Appeal No. UKEAT/0508/10/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 27 May 2011
Judgment handed down on 25 January 2012

Before

HIS HONOUR JUDGE SEROTA QC

MR D BLEIMAN

MR T MOTTURE

MR M AMIN — APPELLANT

WINCANTON GROUP LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR J B HEALEY (Representative)
For the Respondent	MISS K LORAINE (of Counsel) Instructed by: Osborne Clarke Solicitors 2 Temple Back East Temple Quay Bristol BS1 6EG

SUMMARY

JURISDICTIONAL POINTS – 2002 Act and pre-action requirements

RACE DISCRIMINATION – Direct

The Employment Tribunal was in error to hold that it had no jurisdiction to entertain a claim that might have been spelled out in the originating application but was not set out in Particulars ordered by the Tribunal.

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Claimant against the decision of the Employment Tribunal at Liverpool (Employment Judge Hewitt with lay members). The Judgment is dated 20 April 2010 and the Reasons are dated 3 August 2010.

2. The Employment Tribunal held that it had no jurisdiction to consider the Claimant's claim of race discrimination in the absence of a grievance having been raised. It awarded the Claimant the sum of £419.25, by reason of unlawful deduction from his wages. The Employment Tribunal did not adjudicate upon a claim that his dismissal itself was discriminatory on racial grounds. The Employment Tribunal took the view that this allegation had not been pleaded, so the Employment Tribunal had no jurisdiction to entertain it.

3. The appeal was referred to a preliminary hearing by HHJ Peter Clark on 27 October 2010 and to a full hearing by Underhill J on 2 February 2011. Underhill J permitted the Claimant to file an amended Notice of Appeal.

Factual background

4. The Claimant is a Muslim of Pakistani origin. He says that he suffers from dyslexia, diabetes, speech disability, learning and communication difficulties.

5. He was employed by the Respondent company which carries on business as hauliers, as a driver. The Claimant joined another haulier, Excel Logistics, in 1999 and his employment transferred to the Respondent by reason of a TUPE transfer of 12 October 2006.

6. The Claimant worked at Lea Green Distribution Centre, near St Helens.

7. The Claimant had a poor disciplinary record, having a warning and subsequently a final written warning (which was upheld on appeal) in relation to an incident that took place on 13 May 2008, when it is said he failed to comply with instructions not to use an unsafe means of coupling.

8. On 9 February 2009 he damaged his trailer but did not report the damage as having been caused by an accident, as he was required to do. Instead, he asserted that the trailer was defective. When the trailer was examined, the damage was found to be more serious than the Claimant had reported. This led to an investigation and a subsequent disciplinary hearing, which led to the Claimant's dismissal. At no time did he raise a grievance in relation to any acts of discrimination suffered by him.

9. The Claimant exercised his right of appeal against his dismissal. For the purpose of his appeal, a document entitled "Grounds of Appeal" was drafted by a friend and former trade union officer, John Healey. In these grounds of appeal the following appears:

> **"3) The circumstances in which the Allegation resulting in the Final Written Warning and those in which the Allegation which led to the Dismissal were made, give rise to the suspicion that Junior Managers were deliberately trying to get Mr Amin into trouble. Mr Amin has indicated that he has felt victimised by the tenacity of the Disciplinary Actions against him and other matters and he believes this to be Racially motivated."**

Shortly thereafter, Mr Healey assisted the Claimant to produce expanded grounds of appeal. This contains the following:

> **"3) The circumstances in which the Allegation resulting in the Final Written Warning and those in which the Allegation which led to the Dismissal were made, give rise to the suspicion that Junior Managers were deliberately trying to get Mr Amin into trouble. Mr Amin is Asian and of a staff of around 300 drivers he has been for a very long time the only Asian driver. In his 9 years of service there have been many recruitment initiatives which have seen the driving staff double in that 9 years. No other Asian drivers have been recruited in that 9 years. Following his Dismissal there are now no Asian drivers on the staff at Lea Green Wincanton for Somerfield/Co-Op.**

With the exception of only two or three Black drivers and three Women drivers the staff drivers at Lea Green are all White Males. There would seem to be a cultural imbalance in the recruitment policy at Lea Green and Mr Amin has indicated that he has felt victimised by the tenacity of the Disciplinary Actions against him and other matters and he believes this to be Racially motivated."

