Appeal No. UKEAT/0272/19/VP

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 30 April 2020
Judgment handed down on 12 June 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MISS J PRANCZK — APPELLANT

HAMPSHIRE COUNTY COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Ms L Bone (of Counsel) Advocate
For the Respondent	Ms D Gilbert (of Counsel) Instructed by: Hampshire Legal Services Hampshire County Council The Castle High Street Winchester Hampshire SO23 8UJ

SUMMARY

PRACTICE AND PROCEDURE

The Claimant in the Employment Tribunal, who was a litigant in person, presented a claim form which, it was not disputed, raised claims for wages and in respect of loss of annual leave entitlement.

The Claimant did not attend the full merits hearing. The Tribunal dismissed her claims on the basis that the wages had been paid, and carry-over of the annual leave had been granted. It determined that there were no other claims raised by the claim form. It awarded the Respondent £750 costs on the basis that the Claimant had unreasonably continued with the litigation after the wages and leave claims had been satisfied.

The Claimant appealed (a) on the basis that the Tribunal erred by not identifying that the claim form contained a claim of disability discrimination and/or victimisation; and (b) in respect of the award of costs.

Held:

(1) The Tribunal had not erred in not identifying any claim of disability discrimination or victimisation in the claim form. On a fair reading of the claim form, it did not contain any such complaint.

(2) The Tribunal acted unfairly in making an award of costs in the Claimant's absence. It also in any event erred in failing to consider whether to take into account her means, or to explain whether, or how, it had done so. The costs award was quashed.

HIS HONOUR JUDGE AUERBACH

Introduction – the Background – the Tribunal's Decision

1. The Claimant in the Employment Tribunal ("the Tribunal") was employed by the Respondent as a Night Care Assistant. On 30 April 2018 she presented a claim form. She was a litigant in person. The matter came to a full merits Hearing before Employment Judge Craft sitting in Southampton on 10 August 2018. The Claimant did not attend. The Respondent was represented by a solicitor, Mrs Perry. The Judge gave an oral decision at the Hearing.

2. The Tribunal's written Judgment, sent to the parties on 24 September 2018, was:

> **"1. The Claimant's claims are dismissed. The Respondent has paid the arrears of pay and accrued holiday pay claimed by the Claimant. There are no other claims in the proceedings that remain to be adjudicated by the Employment Tribunal.**
>
> **2. The Claimant shall pay costs to the Respondent in the sum of £750 within the terms of rule 76(1)(a) of the Employment Tribunals Rules of Procedure 2013 (as amended). This award of costs is made because of the Claimant's unreasonable conduct of the proceedings."**

3. Written Reasons were requested and these were sent to the parties on 28 February 2019. They ran to nine paragraphs and I will simply set them out in full.

> **"1. There was no attendance by the Claimant at the hearing. The documentation on the case file confirmed that the Claimant had received notification of the hearing which had been fixed for some time and for which documents had been prepared and statements exchanged. The Claimant had not contacted the Tribunal either before, or on the day, of the hearing to explain her absence. Having considered the documents made available to it the Employment Tribunal was satisfied that it could proceed to hear the claim in the Claimant's absence.**
>
> **2. The Respondent provided the Tribunal with the following documents:**
> **• Bundle of Documents (Exhibit R1);**
> **• Statement of Mrs Patricia Connor, the Respondent Senior HR Advisor (Exhibit R2); and**
> **• The Claimant's unsigned statement as exchanged (Exhibit C1)**
>
> **3. The Claimant has been employed by the Respondent as a part time Night Care Assistant since 4 October 2012. This employment with the Respondent was continuing at the date of the hearing. The Claimant pursued claims for arrears of pay and accrued holiday pay.**
>
> **4. The Claimant claims £69.23 for errors made in the calculation of her pay when she changed her working hours on or around 30 August 2015. She also claims that 8.5 hours leave entitlement which could not be used by her in 2016 / 2017 was not added to her leave entitlement for the following year. She seeks an award for 8.5 hours accrued holiday pay**

> **of £100.47 to compensate her for that lost holiday. The Claimant also made reference to victimisation relating to her long term sickness, missing certificates and a wrong work pattern but has made, and particularised, no claims as to such matters. The Claimant's ET1 was received by the Tribunal on 30 April 2018. Case Nos: 1401464/2018 10.2 Judgment - rule 61 Therefore, the claims pursued by the Claimant had been submitted substantially out of time.**
>
> **5. Miss Connor confirmed that although the Claimant had not requested that her unused leave in holiday year 2016 / 2017 be carried forward, which she could have done, that unused leave had been re-credited to her annual leave account for the following holiday year. Miss Connor also confirmed that, although the Respondent had initially denied that the wages claimed by the Claimant were owed to her, the sum claimed of £69.23 had been paid into the Claimant's bank account to settle the claim on 17 July 2018.**
>
> **6. Although the Claimant pursued no other claims the Tribunal noted that the Claimant had provided no evidence that she had undertaken a protected act to support the unparticularised allegation that she had been victimised for taking sick leave, or that she had suffered a detriment. The Claimant had been re-credited with the leave she claimed had not been carried over and there could have been no detriment to her.**
>
> **7. The Respondent submitted that there were no claims which the Claimant could pursue in these proceedings and that the Claimant's claims should be dismissed. The Tribunal accepted that the Claimant had no further claims to pursue in these proceedings. This avoided the necessity of the Tribunal having to consider whether or not it had jurisdiction to consider the claims when they had been submitted out of time and it appeared to have been reasonably practicable for the Claimant to have submitted those claims in time. Therefore, there were no other claims in the proceedings that remained to be adjudicated by the Tribunal and the Claimant's claims are dismissed for these reasons.**
>
> **8. After the Tribunal had confirmed its Judgment Mrs Perry made an application for costs on behalf of the Respondent. She submitted that the Claimant had conducted the proceedings unreasonably by continuing to pursue claims that had no merit after 17 July 2018, which was the date on which the alleged arrears of pay had been paid into the Claimant's bank account. She submitted that the Claimant should meet the Respondent's costs for all work carried out in preparing for the hearing from 17 July 2018 onwards and attending at the hearing.**
>
> **9. The Tribunal was satisfied that the Claimant had conducted the proceedings unreasonably by continuing to pursue these claims after 17 July 2018. The Tribunal was referred to a schedule / summary of the Respondent's costs (Exhibit C1) and, having considered those documents, it made an order for costs in the sum of £750 against the Claimant by reason of her unreasonable conduct of these proceedings.**

