Victimisation: where the Claimant may do a protected act

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Aslam v Transport UK London Bus Ltd (formerly known as Abellio London Ltd) [2025] EAT 113

References to [x] are to paragraphs in the EAT's judgment.

1. **Aslam v Transport UK London Bus Ltd (formerly known as Abellio London Ltd) [2025] EAT 113** ("**Aslam**") concerns a job applicant who told the Respondent (their prospective employer) about a tribunal claim against a former employer; and, during his induction process, the Claimant raised a question (via email) as to whether there was a difference in treatment on grounds of race between himself and other candidates. In the event, the Respondent withdrew the job offer.

2. The Employment Tribunal (**"ET"**) found that the Respondent did not know that the Claimant's pervious tribunal claim had alleged discrimination and rejected that the Claimant's later email to the Respondent was a protected act. Nevertheless, the ET found that the Claimant's actions led the Respondent to believe that the Claimant may do a protected act in the future (s 27(1)(b) EqA 2010). However, after the Respondent's application, the ET reconsidered its decision on the basis that the Claimant had not pleaded the claim explicitly under s 27(1)(b).

3. The Employment Appeal Tribunal (**"EAT"**) allowed the appeal on the basis that the ET1 could be construed as including a s 27(1)(b) claim and/or the ET had adopted an unduly narrow approach to determining whether it was in the interests of justice to allow the original judgment to stand.

Factual background

4. The Claimant was conditionally offered a role at the Respondent and attended an induction. The Claimant subsequently learnt that other candidates had been able to work shifts before the induction and, as a result, the Claimant emailed the Respondent (Ms Morrison and Ms Merchant) and asked whether the other candidates could do so "*because they are of a different race*".

5. Ms Morrison forwarded the email to her manager, Mr Dyett. Mr Dyett's response was "*[I]s he for real?*" and "*he cannot work for us*". Mr Dyett was not directly involved in the recruitment process, but the ET found that his reaction may have influenced Ms Morrison.

6. Ms Morrison spoke to Ms Merican about the Claimant's email, whereupon Ms Merican raised that the Claimant had issued a tribunal claim against his former employer.

7. The pleaded reason for the withdrawal of the Claimant's offer of employment was "*the Respondent's failure to obtain satisfactory references*."

Before the ET

8. In relation to the victimisation claim, the ET found that (a) the nature of the claim against the former employer was not discussed; and (b) the email was not a protected act because it merely raised a question regarding possible differential treatment. However, the ET stated that:

> *"It falls to the Tribunal to determine on the balance of probabilities what the reason for withdrawing the job offer was. We do not have the benefit of evidence from Mr Tigreros as to what was in his mind, though we did have evidence from Ms Morison and Mr Merchant and the contemporaneous emails. In our judgement, on the balance of probabilities, the true reason for withdrawing the job offer was, as is set out in Mr Tigreros' email, to avoid future issues. In our judgement, given the overall context included both (1) the fact that the claimant was pursuing a claim against his former employer and (2) the fact that the claimant had raised a question around differential treatment on the basis of race, it could properly be inferred that those "future issues" sought to be avoided could include a complaint or claim of race discrimination."*

9. The ET (initially) upheld the victimisation claim.

10. Thereafter, the Respondent immediately applied for reconsideration under (then) r 70 of the 2013 ET Rules on the basis that the Claimant's only pleaded allegation was that the Respondent subjected him to a detriment because he had done protected acts (i.e. within s 27(1)(a)). That claim had failed because the ET found that the acts relied on were not protected acts, or that the relevant decision-makers within the Respondent did not know that they were protected acts (i.e., in relation to the previous tribunal claim).

11. The ET's judgment accepted that the victimisation claim had to be determined solely by reference to s 27(1)(a).

Before the EAT

Was the ET's approach too restrictive in relation to the Claimant's pleading?

12. The Claimant submitted that his particulars could encompass a claim under s 27(1)(b), i.e., whether the Respondent believed that he may do a protected act.

13. The Respondent relied on the authorities of **Chandhok v Tirkey** [2015] ICR 527 (the ET1 must set out the claim); and **Marrufo v Bournemouth Christchurch and Poole Council** UKEAT/0103/20/BA (which notes the importance of "*[P]recision, specificity and clarity*", especially in discrimination claims).

14. The Respondent further relied on the recent Court of Appeal case of **Moustache v Chelsea and Westminster Hospital NHS Foundation Trust** [2025] EWCA Civ 185, which considered the status of lists of issues. **Moustache** dealt with a situation where a s 15 EqA 2010 dismissal claim was not included in the list of issues (it was recorded as an ill health capability dismissal, in circumstances where the employee was on long-term sick leave). The claimant argued that her ET1 could encompass a s 15 claim on the basis of the pleaded facts. In **Moustache**, Warby LJ stated that the starting point is to consider "*what claims emerge from an objective analysis of the statements of case*" (para 39). Where the tribunal fails to identify an obvious claim, it is "*liable to amount to a breach of its core duty and hence an error of law*". The Court of Appeal reiterated that a list of issues is not a formal pleading and its purpose is to summarise the existing pleadings.

15. While the EAT in **Aslam** accepted that the Claimant did not explicitly plead that his job offer was withdrawn because the Respondent believed he may do a protected act, the EAT stated that the distinction between the claims under ss 27(1)(a) and 27(1)(b) was "wafer thin" [43]. The EAT stated that the only distinction was the Respondent's rationale, which was a matter entirely within its own knowledge, and that the Respondent's factual case for withdrawing the offer was because it had been unable to obtain a reference for the Claimant. That rationale did not turn on subtle distinctions as to whether the Claimant had done protected acts as opposed to whether he may do protected acts in the future. The EAT also relied on the two claims drawing on the same essential facts.

16. Overall, the EAT was satisfied that the Claimant's particulars could encompass the claim under s 27(1)(b).

Did fairness require the Tribunal to read the pleaded claim more widely or consider whether to permit the Claimant to amend his claim?

17. The EAT noted that this could bite at two stages: (1) at the outset of the ET hearing, and (2) at the point at which the ET considered the reconsideration application. The EAT focused on point 2.

18. The approach to reconsideration was addressed by the Court of Appeal in **Phipps v Priory Education Services** [2023] IRLR 851, in which it was said that the interests of justice test is broad textured and requires a careful assessment of what justice requires.

19. In **Aslam**, the EAT found that the ET had erred by focusing entirely on whether a s 27(1)(b) claim had been explicitly pleaded. It gave the Claimant, then a litigant in person, no chance to amend his claim [52]. The ET also did not consider the fact that the s 27(1)(b) claim arose from essentially the same facts as the s 27(1)(a) claim. The ET had also failed to consider whether the Respondent had a fair chance to address the claim by reference to the evidence that its witnesses had given to the tribunal [55].

20. If the interests of justice test had been properly applied, the EAT found that the only conclusion would have been to let the initial judgment stand such that the s 27(1)(b) claim would succeed [56].

Take aways

21. This case confirms that a central consideration for the tribunal (where a party does not explicitly plead a claim) is to identity (a) whether the claim arises out of the pleaded facts; and (b) the prejudice that a Respondent will suffer as a result of the ET determining a claim which was not explicitly pleaded. Here, the prejudice was almost non-existent, as the Respondent did not suggest that it would have called different witnesses; nor that, had it known from the outset that the Claimant was pursuing a s 27(1)(b) claim, it would have otherwise altered the evidence.

22. Practitioners should consider these points when advising on reconsideration applications where an unpleaded claim was (or was not) determined, as well as on any onward appeal to the EAT in relation to how the tribunal has dealt with a claim that was not explicitly pleaded.

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