Neutral Citation Number: [2022] EAT 4

Case No: EA-2020-000047-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 September 2021

Before :

JUDGE KEITH

- -

Between :

MR SOLOMON IJEGEDE **Appellant**

- and -

SIGNATURE SENIOR LIFESTYLE OPERATIONS LIMITED **Respondent**

- -
- -

Ms S Robertson appearing via Free Representation Unit for the **Appellant**
Mr Z Malik (instructed by Moorepay Compliance Ltd) for the **Respondent**

Hearing date: 23rd September 2021

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The appellant argued that the ET had erred in departing from a list of issues previously agreed at an earlier preliminary hearing by both parties, by exceeding its powers under rule 29 of the Employment Tribunals Rules of Procedure. The ET had failed to explain why such variation was permissible, by reference to one of the exceptions as set out in **Serco Ltd v Wells [2016] ICR 768**. The ET was not entitled to vary the list of issues simply because it disagreed with it, without any reference to the earlier preliminary hearing.

The ET did err in misunderstanding the scope of the appellant's claims, in circumstances where an additional document had been filed with the ET's offices at the same time as the claim form and had been referred to in the claim form, but had not been served on the respondent by the ET's office. Had the ET had its attention drawn to that additional document or had gone through an analysis of why the list of issues had been formulated as it had been at the earlier preliminary hearing, that misunderstanding may have been addressed. As it was, the ET erred in narrowing its consideration of the issues and omitted to consider claims, the scope of which had been previously agreed by both parties.

JUDGE KEITH:

1. The appeal is by the claimant (as he then was) against the decision of the Employment Tribunal sitting in East London, comprising Employment Judge Tobin and members, (the "ET") which sat on 9th, 10th and 11th April; and 29th August and 30th August 2019. In a decision promulgated on 6th December 2019, the ET dismissed the appellant's claims of direct race discrimination, harassment and victimisation.

2. I gave oral reasons for my decision to the parties at the end of the hearing, of which this is the approved transcript.

3. The appellant's notice of appeal against the ET's decision, at page [21] of the appellant's bundle ("AB"), was filed on 16th January 2020 and was initially refused on the papers under rule 3(7) of the Employment Appeal Tribunal Rules 1993 by Linden J on 5th May 2020. His decision is at pages [68] to [69] AB. The appellant renewed his application orally at a rule 3(10) hearing, following which Bourne J allowed amended grounds 1, 2 and 3 as drafted by Ms Robertson, who also appeared before me, to proceed. His decision and reasons for allowing the grounds to proceed, together with directions, are at pages [70] to [73] AB.

The appellant's grounds of appeal

4. The grounds are contained at pages [23] to [24] AB, which I summarise as follows. The ET had exceeded its powers under rule 29 of the Employment Tribunals Rules of Procedure 2013 by departing from a previously agreed list of issues, termed the "Original Issues," dated 11th January 2019. In doing so the ET had failed to explain why the case fell within one of the exceptions as set out in **Serco Ltd v Wells [2016] ICR 768,** despite that list of issues having been

the subject of detailed examination and discussion by two previous Employment Tribunals, in greatest detail by EJ Judge Elgot at the preliminary hearing held on 17th December 2018, with agreed amendments and directions for retyping. The ET was not entitled to take a view different from that of EJ Elgot as to what facts came within the scope of the appellant's claim, without any reference to EJ Elgot's previous case management orders, or without first clarifying whether the parties had covered the issues in their witness statements and/or inviting any amendments to the claim or additional evidence, if necessary.

5. This was particularly important in the context that the appellant was represented by his wife, a lay person, and so remained in the position of a self-represented litigant. The ET ought to have directed itself properly as to the significant issues in dispute, as per the authority of **Mervyn v BW Controls [2020] EWCA Civ 393**. In failing to do so, the ET had erred in excluding consideration of two important issues and facts which would inform the second issue. The first issue comprised the allegations of bullying, said to have taken place on 11th and 14th March 2018, included at paragraph [10(v)] of the Original Issues. The second, listed as issue [2G] by the ET in its decision, was an allegation of being scapegoated and being singled out for disciplinary action in relation to procedural errors in the medication regime of a patient, "JG", where others had committed the same error and not been disciplined. In relation to the second issue, the ET had erred in focussing on whether there was a *prima facie* disciplinary case that the appellant needed to answer, rather than whether the appellant had been singled out for disciplinary action. The ET had failed to consider white comparators, who had not been disciplined in respect of JG or failures in the medication regime for other patients, as identified in the Original Issues.

