Neutral Citation Number: [2025] EAT 130

Case Nos: EA-2022-000686-AS

EA-2022-001457-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 September 2025

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

SHANE MALTBY

Appellant

- and –

CHESTNUT INNS LIMITED

Respondent

- -
- -

David Stephenson (instructed through **Advocate**) for the **Appellant**
Nathan Roberts (instructed by **Birketts LLP**) for the **Respondent**

Hearing date: 22 July 2025

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The claimant in the employment tribunal brought a complaint of disability discrimination but did not identify in his claim form on what claimed disability or disabilities he relied. At a case-management hearing he identified certain specific claimed disabilities. He later added to these by identifying others, in correspondence, and at a further preliminary hearing which had been listed to determine disabled status. The tribunal substantively found that none of these was a disability in law and dismissed the disability discrimination claim.

The claimant appealed on the basis that the tribunal erred by not itself proactively identifying that he was, or raising whether he might be, relying upon a further impairment as a distinct additional disability, having regard to his status as a litigant in person, and/or his mental ill health at the time of the proceedings. The tribunal did not so err. Nor did it err in refusing the claimant's application for reconsideration in that regard. **Moustache v Chelsea and Westminster Hospital NHS Foundation Trust** [2025] EWCA Civ 185; [2025] ICR 1231 considered and applied.

HIS HONOUR JUDGE AUERBACH:

Introduction – the Litigation History

1. I will refer to the parties as they are in the employment tribunal, as claimant and respondent.

2. The claimant was employed by the respondent as Head Chef at a pub from 29 January 2020 until he was summarily dismissed with effect on 11 February 2021. He thereafter began an employment tribunal claim, acting as a litigant in person, in which the complaints raised included disability discrimination. The claim was defended.

3. Following a case-management hearing in January 2022, an opening preliminary hearing was held by CVP at Watford on 29 April before EJ Maxwell. In a reserved decision sent to the parties on 12 May, the tribunal, among other things, determined that the claimant was not a disabled person at the material times; and so his complaint of disability discrimination was dismissed. The first appeal is against that substantive decision. The claimant also applied to the tribunal for a reconsideration of the substantive decision. That was refused by EJ Maxwell on preliminary consideration on paper in a further decision sent on 18 June 2022. The second appeal is against that reconsideration decision.

4. The claimant is again a litigant in person in the EAT. Both of his appeals were considered on paper not to raise any arguable grounds. However, at a rule 3(10) hearing before me, at which David Stephenson of counsel appeared for the claimant under the ELAAS scheme, I permitted amended grounds of appeal drafted by him to proceed to a full appeal hearing. At the full appeal hearing, also before me, he again appeared for the claimant, now through the auspices of Advocate. Nathan Roberts of counsel appeared for the respondent, as he did at the April 2022 hearing in the tribunal.

5. In summary, in the substantive decision the tribunal considered a number of particular claimed disabilities on which it identified that the claimant was, at that point, seeking to rely, concluding, in respect of each one, that he was not a disabled person at the relevant time. These appeals do not challenge the outcome in respect of any of those claimed disabilities considered in that decision.

6. However, the appeal in respect of the substantive decision contends that the tribunal erred in respect of a further claimed disability, being a physical impairment to the claimant's left forearm and/or hand, arising from an injury in around 2007 and associated surgery. It is described in some places as an ulnar nerve injury, but referred to in the grounds, and generally, by the claimant as claw syndrome, which is the term that I will use. The tribunal is said to have erred by failing to appreciate that the claimant was seeking also to rely on that further impairment as a disability, and/or to make further enquiries at least to clarify whether or not he was seeking to rely upon it. The tribunal is said also to have then erred by refusing to reconsider its decision in that respect.

7. To understand how these grounds, and the arguments relating to them, are developed, it is necessary first to set out the course of the litigation in the tribunal in a little more detail.

8. In his claim form the claimant ticked the boxes to indicate that he was claiming unfair dismissal, disability discrimination and that he was owed various payments. In the narrative content he referred to having been dismissed for staff members failing to follow his instructions in relation to matters relating to stock count and in relation to removing and disposing of expired products; "and for shielding". He also referred to having been "forced to attend the restaurant under concerns for my job despite me making them aware I was shielding and in isolation as me and my family are classified as high risk." In box 12, in answer to "do you have a disability?", he ticked "no".

9. The respondent entered a response in which it wrote that "we need more information regarding disability". It stated that in a return-to-work interview and questionnaire following the first lockdown in June 2020 the claimant had not raised any disability and had answered "no" to questions about whether he had a pre-existing medical condition or was high-risk shielding. The respondent denied that the clamant had been forced to attend work and said that he had not at the time communicated that he and his family were isolating and classified as high risk. It said that the first evidence produced of that was a doctor's letter from May 2021 (therefore, I interpose, post-dismissal) stating that the

claimant had been "brought in for vaccination as he is in the high risk category for Covid."

10. The respondent set out its case that a disciplinary process had led to the claimant's dismissal because of non-compliance with a head-office instruction and internal health and safety checks, and serious breach of food hygiene standards, non-compliance with cleaning standards and stock-control accountability, all said to prove his lack of control over processes for which he was responsible.

11. On 20 January 2022 there was a case-management preliminary hearing by telephone before EJ T Brown. The claimant was in person and the respondent was now represented by a solicitor. The judge listed a further open preliminary hearing, among other things to determine whether the claimant was a disabled person at the material times, being between December 2020 and January 2021, and whether the unfair dismissal claim should be struck out because of the claimant's short service.

