Appeal No. UKEAT/0003/20/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 December 2020

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

MR G SMITH APPELLANT

PIMLICO PLUMBERS LIMITED RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	Ms Heather Williams (One of Her Majesty's Counsel) Mr David Stephenson (Of Counsel) Instructed by: TMP Solicitors LLP 30th Floor, 40 Bank Street, Canary Wharf, London E14 5NR
For the Respondent	Mr Christopher Jeans (One of Her Majesty's Counsel) Mr Andrew Smith (Of Counsel) Instructed by: Mishcon de Reya Solicitors Summit House, 12 Red Lion Square, London WC1R 4QD

SUMMARY

DISABILITY DISCRIMINATION

The Appellant was refused permission to amend the Grounds of Appeal in his Discrimination Appeal on Day 2 of a three-day appeal. The consequence of refusal was that no substantive grounds remained and the appeal was dismissed.

THE HONOURABLE MR JUSTICE CHOUDHURY

Introduction

1. The background to this matter is as follows, as set out in paragraphs 2 to 7 of my judgment in **Smith v Pimlico Plumbers** UKEAT/0211/19/DA, UKEAT/0003/20/DA and UKEAT/0040/20/DA, which was heard on 15 to 17 December 2020 ("the hearing") and in which judgment was handed down on 17 March 2021:

> **"2. The Respondent operates a plumbing and maintenance business. The Claimant is a plumbing and heating engineer, who worked for the Respondent from August 2005 to May 2011. Throughout that period, the Respondent maintained that the Claimant was a self-employed independent contractor, without entitlement to paid annual leave. Notwithstanding that, the Claimant did from time to time take periods of leave that were unpaid. On 3 May 2011, the Respondent suspended the Claimant and required him to return equipment and a van. The Claimant regarded this as a fundamental breach entitling him to terminate the contract.**
> **3. On 1 August 2011, the Claimant initiated proceedings in the London South Employment Tribunal ("the Tribunal"). His Claim Form included a claim for holiday pay; and a claim for disability discrimination in relation to his alleged dismissal. The Respondent's Grounds of Resistance denied that the Claimant was an "employee" or a "worker"; denied he was entitled to paid annual leave; and denied he was dismissed or discriminated against.**
> **4. At a Pre-Hearing Review in January 2011, the Tribunal decided that the Claimant was an "employee" of the Respondent within the meaning of section 83(2)(a), Equality Act 2010 ("EqA"); and a "worker" within the meaning of section 230(3), Employment Rights Act 1996 ("ERA") and regulation 2(1), Working Time Regulations 1998 ("WTR"). References in this judgment to "employment" and related terms are to employment within the meaning of those provisions. The Respondent unsuccessfully challenged these decisions before the EAT, the Court of Appeal and the Supreme Court. The case then returned to the Tribunal.**
> **5. At a hearing on 18 and 19 March 2019, Employment Judge Morton ("the Judge") dismissed the holiday pay claim on a preliminary jurisdictional point that it was brought out of time. The Judgment and Reasons were sent to the parties on 1 July 2019 ("the Holiday Pay Judgment"). In a subsequent Judgment sent to the parties on 19 December 2019, the Judge refused a reconsideration application ("the Reconsideration Judgment").**
> **6. The disability discrimination claim was heard by the Tribunal (EJ Freer presiding) on 5 to 7 June 2019. The claim was dismissed. The Judgment and Reasons were sent to the parties on 27 September 2019 ("the Disability Discrimination Judgment").**
> **7. The Claimant brings three appeals against those judgments. These are as follows:**
> **(a) An appeal against the Holiday Pay Judgment, sifted to a full hearing by HHJ Eady QC (as she then was);**
> **(b) An appeal against the Disability Discrimination Judgment which was sifted to a full hearing by me. The appeal against that judgment is the subject of a separate ruling dismissing the appeal; and**
> **(c) An appeal against the Reconsideration Judgment which was also sifted to a full hearing by me."**

2. The appeal against the Disability Discrimination Judgment, (referred to simply as "the Discrimination Appeal") comprised three grounds. On Day 2 of the hearing, the Claimant sought permission to amend the Discrimination Appeal by adding to Ground 3. Having considered written and oral submissions as to that proposed amendment, I delivered an oral *ex tempore* judgment refusing the application. It was agreed between the parties that that refusal, in conjunction with the Claimant's withdrawal of some aspects of the Discrimination Appeal, meant that the Discrimination Appeal fell to be dismissed. I therefore dismissed the Discrimination Appeal and indicated that full reasons for my judgment would follow in due course. Due to difficulties with the quality of the sound recording at the hearing, which was a hybrid hearing with the Claimant and his representatives attending remotely, the transcript of the oral judgment was delayed. This written judgment is a fuller version of the reasons given at the hearing.

