THE INDUSTRIAL TRIBUNALS

CASE REF: 9241/17

CLAIMANT: **Paula Hooker**

RESPONDENTS:
1. Ards and North Down Borough Council
2. Graeme Bannister

PRE-HEARING REVIEW DECISION

The decision of the tribunal is that:-

(1) It is ordered that, following a review of the claimant's witness statement by the claimant and/or her representative, after taking into account the matters set out in this decision, the said witness statement of the claimant must be redrafted/amended, so the maximum number of words does not exceed 8,000 words.

(2) Further Case Management Directions/Orders are made by the tribunal, as set out in more detail in paragraph 4.2 of this decision for the exchange of the witness statements of the parties, in light of this decision.

Constitution of Tribunal:

Employment Judge (sitting alone): **Employment Judge Drennan QC**

Appearances:

The claimant was represented by Mr N McMullan, Solicitor, Worthingtons Solicitors.

The respondent was represented by Mr B Mulqueen, Barrister-at-Law, instructed by Jones Cassidy Brett, Solicitors.

REASONS

1.1 At a Case Management Discussion on 16 April 2018, as set out in the record of proceedings, dated 25 April 2018, the tribunal made various Case Management Directions/Orders, by consent, including Orders that:-

(a) the claimant and any witness she wishes to call must provide a **signed and**

dated witness statement to the respondents' representative by 5.00 pm on 18 June 2018;

(b) the respondent and any witness it wishes to call must provide a **signed and dated** witness statement to the claimant's representative ***by 14 August 2018***;

(c) oral evidence or written supplementary witness statements in response to the respondents' witness statements will only be permitted with leave of the tribunal where good reason is shown;

(d) a witness statement must be a complete statement of the evidence relating to the issues, in respect of both liability and remedy, in the case, that the witness wishes to give to the tribunal. Witness statements must not contain the parties' submissions or arguments. The parties will be given the opportunity to make submissions at the conclusion of the evidence. A witness will not be permitted to add his/her statement without the consent of the tribunal. Consent will only be given by where there is good reason for doing so.

The witness should commence with an introductory paragraph which identifies the witness and explains the relevance of the witness to the claim, eg claimant, line manager, member of interview panel, etc.

The statements should then use the factual issues above and set out the witness' evidence, if any, in relation to each factual issue chronologically. The claimant's witness statement should also include her evidence to support any claim for injury to feelings and/or financial loss. She should also include her evidence of all steps taken to obtain alternative employment. Witness statement should finish with a short summary paragraph.

Witness statements may not exceed 5,000 unless otherwise directed by the tribunal.

(e) Any documents referred to in the witness statements must be identified by the relevance page number in the bundle.

(f) Witness statements will not be read out to the tribunal, subject of the discretion of the tribunal hearing the case.

(g) Witness statements will be read by the tribunal prior to the commencement of the hearing which will then proceed by way of cross-examination.

The above Orders were in accordance with the tribunal's normal Case Management procedures in relation to a discrimination claim before the tribunal.

1.2 The claimant's claim, which requires to be determined by the tribunal, as set out in the agreed statement of issues, lodged with the tribunal is – "did the respondent fail to make reasonable adjustments in light of the claimant's disability contrary to their duty to find within Section 4A of the Disability Discrimination Act 1995, as amended?"

It should further be noted that it is not disputed by the respondent that, at the material time, the claimant was a disabled person within the terms of the said act.

