

EMPLOYMENT APPEAL TRIBUNAL
52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 22nd November 2019 and
15th October 2020
Judgment handed down on
10th February 2021

Before

THE HONOURABLE LORD SUMMERS

(SITTING ALONE)

MISS D KLUKOWSKA

APPELLANT

BRIDGE OF WEIR LEATHER COMPANY LTD

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MISS D KLUKOWSKA
(The Appellant in Person)

For the Respondent

MS JENNIFER WRIGHT
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SUMMARY

TOPIC NUMBER(S):

8 – Practice and Procedure

In this case the Tribunal dismissed a claim because of non-compliance with an “unless” order. The Claimant appealed arguing that she had complied with the order. Held that the Tribunal’s judgement failed to explain why the specification supplied by the Claimant was inadequate. In any event the level of detail could not be said to be materially non-compliant. While more detail could have been given, the specification provided was sufficient to enable the Respondent to prepare their defence. It was important that a realistic approach should be taken to the provision of names, dates and witnesses by a party who was unlikely to have ready access to the relevant information. Documents supplied by parties in compliance with “unless” orders should not be treated as a specie of written pleading or subjected to minute scrutiny; and appeal allowed.

A **THE HONOURABLE LORD SUMMERS**

B **Introduction**

B 1. The Claimant in this appeal seeks to overturn an order pronounced by the Employment
Tribunal in Glasgow on 10 September 2018 dismissing her claim. The Claimant who
represents herself alleged that the Respondent had discriminated against her on various
grounds. On 10 August 2018 the Tribunal made an order under rule 31 of the **Employment**
C **Tribunals (Constitution and Rules of Procedure) Regulations 2013** (hereafter the “Order”)
requiring certain information specified in the Order to be specified. The Order provided that
“unless this order is complied with by the date specified, the claim shall be dismissed on the
D date of non compliance without further order”. The power to dismiss the claim is found in rule
38 –

E 38. (1) An order may specify that if it is not complied with by the date specified the claim or
response, or part of it, shall be dismissed without further order. If a claim or response, or part
of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming
what has occurred.

F 2. These orders are usually referred to as “unless” orders. The Order required details of
the Claimant’s claim of direct discrimination, indirect discrimination, harassment and
victimisation. She was ordered to specify all and any facts she offers to prove to show that the
less favourable treatment she alleges was because of race, sex or sexual orientation. She was
G obliged to provide “all names, dates, events and details” of “all statements or actions alleged,
including the names of any witnesses”. Similar specification was sought in relation to her other
heads of claim. The Order made it clear that that non-compliance would result in dismissal.
The Order drew attention to the need for compliance with the order and warned that a failure to
H comply would result in dismissal. The Order also drew attention to rule 29. Rule 29 permits an
order to be varied, suspended or set aside. The Claimant did not seek to vary, or suspend or set

A aside the Order. She supplied a document (hereafter “the Specification”) in purported
compliance with the Order.

B 3. The Tribunal held that the Claimant had not complied with the Order. It would appear
that the hearing to determine whether the Claimant had complied with the Order coincided with
the first day of the Full Hearing. As a result of the dismissal, the hearing did not proceed and
the claim was brought to an end. The Claimant appealed this dismissal.

C **The Tribunal Judgment**

D 4. In its Judgement the Tribunal noted that the Claimant relied on three protected
characteristics. She claimed she was discriminated against because she was Polish (s. 9
Equality Act 2010), a woman (s. 11 **Equality Act 2010**) and gay (s. 12 **Equality Act 2010**).
Although the Tribunal observes that the Claimant’s ET1 does not contain any reference to
E discrimination based on sexual orientation, the Judgement proceeds on the basis that all three
grounds of discrimination were before it and I take it that at some stage the Tribunal must have
allowed this additional ground of redress to be incorporated into the Claim. I have proceeded
F on the basis that the Claimant is entitled to rely on all three grounds of discrimination.

