclosures to the list that did not appear in her response to the Unless Order. In any event quite apart from that it became apparent to me that it was not possible to produce a list of the public interest disclosures - including the basic particulars of them needed to properly identify them - based upon the written information before me. This gave me pause for thought as to whether my original view that the Claimant had materially answered the questions posed by the Unless Order in respect of public interest disclosures (PIDs) had been correct. I notified the parties of my concerns and gave them the opportunity to address me on it.

9. I indicated that I would reflect on the issue and revisit my decision after the hearing.

10. By this stage of the hearing, it became clear that there would be insufficient time to complete the discussion of the list of issues and to hear the application which the Respondent most wanted to make, which was that no cause of action was pleaded in any case.

11. As such it was agreed that the appropriate route forward was for me to hear the Respondent's application and the Claimant's response, and then for me to reserve, make my decision on the issue compliance with the Unless Order in respect of PIDs, make my decision on the Respondent's application, and complete the list of issues myself in so far as I was properly able to.

Unless Orders: the Law

12. Rule 38 provides as follows:

> *38.—(1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred.*
>
> *(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.*
> *[…]*

13. In *Minnoch v Interservefm Ltd & others*, EA-2021-000305-AT, HHJ Tayler reviewed the authorities and summarised the applicable law as follows (I am

dealing with stage 2 only at this hearing but I set out the full guidance for context and so the Claimant has the full picture – I note that I also explained these three stages to the Claimant at the hearing):

Stage 1 – making an Unless Order

1. *care should be taken in making an Unless Order because of the draconian consequence of material non-compliance – Unless Orders are not just another type of workaday case management order*
2. *it is rarely a good idea to convert a previous general case management order into an Unless Order – careful consideration should be given to whether it will be fit for purpose as an Unless Order*
3. *an Unless Order should be drafted so that it will be easy to determine whether there has, or has not, been material compliance*
4. *an Unless Order should be drafted so that the consequence of material non-compliance is clear – it need not necessarily result in the strike out of the entire claim – an Unless Order can be drafted so that failure to comply with it, or part of it, results in part of the claim being struck out*
5. *although not specifically provided for by rule 38, an order could provide for a lesser sanction than strike out on non-compliance, such as a claimant being limited to reliance on the material set out in the claim form if additional information is not provided*
6. *if a party is required to do more than one thing by an Unless Order, careful thought should be given to the consequence of partial compliance – particular care should be taken before making an order that will result in the dismissal of all claims if there is anything that falls short of full material compliance with all parts of the order.*

Stage 2 – giving notice of non-compliance

1. *at this stage the employment tribunal is giving notice of whether there has been compliance – it is not concerned with revisiting the terms of the order*
2. *particularly if there has been some asserted attempt at compliance, careful thought should be given to whether an opportunity should be given for submissions, in writing or at a hearing, before the decision is taken*
3. *the question is whether there has been material compliance*
4. *the test is qualitative rather than quantitative*
5. *the approach should be facilitative rather than punitive*
6. *any ambiguity in the drafting of the order should be resolved in favour of the party who was required to comply*

Stage 3 – relief from sanction

1. *this involves a broad assessment of what is in the interests of justice*
2. *the factors which may be material to that assessment will vary considerably according to the circumstances of the case*
3. *they generally include:*
    a. *the reason for the default – in particular whether it was deliberate*
    b. *the seriousness of the default*
    c. *prejudice to the other party*
    d. *whether a fair trial remains possible*
4. *each case will depend on its own facts*

14. I reminded myself of some of the authorities underlying the Stage 2 summary above.

15. In *Wentworth-Wood & Others v Maritime Transport Limited* UKEAT/0316/15/JOJ HHJ Richardson said this:

> *The starting point, in construing an Unless Order, as any other Order, is the ordinary meaning of the words used. The legal and procedural context will always be relevant: for example, the context may show that the ordinary meaning cannot have been the meaning in the Order. In any event the party who has to comply with an Order must be able to see from its terms what is required to comply with it; an Order cannot be read expansively against the party who has to comply*

16. In *Uwhubetine v NHS Commissioning Board England* UKEAT/ 0264/18/JOJ, the EAT said this:

> *45. The starting point for the Tribunal engaged in that task is to consider the terms of the Order itself and whether what has happened complies with the Order or not. This may call for careful construction of the terms of the Order, both as to what the Order required and as to the scope of the Order in terms of the consequences of non-compliance, particularly in cases where there are multiple claims or multiple parties. If there is an ambiguity the approach should be facilitative rather than punitive, and any ambiguity should be resolved in favour of the party who was required to comply. However, what the Tribunal cannot do is redraft the Order or construe it to have a meaning that it will not bear, though its words should of course be construed in context.*
>
> *46 Next, the test to be applied is as to whether there has been material non-compliance, that being a qualitative rather than a quantitative test.*