1.3 In a letter, dated 21 June 2018, the claimant made an application to the tribunal in the following terms:-

> *"…. We refer to the above matter and confirm that the claimant's witness statement has been served today.*
>
> *After consideration of the claimant's statement, it is respectfully submitted that the contents of same are relevant and necessary for a fair disposal of the proceedings and unfortunately, we do not believe it is feasible to reduce the claimant's evidence in chief to 5,000 as ordered in the record of proceedings of the Case Management Discussion held on 16 April 2018. We would therefore respectfully request an extension of the word limit ordered by the tribunal from 5,000 words to 11,500 words.*
>
> *We trust this is satisfactory and look forward to hearing from the tribunal in this regard. In the meantime we confirm that a copy of this correspondence has been copied to the respondent's representative at today's date in accordance with Rule 11(4) of the Industrial Tribunal's Constitution of Rules of Procedure) Regulations (Northern Ireland) 2005 …."*

In a letter dated 25 June 2018, the respondents' solicitor wrote to the tribunal stating:-

> *"We refer to the above matter and to the claimant's witness statement and her solicitor's letter of 21 June. This contains a request for an extension of the word limit from 5,000 to 11,500 words. We have reviewed the content of the witness statements and are of the opinion that it contains a lot of information which is not directly relevant to the issues in the case. Therefore we must object to the extent of the extension requested …."*

1.4 Following a Case Management Discussion on 28 June 2018, as set out in the record of proceedings, dated 29 June 2018, this Pre-Hearing Review was arranged, with both parties agreeing to short notice, to consider the following issues, namely:-

> *"(i) whether the word limit of the claimant's witness statement should be extended to 11,500 words*
>
> *(ii) what further or other Orders require to be made by the tribunal if the application to extend the said word limit is granted by the tribunal."*

1.5 At the commencement of the hearing, the claimant's representative confirmed that the claimant's claim is a claim, pursuant to Section 4A of the 1995 Act, as set out above, and the claimant was not making a claim of harassment and/or direct discrimination, pursuant to the 1995 Act and/or any other anti-discrimination legislation.

1.6 During the course of discussion, on foot of this application by the claimant, the claimant's representative accepted that, following a review, he was satisfied the claimant's witness statement could be properly reduced to 10,000 words but he did

not accept that it could be further reduced. The respondents' representative maintained the objection set out previously and, in particular, he did not accept that a word limit of 10,000 words was appropriate in the circumstances and he submitted that the original word limit, or something close to it, should be maintained in the circumstances. The respondents' representative also pointed out that, at the Case Management Discussion on the 16 April 2018, there had been no suggestion by the claimant's representative that a witness statement of such a length would be required and he noted the said Order, limiting the word limit to 5,000 words, was made by consent of the representatives. However, it has to be acknowledged that the word limit of 5,000 is part of the "normal/standard" Case Management Orders made by the tribunal, in the absence of any other relevant application by the parties at the time of the Case Management Discussion. As set out previously, a party is entitled, at any time, to make an application for extension of that word limit in appropriate circumstances.

Relevant Law

2.1 In a series of decisions, including ***Carol Crockett v Police Federation of Northern Ireland and Another, [case reference numbers 5577/13 and 1279/13 – NIIT 9 October 2013]***, ***Michelle Elliott v Chief Constable of Police Service of Northern Ireland [case reference numbers 872/15, 2273/15 – 24 February 2016] Kelly v K-TEC Automaton Limited [case reference numbers 36/15FET, 1336/15, 5/16FET, 227/16 – 12 May 2016], Briercliffe v Southern Health and Social Care Trust [case reference 74/12 – 5 September 2012] and Michelle Connolly v Caterpillar (NI) Ltd [case reference 1804/17 – 16 November 2017],*** I have reviewed many of the relevant authorities and the legal principles which must guide a tribunal in relation to such an application, which have been identified in various legal decisions in this jurisdiction and in Great Britain. Since both the claimant's and the respondents' representatives accepted the principles set out in those decisions, I do not intend to repeat, in extenso, what is set out in those decisions; but I have taken them all into account in reaching my decision, as set out below. Both representatives, in the course of their submissions, recognised the difficulties imposed on a tribunal when considering these issues, at such a Pre-Hearing Review, and in seeking to balance the respective interests of both parties. In this context, I again reminded the representatives of the terms of the overriding objective.

