Neutral Citation Number: [2025] EAT 127

Case No: EA-2023-000904-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 June 2025

Before :

JUDGE KEITH

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Between :

'JP' **Appellant**

(RESTRICTED REPORTING ORDER CONTINUED)

- and –

SPELTHORNE BOROUGH COUNCIL **Respondent**

IT IS ORDERED that pursuant to Rule 23A of the Employment Appeal Tribunals Rules 1993 (as amended), the Appellant shall not be identified in the course of or by reference to the above-named proceedings. All identifying matter which is likely to lead any member of the public to identify such person be omitted from any register kept by the Appeal Tribunal which is available to the public and be omitted or deleted from any order, judgment or other document which is available to the public in or relating to such proceedings, and also in respect of appeal number: EA-2025-000171-AS. This order shall apply until that appeal is finally decided, unless revoked earlier.

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AMANDA ROBINSON (Direct Access) for the **Appellant**
SIMON HARDING (Direct Access) for the **Respondent**

PRELIMINARY HEARING
Hearing date: 26 June 2025

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The Employment Judge (EJ') did not err on the facts of this case in considering first whether the appellant was disabled during the relevant period of the alleged acts of discrimination, without further defining the precise nature of the allegations. The facts of this case were distinguished from the principles in **O'Brien v Bolton St Catherine's Academy** [2017] ICR 737 and **Cox v Adecco Group UK and Ireland & Ors** [2021] ICR 1307 EAT.

JUDGE KEITH:

1. These written reasons reflect the full oral reasons given to the parties at the end of the hearing.

Background

2. The appellant appeals against a preliminary decision of Employment Judge Shastri-Hurst (the 'EJ'), promulgated following a hearing on 30 and 31 May 2023. The question which the EJ answered was whether the appellant was, at the relevant time, disabled for the purposes of **Section 6** of the **Equality Act 2010.** The EJ decided, for reasons I will outline, that she was not.

3. The context of the EJ's decision was that when presenting her Claim Form, the appellant was a litigant in person. Her Claim Form included a claim of disability discrimination. A final hearing had originally been listed to take place between 30 May 2023 and 6 June 2023, but that was converted into a two day preliminary hearing held in pubic, to deal with preliminary issues, following an earlier preliminary hearing on 10 January 2023, held in private by EJ Eeley, at which the appellant represented herself and the respondent was represented by a solicitor.

4. At the January 2023 preliminary hearing, EJ Eeley recorded that the agenda for the May 2023 preliminary hearing would be: determining whether the [appellant] was disabled within the meaning of the Equality Act 2010 at the relevant times for the purposes of her discrimination claim (if not conceded by the respondent); clarification of the specific acts of discrimination alleged by the appellant in her disability discrimination claim, including categorisation of the types of claim brought, eg **Section 13, 15, 26 Equality Act 2010**; and giving further case management orders to prepare the case for the final hearing. EJ Eeley went on further to identify the basis of the appellant's claim to be disabled, which it is not necessary for me to recite, and gave directions that the appellant provide written submissions about how long the impairment on which she had relied had lasted.

5. In a section of the preliminary hearing decision recorded as 'case summary', whilst EJ Eeley identified in detail protected disclosures, for the purpose of claims of pre-dismissal detriment and unfair dismissal, notably the issues defined by reference to disability, at paragraph [6], included: whether the appellant had a mental impairment; did it have a substantial adverse impact on her day to day activities; and were the effects of the impairment long term? At paragraph [7], EJ Eeley recorded that the specific allegations of discrimination were to be clarified and added to the list at the preliminary hearing to be held in public.

6. Finally, by way of background, Ms Robinson referred to a disability impact statement produced by the appellant as a litigant in person, which lacked clarity as to the precise allegations of disability discrimination, and with which the EJ ought to have engaged more in the subsequent preliminary hearing in public.

