EMPLOYMENT TRIBUNALS

Claimant: Mr O Oyesanya

Respondent: The Pennine Acute Hospitals NHS Trust

Judgment was sent to the parties on 28 March 2017 and the claimant requested written reasons by letter dated 9 April 2017. The tribunal made a case management order on 1 March 2017 which was sent to the parties on 26 April 2017. The claimant requested written reasons for the latter case management order orally at the hearing. Accordingly,

REASONS FOR CASE MANAGEMENT ORDER MADE ON 1 MARCH 2017 AND REASONS FOR JUDGMENT SENT ON 28 MARCH 2017

Preliminary

1. In these reasons:

   1.1. "the Judgment" means the judgment sent to the parties on 28 March 2017;

   1.2. "Schedule A" means Schedule A to the Judgment

   1.3. other schedules identified by letters of the alphabet refer to the corresponding schedule to the Judgment;

   1.4. "ERA" means the Employment Rights Act 1996;

   1.5. "EqA" means the Equality Act 2010;

   1.6. "FTER" means the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002;

   1.7. "the bundle" means the bundle prepared for the final hearing starting on 1 March 2017;

   1.8. "the Further and Better Particulars" or "FBPs" means the document appearing at pages 161 to 460 of the bundle;

   1.9. "the September 2014 CMO" means the case management order made by Employment Judge Slater on 24 September 2014;

1.10. "the Refusal Decision" means the decision by Employment Judge Ryan on 9 December 2016 to refuse the claimant's application for permission to rely on a supplemental witness statement; and

1.11. "the List of Issues" means the list of issues prepared by the respondent dated December 2016

Matters in dispute

2. On 1 March 2017 the tribunal began what was supposed to be the final hearing of the claimant's claim. At the outset of the hearing the claimant made an application to adjourn the hearing. We refused the application.

3. Over the course of the ensuing days, the claimant made the following disputed applications:

   3.1. to amend his claim to include a complaint of victimisation;

   3.2. to amend his claim, and in particular his complaint under FTER so as to allege that he was treated less favourably than Rita Bhalla was treated;

   3.3. for permission to give evidence in chief about matters not covered in his witness statement, which would be relevant to the allegations referred to in Schedules B and C;

   3.4. for permission to ask questions in chief of witnesses about matters not covered in their witness statements;

   3.5. for permission to rely on a supplemental witness statement;

   3.6. for specific disclosure of patient notes of Patient L, Patient Z and other patients;

   3.7. for specific disclosure of further rotas;

   3.8. for a witness order for:

      3.8.1. Mr Amu

      3.8.2. Dr Maniaz

      3.8.3. Edna Smith

      3.8.4. Cathy Trinick and

      3.8.5. Dr Thirwell

4. During the course of the claimant's submissions, it became clear that the claimant wished the tribunal to adjudicate on a great many allegations that did not appear in the List of Issues. This led us to spend several days trying to clarify with the claimant how he was putting his case in relation to those allegations. We indicated on the second day of the hearing that, once the claimant had been given the opportunity to clarify those allegations that did not appear in the List of Issues, we would consider whether any of those allegations should be struck out on the ground that they had no reasonable prospect of success.

5. As the claimant continued to talk about the way he was putting his case, it appeared from time to time that what the claimant was actually doing was seeking to introduce allegations that were not even in the FBPs. In relation to

these allegations, the tribunal had to decide whether an amendment was required and, if so, whether it should be granted.

6. The parties' submissions regarding these issues flushed out a further preliminary issue, namely whether paragraph 130 of the claimant's witness statement was admissible. That paragraph stated that the claimant made protected disclosures as set out in his FBPs. The respondent's position was that that paragraph was wholly unsatisfactory because of its attempt to import large sections of the FBPs wholesale into the evidence without setting out any of the factual detail. This was a point raised by the respondent at a previous preliminary hearing, without having been adjudicated.

7. One issue recorded in the List of Issues was whether or not the claimant would be required to amend his claim in order to rely on protected disclosures and to allege detriments which, in each case, had been specifically alleged for the first time in the FBPs. Was the claimant introducing new allegations or merely providing further particulars of existing ones? The parties agreed that this question should be determined at the outset of the hearing along with the claimant's applications.

Procedural history

8. By a claim form presented on 30 October 2013, the claimant raised a large number of complaints including race and age discrimination, detrimental treatment on the ground of being a fixed-term worker, and detriment on the ground of protected disclosures.

9. The way in which the complaints were expressed in the claim form were vague and lacking in detail. For example,

    9.1. At paragraph 17, Box 8.2, in relation to the termination of his employment, he alleged: "a) other people in similar or related circumstances; or b) different i) race, colour, ethnicity, tribal and/or national origin and/or ii) age were treated differently";

    9.2. At paragraph 18, he contended that he had been "treated differently by virtue of fixed-term tenure; discriminated against directly and indirectly on account of [the same protected characteristics as above] and suffered other detriments stated herein and below."

    9.3. He claimed at paragraph 18 of Box 9.2, remedies for "Dismissal for making a protected Disclosure; Victimisation; or in the alternative, aiding my victimization for making a protected Disclosure;…."

    9.4. In paragraph 7 of Box 15, he alleged, "…I was not afforded the right…b) not to be dismissed for making a protected disclosure (ERA s103A);

    9.5. In paragraph 8, he alleged, "RACE: Treating me differently directly and indirectly from other employees holding similar positions [with different protected characteristics] who were neither dismissed nor subjected to the other detriments was discriminatory…"

    9.6. He made a similar allegation of age discrimination at paragraph 9;

    9.7. At paragraph 10, he alleged, "DISCRIMINATORY UNDERTONES: I experienced discriminatory and undermining behaviour under the

Respondent and am aware of others not of my [protected characteristics] who were not dismissed or subjected to the other detriments

9.8. At paragraph 15, after the word, "WHISTLEBLOWING", the claimant contended that his "dismissal or refusal to extend was partly a reaction to the fact that the Respondent discovered that I had whistleblown in a previous post."

10. Not surprisingly, the respondent requested further particulars of those allegations. By the time the case reached a preliminary hearing on 12 February 2014, the claimant had not provided that information. Employment Judge Porter therefore ordered him to provide further information which included:

10.1. (paragraph 2.3) "what exactly is the protected disclosure relied upon by the claimant in his claim for detrimental treatment/dismissal arising from making a public interest disclosure (including what was the qualifying disclosure, to whom it was made, and when it was made)"; and

10.2. (paragraph 2.5) "what is the alleged discriminatory and undermining behaviour referred to at point 10 of Box 15 of the claim form and/or what (if any) alleged discriminatory treatment is relied upon (other than the termination itself)…".

11. The claimant's reply to that order was 14 pages long. He outlined a series of protected disclosures in to two categories, one to his previous employer, the second category being to the respondent. This document still left the respondent guessing about what case it had to meet. For example,

11.1. Under the heading, "Protected Disclosure 2: The Respondent", he asserted, "…I reminded it of its legal obligations under Clinical Governance, to ensure the safety, quality and cost-effectiveness of health care delivery to its patients." He did not indicate on what occasions he had given such a reminder, or which individuals he had reminded.

11.2. Under the same heading he stated "I was reasonably and genuinely concerned that the resulting staffing crisis would further endanger the health and safety of patients. I informed the respondent of my reasonable and genuine concerns". There was no detail as to what those concerns were, whom he informed, or when or how he informed them.

11.3. At page eight of the document he repeated, "I reminded the respondent of its legal obligation, specifically its contractual duty of trust and confidence including but not limited to: breach of contract of employment, unfair dismissal; wrongful dismissal; procedural unfairness and the possible effect on worsening the desperate staff shortage and increased risks of health and safety of patients (and possibly staff) being endangered; which if unchecked could lead to further endangering of the health and safety of others in future. I appealed to the respondent verbally and in writing, my appeal and grievance were ignored". The phase, "including but not limited to" left the respondent wondering what other disclosures of wrongdoing the claimant might subsequently allege had been made.

12. Addressing paragraph 2.5 of Employment Judge Porter's order, the claimant's document expanded on his allegations of discriminatory and undermining behaviour. He divided the allegations into categories. The first two were

"Rudeness and insubordination" and "Rudeness and undermining behaviour". Within these categories there was no indication of who had been rude, what they had said or done, or when it had happened. Paragraph (c), beginning "Unfounded allegations about me by junior medical staff and/or nursing/midwifery staff…" was accompanied by the narrative account of one incident in paragraph (d). Rather frustratingly, however, that paragraph was prefaced, "For example", hinting at further allegations to come.