The appeal was dismissed.

Procedural chronology

10. The Claimant presented his originating application (ET1) on 22 May 2009. This document was prepared by the Claimant in manuscript. He completed the fifth section "Unfair Dismissal or Constructive Dismissal" by explaining why he thought the dismissal was unfair:

"The incident for wich (sic) I was dismissed and th (sic) previas (sic) one wich (sic) I got a final writen (sic) warnin (sic) for were both set up by management to get me in truble (sic)."

Part of the form that deals with discrimination is part 6 and at 6.2 an applicant is asked to describe the incidents which he believes amount to discrimination, the dates of those incidents and the people involved.

"Indidents (sic) happened betewen (sic) early 2007 and up to my dismisal (sic).

Several transport manigers (sic)/clerics are involved.

I have ben (sic) presherd (sic) in to doing jobs that did not alow (sic) me to take regiler (sic) brakes (sic) wich I need for my diabetes.

I have tricked by manigers (sic) in to doing things wich (sic) they then used to acuse (sic) me of misconduct and disoplind (sic) me and dismissed (sic) me.

Managers have refused me request that thy (sic) have alowed (sic) other driver.

I have been refused holliday (sic) and over time.

I have sick pay taken away.

Racist remarks and jokes have been made."

11. We note that the matters complained of are said to be relevant to complaints of both race and disability discrimination. We also note that although there is a reference to the Claimant being tricked by managers, disciplined and dismissed under the rubric "discrimination", there is

nothing to suggest on what basis the complaints of which the Claimant made were racially motivated.

12. The Respondent lodged its response on 26 June 2009 and made clear (see paragraph 6.1 at page 46) that it regarded the Claimant's claims as not adequately particularised. It therefore requested that the Employment Tribunal list the case for:

> **"[A] Case Management Discussion at which the Tribunal may set down guidelines for the future conduct of the case including, as a preliminary direction, that the Claimant provide further and better particulars regarding his claims of unfair dismissal, race discrimination and disability discrimination [...]"**

13. At paragraph 18 (page 48) one finds:

> **"18. Section 6.2 of the Claimant's ET1 Claim Form does not fully particularise his claims for race nor disability discrimination. The Respondent will therefore request further particulars and will request leave to amend its Response on receipt of the same."**

14. The Respondent then set out the complaints in the ET1, which we have set out above, and at paragraph 20 states:

> **"20. The Claimant's ET1 Claim Form does not set out the allegedly race and/or disability discriminatory nature of the purported treatment which is extracted above [...]"**

The 24 June 2009 Case Management Discussion took place before Employment Judge Robinson. The Claimant was represented by his solicitor, Mr Ashcroft. Mr Ashcroft informed the Employment Tribunal that he had just been instructed and needed some time to formulate the claim of the Claimant properly. The order to which we now turn had been agreed between Mr Ashcroft, acting for the Claimant, and the Respondent's legal advisors. The order was as follows:

> **"2. The claimant is ordered to provide to the Tribunal and to the respondents by no later than 4.00pm on 22 October 2009 by way of additional information or amendment to the Originating Application fully itemised and particularised claim form giving details of each and every allegation, act or admission alleged to amount to race and or disability discrimination and also full details of why the claimant feels that he has been unfairly dismissed and full details of the unlawful deduction of wages claim and holiday pay claim.**
>
> **3. The information must include the following:-**
>
> **3.1 When such acts or omission is alleged to have occurred.**
>
> **3.2 By whom any such act or omission is alleged to have been committed; and**
>
> **3.3 Who, if anybody is alleged to have witnessed such act or omission.**
>
> **3.4 The nature of his alleged relevant disability."**

15. The Further and Better Particulars are dated 22 October 2009 and it has to be said they are somewhat ineptly drafted by the Claimant's solicitor. Particulars of the claim for unfair dismissal make no reference to it having been an act of discrimination. The Particulars of the claim for discrimination equally make no reference to the dismissal itself, as being a matter relied upon as an act of discrimination.

