Neutral Citation Number: [2025] EAT 59

Case No: EA-2023-001092-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 April 2025

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

Paul Thompson

Appellant

- and -

Devon and Somerset Fire and Rescue Service

Respondent

- -
- -

Julian Allsop (instructed through direct public access) for the **Appellant**
Spencer Keen (instructed by Plymouth City Council) for the **Respondent**

Hearing date: 1 April 2025

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JUDGMENT

SUMMARY

Practice and Procedure

The Employment Judge erred in refusing an application to amend.

HIS HONOUR JUDGE JAMES TAYLER

The issue in this appeal

1. This appeal raises the all too familiar issue of the proper management of a case in which the claim form was drafted without the assistance of a lawyer and lacks the clarity and particularity thought necessary to bring the claim to a fair hearing.

2. In an ideal world all parties in the Employment Tribunal would have competent legal representation and all pleadings would be succinct and clear, setting out the factual and legal issues impeccably. That is not the world within which the Employment Tribunal operates. Many parties cannot afford legal representation and are unable to obtain *pro bono* assistance so have to plead their claims as best they can. Litigants in person are not lawyers. Repeated requests to plead a claim again will not make them into lawyers. A litigant in person can be expected to explain their story and the complaint(s) that they want the Employment Tribunal to adjudicate but not with the clarity of a good lawyer. Even in a claim of a litigant in person the complaints are limited to those in the claim form, but they must be read having regard to the challenges faced by litigants in person in pleading claims. As Langstaff J stated in **Chandhok v Tirkey** [2015] I.C.R. 527 at paragraph 17:

> 17 I readily accept that **tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication**. They were **not at the outset designed to be populated by lawyers**, and the fact that law now features so prominently before employment tribunals does not mean that those origins should be dismissed as of little value. **Care must be taken to avoid such undue formalism as prevents a tribunal getting to grips with those issues which really divide the parties**. However, all that said, **the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence.** The ET1and ET3have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their Case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

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

3. Even allowing the latitude that is appropriate for litigants in person, the complaints are to be found in the claim form rather than in other documents. A list of issues is often a helpful case management tool, but it cannot usurp the functions of the claim form and response. As Judge Serota QC stated in **Remploy Ltd v Abbott** UKEAT/0405/14/DM:

> 79. Lists of issues are valuable case management tools widely used in Employment Tribunals. However, even when a list of issues is approved by the Employment Tribunal, it is not an order of the Employment Tribunal nor a pleading.

The judgment appealed

4. This is an appeal against a decision of Employment Judge N J Roper after a video hearing conducted on 28 July 2023, refusing the claimant permission to amend his claim form. The decision was sent to the parties on 14 August 2023.

The outline facts

5. The claimant was employed by the respondent as a Fire Fighter from 21 January 2001. An allegation was made against the claimant by a female firefighter about his conduct at a training academy which resulted in disciplinary proceedings. The claimant commenced long-term sick leave due to disability related ill health on 2 July 2021. The claimant was invited to a disciplinary hearing on 19 January 2022. The respondent sent the outcome to the claimant on 18 February 2022. The claimant was given a final written warning for 24 months, demotion, and mandatory redeployment to a non-instructor role for a period of not less than 60 months.

The procedural history

6. The claimant submitted a claim form that was received by the Employment Tribunal on 9

May 2022. The claimant attached a summary produced by his trade union representative. The summary was discursive and did not clearly set out the legal complaints. The claimant's trade union representative could not be expected to plead the claim like a lawyer. It would be a retrograde step to require that parties must plead their cases to the standard expected of a lawyer, particularly as legal aid is not available in the Employment Tribunal.

7. While the pleading was discursive and there was a lack of clarity as to the legal complaints, in broad terms the claimant's core case was that he had been subject to disability and sex discrimination in the manner in which the disciplinary proceedings had been dealt with. The claimant contended that the respondent had failed to take proper account of his disability in conducting the disciplinary proceedings and in reducing his sick pay to half-pay and that he had been treated less favourably than how he would have been treated had he been a woman.