4. Returning to August 2018, on 14 August, the Claimant emailed the Tribunal that she had been unable to attend the Hearing because of ill health on the way to Court. She also wrote: "Claimant understands now the mistake she made filling the form ET-1, and intended to apply for amendment of the claim in the presence of Employment Judge and other Party." She referred to "discriminatory actions from her employer." She concluded that: "Claimant wishes to invite Tribunal to reconsider the possibility of reinstating preliminary hearing date."

5. On 10 September 2018 the Claimant wrote to the Tribunal again. She stated: "Claimant also wishes to apply for Amendment of claim ET-1. The application originally was included in

A the bundle prepared for the Hearing. However, due to new facts and documents the update of the original application was necessary. Claimant decided to present the Application as a separate document, with current date stamp." Attached was a four-page letter of application to amend the ET1 "to include an allegation of discrimination on the grounds of disability."

B

6. Following receipt of the Judgment the Claimant applied for written Reasons. On 6 October 2018 she also applied for a reconsideration, referring also to her application to amend.

C

7. On 28 February 2019 a written Judgment and Reasons refusing the application for reconsideration was sent to the parties. I should note that that Decision has not been appealed.

D Nevertheless, for completeness, I set out the short Reasons for it.

> **"There is no reasonable prospect of the original decision being varied or revoked because the Claimant made two claims within the proceedings which have been dismissed for the reasons given by the Employment Tribunal in circumstances where the Tribunal may have had no jurisdiction to consider them because they were submitted out of time.**
>
> **The Employment Tribunal is satisfied that the Claimant's attendance at the hearing would not have altered that outcome. Furthermore the purpose of the reconsideration application appears to be to provide the Claimant with the opportunity to introduce new claims into the proceedings after the conclusion of them.**
>
> **Therefore, the Tribunal is satisfied for the reasons set out above that it is not in the interests of justice to reconsider the Judgment."**

E

F

The Appeal

8. The Claimant appealed the Judgment from the 10 August 2018 Hearing. At a Hearing before Eady J four amended Grounds of Appeal were permitted to proceed to a full appeal

G Hearing, as follows:

> **"1 The Tribunal erred in finding that the Appellant pursued no other claims than in relation to pay and holiday pay. The Appellant had made a complaint of disability discrimination and victimisation.**
>
> **2 The Tribunal erred at paragraph 6 of the written reasons in that the Appellant had provided evidence of a protected act (her grievance of 1 February).**

H

> **3 The Tribunal erred in awarding costs against the Appellant. The Tribunal's finding that the Appellant had conducted herself unreasonably was erroneous.**
>
> **4 The Tribunal erred when considering whether or not to award costs, [in that it failed] to take into account the Appellant's means."**

A

9. Following the dismissal of her first Tribunal claim the Claimant presented a second, and then a third claim. Having been dismissed in July 2019, she presented a fourth claim. This appeal is, however, solely concerned with the Decision of EJ Craft at the August 2018 hearing.

B

The Claim Form and Subsequent Developments

10. I need to say more about the course of the litigation, starting with the claim form.

C

11. In box 8.1, concerning the type and details of claim, the Claimant ticked the boxes to the effect that she was owed arrears of pay and holiday pay. Within box 8.2, concerning the background and details of the claim, she referred to having raised a grievance on 1 February 2018 about "unpaid wages, unpaid holiday, victimization due to long-term sickness, also missing certificates and wrong work pattern." After giving information about the pay and annual leave claims, she wrote:

D

E

> **"Due to long-term sickness last year, my manager makes my work very difficult. Before the sickness I was offered to train as Night Care Coordinator (supervisor), after sickness I was banned i.e. from taking overtime , and my manager as I can assume tries to find reason to terminate my contract. She also put derogatory remarks and untruthful statements in the referral to Occupational Health Advisor. My appeal from Managing Sickness Absence Meeting which was held in my absence, without proper notice, is still awaiting appeal meeting – third month after hand-delivered appeal letter."**

F

12. She also referred to not being given a Safe Use of Medication certificate, which she assumed was a "malicious act", and to her work pattern being incorrect. She concluded:

G

> **"All of the above (missing pay, holiday certificate and wrong work-pattern) was notified to the manager lots of times before raising formal grievance. Each time she responded 'I will look into that next week' what I can only assume was a 'fobbing off' tactic.**
>
> **I could not bring ET claim on time due to prohibitive costs than applying, which would be 10-times the value of the missing pay or holiday."**

H

13. In box 9, which asks: "What do you want if your claim is successful", the Claimant ticked the boxes for "Compensation only" and for "If claiming discrimination, a

recommendation". In box 12, which asks whether the individual has a disability and whether, if so, they need any assistance, the Claimant ticked "No". In box 15, for further information, she referred to her unsuccessful efforts to resolve her problems with her manager and Human Resources, with regard to "missing wages or wrong work-pattern."

14. In the Grounds of Resistance the Respondent defended the wages and holiday claims. It also referred to the Claimant's statement that she had been victimised for taking sick leave. It asserted that she had not done a protected act within the meaning of section 27 **Equality Act 2010** (the "**2010 Act**"). In any case she had suffered no detriment, as she had lost annual leave through failing to request that it be carried over, but it had been re-credited to her.

