Neutral Citation Number: [2025] EAT 135

Case No: EA-2023-001300-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 September 2025

Before :

MICHAEL FORD KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

CHARLES VESSEY

Appellant

- and –

RICHMOND PHOTOGRAPHY LIMITED

Respondent

- -

The **Appellant** in person
Mr Martin Mensah (instructed by DWF Law LLP) for the **Respondent**

Hearing date 18 September 2025

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The Employment Judge was entitled to decide that the discrimination complaints which the Appellant wished to add by way of amendment were those set out in a note prepared on his behalf by counsel and provided to the tribunal and were not other complaints with different legal labels and factual content referred to in an earlier email.

MICHAEL FORD KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. The Appellant appeals against a judgment of Employment Judge ("EJ") Smith sent to the parties on 12 April 2023 following a hearing on 28 March 2023 in which EJ Smith allowed the Appellant to amend his claim to bring three additional complaints of disability discrimination.

2. The Notice of Appeal was sealed on 10 November 2023, in which the Appellant brought appeals against both the judgment of EJ Smith and a judgment of EJ Abbott made at a case management hearing on 11 October 2023, in which EJ Abbott decided about the scope of the amendment decision of EJ Smith. In a decision contained in a letter of 22 February 2024, Judge Auerbach decided that the appeal against the judgment of EJ Abbott disclosed no reasonable grounds for bringing the appeal for the purpose of rule 3(7) of the EAT Rules of Procedure. The Appellant did not challenge that order.

3. It follows that this appeal is only against the judgment of EJ Smith. Although the appeal was out of time as regards that judgment, the EAT granted an extension of time. In an order dated 28 October 2024, subsequently amended in an order dated 15 November 2024, John Bowers KC, sitting as a Deputy High Court Judge, allowed what he described as a "limited point" to go forward to a full hearing.

4. I shall refer to parties as the Claimant and Respondent, as they were before the ET.

5. The Claimant appeared in person and the Respondent was represented by Mr Mensah of counsel. They both provided written skeletons and made helpful oral submissions.

6. I have produced this judgment quickly because I understand a hearing of the claim is due to take place for five days commencing on 20 October.

Preliminary Issues

7. At the outset of the hearing, I granted the Claimant permission to rely on documents in a supplementary bundle.

8. In addition, the Claimant applied to amend his Notice of Appeal in an application dated 18 July 2025. Although the application did not set out the precise wording to be inserted in the Notice of Appeal, the thrust of the amendment was that the Claimant wished the Notice of Appeal to make clear that his complaint on appeal was that the EJ had wrongly excluded a claim of *direct* disability discrimination rather than one of *indirect* disability discrimination in respect of his treatment during employment. Hence where the Notice of Appeal referred to the "goal" of the appeal as being to reintroduce aspects of the claim relating to "Indirect Discrimination" during the Claimant's tenure (as well as a claim relating to a failure to make reasonable

adjustments), this should be read as a claim relating to "direct discrimination".

9. Mr Mensah resisted the amendment application, saying (for example) it had been made too late. I decided it was just to allow the amendment in accordance with the guidance in ***Khudados v Leggate*** [2005] ICR 1013 at §86. The Claimant brought the application once he realised, when drafting his skeleton, that he had wrongly referred to claim he wished to bring as indirect rather than direct discrimination. It was a small change in terminology which did not affect the substance of the appeal, it would not delay the hearing, and the Respondent was not prejudiced because it could address the appeal even with this small change.

Factual Background

10. The Claimant was employed by the Respondent as a Customer Services Assistant between, according to his claim form, 1 March 2017 and 26 October 2020. He brought a claim in which he contended he had been unfairly dismissed and discriminated against because of disability (box 8). In providing details of his claim in box 8.2 of the claim form, he said that he had been made redundant on 1 November 2020 and he felt this was unfair dismissal and there was evidence to suggest that "disability discrimination was an influential factor in my selection for redundancy".

11. A Case Management Hearing ("CMH") took place on 16 December 2022 at which EJ Self recorded that the Claimant wished to amend his claim to bring a complaint that his dismissal was an act of disability discrimination. He ordered the Claimant to confirm if that was so, indicate what type of discrimination he was claiming and provide particulars of any other acts of discrimination that he wished to add to his claim.