13. On 12 June 2014 the claimant sent the respondent a long list of questions purporting to be a statutory questionnaire under EqA. Among the questions were requests for a considerable amount of statistical data, including:

    13.1. a list of the names of all consultants in all specialities employed by the respondent at North Manchester and Bury in the past 10 years;

    13.2. classification and sub-classification of all those named individuals into groups defined by race and nationality

    13.3. the age of each named consultant

    13.4. like information about all the respondent's consultants on one-year fixed-term appointments and

    13.5. like information about the respondent's consultants in obstetrics and gynaecology.

14. Clarification of the claim was ventilated again at a further preliminary hearing on 13 June 2014 before Employment Judge Sherratt. The respondent was given an opportunity to request further information and the claimant was given a deadline by which to respond.

15. In due course the respondent made a focused and precise request for further information by letter dated 27 June 2014. The claimant did not reply.

16. The claimant's questionnaire was answered on 14 August 2014. The respondent was able to provide statistical information based on ethnic and monitoring. They were not, however, able to go back 10 years and they could not disaggregate the North Manchester and Bury data from the Trust-wide statistics

17. The respondent applied to strike out various parts of the claim. The case came before Employment Judge Slater on 4 September 2014. During the course of the oral argument, the claimant told Employment Judge Slater:

    17.1. that he could not yet provide the information that he had been ordered to provide in relation to his claim, because he was awaiting the respondent's replies to his questionnaire; and

    17.2. that he had not provided all the detail requested because he did not wish to give away his case.

18. In her subsequent summary of the hearing, Employment Judge Slater expressed her concern about the claimant's reluctance to set out his case. Nevertheless she allowed the claim to proceed. She went to considerable lengths to record the claim as she understood it. Her case management order (the 14 September 2014 CMO) listed the various causes of action. Under the heading of "automatic unfair dismissal", at paragraph 12, the order recorded (with our emphasis):

"The claimant relies on a protected disclosure to a former employer, Forth Valley NHS Trust, in a conversation on 18th August 2011. He also relies on a series of disclosures to Mr Amu and others at the respondent Trust **including** a letter to Mr Amu on 26th July 2013, an email to Mr Amu before that letter and telephone **conversations** with Mr Amu **and others**. The claimant has been ordered to provide further particulars of the disclosures to the respondent."

19. Employment Judge Slater also recorded a complaint that the claimant had not been paid for additional shifts he had worked. There was nothing in her summary that suggested that the claimant sought damages for the inconvenience of being required to work the shifts in the first place.

20. The claimant was ordered to provide further particulars, not just of his alleged protected disclosures but also of the various ways in which the claimant claimed to have been detrimentally treated. Paragraph 2.3 ordered the claimant to describe any actual comparator on whose treatment he relied for the purpose of his discrimination complaint. Paragraph 2.5(c) required the claimant to identify the "comparable permanent employee" for the purposes of his FTER complaint.

21. There was nothing in the record of the hearing in front of Employment Judge Slater that gave details of particular incidents of discriminatory or detrimental treatment, to the exclusion of other such incidents.

22. The 4 September 2014 CMO included an order that witness statements should be exchanged and that they must be **"full and complete"** (with original bold type). It must have been clear to the claimant on reading that order that his witness statement had to contain all his evidence and that he could not expect to be able to expand on it at length in his oral evidence.

23. On 9 December 2014 Employment Judge Slater made an Unless Order requiring the claimant to comply with the 4 September 2014 CMO. The Unless Order crossed with a lengthy application by the claimant for specific disclosure of documents. His application again proceeded on the footing that he should not be required to set out his case until the respondent had disclosed the documents he wanted. Employment Judge Slater caused a reply to be sent on 10 December 2014, refusing the claimant's application and reminding him of the need to set out his case.

24. The FBPs were provided by the deadline. They now form pages 165 to 457 of the bundle. Mr Allen, an experienced solicitor who represents the respondent, described the 297-page FBPs as the longest that he had ever seen. Here are some features of the FBPs that are relevant for our purposes:

    24.1. Pages 166 to 296 (titled, "Section 2.1") alleged that the claimant had made sixteen different alleged protected disclosures, each allegedly made to multiple recipients, resulting in some 71 protected disclosures altogether. Almost all of them were alleged to have been made in a telephone call followed by a face-to-face conversation. In most cases the alleged disclosures were all said to have been made separately to the same four individuals.

    24.2. Although the claimant described at some length the various incidents about which he allegedly made the disclosures, there was virtually no detail

in the FBPs about the dates of the conversations or the words he spoke to convey the information about these incidents.

24.3. There were thirty-three alleged whistleblowing detriments spread over 50 pages. Separate blocks, each of approximately 50 pages, alleged more or less identical detriments in relation to race, age and fixed-term status. Some of the alleged detriments were still vague and needed substantial clarification, which ultimately took place over two days during the hearing before us.

24.4. At what are now pages 326, 368, 409 and 440 of the bundle, the FBPs advanced an allegation of detriment headed, "Insufficient issues about conduct being highlighted and/or escalated". The detrimental actions were alleged to have taken place on "September 2012; Oct/Nov 2012" (This was the allegation that we refused the claimant permission to amend and ultimately struck out.)

24.5. The FBPs, at pages 321 (and repeated in various other pages), also contained an allegation headed, "Generating unnecessary complaints". Under this heading, the relevant dates were stated to be "Oct/Nov 2012; April 2013 till June 2013".

24.6. At pages 340, headed, "The (wrong) way that complaints [etc] were handled", the dates were said to be "Sept 2012; October/November 2012; February 2013; March 2013; April 2013; July 2013." The narrative did not identify the complaints or other matters that had been badly handled.

24.7. At page 341 headed, "Undermining", the FBPs alleged that the claimant had been badly treated in "September 2012; Oct/Nov 2012; February 2013; April 2013; July 2013". The FBPs did not describe the undermining behaviour, but merely stated that "Examples are detailed in 2.1". Section 2.1 of the FBPs was 131 pages long.

24.8. The FBPs identified only one comparator for the purposes of his complaints under EqA and FTER. The comparator's name was Ms Amanda Jones. Repeatedly throughout the FBPs, the claimant maintained his stance that he was limiting his case to one comparator because of what he perceived as the respondent's incomplete and evasive replies to his questionnaire.

24.9. At page 451, the FBPs claimed payment for additional shifts that the claimant had worked. He did not claim damages for breach of contract and, in particular, did not claim additional compensation for the inconvenience of having had to work those shifts in the first place.

24.10. According to the FBPs, Mr Amu, the respondent's clinical director, was a recipient of most of the claimant's protected disclosures and the alleged perpetrator of many of the detriments.

25. On 13 May 2016 Employment Judge Ryan heard a further attempt by the respondent to have the claim struck out. He refused the application and listed the case for a 15-day hearing beginning on 27 February 2017. The 9-month gap between listing and the hearing date was typical of listing arrangements at the time. Paragraph 3.5 of Employment Judge Ryan's order set a date for the exchange of witness statements. It continued:

> "The witness statements must set out all the facts a witness wishes to relate to the tribunal."

26. At paragraph 4 onwards, the record of the hearing set out some observations intended "to reinforce to the parties the importance of proper preparation for the forthcoming hearings". The claimant was warned "in the strongest possible terms that any further failures to comply with the orders of the tribunal will be very likely to result in the granting of unless orders." He was reminded "that if he has difficulty in complying with an order he may apply to the tribunal, with good reason, for an extension of time." Paragraph 8 recorded the employment judge's expectation that the parties would cooperate to prepare a list of the legal and factual issues in the case.

27. As ordered by the tribunal, the respondent sent its list of documents to the claimant in May 2016. In August 2016, the respondent provided the claimant with copies of the documents themselves. There is a dispute as to whether the claimant received the documents – or ought to have received them – at that time. In any event, the respondent re-sent the documents to the claimant in September 2016.

28. At some point since August 2016 (we could not at this stage reliably find when this happened) the claimant read the respondent's documents and saw a reference to Ms Rita Bhalla. At around about this time (and again we have no precise dates) the claimant discovered that Ms Jones, his chosen comparator, had retired. Her retirement came some time after the claimant's own employment with the respondent had terminated. Misunderstanding FTER, he thought that he could not compare himself to a person who was not an employee of the respondent at the time of the hearing. He therefore thought it would assist his claim to introduce Ms Bhalla, a serving employee, as a comparator. He did not, however, inform the tribunal or the respondent of his intention to advance his case in that way.

29. On 11 October 2016 the matter came back in front of Employment Judge Ryan who made an Unless Order for the exchange of witness statements. The order also set out a hearing timetable which provided the sequence in which the claimant's and then the respondent's witnesses would be called. At paragraph 3 of his case management summary, Employment Judge Ryan observed that, with the FBPs in their current form, "this claim is not capable of being managed and heard properly in accordance with the overriding objective."

30. Witness statements were in due course exchanged. Among the respondent's witnesses was Mr Amu. In his witness statement Mr Amu confirmed that the claimant had raised concerns with him about Caesarean sections, although gave a different context to that set out in the FBPs. He explained many of the incidents of which the claimant now complains. The claimant had been expecting a witness statement from Ms Trinick, but the respondent's witness statements did not include one.

31. The claimant's witness statement at paragraph 130 stated that the claimant had made the protected disclosures as described in the FBPs. The paragraph gave hardly any more detail than that. On reading it, the respondent's solicitor was

concerned that the paragraph was purporting to incorporate 131 pages of allegations about protected disclosures and confer on those allegations the status of evidence-in-chief. At the same time, it still left the respondent guessing as to the detail of when the telephone and face-to-face conversations had happened, or any background information that might enable the claimant's evidence to be effectively tested or the respondent's witnesses to answer it. Mr Allen was particularly concerned about how he should cross-examine the claimant on paragraph 130. Should he take the claimant through each and every alleged protected disclosure? The clear danger of such an approach would be to elicit further detail that should have been disclosed at a much earlier stage. Or would it be sufficient to address such a sweeping piece of evidence as paragraph 130 with questions in broad-brush terms?

32. On receipt of the claimant's witness statements, and in accordance with Employment Judge Ryan's wishes, the respondent prepared a list of issues to be determined by the tribunal ("the List of Issues"). In an effort to avoid ambushing the claimant with procedural points at the final hearing, the respondent's solicitors divided the List of Issues into two parts. The first part contained the allegations which, in the opinion of the respondent's solicitors, appeared to reflect some evidence contained in the claimant's witness statements. The second part ("Appendix 2") referred to allegations which, on reading the claimant's witness statements, appeared to the respondent to be unsupported by evidence. They drew attention specifically to paragraph 130 and the difficulties it might cause.

33. The respondent's attempt to assist the tribunal prompted the claimant to apply for permission to rely on a supplemental witness statement to plug the gaps in his case. His application was heard on 9 December 2016. Employment Judge Ryan refused the application, giving his reasons for the Refusal Decision as follows:

> "5. In summary I consider that the prejudice to the claimant is outweighed by that to the respondent. There are multiple disputes of fact in these proceedings. The claimant is seeking to raise matters that go back into 2011. It is clear that many of the claimant's allegations of detriment are out of time in any event. He will have to seek extensions of time from the tribunal unless he can establish acts extending over a period. These points serve to reduce the effect of the prejudice upon the claimant. These proceedings having been continuing since 2013. The claimant, though a litigant in person, is entirely the author of his own misfortune. Moreover he is an experienced and intelligent litigant in person. Throughout the proceedings he has known what was and would be required of him and he has simply failed to comply. Indeed, he volunteered that the gaps in his witness statement were entirely his own fault.
>
> 6. There would be considerable prejudice to the respondent if the claimant were permitted to serve a further statement. He would be able to attempt to fill the gaps in the evidence contained in his witness statement having sight of and full knowledge of the evidence already tendered in witness statements by the respondent's witnesses. Moreover, these considerations are in the context of a claimant who has had to seek relief from sanction on two occasions having had

unless orders made against him. One such was relief from sanction which I granted in relation to his failure to exchange witness statements at a much earlier stage.

7. Finally, upon consideration of the matters that the claimant had not included in his witness statement, which were helpfully summarised in Appendices 2 & 3 to the list of issues that Mr Allen had prepared, I identified a number of matters which the claimant could legitimately have added to the list of issues even without being given an opportunity to provide a further statement. This is because Mr Allen accepts that the respondent has already been able to set out its evidential case in answer to those assertions. Insofar as the additional matters include allegations of protected disclosures Mr Allen also agreed that where there were documents recording or repeating the disclosures allegedly made then there would be written evidence before the tribunal upon which the claimant might rely. The orders given below are intended to reflect these considerations and to direct the parties to be in a position to put before the tribunal at the final hearing a list of issues appropriately amended to reflect these decisions."

34. Paragraph 10 of the 9 December 2016 order supplemented the Refusal Decision and went some way to mitigating any harsh effects:

> "On or before 16 December 2016 the claimant shall notify the respondent of any documents which he contends contain evidence of the disclosures alleged and set out in Appendix 2 to the List of Issues."

35. In other words, the tribunal was not taking the respondent's List of Issues for granted. Nor was it agreeing with the respondent's view that, just because an allegation was not referred to in the claimant's witness statements, it was necessarily doomed to fail. The respondent was the required by paragraph 11 to amend the List of Issues in the light of any documents notified by the claimant in compliance with the above order. At the hearing itself the claimant drew the respondent's attention to a document that supported one of his Appendix 2 allegations. This caused the respondent's solicitor to amend the List of Issues. Between the date of the preliminary hearing and the start of the final hearing the claimant did not notify the respondent of any other documents in support of his claim.

36. At the preliminary hearing there was a discussion about whether Ms Trinick would be called as a witness. The respondent's solicitor explained that Ms Trinick had left the respondent's employment after a long period of sickness absence. It was agreed that, if the claimant wished to call Ms Trinick as a witness, he would send a letter to the respondent's solicitors, who would then forward the letter to Ms Trinick. If, on receipt of the letter, Ms Trinick did not cooperate, the claimant would have the option of applying for a witness order. The claimant did not send any such letter to the respondent after the hearing.

37. By notice dated 23 January 2007 the claimant appealed against the Refusal Decision. The appeal was considered by His Honour Judge Shanks in

accordance with rule 3(7) of the Employment Appeal Tribunal Rules 1993. In a letter dated 21 February 2017 the claimant was informed that his appeal would not be permitted to proceed. In the learned judge's opinion, "None of the points raised by the [claimant] have any merit at all" and "The case should proceed as scheduled on 27 February 2017."

38. Undeterred by His Honour Judge Shanks, the claimant exercised his right under rule 3(10) to an oral preliminary hearing. The claimant was asked for his unavailable dates during the window April to July 2017. In the meantime, the claimant asked the tribunal to postpone the 15-day hearing to await his appeal. His request was considered by Regional Employment Judge Robertson, who rejected it. The grounds for refusing the postponement were, essentially, fourfold. First, the EAT appeared to have taken a dim view of the merits of the appeal. Second, it would take many months to relist the hearing. Third, there was a danger that the delay could cause memories to fade. Fourth, the case was already extremely long-running.

39. As at the time of preparing these Reasons, the outcome of the appeal preliminary hearing is yet unknown.

40. For reasons outside the parties' control, the final hearing could not start on 27 or 28 February 2017 and one further date in the middle of the allotted window had to be vacated. Three of the 15 days were therefore lost. Regional Employment Judge Robertson notified the parties of the altered time allocation in advance of the hearing. On receiving this news, the claimant informed his witnesses that they would not be giving evidence during the first week (1 to 3 March 2017).

41. The parties attended on 1 March 2017. No sooner had the tribunal introduced itself than the claimant immediately made an application for the hearing to be adjourned. The grounds for the claimant's application were:

    41.1. He wished to have an opportunity to pursue his appeal against the Refusal Decision before the hearing started. On 28 February 2017 a barrister acting under the ELAAS scheme had discussed the case with him and advised him that there could be potential to advance further grounds of appeal against the Refusal Decision, based on the way in which Employment Judge Ryan exercised his discretion.

    41.2. His witnesses had informed him that they were unable to give evidence during the second week (6 to 10 March 2017). When asked whether the witnesses would be able to give evidence on 2 or 3 March 2017, the claimant initially stated that they could not do so. He later told us that he expected that they would not be able to give evidence because of their other commitments. At a later stage in the hearing, the claimant said that he had checked and that they had all now made alternative arrangements so that they could not give evidence during the first week.

42. Following the parties' oral submissions on the first day, we made enquiries of the tribunal listing office. It transpired that, were the hearing to be adjourned altogether, it would be unlikely to be re-listed until February 2018.

The Cardiff case

43. This is not the claimant's first claim to an employment tribunal. A previous claim against South London Healthcare NHS Trust resulted in an unsuccessful appeal to the Employment Appeal Tribunal (UKEAT 0335/13).

44. He has also brought a claim to the Employment Tribunal in Cardiff resulting in a number of hearings there. In May 2011 a hearing had to be postponed because the claimant had not prepared his witness statement. On 14 November 2011, the claimant was ordered to pay costs by a tribunal chaired by Employment Judge Harper. The reason for the costs order was because of the claimant's late attempt at introducing a lengthy supplemental witness statement had led to the hearing being adjourned.

45. We ought to make clear what our evaluation of these particular events is at this stage. We have an open mind about the credibility generally of the claimant's evidence in relation to other matters. We have not yet reached any conclusion about the general credibility of the claimant's evidence. One thing, however, that is abundantly clear to us is that the claimant must have known from 2011 onwards of the importance of including in his witness statement all those matters on which he wanted to rely at the final hearing. The experience of being made the subject of an adverse costs order would be memorable. It would have given painful resonance to the plain words of Employment Judge Slater and Employment Judge Ryan in their respective orders as to the content of witness statements.

The hearing

46. The hearing before us started on 1 March 2017. No sooner had the employment judge introduced the panel than the claimant applied for the hearing to be adjourned.

47. During the course of the claimant's adjournment application and his submissions over the ensuing few days, the employment judge asked the claimant a number of questions designed to help him focus his arguments. For whatever reason – and here we must be careful not to leap to conclusions about any answers the claimant may give during his oral evidence – the claimant appeared to find it virtually impossible to give straightforward answers. His answers were lengthy, often veered away from the question and often did not begin to engage with the question in the first place. Further delay was caused by the claimant arriving late on the first two days of the hearing.

48. In order to make progress with the hearing, the tribunal resorted to giving the parties time limits to make their submissions in relation to the contested applications. The claimant was fully consulted at the outset of an application about the proposed time allocation and his views were taken into account. Invariably the claimant overran his time allocation despite being warned when it was approaching. The tribunal allowed some additional time and eventually informed the claimant that had run out of time.

49. On Day 2 of the hearing (Thursday 2 March), the tribunal decided that it would not be able to determine the claimant's applications without clarifying the way in which the claimant put his case. There was still the unresolved dispute as to whether the claimant was entitled to pursue the Appendix 2 allegations (which the

respondent viewed as being unsupported by evidence) or not. In breach of paragraph 10 of the 9 December 2016 order, the claimant had not drawn the respondent's attention to the documents which he believed supported the Appendix 2 allegations. The tribunal decided to give him one last opportunity to go through this exercise. The claimant was given Friday 3 March, Monday 6 March and all of the weekend to prepare. Nevertheless it took all of Day 3 (Tuesday 7 March) and most of Day 4 (Wednesday 8 March) for the claimant to clarify how he was putting his case and to identify under each of the alleged disclosures and detriments in the FBPs what, if any, evidence currently supported the allegation.

50. Eventually, based on the claimant's oral submissions, the tribunal was able to record the claimant's case in writing in a manageable form, which now appears as Schedule A. Where the claimant was unable to point to any specific evidence in support of an allegation of a protected disclosure or a detriment, we recorded that fact in Schedules B and C. We also included in Schedules B and C allegations in support of which the claimant had drawn our attention to particular documents or passages in witness statements, but where, on a plain reading of the document or passage, it did not support the proposition that the claimant was advancing.

51. During the course of the claimant's attempt to clarify his FBPs, he referred to a number of incidents and allegations which he contended were covered by his existing claim. These were:

    51.1. An incident concerning Patient L. Reference to the incident can be found at page 700 of the bundle. This, the claimant said, fell under the heading, "Generating unnecessary complaints" at page 321 of the bundle. He also sought to introduce a like allegation at corresponding pages in the FBPs under different heads of claim. The claimant confirmed that the Patient L incident itself took place in December 2012 and resulted in a complaint in February 2013.

    51.2. An incident referred to at page 684 of the bundle. This was said to form part of the claim appearing at page 341 of the bundle headed "Undermining". It was also stated to be the sole allegation under the heading "Insignificant issues [etc]" at page 326. He advanced his claim in the same way under the same headings elsewhere in the FBPs. The report at page 684 was dated 22 January 2013 and stated that the incident had occurred on the same day. The claimant indicated, without any apparent basis, that the incident outlined in the report actually took place significantly earlier than 22 January 2013. Even if the report misstated the date of the incident, it does not get around the date of the report itself. Unless the report was a forgery, it was made in January 2013.

    51.3. An incident referred to at page 779 of the bundle. This was said to be relevant to pages 340 and 341 (respectively "The (wrong) way…" and "Undermining"). The incident itself happened in May 2013.

    51.4. A claim for damages for breach of contract on the basis that the respondent unilaterally required him to work sessions or programmed activities at particular times. Such an allegation appeared in the FBPs in factual terms at page 342 of the bundle, but not as a free-standing claim for damages

52. Whilst discussing the allegation headed, "Generating unnecessary complaints" (page 321 and corresponding pages), the claimant gave further detail about the incident described at page 322. The woman who developed infection as a complication of Caesarean section was Patient Z. The person who is alleged to have accused the claimant of not washing his hands was Ms Trinick. The claimant sought disclosure of Patient Z's notes.

53. On Day 2 of the hearing, the respondent's solicitor informed the tribunal that Mr Amu would not be attending to give evidence. He had left the respondent's employment and was believed to be living abroad. The respondent did not know his current address.

54. At various times during the course of the hearing, the claimant told us that he did not want to give away the points he wanted to make in support of his case. He wanted evidence in support of his case to emerge for the first time when he was cross examining the respondent's witnesses.

55. While we were deliberating on the various preliminary issues, the claimant sent a fax to the tribunal making further submissions and citing further cases. We read it and took it into account.

56. By the time all the preliminary matters had been resolved, there was insufficient time to complete the evidence. The parties agreed that the case would have to be re-listed part-heard for the evidence to be given.

Relevant law

Overriding objective

57. Rule 2 of the Employment Tribunal Rules of Procedure 2013 sets out the overriding objective as follows:

> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Self-represented parties

58. The claimant argues, as a matter of general principle, that tribunals are under a duty to treat litigants in person more favourably than parties who are represented. In support of his argument, the claimant relies on *Walls Meat & Co v. Khan* [1979]

ICR 52 and *Dedman v. British Building and Engineering Appliances Ltd* [1974] 1 All ER 520. We do not think that these cases are authority for that proposition. They deal specifically with the question of whether it was reasonably practicable for a claim to be presented within the statutory time limit. Our responsibilities towards unrepresented litigants come from the overriding objective. We must try to put them on an equal footing with their represented opponents. Examples may include explaining procedures and technical terms, helping a claimant to clarify a claim by discussing it in non-technical language, and taking into account their lack of legal advice in evaluating their reasons for delaying. The extent of an unrepresented party's experience of conducting employment tribunal proceedings will be relevant to the degree to which the tribunal should intervene to put that party on an equal footing. Just as with a represented party, we must not descend into the arena and help the claimant to make his case: *Muschett v. HM Prison Service* [2010] EWCA Civ 25. To go that far would give the appearance of being biased against the respondent.

59. The onus is on the parties, and not the tribunal, to ensure that all relevant evidence is presented. Tribunals are encouraged to be as helpful as possible to litigants in formulating and presenting their cases. Whilst it is always good practice for tribunals to clarify with a claimant, particularly if they are appearing in person or without a professional representative the precise matters raised in the claim form which is to be pursued and to seek confirmation that any others raised are not pursued, it is ultimately a matter of judgment for the tribunal. Matters such as these should not be erected into a duty: *Mensah v. East Hertfordshire NHS Trust* [1998] IRLR 531 and *Kumchyk v. Derby County Council* [1978] ICR 1116, EAT

<u>Case management orders</u>

60. Rule 29 of the 2013 Rules gives tribunals the power to make case management orders, which may vary, suspend, or set aside an earlier case management order where necessary in the interests of justice.

61. In *Serco Ltd v. Wells* UKEAT/0330/15, HHJ Hand QC ruled that the power to vary an earlier order is not untrammelled. Where an employment judge makes an order, another employment judge of equivalent jurisdiction may not vary or revoke that order unless (a) there has been a material change of circumstances since the order was made or (b) the order has been based on either a misstatement (of fact or law) an omission to state relevant fact or (c) there is some other occasion making revocation necessary in the interests of justice – occasions falling into this latter category will be rare and out of the ordinary.

<u>Whether amendment is required</u>

62. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.

63. In *Chandhok v. Tirkey* UKEAT0190/14, Langstaff P observed:

> 17. ….Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in

respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. ...

18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

64. In *Ali v. Office for National Statistics* [2005] IRLR 201 the Court of Appeal emphasised that, in deciding whether a particular complaint has been raised in a claim form, the tribunal should examine the document as a whole. Merely ticking a box alleging discrimination by reference to a protected characteristic may not be sufficient to raise a complaint of such discrimination if the underlying facts cannot be ascertained from the narrative.

65. In *Amin v Wincanton Group Ltd* UKEAT/0508/10/DA, HHJ Serota distinguished between a claim that is "pleaded but poorly particularised" and a *Chapman v. Simon* case, where the complaint is not pleaded at all. In the former case, the claimant is not required to amend the claim. The lack of proper particulars does not affect the tribunal's jurisdiction. The remedy in an appropriate case would be to strike out the relevant part of the claim. It is, HHJ Serota observed, "clearly undesirable that important issues in Employment Tribunal proceedings should be determined by pleading points".

<u>Whether amendment should be granted</u>

66. Guidance as to whether or not to allow applications to amend is given in the case of *Selkent Bus Company v. Moore* [1996] IRLR 661. The following points emerge:

66.1. A careful balancing exercise is required.

66.2. The tribunal should consider whether the amendment is merely a relabelling of facts already relied on in the claim form or whether it seeks to introduce a wholly new claim. (Technical distinctions are not important here: what is relevant is the degree of additional factual enquiry needed by the claim in its amended form: *Abercrombie & Ors v Aga Rangemaster Ltd* [2013] EWCA Civ 1148).

66.3. Where the amendment raises substantial additional factual enquiry, the tribunal should give greater prominence to the issue of time limits and whether or not the relevant time limit should be extended.

66.4. The tribunal should have regard to the manner and timing of the amendment.

66.5. The paramount consideration remains that of comparative disadvantage. The tribunal must balance the disadvantage to the claimant caused by refusing the amendment against the disadvantage to the respondent caused by allowing it.

67. In *Amey Services Ltd v. Aldridge* UKEATS 0007/16, Lady Wise held that tribunals must not allow an amendment to a claim whilst leaving questions of time limits to be determined at a later stage. The case concerned what is known in the jargon as a *Prakash*-type amendment - adding an allegation based on events occurring since presentation of the claim form. Lady Wise did not, however, distinguish between such amendments, on the one hand, and applications, on the other hand, to amend claims based on the events that took place before the claim form was presented. The rationale for taking time limits into account was that an amendment has the effect of backdating the new claim to the date that the original claim form was presented, meaning that the respondent cannot revisit the time limit issue later (*Rawson v Doncaster NHS Primary Care Trust* UKEAT/0022/08). Unfortunately, Lady Wise did not distinguish between the period from original presentation to amendment, on the one hand, and, on the other hand, the time that elapsed between the alleged discriminatory act and the presentation of the claim.

68. It appears at least possible, therefore, that *Aldridge* will be interpreted as meaning that the time limit question must be determined at the amendment stage in every case. This could even apply where, as here, there is a long series of allegations stretching over a number of years, with a dispute as to whether the acts complained of were part of an act extending over a period. That is a notoriously fact-sensitive question.

<u>Adjournments</u>

69. When making his unsuccessful adjournment application on the first day of the hearing, the claimant drew our attention to the case of *Pearson v. The British Airports Authority* EAT 324/84. Whilst we were impressed with the claimant's ability to track down an unreported Employment Appeal Tribunal case from 1984, we did find any general statements of principle that would particularly help us. in that case to be especially helpful. The judgment appeared to be confined to its particular facts, which were stark. The tribunal had refused an unopposed postponement application in circumstances where no disadvantage would have

been caused by granting it, because the dispute turned on a pure question of law. The EAT ruled that the postponement should have been granted.

Striking out

70. Rule 37(1)(a) gives a tribunal the power to strike out all or part of a claim on the ground that it has no reasonable prospect of success.

71. It is well established that it is inappropriate to strike out claims – and discrimination claims in particular – where there are central disputes of fact: *Anyanwu & another v South Bank Students Union* [2001] ICR 391. Complaints of whistleblowing detriment are to be treated in much the same way. It will only be in an exceptional case that such a claim will be struck out as having no reasonable prospect of success where the central facts are in dispute: *Ezsias v. North Glamorgan NHS Trust* [2007] ICR 1126, CA.

Orders for disclosure

72. Rule 31 of the 2013 Rules provides:

> "The Tribunal may order any person in Great Britain to disclose documents or information to a party (by providing copies or otherwise) … as might be ordered by a county court..."

73. This rule raises the question of what documents a county court might order to be disclosed. The answer is to be found in the Part 31 of the Civil Procedure Rules 1998 ("CPR").

74. CPR Rule 31.6 is headed "Standard disclosure: what documents are to be disclosed?" and states:

> "Standard disclosure requires a party to disclose only- (a) the documents on which he relies; (b) the documents which- (i) adversely affect his own case; (ii) adversely affect another party's case; or (iii) support another party's case."

75. What is significant about that paragraph is that it places a limit on what is to be disclosed; it does not automatically mean that any document falling within Rule 31.6 will always be ordered by a court to be disclosed to another party.

76. From time to time, tribunals will be faced with an application for disclosure of documents that are said to contain confidential material. The principles to be applied in such a case were laid down by the House of Lords in *Science Research Council v. Nassé* [1979] ICR 921. They are to be found in the opinion of Lord Wilberforce. The textbook, *Harvey on Industrial Relations and Employment Law,* offers a condensed version of these principles. Counsel agree that it is sufficient for the tribunal's purposes to have regard to the condensed version. The relevant principles are:

76.1. There is no principle of public interest immunity protecting such confidential documents.

76.2. Confidentiality alone is no ground for protection from discovery, although in the exercise of its discretion an employment tribunal might have regard to the fact that the documents are confidential and that to order disclosure would involve a breach of confidence.

76.3. On the other hand, relevance alone, though a necessary ingredient, does not provide an automatic test for ordering discovery, and so general orders for discovery should not be made.

76.4. The ultimate test in discrimination (as in other) proceedings is whether discovery is necessary for disposing fairly of the proceedings. If it is, then discovery must be ordered notwithstanding confidentiality.

76.5. In order to decide whether discovery is necessary, notwithstanding confidentiality, the tribunal should inspect the documents and consider whether justice can be done by adopting special measures, such as 'covering up', substituting anonymous references for specific names, or, in rare cases, hearing *in camera*.

76.6. It is for the tribunals to work out flexible procedures by which this may be done in such a way as to avoid delay and unnecessary applications.

77. In *Plymouth City Council v White* UKEAT/0333/13 *(23 August 2013, unreported)*, HHJ McMullen QC, applying the principles set out in *Nassé*, gave helpful guidance as to the sequence to be adopted in a disclosure application (at para 11):

> "(1) The judge must first consider if the document sought is relevant (if it is not, then it will not be ordered to be disclosed).
>
> (2) If it is relevant, the next question is whether it is necessary for the fair trial of the case for it to be ordered to be disclosed. Where there is objection, the judge should examine the document itself so as to consider whether or not in a contention that it is confidential it should still be disclosed (see, again, *Nassé*).
>
> (3) If the document is relevant and necessary and is to be disclosed, the judge should consider whether there is a more nuanced way of disclosing the material so as to respect confidentiality – in this case, for example, there is an issue of child protection – and the judge may then decide to order the document to be disclosed wholly or partially, usually by the system now known as redaction."

<u>Admissibility of evidence</u>

78. The basic rule is that if evidence is relevant it is admissible and if it is irrelevant it is inadmissible. Nevertheless, the tribunal has the power to exclude relevant evidence, for example, on the ground that it is *insufficiently* relevant or unnecessarily repetitive: *HSBC Asia Holdings BV v Gillespie* [2011] IRLR 209.

<u>Questioning of witnesses</u>

79. The tribunal is not bound by the strict rules of evidence, but the orderly presentation of evidence is an essential part of a fair hearing. To ensure that proceedings are orderly the parties and their representatives should bear in mind two basic points. First, the party who opens the case should call all his relevant evidence before closing his case and ought not to present his evidence tactically by putting to the other sides witnesses in cross examination relevant matters which he has not first adduced as part of his own case. Second, the opposing party should ensure that all the relevant factual matters in dispute are put to the

first party and his witnesses before he and his witnesses give evidence. If both these points are adhered to it will obviate the need for witnesses to be recalled, a course which can lead to a disjointed and sometimes unfair hearing. Support for these two principles can be found in *Aberdeen Steak Houses Group plc v. Ibrahim* [1988] IRLR 420 and at paragraph PI-853 of *Harvey on Industrial Relations and Employment Law.*

<u>Witness orders</u>

80. Rule 32 of the 2013 Rules reads, "The Tribunal may order any person in Great Britain to attend a hearing to give evidence…"

<u>Victimisation and discrimination contrasted</u>

81. In the course of his submissions in favour of being allowed to pursue a complaint of victimisation, the claimant argued that victimisation is simply a kind of discrimination. A complaint of discrimination therefore includes a complaint of victimisation and, so the claimant contends, no amendment is necessary to introduce it. In order to evaluate this argument we have reminded ourselves of some of the relevant sections of EqA.

82. Sections 13 and 19 of EqA respectively define direct and indirect discrimination. The word "discrimination" appears in both sections. They appear under the chapter sub-heading "Discrimination". Section 27 defines victimisation. It does not use the word, "discrimination". It appears under the sub-heading, "Other prohibited conduct." Subsections 39(1) and 39(2) prohibit discrimination by employers. Victimisation is outlawed by subsections 39(3) and 39(4). Schedule 28 (the index of defined expressions) indicates that the definition of "discrimination" is to be found in a variety of sections, none of which include section 27.

83. It is abundantly clear from these provisions that victimisation is not regarded as a form of discrimination. It is an entirely separate form of prohibited conduct.

<u>Timetabling</u>

84. Rule 45 of the 2013 Rules enables tribunals to impose time limits on various aspects of the proceedings including questioning of witnesses.

Conclusions

<u>Refusal of adjournment on 1 March 2017</u>

85. We refused the claimant's adjournment application. In view of the fact that the hearing ultimately ended up being adjourned part-heard, we keep our reasons very short. In summary:

    85.1. The claimant's first ground for adjourning the case was his wish to pursue his appeal to the Employment Appeal Tribunal. We felt bound to reject that ground. The pending appeal point had already been considered by Regional Employment Judge Robertson who had nevertheless refused a postponement. There had been no material change of circumstances since that decision. The claimant having spoken about the case with counsel under the ELAAS scheme was not a material change. Nor was the claimant having been asked for his availability for a preliminary hearing. There was nothing to suggest that the claimant's prospects on appeal had improved.

85.2. Even had we been unconstrained by any prior decision, we would still have found the claimant's first ground to have no merit. In our view, Employment Judge Ryan's Refusal Decision was justified. (See below for our reasons for refusing the claimant's renewed application for a supplemental witness statement). We respectfully agreed with the preliminary assessment of the Employment Appeal Tribunal that the claimant's grounds of appeal had no reasonable prospect of success..

85.3. The second ground of the adjournment application gave us more pause for thought. The reduction in the time allocation and the unavailability of witnesses was a material change of circumstances entitling us to look at the question of adjournment afresh. To some extent, the claimant had brought his difficulties on himself. It was not the claimant's fault that the time allocation was reduced, but he should not have simply stood down his witnesses.

85.4. The witness difficulties did not, in our view, justify aborting the hearing. There were other, more proportionate, means of enabling witnesses to attend, such as taking witnesses out of sequence and, if necessary, issuing witness orders.

85.5. We were concerned that, if the hearing were simply adjourned, it risked not being re-listed until February 2018. That would have been over 4 years after the termination of the claimant's employment. Memories were likely to fade further during that time.

<u>Do the FBPs as a whole require amendment?</u>

86. In our view, the FBPs provided clarification (albeit incomplete clarification) of the claimant's existing claim, rather than introducing a new claim. They fall under the heading of further particulars which, in accordance with *Amin,* do not require amendment.

87. The respondent argued to the contrary. Mr Allen made the forceful point that the principle in *Amin* could not give a claimant *carte blanche* to rewrite his claim completely. Whilst some of the allegations in the FBPs might have amounted to further detail of the vague allegations in the claim form, others were wholly new. He acknowledged that it would be a difficult exercise for the tribunal to establish on which side of the line each allegation fell. So difficult, we might add, that Mr Allen did not attempt it for himself. At no point has the respondent tried to separate, as it were, the wheat from the chaff.

88. We would not want the parties to think we lack sympathy for the respondent's position. The original claim form and subsequent 14-page further information were hopelessly vague. The respondent rightly anticipated that, without further clarification, it would face a moving target. But that is not the same as saying that the claim form, or the subsequent 14-page document, did not encompass the detail that later emerged. In coming to that view, we read the documents as a whole in accordance with *Ali.* There was virtually no attempt in those documents to identify or limit the incidents upon which the claimant relied. Employment Judge Slater clearly did not interpret these documents as alleging particular incidents to the exclusion of others. Otherwise she would not have made the order for further information as she did.

89. Frustrating as it may be for the respondent, our ruling is that the FBPs did not require an amendment to the claim. Where an allegation was discernible from the FBPs, we included it in Schedule A.

Allegations falling outside Schedule A

90. It is a natural consequence of *Chapman* and *Chandok* that, having been through the painstaking exercise of recording the claimant's claim, the claimant cannot be permitted to introduce further allegations without an amendment. Bearing in mind the length of time it has taken to deal with the amendment applications so far, it is likely – though not certain - that further applications to amend will be rejected without further consideration.

Patient L incident - amendment

91. If the claimant wishes to rely on the Patient L incident as a detriment, he has to amend his claim. It was not included in the FBPs.

92. Our route to this decision took us to a point of principle which ran through many of the amendment arguments. The claimant argued that minor errors over dates in his FBPs should not operate as a procedural bar to the tribunal considering his claim on its merits. As attractive as this argument sounds, we cannot agree that the dates in FBPs were simply minor errors. They were an important part of the formulation of his claim. The alleged dates of detrimental actions had every appearance of being deliberately chosen. They would lead any reasonable reader to believe that the claimant was alleging he had been detrimentally treated during those periods, but not detrimentally treated during other periods. A reasonable reader would have attached particular importance to those dates because the accompanying narrative was too vague by itself to enable the respondent to know what precise incidents were being alleged by the claimant. The respondent needed the dates in order to know what case it had to meet. To put it another way, the mention of specific time periods impliedly excluded any allegation of detriment occurring at any other time.

93. The dates of the Patient L incident and subsequent complaint fell outside the dates of alleged detrimental acts appearing at pages 321. It was impliedly excluded.

94. In our view, the amendment should be refused. This is an extremely late application coming after many opportunities for the claimant to clarify his claim. Introducing the Patient L incident would raise significant additional factual enquiry. In particular, the tribunal would need to make a finding as to why the concern in relation to Patient L was raised or escalated. Was it because of a protected disclosure or some protected characteristic or fixed-term status? Or was it for other reasons? The incident dates back over 5 years. During that time, memories will have faded. This will present the respondent with a very real disadvantage if the amendment were to be allowed. By contrast, if the amendment is refused, the disadvantage to the claimant will be relatively modest. He will lose the chance to add one incident to what are already literally hundreds of allegations that already form part of his claim.

Other incidents - amendment

95. For essentially the same reasons we refuse the claimant permission to proceed with the other allegations that require amendment. The detail of those allegations

is set out in paragraph 51 above. In each case, the incident could not be identified from the narrative and was impliedly excluded from the claim because it fell outside the dates of alleged detrimental acts. In each case, an amendment would have raised significant additional factual enquiry which would have resulted in witnesses trying to cast their minds back several years.

<u>Victimisation - amendment</u>

96. The claimant's claim does not currently include a complaint of victimisation. The claimant's attempts to argue otherwise are misconceived. The claim form did not use the word "victimisation" in any context that could reasonably be understood as a complaint of victimisation under EqA. So far as the claimant alleged victimisation at all, it was clearly in the context of a complaint under section 43B of ERA (detriment for making protected disclosures). For the reasons we have given, it is simply wrong to suggest that victimisation is a form of discrimination.

97. As to whether an amendment should be granted:

97.1. The application is made extremely late.

97.2. The allegations of detriment are the same as those for the other strands of his claim. No additional factual enquiry is needed to determine how the claimant was treated. The tribunal is already seized of the "reason why" question. If the amendment were granted, the tribunal would additionally have to ask itself the subtly different question of whether the respondent was motivated by the claimant having made allegations of discrimination.

97.3. This brings us to more troubling new area of factual enquiry. Did the claimant do a protected act in the first place? On the second day of the hearing the claimant was asked to specify which of the protected disclosures in the FBPs were also alleged to amount to protected acts. He was unable to do so and has failed to provide that information subsequently. The tribunal is left having to assume that, if given the opportunity, the claimant would contend that all 71 or so protected disclosures were protected acts for victimisation purposes. The tribunal would have to determine whether, in each of these 71 disclosures, the claimant expressly or impliedly asserted that his rights under EqA had been contravened. That is a large fact-finding task and a difficult one. Witnesses would have to cast their minds back to 2012 to recall what was said in a telephone conversation. Allowing the amendment would cause an incurable disadvantage to the respondent. The claimant is disadvantaged by the amendment being refused, but that is a misfortune he has brought upon himself by leaving his application so late.

97.4. There is one exception. It relates to the claimant's letter of 26 July 2013. That letter clearly alleged discrimination. It is hard to see how fading memories could affect the question of whether the letter came within the statutory definition. We are prepared to allow the claimant to rely on that letter as a protected act.

97.5. When it came to the amendments to allege specific detriments, we decided to adopt different approaches depending on whether the alleged detrimental act was done before or after 26 July 2013. In respect of the acts allegedly occurring before that date, we refuse the amendment. The refusal causes no hardship to the claimant. He did not at any stage seek to advance

a case that the respondent had victimised him because they believed he would do a protected act in the future. If the only protected act post-dated the alleged detriment, the claimant has no prospect of showing that the act was done because of the protected act. Refusing the amendment would merely be depriving the claimant of the opportunity to bring a hopeless case.

97.6. The claimant has an arguable complaint based on detriments allegedly happening after 26 July 2013, provided that they are already alleged in the FBPs. The respondent is not disadvantaged by an amendment to allow such a claim to be pursued. Despite the lateness of the application, we allow it.

<u>Comparators - amendment</u>

98. The claimant needs an amendment to his claim in order to allege that he was treated less favourably than Rita Bhalla. A distinction must be drawn here between (on the one hand) the claimant saying how Ms Bhalla was treated as evidence of how a *hypothetical* comparator would have been treated and (on the other) alleging as an ingredient of his claim that Ms Bhalla actually received better treatment than him. For the former purpose, no amendment is needed. For the latter, an amendment is required. This distinction is particularly important when considering the complaint under FTER.

99. In his FBPs the claimant decried the respondent's reply to his questionnaire. He might have thought that, by doing so, he was reserving the right to rely on further comparators at a later stage without the need for any amendment. It is time to disabuse the claimant of that notion. It would be a recipe for chaos. The claimant must have known that the FBPs were his last opportunity to formulate his claim. The respondent and the tribunal were entitled to regard the claimant as having relied solely on Ms Jones as a comparator.

100. In our view, the amendment should not be granted. Our reasons are as follows:

100.1. Naming Ms Bhalla would raise an additional factual enquiry. Were the claimant's circumstances the same or not materially different from those of Ms Bhalla? For the purpose of FTER, was she a comparable permanent employee? Why was the claimant treated differently to her? The answers to these questions will depend at least in part on the recollections of witnesses whose memories are likely to have faded.

100.2. The application was not made until the second day of the hearing. The claimant has no good reason for the delay. The documents that prompted the claimant to make the application have been in his possession since September 2016 at the latest.

100.3. We have not reached a final conclusion about the adequacy or otherwise of the respondent's replies to the claimant's questionnaire. Reading it for ourselves, it does not appear to us that the missing information on ethnic breakdown of consultants would have enabled the claimant to identify Ms Bhalla as a suitable comparator. All he needed was the name of a full-time, younger worker who did broadly the same job as him.

100.4. If the amendment were refused, the claimant's disadvantage would be less than he thinks. He can still compare himself to Ms Jones, even if she is no longer an employee at the date of the hearing.

101. We do allow the claimant to amend his claim to rely on additional comparators in the event of further disclosure. To grant open-ended permission such as this would be to create a real risk of the goal posts being moved in future. It is far too late for that. As Employment Judge Slater has already reminded the claimant, it is for him to formulate his case first and then wait for disclosure. Not the other way round.

Breach of contract - amendment

102. The final amendment application was made to introduce a free-standing claim for damages for breach of contract by being unilaterally required to undertake additional programmed activities. To avoid any doubt, we are sure that an amendment is required. The FBPs and the careful description of the claim by Employment Judge Slater simply do not mention this head of claim.

103. In our view, this amendment, too, should be refused. We take on board that there is likely to be considerable exploration of the factual background to this claim in any event. The existing claim already concerns payment for the claimant's additional programmed activities. In the context of the whistleblowing and EqA complaints, the tribunal already has to examine the reason why the claimant was given these extra sessions to do. Nevertheless, we think that this amendment would raise a significant new factual enquiry. Did he agree to the additional shifts? If the respondent breached the contract, what loss did the claimant suffer as a result? The answers to these questions, once again, are likely to depend on memories of events that are up to 5 years old. The disadvantage to the respondent in allowing the amendment outweighs any disadvantage to the claimant in refusing it.

Supplemental witness statement

104. We refuse the claimant's renewed application for permission to rely on a supplemental witness statement. There has been no material change of circumstances since the Refusal Decision. The claimant argues that the two days spent clarifying his case are a material change. We disagree. Employment Judge Ryan did not base his Refusal Decision on the lack of clarity in the FBPs.

105. Even given a free hand, we would make the same decision as Employment Judge Ryan, for the following reasons:

105.1. The claimant's submissions on this point included an explanation of his reason for not having prepared a more complete witness statement in the first place. Here is how the explanation goes. Based on his experience of having sat on a jury at Harrow Crown Court, he thought that he would give his evidence in chief orally and there was no need for all his evidence to be in his witness statement. For the reasons we have already given we simply cannot accept this account. Once again, we stress that we have not reached any conclusions about the credibility of the claimant's evidence generally.

105.2. Refusing a supplemental statement still leaves the claimant with a long list of allegations supported by the existing witness statements and documents in the bundle.

105.3. Granting permission would, as Employment Judge Ryan pointed out, give the claimant an advantage over the respondent because he would be able to tailor any supplemental evidence to fit the respondent's witness

statements which he has now had for several months. It would also add to the length of the case, by increasing reading and cross-examination time. Finishing the re-listed hearing within the allotted time is going to need very careful case management as things already stand. Any substantial supplemental evidence risks derailing that process.

Examination-in-chief

106. We are not prepared to allow the claimant to examine himself, or any other witness, in-chief for the purpose of eliciting the evidence that he wished to put in his supplemental witness statement. Not only would such a course defeat the purpose of the Refusal Order, it would take up further time and would leave the respondent having to deal on the hoof with evidence that it hears for the first time in the witness chair.

Strike-out

107. We start with the allegation at page 326 and the like allegations appearing elsewhere in the FBPs. The only incident on which the claimant relies is that referred to at page 684. We have already refused the claimant permission to amend his claim to rely on that incident. It follows that the claimant has no allegations left under this heading. There is simply nothing upon which we can adjudicate. This is therefore one of the rare cases where an allegation can be struck out without hearing the evidence.

108. We have considered whether or not to strike out any of the remaining allegations. Our focus has been on the allegations in Schedules B and C. There is currently little, if any, evidence to support them. Such evidence as there is has been set out in Schedules B and C, together with the claimant's concessions in relation to that evidence. In our view, the claimant's own appraisal of the evidence is such that he should think very carefully about whether he wishes to pursue the allegations in Schedules B and C. To do so will inevitably put more pressure on the hearing timetable and will increase the costs incurred by the respondent.