I am also very conscious of the guidance of Mummery LJ in ***Beazer Homes Ltd v Stroude [2005] EWCA Civ 265***, when he stated at *Paragraph 10*:-

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

In ***Digby v East Cambridgeshire District Council [2007] IRLR 585, paragraph 12*** it was confirmed the tribunal has a discretion, which must be exercised judicially, in accordance with the overriding objective "to exclude evidence which is unnecessarily repetitive or only of marginal relevance in the interests of proper modern day case management".

This guidance was confirmed by Underhill J, as he then was, in ***HSBC Asia Holdings BV v Gillespie [2010] UKEAT/0417***.

After referring to the said guidance by Mummery LJ in ***Beazer Homes Ltd***, Underhill J in ***HSBC Asia Holdings BV***

> *"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. … 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. … ."*

I am also only too well aware, as referred to in ***Crockett***, ***Elliott, Briercliffe, Connolly*** and ***Kelly***, that what is stated in a claimant's witness statement will frequently have a direct consequence for the length and number of witness statements produced by a respondent. In the circumstances, the necessity therefore for witness statements to be properly drafted from the outset has great importance in relation to the conduct of a substantive hearing and length of same.

In reaching my decision, as set below, I also took into account what was stated by me in the decision of ***Briercliffe v Southern Health & Social Care Trust [Case Reference No: 74/12]***, in which I stated, insofar as relevant and material to these proceedings:-

> *"2.4 I am satisfied, before determining this matter, it is necessary to confirm that I do not consider the use of word-limits should become some form of sterile word number competition/bidding war between the parties; and the parties must not forget the purpose of imposing any form of word-limit is merely a tool to enable the tribunal to properly case-manage a substantive hearing, in light of the issues identified. Having said that, I note that, without much apparent difficulty and after reflecting what had been stated at the previous Case Management Discussion, the claimant was able to significantly reduce the words used in her amended witness statement from those used in her original witness statement. It therefore begs the question, why such an exercise was not carried out, before the service of the original witness statement. For the reasons set out below, I think a further reduction can and will require to be made by the claimant, by the tribunal imposing a new word-limit. I accept that, in my discretion, an alternative method for a tribunal when determining such an application can and should be, where it is appropriate to do so, to strike-out certain paragraphs/parts of a witness statement, rather than merely imposing an overall word-limit. Each case will depend on its own facts and the particular issues to be determined, but also the terms of the witness statement, the subject-matter of an application. To strike-out certain paragraphs/parts of a witness statement was able to be done, for example, in the cases of* ***O'Prey, Bowers*** *and*

> ***McNally**, to which reference has been made above. However, on the basis of the submissions made by the representatives in this case, but also the issues to be determined by the tribunal (see later), I came to the conclusion that for a tribunal, in this particular case, to conduct a 'red pen type exercise' at a pre-hearing review was not appropriate and would have meant the tribunal could fall into the very trap, which is warned against in the cases of **Beazer Homes Ltd** and/or **SCA Packaging** and where, in my judgment, the terms of the witness statement, as drafted to date, did not clearly allow such a 'red pen type exercise' to take place.*
>
> *…."*

In light of the foregoing, I decided that, in these present proceedings, a 'red pen type exercise' of specific paragraphs or parts thereof was not appropriate; and certainly at this stage, this decision should involve merely imposing an overall word-limit, in light of a review, as set out later in this decision.

