Neutral Citation Number: [2023] EAT 48

Case No: EA-2022-000283-BA

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 4 April 2023

**Before** :

**THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT**

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**Between :**

**MS H HASSAN** **Appellant**

**- and –**

**BRITISH BROADCASTING CORPORATION** **Respondent**

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**Iris Ferber** (instructed on a direct access basis) for the **Appellant**
**Nathan Roberts** (instructed by BBC Legal) for the **Respondent**

Hearing date: 8 February 2023

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# JUDGMENT

**This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.**
**The date and time for hand-down is deemed to be 10:30 on 4 April 2023**

## SUMMARY

*Practice and procedure – list of issues*

The claimant argued that, in drawing up the list of issues, the ET had wrongly cut down her pleaded case.

Held: *dismissing the appeal*

The ET did not err in drawing up the list of issues. The matters that the claimant said had been wrongly omitted could not be said to have "*shouted out*" from her pleaded case. Moreover, to have allowed such additional claims to be added to the list of issues would have been inconsistent with the way the case had been understood at crucial earlier points in the case management of the proceedings (in particular, when allowing an extension of time, and when considering an application to amend). That would have undermined the earlier case management of this matter and would have been unfair to the respondent.

**The Honourable Mrs Justice Eady DBE, President:**

## Introduction

1. This appeal concerns the drawing up of a list of issues by an Employment Tribunal ("ET"); it raises the question whether the ET thereby improperly cut down the case that was being prosecuted before it.

2. I refer to the parties as the claimant and respondent, as below. This is the full hearing of the claimant's appeal against an order of the London Central ET made at a preliminary hearing on 7 April 2022. Specifically, the claimant complains that the ET erred in determining the list of issues to be determined at the full merits hearing as limited to a single factual allegation, when her pleaded case had clearly included other factual allegations. The respondent resists the appeal and contends that it has now been rendered academic.

3. The claimant appeared before the ET in person but has had the benefit of representation by Ms Ferber, of counsel, acting *pro bono,* since the earlier hearing in this matter under rule 3(10) **EAT Rules 1993** (as amended). The respondent's interests have been represented by Mr Roberts, of counsel, throughout. In initially considering this matter on the papers, His Honour Judge Auerbach expressed the view that the appeal disclosed no arguable question of law. The claimant having exercised her right to an oral hearing under rule 3(10), His Honour Judge Barklem permitted the appeal to proceed on amended grounds.

## The Background

4. I take the factual background from the earlier preliminary hearing Judgment of Employment Judge Elliott, promulgated on 11 December 2020, and from the pleadings and the parties' submissions before me.

5. From 1 November 2011 until 9 December 2019, the claimant worked as a broadcast journalist for the respondent's World Service; her role was in the Arabic radio team. In January 2017, the claimant alleges that she raised what she described as a "*gender-related*" grievance, by which she

alleged that she had been addressed inappropriately by team members; this was not upheld. In August 2018, the claimant raised a second grievance, asking to be moved to a different team. Pending the determination of that grievance, the claimant was temporarily moved into the social media team.

6. During August and September 2019, communications took place between the claimant and her line manager regarding the claimant's request that she stay in the social media team and her refusal to return to radio. The claimant's line manager made clear she expected her to return to radio on 14 September, and that failure to do so would lead to disciplinary action for failing to follow a reasonable management instruction; a final instruction to this effect was given on 13 September 2019.

7. The claimant did not return to work on 14 September 2019 or at any point thereafter. So far as the respondent was concerned, this was unauthorised absence and a disciplinary process commenced on 14 October 2019. On 21 October 2019, the claimant was given a final written warning at a hearing in her absence. The outcome letter was dated 20 December 2019; the claimant received it on 30 December 2019.

8. In November 2019, it was proposed that BBC Arabic would be re-structured, with the loss of 18 posts; voluntary redundancy was offered to all staff whose substantive role was in radio. The claimant took up this offer and left the respondent's employment by voluntary redundancy on 9 December 2019.

## The ET Claim and the ET Proceedings

9. The claimant presented her claim to the ET on 10 February 2020. She complained of breach of contract, (constructive) unfair dismissal, disability discrimination, and victimisation. In providing details of her claims, in a document attached to the form ET1, the claimant explained her case (so far as relevant for present purposes) as follows:

> "In 2017 I made gender-related complaints. My grievance was not given a chance to be heard … and at the end was not upheld. More importantly, my request to be moved away from the perpetrators was not properly addressed so I had to continue working for the same team (Radio).
> …
> While working for Radio, I continued to suffer from the same mistreatment. Other incidents happened too and deepened the gap between me and the team

