Neutral Citation Number: [2026] EAT 14

Case No: EA-2023-001073-JPD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 January 2026

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

Mr Besmir Pepkolaj

Appellant

- and -

Barrett Steel Limited

Respondent

- -
- -

The **Appellant** in person
Nick Singer (instructed by Walker Morris LLP) for the **Respondent**

Hearing date: 15 January 2026

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JUDGMENT

SUMMARY

Practice and Procedure

The Employment Tribunal did not err in law by not identifying a complaint of discrimination because of something arising in consequence of disability in the claimant's claim.

HIS HONOUR JUDGE JAMES TAYLER:

The issue

1. The issue in the appeal is whether the Employment Tribunal erred in law in failing to identify a complaint of discrimination because of something arising in consequence of disability in an Employment Tribunal claim.

The Judgment appealed

2. This is an appeal against the judgment of Employment Judge E Fowell after a hearing on 27 July 2023. Employment Judge Fowell dismissed the claim submitted to the Employment Tribunal on 6 February 2023 because it was presented out of time. Employment Judge Fowell did so on the basis that the sole complaint was one of unfair dismissal. The dismissal of that complaint is not challenged in the appeal.

The factual background

3. The respondent is a large steel stockholder with sites across the UK. It has a depot at Shoreham acquired from Parker Steel from whom the claimant's employment transferred to the respondent. The claimant worked as a Crane Operator and Warehouse Assistant.

4. The claimant had an accident at work on 24 November 2019 when he injured his right wrist. The claimant is right handed. The claimant underwent surgery on 4 May 2021, after which he was given a plaster cast and signed off work. The claimant was dismissed at a meeting on 29 September 2022. The dismissal was confirmed in a letter the following day. The claimant was absent from work at the time. He was awaiting a further operation for which there was no scheduled date.

5. The claimant appealed against his dismissal. The appeal hearing took place on 4 November 2022. The claimant was informed that the dismissal was upheld by letter dated 8 November 2022.

The personal injury claim

6. The claimant brought a personal injury claim in respect of his wrist injury that was settled in December 2022. The claimant was represented by solicitors in the personal injury proceedings.

The Employment Tribunal claim

7. The claimant submitted a complaint to the Employment Tribunal that was received on 6 February 2023. The claimant acted in person with assistance from his partner. Neither are lawyers. The claimant ticked the box at section 8 to state that he was making a complaint of unfair dismissal. He did not tick the box to state that he was bringing a complaint of disability discrimination. At section 8.2 the claimant stated:

> I was dismissed from work due to ill health for a problem that happened when I was working for Barrett Steel. I injured my wrist at work, Barrett Steel accepted liability and I have had a wrist surgery done in May 2022 to repair the damage on my wrist.
>
> Now I am waiting for another surgery on my wrist because the doctor has not repaired it completely. I have asked Barrett Steel to keep me employed for them until after the next surgery because I would struggle to find a job and I would like to go back to the same job after the operation. I had a huge passion for my job and this situation has affected me tremendously. I have been doing this job since 2016.
>
> I have always kept Barrett Steel updated for my situation and I believe that their dismissal was unfair for me because I suffered the injury while working for them and it was due to the manager's neglect.
>
> I will suffer from a huge financial loss if I don't get my job back and me and my family of 5 cannot afford that.
>
> I have always been one of the best workers because I work with passion for the job.

8. At section 9, which concerns remedy, the claimant did not tick the box next to the wording "If claiming discrimination, a recommendation (see Guidance)".

9. At section 12, which concerns disability, in answer to the question "Do you have a disability?" the claimant ticked the box "no".

10. The date of dismissal was stated on the claim form to be 8 November 2022, the date of the letter dismissing the appeal. As a result the time point was not picked up on when the claim was submitted.

11. The respondent submitted a response on 15 March 2023. The respondent was not represented at the time. The respondent also did not pick up on the time point. The respondent stated that attempts

had been made to make adjustments for the claimant.

12. Standard case management orders were made to prepare for a hearing of the complaint of unfair dismissal. A hearing was initially listed for 24 August 2023. The hearing was brought forward to 22 June 2023. A bundle was prepared for the full hearing which included a statement from the claimant in which he referred to having a disability.

13. Having obtained legal representation, the respondent contended that the claim was out of time. The hearing listed for 22 June 2023 was converted to a Preliminary Hearing to consider the time point. It was postponed to 27 July 2023 to allow time for an Albanian interpreter to be provided for the claimant and for an exchange of witness statements relevant to the time point. The claimant provided a statement in which he referred to unfair dismissal, asserted that he had made protected disclosures, but did not refer to disability.

