Appeal No. UKEAT/0059/20/AT

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 May 2021

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

MR E PETRICA APPELLANT

CENTRAL LONDON COMMUNITY NHS TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SAUL MARGO (of Counsel) Appearing via Advocate
For the Respondent	MS RACHEL OWUSU-AGYEI (of Counsel) Instructed by: Capsticks Solicitors LLP 1 St George's Road Wimbledon London SW19 4DR

SUMMARY

WHISTLEBLOWING AND PRACTICE AND PROCEDURE.

The Claimant complained that his claim of whistleblowing was not considered. Although the whistleblowing claim was not contained in an agreed list of issues and an earlier application to amend his claim to add a claim of whistleblowing had been refused, the Claimant contended that the Tribunal ought to have been guided by the contents of the Claim Form, particularly as he was a litigant in person. The Claimant also contended that the Tribunal had failed to address two of the allegations of fact relied upon in his claim of constructive dismissal. Those allegations were set out at paragraphs 13(h) and (j) of the List of Issues and had not been considered at all.

Held (dismissing the appeal), that the Tribunal had not erred in treating the claim as if it did not include a whistleblowing complaint. The claim form did not include such a claim. It was not enough that Box 10 of the ET1 form was ticked. That box is included for the specific purpose of enabling the Tribunal Service to forward on to the relevant regulator the fact that a whistleblowing claim has been made. However, it does not give rise to a whistleblowing claim on its own if no relevant particulars are included in the body of the claim. There were no such particulars here. Furthermore, the Claimant had had numerous opportunities to include a whistleblowing claim if he had so wished including in a detailed restatement of his claim ordered by the Tribunal. There was nothing that required the Tribunal to depart from the agreed list of issues. As for the constructive dismissal allegations, on a fair reading of the judgment, those allegations had been considered.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

Introduction and Background

1. I shall refer to the parties as the claimant and respondent, as they were below. The claimant was employed by the respondent Trust from January 2015 as a senior administrator until his resignation in November 2017. He brought two complaints in the Central London Employment Tribunal, one lodged on 6 September 2017 just prior to his resignation, and a second claim lodged on 21 December 2017 shortly after his resignation. I shall refer to these as "the first claim" and "the second claim" respectively.

2. The claimant contends that the first and second claims both contained a public interest disclosure complaint. However, it is alleged that the Tribunal in its judgment erred in that it failed to consider that complaint and failed to consider two aspects of his complaint of constructive dismissal. The following brief factual summary is taken from the Tribunal's judgment.

3. The claimant's first two years of employment occasionally had been fairly successful. However, a grievance was raised against him by a colleague, referred to here as Nurse X, alleging harassment. As a result of that complaint, an investigation was launched. The conclusion of that investigation was that there was insufficient evidence to uphold the allegation made against him. However, as a result of concerns expressed by Nurse X, the respondent decided to appoint an external investigator to investigate the allegations once again. Meanwhile the claimant was required to refrain from having any contact with X in the workplace.

4. The claimant was understandably very unhappy with this turn of events which had led to him being put, as he saw it, in double jeopardy. The new investigator concluded that there was

a case to answer. This led to a disciplinary hearing and to the claimant being issued with a final written warning, later reduced on appeal to a first written warning.

5. This whole process caused the claimant to suffer stress, which had an effect on his health, and by November 2016, he was displaying symptoms of severe depression and anxiety.

6. As well as raising concerns about the respondent's handling of the allegation against him, the claimant was having some difficulties with a colleague, Ms Halai. Tensions between the claimant and Ms Halai were the subject of various meetings. Notwithstanding efforts to mediate the interactions between the two of them, relations became so bad that it appeared that nurses would avoid if possible, going into a room with the two of them present.

7. By February 2017, the claimant began raising concerns with his manager of the stresses that he was under as a result of the arrangements concerning X, and the behaviour of his colleague.

8. There followed some periods of absence on the part of the claimant caused by depression and stress. By April 2017 the claimant had raised some formal concerns about his work and referred to discrimination in the workplace and the additional stress that he was placed under. He also referred in another letter at the time to there being a breach of trust and confidence. A mediation meeting between the claimant and Ms Halai on 24 April 2017 failed to resolve matters.

9. After that, the claimant sought assistance from the respondent's Freedom to Speak Up Guardian and was advised to make use of the grievance procedure. The claimant took that advice and emailed a formal grievance to his managers on 5 May 2017. He complained that he was being treated unequally and was being discriminated against. He considered that this was

probably because he was from Eastern Europe. He also complained about being re-investigated in relation to the Nurse X matter and to the stress he was experiencing in working with his colleague.

10. That grievance appears to have been sent to an incorrect email address and was not immediately acted upon. The delay in responding to the grievance was one of the matters which the claimant subsequently raised when he resigned.

11. It seemed that the grievance did in fact reach the respondent by 25 May 2017. On the same day the claimant was involved in what was described as an "altercation" involving Ms Cathy Linton, another nurse, and a complaint was made about him arising out of that. The respondent's investigation of the claimant's formal grievance took a considerable length of time.

12. By September 2017 the investigation still had not concluded. On 6 September, as I have mentioned, the claimant issued the first claim. He complained of race discrimination and indicated that he was making another type of claim that the Tribunal could deal with. He specified that in section 8 of his ET1 as follows:

> **"I raised the concern about unequal payment, discrimination, breach of trust and confidence and breach of duty of care/stress compensation."**

13. At section 15 of the same form he stated as follows:

> "**The employer concealed and tried to hide the fact that I raised a grievance and I have been on a long-term sickness absence. I have raised my concerns about these, but I didn't receive an outcome so far. I used Freedom to Speak Guardian to find out about my grievance because of lack of communication from the respondent."**

14. By November 14, the investigation had not concluded. The claimant resigned by a letter dated the same day with immediate effect. In that letter the claimant indicated that he had been left with no choice but to resign without notice and referred to constructive dismissal.

