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Case No: EA-2020-000847-DA
EA-2020-000848-DA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15th December 2021

Before :

HIS HONOUR JUDGE WAYNE BEARD

Between :

MR DANIEL BEECH **Appellant**
- and -
AVON FIRE AND RESCUE SERVICE **Respondent**

The Appellant in Person

Mr A Roberts (instructed by Veale Wasbrough Vizards) for the **Respondent**

Hearing date: 15th December 2021

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The Claimant's first ground of appeal was misconceived insofar as it was argued that it only related to a case management order to alter the list of issues. The case management order sought required the ET to make prior conclusions as to whether an amendment ought to be allowed and whether a strike out application should be granted. Any application to make a change to the ET1 or attached documents should be considered an application to amend. The label "amendment" is not fundamental, it is the exercise of judicial discretion in relation to the amendment application that it requires that is important.

The Employment Judge, as part of her decision to refuse an amendment application, took account of a factual matter (when the Claimant became aware of a fact relied on for the amendment) on a potentially erroneous basis and drew a conclusion as to that fact without hearing evidence or submissions on that fact. The decision was therefore made failing to take account of a matter which should have been considered. The decision on amendment did not admit of only one outcome and as such remitting the matter was appropriate. There were no reasons as to why that could not be before the same Employment Judge.

The final ground was not considered as it would involve drawing conclusions which might have an influence on the amendment decision remitted.

HIS HONOUR JUDGE WAYNE BEARD

Preliminaries

1. This Appeal is against the decision of Employment Judge Rayner, first to require and then to refuse an amendment application and following this up by striking out the remaining claim of direct discrimination on the grounds it had no reasonable prospects of success. The Claim was for sex discrimination, and the judge decided that direct discrimination as set out in a document entitled “Further and Better Particulars” was not foreshadowed in the ET1 form, and would not permit an amendment to add this as a *new* claim of direct discrimination. I shall refer to the Parties as they were below, as Claimant and Respondent.
2. The Grounds of Appeal are as follows (and the Claimant, I should say, relies on these Grounds as the basis of his legal argument):
 - a. First, that the decision to require an amendment application was made because the employment judge either misapplied Rules 29 and 30 of the Employment Tribunal Rules of Procedure 2013 or, alternatively, misdirected herself as to the meaning of those Rules. The contention made is that an allegation of direct discrimination was contained within the facts set out in the Particulars of Claim attached to the ET1;
 - b. The second ground is that the Employment Tribunal (“the ET/Tribunal”) did not adopt a fair procedure. This is, firstly, based on a failure to seek submissions from the Claimant before drawing the conclusion that there was no direct discrimination pleaded. This is because the Claimant’s written submissions had only dealt with the issue as one of adding Further and Better Particulars rather than addressing an amendment application. It is further argued that, if an amendment was required, the employment judge should have sought submissions as to *how* the amendment application was to be determined.
 - c. It is also argued that in approaching matters as she did, the employment judge also drew an erroneous factual conclusion as to the Claimant’s state of knowledge at the

time the ET1 was presented. This, it is argued, could have been corrected by the Claimant calling evidence;

- d. The final ground is that because of the approach taken (that criticised in the first two grounds) the employment judge took account of matters that she should not have and ignored matters she should have considered. Alternatively, it is argued that the decision to strike out was one that no reasonable employment judge could have reached, taking the Claimant's case at its highest and in particular,
 - i. the decision was made on the existence of evidence of less favourable treatment without hearing evidence and in contradiction of documentary evidence before the employment judge.
 1. The Claimant argues that there was evidence of the difference in treatment in marking sheets. That evidence was that a female had been given an opportunity for a re-test on one element of testing and the Claimant was not. Further, there was evidence in a letter of 12th September 2019 from the Respondent which could support a finding that gender was a reason for a difference in treatment.
 2. The further criticism is that the judge was making findings of fact as to the Respondent's reason for difference of treatment without hearing evidence from the Respondent.
 - ii. It is argued that she was misapplying section 136 of the Equality Act 2010 (the reverse burden of proof provisions) and then misdirecting herself on its meaning or, alternatively, coming to a perverse conclusion that the Claimant had not shown something more than a difference in gender and a difference in treatment.
 1. The 12th September letter, sent by the Respondent, contained a potential admission, the Claimant argues, of discriminatory treatment

on the ground of sex. However, at the ET hearing, counsel for the Respondent submitted that this applied only to the third stage of the recruitment process, after the Claimant had been eliminated. The employment judge did not address whether this could amount to something more for the purposes of the reversal of the burden of proof provisions.

