Neutral Citation Number: [2022] EAT 204

Case No: EA-2021-000360-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 June 2023

Before :

HER HONOUR JUDGE KATHERINE TUCKER

- -

Between :

MRS N MOUSTACHE **Appellant**

- and -

CHELSEA AND WESTMINSTER HOSPITAL NHS FOUNDATION TRUST

Respondent

- -
- -

Mr R Pickard (instructed by Free Representation Unit) for the **Appellant**
Miss N Motraghi (instructed by Capsticks LLP) for the **Respondent**

Hearing date: 22 November 2022

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JUDGMENT

Further Revised

SUMMARY

The Claimant, who represented herself, contended that the Tribunal had failed to adjudicate upon a claim of disability discrimination contrary to s.15 of the EqA 2010. That claim was not identified in the List of Issues which she had agreed to shortly before the hearing of her consolidated claims. That document was not considered by the Tribunal before the final hearing took place by remote means.

The claim should have been evident to both the Respondent and the Tribunal from the information supplied by the Claimant. Appeal allowed. Observations about the use of Lists of Issues and Remote Hearings.

HER HONOUR JUDGE KATHERINE TUCKER

1. This is an appeal against the decision of an Employment Tribunal sitting in London South Employment Tribunal. The Employment Judge was EJ Balogun and the members were Mrs J Jerram and Mr P Adkins.

2. I refer to the parties in this appeal as the Claimant and Respondent as they were before the Tribunal.

3. The Claimant appeals against the Tribunal's dismissal of her claims. She was represented by Mr Robin Pickard from the Free Representation Unit.

4. The hearing before the Tribunal took place over 4 days between 6-9 October 2020, the final day being used for the Tribunal to deliberate. At the hearing, the Respondent was represented by a solicitor. The Claimant represented herself, assisted by her daughter.

5. Although this is not clear on the face of the Judgment, the hearing took place by remote means, shortly before the second national lockdown during the Covid pandemic in 2020. The Tribunal reserved its decision and the Judgment and Reasons were sent to the parties on 14th January 2021.

The grounds of appeal

6. Following a hearing before HHJ Auerbach, at a hearing pursuant to r.3(10) of the EAT Rules of Procedure, two grounds of appeal were permitted to proceed to a full hearing as follows:

1. Ground 1: The Tribunal erred in law in failing to identify and determine the Claimant's claim of disability discrimination arising out of her dismissal and/or failed to give adequate reasons for dismissing this complaint.

2. Ground 2: The Tribunal erred in failing to have regard to, or adequate regard to, the Claimant's claim of disability discrimination (mental impairment) in determining whether her dismissal was fair or unfair.

7. In its Answer to the appeal, the Respondent to the appeal accepted that, if a claim for discrimination arising out of dismissal were before the Tribunal, that matter and the unfair dismissal claim should both be remitted to the Tribunal for fresh consideration.

The facts

8. The Claimant worked for the Respondent for approximately 28 years, her employment having started in January 2001 and ending in September 2019. At the end of her employment, her job title was 'Senior Administrator' and she worked as a Personal Assistant.

9. The Claimant presented her First Claim to the Tribunal on 10 December 2018 and provided Further Particulars in respect of it on 30th April 2019 in the form of a statement. The claim alleged disability and age direct discrimination and harassment in respect of matters preceding the termination of her employment. At paragraph 8.1 of the ET1 she ticked the box to show her claim included claims for discrimination and, in respect of the relevant protected characteristic, she ticked age and disability. At para 9.1 in response to the instruction "please tick the relevant box to say what you want if your claim is successful" she ticked the box "if claiming discrimination, a recommendation" and "compensation". She also made allegations of discrimination arising from disability under s.15 Equality Act 2010. I accept, as the Respondent contended, that this provided some evidence that the Claimant had, at that stage, an awareness of the existence of a claim under s.15 of the Equality Act 2010 ("**EqA 2010**").

