Appeal No. UKEAT/0064/18/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 7 June 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

DR L TARN — APPELLANT

(1) DR N HUGHES
(2) DR G MICKLETHWAITE
(3) DR D MOODLEY
(4) DR A PAL
(5) DR J DeVERTEUIL — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS NICOLA NEWBEGIN (of Counsel) Instructed by: Hempsons Solicitors 100 Wood Street London EC2V 7AN
For the Respondents	MS AMY STROUD (of Counsel) Instructed by: DAS Law North Quay Temple Back Bristol BS1 6FL

SUMMARY

PRACTICE AND PROCEDURE

Employment Tribunal - case management

The Claimant is a GP, who formerly worked in partnership with the Respondents. She is pursuing various claims of sex and pregnancy discrimination, harassment and victimisation before the ET and the parties have agreed a list of issues, identifying 30 separate acts about which the Claimant is making complaint. It is apparent from the list that there will be some overlap in terms of the evidence the ET will need to hear relevant to the different issues. Having listed the case for a six-day Full Merits Hearing, due to commence 1 October 2018, the ET gave directions for its future conduct at a telephone Preliminary Hearing; it ordered the Claimant to select up to ten events for consideration at the October hearing, allowing that she could rely on the other matters identified as background or context, alternatively she could pursue those other matters as separate claims at a later hearing. The Claimant appealed.

Held: *allowing the appeal*

Although the ET had been careful not to strike out any part of the claims, it had failed to have regard to the practical consequences of its Order; specifically, the potential unfairness in requiring the Claimant to elect whether to rely on particular matters, either as background to the ten complaints to be considered in October or as actual claims. In the alternative, and to the extent that the ET was not requiring the Claimant to make such an election, it was not possible to see what benefit would be achieved as a result of its Order in terms of time or cost: the ET would be required to hear the same evidence and would inevitably have to make findings in respect of the whole picture thus created. There was no indication that the ET had considered the practical consequences of the fragmented approach it had adopted or how this could be said to be consistent with the overriding objective in this case; it had failed to have regard to relevant considerations and, on its face, its Order was perverse.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal raises an important question as to the exercise of an Employment Tribunal's case management discretion; specifically, as to its Order that the issues to be determined at a particular hearing should be limited to a sample of allegations of discrimination, when the complainant was seeking to litigate significantly more than that sample.

2. In giving this Judgment, I refer to the parties as the Claimant and Respondents as below. This is the expedited Full Hearing of the Claimant's appeal from a case management decision of the Reading Employment Tribunal (Employment Judge Vowles sitting alone; "the ET"), reached after a telephone Preliminary Hearing on 14 November 2017. Ms Newbegin of counsel appeared then for the Claimant as she does today; the Respondent was represented by a paralegal, but today appears by Ms Stroud of counsel. At the telephone Preliminary Hearing, the ET listed the case for a six-day Full Merits Hearing, due to commence on 1 October 2018 and gave further directions in that regard. It also directed there should be a further Preliminary Hearing on 18 July 2018 to determine certain preliminary matters in the proceedings.

3. The Claimant's claims before the ET were particularised in grounds attached to her ET1, lodged on 21 July 2017; they include complaints of sex and pregnancy discrimination and of harassment and victimisation and it is apparent that the Claimant seeks to complain about a large number of alleged acts by the Respondents. For completeness, I note that, since the case management Preliminary Hearing with which this appeal is concerned, the Claimant has lodged a second ET1, albeit I am not concerned with that claim at this stage.

4. Returning to the hearing with which I am concerned, having identified the specific causes of action (as detailed above), the ET referred to the future Full Merits Hearing and noted that "*No other claims or issues will be considered without the permission of the Tribunal*" (ET, paragraph 16). It further directed:

> **"17. The number, nature and extent of the complaints should be within reasonable bounds. The case listed to be heard must be pleaded, prepared and presented so as to be fair to both parties and a proportionate use of the Tribunal's resources. The overriding objective means that each case should have its fair share of available time, but no more, otherwise other cases would be unjustly delayed."**