2. It was argued that the employment judge should not have accepted this assertion by the Respondent's counsel without oral evidence about the process as a whole.
- iii. The employment judge is also criticised in this Ground of Appeal, for drawing a conclusion that a letter conceding that a criterion for selection considering the under-representation of women was positive action, without consideration of the law or submissions on that point and/or hearing evidence.

The Facts

3. The Claimant sought an apprentice firefighter role with the Respondent. There seems little dispute about the recruitment process. From 124 applicants (108 male, 15 female) 67 (including the Claimant) were shortlisted (55 males and 12 females). Those applicants were required to attend an assessment centre. Eight males and one female did not turn up at the assessment centre. The first stage was a fitness test ("the Gym test"). Three people failed at this stage. At the next stage, a series of tests were undertaken which form a standardised national fitness requirement ("NFS" as it is known). The Claimant and one female were eliminated for failing part of the NFS; in the Claimant's case involving a ladder climb. In the Claimant's case, it was said that he demonstrated insufficient confidence in this aspect and used the wrong leg and arm sequence. The female was allowed a second attempt at the ladder climb and the Claimant was not. She then, however, failed in another aspect of the test; others failed at a later stage in other ways. These failures prevented the Claimant and some nine

others from going through to the final phase. The 48 candidates then left were subject to a final selection, from which tables show that ten were selected and five were placed on a reserve list. Of the ten selected, six were female and four male; of the five reserves, two were female and three male.

4. After his rejection in this process, the Claimant, through his mother, asked for feedback, this was not provided to him. The reason for not providing feedback advanced by the Respondent at that stage was that, given the numbers involved, it was not possible to give such feedback. Not content with this response, the Claimant then made either a Freedom of Information application or a Subject Access Request, it is not clear to me which but that does not matter for the purposes of this hearing; the result was that the Claimant being provided with some of the information I have just set out above.
5. However, in the material provided to the Claimant there was information which the Respondent has since admitted was not correct. For instance, the information indicated that the Claimant had passed the national requirements section.
6. The Claimant's mother sent a letter on 2nd August 2019. She complained that the tables recording scores were incorrectly calculated and that the data was flawed or that unrecorded additions had been made to scores. She went on to complain that there appeared to be bias towards appointing females, given the balance of male:female applicants and that of male:female appointees. She also complained that the interview panel was made up only of women.
7. The Respondent sent a letter in response, dated 12th September 2019. The letter indicated that the arithmetical errors were only present in the document that had been sent to the Claimant. It was explained that figures had been taken from an original spreadsheet and were not checked. The letter also indicated that the document showed the Claimant as having passed the NFS test when he had not and this had also been corrected. The letter then set out that there had been a review of the selection process and set out the following in respect of the

complaint of bias:

“Our review has revealed that there were some shortcomings in the process that was followed as part of the recruitment exercise. These relate specifically to the decision by the lead assessors to apply a selection criteria, which was in accordance with the information that you have been provided with, but which also had regard to the under representation of female Firefighters within the workforce.”

The letter went on to indicate that there was a gender mix in the assessment panels overall and over the assessment process as a whole. One thing is now apparent: the entire recruitment process was abandoned because of the Respondent’s concerns about the flaws in the process, which it referred to in that letter, and the offers made to those selected were withdrawn.

