Neutral Citation Number: [2024] EAT 34

Case No: EA-2021-001119-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 March 2024

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

MR B KING

Appellant

- and –

THALES DIS UK LTD

Respondent

- -
- -

LYDIA SEYMOUR (instructed through Advocate) for the **Appellant**
ZAC SAMMOUR (instructed by Astons Legal) for the **Respondent**

Hearing date: 13 February 2024

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JUDGMENT

SUMMARY

Practice and Procedure

Mr King brought a first claim alleging unfair dismissal. It was dismissed because it was submitted out of time. Mr King brought a second claim alleging sex discrimination. A Preliminary Hearing was held to consider whether the second claim also included a claim of disability discrimination and whether the claim of sex discrimination was an abuse of process. Mr King is vulnerable and has mental health conditions. The Preliminary Hearing was not conducted in a manner that was unfair. The Employment Judge correctly concluded that the first claim did not include a claim of disability discrimination. The Employment Judge erred in law in his approach to abuse of process which resulted in the dismissal of the sex discrimination claim, and was the primary reason for the refusal of the application to amend the second claim to add a claim of disability discrimination. The matter was remitted to the Employment Tribunal.

HIS HONOUR JUDGE JAMES TAYLER

Writing this Judgment

1. Mr King has learning difficulties that makes it difficult for him to understand complicated documents. I told Mr King that I would write my judgment in ordinary language. Mr Zahra and Ms Seymour may also be able to help explain my decision to Mr King.

2. I will have to deal with some legal arguments that are complicated and refer to some points of law by looking at some legal cases. Some of the cases use complicated wording. I will keep things as simple as I can. However, it is important that I explain my reasoning sufficiently for all those who may need to read this judgment.

Introduction

3. Mr King has brought three claims against Thales. Mr King used to work for Thales. This appeal is about the second claim. On 2 August 2021, Employment Judge Reed dismissed the second claim. Employment Judge Reed decided that:

3.1. the second claim did not include a claim of disability discrimination

3.2. Mr King could not add a claim of disability discrimination to the second claim, and

3.3. the claim of sex discrimination in the second claim should be dismissed because bringing the claim was an abuse of process

People involved in the appeal

4. Mr King was represented by Lydia Seymour at this appeal. Ms Seymour is a barrister who represented Mr King under a scheme called Advocate. Advocate provides help free of charge. I am grateful to Ms Seymour for her careful and skilful argument.

5. Mr King was also helped by his friend Mr Zahra.

6. Mr Zahra also helped Mr King at the hearing before Employment Judge Reed on 2 August 2021.

7. Zac Sammour is the barrister who represented Thales at this appeal hearing.

8. I am Judge Tayler. I am a judge of the Employment Appeal Tribunal. Judges of the

Employment Appeal Tribunal hear appeals from decisions of the Employment Tribunals. It is not my job to take the decision again. My job is to decide whether Employment Judge Reed conducted the hearing fairly and whether he got the law right or wrong when he made his decision.

9. Like all judges I have taken the judicial oath. I have sworn to "do right to all manner of people" and to do so "without fear or favour, affection or ill will". In more modern language, I have promised to treat everyone fairly.

10. I must treat both Mr King and Thales fairly. I must do so "after the laws and usages of this realm" which means that I must apply the law as it is set out in statutes, rules and by applying decisions of other judges where they are binding on me.

What happened

11. I need to describe what happened in quite a lot of detail. It is necessary to go into detail to explain what this appeal is about. I will set out my understanding of the facts and Mr King's claims in broad terms. I am not making any final decisions about the facts. Findings of fact are for the Employment Tribunal not the Employment Appeal Tribunal.

12. Mr King started working for Thales in December 1999. Thales' full legal name is set out in the heading of this Judgment. When Mr King started working for Thales it was called Gemelato. It has changed names a number of times. We agreed I will call it Thales. The business Mr King worked for provides digital security products.

13. Mr King worked as a "Bureau Operative" at Havant. Mr King was responsible for personalisation of banking cards for clients of Thales. One of the people who supervised Mr King was Luke Mercer. There were a number of disputes between Mr King and Mr Mercer. Mr King alleges that he was bullied and harassed by Mr Mercer.

14. Mr King was given a first written warning as a result of a dispute he had with Mr Mercer on 20 July 2017. Mr King does not accept that he should have been given a written warning.

15. There was a further incident with Mr Mercer on 31 May 2018. Thales allege in the response to the first claim that:

> "the Claimant became aggressive towards Mr Mercer, advancing towards him closing down his personal space and ultimately grabbing Mr Mercer so that he could not move his arms in a manner he found intimidating"

16. Mr King attended a disciplinary hearing on 8 August 2018. He was represented by Debbie Watson, a Unite trade union representative. Thales dismissed Mr King for gross misconduct by letter dated 13 August 2018. Mr King appealed against his dismissal. The appeal hearing was held on 21 November 2018. Mr King produced evidence that he was suffering from anxiety and depression. Mr King was again represented by Ms Watson. The appeal was rejected by letter dated 3 December 2018.

The first claim

17. Mr King sent a claim form that was received by the Employment Tribunal on 13 November 2018. At section 8.1 of the claim form the box was ticked for unfair dismissal. The boxes for discrimination on the grounds of sex and disability were not ticked.

18. In the claim form Mr King said things like:

> I have been bullied, unlawfully discriminated against, harassed, singled out and been made to feel humiliated in front of my work colleagues, by a cell leader

19. On19 November 2018, an e-mail was sent by the Employment Tribunal saying:

> The claim form has been referred to Employment Judge Mulvaney, who directs the Claimant to inform the Employment Tribunal if he is claiming discrimination and if so, on what basis (i.e. whether sex, age, disability or other protected characteristics).

20. Mr. King replied on 22 November 2018:

> I have been dismissed without notice or payment in lieu of notice for giving an 'unwanted hug'. I wish to appeal against this unfair dismissal on the following grounds …
>
> I have been bullied, unlawfully discriminated against, harassed, singled out and been made to feel undermined and humiliated in front of my work colleagues

21. The e-mail from Mr King referred to discrimination and harassment but did not refer to disability or sex. The only specific type of claim that was mentioned was unfair dismissal.

22. Mr King sent a further e-mail on 28 November 2018 in which he tried to explain why the

claim had been submitted late. Mr King said that he had become ill as a result of the bullying and harassment at work. He did not say he had been subject to disability discrimination.

23. On 7 December 2019, the Employment Tribunal sent a letter to Mr King saying:

> The claim form has been referred to Regional Employment Judge Pirani who has directed that as the Claimant has failed to identify the protected characteristic relied on, despite being asked, the claim can only be accepted as Unfair Dismissal.

24. Thales responded to the first claim on 4 January 2019. Thales argued that the dismissal was fair and that the first claim had been submitted out of time.