15. On 19 June 2018 the Respondent emailed the Claimant "without prejudice save as to costs." It referred to an offer to settle the claim for £69.23 and explained why it considered that this was the maximum amount that she could be awarded. It also stated: "Whilst I appreciate that you refer in your claim to background including your belief that you have been treated unfavourably because you took sick leave, this does not amount to a claim of any kind and would not be taken into account by the Tribunal." The letter also warned that if the Claimant did not accept the offer, and lost at the Hearing, the Respondent would show the letter to the Tribunal and apply for costs, which could be in the region of £4000 or more.

16. There ensued correspondence in which the Claimant asserted that there were "other issues mentioned in my claim … victimization and persistent action of my employer to treat me unfavourably after my long-term sickness" and the Respondent maintained that wages and holiday were "the only claims you have made on your claim form." The Claimant also explained that she had yet to receive the ET3, and the Respondent provided a copy to her.

A

17. On 26 June 2018 the Claimant wrote to the Tribunal, saying she wished to update it, including as to "the outcome of my appeal running in parallel to ET-1". This was a reference to the decision on her internal grievance appeal, of 24 May 2018. She referred to the appeal outcome having found failures regarding the Respondent's managing-sickness procedures. In particular "[m]anagement failed to consider the possibility of reasonable adjustments in accordance with the Equality Act." She added: "I am in contact with the ACAS Conciliator and it was recommended that I should seek formal legal advice in the part of the claim concerning victimization on the basis of Equality Act." In July she copied that email to the Respondent.

B

C

D

18. Also in July the Respondent informed the Claimant that the wages had been paid and that it was applying to the Tribunal for the claims to be dismissed, on the basis that they had been satisfied. The Claimant made applications, including for a disclosure order. She asserted that wages and holiday pay were only part of the claim and that the most important part was "victimization claim connected with discrimination by the employer." The Respondent reasserted that there were only two pleaded complaints, being wages and holiday pay.

E

F

19. On 31 July 2018 the Tribunal wrote to the parties, on the direction of EJ Mulvaney, refusing the Claimant's applications and re-ordering her to provide a schedule of loss. It also informed the Claimant that any further application for documents must "set out why any documents specified are relevant to her claims for holiday pay and wages."

G

20. The Claimant prepared a witness statement dated 1 August 2018. This gave an account of her having experienced stress and anxiety, and depression, in 2016. It also referred to discussions about a return to work in February 2017 and to the "Appeal Outcome Letter",

H

which, she said, had confirmed that not providing any phased return or adjustments "according to Equality Act 2010" was a management failure. She also emailed a schedule of loss to the Respondent on 3 August 2018. This included a request for a declaration that the Respondent had "discriminated" against her, compensation for financial loss "due to discrimination" and damages for injury to feelings arising from an "on-going discrimination campaign." It referred to the Respondent having failed to consider or offer "adjustments according to Equality Act."

21. There was a statement from Ms Cannon, the Respondent's Senior HR Adviser. This referred to the Claimant having submitted a grievance on 30 January 2018 concerning leave not carried over, unpaid hours, and other matters, including "victimisation due to sickness absence." It gave an account of her sickness and absence record, including one period on account of anxiety and stress from 29 September 2016 to 1 March 2017, which, it said, did not recur. A later period of sickness for other reasons led to a Stage Two warning under the Respondent's Managing Sickness procedure, but this was overturned by an appeal decision of 25 May 2018. Instead, the duration of a previous warning was extended. Ms Cannon also stated that the £69.23 claimed was paid to the Claimant on 17 July 2018; and the leave claimed was confirmed as having been credited for the year 2017/2018 on 30 May 2018.

22. The two witness statements and the Schedule of Loss were in the Tribunal's bundle for the Hearing of 10 August 2018.

Arguments

23. At the Hearing of this appeal the Claimant once again had the benefit of being represented by Ms Bone of counsel. The Respondent was represented by Ms Gilbert of

counsel. I had written skeletons and oral submissions from them both. The following is only a summary of what seem to me to be the most material arguments advanced by each of them.

Claimant

24. In relation to Grounds 1 and 2, in oral submissions Ms Bone indicated that it was the Claimant's case that three complaints under the **2010 Act** should have been identified as having been raised by her, being of detrimental treatment by way of direct discrimination (Section 13), discrimination arising from disability (Section 15) and victimisation (Section 27).

25. Ms Bone relied on Elisabeth Laing J's approach to the construction of an ET1 in **Adebowale v ISBAN UK Limited** UKEAT/0068/15 at [16].

> **"In my judgment the construction of an ET1 is influenced by two factors: the readers for whom the ET1 is produced, and whether the drafter is legally qualified or not. The ET1, whether it is drafted by a legal representative, or by a lay person, must be readily understood, at its first reading, by the other party to the proceedings (who may or may not be legally represented), and by the EJ. The EJ is, of course, an expert, but (as this litigation shows) should not be burdened by, or expected by the parties to engage in, a disproportionately complex exercise of interpretation. The EJ has the difficult job of managing a case like this, and the EJ's task will not be made any easier if this Tribunal imposes unrealistic standards of interpretation on him or on her."**

26. She also cited remarks of the EAT (Underhill P, as he then was, presiding), in **Abbey National plc v Chagger** [2009] IRLR 86 at [33] concerning race discrimination claims, and the approach taken in **Khetab v AGA Medical Limited**, EAT/0313/10, concerning an issue as to whether, on a time point, an express pleading of continuing discriminatory acts was necessary.