The Disability Discrimination Claim

3. The Claimant's disability claim below was that he had been constructively dismissed. It was accepted that he had a disability by reason of a heart condition. On 21 April 2011, he requested permission to work a three-day week for health reasons. The Respondent, by an email dated 3 May 2011 from Mr Ceraldi, said in response that it had a duty to inquire into this and sought further information from the Claimant's GP as to his health, any recommendations regarding health and safety and as to his capability to work. Mr Ceraldi went on to say that:

> **"In the interests of your health and safety, any future work will be suspended until this matter is resolved. In the interim, would you please also arrange for the return of all Company property…"**

4. The Claimant considered, upon receipt of that letter, that he had "been dismissed" and by a letter from his advisers later that day, referred to the fact that "the Claimant considered his

employment relationship with the Respondent to be at an end": Judgment at [66]. The Claimant was signed off sick from work for a period two weeks.

5. He issued proceedings claiming that he been constructively dismissed because of his disability or for a reason connected to his disability. He relied upon the Respondent's breach of an express term (arising out of the obligation to provide a certain quantity of work) and the implied term of mutual trust and confidence ("the implied term"). It was contended that his dismissal amounted to direct discrimination contrary to s.13, EqA and discrimination arising out of disability contrary to s.15, EqA. He also claimed that there had been a failure to make reasonable adjustments.

Disability Discrimination Judgment

6. EJ Freer ("the Judge") concluded that the Claimant had not been constructively dismissed. He found that there was no breach of any express term. As to the implied term, the Judge considered that, whether or not it applied to the contract between the parties, there was reasonable and proper cause for the Respondent to act as it did in that it was reasonable, given the risk to health and safety, to "view medical information regarding the Claimant's health condition and any recommendations from a qualified medical practitioner regarding the Claimant's fitness for work", and that there was nothing unlawful or unreasonable in its failure to provide work whilst the Claimant remained unfit to work: [72] to [81], [103] to [106]. The ss.13 and 15, EqA claims were dismissed as they were both dependent on there being a dismissal. The Judge went on to consider the position in the alternative as if there had been dismissal and concluded that there was no direct discrimination. As to the s.15 claim, the Judge concluded that the suspension of work pending medical confirmation at a time when the Claimant was incapable of work "does not amount to unfavourable treatment… when

objectively considered." Furthermore, even if it did amount to unfavourable treatment, it was justified as amounting to a proportionate means of achieving a legitimate aim: [106] to [113].

The Grounds of Appeal

7. There are three grounds of appeal.:

   a. "Ground 1 – The ET erred by treating the termination of employment on 3 May 2019 (sic) as an unfair constructive dismissal pursuant to s95(1)(c) ERA rather than a discriminatory dismissal pursuant to section 39(7)(b) EqA"

   b. "Ground 2 – The ET erred by failing to consider whether the Claimant was entitled to terminate the employment because of the Respondent's conduct…"

   c. "Ground 3 – The ET erred in its analysis on the application of justification s.15(1)(b)…"

8. Each ground was developed in the Grounds of Appeal by way of several numbered sub-paragraphs. It is necessary, given the nature of the amendment application, to set out sub-paragraphs (3) to (8) under Ground 1 in more detail:

> **"(3) The Claimant brought a claim that he had been dismissed pursuant to Section 39(7)(b) of the Equality Act 2010. A fundamental question arising in this appeal is whether constructive dismissal under the Employment Rights Act has the same meaning and purpose as a constructive dismissal under the Equality Act 2010 for a limb (b) worker.**
> **(4) S.39(7)(b) the Equality Act 2010 arises from domestic law and EU law such as from Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. Section 95(1)(c) of the employment Rights Act 1996 is a UK domestic law protection against unfair dismissal. See below the wording for each section:**
> **Section 95(1)(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.**
> **Section 39(7)(b) by an act of B's (including giving notice) circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.**
> **(5) both sections are colloquially known as constructive dismissal…Section 39(7)(b) .**
> **(6) The ET erred by treating the Claimant's termination of employment as a s95(1)(c) unfair dismissal citing Western Excavating Ltd v Sharp [1978] IRLR 27, CA as authority for the legal test [15];**
> **(7) the ET also misapplied the legal test in Malik v The Bank of Credit and Commerce International SA [1997] IRLR 462 HL … Which confirmed that the implied term of mutual trust and confidence was imported into every contract of employment. The ET erred by not extending the implied term of mutual trust and confidence into the Claimant's limb (b) employment relationship**

