Neutral Citation Number: [2023] EAT 150

Case No: EA-2021-000682-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 7 December 2023

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

DR S HASSANE	**Appellant**
- and -	
GLAXOSMITHKLINE SERVICES UNLIMITED	**Respondent**

- -
- -

Charlotte Elves (instructed through Advocate) for the **Appellant**
Laura Bell (instructed by Eversheds Sutherland (International) LLP) for the **Respondent**

Hearing date: 18 October 2023

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JUDGMENT

Further Revised

This judgment was handed down by the Judge remotely by circulation by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30 on 7 December 2023

SUMMARY

Practice and procedure – whether ET had addressed the claimant's case – adequacy of reasons

The claimant complained that the ET had failed to permit him to develop, and/or to address in its judgment, his case on alternative employment to the extent that he relied on the differential treatment of a specific comparator. He said this was relevant as demonstrating that his dismissal was unfair and/or as shifting the burden of proof to the respondent on his claims of discrimination.

Held: dismissing the appeal

The case the claimant had pursued before the ET – as set out in his claim forms and further particulars, and as summarised in the list of issues – had not identified the specific comparison relied upon for the purposes of his appeal. Although the claimant had made an application for disclosure in respect of the individual in question, he had not then applied to amend his claim and it was not incumbent upon the ET to trawl through the interlocutory correspondence and applications to see if there might be some other case that he could advance and/or effectively undertake the task of amending the claim on his behalf, during the course of the full merits hearing.

More generally, to the extent that the claimant had relied upon a specific comparator relevant to the issue of alternative employment in his claim, he had then failed to provide any evidential basis for concluding there had been inconsistent treatment/he had suffered any discrimination. On the basis of the claim before it, the ET had adequately engaged with the question of alternative employment and its reasons where sufficient to explain the conclusions it had reached in this regard.

The Honourable Mrs Justice Eady DBE, President:

Introduction

1. The absence of formal pleadings in Employment Tribunal ("ET") proceedings can give rise to disputes as to the issues that are to be determined at the full merits hearing. Where there are a multiplicity of claims and/or a large number of issues in dispute, there will generally be attempts – sometimes over a number of preliminary hearings - to identify the matters to be determined, reducing these to a list of issues well in advance of the final hearing. Unhappily, this does not always remove the possibility of a mismatch between the matters that a party considers require determination and the list of issues to which the ET has worked in reaching its decision. The present appeal is an example of what is said to be a misunderstanding as to the case the ET was required to determine; specifically, it is contended that the ET failed to deal with a question of inconsistent treatment, relating to another named employee, going to the issue of alternative employment, which was relevant to the complaint of unfair dismissal and the claims of unlawful discrimination.

2. In giving my judgment on the appeal, I refer to the parties as the claimant and respondent, as below. This is the full hearing of the claimant's appeal against the judgment of the London South Employment Tribunal (Employment Judge Wright, sitting with lay members Ms Dengate and Mr Rogers, via CVP, from 22-26 March 2021; "the ET"). Oral judgment having been given on 26 March 2021, at the claimant's request, written reasons were sent out on 5 May 2021.

3. The claimant seeks to appeal against the ET's dismissal of his claims of unfair dismissal and unlawful discrimination. His appeal was initially viewed (on the papers) as raising no reasonably arguable question of law. Subsequently, at a hearing under rule 3(10) **Employment Appeal Tribunal Rules 1993**, I permitted the appeal to proceed to an all-parties preliminary hearing on one ground only, namely:

> Whether the ET erred in law by failing to permit the Appellant to develop, and/or to address in its Judgment, his case on opportunities to remain in the workforce/alternative employment (as identified at issues 6.1.2, 6.1.3, 8.1.2, 8.1.3 and 4.6) to the extent that he relied on the Respondent's differential treatment of Adele Cheli, who had been appointed to the position of SPO Director (a position for which the Appellant had applied), as shifting the

burden of proof to the Respondent and/or as demonstrating that his dismissal was unfair.