5. More specifically, however, the ET then went on to make the following orders:

> **"18. No later than 15 January 2018 the Claimant shall provide to the Respondent, with a copy to the Tribunal, in concise and clear terms, the most recent and serious 10 (maximum) events relied upon as giving rise to the above complaints and on which the Tribunal is required to make findings of fact and determinations. These must be individual distinct events, not lists of events, and must be taken from the contents of the ET1 claim form. The Claimant may rely upon more than one head of claim for each event. If this is done, an appropriate hearing allocation would be no more than 6 days as listed above.**
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> **19. The Claimant is not prevented from relying upon other events as background or context to the 10 chosen events. Alternatively the other matters may be pursued at a later hearing after the currently listed hearing has been concluded."**

These rulings lie at the heart of the current appeal.

The Factual and Procedural Background

6. There has been no determination of the facts in this case and I set out this summary, largely taken from the Claimant's skeleton argument for the appeal, to provide context; nothing said at this stage can be taken to amount to a finding on any disputed issue of fact.

7. The Claimant is a registered medical practitioner, on the GP register. The Respondents are, or were at all material times, GPs and partners of the Milestone Surgery. The Claimant was also a member of that partnership between February 2013 and 31 December 2017. In or about January 2016, the Claimant informed her fellow partners that she was pregnant. It is her case

that, after doing so, she was then subjected to a number of discriminatory acts by the Respondents, ultimately leading her to resign from the partnership on 21 July 2017.

8. As I have recorded, at that stage the Claimant lodged her first ET1. The Respondents lodged their ET3s at the end of August 2017 and the Preliminary Hearing was then listed for 14 November 2017; initially it was to be an in-person Preliminary Hearing but subsequently, at the Respondents' request, it was converted into a telephone Preliminary Hearing - the Claimant not objecting to that course, provided the list of issues was agreed in advance.

9. The parties managed to agree a joint list of issues and this was submitted to the ET in advance of the Preliminary Hearing. The list contained, as the parties have agreed before me, 21 alleged acts of direct sex/pregnancy discrimination, 19 alleged acts of harassment (albeit only three of those were not already relied on as acts of direct discrimination), and 6 alleged acts of victimisation; making a total of 30 separate acts of which the Claimant is making complaint (although there may be some overlap in terms of the evidence the ET will need to hear relevant to those different acts). Not all the acts referred to in the Claimant's claim were included within the list of issues; specifically, the Claimant relied on acts pre-dating January 2016 as background only. There was no objection by the Respondents to the list of issues - as stated, it was agreed - or to the Claimant's inclusion of background evidentiary matters. During the course of the telephone Preliminary Hearing, however, the Employment Judge raised his own concerns regarding the number of pleaded acts of discrimination contained within the list of issues and made the Orders I have recorded above.

10. Subsequent to the Preliminary Hearing, the Claimant applied for a reconsideration of the ET's Orders. That application was, however, refused. The ET's decision in that regard, communicated to the parties by letter of 8 February 2018, (relevantly) observed as follows:

> **"The Claimant has set out 31 separate factual issues, some expressed in broad general terms, which she requires the Tribunal to determine and make findings as to whether each one amounts to direct discrimination or pregnancy/maternity discrimination. There are also 24 factual issues under the heading of sex harassment. Additionally, there is an outstanding application to amend the claim by adding 6 factual issues under the heading of victimisation.**
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> **Assume that each matter involves at least 3 findings (a finding of fact as to whether an event occurred, a finding that if it did occur whether it amounted to less favourable/ unfavourable treatment/detriment etc. and a finding whether there was a causal link to a protected characteristic) the Tribunal would need to hear and consider evidence about each matter and potentially be required to make over 180 findings. That is not a reasonable or proportionate use of the Tribunal's resources.**
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> **In *HSBC Asia Holdings BV & another v Gillespie* [2010] UKEAT 0417 Underhill J suggested the use of samples where a Claimant complains of a very large number of discrete incidents but the gist of the claim can for all practical purposes by fairly tried by reference to a sample only, with a consequent reduction of the burden on the resources both of the parties and the Tribunal. A Tribunal has no power to prevent a Claimant pursuing a properly arguable claim, but it does not necessarily follow that all the claims need to be heard at a single hearing. In this case the Claimant is not prevented from relying upon the other events as background or context to the 10 events, or they may be pursued at a separate hearing.**
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> **There has been no material change in circumstances since the case management order was made. There are no grounds of vary, suspend or set aside the order and the application is refused."**

The reference to the Claimant's application to amend may have been superseded by the subsequent lodging of her second ET1; again, this is not a matter with which I am directly concerned at this stage.