2.2 In reaching my decision, as set out below, in this application for an appropriate word limit, I do not ignore, but expressly take into account, that in "a discrimination type case", which would include a claim for failure to make reasonable adjustments, pursuant to the 1995 Act, background circumstances and/or context may frequently require to be included in a witness statement (see ***Anya v University of Oxford [2001] IRLR 377***). However, such facts relating to background and/or context must be kept to a minimum, insofar as relevant and necessary, in order to establish a particular claim. In particular, as seen in many cases, there is often a danger that such background facts, being merely background or matters of context, unless properly limited, can take on an importance greater than the identified issues in the claim itself. It can sometimes be difficult to achieve the necessary balance and to determine where the line must be drawn, indeed, as part of the review of the claimant's witness statement in the present proceedings, (see later) the claimant and the claimant's representative must consider where so called matters of background and/or context could be omitted or expressed in more limited/reduced terms than is presently the case. In advance of that review and, in light of what I have said about a "red pen exercise" at a Pre-Hearing Review, I am reluctant to refer to specific paragraphs of the claimant's witness statement, where I have such concern; although some were addressed in general terms, during the course of discussion (see later). However, if necessary, following any such review and exchange of an amended witness statement to comply with a new word limit, I will determine, if it is appropriate to do so, any such matter in light of any further appropriate application and/or objection by either party, which application will require to refer to specific paragraphs of the said witness statement. Hopefully this will not be necessary.

2.3 In various recent decisions in the High Court in Great Britain, where witness statements are a normal part of the evidential procedures, there have been various examples where orders for costs have been made by the Civil Courts, where witness statements have been held to been improperly drafted (see for example ***Nicholls v Ladbrokes Betting and Gaming Limited [2013] EWCA Civ 1963)***. Although I appreciate that, in Employment Tribunal proceedings, costs do not normally follow the event and indeed are infrequently ordered; the dangers and

consequences for improperly drafted witness statements, as indicated in such decisions, are clearly to be seen.

In the ***Farepak*** litigation, Peter Smith J stated:-

> *"47. Courts have regularly reminded parties that the purpose of witness statements is to replace oral testimony. It is not to rehearse arguments, it is not to set out a case and whilst necessarily has to be drafted with the corroboration of lawyers, it should not be a document created in the language of lawyers by the lawyers, because the lawyers do not go into the witness box and defend it … ."*

In ***ED & F Man Liquid Products Ltd v Patel [2002] 1706 EWHC (QB)*** HH Judge Dean provided a classic example of the dangers of a statement given opinion evidence, when he stated:-

> *"Witness statements are not the place for arguments. It means you have to read everything twice … a lot of it is tendentious comment which is bound up with fact. I think this witness statement is an example of what a witness statement should not be whether in the commercial court or anywhere else … here we have the commercial court practice which says that witness statements must comply with the Rules. They should be as concise as the circumstances allow it. They should not engage in argument … ."*

In ***JD Wetherspoon PLC v Harris & Others [2013] EWHC 1088***, the High Court granted an application to strike-out the majority of a witness statement on the grounds that there was an abuse, as it contained recitations of facts based on documents (rather than direct knowledge), commentary on those documents, argument, submissions and expressions of opinion.

In ***Rock (Nominees) Ltd v RCO Holdings [2003] EWHC 80 (CH)***, the court had to determine an application to exclude a witness statement which was full of comment and submission, which it clearly considered was inappropriate and required to be excluded. It also referred to the risk of costs entailed by submitting a statement containing such evidence.

2.4 The guidance in legal authorities, previously referred to, show witness statements must set out relevant facts, but omit argument, supposition, hypothesis, statements of belief and repetition. In particular, a witness cannot dictate what is contained in the witness statement by stating, in terms, "this is my story I will say it as I like". The witness is subject to the Case Management Orders and Directions of the tribunal, the relevant Rules of Procedure, including the overriding objective and must confine himself/herself to such statements of facts. Witness statements obviously have clear advantages, not least in relation to the modern principles of "cards on the table". In many cases, but sadly not all, witness statements can be of great assistance in reducing the length of hearings. However, it must not be forgotten that the claimant's witness statement, for example, which is now normally pre-read by the tribunal prior to the hearing, replaces the oral examination in chief of that witness. If such evidence was to be given orally by a claimant, in the absence of witness statements, then the factual evidence to be given by that witness, by way of examination in chief, would normally be guided/directed by a