16. The Respondent, on 13 November 2009, served amended grounds of resistance, and under the rubric "race discrimination", the Respondent pleaded:

> **"28. On 29 September 2009, the Claimant was ordered by the Tribunal to provide further and better particulars which fully itemised and particularised details of each and every allegation, act or admission alleged to amount to race discrimination, and also full details of why he feels that he was unfairly dismissed (the "Order"). The Respondent therefore assumes that the Claimant's race discrimination claim does not extend beyond the alleged incidents referred to by the Further and Better Particulars under the heading *"2. The Claim for Discrimination."* If the Claimant should seek to contend that there were other incidents of alleged discrimination, then in the light of the Order, the Respondent will contend that the Claimant should not be permitted rely on any such further allegations."**

17. The Employment Tribunal had before it a letter dated 24 November 2009 from Mr Healey, to the Claimant. Mr Healey was giving advice to the Claimant who apparently felt that he was concerned he might not be able to get his points or meaning across to his solicitor. He was writing the letter for the assistance of the solicitor.

18. The letter contained the following:

> **"1) You do believe you were unfairly dismissed in the straightforward sense of the meaning. This is because you believe that the actions of managers at work amounted to "setting you up" for disciplinary warnings and ultimately dismissal.**
>
> **2) you believe also that the reason you were set up in this way is racially motivated this is detailed at 6.2 of your Tribunal complaint. Essentially under the heading Discrimination you say you were tricked by managers, then accused of misconduct then disciplined and then dismissed - all for a racially motivated reason.**
>
> **3) your ET complaint does detail this and therefore your claim for dismissal for a racially motivated reason was submitted in writing within the time limit. It would also note that you had me present this in your appeal against dismissal.**
>
> **5) the matters which you listed in your application to Tribunal as racist incidents and which I understand you have given further particulars of (which I have not seen.) Apart from those you raised verbally in your grievance one month before dismissal you did not raise these matters during your time in work. They have been included as incidents which you would like to bring out as evidence in a Tribunal Hearing as to the strength of your case that the dismissal was racially motivated.**
>
> **To put it another way – these matters are not themselves intended to be separate and individual claims against the employer rather they are evidence of the way you were treated in the months prior to your dismissal. In my view the fact that you did not raise them as a grievance or within any particular time frame does not stop them being recounted as evidence in a Tribunal."**

19. A further Case Management Discussion took place on 3 February 2010, presided over by Employment Judge Shotter. Again, the Claimant was represented by Mr Ashcroft for the CMD which took place by telephone. The Claimant withdrew his claim for disability discrimination, which was dismissed by the Tribunal, directions were given for disclosure and in relation to the discrimination claim. The point was taken by the Respondent that the Claimant had not issued a grievance in respect of matters set out in his discrimination claim; the Claimant believed he had lodged such a grievance and there was some doubt as to whether or not the claim for unlawful race discrimination would be proceeded with.

20. Further, the Respondent was asserting that the discrimination claims were time-barred. At paragraph 7, a minute of the Case Management Discussion is in these terms:

> **"7. The parties discussed the issue in this case and it was agreed that they were fully pleaded. The unfair dismissal claim will entail a straightforward consideration of the principles as set out in British Home Stores v Burchell 1978 IRLR 379; 1980 ICR 303 and the issues in relation to the unlawful deduction and accrued unpaid holidays were straightforward. However, one**

further issue remained in respect of the respondent's amended response paragraph 40.1 to 40.6, in response to which Mr Ashcroft agreed to confirm whether or not the claimant intended to rely upon those specific allegations, such a confirmation to be sent to the respondent and lodged with the Tribunal on or upon 3 March 2010."