25. The first claim was considered at a hearing on 17 June 2019 before Employment Judge Gray. Mr King and Thales had prepared to argue the unfair dismissal claim in full. In the period leading up to the hearing Mr King was represented by solicitors. At the hearing Mr King was represented by a barrister, Miss Nicholls. Employment Judge Gray started by considering whether the first claim had been submitted out of time. Employment Judge Gray decided that the claim had been submitted out of time and dismissed it.

26. Mr King appealed against the decision to dismiss the first claim because it was submitted out of time. The appeal was unsuccessful.

The second claim

27. Mr King submitted a second claim that was received by the Employment Tribunal on 14 July 2020. At section 8.1 Mr King ticked the box to say that he had been discriminated against on grounds of sex. He did not tick the box to say that he had been discriminated against on grounds of disability. Mr King said at section 8.2 "I want to make a new claim for sexual discrimination". He said that there had been "sexual discrimination, bullying and harassment" a number of times. Mr King did not refer to disability discrimination when describing his claim.

28. At section 12 Mr King answered the question "do you have a disability" by ticking "yes". Mr King answered the question about whether he needed any assistance by stating: "mental health problems – seek help from my friend."

29. The Employment Tribunal sent an email to Mr King on 22 July 2020 saying that Employment

Judge Midgley had ordered Mr King to provide additional information about his discrimination claim. Employment Judge Midgley stated that Mr King "must clarify whether he is seeking to bring a discrimination claim". Employment Judge Midgley required details of any treatment that Mr King stated was influenced by his sex. Somewhat confusingly, within the section asking for details of the complaint of sex discrimination, Employment Judge Midgley asked about any complaint of failure to make reasonable adjustments.

30. Mr King replied on 28 July 2020. He referred to an occasion on which he had forgotten his work trousers and had been told by Mr Mercer to cycle home and get his work trousers. He said that a woman who wore leggings was not required to go home and change. Mr King said this was sex discrimination. Most of the document was about sex discrimination but there was a reference to "indirect disability discrimination, reasonable adjustments, disability discrimination, harassment and victimisation" but without any details.

31. On 11 March 2021, Mr King sent a further document to the Employment Tribunal headed "Bernie's Luke Mercers daily harassment & bullying log with their 'protected characteristic'" It included some allegations of disability discrimination, although the specific allegations are unclear.

The Employment Judge Dawson case management hearing in the second claim

32. The second claim was considered by Employment Judge Dawson at a telephone case management hearing. Employment Judge Dawson took very great care to consider the needs of the claimant and to write his order in clear and simple language. Mr Zahra helped Mr King at the case management hearing. Employment Judge Dawson noted that Mr Zahra had written a document explaining that:

> As a friend who has known the Claimant for over 25 years, I have been asked by him if I would help assist with this claim. He is vulnerable, of low intellectual ability, struggles with reading and writing, lacks the ability to express himself, is frequently unable to make connections and associations, and often misunderstands what is being said to him. I have thus decided I will assist him.

33. Employment Judge Dawson was concerned that Mr Zahra said that Mr King "was not mentally sound enough or strong enough to bring the claim". Employment Judge Dawson referred to

the possibility of appointing a litigation friend if Mr King could not make decisions about the claim. Employment Judge Dawson said that if the appointment of a litigation friend was requested Mr King and Mr Zahra should provide evidence. Employment Judge Dawson did not conclude that a litigation friend was required and stated that Mr Zahra could continue to help Mr King.

34. Employment Judge Dawson noted that Mr King said he was not sure what to put in his claim form but intended to complain about sex discrimination and disability discrimination. Employment Judge Dawson said that he found it "difficult to understand what his claims of disability discrimination are".

35. Thales argued that the claim form did not include a claim of disability discrimination so that Mr King would need the permission of the Employment Tribunal to add a claim of disability discrimination. Thales also argued that Mr King could not bring discrimination claims in the second claim as they "could" have been brought in the first claim, so that the second claim was an abuse of process. Thales also argued that the sex discrimination claim had been submitted long out of time.

36. Employment Judge Dawson decided that there should be another hearing to determine whether the second claim included a claim of disability discrimination and whether the first claim meant that the second claim could not be brought.

37. Employment Judge Dawson required Thales to provide Mr King with their argument by 8 April 2021 so that Mr King would have "as much time as possible to understand the things which will be decided at the next hearing". The next hearing was listed for 8 August 2021. Employment Judge Dawson gave directions to prepare for the hearing.

38. Thales wrote explaining their arguments on 8 April 2021, as directed by Employment Judge Dawson.

39. On 20 May 2021, Mr Zahra wrote to the Employment Tribunal about the medical conditions and needs of Mr King. Mr Zahra said:

> 10. Mr King acknowledges he has always struggled with reading and writing. The problem was picked up in his infant school when they recognised, he had problems with learning. He was later moved to a school for children with learning difficulties. His problems are not only with

> reading and writing. Amongst others in my opinion, he finds it difficult to sequence things, to assimilate information and to communicate. In EJ Dawson's document and referring to point 12 he (EJ Dawson) clarifies that we all agree that Mr King can make decisions if things were explained properly and simply. This does nevertheless pose further questions as to what is meant by properly and simply, and where one draws the line.
>
> 11. It is my view that Mr King suffers from some form/s of underlying mental disadvantage even though to my knowledge he has not been diagnosed as such. He has always said that he is dyslexic but has recently had the courage to open up to me that after years of living in silence he might be suffering with some form of autism, have ADHD or some other behavioural disorder. He has been referred by his GP to specialists for tests in this regard. …

40. Mr Zahra specifically referred to some things that might be done to help Mr King:

    40.1. "Mr King wants to continue his claims with me by his side as he feels I am the only person he trusts when it comes to understanding him, his predicament, and his claims"

    40.2. "I believe he needs the opportunity to be involved with normal two way dialogue on an equal footing, not a one sided cross examination by those with a selfish agenda."

    40.3. "Mr King and I are asking that the Tribunal take into consideration and are aware that he has real difficulties both psychologically and intellectually. He is vulnerable."

    40.4. "Mr King wants the Tribunal to realise his predicament and treat him fairly and accordingly have his human rights respected. In his rather painful words "I want to be on a level playing field where it's fair for both parties. I do not know how to argue my case because I am stupid, confused and mentally messed up."

41. Mr Zahra and Mr King were appreciative of the efforts of Employment Judge Dawson, stating:

> 23. Again, I wish to thank EJ Dawson for firstly recognising and secondly actually exploring further to try and identify a (or the) problem for Mr King and the Tribunal, and thirdly for giving Mr King and I the chance to express what we are saying it is and how it is affecting Mr King's ability and capacity to see them to the question … It is difficult not to try and assist a friend in distress. That is all I am trying to do. Mr Kings says "At least EJ Dawson appears to understand. I will attach my medical notes

> from the important people and hopefully your evidence (mine, in this document) and my medical notes will let him realise my situation and mental health more".