8. The claim form was considered on receipt by Employment Judge Livesey who, on 23 September 2022, ordered that the claimant provide additional information stating, in broad terms, the date of each event, the person(s) responsible, what was done or said and any person who was treated differently. I would urge some caution in making such orders before a Preliminary Hearing for Case Management because they can send the case in the direction of contentious and ever more complex particularisation and contested applications to amend. A person who was unable to plead the case to the desired standard may not be well placed to do any better on a second attempt, particularly if there has been no opportunity for a discussion about what is required, explained in layperson's terms.

9. In response to the order, the claimant provided a table on 14 October 2022. The table set out the date, the person asserted to be responsible, the manner in which the claimant asserted that the respondent had dealt improperly with the disciplinary proceedings, and a comparator or that a hypothetical comparator was relied on. I cannot see any significant respect in which the claimant had failed to do what he had been directed to do. I think it likely that the claimant had some legal assistance in putting together the table.

10. A Preliminary Hearing for Case Management was fixed before Employment Judge Cadney for 9 February 2023. On 8 February 2023, the claimant submitted an Agenda and a draft List of Issues.

By this stage the claimant was represented by Kerry Gardiner, instructed through direct access. The proceedings took an all too familiar path. The respondent disputed the table and proposed list of issues and asserted that an amendment was required. The respondent complained that some of the matters that had been added post-dated the claim form. EJ Cadney directed a further Preliminary Hearing to consider an application to amend and directed:

> No later than 2nd March 2023 the claimant shall notify the respondent and tribunal which of his claims (by reference to the draft List of Issues and/or Schedules) he seeks permission to amend to rely on whether because they relate to events which postdate the ET1 and/or do not derive from claims set out in the ET1.

11. It is to be noted that the claimant was directed to make the application to amend "by reference to the draft List of Issues and/or Schedules". On 2 March 2023, the claimant sent an email stating that he would not be pursuing some of the allegations in the list of issues and suggesting some amendments to the list of issues, rather than stating which items in the list of issues would require amendment of the claim form. On 16 March 2023, the respondent sent an email to the claimant asserting that he had failed to comply with the order of EJ Cadney. By email dated 23 March 2023, the claimant asserted that he had complied and attached an amended list of issues.

12. On 31 March 2023, the claimant issued a second claim, in part to deal with the assertion that he had sought to add complaints to the first claim that post-dated the submission of the first claim form.

13. A further Preliminary Hearing for Case Management took place by video before Employment Judge Goraj on 3 April 2022. The claimant was represented by Mr Allsop acting through direct access and the respondent by Mr Keen, both of whom appeared in this appeal. After a discussion with Counsel, Employment Judge Goraj correctly concluded that any amendment should be to the claim form. Employment Judge Goraj was able to identify some of the complaints that were being asserted by the claimant and permitted amendment in respect of some of them:

> 29. In an effort to take the matter forward, the Tribunal sought to work through the List of Issues with the parties (by cross reference to the particulars of claim and the Schedule) however the Tribunal was only able to make very limited progress in the available time. **The matters which the Tribunal was able to consider/ grant or refuse leave to pursue/amend are documented below**.

> 30. After discussion with the parties, **it was agreed that the most appropriate way going forward was for the claimant to make a formal written application to amend his particulars of claim. It was further agreed that this would be done by way of a formal draft proposed amended particulars of claim contained in a single document which would replace the particulars of claim / List of issues/ Schedule** and which will clearly identify the nature of the claims including the factual and legal basis for both the existing/ claims permitted by the Tribunal (and which will also identify where the claim is currently referred to in the particulars of claim) and also any proposed amendments. The claimant's Counsel confirmed at the hearing that he is instructed by the claimant to prepare such amended pleading/ the associated application on his behalf. The further Preliminary Hearing was also listed on a date on which both Counsel were able to attend in order to provide continuity.
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> 31. It was agreed that matter should be relisted for hearing for one day to ensure that there was sufficient time to adjudicate on any further procedural disputes between the parties as well as determining the further matters identified above/ any further applications from the parties. [emphasis added]