8. The Claimant presented his claim to the Tribunal in December 2019. The substance of the Claim was contained in a Particulars document attached to the ET1 which set out, amongst other things, the following alleged facts: that the Claimant had attended an assessment centre and there had been admitted shortcomings in the selection process with regard to under-representation of female fire fighters; that the process of recruitment had been halted because of the flaws; and that:

“it is against the law to discriminate against anyone because of their sex in recruiting”

In paras. 9 and 10 the Claimant refers to the 12th September letter and a flawed process specifically. However, there is no further indication as to the basis of those flaws, save the earlier references to disproportionate outcomes. Under the heading “Claims”, the document set out that the Claimant was

“directly discriminated against contrary to s19 and s39 (1) of the Equality Act 2010.”

Of course, that is internally inconsistent, as s19 deals with indirect discrimination and direct discrimination is dealt with by s13 of the Act.

9. On 23rd July 2020, a preliminary hearing was conducted at which the Claimant was represented by Mrs Anwar, described as a caseworker, presumably working for the Bristol Law Centre, which was recorded as representing the Claimant at that stage. In the Case Management Order made on that date, the only legal issues listed (after discussions with the

Parties) were those pertinent to an indirect discrimination claim. As part of the same order, the employment judge ordered that the Claimant provide further information. That, too, related to indirect discrimination, requiring the Claimant to provide information upon which provisions, criteria and/or practices were alleged and what relative disadvantage was relied upon. At the hearing, the employment judge declined to order a deposit, but arranged for a preliminary hearing to consider whether the Claimant's case should be struck out or deposit ordered.

10. The Claimant, as ordered, provided the further information required by 30th July 2020. This document indicated that the direct discrimination claim was being pursued. It made clear that this was because, in the absence of disclosure, the approach to the scoring of assessment was such that it could not be ascertained whether the approach was direct discrimination. However, a document dated 28th August 2020 and headed "Further and Better Particulars" was also sent to the Tribunal. That document was accompanied by a further document, setting out an application for a case management order to vary the list of issues. The Further Particulars included a claim of direct discrimination, indicating that the Claimant alleged that he had been marked more harshly or treated with less leniency than female applicants, relying on a hypothetical comparator. The application was made to amend the list of issues to include this complaint of direct discrimination. It would appear that this was created after disclosure of documentation which showed that a female had been allowed to re-set in the ladder climb, that information coming on 24th August 2020.
11. The Judgment and decisions made by the employment judge following the Preliminary Hearing on 4th September was, perhaps unusually, set out in three separate documents: one deals with the order to strike out a direct discrimination claim; the second deals with the deposit order; and the third deals with case management issues. Approaching matters in that way separates the reasons for ordering a strike out on the direct discrimination from those relating to the Further Particulars and the case management order application, despite those

matters being intimately connected.

- a. The decision on the application described that the Claimant was seeking to include a new claim of direct discrimination. The judge records in the first case management hearing, that she, following a discussion, had understood that there was an indirect discrimination claim and only an indirect discrimination claim. She concluded that, although direct discrimination formed part of the ET1 information, it was based on different facts from those the Claimant was now trying to advance. She came to a conclusion that this was in reality an application to amend the ET1, because

“the assertion that there may have been ---- discrimination by the person who carried out the assessment of the Claimant’s ladder climbing appears nowhere in his ET1”

She then appears to apply the **Selkent** principles in concluding that the amendment should not be allowed, referring to time limits; that this was not a re-labelling of facts; that the factual information supporting the new position was available to the Claimant at the July hearing and before; and there was no explanation for the late application. She went on to consider the potential merits of the case. The judge accepted that there was a direct discrimination claim based on a failure to progress, but without an allegation of less favourable treatment within it. The reason for strike out is summarised in this document but dealt with in full in the separate judgment.