10. As noted above, therefore, in the First Claim, the Claimant ticked the boxes at paragraph 8.1 of the Claim Form to indicate that she brought claims of age and disability discrimination, that she

claimed 'other sums' were owing to her, and that she was bringing claims of bullying, harassment and victimisation. At paragraph 8.2 of the Claim Form she set out a summary of some of the factual events relevant to her claims, in particular, that she had felt bullied by a member of staff, and, as a result, had issued a grievance. She described feeling anxious about the events, experienced a panic attack at work and was signed of work for a period of time. She expressed dissatisfaction with how her grievance had been dealt with and how, from her perspective, what had been intended to be a facilitated meeting to resolve issues related to her grievance, in fact turned into consideration of a separate, different issue, namely performance management. In box 15, under 'additional information' she set out complaints about re-banding and what she believed was pay discrimination due to her age and disability.

11. In its Response, the Respondent sought further and better particulars of the Claimant's claim. It appears that this resulted in an Order of 16th April 2019 being made, pursuant to which the Claimant was to provide further particulars of her claim. She did so by way of a statement. In that statement she identified that her disability arose from a hip replacement which she had in March 2015. The Claimant also set out details of events which had led to her grievance, why she considered it had been dealt with inappropriately and how she believed that that process was, effectively, high jacked.

12. The Claimant lodged a second claim on 1 September 2019 ("the Second Claim"). This claim post-dated her dismissal. In it she made a claim for unfair dismissal. In her Claim Form she stated, amongst other matters, as follows:

> "My employment with Chelsea and Westminster Hospital NHS Foundation Trust was terminated on 13th June 2019 following my 18-year employment with this hospital….
>
> I believe I was unfairly dismissed from my employment, due to having been on long term sickness since May 2018. Following a long-term sickness hearing held on 31st May 2019, I received a hearing outcome letter from Anna Letchworth stating that my employment would be terminated on the grounds of capability due to ill health with effect from the date of the letter. I had been signed off sick from my work since May 2018 with work related stress, following various grievances I had taken against my employer relating to my treatment as an employee from May 2017 to May 2018.

> …I was invited to a long-term sickness meeting in May 2019 which resulted in my employment being terminated which I believe is classified as unfair dismissal as I was still signed off sick which was caused by my employer. In this letter Anna states that my employment would be terminated on grounds of capability due to ill health which I do not believe is a satisfactory reason in this case." (CB/63 [8.2]).

13. The Claimant also stated that she already had a claim pending before the Tribunal against the Respondent for age and disability discrimination. In this claim the Claimant stated that she believed that she was unfairly dismissed because she was "still signed off sick" and that that was caused by her employer.

14. In the skeleton argument prepared for this appeal, the advocate for the Claimant, acting through the Free Representation Unit informed me that, at all material times, the Claimant was unrepresented and (subject to the point made below) that she did not have legal assistance in respect of the drafting of her ET1, preparing the agreed list of issues or preparing/presenting her legal submissions to the Tribunal. The one caveat to that is that the Claimant received, "ad hoc assistance from the West London Equality Centre. However, in relation to [the Claimant's] complaint of dismissal, such assistance was limited to typography and grammar only." There is, in my judgment, no sufficient evidence before the EAT upon which it could properly conclude that the assistance with which the Claimant was provided was otherwise than described within this paragraph.

15. Following a preliminary hearing which took place on 18 June 2019, EJ Balogun (who ultimately heard the final hearing) held a Preliminary Hearing to consider the Appellant's First Claim only. The Respondent was directed to update the draft list of issues and send a copy to the Claimant by an Order headed "Agreed list of issues". That took place. The document which was subsequently produced was dated 24 June 2019. In it, it was identified that the disability asserted by the Claimant was a "mobility issue". The document set out the Claimant's claims for direct discrimination, harassment and discrimination arising from disability (s15 Equality Act). The s.15 claim was

identified as concerning the handling of issues regarding the Appellant's performance at a meeting on 23 August 2017.

16. After that document was prepared, the Claimant issued the Second Claim, on 1 September 2019.

17. The Second Claim was listed for a one-day final hearing by the Tribunal in a Notice of Hearing dated 31 October 2019. The Claimant made a request that the claims be consolidated, which was agreed to by the Respondent. Further, by a letter dated 28 November 2019 the Respondent asked that both claims be heard 'at the forthcoming October hearing'. Employment Judge Balogun agreed to consolidate the two claims and they were heard together on 6 – 9 October 2020. No further hearing took place in respect of the Second Claim before the final hearing.

18. Shortly before that hearing, the List of Issues was revised and updated. It appears that this took place by way of email: the document was updated by the solicitors acting for the Respondent and sent to the Claimant (on 24 September 2020) together with a chronology. In reply, on 1 October 2020 the Claimant stated, "This is to confirm that I accept the final list of issues which you have updated". The List of Issues was then sent to the Tribunal by email on 2 October 2020 by the Respondent's solicitors. The revised List of Issues was not considered by the Tribunal prior to the final hearing.

19. The disability status issue was still said to relate to the Claimant's mobility issues following hip replacements. It did not record that it concerned the impact of stress upon her nor any mental impairment. Further, under a heading "*discrimination arising from disability*" reference was made to a single incident of unfavourable treatment: "*raising issues regarding the Claimant's performance at a meeting on 23 August 2017".* It did not include, therefore, reference to a mental impairment or any claim under s.15 of the **EqA 2010** regarding dismissal. No one raised or queried anything about the

content of the Claimant's claim form at paragraph 8.2 of the First Claim (set out in paragraph 10 above).

20. The Claimant sent a witness statement to the Respondent in July 2020. In that she stated that the deterioration in her mental health amounted to a disability. Again, the relevance of this was not queried or clarified with the Claimant.

The Tribunal hearing and decision

21. As noted above, the claims were heard over 4 days at the beginning of October 2020. The Claimant represented herself, with the assistance of her daughter. The hearing was wholly remote and took place by CVP. The Respondent was represented by Ms Ramadan, a solicitor.

22. At the start of the hearing on day 1, the Employment Judge, properly in my view, initiated a discussion regarding the List of Issues. The Respondent has a note of the hearing and discussions within it. The Claimant does not. It is not clear that there was any discussion about the passages in paragraph 8.2 of the First Claim form, or the relevance of the passage referred to above in the Claimant's witness statement.

23. The Tribunal recorded in its Reasons that the issues to be determined were contained in an updated List of Issues document prepared by the Respondent. The Tribunal dismissed the claim of unfair dismissal. It concluded that the Respondent consulted with the Claimant through absence review meetings and, at each, clarified the reasons for her continued absence, discussed any medical information available, sought her view on the likelihood of a return in the foreseeable future and on any measures/ adjustments which might assist. The Tribunal found that on each occasion the Claimant indicated she was unfit to resume work in any capacity and, that there were no adjustments the Respondent could make which would alter that fact. The Tribunal found that the Respondent took steps to establish the true medical position by referring her to OH, asking appropriate and relevant

questions as to whether or not the point of dismissal had been reached. By the date of the final absence review, the Claimant had been absent from work for some 13 months and there was no foreseeable return date. The Tribunal considered that there was evidence that her absence had caused pressure on the running of the service, as her work had been covered by colleagues or by bank staff, which created an additional cost burden. The Tribunal concluded the Respondent had reached the point where it was entitled to dismiss and that such dismissal was fair in all the circumstances. The claims of disability discrimination and age discrimination, as set out within the List of Issues, were dismissed.

The Law

24. The over-riding objective is set out in rule 2 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 ("**ET Rules**"):

> "2. Overriding objective
>
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

Section 15 of the Equality Act 2010 provides as follows:

> (1) A person (A) discriminates against a disabled person (B) if—

> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Rule 29 **ET Rules** states that:

> The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. … the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

25. The use of List of Issues was considered in **Parekh v Brent London Borough Council** [2012] EWCA Civ 1630. In that case Mummery LJ explained the following:

> **"31. A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see Land Rover v Short (unreported) 6 October 2011, paras 30-33. As the employment tribunal that conduct the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence: see Price v Surrey County Council UKEAT/450/10 (unreported) 27 October 2011, para 23."**

He further stated that, at paragraph 32, that:

> **"if a list of issues is agreed, it is difficult to see how it could ever be the proper subject of an appeal on a question of law. If the list is not agreed and it is contended that it is an incorrect record of the discussion, or that there has been a material change in circumstances, the proper procedure is not to appeal to the Employment Appeal Tribunal, but to apply to the employment tribunal to reconsider the matter in the interests of justice."** [32]

26. The Court of Appeal again considered the use of lists of issues, particularly in proceedings before Employment Tribunals where one party was unrepresented in **Mervyn v BW Controls Ltd [2020] ICR 1364.** Bean LJ set out the following guidance:

> **"what is 'necessary in the interests of justice' in the context of the tribunal's powers under rule 29 depends on a number of factors. One is the stage at which amending the list of issues falls to be considered. An amendment before any evidence is called is quite different from a decision on liability or remedy which departs from the list of issues agreed at the start of the hearing. Another factor is whether the list of issues was the product of agreement between legal representatives. A third is whether amending the list of issues would delay or disrupt the hearing because one of the parties is not in a position to deal immediately with a new issue, or the length of the hearing would be expanded beyond the time allotted to it." (Paragraph 38).**

Furthermore, the Court of Appeal set out its expectations of good practice in the following terms:

> **"43 It is good practice for an employment tribunal, at the start of a substantive hearing, with either or both parties unrepresented, to consider whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute between the parties. If it is clear that it does not, or that it may not do so, then the employment tribunal should consider whether an amendment to the list of issues is necessary in the interests of justice."**

On the facts of that case the Court held that the Tribunal should have considered both a claim of actual dismissal and one of constructive dismissal: pre-reading of the essential material by the Tribunal should have alerted the Tribunal to the possibility of a constructive dismissal being a real issue between the parties. Bean LJ held that even where the claimant expressly stated that she had been dismissed, the ET should have considered whether the complaint was in truth one of constructive dismissal: it 'shouted out' from the pleadings that this claim was being brought (para 42). He stated that that did not require the Tribunal "to step into the factual and evidential arena"; the Tribunal, at the outset of the hearing, could have stated that it appeared there was an issue as to whether the claimant resigned or was dismissed (see para 45).

27 I note that at the EAT stage of that case, Laing J stated (at para 84) that **"if it is obvious from the ET1 that a litigant in person is relying on facts that could support a legal claim",** the ET has a duty to ensure that the litigant in person understands the nature of that claim. Where a litigant in person has decided not to advance a claim, the ET should be confident that this has been done "advertently."

28. In **McLeary v One Housing Group Ltd** UKEAT/0124/18/LA HHJ Auerbach again revisited this issue. That case concerned a litigant in person who brought a claim for constructive dismissal. The claimant had not advanced a claim for discrimination arising out of her constructive dismissal, and this was not included in the agreed list of issues. In submissions, the Claimant asserted that this authority stands as support for the following two propositions:

a. The ET is entitled to clarify a complaint where to do so would not involve the assertion of additional facts; and

b. The ET ought to clarify whether a complaint is being brought where the factual basis of the claim has been pleaded in substance.