14. Employment Judge Goraj made an order that, so far as is relevant, provided:

> 3. By the 5 May 2023, the claimant shall send to the Tribunal and the respondent:
>
> 3.1. The claimant's proposed amended particulars of claim which shall be contained in a single document and shall also: -
>
> > (a) **Identify (by reference to the relevant paragraph in the particulars of claim which were submitted with the claimant's claim form on 9 May 2022 ("the particulars of claim")) the allegations which the claimant contends are already contained in the particulars of claim** together with **confirmation of the factual and legal basis for such claims** (including dates and the names of any alleged discriminators together with the further particulars required to meet all relevant legal components for each of the claims as required for the purposes of the previously stated claims pursuant to sections13, 15, 20/21 and 26 of the Equality Act 2010 ("the 2010 Act").
> >
> > (b) **Identify any proposed amended claims not previously contained in the particulars of claim (including dates and the names of any alleged discriminators together with (i) the factual and legal particulars required to meet all relevant legal components of the relevant sections of the 2010 Act for any new proposed claims** and **(ii) a separate document explaining why the claimant contends that it would be in the interests of justice (balancing any prejudice and hardship between the parties) to permit any such amendments.**

15. On 5 May 2023, the claimant served his proposed amended particulars of claim and a written submission arguing why it would be in the interests of justice to permit the amendment. The proposed amended claim was pleaded by Mr Allsop. It started with the factual assertions in chronological order as would be expected in a professionally pleaded claim. The document then set out the legal

complaints. The legal provision relied on was in bold text. The alleged conduct was set out. Where the matter had been identified by Employment Judge Goraj there was a footnote to that effect. Complaints which the claimant accepted required amendment were underlined with references to the issue in the list of issues. Where it was asserted that the complaint was within the document attached to the original claim form, a paragraph number was given for a version that was annexed. The date of the alleged conduct and the alleged perpetrator(s) were set out.

16. The parties also took steps to finalise a list of issues.

The hearing before Employment Judge Roper

17. The application to amend was heard by video by Employment Judge Roper on 28 July 2023. Employment Judge Roper had been able to read documents on the Employment Tribunal files for the two claims, but did not gain access to a lengthy bundle that had been prepared by the parties until moments before the hearing commenced.

18. Employment Judge Roper was not best pleased with the state of the proceedings, which he made clear from the outset of the hearing. Employment Judge Roper has provided comments about the hearing, much of which is not in dispute. Employment Judge Roper stated that he was "concerned" and that the case was a "dog's breakfast". He expressed surprise that the claim was being brought because the claimant had admitted some improper conduct with the complainant, although when Mr Allsop pointed out that was an assertion pleaded by the respondent in the response, he backed down from that assertion. Employment Judge Roper said it was necessary to concentrate on the "nub of the case" which he suggested was the claimant's dissatisfaction with the disciplinary sanction. Employment Judge Roper accepted the respondent's assertion that there had been multiple iterations of the claim and expressed his dissatisfaction about the delay this had caused. Employment Judge Roper expressly asked for submissions on whether the proposed amended claim complied with the order of Employment Judge Goraj, although he did not expressly say that submissions on the application to amend must be limited to that point.

The decision

19. Employment Judge Roper properly directed himself as to the law relevant to applications to

amend in the Employment Tribunal. He refused the application:

> 27. **The very significant difficulty which I face with this application is the lack of clarity as to the proposed amendments**. In my judgment **the claimant has not complied with the earlier case management order which was effectively to prepare a single document making it clear, by reference to the first originating application, exactly what claims are proposed to be amended or added by reference to the original ET1 originating application**.
>
> 28. I agree with the respondent's observation that the approach deprecated by the EAT in *Chandhok* is the approach which has been taken by the claimant in this case. **He has treated the original claim as something "to set the ball rolling"** and has expected the Tribunal merely to take the repeatedly redrafted list of issues as a legitimate replacement for the original originating application.
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> 29. **This case has already had allocated to it a disproportionate amount of judicial resource by way of case management.** In short, the claimant was ordered by the tribunal to make his proposed changes in a single document which easily identified the original claim, the amendments sought, and their consequences. In failing to do so **the claimant has placed the onus on both the respondent and the Tribunal to work through the proposed changes laboriously in order to identify exactly what applications are being made. This is against the background of the claimant treating his claim as a movable feast**.
>
> 30. **I therefore refuse the claimant's application to amend** his claim for the following reasons. In the first place **I agree with the respondent that the claimant has failed to meet the terms of the earlier order to include the proposed amendments in a single document showing, by reference to the starting point of the originating application, exactly what amendments are proposed.** Secondly, **for this reason, the application lacks sufficient clarity** in this respect. **I am not able to identify and record the claims that are legitimately before the Tribunal and I am also not able to conduct a proper balancing exercise of the relevant *Selkent* factors, particularly with regard to the relative injustice and hardship for each proposed amendment.**
>
> 31. Against this background in my judgment **the balance of prejudice favours the respondent, and favours refusing the application.** It is not in the interests of justice to allow the amendments as sought. **The claimant is still free to pursue the allegations raised in his first originating application, together with the subsequent claims of discrimination contained in his Second Claim**, and separate case management orders have been made so that both claims can now proceed to hearing. [emphasis added]