even further. I became more depressed and continued to be reliant on the anti-depressant medication which I started in July 2016.
As I reached a point I couldn't take any further, I wrote on 6th Aug 2018 … to inform …the head of service, that I was no longer capable of carrying on working for Radio because I feared for my safety and wellbeing. …
Nearly a year later the process was concluded and my grievance was not upheld.
The process, although lengthy and involved three hearing managers, had failed to investigate the matter as it should've.
…
During the formal process, however, I finally was allowed to work away from my team but on a temporary basis.
After the process was concluded I asked for a final decision to be made and hoped for a permanent opportunity to work away from Radio. Contrary to that, I was asked to get back to Radio starting 14th September 2019 …
As I believed getting back to Radio wouldn't be of any help to my health, I refused to resume working in Radio.
…
I was contacted by a hearing manager on 14th October 2019 to attend a disciplinary hearing. When asked about the prospects of outcomes, she confirmed that it doesn't include the possibility to move me to another platform. Moreover it could've resulted in dismissal, final written warning or a formal warning at best.
…
As I felt between a rock and a hard place, was too disappointed and too depressed, I contemplated the option of [voluntary redundancy].
On 29.11.19 I informed HR of my interest in [voluntary redundancy] …
…
On 4.12.19 [my manager] confirmed approving [voluntary redundancy] and possibility of leaving as early as 9th December. She was adamant that any serving time beyond that date would've been allowed only with Radio. I couldn't agree on that as I didn't want to expose myself to any more of mistreatment.
…
Looking in hindsight now … I don't think I could've taken any different course. Although voluntary, I felt I was compelled to take redundancy and believe it's unfair constructive dismissal.
…
For years, I battled with depression which I believe … amounts to a disability. I brought this to the attention of my employer several times and asked for adjustments (moving me away from the people and environment which trigger and fuel the condition) but in no avail.
By insisting not to allow such a simple necessary adjustment, I believe I was subjected to **disability discrimination.**
I also believe such an adjustment was feasible and could've been easily accommodated ...
I can't think of any reason behind the determination not to allow such an adjustment but **victimisation** for the complaints I made in 2017. I was not taken seriously and perceived as a nuisance and a trouble maker. There was a tendency to keep me contained in one place within one team regardless of the effects of such decision on me. And even when I submitted job applications to move to other teams, I was unfairly denied so.

…"

10. It is the claimant's case that the narrative thus attached to her ET1 made clear that she was not simply complaining of the decision taken in September 2019; she was also saying she had suffered disability discrimination (by reason of a failure to make reasonable adjustments) and/or victimisation, as a result of: (1) the refusal of her request in 2017 to move away from those she described as the perpetrators of the acts she was complaining about in her grievance at that time; and (2) the failure to move her on a permanent basis, in August 2018, when she said she was no longer capable of working in radio. In oral argument Ms Ferber accepted, however, that clarification had been required so as to identify the claims the claimant sought to pursue.

11. On 16 March 2020, the respondent entered an ET3 whereby it resisted the claimant's claims but made clear that it did not consider the nature and extent of those claims to be clear. It also argued (relevantly) that any claim of disability discrimination had been brought out of time: the claimant had entered Acas early conciliation on 6 January 2020 and the early conciliation certificate had been issued on 6 February 2020; any act complained of which had occurred prior to 7 October 2019 was therefore out of time.

12. On 9 June 2020, the parties attended a preliminary hearing before EJ Welch (conducted by telephone). By this stage, the claimant had provided further particulars of her case and there was some question as to whether this amounted to further particularisation of claims that were already before the ET or to an attempt to add further claims. The ET gave directions in respect of the particulars of claim as follows:

> "The Claimant is to make an application to amend her particulars of claim on or before 7 July 2020. The Claimant will identify in her amended Particulars of Claim what text is original material (by reference to paragraphs in the original claim form) and will identify in a different colour text that is the subject of the amendment application."

13. It was further directed that the respondent would provide its response by 4 August 2020, and that a hearing would be listed to then determine any application to amend, and to consider the question of time limits and any applications for strike out/deposit orders.

14. On 7 July 2020, the claimant duly produced her proposed amended claim, by way of "Particulars of Claim" ("POC"), which set out her case in narrative form. The respondent provided its response on 4 August 2020, by way of comments on the claimant's POC. I have not been provided with a copy of this POC; there is, however, a dispute between the parties as to its nature. For the respondent it is said that it stood in place of any earlier pleading; the claimant says, however, that it provided further clarification of the original claim, it did not supersede it. In any event, the claimant says that this document again made clear that she was making complaints of disability discrimination (by way of failure to make reasonable adjustments) and victimisation in relation to matters that pre-dated the September 2019 decision. A later iteration of the POC has been included in the appeal bundle and I have understood this to take substantially the same form as the document produced on 7 July 2020, albeit with additional proposed amendments. The relevant parts of that later form of the POC are set out below.

15. A further preliminary hearing took place by video on 22 October 2020, before EJ Elliott, but technical difficulties meant the hearing did not start on time and the late production of the claimant's response to the respondent's skeleton argument meant that the matter could not proceed that day. For the claimant, it is observed that the respondent (in its skeleton argument at paragraph 25) understood that the claimant's discrimination complaints related to "*not allowing C to work in a different team/environment*" and she further points out that her submissions expressly referred to her request to move to another work environment/team in August 2018 as "*a way of making a reasonable adjustment*". Otherwise, the focus of the parties' submissions at this stage was on the last date of the discrimination complained of, as this was the key point for the purpose of determining the issue of time limits.

16. On 10 December 2020, the parties attended an in-person preliminary hearing before EJ Elliott. At that hearing, it was agreed that the ET would first determine the issues relating to strike out and time limits; in the event, there was insufficient time for the claimant's amendment application to be considered.

17. By her reserved decision, sent to the parties on 11 December 2020, EJ Elliott identified that, before considering any application to amend, three categories of claim could be identified; relevantly for present purposes the claims under the **Equality Act 2010** ("EqA") were characterised as follows:

> "(6) … (i) the disability discrimination claim for reasonable adjustments and victimisation. This centred on the refusal to allow the claimant to move to a different team. This was put as a failure to make a reasonable adjustment and an act of victimisation due to the claimant's grievance of January 2017."

18. EJ Elliott struck out the claimant's claims of unfair dismissal and breach of contract as having no reasonable prospect of success. Although the claimant pursued an earlier appeal against this decision, that was unsuccessful and no issue relating to the unfair dismissal or breach of contract claims remains before me.

19. In considering the claims brought under the **EqA** and the question of time limits, EJ Elliott recorded the parties' respective positions, as follows:

> "(9) … For the discrimination claim the respondent relied upon a decision made on 13 September 2019 as to the claimant not being permitted to move to another team. The respondent says that on the time limit it is prima facie out of time and it is not just and equitable to extend time.
> (10) The claimant relied upon a continuing act and said that the failure to allow her to move to another team was a failure to make a reasonable adjustment which continued until the date of dismissal on 9 December 2019. She said the continuing act went further because of a disciplinary outcome letter she received on 30 December 2019 which upheld that decision not to allow her to move …. In any event it was accepted by the respondent that if there was a continuing act to 9 December 2019, it was in time."

20. Under the heading "Relevant factual position", EJ Elliott set out the following history relevant to the claimant's case in respect of the years 2017 and 2018:

> "(19) The background to the case is that the claimant raised a grievance in January 2017 about what she called "gender related issues". It included an allegation that she had been addressed inappropriately by team members. Her grievance was heard on 20 March 2017 under the Grievance Policy. This grievance is relied on as the protected act for the victimisation claim."
> …
> (21) There was a further grievance raised on 6 August 2017. The claimant wished to be moved to a different team. It is not in dispute that on a temporary basis, ending the outcome of this grievance, the claimant was placed in the social media team.
> (22) The August 2018 grievance was unsuccessful. The claimant appealed the grievance decision and received an outcome on 16 July 2019; it was not upheld. She said she continued to "*suffer from the same mistreatment*" and

> said she expected to be referred to Occupational Health which did not happen. The claimant refers to her request to move to another team as a request for a reasonable adjustment.
> (23) On 5 August 2019, a year after lodging the latest grievance, the claimant emailed her manager … She said her move to the social media team was coming to an end at the end of the week and she wanted to know what was going to happen next. [Her manager] replied that the claimant would stay in the social media team until her leave in October 2019 and they would discuss it. The claimant wanted a "*final word*" on the matter.
> …"

21. For the claimant it is said that EJ Elliott was focussed on the time limit issue and was not seeking to otherwise set out the complaints raised by the claimant. Certainly, the question whether the claim had been brought out of time was the first matter addressed by EJ Elliott, who concluded that:

> "(74) … even if there was a continuing act, it did not extend beyond 13 September 2019 and the claim in relation to the decision not to allow the claimant to move teams is on the face of it out of time ..."

22. Having thus found that the claim was out of time, EJ Elliott held, however, that it would be just and equitable to extend time. In reaching this decision, EJ Elliott observed that the forensic prejudice that would be suffered by the respondent was simply that "memories fade with time" and reasoned as follows:

> "(98) The case as pleaded has the benefit of considerable documentary records, particularly during a period [from August 2019 to the end of her employment] when the claimant declined meetings or telephone conversations and the dialogue is in the email correspondence. This will assist witnesses when they come to prepare their witness statements. …
> (99) … The delay in this case is not substantial, it is just under two months. [The claimant] takes the view that the respondent failed to make a reasonable adjustment in allowing her to move teams and that there was victimisation based on her January 2017 grievance. I do not share the respondents view that this is a claim of little value …
> (100) The claimant acted promptly in December 2019 and January and February 2020 on her understanding of the law at the time. She did not know until she saw the ET3 that the claim was potentially out of time in relation to the decision to refuse to allow her to move teams."

23. On 21 December 2021, the claimant made a further amendment application, which she did by again setting out her proposed amendments in different coloured text on the POC document; that which the claimant contended to be drawn from the original details of claim (that is, as attached to

her ET1) was in black. That document has been included within the appeal bundle and both parties have treated it as representing the POC relied on by the claimant from 7 July 2020 (albeit that Ms Ferber says that it did not stand in place of the original details of claim). As part of the text in black, the claimant set out what she wished to say about events in 2017 and 2018, (relevantly) as follows:

In respect of 2017:

> "10. Ahead of the hearing meeting on 20th March 2017, the claimant submitted a document in relation to the harassment part of her claim made under Equality Act 2020. She also submitted further documents afterwards as she responded to enquiries from the hearing manager … The claimant asked [the hearing manager] to consider her request to move to another team.
> On 14th June the claimant was informed that her grievance was not upheld and [the hearing manager] didn't make a decision in regard to moving the claimant.
> …"

The claimant also added, by way of clarification:

> "(paragraphs 9-13 are part of original text … but with more details and better clarifications)"

In relation to 2018:

> "32. On 6th Aug 2018 the claimant wrote to … the head of service to inform him that she was no longer capable of carrying on working for Radio because she feared for her safety and wellbeing. He replied saying that the claim will be treated as a formal grievance and in the meantime, they will look at moving her outside of radio.
> 33. As a result, the claimant attended a hearing meeting … on 30th Aug 2018. … The claimant made it clear … that she was on medication for depression and working for radio was not helping her at all. Therefore she asked once again to be moved outside radio as a way of reasonable adjustment.
> …
> 35. The claimant attended a second hearing meeting on 17th Dec 2018 … After unreasonable period of delay the outcome was released on 8th April 2019. The grievance was not upheld and the claimant was told that her request to move to another team would be 'entirely a business decision whether this is reasonable or sustainable'."

Again, the claimant further clarified:

> "(The above paragraphs 32-44 … were included in the original claim … More details added for better explanation. They all are part of the original claim of constructive dismissal, breach of contract, disability discrimination and victimisation)."

24. Under the heading "Disability Discrimination", the claimant then set out her case (relevantly) as follows:

> "45. The decision of insisting not to make the reasonable adjustment of moving the claimant to another team as identified in paragraphs 44 [which related to the disciplinary process in December 2019], 32-37, … and 9-13 amounts to "direct disability discrimination" (originally claimed as disability discrimination …)."

25. As the annotations made to this further POC document make clear, the respondent did not agree the additions to the claim that had been made at paragraphs 10 and 33.

26. The ET proceedings were stayed pending the determination of the claimant's appeal against EJ Elliott's decision. The proceedings subsequently resumed at a hearing before EJ Heath (held remotely by video) on 14 January 2022, at which the claimant's proposed amended POC was considered.

27. In order to determine whether any of the proposed amendments should be allowed, EJ Heath first considered what claims had originally been pleaded:

> "29. The discrimination and victimisation claims, as originally pleaded, centres on a refusal to allow the claimant to move to a different team in September 2019. This is put as a breach of the duty to make reasonable adjustments, and an act of victimisation based on the claimant's grievance of January 2017. Reasonable adjustments claims often bring with them a degree of complexity, and discrimination and victimisation claims very often involve looking at the background in order to make inferences about the reason why people made the decisions that they did. That said, the originally pleaded discrimination and victimisation claims are reasonably narrow in scope, focusing, as they do on the decision not to allow the claimant to move to a different team. …"

28. In then considering the application to amend, although permitting the claimant to make four specific amendments to her claim, EJ Heath otherwise agreed with the respondent that the nature of the proposed amendments was "*wholly transformative*", observing:

> "49. … They seek to turn a narrow, focused claim on the decision not to allow the claimant to change teams in September 2019 into a vast sprawling claim about everything that went wrong with her employment from 2017 onwards."

29. For completeness, I note that one of the amendments that was allowed permitted the claimant to add an allegation of direct disability discrimination "*to the extent that it related solely to the decision not to allow the claimant to move teams in September 2017*" (see paragraph 30). As the respondent has pointed out, however, this must be a typographical error and plainly ought to have read "*September 2019*": that is made clear from the fact that, within the same paragraph, the ET

recorded that the respondent had agreed to the amendment "*insofar as it relates to decision-making in 2019*"; it is also consistent with the rest of the ET's decision, which allowed amendments to the extent that they related to decision-making in 2019.

## ET Order of 7 April 2022 and Subsequent Events

30. On 7 April 2022, a further preliminary hearing took place, by video, before EJ Klimov. The ET refused an application by the claimant to vary EJ Heath's Order and then proceeded to make Case Management Orders for the conduct of the proceedings to a Full Merits Hearing, which was listed for three days to commence on 16 November 2022.

31. In considering the claims and issues to be determined, the ET recorded:

> "5. The claims and issues, as discussed at the preliminary hearing, are listed in the Case Summary. The list will be treated as final unless the Tribunal decides otherwise."

32. In the Case Summary, the ET observed as follows:

> "3. In all complaints the alleged discriminatory (less favourable/unfavourable) treatment/PCP/detriment is on 13 September 2019 the respondent's requiring the claimant to return to work in her role in BBC Arabic Radio."

33. In defining the issues to be determined at the Full Merits Hearing, the ET ruled as follows:

> "1.1 Did the Respondent do the following: on 13 September 2019, require the Claimant to work in her role in BBC Arabic Radio?
> …
> 4. Failure to make reasonable adjustments (sections 20 and 21 EqA)
> …
> 4.2 … did the Respondent commit the action referred to in paragraph 1.1 above?
> …
> 5. Victimisation (section 27 EqA)
> …
> 5.2 … did the Respondent commit the action referred to in paragraph 1.1 above?
> …"

34. The claimant filed an appeal against the Case Management Orders of 7 April 2022. On 3 August 2022, at the rule 3(10) hearing before HHJ Barklem, the appeal was permitted to proceed to a full hearing.

35. On 28 September 2022, the claimant applied for the ET proceedings to be stayed pending the

determination of her appeal. The respondent resisted that application, arguing:

> "Should the Claimant's appeal be accepted, the remaining issues can be determined separately as they arise from different events. …"

36. By email of 29 September 2022, the claimant disagreed, arguing:

> "The subject of the appeal at EAT is related to events that all form part of a continuing act of the outstanding claims…."

37. Subsequently (by email of 30 September 2022), she made a request to the respondent, as follows:

> "I take the opportunity here to ask the respondent to review their position in terms of settling the appeal … it's not clear why the respondent wouldn't agree to include the remining claims of ET1 in the list of issues …"

38. The respondent, however, characterised that as "*an amendment application*"; it did not consider it would be in accordance with the overriding objective to withdraw its objections to that.

39. On 5 October 2022, EJ Klimov refused the claimant's application for a stay.

40. By email dated 3 November 2022, the claimant withdrew her claim of direct disability discrimination.

41. On 4 November 2022, the claimant applied for further information of the respondent's case and for specific disclosure; this application was refused on 8 November 2022.

42. On 8 November 2022, the claimant applied for the full merits hearing to be postponed; that application was refused on 10 November 2022.

## The Full Merits Hearing

43. At the outset of the full merits hearing on 16 November 2022, the claimant confirmed that she wished to withdraw her claim of direct disability discrimination and, with the consent of the parties, this claim was duly dismissed by the ET. The ET also confirmed the list of issues with the parties, recording as follows:

> "13. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these"

44. The respondent points out that some (relatively minor) variations to the list of issues were

made at the request of the claimant who also (as the ET recorded at paragraph 14 of its judgment), sought to add to the description of the issue set out at paragraph 3.1 of the list (not in issue for the purposes of this appeal) but that was refused.

45. Also at the start of the full merits hearing, the claimant made a further application for a postponement, which was again refused.

46. After those preliminary applications and clarifications, the ET adjourned the hearing at 1.32 pm on 16 November 2022, to allow it time to read-in that afternoon.

47. When the hearing resumed on 17 November 2022, the claimant was not present but made a further application by email for the hearing to be postponed. That application was also refused. Another application was made on 18 November 2022, but was similarly unsuccessful. The ET ultimately dismissed the claimant's claims at 4:04pm on 18 November 2022, on the basis that she was not in attendance at the hearing and no satisfactory evidence had been provided such as would establish a good reason for her failure to appear.

**The Claimant's Appeal and Submissions in Support**

48. The claimant complains that, in defining her complaints of disability discrimination by failure to make reasonable adjustments, and of victimisation, the ET wrongly purported to limit her claims to a single factual allegation that, on 13 September 2019, the respondent had made a decision that she was required to work in her role in radio. Put as a continuing act, the claimant had also made claims relating to the refusal to move her to a different working environment/team in 2017 and (to the extent that the respondent refused to move the claimant on a permanent basis) in August 2018. It was not open to the ET to thus limit the claimant's claims (**Tarn v Hughes** [2018] IRLR 1021 EAT).

49. To the extent that the ET assumed that a decision had already been made regarding the content of the claimant's original claim, that would be an error of law:

(1) EJ Elliott made no decisions regarding events prior to September 2019: she was determining whether the claim was out of time and, in that context, was (correctly) focused only on the last allegation in time and what happened *after* – not before – that date.

(2) EJ Heath did not conduct a case management hearing dealing with the clarification or listing out of the claims already set out in the details attached to the ET1; on the contrary, where EJ Heath considered an allegation was contained in the original pleading, he recorded that there was no need for an amendment.

50. The ET on 7 April 2022 had wrongly assumed that the decisions previously made by EJ Elliott and EJ Heath had limited the claimant's already-pleaded claim. That, however, had not been a course open to either Employment Judge as a matter of law, absent the claimant's agreement.

51. As for the suggestion that the appeal had been rendered academic, the ET at the start of the full merits hearing on 16 November 2022 had not taken the necessary steps to correct the list of issues, which therefore continued to wrongly limit the claimant's pleaded case.

**The Respondent's Response**

52. For the respondent it is first contended that the appeal is academic: the list of issues under challenge was no longer the list of issues in the case. The order under challenge allowed that the list of issues could be re-visited by the ET (see paragraph 5) and that list was reconsidered at the outset of the full merits hearing.

53. In the alternative, the answer to the appeal is in the procedural history of the case: where a claim had been managed on the basis of a particular interpretation of the pleaded case, a party should not be permitted to seek at trial to go back on the clear case parameters that had thus been set (**Bailey and ors v GlaxoSmithKline** [2019] EWCA Civ 1924 paragraphs 48-51). Accepting that (save where there was a proper basis for striking out part of the claim) it would not be open to the ET to cut down the pleaded case (per **Tarn**), that was not the same as saying that it should not attempt to define that case. Here, as had been conceded, the details attached to the ET1 did not identify the claimant's claims and their constituent elements; the case had required clarification. Specifically, it was unclear what, if anything, was being claimed regarding events in 2017 and 2018. The claimant sought to provide that clarification by way of the POC document, and it was clear she had relied on this as providing a full account of her claims (the details attached to the ET1 were not relevant after that

point). The POC had been considered by EJ Elliott, who was not only concerned with the date of the last act of which complaint was made (and whether that was out of time) but had to consider the entirety of the claim to determine whether it would be just and equitable to extend time; in extending time, it was clear what claims EJ Elliott considered she was permitting to proceed on just and equitable grounds. Similarly, in determining the amendment application, EJ Heath had first had to consider what the original claim was, particularly where the respondent had not agreed various additions to the claim which the claimant had described as clarifications. EJ Klimov had thus been bound to define the list of issues on the basis of the claims that had previously been identified.

**The Law**

54. Proceedings before the ET are governed by rules laid down within schedule 1 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"). By rule 29, it is stated that the ET:

> "may at any stage of the proceedings, on its own initiative or on application, make a case management order"

Although the rules that then follow provide for specific forms of case management order, rule 29 further makes clear that:

> "… the particular powers identified in the following rules do not restrict that general power."

And it is further provided that:

> "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 order did not have a reasonable opportunity to make representations before it was made."

55. In exercising its powers of case management, the ET is required to seek to give effect to the overriding objective (as provided by rule 2 **ET Rules**):

> "… to deal with cases fairly and justly [which] … includes, so far as practicable- (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense."

56. In order to deal with a case fairly and justly, the ET must thus have a clear understanding of the issues raised. That is not just an essential requirement for the final determination of the merits of the claim, it is a necessary preliminary step that needs to be taken at an early stage to enable the ET to carry out its case management functions. In more complex cases - particularly those involving allegations of unlawful discrimination, or of detriment or dismissal by reason of a protected disclosure - once a response has been entered, the case will generally be listed for a case management preliminary hearing, at which the ET will endeavour to ensure all concerned are clear as to the claims pursued and the issues that will need to be determined. The list of issues then drawn up will effectively set the agenda for the case management of the claim to determination. As Mummery LJ observed in **Parekh v London Borough of Brent** [2012] EWCA Civ 1630:

> "[31] A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list …"

57. Where the issues have thus been identified by the ET, the case will then be managed on that basis to trial; as the Court of Appeal observed in **Bailey and ors v GlaxoSmithKline** [2019] EWCA Civ 1924

> "50. Active case management in accordance with the overriding objective will often involve the identification of a list of issues. That list of issues will generally be used to form the basis of the management of the case, of the need for disclosure and of the preparation of factual and expert evidence for trial, as it did in this case. Allowing parties at trial to expand the issues and the evidence needed in reliance on pleading points is to undermine such good case management. Certainly, there was no possible basis for doing so in this case given the decisions and rulings made and, in particular, the Prior Rulings."

58. In the context of an application to strike out a claim, in **Cox v Adecco Group** [2022] ICR 1307, His Honour Judge Tayler emphasised the importance of first properly identifying the claims and issues in the case:

> "30. There has to be a reasonable attempt at identifying the claims and the issues …. In some cases, a proper analysis of the pleadings, and any core

> documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success. …."

59. The need for the ET to thus roll up its metaphorical sleeves equally applies to the drawing up of the list of issues, which should be true to the claim that has been made. Certainly, the purpose of such a list is not to reduce the claims that have been made: leaving aside cases where pursuit of a claim might constitute an abuse, it is not open to the ET to prevent a claimant prosecuting a properly arguable claim, see **HSBC Asia Holdings BV and anor v Gillespie** [2011] IRLR 209 EAT at paragraph 25; **Tarn v Hughes and ors** [2018] IRLR 1021 EAT at paragraph 28(3). Moreover, where a claim has been made, the fact that it is inadequately particularised does not mean that it is not being pursued, see **Mendy v Motorola Solutions UK Limited** [2022] EAT 47 at paragraph 40.

60. In **Mervyn v BW Controls Ltd** [2020] IRLR 464 CA the pleaded claim (and response) had originally put forward a case of constructive unfair dismissal but the claimant (acting in person) had expressly rejected the contention that she had resigned when the ET sought to clarify the issues in the claim at a case management hearing. The list of issues was drawn up to reflect the claimant's apparently clarified case as one of direct (rather than constructive) dismissal. At the full merits hearing, the ET found, however, that the claimant had resigned and, accordingly, that her claim of unfair dismissal must thus fail. In considering the status of the list of issues in these circumstances, the Court of Appeal observed that, although it would be unusual for an ET to depart from the terms of a list of issues, there was no "*requirement of exceptionality*" before it did so:

> "38. … what is 'necessary in the interests of justice' in the context of the tribunal's powers under r 29 depends on a number of factors. One is the stage at which amending the list of issues falls to be considered. An amendment before any evidence is called is quite different from a decision on liability or remedy which departs from the list of issues agreed at the start of the hearing. Another factor is whether the list of issues was the product of agreement between legal representatives. A third is whether amending the list of issues would delay or disrupt the hearing because one of the parties is not in a position to deal immediately with a new issue, or the length of the hearing would be expanded beyond the time allotted to it."

61. Addressing the question whether the ET might be said to be entering into the arena in identifying a claim from the pleadings that was other than had been included in an apparently agreed list of issues, the Court of Appeal did not consider that would be so where such a claim "*shouted out"* from the contents of the pleaded case (see paragraphs 41-42). In such circumstances, the procedure that ought to have been adopted by the ET was explained as follows:

> "43. It is good practice for an employment tribunal, at the start of a substantive hearing with either or both parties unrepresented, to consider whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute between the parties. If it is clear that it does not, or that it may not do so, then the ET should consider whether an amendment to the list of issues is necessary in the interests of justice.
> 44. In this case … the pre-reading of the essential material (in particular the ET1 and ET3) which no doubt occurred should have indicated to the tribunal that it was in truth far more likely than not that the Claimant had resigned, and that the real issue between the parties was (or should be) why she did so.
> 45. Against that background, and with the Claimant appearing once again in person, I do not think, with respect, that it was enough for the Tribunal simply to ask at the start of the substantive hearing whether the parties confirmed the previous list of issues. It would not have amounted to a 'step into the factual and evidential arena' for the tribunal to have said that it seemed to them that there was an issue as to whether Ms Mervyn has been dismissed or had resigned and that the list of issues ought to be modified accordingly, …"

**Discussion and Conclusions**

62. Since this appeal was permitted to proceed to a full hearing, the proceedings before the ET have progressed to a merits hearing, at the outset of which – in what seems to have been an attempt to comply with the practice suggested at paragraph 43 **Mervyn** – the ET first checked with the parties that all concerned understood that it would proceed to determine the matters set out within the list of issues. For the respondent it is said that the ET at this stage effectively created a fresh list of issues, such as to render the present appeal academic. In particular, it is pointed out that some amendments to the list of issues were then made, at the claimant's request, and that the ET addressed a further application to add a point to the list.

63. Although it may not have been the subject of consideration at the outset of the merits hearing before the ET on 16 November 2022, it was, however, also the claimant's position that the list of issues should include the additional claims that had been identified in the current appeal. In addition

to (unsuccessfully) applying to the ET for a stay, pending the determination of her appeal, the claimant had asked the respondent to agree that these additional matters be included in the list of issues, but the respondent had refused to agree to this, making clear it would object to any such application as amounting to an amendment to the claim. In those circumstances, the claimant can be forgiven for proceeding on the basis that it would be for the EAT to resolve the question regarding whether the two additional claims should have been included within the list of issues. That question was, therefore, not re-visited on 16 November 2022 and I do not think it can fairly be said that the discussion that did take place before the ET on that occasion rendered the current appeal academic.

64. Turning then to the substantive issue raised by the appeal, the question is whether the drawing up of the list of issues by EJ Klimov on 7 April 2022 improperly cut down the claimant's pleaded case. As Ms Ferber fairly conceded in oral submissions, this was not a case where the additional claims in issue "*shouted out*" from the contents of the pleaded case (**Mervyn**, paragraphs 41-42). Indeed, as the respondent has observed, the original details of claim did not make clear whether the narrative in respect of events in 2017 and 2018 was simply part of the background history or formed an essential part of one or more of the claimant's claims. The pleaded case did link the claim of victimisation to the grievance made in 2017 but it was also possible that the history was relied on in support of the claimant's claim of constructive unfair dismissal. Still less clear was any relevant connection with the claimant's claim of disability discrimination; the claimant had complained that this arose from a refusal to move her to a different team, which had been a "*necessary adjustment*", but had not stated when she was saying that a duty to make a reasonable adjustment had actually arisen.

65. Recognising the need to clarify her claims, the claimant then set out her case within the POC document. In argument on this appeal, Ms Ferber has said that this was in addition to the original details of claim (as attached to the ET1) but that does not appear to have been the claimant's position at the time. The document was headed "*Particulars of Claim/Amendments Application*" and not only set out the proposed additions that the claimant sought to make but also re-stated the history on which

she relied, making clear that she was thereby setting out the original text "*but with more details and better clarifications*". Any reasonable reading of the POC document would lead one to conclude that this was intended to stand in place of the original pleading; certainly, it was entirely reasonable for the ET (and the respondent) to have proceeded on that basis.

66. It was on the basis of an early iteration of the POC document that EJ Elliott approached the question whether the claimant's claims should be struck out (as having no reasonable prospect of success) or dismissed (as being out of time). In considering the latter question, it is correct to say that EJ Elliott first had to determine the date of the final act complained of: it was the claimant's case that the discrimination in question had continued after the instruction of 13 September 2019 and that her claim was thus to be treated as being in time. That, however, was not the only issue for determination. Having found, against the claimant, that the instruction of 13 September 2019 had in fact been the final act, EJ Elliott had to then consider whether it would, nevertheless, be just and equitable to extend time. As Mr Roberts has submitted, at that stage the ET was required to consider not only the position of the claimant, it also had to take into account the possible prejudice to the respondent, which might include the evidential difficulties if the out of time claim extended over a lengthy period. It is, therefore, simply incorrect to characterise EJ Elliott's decision as focused only on the date of the last act complained of.

67. For the claimant, it is urged that EJ Elliott must have appreciated that this was a claim that went back over time; after all, as Ms Ferber has emphasised, EJ Elliott premised her findings on the basis that the claimant was relying on a "*continuing act*" (see paragraph (74) of that decision): even if the act ended with the instruction of 13 September 2019, that was not the sole date under consideration and the ET was aware that the claimant was saying this was something that had extended over time. The difficulty with this submission is that it takes the reference to "*continuing act*" out of context. In determining that the claim had been brought out of time (the conclusion recorded at paragraph (74)), EJ Elliott was addressing the claimant's argument that the discriminatory conduct was not limited to just one instruction on one day. It is equally apparent, however, that EJ

Elliott did not see this as a case where there had been several decisions on the question whether the claimant should be moved to a different team; indeed, the reasoning in the preceding paragraphs expressly distinguishes the claimant's case from that of **Cast v Croydon College** [1998] IRLR 318 on precisely this point. It is certainly possible to read the claimant's pleaded case as relying on the events leading up to the instruction of 13 September 2019 as being one continuing act, without seeing that as extending back to what would appear to be described as entirely separate incidents in 2017 and 2018.

68. Even if the precise extent of the claimant's case cannot be said to have been identified by EJ Elliott, at the next hearing, before EJ Heath on 14 January 2022, the ET again rolled up its sleeves in an attempt to get to grips with the issues to be determined in this matter. At this stage, the claimant was relying on a further proposed iteration of her POC, the relevant passages from which are set out at paragraph 23 above. Just as it would have been difficult to discern that a claim of a failure to make reasonable adjustments had been made in the original details of claim in respect of events in 2017, the clarified history provided by the claimant similarly did not make clear that this was her case. This was not simply a failure to provide adequate particulars; a reasonable reading of the pleading would not lead one to conclude that the claimant was prosecuting a claim of disability discrimination in respect of the events of 2017. As for the position in August 2018, the POC at least identified that the claimant was saying she had asked to be moved outside radio "*as a way of reasonable adjustment*", albeit that the refusal of this request was only identified as dating from April 2019 (which would be understandable, given that, in the interim, the claimant had been moved out of radio on a temporary basis). It still could not be said, however, that either of the additional claims "*shouted out*" from the claimant's pleading.

69. For the claimant it is argued that, again, the ET was not focussed on the identification of the extent of her claims when dealing with this case on 14 January 2022: EJ Heath was concerned with the application to amend, not the determination of the issues that would need to be considered at the full merits hearing. This, however, would be an entirely superficial characterisation of the task EJ

Heath had to undertake. As the respondent has observed, in order to determine the claimant's application to amend, EJ Heath had to first consider the nature and extent of the original claims: there would be no need for her to apply to amend where a matter was already the subject of an extant claim; without a proper understanding of what was part of the claimant's originally pleaded case (and what was not), EJ Heath could not begin to engage with the question whether the proposed amendments should be allowed. The detailed consideration of the claimant's case at this stage is apparent from the fact that the hearing lasted nearly a full day and the decision was reserved, to allow EJ Heath to undertake the work required.

70. Having thus engaged with the claim that had been made on the basis of the claimant's original pleading, EJ Heath's characterisation of the claimant's case was as follows:

> "29. The discrimination and victimisation claims, as originally pleaded, centres on a refusal to allow the claimant to move to a different team in September 2019. This is put as a breach of the duty to make reasonable adjustments, and an act of victimisation based on the claimant's grievance of January 2017. Reasonable adjustments claims often bring with them a degree of complexity, and discrimination and victimisation claims very often involve looking at the background in order to make inferences about the reason why people made the decisions that they did. That said, the originally pleaded discrimination and victimisation claims are reasonably narrow in scope, focusing, as they do on the decision not to allow the claimant to move to a different team. …"

71. That, it seems to me, cannot be faulted as a succinct, but careful, summation of the case the claimant was seeking to prosecute in the ET proceedings. The identification of that case did not ignore the background context but it permissibly concluded that the reasonable adjustments claim centred on the refusal to allow the claimant to move to a different team in September 2019. The claimant did not seek to challenge that ruling (and, for completeness, I note that the claimant later applied to vary a different aspect of EJ Heath's Order; she did not similarly apply for his decision in respect of the characterisation of her original claim to be varied in any relevant way).

72. Turning then to the ET decision that is the subject of challenge in these proceedings, when the matter came before EJ Klimov on 7 April 2022, it was necessary to identify the particular treatment or provision, criterion or practice ("PCP") that was in issue. This was defined as the

requirement, on 13 September 2019, that the claimant return to her role in radio. The reasonable adjustment that was identified in the list of issues was, on 13 September 2019, to permit the claimant to move to another team. Although the claim was thus defined by reference to the particular instruction on 13 September 2019, that did not mean that the ET would not have regard to the background and context of that instruction; after all, in order to assess whether the proposed adjustment was "*reasonable*", the ET would, as EJ Heath had identified, have needed to consider that background.

73. To have defined the claim more broadly, however, as including additional complaints of disability discrimination arising in 2017 and 2018, would have been to allow the claimant to extend her case some two years after the proceedings had commenced. These were not claims that "*shouted out*" from the original details of claim or from the more considered POC. Furthermore, to have allowed such additional claims to be added at that stage would have been inconsistent with the way the case had been understood at crucial earlier points in the case management of the proceedings; in particular, by EJ Elliott when allowing an extension of time, and by EJ Heath when considering the claimant's proposed amendments. That would have undermined the earlier case management of this matter and would have been unfair to the respondent (see **Bailey v GlaxoSmithKline**).

74. Contrary to the claimant's objections, EJ Klimov did not err in the identification of the claims and issues in this case. The case management exercise that was undertaken on 7 April 2022 did not cut down a case that could properly be identified on the pleadings. It was, furthermore, entirely consistent with how the case had been understood at previous stages, where significant case management decisions had had to be taken. That previous understanding had not been the subject of challenge by the claimant and it would have been contrary to the overriding objective to have re-characterised the case, to permit two further claims to be added, at such a late stage. At each of the preliminary hearings in this case, the ET had undertaken the task required of it (per **Cox v Adecco**). The ET did not then err in law in proceeding on the same understanding as to the nature and extent of the claims when it came to set down the list of issues at the hearing on 7 April 2022.

75. For all the reasons provided, I therefore dismiss this appeal.