12. Following that order, on 11 January 2023 the Claimant provided to the employment tribunal ("ET") an email said to identify the legal bases of his claims under the Equality Act 2010 (the "EqA"). It gave details of his claims for disability discrimination under four headings (my numeration added): (1) harassment "during tenure", referring to s.26 EqA; (2) indirect discrimination "during tenure (Section 13 of the Equality Act 2010)"; (3) "Discrimination Arising from Disability at Redundancy" under s.15 EqA; and (4) "Indirect Discrimination at Redundancy/Reasonable Adjustments (Section 19, 20 and 21 of the Equality Act)". Dealing with each of these in turn:

    (1) The claim for harassment related, it was said, to comments the Claimant's colleagues had made about him on the "Criteria Matrix" which, it seems, was a document that set out the criteria used by the Respondent in the redundancy exercise which led to the selection of the Claimant for redundancy.

    (2) Though the second claim referred to "indirection discrimination" - a typographical error - it also referred to s.13 EqA, the provision in the Act

concerned with direct discrimination. This section of the email began by stating that this "aspect of the claim relates to information held in the Criteria Matrix". The Claimant then went on to complain about his exclusion from a WhatsApp group established by his colleagues in April 2022 - I think it is likely the date is a mistake - and comments or rumours on that group which, he said, amounted to less favourable treatment. He also said there were "other instances" of less favourable treatment and violations of his dignity which provided context to his complaints. He did not complain that his dismissal itself was less favourable treatment because of his disability or an act of direct discrimination.

(3) The third claim, based on s.15 EqA, was that the Claimant had received low scores in respect of three factors used in the Criteria Matrix because of matters associated with his disability.

(4) In relation to (4), under heading "Indirect Discrimination at Redundancy/Reasonable Adjustments", the Claimant stated that this "aspect of the claim refers to the criteria applied in the Respondent's Criteria Matrix." The email went on to explain how the application of the criteria in that Matrix put the Claimant at a disadvantage and explained how his disability hampered his capacity to perform or deliver in relation to the criteria, saying that he had no support during his tenure making it "difficult, if not impossible for me to request additional support on many of, if not all, the aforementioned matters in the Criteria Matrix. Reasonable adjustments were also not applied to the Criteria Matrix to account for my mental health". The section concluded by mentioning that when he raised challenges he was facing in the workplace and potential solutions, the Respondent did not engage in discussions.

13. Prior to the hearing before EJ Smith, the Claimant instructed Counsel through direct access. One of the issues to consider at the CMH was the Claimant's application to amend. For the purpose of the hearing, Counsel prepared a note on behalf of the Claimant for the hearing dated 24 March 2023 (the "Note"). It set out the background, including that Claimant only received the Criteria Matrix used to select for redundancy following disclosure on 23 May 2022.

14. The Claimant accepted that he saw and read the Note before it was produced to the ET at the hearing. According to an email from his counsel in the documents before me, he approved the Note.

15. Regarding the application to amend, §12 of the Note stated that in the email of dated 11 January 2023 "C further particularised his claim", adding that "in summary" the Claimant sought to include the following claims (numbering in original): (i) harassment, (ii) direct disability discrimination, (iii) discrimination arising from disability and (iv) indirect discrimination, in each case referring to the corresponding

section of the EqA which defined that type of discrimination. Under (iv), the Note referred only to s.19 EqA and not ss 20-21 EqA, the sections of that Act concerned with reasonable adjustments.

16. The Note then stated at §13 that "the Claimant has considered the above and does not wish to pursue (i)" - the claim for harassment during employment because, it was said, he recognised there were "evidential difficulties". But it continued that he

> "C wishes to pursue (ii-iv). In summary:
>
> 1. **Direct discrimination/automatic unfair dismissal**. Claimant alleges that he was dismissed because of his disability. C avers that the real reason for his dismissal was that he was disabled. R has not provided evidence of a redundancy situation, instead relying on financial concerns. R used the lockdown situation to justify C's dismissal without engaging in a proper process. In the alternative, C was dismissed because of something arising in consequence of his disability.
>
> 2. **Discrimination arising from disability**. [*The Note set out details of how it was said that "something" connected with the Claimant's disability affected his scoring on the Criteria Matrix*.]
>
> 3. **Indirect discrimination**. C avers that the provision, criterion or practice was the use of the criteria matrix. This put C at a disadvantage as there was no adjustment to take into consideration his disability. C avers that the criteria matrix should have been modified (for example, by removing certain categories (flexibility) or increasing scores within other categories) to take into consideration his disability."