The Appeal and the Claimant's Submissions

11. The Claimant has pursued her appeal on nine grounds.

12. By ground 1, she contends that the ET's Order that she provide a list of the most recent and serious ten matters relied on is *ultra vires*, the ET having no power to make such an Order (see **McKinson v Hackney Community College & Others** UKEAT/0237/11). It is the Claimant's case that this effectively amounted to a striking out of parts of her claim when there

was no basis for this: she had properly pleaded her case in her ET1; it had been accepted by the ET, and there was no suggestion that any of the allegations made had no reasonable prospect of success. Additionally, by ground 1(a), the Claimant contends the ET erred in law in its reliance (in its Reconsideration Decision) upon the *obiter* comments of the EAT in **HSBC Asia Holdings BV & Another v Gillespie** UKEAT/0417/10; there, the parties had consented to deal with the case by way of sample - that was not this case.

13. By ground 2, the Claimant contends the ET erred in law in its interpretation of the overriding objective. Although Rule 2(b) of Schedule 1 of the **Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013** provided that the ET should deal with cases in ways "*which are proportionate to the complexity and importance of the issues*", that meant the issues *as pleaded*; in other words, the case must be managed in a way proportionate to the issues raised in the pleaded case, it did not mean artificially curtailing the pleaded case. By ground 3, the Claimant argues the ET erred in law, or acted perversely, by making an Order that was contrary to the overriding objective, which requires the ET to deal with cases fairly and justly; that was not achieved by requiring the Claimant to cherry-pick aspects of her case for determination and doing so was to penalise the Claimant for being subject to more than ten acts of discrimination. Moreover, the ET's Order was not supported by the guidance provided in **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96 CA, which focused upon steps that might be taken to reduce areas of dispute; the ET's Order went further by seeking to artificially limit the Claimant's claim.

14. By ground 4, the Claimant complains the ET erred in law and/or acted perversely and/or took into account irrelevant factors. Specifically, during the course of the telephone Preliminary Hearing, the Employment Judge said he considered it disproportionate to expect

A the ET to consider in respect of each individual act (a) whether it had happened and (b) whether discrimination was made out; he further suggested the ET lay members sometimes felt overwhelmed by the number of individual issues requiring determination in a particular case. Such considerations, the Claimant argues, are simply irrelevant - it being the job of the ET, including lay members, to consider and determine the pleaded allegations.

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15. Turning to ground 5, the Claimant complains the ET erred in law or acted perversely or failed to take into account relevant matters, specifically: the clarity with which the issues had been set out in the list of issues; the fact that the Claimant had already limited her claims to the most recent (those from February 2016 onwards); the lack of any suggestion that the Respondents were unable to understand the allegations and appropriately respond; the fact that the Claimant was still relying on other allegations as background evidence, thus requiring those matters to be determined in any event, so resulting in no saving of time; the potential impact of limiting the claim on the question of remedy. Moreover, the Order was perverse, giving rise to potentially separate hearings with overlapping issues which would vastly increase the time required to hear the case, the cost to the parties, and the complexity involved.

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16. The issue of remedy is then picked up again by the Claimant's sixth ground of appeal, where she relies on various instruments of EU law as requiring she be permitted an effective remedy for the discrimination she has suffered. Similar points are then made by ground 7, but by reference to Article 6 of the European Convention on Human Rights.

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17. By ground 8, the Claimant contends, more generally, that the ET's Order was perverse, or a decision that no reasonable ET could have reached.

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18. Lastly, by ground 9, she objects that the process by which the Order was granted was perceived to be unfair, the Claimant only having agreed to the Preliminary Hearing taking place by telephone on the basis that the parties had agreed the list of issues.