6. The ET had impermissibly limited its findings, which would have otherwise informed an analysis of differential treatment, to paragraphs [50] and [62] to [64]. The ET had failed to consider

the following facts (I abbreviate the names of the individual employees because it is unnecessary for me to name them in full):

(i) No disciplinary action had been taken against a colleague, "IR" in relation to JG's medication issues.

(ii) No disciplinary action had been taken against "VH" in relation to JG's medication issues.

(iii) No disciplinary action had been taken against other white employees, despite a statement that showed medication and procedural failures in relation to JG had been raised by a colleague, "IT", to a senior member of the management team.

(iv) There was oral evidence from a witness, "J", that all staff had failed to carry out weekly spot checks in respect of a patient, "JB".

(v) There was evidence from an employee, "S", who acknowledged in oral evidence that "GB", a patient, had not been self-medicating.

(vi) The appellant had recorded non-compliance with medication regimes in a risk assessment and care plan.

(vii) The appellant had escalated the issue of non-compliance to a member of the respondent's senior management team.

7. All were important facts which the ET ought to have considered, crucially, when the answering the question of why the appellant had been the subject of disciplinary investigation, while white comparators had not.

The respondent's answer

8. The summary of the respondent's answer, a copy of which was at pages [25] to [27] AB and on which I will expand on which I will expand when discussing Mr Malik's skeleton argument and oral submissions, is that the ET did not exceed its powers under rule 29 or depart from recognised best practice as per **Mervyn.** Case management discussions are not a final statement of the scope of a claim and the Original Issues, following the preliminary hearing before EJ Elgot, had raised new complaints that were not included within the claim form. Moreover, the appellant had also sought to introduce further complaints at the ET hearing, entitling the ET to consider what issues were before it.

9. The allegations of bullying on 11th and 14th March 2018, had never been pleaded, either within the claim form or the grievance document.

10. The ET had not failed to consider the appellant's claim to have been scapegoated. The Original Issues had recorded the appellant's principal case as being that he was not at fault, or alternatively argued that he was being victimised because he had raised a complaint about a manager. In these circumstances, the ET was entitled to exclude consideration of previously identified comparators in an earlier version of a list of issues, to which the appellant had agreed at the ET hearing.

11. Finally, the respondent pointed out that it had stayed disciplinary action against the appellant pending the outcome of the ET proceedings; two other members of staff were to be disciplined; and between eight to nine staff would be removed from administering medication.

12. On exchange of skeleton arguments before this Tribunal, one important new issue was identified. It appears that the appellant had, when presenting his claim form, also submitted to the ET at the same time a document entitled "grievance numbers 1 and 2", a copy of which was at pages [41] to [49] AB. The appellant also stated in box [8.2] of the claim form (page [34] AB) that:

> "My grievance document is too large to upload and therefore I have sent it via email to eastlondon@hmcts.gsi.gov.uk"

13. On behalf of the respondent, Mr Malik confirmed while the grievance document may have been sent to the ET (on which he could not comment), it had never been served on the respondent. I accept the respondent's position, while also accepting the appellant's contention that the grievance document was sent to the ET, as claimed. The appellant's position is consistent with emails at pages [81] to [83] AB in the period 30th May to 6th June 2018 between the appellant's wife and the ET 's administration office. On 30th May 2018, the appellant's wife referred to submitting an additional grievance document, by reference to the appellant's claim, entitled: "Grievance 13.3.18 pdf." Following this, she sent a chasing email to the ET, asking for the grievance document to be forwarded to the team dealing with the claim form. She received a response from the ET and resent the grievance document.

