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EMPLOYMENT TRIBUNALS

Claimant: Dr J Al-Tarkait

Respondent: Kuwait Oil Company

At: London Central

On: 9 – 12 January 2017

Employment Judge: Dr S J Auerbach
Members: Ms K A Church
Ms M Jaffe

Appearances

For the Claimant: Mr R Hignett, counsel
For the Respondent: Mr M Duggan, counsel

REASONS

Introduction

1. This case was listed for a ten-day full merits hearing opening on 9 January 2017. In the event the Tribunal dealt with a succession of what amounted to case-management matters. On day three we granted an application by the Respondent to postpone the full merits hearing proper; and on day four we relisted it and gave further case management directions, including in relation to costs issues.

2. A minute recording the matters that we dealt with, and orders made, has been promulgated. One of those matters concerned what were described as evidential issues, set out at paragraphs 1(a) – (f) of the draft list of issues that was before us. We gave an oral reasoned decision in relation to that matter on day one; but, before the conclusion of the hearing on day four, Mr Hignett, on behalf of the Claimant, applied for written reasons. These are accordingly now provided.

3. The context is this. There is no dispute that the Claimant was, at all times during his employment with the Respondent, a disabled person in law, his disability being limb girdle muscular dystrophy. Unfortunately, at a certain point, as a result of a fall, the Claimant became a permanent wheelchair user. At the time when we

considered this application, in his pleadings and witness statement, he put the date on which he began to use a wheelchair as being in or around May 2014.

4. In October 2015 an internal investigation committee was established by the Respondent. Ultimately, following an expansion of its remit, that committee made a recommendation that the Claimant be dismissed for misconduct. He was dismissed for that given reason in March 2016. Along the way he was, for a period of time, suspended. His appeal against dismissal was unsuccessful.

5. Prior to the start of our hearing the Claimant's complaints were of

(a) Unfair dismissal;
(b) Wrongful dismissal;
(c) Direct disability discrimination (section 13 Equality Act 2010); and
(d) Failure to comply with the duty of reasonable adjustment.

6. The direct discrimination complaints related, solely, to the investigation, the suspension and the dismissal. Ultimately by agreement, we permitted the Claimant to add complaints that the same conduct amounted, further or alternatively, to discrimination contrary to section 15 of the 2010 Act, the "something" relied upon for that purpose being (only) the fact that he began to use a wheelchair. The reasonable adjustments complaints all relate to adjustments which the Claimant says ought reasonably to have been made, but weren't, to address disadvantages that he experienced after he became a wheelchair user.

7. The parties agreed on day one that certain matters referred to in the draft list of issues (at paragraphs 5(a) to (d)) need not be considered by the Tribunal. However, we heard argument on the Respondent's application also to exclude from consideration at the full merits hearing, the Claimant's factual allegations relating to the matters referred to in paragraphs 1(a) to (f) of the list of issues before us (save, at (f), in relation to the vacancy which arose in 2016).

8. These matters were set out in the list of issues in the following terms:

> Over the period from 2007 to his dismissal in March 2015 was there a pattern in C's career history of him being held back in terms of grade and promotional opportunities and, if so, what is the explanation for this?
>
> (a) In January 2007, transferring him to work in the London office as "Medical Advisor" on a grade below that which he had been working at in Kuwait and the normal grade for this role;
> (b) In July – October 2007 and upon C challenging the position, changing his role form "Medical Advisor" to that of "Medical Specialist" (a role that did not exist in the structure at the London office) which the effect of keeping him on a lower grade;
> (c) In August 2010 appointing him to the role of Deputy Head of London Office and Medical Attache on grade 17 when C ought to have been appointed on grade 18 as a minimum;
> (d) In late 2013, when awarding him grade 18 status for the role he was appointed to in August 2010, refusing to backdate his pay for more than 9 months;

(e) Not promoting him in the last 5 years of his employment (since August 2010);
(f) Not considering C as a candidate for Head of London Office when the vacancy arose in 2010 and 2013 and 2016.

9. Mr Hignett confirmed that the Claimant did *not* seek to bring additional substantive complaints of discrimination in respect of any of these matters. Rather, he sought to have the Tribunal consider evidence, and make findings, about them, because, he argued, they were matters that amounted to relevant background to the actual complaints. What is meant by "background", to spell it out, is that it was contended that these were all matters in respect of which the facts found would be probative of (one or more of) the actual complaints of discrimination, whether by throwing light on the reasons for the actual treatment complained of, by way of support for a common law inference, or the shifting of the statutory of burden of proof, or otherwise.