21. The Claimant was directed to confirm with the Employment Tribunal and the Respondent whether or not he intended to proceed with his race discrimination claim. Evidence in chief of each witness would be called at the liability hearing and should be given by the witness reading from a prepared written statement. Directions were given as to service. On 15 February 2010, the Claimant wrote directly to the Employment Tribunal and enclosed a copy of a letter from his solicitors of 11 February 2010 and the letter from Mr Healey, to which we have previously referred, together with the expanded Notice of Appeal in the internal disciplinary proceedings. It was apparently believed by the Claimant that these documents could constitute the appropriate grievance and should be served directly on the Employment Tribunal. There was correspondence between the Claimant's solicitors, John A Behn Twyford and Osborne Clarke for the Respondent, relating to whether or not the Claimant was pursuing his claims for discrimination. In a letter of 9 March 2010, John A Behn Twyford wrote:

"Our client instructs us that it is his firm intention to proceed with his claim for racial discrimination. He would like to make it clear that he seeks compensation for the incidents referred to at paragraphs 2(a) to (e) of the Further and Better Particulars and also contends that his dismissal was discriminatory."

22. On 12 March 2010, Osborne Clarke wrote to the Employment Tribunal enclosing the letter of 9 March 2010 in which it had been contended on behalf of the Claimant that his dismissal itself was discriminatory.

"The Respondent's position is that it is not part of the Claimant's case that his dismissal was discriminatory. He respectfully applied for an order confirming this."

Messrs Osborne Clarke points out that the Claimant had not in his ET1 or Particulars stated whether he intended his claim to include the allegation that the dismissal itself was

discriminatory. The Respondent contended that the allegation, the dismissal was discriminatory, was not part of the Claimant's pleaded case and requested that the Employment Tribunal confirm the same:

> **"6. We would note that, as summarised above, the Respondent has on more than one occasion sought to clarify the scope of the Claimant's race claim and on 13 November the Respondent stated its assumption that the Claimant did not seek to contend the dismissal was discriminatory. In more than 8 months since the Respondent first sought such confirmation, the Claimant at no point stated an intention to plead that his dismissal was discriminatory, until the letter dated 9 March. Indeed, the Claimant's Further and Better Particulars, and the discussion at the CMD on 3 February referred to at 4.7 above, had clearly indicated that this allegation did not form part of the Claim.**
>
> **7. We would also contend that the Claimant should not at the eleventh hour be permitted to amend his claim to encompass the above allegation. To do so would cause detriment to the Respondent, which is in the process of preparing disclosure and witness statements. The disclosure exercise and statements would have to be re-revisited to cover evidence on this allegation."**

23. Messrs John A Behn Twyford wrote to the Employment Tribunal on 22 March 2010. It is made clear that the Claimant intended to pursue his claims for unfair dismissal, discrimination on the grounds of race. The letter then continued:

> **"So far as discrimination in respect of the dismissal is concerned, in describing incidents which amounted to discrimination in his claim form the Claimant stated "Incidents happened between early 2007 and up to my dismissal...I have tricked (sic) by managers into doing things which they then used to accuse me of misconduct and disciplined me and dismised (sic) me." Furthermore in his notice of appeal against his dismissal it was stated "Mr Amin has indicated that he has felt victimised by the tenacity of the disciplinary actions against him and other matters and he believes this to be racially motivated" and "conclusions reached by the dismissing officer – Mr Cowley were arrived at by a prejudicial process."**
>
> **Although it is accepted that the Further and Better Particulars did not make it clear that the Claimant was contending the dismissal was discriminatory, this was confirmed by a letter to the Respondent's representative dated 9th March.**
>
> **We expect that the Respondent will now have the clarification which it requires and will realise that the Claimant contends that the dismissal was discriminatory. The Claimant also contends that little additional work will be required to deal with the allegation that the dismissal was discriminatory, bearing in mind that instructions will no doubt already have been taken on the several other allegations of race discrimination, and that the parties ought to be ready to comply with the requirement to complete disclosure of documents and exchange of statements by 29th March."**

