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Case Nos: EA-2021-000699-BA
EA-2021-000956-BA
EA-2021-001012-BA
EA-2021-001014-BA
EA-2022-000151-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 March 2023

Before :

MICHAEL FORD KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

MR S KHAKIMOV **Appellant**

- and –

NIKKO ASSET MANAGEMENT EUROPE LIMITED **Respondent**

- -

Mark Green (instructed through the Advocate Scheme) for the **Appellant**
Andrew Smith (instructed by CMS Cameron McKenna Nabarro Olswang) for the **Respondent**

Hearing date 23 February 2023

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The Claimant, who was a disabled person, brought claims for race and disability discrimination, victimisation and being subject to detriments for making a protected disclosure under section 47B of the **Employment Rights Act 1996** ("ERA"). In his appeal to the EAT he challenged several different decisions of Employment Judges ("EJs) made in the course of the proceedings. There were five grounds of appeal; the central thread running through them was that each EJ failed to take sufficient account of his disability.

All five grounds of appeal were dismissed. First, at an interim relief hearing when considering whether the claim could be amended to include a complaint under section 103A of ERA, the EJ made adjustments and allowances for the Claimant's disability and his status as a litigant in person. She took a permissible approach, in favour of the claimant, to the date when the Claimant was treated as having first made an application to amend and she was entitled to have regard to the insufficient particularisation of the claim, even though the claimant had cognitive difficulties. Second, at the same hearing the EJ correctly directed herself and took a permissible approach to whether the claimant's conduct had been unreasonable for the purpose of a costs order under rule 76 of the **Tribunal Rules of Procedure**. She was not required to consider every possible explanation, related to his disability, for his conduct and nor was she precluded from making findings against the claimant of unreasonable or opportunistic conduct without his having been cross-examined. Third, in having regard to the claimant's means under rule 84 for the purpose of a costs order, the EJ did not err in deciding that a costs award of £7,500 was reasonable and proportionate on the basis that, in future, the claimant should be able to find the means to pay it. In assessing whether there is a reasonable prospect that a claimant can pay a costs order, an employment tribunal is not restricted to considering whether the costs order can be paid by the date it is payable. Fourth, an EJ did not err in deciding that an order granting the claimant access to his e-mail inbox or outlook calendar fell outside the **Tribunal Rules**

of Procedure, nor in deciding that an order for equivalent disclosure of about six years' of e-mails and calendar information was too wide. Fifth, an EJ was correct to restrict a list of issues for the final hearing to matters which were pleaded by the claimant and matters in his further and better particulars which properly fell within the scope of the pleaded case.

MICHAEL FORD KC, DEPUTY JUDGE OF THE HIGH COURT

Introduction

1. The appellant, Mr Khamikov, appeals against four employment tribunal ("ET") decisions, all in the same proceedings. There are five notices of appeal. Following a rule 3(10) hearing before HHJ Tucker, at which the Appellant was represented by Mr Green through the ELAAS scheme, the appeal was distilled to five grounds set out in an amended notice of appeal for which permission was given.

2. I shall refer to parties as the Claimant and Respondent, as they were before the ET.

3. Before me, the Claimant was again represented by Mr Green, who did not appear below. Mr Smith, who represents the Respondent, did appear in the ET. Both presented helpful and clear written and oral submissions. I am especially grateful to Mr Green for representing the Claimant through the Advocate Scheme.

4. Although the hearing was originally listed before me and two lay members, both parties consented to my hearing the case alone. In accordance with the request of Mr Green, reasonable adjustments were made during the hearing to accommodate the Claimant's disability, such as pauses between submissions and breaks in the course of the hearing.

Background

5. I can be brief on the background because the challenge is to specific aspects of several ET decisions and because there has not yet been a full hearing, which I am told is listed for October 2023.

6. The Claimant was employed by the Respondent from 1 January 2013 until 13 January 2021.

He was off sick from 17 April 2019. At the time his employment ended his post was Product Management Director, UK. The Respondent is engaged in fund management.

7. The Claimant brought his first claim while he was still employed, and it was received on 17 May 2020. In it, he claimed discrimination owing to race and disability and victimisation under the **Equality Act 2020** ("EqA"). He also claimed "unlawful retaliation", which he identified as being subject to a detriment for making a protected disclosure for the purpose of section 43B of the **Employment Rights Act 1996** ("ERA"). In the extensive "Grounds of Complaint" annexed to the claim form, the qualifying disclosure was said to have been made in an e-mail of 17 January 2017 and at a subsequent meeting, and appeared under the heading "July 2017 demotion". The Claimant referred to his disability, saying he had been diagnosed with functional neurological disorder ("FND") and explaining that he had problems concentrating and had difficulty formulating sentences.

8. In its response to the first claim, served on 14 November 2020 and later amended, the Respondent denied the claims as well as contending a number of claims were time-barred. It admitted that Claimant was disabled by reason of FND but denied it had actual or constructive knowledge of the disability at the material time.

9. The Claimant brought a second claim very shortly after he was dismissed, received on 19 January 2021. Under box 8, he said he was claiming unfair dismissal and discrimination on grounds of race and disability. At the outset of the annexed "Grounds of Complaint" he said he was applying for interim relief "pending determination of my new complaint about Unfair and Discriminatory Dismissal". In the summary of the legal claims, he referred to his existing claims as including "Retaliation for Protected Disclosure per 47B **ERA** 1996" and said he was bringing a new claim for "Unfair and Discriminatory Dismissal per Sections 94(1) and 126,

ERA 1996". The second claim included the same details as the first about the protected disclosure under the same heading "July 2017 demotion".

10. In its response to this second claim, which was also subsequently amended, the Respondent denied unfair dismissal and denied the dismissal was an act of direct disability or discrimination arising from disability.