The decision under challenge that the appellant was not disabled

7. The EJ recorded, at para [2], that the appellant had presented three claim forms. The second included a claim of disability discrimination. The EJ noted, at para [3], the January 2023 preliminary hearing at which EJ Eeley had not been able to complete the list of issues regarding the disability discrimination claim. At para [4], the EJ referred to EJ Eeley's direction that the question of whether the appellant was disabled be decided as a preliminary issue at a preliminary hearing in public. At the same hearing, if she were so disabled, there would be clarification of the specific acts of discrimination alleged and further case management orders.

8. On the preliminary decision, the EJ concluded:

> **"22. At the hearing on 10 January 2023, the claimant had clarified that the earliest act of disability discrimination of which she complained took place around 9 July 2020. At the beginning of the hearing in front of me, the**

claimant clarified that in fact she alleged that the earliest act of discrimination had taken place in December 2019.

23. Therefore, for the purposes of determining the claimant's disability status, the relevant period for me to consider is December 2019 through to the claimant's date of termination of 17 January 2021.

24. In determining the issue of disability, I heard evidence from the claimant and was provided with a bundle… The claimant was cross-examined and both parties made closing submissions. During the course of the hearing the claimant produced a few additional emails, some with attachments. Mr Harding did not object…."

9. The EJ recited the statutory test for what constitutes a disability for the purposes of the **Equality Act 2010** and the relevant case law, including **McDougall v Richmond Adult Community College** [2008] EWCA Civ 4 (namely a prediction of whether adverse effects were likely to occur or recur based on available evidence prevailing at the time of the discriminatory acts). The EJ defined the question as whether, at the time of the alleged discrimination, the effect of the impairment was likely to last at least 12 months, or recur. The EJ then made a detailed analysis of the nature of the appellant's medical conditions, which due to their sensitivity, it is not necessary for me to recite. Having accepted that in fact there was evidence of the effect of impairments continuing after the appellant's dismissal, the EJ found:

"117. Nevertheless, from the evidence I have before me, I am not satisfied that the claimant's GP or Dr Rumalean, if asked on 17 January 2021 to give a prognosis, would have answered '12 months or more'. It may well be that they would envisage the effects of the claimant's impairments lasting for a period of 2-6 months, as they had done in the past. However, the test is whether substantial adverse effects are likely to last for at least 12 months, or recur.

"118. I therefore conclude that the effects of the claimant's impairments were not likely to last 12 months or more as at 17 January 2021.

119. In terms of recurrence, I accept that the effects on the claimant were a reaction to the situation at work. That was a specific life event, and therefore in itself was not likely to recur so as to exacerbate those effects again. There was no indication as at 17 January 2021 that there would be any other life event in the near future that could well lead to a recurrence of the claimant's symptoms.

> **120. As such, the claimant did not satisfy the requirements of s6 EqA at the relevant period of December 2019 to 17 January 2021. The claimant's disability discrimination claim will therefore be dismissed.**

10. The appellant appealed against that decision. Permission to appeal was initially refused on the papers, but on a renewed application at a hearing under **Rule 3(10)** of the **Employment Appeal Tribunal Rules 1993** (as amended), I permitted two amended grounds to proceed.

The appellant's grounds of appeal

Ground (1)

11. The appellant submitted that EJ misdirected herself and/or misapplied the law in failing to identify the specific allegations of disability discrimination pursued by the appellant, before deciding the preliminary issue of whether she was disabled. The appellant was a litigant in person at the preliminary hearing. It was necessary to understand the precise nature of the allegations in order to understand the date at which the Judge ought to assess the effects of her impairments, to answer the question of whether the appellant was disabled at the material time. The EJ reached her decision on the basis of evidence at the date of the appellant's dismissal on 17 January 2021 instead of assessing evidence at the conclusion of the appellant's appeal in May 2021.

12. The appellant drew the analogy of erring in striking out a claim without having first identified the nature of the claim, following the authority of **Cox v Adecco Group UK and Ireland & Ors** [2021] ICR 1307 EAT.

Ground (2)

13. The EJ misdirected herself and/or misapplied **Section 6 EqA** and erred in deciding whether the appellant was disabled by reference to the allegation of discriminatory dismissal, when the

discriminatory act included the appeal process. The appellant relied on the principle in **O'Brien v Bolton St Catherine's Academy** [2017] ICR 737 that in assessing whether the test for a defence of objective justification to a claim of discriminatory dismissal pursuant to **Section 15 EqA** was met, the relevant period for assessment included the outcome of the appeal against dismissal, as the dismissal was a product of both the combination of the original dismissal and the appeal decision. By analogy the same must be true for assessing whether the appellant was disabled.

The parties' positions

14. I do no more than summarise the parties' positions, which I have considered in full.

The appellant's position

15. The appellant had been unwell at the preliminary hearing at which the EJ concluded that she was not disabled. While the appellant accepted that she had not expressly referred to the different period of time (up to May 2021) during which the effect of her impairments ought to have been assessed, for which she now said that the EJ had erred, that was a reflection of her ill health at the hearing and that she was a litigant in person. Had the EJ identified the acts of discrimination relied on, the EJ would have avoided the error.

16. Ms Robinson added that it was the usual practice to identify the acts complained of first, before considering the relevant period for assessing whether someone was disabled.

17. In addition to the second ground, Ms Robinson argued that there were a number of passages in the Claim Form and the appellant's impact statement, where although she accepted that it did not have the clarity which one might want, they touched upon the appeal process.

The respondent's position

18. Mr Harding relied on the respondent's answer and submitted that the two grounds can be answered as follows. The EJ had unarguably engaged with the period which she was being asked to consider, for the purposes of when the appellant was disabled. That much had been clear in paras [23] to [24] of the EJ's decision, which I do not recite.

19. **Cox v Adecco** was distinguishable, as it was not authority for a hard-edged principle that allegations ought to be identified in all cases before claims were dismissed. Mr Harding argued that there was a difference between public interest disclosure cases and the far simpler issue of whether someone was disabled, before a claim could be dismissed. A claim relying on a public interest disclosure required a multifaceted evaluation, including particular communications, what those communications were intended to say so as to constitute a protected disclosure, the question of causation and how they linked to any detriments. In those circumstances, it could be entirely understood why HHJ Tayler had made clear that unless the precise scope of an appellant's claims were identified, an evaluation of whether they ought to be dismissed as a preliminary issue was not possible, but Mr Harding reiterated that that was not a hard-edged rule.

20. In contrast, this case was very different. On the one hand it was often difficult to frame precisely the nature of disability discrimination claims, particularly for those who are litigants in person. On the other hand, the relevant time for assessing whether someone was disabled was far simpler. It ended with the last act of discrimination. An assessment at that point was a binary question, namely whether the appellant was disabled or not.

21. In those circumstances, the EJ's decision to proceed in the order which had been outlined by Judge Eeley could not be impugned. The EJ had quite clearly set out before the appellant the period as she had understood it. The appellant had not disagreed, including when she later applied for a

reconsideration of the EJ's decision. Nothing in either the Claim Form or the impact statement had identified any readily discernible act of discrimination which was after the period of the effective date of termination, up to the date of the appeal hearing.

22. Mr Harding used two analogies. The first analogy was whereby an appellant may say that they had begun to articulate a potential claim which had been ignored by the EJ. That was not the case here. A second formulation might be where an appellant argued that, had they only been given the chance to do so, they would have formulated a precise set of claims. Once again, that was not the case here. Even now, the nature of claims said to be discriminatory were not discernible. That was distinct, Mr Harding pointed out, from references to the fact of the appeal in the context of the public interest disclosure claims. It was true there had been references to the appeal but no obvious or readily discernible complaints about them, let alone any complaint that the actions were discriminatory.