10. Mr Duggan submitted that we should not consider the evidence or factual allegations relating to any of these matters, for either or both of two reasons. Firstly, he said that they were not "sufficiently relevant". We use that expression as shorthand to describe the test explained by the EAT in **HSBC Asia Holdings BV v Gillespie** [2011] ICR 192. Secondly, he submitted that, even if we considered that this material was sufficiently relevant, so as to, as it were, cross the **Gillespie** threshold, it required an amendment to the Claimant's existing pleaded case, to enable it to be introduced, which amendment, he said, we should not permit.

11. We deal first of all with the **Gillespie** point.

12. At paragraph 10 of the decision in **Gillespie** the EAT (Underhill P, sitting alone) set out the position regarding the power of the Tribunal to exclude evidence on the ground that it is not, or not sufficiently, relevant, as follows.

(1) The basic rule is that if evidence is relevant it is admissible and if it is irrelevant it is inadmissible. In **O'Brien** (above) Lord Bingham said, at para. 3 (p. 540 F-G):
"Any evidence, to be admissible, must be relevant. Contested trials last long enough as it is without spending time on evidence which is irrelevant and cannot affect the outcome. Relevance must, and can only, be judged by reference to the issue which the court (whether judge or jury) is called upon to decide. As Lord Simon of Glaisdale observed in *R v Kilbourne* [1973] AC 729, 756:
'Evidence is relevant if it is logically probative or disprobative of some matter which requires proof … relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable.'"

(2) Crucially for present purposes, relevance is not an absolute concept. Evidence may be, as it is sometimes put, "logically" or "theoretically" relevant but nevertheless too marginal, or otherwise unlikely to assist the Court, for its admission to be justified. As Hoffmann LJ said in **Vernon v. Bosley** [1994] PIQR 337, at p. 340:

"The degree of relevance needed for admissibility is not some fixed point on a scale, but will vary according to the nature of the evidence and in particular the inconvenience, expense, delay or oppression which would attend its reception. … [A]lthough a Judge [in a civil case] has no discretion to exclude admissible evidence, his ruling on admissibility may involve a balancing of the degree of

relevance of the evidence against other considerations which is in practice indistinguishable from the exercise of a discretion."

(3) There may be some divergence in the authorities as to whether the exclusion of evidence in such cases is to be described as being on the basis that the evidence in question is, properly understood, not relevant at all or rather that it is not *sufficiently* relevant. That question is reviewed in *Phipson on Evidence* (17th ed.) at para. 7-07. In my view the language of "sufficient relevance" gives a better idea of the nature of the judgment required; but the difference is one of terminology only. Likewise, it makes no real difference, as Hoffmann LJ observes in **Vernon v. Bosley**, whether the exercise of judgment required is described as the exercise of a discretion.

(4) There is, as I have already said, no distinction in principle between the powers in this regard of the civil courts – before or after the introduction of the CPR - and those of the employment tribunal. If anything, it is arguable that employment tribunals, while guided by the same principles, should be rather more willing to exclude irrelevant, or marginally relevant, evidence. In **Noorani** (above) the Court of Appeal upheld the decision of a tribunal to refuse an application for witness orders on the grounds that the evidence which the witnesses would have given was insufficiently relevant to the claimant's case. Henry LJ said, at paras. 31-32:

"30. .... The courts have long recognised that relevance is a matter of degree for the discretion of the trial judge. Thus in *Cross & Tapper on Evidence* (8th edition) at p. 61:
'Relevancy is a matter of degree and it is as idle to enquire as it is impossible to say whether the evidence was rejected in the above two cases because it was altogether irrelevant, or merely because it was too remotely relevant. It may also, on occasion, require a balance to be struck between the probative force of the evidence and external pressure vitiating its use, such as the time likely to be taken in resolving collateral issues, the danger of manufacture, and sensitivity to private and public sentiment. ...
31. A modern affirmation of that rule was made by Lord Templeman in his speech in *Ashmore v Corporation of Lloyd's* [1992] 2 All ER 486 at 493. Lord Templeman said how in an earlier case he:
'... warned against proceedings in which all or some of the litigants indulge in over-elaboration causing difficulties to judges at all levels in the achievement of a just result. ... ' "

At paras. 35 and 36 he said:

"35. ... [P]roactive judicial case management in the law courts becomes more and more important now that it is generally recognised that, unless the judge takes on such a role, proceedings become overlong and over costly, and efforts must be made to prevent trials being disproportionate to the issue at stake, and thus doing justice neither to the parties, to the case at point or to other litigants.