> **(8) The issue for this appeal is whether, and if so, to what extent a limb (b) worker bringing a claim under section 39 (7) (b) of the EqA should be subjected to the same unfair dismissal test under section 95(1)(c) [ERA], such as whether there has been a breach of contract amounting to a fundamental breach entitling the "employee" to leave employment as a consequence (Western). …"**

9. The Claimant's skeleton argument for the hearing developed these three grounds of appeal at paragraphs 147 to 193. The skeleton argument, which was served on the Respondent in substantially the same form on 6 July 2020, summarises the three grounds of appeal as follows at paragraph 147:

a. "Ground One: The Claimant will confine this Ground to the contention that the ET erred in law in not finding that the implied term of trust and confidence applied to employment contracts that satisfied the extended definition of an employee in section 83(2)(a) EA 2010: see para 7, Grounds of Appeal…"

b. "Ground Two: contends that the ET erred in law in its alternative conclusion that if the implied term of trust and confidence applied, the Respondent had not acted without reasonable and probable (sic) cause"; and

c. "Ground Three: contends that the ET erred in law in rejecting the discrimination arising from disability claim."

10. It is apparent from this summary, that under Ground 1, far from contending that there was an error in approaching the issue of constructive dismissal in the same way as for a claim under the 1996 Act, the Claimant was now seeking to argue that the implied term should be applied to limb (b) worker contracts. In relation to Ground 2, the summary above pouts the matter differently from Ground 2 in the Notice of Appeal. The reason for this is set out at paragraph 179 of the Skeleton Argument, where the Claimant "accepted that the heading of this Ground in the grounds of appeal is inaccurate; the ET did consider this issue and did conclude that Mr Ceraldi had acted with reasonable and probable (sic) cause." It was contended, however, that the substance of the complaint made under this ground, which was that the ET

erred in concluding that the Claimant was not dismissed, was in fact set out under the sub-paragraphs of Ground 2. Furthermore, whereas Ground 3 in the Notice of Appeal was a challenge to the ET's conclusions as to justification, the argument was now about the rejection of the Claimant's claim that there was unfavourable treatment. As to that argument, the Claimant accepted, at paragraph 191 of the skeleton argument, that this contention is not contained anywhere within the grounds of appeal. Notwithstanding that acknowledgement, no application for permission to amend the Grounds of Appeal was made at that time.

The Respondent's Note of Objections and the Claimant's Application to Amend

11. On the first day of the hearing, the EAT was served with a Note of Objections from the Respondent. This Note highlighted departures in the Claimant's skeleton argument from the contentions raised in the Disability Appeal, and contended that it was too late to pursue the appeal on these alternative bases.

12. On the second day of the hearing, the Claimant sought permission to amend Ground 3 of the Discrimination Appeal. The proposed amendment, set out in a document dated 14 December 2020, was as follows:

> **"Ground 3 The ET erred in its analysis on the application of ~~justification~~ s15~~(1)(b).~~"**

13. The Respondent objects to that proposed amendment on the grounds that it is being sought far too late in the day and also because it represents a fundamental change to the nature of the Discrimination Appeal. The Respondent also contends that the way in which the Claimant now proposes to argue Grounds 1 and 2 of the Discrimination Appeal differs substantially from the pleaded grounds and that those grounds ought not to be given permission to proceed in their altered form at this stage.

14. I shall deal with each of the three Grounds of Appeal in turn.

Ground 1

15. Mr Jeans submits that, when the Grounds of Appeal are fairly considered, the only point taken under Ground 1 is whether the legal test of dismissal under EqA is different from the test of dismissal under ERA. Although all the sub-paragraphs underneath that ground appear to address that issue, the Claimant is now seeking to present an argument that is, said Mr Jeans, entirely different in that he is now contending that the Tribunal had erred by not extending the implied term into the Claimant's limb (b) employment relationship. As such, this is not a pleaded ground and would require permission to proceed. He also says that the point is academic because, as the Tribunal found, even if the implied term were to be applied to such a relationship, there was no breach of it because, on the facts, the Respondent acted with "reasonable and proper cause" for the acts complained of. The Claimant would be left with a perversity challenge which is hopeless and has not been brought in accordance with the EAT's Practice Direction.