- b. The Strike Out Judgment refers to the claim of direct discrimination as: the Claimant failing to be recruited because the Respondent operated a system which favoured women over men. The Judgment goes on to indicate that discrimination was denied and the reason advanced by the Respondent for the Claimant’s failure was the failure in the ladder climb; the 12th September letter was quoted. The judge then goes on to state that at the Preliminary Hearing no direct discrimination claim was advanced by the Claimant and that employment judge had concluded that, on the evidence before

her there was no obvious basis for asserting less favourable treatment, the judge indicating that the Claimant must be able to pinpoint something more than a difference in treatment and a difference in gender to establish that. The employment judge draws two factual conclusions which she considered were “highly likely”: first, acceptance of the Respondent’s assertion that the Claimant was subjected to the same treatment as all candidates; and secondly, that the Claimant failed to climb a ladder at the required standard.

The Law

12. The Claimant relies on Rules 29 and 30 which provide:

“Case management orders

29. The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. ... the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

...

30.—(1) An application by a party for a particular case management order may be made either at a hearing or presented in writing to the Tribunal.

(2) Where a party applies in writing, they shall notify the other parties that any objections to the application should be sent to the Tribunal as soon as possible.

(3) The Tribunal may deal with such an application in writing or order that it be dealt with at a preliminary or final hearing.”

13. In respect of Rule 37, which I also have to deal with, it provides that:

“Striking out

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

[And the only relevant ground here is:]

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

...

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.”

14. What amounts to an amendment is not defined within the ET Rules. However, in **Selkent Bus Company Limited v Moore** [1996] IRLR 661, guidance on allowing and refusing

amendments has been given. The judgment in that case makes it clear that such decisions amount to the exercise of judicial discretion, made:

“...in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions....”

15. Within his description of types of amendment, Mr Justice Mummery (as he then was) indicated that applications span a wide range, from the minor (for example, correction of clerical errors), through the more important (such as an addition of factual details of existing allegations), to the very substantial (for example, making new factual allegations which change the basis of a claim). In my Judgment, that analysis supports a conclusion that any change made to add to or subtract from the ET1, or any document attached to the ET1 (that is: an alteration to the original pleaded case), however minor, is an amendment. Such changes are necessarily intended to form the framework of a claim at a trial. That any change is an amendment matters little, however, because that simply starts the process of judicial consideration; what is fundamental is the exercise of judicial discretion in relation to an amendment. Such consideration *must* take account of all the circumstances in which it has been sought, which include those matters mentioned in **Selkent**, but are not confined to those matters. **Gillett v Bridge 86 Ltd** UKEAT/0051/17/DM indicates that, in considering all the circumstances which relate to an amendment application, the merits of the proposed amendment may be taken into account.
16. My attention was drawn to a number of authorities. I don't refer to all of them here, but those which are of some relevance are these: starting with the correct approach to appeals on interlocutory matters, I was referred to **Adams v Raynor and West Sussex Council** [1990] IRLR 215, where it was decided that the Employment Appeal Tribunal (“EAT”) does not have a general power of review of interlocutory orders made by employment tribunals. In order to succeed, the ET must have erred in legal principle in the exercise of the discretion, or must have failed to take account of relevant considerations or take account of irrelevant factors or,

finally, that no reasonably tribunal properly directing itself could make the decision.

17. Of course, this appeal also relates to a strike out of a claim, and so involves a final disposal and so is not interlocutory in that respect. In **Mr A Kwele-Siakam v the Co-operative Group Ltd** UKEAT/0039/17/LA Mrs Justice Slade DBE considering the appeal in a race discrimination case in which a strike out decision was made by the employment judge after hearing evidence and cross-examination of the claimant alone. The point is made by her that where factual, as opposed to jurisdictional, matters are at issue, the draconian step of strike out should be exercised with extreme hesitation and, where such a decision could not be determined without evaluating evidence, there should be no strike out. Mrs Justice Slade went on to say that, where the employer's treatment is at issue, that is a finding of fact for the tribunal, even where that fact may need to be drawn from inferences about undisputed facts. Where such a finding of fact is, as she put it, "at the heart" of a claim, it is not likely that it would be suitable for a decision on strike-out.
18. **Ahir v British Airways** [2017] EWCA Civ 1392 is a case in which the Court of Appeal makes it clear that, even in a discrimination claim, a strike-out can be justified where there are disputed facts, where there is no reasonable prospect of the facts necessary to the liability being established. Similarly, **Jaffrey v the Department of Environment, Transport and the Regions** [2002] IRLR 246 provides authority for the proposition that, where facts are not in dispute, but an essential element of a complaint for discrimination is not shown by those facts, a strike-out is appropriate.
19. **Mechkarov v Citibank NA** [2016] ICR 1121 makes it clear that any strike-out decision is required to take the Claimant's case at its highest, and both **Mechkarov** and **Kwele-Siakam** make it clear that mini-trials are to be avoided when considering such matters.
20. In **Mervyn v BW Controls Ltd** [2020] EWCA Civ 3930] the Court of Appeal held it is good practice for an ET, where a party or parties are unrepresented, to examine whether any previously prepared list issues properly reflects the significant issues in dispute between the