The procedural history

15. This needs to be set out in some detail given the nature of the appeal. The first claim was presented when the claimant was still employed. Having lodged that claim on 13 November 2017, Employment Judge Manley sought clarification as to whether the claim was only one of race discrimination. The claimant responded on 21 November 2017 to say that that was not the only claim and that he also sought permission to rely upon unfair dismissal, including constructive dismissal. Of course, by that stage the claimant had resigned. He made no reference in that correspondence to any complaint of whistleblowing dismissal.

16. The second claim was lodged on 21 December 2017. Section 8 of that form includes the following entries:

> **"First, I raised a formal concern with my line manager, HR and Janet Lewis, DDO of service, and I haven't received any answer. Afterwards, I raised formal concern with Freedom to Speak Guardian and I was told that a formal grievance would be more appropriate. I raised formal grievance on 5 May 2017, but the Trust lied to me that they didn't receive my grievance …**
>
> **I raised concerns about wrongdoing inside the Trust with chief executive on 10 August 2017 and I didn't receive an outcome so far (just partial recognition of this and overall unsatisfactory being incomplete). The Trust's course of conduct affected badly my health and I'm suffering from stress and anxiety ..."**

17. These passages were clearly drafted by the claimant himself.

18. Section 10 of the ET1 form is entitled, "Information to regulators in protected disclosure cases". 10.1 says:

> **"If your claim consists of or includes a claim that you are making a protected disclosure under the Employment Rights Act 1996, otherwise known as a whistleblowing claim, please tick the box if you want a copy of this form or information from it to be forwarded on your behalf to a relevant regulator."**

19. The claimant ticked that box. No further details were set out in the claim form.

20. On 26 December 2017, the claimant emailed the Tribunal with a document entitled "Grounds of Claim". One of the attachments to that document is referred to as "Concerns with Freedom to Speak Guardian". That document is not before the Employment Appeal Tribunal ("the EAT") and it appears it was not before the Tribunal either, or may not have been.

21. On 4 January 2018 there was a preliminary hearing. It appears that Employment Judge Lewis made some directions following that hearing. One of those was that the claimant provide the Tribunal and the respondent with a re-statement of his case brought under both claims. The Tribunal goes on to say:

> **"The objective in so doing is to enable the respondent to understand the nature of the case which it has to meet so that it can identify the relevant documents for disclosure and witnesses to be called. The Tribunal should be able to manage the case on the basis of the re-statement. It is suggested that the claimant should set out in numbered paragraphs a chronological account of the events which he wishes to be heard, followed by a cross-reference section in which he sets out which parts of the narrative of claims of race discrimination, claims of victimisation, allegations of a protected act which is relied upon, and matters giving rise to the breach of trust and confidence which led him to resign from his employment. The claimant need not set out every event which gives him concern but is encouraged to make a concise and focused selection of the most recent and the most significant events."**

22. The claimant duly responded to that direction by a document sent on 22 February 2018 entitled "Claimant's Further and Better Particulars". It is sufficient to note for present purposes that there is no specific reference to a whistleblowing dismissal complaint in that document. There is, however, a reference to the Trust having used the whistleblowing

policy as an excuse to cover up the Trust's wrongdoing and keep secrecy. That would appear to be the only reference to whistleblowing in that document.

23. On 12 June 2018 there was a further case management preliminary hearing, this time before Employment Judge Palmer. On the morning of that hearing, the claimant lodged an application to amend his complaint to add a claim for whistleblowing dismissal pursuant to section 103A of the **Employment Rights Act 1996**. The case management summary from that hearing provides as follows:

> **"2. It was not at all clear from the second claim form lodged on 21 December 2017 whether the claimant was making a claim under section 103A of the Employment Rights Act (ERA). In the claim there is a reference to raising a formal concern which referred to the 'Freedom to Speak Guardian' and to 'about wrongdoing inside the Trust'. No doubt because of the lack of clarity in both claims, Employment Judge Lewis ordered that on or before 23 February 2018 the claimant was to send to the Tribunal and the respondent a re-statement of his case brought under both claims. The objective, as set out in the preliminary hearing was to enable the respondent to understand the nature of the case which it had to meet so it could identify the relevant documents for disclosure and witnesses to be called."**

24. At paragraph 5 Employment Judge Palmer says:

> **"On 22 February 2018 the claimant provided further and better particulars in response to the order. This included direct race discrimination, victimisation, unfair dismissal, including constructive dismissal. The claimant did not refer to a claim under section 103A."**

25. In paragraph 6 the judge says as follows:

> **"At or before the open preliminary hearing on 12 June 2018, the claimant applied for the following.**
>
> **…**
>
> **6.2 To amend his ET1 to include a claim under section 103A."**

26. In paragraph 7.1 the Tribunal rejected the application to amend stating as follows:

> **"The claimant had an opportunity to set out a claim under section 103A Employment Rights Act in his second claim form and clarified this further in the further particulars he provided. When asked to explain the nature of the protective disclosure during the hearing on 12 June and under which category it fell under section 43B, he could not do so, nor could he explain why it was in the public interest."**

27. The claimant applied for a reconsideration of Employment Judge Palmer's decision. That application was refused by a decision sent to the parties on 23 August 2018 in which the judge said:

> **"The application to amend the ET1 to include a claim under s103A ERA was heard and rejected at the hearing for the reasons given. The claimant was given every opportunity to put forward his case for an amendment."**

28. On 17 February 2019, the claimant made a further application to amend his claim. That application was rejected by Employment Judge Wade, who said that she could not reconsider previous decisions of the Employment Tribunal.