42. Employment Judge Dawson did an excellent job at the case management hearing. Employment Judge Dawson went out of his way to understand Mr King's problems and to set up a hearing that would be fair to both parties by allowing Thales to put forward their legitimate arguments that the claim should not be allowed to proceed, but with adjustments for Mr King. The adjustments specifically suggested by Mr Zahra were that he should be able to support Mr King, that there should be a normal two way dialogue (possibly not permitting cross-examination by the respondent), and that the Employment Tribunal should take account of Mr King's learning difficulties and mental health issues.

Response to Employment Judge Dawson's directions

43. On 20 May 2021, Mr Zahra sent a detailed response to Thales' written argument. Mr Zahra said that Mr King had brought a claim of disability discrimination in the second claim and in his response to the order of Employment Judge Midgley. If not he should be given permission to amend the second claim to add complaints of disability discrimination. Mr Zahra stressed that Mr King had not brought anything other than a claim of unfair dismissal in the first claim. Mr Zahra said that Mr King believed that he could not bring a discrimination claim in his first claim because he had not completed Thales's grievance procedure.

44. Mr Zahra explained the situation with a theatrical analogy:

> The Claimant likens his First Claim as Hamlet and the instant claim as Macbeth. He is doing Hamlet only in his First claim as he thinks he intended and what EJ Pirani restricted it to. He is now doing Macbeth only in his instant Claim. It was not possible for him to advance Macbeth when doing Hamlet, so how 'could' he have been able to 'could' have? He also now has new evidence for Macbeth of which he did not know when he was doing Hamlet.

The Employment Judge Reed Preliminary Hearing

45. The Preliminary Hearing was heard by Employment Judge Reed on 2 August 2021.

46. Employment Judge Reed's judgment is written in more traditional terms than the case

management order of Employment Judge Dawson. Employment Judge Reed did not start the hearing by conducting a "ground rules hearing". Employment Judge Dawson had not suggested that there should be a ground rules hearing and one was not requested by Mr King or Mr Zahra.

47. Employment Judge Reed referred briefly to Mr King's learning difficulties and mental health issues:

> 9. In the course of Mr Zahra's submissions he repeatedly emphasised the fact that Mr King had learning difficulties, had problems dealing with documents and suffered from depression. I did not doubt that was the case and it might well have been that he was disabled on account of those conditions.

48. Employment Judge Reed decided that the second claim did not include a claim of disability discrimination:

> 10. However, **this first issue I was called upon to address did not involve the exercise of any discretion on my part but simply required me to construe the document itself**. **It either made a claim of disability discrimination or it did not**.
>
> 11. As I have said above, the **box indicating a claim of disability discrimination was not ticked**. Although disability is referred to in the narrative itself, **no reasonable reading of that document would alert a reader to the fact that a claim of disability discrimination was being made**.
>
> 12. I took the view that the claim form did not contain an allegation of disability discrimination. Such a claim could therefore only go forward if I was prepared to grant leave to amend. Whether leave should be granted was the second matter to be addressed by me in accordance with the directions of Employment Judge Dawson. [emphasis added]

49. Employment Judge Reed did not allow Mr King to add a claim of disability discrimination:

> 13. In determining that question **I was bound to look to Mr King for an explanation** for his failure to make the claim clearly in the form. **I was certainly entitled, on that subject, to consider his mental state.**
>
> 14. **One particular problem for him, however, was that the broad factual allegations giving rise to the claims of disability discrimination he was now seeking to take forward were actually raised in the first claim. He told me that he only intended to claim unfair dismissal in that first claim but that was not what a natural reading of that document would lead one to conclude**. **Nor was it consistent with his replies to correspondence from the tribunal. I was satisfied that it was indeed his intention to claim discrimination in that first claim but since he claimed otherwise to me, he could not provide an explanation for his failure to reply satisfactorily to the correspondence from the**

tribunal.

15. **This was not a matter of the "capability" of Mr King but rather his credibility. Contrary to his evidence I concluded that he did intend to claim discrimination in the first claim. He might have claimed that his mental state prevented him properly articulating such claims but since he denied any intention to do so anyhow, that was not an argument open to him.**

16. I reminded myself that in the narrative in the second claim he expressly pointed out that he was two years out of time in making the claim. (As a side issue, he seemed to be suggesting in the course of his evidence that the claim was not out of time at all, on this basis that he was obliged to wait until the respondent's internal processes had been exhausted before he brought the claim. He also said that they failed to hold a meeting he was expecting them to hold and that meant that the limitation period did not expire until literally years after the actions of which he complained. That did not stand up to any sort of scrutiny. If he was expecting further steps to be taken by the respondent, they would have to be taken very shortly after his dismissal at the very latest. If he thought that he was being mistreated by the failure to hold a meeting, that failure occurred at least a year if not eighteen months before the claim was presented)

17. In short, he was considerably late in making these claims and given the contents of his claim form it was clear he was well aware of that. **He had already been offered the chance to progress them in the first claim but, for reasons that he could not give me (having denied an intention to make such claims there) had failed to avail himself of that opportunity.**

18. **Mr King took legal advice. He engaged solicitors who assisted him from January 2019 at the latest until the determination of his first claim in June of that year. It seemed highly unlikely that the actual wording within his claim form would not have been discussed with them. He said no such discussions took place but again that seemed to me to be literally incredible.**

19. **To some extent there was an overlap between this issue and the question of whether it would be an abuse of process for the claimant to pursue a claim of disability discrimination in the second proceedings (see below). Even if the claimant had expressly made such a claim in the second set of proceedings, for the reasons set out below I would have dismissed it. It would hardly make sense to permit an amendment to make a claim that in any event would not be going forward.**

20. **Certainly, the balance of prejudice favoured Mr King. If I were to deny him leave to amend he would be driven from the seat of justice. The respondent would have to deal with claims somewhat later than they would otherwise but there was no evidence that that would cause them any particular problem.**

> 21. **On balance, however, and in the light of all these considerations, I was not inclined to exercise my discretion** to allow the claimant to amend his claim form to add a claim of disability discrimination. [emphasis added]

50. The central reasoning of Employment Judge Reed was that:

50.1. Mr King intended to bring a disability discrimination claim in the first claim

50.2. Mr King was lying when he said he only intended to bring an unfair dismissal claim in the first claim

50.3. as a result, Mr King could not explain why he had not taken the opportunity to bring the disability discrimination claim in the first claim

50.4. Mr King must have discussed the wording of his first claim with his solicitors

50.5. even if Mr King had brought a complaint of disability discrimination in the second claim it would be struck out as an abuse of process

50.6. accordingly, although otherwise the "balance of prejudice" between Mr King and Thales would favour allowing the amendment, permission to amend the second claim to add a claim of disability discrimination was refused

51. The fundamental reason for refusing the amendment was that bringing a claim of disability discrimination in the second claim would be an abuse of process.