27. **McLeary v One Housing Group Limited** [2019] UKEAT 0124/18, indicated that the Tribunal should not read the claim form passively. Where the factual elements of a complaint shout out from the contents of a claim form, the Tribunal has a duty to pick it up, or at least to seek clarification from a claimant as to whether that complaint was being asserted. **Mervyn v**

BW Controls Limited [2020] EWCA Civ 393 confirmed that, in taking that approach, a Tribunal was not wrongly stepping into the arena. **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531 (CA) was distinguishable. It concerned a complaint that was in the original claim form in that case but was not pursued at trial.

28. The Respondent relied upon **Housing Corporation v Bryant** [1999] ICR 123 (CA) for the proposition that all the necessary elements of the cause of action relied upon must be found within the claim form itself. However, that was too narrow a reading of the speeches in that case. The claim form had to be set within all the circumstances of the case, and regard could and should be had to other materials when considering it, such as a witness statement.

29. It was of concern in this case that it appeared that the Tribunal had made no effort to call the Claimant to try to find out why she was not there. There was no freestanding ground of appeal raising that issue; but it was relevant background or context, forming part of a picture in which the Tribunal did not give sufficient care and attention to the Claimant's case and the materials that it had in its bundle, including the witness statements and schedule of loss.

30. Ms Bone submitted that the statement in the claim form box 8.2: "Due to long-term sickness last year, my manager makes my work very difficult" amounted to a pleading of direct disability discrimination. It asserted the disability, the detriment, and the causal link between the two. There is no requirement, at the stage of presenting the claim, for detailed particulars. Account should be taken of the fact that the Claimant was a litigant in person, and English is not her first language. The constituent elements of the cause of action were there. It could readily be inferred that, in referring to "long-term sickness" the Claimant was asserting that she was disabled. At the very least, this put the Tribunal on notice that this might be her case.

A

31. It was also clear from the document as a whole, that the Claimant was asserting that she had been subjected to detrimental treatment because of long-term sickness absence. Accordingly, the elements of a Section 15 claim were present, the absence being the "something" which arose in consequence of the long-term sickness, which was the disability.

B

C

32. In relation to victimisation Ms Bone referred to the evidence before the Tribunal that the Claimant had brought a grievance by way of a letter dated 30 January 2018. The Claimant's witness statement also complained of detrimental treatment after the grievance was tabled. The Tribunal did not appear to have taken any of this material into account. Any issue about the merits, including as to whether the grievance itself did amount to a protected act, would be for later consideration. The Claimant had done enough to assert the claim, as such.

D

E

33. Ms Bone acknowledged, in oral submissions, that it might be said that, in the claim form, the Claimant was using the word "victimisation" in the ordinary linguistic sense, not as a legal term of art. If so, she recognised that that might go against her contention that it contained a Section 27 claim; but it would support her case that all the necessary elements had been asserted for the purposes of identifying Section 13 and/or Section 15 claims.

F

G

34. Ms Bone also relied upon the fact that in section 9 of her claim form, the Claimant had ticked the box seeking a recommendation. No adverse inference could be drawn from the failure to tick "yes" in box 12.1. There was no need to do so, if she did not need the Tribunal to make any adjustments for her. Ms Bone said it was also her understanding from the Claimant that ticking "yes", but leaving the details box blank, caused the electronic form to default the answer to "no".

H

35. Ms Bone also referred to the HMCTS Guidance Booklet T420 on completing a claim form. While this advises someone claiming discrimination to describe in box 8.2 the incidents which they believe amounted to discrimination and how they believe they were discriminated against, it does not, she submitted, tell the reader to state that the treatment *was* discrimination, nor what kind of discrimination. Nor does it state that a failure to tick the applicable boxes in section 8.1 will be determinative or significant. Ms Bone also noted that in the Grounds of Resistance the Respondent had addressed the issue of victimisation. She also relied upon the references to discrimination in the schedule of loss, which was also before the Tribunal.

36. In relation to Ground 3 Ms Bone submitted that, consequentially on its error in not recognising the Claimant's claims under the **2010 Act**, the Tribunal erred in concluding that she had unreasonably continued with the litigation. But even if the Tribunal did not err in respect of the scope of the claims, it still erred, she said, in particular in not taking into account that there had been no admission of liability in relation to the wages and holiday claims, and so the Claimant was still entitled to declaratory relief. She also submitted that the without prejudice correspondence, in which the Claimant had maintained that she had made a discrimination claim, was relevant, but was given no consideration by the Tribunal.

37. In relation to Ground 4 Ms Bone accepted that the **Employment Tribunals Rules of Procedure 2013** do not require the Tribunal to take account of means in every case. However, she referred to **Jilley v Birmingham and Solihull Mental Health NHS Trust** EAT/0584/06, to the effect that if a Tribunal is asked to take account of means and decides not to do so, it should say why; **Doyle v North West London Hospital Trust** [2012] ICR D21, to the effect that a Tribunal should act judicially when deciding whether to take account of ability to pay;

and also **Hammond v Secretary of State for Work and Pensions**, UKEAT/216/13. Ms Bone submitted that this aspect was particularly important in this case, given that the Claimant was relatively low paid and was not present at the hearing. Further, she submitted, having found that the conduct was unreasonable, the Tribunal proceeded to make the award of costs without considering at the second stage whether or not it should exercise its discretion to do so.

Respondent

38. In relation to Grounds 1 and 2, Ms Gilbert accepted that, in determining what claims are in a claim form, the contents as a whole must be fairly considered. But, for a particular claim to be asserted, the essential factual elements of that cause of action must be present in the claim form itself. She relied on **The Housing Corporation v Bryant** [1999] ICR 23 and **Foxtons Limited v Ruwiel** UKEAT/0056/08. **Bryant** did *not* support the proposition that other material, such as a witness statement, could be drawn upon.