14. The appellant's concern is that it is far from clear whether the ET had proper regard to the grievance document, which included, at the end, a general assertion that the appellant had been singled out and picked on.

15. I set out below the gist of both parties' skeleton arguments and oral submissions to me.

The appellant's submissions

16. By departing from the Original Issues, the ET had excluded consideration of the bullying allegations. In relation to the ET's failure to consider the allegations of scapegoating, the grievance document had referred to the appellant being singled out, which EJ Elgot had considered referred to scapegoating. If there were any challenge that the grievance document did not constitute part of the claim form, a non-technical and liberal approach should be applied (see: **Birmingham City Council v Adams [2019] ICR 531** and **The Trustees of the William Jones's Schools Foundation v Parry [2016] ICR 1140**). The grievance document had been expressly referred to and had been unarguably incorporated and included within the complaints within the claim form. The respondent's representatives in the preliminary hearings before the ET had not raised any issue with the status of the grievance document or whether it impermissibly expanded the scope of the claims.

17. The Original Issues had been the subject of discussions at preliminary hearings before two EJs, as well as the respondent's representative before EJ Elgot, Mr Collier. The respondent's representatives had then sent the Original Issues to the ET, on the basis that they were agreed by the parties.

18. Ms Robertson also referred me to EJ Elgot's handwritten notes of the preliminary hearing, from which it was clear that she had considered and amended the draft list of issues, and which had specifically included the names of the white comparators, IR, IT and IG (page [87] AB). The only elements of the Original Issues that had not been initially agreed, Ms Robertson pointed out, were in relation to complaints of victimisation at paragraphs [9] and [10], page [100] AB, which were separate from the claims of discrimination. In any event, this late drafting issue was resolved and

agreed by the parties and the respondent's legal representative then forwarded the Original Issues to the ET as agreed (page [95] AB). It was not open to the respondent to resile from those previous orders, unless the test in **Serco Ltd,** as to the operation of rule 29, was satisfied.

19. At the ET hearing, the respondent had not stated that the grievance document did not form part of the claim form, which would be the basis of excluding the actual comparators named and the claim of scapegoating. Had the ET been prompted by the respondent's legal representative to check the ET's correspondence file, the ET would have seen the relevant correspondence, and without wishing to personalise matters or criticise Mr Malik in any way (who had not appeared below), the respondent's silence before the ET could be seen as opportunistic. It was readily apparent that the ET had, in describing the pleadings at paragraphs [4] and [5], misunderstood the basis of the claims. The ET's misunderstanding infected and undermined any suggestion of consent by the appellant at the ET hearing to the issues being narrowed, particularly where, as here, the appellant's representative was not legally qualified. The Original Issues agreed with EJ Elgot reflected the claims and provided the detail of the allegation of being "singled out". Had the status of the grievance document been the subject of any debate or discussion at the ET hearing, then the email correspondence with the ET would have been apparent and it was highly likely that any application to amend the claim, should it have been regarded as necessary, would have been granted.

20. Developing her point on procedural error, Mr Robertson submitted that **Serco Ltd** and **Mervyn** were consistent with the proposition that where the scope of issues had been the subject of Tribunal orders, there needed to be a variation of those orders to depart from them, which in turn required a material change in circumstances; or that the original orders had been based on a material omission or a mis-statement; or some other substantial reason for necessitating variation. It was not permissible for a second ET to vary an order simply because it disagreed with the order.

21. The allegations of bullying on 11th and 14th March 2018 had been included in the Original Issues as items [10(iv)] and [11(ix)] as victimisation and direct discrimination, and the respondent had even included a response in the grounds of resistance.

22. In addition, the ET had failed to provide adequate reasons and findings in relation to the allegation of scapegoating based on the disciplinary action of 2nd March 2018. The ET had failed to consider that no disciplinary action had been taken against IR, VH or IT and there was further evidence not only in relation to one patient, JG, but the other two patients referred to.