12. In a section headed "the claim" the tribunal identified the respondent's case as to why the claimant had been dismissed. Further on, at [12] and [13], the tribunal said this:

> **"(12) I clarified the issues with the parties at the hearing. The claimant had produced a two documents recently called "statement against The Chestnut Group" and "My claim against the Chestnut Group" as well as responding to an application by the respondent, dated 14 January 2022 to strike out his claim. This proliferation of documentation tended to obscure, rather than highlight the issues in the ET1. The claimant said that he had sent other emails that were not included in the preliminary hearing bundle, and these documents may contain what are properly to be treated as applications to amend his claim, but since I did not have those documents, and given the limited duration of the hearing, I did not consider that I could determine any applications to amend today.**
>
> **(13) I clarified the issues in the claim with the assistance of the claimant."**

13. A further section headed "the issues" included the following passage:

> **"(15) The issues may need to be reconsidered, but the issues which appeared to arise from the claim:**
>
> **(i) Was the claimant a disabled person by virtue of IBD and/or a burn to his left hand between December 2020 and January 2021?**
>
> **(ii) If disabled by IBD, was the claimant required in January 2021to shield as a result of the covid pandemic?**
>
> **(iii) Was the claimant's partial attendance at work in January 2021 because he was shielding?**
>
> **(iv) Was the claimant's dismissal because of something arising in consequence of his disabilities, namely a need to shield and therefore not attend work during his normal working hours in January 2021?**

> **(v) If so, does the respondent show either that it did not know and could not reasonably be expected to know that the claimant was a disabled person, or that the claimant's dismissal was a proportionate means of achieving a legitimate aim. Any such aim will need to be clarified in due course.**
>
> **(vi) While I identified the claimant's burn injury to his hand as an impairment on which he seeks to rely for the purposes of his complaint of disability discrimination, it was not clear why that was said to be (or be part of) a disability where it had affected the claimant for about two months (he said that he had been signed off between January and February 2021, and the respondent said that this certification had been retrospective), nor how the claimant said that his dismissal had been because of the burn to his hand. The claimant may have been saying that the respondent's approach to health and safety was inconsistent as between its response to his burn and the conduct on which it relied in dismissing him, but I was not clear how this was said to amount to disability discrimination, and this is something the claimant may need to be prepared to address by the time of the next hearing.**
>
> **(vii) The claimant also said that as a result of the respondent's conduct towards him he had developed PTSD and he believed that he had undiagnosed PTSD prior to January 2021. I expressed the provisional view that any mental illness that developed after and in response to the claimant's treatment was unlikely to be a relevant protected characteristic for the purposes of the claimant's claim but might well be relevant to issues of remedy, and in any event the claimant did not link the reasons for his dismissal with PTSD. Again, if the claimant seeks to amend his claim in any such way, he would need to explain how he is saying that his treatment related to PTSD (and questions of knowledge may also arise)."**

14. The directions given included for the claimant to provide to the respondent copies of any medical evidence on which he relied in support of, or which would undermine, his case that he was at the relevant time disabled by virtue of IBD or a burn injury to his left hand; and for the claimant to provide a disability impact statement.

15. As that minute noted, the claimant's case at that point was based on what he said was his understanding that his IBD was the reason why he had been advised to shield. However, in an email to the tribunal and the respondent's representative of 28 January 2022 he wrote:

> **"I would like to clarify an issue I have been struggling to explain I was under the impression that my I.b.d was the reason for my high risk status I have now been informed it was not the contribute reason (as shielding correspondent do not stipulate reason) it was due to my having a seizure in 2019 to witch the respondent has the medical clarification on this already.**
>
> **I would there for like to amend my et1 form and put in place the correct reason for my high risk status and as it is a physiological disorder it would be protected under the equality's act 2010 under disability there for an impairment**
>
> **I would also like to add whilst working at chestnut limited I was prescribed medicine that can brings on this condition**
>
> **I would also like to add in if I have not already my adjustments claim for my post traumatic stress disorder, breach of contract and whistle blowing all relevant information has been sent to the respondent."**

The Tribunal's Substantive and Reconsideration Decisions

16. At the open preliminary hearing in April 2022 the claimant was in person and Mr Roberts appeared for the respondent. In its reserved decision, as well as deciding that the claimant was not a disabled person at the material times, the tribunal struck out the unfair dismissal claim because of the claimant's short service, and struck out a wages claim as having no reasonable prospect of success. There is no appeal from those decisions. Claims for notice and holiday pay were not struck out.

17. The tribunal's reasons began by setting out the agenda for the hearing and describing the claims. At [4] the tribunal said:

> **"The discrimination claim was clarified by EJ Brown on20 January 2022 as one of discrimination arising from disability (EqA section 15) with respect to dismissal. For being a disabled person the Claimant relied upon the physical impairments of IBD and a burn to the hand, along with the mental impairment of PTSD. The something arising from disability was his inability to attend for work because he was shielding from Covid."**

18. Under the heading "further information", at [5], the tribunal said this:

> **"Both prior to and after the case management hearing on 20 January 2022, the Claimant has written to the Respondent and/or the Tribunal endeavouring to set out his claim. Unfortunately, each time the Claimant writes, he describes his complaints in a somewhat different way. This has made it difficult to understand the legal claims he wishes to pursue and what impairments he is relying upon for being a disabled person. I sought to clarify these matters with him during this hearing."**

19. The tribunal then referred to the evidence that it had, by way of documents and witness statements, and to having heard oral evidence from the claimant and two witnesses for the respondent.