109. This is not, however, such a plain and obvious case that the claim or part of it should be struck out altogether. The allegations are fact-sensitive. The alleged protected disclosures listed in Schedule B are supported by some evidence in the form of paragraph 130 of the claimant's witness statement. Our observations in relation to that evidence are little more than statements of the obvious, but they do not necessarily mean that the tribunal is bound to reject it. As for the Schedule C detriment allegations, we must bear in mind that, in finding the facts, we would take account not just of the claimant's evidence but also that of the respondent's witnesses. It is not unheard of for an employer's witnesses to give evidence in cross-examination that supports the case of the employee. The claimant should not set too much store by this possibility. He will be permitted to ask leading questions of the respondent's witnesses, but he will not be allowed to put a positive case to them unless it is supported by some evidence in the bundle or witness statements or in his own permissible answers to questions. Nevertheless, in such a fact-sensitive case, we would risk making an error of law by dismissing the allegations without allowing the evidence to run its course.

Specific disclosure of patient notes

110. We now turn to the claimant's application for specific disclosure of patient notes, starting with Patient L. The application is refused. Disclosure is not necessary to dispose fairly of the proceedings for these reasons:

110.1. It is not clear to us in fact how the Patient L incident is relevant to any allegation of detriment. Where the claimant expressed the wish to rely on the Patient L incident in relation to an allegation, we considered that the claimant would need an amendment, which we were not prepared to grant.

110.2. It is possible that Patient L might be relevant to the protected disclosures that the claimant allegedly made. Even then, the question for the tribunal is unlikely to be what actually happened in the incident. Rather, the tribunal will examine what information the claimant disclosed about the incident, what he believed that information would tend to show, also whether that belief was reasonable. We do not think that Patient L's notes are likely to help us answer those questions. Patient notes do not generally record interactions between doctors about each other's practice, or the opinion that one doctor has expressed about another. In broad terms, they show the patient's history, findings on examination, treatment, and outcome. If a doctor or other health professional has a concern about a colleague's dealings with a patient, that concern is generally raised in an incident report and not in the patient notes. We find it difficult to see how the patient notes could show the claimant disclosing something about anybody else or even what his basis was for disclosing it.

110.3. The claimant left it until the final hearing to apply for disclosure of the notes.

110.4. An order for disclosure would unnecessarily increase the parties' expense. It would put the respondent to the cost of extensive redaction of the notes. They would have to be inserted into a bundle that is already about 1,700 pages long, we have decided overall it is not necessary to dispose fairly of the proceedings to disclose the notes relating to patient L.

111. We also refuse the claimant's application for specific disclosure of Patient Z's notes. They are not necessary to enable the Tribunal to dispose fairly of the proceedings. They might show what each doctor did in relation to Patient Z, but not what any doctor thought about it. They would not show any encouragement by a doctor to a patient to make a complaint about a particular doctor. If a doctor had a negative opinion of another doctor's handling of a case, it would appear in an incident report. Specifically in relation to the allegation at page 322 of the bundle, the allegation is whether Ms Trinick treated this incident as a complaint about the claimant or whether she encouraged Patient Z to make a complaint in the first place. We cannot see how the patient notes will help the tribunal determine either of those issues.

112. We have also considered the claimant's request for disclosure of notes from two other patients. The claimant has not explained how the other patients' notes would be relevant. Still less has he explained to us why it would be necessary to order their disclosure. The claimant has in any event left it far too late to apply for the notes and the cost of disclosing and redacting them would be disproportionate.

<u>Specific disclosure of further rotas</u>

113. Next we deal with the application for specific disclosure of further rotas. The claimant wants them so he can look for further comparators. This is precisely the approach against which Employment Judge Slater warned. The claimant is trying to get as many documents as possible from the respondent before telling them what case they have to meet. This tactic is known as “fishing”. It is time the claimant stopped.

Witness orders

114. We start with a general observation about witness orders. The claimant should not raise his hopes too high. Just because a witness order is granted dow not mean that the witness will give evidence in the claimant’s favour. He would not be able to ask leading questions of the witness. He would have to ask open questions and may then be stuck with the answers. To our minds, this consideration is relevant to whether a witness order should be granted in the first place. It is not enough for the claimant to show that the witness could give relevant evidence. The claimant must satisfy us that it is reasonably likely that a witness would give such evidence in response to the kinds of question that the claimant would be permitted to ask.

115. We now turn to Mr Amu. The application is made late, but that is not the claimant’s fault. The first time the claimant could have known that Mr Amu would not be giving evidence was on the second day of the hearing. Until then he expected to be able to cross-examine Mr Amu and make use of the evidence already in his witness statement.

116. Mr Amu’s witness statement appears to be relevant. He has referred to some conversations he had with the claimant in which issues were raised which appear at least similar to the protected disclosures upon which the claimant relies. It is not inconceivable that the claimant could ask open questions of Mr Amu that might elicit detail that would support his case. The overriding objective would normally point towards the witness order being granted.

117. The respondent raises a point of jurisdiction. If Mr Amu is outside Great Britain, the tribunal has no power to make an order. We do not think this objection should stand in our way. The respondent has not provided any address for Mr Amu, or even told us what country he lives in. There is nothing as yet to substantiate the respondent’s belief that he is outside Great Britain. As the claimant points out, however, the respondent is in a far better position than he is to know where Mr Amu is actually living. In our view, the better course is to grant the order, subject to the right of Mr Amu or the respondent to apply to discharge it with evidence of his being overseas.

118. Granting the order has consequences for managing the case. We cannot allow the hearing timetable to be derailed. Our experience of the hearing so far is that the claimant needs the maximum possible direction from the tribunal to help him manage his time. We have therefore decided to make a timetabling order to keep Mr Amu’s evidence within reasonable bounds. It would be unfair to limit the claimant’s time without imposing an equivalent restriction on the respondent. We therefore limit examination-in-chief to 30 minutes and cross examination to 30 minutes as well. We also take into account that Amu has made a very full witness statement. There should be very little in the way of supplemental questions in chief that the claimant should need to ask.

119. We turn next to Ms Trinick. In our view, there are three reasons why we should refuse the order:

119.1. The claimant has left it too late to apply.

119.2. The claimant has not attempted to arrange Ms Trinick's voluntary attendance by means of the procedure agreed at the preliminary hearing.

119.3. The claimant has not persuaded us that Ms Trinick would say anything, in answer to an open question, that would assist his case.

120. So far as the other witnesses are concerned, the claimant has left it far too late to apply for witness orders and has not explained how their evidence would be relevant.

Admissibility of paragraph 130

121. We have decided to allow the claimant to rely on paragraph 130 of his witness statement. The evidence is highly relevant, in that it is an assertion that he made the 71 protected disclosures. It is unsatisfactory, for the reasons set out in paragraph 31. But that does not, in our view, mean that it should be excluded.

122. As for Mr Allen's legitimate concern about cross-examination, it is up to him whether he wishes to kick the hornet's nest or take a more proportionate approach. The observations about paragraph 130 contained in Schedule B should enable Mr Allen to make an informed judgment about how detailed to make his questioning.

Schedule B and C

123. Finally, we will deal with our reasons for creating Schedules B and C. We ought to make clear that this is not the same as making a Deposit Order. We have not made an assessment of the merits of these allegations. We have not expressed any concluded view about their prospects of success. All we have done is recorded the claimant's concessions about the current state of the evidence in relation to those allegations, together with our observation of what particular documents highlighted by the claimant appear to show.

124. We should stress that we are still open to persuasion that there is merit in the Schedule B and C allegations. The purpose of Schedules B and C is to make clear to the claimant which allegations he could not substantiate with evidence when given the opportunity. That way, he can choose whether or not to pursue those allegations. It is only right to remind the claimant of the constraints that he has on bringing out new evidence in relation to these allegations. His prospects depend in large part on his rather speculative hopes of eliciting evidence in support of his case by asking questions of the respondent's witnesses. Here, too, his task may be more difficult than he might think. We will not permit him to a witness a positive case that has no basis in the evidence.

125. The claimant ought to be aware that to pursue the Schedule B and C allegations is likely to add to the cost of the hearing and will put pressure on the timetable set by Employment Judge Ryan. If the allegations are pursued and it transpires that there really is no evidence to support them, it would be open to a tribunal to decide that the claimant had acted unreasonably in choosing to take these allegations forward.

Constitution of the tribunal going forward

126. Once the judgment and reasons were announced to the parties, they were expressly invited to consider whether they were content for this tribunal, as presently constituted, to continue to hear the case. After a break of approximately 20 minutes, both parties indicated their consent.

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Employment Judge Horne

Date: 22 May 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

6 June 2017

FOR THE TRIBUNAL OFFICE