series of direct questions put to that witness by the relevant representative. By use of such questions, but also where necessary, any relevant intervention of the tribunal, it is possible to prevent the witness straying into areas of arguments, statements of opinion or belief and/or hypothesis and/or repetition. However this measure of control, which would normally be present if evidence was given orally rather than by way of witness statement, is still relevant, in my judgement, and must be borne in mind whenever consideration is given to what must be contained in a witness statement. Certainly, a witness statement must not be an opportunity for a witness to get round "controls" that would normally operate, if evidence was given orally. A major difficulty that is frequently observed by tribunals, in my experience, is that a respondent faced with a witness statement that has included irrelevant/excessive background/context, inevitably believes all such matters set out must be responded to in similar detail/length, in the absence of any relevant Order of the tribunal.

2.5 In *Disclosure by Malek and Matthews (5th Edition)* in relation to the form and contents of witness statements, it is helpfully suggested at *Paragraph 21.23*:-

> *"In general the witness statement will stand as part or all of the evidence-in-chief of the witness in question. Hence it should resemble that oral evidence as far as possible. Rather than being a legalistic document, the witness statement should be in the witness' own words. The witness statement must indicate which of the statements in it are made from the witness' own knowledge and which are matters of information and belief and the source for any matters of information or belief. A witness statement for trial should be no longer than is essential to convey the first-hand evidence of the witness. There should not be recitation of the content of documents or commentary on the issues in the claim. The witness statement should not include commentary on the trial bundle or other matters which may arise during the trial or may have arisen during the proceedings.*
>
> *… Inadmissible and irrelevant matters should not be included in a witness statement. The court has power to strike out irrelevant matters collateral to the issues to be tried from witness statements, direct the witness statement to be re-submitted, to make appropriate costs sanctions."*

2.6 Whilst not applicable in Northern Ireland, the *White Book on the Civil Procedure Rules of Great Britain*, where the use of witness statements is much more common than in Northern Ireland, states at *Paragraph 32.4.21*:-

> *"The party's awareness of the court's wide power to control evidence may encourage them to apply to the courts for an order striking out part of, or the whole of, a witness statement served on them by their opponent. Such an application might be made, for example, on the ground that the material sought to be struck out in irrelevant or would unnecessarily lengthen the proceedings, or is disproportionate (as well as, of course, on the ground that the disclosure would be in breach of a privilege enjoyed by the party). Where an application is made during trial, the judge is well placed to determine whether particular passages in the witness statement have no value or are irrelevant and/or disproportionate. A judge asked to approach such questions at the interlocutory stage is at a disadvantage and should*

*only strike out proffered evidence if it is quite plain that, no matter how the proceedings may look at trial, the evidence will never appear to be either irrelevant or, if relevant, will never be sufficiently helpful to make it right to allow the party in question to adduce it (**Wilkinson v West Coast Capital [2005] EWHC 1606, July 22 2005 Unreported Mann J**). The court must be on its guard to ensure that costs and delays are not increased by ill-conceived applications to strike out witness statements."*

2.7 Regulation 3 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 sets out the overriding objective which an Employment Judge shall seek to give effective to when exercising any power given under, or interpreting these Regulations and Rules.

Further, in ***Rogan v South Eastern Health & Social Care Trust [2009] NICA 47***, Morgan LCJ approved the judgment of Girvan LJ in ***Peifer v Castlederg School and Western Education & Library Board and Another [2008] NICA 49*** when he stated, inter alia, after reference to the terms of the overriding objective:-

" … Tribunals must ensure proper focus on the relevant issues and ensure that time taken in cross examination is usefully spent. The overriding objectives, which are, of course, always intended to ensure that justice is done, impel a tribunal to exercise its control over the litigation before it robustly but fairly. .. ."

2.8 In *Harvey on Industrial Relations and Employment Law, Volume 4, P1 Practice and Procedure* at *Paragraph 8.77*, much of the case law referred to above is helpfully referred to.