36 The position in relation to employment tribunals is *a fortiori* since they are intended to be relatively informal and inexpensive. Costs are seldom awarded to the successful party. Not surprisingly, there is no express fetter on the court's discretion to issue witness summonses, see para. 4(2)(a) of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993. It has never been the position that any evidence that might be relevant must be admitted; see *Gorman v The Trustees of St Clare's Oxford* (unreported) Employment Appeal Tribunal presided over by Slynn J on 23 October 1980. In that case there was a familiar

employment tribunal situation. The employee sought witness summonses for his employer's senior management to attend when they would be most unlikely to be able to add anything to the witness in middle management who was to be called in relation to deal with the issues on which the senior management could help. And, as that case makes clear, if during the course of the case it seemed that the original decision not to issue a witness summons might be wrong, then the employment tribunal can always remedy the matter, adjourning if necessary."

(5) Consistently with the approach in **Noorani**, there have been a number of subsequent decisions of this Tribunal in which decisions of an employment tribunal that evidence was insufficiently relevant to be admissible have been upheld. I was referred in particular to **Krelle v. Ransom** (UKEAT/0568/05); **Digby v. East Cambridgeshire District Council** [2007] IRLR 585; and **McBride** (above). In **Krelle** the tribunal had refused to allow the claimant to call his wife to give evidence on matters which it regarded as being of only peripheral relevance. Although in the event the appeal was decided on other grounds, Langstaff J discussed the point fully and made it clear that a challenge to this aspect of the tribunal's decision would have been unlikely to succeed. In **McBride** HH Judge Peter Clark upheld the decision of an employment judge at a case management discussion that the evidence of certain witnesses whom the claimant proposed to call at the hearing was inadmissible: at para. 19, applying **Noorani**, he characterised the question as being whether the witnesses' evidence would be "sufficiently relevant". In **Digby** Judge Clark upheld the decision of a tribunal in the course of a hearing to exclude evidence on an issue which it held to have no capacity to affect the outcome of the case.

(6) In both **Krelle** and **Digby** the claimant sought to rely on an old decision of this Tribunal, **Rosedale Mouldings Ltd v. Sibley** [1980] ICR 816, in which Talbot J said, at p. 822B:

"In our judgment there is no … discretion in an industrial tribunal to refuse to admit evidence which is admissible and probative of one or more issues before it."

The correctness of that statement was challenged, albeit *obiter*, both by Sir Ralph Kilner Brown in **Snowball v Gardner Merchant Ltd** [1987] IRLR 397 (see para. 11, p. 400) and by Langstaff J in **Krelle** (see paras. 21–24); and in **Digby** it was disapproved as a matter of *ratio.* Judge Clark, adopting an observation of Langstaff J in **Krelle**, held, at para. 12 (p. 586):

"A tribunal has a discretion, in accordance with the overriding objective, to exclude relevant evidence which is unnecessarily repetitive or with only marginal relevance in the interests of proper modern-day case management."

Before me, Mr. Craig sought, somewhat faintly, to contend that **Digby** was wrong and that the proposition quoted from **Rosedale** remained good law. I do not accept that submission. Talbot J's proposition, at least if taken to refer to "theoretical" relevance, is out of line with the whole trend of authority as I have set it out above. (Judge Clark in **Digby** referred specifically to the overriding objective set out in reg. 3 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004**, but in fact I believe that **Rosedale** was wrong (or at least too widely expressed) from the start: I like to think that the principles enunciated in reg. 3 fell to be, and generally were, observed by tribunals as much before as after the explicit adoption of the overriding objective.)