29. A full merits hearing of this matter took place on 9 to 15 April 2019 before Employment Judge Stewart and members. The Tribunal noted at the outset that it had a list of issues before it. That was a list drafted by the respondent and which had been added to by the claimant. The list of issues was lengthy and ran to eight pages. It did not include any claim for whistleblowing dismissal. Employment Judge Stewart rejected the claimant's claims. The claimant now appeals against that judgment.

Grounds of Appeal

30. The grounds of appeal were numerous, and these were rejected on the paper sift. At a Rule 3(10) hearing before HHJ Stacey (as she then was), the appeal was permitted to proceed on the basis of two grounds.:

a. The first is whether the Tribunal had erred in failing to consider whether there was a separate public interest disclosure complaint before it.

b. The second ground is that the Tribunal erred in failing to consider as part of the constructive unfair dismissal claim, the allegations contained at paragraphs 13(h) and 13(j) of the agreed list of issues.

These grounds, which I have summarised, were drafted by Counsel acting under the ELAAS scheme.

31. Judge Stacey's reasons for permitting the appeal to proceed were that the second claim, and arguably also the first, raised allegations of protected interest disclosure which were not dealt with or referred to by the Tribunal.

Ground one - Submissions

32. Mr Margo, who appears for the claimant before me, acknowledges that Judge Stacey may not have had all the documents that were before the EAT, and in particular may not have been referred to the claimant's applications to amend his complaint. Mr Margo, in very able submissions, submitted that on an objective assessment of the claimant's claim, and particularly the second claim, it is clear that there is a reference to the claim of whistleblowing dismissal. He submits that that is apparent not only from the wording used by the claimant, bearing in mind that he is a litigant in person whose first language is not English, but also having regard to the fact that box 10 in the ET1 had been ticked and which refers to the claim including one of whistleblowing.

33. He submits that the claimant also expressly refers to raising an allegation of wrongdoing on the part of the respondent with the Chief Executive. That wrongdoing is set out in a letter which is in the papers before me, but which was not attached to the form ET1. That letter refers to the claimant wishing to raise a concern about wrongdoing inside the trust, that he has a strong belief that some staff are trying to cover up some clear evidence, which is worrying him a lot and causing him stress, and that he is concerned about health and safety. He says that he suspects the involvement of some managers' decision making on this is not in line with Trust policies. There is no express reference to a whistleblowing dismissal complaint or whistleblowing complaint at all in that letter.

34. Mr Margo submits that reading the claim form objectively and in particular having regard to box 10, it is clear that the claim did include a whistleblowing dismissal complaint and, if that is accepted, then nothing in the procedural history should be taken as meaning that that claim had been withdrawn. As for the further and better particulars, Mr Margo submits that that again needs to be read in light of the fact that the claimant was a litigant in person whose first language is not English and that it would not necessarily be clear to the claimant that not including some matters in that statement might lead to them being treated as not being pursued.

35. As for the applications to amend, Mr Margo submits on instructions that these were prompted by the claimant wishing to take a belt and braces approach as there was a concern that the claim might not have been included. In any case, submits Mr Margo, the attempt to amend the claim was unnecessary and the Tribunal ought to have considered that the claim was already apparent from the claim form. This is not a case where the claim was not being pursued or where it had been abandoned by the claimant. As such, he submits, the principles set out in the case of **Mervyn v BW Controls Limited** [2020] ICR 1364 are engaged.

36. In that case the Court of Appeal was concerned with whether the Tribunal ought to have departed from the precise terms of an agreed list of issues in the interests of justice. It was held that whether or not the Tribunal should depart from the list of issues depended on a number of factors and that it was good practice at the outset of the substantive hearing, particularly where either or both of the parties were unrepresented, for the Tribunal to consider whether any list of issues previously drawn up properly reflected the significant issues in dispute.

37. Bean LJ, giving the lead judgment, said as follows:

> **"37. Underhill LJ agreed with Longmore LJ. At the end of his short judgment he said:**
>
> > **'There are 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 this is not one of them.'**
>
> Peter Jackson LJ agreed with both judgments.
>
> **38. I do not read the last sentence of the judgment of Underhill LJ in *Scicluna* as imposing a requirement of exceptionality in every case before a tribunal can depart from the precise terms of an agreed list of issues. It will no doubt be an unusual step to take, but what is 'necessary in the interests of justice' in the context of the tribunal's powers under Rule 29 depends on a number of factors. One is the stage at which amending the list of issues falls to be considered. An amendment before any evidence is called is quite different from a decision on liability or remedy which departs from the list of issues agreed at the start of the hearing. Another factor is whether the list of issues was the product of agreement between legal representatives. A third is whether amending the list of issues would delay or disrupt the hearing because one of the parties is not in a position to deal immediately with a new issue, or the length of the hearing would be expanded beyond the time allotted to it.**
>
> ***Stepping into the arena?***
>
> **39. In *Mensah*, Gibson LJ encouraged tribunals 'to be as helpful as possible to litigants in formulating and presenting their cases. It is always good practice for Industrial Tribunals to clarify with the applicant (particularly if appearing in person or without professional representation) the precise matters raised in the IT1 which are to be pursued and to seek confirmation that any others so raised are no longer pursued'. However, Peter Gibson LJ went on to find that an ET is not under a 'duty to hear every allegation in the originating application unless so abandoned, the Industrial Tribunal being bound to act of its own motion even if the applicant does not put forward evidence to make good the allegation nor argues in support of it'. This is because:**