17. In *Johnson v Oldham Metropolitan Borough Council* UKEAT/0095/13/JOJ Langstaff J said this:

> *7. The phrase used by Pill LJ in Marcan was, "...any material respect": I would emphasise the word "material". It follows that compliance with an order need not be precise and exact. It is agreed by counsel before me that Employment Judge Feeney in adopting a test of substantial compliance therefore adopted one in accordance with the law. I would make this comment however: "material" may be a better word than "substantial" in a case in which what is in issue is better particularisation of a claim or response. That is because it draws attention to the purpose for which compliance with the order is sought; that it is within a context. What is relevant, i.e. material, in such a case is whether the particulars given, if any are, enable the other party to know the case it has to meet or, it may be, enable the Employment Tribunal to understand what is being asserted. To use the word 'substantial' runs the risk that it may indicate that a quantitative approach should be taken: thus, where 11 matters must be clear to enable a party to deal fairly with a claim, of which 9 have been provided but not 2, which remain necessary, compliance has not materially been provided because the purpose of seeking compliance has not*

been achieved in the context; the other party still cannot obtain a fair trial. To adopt a quantitative approach may erroneously lead the Judge in such a case to conclude that there had been sufficient compliance (9 out of 11) even if the further particulars remained necessary before a fair trial could take place. Substantial compliance has thus in my view to be understood as equivalent to material compliance not in a quantitative but in a qualitative sense. [emphasis added]

The parties' submissions on the Unless Order

18. In brief, the parties' submissions were as follows:

    a. Mr Baker put his case in about 20 minutes. He submitted that there was non-compliance with the Unless Order in many respects, that it was a matter for the tribunal whether that non-compliance was material and that in deciding materiality I should not adopt an overly technical approach;
    b. The Claimant made her submissions with great passion, emotion and at times anger. They ranged over a lot of topics including several tragic events in her family life, medical issues her sons have and, in considerable detail, the Respondent's conduct towards its tenants and towards her both as tenant and employee. She also submitted she had complied with the Unless order, or at least had done so to the best of her ability. She explained that she is dyslexic and that her neuro-diversity made compliance more difficult. She expressed aggrievement that the Unless Order had been made in the first place. The Claimant spoke for 30 minutes with no interruption save that, when she referred to the video footage of certain internal hearings mentioned at paragraph 7 of Employment Judge Beale's case management summary, I asked her whether, and if so when, she had received the footage. She confirmed she had received it within a reasonable timeframe after the last PH. After 30 minutes I asked the Claimant how much longer she wanted to speak for. She asked for a further minute and in the event I gave her a further five at the conclusion of which she had said what she wanted to say.

19. As noted above, I gave the parties the opportunity to address me again on the Unless Order when we came to try and identify the PIDs for the list of issues. In short:

    a. The Claimant submitted that she had given all the information that was required in respect of PIDs and that if she had not this was because of her dyslexia and in any event it was all in the claim forms;
    b. The Respondent submitted that the Claimant had not properly answered the questions posed in the Unless Order and that the Answer took matters no further than they had previously been.

Discussion and conclusion on Unless Order

Construing the order

20. I start by construing the Unless Order. I have of course read the order and the reasons given for it in full and I have set those in the context of the lengthy and unhappy litigation history of these claims.

21. Among other things the order said this:

> *The Claimant is to write to the Respondent and the Tribunal responding to each of the questions set out in the attached Schedule by Friday 17 March 2023. If the Claimant fails to respond to any question, the legal head of complaint to which that question relates will be dismissed without further order.*

22. The reference to the Claimant failing to respond should not be construed overly literally. Plainly compliance with the order does not mean entering any response whatsoever. For example, if the Claimant's response to each question was simply the letter 'X', then in a literal sense that would be a response but it would not be compliance with this order. In my view '*fail to respond to any question'* in this context, meant either not responding to the question at all, or giving a response that failed in a *material* way to answer the question posed.

23. The next matter to deal with the consequence of non-compliance. The order says "*the legal head of complaint to which that question relates will be dismissed without further order".* The order identifies the heads of claim. They are as follows:

    a. Automatic Unfair Dismissal (section 103A ERA 1996)
    b. Detriment on the ground of making protected disclosures (section 47B ERA 1996)
    c. Direct Disability Discrimination
    d. Direct Race Discrimination
    e. Direct Sex Discrimination
    f. Failure to make reasonable adjustments
    g. Harassment related to race and/or disability
    h. Victimisation
    i. Other Payments

24. In my view the order means that if there is a failure to answer one of the questions that relate to a given legal head of claim, e.g. race discrimination, all of the complaints under that legal head of claim stand dismissed by the automatic effect of the Unless Order. I think this is the only way the order can sensibly be construed. There is a difference between a claim (the whole thing), legal head of claim (e.g. direct race discrimination), and the particular complaints made under a head of claim (e.g. the dismissal was an act of race discrimination). The Unless Order is clear about what it 'bites on'.

25. This means the Unless Order could potentially have quite harsh consequences. For instance where there are several complaints made under a legal head of claim and there is a material failure to answer a question that relates to that legal head of claim, all of the complaints under that legal head of claim would stand dismissed even if some of them were properly comprehensible. However, it is not

for me to revisit the terms of the order. My task at stage 2 is to faithfully give effect to it.

26. A further point of construction arises in relation to question 2. It says this *"Are these [the disclosures identified in paragraph 1] the only protected disclosures relied on in this claim? If not, please write down any other protected disclosures the Claimant says she made, including: [it goes on to list 4 matters]."* Did the question require the Claimant to state the content of any such protected disclosures or did it only require her to state the four things listed in paras 2.1 – 2.4?