20. The tribunal then considered an application by the claimant to amend with respect to the impairments that he sought to rely upon as disabilities. In the course of this section it said, at [12]:

> **"The central factual complaint made by the Claimant can be stated simply. He was Head Chef in the kitchen at the Respondent's Rupert Brooke pub. On 17 December 2020 he suffered a burn to his hand as a result of a workplace accident. This burn became infected and required antibiotic treatment. His GP advised he was unfit for work. Notwithstanding he made his employer aware of this state of affairs, he was pressurised into carrying on at work over a number of busy days. Shortly thereafter, the Claimant was advised to shield and isolate because of covid. Following that point, the Respondent discovered what it believed were a number of serious breaches of procedure, including with respect to hygiene or health and safety in the kitchen at which the Claimant was Head Chef. Disciplinary proceedings were commenced and the Claimant dismissed. The Claimant says that his absence from work whilst shielding contributed to the kitchen issues for which he was dismissed. For the purpose of a claim under EqA section 15, the something arising was the Claimant's absence from work."**

21. The tribunal then identified that the claimant sought, by amendment, to rely upon further additional impairments as disabilities, which were described as: (1) obesity; (2) taking opioid medication for pain relief; (3) asthma; (4) seizure. The claimant no longer relied upon IBD. The respondent did not oppose the amendment to introduce these further claimed disabilities, as such (while disputing that he was a disabled person by reference to any of them), and the tribunal considered it in the interests of justice to grant the amendment.

22. The tribunal went on to refuse permission to the claimant to add complaints of automatic unfair dismissal on health and safety and/or whistleblowing grounds.

23. The tribunal then turned to determination of the issue of disabled status, including in respect of the claimed disabilities that the claimant had sought to add by way of amendment.

24. As we shall see, the tribunal had been given *some* medical evidence in the form of letters or reports. But it noted that much of it post-dated the employment, and that the claimant had not obtained his GP records; and, for reasons it gave, it considered that he had had sufficient opportunity to do so.

25. The tribunal referred to an admission to hospital in April 2019 following an excess dose of tramadol and a seizure. The tribunal considered that the seizure was likely a one-off event, triggered by the tramadol. It considered the claimant's health questionnaire on joining the respondent. The claimant disputed the authenticity of the document put before the tribunal by the respondent, but the tribunal found it to be genuine. That document referred to the claimant having had shoulder surgery, necessitating some absence from work at that time, and to hay fever, but not to any other condition. The claimant had ticked "no" to medication, relevant health problems or being a disabled person.

26. The tribunal continued:

> **"24. On 17 December 2021, the Claimant suffered a nasty burn to his hand as a result of an accident at work. He continued to work, although he believes this was only because he was pressurised to do so. Mr Roberts put to the Claimant that when he attended to the disciplinary**

hearing on 11 February 2021, he was wearing no bandage or dressing and the burn appeared to have healed. In answer he said "That was two months after, of course it appeared nearly to be healed". Retrospectively, on 21 May 2021, the Claimant's GP gave him a fit note saying that he was not fit for work between 17 December 2020 and 17 February 2021, being a period of 9 weeks. I find that by 17 February 2021, the burn had substantially healed.

25. The Claimant was dismissed on 12 February 2021.

26. On 21 May 2021, the Claimant's GP wrote a letter saying he had been brought in for vaccination because he was in the high risk category for covid 19.

27. A letter of 21 October 2021 from a pain management specialist noted the Claimant had suffered with right-sided shoulder pain following an encounter with the police in 2019 when he was arrested for a crime he did not commit. The Claimant is said to have undergone acromioclavicular joint repair and been managing well until something "slipped and popped" whilst "he was doing some bench presses in the gym". The letter included:

> **Mr Maltby tells me that he is otherwise fit and well and he denies any significant medical history. He tells me that he has previously experienced a significant ulnar nerve injury to his left arm which has left him with some residual problems. In terms of other management, he did have a local steroid injection into his shoulder which gave him some good relief, but the benefit of this has now waned,**

The letter referred to the Claimant's pain relief mediation for his shoulder and then:

> **This led on to a slightly more detailed discussion about Mr Maltby's wellbeing and his mood. He currently feels quite despondent about his pain and in concerned about how things will be in the future. He reports his pain is feeling life changing and is currently frustrated as this is preventing him from working to his role as a chef. […] Mr Maltby clearly understands that pain and mood can be linked.**

28. A letter of 5 November 2021 from a Clinical Psychologist included:

> **Shane told me that more recent events of losing his job have caused more distress and been more traumatic and unsettling for him. Work provided him with so much, a sense of purpose helped his mood, and helped him to stay active. He was unfairly treated and dismissed under circumstances which did not warrant this. I wonder whether being unfairly treated and wrongfully dismissed may well have re-triggered feelings of vulnerability. He reported an increase in nightmares based around fears of this area of his life. Shane has experienced a great deal of difficulty in his life […]. However, he felt that he had dealt with 009 and processed these events. The impact of them on him were different and related to where he was in his life at that time, e g being younger and not being a parent himself yet.**

29. A letter dated 8 December 2021 from a mental health practitioner included the Claimant reporting that he had undergone a traumatic event in 2019, namely being wrongfully accused of a crime, remanded in custody and then acquitted. This was then followed by further trauma because of the events surrounding his dismissal by the Respondent. The Claimant is noted as saying "I used to be able to do these things" and "I have lost everything". I note the Claimant provided only pages 1 and 3 of this letter, page 2 has been omitted. The practitioner was of the opinion the Claimant's flashbacks of these events were indicative of PTSD. Psychological therapies were recommended. There is also a more recent letter (14 January 2022) which records the Claimant being assessed for CBT.