16. Ms Williams submits that the point was squarely set out under Ground 1 and referred me to sub-paragraph 7, in particular the second sentence thereof, which states:

> **"The ET erred by not extending the implied terms of mutual trust and confidence into the Claimant's employment relationship."**

17. That is the only reference to that issue under Ground 1. Ms Williams submits that the Claimant is doing no more here than "pruning" Ground 1 down to one short point, namely that the Tribunal erred in not applying the implied term to limb (b) worker contracts. That is a point that is already set out in the second sentence of sub-paragraph (7) of the Grounds of Appeal, and she submits that it is open to an appellant to narrow the basis of the appeal in this way. Ms Williams accepts that even if the Claimant is permitted to proceed on the narrowed basis, he would still have to succeed in overturning the Tribunal's finding that there was reasonable and proper cause for those acts of the Respondent that caused him to resign. However, it is said that that would not be reason in itself not to allow this narrowed ground to proceed.

18. It is further submitted that, in any event, this is a matter in respect of which the Respondent has had ample notice and there can be no prejudice to them, whereas the prejudice to the Claimant is severe as Ground 1 would fall away in its entirety if this small part of it were not permitted to proceed.

19. In my judgment, it is clear from a proper reading of Ground 1 in the original Grounds of Appeal that, although the implied term point was mentioned in passing, it was not identified as a Ground of Appeal, either in the heading or in the Grounds as developed in the sub-paragraphs thereunder. Ground 1 is, on its face, about one issue and that is whether the correct approach was taken to the question of constructive dismissal. If there were any doubt about the scope of this particular ground, it is removed by sub-paragraph 8. That states unambiguously that "the issue in this Appeal is whether, and if so, to what extent a limb (b) worker bringing a claim under the EqA should be subjected to the same unfair dismissal test as under s95(1)(c), ERA". That issue correlates to the one identified in the heading to Ground 1. It is also relevant to note that sub-paragraph (3) refers to that issue being the "fundamental question arising in this appeal".

20. It is of course open to a party to eschew certain grounds of appeal to leave others. However, the utility of any such strategy is dependent on there being other grounds which can survive the pruning exercise. In the present case, the second sentence of sub-paragraph (7) of Ground 1 was not a freestanding ground of appeal that could survive on its own. It is noteworthy that permission to proceed on this appeal was given on the basis that "the grounds of appeal are arguable". Of course, the sift judge (which in this case happened to be me) will focus on the grounds as encapsulated in the heading and as developed in sub-paragraphs set out under the heading. Thus permission was given in respect of Ground 1 because, it may be assumed, the sift judge considered that the ground identified by that heading was arguable. There is no suggestion from the sift decision that an entirely separate (and different) ground of

appeal, mentioned in passing in part of a sub-paragraph and not identified as freestanding ground of appeal, would also be permitted to proceed.

21. As there was no express permission for this ground to proceed, it is not open to the Claimant to rely upon it after a "pruning exercise" without permission being granted. The principles for determining whether permission to amend should be granted at a late stage were set out by HHJ Serota QC in the case of **Khudados v Leggate and others** [2005] ICR 1013, one of the EAT's "familiar authorities". After confirming that the merits of a proposed amendment are relevant, HHJ Serota QC said as follows at [86]:

> **"86. The appeal tribunal has a broad and generous discretion in applying its rules and practices so as to achieve the overriding objective of dealing with cases justly. We consider that, without wishing to set out an exhaustive list of considerations, the following are among the matters to be taken into account in determining whether or not an amendment should be allowed.**
> **(a) Whether the applicant is in breach of the Rules or Practice Directions; in our opinion compliance with the requirement in para 2(6) of *Practice Direction (Employment Appeal Tribunal: Procedure) 2002 [2003] ICR 122* , that an application for permission to amend a notice of appeal be made as soon as the need for amendment is known, is of considerable importance. The requirement is not simply aspirational or an expression of hope. It does not set a target but is a requirement that must be met in order to advance the efficient and speedy dispatch and conduct of appeals.**
> **(b) Any extension of time is an indulgence and the appeal tribunal is entitled to a full honest and acceptable explanation for any delay or failure to comply with the 1993 Rules or 2002 Practice Direction, as Mummery J observed in *United Arab Emirates v Abdelghafar [1995] ICR 65* .**
> **(c) The extent to which, if any, the proposed amendment if allowed would cause any delay. Clearly proposed amendments that raise a crisp point of law closely related to existing grounds of appeal, or offering limited particulars that flesh out existing grounds, are much more likely to be allowed than wholly new grounds of perversity raising issues of complex fact and requiring consideration of a volume of documents, including witness statements and notes of evidence. Such amendments if allowed are bound to cause delay and extra expense. The latter class of amendments should be contrasted with the first. In many cases in the first category the party against whom permission to amend is sought will be in no worse position than if the amended grounds had been included in the original notice of appeal.**
> **(d) Whether allowing the amendment will cause prejudice to the opposite party, and whether refusing the amendment will cause prejudice to the applicant by depriving him of fairly arguable grounds of appeal. We recognise that a party cannot be prejudiced in point of law simply because an argument is raised by way of amendment that saves what would otherwise be an unsustainable appeal. We also would suggest that the prejudice caused by refusing permission to amend to an applicant who seeks permission to amend by adding fairly arguable grounds, but who has failed in a significant way to comply with the Rules or Practice Direction, or who has delayed excessively, is likely to carry less weight than in the case of an applicant who has not delayed and has acted in accordance with the 1993 Rules and 2002 Practice Direction.**
> **(e) In some cases it may be necessary to consider the merits of the proposed amendments, assuming they can be demonstrated to cross the appropriate thresholds we have mentioned earlier; that is to say as a general rule they must**

raise a point of law which gives the appeal a reasonable prospect of success at a full hearing.
(f) Regard must be had to the public interest in ensuring that business in the appeal tribunal is conducted expeditiously and that its resources are used efficiently."

22. Applying these principles (recognising that they are not exhaustive) to the present case, the position as it seems to me is as follows:

a. Permission to amend was not sought expeditiously. Whilst it may have been considered (wrongly) that permission was not required in respect of Ground 1, it ought to have been clear from about July 2020, when the Skeleton Argument was served and in which it was acknowledged that the contentions being made under Ground 3 were not contained in the Grounds as pleaded, that an amendment would be required. However, permission was first sought on the 14 December 2020. It may be that the Claimant was lulled into a false sense of security by the Respondent's inaction and lack of objection following the service of the Skeleton Argument. However, the Respondent's inaction (which might go to the relative prejudice) does not absolve a party of its own responsibility under 3.12 of the Practice Direction to make an application for permission to amend as soon as practicable.

b. There is no real explanation for the delay, except, as I have mentioned the lack of any objection from the Respondent. However, for reasons already set out, that does not provide an adequate explanation for the Claimant's failure;

c. Additional delay is not a factor on which I heard any submissions. It was not suggested, for example, in relation to this particular ground, that allowing it to proceed on the basis set out in sub-paragraph (7) would necessitate an adjournment or delay.

d. As to prejudice, this would appear at first blush to weigh in favour of permission being granted because the Claimant loses his right to pursue the Discrimination

Appeal altogether if permission is not granted, and prejudice to the Respondent is limited. However, as stated in **Khudados**, the prejudice caused to an applicant who has delayed excessively would usually carry less weight than in respect of one who has not delayed. It seems to me that in this case, where the Claimant has been fully represented throughout, and has had ample opportunity to present the appeal in the way that he wished by making amendments timeously, the prejudice that would result from losing his right to pursue the Discrimination Appeal as a result of being refused permission is one that could readily have been avoided by him had he taken appropriate steps in compliance with the Practice Direction at an earlier stage.

e. It is relevant in this case to take account of the merits of the proposed amendment. As Mr Jeans submits, the amended Ground 1 would be academic because, in order to succeed, the Claimant would still need to overturn the finding of fact that there was reasonable and proper cause for the Respondent to act as it did. That would be a perversity challenge which would have little prospect of success. Thus even if the point itself were arguable, it would have little prospect of making a difference to the overall outcome of the appeal.

23. Taking account of all these considerations, it is my view that the balance weighs against permitting Ground 1 to proceed on the revised or narrowed basis. The proposed narrowing is in fact an attempt to argue a new and unmeritorious ground of appeal that is not properly contained in the Grounds of Appeal or for which permission was granted.