In particular, in *Paragraph 8.77(viii*) it is stated:-

" … However, caution should not be treated as an excuse for pusillanimity, and if a judge is satisfied on the facts of a particular case that the evidence will not be of material assistance in deciding the issues and that its admission will cause inconvenience, expense, delay or oppression, so that justice would be best served by its exclusion, he or she should be prepared to rule accordingly."

In the case of ***Kalu v Brighton & Sussex University Hospitals NHS Trust & Others [2014] UKEAT/0609/12***, Langstaff J, in a discrimination case, where the issue of exclusion of evidence arose stated:-

*"35. We therefore start by accepting that the excluded evidence might have been of some relevance. A tribunal should pause to think long and hard before it excludes any evidence which is of some relevance. However, the rule that evidence may not be admitted at all unless it is relevant does not have the corollary that if it is relevant it may not be excluded. In **Noorani v Merseyside Tec Ltd** **[1999] IRLR 184, CA** the Court of Appeal regarded it as a proper exercise of discretion by a tribunal to refuse to issue witnesses with witness summons which went to issues which were collateral and subsidiary, taking into account the likelihood that those subsidiary issues would affect the*

outcome. At paragraph 35, Henry LJ, with whom Thorpe and Beldam LJJ agreed, observed:

> *'Such proactive 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 over long 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.

The Court emphasised that the decision was discretionary. It is of the nature of discretions that they are entrusted to the Court at first instance. Appellate Courts must recognise that different courts may disagree about whether a discretion should be exercised or not without either being wrong, far less having made a mistake in law. A decision to exercise a discretion can be set aside only if the conclusion reached is outside the generous ambit within which a reasonable disagreement is possible. …..''

In ***Kalu***, Langstaff J referred, with approval, to the guidance set out in ***HSBC Asia Holdings BV and Another v Gillespie*** by Underhill J, referred to previously.

However, it has to be noted that the decision of the Employment Appeal Tribunal was by a majority, with Langstaff J being the minority member. The ***Kalu*** decision was subsequently appealed and judgement was given, on appeal, by Lord Justice Underhill [2015] EWCA Civ 897. In essence, Underhill LJ disagreed with the reasoning and conclusion of the majority in the Employment Appeal Tribunal and therefore approved what had been stated by Langstaff J. However, it may be useful, having regard to the issues in the present proceedings, to refer to the judgement of Underhill LJ, when he stated –

"17 I start my consideration of the issues by saying that I would endorse, with I hope appropriate diffidence, the summary of the relevant principles at paragraph 13 of my own judgement in ***Gillespie*** *– see pages 198-203 – I see no other advantage in my repeating them in extenso here. The most relevant of the propositions in that passage for present purposes is number 10. As I there record, it is well recognised in the discrimination case law that evidence about conduct on part of the respondents beyond the acts complained of (typically, but not always, prior conduct) may be highly relevant in deciding whether the acts complained of were discriminatory. The obvious example of this line of authority is, as indeed was pleaded in the grounds of appeal to the EAT,* ***Anya v University of Oxford [2001] EWCA Civ 405***). *But it must also be recognised there is a tendency for claimants to rely on that line of authority to seek to introduce a wealth of background evidence which is said to support the primary claim but which on analysis has little or no probative value and adds substantially to the length and cost of the proceedings – as well as*

*creating a real risk of distracting attention from the real issues (as occurred in **Qureshi v Victoria University of Manchester [2001] ICR 863**: see in particular the passage in the judgement of Mummery J, from page 874H-875B). I would refer to the passages from the judgements of Browne-Wilkinson J in **Chattopadhyay v Headmaster of Holloway School [1982] ICR 1323** and Mummery LJ in **Commissioner of Police for the Metropolis v Hendricks {2003] ICR** 530 which I set out, or referred to, under proposition 9 in Gillespie (see page 203B-C). There will certainly be cases in which, as I put it in proposition 10, the tribunal is satisfied that the evidence in question will not be of material assistance in deciding the issues in this case before it and will cause inconvenience, expense, delay or oppression if admitted, in which case the evidence in question not only may but should be excluded."*