G 5. The Tribunal acknowledged that the Claimant had not been given a great deal of time to
prepare the Specification. Despite this it was clear that the Claimant had made considerable
efforts to compile the document (paragraph 78). The Tribunal acknowledged that the fact she
was unrepresented would have handicapped her ability to comply with the Order. The Tribunal
considered nevertheless that compliance with the Order was essential. It was in the interests of
H justice that the Respondents should know what incidents of discrimination the Claimant relied
upon so that they could prepare their defence. This involved identifying the dates, and the

A people involved (paragraph 89). It further noted that there had been three preliminary hearings prior to the one at which the case was dismissed. At those hearings the Tribunal had sought to elicit suitable specification of the basis for the Claimant's case (paragraph 92).

B 6. The Tribunal reviewed the authorities (paragraphs 98-105). In summary the case law establishes that a claim may be dismissed if it is not adequately specified. In **Marcan Shipping (London) Ltd v Kefalas & Another** [2007] EWCA Civ 463; 3 All ER 365 Pill LJ said -

C **... the sanction embodied in an Unless Order in traditional form takes effect without the need for any further order if the party to whom it is addressed fails to comply with it in any material respect. (paragraph 34)**

D 7. **The Royal Bank of Scotland v Abraham** (UKEAT/0305/09/DM) is authority for the proposition that if there is non-compliance in any material particular the whole claim may be dismissed. The effect of this is that in cases where there was more than one head of claim a failure to adequately specify one could lead to the dismissal of the whole claim. See also

E **Scottish Ambulance Service v Laing** UKEATS/0038/12BI. Underhill, J (as he then was) in **Johnson v Oldham** MBC UKEAT/0132/13/JOJ pointed out however that where claims are brought on different bases each is a separate cause of action and that it would be illegitimate to

F strike out an adequately specified cause of action because another cause of action was inadequately specified (see paragraph 6 of his judgement). In his judgement **Abrahams** was authority for the proposition that a claim should only be dismissed in its entirety if the "unless" order required the whole claim to be adequately specified. There may be cases where the

G underlying facts are so intertwined that this is an appropriate course of action. In such a situation non-compliance with one aspect of a claim may well justify the dismissal of the whole claim. But that will not always be the case. Underhill, J encouraged tribunal judges to word

H their orders so that if necessary each head of claim could be considered separately. In such a

A situation it would be open to the tribunal to dismiss only those parts of the claim that had been inadequately specified rather than the whole claim.

B 8. In paragraph 7 of his judgement in Johnson Underhill, J emphasised that the standard
C by which compliance was to be judged was “material” compliance. In other words the tribunal
D should examine the specification given to determine whether it was sufficiently detailed to give
E the other party enough information to understand the nature of the claim and prepare
F effectively. HHJ, Auerbach has provided a useful overview of the issues posed by “unless”
G orders in Uwhubetine v NHS Commission Board UKEAT/ 0264/18/JOJ (see paragraph 43 et
H seq.). He notes that in determining whether adequate specification has been given the tribunal
is not concerned with whether the party is likely to be able to prove the facts averred nor with
whether the facts are sufficient in law to establish a right to a remedy.

In a case where the Order required some further Particulars to be given, the benchmark is whether the Particulars have sufficiently enabled the other party or parties to know the case that they must meet. However, the Tribunal is not concerned with the legal or factual merits of the case advanced, but merely with whether sufficient Particulars have been given to meet that test. (paragraph 46)

F It is important therefore that when assessing whether there has been material compliance, the
tribunal should not make any judgement as to whether the facts if proved would establish the
claim. Provided the specification bears to support the claim and is capable of doing so that is
sufficient. It is not for the tribunal when assessing whether the order has been complied with to
G pass judgement on whether the case thus specified is sufficient in law.

The Tribunal’s Reasoning

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A 9. The Tribunal examined the Specification and described it as “confused and confusing” (paragraph 73). At paragraph 74 the Tribunal held that the Claimant had failed to provide appropriate specification for her claim.

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In particular it does not distinguish between each protected characteristic when purporting to specify facts that the Claimant offers to prove to show that the less favourable treatment she alleges was because of that particular protected characteristic, it does not provide names, dates, events and details of all statements or actions alleged including the names of any witnesses.