4. At the subsequent preliminary hearing before His Honour Judge Shanks on 23 November 2022, the appeal was permitted to proceed, with directions for the parties to exchange affidavits dealing with what happened before the ET, allowing the opportunity for the Employment Judge and lay members to respond if they so wished. Pursuant to HHJ Shanks' order in this regard, the claimant served an affidavit on 20 December 2022 and, by way of response, on 31 January 2023, Mr Jason French-Williams (solicitor for the respondent) served his affidavit, exhibiting the notes taken at the hearing by a trainee solicitor from his firm. Having been provided with that material from the parties, the Employment Judge and lay members did not seek to make any response.

5. In the claimant's skeleton argument for the full hearing of his appeal, the way he sought to put his case was expanded to make various allegations of apparent bias against the Employment Judge. In clarifying the position with Ms Elves, it was accepted that this was not a basis of appeal that had previously been identified at the earlier hearings before the EAT but, nevertheless, it was said that the claimant now wished to apply to amend his grounds of appeal to include such an allegation. For reasons provided in my oral judgment on this question, given at the hearing, I refused this application (see order seal dated 19 October 2023). The appeal thus proceeded before me on the basis of the sole ground of appeal identified at the rule 3(10) hearing.

The Background Facts

6. From 14 January 2014, the claimant had been employed by the respondent as Director of its Global Healthcare Academic Partnership. In late 2017, the future development of the Global Health Unit was reviewed, which resulted in a realignment of its activities; some areas of operation were to be phased out, and the then Vice-President of Global Health Programmes, Mr Wright, identified his own post as potentially redundant, along with six other roles, including that of the claimant. Accepting this reorganisation was genuine, the ET found that the end result was that the respondent would no longer pursue academic partnerships (the claimant's responsibility), albeit some

partnerships would continue and require managing (leaving around 15% of the claimant's role).

7. The claimant had been informed of the changes being made in the unit in mid-August 2018, with a meeting taking place with him on 21 August 2018 and lengthy consultation by correspondence following thereafter. The consultation period ended on 30 September 2018, when the claimant was given three months' notice of the termination of his employment, to take effect on 31 December 2018. Throughout this time, the claimant was in the United States of America, where he had gone to look after his mother in mid July 2018 and had continued to be located, initially on special paid leave and annual leave, but then working remotely from the US.

8. The claimant appealed against the decision to make his role redundant and his appeal was considered by Ms Ramneek Mahal, but was unsuccessful. On 18 December 2018, he was told that, due to the Christmas shut down, his last working day would be 21 December 2018; he was also told that his IT access would cease from that date.

9. The claimant's employment formally terminated on 31 December 2018 but, before then, he had made an application for alternative employment as a Strategy, Planning and Operation ("SPO") Director. He was interviewed via WebEx on 23 January 2019 but was not appointed. It was the respondent's case that a decision had been made not to proceed with recruitment to that SPO Director role at that time, but, in any event, the claimant was not the strongest candidate at interview and would not have been successful had the process continued.

The ET Proceedings

10. The claimant presented two claims to the ET: the first, coinciding with the termination of his employment, on 31 December 2018; the second on 12 February 2019; these were consolidated on 11 April 2019.

11. In his ET claims, the claimant complained of unfair dismissal; detriment and automatic unfair dismissal by reason of having made protected disclosures; age, race and religious discrimination; and breach of contract in respect of notice and redundancy pay. For present purposes, I am only concerned

with the claimant's claims of unfair dismissal and discrimination (the latter being put on the following bases: age (being over 40), race (non-Caucasian) and religion or belief (non-Christian)).