The Respondents' Case

19. The Respondents resist the appeal, noting the broad discretion vested in the ET to case manage its proceedings, duly having regard to the overriding objective. Specifically, the Respondents observe that the issue of proportionality was addressed by the Court of Appeal in **Hendricks**, where Mummery LJ encouraged parties "*to keep the discrimination proceedings within reasonable bounds by concentrating on the most serious and the more recent allegations*" (see paragraph 54); a suggestion further emphasised by the EAT in **Gillespie**.

20. On the Claimant's suggestion - ground 1 - that the ET's Order was *ultra vires*, the Respondents observe that it did not amount to the striking out of her claim and was, contrary to the suggestion at ground 1(a), a permissible exercise of discretion as allowed by the EAT in **Gillespie**; the comparison with **McKinson** was simply misconceived. Moreover, the Claimant's various objections, made on the basis that she had been denied an effective remedy or right to prosecute her case under EU law and/or the Convention, were dependent upon her first establishing that her case had been struck out; it had not.

21. As for the various suggestions that the ET had reached a perverse decision and/or failed to take into account the relevant factors or had taken into account irrelevant factors, there was no basis for thinking the ET had lost sight of the particular nature of these proceedings, including the fact that the parties had attempted to agree a list of issues. The ET had been entitled not only to have regard to the number of factual issues to be determined, but to also

break down each issue by reference to the separate questions it would be required to answer, thus giving rise to the 180 findings referenced by the ET in its Reconsideration Decision. The ET was best placed to determine what was proportionate in this case, which included the broader interests of justice viewed from the perspective of the ET system as a whole (see per Langstaff P at paragraphs 34 and 35, **Harris v Academies Enterprise Trust & Others** [2015] IRLR 208 EAT), and how it was to be justly determined.

22. It was also wrong to suggest the ET's general power to case manage proceedings under Rule 29 prevented it from selecting out discrete parts of a case to determine separately, as the ET had directed here. Allowing the Claimant to rely on non-selected matters as background or context, the ET had avoided the danger of artificiality or unjust fragmentation. There were, moreover, clear advantages to the course the ET had directed in terms of expediency and proportionality and there was no reason to depart from the general rule that the ET was the best judge of case management decisions such as this (see **X v Z Ltd** [1998] ICR 43 CA).

Discussion and Conclusions

*The **ET Rules** and Guidance from the Case Law*

23. The ET has a broad case management discretion, as provided by Rule 29 of Schedule 1 of the **Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013** ("the ET Rules"):

> **"29. *Case management orders***
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> **The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. The particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."**

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24. In exercising that discretion, the ET will seek to give effect to the overriding objective, to deal with cases fairly and justly (see Rule 2 of the **ET Rules**). That will include dealing with cases in ways that are proportionate to the complexity and importance of the issues; seeking flexibility in the proceedings; avoiding delay, so far as is compatible with proper consideration of the issues; and saving expense. There is, further, an obligation upon the parties and their representatives to assist the ET in furthering the overriding objective.

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25. The case management challenge faced by ETs when seeking to deal with proceedings that raise numerous allegations has long been recognised, particularly in the field of discrimination law (see, for example, **Qureshi v Victoria University of Manchester** [2001] ICR 863 EAT, **Anya v University of Oxford** [2001] ICR 847 CA, **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96 CA). That said, of its nature, a discrimination claim is likely to require an ET to draw inferences from the evidence and from its primary findings of fact; to adopt a fragmented approach to the issues to be determined may "*have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have [on the determination of causation]*" (see per Mummery J (as he then was) in **Qureshi** at page 875H). Moreover, to limit the potential impact of the complete picture provided by the full complaint made might well be "*both unreal and unfair*" (see per His Honour Judge McMullen QC at paragraph 11, **Franco v Bowling & Co Solicitors** UKEAT/ 0280/09). That said, in **Hendricks** the Court of Appeal sought to encourage the proportionate conduct of discrimination cases in which numerous allegations are pursued; specifically, Mummery LJ observed as follows:

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> **"53. I would add a few words on the case management aspects of a case like this, where the complaints involve numerous instances of acts by many different people over a long period. As appears from the directions already given, the tribunal chairman is well aware of the importance of directions hearings to ensure that the case is ready for hearing and to explore ways of saving time and costs.**
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> **54. Before the applications proceed to a substantive hearing, the parties should attempt to agree a list of issues and to formulate proposals about ways and means of reducing the**