The decision of the Employment Tribunal

14. The Employment Tribunal concluded that the dismissal had taken place on 29 September 2022. The Employment Tribunal held that the complaint of unfair dismissal was submitted out of time. The Employment Tribunal noted that assistance might have been obtained from Citizen's Advice or from the solicitors who represented the claimant in the personal injury claim.

15. The Employment Tribunal was provided with a bundle of documents that included a medical report from Dr Perez.

The appeal

16. The claimant appealed to the Employment Appeal Tribunal ("EAT"). The original grounds of appeal were in general terms. There was some very limited reference to disability and reasonable adjustments. His Honour Judge Barklem was of the opinion that there were no reasonable grounds for bringing the appeal. The claimant challenged that opinion pursuant to Rule 3(10) of the **Employment Appeal Tribunal Rules 1993 (as amended)**.

17. At the Rule 3(10) hearing, the claimant was represented by James Wynne of Counsel under

the Employment Law Appeal Advice Scheme who submitted amended grounds of appeal that His Honour Judge Beard permitted to proceed:

> Background
>
> 1. The Claimant in his ET1 ticked the box at paragraph 8.1 regarding unfair dismissal, he did not tick any box regarding discrimination. However, in paragraph 8.2 he says, "*I was dismissed from work due to ill health*", "*I had a wrist surgery done*", "*the doctor has not repaired it completely*" and "*I have asked Barrett Steel to keep me employed for them until after the next surgery because I would struggle to find a job*".
>
> 2. In the ET3, at the continuation of paragraph 6.1, and at paragraph 17 of that text, the Respondent says, "*On the 26th August 2022, having been off sick for 16 months, the business was still no clearer with regards to Besmir having a return to work date despite trying to work with him to get to a point when he would be fit for full duties, and the absence continues to cause operational issues*". At paragraph 20 of that text the Respondent says "*Discussions took place initially on whether there were any reasonable adjustments which could be made to his current role in order to facilitate a return, as well as that looking at any other alternate roles within the business. Following a full discussion and consideration, from his own admission he agreed that there were no suitable reasonable workplace adjustments which could achieve this whilst he were waiting for the outcome of the meeting with the specialist in December and what the subsequent actions that may come of this*". At paragraph 21 the Respondent says, "*Barrett Steel couldn't keep the role open indefinitely so the decision was made to terminate Besmir's contract on ill health capability*".
>
> 3. A medical report from Dr Perez produced and seen by the Respondent before the Claimant's employment was terminated, and dated 21.02.2022, identified substantial adverse impacts on the Claimant's day-to-day activities. This report was before the Tribunal.
>
> 4. The matters set out in the ET1, the ET3 and the medical report should have indicated to the Tribunal at the Preliminary Hearing that the alleged facts may raise a claim not just of unfair dismissal due to ill health but also that the dismissal was because of absence arising from a disability, namely a s.15 disability discrimination claim. The Tribunal ought to have enquired of the Claimant as to the nature of the ill health leading to the absence and clarified the nature of and differences between an unfair dismissal claim and a claim that the dismissal amounted to disability discrimination. Had the Claimant expressed the intention to pursue a disability discrimination claim on the facts alleged in his ET1, the legal test for the applicable time limit was the "just and equitable" test, which the Claimant may well have satisfied. The Tribunal may then have extended time for the disability discrimination claim and potentially also the unfair dismissal claim.
>
> 5. The Claimant asserts that had he been informed of the possibility of a s.15 disability discrimination claim along the lines of what is set out above, he would have sought to pursue that claim.

> Grounds of Appeal
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> (1) The Tribunal erred in not addressing with the Claimant whether his dismissal claim included a s.15 disability discrimination claim.
> (2) The Tribunal erred in not addressing whether time should be extended for that disability discrimination claim under the "just and equitable" jurisdiction.
>
> (3) The Tribunal erred by considering in isolation an extension of time for the unfair dismissal claim, without also considering whether time should be extended for the s.15 claim under the "just and equitable" jurisdiction, and how the interaction of the two limitation tests should impact the exercise of its discretion.