> **'it must be for the judgment of the particular Industrial Tribunal in the particular circumstances of the case before it whether of its own motion it should investigate any pleaded complaint which it is for the litigant to prove but which he is not setting out to prove.'**

40. In *Muschett* the claimant submitted that, since he was a litigant in person, the employment judge should have helped him to unearth relevant facts to help him make his case. Rimer LJ rejected this view of the function of employment judges at [31]:

> **'It is not their role to engage in the sort of inquisitorial function that Mr Hopkin [counsel for the claimant] suggests or, therefore, to engage in an investigation as to whether further evidence might be available to one of the parties which, if adduced, might enable him to make a better case. Their function is to hear the case the parties choose to put before them, make findings as to the facts and to decide the case in accordance with the law. The suggestion that, in the present case, the employment judge committed some error of law in failing to engage in the sort of inquiry that Mr Hopkin suggested is, in my judgment, inconsistent with the limits of the role of such judges as explained by this court in *Mensah v. East Hertfordshire NHS Trust* [1998] EWCA Civ 954; [1998] IRLR 531 (see paragraphs [14] to [22] and the cases there cited by Peter Gibson LJ). Of course an employment judge, like any other judge, must satisfy himself as to the law that he must apply to the instant case; and if he assesses that he has received insufficient help on it from those in front of him, he may well be required to do his own homework. But it is not his function to step into the factual and evidential arena."**

41. In the recent EAT case of *McLeary v One Housing Group Ltd* UKEAT/0124/18/LA, Judge Auerbach said:

> **'I have also considered whether it might be said that it would not be appropriate for the Tribunal, as it were, to invite a claimant to add a wholly new complaint. Indeed, it would not. However, what was necessary here, starting with the Case Management hearing, was simply to *clarify* the substance of what the Claimant was saying and the claims that she was seeking to bring. A margin of appreciation should indeed be allowed to the Judge below, as to how such matters are managed; but when, as in this case in my judgement, it shouts out from the contents of the Particulars of Claim that it is being alleged that there have been a number of acts of disability discrimination that have, along with other acts, contributed to an undermining or trust and confidence that has driven an employee to resign, and the employee is effectively a litigant in person and has no professional representation, this is a matter that should, at the very least, be raised at the Case Management Preliminary Hearing so that clarification can be sought.'**

42. In the present case to use Judge Auerbach's vivid phrase, it 'shouted out' from the contents of Ms Mervyn's Particulars of Claim that, on a proper analysis, she was alleging that she had been constructively dismissed.

Conclusion

> **43. It is good practice for an employment tribunal, at the start of a substantive hearing with either or both parties unrepresented, to consider whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute between the parties. If it is clear that it does not, or that it may not do so, then the ET should consider whether an amendment to the list of issues is necessary in the interests of justice.**
>
> **44. In this case (putting to one side the claim for alleged discrimination) the pre-reading of the essential material (in particular the ET1 and ET3) which no doubt occurred should have indicated to the tribunal that it was in truth far more likely than not that the Claimant had resigned, and that the real issue between the parties was (or should be) why she did so.**
>
> **45. Against that background, and with the Claimant appearing once again in person, I do not think, with respect, that it was enough for the Tribunal simply to ask at the start of the substantive hearing whether the parties confirmed the previous list of issues. It would not have amounted to a 'step into the factual and evidential arena' for the tribunal to have said that it seemed to them that there was an issue as to whether Ms Mervyn has been dismissed or had resigned and that the list of issues ought to be modified accordingly, perhaps on the lines suggested in the Respondent's agenda form produced for the case management hearing. The Respondents had suggested these questions:**
>
> > **i) Was the Claimant dismissed, if so, what was the reason for the dismissal, and did the Respondent act reasonably in treating it as a reason for dismissal?**
> >
> > **ii) If the Claimant was not dismissed but resigned, why did she resign? Was the resignation in response to any behaviour by the Respondent amounting to constructive dismissal?"**

38. Mr Margo submits that the fact that the application to amend was made and rejected is no more than a relevant factor to be taken into account and is not decisive of the issue. The Tribunal ought to have noted that the claim form did include a claim for whistleblowing dismissal, notwithstanding what was said in the list of issues. Furthermore, although it is acknowledged by Mr Margo that had the list of issues been amended, the respondent might rightly have sought an adjournment, that would not override the interests of justice which required that if a claim had been pleaded and had not been withdrawn, it should be heard and determined, even if that required an adjournment.

39. Mr Margo submitted in the alternative that the employment judge was in a position to revisit the earlier case management decisions of Employment Judge Palmer. I was referred to the

case of **Rose Morton v Eastleigh Citizens' Advice Bureau** [2020] EWCA Civ 638. The issue there was whether the Tribunal had erred in law in refusing an adjournment in circumstances where previous applications to adjourn had been refused. The Court of Appeal, Lewison LJ, said as follows:

> ***"35. A new argument.*** **Mr Curtis relied on the decision of the EAT in *Serco Ltd v Wells* UKEAT/330/15, [2016] ICR 768. In that case an employment judge directed a preliminary hearing to decide whether the claimant had sufficient length of service to bring a claim. A different employment judge revoked that order on the ground that the preliminary hearing would resolve only a few of the issues that needed to be decided. The EAT (HH Judge Hand QC) held that the revocation of the first order was not necessary in the interests of justice; and hence was outside the scope of rule 29. It is particularly to be noted that the appeal was an appeal directly from the second of the two orders. Judge Hand reviewed a number of authorities before stating his conclusions. First, he held that a challenge to an order is usually directed to a tribunal of superior jurisdiction and that seeking a judge of the same jurisdiction to look again at an order is discouraged, save in carefully defined circumstances. Second, he held that:**
>
> > **'… before a judge can interfere with an earlier order made by a judge of equivalent jurisdiction there must be either a material change of circumstances or a material omission or misstatement or some other substantial reason, which … it is not possible to describe with greater precision.'**
>
> **36. Third, he held that rule 29 should be interpreted in this way. Thus:**
>
> > **'…variation or revocation of an order or decision will be necessary in the interests of justice where there has been a material change of circumstances since the order was made or where the order has been based on either a misstatement (of fact and possibly, in very rare cases, of law, although that sounds much more like the occasion for an appeal) or an omission to state relevant fact and, given that definitions cannot be exhaustive, there may be other occasions, although …these will be "rare" and "out of the ordinary".'**
>
> **37. Based on that case, Mr Curtis argued that EJ Kolanko ought to have considered whether EJ Reed's order could properly have been made. Had he done so, he would have concluded that it was not properly made, with the consequence that EJ Kolanko ought not to have followed it. In effect, therefore, EJ Kolanko ought to have ignored the earlier order of EJ Reed.**
>
> **38. This argument does not appear to have been advanced before the EAT; and does not form one of the grounds of appeal for which permission was given. Nor has there been any application to amend the grounds of appeal. These are factors which may lead this court to refuse even to entertain this argument: see *Gover v Propertycare Ltd* [2006] EWCA Civ 286, [2006] ICR 1073.**

> **39. But in any event, in my judgment this argument suffers from a fatal flaw. Although Ms Morton objected to EJ Reed's order, she did not appeal against it. If (as Mr Curtis argues) EJ Reed ought not to have interfered with EJ Harper's direction of 2 October 2017, by what right could EJ Kolanko interfere with EJ Reed's order? This is the very thing that HHJ Hand QC warned against. In his answers EJ Kolanko said both that he saw no reason to interfere with EJ Reed's decision; and also that he agreed with it. There is also some force in Mr Self's argument that there was a significant change in circumstances following the CAB's concession that Ms Morton was a disabled person. EJ Harper's second direction of 2 October 2017 (after that change of circumstance) was made without having given the parties the opportunity to make full representations about the need for and scope of any medical report; and that the indication that there would be a joint report was incomplete because further directions (e.g. about timetabling and the issues to which any report would be directed) had yet to be considered and made. Thus EJ Reed's decision was not the same as a departure from a fully considered and finalised case management decision. Fuller submissions on the need for (and utility of) a formal medical report were made to EJ Pirani who, given the two conflicting decisions, ruled in favour of EJ Reed.**
>
> **40. In addition, what is directly in issue on this appeal is EJ Kolanko's refusal of an adjournment. Yet that very application had already been made to the ET and refused by EJ Pirani. Ms Morton was thus doing exactly what HHJ Hand QC said should not be done: namely asking a second judge of the ET to reverse a previous decision of the same tribunal. It is not acceptable, having failed in an application before one employment judge, to make an identical application to a second employment judge in order to provide a peg on which to hang what is essentially an appeal against the decision of the first employment judge.**
>
> **41. For these reasons, I do not consider that EJ Kolanko's refusal of the requested adjournment was vitiated by an error of law. I would dismiss the appeal."**

40. Mr Margo acknowledges in the light of that case that it will be rare for the Employment Tribunal to revisit an earlier Employment Tribunal decision. However, this is one of those rare cases, he says, because it is evident from Employment Judge Palmer's decision that the Judge did not appreciate the whistleblowing-related role of the Freedom to Speak Up Guardian, or the significance of box 10 in the claim form. On that basis, it was open to the judge at the hearing to conclude that Employment Judge Palmer had reached the wrong decision and that it was in the interests of justice to allow the claim to be amended and, if necessary, to adjourn.

41. The respondent was represented today as below by Ms Owusu-Agyei. In her clear and comprehensive submissions, Ms Owusu-Agyei reminds me that this is an appeal against the

decision at the full merits hearing and not against the judgment of Employment Judge Palmer. Given the narrower scope of the ground of appeal, this appeal tribunal should not entertain Mr Margo's alternative submission based on a revisiting of the earlier case management decisions.

42. As to the substance of the ground of appeal, Ms Owusu-Agyei submits that this is not a claim which clearly included any reference to a whistleblowing dismissal complaint. There was no identification of the disclosure or which aspect of section 43 of the 1996 Act it relates to, how it is in the public interest and how it led to his dismissal. She submitted that Employment Judge Palmer was clearly correct to say that there was a lack of clarity in the claimant's claim and that the judge had expressly discussed with the claimant at the hearing on 12 June in an attempt to gain some clarification. She reminds me of the principles established in the case of **Parekh v Brent London Borough Council** UKEAT/0097/11, in which there was an issue as to whether the claim form contained a claim of automatic unfair dismissal.

43. The employment tribunal judge in that case decided that the claim form did not include such a claim and refused an application to amend. The Employment Appeal Tribunal held that on the proper construction of the claim form it did not include a claim of automatic unfair dismissal and the employment tribunal had not erred in law in exercising its discretion to refuse an amendment.

44. Mr Record Luba QC said as follows:

> **"16. Those, then, are the matters which the Claimant advanced on the form as explaining why his dismissal had, in his view, been unfair. But in line with the guidance given by Waller LJ in the Ali case, it is right to consider the document as a whole, and for this purpose Ms Joffe, in particular, takes me to section 6 of the form which is headed 'Discrimination' and invites the Claimant to identify if he has been discriminated against and in what respect. Under that heading the Claimant has ticked the two boxes 'Sex' and 'Disability', and under the instruction to describe incidents which are**

believed to amount to discrimination, the dates of those incidents and the people involved, he has entered this text:

> **'This relating to my grievances and whistle blowing statements that yet to be investigated.'**

17. As to that document and the way it had been completed, the Employment Tribunal Judge said the following at paragraph 10 of his Judgment:

> **'The first question to be considered was whether the whistle blowing aspect of the claim was covered by the existing claim. In my view, despite the oblique reference to whistle blowing in paragraph 6.2 of the claim, it could not fairly be said that this claim now put forward by the Claimant in the pre-hearing review was covered by the existing claim. There was no basis upon which, on any reasonable reading of the claim, the respondent could be said to have been put on notice that this claim was to be put forward at the hearing.'**

18. In my judgment, no error of law was made by the Employment Tribunal Judge in this respect in his construction of the claim form. It is quite plain that nothing in that document ET1 spells out, whether in layman's terms or by reference to the ingredients of the statutory provisions of section 103A, that what is asserted is effectively a case of victimisation by dismissal by reason of the making of a protected disclosure. I accept Ms Joffe's submission that a degree of latitude must be allowed to a litigant in person, so that where, for example, a Claimant had simply written the two sentences, 'I blew the whistle on my employers. I was sacked' an inference could readily be drawn that the claim is for automatic unfair dismissal for the making of a protected disclosure. But, in my judgment, this case gets nowhere close to that example. An assertion of automatic unfair dismissal for the making of a protected disclosure manifestly does not emerge expressly from the form ET1 and, in my judgment, nothing about it infers such a claim.

19. As to Ms Joffe's second point on this first ground – that is to say, that the Claimant could pray in aid the content of documents already in the possession of the Respondent, even if not attached to the claim form, provided they were referred to in it – I am not satisfied that that proposition is sound in law. Whether or not it is sound in law it seems to me that on the facts of this case any such contention is entirely tenuous. Ms Joffe needs to rely entirely on the single sentence in paragraph 6.2, 'This relating to my grievance and whistle blowing statements that yet to be investigated'. It is quite plain that there is no reference there to any particular disclosure, or to whom disclosure was made or on what date disclosure was made.

20. In my judgment, an Employment Tribunal Judge must be able to see from the claim document and its attachments, and not from other documents, what the claim is about and whether the Employment Tribunals Service has jurisdiction. As I have indicated, in this case even the purportedly relevant documents are not identified by date nor with sufficient particularity for them to be easily turned up, and nor is it indicated in what respect any particular content of those documents might be relevant to the claim presented to the Tribunal. For all those reasons ground 1 of the grounds of appeal, in my judgment, has no substance and falls to be dismissed."

45. Ms Owusu-Agyei submits that as in **Parekh** the EAT does not know what the claim is here as far as whistleblowing is concerned and it is reasonable to conclude that there was no section 103A claim on the face of the claim form. She submits that the case of **Mervyn** is not relevant because this is not a case about the list of issues.

Ground one - Discussion

46. I have been taken to the claimant's claim form and related documents in some detail this morning. Having considered these, it is clear to me that the claim form did not, on the face of it, clearly elucidate any claim under section 103A of the **Employment Rights Act 1996**. Mr Margo places considerable reliance on the fact that there is a reference to the fact that the claimant spoke to the Freedom to Speak Up Guardian. However, there is nothing in the references to the guardian, whether in the first claim or in the second claim, that even begin to indicate what disclosures might have been made, when they were made, whether they were made in the public interest and how they could give rise to any detriment or, in respect of the second claim, any dismissal.

47. In respect of the second claim, Mr Margo's case appears to me to hinge on three matters. The first is that the claimant refers to raising a formal concern with the Freedom to Speak Up Guardian, but for the same reasons as in relation to the first claim, that reference in itself tells one very little, if anything, about the disclosures or how they gave rise to a claim under section 103A. As Ms Owusu-Agyei submits, it is noteworthy that nowhere in any of the various documents to which I have been referred, does one find any identification of what was specifically said to the guardian.

48. One can infer from the documents that I have seen that the interactions between the claimant and the guardian consisted of little more than seeking advice in relation to the grievance

A and/or chasing up the grievance when it had not been responded to promptly by the respondent. What does not emerge is that the claimant made any specific disclosures to the guardian which could fall within the ambit of a protected disclosure under the 1996 Act.

B 49. The second matter relied upon is the reference to raising concerns about wrongdoing inside the Trust with the Chief Executive on 10 August 2017 and the fact that no outcome has been received so far. Those concerns were not identified on the face of the pleading.

C 50. I have been taken to letter sent by the claimant to the Chief Executive. I note that the letter was not attached to the ET1. However, even if it had been, it is not apparent on the face of it that any claim for whistleblowing is being made. Indeed, it is very difficult to discern from D that document any matter which could give rise to the kind of matters that would be necessary to identify a protected disclosure.

E 51. The final matter relied upon is the ticking of box 10. This box is included for the specific purpose of enabling the Tribunal Service to forward on to the relevant regulator the fact that a whistleblowing claim has been made. It is not part of the pleaded case in terms of setting out the factual basis on which the claim relies. However, I accept that the claim form is to be read as F a whole, and this box is not to be disregarded. Even taking that approach, the ticking of a box would not on its own give rise to the making of a whistleblowing complaint; particulars would be required in other sections of the claim form to make good such a claim. For reasons already G indicated, the particulars that are included in the ET1 in this case do not begin to establish the necessary ingredients for a whistleblowing complaint. It certainly would not be sufficient, in my judgment, simply to tick box 10 and to rely upon that as giving rise to a whistleblowing complaint without more.

H

52. Of course, the question for me is whether or not the Tribunal erred in law in failing to treat the claimant as having a whistleblowing complaint to pursue. The difficulty for Mr Margo, it seems to me, is that this is not a case where the claimant has arrived at the Tribunal with a clear claim for a whistleblowing dismissal on the face of the pleading, which the Tribunal has proceeded to ignore, either because of a deficient list of issues or for some other reason.

53. This is a case where a claimant has had numerous opportunities to set out a section 103A claim. The first such opportunity was of course in the claim form itself. For reasons I have already discussed, I consider that the tribunal judges that considered the matter before the full hearing, were fully entitled to conclude that, at most, it was unclear whether such a claim was included. No fewer than three employment judges considered the matter before the full hearing, and none of them thought that the claim was unequivocally included.

54. The second such opportunity was when the claimant was invited to restate his claim. I agree with Ms Owusu-Agyei that this was the claimant's opportunity to set out his complaint clearly and fully. The claimant's further and better particulars are of a high standard, given that they were drafted by a litigant in person. They refer to the heads of claim and to the statutory provisions relied upon, and under each head provide a factual summary of the complaints being made. It seems to me that there was absolutely nothing to prevent the claimant, should he have so wished, from including a section 103A claim in this document. By not doing so, it was reasonable for the tribunals considering the document subsequently to proceed on the basis that that document contained the primary complaints which he was making.

55. I do not accept Mr Margo's contention that it would be unfair to a litigant in person to treat the further and better particulars document as being effectively decisive of the issues to be determined. I say that because the direction from Employment Judge Lewis was in clear terms,

the claimant being given clear instructions as to what was expected of him. More importantly, Employment Judge Lewis made clear the purposes to which the restated case would be put. In particular, the references to enabling the respondent to understand the nature of the case it has to meet and to the fact that the Tribunal would be managing the case on the basis of the restatement, would have indicated to any reasonable litigant that this is the opportunity to set out everything on which he wished to rely, or at the very least the key points on which he wished to rely.

56. That the claimant understood that to be the effect of the direction as to the restated case appears to me to be confirmed by the claimant's subsequent applications to amend. It is quite clear that he himself considered, certainly by 12 June 2018, that there was some doubt as to whether his claim included a whistleblowing dismissal complaint at all. He therefore made the application to amend. That application was rejected by Employment Judge Palmer for the reasons I have already set out. It seems to me that Employment Judge Palmer cannot be criticised for saying that it is not at all clear from the second claim form whether the claimant was making a claim under section 103A. She notes specifically in that context that there is a reference to raising a formal concern about wrongdoing, and to the Freedom to Speak Up Guardian. In doing so, the judge identified precisely those two aspects of the claim form which might conceivably form the basis of a protected disclosure complaint. The Tribunal then goes on to note that there is no reference to a whistleblowing claim in the further and better particulars and rejected the application to amend, not only on the basis that the claimant had had an opportunity to include the claim at an earlier stage, but also because the Tribunal found that the claimant had been unable to explain the nature of the claim during the hearing. In particular, he was unable to identify the category of protected disclosure under section 43B of the 1996 Act that was being relied upon, and why it was said to be in the public interest.

57. The failure by Employment Judge Palmer to refer to box 10 being ticked does not advance the claimant's case. As I have already said, ticking the box on its own does not get the claimant anywhere without particulars, and in this case the particulars were lacking. Employment Judge Palmer's decision was confirmed, by the rejection of the application for reconsideration. In my judgment, she correctly stated that the claimant was given every opportunity to put forward his case for an amendment at the hearing on 12 June. Of course, as Ms Owusu-Agyei reminded me, this appeal is not about Employment Judge Palmer's decision, but about that of Employment Judge Stewart at the full hearing.

58. Turning then to the full hearing, the Tribunal there was faced with what appeared to be an agreed list of issues. This is not a case of a list of issues being thrust upon a litigant at a late stage where there might be some undue pressure to accept without having the opportunity to give the matter proper thought. In fact, the position was very far removed from that sort of scenario. The list of issues was first submitted by the respondent as far back as May 2018, almost a year before the full hearing. The claimant had had an opportunity to add to the list of issues, and did so very substantially. Furthermore, I am told that there was some discussion about the list of issues at the outset of the hearing as two or three items had not been agreed by the respondent. It was only after discussion that the list of issues was treated as agreed.

59. It seems to me that it would impose a near impossible burden on a Tribunal at the full hearing to require it in those circumstances to disregard the earlier decisions of the employment tribunal and to go back to the claim form. There may be very rare cases where, as a result of a glaring error on the part of an earlier tribunal judge, a clear and unequivocal claim on the face of the claim form was omitted from the list of issues. Additionally, there may be scope for departing from the list of issues in the kind of circumstances described by the Court of Appeal in

A the **Mervyn v BW Controls** case. However, in the present case, there were no circumstances, in my judgment, that would have warranted the Tribunal to revisit an earlier decision.

60. Given the procedural history of this matter, whereby the claimant had had ample
B opportunity to set out his case, and had tried and failed to amend his claim to include the whistleblowing dismissal complaint, the interests of justice did not require the Tribunal to take the unusual step of departing from what was on the face of it an agreed list of issues. I would
C agree with Ms Owusu-Agyei that Mr Margo's alternative submission cannot fairly be entertained given that a challenge to the Tribunal's approach to the earlier decisions was not one of the grounds of appeal.

D 61. For these reasons, ground one of the Appeal fails and is dismissed.

Ground two

E 62. I can take ground two much more quickly. The complaint here is that the Tribunal failed to consider two allegations of breach of the implied duty of trust and confidence. The claimant had relied upon numerous matters as giving rise to the breach. These are set out at
F paragraphs 13(a) to 13(j) of the list of issues. The claimant complains that the Tribunal failed to consider the issues at 13(h) and 13(j).

63. The issue under 13(h) was that the respondent had failed to deal with the claimant's
G grievance in the period May to November 2017. The issue under 13(j) is that the claimant had been harassed and bullied by Ms Linton and Ms Halai on 25 May 2017 and on 18 October 2017. Mr Margo submits that the Tribunal has simply failed to deal with these allegations and/or that it
H has failed to discharge its duty to give reasons for its decision pursuant to Rule 62 of the Employment Tribunal Rules of Procedure.

64. He notes that there are no specific findings as to whether the allegations of bullying and harassment are made out. The fact that the Tribunal overlooked these matters is confirmed, he says, by the Tribunal's finding at paragraph 80 of the judgment that all allegations of breach were known to the claimant by 6 September 2017. Given that the failure to respond to the grievance continued right up to his resignation in November 2017 and that the second alleged act of bullying took place in October 2017, it is apparent, says Mr Margo, that these allegations were overlooked. I do not accept those submissions.

65. It is not correct to say that the Tribunal did not consider these matters. The respondent's response to the grievance is dealt with in considerable detail at paragraphs 39 to 48 of the judgment. The Tribunal notes that there was an issue as to the date of the receipt of the grievance, but concluded that there was no reason for the claimant's managers to have lied about when they did see it. At paragraph 50 of the judgment the Tribunal gives a detailed description of what the investigator, Mr Jones, did and why the investigation was taking such a long time. The Tribunal notes as follows:

> **"50. Ms Lewis asked Mr Ian Jones to investigate both matters. He wrote to the Claimant on 12 July inviting him to attend an investigatory meeting on 7 August. The Claimant was unable to attend that meeting so it was rescheduled for 8 September and, while the Claimant attended that meeting having provided a personal statement ahead of it, he would not consent to answer questions on the matters involved, preferring to rely on the personal statement. The investigation took some considerable time with Mr Jones having to arrange a number of other interviews with members of staff against a background of there being a considerable amount of organisational change going on within the Respondent. However, as he candidly admitted in his evidence, the resignation of the Claimant took some of the pressure off him to deal with the grievance and disciplinary matters as quickly as he would have liked."**

66. Then at paragraph 52 the Tribunal refers to the investigation and report into the claimant's grievance being completed on 20 February 2018 and to Mr Jones' conclusions and recommendations.

67. The Tribunal does not there make any criticism of the respondent's handling of the grievance, and it is implicit in its findings, in my judgment, that it did not consider the delays to amount to a fundamental breach of the claimant's contract, in particular a breach of the implied term of trust and confidence. If there were any doubt about that, it is removed by the Tribunal's conclusion, at paragraphs 66 to 81 of the judgment, that only one of the alleged breaches amounted to a breach of the implied term and that was the respondent's decision to reopen the investigation into the allegations made by Nurse X.

68. It is implicit in that conclusion that none of the other matters amounted to a breach of the implied term. As the Tribunal says at paragraph 72 of the judgment:

> **"The other breaches of the implied term as to trust and confidence relied upon by the Claimant did not carry anything like the same weight as did the decision to take abandon the Bloomfield conclusion of 'No case to answer'."**

69. Whilst the Tribunal does then go through some of the other allegations expressly, the failure to refer again to the allegation in 13(h) expressly does not mean that it was not considered. The judgment needs to be read as a whole. Once that is done, it is more than clear, in my judgment, that the Tribunal concluded that there was no breach of the implied term in dealing with the claimant's grievance. On a fair reading of the judgment the reasons for the Tribunal's conclusions were also clear.

70. The same may be said of the allegations under 13(j). The incident on 25 May 2017 is referred to at paragraph 47 of the judgment. The Tribunal's view of the claimant's allegation that he was a victim of bullying on that occasion is apparent from its description of the incident as an "altercation". Moreover, the Tribunal refers to the claimant as having refused to assist Ms Halai by showing her how to access some files and that, after refusing to assist, the claimant had shouted at Ms Linton that he was not well, that she should not speak to him and that he was going home.

A Ms Linton wanted something done because, as she emphasised (making use of the upper case), "I AM ACTUALLY SCARED OF HIM NOW AND WILL NOT ALLOW MYSELF TO BE ALONE IN A ROOM AGAIN WITH HIM ALONE."

B 71. From these passages one can readily infer that the Tribunal rejected the claimant's version of events, even though it did not say so in terms. The Rule 62 obligation to explain its decision is, in my judgment, clearly discharged.

C 72. The final allegation about the events of 18 October 2017 appears to be a complaint about Ms Linton chasing the claimant for a response to a request to provide some assistance. That much is clear from the respondent's submissions before the Tribunal to which I was taken. This D allegation appears to have been dealt with, albeit very briefly, at paragraph 77 of the Tribunal's judgment, where the Tribunal refers to the final example advanced by the claimant as being a breach of the implied term. Taking those matters together, it is clear that the complaint appears E to be about a fairly innocuous chasing email from Ms Linton and would hardly give rise to conduct amounting to a breach of the implied term.

73. Mr Margo's reliance upon the Tribunal's comments at paragraph 80 of the judgment do F not advance his case. The Tribunal clearly dealt with both the grievance and the allegations under 13(j). As to the grievance, the Tribunal made findings about that right up to February 2018.

G 74. Even if the claimant did not know about one or two of the matters he relies upon subsequently as at 6 September 2017, the Tribunal's conclusion about affirmation as at the time of his resignation would still stand.

H 75. For these reasons I do not consider there has been any error of law in the Tribunal's approach and nor was there any failure to comply with the duty to give reasons under Rule 62.

Conclusion

76. For these reasons, and notwithstanding Mr Margo's careful and powerful submissions, this appeal fails and is dismissed.