30. The Claimant has produced a letter from his GP dated 7 February 2022 which says:

> **Mr Maltby is a patient at the Reynard Surgery. He currently takes Venlafaxine to help with depression and he is only codeine to help with chronic shoulder pain. In his medical history he has a diagnosis of depression and asthma which was diagnosed in 2003 although he is not currently on treatment for that. In the past he has been on stronger pain relief including morphine and tramadol for his shoulder pains."**

27. After setting out an extract from the claimant's impact statement the tribunal said:

> **"32. Whilst the impact statement may accurately describe the Claimant's current position now, I do not accept it reflects the position when he was employed by the Respondent. According to the impact statement the Claimant is extremely limited in being able to walk, cannot use his hands properly, needs help with bathing and dressing and has difficulty being around people. This description is not only very different from the medical questionnaire he completed but also inconsistent with the substantive role he carried out for the Respondent, being head chef at the Rupert Brooke pub. More likely, the impact statement reflects a subsequent deterioration in the Claimant's health. The Claimant told me that his "career" as a head chef was "over" because of the way in which he had been treated by the Respondent, which strongly suggests a worsening of his health thereafter. I am also reinforced in this conclusion by the observations of the Claimant's psychologist in her November letter about the "re-triggering"."**

28. For further reasons that it set out, the tribunal concluded that the claimant was not disabled at the relevant time by reference to: obesity, taking opioids, asthma, or what it found had been a one-off seizure. In relation to the opioids, these were taken for shoulder pain, but the claimant confirmed that he did not rely on the shoulder problem as having been a disability at the time.

29. Of the burn to the hand the tribunal said, at [39]:

> **"As above, I find the Claimant received a nasty burn to the hand on 17 December 2020, which had substantially healed by the point of 9 weeks later."**

30. As part of its later conclusions on disabled status the tribunal said at [56.5]:

> **"whilst the burn to the Claimant's hand was a physical impairment and must have had an adverse effect in terms of pain and reduced function when healing, this had not lasted for 12 months at the material time and nor could it be said to have been likely to do so; rather substantial healing would have been anticipated with a few weeks at most;"**

31. As to PTSD the tribunal said this:

> **"40. I do not find the Claimant was suffering with PTSD and the time of his employment.**
>
> **41. The Claimant has suffered with depression in the past, although I cannot make any finding about the nature and extent of that on the evidence before me. It does not, however, appear the Claimant was receiving any treatment for depression (either talking therapies or medication) during his employment by the Respondent. Unfortunately, following the Claimant's dismissal his mental health deteriorated and as at February 2022, he was being prescribed Venlafaxine for this."**

32. In introducing its conclusions on disabled status the tribunal said at [54]:

> **"The various impairments now relied upon emerged at different times in the Claimant's various attempts to set out his complaints in writing. The Claimant explained this pattern in two ways: firstly, his PTSD made him forgetful (i.e. he forgot to mention some of these matters**

> **when preparing his documents) and secondly, he did not know which conditions had been taken into account when he was told to shield or isolate. This latter point is of some importance. The Claimant has sought to work backward from the fact that he received advice to shield or go into isolation, as indicating that it must follow that he had one or more serious health concerns amounting to a disability. I cannot, however, proceed in this way. There is no evidence of why the Claimant was advised to shield or isolate. The Claimant says he was contacted by Track and Trace. Whilst this might suggest he was a close contact of someone who had tested positive for covid, the Claimant says it was to tell him he needed to shield. There is a letter from the Claimant's GP about receiving the vaccination saying he was in a high risk category but not why. I note that the Claimant's witness, Mr Goldsack, says the Claimant's partner was pregnant at the time and at higher risk."**

33. In relation to PTSD it concluded at [56.6]:

> **"the Claimant was not suffering with PTSD at the material time (whilst he had a prior history of depression, I could not find this was active at the time or that it had a substantial adverse effect when it had been previously)."**

34. On 14 May 2022 the claimant sent the tribunal an email and an attached letter seeking a reconsideration. The email began:

> **"Please see attached the start of my appeal on your decision regarding my case I will be submitting my medical evidence on my left for arm and hand that will prove I am disabled and have been for years**
>
> **I would request the tribunal to review there decision as I feel it has been made in haste and I would request that medical evidence I have already submitted be read more closely with the burn evidence to my disabled hand…"**

35. The attached letter postulated that the "burn to my hand" had already been found to be an impairment by EJ Brown on 20 January 2022, and then set out the text of what EJ Brown had said at paragraph [15(vi)] of their reasons (which I have set out above). The letter continued:

> **"As I was only given 15 minutes to state my case and this section wasn't subject to conversation I would like to clarify the parts of judge browns question as to how my burn impairment links to disability.**
>
> **In 2007 I severed my left arm and had to have reconstructive plastic micro surgery on it and physio therapy for a number of years after also I had to undergo another major surgery in my left hand a muscle transplant from my ring finger to my palm all of the surgery put me as a disabled impaired person for life in my left hand and for arm.**
>
> **I will submit hospital record on this as well as detailed proof of my being impaired/disabled permanently from 2007.**
>
> **I can not see how judge maxwell would say I was not a disabled person at the material time."**

36. Further on the claimant wrote:

> **"I can not understand how my disabled hand that was burn badly and then contracted a major infection witch could not be contained this would not allow me to be in a restaurant (e.h.o.own**

> **rules) but would be ok for a company to dismiss me for gross misconduct for an incident that took place on the 27/12/20 during a u.k lockdown it is true no health and safety process was followed to keep myself and other safe (I was classed as high risk as well as having a infection that would spread as it could not be contained)**
>
> **Also I will have my doctor confirm as I have a disabled left for arm and hand due to the severities of that injury I heal at a fraction of time then a normal person in that arm and hand due to nerve muscle arteries etc damage.**
>
> **The respondent did dismiss me for nonattendance to the rupert brook on the the closedown on 27/12/20 how could I attend whilst shielding and whilst signed off sick for 2 months how could I attend on the 13/14/18/01/2021 whilst having an infection that could not be contain an as well as recovering from a burn on my disabled hand clearly no care for health and safety and the fact I partly attended due to there pressure breaches employment rights act 1996."**

37. He then cited from section 100 **Employment Rights Act 1996** and developed his argument in relation to it.

38. On 22 May 2022 the claimant sent a further email attaching a bundle of medical evidence. However, in response to a question from the EAT the judge did not identify this as among the correspondence that they had seen when reaching their decision; and Mr Stephenson indicated in the course of argument that, in light of that, he did not seek to rely upon its contents.