24. On 7 April 2010, Judge Reed directed the Secretary to the Employment Tribunal to write to the parties to say the case would be listed for three days, commencing 12 April 2010 and, if any issue of amendment should arise, it could be addressed at the hearing. The letter asked

whether in the light of that observation, and the Claimant's solicitor's letter of 22 March, it required any further action from the Tribunal. We do not believe there was any response to that letter. The Employment Tribunal in due course held that the allegation that the dismissal was discriminatory on racial grounds had not been pleaded and went on to dismiss all of the claims.

25. As we have said the Notice of Appeal (dated 14 September 2010) was referred by HHJ Peter Clark to a preliminary hearing on 26 October 2010.

26. On 2 February 2011 the Employment Appeal Tribunal presided over by Underhill J, on the basis that it was arguable that the Employment Tribunal was wrong to hold that the question of discriminatory dismissal was not pleaded referred the appeal to a full hearing. The Employment Appeal Tribunal gave permission for an amended Notice of Appeal in which it is asserted that the Claimant had indeed pleaded that his dismissal was on the grounds of his race and that the Employment Tribunal was wrong to find that he had not pleaded the issue.

27. During the course of submissions before us, an issue arose as to whether evidence had been adduced before the Employment Tribunal to support the allegation that the Claimant had been dismissed on discriminatory grounds. Accordingly we gave permission to the parties to send to us the Claimant's witness statement. The Claimant produced the statement but has objected to our taking it into consideration.

The Decision of the Employment Tribunal

28. The Claimant was represented again by his solicitor, Mr Ashcroft.

29. Issues were taken by the Respondent at the outset, that the allegations relating to discrimination were out of time, and that no grievance had been raised in respect of them.

Further, that although in correspondence (we presume a reference to the letter of 22 March 2010) the Claimant asserted that his dismissal was discriminatory, this had not previously been raised. The Claimant sought to argue that the Notice of Appeal itself constituted a grievance.

30. The Employment Tribunal concluded that the specific acts of discrimination (other than dismissal) had been presented out of time, and that it was not just and equitable to extend time. It also concluded that no grievance had been lodged as required by s.32 of the **Employment Act 2008**: and in relation to the claim of race discrimination by way of dismissal it said

> **"Insofar as the allegation that the dismissal itself was a discriminatory act, that had not been pleaded, either in the original claim form or in the Further and Better Particulars."**

Accordingly the Employment Tribunal determined before it heard any evidence that it did not have jurisdiction to determine the claims for race discrimination.

31. The Employment Tribunal went on to consider the question of unfair dismissal by reference to the relevant facts and directed itself correctly as to the law, and referred to s.98 of the **Employment Rights Act 1996**, and the well-known cases of **British Home Stores v Burchell** [1978] IRLR 379 and **Iceland Frozen Foods v Jones** [1982] IRLR 439. The Employment Tribunal, having considered the facts and made its findings, concluded that the dismissal was:

> **"[U]ndoubtedly within the band of responses available to a reasonable employer [...] In arriving at this conclusion, the Tribunal is entirely satisfied that the respondent complied with all three legs of the "Burchell test" [...]"**

Notice of Appeal and submissions

32. The Claimant was represented before us by his friend, the former trade union officer, Mr Healey who had helped him during the Employment Tribunal proceedings. Mr Healey has considerable skill and experience in representing parties before Employment Tribunals and in the appropriate procedure.