23. By reference to ground (2), Mr Harding sought to distinguish **O'Brien.** That case had extended, to **Section 15 EqA** claims, the principle in unfair dismissal claims of **Taylor v OCS Group Ltd** [2006] ICR 1602, that it is necessary to look at what happened throughout the disciplinary process. In **O'Brien**, this was appropriate where there was a development in the appellant's health which ought to have been considered as part of a dismissal on grounds of capability. That was inapposite here, where the respondent had dismissed the appellant on the basis of a fundamental breakdown in the relationship between the parties. In other words, there was no requirement for justification for dismissal which turned on events or developments during the appeal process. **O'Brien** was more frequently applicable in relation to the principle of whether anything turned upon the nature of the appeal process, and whether it was a review or a full reconsideration.

24. In addition, and alternatively, although I do not dwell on these submissions, Mr Harding points out that even if the EJ had considered a period extending to May 2021, it would not have made any difference for the purposes of materiality. It was not possible to discern the allegations of

discrimination between the appellant's dismissal in January 2021 and the conclusion of the appeal process. Taking the appellant's case at its highest, if it was said that the manner in which either the appeal hearing or preceding process were conducted was an act of discrimination, then there may be an award for injury to feelings, when there was a separate claim for unfair dismissal.

Discussion and conclusions

Ground (1)

25. On the one hand, I am acutely conscious that the appellant was a litigant in person before EJ Eeley and the EJ. I take, at their highest, her assertions that she had significant health issues at the preliminary hearing before the EJ. On the other hand, I bear in mind, when evaluating the EJ's preliminary decision and reasons, two principles. First, there should be a certain respect and latitude afforded to an EJ who will have had the benefit of submissions and an oversight of the evidence in a way this Tribunal cannot, as an appellate jurisdiction. Second, an EJ's reasons are not to be pored over in a forensic way, looking for fault. The question here is whether I can be satisfied that notwithstanding the brevity of reasons, which I do not criticise, it is tolerably clear why the EJ reached the decision she did, or as sometimes may be the case, it is tolerably clear that the EJ failed to consider a crucial point, fundamentally misunderstood a case, or misapplied the law.

26. I return to the context of the EJ's decision. The EJ had made clear that the precise nature of the disability discrimination claims had yet to be decided. Nevertheless, while the appellant was a litigant in person and in poor health, she knew before the preliminary hearing that the question of whether she was disabled was going to be decided as a preliminary issue.

27. While I do not in any way undervalue the importance of a list of issues, particularly for a public interest disclosure claim, I accept Mr Harding's submission that there is no hard-edged rule

that in all cases, a list of the precise nature of the claims ought to be identified in a particular order, in preference to an identification of whether somebody has a protected characteristic. In other words, the question is not whether there ought to have been a list of issues, and indeed the EJ said that there ought to be if the appellant's protected characteristics were made out, but the question is whether there is a set order to the questions.

28. I further accept Mr Harding's submission that while the effect of granting a strike-out application may be the same as deciding whether a claimant has a protected characteristic, the evaluation of those claims may be very different. Claims based on protected disclosures may well involved multifaceted elements, namely the precise nature of communications, when they were made, to whom, and their relevance, in terms of causation, to a detriment or dismissal. All of these are likely to need to be identified to evaluate the merits of the claim before dismissing it on the basis that it has no reasonable prospects of success.

29. That is an entirely different proposition from an evaluation at the point at which someone is disabled. This is a simpler proposition, namely the date of the act or acts of discrimination. However the nature of the precise nature of the claims is put, the date at which an assessment should be made is no later than the last discriminatory act. It is not necessary in those circumstances, absent a lack of clarity on those two points, for there to be a detailed exploration of the precise nature of those claims, provided that the date is identified.