HHJ Auerbach stated:

> **'88. … a claim of discriminatory dismissal was, like her other EqA claims, a claim of disability discrimination, which drew entirely on them for its essential elements, and it did not involve the assertion of any additional facts. …**
> **'I have also considered whether it might be said that it would not be appropriate for the Tribunal, as it were, to invite a claimant to add a wholly new complaint. Indeed, it would not. However, what was necessary here, starting with the Case Management Hearing, was simply to clarify the substance of what the Claimant was saying and the claims that she was seeking to bring … when, as in this case in my judgement, it shouts out from the contents of the Particulars of Claim that it is being alleged that there have been a number of acts of disability discrimination that have, along with other acts, contributed to an undermining of trust and confidence that has driven an employee to resign and the employee is effectively a litigant in person and has no professional representation, this is a matter that should, at the very least, be raised at the Case Management Preliminary Hearing so that clarification can be sought …**
> **In short, where it is clear from a claim form and/or particulars of claim, that a lay claimant is saying, factually, I was subjected to discrimination in my employment and this drove me to resign, it is both proper, and incumbent on the Tribunal, to seek clarification of whether such a claim is intended.'**

Submissions

29. On behalf of the Claimant it was submitted that the Claimant had pleaded all of the necessary factual ingredients to support a claim for discriminatory dismissal under s.15 EqA 2010. Whilst she failed to articulate that the dismissal itself was the product of discrimination, that was a mistake made by a litigant in person. It was submitted that it was an error not to have properly analysed and clarified

that which the Claimant had said. It was submitted that the approach advocated by the Respondent was wrong and that Lists of Issues should not be slavishly adhered to.

30. The Respondent submitted that the authorities to which it referred me established the following principles:

(i) If a list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list.

(ii) If a list of issues is agreed, it is difficult to see how it could ever be the proper subject of an appeal on a question of law.

(iii) The Tribunal should at the start of a substantive hearing, with either or both parties unrepresented, consider whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute and if not consider whether an amendment is necessary in the interests of justice.

(iv) When considering what is 'necessary in the interests of justice' under rule 29 the following factors are relevant:

a. The stage at which amending the list of issues falls to be considered. An amendment before any evidence is called is quite different from a decision on liability or remedy which departs from the list of issues agreed at the start of the hearing.

b. Another factor is whether the list of issues was the product of agreement between legal representatives.

c. A third is whether amending the list of issues would delay or disrupt the hearing because one of the parties is not in a position to deal immediately with a new

> issue, or the length of the hearing would be expanded beyond the time allotted to it."

31. The Respondent submitted that the Tribunal did not err in law: no claim of disability discrimination arising out of dismissal was set out the Second Claim, List of Issues and nor was any application to amend made. It cannot, and should not, be criticised for failing to consider a claim which was not before it. Not only was the claim not expressly articulated, a fair reading of the Claim would not suggest that it was being pursued. Further, it was not until the promulgation of the Judgment that the Claimant sought to advance, and it was submitted, widen her claim. In any event, it would not have been in accordance with r.29 of the **ET Rules** to consider such a claim at the final hearing in the circumstances of this case having regard, in particular, to the factors in **Mervyn**.

Analysis and Conclusions

32. Employment Tribunals and Employment Judges are used to working in proceedings where one, or both, parties represent themselves and are experienced in meeting the requirements of the over-riding objective in those circumstances. They do not, generally, simply expect litigants in person to label their cases with the correct legal language. It is far more common that Employment Judges ask litigants to explain the substance and factual basis of their claim and, through discussion, clarification of those issues, and a clear and straightforward explanation of the different, relevant legal concepts, identify the issues which the Tribunal will be required to consider and determine in order to fairly decide upon the dispute between the parties. That exercise takes time and patience, but it is, in my view, undoubtedly the correct approach.

33. It is important to stress that a List of Issues is **not** a pleading. Nor is it a Claim Form, or Response. It is a document which can be an exceptionally useful Case Management tool. It can provide clarity and structure when that is otherwise woefully absent. Lists of Issues should be used.

They are helpful, as a case management tool, no less, and certainly no more than that. Their use is subject to the rigours of the Overriding Objective, the underlying principles of which Employment Tribunals must closely guard. Employment Tribunals and Employment Judges must be careful to ensure that that which is a useful case management tool does not, through slavish adherence to it, or elevation of it to a formal and rigid pleading, preclude a fair and just trial of the real issues in the case, the principle at the core of the Overriding Objective. Equally, they should be astute to ensure that advantage is not unfairly afforded to any one party through their use.

34. I considered carefully the proposed principles summarised by the Respondent. The points set out there *may* be relevant when both parties are legally represented, and the proposed list of issues has been prepared and agreed by those representatives, although again, it should be recalled, lists of issues are not pleadings. I do not, however, consider that it would be helpful to endorse the summary set out at paragraph 30 above, not least because that runs the risk of encouraging the development of a culture that lists of issues are akin to a pleading, something which, in my view, is neither appropriate nor necessary.

35. In this case, I consider that, standing back, it was, or should have been clear to the Tribunal, and to the Respondent, that the Claimant was seeking to assert that there was a connection between a potential disability (stress and mental health problems), the impact of those conditions upon her, and her dismissal. She asserted that she had been signed off from work due to long-term sickness because of anxiety, work-related stress and panic attacks. She explained that her absence began in May 2018 and that, after a long-term sickness hearing on 31 May 2019, she received a letter stating the Respondent's intention to dismiss her. She identified in her Claim Form that she had been absent from work for a substantial period due to her mental health condition. Further, she asserted that a return to the workplace would cause her anxiety to deteriorate. I also consider that this issue of discrimination became increasingly obvious in the Claimant's witness statement (dated July 2020) in which she stated that the determination in her mental health amounted to a disability.

36. Those details should, in my judgment, have given the Tribunal and Respondent, an obvious indication that the dismissal concerned an asserted disability and so may have been discriminatory.

37. By the time of the Claimant's statement in July 2020, the final List of Issues had not been drawn up. Further, there was no consideration of the draft List of Issues by the Tribunal after the consolidation of the claims and before the date of the final hearing. Having regard to the requirement placed upon the parties by the over-riding objective, and the parties' role to assist the Tribunal in furthering it, I consider that it may have been appropriate, on the facts of this case, for the Respondent to have alerted the Tribunal to the possibility of this claim, if the Tribunal had not identified them itself prior to, or at, the final hearing. In any event, what was required was clarification of that which was set out in the documents provided by the Claimant. Had that been done, significant time and expense could have been saved.

38. Certainly, in my judgment, the Tribunal should have revisited the list of issues at the outset of the hearing and clarified this issue. Further, given that the Claimant appears to have alluded, at least, to a complaint of disability discrimination arising out of her dismissal in her closing submissions by stating that *'I am claiming unfair dismissal because I believe that the Respondent did not take into consideration the extent of my mental health disability',* the issue should have been raised then, if not before.

39. The hearing took place entirely remotely. There are many advantages to the relatively newly developed means of conducting contested hearings remotely. Nevertheless, some caution should be exercised in my view when listing contested hearings remotely, particularly when parties represent themselves. A remote format impacts upon communication between the parties and the Tribunal, and may have done in this case. Communication with litigants in person may not be as effective over a remote platform. Cues which can instantly be picked up on in a face -to- face hearing can far more readily be missed. Further, it may be much harder for a litigant in person to interrupt so as to ask a

point of clarification over a remote link rather than in person if, for example, a litigant is unsure of a matter, or is not confident they have understood. These difficulties should not, in my view, be underestimated when considering the use of remote hearings.

40. In my judgment, the Claimant had set out sufficient information to have alerted the Tribunal to her claim that her dismissal was an act of unlawful discrimination. The failure to clarify the position in my judgment was an error. I allow the appeal. Both the claim of unfair dismissal and of discrimination should be remitted. My initial view is that that should be to a different Tribunal, but I invite further written submissions on that point before reaching a conclusion within 14 days.