27. In my view, question 2 plainly required the Claimant to state the content of the protected disclosures. That is what "*write down any other protected disclosures*" means. I think that is the meaning that the drafting naturally communicates (including to a lay person). It is also clearly the intended meaning of the judge, since she was undoubtedly attempting to get the Claimant to explain what her case was and stating the content of putative protective disclosures is an essential part of that. The judge was plainly of the view that the claim form itself did not adequately make clear what the disclosures were and wanted the Claimant to provide this information in her response to question 2 if there were further disclosures beyond those identified in paragraph 1 of the Unless Order.

28. I make like points about question 19 which is essentially the same as question 2 except that it relates to protected acts rather than protected disclosures.

29. Question 15 deals with failure to make reasonable adjustments. It required the Claimant to write down:

> *15.1 the thing the Claimant says the Respondent has done, or failed to do, that has caused her a disadvantage because of her disability (this could be a policy or practice operated by the Respondent, a physical feature of the workplace, or a failure to provide aids or equipment)*

30. An employment lawyer reading that can see that the question it is getting at *'what is the provision, criterion or practice (PCP), or as the case may be, physical feature, that you are relying?*' whilst smartly avoiding the use of technical language. However, I do not think that is necessarily how this would read to a lay person. To a lay person the question could equally be asking *'what are the adjustments that the Respondent failed to make?*' since the lay person's case will invariably be that the failure to make adjustments disadvantaged them because of their disability. Thus in accordance with the approach to construction that is required here, in my view it would be (and in fact was) acceptable for the Claimant to answer this question by setting out the adjustments she says the Respondent failed to make and that disadvantaged her because of her disability.

Compliance with the Unless Order

- *Protected Disclosures*

31. Working under pressure of time (this was my first exposure to the litigation, there was as 350 page bundle, a late start to the hearing and a long agenda to try and get through) my initial view was that the Claimant had materially answered questions 1 – 3. However, I think it is in the interests of justice to reconsider my original view because on reflection it was mistaken. My considered view is that the Claimant materially failed to answer questions 2 and 3 of the Unless Order.

32. In her answer to question 2 the Claimant indicated that protected disclosures beyond those identified in question 1 were relied upon. However, she did not comply with the requirement to "*write down any other protected disclosure*". As noted, in my judgment, this question required her to state what the disclosures actually were in her answer.

33. Employment Judge Beale's drafting of question 1 of the Unless Order gave the Claimant a model for writing down what her protected disclosures were. Of course the Claimant did not have to copy Employment Judge Beale's style of drafting. She did have to write down, in her answer to question 2, what any disclosure beyond those identified at 1 were – but she did not.

34. It is true that in her answer to question 3 the Claimant gave some information about the content of one or more disclosures. If all that had gone wrong was that the Claimant had provided the information she needed to provide in response to question 2 in her answer to question 3 that would be nothing more than a technical breach of no materiality. However, that is not what happened here.

35. Reading the answer to question 3, it is unclear whether the information given there relates to the detail of the disclosures identified in paragraph 1 and if so which one(s), those referred to in the answer to question 2 (and if so which ones), both those in paragraph 1 and those referred to in the answer to question 2, or neither. It is also unclear how the information that *is* given in answer to question 2 relates to the information in question 3. I therefore do not think that the answer to question 3 remedies the deficiencies in the answer to question 2.

36. Turning to compliance with question 3 itself. It required the Claimant to identify which sub-paragraph of s.43B(1) ERA applied to *each* disclosure identified in paragraph 1 and 2. The answer to question 3 is generalised not specific to any disclosure. Indeed, it is not clear whether the information the Claimant say she disclosed in her answer to question 3 is further detail about the disclosures recited at paragraph 1 or those referred to at paragraph 2, or both (or possibly neither, since orally today the Claimant referred to and sought to rely on numerous disclosures that are neither recited at paragraph 1 nor in the date range identified in the answer to question 2). In response to the instruction "If any of the disclosures falls into more than one of these categories, please write down all the categories that apply" the Claimant gave no answer.

37. In short, contrary to what was required by question 3, the Claimant did not identify which sub-paragraph(s) of s.43B(1) ERA 1996 applied to each of the disclosures at paragraph 1 nor each of the disclosures at paragraph 2.

38. Thus it is my considered view that the Claimant is in breach of the Unless Order in her responses to questions two and three. In my view these are individually and together material breaches. I have regard to the nature of the breaches in reaching that conclusion. The unfortunate reality is that despite the Unless Order it remains very unclear in many respects what the Claimant's case is in respect of protected disclosures. This is not simply a matter of minor, inconsequential missing detail missing. It is much more substantive than that.

39. The consequence is that the heads of claim to which questions 2 and 3 relate were dismissed. Plainly questions 2 and 3 relate to automatic unfair dismissal (s.103A ERA) and detriment on ground of making protected disclosures (s.47B ERA).

Automatic unfair dismissal (s.103A)

40. Question 4 was properly answered. However, this head of claim falls because of the failure in the answer to questions 2 and 3.

Detriment on the ground of making protected disclosures (section 47B ERA 1996)

41. Questions 5 and 6 related to this heading. Clearly question 5 was answered.

42. Question 6 required the Claimant to identify *each* detriment relied upon and then in relation to *each* detriment, the person who did it, approximately when, and whether it was referred to in either ET1 and if so where. To emphasise, it clearly required that this basic information be made plain in relation to *each* detriment.