39. The judge refused a reconsideration on preliminary consideration on paper. Their substantive reasons were as follows:

> **"1. The need for a preliminary hearing and the issues to be determined were explained to the Claimant at a case management preliminary hearing before EJ Brown on 20 January 2022. Orders were made for the Claimant to provide the evidence he wished to rely upon in advance of the preliminary hearing. He made no application for a postponement, nor did he challenge the time allocated for this matter.**
>
> **2. The hearing to determine the preliminary issues took place on 29 April 2022. The issues were explained at the beginning as was the process to be followed. The Claimant's witness evidence lasted for about an hour, the Respondent's witness evidence for a little less than an hour. Closing submissions took just over half an hour, with both sides speaking for about half of that time. The Respondent sought to reply to the Claimant and having allowed this briefly, I then reverted back to the Claimant so he could have the final word. At the end I asked the Claimant whether there was anything more he wished to say and he replied "That's it". I spent the afternoon considering the evidence, submissions and the Claimant's various statements of his case. I found I needed more time and so reserved my decision, which has now been provided to the parties in writing along with my detailed reasons.**
>
> **3. In his email of 14 May 2022, the Claimant for the most part rehearses arguments made at the hearing (or variants of the same) which were rejected. To the extent, if at all, the Claimant is now under the impression that EJ Brown had already found he was a disabled person by reason of the burn to his hand, he has misunderstood what was recorded. EJ Brown was seeking to capture the Claimant's position or argument rather than determine whether he was correct in what he said. The time taken by each party in closing submissions was very similar and the Claimant's reference to him having 15 minutes and the Respondent and hour is again, a misunderstanding on his part. I clarified with the Claimant which impairments he was**

> **seeking to rely upon for being a disabled person and addressed these (having first allowed an amendment so he might rely upon additional impairments). I have given my reasons for not being satisfied he was a disabled person and if he believes there is an error or law he may appeal against that decision.**
>
> **4. In substance, having been unsuccessful at the hearing, the Claimant seeks a second chance to argue his case. There is no reasonable prospect of it being found in the interests of justice to revoke my original decision to allow him to do this."**

Moustache

40. In **Moustache v Chelsea and Westminster Hospital NHS Foundation Trust** [2025] EWCA Civ 185; [2025] ICR 185 it was contended that the tribunal erred by failing to identify that, in addition to claiming unfair dismissal, the claimant, who had been a litigant in person, was claiming that her dismissal was an act of disability discrimination by reference to her mental ill health. The Court of Appeal concluded that the tribunal had not so erred. Warby LJ gave the only reasoned judgment, with which Elisabeth Laing LJ and Dingemans LJ concurred. In the course of it he conducted an extensive review of the key prior authorities from both the EAT and the Court of Appeal.

41. Warby LJ stated at [2] that the first of two main issues in that appeal was "the circumstances in which the ET comes under a duty to identify and determine a claim which is not in an agreed list of issues… ." When he came to address that issue, starting at [32], he made four general points. The first is that employment tribunal proceedings are adversarial. The primary duty is on the parties to set out their cases. The second is that the issues raised are those which emerge clearly from an objective analysis of their statements of case, that is, those which have the status of pleadings. The third is that the tribunal has a duty to address any issue that has been raised in a pleading, and that is still being pressed by the party concerned.

42. Warby LJ continued:

> **"37. Fourthly, however, the ET's role is arbitral not inquisitorial or investigative. It must perform its functions impartially, fairly and justly, in accordance with the overriding objective, the law, and the evidence in the case. It may consider it appropriate to explore the scope of a party's case by way of clarification. That may, in particular, be considered appropriate in the case of an unrepresented party. Whether to do so is however a matter of judgment and discretion which will rarely qualify as an error of law such that the EAT can interfere. The ET has no general duty to take pro-active steps to prompt some expansion or modification of the case advanced by a party where that might be to their advantage. These propositions emerge clearly from a series of decisions of this court and the EAT.**

> **38. We have been referred to the decisions of this court in *Mensah* (above) at [28] and [36] and *Muschett v HM Prison Service* [2010] EWCA Civ 25; [2010] IRLR 451 [31]. I do not consider it necessary to review those two cases in further detail. That was done in *Drysdale v Department of Transport* [2014] EWCA Civ 1083; [2014] IRLR 892 where the court subjected the relevant authorities to a detailed analysis from which Barling J (with whom Arden and Christopher Clarke LJJ agreed) derived the following general principles:**
>
> **(1) It is a long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case.**
>
> **(2) What level of assistance or intervention is "appropriate" depends upon the circumstances of each particular case.**
>
> **(3) Such circumstances are too numerous to list exhaustively, but are likely to include: whether the litigant is representing himself or is represented; if represented, whether the representative is legally qualified or not; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.**
>
> **(4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.**
>
> **(5) The determination of the appropriate level of assistance or intervention is properly a matter for the judgment of the tribunal hearing the case, and the creation of rigid obligations or rules of law in this regard is to be avoided, as much will depend on the tribunal's assessment and "feel" for what is fair in all the circumstances of the specific case.**
>
> **(6) There is, therefore, a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/omitted to do, and which amounts to unfair treatment of a litigant.**
>
> **39. The following analysis seems to me correct in principle and consistent with the case law. The starting point is to consider what claims emerge from an objective analysis of the statements of case. A failure by the tribunal to identify and address those claims is liable to amount to a breach of its core duty and hence an error of law. A failure to identify and determine a claim that does not emerge from such an analysis can amount to an error of law but only in rare or exceptional circumstances of the kind outlined in *Drysdale*. It is in this overall context that the role of an agreed list of issues falls for consideration."**