C 10. The Tribunal indicates here that the Claimant failed to comply with the Order by aggregating her protected characteristics rather than separating them out. The Tribunal also indicates that the Specification did not provide “names, dates, events and details of all statements or actions alleged including the names of any witnesses”. The Tribunal considered that the Claimant had failed to

D

E ...identify in any clear way who did what, when, and in whose presence and does not comply with the specific terms of the Order contained within the “harassment” heading of the “unless” Order. (paragraph 75)

F 11. The Specification is described as a “hotchpotch” (paragraph 76). The Tribunal held that the allegations made were not “patently attributable to any particular protected characteristic” and is “in many instances... a combination of protected characteristics which apply to her” (paragraph 76). The Tribunal declared itself satisfied in relation to claim of victimisation. Otherwise “the Tribunal has determined that the Claimant failed to comply with the Unless Order” (paragraph 109).

G

H The Appeal

A 12. The Notice of Appeal consists of two sections. The first raised a short point about the
interpretation of the Order. The second involved a lengthy challenge to the idea that the
B Claimant had failed to distinguish her protected characteristics. She submitted that the
Specification did separate out her protected characteristics. The Notice of Appeal does not
specifically say whether she regarded that failure as an error of law or perversity. In the
Respondent's submissions they assume that this argument is based on perversity. I am not
C convinced that this is so. Perversity typically arises where the tribunal arrives at a conclusion
that was not open to it on the facts found proved or a conclusion unsupported by any relevant
facts. I consider that the Claimant's submission was based on error of law. I consider that she
in effect submitted that the Specification satisfied the terms of the Order and that in arriving at
D the opposite conclusion the Tribunal failed to apply the law. She also complained that the
Tribunal had failed to comply with Meek v City of Birmingham DC [1987] IRLR 250. She
submitted that the Tribunal had failed to tell her why her case had not been adequately specified
and that the reasons given for dismissing her case were inadequate.

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13. I can deal with the first ground of appeal shortly. The second ground of appeal requires
more careful scrutiny.

F

The Interpretation of the Order

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14. The Claimant submitted that a distinction was to be drawn between the "Order to
provide Information" and the "Information Order Schedule" attached to the Order. She
submitted that these were separate documents and that the mandatory requirements arose in
relation to the Order but not the "Information Order Schedule". Since the Schedule contained
H the various types of information she was obliged to provide, breach of its terms was not breach
of the Order's terms.

A

15. I do not accept this submission. The Schedule sets out the content of the Order. It opens with the following words, “The claimant is ordered to provide the respondent further specification of her claims as follows”. Non-compliance with the terms of the Schedule was therefore a breach of the Order. The first ground of appeal is refused.

B

Protected Characteristics

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16. The Claimant’s second ground in her Notice of Appeal arises from the terms of the Order. It required her to fully specify her claim “in relation to each of her protected characteristics”. This wording is used in relation to the claims of direct and indirect discrimination but not in connection with the claims of harassment or victimisation. The wording is obviously designed to compel the Claimant to provide information in alignment with the law. The **Equality Act 2010** does not permit claims based on combinations of protected characteristics. Although there is provision in the **Equalities Act 2010** for claims based on two protected characteristics (see s. 14 of the **Equalities Act 2010**) the section has not been brought into force. The Act does not address directly the possibility of discrimination based on more than two protected characteristics.

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17. In order to assess this ground of appeal it is necessary to examine in detail what the Claimant was ordered to do and how she set about doing it.

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18. Paragraphs 1 and 2 of the Order states as follows –

H

Claim for Direct Discrimination

In relation to each of her protected characteristic the claimant is to specify all and any of the facts she offers to prove to show that the less favourable treatment she alleges was because of

A that protected characteristic. All names, dates, events and details are to be given of all statements or actions alleged, including the names of any witnesses.

B Claim for indirect discrimination

In relation to each of her protected characteristics, the claimant is to specify what it is that puts individuals who share that characteristic at a disadvantage and how it put her at that disadvantage.

C Harassment

In relation to the table already provided, the claimant is to give details of what was said to her in each of the statements complained of, when (the dates) and by whom, where the complaint is of an action, precise details are to be given along with the dates and the identity of any witnesses.

D Victimisation

In relation to the table already provided dates and exact details of what was said and done and by who must be given, along with the identity of any witnesses.