The appeal

20. The claimant appeals against the decision on four grounds, asserting that the Employment Tribunal:

20.1. erred in law in concluding that the amended particulars did not comply, or materially comply, with the order of Employment Judge Goraj, or that determination was irrational

20.2. erred in law in treating a failure to comply, or materially comply, with the order of Employment Judge Goraj as determinative of the application

20.3. not inviting oral submissions on the amendment application beyond the question of whether the claimant had complied with the order of Employment Judge Goraj

20.4. that the Employment Judge's comments were such as to give the appearance of bias

The law

21. The law on amendment could scarcely be more familiar. In **Selkent Bus Co Ltd v Moore** [1996] ICR 836 Mummery J held at p843D:

> Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

22. Mummery J set out some factors that will generally be relevant to that balancing exercise: the nature of the amendment, the applicability of time limits and the timing and manner of the application. I noted in **Vaughan v Modality Partnership** [2021] I.C.R. 535:

> 16. The list that Mummery J gave in *Selkent* as examples of factors that may be relevant to an application to amend ("the *Selkent* factors") should not be taken as a checklist to be ticked off to determine the application, but are factors to take into account in conducting the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment. Mummery J specifically stated he was not providing a checklist at p 843F: "What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively."

23. I also warned against allowing annoyance that the matter could have been properly pleaded from the outset taking precedence over conducting the required balancing exercise:

> 28. An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost; but, while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice.

24. I suggested a possible approach that might assist in considering applications to amend in **Chaudhry v Cerberus Security and Monitoring Services Ltd** [2022] EAT 172 at para. 37:

> In case some judges might find a checklist helpful when considering applications to amend a claim form, one could do worse than: 1) identify the amendment or amendments sought, which should be in writing 2) in express terms, balance the injustice and/or hardship of allowing or refusing the amendment or amendments, taking

> account of all the relevant factors, including, to the extent appropriate, those referred to in *Selkent*.

25. Where a number of amendments are sought an all or nothing approach need not be adopted: **Chaudhry**:

> 24. When considering each amendment there are a number of possible decisions:
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> 24.1. the whole application may be allowed
>
> 24.2. the application may be allowed in part
>
> 24.3. the whole application could be refused
>
> 24.4. the party seeking the amendment may be required to set out the proposed amendment in writing and/or clarify the proposed amendment before the application is determined
>
> 25. The options for each proposed amendment are allow, refuse or clarify.

26. As a decision whether to permit an amendment involves the exercise of a judicial discretion, it can only be interfered with if there is an error of law, which could include a decision that is irrational such that it falls outside the generous ambit within which reasonable disagreement is possible.

27. The parties agreed that, when considering whether there has been compliance with an order, the focus should be on whether there has been material compliance, as is the case when considering whether an unless order has been breached.

28. The appellant asserted an appearance of bias through prejudgment. I considered this type of apparent bias in **Werner v University of Southampton** EA-2019-000973:

> 43. The leading authority on the test to be applied in considering whether apparent bias is established is *Porter v Magill* [2002] 2 AC 357, Lord Hope of Craighead at paragraph 103:
>
> > The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased
>
> 44. The fair-minded and informed observer is to be distinguished from the litigants: *Harb v Aziz* [2016] EWCA Civ 55:
>
> > But the litigant is not the fair-minded observer. He lacks the objectivity which is the hallmark of the fair-minded observer. He is far from dispassionate. Litigation is a stressful and expensive business. Most litigants are likely to oppose anything that they perceive might imperil their prospects of success, even if, when viewed objectively, their perception is not well-founded.

45. *Porter v Magill* explains how to assess if apparent bias is made out, but does not define what constitutes bias. In *Serafinn* Lord Wilson assumed, rather than decided, that the quite narrow definition of bias offered by Leggatt LJ in *Bubbles & Wine Ltd v Lusha* [2018] BLR 341, para 17 "Bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits of the case . . ." was correct.