12. In making his first ET claim, the claimant attached to the ET1 a marked up copy of his response to the respondent's internal appeal outcome, dated 2 January 2019. In part, that recorded the claimant's dissatisfaction with the respondent's attempts to find him an alternative role; specifically, he stated:

> "… the process did not follow the UK labour laws and the policy stated in redundancy by GSK which required GSK to follow fair labour practices, specifically based on qualifications of current/modified positions, opportunity to apply for or interview for open modification option and the selective choices appear to be based on bias and non-transparent processes. Grounds for selections were not clear. Positions like Director of Strategy, planning and Operation, Global Health Unit, that he applied for in 3 December, 2018 (the same day of announcement) was filled by Sarah Pasternak on December 6 2018 and during her maternity leave which she will finish in January when she will take up one of the new Director, Strategy, Planning and Operations roles – Mr. Hassane applied for the two roles and was not even considered for any of them that were filled unfairly – no oversight. … Even though the first position was directly appointed, the team held both roles that Mr. Hassane applied for until Mr. Hassane exited. ..."

13. Filing his second ET claim, the claimant set out the details of his complaints at box 8.2 of the ET1, stating:

> "When I applied for similar roles in the organisation, the posts were filled without interview for other employees and in my case and even as the strongest candidate who is displaced, GSK intentionally held the positions after going through interviews. It is only persons of colour that were selected for redundancy in that unit and me and another person (Hasu Champenari …). No suitable alternative role was suggested.
> GSK did not also follow the redundancy policy as they deliberately put positions that I could have filled, being a displaced employee with no reason.
> The selection was based on discrimination for persons of colour, integrity and unfortunately over 45 years. I am 48 years old."

14. When lodging consolidated grounds of resistance in respect of the two claims, the respondent addressed the question of alternative employment, as follows:

> "19. The Claimant applied for the role of SPO Director and was interviewed on 23 January 2019 via WebEx. A decision was made not to proceed with the recruitment in that role due to changes across global affairs. However, the Claimant was not the strongest candidate during the interview process and would not have been successful had the recruitment process proceeded.
> 20. The Claimant suggests in [his second] claim … that the role of SPO

> Director is now available and has been promised to another employee. This is denied as the role has not been re-released and so far as the Respondent is aware, this role has not been promised to anyone else.
> 21. One individual that was also at risk of redundancy was offered a vacancy without interview as she was on maternity leave and was therefore protected under Regulation 10 of the Maternity and Parental Leave etc. Regulations 1999/3312 (the 'Maternity Regulations').
> 22. The Claimant has made reference to another individual who remains at risk of redundancy. Her notice was extended as she had been involved with a specific project that was ongoing. She has not been appointed to another role and is currently still under notice of redundancy.
> …
> 29.3 Lack of opportunity to apply for vacancies and compete for roles.
> There were only two vacancies available in the Global Health department. Sarah Pasternack was on maternity leave and the Respondent was obliged to appoint her in accordance with the Maternity Regulations. With respect to the other role a decision was made not to proceed with the recruitment process. The roles that remained as part of the Global Health structure were already focused on the new strategy and pooling was therefore not appropriate. The Claimant could also have applied for all vacancies across the business.
> …
> 36.3 It is denied that the Respondent's decision to dismiss the Claimant was in anyway related to the Claimant's race, age or religion or belief.
> …
> 36.9 The Claimant was notified on 18 December 2018 that his IT access would stop on 21 December 2018. As noted above, this was due to the Christmas shut down and as he had annual leave. The Claimant was not prevented from applying for the SPO Director role and was interviewed on 23 January 2019. Further, no additional roles were advertised in the period 21 December 2018 to 31 December 2018."