E 19. The paragraphs that deal with direct and indirect discrimination begin with the words, “In relation to each of her protected characteristic(s)...”. The Order then proceeds to require the Claimant to supply specification in relation to each protected characteristic. The purpose of the Order is evidently designed to provide notice of how the Claimant proposed to prove her case in relation to individual protected characteristics. The Claimant could not claim that she **F** had suffered discrimination because of two or more protected characteristics. Thus even although she may have considered that the treatment of which she complained was due to the fact she was Polish, female and gay, she was obliged to say how she intended to establish that **G** one of those characteristics led to less favourable treatment. Section 13(1) of the **Equality Act 2010** states as follows -

H (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others

A 20. Thus provided the Claimant shows that one of her protected characteristics was causally
connected to the less favourable treatment, she may rely on section 13. The section does not
B require the protected characteristic in question to be the sole cause. The words “because of”
requires the characteristic in question to have made a material contribution to the treatment
complained of. A Claimant may bring claims based on two or more protected characteristics
provided these claims are kept apart and it can be asserted that the less favourable treatment in
C each case was “because of” the protected characteristic. It will be for the tribunal to decide
whether the less favourable treatment was because of the protected characteristic. As the
Claimant stated in her Notice of Appeal -

D **No one ever tells you directly why they treat you less favourably than others.**

This exaggerates the position to a degree. As she points out in her Specification there were
occasions when she alleges specific reference was made to her nationality. But in cases where
E it is alleged that more than one protected characteristic has led to less favourable treatment the
claim may be based on more than one protected characteristic. It is for the tribunal to decide
after hearing the evidence what the cause of the less favourable treatment was. There may be
F difficult questions of causation for the Tribunal in deciding whether each individual protected
characteristic was a cause of the less favourable treatment or whether the less favourable
treatment would not have occurred but for a combination of protected characteristics. I accept
G that since section 14 of the Equality Act 2010 has not been brought into force it may not be
possible to interpret section 13 as permitting a claim of direct discrimination where the cause of
the discrimination is a combination of protected characteristics. In that situation ex hypothesi
H there would have been no unfavourable treatment but for the presence of both protected
characteristics. Where however there is evidence that each protected characteristic could
independently have resulted in the same treatment then there is no need to rely on dual (or

A multiple) protected characteristics. These would be issues to be determined after hearing the evidence.

B 21. The most natural way of complying with the Order would have been for the Claimant to identify a relevant protected characteristic and then set out the less favourable treatment caused by it. This would have had the great benefit of forcing the Claimant to separate out her heads of claim and thus make it clear what adverse treatment she linked to which protected **C** characteristic. The Claimant did not follow that route, possibly because she did not think she could say that any one of her protected characteristics was a cause of the less favourable treatment of which she complained. What she did was set out the treatment of which she **D** complained and thereafter narrate the protected characteristics upon which she relied. She does not follow this course consistently. Sometimes she relies on one characteristic and on others on multiple protected characteristics. This does not make it easy to see if the Order has been **E** complied with.

22. That said the Specification is presented in an orderly way. The first three subjects, Harassment, Indirect Discrimination and Direct Discrimination begin with the same heading, **F** “Events, evidence and employer’s action”, and then there are a number of paragraphs headed “Why I believe I was harassed/discriminated because of my protected characteristics”. There are also a number of sections headed “How did the employer deal with the issue?” For some **G** reason the section on Victimisation is not divided into these sub-headings. The various examples of less favourable treatment are dated and names are included. The author of the Specification is Polish and English is not her native language. Despite this the language is clear and comprehensible. The Specification runs to ten pages. The document is typed and single **H** spaced. I do not consider that it could be criticised for being too long or poorly presented.

A Approximately three pages are devoted to each ground of claim. Each heading follows a similar pattern.

B 23. There are aspects of the Specification that are incongruous. Material is included that is extraneous to the Order. Thus each subject section begins with bullet points that relate to the physical side effects the Claimant attributes to the treatment she alleges and are extraneous to the Order.

C

Discussion

D 24. I will deal with the protected characteristics in the order in which they appear in the Specification.

E 25. **Harassment** – the Order refers to a “table”. This document was not in the core bundle. A copy was supplied to me after the hearing. It is a document that sets out the legal definition of direct discrimination, indirect discrimination, harassment and victimisation. In relation to each head of claim a series of questions are asked in tabular form designed to enable the

F Claimant to give appropriate specification. The first column asked the Claimant to say “What was the unwanted conduct?” The Claimant gives six examples of what she considered to be unwanted conduct that fell within the scope of harassment. The second column asks “How did that relate to protected characteristic and which one?” The Claimant seeks to answer this

G question in relation to each example of unwanted conduct. The Claimant’s argues that since no British woman was treated as she was treated as she was treated she is entitled to infer discrimination. The Claimant identifies two protected characteristics as the reason for the

H treatment except in relation to one example where she relies only on sex.