39. The Claimant's witness statement, or schedule of loss, could not be used as aids to construction of the claim form. Those might refer to additional matters that the Claimant had later decided that she would *like* to raise, if permitted; but they could not assist in determining what claims she had actually raised. That the claims which the Tribunal had to deal with must be raised by the claim form was a cardinal principle. It cannot deal on it own initiative with complaints that have not actually been raised – the well-known principle in **Chapman v Simon** [1994] IRLR 124; and for a recent reminder of the importance of the claim form as the source of the Tribunal's jurisdiction in a given case, see **Chandhok v Tirkey** [2015] ICR 527.

40. Every case turned on its own particular facts. In **McLeary** all the factual elements of a claim of discriminatory constructive dismissal were present in the claim form. The disability

was identified, and the treatment complained of, disability discrimination was asserted, there was a claim of constructive dismissal, and the causative link between them was asserted.

41. The present case stood in stark contrast to **McLeary**. The reference to "long-term sickness" could not be treated as an assertion that the Claimant was disabled. It was not itself a disability. In some cases long-term sickness, and associated absence, arises from a disability, in others not. There was no sign in section 8 of the claim form, that the Claimant considered *her* long-term sickness to arise from a disability, or that she had been the victim of disability discrimination. She had completed box 8.1 to indicate that she was claiming holiday pay and arrears of pay, but had not ticked the "discrimination" or "disability" boxes. She did not use either of these words in box 8.2. Although it contained narrative referring to the treatment of which she complained being connected with long-term sickness absence, the *complaints* that it raised in that connection were those relating to her wages and holiday entitlements.

42. Ms Bone had referred to a concession that the Claimant was a disabled person in respect of one of her later claims. But that related to a claim concerning a different time period. As a matter of fact the Respondent did not accept that she was a disabled person by reference to the particular period of sickness absence to which the present claim related.

43. On a natural reading of what the Claimant had written in box 8.2, the treatment of which she complained was because of her long-term sickness absence, not because of the grievance or anything else that would amount to a protected act within scope of Section 27 of the **2010 Act**. On a natural reading, "victimisation" was being used by her in its ordinary language sense, to indicate that she felt that she had been wrongly treated because of that absence, not to assert a complaint of victimisation in the sense meant by the **2010 Act**.

44. In any event, that grievance could not be relied upon as a protected act, because it complained of the same alleged detrimental treatment as the claim form. It could not be relied upon as a protected act in relation to treatment which was said to have occurred earlier. The reference to later events came only in the later witness statement. Even if the Claimant was purporting to bring a victimisation claim in the legal sense, the Tribunal was therefore right to conclude that she had not identified a protected act that could support it.

45. The Tribunal was not obliged to formulate a claim for the Claimant which did not exist. The extent of the assistance the Tribunal gives to a litigant in person is a matter for its judgment, with which the EAT should not interfere. Ms Gilbert referred to **Hyde-Walsh v Ashby** UKEAT/0463/07 and **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 351.

46. While the Respondent had responded, in the Grounds of Resistance, to the reference to victimisation in the claim form, it did so out of prudence, and in order to assert that the Claimant had not done a protected act and accordingly could not claim victimisation. This material could not be relied upon to cure the deficiencies in the claim form.

47. As to Ground 3, the decision whether to award costs was a matter for the Tribunal's discretion. The correspondence in June and July 2018 was highly relevant. The Claimant had been paid the wages and the holiday issue had been addressed. She had been told that the Respondent was seeking the dismissal of her claims, and warned of a possible costs application if she carried on. The correspondence showed that she continued with the litigation, not because she was seeking declarations in relation to those claims, but because she now wished to assert discrimination and wanted to obtain disclosure. But she had been fairly warned that the

A Respondent's position was that the claim form did not contain any other claim. The Tribunal's letter of 31 July 2018 had itself referred to "her claims for holiday pay and wages." Given all of these matters, the Judge's conclusion that her conduct was unreasonable, and hence the decision to award costs, were neither wrong nor perverse.

B

48. As to Ground 4, the Tribunal was not obliged to take the Claimant's means into account; and the Judge's decision not to do so was, in light of the Claimant's failure to attend the hearing, not perverse. Even where means are considered, the Tribunal is not limited by the amount that the individual can pay. See: **Arrowsmith v Nottingham Trent University** [2012] ICR 159 at [37]. In any event the Claimant was at the time still employed by the Respondent, and on full pay, though on sick leave. The award was not, in all the circumstances, excessive.

C

D

Discussion and Conclusions

Grounds 1 and 2

E

49. The pertinent document was the claim form. That pleadings matter, including in Employment Tribunals, is not a novel or controversial point. See **Chapman v Simon** [1994] IRLR 124. In **Chandhok v Tirkey** [2015] ICR 527 the EAT was concerned with whether the concept of "race" in the 2010 Act included caste, but also with whether a complaint of caste discrimination had, in any event, been properly raised. As to that, Langstaff J said:

F

> **"15. In paragraph 4 of his judgment the judge identified the Claimant's case – saying that it was that she was one of the Adivisi people – not from what was asserted in her claim, lengthy though it was, but from material which could only have come either from her witness statement (which was brief) or what he was told.**
>
> **16. I do not think that the case should have been presented to him in this way or that it should have formed part of his determination. That is because such an approach too easily forgets why there is a formal claim, which must be set out in an ET1. The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.**

G

H

> **17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.**
>
> **18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."**

50. For this reason, I reject Ms Bone's submission that the Tribunal could, or should, have had regard to the contents of the response form, the Claimant's witness statement, or schedule of loss. The Claimant may have decided, further down the track, following the outcome of her internal appeal, that she would like to bring, or add, a discrimination claim, in particular of failure to comply with the duty of reasonable adjustment. But what the Tribunal had to consider was whether she had in fact brought any such claim in the claim form as presented.

51. The Tribunal's task was to consider, fairly and objectively, looking at the claim form as a whole, whether it contained any complaint, other than for wages or holiday pay. This is a question of objective construction. As to how the task should be approached, I agree with the observations of Elisabeth Laing J in **Adebowale** (cited above).

52. More generally, technical or formal legal language did not need to be used, and, in that regard, due allowance should be made for the fact that the Claimant was a litigant in person, and for a little infelicity of expression. The legal cause of action did not have to be named, or statutory provisions cited. But, one way or another, the essential factual elements of the putative additional claim had to have been asserted. See **Bryant**, in which the claim form identified a protected act and a later dismissal, but failed to assert a causative link between the dismissal and the protected act; and **Ruwiel**, in which the facts necessary to support a claim of sex discrimination were not asserted in the claim form, and therefore the Tribunal was wrong to regard an application to amend to add such a claim as a mere relabelling exercise.

53. The speeches in **Bryant** do not provide any warrant for looking beyond the contents of the claim form to other materials. That case concerned whether there was a live victimisation claim, or whether an essential element – the causative link between the alleged protected act, and the treatment complained of – was absent. The Court of Appeal upheld the Tribunal's decision that it was absent. At 130B Buxton LJ said: "That linkage must be demonstrated, at least in some way, in the document itself", by which he meant the claim form. At 130F he said that the absence of this in the claim form was fatal. Peter Gibson LJ also clearly focussed on whether this element was present in the claim form, at 132E and H. Nor does Peter Gibson LJ's closing remark, at 133F, to the effect that the decision not to include a claim of victimisation in the claim form may have been deliberate, and why, assist Ms Bone's case. This was no more than a comment on the possible explanation for the absence of the claim. It does not support the proposition that wider material may be drawn upon when determining such an issue.

54. If, on a fair objective reading of the claim form in the present case, as a whole, no additional claim of discrimination or victimisation (in the **2010 Act** sense) was properly asserted, the fact that the Claimant was a litigant in person would not make it incumbent on the Tribunal to treat it as if it contained one. Indeed, it would be wrong to do so. If, however, on a fair reading, all the factual elements of the cause of action were present, then that would be sufficient to constitute such a complaint, or, at the least, to make it incumbent on the Tribunal to clarify whether the Claimant was indeed bringing a complaint of that sort, as in **McLeary**.

55. In this case, the failure of the Claimant to tick the boxes in section 8.1, to signify a claim that she was discriminated against on the grounds of disability was not, of itself, fatal. The claim form must be read as a whole, and this omission would not matter if the elements of a claim under the **2010 Act** were all clearly asserted elsewhere. But it did mean that the Claimant could not gain any assistance from box 8.1, to figuratively tick the boxes of those elements of a claim of some form of discrimination, relying upon the protected characteristic of disability.

56. Should the "No" in box 12.1 count against the Claimant? The question there is directed to whether a disabled claimant may need some assistance from the Tribunal in relation to the litigation itself, not to what claims are being brought. It may elicit a positive answer from someone who is not bringing a disability discrimination claim, but happens to be disabled; or a negative answer from, for example, someone who is disabled, but does not need any assistance, or from someone who claims they *were* disabled at the relevant time, but no longer are.

57. In this case, the matter turns on the fair construction and reading of the contents of boxes 8.2 and 15, where the Claimant volunteered some further information. I consider first the

question of whether this material should have been treated as containing a complaint of victimisation in the sense of a complaint of treatment contrary to Section 27 of the **2010 Act**.

58. While the Claimant referred to "victimization due to long-term sickness", that does not by itself necessarily mean that she thereby conveyed that she was asserting such a complaint. The word "victimization" is used in Section 27 as a defined term of art, incorporating the defined concept of a "protected act", and giving the word a meaning which is not its ordinary English language meaning. But non-lawyers, including litigants in person, will frequently use the word, simply in its ordinary sense, to convey that they consider that they have been picked on, singled out, or on in some way punished, for some bad reason. It cannot be inferred, merely from the use of this word alone, that the writer is saying that the particular reason in their case was something in the nature of what Section 27 defines as a protected act.

59. In this case, in box 8.2 the Claimant set out why she thought she had been "victimized". It was "due to long-term sickness." She expanded on this bullet point later on in the narrative, in the paragraph beginning: "Due to my long-term sickness last year, my manager makes my work very difficult"; and the rest of the paragraph then set out what she meant by that. I think it is objectively clear that the Claimant was not, here, claiming victimization in the sense meant by Section 27. She was not complaining about treatment said to have occurred because she did something which would amount in law to a protected act. She was complaining of treatment because of long-term sickness absence. Whatever else it might signify, being absent on account of long-term sickness could not be something that might amount to a protected act.

60. Even if the Claimant *had* intended to use "victimisation" to mean, in substance, the sort of conduct defined by Section 27, the factual elements of such a claim were not present.

Although she referred to the grievance of 1 February 2018, that cannot be read as being the protected act on which she relied. It was said *itself* to have complained of "victimisation". But nothing else that could factually amount to a protected act, which might be said to have provoked the victimisation referred to in the grievance (such as an earlier formal or informal complaint) was anywhere identified in the claim form. Rather, as Ms Gilbert fairly submitted, it is the sickness absence which is said to have been the catalyst for the treatment of which the grievance complained. Nor does the narrative in the claim form suggest anywhere that the Claimant was complaining that she was subject to *further* adverse treatment *because she had raised the grievance*, and after she had raised it. That came only in the witness statement.

61. I turn to whether the Tribunal was wrong not to detect the presence of a claim of direct discrimination or one of disability-related discrimination. Here, the Claimant faces two difficulties which, either alone, or in combination, are, in my view, fatal to that contention.