11. The Claimant provided evidence to the ETs in support of his contention that he was disabled in April 2021. It included a disability impact statement and a report from two GPs, referring to a history of physical and psychological symptoms and a diagnosis of FND, and listing among other symptoms cognitive disturbance, inability to concentrate, poor memory and "glitches", when he lost his train of thought. The Respondent accepted the Claimant's diagnosis of FND meant that he met the definition of disability within the meaning of section 6 of the **EqA** from April 2019.

12. I was told there have been eight preliminary hearings ("PHs") in this case so far. They included a hearing before employment judge ("EJ") Palca on 2 December 2020, where she ordered further information of the Claimant's claim, and a hearing before EJ Elliott on 1 April 2021, at which she made unless orders.

13. On 26 April 2021 EJ Stout heard an application for interim relief under the provisions in sections 128-132 of **ERA**. In a judgment sent to the parties on 28 April 2021, she dismissed that application and decided that the Claimant had acted unreasonably in bringing the application for interim relief for the purpose of rule 76 of the **Employment Tribunal Rules of Procedure** (the "ET Rules"). In a subsequent judgment sent to the parties on 14 September 2021, she ordered the Claimant to pay the Respondent £7,500 in costs within 28 days. Both

of these decisions are subject to appeals, under grounds (1), (2) and (3).

14. On 27 May 2021, EJ Nicolle dealt with a further case management hearing. He consolidated the claims, listed them for a full hearing and, among other matters, refused an application for disclosure. This aspect of his decision is subject to an appeal: see ground (4).

15. On 4 October 2021 a hearing took place before EJ Spencer, at which she drew up a list of issues for the full hearing. EJ's Spencer's decision is challenged under ground (5) of this appeal.

16. On 25 November 2021 EJ Spencer refused the same application for access to the Claimant's e-mail account which had earlier been refused by EJ Nicolle and also refused a further application for specific disclosure. That decision is the subject of an appeal under ground (4).

17. The current position, I was told, is that a full hearing is due to take place in October 2023

18. It is against that background which I consider the specific grounds of appeal. Mr Green said that the thread running through the grounds was that the relevant EJs did not take sufficient account of the Claimant's disability, but each ground raises additional, specific challenges to each decision.

Ground 1

19. The first ground of appeal is a challenge to EJ Stout's decision, made at the interim relief hearing on 26 April 2021, to refuse an amendment to include a claim of unfair dismissal under section 103A of **ERA**. It is said that EJ Stout used the wrong date of when the application to amend was made, failed to provide sufficient reasons for selecting a date of 21 April 2021 and

wrongly made and took into account that the claim was not sufficiently particularised.

20. An application for interim relief may be under section 128 of **ERA** where an employee presents a complaint of unfair dismissal of various kinds. The listed provisions include section 103A, by which it is unfair to dismiss an employee where the reason or principal reason for the dismissal is that the employee made a protected disclosure. Interim relief, which originated in the legislation dealing with unfair dismissal for trade union related reasons (now found in 161 of the Trade Union and Labour Relations (Consolidation) Act 1992), is meant to provide a speedy procedure to decide if the tribunal is "likely" to find that a claimant was dismissed for one of the proscribed reasons: see **ERA**, section 129. If it does, the tribunal either makes an order reinstating the employee or an order continuing the contract.

21. In the judgment of the EAT in ***Steer v Stormsure Ltd*** [2021] ICR 807 it was made clear that interim relief was not available for a discriminatory dismissal under the **EqA** (the Court of Appeal subsequently confirmed this, although for different reasons: see ***Steer v Stormsure Ltd*** [2021] ICR 1671). As regards the Claimant, the consequence of these judgments was that he could only bring a claim for interim relief if he had made a complaint of unfair dismissal under section 103A of **ERA**.

22. The background to the matter is set out in EJ Stout's written reasons at paras 5-19. As I have stated, in the Claimant's second claim following his dismissal he had applied for interim relief and referred at para (19) of his Grounds of Complaint to the EAT judgment in ***Steer***. On 19 March 2021, the ET wrote to the Claimant, pointing out that interim relief was not available for a discrimination or victimisation claim under the **EqA** following the EAT judgment in ***Steer***, and asked him to confirm what he said was the reason for dismissal. EJ Stout quoted the response of the Claimant in his e-mail of 23 March 2021:

> **"…as noted in my application there is an open legal claim with ET (Case No. 2202809/220), where one of the claim heads is "Retaliation for Protected Disclosure per 47B(1) ERA 1996". I contend that the Respondent's series of discriminations and victimisations up until the point of unfair and discriminatory dismissal on 13 January 2021 stem from that protected disclosure and subsequent chain of events over a long period.**
> **…..**
>
> **Therefore, I request that interim relief mechanism be allowed as a step to rectify the case management to ensure that parties are able to represent on an equal footing."**

The Claimant went on to refer to the appeal in ***Steer***. The case number to which he referred in the e-mail was that for his first claim, not the claim in which he complained of dismissal (2200247/2021).

23. On 6 April, the ET wrote to the Claimant, stating as follows:

> **"Your e-mail of 23 March 2021 at 21:41 hours has been considered by EJ Elliott who notes that you rely on the reason for your dismissal being because of a protected disclosure. For this reason an interim relief hearing will be listed".**

24. As EJ Stout recorded, the Respondent later wrote to the Claimant saying that it considered his interim relief application was misconceived and warning him that it might seek to recover costs. On 21 April, the Claimant submitted a witness statement for the interim relief hearing, of 193 pages, in which the Claimant stated that the reason for his "unfair and discriminatory dismissal was [his] acts of making...Protected Disclosures per 47B(1) ERA 1996". He also listed five categories of protected disclosure, which referred to protected disclosures which were not set out in his first (or second) claim.

25. Accordingly, the first issue for EJ Stout to consider was whether the Claimant's second claim, properly interpreted, already included a claim for automatic unfair dismissal under section 103A. She decided it did not, and this aspect of her judgment is not challenged: see paras 37-39.