46.The authorities suggest that pre-judgment is also a form of bias. The claimant relied on *Otkritie International Investment Management Ltd v Urumov* [2014] EWCA Civ 1315 in which Longmore LJ stated that:

> It is a basic principle of English law that a judge should not sit to hear a case in which "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that [he] was biased", see *Porter v Magill* [2002] 2 AC357 para 103 per Lord Hope of Craighead. It is an even more fundamental principle that a judge should not try a case if he is actually biased against one of the parties. The concept of bias includes any personal interest in the case or friendship with the participants, but extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have "pre-judged" the case.

47. This type of bias was considered by HHJ Richardson in *RBS v Wilson* (UKEAT/0363/08/CEA 24 June 2009):

> 34. We do not accept Mr Sadiq's submission that the language is indicative of apparent bias. As we shall see, the type of apparent bias which is alleged in this case is the demonstration of a closed mind during the hearing. There is no suggestion that the Tribunal evinced any bias towards the Bank by reason of its identity or by reason of its business as a bank. A Tribunal is expected to keep an open mind while it conducts a hearing and to avoid giving the appearance of a closed mind. But when a Tribunal reaches its conclusions, it is entitled – and indeed maybe bound – to express its findings and reasons in a manner which is critical of one or even both parties. To do so does not of itself demonstrate that a Tribunal evinced a closed mind during the hearing.

48. A judge is not expected to remain completely silent to avoid it appearing that the case has been prejudged: *Arab Monetary Fund v Hashim and Others* [1993] 6 Adm LR 348 (Court of Appeal 28 April 1993), Sir Thomas Bingham MR:

> In some jurisdictions the forensic tradition is that judges sit mute, listening to advocates without interruption, asking no question, voicing no opinion, until they break their silence to give judgment. That is a perfectly respectable tradition, but it is not ours. Practice naturally varies from judge to judge, and obvious differences exist between factual issues at first instance and legal issues on appeal. But on the whole the English tradition sanctions and even encourages a measure of disclosure by the judge of his current thinking. It certainly does not sanction the premature expression of factual conclusions or anything which may prematurely indicate a closed mind. But a judge does not act amiss if, in relation to some feature of a party's case which strikes him as inherently improbable, he indicates the need for unusually compelling evidence to persuade him of the fact. An expression of scepticism is not suggestive of bias unless the judge conveys an unwillingness to

be persuaded of a factual proposition whatever the evidence may be.

49. An employment judge may express preliminary views and may point to weaknesses in a case as a component of active case management: *Hussain v Nottinghamshire Healthcare NHS Trust*, HHJ Eady QC:

> 40. Having due regard to the full context, I am satisfied this is not a case where the ET impermissibly stepped over the line. A court or tribunal must be able to give guidance to parties as to how their case or conduct might be viewed and the risks they might be taking if they continue down a particular path; in certain circumstances, not to do so could itself be considered a failure to try to ensure a level playing field. At the same time, of course, the tribunal must be careful not to reach a conclusion as to whether the case or conduct in issue should in fact be viewed in any particular way before it has had the opportunity to hear from both sides on the point.
>
> 41. The ET in the present case did suggest that the Claimant might focus on whether certain of his claims now had any prospect of success. That was not, however, the statement of a concluded view that those claims did not have any prospect of success, but an urging that the Claimant reflect on his position given the evidence; the ET was not saying it had concluded the claims had no prospect of success but was asking the Claimant - who should have been in a better position to assess the merits of his own claims, given that he would have been more familiar with the further evidence that was to come than the ET was at that stage - to himself reflect on the question. It is right that the ET went on to observe that which was by then apparent to it on the Claimant's own evidence - that it had come apart in cross-examination and by reference to the documentation he had been taken to - but that was an observation made against a background of concerns as to how the Claimant was putting his case - concerns that had been expressed at various stages in the ET proceedings - and as to whether he had understood what he needed to establish (see paragraphs 5, 8, 11 and 12 of the ET's Liability Decision). It was further limited to that which the ET had by then heard and about which it was able to form a provisional view. In context, it was an observation that properly arose out of the ET's attempt to case manage the hearing and no more.