33. His case in essence was that the ET1 contained a clear reference to the dismissal having been racially motivated. Accordingly the Employment Tribunal was bound to deal with this issue. While the subsequent Further and Better Particulars and correspondence may have failed to adequately clarify the matter, the claim was pleaded, and as he had submitted should have been dealt with.

34. The Employment Tribunal was wrong to say that it had not been pleaded having regard to the clear words in part 6 of the ET1 "discrimination" where the dismissal is referred to as an incident of discrimination.

35. Mr Healey also drew our attention to the various references and correspondence and the internal appeal documents to which we have mentioned as showing that the Claimant always maintained his dismissal was itself discriminatory.

36. Mr Healey submitted the Claimant was a lay person and dyslexic, and had completed the ET1 himself, so both the Employment Tribunal and the Employment Appeal Tribunal should be sympathetic to his lack of clarity. The Claimant used his own language in the ET1 and paragraphs 5.1 and 6.2 should be read together as saying that he had been dismissed by reason of his race.

37. Mr Healey submitted that the letter of 15 February constituted compliance with the Employment Tribunal's order of 3 February. He also asserted that before the Employment Tribunal, the Claimant's managers were said to be racist and he gave evidence in his internal appeal that his dismissal was on racial grounds; he could not say if such evidence had been led at the Employment Tribunal.

38. He also submitted that the finding by the Employment Tribunal that the Claimant had not pleaded that his dismissal was discriminatory was perverse.

The Respondent's submissions

39. Ms Loraine, for the Respondent, submitted that the dismissal was neither pleaded as being discriminatory in either the ET1 or in the Further and Better Particulars. She submitted that at the Employment Tribunal Case Management Discussion on 24 September, it was conceded by the Claimant's solicitor that this was not clearly pleaded in the ET1 (something we are unable to resolve) and that the Further and Better Particulars would set out the Claimant's case in full. The proper course, she submitted, was for the Claimant to have applied to amend although the Respondent would have objected to the amendment. The Employment Tribunal was, therefore, correct when it decided it had no jurisdiction to entertain the Claimant's complaint that his dismissal was itself discriminatory.

40. Ms Loraine stressed the importance of the absence of the pleading as being a jurisdictional issue. She relied upon the decision of the Court of Appeal in **Ahuja v Inghams** [2002] EWCA Civ 1292 to support her case that if an issue was not pleaded, even if it were the subject of evidence and submission, the Employment Tribunal had no jurisdiction to entertain the claim. It was submitted there was no evidence before the Employment Tribunal to support

the allegation that dismissal was, itself, an act of discrimination; even at the date of the hearing the Respondent did not know what the Claimant's case was. It was apparent that the case was not set out in the Further and Better Particulars, which required each allegation of discrimination to be fully itemised and particularised. There were no findings in relation to allegations of discrimination by the Employment Tribunal, and it was submitted that the Respondent's witnesses were not cross-examined as to the allegedly discriminatory nature of the dismissal.

41. The fact that no case was put as to the discriminatory nature of the dismissal in evidence showed clearly that the issue was not before the Employment Tribunal.

42. The grounds of appeal did not meet the high standard required of a perversity appeal.

The law

43. In **Chapman v Simon** [1994] IRLR 124 paragraph 42 Gibson LJ stressed the importance of pleading all allegations that were to be relied upon:

> **"Under s.54 of the 1976 Act, the complainant is entitled to complain to the tribunal that a person has committed an unlawful act of discrimination, but it is the act of which complaint is made and no other that the tribunal must consider and rule upon. If it finds that the complaint is well founded, the remedies which it can give the complainant under s.56 (1) of the 1976 Act are specifically directed to the act to which the complaint relates. If the act of which complaint is made is found to be not proven, it is not for the tribunal to find another act of racial discrimination of which complaint has not been made to give a remedy in respect of that other act."**