26. EJ Stout therefore turned to consider whether the Claimant should be permitted to amend his claim to include a complaint under section 103A. Her reasons are at paras 43-62. The structure is as follows:

(1) She first noted that the Claimant's position was that he did not need to make an amendment application. But because he had made submissions on the matter she considered it was "implicit" that he was seeking such permission and therefore considered the question of amendment (para. 43).

(2) She rejected an argument on behalf of the Respondent that, unless and until an amendment was particularised, the ET should not consider whether to give permission to amend, noting that "I do not consider such a strict approach is necessarily appropriate in the case of a litigant in person" (para. 44).

(3) The EJ then directed herself in accordance with the case-law on exercising the discretion to amend and, in particular, ***Selkent Bus Co Ltd v Moore*** [1996] ICR 836. No challenge is made to that self-direction.

(4) For the purpose of considering whether the claim was in time, the EJ said she was "prepared to assume for the purpose of this hearing that the relevant time is the date on which the Claimant made the application [to amend]", taking 21 April, the date the witness statement was served, as the relevant date (para. 47).

(5) At paras 51-62 EJ Stout undertook the exercise of applying the relevant principles to which she had earlier directed herself. After going through the familiar ***Selkent*** factors, she weighed the balance of prejudice at para. 60, considering there was no significant

prejudice to the Claimant in not pursuing the claim either at the interim relief stage or at a full merits hearing because it stood "no reasonable prospect of success".

(6) Finally, taking into account "all the foregoing factors" EJ Stout refused permission to amend to bring a claim under section 103A (para. 62). She also refused the Claimant permission to amend to include the additional disclosures in his witness statement for the purpose of his existing claim under section 47B of **ERA**, though saying he could make a "more concise, properly particularised" application at a later date.

27. Mr Green's first challenge is that EJ Stout wrongly took 21 April 2021 as the relevant date on which the Claimant first made the application to amend. The argument, in essence, is that the date she should have chosen was 23 March 2021, when the Claimant sent his e-mail to the ET saying he was claiming automatic unfair dismissal because of a protected disclosure. In light of the Claimant's disability, it is said that EJ Stout should have read the e-mail of 23 March as an application to amend, just as she did his witness statement. The significance of this was that if EJ Stout had selected the correct date, of 23 March 2021, the claim would have been in time, undermining her analysis at para. 53 that the application was made outside the primary three-month limit. This (wrong) starting point, Mr Green submitted, therefore infected both her immediate conclusion on the point at para. 53 and her whole analysis rejecting permission to amend because at the end she had regard to "all the foregoing factors".

28. I do not accept this submission. On the face of it, the e-mail of 23 March 2021 did not say the Claimant was making an application to amend and it referred to the first claim rather than the second one (which was the claim concerned with dismissal in which the Claimant had applied for interim relief). From the language used in the e-mail it was not entirely clear whether the Claimant was, in fact, asserting that the reason or principal reason for his dismissal was

making a protected disclosure. Nor do I consider that EJ Elliott's e-mail of 6 April meant that she had treated the 23 March e-mail as an application to amend or, more importantly, that EJ Stout was obliged to do so. All EJ Elliott did was note that the Claimant was, it seemed, claiming his dismissal was because of a protected disclosure, without purporting to treat him as applying to amend.

29. I also reject the submission that EJ Stout was bound to treat that e-mail as an application to amend in order to be consistent with the approach she took to the witness statement, which equally did not state it was an application to amend. EJ Stout treated the Claimant in his favour as implicitly applying to amend his claim at the hearing even though he had not applied to do so (para 43). As a further step in his favour, she was "prepared to assume" the application was made in the witness statement on 21 April 2021 (para. 47), even though she could have decided the witness statement did not include such an application at all. But two acts of generosity or fairness to the Claimant did not entail a legal duty to perform a third.

30. Supporting that view is the fact that it was not suggested to EJ Stout at the hearing that an application to amend was made in the e-mail of 23 March, perhaps because the Claimant's case was that he did not need to amend his claim at all. In addition, as Mr Smith pointed out, the Claimant's witness statement of 21 April expressly used terminology redolent of section 103A, stating that the "reason for my unfair and discriminatory dismissal was my acts of making the above Protected Disclosures", whereas the e-mail of 23 March did not use the language of section 103A and was more opaque in exactly what it was asserting. This suggested it was permissible for the ET to treat the witness statement and the e-mail differently, and only to treat the witness statement as the date of an implicit application to amend.

31. I do not consider my conclusion is affected by the Claimant's disability or the fact he was a litigant in person. EJ Stout made extensive adjustments for the Claimant at the hearing, as explained at paras 20-26. Other steps can be seen in the same light. EJ Stout permitted the Claimant to speak, it seems, for about four hours (para. 26); she treated him as making an application to amend when his position was that no application was necessary; she rejected the Respondent's argument that insufficient particularisation was a bar to considering amendment, saying it was "not necessarily appropriate in the case of a litigant in person" (para. 44); and she left open the door to the Claimant making a later application, with more concise particulars, to amend his claim for being subject to detriments contrary to s.47B of **ERA** (para. 62). In the costs aspect of her judgment, she also directed herself not to judge a litigant in person by the standards of a legal professional (para. 66) and directed the provision of later information about means "given the Claimant's difficulties" (para. 70). Lastly, she also decided not to base a costs order against the Claimant on his unreasonable conduct at the hearing, saying she was not "prepared to find that it was unreasonable given his claimed disability" (para. 73). In an area where the adjustments to be made are primarily a matter for the assessment and discretion of the employment tribunal hearing from the parties, I do not consider she was required to make a further adjustment and treat the e-mail of 23 March as an application to amend.

32. As a supplementary ground, Mr Green also argued that EJ Stout did not give sufficient reasons why she took the date in his witness statement as the date of the application to amend. EJ Stout explained why she selected that date: she did so as an act in the Claimant's favour in circumstances where it was only "implicit" that he was applying to amend (see paras 43, 47, 53). I do not consider the duty to give reasons requires more, especially in circumstances where the Claimant was not contending that he had made an application to amend on 23 March or at all. There is limited scope for a party to argue he does not know why he has lost on a

point when he never pursued the point at all.