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> **area of dispute, the number of witnesses and the volume of documents. Attempts must be made by all concerned to keep the discrimination proceedings within reasonable bounds by concentrating on the most serious and the more recent allegations. The parties' representatives should consult with one another about their proposals before requesting another directions hearing before the chairman. It will be for him to decide how the matter should proceed, if it is impossible to reach a sensible agreement."**

26. Further guidance as to the possibility of selecting sample allegations in discrimination cases was provided on a strictly *obiter* basis by Underhill J (as he then was) in **HSBC Asia Holdings BV & Another v Gillespie** UKEAT/0417/10, as follows:

> **"24. We are here concerned not with the power of the Tribunal to exclude evidence but with whether it has any power to prevent the prosecution of a claim in respect of an actual pleaded cause of action. There are sometimes cases in which a claimant complains of a very large number of discrete incidents but it appears that the gist of his or her claim can for all practical purposes be fairly tried by reference to a sample only, with a consequent reduction of the burden on the resources both of the parties and of the tribunal. In such a case I can see no objection whatever to an employment judge at a case management discussion, or a tribunal at the start of a hearing, seeking to persuade the parties to agree that only certain of the claims will be heard and that the outcome of the balance will follow the outcome on those claims. If both parties are represented, securing the necessary agreement may be straightforward (though there may of course be difficult issues as to particular questions, such as the number and selection of the samples and the impact of any selection on the question of remedy). If, however, one party (typically the claimant) is unrepresented, the judge or tribunal will need to proceed with great circumspection and to ensure that the unrepresented party understands what is being proposed.**
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> **25. The question then arises of what the tribunal can do if agreement to proceed by sample cases cannot be obtained. Leaving aside cases where for particular reasons pursuit of the claims in question may constitute an abuse, it seems plainly right as a matter of principle … that a tribunal has no power to prevent a claimant prosecuting a properly arguable claim, even if it forms one of very many similar claims and determination of a sample might be thought for all practical purposes to suffice. However, it does not necessarily follow that all of a claimant's claims need be heard in a single hearing. There is no reason in principle why as a matter of case management … a tribunal cannot hive off claims which it regards as secondary or repetitive or otherwise unnecessary, to be dealt with at a subsequent hearing, in the more or less confident expectation that in practice once the first tranche of claims has been heard the second is unlikely to proceed.**
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> **26. To say that such a course is possible in principle is not to say that it should always or generally be followed. Although the hope would be that the second hearing would never happen, that could not be assured, and if it did happen the cost and delay would almost certainly be greater than if there had been a single hearing, however long. There would also potentially be problems of obtaining the same tribunal for both hearings: if a different tribunal sat on the second tranche, not only would more evidence have to be re-heard but there would be the risk of inconsistent findings. For those and similar reasons … splitting hearings might be generally unwelcome to both claimants and respondents. It will also often be the case that the claims will not lend themselves to being split. There may be too much factual overlap, and claimants may be able legitimately to argue that the cumulative effect of a large number of claims has an evidential value which would be unfairly weakened if they were heard separately. Even leaving that point aside, choosing which claims should proceed in the first tranche may be difficult. None of those points means that it will always be wrong for a tribunal to order, without the agreement of both parties, that in a case raising a large number of discrete claims a sample of those claims should be heard as a first tranche. The power to make such a direction should be part of the tribunal's case management armoury. But it does mean that it is a course which should only be followed after most careful consideration and where the advantages of doing so are clear. Heroic case management interventions sometimes cause more trouble than they save."**

27. In **McKinson v Hackney Community College & Others** UKEAT/0237/11, the EAT (HHJ Richardson presiding), was concerned with a case management Order which required that the Claimant limit his claims to not more than six incidents of direct discrimination and not more than three incidents of victimisation in addition to his claim of unfair dismissal. Allowing the appeal against this Order, HHJ Richardson observed:

> **"14. Case management of discrimination claims is a notoriously difficult exercise, particularly where the allegations are numerous and extend over a significant period.**
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> **15. The first task always is to identify precisely what claims are being made and on what basis. This assists the claimant: certain elements have to be established, and if the claimant has not addressed his mind to them before the hearing, it may be too late to do so at the hearing. Moreover it is a necessary protection for the respondent: allegations of discrimination are serious matters, and a respondent is entitled to know precisely what the allegations are which must be faced. Further, it is extremely difficult for an employment tribunal to read into and conduct a final hearing without a clear understanding of what is and is not being run at the hearing.**
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> **16. Once it has been established just what claims are being made, it should then be possible to identify what is in issue. A list of issues is a tool of great value in a discrimination claim.**
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> **17. Once it is plain what the potential issues are, the case can (if necessary) be further case-managed. How much case management is required will depend on the individual case. In some cases - particularly where there are a great number of issues, over many years, significant further case management may be required. An employment judge may encourage the parties to concentrate on issues which really matter as suggested in *Hendricks*; in an appropriate case (although there may not be many of these) an employment judge may select issues to be tried first, if this can be done fairly to both parties. But case management must take place within the rules.**
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> **18. Turning to this case, the Employment Judge was in my view entitled to ask the Claimant to identify in schedule form precisely what his complaints of discrimination and victimisation were. The claim form ran to 50 paragraphs and is in the nature of a narrative. The complaints of discrimination and victimisation have to be distilled from it. The Employment Judge was entitled to say to the Claimant that he should distill them; and it is in his interests as well as those of the Respondents that he should do so. It is not satisfactory to leave a Tribunal at a final hearing to work out from a narrative claim form precisely what complaints are being put and how. I see nothing perverse in this part of the Employment Judge's order. Nor was it in any way in breach of natural justice - at a case management discussion there are limits to the extent to which an employment judge is required to explore in detail the case of each party. The order for a schedule was good case management, likely to be of benefit to both sides and the Tribunal in due course.**
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> **19. However, in my judgment the Employment Judge erred in law in limiting what would be considered at the final hearing to no more than six incidents of direct discrimination and no more than three incidents of victimisation. The claim form on its face appears to encompass more than six incidents of direct discrimination and more than three incidents of victimisation. Moreover incidents of victimisation and discrimination may overlap; there is not necessarily any watertight compartment between them. There is no power to require a claimant in effect to self-select which of a number of complaints, all encompassed within a claim form, he will pursue at the final hearing. This part of the Employment Judge's order must be deleted.**
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> **20. I have said that, once issues are identified, there may need sometimes to be further case management along *Hendricks* lines. Speaking for myself, I doubt whether this case is so complex that a great deal of further case management will be required, once the issues are identified. If it is, either party may apply for a further case management discussion."**

28. At the risk of simply repeating that which has already been said, it seems to me that when considering the appropriate case management of a discrimination claim, it is useful to keep in mind the following points:

(1) The ET has a broad discretion to manage cases justly, having regard to the overriding objective. It can expect the parties to assist it in that exercise, having regard to their obligation under the overriding objective.

(2) A discrimination case may well involve a large number of allegations, pursued as different legal claims under different statutory provisions, and concerning events over a long period of time, perhaps involving a number of different people. The starting point for the ET must be to identify precisely what claims are made and on what basis; once that is done, it is possible to identify what is in issue. In this regard, the ET will be assisted by a list of issues - preferably drawn up and agreed by the parties, although it may be necessary to complete this exercise at a case management hearing.

(3) There will be some cases - albeit rarely discrimination cases, involving disputes of fact - where it will be appropriate for the ET to consider striking out claims that can properly be said to have no reasonable prospect of success (see Rule 37 of the **ET Rules**). Save in such cases, however, the claims will stand to be determined after a Full Merits Hearing on the evidence; it is not open to the ET to otherwise limit the claims a complainant can pursue - that would be to restrict her access to justice and to potentially deny an effective remedy in a case of unlawful discrimination.

(4) That said there may be cases where it will be possible to separate out a sample of complaints or issues, such that these might usefully be heard in advance of the remaining allegations. Where that would be an appropriate course, it would be hoped that the parties (consistent with their obligation under the overriding

obligation) would assist the ET by identifying and agreeing the complaints to be taken forward but, even if there were no such agreement, the ET would not be prevented from so directing, if that could properly be said to provide for the just determination of the particular case.