18. At the Rule 3(10) Hearing His Honour Judge Beard stated:

> I considered the grounds to be just about arguable: the claimant had indicated in the ET1 that he had been dismissed because he was absent through injury, the ET3 and E1 read together indicated that this injury had been long term, a medical report before the tribunal at the preliminary hearing indicated that the injury had a more than merely trivial impact on the claimant's day to day activities. Had the box for discrimination been ticked on the ET1 form then no doubt that claim would have been explored and the just and equitable test would have been in operation for disability discrimination and the outcome might have differed. I was doubtful that an Employment Judge should explore discrimination when no indication is given, however, the claimant is not a native English speaker and it may be some leeway ought to be accorded to him given that fact. However, my substantive reason for permitting the appeal is, although not on all fours, there is enough coincidence of facts in the case of **Moustache v Chelsea &Westminster Hospital NHS Foundation Trust** [2023] ICR 1231, where the appeal was allowed, for the specific facts of this case to be explored on appeal.

19. At the time of the Rule 3(10) Hearing **Moustache** had been determined in the EAT. It has subsequently been overturned by the Court of Appeal.

The appeal hearing

20. Mr Wynne had been due to represent the claimant but withdrew on 14 January 2026. The claimant did not seek a postponement. With the assistance of an interpreter the claimant and his partner made quite lengthy submissions. It was clear that the claimant feels very strongly about his situation. He was, as appears to have been accepted by the respondent, a good and committed employee. He wished to stress his honesty and hard work for the respondent, which I have no reason to doubt. I accept that he has found the process stressful and believes that there is obvious merit in his claim and the appeal. While I understand how strongly the claimant feels, I have to apply the law and act in a manner that is fair to both parties.

The relevant law

21. The protected characteristic of disability is defined by section 6 of the **Equality Act 2010** ("**EQA**"):

> 6 Disability
>
> (1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
>
> (2) A reference to a disabled person is a reference to a person who has a disability.

22. In **Goodwin v Patent Office** [1999] ICR 302, Morison J analysed the predecessor provision in the **Disability Discrimination Act 1995** into four components, at p308 B-C:

> 3. Section l(l) defines the circumstances in which a person has a disability within the meaning of the Act. The words of the section require a tribunal to look at the evidence by reference to four different conditions. (1) **The impairment condition**. Does the applicant have an impairment which is either mental or physical? (2) **The adverse effect condition**. Does the impairment affect the applicant's ability to carry out normal day-today activities …, and does it have an adverse effect? (3) **The substantial condition**. Is the adverse effect (upon the applicant's ability) substantial? (4) **The long-term condition**. Is the adverse effect (upon the applicant's ability) long-term? [emphasis added]

23. Section 15 **EQA** provides:

> 15 Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B **unfavourably because of something arising in consequence of B's disability**, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability. [emphasis added]

24. The relevant law on the interpretation of claim forms has now been settled by the Court of Appeal in **Moustache v Chelsea and Westminster Hospital NHS Foundation Trust** [2025] EWCA

Civ 185, [2025] I.C.R. 1231. Lord Justice Warby stated the appropriate approach, specifically in the context of a case in which there was an agreed list of issues, but making points of general significance:

> The first issue: what is the nature and scope of the ET's duty to identify and determine issues in the proceedings, where the parties have agreed a list of issues?
>
> 32. I think it helpful to approach this question with four general points in mind.
>
> 33. **First, proceedings in the ET are adversarial.** The range of claims that may be brought and the range of substantive or procedural answers that may be raised to those claims are defined by law, principally by statute. In any given case the primary onus lies on the parties to identify, within those ranges, which claims they wish to bring and which answers they wish to advance.
>
> 34. **Secondly, the issues raised by the parties are those which emerge clearly from an objective analysis of their statements of case. Identification of the issues does not involve reference to other documents which do not have the status of pleadings and come later. Nor should the process be a complex or difficult one.** As Judge Auerbach said in *Pranczk v Hampshire County Council* (unreported) 12 June 2020, para 49, "That pleadings matter, including in employment tribunals, is not a novel or controversial point". **The EJ should not be expected to analyse a party's case by reference to documents which come after the pleadings and do not have the same status, such as a witness statement, or by reference to submissions.** As Langstaff J (President) explained in *Chandhok v Tirkey* [2015] ICR 527, paras 16–17:
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> > "such an approach too easily forgets why there is a formal claim, which must be set out in an ET1. The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made—meaning, under the [ET Rules], the claim as set out in the ET1.
> >
> > "… the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted … Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute."
>
> 35. **Of course, the contents of a statement of case must be analysed in their proper context but this does not require the ET to engage in an elaborate or complex interpretative exercise.** I would adopt the words of Elisabeth Laing J (as she then was) in *Adebowale v ISBAN UK Ltd* (unreported) 5 August 2015 at para 16:
>
> > "the construction of an ET1 is influenced by two factors: the readers for whom the ET1 is produced, and whether the drafter is legally qualified or not. The ET1, whether it is drafted by a legal representative, or by a lay person, must be readily understood, at its first reading, by the other party to the proceedings (who may or may not be legally represented) and by the EJ. The EJ is, of course, an expert but … should not be burdened by, or expected by the parties to engage in, a disproportionately complex exercise of

interpretation."