33. Nor do I accept that EJ Stout erred in the approach she took to whether the claim was sufficiently particularised, a factor she took into account under ***Selkent*** (see para. 44). At para. 52 she explained why the protected disclosures set out in the Claimant's witness statement did not provide sufficient detail of the terms of the disclosure, nor of the legal duty said to have been breached.

34. Mr Green relied on ***Vaughan v Modality Partnership*** [2021] ICR 535 to suggest that the ET should have applied a more inquisitorial approach because the claimant was a litigant in person with a cognitive disability. EJ Stout should, it is said, have requested further and better particulars rather than treat the insufficient particularisation as a reason for refusing the application. The comments of Judge Tayler at para. 19 of ***Vaughan*** were cautioning EJs against using the ***Selkent*** factors as a mechanical check list without considering the overarching question of balance of hardship. It was in that context he spoke of EJs having to adopt a "more inquisitorial approach" with litigants in person - to ensure the correct legal question was addressed. But this is exactly what EJ Stout did: she took care to address all the questions relevant to ***Selkent***, including the balance of hardship, even though the Claimant's stance was that he did not need to amend and the Respondent's position was that insufficient particularisation was an insurmountable barrier to amendment.

35. Of course, in general tribunals may need to adopt a more inquisitorial approach on amendment questions when faced with a litigant in person or a person with disabilities than with a legally represented party. Though every case is different, greater care may need to be taken to ensure the amendment is saying what the Claimant means to achieve, that the correct legal label is used, that all the ***Selkent*** factors are properly addressed and so on. But in several respects EJ Stout appeared to have made allowances for the Claimant's position as a litigant in person

with a disability, including not requiring a written properly formulated written amendment as a pre-condition of granting permission to amend (see para. 44). When it came to the ***Selkent*** exercise, I do not consider she was required to take the further step of discounting the lack of particularisation in the witness statement just because the Claimant was a litigant in person with disabilities.

36. For all these reasons, I dismiss ground (1). In the circumstances, I do not need to consider Mr Smith's argument that, in light of EJ Stout's conclusion that the claim based on section 103A stood no reasonable prospect of success, only one conclusion was open to her, meaning that the case would not need to be remitted to an ET in any event. But I can see some force in that argument.

Ground 2

37. Ground (2) is also a challenge to EJ Stout's judgment of 28 April 2021 and her reasons and conclusion that the Claimant acted unreasonably within meaning of rule 76(1) for the purpose of an award of costs. It is said that she took into account irrelevant factors, made serious findings against the Claimant without his being cross-examined, and failed to consider other explanations, related to his disability, for his change in position across time.

38. Rule 76(1) of the **ET Rules** provides as follows:

> **"(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—**
> **(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;**
> **(b) any claim or response had no reasonable prospect of success;**
> **(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins."**

39. The application here was on the basis that the interim relief application had no reasonable

prospects of success and/or that the Claimant had acted unreasonably: see para. 166. EJ Stout directed herself in accordance with the correct legal principles at paras 64-67. It follows that an appeal court should be slow to conclude she did not properly apply those principles, and should only do where it is clear from language that different principles have been applied: see Popplewell LJ in ***DPP Law v Greenberg*** [2022] IRLR 1016 at para. 58.

40. The EJ summarised the parties' submissions on costs at paras 68-69. She found the Claimant had acted unreasonably for the reasons given at para. 71, in which she adopted her early findings at para 41. There, she found that the Claimant had deliberately omitted a claim based on s.103A **ERA** in his second claim based on various factors, including that he had done considerable legal research, had been in receipt of legal advice, did not assert in correspondence with the Respondent that he had been dismissed because of making a protected disclosure and had referred in his second claim and in his e-mail of 23 March 2021 to ***Steer v Stormsure*** (which would not be necessary for a claim brought under section 103A because that section is expressly listed in section 124 of **ERA**).

41. EJ Stout concluded at para. 71 as follows:

> **"I acknowledge that the Claimant is acting in person, but (as he emphasised to me at the start of the hearing) he is an intelligent person who excelled in his academic studies, he has done a significant amount of legal research and he has been in receipt of legal advice. More importantly, the core of unreasonable conduct lies not with any question of legal judgment but with what the facts were as they were known to the Claimant. Although he does not accept that this is what he has done, I find that his change of case was not based on the facts as he believed them to be, and was an opportunistic attempt to maintain an application for interim relief that ought to have been abandoned once it was pointed out that he had misunderstood *Steer v Stormsure*."**

She found that the threshold test in rule 76(1) was met, subject to consideration of the Claimant's means to see both whether an order should be made at all and, if so, its amount (para. 72).

42. Mr Smith cites ***Barnsley MBC v Yerrakalva*** [2012] ICR 420 in which Mummery LJ stated this in relation to rule 40 of the 2004 **ET Rules**, the forerunner of rule 76 of the current **ET Rules**:

> **"40. The actual words of Rule 40 are clear enough to be applied without the need to add layers of interpretation, which may themselves be open to differing interpretations. Unfortunately, the leading judgment in [*McPherson v BNP Paribas* [2004] ICR 1398] delivered by me has created some confusion in the ET, EAT and in this court. I say "unfortunately" because it was never my intention to re-write the rule, or to add a gloss to it, either by disregarding questions of causation or by requiring the ET to dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as "nature" "gravity" and "effect." Perhaps I should have said less and simply kept to the actual words of the rule.**
>
> **41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in Mc Pherson was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."**

43. The four alleged errors under this ground of appeal fall to be considered in that light: the primary guide is the wording of rule 76, and ETs should look at the "whole picture".

44. First, it is said that the EJ took into account the Claimant's academic excellence as a factor counting against him, when in fact it was a factor going the other way because it was only relevant to showing the *decline* in his abilities. But the finding of the EJ at para. 71, based on the having heard from the Claimant, was that he "*is* an intelligent person" (my emphasis) as illustrated by his academic record, not that he was in past. That finding cannot be said to be perverse on appeal. Accordingly, I consider the EJ was entitled to have regard to this factor in deciding whether the Claimant considered at the time of his dismissal that he had in fact been dismissed because of making a protected disclosure.