The point was taken further in **Ahuja v Inghams** [2002] EWCA Civ 1292. This was an unusual case in which evidence was adduced by the claimant of three allegations of separate incidences of discrimination. The evidence was the subject of cross-examination and submissions, as Sedley LJ observed at paragraph 49:

"Here, as it happened, one allegation was pleaded but not formally proved and two were proved but not pleaded. A lay person may be forgiven for not differentiating between the two things but the law says otherwise"

44. We also refer to the Judgment of Mummery LJ at paragraph 35:

"Chapman v Simon is Court of Appeal authority for the proposition that the jurisdiction of the Employment Tribunal is limited to complaints made to it. Under Section 54 of the 1976 Act the complainant is entitled to complain to the tribunal that a person has committed an act of unlawful discrimination. But it is the act of which complaint is made and no other that the tribunal must consider and rule on. If the act of which complaint is made is found to be not proven, it is not for the tribunal to find another act of racial discrimination of which complaint has not been made and to give a remedy in respect of that act. The tribunal should confine itself to the acts of racial discrimination specified in the originating application, unless it allows the originating application to be amended."

Discussions and conclusions

45. In the light of the assertion by the Claimant, that the issue of the dismissal being discriminatory was raised in evidence at cross examination before the Employment Tribunal, we asked if we might see the Claimant's witness statement, and this was supplied to us by both parties. Although the witness statement refers to the internal appeal, and refers to the complaint of racial abuse and discrimination being raised at the internal appeal hearing, there is no other mention of the dismissal itself, being discriminatory. The Claimant declined to make submissions in relation to his witness statement, on the basis that we should not rely upon a document the Respondent had not chosen to rely upon, and there was no cross-appeal. We had asked to see the statement in order to assist the Claimant, but in the light of his stance we have chosen not to take account of it. In any event we find it difficult to see how the issue was raised in cross examination when the Employment Tribunal had decided the question of jurisdiction against the Claimant *before* it heard any evidence.

46. It is apparent that the ET1 is not the clearest and that little (or indeed no) evidence was advanced in the documents we have seen to show that the dismissal was racially motivated beyond the assertions contained in the ET1, the letter from Mr Healey and the internal appeal

document. It is clear from correspondence that we have cited that the Claimant always intended to raise the issue of the dismissal being discriminatory and it is apparent from the internal appeal documentation, to which we have referred, that he had previously made this assertion (again) without anything by way of evidential support. We refer to the correspondence of 9 March 2010 (page 50), a letter of 22 March 2010 (page 58), the Notice of Appeal and expanded Notice of Appeal relied upon in the internal appeal proceedings, together with the letter from Mr Healey at page 158. Reference to the dismissal having been discriminatory was, however, conspicuously omitted from the Further and Better Particulars which were served in purported compliance with the order that he provide further and better particulars which 'fully itemised and particularised details of each and every allegation, act or admission alleged to amount to race discrimination, and also full details of why he feels that he was unfairly dismissed.'.

47. It is most unfortunate that the Claimant's solicitor failed to address the question at the Case Management Discussion of 3 February 2010, nor did he seek to amend the further and better particulars, and provide the necessary particulars although in the letter of 22 March 2010 it was accepted that the Further and Better Particulars did not make it clear that the Claimant was contending the dismissal was discriminatory.

48. It is equally unfortunate that the Employment Tribunal did not itself suggest that the issue could be determined by the Claimant amending the Further and Better Particulars. It is clearly undesirable that important issues in Employment Tribunal proceedings should be determined by pleading points. It should have been clear to the Employment Tribunal that the Claimant had intended at all times to assert that the dismissal was discriminatory, and it is hard to see what prejudice the Respondent would suffer by reason of any amendment.

49. We are unable to accept that the letter on 15 February was intended to provide compliance with the order of 3 February; it did not purport to do so; it gave none of the required particulars and simply repeated the assertion in the ET1 that the dismissal was discriminatory.