50. Robust language, even if it goes well beyond good judicial practice, does not necessarily demonstrate apparent bias: *Ross v Micro Focus Ltd* UKEAT/0304/09; Burton J:

> 13. Robust language by a tribunal is not of itself objectionable nor of itself founds a case of bias. In the judgment of the Court of Appeal (Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V-C) in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] IRLR 96, the Court stated at paragraph 25 that "the mere fact that a judge, earlier in the same case or in a previous case, had commented adversely upon a party or a witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection". There are examples of cases where intemperate language by an employment tribunal chairman (Kennedy v Commissioner of Police of the Metropolis [19090] TLR 709), the asking by a tribunal member of aggressive questions (Docherty v Strathkelvin D.C. [1994] SLT 1064) and a vituperative exchange between a tribunal chairman and a party's Counsel (Egerton v Rentokill Initial Management Services Ltd EAT/141/98 22 January 1999) have not been adjudged by appellate

> tribunals to found a case of bias. …
>
> However, there is in our judgment a substantial difference between falling below the standard set by appropriate guidelines for professional judging, breach of which would or could amount to discourtesy, and would unnecessarily add to what is already the strain and stress of a court hearing, and evidence of bias. The question is whether such an obvious display, by body language, of approval of what a witness was saying is, notwithstanding the authorities referred to above, sufficient to evidence a closed mind, that is a mind which is made up not, as in Peter Simper, at a stage right at the outset of the hearing, but at least at a stage, though well into the hearing, materially before its conclusion. [emphasis added]

51. It might be thought odd, if a judge has used language that falls below the standard and appropriate guidelines for professional judges, that the judgment could stand. The reason is that justice must be done to both parties. If the reality is that excessively robust language did not, in fact, give rise to an appearance of bias or prevent a fair hearing it would be unjust to the other party should the judgment be set aside despite being sound, notwithstanding intemperate language used by the judge. A party should be able to rely on a judgment and should not be put to the cost of the matter being determined afresh if the original judgment was validly made.

Analysis

Ground 1

29. The Employment Tribunal erred in law in concluding that there had not been material compliance with the order of Employment Judge Goraj in that the decision was not within the range within which there could be reasonable disagreement. The claimant produced the document on time. The document attached the original particulars with paragraph numbers so that claims asserted to have been pleaded originally could be identified. The document set out the complaints, the person said to be responsible and the date. The document identified the complaints it was accepted required amendment.

30. The respondent was clearly dissatisfied with the amended pleading. It appears the Employment Judge envisaged something based on the original document attached to the Claim Form, presumably with additions underlined and any text to be removed struck through, or some similar colour coding. He clearly considered that the original document was something of a “dog’s breakfast”. Amending that document by strike through and underlined new text was only likely to change it into a “dog’s dinner”.

31. The respondent was not required to accept the claimant’s position and consent to the

application to amend, but the task of considering the amendment application was nowhere near as much of a challenge as the respondent asserted, and Employment Judge Roper accepted it to be.

Ground 2

32. The Employment Judge treated what he considered to be a failure to comply with the order of Employment Judge Goraj as determinative against the application to amend. He expressly stated that he was not able to consider the **Selkent** factors and so did not fully consider the balance of justice in allowing or refusing the amendment.

Grounds 3 and 4

33. Because the first two grounds succeeded, it is not necessary to determine grounds 3 and 4. Were it necessary to do so, while I accept that Employment Judge Roper specifically requested submissions on whether there had been compliance with the order of Employment Judge Goraj, I do not consider that he prevented the claimant making submissions in favour of the application to amend the claim. The Employment Judge had also read the skeleton argument produced to support the application to amend. Although Employment Judge Roper used robust language it should be remembered that this was a preliminary hearing rather than a final hearing. Within reason, Employment Judges should test out the claims when undertaking case management as it may encourage settlement by making the parties focus on the likely prospects of success. I do not consider that Employment Judge Roper's comments were such as to create an appearance of bias by pre-judgment.

Disposal

34. The parties did not suggest that there was only one possible answer to the application to amend and did not agree that I should determine the application. Accordingly, the matter must be remitted to the Employment Tribunal. While Employment Judge Roper's comments were not such as to demonstrate an appearance of bias, I consider that they were so robust that it is appropriate that the matter should be remitted to a different Employment Tribunal. A fresh pair of eyes is required.