45. Second, it is said that EJ failed to take account of the Claimant's disability, which could be relevant to what he in fact thought was the case in the past, such as when he brought his second claim. Mr Green referred me to passages in the **Equal Treatment Bench Book** on making adjustments for those with cognitive disabilities. However, the EJ was well aware of the Claimant's disability, as illustrated by the matters to which I have referred at para. 31 above. Her decision about what the Claimant believed to be the case when he brought the second claim, and why he changed his mind, was carefully reasoned and was based on the claim form, the background and other documents. To require her to go further, and expressly consider his disability in deciding what in fact happened, is to place too great a burden on the reasoning which is required of EJs. Just as an ET is not required to consider every piece of evidence when it comes to its findings of fact, nor is it required to consider every possible explanation or submission when it comes to addressing matters such as unreasonable conduct under rule 76 (compare ***Greenberg***, above, per Popplewell LJ at para. 57).

46. Third, Mr Green submits EJ Stout erred in making a serious finding against the Claimant - that he had acted unreasonably, that he did not believe the facts to be as he now stated when he brought the second claim, and that he had made an opportunistic change of position - without him having the opportunity to respond to the allegations against him in cross-examination.

47. The only requirement of the **ET Rules** about the procedure to adopt on costs applications is rule 77, which requires that a party has a "reasonable opportunity to make representations (in writing or orally, as the Tribunal may order)" in response to a costs application. In that light, there can be no *general* requirement of cross-examination before a costs order is made, and the submission can only be that it was required in the particular circumstances here. There is

an obvious practical concern that, if cross-examination were required here (or in other cases), a costs hearing at a preliminary or later stage would turn into a "mini-trial" of a party's credibility and might itself give rise to issues of unfavourable treatment based on disability. Such a result is in tension with rule 77. Here, the Claimant was put on notice of the Respondent's costs application (see para. 68) and had the opportunity to respond to it. I do not consider the EJ was required to go further and only make the findings she did if the Claimant were cross-examined.

48. The fourth point is that the EJ did not consider other possibilities why the Claimant might have changed position because he was e.g. disabled and not because of his being disingenuous. This is similar to the second point. The EJ provided sufficient reasons for her decision so as to be compliant with ***Meek v Birmingham City Council*** [1987] IRLR 250. She was not required to consider or spell out every other possible explanation for the Claimant's change of stance.

49. For all these reasons, the appeal on ground (2) fails.

Ground 3

50. This ground is a challenge to the subsequent decision of EJ Stout sent to the parties on 14 September 2021, deciding the amount of costs to be paid by the Claimant. There are said to be two errors of law:

    (1) The EJ took into account irrelevant factors or was perverse in finding or concluding that the Claimant should be able to find the means to pay a costs award of £7,500 from his minimal savings, a heavily-mortgaged property or benefits.

(2) The EJ made an award which was punitive rather than compensatory when she took into account C's unreasonable conduct at para. 16 of her reasons.

51. By rule 84, in deciding whether to make a costs order, and if so in what amount, a tribunal "may have regard to the paying party's...ability to pay" the costs order. The tribunal is not required to have regard to ability to pay (contrast rule 39 on deposit orders).

52. The background to this decision was that, at the earlier hearing, after deciding that it would not be fair to hear evidence as to means "on the hoof" (para. 70), EJ Stout directed the Claimant to provide a witness statement setting out details of his means within seven days, gave the Respondent a right to respond and said she would decide the amount of costs on the papers.

53. The Claimant did not provide a witness statement as ordered but instead sent an e-mail, unsupported by documents, saying he owned a house which was subject to an 85% mortgage, implying he was behind with mortgage payments and had minimal saving and explaining he was in receipt of Universal Credit. I did not see that e-mail on the appeal. Despite the lack of a witness statement, EJ Stout was "prepared to accept that in broad terms" it was accurate (para. 15).

54. EJ Stout had regard to the Claimant's ability to pay, even though she was not obliged to do so, and decided that factor did not mean there should be no costs order but that the amount ordered should be "modest" (para. 16). Next, she decided that the amount claimed by the Respondent was disproportionate to the issues at stake (para. 17). In light of those factors and that the interim relief hearing was only a preliminary stage so that the level of costs should not stifle the Claimant's claim altogether, she decided that the Claimant should not pay the

whole costs claimed, of £20,000.

55. At para. 19 she concluded as follows:

> **"This is necessarily a rough and ready exercise, but I consider the appropriate and proportionate amount is £7,500. I am satisfied on the basis of the limited evidence provided that this is an amount that the Claimant should be able to find the means to pay (from his property or any savings or on a longer-term arrangement through his benefit payments) so that it is unlikely of itself to stifle his claim. I also consider that it is a large enough amount to reflect the extent of the unreasonable conduct and provide the Respondent with some (albeit limited) recompense for the costs that it had to incur because of the Claimant's unreasonable conduct".**

She ordered the sum to be paid within 28 days, two weeks longer than the ordinary time for paying a tribunal costs order (para. 20).

56. It is not in dispute that, in having regard to means under rule 84, a tribunal is not restricted to current ability to pay a costs order but may have regard to a realistic prospect that in the future a party may be able to pay a higher amount: see ***Arrowsmith v Nottingham Trent University*** [2012] ICR 159 at paras 28-29.

57. In ***Herry v Dudley Metropolitan*** Council [2017] ICR 610 the EAT criticised a tribunal which had regard to a claimant's future earning capacity but, having decided that the claimant could return to work as a teacher, made no findings as to his likely earnings and ordered him to pay the whole of the costs (later assessed at over £110,000) without considering if that sum was proportionate.