43. In my view there was material non compliance. At paragraph 6.1 of the Answer, there is a list of 14 bullet points that are said to identify detrimental treatment. Several of them do not identify who is said to have done the treatment complained of in the description of the detriment itself:

- *I was not given training opportunities to upgrade my pay as agreed – others white employees were. Excelled into trainee supervisory roles. After staying late to work overtime.*
- *I was given excessive and mundane work, making me stay after hours online to support department.*
- *Demeaning and humiliating comments were made to me in group sessions.*
- *My broken Laptop was refused replacement – leaving me weeks of heavy writing unable to log in, losing important data and disciplined due to it not running inefficiently - despite multiple failure/tickets and proven faults and L&Q IT Manager recommending full replacement by courier.*
- *My managers [being generous these managers are identifiable because they are the Claimant's managers] conspired with other department managers [not specified who or which department and the Respondent is a substantial employer] and highlighted insignificant issues about conduct.*

44. At paragraph 6.3, the Claimant returns to the issue of who is said to have done the treatment complained of and she simply answers compendiously as follows:

"Charlotte Daisley, Sarah Goodearl, Kate Mitchell, Kim Baker, A Martin, J Bishop, Jo Sharpe, Laura did not take grievance, and disciplinary issues seriously by adequately processing or protecting me as promised, or managing contact from whistleblowing team or acting on raised written issues raised."

45. The Claimant does not (save in relation to the comments about 'Laura') say which person(s) is/are responsible for which detriment(s). She was required to identify who did each detriment. In several cases she did not do this either in the description of the treatment itself or in her answer to paragraph 6.3.

46. The Claimant was also required to state the date (which could be approximate) of each detriment. She answered as follows:

January 2021-June 2021 claim 1 – Claim 2 January 2021 – May 2022

47. By using the word 'approximate' Employment Judge Beale clearly intended to give the Claimant some latitude to account for the fact that it may be impossible to recall exact dates. However, it did not mean that the Claimant could give any date range at all, no matter how wide. Material compliance required a proper effort to be made to identify the date of each detriment complained of. What the Claimant did was to give two date ranges that are both very wide and give no information about when each particular detriment happened within the date range. In other words, no real effort was made to put an approximate date on each detriment. The date ranges given are so wide they do not really assist in pinpointing when something is said to have happened, which is one of the main purposes of giving dates.

48. It is relevant that there was a long list of complaints here and I find it wholly implausible that the Claimant was unable to be materially more specific than she was.

49. In my view, individually and cumulatively these failures to answer question 6 amount to material non-compliance with the Unless Order. The failures relate to significant matters that are important parts of understanding what the Claimant's case is with sufficient clarity to enable the Respondent to properly respond to it and the tribunal to follow it, produce a list of issues in respect of it with adequate detail, and later adjudicate upon it.

50. The consequence is that the complaint of detriment on ground of making protected disclosures was dismissed also by reason of a material failure to answer question 6.

Direct disability

51. Questions 7 and 8 relate to direct disability discrimination. Question 7 was answered.

52. Not all of question 8 was answered. The Claimant was required to state who did each of the detrimental things that were done. In the description of the detriments, in some cases the identity of the person who did the detrimental thing is not stated:

    - *Disallowed to work or apply for paid overtime.*
    - *Disallowed to apply for other departmental and available vacancies.*
    - *Given mundane work – Left without supervision on purpose or specific training on excessive complex/suicidal police referral calls.*

53. However, it is true that the Claimant returned to the issue of who did the detriments complained of in her answer to question 8.2. She gave a compendious answer rather than one that dealt with each detriment and said this: "*Tanya C, Jo Sharp, Matt Green. Kim Baker, All HR Staff, CSA Managers – mentioned in 1-56 Claim 2."*

54. No attempt was made to identify who was responsible for which detriment. Further, some the categories were defined very broadly e.g. '*All HR*'. In my view that was a breach of the Unless Order.

55. The Claimant was required to give an approximate date for each detriment. In three cases when describing the detriment the Claimant gave a date. However, in all other cases she did not when giving the description of the detriment. In the answer to question 8.3 the Claimant dealt with the dates and a compendious date range was given: December 2020 – April 2021. No attempt was made there to differentiate between the complaints. In my view, applying similar reasoning as above that was a breach of the Unless Order. (The date range given is also puzzling because one of the detriments that is dated in the description of it given in the answer to question 8.1 in part falls outside this date range.)

56. The Claimant was also required to state in answer to question 8.4, among other things, *where* in claim 2 the detriments identified were referred to. She did not do so, she simply said "*claim 2 ET1*".

57. In my view, there was individually and cumulatively material non-compliance with the Unless Order. The failures relate to significant matters that are important elements of understanding parts of the Claimant's case with sufficient clarity to enable the Respondent to properly respond to it and the tribunal to follow it, produce a list of issues in respect of it with adequate detail, and later adjudicate upon it.

58. The direct disability discrimination claim was therefore dismissed by the Unless Order.

Victimisation

59. Questions 18 to 20 related to victimisation. Question 18 was answered.

60. In her answer to question 19 the Claimant did not write down what each protected act was. The answers in question 19 do not otherwise clarify what it/they was/were.