Ground 2

24. Ground 2 as formulated states that the Tribunal erred by failing to consider whether the Claimant was entitled to terminate his contract because of his employer's conduct under s39(7)(b), EqA. Ms Williams acknowledges that, so formulated, the ground seeks to attack

A something which the Tribunal did not in fact fail to do; the Tribunal *did* consider this issue but had concluded that the Respondent had acted with reasonable and proper cause.

B 25. Ms Williams seeks to advance Ground 2 on the different basis that the Tribunal erred in concluding that the Claimant was not dismissed in that the Tribunal "failed to engage with the **Malik**" test in considering the matters set out in the Respondent's letter, and which gave rise to the Claimant's resignation. That alleged error, she submits, is set out in substance in sub-paragraphs (12) to (15) of Ground 2. I should make it clear that in the course of submissions, C there was some further revision to those sub-paragraphs in that the first sentence of (13), all of (14) and the allegation of the misapplication of the burden of proof in the first sentence of (15) are no longer pursued. What does that leave? Sub-paragraph (12) recites part of the Claimant's D evidence without alleging any particular error on the part of the Tribunal. All that remains is the allegation in (13) that the Tribunal erred by failing to determine whether the Claimant was entitled to terminate his employment without notice given the Respondent's conduct; and the E allegation in (15) that the Tribunal erred in finding that the suspension pending medical input was immaterial to the finding of discrimination. It is not clear to me that those remaining points do, in substance, reflect the points now being made in the Claimant's skeleton argument. For instance, it is not clear from those paragraphs that any specific complaint is made about the F Tribunal's application of the **Malik** test, beyond that which is alleged in the (now abandoned) heading to Ground 2. However, even if they did, the Claimant is seeking, as under Ground 1, to pursue a materially different point than the ground for which permission was granted. As such, G the same points as discussed above in relation to Ground 1 apply, and the Claimant would require permission to proceed on the revised basis.

H 26. For the same reasons as set out under Ground 1 above, I refuse permission. It is relevant to note that the remaining challenges under Ground 2 seek, to a large extent, to undermine the Tribunal's approach to the evidence. Furthermore, in order for the appeal to succeed, the Claimant would still have to undermine the Tribunal's finding of fact as to reasonable and

proper cause. These both involve perversity challenges which would have little prospect of success.

Ground 3

27. Ground 3 in its unamended form states as follows:

> **"The Tribunal erred in its analysis on the application of justification s15(1)(b)."**

The focus of Ground 3, therefore, as it appears under that heading, is entirely on justification. The proposed amendment (see above) removes the reference to justification and simply asserts that there is an error in the application of s.15. That would shift the target of this ground of appeal to the earlier stage in the analysis of whether there was unfavourable treatment.

28. Ms Williams acknowledges that this proposed amended Ground 3 is not contained within the existing Grounds of Appeal, but contends that it should be permitted to proceed as the Tribunal's errors are clear and can be shortly stated and addressed. She also makes the point that the skeleton argument, which was served back in July, contained substantively the same point now contained in the proposed amended Grounds. She says, in short, that this ground of appeal has merit and gives rise to a clear error of law in that the Tribunal confined its approach to the purely objective one of analysing whether there was unfavourable treatment under s.15, thereby failing to have regard to the decision of the Supreme Court in **Williams v Trustees of Swansea University Pension and Assurance Scheme** [2017] EWCA Civ 1008. Further, and in any event, it is submitted that it is a surprising proposition that suspension without pay without limitation in time is not unfavourable treatment.

29. In my judgment, the clarity of a point raised by way of amendment, or its brevity, or indeed its merits are not necessarily sufficient reasons in themselves for giving permission to proceed with the amendment at a late stage; if anything, those are reasons that might legitimately lead one to ask why permission for the amendment was not requested earlier as required by 3.12 of the Practice Direction. I do note, of course, that the skeleton argument was

lodged in July in accordance with the Tribunal's directions, but it is incumbent upon a party to ensure that the grounds of appeal properly reflect the arguments which they seek to advance.

30. Mr Jeans made three points in response to the application to amend. First, he said, that the amendment is not one that could be granted as it goes behind or seeks to undermine the Judgment of Employment Judge Martins, who refused an application to amend the claim below so as to include a number of detriments, including the suspension of the Claimant on 3 May 2011. That point, in itself, I do not consider to be particularly persuasive. I accept Ms Williams' submission that in the context of a claim of discriminatory constructive dismissal, which is the allegation here, the Claimant would be entitled to rely on the matters that gave rise, allegedly, to that constructive dismissal.