43. Warby LJ's review of the authorities also took in, at [42], **McLeary v One Housing Group**, UKEAT/0124/18, in which, he said:

> **"…the EAT held that the ET had erred in law by overlooking a claim that discrimination during employment had contributed to the employee's constructive dismissal. At [63] HHJ Auerbach identified as his starting point the question of "whether the claim form, read or not with other relevant documents, should have been treated as advancing a claim of constructive dismissal pursuant to section 39 EqA." He found that although such a claim was not expressly identified it was "plainly being asserted" and "shouted out" from the particulars of claim which "should have been treated as including" such a claim. In my view the ratio decidendi of the case is that on an objective reading of the statements of case in their proper context the employee was claiming that her constructive dismissal flowed from acts of discrimination. The judge did say, further and alternatively, that the issue "should at least have been raised and clarified by the tribunal at the initial case management hearing". In reaching that conclusion the judge referred to *Drysdale* and made clear that he regarded his conclusions as consistent with the principles there identified. I therefore read this alternative ground of decision as a finding that if (contrary to the judge's primary conclusion) the discrimination claim was not**

> **clearly pleaded then, on the facts of the case, the claim was so obvious that it was perverse of the tribunal not to identify it."**

44. Warby LJ also discussed **Mervyn v BW Controls Limited** [2020] EWCA Civ 393; [2020] ICR 1364, which he read as holding that the pleading in that case "shouted out" a complaint of constructive unfair dismissal (as an alternative to actual dismissal) in the **McLeary** sense.

The Grounds of Appeal, Discussion, Conclusions

Ground 1

45. Ground 1 contends that the tribunal erred in its substantive decision by failing to appreciate that the claimant was relying, as a disability, on claw syndrome, as distinct from the burn injury to his left hand; and/or by failing to enquire whether he was seeking to rely on it as a further disability.

46. Following the guidance in **Moustache**, the first question to consider is whether the tribunal erred by not identifying that claw syndrome was among the claimed disabilities that the claimant relied upon in his pleaded case. My answer to that question is "no".

47. As I have described, in his claim form the claimant did not identify what claimed disability or disabilities he was relying upon. At the case-management hearing before EJ Brown it was noted that the claimant was seeking to rely upon IBD and the burn injury, both of which EJ Brown appears to have treated as forming part of his pleaded case from that point. He thereafter wrote that he wished to add the seizure in 2019, prescribed medication and PTSD. At the hearing before EJ Maxwell on 29 April he no longer relied upon IBD. He also raised, and the judge also considered, asthma and obesity. Claw syndrome (however described) was *not* identified at any point, whether before or at that hearing, by the claimant as a claimed disability upon which he wished to rely.

48. Nor was this a case where the judge erred because it should have been considered that it "shouted out" that the claimant was plainly seeking to rely upon claw syndrome as a further disability. The complaint advanced by the claimant – as fairly captured by both judges – was that his dismissal

was because of matters arising during his absence from work, during a period when, on his case, he was absent because he had been advised to shield, and that he had been advised to shield because of disability. He originally contended that the advice to shield was given because of IBD, later that it was because of his having had a seizure. Mr Stephenson told me that he took no issue with EJ Maxwell's summary, at [12], of how the claimant put his case.

49. However, Mr Stephenson said that there were red flags that the tribunal should have picked up. He relied on the letter cited by the tribunal at [27] referring to the claimant mentioning a "significant ulnar nerve injury to his left arm". At [31] the tribunal cited a passage from his impact statement in which the claimant said that he could not "operate my hands properly". His impact statement also contained references to his left hand lacking full mobility and being classified as disabled, and to "claw syndrome". The tribunal also had copies of WhatsApp exchanges with colleagues in the course of which he had referred to a permanent injury to his left hand.

50. However, these passages in the materials now relied upon by the claimant in support of his appeal, were not such as should have made it clear and obvious to the *tribunal* that he was also seeking to rely on claw syndrome, as a distinct disability for the purposes of his disability-discrimination complaint. The reference in the pain management report, to the ulnar nerve injury, was in the context of a report about the shoulder injury, and by way of background. The claimant confirmed to the tribunal that the shoulder injury itself was not relied upon. The claimant's own materials were wide-ranging. The mere presence of references in the impact statement and the long WhatsApp chain to the prior injury to his arm, did not indicate, or make it obvious, that he was relying on claw syndrome as a distinct disability for the purposes of that complaint.

51. The impact statement did say that the burn had taken longer to heal because the claimant could not use a glove on that hand. But the tribunal considered the length of time that the burn had been likely to take, and did take, to heal, and hence whether it was a disability; and in any event the claimant had not claimed that he had been required to shield because of the burn. Indeed, in argument before

me, Mr Roberts having questioned whether the burn had in fact been relied upon for the purposes of the disability-discrimination complaint (as opposed, perhaps, in relation to the aspirational section 100 complaint), Mr Stephenson, for his part, responded that the burn was a "red herring".

52. Mr Stephenson, however, submitted that the tribunal had still not done enough to ascertain what claimed disabilities the claimant wished to rely upon, for a number of reasons. First, the tribunal had not, at the initial case-management hearing, directed the claimant to particularise the disabilities on which he sought to rely, in writing, nor had it directed an agreed list of issues to be produced; and there was no agreed list of issues at the further hearing before EJ Maxwell. Citing **Cox v Adecco** [2021] ICR 1307 he submitted that, as a result, the claimant was a "rabbit in the headlights" at these hearings, and the tribunal had not "rolled up its sleeves" to identify how he was putting his disability-discrimination complaint, including the claimed disabilities relied upon.