62. The first is that a reference to long-term sickness, or absence on account of long-term sickness cannot, in and of itself, be taken to amount to the assertion of a disability. It is not a disability in itself. Further, it is not a direct proxy for disability. *Some* long-term sickness, or related absence, is caused by disability, and some isn't. In so far as Ms Bone sought to argue that the reference to long-term sickness, or to long-term sickness absence, was, in and of itself, a reference to a disability, that therefore cannot be sustained.

63. Nor can it be taken, as, in and of itself, an assertion that the sickness, or the absence, was attributable, or otherwise connected, to a disability. Of course, the idea that a long-term sickness, or a related absence, *may* reflect the fact that the individual has what amounts to a disability, is not hard to grasp, and any practitioner in the field would appreciate that disability

discrimination claims, including under Section 15, or claims of failure to comply with the duty of reasonable adjustment, often relate to such scenarios. But it is also perfectly possible that someone who is complaining about treatment in connection with long-term sickness absence does not consider themselves to be disabled, and is not seeking to bring any kind of disability discrimination claim, but is simply bringing some other kind of claim with which an Employment Tribunal can deal, such as in relation to their sick pay.

64. Accordingly, the reference to long-term sickness, and associated absence, was not, by itself, enough. The question then, however, was whether, reading the claim form as a whole, *including* that feature, it could be read as conveying that the Claimant considered that sickness, and that absence, to have arisen from a disability. However, it is here that the second difficulty arises. There is nothing else in the box 8.2 narrative as a whole to suggest that the Claimant thought, or was asserting, that she was, or may be, a disabled person, or was intending to bring some other claim, over and above the wages and holiday claims. I do not think the use of the adjective "long-term" conveys it. Although this has a specific meaning in the legal definition, it is also an ordinary descriptive word.

65. Importantly, what the Claimant *did*, in boxes 8.1 and 8.2, clearly assert, was that she was owed wages, and that her holiday rights have been infringed, on account of her long-term sickness absence. The closing sentence again conveys to the reader that, while she has set out the background to her claims (as the printed words at the beginning of box 8.2 enjoined her to do) the claims themselves are for wages and holiday rights. Further, she has set out the value of those particular claims, and, apparently anticipating the time point, states that it would have been disproportionately costly to pursue those (small-value) claims sooner. This does not

convey that she is asserting some additional claim, which might have additional value. Nor does the additional information in box 15 suggest that she is asserting any other type of claim.

66. Should the Tribunal have regarded the tick in the "recommendation" box in section 9.1 of the claim form as pointing to a different conclusion? The claim form should be read as a whole. However, this box does not ask whether the individual is seeking to bring a claim of discrimination. That is the purpose of box 8.1. Rather, it asks a question which is relevant only in those cases where there *is* a claim of discrimination asserted elsewhere in the claim form. Nor do I think that the fact that the individual has ticked this box should be treated as *necessarily* conveying that they intended to bring a discrimination claim. Experience suggests that its meaning is often misunderstood (as is the meaning of the box asking whether a regulator should be notified of a whistleblowing claim).

67. It must be remembered, as discussed in **Adebowale**, that the claim form has to be construed by the Tribunal, as well as the Respondent. Section 8 is the place where the complaints should be identified. Particularly where the relevant boxes in section 8.1 have *not* been ticked, the ticking of box 9.1 alone cannot be treated as a sure sign. In any event, in this case, even if the ticking of box 9.1 were treated as a sign that the Claimant might have intended to present a discrimination claim, that would not repair the gaps in the factual matrix conveyed by the account in box 8.2, so as to make out the necessary elements of such a cause of action.

68. The HMCTS Guidance Form 420 cannot be relied upon in the way that Ms Bone seeks to do. It relates to section 8 as a whole. It enjoins the reader to tick the relevant boxes in section 8.1, as well as itself helpfully listing the protected characteristics. It then enjoins the reader to "Explain in what way you believe you were discriminated against." If the reader

follows this Guidance *on section 8 as a whole*, they will complete that section so as to identify that they are seeking to claim discrimination, and which protected characteristic they rely on, as well as conveying the factual basis for their claim. The form does not encourage, or sanction, the omission of these essential elements from section 8 of the form altogether.

69. I do not think the fact that the Respondent addressed a possible victimisation claim in the claim form assists the Claimant. It may have done so out of caution, given her use of the word "victimised". But its having done so could not create a claim where none existed.

70. In summary, the claim form did, factually, assert that the Claimant had been treated in a way that would amount, in law, to detrimental treatment; and it did assert that this happened because of long-term sickness absence. But it did not contain any assertion, or anything to suggest, that she was claiming that she was disabled, that the sickness absence was on account of disability, or that she was, or may be, seeking to bring what would amount to a Section 13 or Section 15 claim in addition to her other complaints. Nor, on a natural reading, did it assert a victimisation claim, being a factual complaint that would fall within the scope of Section 27.

71. I agree with Ms Bone that **Mensah** is not directly in point. It was specifically concerned with what approach the Tribunal may, or should, take when it appears that a litigant in person is not pursuing at trial, a part of her pleaded case. But the cases she relied on also do not assist. **Khetab** is about an application to amend. The passage in **Chagger** cited to me does not assist her, as it was concerned with a peculiar issue thrown up by the concept and definition of "race" as a protected characteristic. **McLeary** is, for reasons I have explained, distinguishable. In that case all of the necessary factual components of the cause of action were

found in the claim form. The present case is not like that. Essential blocks were missing; and the putative complaint simply did not jump out to the reader.

72. In **Mervyn** the claim form included all the elements of a claim of unfair constructive dismissal. Yet, in the course of the litigation, and at trial, the employee maintained that she had not resigned. The Court of Appeal concluded that the Tribunal at trial should have appreciated that something had gone wrong, and that the list of issues could not be relied upon as truly capturing her case. But this was precisely because, as in **McLeary**, the complaint in question plainly *was* present in the original particulars of claim. Once again, this case is not like that.