58. Here, in contrast, at para. 19 the EJ expressly considered what amount of costs was "appropriate and proportionate" and did not award the Respondent all its costs. In deciding whether there was a realistic prospect that the Claimant could pay £7,500 and, therefore, that his future claims would not be stifled, the EJ considered that he "should" be able to find those

means somehow. I do not consider that, in making such an assessment, she was restricted to assessing whether the Claimant could pay £7,500 within the 28-day period in which the costs were ordered to be paid. Otherwise, any costs award payable within the ordinary period of 14 days from the date of the order[1] and which took account of longer-term earning prospects would be vulnerable to challenge. The wide wording of the discretion in rule 84 - "have regard...to ability to pay" - does not require an ET to be satisfied the party is able to pay the costs order by the date when it is payable.

59. I respectfully adopt what the EAT (Underhill J) said in ***Vaughan v London Borough of Lewisham (No.2)*** [2013] IRLR 713 at para. 28:

> **"The starting-point is that even though the Tribunal thought it right to "have regard to" the Appellant's means that did not require it to make a firm finding as to the maximum that it believed she could pay, either forthwith or within some specified timescale, and to limit the award to that amount. That is not what the rule says (and it would be particularly surprising if it were the case, given that there is no absolute obligation to have regard to means at all). If there was a realistic prospect that the Appellant might at some point in the future be able to afford to pay a substantial amount it was legitimate to make a costs order in that amount so that the Respondents would be able to make some recovery when and if that occurred. That seems to us right in principle: there is no reason why the question of affordability has to be decided once and for all by reference to the party's means as at the moment the order falls to be made. And it is in any event the basis on which the Court of Appeal proceeded in Arrowsmith , albeit that the relevant reasoning is extremely shortly expressed. It is necessary to remember that whatever order was made would have to be enforced through the County Court, which would itself take into account the Appellant's means from time to time in deciding whether to require payment by instalments, and if so in what amount."**

60. In that light, I consider it was open to the EJ here to decide that there was a realistic prospect the Claimant would be able to pay £7,500 at some stage in the future. The appeal ground is, at root, that such a finding was perverse. But once it is recognised that ability to pay does not mean ability to pay the full sum within the 28 days, the equity in the Claimant's house alone

[1] The ET Rules fix no period for payment. But the Civil Procedure Rules rule 44.7 require payment within 14 days, and sums payable following a tribunal decision are enforceable as if payable under a county court order: see section 15 of the Employment Tribunals Act 1996.

provided a sufficient basis for such a conclusion, especially in a context in which the Claimant had been vague about his actual means and had not provided a witness statement or supporting documents to confirm them.

61. As to the second aspect of this ground, I do not consider the EJ wrongly based her order on punitive reasons. The aim of a costs order is not to punish the losing party: see ***Lodwick v Southwark London Borough Council*** [2004] ICR 884, CA, per Pill LJ at para. 23. By the same token, it is not a sufficient reason to refuse a costs order that it would have the effect of punishing the paying party: see ***Davidson v John Calder*** [1985] ICR 143 (the very case cited by Pill LJ in ***Lodwick***). But it does not follow from these considerations that a tribunal should not assess the extent of unreasonable conduct in deciding the amount of any costs order. On the contrary, in deciding what it is reasonable and proportionate for a paying party to pay, the nature and extent of the unreasonable conduct is relevant to examining the whole picture of what happened: see ***Yerraklava***, per Mummery LJ at paras 40-42. The EJ correctly directed herself in accordance with the principles, including ***Yerraklava***, at paras 65-67. In having regard to the extent of the unreasonable conduct at para. 19, I consider she correctly applied them.

Ground 4

62. Grounds 4 and 5 both challenge case management orders. Owing to the broad discretion employment tribunals have on such matters, there is limited scope for appeal. As it was put by Henry LJ in ***Noorani v Merseyside*** [1999] IRLR 184 at para. 32:

> **"These decisions are entrusted to the discretion of the court at first instance. Appellate courts must recognise that in such decisions different courts may disagree without either being wrong, far less having made a mistake in law. Such decisions are, essentially, challengeable only on what loosely may be called Wednesbury grounds, when the court at first instance exercised the discretion under a mistake of law, or disregard of principle, or under a misapprehension as to the facts, where they took into**

> **account irrelevant matters or failed to take into account relevant matters, or where the conclusion reached was "outside the generous ambit within which a reasonable disagreement is possible", see *G v. G* [1985] 1 WLR at 647."**

Asquith LJ's words in ***G v G*** were also cited by Wall LJ in ***CICB v Beck*** [2009] IRLR 740 at para. 23.

63. Ground 4 relates in part to the refusal of the order of disclosure made initially by EJ Nicolle in the judgment sent to the parties on 28 May 2021 following a hearing on 27 May, later upheld by EJ Spencer in a letter of 25 November 2021. The grounds of challenge are in essence twofold:

(1) That both EJs failed to take account of Claimant's disability, a relevant factor because he needed documents to remind him of past events and their sequence in time, so that without such disclosure the parties were not on an equal footing.

(2) That EJ Nicolle erred in considering that the order sought fell outside the ET's powers.

(It was accepted at the appeal that EJ Nicolle did not make an error of law at paragraph 3.9 where he declined to interfere with an order of EJ Elliott because there had been no material change of circumstances. That order was about the provision of further information, not disclosure).

64. The order sought by the Claimant was set out at para. 18 of EJ Nicolle's judgment. It was an order that the Respondent provide the Claimant with "access to his e-mails and outlook calendar for the period from 1 January 2015 until his dismissal", said to be so that he could carry out a keyword search to assist him in completing further and better particulars that had been ordered.

65. EJ Nicolle gave two reasons for refusing the order at para. 19. The first was that the ET did not have power to make the relevant order, of mandatory access to the computer, under the **ET Rules.** Mr Green challenged the judgment on this aspect, contending the ET had power to make such an order under its general powers of case management in rule 29, though he accepted there was no authority on the point.