50. We do not consider that the withdrawal of the other discrimination claims was of any relevance. It was noted by the Employment Tribunal that those claims relied upon proof of a grievance having been lodged, whereas in cases of racially motivated unfair dismissal there was no obligation to lodge such a grievance.

51. The function of Particulars is to limit and define issues to be tried, and to inform the other side of the case it has to meet, and avoid surprises. Particulars will limit the generality of a pleading. It was clear that the Claimant wished to pursue his assertion that his dismissal was discriminatory, as revealed by the correspondence and documents to which we have referred. However, despite being put on notice as to the inadequacy of his pleadings and Particulars, at no time did the Claimant's solicitor seek to make an amendment.

52. Failure to plead the matter in the ET1 should not be thought of as simply a technicality; it goes to jurisdiction as the cases we have cited earlier, **Chapman v Simon** and **Ahuja v Inghams**, make clear. It is striking that in **Ahuja v Inghams**, the Employment Tribunal had heard evidence and submissions (apparently without objection) in relation to two unpleaded allegations but the failure to plead those allegations as part of her case was fatal to the jurisdiction of the Employment Tribunal to entertain those complaints. In the present case, in compliance with the order requiring the Claimant to supply, by way of additional information or amendment, the Originating Application, it is most unfortunate, so far as the Claimant is concerned, that although he was legally represented, the Particulars failed to set out any reference to the dismissal being an act of discrimination.

53. It is clear to us, as it was to Underhill J, that although, contrary to the view of the Employment Tribunal, the ET1 did contain a plea that the dismissal was an act of discrimination and accordingly the Employment Tribunal was wrong to find otherwise. As we have already described at paragraphs 6 and at 6:2 of the ET1 when required to describe the incidents which he believed to amount to discrimination the Claimant pleaded that he had been tricked by managers into doing things which they then used to accuse him of misconduct and 'disciplined me and *dismissed* me'.. [our italics].

54. No argument was raised that this allegation should have been treated as abandoned by reason of its absence from the Further and Better Particulars, nor did the Respondent seek an order at the hearing that the claim that the dismissal was discriminatory should be struck out for failure to comply with the order to provide Further and Better Particulars.

55. We have asked ourselves whether the inadequate Further and Better Particulars deprive the Employment Tribunal of jurisdiction to entertain the complaint.

56. Although the point is a short one we have not found it easy to decide. We are not in any way influenced in coming to our conclusion by the Claimant's disability. The Respondent's case is not so much that the Claimant did not plead the case of discriminatory dismissal but that it was not properly particularised in accordance with the order of 24 June 2009.

57. This case can therefore be distinguished from **Chapman v Simon** and **Ahuja v Inghams** in which the pleading itself did not raise the disputed issues. That was a matter going to jurisdiction. In the present case the issue was pleaded but not properly particularised. Failure to provide proper Further and Better Particulars does not go to jurisdiction. The Respondent's

remedy was to seek to strike out the pleading on the basis that there had been a failure to provide the particulars required by the order of 24 June 2009 rather than challenge the jurisdiction of the Employment Tribunal.

58. In those circumstances we consider that the Employment Tribunal fell into error in holding that the claim in respect of the alleged discriminatory dismissal was not pleaded. Accordingly it had jurisdiction to entertain the claim. Therefore, the appeal must be allowed.

59. In light of the nature of the Employment Tribunal's error we consider that the claim relating to the alleged discriminatory dismissal only should go to a hearing before a fresh Tribunal. We do not doubt that the original Employment Tribunal would conscientiously try to approach the case with a fresh mind, were we to remit the case to the same Tribunal. However, the Claimant might reasonably consider that the original Tribunal might not bring a fresh mind to bear, but would be affected by its findings that led it to dismiss the other heads of discrimination ; see **Sinclair Roche & Temperley v Heard** [2004] IRLR 767.

60. Finally we would like to thank both Ms Loraine and Mr Healey for their assistance.