A 26. In the Specification the Claimant describes a course of sexual harassment in the period
October 2016 and March 2017 which is broken down into specific allegations on 25 October
B 2016 and 15 December 2016. The Claimant states that these episodes of sexual harassment
were because she was a Polish woman. She avers that she reached this conclusion because “no
complaints against his unwanted behaviour were made by British people (males or females)”.
Assuming that she gives evidence that Mr Budgen sexually harassed her and that she is in a
C position to lead evidence that no British male or female complained of being harassed by Mr
Budgen it would then be for the Claimant, if she can satisfy the Tribunal that the behaviour in
question occurred, to persuade the Tribunal that this evidence justified the inference of
discrimination. The Respondent would of course be entitled to submit that no inference could
D be drawn. It would be for the Tribunal to assess the cogency of the evidence after hearing the
evidence and parties’ submissions.

E 27. The Claimant gives details of another episode on 21 April 2017. The facts are set out
and the person involved is named. The Claimant avers that she believed that the treatment of
which she complained was “because I am a woman”. She supports this inference on the basis
of evidence from other team members that “he would not dare to pick on any males”.

F

28. The Claimant sets out a series of complaints on 11 November 2016, 4 May 2017, 15
September 2017 and 8 December 2017. She explains that she considered these episodes were
G discriminatory because “other females (British, straight) from my team state that they have
never been harassed by Michael”. She avers that she believes it was because she was “Polish
and/or gay”. She alleges that Michael Carnachan referred to people of her nationality as
H “bloody Poles”. Again, it is evident that the events complained of may be liable to challenge or
explained in other ways. But ex facie the Claimant has complied with the terms of the Order

A nor are the grounds she proposes to rely on in support of her claims of discriminatory behaviour obviously unconnected to her complaints.

B 29. Given the level of detail supplied by the Claimant in the table and Specification it is difficult to see how the Tribunal could have concluded that the claim was inadequately specified. Some of the episodes were said to have occurred because she was a woman, a single characteristic. Some because she was a Pole, a single characteristic. Others are based on the **C** fact she was “Polish and/or gay”. The Tribunal does not discuss the Claimant’s use of this formula. The Tribunal does state that it felt unable to say which protected characteristic the Claimant was relying on because she relied on the formula “Polish and/or gay”. The Tribunal **D** does not indicate whether it was this the phraseology that caused the confusion it referred to.

E 30. The words “and/or” indicate that the Claimant is seeking to advance her case on two footings. She claims that she was discriminated against because she was both Polish and gay. Alternatively, she claims she was discriminated against either because she was Polish or gay. The latter approach complies with the Order. I do not consider that the Tribunal should have **F** dismissed the case because the Claimant advanced a case that was contrary to the Order. The primary case was surplusage. The alternative case was relevant. The Tribunal should have proceeded on the basis that she had identified less favourable treatment and attributed it to two **G** separate protected characteristics namely nationality or sexual preference.

H 31. **Indirect Discrimination** – According to the Specification the claim of indirect discrimination is based on the proposition that weekly contracts were inferior to monthly contracts and that she was on a weekly contract. She avers that she was in an administrative role and that others in administrative roles were British and on monthly contracts. She alleges

A that this less favourable treatment was “because I was Polish”. The Claimant lists the names of
others in administrative roles and avers they were British and on monthly contracts. She states
B that there were seven such roles. Four were held by British persons who had monthly contracts
and three were held by Polish persons who were on weekly contracts. There is a detailed
section responding to the Respondent’s “nationality statistics”. In this section the Claimant
C explains why the way contracts were awarded disproportionately affected Polish people. It is
not appropriate to engage in an evaluation of the probative value of the statistics and figures
when scrutinising the Specification with a view to assessing compliance with the Order. It does
D seem to me however that the material complies with the terms of the Order. I note that in the
relevant section of the table she confines herself to one protected characteristic namely
“race/nationality”.