[Tribunal's emphasis]

2.9 In relation to my decision, as set out below, it is without prejudice to any decision taken by the tribunal, at the substantive hearing, including any issue of costs arising out of the contents of the witness statements of either party, as placed in evidence before that tribunal, including, if appropriate, where it is decided the contents of any such witness statements have unreasonably impacted upon the length of the hearing. As seen in ***Beazer*** and ***HSBC Asia Holdings***, any decision made at a pre-hearing review, in relation to issues, the subject-matter of the hearing, inevitably, have to be limited given the nature and purposes of relevant Case Management. The tribunal, at the substantive hearing, will have much greater knowledge and understanding of the whole picture.

3.1 As stated previously, the parties have agreed the statement of legal and main factual issues in this matter, which confirm the limited legal issue to be determined by the tribunal and indeed the main factual issues which require to be determined by the tribunal. As discussed in the course of this hearing, given the limited main factual issues set out in the agreed statement of issues to determine the said claim of the claimant, which is not surprising given that the claim is a claim of failure to make reasonable adjustments and is not a claim of direct discrimination and/or harassment, pursuant to 1995 Act, or any other anti-discrimination legislation, the amount of background/context detail that has been set out in the claimant's witness statement is, in my judgement, surprising and gives rise to the concerns and issues set out in the case law, as referred to in the previous paragraphs of this decision (see ***Kalu***). In particular, it also has to be noted that, given that the issue of disability, will not require to be determined by the tribunal the amount of medical detail set out in the claimant's witness statement similarly gives rise to the concerns and issues addressed in the said case law.

The Court of Appeal in the case of ***Scicluna v Zippy Stitch Limited and Others [2018] EWCA Civ 1320*** has emphasised the particular relevance and importance, of the statement of issues.

As Longmore LJ stated:-

"14 …. Ever since the Woolf reforms, parties in the High Court have been required to agree lists of issues formulating the points which need to be determined by the Judge. That list of issues then constitutes the

road map by which the Judge is to navigate his or her way to adjust a termination of the case. Employment Tribunals encourage parties to agree a list of issues for just that reason and, if advocates are retained on both sides, it is right and proper for a list of issues to be prepared.

15 *Paragraphs 32-33 of* ***Land Rover v Short [2011] UKEAT*** *Langstaff J approved the submission of Counsel that:-*

> *"It was trite law that it was the function of an Employment Tribunal to determine the claims which the claimant had actually brought rather than the claimants which he might have brought and that accordingly the claimant was limited to the complaints set out in the agreed list of issues".*

So, likewise, must the respondent be limited to the defences set out in the agreed list of issues.

16 *In similar vein, Mummery LJ in* ***Parekh v London Borough of Brent [2012] EWCA Civ 1630*** *(with whom Patten LJ and Fonkett J agreed) said:-*

> *"31. A list of issues as 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 minimised. The list is usually the agreed outcome of discussions between the parties or their representatives and the Employment Judge. If the list of issues has agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see (**Land Rover v Short at paragraph 30-33).**"*

Further, Underhill LJ approved what was said by Longmore LJ; albeit he accepted that there can be exceptional cases where it may be legitimate for a tribunal not to be bound by the precise terms of an agreed list of issues but the proceedings in ***Zippy Stitch*** were not one of them.

In my judgement, the statement of issues having provided the relevant "road map", this must have a relevance and measure of control in relation to what is contained in the witness statements of the parties.