61. Turning to question 20, the Claimant did not write down all of the detrimental things that were said to have been done as required by question 20.1 and then give the further detail required about them. Instead, in response to 20.1 the Claimant said "*ET1 & 2 state this in great detail 8.2 and 1-56".* This is not what was required and failed to materially answer the question. The documents referred to (the claim forms) are confusing, hard to follow beyond getting the general gist of a narrative, and are no substitute for writing out each detrimental thing that was said to have been done as required by the Unless Order.

62. Order 20.2 required that the person who did each detriment be identified in each case. The Claimant did not do this. Instead she gave a compendious answer simply stating "*manager named in ET1 in both claims*".

63. Order 20.3 required the Claimant to state the dates of each detriment. She responded by giving the names of four people and said please see attached below. Attached below were the Particulars of Claim in claim 2. Many detrimental things are referred to therein and many of them are not dated.

64. Order 20.4 required the Claimant to say not only whether each detriment was in either ET1 but also where. She answered simply 'yes', thus not answering where in either ET1.

65. In my view these were individually and together material breaches of the Unless Order. Questions 19 and 20 of the Unless Order were designed to clarify the Claimant's case as to protected acts and detriments. If they had been answered properly the answers would have done that. They were not answered properly and the result is that the Claimant's case is barely clearer than before she answered.

Direct race discrimination, sex discrimination, harassment related to race/disability, reasonable adjustments and other payments

66. In my judgment the Claimant materially answered the questions under these heads of claim. Mr Baker did not contend otherwise so there is no need for me to say anything further.

Strike out application

67. The Respondent submits that the Claimant's claims should be struck-out because she has failed to plead a complete cause of action. I now consider this application in relation to the heads of claim that remain before the tribunal.

68. Mr Baker outlined the approach to pleadings that the tribunal should take and referred to a number of authorities set out in his skeleton argument. I do not demur from those authorities themselves. However, I do not think that they wholly

support the approach to pleadings that Mr Baker outlined - which was bordering the extreme. In essence his submission was:

a. every single element of a cause of action must be pleaded;
b. the pleading of each element must be *in terms* rather than pieced together from reading the claim form;
c. there is no room for any latitude for litigants in person at all when analysing what is / is not pleaded.

69. The Claimant referred me to *Secretary of State for BEIS v Parry* [2018] EWCA Civ 672. I do not think it is totally on point not least because the case was about the circumstances in which a claim form should be rejected because it could not properly be responded to. It related, then, to a particular statutory provision that is not in issue here. However, there is some learning in the case that is of tangential relevance. Bean LJ considered that Laing J had been wrong to say that the respondent would have had no idea of the basis of the Claimant's claim when certain details about it were omitted from the claim form. Laing J was wrong because the gist of the claim was known to the Respondent from its previous dealings with the Claimant as its employee. However, Bean LJ stopped far short of saying that there was a general principle that deficiencies in pleadings can always be ignored if the other side can work out the gist of the claim.

70. In my judgment, Mr Baker's approach to pleadings goes too far and applies an overly strict standard. In my view, there is a greater role for construction than his approach allows.

71. I accept that the importance of pleadings should not be underestimated nor is there any doubt that the focus must be on the claim form itself not other documents. In *Chandhok v Tirkey* [2015] ICR 527 at 17 and 18, Langstaff J said this:

> *17. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.*
>
> *18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the*

expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings".

72. In *Office of National Statistics v Ali* [2005] IRLR 201, Waller LJ said at paragraph 39:

"In my view the question whether an originating application contains a claim has to be judged by reference to the whole document. That means that although box 1 may contain a very general description of the complaint and a bare reference in the particulars to an event (as in Dodd), particularisation may make it clear that a particular claim for example for indirect discrimination is not being pursued. That may at first sight seem to favour the less particularised claim as in Dodd, but such a general claim cries out for particulars and those are particulars to which the employer is entitled so that he knows the claim he has to meet. An originating application which appears to contain full particulars would be deceptive if an employer cannot rely on what it states. I would for my part think that insofar as Quacoopome suggests to the contrary it should not be followed…"

73. That principle was applied in *Baker v Commissioner of Police of the Metropolis,* UKEAT/0201/09. In that case though the claim form checked the 'disability discrimination' box, the ET found and the EAT agreed that there was no such complaint. In Baker the EAT also cited a couple of other authorities that are of assistance:

50. We have considered Dodd v British Telecommunications plc [1988] ICR 116 referred to in Ali. In that case in the EAT Scott J, as he then was, held that an ET1 which specified the acts complained of and referred to the SDA and the RRA but did not state whether it was alleged that the acts were of sex or race discrimination or both was an effective application to the ET under both Acts.

51. We have also considered the dictum of Neill J, as he then was, in Burns International Securities Services (U.K.) Ltd v Butt [1983] ICR 547 at pp 550 and 551 cited in Dodd:

> *"It seems to us that in the field of industrial relations where application forms are frequently completed by individual employees without professional assistance a technical approach is particularly inappropriate … It was pointed out in Cocking v. Sandhurst (Stationers) Ltd. [1974] I.C.R. 650 that the rules did not require that the complaint as presented should be free of all defects or should be in the form in which it finally came before the tribunal for adjudication. The purpose of the rules is to ensure that the parties know the nature of the respective cases which are made against them."*

74. In my view the principles that I must apply are in essence these:

a. in order to determine whether a complaint is pleaded it is necessary to read a claim form as a whole;
b. the pleading does not need to be perfect or free of all defects;
c. a non-technical approach should be taken. As a result it is permissible, and indeed sometimes necessary, to take into account the fact that the author of the claim form is a litigant in person. This is important because litigants in person almost always express themselves differently to lawyers. Lawyers can reasonably be expected to express themselves clearly in pleadings. The same is not true of litigants in person. Thus the process of construing the claim form is more demanding. It is often necessary to piece together the meaning of what is written in order to determine what complaints are pleaded.

Race discrimination

75. In my judgment the direct race discrimination complaint identified in the Answer - the refusal to give/pay the Claimant for overtime - is pleaded in both claim 1 and claim 2.

76. In claim 1 the box for race discrimination is checked. The Claimant says in box 8.2 that "*racist staff targeted a campaign to have me removed*." Later in box 8.2 she says "*I worked late unpaid, incurred injury, told I did not qualify for overtime as I was on probation. Other white/caucasian probation staff were progressed, trained in a special academy and paid overtime*". In my view she is obviously alleging that the difference of treatment (including in relation to overtime) between her and others was because of race. She did not use the expression "because of race" but in my judgment she did not need to.

77. In claim 2, although the box for race discrimination is not checked, reading the claim form as a whole it is clear that it is alleged. The complaint about overtime is referred to in several places. In the bullet points under the heading 'Unfair dismissal and constructive dismissal' the Claimant says *"I was denied permission for work overtime because I was a new start. All New start - White colleagues were given overtime".* At paragraph 46 the Claimant returned to this issue and said this:

> "*White Customer Service Staff - Were trained, paid for overtime, which was disallowed by written/published Employment Policy. This meant White staff had an opportunity for promotion, access to a higher opportunity, despite being told in writing - being paid for overtime was not allowed before 3 months Probationary period."*

78. I think that taken together the Claimant is clearly saying that, at least in part because of race, she was not given paid overtime unlike white colleagues who were. She did not use the language of the statute but she did not need to. The causative link between race and the treatment complained of is there.

Direct sex discrimination

79. The Claimant herself accepts that no complaint of sex discrimination is pleaded. That is also Mr Baker's case and it is also my conclusion.

80. I do not think it would be appropriate for me to strike-out a complaint that does not exist so I simply declare that there is no such pleaded claim. The Claimant has not (as yet at least) applied to add one although she did indicate at the hearing that she was contemplating an application to amend in due course. She asked me if there was a time limit for making one and I explained to her that there was no formal time limit as such but that the 'timing of the application' was one of the important factors the tribunal had to take into account and that generally speaking the later an application is left the less likely it is to be allowed.

Reasonable adjustments

81. As noted, on Mr Baker's approach to pleading it is necessary for the Claimant to in terms plead every element of the cause of action. Failing that there is no claim pleaded and the additional details needed to complete the cause of action can be added by amendment (if at all).

82. In argument I asked Mr Baker whether in the following scenario permission to amend would be needed. The claimant pleads that there was a failure to make reasonable adjustments but does not in terms identify the PCP/physical feature in the ET1. However, it is obvious from what they do plead what the PCP/physical feature is. I indicated that I inclined to the view that in such circumstances the PCP/physical feature could be clarified in further particulars (whether given orally at a hearing or in writing) without the need for permission to amend. Mr Baker's submission was that permission to amend would be needed.

83. A good example might be as follows. The employee pleads *"I am a wheelchair user and the respondent has failed to install a ramp to my office or to let me work somewhere else that is wheelchair accessible."* At a PH the judge attempts to draft a list of issues. The employee is asked to explain their claim and they say "*there is a step up to the X office which is really hard to navigate in a wheelchair. I've asked for a ramp and they keep saying they will install one but haven't. I've also asked to work somewhere else and they keep saying they will get back to me and in the meantime I have to work there* ". In my view, following consultation with the parties, it would be permissible for the judge to record the physical feature as *'the steps up to the X office'* and/or the PCP as *'the requirement to work at the X office*.' I do not agree that permission to amend would be needed. In my view, it is a type of particularisation that does not require permission to amend. On Mr Baker's approach, however, the claimant would need to make a (written) application for permission to amend and that application would need to be determined in their favour for there to be any reasonable adjustments complaint before the tribunal. In my view that goes to far and would also be unworkable in practice.