15. A telephone preliminary hearing took place before the ET (Employment Judge Freer) on 15 January 2020, when the claimant was directed to provide further particulars of his claims. Providing his responses in Scott Schedule format, the claimant - addressing a request that he specify any real or hypothetical comparators relied on for the purposes of his claim of direct discrimination - stated:

> "1. Not providing equal opportunity for a modified role similar to a person of younger age who is Daryl Barnaby …
> 2. Not providing similar opportunity to remain in the workforce after the redundancy announcement until the claimant is matched with alternative job similar to what was provided to an employee of a younger age who is Jenny Cozens …
> 3. The claimant was denied other roles (WD1900092-Director, Strategy, Planning and Operations Director) that were announced, were kept on hold (2018-2020) until the claimant exit the company, despite being displaced by redundancy and in family leave situation similar to a person of younger age who is Sarah Pasternak who was filled in a similar role and the claimant was not filled even though, the claimant was protected by the return from similar family leave."

The same complaint was then essentially repeated by the claimant under various other requests, including a request that he "*identify which job was allegedly held open and not filled*."

16. Further telephone preliminary hearings took place (again before EJ Freer) on 2 April and 13 November 2020. At the hearing on 13 November 2020, EJ Freer recorded:

> "3. … the Respondent has prepared an extensive List of Issues. The Claimant wished to add to that list, but during the hearing was unable to point to any issues for determination that were contained in his Particulars of Claim that were not set out in the ten-page list of issues. The changes the Claimant appeared to wish to make were to include narratives relating to the issues, which are more properly for the witness statement."

17. Relevantly for the purposes of this appeal, the list of issues specified as follows:

> "4. Unfair Dismissal
> 4.6 In the circumstances, did the Respondent act reasonably in treating this reason as a sufficient reason for dismissing the Claimant, taking into account its size and administrative resources and having regard to equity and the substantial merits of the case?
> …
> 6. Direct Discrimination – Age
> 6.1 The Claimant alleges that the Respondent did the following things which constituted direct age discrimination:
> 6.1.2 not providing an opportunity for the Claimant to remain within the workforce until an alternative role became available.
> 6.1.3 denying the Claimant other roles.
> …
> 8. Direct discrimination – Race
> 8.1 The Claimant alleges that the Respondent did the following things which constituted direct race discrimination:
> …
> 8.1.2 not providing an opportunity for the Claimant to remain within the workforce until an alternative role became available.
> 8.1.3 denying the Claimant other roles."

18. Subsequently, by email of 1 February 2021, the claimant made an application for specific disclosure of the HR file of Ms Adele Cheli, explaining:

> "We note that SPO position that claimant had priority to fill for being under risk of redundancy, and which was put on hold until the claimant exit the company and his case is closed and where the respondent denied that it is opened since February 2018 was opened and offered to an employee who is not under risk of redundancy who is Adele Chelli *[sic]*."

19. That application was considered at a further telephone preliminary hearing before the ET (this

time, before Employment Judge Fowell), on 11 February 2021. The respondent points out that this was the first time the claimant had sought to compare his relative merit to Ms Cheli, in respect of the SPO Director role or at all. It observes that Ms Cheli was appointed to the role of SPO Director after the claimant's employment had been terminated, explaining:

> "… The recruitment exercise which culminated in Adele Chelli's *[sic]* appointment had been revived in or about July 2020, approximately 19 months after the termination of C's employment." (paragraph 14 respondent's skeleton argument for this appeal)

In any event, the ET recorded its decision on the application for specific disclosure in the following terms:

> "8e) Another issue concerned his relative merit as an employee compared with two named employees, Jenni Cozens and Adele Chelli *[sic]*. Ms Cozens was retained in the business and Ms Chelli was appointed to the post of SPO Director to which he applied. Their relative merits are relevant to the question of why he was not retained/selected and so I have ordered disclosure of copies of any CV or resume which they provided to the respondent."

20. The disclosure provided by the respondent in respect of Ms Cheli comprised a copy of her CV and her letter of application for the SPO Director role, which was dated 23 September 2019. The respondent observes that, having received this disclosure, the claimant did not then make any application to the ET to amend the list of issues, either to allege that the respondent's treatment of Ms Cheli shifted the burden of proof, or that this demonstrated that his dismissal was unfair.

21. On 16 February 2021, the parties exchanged witness statements. The earlier orders of the ET had already directed the parties in relation to witness statements as follows:

> "15. The parties shall prepare a written statement for each witness (including the Claimant who will give evidence personally) whom it is intended will be called to give evidence on their behalf at the Tribunal Hearing. Such witness statement shall:
> • contain the evidence in chief of such witnesses;
> …
> • set out in chronological order, with dates, the facts which the witness can state;
> • omit any matter not relevant to the issues in this case;
> …
> 16. These statements will be read by the Tribunal to itself at the start of the Hearing and will comprise the evidence-in-chief of the witness once the witness has confirmed on oath or affirmation that the content is true to the best

of their knowledge and belief."

22. In his statement for the ET full merits hearing, the claimant (relevantly) gave the following evidence relevant to his case regarding the SPO Director role:

> "57. Following the grievance, the claimant received invite for Interview for the SOP role on 23 January 2019.
> …
> 59. The claimant received email for interview that was done on 23 January 2019 information that the role was put on hold until end of Q1 … so that the claimant will not be considered for it.
> 60. … The respondent … held the position again to prevent the claimant from getting this role and later filled it with someone who was not impacted by redundancy despite denying that position was opened in absolute misrepresentation of the truth … when Ms Adele Cheli … has occupied this role since September 2019 and without announcement nor interview and while she was not impacted by redundancy. …"

23. For its part, the respondent addressed the issue of alternative employment in the witness statement of Ms Claire Hitchcock (Director of Global Health Programmes; formerly the claimant's line manager), who explained as follows:

> "43. I had notified Sherif in my response dated 27 September 2018 that other roles in the function were being developed and would be posted in due course. I also notified him that individuals with roles being eliminated were free to apply for other roles within GSK …
> 44. Sherif was also advised in the notice of redundancy … to register for access to GSK's internal careers page and a note outlining how to do this was provided. He was also notified that career transition services were available through a third party company.
> 45. Sherif applied for the role of SPO Director (UK based role) and was interviewed on 23 January 2019 via WebEx … A decision was made not to proceed with the recruitment in that role due to changes across global affairs; I am not sure why exactly this was not taken forward but I was not part of that recruitment process."

24. The full merits hearing ultimately took place by CVP, commencing on 22 March 2021. The claimant attended from the US. There was a hearing bundle of 481 pages but the claimant also sought to produce a supplementary bundle and to rely on a 35-page transcript of a covertly recorded conversation. The respondent objected to these additional documents but the ET allowed that they should be adduced in evidence "*to the extent that they were referred to in the evidence-in-chief*" (ET paragraph 7). In the event, as the ET recorded:

> "8. … there was absolutely no reference by the claimant to this documentation

> either in his evidence-in-chief, when he was given the opportunity to provide any supplementary evidence or during his cross-examination of the respondent's witnesses."

25. The ET further noted that, at the preliminary hearing on 11 February 2021, the claimant had previously made an application for specific disclosure, which had been granted. It observed, however, that:

> "9. … The claimant did not refer to those documents in his evidence-in-chief and only referred, very briefly, to one or two pages during questions. Those documents were not relevant to the issues which the Tribunal had to determine."

26. There was a dispute between the parties as to what was said by the claimant at the outset of the hearing. In his affidavit for this appeal, the claimant stated:

> "1. EJ Wright asked me at the start of the hearing if I am pursuing my claims in the list of issues, and I answered yes and confirmed that I am pursuing all which included in my case denying me opportunities to remain in the workforce/alternative employment … to the extent that I relied on the Respondent's different treatment of Adele Chelli *[sic]*, who had been appointed to the position of SPO director (a position for which I had applied), as shifting the burden to the Respondent and/or as demonstrating that his dismissal was unfair."