3.2 During the course of discussion, I raised with the claimant's representative particular concerns in relation to the detail set out by the claimant in her witness statement relating to allegations of harassment and bullying etc, in the context that the claim was a claim for failure to make reasonable adjustments and was not, as agreed by the claimant's representative, a case of harassment. Indeed, if the claim had been a claim of harassment many of the issues and concerns that were raised by me, during the course of discussion, would not have been appropriate. The claimant's representative, in response, insisted that, although the claimant was not making a claim of harassment, these were required to be included by way of background/context. Whilst accepting that, for the purposes of these proceedings, there does require to be an element of background/context for the claimant's said claim, the claimant, in my judgement, in her witness statement has gone far beyond

the various limitations/controls expressed in the decisions, referred to previously, in relation to what can be contained in a witness statement in relation to background/context. Indeed, a reader of the claimant's witness statement, without the knowledge of the limited nature of the claimant's claim, might have been forgiven for thinking the claimant was in fact making a claim of harassment and that disability was still required to be proved by the claimant. This emphasises, in my judgement, the difficulties with the claimant's witness statement, as presently drafted, and which require to be addressed by the claimant and the claimant's representative (see later).

3.3 Although relating to issues about pleadings and in particular lengthy pleadings Briggs LJ in the case of ***Hague Plant Limited v Hague and Others [2014] EWCA Civ 1609*** stated, with some relevance to the application in the present proceedings, as follows:-

> *"…. But the sheer number of examples does not sufficiently describe the sense of bewilderment and confusion experienced by a reader of the pleadings as a whole. So far from being a concise statement of the primary facts relied upon and in support of the claim, it comes across as a rambling narrative of the supposed twists and turns of the defendant's case about the matters in issue, serving no apparent purpose, and obscuring, rather than clarifying, the claimant's own case".*

4.1 In light of the principles and guidance set out in the legal authorities referred to in the previous paragraphs of this decision, I have carefully considered the terms of the claimant's said witness statement, in light of the submissions of the representatives and the further discussion at this hearing. Taking into account the agreed statement of issues, and after reading the witness statement as a whole, I have concluded that the witness statement contains considerable detailed background context material, which is not necessary for a claim of failure to make reasonable adjustments on the part of the respondents and, in the circumstances, must be appropriately omitted/reduced, following further review. I am also satisfied the witness statement wrongly contains, given disability is not in issue, certain evidence, in relation to medical issues, which must also be appropriately omitted/reduced from the said statement, following further review.

Since I am not determining, at this Pre-Hearing Review, any of the issues which will require to be determined by the tribunal in relation to the claimant's said claim of failure to make reasonable adjustments, I am therefore reluctant, in giving my reasons for this decision, to specify specific wording/sections etc to be found in the said witness statement, which require to be addressed, so as not to give rise to any issue of prejudice to either party. In light of the foregoing, I have come to the conclusion that there requires, in the circumstances, to be a review by the claimant's representative, of the claimant's witness statement and in doing so, to take account of the above matters, as referred to in this decision. I have concluded, following this review, the claimant's witness statement must be able to be redrafted/amended to reflect same, and the present word count of the claimant's witness statement can be properly and appropriately reduced from its present word count of approximately 11,500 words. I have further decided, following such a review, the word limit for the claimant's witness statement must not exceed 8,000 words. I fully appreciate to set any such limit is not and cannot be an exact science

and I have therefore, by imposing this new limit, sought to be as generous as possible, in the exercise of my discretion.

4.2 The substantive hearing in this matter is to be ***from 1 October 2018 to 12 October 2018*** and, in connection therewith the respondent's witness statements were to be provided ***by 14 August 2018.*** Allowing for the claimant's representative to carry out the above review and to redraft/amend the claimant's witness statement to reflect the new word limit, as set out above, I have therefore amended the tribunal's previous Order and ordered the respondents' witness statements to be exchanged with the claimant's representative ***by no later than 7 September 2018.***

4.3 These are Orders of the tribunal and must be complied with. If any further Order is required to be made to the Office of the Tribunals, including any application for any extension of time and/or to determine any ongoing dispute in relation to the length of the claimant's witness statement, then any such application must be made promptly and in accordance with the relevant Rules of Procedure and having regard to the dates for hearing, as set out above.

Employment Judge Drennan QC:

Date and place of hearing: 28 June 2018, Belfast.

Date decision recorded in register and issued to parties: