A Tribunal's duty to seek clarification of what a claim intended

By Katherine Anderson
3PB Barristers

Mrs N Moustache v Chelsea and Westminster NHS Foundation Trust: [2022] EAT 204

Employment Appeal Tribunal judgment of Her Honour Judge Tucker on 15 June 2023.

When claimants are litigants in person, effective case management can be time consuming and challenging. In this appeal, the Claimant, who represented herself, contended that the Employment Tribunal had failed to adjudicate upon a claim of disability discrimination contrary to section 15 of the Equality Act 2010 in relation to her dismissal for long-term ill-health capability. The Employment Appeal Tribunal allowed the appeal on the basis that the Claimant had set out sufficient information to have alerted the Tribunal to this claim, and the Tribunal's failure to clarify the position was an error.

How had the error occurred? The EAT accepted that the Claimant had not had legal assistance in respect of the drafting of her ET1 forms, preparing the agreed list of issues or preparing/presenting her legal submissions to the Tribunal. The Claimant had presented two claim forms. In the first, which pre-dated her dismissal, she had indicated discrimination claims in respect of age and disability; an agreed List of Issues was then produced. In the second claim, which post-dated her dismissal, the Claimant claimed that she had been unfairly dismissed for reason of long-term ill-health capability; she also stated that she already had a claim pending before the Tribunal against the Respondent for age and disability discrimination. The claims were consolidated, and, shortly before the final hearing, the List of Issues was revised and updated by the Respondent's solicitors and the Claimant agreed the list. The list did not refer to any claim under section 15 of the Equality Act 2010 regarding dismissal.

HHJ Tucker considered the relevant authorities including guidance given by Bean LJ in *Mervyn v BW Controls* Ltd [2020] ICR 1364 and HHJ Auerbach in *McLeary v One Housing Group Ltd* UKEAT/0124/18/LA. She observed, at [32], that it is common for Employment Judges to ask litigants in person to explain the substance and factual basis of their claim and,

through discussion, clarification of those issues, and a clear and straightforward explanation of the different, relevant legal concepts, identify the issues which the Tribunal will be required to consider and determine in order to fairly decide upon the dispute between the parties. That exercise takes time and patience, but it is undoubtedly the correct approach. She also stressed, at [33], that Employment Tribunals and Employment Judges must be careful to ensure that that a List of Issues, which is a useful case management tool does not, through slavish adherence to it, or elevation of it to a formal and rigid pleading, preclude a fair and just trial of the real issues in the case, the principle at the core of the Overriding Objective. Equally, they should be astute to ensure that advantage is not unfairly afforded to any one party through their use. She held, at [38], that the Tribunal should have revisited the list of issues at the outset of the hearing and clarified the issue in question. Further, given that the Claimant appeared to have alluded, at least, to a complaint of disability discrimination arising out of her dismissal in her closing submissions by stating that *'I am claiming unfair dismissal because I believe that the Respondent did not take into consideration the extent of my mental health disability',* the issue should have been raised then, if not before.

HHJ Tucker also observed, at [39], that some caution should be exercised when listing contested hearings remotely, particularly when parties represent themselves. A remote format impacts upon communication between the parties and the Tribunal and may have done in this case. Communication with litigants in person may not be as effective over a remote platform; cues which can instantly be picked up on in a face -to- face hearing can far more readily be missed. Further, it may be much harder for a litigant in person to interrupt so as to ask a point of clarification over a remote link rather than in person if, for example, a litigant is unsure of a matter, or is not confident they have understood.

Cases like this require a finely balanced response from Employment Judges and Tribunals and from the legal representatives who act for the respondent. In *McLeary v One Housing Group Ltd* UKEAT/0124/18/LA it was at issue whether the Claimant had raised a claim of discriminatory constructive dismissal. HHJ Auerbach stated, at [88], that it would *not* be appropriate for the Tribunal, as it were, to invite a claimant to add a wholly new complaint; what is necessary, starting with the Case Management Hearing, is simply to clarify the substance of what the Claimant is saying and the claims that he or she is seeking to bring. When it "shouts out" or is "clear" from the contents of the Particulars of Claim that a lay claimant is saying, factually, 'I was subjected to discrimination in my employment and this drove me to resign', it is both proper, and incumbent on the Tribunal, to seek clarification of whether such a claim is intended.

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Katherine Anderson

Barrister
3PB Barristers

0330 332 2633
katherine.anderson@3pb.co.uk

3pb.co.uk