30. I have considered the guidance of HHJ Tayler at paragraph [28] of **Cox v Adecco**, which included the following general propositions:

> **"(1) No one gains by truly hopeless cases being pursued to a hearing.**
> **(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate.**
> **(3) If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate.**
> **(4) The claimant's case must ordinarily be taken at its highest.**
> **(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly,**

> **you can't decide whether a claim has reasonable prospects of success if you don't know what it is.**
> **(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim.**
>
> **(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing."**

31. In this case, the appellant was not put 'on the spot' at the preliminary hearing, when the issue had already been identified by EJ Eeley at the earlier hearing, and the appellant knew that the relevant period and whether she was disabled during that period would be considered. In other words, she was expected to be able to explain her claims, which the EJ was also able assess by reference to her written submissions, including her impact statement. The EJ can be taken to have read, with reasonable care, the pleadings and the key document (her impact statement) in which the appellant set out her case.

32. The practical difficulty which the appellant's appeal faces, as Mr Harding pointed out, is that although the appeal process is referred to in the Claim Form and impact statement, nothing is arguably discernible from them so as to amount to a discrimination claim. Put another way, in answer to Mr Harding's scenarios, the first is that there is no suggestion that the appellant had identified or articulated potentially unstructured submissions which, had the EJ considered, would have made it obvious that the later date of the appeal process formed part of the correct period; or, second, there is nothing in terms of a reformulated list of the allegations of discrimination before this Tribunal where it can be said that, had the EJ only considered the later period with more care and expressly referred to them more fully, that this would have resulted in a different decision.

33. In summary, on ground (1) and whether the EJ had erred by failing to identify the specific issues or allegations before considering the appellant's protected characteristic, as somebody with a disability and the relevant period, I am satisfied that although the EJ's reasons were brief, the answer to the challenge is at paras [22] and [23] of the EJ's decision, from which it can be inferred that the

EJ had discerned that the relevant period as ending on 17 January 2021, namely the date of the appellant's dismissal. That was discerned on the basis of a reasonable reading of the pleadings and by reference to the appellant's impact statement. Ground (1) therefore fails and is dismissed.

Ground (2)

34. I turn to the question of whether, by virtue of the nature of the allegations, the EJ erred in considering that the period ended with the appellant's dismissal and excluded the post-dismissal appeal process. I accept Mr Harding's submission that the principles of **O'Brien** can be distinguished from this case. It is worth reciting para [41] of the Court's decision in **O'Brien**, by Underhill LJ:

> **"…We are here concerned with the specific case of an employee who deploys on the appeal evidence of changes in her medical condition and prognosis since the date of the initial hearing. A different approach may well be appropriate where what the employee is seeking is a second bite of the cherry as regards material that was available, still more as regards material that was deployed at the first hearing."**

35. While the Court extended the principle from **Taylor v OCS** to **Section 15 EqA**, namely justification dependent on things that had happened in the appeal process, in this case the dismissal was not on grounds of capability. The context of the EJ's consideration of whether the appellant was disabled was whether there had been a fundamental breakdown in the employment relationship, what was the reason for the appellant's dismissal and whether that dismissal in turn was discrimination arising, in breach of **Section 15**. It did not follow because of any later change in the nature of the appellant's medical condition, that the principles in **O'Brien** required the EJ to have considered a later date for the end of the relevant period for assessing the appellant's disability. As Mr Harding submitted, if that were case, that could have been a part of the claim, and it was not. This did not 'shout out' from the pleadings, to use HHJ Auerbach's phrase cited in **Sridar v Kingston Hospital NHS Foundation Trust** [2020] UKEAT/0066/20.

36. Although there may be some claims of discrimination arising where it is relevant and appropriate to consider a different relevant period, on the particular facts of this case, as pleaded, and even where the precise nature of the allegations had not been identified in full, the EJ was entitled to rely upon an analysis of the pleadings and impact statement, which on the face of them contained no claim of discrimination for the period after the effective date of determination. Ground (2) also fails and is dismissed.

37. In the circumstances, it is unnecessary for me to decide whether any error of law was material.