66. The requested order has some resemblance to search orders, requiring a person to admit another to premises for the purpose of a search for evidence, which is now on a statutory basis under section 7 of the **Civil Procedure Act 1997.** These can only be made in the High Court: see section 7(8).

67. An employment tribunal has power to order the disclosure of documents under rule 31. But there is no express power to order a person to give another access to property for the purpose of obtaining documents. Although rule 29 gives a tribunal a general power to make a "case management order", defined in wide terms in rule 1(3), and the particular powers in the following rules do not restrict the scope of that general power, I doubt that rule 29 is sufficiently elastic to allow the order sought here. For example, such an implied power would be in tension with the restricted power in the **Civil Procedure Act 1997** and the common law's jealous protection of property rights. Were such a power to be part of the **ET Rules,** I would expect them to say so expressly. In those circumstances, it seems to me that EJ Nicolle was right to consider that the order sought fell outside the scope of the **ET Rules**.

68. But Mr Green had a fall-back argument: that a way of achieving the result sought by the Claimant was simply to give the Claimant disclosure of the e-mails and calendar; the Respondent could then give him access to its computer system as a practicable way of complying with the order. This submission engages with EJ Nicolle's second reason for

refusing the order sought - that it was not necessary or proportionate in the absence of general particulars of the acts or omissions on which the Claimant relied - which itself was an alternative and sufficient basis upon which to refuse the order sought. According to the EJ, particulars of the acts or omissions of which the Claimant complained would then provide parameters for a search, and the Claimant could always request additional disclosure after seeing the Respondent's disclosure. Consequently, EJ Nicolle refused the application and made an order for standard disclosure of documents relevant to the issues in the case, to be complied with by 15 September.

69. I consider this second element of EJ Nicolle's decision fell squarely within the generous ambit given to EJs on matters of case management. The context here was that the Claimant had had access to his e-mails and calendar when he produced his first claim form, which included many dates and events. Mr Smith told me that the Claimant in fact had access to his e-mails and calendar until 13 January 2021, shortly before his employment was terminated and shortly before his second claim for was received. At the hearing on 27 May the list of issues had not yet been finalised. The claims made by the Claimant already referred in significant detail to dates and documents in support. EJ Nicolle had made adjustments for the Claimant's disabilities at the hearing on 27 May and so was fully aware of them: see, for example, at paras (1)-(2). EJ Nicolle gave sufficient, if short, reasons for refusing the application. In these circumstances, I do not accept either that he was required to refer to the Claimant's disability when it came to the order of disclosure sought, nor that the Claimant's disability required an order of disclosure of over six years' e-mails and calendar information.

70. Finally under this ground the Appellant also challenges the order of EJ Spencer refusing disclosure in a letter dated 25 November 2021. The background here was that in an e-mail of 3 November 2021 the Claimant asked for disclosure of documents set out in a Schedule by 15

November. He attached a long schedule of many documents which was not easy to follow. EJ Spencer said that it was not clear how the documents listed would assist the ET in determining the issues before it (para (2)). She added that the "issue of access to the Claimant's e-mail account has already been determined by EJ Nicolle" (para (3)).

71. In light of the limited scope to challenge case management orders, once more I do not consider EJ Spencer erred in this letter. Mr Green did not contend that any specific documents were wrongly excluded under paragraph (2) of EJ Spencer's order. It would place too high a burden on employment judges if she were required expressly to take account of or refer to the Claimant's disability. Her conclusion that the documents would not assist the ET in determining the issues regardless was a sufficient basis on which to refuse disclosure.

72. As to para. (3) of the letter, Mr Green submitted EJ Spencer did not exercise her discretion in respect of the request for access to the Claimant's e-mail inbox because she simply referred back to EJ Nicolle's decision.

73. Rule 29 allows an employment judge to vary or set aside a case management order where that is "necessary in the interests of justice", giving the example of an order made where the party affected by it did not have the opportunity to make representations. But the discretion in rule 29 has been read so as to chime with the approach taken in the civil courts under rule 3.17 of the **Civil Procedure Rules**. Consequently, the power in rule 29 should only be exercised where there has been a material change of circumstances, the order was made on a wrong factual basis or there exist some other rare and exceptional circumstances for changing the original order: see ***Hart v English Heritage*** [2006] ICR 657 per Elias J at paras 31-35, citing the familiar authority of ***Goldman Sachs Services Ltd v Montali*** [2005] ICR 1251. When EJ Spencer came to decide whether the Claimant should have access to his e-mail account, there

had been no material change of circumstances from EJ Nicolle's earlier decision. As a result, she was entitled to treat the issue as already having been determined by him.

74. Ground (4) is therefore dismissed.

Ground 5

75. This ground of appeal is a challenge to another decision of EJ Spencer, made at a PH on 4 October 2021 and sent to the parties on 7 October 2021. It is contended on behalf of the Claimant, in summary, that EJ Spencer erred in excluding from the list of issues finalised at that hearing (i) additional protected disclosures; and (ii) matters which were set out in the Claimant's further and better particulars, without explaining it was open to the Claimant to apply for amendments.

76. The background to EJ Spencer's decision is set out in her "Summary of the Hearing". The purpose of the hearing was to finalise the list of issues for the full hearing. Initially, the Claimant wanted the list of issues to be dealt with on papers but, if a hearing were necessary, he asked for it to take place via CVP. A CVP hearing was therefore arranged and, after further correspondence in which the Claimant objected to an oral hearing, EJ Baty decided the hearing would take place. The Claimant did not attend it.

77. There appears to have been a considerable amount of documentation before EJ Spencer. In drawing up the list of issues, EJ Spencer said that she had regard to the Claimant's submissions on the Respondent's agenda for the hearing, his particulars of claim and his further and better particulars (para. 5). In addition, she had before her an extensive table which set out in three columns (i) the paragraphs in the draft list of issues, (ii) the Claimant's comments on them and (iii) the Respondent's reply. In some cases, the Respondent agreed to the Claimant's

clarification or amendment of the issues for the hearing; in others it objected on the basis that, for example, a matter was not pleaded.