parties. The Court then goes on to say that where it is clear that the list does or may not reflect those issues, the tribunal should, in the interests of justice, consider a change to the list. However, the case does make it clear that these issues must be apparent from the pleadings.

Discussion and Conclusions

21. It appears to me that Ground 1 of the Appeal is misconceived; in terms, it appears to rely on the request for a change in the list of issues. Rules 29 and 30, appear to me to set out practical steps to be taken by the tribunal in case management. I do not consider the rules have any great relevance to the matters raised in Ground 1 of the appeal. The change that was sought in the list of issues was a change which would have only been appropriate where an amendment was granted and the strike out application refused. The Tribunal did not conclude that there was no direct discrimination claim in the original documentation, but instead that the additional facts contained in the Further Particulars document did not form part of the existing direct discrimination claim, but were seeking to add a new complaint. As may be clear from my conclusions as to the applicable law, any change to the documentation presented to commence a claim involves an amendment. In terms, therefore, what the employment judge was engaged in was an exercise in discretion in deciding issues related to the amendment sought by the changes to the ET1 requested. As such, that is an interlocutory decision which, in line with Adams, I am required to pay due respect to the employment judge's conclusions and can only interfere in the limited circumstances prescribed by that case.
22. The employment judge set out her facts and conclusions from the 4th September Hearing in more than one document. I can understand why this was done, in order that the Parties could clearly understand the orders that had been made and their differing impacts. However, in practical terms, it might have been more convenient for the judge to create a single document in which the facts found and reasons for her decisions were to be found. That document could have had attached to it separate pages for the orders of case management, deposit and strike

out which referred back to those facts that she had found. However, having said that, having read all three documents, the facts upon which the judge relied can be clearly understood.

23. Mr Roberts (for the Respondent) submitted that it was obvious that this was a new complaint of direct discrimination because in the earlier documentation everything had related to disproportionate outcomes and scoring. The assessment was in parts; it was obvious that the flaws referred to in the letter were related to the final part of the assessment; and this was accepted by all in the Hearing before the ET. The new complaint related to the second part of the assessment. He argued that the Claimant does not contest that he failed that second part and it is a pass/fail situation; scoring only related to the final part and, therefore, the complaint was originally about that. The judge was entitled, on the information before her, to conclude that this was a factual situation, albeit about direct discrimination, which was not set out before 28th August 2020.

24. I am not entirely persuaded by that argument. Firstly, the assessment centre was the subject of the treatment complained of in the original ET1. In addition, the ET1 referred to evidence of disparity of outcome. Finally, the reference to a flawed process, relying on an admission by the Respondent, is pertinent. On that basis, the Claimant appears to have been complaining about the entire process and the outcomes. Further, on that basis, what the Claimant was doing was clarifying the direct discrimination claim that had been made at a later stage. However, I must not forget that this was in some ways a *volt face* by the Claimant, who had initially limited the Claim to indirect discrimination. In addition, there is force in the submission, that because the Claimant was aware that the scoring related to the final element, and what was now being relied upon was a specific complaint in relation to a specific element of the NFS, that this was entirely new.