23. In oral submissions, Ms Robertson emphasised the deficiency of the ET's reasoning on liability, which was limited to paragraphs [50] and [64], which excluded consideration of the treatment of others as well as the bullying allegations. In relation to the procedural unfairness complaint, paragraphs [4] and [5] of the ET's decision had made no reference at all to EJ Elgot's orders and the fact that the issues had already been identified and agreed. The suggestion that the previous list was removed by consent was a misunderstanding of the appellant's wife's position in circumstances where she was not legally qualified.

24. Whilst the ET's description of the claim identified in paragraph [2G] purported to set out one of the list of issues in relation to the disciplinary proceedings, it omitted the identified comparators at page [97] AB. Instead, the ET criticised the appellant for attempting to raise issues of comparison at paragraph [62], describing them as "premature". Given the amount of documentation and the detail that the appellant had provided, it would be unrealistic to think that the appellant's wife had genuinely intended to give up an important part of his claim, namely the identified white comparators. There was no suggestion by the respondent at the time that these comparators had been improperly pleaded. No direct comparators were mentioned at paragraph [64] and in essence the ET had proceeded on the wrong basis in identifying the claims.

25. It was also not clear from paragraph [11] of **Mervyn** that the issues in that case had formed part of the orders, whereas in contrast, it was clear here that the identification of the list of issues, albeit not finalised in respect of the claim of victimisation, did form part of the orders. Therefore, the **Serco Ltd** principles applied and, whilst lists of issues were a useful case management tool, it was also important, not only from a practical perspective of finality, but also fairness, that lists of issues should not be departed from in the way that they had been in this case.

26. In relation to the other grounds of appeal, the ET had failed to make findings in respect of two other patients and had also erred in considered whether the appellant had a *prima facie* disciplinary case to answer, rather than whether there was differential treatment of the appellant's colleagues. Limiting an inquiry to whether there was a *prima facie* case to answer ignored the fact that the appellant worked within a regulated regime where most, if not all, infringements in dispensing medication merited investigation. The question was not whether the appellant ought to have been investigated, but whether by not investigating and subsequently subjecting his colleagues to a formal disciplinary process, the process of the investigation was a discriminatory one in the appellant's particular case. By failing to explore the wider allegations, the ET had missed the opportunity to shed light on the reasons for the investigation of the appellant when all the evidence, particularly considering the agreed list of evidence, had been before the ET, but had not been addressed.

The respondent's submissions

27. Whilst the respondent had sympathy for the appellant in respect of the grievance document, the question of whether the ET had failed to consider this document appeared to have arisen in the context of exchange of the skeleton arguments for the appeal to this Tribunal. Regrettably, the ET had not explained how it had dealt with the document.

28. Nevertheless, the ET was not only entitled to check that the list of issues reflected the full scope of the claims, but it was good practice to do so – see **Mervyn,** which remained good law.

29. Turning to some of the specific allegations, the allegations of bullying of 11th and 14th March 2018 had never been included either in the claim form or the grievance document and Original Issues had never been finalised. It was still the subject of further amendments and further particulars in respect of the complaint of victimisation. The ET had acted within the best practice set out in **Mervyn** and, even to the extent that the respondent had dealt with some of the additional allegations in the ET3 which had not been included in the ET1, this simply reflected the standard practice of pleading a wide context and background in the defence.

30. In respect of the disciplinary action in paragraph [2G] of the ET's decision, the respondent accepted that by the time of the preliminary hearing before EJ Elgot, the comparators had been named. However, prior to that hearing, the claims in the ET1 had been either that the appellant denied the allegations or disputed his blameworthiness or complained of being victimised because of complaining about a manager. The appellant's grievance document did not disclose any discernible complaint and so the ET had been entitled to consider hypothetical comparators, at paragraph [64] of its decision.

31. The appellant's circumstances were unique, in that only he had made repeated and avoidable errors, without learning from his previous mistakes. It did not matter that other colleagues had not had disciplinary action taken against them, because he alone had a history of repeated medication errors.

32. In oral submissions, Mr Malik took me through the various passages of the ET1, the grievance document and the ET's decision. Whilst I do not recite each of the comparisons in full, the key point

is that was a variety of claims, some of which were in the grievance document and which the ET had dealt with in its decision but had not been in the claim form. There were others referred to in the grievance document but not in the ET's decision. The ET had resolved the scope of the claims by identifying and agreeing with the parties at the hearing what issues it was being asked to consider.