(7) The fact that evidence is inadmissible because it is insufficiently relevant does not, however, mean that it is necessary to take steps to exclude it in every case, and certainly

not to seek to do so interlocutorily or at the outset of a hearing. On the contrary, employment tribunals are constantly presented with irrelevant evidence; but most often it is better to make no fuss and simply disregard it or, if the evidence in question is liable to prejudice the orderly progress of the case, to deal with it by a ruling in the course of the hearing. In the generality of cases the cost and trouble involved in a pre-hearing ruling are unjustified. Further, where there is genuine room for argument about the admissibility of the evidence, a tribunal at a preliminary hearing may be less well placed to make the necessary assessment. As Mummery LJ observed in **Beazer Homes Ltd v. Stroude** [2005] EWCA Civ 265, at para. 9:

"In general, disputes about the inadmissibility of evidence in civil proceedings are best left to be resolved by the judge at the substantive hearing of the application or the trial of the action, rather than at a separate preliminary hearing. The Judge at a preliminary hearing on non-admissibility will usually be less well informed about the case. Preliminary hearings can also cause unnecessary costs and delays."

(8) Notwithstanding the general position as stated at (7) above, there will be cases where there are real advantages in terms of economy (in the broadest sense of that term) in ruling out irrelevant evidence before it is sought to be adduced and, more specifically, in advance of the hearing. (That this would sometimes be so was acknowledged by Mummery LJ in **Beazer Homes**: see para. 10.) The issue of relevance may be central to an interlocutory order which the tribunal is being asked to make, for example about witness orders (as in **Noorani**) or disclosure: in such cases a "wait and see" approach will generally not be practicable or fair. But it may also come up by way of a frank application to exclude evidence as a matter of case management – for example where if the evidence in question is called it will seriously affect the estimate for the hearing or where its introduction might put the other party to substantial expense or inconvenience. That seems to have been the basis of the order which was upheld in **McBride**, where the claimant wished to call no fewer than seven witnesses all of whose proposed evidence the judge held to be irrelevant.

(9) Discrimination claims constitute a particular class of case in which it may - I emphasise "may" - be appropriate to decide questions of admissibility in advance of the hearing. It is notorious that there is a tendency in such cases for claimants to adduce evidence of very many incidents of alleged ill-treatment often extending over long periods of time and that this can lead to very long hearings which put an enormous burden both on the parties and on the tribunal and carry the risk of the essential issues being obscured in a morass of detail. In **Chattopadhyay** (above) Browne-Wilkinson P said, at pp. 139–140:

"… we are very conscious of the great dangers of opening too widely the ambit of an inquiry under the Race Relations Act 1976. If this is done and not controlled, industrial tribunals will be faced with numerous issues on matters only indirectly relevant to the main issue. This in turn would lead to long and complicated hearings and great expense and inconvenience to the respondents. It is not in the best interests of those who are being racially discriminated against that the protection of their rights before tribunals should become a matter of great expense and complication. The end result of so doing would be to render the legal redress they have difficult and expensive to obtain. In the circumstances there is a very heavy burden on legal advisers, the Commission for Racial Equality and the Equal Opportunities Commission to ensure that matters of the kind that we have had to consider in this case are not introduced into a case, except where they are satisfied that there is a real probability that they will affect the outcome. This judgment should not be treated as a charter for wholesale allegation of subsequent events."

As appears, those observations were made in a case, where, unusually, the evidence whose admission was disputed concerned incidents subsequent to the acts complained of; but they are equally applicable where it concerns alleged prior incidents. Similar observations have been made from time to time in later cases: see, e.g., *per* Mummery LJ in **Commissioner of Police of the Metropolis v. Hendricks** [2003] ICR 530, at paras. 53-54 (pp. 544-5).

(10) Whether a pre-hearing ruling on admissibility should be made in any particular case will depend on the circumstances of that case. For the reasons identified at (7), caution is necessary. As Mummery LJ pointed out in **Beazer Homes** (above), it will not always be possible to make a reliable judgment on the issue of relevance at an interlocutory stage. In the context of discrimination claims in particular, tribunals will need to bear in mind (though their relevance will depend on the particular case) the observations of Lord Steyn and Lord Hope in **Anyanwu v. South Bank Student Union** [2001] ICR 391 to the effect that such cases are generally fact-sensitive (see paras. 24 and 37 (pp. 399 E-G and 404C)). Prior incidents which are not complained of in their own right (typically because they are out of time) may still be important as shedding light on whether the acts complained of occurred or constituted discrimination. This point was made most clearly by the Court of Appeal in **Anya v. University of Oxford** [2001] ICR 847, notwithstanding that the Court had a clear appreciation, derived from the judgment of Mummery J in **Qureshi v. Victoria University of Manchester** [2001] ICR 863 (which was cited at length in the judgment of Sedley LJ), of the problems to which reliance on a long history of alleged prior incidents could give rise. But each case is different, and caution should not be treated as an excuse for pusillanimity. If a Judge is satisfied on the facts of a particular case that the evidence in question will not be of material assistance in deciding the issues in that case and that its admission will (in Hoffmann LJ's words) cause "inconvenience, expense, delay or oppression", so that justice will be best served by its exclusion, he or she should be prepared to rule accordingly.