25. In my judgment, I cannot say that the employment judge was wrong in concluding that this was a new complaint of direct discrimination. The material that was before the judge would allow her to draw that conclusion and it is not one that an appeal court ought to interfere with.

As it was a new complaint, the judge was required to consider it applying the Selkent guidance, and the approach that she took to those specific elements of guidance is, in my judgment, not open to criticism.

26. Similarly, as I have indicated above, the law makes it clear that taking account of the merits of the Claim is a legitimate part of exploring all of the circumstances and, in this case, the judge was entitled to have in mind those matters that I referred to above with regard to Ahir v British Airways and Jaffrey v the Department of Environment and she was not hearing evidence from the Claimant and, in effect, conducting a mini-trial at that point.
27. However, the question for me is: did those considerations that the judge applied fail to take account of a relevant matter which she should have considered in all the circumstances of the case? The only matter that appears to me to be relevant is that the employment judge concluded that the information available to the Claimant on 28th August was the same information as had been available at a much earlier stage, and certainly by the 23rd July case management hearing. On the information that I have seen and heard today, that is not correct.
28. The information as to the ladder climb and the mark given was only, apparently, made available to the Claimant on 24th August 2020. In those circumstances, the employment judge appears to have drawn a conclusion without having heard evidence or submissions on that specific point. Had she concluded that the 24th August was when the material became available to the Claimant, I ask myself, could that have had an impact on her decision-making? Is that a sufficient matter for the Appeal to succeed on the point? Mr Roberts pointed to the remainder of her decision and her finding that the Claimant could not establish a difference in treatment, let alone less favourable treatment. However, this is a discretionary matter and I do not consider I am in the position to usurp the jurisdiction of the employment judge. I am not able to second-guess whether it would have made a difference to the employment judge's decision. It was a relevant and important point and the employment judge has, potentially, come to an erroneous factual conclusion on the matter without, it would appear, having heard

or seen evidence on the point.

29. The procedural point in Ground 2 is without sufficient substance; the Claimant was represented on 4th September, anything that could have been said in submissions should have been said by the lawyer representing him on that day, albeit that it was a pupil barrister. The Respondent, on that occasion, I am told, made its argument first. That argument included that there would be a need for an amendment and that it could easily have been responded to at the hearing. The only issue with regard to the procedural complaint on ground 2 is drawing a factual conclusion without seeking evidence or submissions on the point, when there is a relevant factual matter which could affect a discretionary decision. It seems to me, having drawn those conclusions, that I should remit the matter to the ET to consider the question of amendment again with that factual matter resolved by the judge who makes that decision.
30. In order to avoid the danger of influencing that decision, and because Ground 3 deals with matters that might have an impact on the decision as to whether to allow the amendment or not, I do not intend to deal with Ground 3 any further.
31. It means that I am now required, to consider the position in **Sinclair, Roche and Temperley v Heard** [2004] IRLR 763 as to whether remission should be to the same or a different judge. It seems to me that it is proportionate to remit this to the same judge. That judge will be familiar with the materials in the case and, given the narrow element of the success on the Appeal, can deal appropriately with the material in a more efficient way than if it were to go before a new judge.
32. It seems to me that there has not been a significant passage of time since the original hearing, the judge will have her notes and will have from those notes, no doubt, an ability to recall the important elements in her decision. I saw no indication of bias from the judge; in terms, the judge approached the matter as she was entitled to do and the flaw in the decision was, in essence, a minor flaw, in that there was one failure to take account of a relevant issue. I cannot

say that the tribunal has already made up its mind and I rely on the professionalism of the employment judge in dealing with this matter and, therefore, the matter will be remitted to the same employment judge to consider the question of whether, in light of the timing of the disclosure of material to the Claimant, the decision on whether the amendment should be allowed is re-approached with that element in mind.

33. The order I will make, then, is that the Appeal succeeds to the extent that I have indicated and the matter will be remitted to the employment judge to reconsider the question of whether an amendment, as set out in the Further and Better Particulars document of 28th August relating to direct discrimination, should be allowed.