33. What the ET did, as was best practice, was to focus on the essence of the claim, which was a fractious relationship between the appellant and FS, a colleague. Mr Malik accepted it was unclear whether the grievance had been accepted as part of the ET1. He could not provide confirmation as none of the respondent's legal representatives who appeared below remained employed by the respondent's legal representatives. However, even if the grievance document did form part of the ET1, the allegations were too generalised and were insufficiently precise (see the authority of **Chandhok v Tirkey [2015] IRLR 195**). For example, in relation to the allegation of harassment (issue [3A] in the ET's decision) the ET had recorded at internal page [3], in a footnote, that the ET had attempted to understand the specific details of the allegations, but none were forthcoming.

34. Similarly, the appellant's allegation of being singled out, which was included in the grievance document at page [49] AB, did not provide specific details. Whilst EJ Elgot had ascertained those further details subsequently, they had not been properly provided in the claim form and consequently not responded to in the response. They could not properly be regarded as part of the pleadings.

35. Noting the cases of **Chandhok** and **C v D UKEAT/0132/19 (19 September 2020, unreported)**, an ET1 should not be the same as a witness statement and the lack of clarity in an ET1 risked wasting valuable time. Indeed, here, there had been two preliminary hearings, neither of which had ultimately resolved with finality what the issues were before the final ET hearing. The Original Issues did not amount to an order (see **Parekh v London Borough of Brent [2012] EWCA Civ 1630**

at paragraph [21]) but were a useful case management summary and where the issues had not been finally agreed, and indeed the appellant appeared to be raising new issues, the ET was unarguably entitled to check its understanding of the issues and would have been criticised for not doing so.

Discussion and conclusions

36. I turn now to the discussions and conclusions. Whilst its reasons were detailed and clearly structured, the heart of the appellant's challenge is the ET's misunderstanding of the scope and nature of his claims. The misunderstanding is laid out at paragraphs [4] and [5] of the decision:

> **"4. The parties had prepared an 'agreed list of issues' at the outset of the hearing. The Employment Judge went through the list of issues with the parties at the commencement of the hearing. This was in order to clarify the matters to be determined by the Employment Tribunal and was in accordance with the overriding objective.**
>
> **5. The parties' agreed list of issues included background information and commentary which were removed by consent. The document also included apparent claims that had not be raised in the Claim Form. The claimant referred to further identified 'Detriments suffered by Claimant'. Mrs Rogers [the appellant's wife] clarified these allegations as being contained in a document in the hearing bundle at page 146-156 which Mrs Rogers said summarised the claimant's complaint. This is the claimant's 'Grievance No.1' and 'Grievance No.2' summary and was handed to the respondent at the grievance hearing on 13 March 2018. The claimant's representative identified these further complaints, which the claimant contended amounted to less favourable treatment on the grounds of his race."**

37. As Mr Malik candidly accepts, it is far from clear that the ET accepted that the grievance document was part of the claim form, as it is now clear that the appellant was intending, when the contemporaneous emails, sent at the same time as the claim form, are read. I have no reason to doubt Mr Malik's submission that the respondent had not received a copy of the grievance document as filed by the appellant, together with his claim form, which the ET failed to send to the respondent,

with the result that the respondent failed to deal with the allegations in the grievance document, in its response.

38. Where, as here, the grievance document was submitted (or at least intended to be submitted) as part of the claim form, the extent to which the Original Issues went beyond the issues in the claim form went to the heart of the ET's identification of the issues at the substantive ET hearing, and whether the parties had given informed consent to the withdrawal of any of the claims. What is clear is that the allegation of being "singled out" was included in the grievance document and the appellant's intended claim form, at page [47] AB.

39. Moreover, the allegation of being singled out was specifically cited in the Original Issues at page [97] AB, paragraph [B], which named IR, IT and IG, and was also discussed at the preliminary hearing with EJ Elgot, as referred to in her handwritten notes of the hearing at pages [87] to [88] AB. I accept that EJ Elgot did no more than expected as part of usual case management. This was to identify the particulars and actual comparators in relation to a generalised allegation.