36. Thirdly, where a party seeks the ET's ruling on an issue that emerges from an objective analysis of the statements of case (and falls within its jurisdiction) the ET has a duty to address that issue. This is the core function of the tribunal. That does not mean that the ET has to resolve every issue that is raised in a case. Sometimes a party will not press all the claims that have been pleaded; the ET is not obliged to address those which are raised but later abandoned: see *Mensah v East Hertfordshire NHS Trust* [1998] IRLR 531 . And the ET needs only decide enough to reach a conclusion on the claims that have been pressed. Subject to these points, however, I would accept the broad submission of Ms Monaghan, that the ET does not have a discretion not to consider and determine a claim that has been brought before it.

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 proactive 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 paras 28 and 36 and *Muschett v HM Prison Service* [2010] IRLR 451, para 31. I do not consider it necessary to review those two cases in further detail. That was done in *Drysdale v Department of Transport (Maritime and Coastguard Agency)* [2015] ICR D2; [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.
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> (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.
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> (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.

Analysis

25. The claimant contends that it should have been clear from the claim form, when read with the report of Dr Perez and his witness statement that had been produced for the full hearing, but was in the bundle at the Preliminary Hearing, that he was claiming disability discrimination.

26. I have concluded that, at most, the Employment Judge might have thought that there was a possibility of a complaint of discrimination because of something arising in consequence of disability. The claim form suggested the impairment condition could be met because of the wrist injury. The fact that the claimant could still not undertake his job duties suggested that the adverse effect and substantial conditions might be met. The period from the accident to the dismissal suggested that the long-term condition could be met. The report from Dr Perez provided some further support.

27. I do not consider it was incumbent on the Employment Judge to read the liability statement even though it was in the bundle. The statement is also not relied on in the amended grounds of appeal. Further, I do not consider that it adds anything of real significance to the other material.

28. The fact the respondent referred to adjustments also suggested the possibility of a disability discrimination complaint. The fact that the claimant was dismissed because he was unable to undertake his job duties suggested the possibility of a complaint of discrimination because of something arising in consequence of disability.

29. But **Moustache** makes it clear that the fact that the claim form suggests the possibility of a complaint does not mean that the complaint has been pleaded. The claimant had not ticked the box for disability discrimination and had specifically stated that he was not disabled. The complaints brought

were limited to those which emerged clearly from an objective analysis of the claim form. On an objective analysis a complaint of discrimination because of something arising in consequence of disability was not pleaded.

30. **Moustache** suggests that the identification of the issues does not involve reference to other documents. That does not mean that it would have been impermissible for the Employment Judge to look at some additional document. However, the other documents relied on by the claimant also only suggest the possibility of a claim of discrimination because of something arising in consequence of disability. The claimant would have needed to seek an amendment to bring such a complaint. As stated in **Moustache** an Employment Judge may consider it appropriate to explore the scope of a party's case by way of clarification, particularly in the case of an unrepresented party. But **Moustache** also makes it clear that whether to do so is a matter of judgment and discretion which will rarely qualify as an error of law. It probably would not have been an error of law for the Employment Judge to investigate the possibility of such a claim further, including the possibility of amendment. However, the Court of Appeal in **Moustache** states in clear terms that there is no general duty to take proactive steps to prompt some expansion or modification of the case advanced by a party where that might be to their advantage.

31. Many complaints of unfair dismissal are brought where a person is dismissed on capability grounds as a result of ill health, without an additional complaint of discrimination because of something arising in consequence of disability. Not all ill health qualifies as a disability. In claims such as this it does not cry out for the ET1 that the claim necessarily includes a complaint of discrimination because of something arising in consequence of disability.

32. It was not an error of law for the Employment Tribunal not to address with the claimant "whether his dismissal claim included a s.15 disability discrimination claim." On an objective analysis the claim form did not include such a complaint and the Employment Judge was not obliged to investigate whether the claimant wished to bring such a complaint. Accordingly, there was no basis

for the Employment Judge to consider an extension of time on just and equitable grounds.

33. I do not have a transcript of the Preliminary Hearing. From the judgment it appears that the focus at the hearing was on the claimant's contention that time ran from the outcome of the appeal rather than the effective date of termination. It is not suggested that the claimant said at the hearing that he wished to bring a complaint of disability discrimination.

34. In the circumstances, on a proper application of the relevant legal principles, the appeal must fail and is dismissed.