13. We bore in mind, in particular, the well-known dicta in earlier authorities, referred to at point (10) of that guidance, regarding the fact-sensitive nature of discrimination claims, and the way in which, in some cases, prior incidents not complained of as such, may shed light on whether the conduct complained of involved discrimination. We also bore in mind that discrimination may occur without, for example, any overt use of discriminatory language, or even sub-consciously. Further, the Tribunal is sometimes invited to consider whether a constellation of episodes paint a certain picture from which an inference might be drawn, which would not emerge from consideration of a given incident in isolation. Also in some cases, it may be said that there is a discriminatory culture or state of affairs in the workplace, for example, which is generally antipathetic to those with a particular characteristic; and it may be said that such a culture has influenced the conduct of a number of different individuals, for example, by creating a climate in which discriminatory behaviour is tolerated or tacitly condoned.

14. These possibilities feed in, also, to the need for caution, when considering an application to exclude evidence from consideration before, or at the very start of, the full merits hearing: the Tribunal should not exclude from consideration, evidence about the potential relevance of which it cannot confidently make a judgment without hearing all of the wider evidence in the case.

15. All of that said, as Underhill P also pithily observed: “each case is different, and caution should not be treated as an excuse for pusillanimity.”

16. Bearing all of that in mind we turn to the particular arguments about whether the matters in issue in the application before us crossed the **Gillespie** threshold.

17. Mr Duggan's submission was that consideration of the disputed matters could not throw any light on the merits of the actual complaints in this case because (a) the actual complaints are solely about the investigation, suspension and dismissal, and the matter of specific adjustments for the Claimant once he became a wheelchair user, whereas the matters which were the subject of this application were distinct in subject matter and time period, going back to 2007; (b) the decision-makers involved in the matters subject of the actual complaints were different from those who would have been involved in the matters the subject of this application; and (c) the premise of the section 13 and section 15 complaints was that attitudes towards the Claimant and/or his disability changed after, and because of, his becoming a wheelchair user (and the reasonable adjustments claims were plainly linked to that), so that consideration of how he was treated *before* he became a wheelchair user could not illuminate his case.

18. As to the decision-makers involved in relation to the actual complaints, the Respondent's case is that they were, in respect of the investigation, suspension and dismissal, the four members of the investigation committee and the then CEO, and, in respect of the adjustments claims, Mr Ali, who was the Claimant's then boss in London. All of the decision makers involved in the matters which were the subject of this contested application, going back to 2007, were different people. Further, said Mr Duggan, there was no specific material to support the allegation that there was a wider discriminatory culture which might have influenced the behaviour of a range of decision-makers. That was a mere assertion.

19. As to the link between the actual complaints of discrimination and the Claimant becoming a wheelchair user, the reasonable adjustment claims specifically related to the impact of this change; but in addition the specific premise of the Claimant's section 13 (direct discrimination) complaints, as originally pleaded, was that the adverse treatment in relation to the investigation, suspension and dismissal was the product of attitudes to him becoming unsympathetic, negative or hostile *after he became a wheelchair user*. Further, it was precisely because the premise of the section 13 claims was that the adverse treatment of the Claimant because of his disability was linked to his becoming a wheelchair user (for example because of discriminatory views about image associated with that), that Mr Hignett sought to add a section 15 claim – lest it be argued that this was the more proper legal categorisation of that factual case than section 13.

20. Mr Hignett made a number of points in response.

21. Firstly, while the Respondent's case was that the relevant decision-makers were the four committee members, the CEO, and Mr Ali, Mr Hignett submitted that we could not be sure that others might not have been involved in participating in, or influencing, their decisions. This was the sort of thing that they could be asked about, and which might emerge, in cross-examination during the trial proper. However, this was essentially a speculative argument and, in this case, faced the

further obstacle that we were told that none of the people who would have been involved in the decisions relating to the earlier matters remained in the Respondent's employment by the time of the treatment that was the subject of the actual complaints. It was difficult, therefore, to see how the link between these two areas could be forged through the channel of direct influence of that sort.