17. It should be noted that, as well as being expressed in very different language from the Claimant's email of 11 January, categories (1) and (3) in §13 of the Note had different legal labels and content from the corresponding categories in the email of 11 January. For example:

(1) At §13(1), the Note referred to "direct discrimination/automatic unfair dismissal" and was directed to a complaint that Claimant's dismissal was because of his disability - that is, his dismissal was an act of direct discrimination. This was a legal relabelling or recategorisation of the first category in Claimant's email of 11 January, resolving any ambiguity in that email as to whether the complaint he wished to bring was of direct or indirect discrimination. But the Note also fundamentally differed in the *content* of the

complaint. For whereas the complaint of indirect discrimination "during tenure" in the email of 11 January referred principally to the Claimant's exclusion from a WhatsApp group established by staff members (and not to his dismissal) it seems during employment, the Note referred exclusively to a claim of direct disability based on the Claimant's dismissal.

(2) There was a similar recategorisation and change of content in relation to claim (4) in the email of 11 January, the heading of which referred to both indirect discrimination and a failure to make reasonable adjustments. By contrast, at §13(4), the Note referred solely to "Indirect Discrimination" and said nothing about reasonable adjustments, consistent with how the claims had been expressed in §12. Here, too, there was also a change in the content. While the email of 11 January was very much focussed on how the criteria in the Criteria Matrix placed the Claimant at a disadvantage, it also made some passing mention of how the Claimant had not been told during his employment that he had room for improvement, adding that when he did mention he was facing challenges in the workplace, the Respondent did not discuss these. The Note said nothing about this and made clear that the relevant provision, criterion or practice relied upon for the purpose of s.19 of the EqA was the use of the Criteria Matrix, applied at the point of the Claimant's dismissal.

18. The Note then went on to refer to the familiar criteria in ***Selkent Bus Co Ltd v Moore*** [1996] ICR 836. When it came to applying those criteria, the Note stated that the Claimant accepted the amendment involved a new claim but considered "that the facts underpinning the claim (namely the fairness of the dismissal and whether there was a genuine redundancy situation) was within Claimant's ET1" (§15). It went on to say that the reason for the amendment was that "new information came to light which suggested there may have been a discriminatory reason for the dismissal" (§15; my emphasis). As for potential prejudice to Respondent, the Note stated that it "had the criteria matrix on which it based the decision and it appears that the decision maker is still the manager" of the Respondent (§16).

19. EJ Smith explained in his oral reasons on the day that he had granted Claimant's application to amend based on §13 of the Note. A written summary of his oral reasons, produced by the Claimant's counsel, was included in the documents before me and Mr Mensah did not challenge its accuracy. In summary, EJ Smith said he had decided to allow the application to amend articulated at §13 of the Note because he did not consider any prejudice to the Respondent outweighed the prejudice to Claimant. He concluded, according to counsel's note, that Claimant's claim was amended to include the three claims articulated in §13 of the Note.

20. In his subsequent written reasons EJ Smith stated at §9:

"The Claimant's application to amend his claim was granted. The

> claim is amended to include claims of direct discrimination (section 13 Equality Act 2010), discrimination arising from disability (section 15 Equality Act 2010) and indirect discrimination (section 19 Equality Act 2010) as set out at paragraph 13 of the Claimant's "Note on behalf of the claimant dated 24 March 2023 i.e. as follows:"

The reasons then directly quoted from §13(1)-(3) of the Note in italics under three headings of direct discrimination, discrimination arising from disability and indirect discrimination.

21. Because all the matters for the CMH could not be dealt with by EJ Smith, he decided a further CMH should be held to determine matters such as the list of issues.

