What's arising in s15 EqA claims? Getting it right

By Stephen Wyeth

3PB Barristers

Stephen Wyeth summarises the recent Employment Appeal Tribunal decision of Williams J in Khakimov v Amova Asset Management UK Ltd (formerly Nikko Asset Management Europe Ltd) [2026] EAT 47 concerning the proper identification of the "something arising" under section 15 Equality Act 2010 ("EqA"), the role of agreed lists of issues, and the limits of appellate intervention in proportionality and perversity challenges.

The facts

1. The appellant, Mr Khakimov, was employed by the respondent asset management firm in senior product management roles, latterly as Product Management Director (UK) until his eventual dismissal on 13 January 2021. Following a prolonged period of sickness absence commencing in April 2019, and extensive disputes over the process to be followed in respect of an occupational health assessment (mainly about who should conduct it) and a failed application for group income protection ("GIP") insurance, his employment was terminated on capability grounds. The respondent conceded that the claimant suffered from Functional Neurological Disorder ("FND") amounting to a disability within the meaning of the Equality Act 2010. The respondent had only learned of this condition when it received Mr Khakimov's first tribunal claim on 7 October 2020 (even though that claim had been filed some months earlier on 17 May 2020).

2. The appellant claimant brought a wide-ranging set of claims before the London Central Employment Tribunal ("ET"), many of which were dismissed as being out of time or withdrawn. Those relevant to this appeal were a claim for discrimination arising from disability contrary to section 15 EqA in relation to dismissal, and a claim for unfair dismissal under the Employment Rights Act 1996 ("ERA"). The ET (EJ Snelson sitting with members) dismissed both claims on the merits in a reserved liability Judgment promulgated on 7 November 2023.

The appeal

3. Following a rule 3(10) hearing before HHJ Auerbach, Mr Khakimov was permitted to advance two principal grounds of appeal (of which the second was subdivided in to two). First, it was asserted that the ET erred in law or reached perverse conclusions by failing to take proper account of alleged concessions made by the dismissing officer in cross-examination, particularly concerning whether the respondent ought to have revisited the GIP claim after learning of the claimant's FND diagnosis in October 2020 before dismissing him in January 2021 (Ground 1). Secondly, it was alleged that the ET took too narrow a view of the "something arising" from disability under section 15, both by holding that dismissal was not because of the "something arising" identified in the agreed list of issues (Ground 2A) and by refusing to permit a later reformulation of that "something" to encompass unfitness for work or incapacity as such (Ground 2B).

4. As an aside, a late application was also made to add a further Ground 3 alleging procedural unfairness arising from what the appellant asserted to be a distorted list of issues (because wording in the original formulation of the issues had been removed at a later preliminary hearing before EJ Hodgson when the issues were finalised) but this was refused at the Appeal hearing. In short, the EAT concluded that there was no properly arguable case of serious procedural irregularity in this regard not least because the omission of the earlier wording did not occasion injustice or undermine the integrity of the decision-making process.

The approach of the EAT

5. Much of the focus of the appeal was on the process leading up to the agreed list of issues. Williams J noted the extensive interlocutory proceedings that had been necessary to case manage this claim to trial and the extensive efforts that were exhausted in resolving how the definitive list of issues should be recorded. Williams J commented on the fact that the final version of the list of issues appended to EJ Hodgson's case management summary ran to 14 pages in total. An earlier version of the list of issues (prepared by EJ Spencer) had been the subject of an unsuccessful amendment application to the tribunal and a subsequent (unsuccessful) appeal to the EAT by Mr Khakimov.

6. The final list recorded the claimant's s15 case as relying on the following as the relevant "something arising" from disability:

"*The claimant asserts that his disability makes it difficult to think in multiple layers, deal with unclear responsibilities and uncertainty of his allocated roles. The uncertainty is compounded when misrepresentation takes place.*"

7. At the start of the multi-day liability hearing before the ET, counsel for Mr Khakimov unequivocally confirmed that the list fairly identified the matters for determination. It was only in his closing submissions that Mr Khakimov's counsel sought to depart from what was specified in the final list and re-characterise the "something arising" as the claimant's 'unfitness for work caused by his FND'. The tribunal rejected the proposition that it should depart from the final list of issues and accept the new construct being suggested for the purposes of s15.