73. For reasons I have explained, the later correspondence, schedule of loss and witness statement in which the Claimant expressly alleged discrimination, referred to the **2010 Act** and sought compensation for injury to feelings, could not be relied upon to reinterpret the claim form. The reference that these documents made, to the mention in the claim form of victimisation, as a hook on which to hang new claims, cannot retroactively have conferred on that word a meaning which, in the context of that claim form, it did not have.

74. These documents are, of course, in themselves, explicit, and entirely consistent with the Claimant having decided that she now wished to advance claims under the **2010 Act**. However, that would have required a successful application to amend. The Claimant did, as I have described, in fact submit such an application following the Hearing on 10 August 2018 (and, she indicated in that correspondence, had intended to make one at that Hearing, had she attended). However, this appeal was only against the Decision arising from that Hearing itself. There was no appeal against the subsequent refusal of the reconsideration application, or the associated refusal to entertain the application to amend that was in fact made after that Hearing.

A

75. The Tribunal may, rather like the Respondent, perhaps have hedged its bets in paragraph 6 of its Reasons as to whether there was a live victimisation claim. But in view of my foregoing conclusion that, on a fair reading, there was not, there is no error in that regard. For reasons I have explained, it cannot be said that the other materials before the Tribunal should have led it to a different conclusion about whether there were claims under the **2010 Act**.

B

C

76. For all of the foregoing reasons I conclude that Grounds 1 and 2 fail.

77. I turn to Grounds 3 and 4.

D

78. It is a matter of clear construction of Rule 76 of the **Employment Tribunals Rules of Procedure 2013**, and well-established in the authorities, that, when considering a costs application, the first task of the Tribunal is to decide whether the costs threshold has been crossed in the manner claimed – in this case by unreasonable conduct of the litigation. But, if so, there is then a second-stage decision required. The Tribunal must consider whether to make an award, and if so, in what amount – but it is not bound to do so.

E

F

79. Rule 84 provides that the Tribunal *may* have regard to ability to pay, not that it must do so. However, as the EAT stated in **Jilley**, at [44], if the Tribunal decides not to take into account ability to pay, it should say why; and it must act judicially in deciding whether or not to do so: **Doyle** at [5]. The question therefore must be considered; and if it is not possible to tell from the Tribunal's Decision whether it has considered whether to take into account the proposed payee's means, that itself amounts to an error of law. See: **Hammond** at [24].

G

H

A

80. True it is that, in recognising that there may be cases where the Tribunal may decide that, for good reason, ability to pay should not be taken into account, the EAT in **Jilley**, at [53], gave, as an example: "if the paying party has not attended." But that plainly does not mean that in *all* cases where the paying party does not attend, that fact, *alone*, will automatically justify the Tribunal not having regard to their means. The Tribunal will still need to have regard to all the relevant circumstances relating to the absence, and more generally of the particular case.

B

C

81. Two pertinent considerations in such cases are likely to be: what the Tribunal knows about why the individual is absent, and what information the Tribunal has about what they knew, or could reasonably have been expected to know, about the possibility of a costs application being made against them at the hearing in question. Further, as the EAT observed in **Doyle**, at [14], there must be *some* circumstances in which the Tribunal ought to raise the question of whether it should consider ability to pay, even if the proposed payer does not do so, giving the example of a case in which they are unrepresented.

D

E

82. In the present case, the Claimant was warned, in the course of the correspondence, that, if she continued with the litigation and was unsuccessful, the Respondent might make a costs application against her, and the scale of the costs that might be involved. But she was not told that she could ask the Tribunal to have regard to her means. While the Respondent was not under any duty to advise her of that, as such, what information she had in fact been given, was a relevant consideration when deciding whether or not to make a costs award in her absence.

F

G

83. In the present case, the Tribunal does not appear to have considered the question of what the Claimant did or did not know about a possible costs application. It also had no information, either way, about why the Claimant was not present at the Hearing. It therefore did not have

H

any proper basis to infer that, despite being warned of a possible costs application, she had consciously chosen not to attend, and not to advance any submissions in opposition to it.

84. Given that the Tribunal had properly concluded that she had no other claims, and that the wages and holiday issues had been addressed, that certainly provided the potential basis for a finding that the Claimant had acted unreasonably. But that does not mean that she was bereft of points that she could have made; and it appears that the Tribunal either was not given, or at least did not consider, the full picture regarding why she had continued with the litigation.

85. Further, the Tribunal needed to consider not only whether the costs threshold was crossed, but if so, separately, whether in all the circumstances, an award should, in principle, be made (a point which the wording of Ground 3, alone or with Ground 4, is broad enough to take in), and, if so, whether to take account of her means, and, if so, to consider those means when finally deciding whether, and if so in what amount, to make an award. The Tribunal, on the face of its decision, simply did not consider any of those questions, or, if it did, has failed to record that it did so, or, even in the briefest terms, its reasoning. The failure to address these questions is, of itself, an error of law. Further, given that the Tribunal had no information about why the Claimant had not attended, and could not be confident that she had had a fair opportunity to make submissions about her means, it could not have properly assumed that, in this case, that was sufficient reason not to consider them.

86. I conclude that both Ground 3 and Ground 4 succeed.

Outcome

87. For all the foregoing reasons, Grounds 1 and 2 fail, and Grounds 3 and 4 succeed. The Tribunal did not err in law in failing to identify the presence of any claims other than for wages

A

and in respect of holiday rights. It did err in relation to costs and its award cannot stand. Both counsel have had sight of this decision in draft and Ms Gilbert has indicated that the Respondent does not seek remission of the costs issue. The conclusion is that Paragraph 1 of the Tribunal's Judgment stands. The costs award in Paragraph 2 is quashed. There will be nothing remitted to the Tribunal for further consideration.

B

C

D

E

F

G

H