52. Employment Judge Reed then considered the abuse of process argument in relation to the claim of sex discrimination:

> 22. The next issue I was called upon to address was whether the claim actually made in the second claim form – sex discrimination - should be permitted to go forward. It was suggested on the part of the respondent that issue estoppel applied in the light of the dismissal of the first claim such that Mr King was prevented from making the second claim. I did not accept that could be the case. The first claim was of unfair dismissal only. Issue estoppel did not apply where the claim in the second form was different.
>
> 23. **Alternatively, it was suggested that the second claim was an abuse of process, on the authority of Henderson v Henderson. Where a claimant commences proceedings, the expectation is that he will not "leave out" any claims he has and bring them in later proceedings. It is not acceptable that he should commence further proceedings at a later stage in respect of claims that he could have made in the first set of proceedings.** ***Mr King presented his first claim in November 2018 and***

> ***he did refer there to the matters giving rise to the discrimination claims that he now wished to take forward. For reasons I have mentioned already, they did not go forward to a hearing at that particular time.***
>
> 24. **Again, determination of this question involved the exercise of a discretion. I could therefore consider Mr King's mental state.**
>
> 25. **Again, however, a problem was presented by the wording that he used in the first claim. He effectively recounted there the matters relevant to the discrimination claim (whether sex or disability) he wished to take forward albeit that the claim was treated as only one of unfair dismissal.** ***Clearly, those matters could have been progressed at that stage. The reason they were not was that Mr King failed to provide a proper reply to the letter from the tribunal.*** **He did not suggest to me that it was his mental state that prevented him from doing to. Rather, he asserted that he all along intended to claim unfair dismissal only there. As I have mentioned, I did not accept that evidence.**
>
> 26. **In short, Mr King raised these matters in the first claim but his actions were such that he did not have the opportunity to take them to trial. He obviously could have progressed the relevant matters in his first claim had he dealt properly with the enquiries from the tribunal. In those circumstances I was driven to conclude that it was indeed an abuse of process for him to attempt to take them forward in a later claim.** It followed that the remaining claim – of sex discrimination – fell to be dismissed.

53. The core reasoning of Employment Judge Reed was that:

53.1. the key facts for the discrimination claims had been set out in the first claim

53.2. he was exercising a discretion in deciding whether the second claim was an abuse of process

53.3. Mr King's mental state could have been taken into account in exercising that discretion but for the fact that Mr King denied that he wished to bring any claim other than a claim of unfair dismissal in the first claim

53.4. the reason that the discrimination complaints had not been pursued in the first claim was that Mr King had not provided a "proper reply" to the request from the Employment Tribunal when he was asked if he was bringing a discrimination claim

53.5. Mr King did not suggest that his mental state prevented him from providing a "proper" reply to the Employment Tribunal

The original appeal

54. Mr King appealed against the decision of the Employment Tribunal on 8 November 2021. In the original grounds of appeal Mr King stressed that he had only intended to bring a claim of unfair dismissal in the first claim. Regional Employment Judge Pirani had decided that the first claim only included a claim of unfair dismissal. Mr King had thought that he could not bring a discrimination claim until he had completed Thales' grievance process. That is why he sought to bring the discrimination claims in the second claim.

The Employment Appeal Tribunal Preliminary Hearing

55. The grounds of appeal were considered by Judge Beard who directed there should be a Preliminary Hearing to clarify them. The Preliminary Hearing was held by Judge Auerbach on 31 May 2023. Mr King was represented by Stuart Brittenden, acting under the Employment Law Appeal Advice Scheme, a scheme like Advocate that provides representation without charge. I am grateful for Mr Brittenden's work. Mr Brittenden persuaded Judge Auerbach that the appeal should go forward on revised grounds.

My decision on the appeal

56. I will consider the grounds one by one. I will consider the ground, the relevant law, the arguments and then reach my conclusion. There is significant overlap between the grounds.

Ground 1

57. The first amended ground concerns the fairness of the Preliminary Hearing before Employment Judge Reed:

> Ground 1: common law duty of fairness
>
> (1) Having regard to each/any of the following:
>
> (i) the case management summary prepared by EJ Dawson following the case management preliminary hearing on 25 March 2021;
>
> (ii) the letter written by Mr Zahra which was submitted to the Tribunal in May 2021;
>
> (iii) any medical evidence submitted by the Appellant to the Tribunal in advance of the hearing on 2 August 2021;

> **whether the ET erred in failing to comply with the common law duty of fairness** in:
>
> (a) **failing to conduct a "ground-rules" hearing** (or other such equivalent) either in advance of, or at the start of the preliminary hearing on 2 August 2021 to ascertain what adjustments/modifications the Appellant required in light of his conditions and/or his presentation as a vulnerable litigant;
>
> (b) **failing to make any adequate allowances in respect of the Appellant and/or the evidence he provided at the hearing**;
>
> **By reason of the above, the ET made various criticisms of the Appellant's inability to provide explanations and/or otherwise made adverse findings in relation to his credibility in deciding (i) whether to permit an amendment to his claim to include disability discrimination; and (ii) whether the proceedings were abusive**. [emphasis added]

The Law about fair hearings

58. An Employment Tribunal may have to take account of learning difficulties and mental health issues that make a witness vulnerable in two principle ways:

58.1. the Employment Tribunal may have to adjust its procedures to permit a witness to give his or her best evidence. A failure to make an adjustment could possibly be so serious as to render the hearing unfair

58.2. it may be necessary for the Employment Tribunal to take vulnerability into account when assessing the evidence of a witness. A failure to do so could possibly:

58.2.1. be so serious that the hearing is unfair

58.2.2. involve a failure of the Employment Tribunal to direct itself to the relevant law

58.2.3. undermine the Employment Tribunal's analysis of the evidence to such an extent that a decision might be perverse, even taking account of the high threshold of showing perversity – this might be in connection with any other errors of analysis of the evidence or application of the appropriate legal tests

I considered the issue of adjustments in **Buckle v Ashford and St Peter's Hospital NHS**

Trust UKEAT005420DA a case that both Ms Seymour, for Mr King, and Mr Sammour, for Thales, relied on:

> 19. Although the legal duty to make reasonable adjustments pursuant to the Equality Act 2010 does not apply to the employment tribunal, it is well established that the tribunal should make such adjustments as are necessary to ensure a fair hearing: *Heal v University of Oxford* [2020] ICR 1294, at paragraph 18.
>
> 20. The employment tribunal will often have regard to the *Equal Treatment Bench Book* …
>
> 21. Subsequent to the hearing in this matter, further similar guidance has been given in the *Practice Guidance (Employment tribunals: Vulnerable parties and witnesses)* [2020] ICR 1002 …
>
> 22. The approach to be adopted in considering appeals against decisions about medical issues, and adjustments, depends on the nature of the decision taken. At one end of the spectrum a decision whether to postpone a hearing because of the ill-health of a claimant is a case management decision that may only be challenged on *Wednesbury* grounds: *Phelan v Richardson Rogers Limited*: UKEAT/0169/19/JOJ
>
> 23. Conversely, there may be circumstances in which a party requires an adjustment that is of such fundamental importance that without it being made there cannot be a fair hearing. In such a case it is for the appellate court to determine as a matter of substantive fairness whether the adjustment requested was such that the failure to make it rendered the hearing unfair because the party was not able to sufficiently participate in the hearing and so was not given a fair trial, just as would be the case if the hearing was improperly conducted in the party's absence.
>
> 24. There are other cases in which a party has a medical condition (that may be a disability) in response to which a number of approaches to the conduct of the hearing could be adopted, that may have consequences for the other party, and the tribunal's allocation of resources to other litigants. In such a case it is still a matter of substantive fairness, but there could be a number of courses of action that could have been taken by the tribunal that would have been fair. It is not for the appeal tribunal to determine that it might itself have chosen another of a range of fair options to that adopted by the tribunal. Put conversely, the real question is whether the decision taken by the tribunal was one that resulted in the hearing being substantively unfair. If it was, the appellate court should intervene. If it was not, the fact that there might have been a course of action that the appellate court thinks might have been better, does not change a fair hearing into an unfair hearing.
>
> 25. In *Rackham v NHS Professionals Limited* UKEAT/0110/15/LA Langstaff J (P) stated:
>
> > 50. It seems to us we have to ask here whether there was

> any substantial unfairness to the Claimant in the event. We have to consider the whole picture, and we have to consider fairness not in isolation, viewing his case alone, but as one in which there were two parties.
>
> 26. Where the absence of a particular adjustment is not so severe that it would render the hearing unfair the decision whether to make that adjustment, some other adjustment, or none is essentially a matter of case management discretion taking into account all of the relevant factors: Heal at paragraph 27.
>
> 27. In *Rackham* Langstaff J placed great emphasis on the autonomy of disabled persons and the importance of listening to what they have to say about the adjustments they require. As Ms Banton put it, ensuring that the disabled person's voice is heard.

59. It may be necessary to hold a ground rules hearing to decide what adjustments should be made.

The **Presidential Guidance (Employment tribunals: Vulnerable parties and witnesses)**:

> 5. The requirement to deal with a case justly is set out in the overriding objective contained in rule 2. This includes the tribunal and all parties to the proceedings ensuring that all parties can effectively participate in proceedings and that all witnesses can give their best evidence.
>
> 6. The tribunal and parties need to identify any party or witness who is a vulnerable person at the earliest possible stage of proceedings. This may be done via the ET1 claim form or the ET3 response form or separately by any reasonable method of communication with the tribunal. They should consider whether a party's participation in the proceedings is likely to be diminished by reason of vulnerability. They should also consider whether the quality of the evidence given by a party or witness is likely to be diminished by reason of vulnerability. If so, in either example, they need to consider whether it is necessary to make directions or orders as a result.
>
> 7. This can include considering the setting of "ground rules" before a vulnerable witness gives evidence. That involves deciding what directions or orders are necessary in relation to the nature and extent of that evidence. That includes consideration of the conduct of the representatives and/or the parties in respect of the evidence of that person. Consideration will also be required as to any necessary support in place for that person. If in any doubt, ask the person concerned.

60. A ground rules hearing is probably best analysed as a method by which any necessary adjustments can be identified, rather than being an adjustment itself. An adjustment is something that might remove the disadvantage caused by a witnesses' vulnerability and/or disability whereas a ground rule hearing is one of the mechanisms by which such vulnerability and any necessary adjustments might be identified.

61. In the Employment Tribunal a case management hearing may often serve the same purpose as a ground rules hearing. In **Anderson v Turning Point Eespro** [2019] ICR 1362 Lord Justice Underhill in the Court of Appeal said:

> (1) Ground rules hearing
>
> 30. I have already made clear that I do not believe that the tribunal can be criticised for the way that it proceeded at the January 2014 hearing. There is no rule that in every case where there is a disabled or vulnerable witness there must be something specifically labelled a "ground rules hearing" (which has its origin in the rather different world of criminal procedure); or that a specific checklist must be gone through in every such case, whether relevant or not. As Langstaff J went out of his way to emphasise in the Rackham case 16 December 2015, what fairness requires depends on the circumstances of the particular case. For the reasons given, fairness did not require the tribunal to do more than it did in this case.
>
> 31. I would add that in an employment tribunal case of any complexity there will be a case management hearing, and any difficult or contentious issues about accommodations that might be required as a result of a disability suffered by a party or other witness would typically be canvassed on that occasion—though where that has for any reason not occurred any problem can usually still be resolved at the substantive hearing itself.
>
> 32. The foregoing should not be regarded as qualifying the importance, as expounded in such cases as *Rackham and Galo* [2016] IRLR 703 , of tribunals making whatever adjustments are reasonably required to ensure that vulnerable parties or witnesses are enabled to present their case and/or give their evidence effectively, or of their ensuring that they have the appropriate information for that purpose. That follows from the basic common law duty of fairness and is reinforced, where the vulnerability is the result of disability, by the various international instruments referred to in *J v K* [2019] ICR 815 (although, as there stated, it is not clear that they add anything to the common law position). But, as I have said, what particular measures are required will depend on the circumstances of the case, and I would deprecate any mechanistic approach.

62. The **Equal Treatment Bench Book** suggests a number of adjustments that might be identified, such as:

62.1. breaks and shorter hours

62.2. style of communication

62.3. adjusting cross-examination

62.4. representation

63. The **Equal Treatment Bench Book** explains some problems people with Dyslexia may face:

> Dyslexia is the most common of a family of related conditions known as Specific Learning Difficulties.
>
> Dyslexia often manifests itself as a difficulty with reading, writing and spelling. The core challenges, however, are the rapid processing of language-based information and weaknesses in the short-term and working memory.
>
> By adulthood many dyslexic people have equipped themselves with an array of coping strategies, diverting some of their energy and ability into the operation of these systems, and thereby leaving themselves few extra resources to call upon when they have to deal with situations that fall within their areas of weakness. As a result of these difficulties, inconsistencies and inaccuracies may occur in their evidence.

64. The **Equal Treatment Bench Book** suggests reassurance should be given that:

> Misunderstandings on their part will not be treated as evasiveness and inconsistencies will not be regarded as indications of untruthfulness.