53. Secondly, he argued, the tribunal was under a particular duty to go further to support the claimant in its proactive enquiries in this particular case, because of the evidence that it had regarding his mental ill health. The tribunal had itself noted at [29] a mental health practitioner letter referring to PTSD; and at [30] a GP's letter referring to him taking Venlafaxine for depression; at [41] it referred to his mental health having deteriorated following his dismissal; and it noted at [54] that he had referred to his PTSD making him forgetful, as part of his explanation for why he had raised a number of different impairments piecemeal.

54. Citing **Heal v University of Oxford** [2020] ICR 1294 at [18] – [20] (and other authorities there referred to, such as **Rackham v NHS Professionals Limited**, UKEAT/0110/15), Mr Stephenson submitted that the claimant was therefore a particularly vulnerable individual. In light of that, and in view of the "red flags", he said, it had a duty to make further proactive enquiry of the claimant as to whether he was seeking also to rely upon claw syndrome.

55. My conclusions on these further aspects are as follows.

56. Firstly, in so far as the claimant was a litigant in person, I consider that, applying the **Drysdale** guidance, adopted in **Moustache**, the tribunal did more than sufficient to enable him to have a fair opportunity to identify the claimed disabilities on which he relied, and indeed how he put his disability discrimination complaint more generally. Litigants in person do not all have the same communication skills or ability to grasp and engage with legal concepts, or explanations of them. There is no "one size fits all", in terms of the ways in which such a litigant's complaints may be most usefully or fairly explored or canvassed either in writing or orally at a hearing. In some cases the tribunal may rightly judge that discussion at a hearing is the fairest and best way to ascertain or clarify a litigant in person's case on a particular aspect, to be followed by the tribunal itself producing a written record of what has been ascertained, enabling the litigant to raise any concerns about its accuracy.

57. In this case, EJ Brown specifically noted that there had been a "proliferation" of written communications from the claimant, but that these tended to obscure rather than clarify how he was seeking to put his case. EJ Brown then proactively, at the hearing, sought clarification of what disability or disabilities he relied upon. It was not wrong in this case to do so, and it yielded some positive and helpful results. EJ Brown recorded the claimed disabilities that had been identified in that way, in the subsequent minute of hearing. The judge also elucidated, and recorded, that, in substance, the claimant's case was that he had been dismissed because of (what had occurred during) a period of absence following advice to shield, and that he was advised to shield on account of disability. Even though it was incomplete, and might have to be revised following updated grounds of response, this was, I consider, a useful and fair working list of issues going forward.

58. The claimant's email following that hearing did not take issue with that record of how, in substance, he put that complaint, but indicated that he was now seeking to revise his case as to the particular disability which (as he contended) was the reason for the advice to shield, and to rely upon other claimed disabilities as well. That was consistent with EJ Maxwell's later observation that the claimant had advanced his case on the assumption that he must have been advised to shield because

he had *some* disability, and he was then seeking to piece together a case as to what that disability was.

59. Then, at the hearing before EJ Maxwell, the judge noted (again) that there had been significant correspondence from the claimant, but this had not been consistent; and the judge therefore went over with him *again* what claimed disabilities he relied upon, and how he said they were relevant to his disability-discrimination complaint. Once again the judge was not wrong in this case to do so.

60. The claimant raised, and was allowed to add, further claimed disabilities to his list. The judge correctly captured in the minute of this hearing (as EJ Brown had in effect done earlier) that the claimant was seeking to advance what amounted to a section 15 **Equality Act 2010** complaint in relation to the dismissal, with the period of absence following advice to shield being, on his case, the thing which arose in consequence of disability and had in turn been a material influence on the decision to dismiss him (because – on his case – the problems in the kitchen for which he had been disciplined had occurred during his shielding absence and unfairly been laid at his door).

61. I pause to note that, as EJ Brown had noted, there was something of a puzzle as to how (even if it was a disability) the claimant was seeking to rely upon the burn as relevant to his disability-discrimination complaint in relation to the dismissal. But both EJ Brown and EJ Maxwell were given to understand that, in some way, he was; and so whether it was a disability was duly considered.

62. I turn to the argument based on the **Rackham/Heal** line of authority,

63. It is not unusual for a claimant in the employment tribunal to indicate that they are suffering from mental ill health, whether or not said to amount to a disability, or said have been caused by ill treatment by the respondent. It is common that a claimant is said to be suffering to some degree from stress, depression and/or anxiety and/or has been prescribed medication for such a condition. Once again, however, not all such claimants are the same, and the fact of such a scenario does not, in and of itself, mean that there are any particular specific additional steps that the tribunal should take to support such a litigant in the given case. What, if any, particular proactive steps the tribunal may

need to take in light of an issue raised relating to a party's mental ill health, to ensure that the process is fair to them, depends on the facts and circumstances of the particular case.

64. In this case, there was evidence before EJ Maxwell that the claimant had seen mental health specialists following the start of his tribunal claim and had got a letter from his GP not long before the hearing before EJ Brown. But this was not a case where he had asked for a postponement of any hearing to allow him more time to prepare, or on the basis that he was not presently medically fit to participate. Nor had he put forward any medical evidence otherwise pertaining specifically to his participation in hearings. The letter cited to the tribunal at [29] referred to indicators for PTSD, but did not give a diagnosis. The tribunal specifically referred at [54] to the claimant's case that he had raised various claimed disabilities piecemeal because his PTSD made him forgetful, but it did not make a finding accepting that, if he did have PTSD, it had that effect. Its findings at [56.6] about depression, and any effects of it, were also extremely limited. The tribunal also knew that the claimant had been able to raise a large number of specific claimed impairments up to, and at, that hearing.