84. Perhaps unsurprisingly, my view is shaped not only by my understanding of the law but also my experience in practice. In my c.10 ten years as an employment judge and c.16 years at the employment bar I cannot recall any case in which a litigant in person who drafted their own claim form pleaded *in terms* all of the

elements of a reasonable adjustments complaint. Typically the litigant in person will at most set out the main adjustments they say ought to have been made. Of course, since *Environment Agency v Rowan* [2008] IRLR 20 significant emphasis has rightly been placed on identifying the other elements of a reasonable adjustments complaint beyond the adjustments themselves. In my experience the most typical resolution is for these details to be flushed out in the course of a case management discussion. That is because the terms 'provision, criterion and practice' are obscure and even when the terms are understood identifying the relevant PCP can be difficult for lay-people. As such simply asking a litigant in person to give further particulars of the PCP(s) typically does not assist. They typically need assistance to identify what the PCP(s) is/are. Where, as is now very often the case, the litigant in person has no legal advice, it is usually an Employment Judge that helps to identify the PCP. The Employment Judge does not make it up. On the contrary, they read carefully what the litigant in person has written/listen carefully to what the litigant in person says and transpose it into the required legal framework using succinct and focussed wording. This is a difficult task for many reasons including because it requires a balance to be struck between providing proper assistance to a litigant in person consistent with the overriding objective (permitted and required) and entering the arena (forbidden). Provided that the end result is consistent with what is said in the claim form, invariably no issue of the need for permission to amend is raised by anyone.

85. In practical terms, if Mr Baker is right, then in virtually every case in which a litigant in person makes a reasonable adjustments complaint, a written application to amend will be needed. I accept that from time to time it is established that a widespread practice that is followed in the employment tribunal is wrong. That could be the case here, but my view is that it is not and that the approach Mr Baker contends for is more rigid/strict than the law requires.

86. In this case, unsurprisingly, the Claimant did not in terms identify the PCP(s) relied upon in either claim. Nor did she in her answer to the Unless Order (but for reasons explained in my construction of the Unless Order she was not required to). In my view, however, the gist of the Claimant's reasonable adjustments complaints, including the PCPs, is pretty clear from her claim forms.

87. The overall shape of it is that she had (and has) Dyslexia. She had a job and the job required her to carry out its duties. As a result of her dyslexia this was more difficult for her to do and so she needed certain adjustments to help her do her job properly. The Respondent did not make them.

88. The PCP seems to me to be the requirement for the Claimant to carry out her job duties.

89. The Claimant's case on substantial disadvantage is (more or less) stated in her answer to the Unless Order. Essentially she is saying that the PCP put her at a substantial disadvantage compared to others that are not disabled in that (this information is taken from the answer to question 15.2):

    a. she was unable to process and retain information

b. she was unable to process resident records adequately at the necessary speed;

with the consequence that she was unable to acquire the skills needed to be promoted to supervisor, was disciplined and her KPI performance and bonus pay performance suffered and she had to work beyond her paid hours.

90. The steps she says the Respondent should have taken (the failures to make reasonable adjustments) are as set out in the Answer at 15.1.

91. In terms of what is and is not pleaded in terms in the claim forms:

a. The dyslexia itself is pleaded.
b. The PCP I have mentioned is not identified in terms but (1) it is as anodyne as they come and (2) though it is not stated in terms it is very obviously implied.
c. The substantial disadvantage is not identified in quite the terms set out in the Answer but many of the facts it relates to are pleaded.
d. Many but not all of the adjustments listed in the answer to 15.1 are pleaded or at the least factually referred to.

92. For my part, I do not think permission to amend is required in order for the Claimant to pursue a reasonable adjustments complaint of this kind:

a. The PCP: the PCP is sufficiently obvious / implied from what is said in the claim forms that permission to amend is not required;
b. Substantial disadvantage: the same analysis as the PCP and/or the Answer clarifies some details of an existing claim in a way that amounts to particularization that does not require permission to amend;
c. The steps/adjustments: permission to amend is not needed. *Project Management Institute v Latif* [2007] IRLR 579 makes clear that the Respondent must have a proper opportunity to deal with any adjustment that is under the tribunal's contemplation but that adjustments can be raised, subject to that, at a later stage including by the tribunal at the final hearing. My reading of that authority is that it is not suggesting that permission to amend is required if a further adjustment is raised. However, the need for the Respondent to have a proper chance to deal with the adjustment is an important and weighty control mechanism. In this case, the Respondent would have a proper opportunity to deal with the adjustments listed at 15.1 of the Claimant's answer.

93. However, if I am wrong about this I would grant the Claimant permission to amend. I deal with this very briefly. In the course of the hearing this possibility was canvassed. Mr Baker said I could treat the Answers to the Unless Order as an application to amend though he opposed any such application because the Claimant had previously had the opportunity to state her case and because of limitation. I would only treat the Answer as an application to amend where it was a minor matter of adding some details to an existing claim. Beyond that I would

require the Claimant to expressly indicate she wished to amend and make the application fully.

94. I would grant the Claimant permission to amend in this instance if it is needed. It is essentially a question of adding a few factual details to a complaint that is already pleaded in outline. I do not think the Respondent is significantly prejudiced since it still has every opportunity to defend these points. They are points that are foreshadowed in the claim forms. On the other hand the Claimant would be significantly prejudiced if barred from pursuing any reasonable adjustments complaint.

95. I do not think time limits would be engaged by the amendment in this instance since it is a matter of adding details to an existing complaint. However, if that were wrong I would defer and preserve any limitation issues to the final hearing. Time limits in reasonable adjustments claims can be very complex and depend upon findings of fact and analytical assessment of evidence.