65. A failure to take account of a persons vulnerability and/or disability can be so serious as to render a hearing unfair. An example is **Habib v Dave Whelan Sports** [2023] ICR 1488 where Judge Beard held:

> 33. The ET does not within its reasons make any reference to the Presidential Guidance or the ETBB . That of itself is not specifically important, however it also does not set out anything which would resemble the type of analysis that should be applied to a witness with a specific learning difficulty. Such analysis would be expected if it had done so. Again, taken alone that would not be sufficient to impugn the fairness of a hearing. However, beyond that the ET appears to rely on specific elements of the way in which the claimant's evidence was given as a basis for deciding and impugning credibility. There is always a danger in relying, simply, on demeanour as a guide to the truthfulness or not of evidence. Cultural and other differences can make the reliance on such factors unreliable. This is all the more important in circumstances where the tribunal is aware of a condition that might affect demeanour or the manner in which evidence is given. Paras 201–207 of the ET judgment are headed "Observations of the claimant's conduct during the hearing relevant to her credibility". Within this section of the judgment the ET makes explicit and detailed findings impugning the claimant's credibility based upon her behaviour during the hearing, with no reference to the ETBB . This is of particular importance when the bulk of this case was about which of two witnesses were telling the truth about particular events.
>
> 34. The ET set out that the claimant displayed an inconsistency in being able to follow proceedings along with an inconsistent inability to understand particular words. The ET stated that there was no medical evidence, but that it had given careful consideration to how the claimant

> behaved before it. It came to the conclusion that the difference in the claimant's behaviour was so marked that there was an element of performance and exaggeration in the claimant's difficulties. The ET then went on to consider that this was similar to the respondent's descriptions of the claimant. Given what we have set out above as to the ETBB indications on dyslexia, it would appear that the ET was relying on the very matters that might arise from the condition as reasons to doubt the claimant's evidence. We should emphasise that the ET would be perfectly entitled to come to such a conclusion, however, we would expect that conclusion to be analysed and explained.
>
> 35. The claimant was never made aware that the existence or extent of her dyslexia was in issue. The case management hearing had accepted the existence of the condition, and until an, apparently, off-the-cuff element of cross-examination, the respondent had never made this an issue in the case. Without giving the claimant an opportunity to present medical or other evidence about dyslexia, the ET could not, fairly, come to a conclusion that the claimant was or was not dyslexic. Further, the ET could not say, one way or the other, what the specific aspects of dyslexia were or were not in her case without such evidence. In those circumstances it would be reliant on the broad general guidance in the ETBB . On that basis, we consider that any explanation by the tribunal as to why it had come to the conclusions it had should engage squarely with that general guidance. There was no such engagement or explanation. This is sufficient for us to say that the reasons are not Meek -compliant. However, as uncomfortable as it is, we are drawn to the conclusion that this hearing, by approaching the matter without reference to the ETBB and the Presidential Guidance , was unfair. Without the ET approaching deliberation making that adjustment to its analysis there is such a fundamental failing as to make the hearing unfair. Further the claimant would never have been made aware of the concerns of the ET as to the extent of the effects of dyslexia until the judgment.

66. Where a hearing is not rendered unfair by a failure to consider vulnerability or disability, such vulnerability will generally be relevant to the analysis of the evidence. When doing so, it is also important to be fair to the other party. A witness who is vulnerable or disabled may give evidence that is untruthful or incorrect. The opposing party must have a fair opportunity to challenge evidence even where a witness is vulnerable. It can be difficult to assess whether evidence is of a poor quality because of vulnerability/disability or because it is untrue. It cannot be an appropriate adjustment that an Employment Tribunal is required to accept all the evidence given by a vulnerable or disabled witness. The Employment Tribunal should take account of the vulnerability of a witness when assessing the validity of the evidence, but still must decide whether the evidence is correct.

Analysis of Ground 1

67. I am not persuaded that the Preliminary Hearing before Employment Judge Reed was substantively unfair. To the extent that a ground rules hearing was required that had been conducted by Employment Judge Dawson. Provision was made for Thales to explain their argument in writing 4 months before the hearing held by Employment Judge Reed and for Mr King, no doubt with the assistance of Mr Zahra, to respond in writing before the hearing. Mr King had the support from Mr Zahra that he asked for. While Mr Zahra had suggested that there should not be any "one sided cross examination by those with a selfish agenda" it would not have been fair to Thales to prevent them from challenging Mr King's evidence. Mr King has not identified any other specific adjustments to the hearing that he contends should have been made, such as an alteration to the way in which he was to give his evidence. No such adjustments were requested at the hearing.

68. Employment Judge Reed did have some regard to Mr King's vulnerability and possible disability but because of the way he analysed the application to amend and the law concerning abuse of process he considered it was, in effect, irrelevant. I shall return to this point when I deal with Employment Judge Reed's analysis of abuse of process which resulted in the dismissal of the sex discrimination claim, and was the primary reason for refusing permission to amend to add a claim of disability discrimination.

Ground 2

69. Ground 2 concerns the decision of Employment Judge Reed that the second claim did not include a claim of disability discrimination:

> Ground 2: construction of the Claim Form
>
> (1) Whether the ET erred in concluding that the Claim Form did not include a complaint of disability discrimination (albeit one which it is accepted required further particularisation).

The Law about the claim that is being brought

70. Judge Auerbach has considered whether a claim is included in a claim form in two cases. In **McLeary v One Housing Group Ltd** UKEAT012418LA he said:

> 97. Drawing all the threads together, I stress that every case will turn on its particular circumstances, the contents of the documents, the attributes

> and capabilities of the litigant, and the Judge's appreciation of how best to manage things, in order to make due allowance for a litigant in person, while not intervening to take their side. Generally, it must be left to the appreciation of the Employment Judge, whether, or how, a point of this sort needs to be proactively raised or addressed. The EAT should be slow to second guess the Judge's approach, and a wide margin of appreciation should be allowed. The Drysdale guidance is the touchstone.
>
> 98. However, the starting point is a fair reading of the pleadings. It seems to me that in this case, on a fair reading, the Claimant's original Particulars of Claim and/or her original Particulars of Claim and her subsequent March pleading, should have been read as sufficient to include a claim of constructive dismissal contrary to section 39; or, at the very least, their content was such that the matter should have been proactively raised by the Judge at the Case Management Preliminary Hearing and clarified, given how the point, it seems to me, jumped out from the claim form and Particulars of Claim; and/or given that it was not in this case, raised at the case management hearing, it should have been raised prior to or at the Preliminary Hearing on time.