E 32. **Direct Discrimination** – the Claimant sets out the factual details of various complaints.
In connection with 4 May 2017 she refers to a specific dispute about a memo with Mr Budgen
and in effect complains that Mr Carnachan discriminated against her by not taking her
complaints seriously. She alleged this was because she was “Polish and/or gay”. She refers to
F an incident on 4 September 2017 involving appointing her to be a fire warden without her
agreement. She states this happened “because I am Polish”. There is a lengthy justification
offered of why this was discriminatory. The time to evaluate this is after evidence has been led.
Another incident on 5 and 15 September 2017 is referred to. The Claimant asserts that she
G made certain complaints and asserts that it would have been different if they had come from
“my British managing director” and that she was discriminated against because “I am Polish
or/and gay female”. This formulation of her protected characteristics (or variations of it)
H appears on a number of occasions in her claim of direct discrimination.

A 33. The form of words chosen here differs from the formula used in connection with harassment. The Claimant relies on being “Polish or/and gay female”. There is no difficulty with her reliance on her Polish nationality. But as an alternative to this protected characteristic
B she relies on being a “gay female”. This has the appearance of being a combination of protected characteristics. But it may equally be another way of identifying herself as a lesbian, in which case only one protected characteristic is in view. The Specification does not say “gay and female”.

C 34. **Victimisation** – the Tribunal accepted that this head of claim was sufficiently specified.

D 35. **Summary.** Those complaints that are linked to a single protected characteristic e.g. “I was Polish” obviously satisfy the Order. Those that are based on being “Polish and/or gay”, or “Polish or/and gay” should in my opinion have been accepted by the Tribunal. It does not appear to me that the formulation she has adopted justifies the dismissal of the case. The form of words she has adopted of course also entails an allegation that she was discriminated against
E because she was Polish and gay. This does not comply with the Order (or with the law as explained above). I do not consider however that it would be appropriate to dismiss her claim because she included an irrelevant and additional ground of complaint. The inclusion of a
F superfluous ground does not have the effect of extirpating the lawful grounds.

G 36. The Respondent provided me with a detailed list of the matters that had not been properly specified. I do not propose to go over each one. I will however give examples of why I consider the Respondent’s approach to the Order and Specification does not indicate material non-compliance.
H

A 37. The Respondent complains that the Claimant has alleged that her emails were monitored
but does not give the dates when this happened or who was monitoring her. Whether or not she
B was monitored by the Respondents is of necessity a fact known to the Respondents and which
they must be taken to be aware. It is wholly unrealistic to expect the Claimant to know who
instructed the monitoring or when they did so. If there was no monitoring the Respondents will
be in a position to prove that. Her employment with the Respondents was not lengthy. Of
necessity it occurred in the period of her employment. The terms of the Order must not be
C turned into a rod for the Claimant's back.

D 38. The Respondent submits that she heard Mr Michael Carnachan describing Polish
workers as "bloody Poles" but fails to say when this occurred or whether there were witnesses.
It is true that these details are not supplied in the bullet point list under the heading "Why I
believe I was discriminated against because of my protected characteristics" (Core Bundle p.
E 72) but the allegation is not one by its nature which the Claimant can be expected to date. As
the Specification as a whole shows she takes the position that the work environment was hostile
to those of her nationality. Thus under the Harassment head she names and dates incidents
where Polish workers were treated aggressively (Core Bundle p 65); she dates and names
F witnesses when she was shouted at and where inappropriate language was used (Core Bundle p.
67). The use of the expression "bloody Poles" also appears in connection with the harassment
claim (Core Bundle p. 68). I consider that there is no merit in a "nit picking" approach to the
G Specification or the Order. The document should be looked at broadly.

H 39. The Respondent draws attention to the Claimant's assertion that Mr Michael Carnachan
did not want to hire her. The Respondent complains that no date is given for this. But it is
obvious that the Claimant is basing her claim on an inference from the delay in offering her

A employment. Since the date she was given employment is known to the Respondents there is
no merit in this complaint. The Respondent points out that she was offered employment and
B asks why she can allege that Mr Carnachan did not want to offer her employment if she was
offered employment. There is no merit in this. The Claimant explains why she drew the
inference (Core Bundle p. 72). I accept that her assertions are based on weak inferences and
that the evidence may not support her case but that is not an issue for the Tribunal when it is
examining compliance with the Order. These are points for submission at the end of the case.
C These points have nothing to do with whether the Claimant complied with the Order.