(5) Allowing that an ET has such a power does not, however, suggest that this is a course that should be adopted, save in those cases where it is clear this would not endanger the just determination of the case - something that might be difficult for the ET to assess at a preliminary stage.

(6) And this leads into the real problem with attempts to case manage discrimination claims in this way: in many such cases, it is necessary to consider the entire picture before any conclusion can be drawn as to whether, or not, there has been unlawful discrimination in respect of any particular allegation. There is an obvious temptation in directing the complainant to select her ten best points; no doubt, hoping that the determination of those matters will enable the parties to reach agreement in respect of the allegations that remain. In many discrimination cases, however, this will not be consistent with the just determination of the claims made: the ET will have to consider the complete picture if it is to fairly answer the question whether there has or has not been unlawful discrimination on the relevant protected grounds.

(7) Moreover, the separate determination of selected allegations or issues may not be the proportionate course in a particular case; careful regard would need to be had as to whether it will really avoid delay and save expense in those proceedings.

The Current Case

29. With those observations in mind, I turn to the specific grounds of this appeal.

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30. By ground 1, the Claimant relies on HHJ Richardson's ruling in the **McKinson** case, that the ET has "*no power to require a claimant in effect to self-select which of a number of complaints … he will pursue at the final hearing*" (paragraph 19). HHJ Richardson did not, however, rule out the possibility that it might be open to the ET to select particular issues to be tried first, if that could be done fairly (see paragraph 17), and it seems to me that this is what the ET in the present case was seeking to do. Unlike the Order in **McKinson**, the Order in issue in the current proceedings expressly allows that the Claimant may rely upon matters other than the ten allegations she was directed to identify, *either* as background or context *or* as separate claims at a subsequent hearing.

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31. The Claimant says this is not an answer to her first ground of appeal, given the difficulties arising in adopting this course, and I have some sympathy for the points she makes, which certainly give rise to other questions regarding the ET's Order. I am not, however, persuaded that it is correct to characterise that Order as the *ultra vires* striking out of aspects of the Claimant's claim. Similarly, to the extent that the Claimant's further points of challenge under grounds 6 and 7 - denial of effective remedy and/or of Convention rights - also depend on the characterisation of the ET's Order as amounting to a strike out of her claims, I again consider this is putting the objection too high. Put simply, the selection of sample allegations need not give rise to the consequences the Claimant asks me to assume. If the ET had sought to strike out aspects of the Claimant's pleaded case without any ruling that these were without reasonable prospect of success, then I would agree it would have had no power to adopt that course. As I have observed, however, it was careful not to take that step, allowing that the Claimant might still pursue her other allegations at a later hearing. What the ET sought to do was to split off particular allegations, presumably in the hope that this would make the hearing

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more manageable and would allow the parties to take a realistic view of success of the remaining allegations.

32. The better point made by the Claimant is under ground 1(a), which takes issue with the ET's reliance on **Gillespie** (a reliance clarified by the ET in its response to the reconsideration application). Whilst the ET was entitled to seek to draw comfort from the *obiter* observations of Underhill J, in terms of providing it with some assurance as to the *vires* of the course it was proactively seeking to adopt, the Claimant rightly criticises it for apparently failing to have regard to the relevant considerations identified in **Gillespie** at paragraph 26.

33. That brings me to the question that I consider really lies at the heart of this appeal; that is, whether the ET's decision was made absent proper account being taken of relevant considerations, both those arising generally in discrimination claims and those pertaining to this particular case. This was not a case where the ET was faced with a lengthy discursive claim where there had been no identification of the different causes of action and issues. Rather, there was an agreed list of issues that was neither unwieldly nor unmanageable. The Respondents had not suggested that they were unable to understand or respond to the Claimant's pleaded case, and there was a clear appreciation, on both sides, of that which was to be determined as a cause of action and that which formed part of the evidentiary or background material. Moreover, considering the agreed list of issues, it is apparent that much of the evidence given on one issue would inevitably address other factual issues at the same time. There is no indication that the ET had regard to these various factors, which were all highly relevant to the case management decision it had chosen to undertake.