40. Instead of addressing those actual comparators which had been agreed by the parties with EJ Elgot, the ET instead proceeded on the basis of a hypothetical comparator, as recorded at paragraph [64] of its reasons. This inevitably influenced its analysis of why the appellant had been the subject of a disciplinary process. Moreover, the ET further limited its consideration of that question to being one of whether there was *prima facie* evidence which the appellant needed to answer, as opposed to the wider evidence that was identified within Original Issues of the alleged infringements of medication regimes by other employees.

41. Turning to the grounds of appeal, in relation to the first procedural ground, I accept the submission that there is no inconsistency between the authorities of **Serco** and **Melvyn**. **Serco** focuses on the question of variation of orders and rule 29, whilst **Mervyn** focuses on good practice

but without specifically identifying whether the issues were, in that case, set out in the orders. When properly read, **Serco** in my view does not interpret rule 29 as imposing a straitjacket, rather it subjects any variation of orders to important qualifications, namely when variations are necessary and in the interests of justice and not simply because an EJ or ET disagrees with the earlier orders.

42. However, even if I am incorrect and there is a broader case management power beyond and unconnected with rule 29, in my view it matters not. In this case, the ET fundamentally misunderstood how the claim had originally been framed and then later identified in preliminary hearings over time. In fairness to the ET, they may not have been addressed on the genesis of the grievance document and how Original Issues had previously been identified and agreed. In particular, it is far from clear, and indeed has only been identified in the context of the exchange of skeleton arguments; that the grievance document was submitted at the same time as the claim form; that the claim form cross-refers to the grievance document; and the appellant's wife had made every attempt to ensure that the ET had received and would properly serve the document.

43. The ET did not adequately explain, in describing the issues at paragraph [5], whether it regarded the grievance document as part of the claim form. EJ Elgot had resolved any lack of clarity in the appellant's generalised claim that he had been singled out, by identifying the actual comparators and the alleged reason for his treatment. The ET's subsequent description of these details as merely background information, was not adequately explained or reasoned, setting aside the correctness of its further reason that the allegation had not been included in the claim form. I am also not satisfied that in agreeing to the narrower issues at the hearing before the ET, the appellant's wife, who is not legally qualified, would have appreciated and was giving informed consent, on the appellant's behalf, to abandoning some of his claims. Had the ET considered, or had its attention drawn to rule 29, it may well have focussed on the two previous preliminary hearings; the context of the Original Issues; and whether the claim form (which cross-referred to the grievance document) comprised the full

scope of the claims. A more formal analysis under rule 29 as to why the orders merited variation might have uncovered the ET's misunderstanding of the claims. I make these comments, while recognising that ETs frequently face lists of issues that vary over time, and there is a real need to achieve finality in the issues.

44. The ET also omitted from its consideration the bullying allegations of events on 11th and 14th October 2018, which the appellant claimed amounted to harassment. For the same reasons that the ET erred in excluding consideration of the allegations of being singled out, I conclude that the ET erred in excluding these allegations, when they had been agreed in the Original Issues.

45. For all these reasons, I conclude that the ET's decision is unsafe and cannot stand. I gave consideration as to whether it would be safe to preserve any of the ET's findings. I conclude that it would not, as there is the practical difficulty of the extent to which the allegations cross-over with one another and therefore the ease with which any findings which underlie a particular issue can be separated from others. While not preserving any findings, the parties may rely on any evidence given before the ET, to the extent that the record of such evidence is undisputed, particularly as there is a detailed record of the evidence (pages [75] to [80] AB).

46. Whilst I do not cast into any doubt the ET's professionalism, bearing in mind that it has already had to consider the evidence and make nuanced findings, its members would inevitably be hampered by having to consider those findings afresh. I conclude that it would therefore be appropriate that the matter be remitted to a fresh ET other than the previous panel, albeit there is no reason it cannot be heard at East London Employment Tribunal.