D 40. The Respondent supplies a variety of other examples. Some have more merit than
others. But the task of the Tribunal was to take a step back and assess whether there was
material compliance not absolute compliance. Having regard to the number and complexity of
the heads of claim it is unsurprising that some aspects of the case are not fully specified. I have
no doubt however that looked at broadly the Specification satisfies the relevant standard.
E

F 41. The Tribunal was not asked to decide whether the claim should have been struck out
because the facts averred could not yield the remedies sought (**Madarassy v Nomura**
International plc [2007] ICR 867). If the Claimant is of the opinion that what has been
averred does not provide an adequate basis in law for the remedies sought that will require a
separate application. I acknowledge that there is an intimate connection between the Order and
G the relevancy of the Claimant's case. No doubt one was designed to achieve the other. But I do
not consider that compliance with the Order necessarily means that the Claimant has a relevant
case. That said it seems to me that these cases will rarely be amenable to dismissal on a
H scrutiny of the pleadings. It is evident that the Claimant considers the facts she relies on to be
eloquent of discrimination whereas the Respondents consider that the reverse is true. In that

A situation it will usually be the task of the tribunal to hear the evidence and decide the matter. Although s. 136 of the **Equality Act 2010** places the burden of proof on the claimant, that is not a factor that has any relevance to the appeal. I do not consider that it is appropriate at this stage
B to examine the Specification in minute detail. The Respondent identified here and there matters in the Specification that lacked dates or supporting detail. But given the nature of tribunal procedure it is neither appropriate or desirable to treat the Specification or the table as if they were written pleadings. The Respondent also pointed out that the facts from which the
C Claimant inferred discrimination were not sufficiently clear to support her claims. I consider this a matter to be addressed after evidence has been heard. In cases of this nature it may be rare for a discriminatory intention to be explicitly articulated. The inferences the Claimant draws from the facts she offers to prove may be quite different from those drawn by the
D Respondent.

E **Conclusion**

42. I accept that the Claimant's submission that the decision to dismiss the claim was the wrong one to make. Perversity is usually regarded as the appropriate test when a tribunal assesses issues of fact. Here the question is whether the Specification was in material
F compliance with the Order. That is a legal issue. I conclude therefore that the Tribunal erred in law.

G 43. The Claimant also argues in her Notice of Appeal that the Judgement is not **Meek** compliant. I agree. While the Tribunal's conclusions are clearly set out the Tribunal's reasoning is largely obscure. It does not engage directly with the terms of the Specification and
H explain why it was defective. I do not know for example why the Tribunal thought that the Claimant had failed to separate out her protected characteristics. To explain its position it

A would have had to refer to the wording of the Specification and what it thought of the Claimant's use of the "and/or" formula. I am also nonplussed by its conclusion that the Claimant had failed to

B **....identify in any clear way who did what, when, and in whose presence and does not comply with the specific terms of the Order contained within the "harassment" heading of the "unless" Order. (paragraph 75)**

C 44. There is a great deal of information about dates, names and occasions given in the Specification. If the tribunal was to come to the conclusion that there was inadequate specification it would have had to perform a balancing exercise and explain why there had been material non-compliance.

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45. Given the length of time it has taken for this appeal to be resolved I consider that it would be best to make progress with the case. I do not consider I should remit it back and order the Tribunal to re-take the decision. Nor do I consider that I should ask the Tribunal to supply fuller reasoning. I have come to the conclusion that I am in as good a position as the Tribunal to decide whether the relevant test has been met and that I should remit the case back to the Tribunal with a view to progressing the claim.

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Postscript

G 46. I have expressed my sympathy for the Claimant and the difficulties that party litigants encounter when seeking to navigate their way through the thickets of employment law. But my sympathy should also be extended to the Tribunal. The issue with which this appeal is concerned arose on the first day of the hearing on evidence. It could not have been easy to

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A digest the document in the short period of time available. The decision above should not be interpreted as criticism of the Tribunal.

B 47. I will remit the case back to the Tribunal to proceed as accords. It will be open to the parties to make such motions as they see fit as regards further procedure.

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