65. Given all of that, I do not consider there was anything in the information or evidence about this claimant's mental health and its impact at the time, such as to have made it unfair that EJ Maxwell did not proactively seek clarification as to whether, although it had not been raised by him at any point hitherto, including in his application to amend, the claimant might nevertheless be seeking also to rely upon claw syndrome as a distinct disability in his disability-discrimination complaint.

66. For all of these reasons, ground 1 fails.

Ground 2

67. Ground 2 relates to the reconsideration decision. It contends that the tribunal erred by failing to appreciate, or consider, at the reconsideration stage, that the claimant was seeking to rely upon claw syndrome as an additional disability. Mr Stephenson submitted that this was made clear by the reconsideration application (even leaving aside the 22 May email and attached evidence, upon which,

as I have noted, Mr Stephenson said he did not rely). The email and attached letter in which he made that application referred to his having been disabled for years, giving a summary history of the injury in around 2007 and later operations, and referred to a burn "to my disabled left hand" – all of which got across his case that his hand was independently disabled long before he suffered the burn.

68. Mr Roberts submitted that, even from the application, it was not entirely clear that the claimant was relying on a longstanding impairment to his hand or arm as a freestanding disability in its own right. The application referred to the claimant's understanding that EJ Brown had already accepted that the *burn injury* was a disability (whereas, he noted, in fact EJ Brown had only identified it as a claimed disability); and/or the claimant appeared to be arguing that the fact that the burn was to a disabled hand or arm itself imparted disabled status to the burn injury *as well*; and/or it appeared that part of the point of the reconsideration application was to challenge the refusal to permit the claimant to amend to add a section 100 **Employment Rights Act 1996** unfair-dismissal complaint.

69. I do see some force in Mr Roberts's points. The claimant does appear still to have been relying on the burn injury, and the impact of the earlier injury on that – there is reference at one point to the burn taking longer to heal on account of the claw syndrome; and there are various passages to the effect that the fact of the burn injury, or the respondent's handling of it, showed a disregard for the claimant's health and safety, in particular on the basis that he was pressurised to attend work during a period when he should have been off recuperating from it, or because of a risk of working while it was not fully healed. Nevertheless, I consider that it was also a theme of the application that the ulnar nerve injury, and related surgery that followed, had itself rendered him permanently disabled.

70. However, Mr Roberts in any event had a more fundamental objection to this ground. This was that, even if the claimant was (now) sufficiently clearly conveying in his reconsideration application that he wished to contend that he had a distinct disability by way of claw syndrome, that was simply not a good ground for reconsideration; and so the tribunal had not erred by rejecting the application on the basis that he was not entitled to use it as an attempt to reargue his case.

71. Mr Stephenson accepted that, while the rules provide that a tribunal may grant a reconsideration where it is necessary in the interests of justice to do so, that formulation does not mean that the power to grant a reconsideration is completely at large. See, for example, the discussion in **Outasight VB Limited v Brown**, UKEAT/0253/14 at [27] – [38] and the earlier authorities cited there. The principle of finality in litigation is an important consideration in this context. It is generally not appropriate to grant a reconsideration where the contention is that the tribunal has made an error of law which can be raised by way of an appeal. Nor is it ordinarily a proper basis for a reconsideration application that a party wishes to advance a new argument, or introduce further evidence, which they could, and should, have raised or introduced first time around. Mr Stephenson however argued that in this case a reconsideration should have been granted, because it was apparent from the application that there had been a "procedural mishap" by way of a "misapprehension" on the part of the tribunal, of the disability on which the claimant was seeking to rely.

72. However, that argument rests, again, on the proposition that the tribunal should, at the prior hearing, have proactively considered, or sought to elicit, whether the claimant might be seeking to rely upon claw syndrome as a disability. But, for reasons I have given, I consider that, up to, and at, that hearing, he had been given a more than fair opportunity, as a litigant in person, to identify his case as to the impairments that he was seeking to rely upon as disabilities. I am also not persuaded that the tribunal had treated him unfairly by failing to make further proactive enquiries as to whether he was seeking to rely on claw syndrome, in light of his mental health. Although Mr Stephenson did not specifically press the point in his oral submissions, I also note that, in my judgment, the tribunal fairly answered, in the reconsideration decision, the claimant's contention that he had not had sufficient time to advance his case on this aspect at the earlier hearing.

73. I add that, in so far as the claimant contended in the reconsideration application that the impact of the claw syndrome was that the burn took longer to heal, the tribunal had already made proper findings that the impairment caused by the burn injury had not been, in the requisite legal sense, long-

term, drawing in particular on the evidence that it had about how long it had in fact taken to heal. Nor was it his case that he had been advised to shield because of the burn or claw syndrome.

74. Nor, I add for completeness, did the tribunal err by failing to consider that the medical evidence which the claimant said he would produce (and in fact did send in on 22 May) might amount to new evidence. His reconsideration application explained that the original injury had occurred in around 2007, and that the evidence he would be producing would show that he had been disabled for years. This was plainly not going to be evidence that had only come to light since the hearing; and the tribunal had already (properly) held that the claimant had had a sufficient opportunity to obtain and produce his GP records prior to, and at, the earlier hearing.

75. For all of these reasons, even assuming that the content of the reconsideration application was sufficient to make clear that the claimant was *now* seeking to rely upon claw syndrome as a distinct disability, the tribunal did not err by failing to conclude upon preliminary consideration, that this provided an arguable basis for a reconsideration, so that the application should not be rejected.

76. Ground 2 therefore also fails.

Outcome

77. For all the foregoing reasons, the appeal is dismissed.