34. More than that, however, the ET's reasoning does not evidence any engagement with the very real difficulties arising from the course its Order requires. To the extent the ET was seeking to make the Claimant choose whether to rely on matters other than the ten claims she was to identify as part of the background, or to have those other matters separately determined at a later hearing - which is what paragraph 18 of the ET's Decision suggests - she has been placed in the invidious position of *either* continuing to assert her right to pursue these as claims *or* to rely on them simply as providing context for the ten matters she has been required to identify. There is nothing in the ET's Decision - even when read together with its response to the reconsideration application - to suggest it had considered the potential unfairness of this election.

35. The Respondents say the ET's Order should not be read as giving rise to such a stark choice: the word "alternatively" should rather be read as an "and/or". If that is correct, however, it would apparently be left open to the Claimant to simply rely on all other matters as part of the background or evidentiary material, removing any saving in terms of time or cost.

36. The separation out of issues was not a course suggested by the parties and consideration of the pleadings and the agreed list of issues provides no reason to think this was a case where that would be a practical or proportionate suggestion. The ET's reasoning does not take matters any further in this respect. The simple fact that there may be a large number of questions the ET will need to grapple with when determining this claim, does not, of itself, require that it should do so in a series of separate hearings. Indeed, on the contrary, that fact may suggest that all matters should be considered together: as the Claimant has observed, if a complainant has suffered multiple acts of discrimination, it might be artificial and detract from the just determination of her claim if regard was not had to all of those acts, which may serve to

corroborate each other. Of course, there is a risk that a plethora of allegations will mean that the wood is lost for the trees - something Claimants, in particular, are always well advised to bear in mind - but ETs are well used to the need to consider allegations both individually and as a whole, so as to reach a just determination of the complaints made.

37. In saying this, I do not say, as the Claimant urges, that it was simply irrelevant for the ET to have regard to the difficulties for those charged with determining complex discrimination cases at first instance. To the extent the Employment Judge expressed concern, in particular, for lay members who might feel "overwhelmed" by the plethora of issues to be determined, having sat with many lay members (both in an earlier life in the ET and in more recent years in the EAT) I am not sure that I recognise that concern, in respect of the ability of lay members to get to grips with multiple allegations. That said, I do not consider it irrelevant for the ET to have regard to the difficulties that can arise from very large lists of issues requiring multiple findings across the different claims made; on the contrary, that strikes me as a potentially relevant matter for the ET to take into account when determining how best to case manage proceedings of this nature.

38. What I do consider to be a fair criticism in this case, however, is that there is no demonstration that the ET carried out any qualitative assessment of the actual issues to be determined, evincing an appreciation of the degree of overlap that will inevitably arise in terms of the evidence to be given. Rather, it seems to have made an Order that puts the Claimant to a wholly unfair election between relying on matters of which she makes complaint *either* as claims *or* as mere context. Alternatively, it has allowed her to simply rely on all other matters as background material at the October hearing but then to also pursue those allegations as separate claims, thus removing any potential benefit in terms of time and cost.

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39. Once regard is had to these very relevant considerations, I consider it open to question as to whether this is an appropriate case for the segregation of particular issues for separate determination. The Claimant says the ET's Order was perverse and, on its face, I think that is right: it was an Order that no reasonable ET could have reached in those particular terms. Whether it might have been possible to make some other case management direction for the prior determination of sample issues, I am doubtful, but I would not go so far as to say that this could be not the result of the proper exercise of the ET's discretion, taking into account all relevant factors. Adopting such a course would, however, require the ET - along with the parties - to engage with the list of issues and assess what was being alleged, so as to determine whether sample issues could be identified and whether it really would be consistent with the overriding objective - avoiding the problems alluded to at paragraph 26 of **Gillespie** - to direct that these be considered at a separate hearing. That is an exercise that has not yet been done in this case and I am therefore satisfied that this Order cannot stand and this appeal must be allowed.

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40. On that basis, it is unnecessary for me to deal with the separate objection to the ET making the Order at the telephone Preliminary Hearing raised by ground 9 of the appeal, although I find it hard to see any substantive prejudice in this regard. As for disposal, as these proceedings remain at the case management stage, it is inevitable that this matter will now return to the ET.

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