8. The tribunal went on to applying the framework in *Pnaiser v NHS England* [2016] IRLR 170 and *City of York Council v Grosset* [2018] IRLR 746, and held, primarily, that dismissal was not "because of" the "something arising" as defined in the list of issues. The tribunal said the following (at paragraph 212 of their Judgment):

   "*There is no basis for supposing that Mrs Marks rested her decision to dismiss on her perception of the Claimant's cognitive functions and/or any uncertainty he might feel about his functions and responsibilities. She did not have any reason to doubt his cognitive capacity or to wonder whether he was clear about his functions and responsibilities. Moreover, she had no reason to turn her mind to these questions. They did not arise. She dismissed the Claimant on capability grounds. The main factors on which her decision was based were that he had been away from work for an extended period; there was no apparent prospect of that period coming to an end; his long-term absence had prejudiced the Respondent's business and threatened, if continued, to cause it further prejudice; and the Respondent had not been provided with any evidential basis on which to consider any alternative to dismissing him on capability grounds.*"

9. In essence, the ET found as fact that the dismissing officer's decision was based on Mr Khakimov's prolonged absence, a lack of medical evidence, failure to engage with occupational health processes and business impact, rather than any perception of cognitive difficulty or uncertainty about role responsibilities. The ET went on to find in the alternative that even if it was incumbent upon them to determine whether Mr Khakimov's dismissal had been because of incapacity arising from disability (a proposition the ET rejected because this was not what was stated in the list of issues), it would have been justified as a proportionate means of achieving legitimate aims under s15(1)(b), and that

dismissal was in any event within the band of reasonable responses for unfair dismissal purposes.

Disposal of the appeal

10. The EAT dismissed the appeal in its entirety. Turning to Ground 2B first, it held that the ET was entitled to confine itself to the agreed list of issues and to reject the attempted re-formulation of his case at closing submissions. Relying on the Court of Appeal's recent guidance in *Moustache v Chelsea and Westminster Hospital NHS Foundation Trust* [2025] IRLR 470, the EAT emphasised that proceedings are adversarial and that it is for the parties, not the tribunal, to identify the scope of the claims advanced. An agreed list of issues normally defines the case, and neither fairness nor the overriding objective required the ET to reopen the agreed scope of the issues at such a late stage (not least because of the specific reasons identified by the EAT at paragraph 101 in particular). Applying *Moustache*, the EAT was satisfied that this was not a case where a pleaded claim had been omitted nor one where fundamental fairness required departure from the list.

11. As for Ground 2A, the EAT held that the tribunal correctly applied the two-stage causation analysis required by section 15, distinguishing between the subjective reason for dismissal and the objective question whether the "something" arose in consequence of disability. The ET had permissibly concluded that the identified "something arising" was not a significant influence on the dismissing officer's decision. Again, the EAT was satisfied that this conclusion was not perverse and was adequately reasoned by the ET.

12. Addressing Ground 1, the EAT rejected the contention that the ET had failed to consider relevant concessions or that its conclusions on proportionality or unfair dismissal were perverse. The tribunal was entitled to assume, absent any contrary indication, that all relevant evidence had been considered, and was not required to list every piece of evidence in its reasoning. The fact that the dismissing officer made concessions in cross examination about the fact that there had been no suggestion or discussion about reverting to the GIP provider to reconsider his eligibility for cover due to his FND (described by the EAT as "the oversight concession") did not undermine the ET's careful and detailed reasoning in the EAT's view. The ET was entitled to reach the decision it did particularly given the claimant's repeated refusal to provide medical evidence or to engage with occupational health, and the history of the insurance claim process generally.

13. The appeal was therefore dismissed in full.

Key take away points for practitioners

14. For practitioners, the decision offers significant reinforcement of several principles.

15. Firstly, s15 discrimination claims depend critically on careful identification of the "something arising". While the statutory language allows for flexible chains of causation, the case advanced will be confined to how that element is articulated in the pleadings and, in practice, in the agreed list of issues. It is imperative that advisers think very carefully about what assertions are being made regarding causation and whether they are logical and evidence based. Attempting to re-characterise the "something arising" at trial or on appeal, particularly after evidence has closed, will encounter resistance that is likely to be insurmountable.

16. Secondly, the Judgment underscores the practical and forensic significance of lists of issues. Once agreed, particularly if both sides are legally represented, they will ordinarily define the battlefield. It is recommended that practitioners should therefore approach their formulation with the same care as the pleadings themselves.

17. Thirdly, the case once again reinforces the high threshold facing appellants who seek to advance perversity or 'failure to take account of evidence' type arguments, especially in relation to proportionality assessments under s15(1)(b) EqA and 'band of reasonable responses' findings in unfair dismissal.

18. The decision also provides a clear reminder that when scrutinising the evidence for the purposes of assessing justification (in s15 EqA cases) and fairness (in s98 ERA cases) tribunals will reach their conclusions in the context of the totality of the factual matrix rather than formulating findings on isolated concessions made by one side or the other. Somewhat specific to the facts in this case, the decision, both at first instance and on appeal, emphasises that employers are not required to pursue speculative alternative processes where an employee has persistently declined to cooperate with reasonable attempts to obtain medical evidence.

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Stephen Wyeth

Barrister
3PB

01962 868 884
Stephen.Wyeth@3pb.co.uk

3pb.co.uk