Harassment related to race/disability

96. Under the heading of "39. Discrimination: racial – disability" the Claimant said this at paragraph 47 of claim 2:

> *Black residents were raising complaints regarding my supervisor and i was forced to call back a customer and cancel her repair. It was a humiliating experience - I was forced to do this by my supervisor Jo Sharpe, who also made derogatory statements and published negative criticism in internal databases and online group TEAMS.*

97. In my view this very obviously pleaded the complaint of harassment related to race that is set out in the Answer. It identified unwanted conduct, identified a strong racial element to the treatment and identified that the Claimant found it humiliating.

98. I am just about persuaded that the like complaint of harassment related to disability is raised. Not only is there the heading at 39 which I have referred to but there is also what is said at paragraph 41:

> *"Residents - typically were non white, non English speaking and often elderly, <u>disabled</u> and with mental health and unable to communicate as well. Staff refused to allocate correct procedures to remedy and residents to go without heat, hot water, electricity and access to hospital care."* [underlining added].

99. The Respondent's draft list of issues suggested that the conduct complained of needed to relate to the *Claimant's* disability / the Claimant's race. There is no such requirement.

Other payments (wages claim)

100. The complaint essentially is that the Claimant was not paid for overtime that she had worked. In the answer to the Unless Order she put a figure on the

amount. She had not done that in the claim form but in my view she did not need to in order to successfully plead the complaint. It was sufficient to make clear that she considered she had not been paid for overtime when she ought to have been. The Claimant did this. For instance she checked the box for '*other payments'* in claim 1 and then said in box 8.2 "*I often worked 2 hrs over shift…. I worked late unpaid*" and then refers to other staff being paid for overtime. She makes various other references to not being paid overtime in claim 2 and in my view it is tolerably clear that she is saying there was a legal obligation to pay her overtime and she was not paid it.

LIST OF ISSUES

Disability status

1. Was the Claimant disabled within the meaning of s.6 EqA at the relevant times?
    a. Did she have a *"physical or mental impairment".* She relies upon dyslexia. The Respondent admits that the Claimant suffered from dyslexia to some degree.
    b. Did the Claimant's dyslexia have a *"substantial adverse effect"* on the Claimant's ability to carry out normal day-to-day activities?
    c. If so, was that substantial adverse effect *"long-term"*?

Failure to make reasonable adjustments

2. Did the Respondent operate the following alleged *"provision, criterion or practice"* ("PCP") at the relevant times? The Claimant relies upon the following alleged PCP:
    a. The requirement for the Claimant to perform her job duties.

3. Did the PCP put the Claimant at a *"substantial disadvantage"* compared to other employees who are not disabled? The Claimant relies upon the following alleged substantial disadvantages:
    a. she was unable to process and retain information;
    b. she was unable to process resident records adequately at the necessary speed;

    In consequence she was unable to acquire the skills needed to be promoted to supervisor, was disciplined and her KPI performance and bonus pay performance suffered and she had to work beyond her paid hours.

4. Ought the Respondent to have taken the following steps to remove or mitigate the disadvantage:
    a. the adjustments agreed in probationary reports of October 2020;
    b. update the Claimant's laptop with the software: Dragon, Bitmapped, Recorder (the Claimant says these items were allocated by Access to work and worth £5300);
    c. book a dyslexia diagnosis with a psychologist and manage the appointments in the manner as agreed by Sara Goodearl;
    d. process invoices to get equipment for dyslexia support;
    e. send paper copies of training manuals;
    f. set agendas for formal meetings;

g. send the Claimant videos so she could train in her own environment;
h. send the Claimant videos of coaching sessions so she could process them;
i. set a specific day each week away from the busy live call setting so the Claimant could learn information in a non busy environment and pace.

5. Did the Respondent know, and if not, ought it reasonably to have known, that:
   a. The Claimant was a disabled person;
   b. The PCP put her at a substantial disadvantage.

6. When does time run from in relation to these complaints?

Harassment related to race/disability

7. Did the Respondent subject the Claimant to the following alleged conduct:
   a. The Claimant was forced to call back black residents and cancel repairs she had booked. The People complained of are Joe Sharp and Tanya C.

8. Was the conduct unwanted by the Claimant?

9. Was the conduct related to race / disability?

10. Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

101. In light of all of the above I am able to produce a list of issues as follows:

Race discrimination

11. Was the Claimant subjected to the following alleged treatment:
    a. Not given/allowed to work paid overtime between January 2021 and May 2021;

12. Was the treatment *"less favourable"* treatment than the way in which the Respondent treated or would treat a relevant comparator? The Claimant relies upon the following comparators:
    a. Miss L – a co-worker whose surname the Claimant can no-longer remember in full who was white and was given paid overtime.
    b. A hypothetical comparator.

13. Was the Claimant subjected to the treatment *"because of"* race? The Claimant's race is Black British Caribbean.

Other payments (deduction from wages)

14. The Claimant's case is that 1 hour overtime was properly payable to her per day at her hourly rate to reflect additional work she in fact did. Her case is that there was a deduction of 5 hours per week. The period of claim is a 6 month period the dates of which are not yet stated.

    a. Was the Claimant entitled to pay for overtime?

b. Did the Claimant work overtime as alleged?

Limitation

15. Have any of the complaints been presented outside of the applicable primary limitation period? If so should time be extended pursuant to the applicable statutory test?

Employment Judge Dyal
Date: 19 May 2023