71. In **Pranczk v Hampshire** CC UKEAT027219VP Judge Auerbach said:

> 49. The pertinent document was the claim form. That pleadings matter, including in Employment Tribunals, is not a novel or controversial point. See *Chapman v Simon* [1994] IRLR 124. In *Chandhok v Tirkey* [2015] ICR 527 the EAT was concerned with whether the concept of "race" in the 2010 Act included caste, but also with whether a complaint of caste discrimination had, in any event, been properly raised. As to that, Langstaff J said:
>
> > "15. In paragraph 4 of his judgment the judge identified the Claimant's case – saying that it was that she was one of the Adivisi people – not from what was asserted in her claim, lengthy though it was, but from material which could only have come either from her witness statement (which was brief) or what he was told.
> >
> > 16. I do not think that the case should have been presented to him in this way or that it should have formed part of his determination. That is because such an approach too easily forgets why there is a formal claim, which must be set out in an ET1. The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.

> 17 I readily accept that Tribunals should provide straightforward, accessible and readily fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. 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."

50. For this reason, I reject Ms Bone's submission that the Tribunal could, or should, have had regard to the contents of the response form, the Claimant's witness statement, or schedule of loss. The Claimant may have

decided, further down the track, following the outcome of her internal appeal, that she would like to bring, or add, a discrimination claim, in particular of failure to comply with the duty of reasonable adjustment. But what the Tribunal had to consider was whether she had in fact brought any such claim in the claim form as presented.

51. The Tribunal's task was to consider, fairly and objectively, looking at the claim form as a whole, whether it contained any complaint, other than for wages or holiday pay. This is a question of objective construction. As to how the task should be approached, I agree with the observations of Elisabeth Laing J in Adebowale (cited above).

52. More generally, technical or formal legal language did not need to be used, and, in that regard, due allowance should be made for the fact that the Claimant was a litigant in person, and for a little infelicity of expression. The legal cause of action did not have to be named, or statutory provisions cited. But, one way or another, the essential factual elements of the putative additional claim had to have been asserted. See Bryant, in which the claim form identified a protected act and a later dismissal, but failed to assert a causative link between the dismissal and the protected act; and Ruwiel, in which the facts necessary to support a claim of sex discrimination were not asserted in the claim form, and therefore the Tribunal was wrong to regard an application to amend to add such a claim as a mere relabelling exercise.

53. The speeches in Bryant do not provide any warrant for looking beyond the contents of the claim form to other materials. That case concerned whether there was a live victimisation claim, or whether an essential element – the causative link between the alleged protected act,
E and the treatment complained of – was absent. The Court of Appeal upheld the Tribunal's decision that it was absent. At 130B Buxton LJ said: "That linkage must be demonstrated, at least in some way, in the document itself", by which he meant the claim form. At 130F he said F that the absence of this in the claim form was fatal. Peter Gibson LJ also clearly focussed on whether this element was present in the claim form, at 132E and H. Nor does Peter Gibson LJ's closing remark, at 133F, to the effect that the decision not to include a claim of victimisation in the claim form may have been deliberate, and why, assist Ms Bone's case. This was no more than a comment on the possible explanation for the absence of the claim. It does not support the proposition that wider material may be drawn upon when determining such an issue.

54. If, on a fair objective reading of the claim form in the present case, as a whole, no additional claim of discrimination or victimisation (in the 2010 Act sense) was properly asserted, the fact that the Claimant was a litigant in person would not make it incumbent on the Tribunal to treat it as if it contained one. Indeed, it would be wrong to do so. If, however, on a fair reading, all the factual elements of the cause of action were present, then that would be sufficient to constitute such a complaint, or, at the least, to make it incumbent on the Tribunal to clarify whether the Claimant was indeed bringing a complaint of that sort, as in McLeary.

72. Ms Seymour suggested that because Judge Auerbach referred to circumstances in which it might be incumbent on an Employment Judge to "clarify" whether a claim is being brought, there are three possibilities: (1) the claim form contains the claim, (2) the claim form does not contain the claim or (3) the claim form might contain the claim. In the last of those three circumstances it is incumbent on the Employment Tribunal to enquire whether the claim form does include the claim. The logic of Ms Seymour's submission is that of the answer is "yes" then the claim form does include the claim, at least when the clarification has been provided, presumably by provision of additional information. I reject that argument. A claim form either does or does not include a claim. An Employment Judge should have regard to the person who drafted the claim. When a claim is drafted by a litigant in person it may not be necessary to identify the legal provision relied on or to use formal language, but the required elements of the claim must be identified. Judge Auerbach referred to circumstances in which it may be incumbent on an Employment Judge to enquire because such an enquiry could clarify how a litigant in person used language that might result in a conclusion that the claim was in the claim form or, more likely, that there had been an intention to include such a claim which could be a powerful factor in deciding whether to grant an amendment.

73. Ms Seymour also argued that answers given to questions asked by the Employment Tribunal should have a special status and are to be treated as forming part of the claim form. The questions asked in this case where asked before the response was served so were not part of initial consideration under the scheme set out in Rule 26 of the **Employment Tribunal Rules 2013**, but was a request for information under Rule 31, that can, by application of Rule 29, be made "at any stage of the proceedings". I do not consider that the fact that information is provided in response to a question from the Employment Tribunal, whatever the procedure used, means that the answer becomes part of the claim form. The answer might clarify the meaning of the claim form or, more likely, identify the need to amend the claim form at an early stage.

Analysis of Ground 2

74. Employment Judge Reed did not make a mistake of law in concluding that the second claim

form did not include a claim of disability discrimination. The box was ticked for sex discrimination but not for disability discrimination. The wording of the claim form made it clear that only sex discrimination was being claimed. The claim form did not include the factual basis for a claim of any of the forms of disability discrimination. I can see no basis upon which it can be said that taking account of Mr King's vulnerability or disability would change the reading of the claim form such that it does contain a claim of disability discrimination. The fact that the claimant did raise matters of disability discrimination, initially in response to a question from the Employment Tribunal, did not make it part of the second claim form. Employment Judge Reed was right to hold that Mr King would have to apply for an amendment to add the claim.

Ground 3

75. This ground is about abuse of process:

> Ground 3: abuse of process
>
> (3) In deciding that the complaints of sex and disability discrimination amounted to an abuse of process, whether the ET erred in (a) failing to apply a "broad merits-based" judgment taking into account all of the facts (Johnson v Gore Wood [2002] 2 AC 1); and/or (b) whether its decision is vitiated by Ground (1).

The Judge's understanding of the Law

76. Employment Judge Reed did not refer in detail to the legal authorities that explain this type of abuse of process. To the limited extent that there the law was considered, it was in these passages:

> 23. Alternatively, it was suggested that the second claim was an abuse of process, on the authority of *Henderson v Henderson*. Where a claimant commences proceedings, **the expectation is that he will not "leave out" any claims he has and bring them in later proceedings**. It is **not acceptable that he should commence further proceedings at a later stage in respect of claims that he could have made in the first set of proceedings**. …
>
> 24. Again, determination of this question **involved the exercise of a discretion**. ...