For the respondent, while accepting that the note taken at the hearing by the trainee solicitor did not include this part of the hearing, it was denied that the claimant included this additional information regarding Ms Cheli; in his affidavit for the appeal, Mr French-Williams attested:

> "6. I do not agree that the Appellant stated at the start of the hearing that he was relying on Adele Cheli as shifting the burden of proof to the Respondent or as demonstrating that his dismissal was unfair."

Relevantly, the ET's decision records that, having referred to the claims made in the list of issues,:

> "5. The claimant was asked at the commencement of the hearing, whether he had withdrawn any claims and he confirmed he was pursuing all of the claims detailed in the list of issues."

27. In oral argument before me, Ms Elves accepted that the first paragraph of the claimant's affidavit simply adopted the words I had used in setting out the ground of appeal that was permitted to proceed in this matter. Acknowledging that it was unlikely that the claimant had in fact used those words at the outset of the ET hearing, Ms Elves said that she did not seek to push this part of the

claimant's case. For my part, I consider the most reliable record to be that provided by the ET's written decision: the claimant confirmed that he was pursuing all the claims detailed in the list of issues; he did not refer to Ms Cheli and did not provide any further detail of his claims at that stage.

28. Turning then to the conduct of the hearing, I note that the ET acceded to the claimant's preferred course that the respondent should first present its evidence and the ET heard evidence from Mr Wright, Ms Hitchcock, and Ms Mahal. The claimant gave evidence on his own behalf and also called a former colleague, Ms Hasu Champaneri, as a witness in support of his case.

29. Having called Ms Champaneri, the claimant was given the opportunity to ask any supplemental questions arising from the respondent's witness statements. In response, the claimant sought to elicit further testimony from Ms Champaneri on a number of matters, including her own attempts to apply for alternative employment before being made redundant; specifically: "*You mentioned ... that you were trying to apply for roles in the consultation period, were you aware that you could have extended your redundancy by requesting that?*". The ET, however, did not permit Ms Champaneri to answer this question, on the basis that it did not arise from the evidence of the respondent.

30. During the course of the claimant's evidence (while he was being cross-examined), EJ Wright's connection went down for a short period. This was at the end of the following exchange (taking the questions and answers from the note exhibited to the respondent's affidavit):

> Q: … It was a conclusion wasn't it that you did not demonstrate the additional capabilities required, during the interview question?
> A: Yes.
> Q: Decision was made to make you redundant due to changes across global affairs, yes?
> A: Yes I was told the role was put on hold but when I asked the Respondent if it was put on hold in May 2020 … [the claimant referred to the grounds of resistance] the Respondent said that this role had not been released to anyone else. … However, we see an application on 23 September 19 from Adele Chelli that was shared on the special disclosure from the Respondent, based on court orders … This role has been filled by Adele. She was not impacted by redundancy; she was not part of any consultation – the role was not impacted. The C should have been filled in that role if [Claire Hitchcock] had not been lying and [the respondent's solicitors] producing false documents.
> Q: Is this the same role?

At that point, it was recorded that EJ Wright's connection had failed. The ET then took a lunch break and on the resumption of the hearing, EJ Wright is recorded as stating: "*I will get note from colleagues for part I missed*".

31. The parties presented their closing submissions on the morning of the fourth day of hearing. The respondent had provided written submissions, sending these to the claimant the previous day, in which it addressed the position of Ms Cheli as follows:

> "16.5.3.8 C raised an issue in relation to Adeli *[sic]* Cheli (AC) undertaking a role within R. AC applied for a maternity cover role during September 2019 … This was maternity cover for Sarah Pasternak's role as Director of Strategy Planning and Operations for the period September 2019 to June 2020. AC was then appointed to the second Director of Strategy Planning and Operations role in July 2020 (i.e. the role noted as vacant in the organogram …). These roles are clearly a significant period of time after C had been made redundant."