31. Mr Jeans' next point was that the amended claim is hopeless in any event in light of the Tribunal's findings. He took me to [81] and [113] of the Judgment where the Tribunal records that:

> **"…the Claimant accepted under cross-examination that it was reasonable for the First Respondent to seek medical information and recommendations in respect of his situation and to defer making any decision in respect of his future working arrangement until it had a reasonable opportunity to review and consider that information and advice. The Claimant also accepted in evidence that in his view it was lawful for the First Respondent not to have offered him work in circumstances where he was signed off as unfit to work, as was the case. The Tribunal agrees."**

32. Mr Jeans' submits that to argue, on the back of those findings as to the Respondent's treatment (treatment which the Claimant himself considered to be reasonable and lawful), that there was unfavourable treatment is absurd. Whilst it is not the case that a concession that treatment was not unreasonable necessarily precludes any argument that the treatment was unfavourable, particularly given the low threshold for unfavourable treatment, I agree that in the circumstances of this case, the Claimant's contention appears unarguable. Ms Williams submits that the Tribunal's reliance on the Court of Appeal's decision in **Williams** instead of that of the Supreme Court discloses an arguable error of law. However, I am not persuaded that

there was any arguable error of law. The Supreme Court was "substantially in agreement" with the reasoning of the Court of Appeal: [27]. Whilst it did say that there was little to be gained in seeking to draw narrow distinctions between "an objective and subjective/objective" approach (at [28]), the circumstances of the present case do not suggest, even arguably, that the treatment complained of was or could have been regarded as unfavourable. Apart from the concessions made by the Claimant, to which I have already referred above (and which would appear to militate against any finding that the treatment was even subjectively unfavourable), there is also the fact that the suspension of work was imposed at a time when the Claimant was incapable of work having been signed off for stress: [108]. As the Tribunal found, it was not unfavourable treatment to suspend in those circumstances. Ms Williams submits that the open-ended nature of the suspension meant that it could have been considered to be unfavourable treatment. That submission, however, faces the difficulty that the Tribunal made express findings of fact that the suspension of work was limited in time, either pending the receipt of medical information ([73]) or for the duration of the Fitness for Work Statement ([81]). The Claimant's amended ground does not, therefore, appear to me to disclose any reasonable grounds for bringing the appeal.

33. Even if I am wrong about that and the amended ground does cross the arguability threshold, the amendment still faces the difficulty that it is being sought very late in the day. As such, the **Khudados** factors considered under Grounds 1 and 2 above also apply here. Here, the amendment is being sought in the course of the hearing itself, and has resulted in some of the time set aside for the hearing being lost whilst it was considered. I note that the refusal of permission in respect of Ground 3 would also carry with it the prejudice to the Claimant of not being able to pursue the Discrimination Appeal at all. However, as stated above, that is a prejudice that carries less weight in circumstances where steps could have been taken earlier to comply with the Practice Direction. The position is even less meritorious for the Claimant in respect of Ground 3 than under Grounds 1 and 2 in this respect, as the Claimant expressly

A acknowledged back in July 2020 that the argument now being pursued under Ground 3 was "not within the Grounds of Appeal", and there was no suggestion that it was contained in or could be inferred from the sub-paragraphs under that ground.

B 34. Taking all of those matters into account, I refuse permission to amend. In coming to that decision I have taken account of the overriding objective to deal with matters fairly and justly. Whilst the Claimant does lose the right to pursue his appeal, it is a right lost in respect of an entirely different appeal from that for which he had obtained permission. Had there been

C compliance with the EAT's Practice Direction, then the prejudice that he now faces could have been avoided. In any event, I consider the amended grounds to be inherently weak and/or unarguable for the reasons set out. It is not the case, therefore, that the Claimant has lost the

D right to pursue a meritorious appeal. He eschewed the grounds for which permission was granted (and which were considered to be arguable) and sought to replace them with others at a very late stage. In the circumstances, I do not consider the outcome to be unjust or unfair.

E 35. It is accepted by both sides that the Discrimination Appeal stands or falls with the amendment to Ground 3. Accordingly, the Disability Appeal is dismissed.

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