The Law about abuse of process

77. The type of abuse of process that Thales relied on comes from an old authority called **Henderson v Henderson** (1843) 3 Hare 100. Judge Wigram, who was then the Vice Chancellor,

said, at page 114:

> … where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time …"

78. More recently, in **Johnson v Gore Wood** [2002] 2 AC 1 Lord Bingham said:

> But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that **there should be finality in litigation and that a party should not be twice vexed in the same matter**. This public interest is reinforced by **the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole**. **The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.** I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. **It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.** [emphasis added]

79. In **Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners** [2022] AC 1 Lord Hodge said:

> 76. From these authorities it is clear that for the court to uphold a plea of abuse of process as a bar to a claim or a defence it **must be satisfied that**

> **the party in question is misusing or abusing the process of the court by oppressing the other party** by repeated challenges relating to the same subject matter. **It is not sufficient** to establish abuse of process for a party **to show that a challenge could have been raised in a prior litigation** or at an earlier stage in the same proceedings. **It must be shown both that the challenge should have been raised on that earlier occasion and that the later raising of the challenge is abusive.** [emphasis added]

80. In **Moorjani & Ors v Durban Estates Ltd** [2019] EWHC 1229 (TCC), Mr Justice Pepperall summarised the situation at paragraph 17.4:

> 17.4 Even if the cause of action is different, the second action may nevertheless be struck out as an abuse under the rule in Henderson v. Henderson where the claim in the second action should have been raised in the earlier proceedings if it was to be raised at all. In considering such an application: a) The onus is upon the applicant to establish abuse.
>
> b) The mere fact that the claimant could with reasonable diligence have taken the new point in the first action does not necessarily mean that the second action is abusive.
>
> c) The court is required to undertake a broad, merits-based assessment taking account of the public and private interests involved and all of the facts of the case.
>
> d) The court's focus must be on whether, in all the circumstances, the claimant is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.
>
> e) The court will rarely find abuse unless the second action involves "unjust harassment" of the defendant.

81. The approach to an appeal against a decision that proceedings are an abuse of process was considered by Lord Justice Thomas in **Aldi Stores Ltd v WSP Group Plc** [2008] 1 WLR 748:

> 16. In considering the approach to be taken by this court to the decision of the judge, it was rightly accepted by Aspinwall that **the decision to be made is not the exercise of a discretion**; WSP were wrong in contending otherwise. It was **a decision involving the assessment of a large number of factors to which there can, in such a case, only be one correct answer** to whether there is or is not an abuse of process. None the less **an appellate court will be reluctant to interfere with the decision of the judge where the decision rests upon balancing such a number of factors**; see the discussion in *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2003] 1 WLR 577 and the cases cited in that decision and *Mersey Care NHS Trust v Ackroyd (No 2)* [2007] HRLR 580 , para 35. The types of case where a judge has to balance factors are very varied and the judgments of the courts as to the tests to be applied are expressed in different terms. However, it is sufficient for the purposes of this appeal to

> state that **an appellate court will be reluctant to interfere with the decision of the judge in the judgment he reaches on abuse of process by the balance of the factors; it will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him.** [emphasis added]

Analysis of Ground 3

82. Thales accepts that Employment Judge Reed was wrong in law when he referred to exercising a discretion. At paragraph 23 when Employment Judge Reed considered the legal test he referred only to claims that Mr King "could" have made in the first claim. Employment Judge Reed did not refer to the linked components of the second question; whether Mr King should have done so and whether seeking to bring such a claim in the second claim was an abuse of process. At paragraph 26 Employment Judge Reed concluded that bringing the second claim was an abuse because Mr King could have brought the discrimination claims in first claim. He did not state that in addition to being claims that "could" have been brought in the first claim, they were claims that "should" have been brought in the first claim, and that seeking to bring them in the second claim was an abuse of process.

83. Employment Judge Reed did not direct himself that he had to undertake a broad, merits-based assessment taking account of the public and private interests involved and all the relevant facts. He did not direct himself that he must consider whether Mr King was misusing or abusing the process and whether the second claim involved "unjust harassment" of the defendant. The judgment does not demonstrate that he considered those factors. Therefore there were very important factors that Employment Judge Reed failed to take into account that he should have considered.

84. I also conclude that had Employment Judge Reed conducted that broad, merits-based assessment, a significant factor would have been the vulnerability and possible disability of Mr King. While I have concluded that the hearing was not unfair, I consider that Employment Judge Reed did not approach the assertion that Mr King was guilty of an abuse of process correctly.

85. Mr King said that he had not intended to bring any claim other than unfair dismissal in the first claim because he thought he had to complete the internal grievance procedure before bringing a discrimination claim.

86. I do not follow the logic that led Employment Judge Reed to conclude that Mr King did intend to bring a discrimination claim in the first claim and because he denied that was the case he could not explain why he should be permitted to bring the discrimination complaints in the second claim. While it is correct that Mr King referred to unlawful discrimination and harassment in the first claim he did not refer to any protected characteristic. Without a reference to a protected characteristic the first claim could not be analysed as including a discrimination claim. When asked about his claim the claimant stated his claim was of unfair dismissal. Although he referred to discrimination and harassment again he still did not link it to a protected characteristic. Therefore Regional Employment Judge Pirani was right to say that the claim was only one of unfair dismissal. Even if Mr King, at the time of submitting the first claim, had in mind the possibility of claims of sex and/or disability discrimination, his argument that he thought he could not bring such a claim until he completed the grievance process had to be considered, taking account of his vulnerability, particularly in the period before he instructed solicitors and then was represented by counsel at the hearing before Employment Judge Gray. In undertaking the broad, merits-based assessment, including the analysis of Mr King's evidence, Employment Judge Reed needed to take account of Mr King's vulnerability.

87. I conclude that Employment Judge Reed made a mistake in law in analysing Thales argument that the second claim was an abuse of process. The decision that the second claim was an abuse of process was fundamental to the refusal of the application to amend to add a claim of disability discrimination. Accordingly, I allow the appeal, primarily on Ground 3 but also in respect of that aspect of Ground 1 that suggests that proper allowance should have been given to Mr King's vulnerability when assessing his evidence.

88. I set aside the decisions that the sex discrimination claim was an abuse of process and refusing the amendment of the second claim to add a claim of disability discrimination. The matter will be remitted for consideration by a new Employment Tribunal as the error in the determination was fundamental and the matter will largely have to be considered afresh.

89. It will be for the Employment Tribunal on remission to determine all of the material factors,

but they are likely to include

89.1. the precise nature of the sex and/or disability discrimination claims Mr King wishes to bring

89.2. why Mr King did not bring those claims in the first claim

89.3. whether the failure to bring the sex and/or disability claims was affected by Mr King's disability

89.4. why Mr King did not apply to amend the first claim during the period that he was represented by solicitor and counsel

89.5. the prejudice that Thales would face should the second claim proceed

89.6. the wider public interest in finality of litigation

89.7. possibly, subject to full argument, the time issues