The claimant made his submissions orally. The respondent's note of the claimant's submissions goes over some five pages; the references to the SPO Director post are as follows:

> "When the C applied for role of strategy - emphasis on strategy director - in 2018 why was this position put on hold for 2.5 years?
> Adele Chelli *[sic]* was given the job but are you aware of any maternity leave that would span for 1.5 years? Adele has occupied this position for 1.5 years - they deny it has been filled.
> Even if the maternity leave has finished, why would a company as big as GSK put a strategy director on hold for 2.5 years, that the applicant has applied for? It was intentionally done so that he is deprived of the opportunity for alternative employment. The right thing would be to offer him an alternative role, or keep in role and not put CH in that role. They should have given the opportunity to look for alternative roles during a redundancy extension.
> …
> Why is it that an extension of redundancy was given to JC but not the same thing when C had partnerships and C was not considered for a request? When C applied for alternative role for SPO - why was it put on hold for 2.5 years? Why did Adele take position and still here even though taken for maternity leave, 1.5 years later."

32. Closing submissions were completed at 11:20 on the fourth day and the ET then deliberated in chambers, before resuming at 11:30 on the fifth day of hearing to then give its reasoned decision. Having heard the ET's oral judgment, the claimant raised a query, as follows (I again take this record from the respondent's attendance note from the hearing):

> "Issue of applying for alternative employment on 23 Jan and as a result of redundancy, the C had priority to be filled in the position of SPO director role

> which was announced during redundancy period. Did not address that, whilst he was not the strongest candidate to that, that position had not been filled by any candidate and that position remains vacant and underhold."

The Employment Judge is recorded as then responding:

> "This is not an opportunity to have a debate but those issues are not in the list of issues and therefore not addressed by us."

33. The claimant having asked for written reasons, these were subsequently sent out by the ET on 5 May 2021 and I have used this document when summarising the ET's reasoning in the next section of this judgment.

The ET's Findings and Conclusions

34. In setting out its findings of fact, the ET addressed the complaints of age, race and/or religion or belief discrimination, recording how the claimant had put his case in this regard as follows:

> "42.The claimant has not advanced any evidence on this aspect of his claim. An example of this is that when Mr French-Williams put it to the claimant that he had simply not presented any evidence on his claim of unlawful race discrimination; the claimant replied he had. He said he had :
>
> > 'Presented for everyone's education and entertainment a picture of the whole team at page 207, this is my proof to you white Brits…'
>
> 43.There is a team picture on page 207 and it shows 12 people (one holding a baby) sat around a table in what would appear to be a restaurant. It is not clear who took the picture, whether or not it was the claimant and if he attended this event.
>
> 44.The claimant had not referred to the picture in his evidence, much less said how this showed direct race discrimination in not modifying his role, not providing him an opportunity to remain with the respondent until an alternative role became available to him or denied him other roles. Equally, it does not establish how those allegations could amount to the prohibited conduct of harassment related to race."

35. Considering the claimant's named comparators for his complaint of direct race discrimination (as specified in the Scott Schedule; see paragraph 15 *supra*) - Daryl Barnaby, Jenny Cozens and Sarah Pasternak - the ET found as a fact that Daryl Barnaby's role was not potentially redundancy so he was not a valid comparator. Otherwise – and on the assumption that the named comparators "*are Caucasian as opposed to non-Caucasian*" – the ET recorded that:

> "45. … The claimant has done no more than to reference a protected characteristic and then has made vague allegations. What he has not done is

> to provide any evidence or any other detail/particularisation at all."

36. As for his claim of direct age discrimination, the ET observed:

> "46. … Despite not being a named comparator, the claimant in answer to a question referred to Adele Cheli as being white and under-40. He has not advanced any direct evidence in respect of the age discrimination claim."