22. However, Mr Hignett said that it was indeed the Claimant's case that there was a longstanding discriminatory culture in this workplace, and that consideration of his treatment in relation to the matters dating from 2007 would potentially shed light on the merits of the substantive complaints, even though different people were involved. However, we agreed with Mr Duggan that this was simply an assertion. There was nothing in the content of the matters the subject of the application, as described in the draft list of issues, or in any other material before us, that could be said, if shown, to support the submission that there was a historic discriminatory culture. Further, the argument that there was, going back over many years, a discriminatory culture, fostering antipathy towards him as a disabled person, was at odds with the core of the Claimant's pleaded case, that attitudes turned against him because he became a wheelchair user, or for a reason related to that fact.

23. Mr Hignett also submitted that the matters that were the subject matter of this application ought to be allowed in as background, because they could not be the subject of complaints in their own right, as they would be out of time. However, we did not share that reasoning. It is not unusual that matters which might be out of time as actual complaints *are* permitted to be ventilated as background, but that occurs where it is accepted that they are, or could be, sufficiently relevant to the actual complaints. But if a matter would be out of time as a complaint in its own right, that does not mean that the threshold for allowing it in as background should be relaxed for that reason. It must still pass the test of sufficient relevance.

24. We add that material properly argued to support the case for a discriminatory "state of affairs" may not merely pass the **Gillespie** threshold as background. Findings in relation to the existence of such a situation may also in fact and law support the conclusion that the conduct of a number of different individuals should be viewed as a part of a continuing act of discrimination for the purposes of time limits (see the discussion in **Hendricks** [2003] ICR 530 and **Arthur** [2007] ICR 193). But, as we have said, there was no specific material or factual case advanced in relation to these matters to support the line of argument that there was a historic discriminatory state of affairs or culture in this case, at all.

25. Secondly, Mr Hignett argued that the Claimant should be permitted to rely on these background matters, as he needed to do so to help him shift the burden of proof. Once, again, however, the logic of this line of argument did not convince. It is of course, as already noted, well-recognised that discrimination is often not overt and often hard to prove. That is why a claimant may need to invite the Tribunal to draw an inference from a combination of other facts, matters or circumstances, as to whether discrimination has played a part in the treatment complained of. It is also why, driven by Community law, section 136 of the 2010 Act provides for a shifting of the burden of proof to a respondent in certain cases.

26. However, it does not follow that if, in the absence of consideration of the alleged background matters, a claimant would not be able to point to sufficient facts to shift the burden of proof to the respondent, he should *therefore automatically* be permitted to adduce evidence relating to those other matters. It *is* correct that the Tribunal should consider whether those matters, if shown as facts, might provide enough extra material to support a common law inference, or a statutory shifting of the burden, as, if so, they would be (potentially) sufficiently relevant for *that* reason. That is another potential route to relevance and across the **Gillespie** threshold. But in the present case, once again, given all the features of the actual complaints, and of the disputed material, to which we have referred, we could not see, and Mr Hignett did not explain, how this material might support an inference, or statutory shifting of the burden, in relation to the actual complaints.

27. Standing back, and looking at the picture in the round, for all of these reasons, we were not persuaded that any of this material passed the **Gillespie** threshold of sufficient relevance to the actual complaints of failure to comply with the duty of reasonable adjustment, section 13 and section 15 discrimination in this case, given the factual premise of those complaints, the different individuals involved, and the lack of any sufficient case to support the assertion that there was a discriminatory culture; nor that this material would otherwise support a common law inference or statutory shifting of the burden of proof.

28. Consideration of these historical matters would have involved a very significant body of additional evidence, significantly extending the factual scope, and length, of the trial. For all of these reasons, we were satisfied that they were not sufficiently relevant to the actual complaints, and that it was right, at the outset, for that evidence and material to be excluded.

29. That was sufficient to dispose of the application, but since we also heard argument on the amendment point, and it raised an issue of practical substance, we addressed this in our oral reasons, and do so here, as well.

30. One of the purposes of pleadings is to enable a party to know sufficient about their opponent's case to be able to respond, marshal their evidence, and fairly to meet that case at trial. This principle requires that sufficient information and particulars be set out in the pleadings, not merely about the actual conduct complained of, but about the other essential factual territory, or (alleged) matters, that are to be raised at trial.