22. No application was made to EJ Smith for him to reconsider his judgment after his written decision was produced.

23. A subsequent hearing took place before EJ Abbott on 11 October 2023. EJ Abbott dealt with many issues, one of which was the scope of the amendment decision made by EJ Smith. The Claimant, it seems, argued that EJ Smith had granted permission to amend his claim bring claims for disability discrimination as set out in his email of 11 January 2023, including complaints of discrimination which had taken place during his employment. EJ Abbot disagreed. After viewing the Note, EJ Abbott decided that he was correct in his understanding that EJ Smith's amendment was restricted to issues surrounding Claimant's dismissal, as expressed in his Note: see his EJ Abbott's summary at §12.

The Grounds of Appeal

24. It is against that background that I consider the grounds of appeal. The Notice of Appeal sets out at §3 various criticisms of the decision of EJ Smith. The goal of the appeal is, according to the end of that paragraph, is to "reintroduce the aspect of the Indirect Discrimination during the Claimant's tenure of employment, as well as the aspect of the Claim referring to Failure to Apply Reasonable Adjustments" (underlining in original). As a result of the application to amend the reference to "Indirect Discrimination" should read as a reference to "Direct Discrimination".

25. In support of that overarching end, the Claimant submitted, for example, that (i) the Note referred to by EJ Smith was only stated to be a "summary" of the matters set out in detail in the email of 11 January, (ii) that email made clear it included a claim for direct discrimination in respect of the Claimant's exclusion from a WhatsApp group during employment, (iii) the email also referred to a claim for reasonable adjustments, which the Note never indicated Claimant was withdrawing, (iv) the Note did not state that it would now override the email of 11 January. This mean, the Claimant argued, that he should be permitted to pursue all the claims set out in the email of 11 January 2023, including the claims of direct discrimination in respect of the WhatsApp group

and a failure to make reasonable adjustments during his employment. At §7 of the Notice of Appeal, it is stated said that without allowing the Claimant to pursue these claims, and without any commentary about them, the Claimant has been denied access to justice.

26. When the Note is interpreted in context, I consider that EJ Smith was entitled - and right - to decide that the claims which Claimant wished to amend his claim to include were those set out at §13(1)-(3) of the Note. In other words, he was entitled to decide that the Claimant was then not pursuing the claims as articulated in the email of 11 January 2023 but only the claims as summarised and articulated in §13(1)-(3) of the Note. My reasons are the following.

27. Although §12 of the Note referred to the email of 11 January and said that "in summary" the Claimant had sought to include the listed claims, even at that stage the Note differed from the legal categories set out in the email because the Note did not refer to a failure to make reasonable adjustments. It therefore provided a preliminary indication that the legal categories of the claims the Claimant was then pursuing, after having obtained legal advice, were not the same as those in the earlier email.

28. The next paragraph in the Note further underlined that the Note, and not the email of 11 January, was summarising the claims which the Claimant wished to bring. First, it made clear that the Claimant was not pursuing a claim of harassment, in contrast to the claim based on s.26 of the EqA referred to in the email. Second, the claims which it said the Claimant did wish to pursue - of direct discrimination, discrimination arising from disability and indirect discrimination - no longer included a claim of a failure to make reasonable adjustments. While the Note did not expressly state that the Claimant was no longer pursuing such a claim, in the absence of any reference to such a claim in §12 or §13 of the Note, the EJ was entitled to assume he was no longer seeking to amend his claim to add such a complaint.

29. Third, as explained above, the content of the claims summarised at §13(1)-(3) were different in very significant respects from the content of the claims in the email of 11 January 2023. In addition to no longer saying anything about a failure to make reasonable adjustments (whether during employment or at the point of dismissal), §13 of the Note framed the complaint about direct discrimination as solely directed to the dismissal, contending that the real reason was not redundancy. It said nothing about exclusion from a WhatsApp group during employment or any other form of direct (or indirect) discrimination during employment. Against that background, the EJ was entitled to assume that the claim of direct discrimination being pursued and which it was sought to add by way of amendment was that referred to in the Note.