78. EJ Spencer said this at para. 7:

> **"As the Claimant had not applied to amend his claim, the issue was whether the list of issues fairly reflected the particulars of claim, together with any further details that could properly be regarded as further particulars rather than amendments to his claim."**

79. On that basis, she drew up a long list of issues which was annexed as a Schedule to her orders and ran to some 15 pages.

80. The first element of this ground of appeal is that EJ Spencer should have included additional protected disclosures in the list of issues. The list of issues drawn up at the hearing referred to two protected disclosures, made on 17 January 2017 and on around 27 January 2017. That reflected the pleading in the Claimant's first claim, which referred to a disclosure in an e-mail on 17 January 2021 and in a "subsequent meeting", and repeated in his second claim. The additional disclosures which, it is submitted, should have been included in the list of issues were those set out in his witness statement for the interim relief hearing, which included five categories of additional and different disclosures, made at various dates between 2016-2018. However, it is *conceded* by Mr Green that an application to amend may have been necessary to include these; and in fact the Claimant *did* make such an application to amend his claim to include these additional protected disclosures in a letter dated 13 October 2021. That application was refused by EJ Spencer in a decision relayed to the Claimant in an e-mail dated 29 October 2021.

81. In those circumstances, I consider this element of the appeal faces an uphill struggle. Mr Green

relied on ***Cox v Adecco Group*** [2012] ICR 1307 where, in the context of a strike-out of a claim brought by a litigant in person, the EAT emphasised the importance of EJs examining the pleadings and other "core documents" to establish the case that the claimant wished to advance (para. 26). After referring to passages in the **Equal Treatment Bench Book** on litigants in person, HHJ Tayler explained at para. 27 that before striking out a claim, an ET may need to consider whether an amendment should be permitted or whether the claimant has used the correct legal label for a claim.

82. ***Cox*** should not be read as general licence to include in a list of issues matters which have not been pleaded but which have been referred to in other documents. The formal claim is not just a document to "set the ball rolling" but the document which sets out the essential case to which the respondent must respond: see ***Chandhok v Tirkey*** [2015] ICR 527 at paras 16-18. In the present case, EJ Spencer examined the pleadings and the other information provided by the Claimant as to the claims he wished to bring. She also considered whether the Claimant needed to amend his claim, but noted that he had not applied to amend it. It would not have been permissible for her simply to include in the list of issues matters which had not been pleaded by the Claimant: rather, as she correctly stated, her task was to consider what matters in the issues fell within the scope of the particulars of claim.

83. Nor do I consider that, in light of the fact that the Claimant was a litigant in person with a disability, EJ Spencer should have gone further and considered an application to amend (which had not been made) at the hearing to include all the new protected disclosures. Had she done so, and refused the amendment, the Claimant might justifiably have complained that he did not know this issue was to be addressed at the hearing and it was unfair to decide it without hearing from him.

84. I can see no error in the way EJ Spencer dealt with the additional protected disclosures. In any case, I agree with Mr Smith that this aspect of the appeal is academic because when the Claimant later made an application to amend his claim to include the additional protected disclosures, it was rejected.

85. The second aspect of the appeal is that EJ Spencer wrongly excluded items which were in the Claimant's further and better particulars. These had been ordered by EJ Elliott at an earlier hearing and I was shown a document which included 30 pages of additional information about the first claim (dated 1 June 2021 according to the index) and another, shorter one, about the second claim (said to be dated 10 June 2021); I refer to these two documents as the "June FBPs". On 12 October 2021, the Claimant sent an e-mail to the ET in which the Claimant purported to set out numerous matters which were set out, he said, in the June FBPs but which had not been included in the list of issues drawn up by EJ Spencer.

86. Mr Green relied on the document of 12 October 2021 as setting out, in underlined text, the matters which were in the June FBPs but not in the list of issues finalised by EJ Spencer. These, he said, should have been in the list of issues as pleaded items and they had been wrongly excluded. It proved a difficult task to work out exactly how the e-mail of 12 October 2021 related to the initial claim forms, the June FBPs or the list of issues. The more the appeal progressed on this ground, the more it appeared to me to amount to a re-run of the task performed by the ET or micro-management of the ET's decision, falling outside the "generous ambit" given to ETs in matters of case management. To take two examples:

(1) One of the matters in the June FBPs, listed under "Act 3" as an act of race discrimination, was a complaint that the Respondent deliberately delayed the Claimant's request for early sponsorship of his indefinite leave to remain. According

to the e-mail of 12 October 2021, "Act 3" had been omitted from the list of issues. But this was incorrect: it *was* included in the List of Issues as an act of direct discrimination because of race, under para. (3)(b)(ii) of the List.

(2) Under "Act 6", the June FBPs referred to the failure to promote the Claimant to Head of Product Development as an act of race discrimination in the period April-June 2017. According to the e-mail of 12 October 2021, "Act 6" had also been omitted from the list of issues. But the list of issues included the failure to promote the Claimant to the role of Head of Product in March 2019 (see para. (3)(b)(v)). Moreover, in his first claim the Claimant complained that it was in March 2019 that another employee, rather than him, was placed as Head of Product (see para. 43).

87. EJ Spencer was not obliged simply to include every aspect of the June FBPs in the list of issues. As she rightly noted at para. 7 of her judgment, the prior question was whether matters in the June FBPs were properly further and better particulars of the existing pleadings or attempt to include new claims, for which amendments would be required. Based on the submissions I have heard, I cannot see that she erred in the approach she took to that question. On the contrary, she appears to have taken great care to analyse carefully which claims should be included in the list of issues and which should be excluded, no easy task in the circumstances. I therefore dismiss ground (5).

Conclusion

88. My conclusion is that all five grounds of appeal are dismissed. These proceedings already have a very long history and have been marked by repeated procedural challenges. I hope that in the future the focus can be on preparing for the full hearing on this matter, due to take place in October 2023.