31. There may sometimes be a temptation to think that if a matter is "merely" relied on as "background", then it matters less if it be referred to in a broad brush or generalised way, without the same degree of particularisation as an actual complaint. However, it seems to us that where a claimant seeks to rely on specific past episodes or matters, that he knows about and can identify and particularise, as relevant to the merits of his actual complaints, then they should be properly pleaded, with sufficient particulars, so that the respondent has a fair opportunity to marshal its evidence and present its case about them. For the same reason, if a claimant wishes to introduce new factual allegations, not already covered in the original particulars of claim, as additional episodes of "background" treatment, an

application to amend must be made, and granted, just as would be needed in relation to the addition of a new complaint.

32. In the present case Mr Hignett made the point that the matters which were the subject matter of this disputed application had been referred to in a reply tabled by the Claimant, to a request by the Respondent for further particulars of his original claim. However, that was a request for further particulars of the Claimant's existing complaints that he had been the victim of discrimination following, and because of, or related to, his becoming a wheelchair user. Including this other material in the reply to that request for particulars did not, thereby, make it part of the Claimant's pleaded case. That still required an application to amend.

33. Mr Hignett nevertheless submitted that if the Respondent considered that the introduction of this material required an application to amend, which it opposed, its solicitors should have raised that much sooner, following the tabling of those particulars, and at least, in, or when submitting, its amended grounds of resistance. He argued that it was too late to object now. However, as Mr Duggan pointed out, the Respondent did, at a number of points in its amended defence, make clear that it regarded these matters as irrelevant to the Claimant's pleaded case, and their (attempted) introduction through the route of the reply as objectionable. Given that, the Respondent could not be said to have acquiesced in this attempted expansion of the Claimant's pleaded case.

34. Mr Duggan also informed us that the Respondent no longer employed the individuals who were the decision-makers in relation to the disputed conduct which was the subject of this application, and would be in difficulty adducing evidence relating to them. In the context of an opposed application to amend, this would be a significant factor in deciding whether such amendment should be granted, even had the **Gillespie** hurdle been overcome. Mr Hignett submitted that they could avail themselves of documents relating to these matters. But if the Tribunal were to consider them, it would be concerned very much not merely with what happened (e.g. what pay scale or grade was the Claimant on at a particular time) etc., which might be resolved by reference to available records, but with *why* – and the unavailability of witnesses could obviously make a crucial difference in that regard.

35. Mr Hignett did raise one issue about the relevant decision-makers and their availability. Regarding the vacancy for Head of the London office which arose in 2013, Mr Duggan said the decision-maker would have been the then CEO, Mr Hashim, who was no longer available to be called as a witness. Mr Hignett said that his instructions were that a deputy would also have been involved in that decision. But on either view it seems fair to assume that Mr Hashim would, at least, have been the lead decision-maker, so that his lack of availability would place the Respondent at a material disadvantage.

36. Accordingly, even if we had thought that this material could potentially be sufficiently relevant, or in the borderline territory, it would still have required an amendment to introduce it, and the considerable factual expansion of the case, into new and discrete territory, and the Respondent's witness difficulties, would have tipped the balance against allowing such amendment.

37. For all of these reasons we concluded that evidence relating to the matters referred to in paragraphs 1(a) – (f) of the list of issues before us (save in relation to the London office vacancy in 2016, which Mr Duggan conceded should be considered) should be excluded from consideration by the Tribunal. It did not pass the **Gillespie** threshold of sufficient relevance; and in any event, had we thought that any of these matters might pass that threshold (or been uncertain about that) they all required an application to amend, which we would have refused.

38. There is a short postscript. As our earlier minute of case management orders records, on the second day of our hearing, Mr Hignett indicated that, on reflection, the Claimant now realised that the date on which he had become a permanent wheelchair user was not May 2014 but May 2013. As that minute documents, the ramifications of this proved significant and led ultimately to the postponement application being granted. But Mr Hignett indicated that it was *not* contended that this made any difference, as such, to this present decision on the status of the matters in paragraphs 1(a) – (f). Further, it was accepted that this decision is not affected by the fact that the full merits hearing proper was later postponed to September, this being a prior case management decision.

Employment Judge Auerbach
13 February 2017