30. Fourth, the Note did not expressly state that the Claimant wished to pursue all the claims as set out in that email (and only those claims), save for the harassment claim which was expressly withdrawn. If that was the basis of the application before the EJ,

or the proper interpretation of the Note, it risked producing serious difficulties. For example, at the hearing before me, the Claimant submitted that the EJ should have found that the only claim of direct discrimination he was pursuing was that set out in the email, about exclusion from the WhatsApp group during employment, consistent with his submission that the Note only summarised the claims in that email. But the Note very clearly stated that the claim of direct dismissal was about dismissal and said nothing about the direct discrimination during employment. The logic of the Claimant's position was that the Note produced by his counsel was not a "summary" of the actual claims he was seeking at all because, instead of summarising his claim of direct discrimination during employment, it added a new, different claim based on his dismissal. But this made the EJ's task very unclear. The better interpretation of the Note, I consider - and the one the EJ was entitled to adopt - was that it expressed the claims the Claimant was then seeking to add by way of amendment.

31. Fifth, §§15-16 of the Note further underlined that the Claimant was not bringing a claim of discrimination in respect of his treatment during employment (whether of direct discrimination or a failure to make reasonable adjustments). The Note had already made clear that the Claimant was no longer seeking to complain of harassment during employment. In making submissions about the application of ***Selkent*** at §§15-16, the Note contended that the facts about the new complaints were already signalled in the Claimant's ET1, because the claims were only about his dismissal. That was a further reason why the EJ was entitled to assume that Claimant was not, or was no longer, seeking to complain about discrimination during his employment.

32. These considerations all indicate, in my judgement, that the words "in summary" in §12-13 in the Note will not bear the weight the Claimant seeks to place on them. When the Note was interpreted in context and against its background, the EJ was entitled - and right - to interpret §13 of the Note as setting out an accurate and exhaustive "summary" of the claims that the Claimant then wished to amend his claim to include, the legal categories of the claims he wished to pursue, and the summary content of the complaints being pursued.

33. It follows, in my judgement, that the EJ was entitled to restrict the direct discrimination claim to the way it was expressed in §13(3) of the Note and to assume that the Claimant was not pursuing a discrimination claim based on his exclusion from the WhatsApp group as stated in the email of 11 January. The EJ was also entitled to assume that the Claimant was only complaining of indirect discrimination under s.19 EqA as expressed in §13(3) of the Note, and was not complaining of a failure to make reasonable adjustments at all, and in particular during employment (something which, in any case, had very little prominence in the email of 11 January, where the fourth complaint the Claimant sought to add was focussed on the criteria applied at dismissal).

34. Although it is not necessary for the purpose of this appeal, I consider too that when EJ Smith's judgment is interpreted in context and against the background - including how the claims had been reformulated and given different legal categories in the Note - it meant that the Claimant was only pursuing the claims referred to in §9 of the judgment of EJ Smith. It follows that I consider EJ Abbott was correct to reach the view that EJ Smith's judgment, fairly and properly interpreted, did not have the effect of allowing the Claimant to pursue all the amendments set out in the email of 11 January 2023, but only those set out and summarised in the Note.

35. The Claimant raised some other points in his skeleton and oral submissions which I deal with briefly below.

36. I consider EJ Smith gave adequate reasons for his decision to allow the amendment: those were the oral reasons he gave at the time. In circumstances in which counsel gave EJ Smith the Note and only asked for the amendments to include the matters set out at §13(3) of the Note, I do not consider the EJ was required to give any reasons why he was not allowing the Claimant to pursue all the matters set out in the email of 11 January. Rule 60 of the Employment Tribunal Rules of Procedure 2024 only requires a tribunal to give reasons "on any disputed issue". There was no dispute before the EJ that the Note did not accurately summarise the claims the Claimant wished to bring. The EJ gave adequate reasons for answering the matter in dispute before him - whether or not to allow the Claimant to amend to include the claims set out in the Note - in favour of the Claimant.

37. Nothing in how EJ Smith dealt with the application to amend begins to show any procedural irregularity, bias or prejudgment. On the contrary, the EJ allowed the Claimant's amendment application as it was formulated before him. Nor is it correct to characterise what the EJ did as tantamount to striking out the claims set out in the email of 11 January because the Note made clear the claims the Claimant wished to pursue, their legal labels and a summary of their content.

Conclusion and Disposal

38. My conclusion is that the appeal is dismissed. As I explained to the Claimant at the hearing, the directions for the full hearing before the ET are a matter for the ET.