37. In relation to the claim of religion and belief discrimination, the ET recorded the way the case was put by the claimant as follows:

> "47. As far as the religious discrimination claim was put, the claimant put it to Mr Wright that his father and brother were priests in cross-examination. Mr Wright disagreed this was the case and said that he could not recall having had such a conversation with the claimant. Mr Wright said his brother was a pastor.
> 48. There was also a reference by the claimant to being required to attend a meeting on 21/8/2018 during Eid Aladha which was referred to in the list of issues, which the claimant did not refer to in his evidence. Similarly, he did not refer to a meeting on 11/9/2018 in his evidence; although this was referred to in the list of issues. When he was asked about this in cross-examination, the claimant made the ludicrous claim that due to the 11/9/2001 terror attacks in the US, that he as a Muslim, should not be invited to a meeting on this date.
> 49.The claimant also referred to an undated lunch meeting where sandwiches were provided and consumed whilst he was fasting for Ramadan. This was first mentioned at the hearing and did not feature in the list of issues."

38. More generally, the ET observed:

> "50. That was the extent of the evidence the Tribunal heard on this part of the claimant's claim and again, there was no direct evidence from him of the allegations he had made of direct discrimination or harassment.
> 51. Unfortunately for the claimant, this demonstrated the weaknesses in his claim overall and particularly his claim of unlawful discrimination."

39. On the question whether the claimant had been unfairly dismissed, the ET accepted the respondent's evidence regarding the review of the Global Health Unit (see summary at paragraph 6, *supra*). Finding that the coronavirus pandemic might have extended some of the partnerships beyond the period initially anticipated, but considering the position (as it was bound to do) as at the time of the relevant decisions, the ET accepted there was a genuine redundancy situation which meant that the claimant's role would cease or diminish to such an extent that it met the statutory definition of redundancy.

40. The ET was also satisfied that the process followed by the respondent was fair. Outlining the process adopted, which included consultation with the claimant (the ET (relevantly) finding that the

meeting on 21 August 2018 had not been deliberately arranged during Eid Aladha, noting that the claimant had not objected to that date but that, had he done so, it would have been re-arranged), the ET found the respondent had kept an open-mind during this period. This, it observed, was demonstrated by the fact that Ms Cozens had made a case for her role to be extended by three months so she could complete some work she was involved in. In contrast, however, the ET found that the claimant had not made a specific business case that his employment should similarly continue for a limited period of time. Although the ET did not expressly address the claimant's application for alternative employment in the role of SPO Director, it did allude to this when dealing with a separate allegation (not relevant for present purposes) relating to the termination of the claimant's IT access, finding as follows (albeit that it is common ground before me that the ET was wrong to state that the claimant's application for the SPO Director role was made after the termination of his employment as it had been made before his redundancy):

> "37. … The claimant has not said how he suffered a disadvantage by not having access to the respondent's IT system during the period 21/12/2018 - 31/12/2018. He had not evidenced anything he has 'missed out' on. The claimant applied for the role of SPO Director on 20/1/2019; clearly, he was aware of the vacancy and applied for the role, irrespective of the removal of the IT access."

The ET also found that the appeal process had been fair and consistent with the respondent's policy.

41. Given its findings on the evidence, the ET dismissed the claimant's claims, concluding (relevantly for present purposes):

> "101. The claimant has simply failed to advance his discrimination claims. There was no evidence-in-chief in respect of them. In light of that, he had not transferred the burden to the respondent to give a non-discriminatory explanation. As far as the respondent and the Tribunal did understand the claimant's claims of discrimination, the Tribunal accepted the non-discriminatory explanation. …
> 102. The discrimination claims were weak, were not actively pursued and were a disingenuous and opportunistic use of the legislation by the claimant.
> 103. The claimant's dismissal was fair by reason of redundancy. … The respondent acted fairly and reasonably. It demonstrated that it had supported its potentially redundant staff into finding alternative employment. That the claimant did not do so was down to him; not to the respondent's actions.
> …
> 106. Finally and for the sake of completeness, if any of the discrimination claims had succeeded, the claimant made no attempt to persuade the Tribunal they were continuing acts or to exercise its discretion to extend the time limit.

…"

Submissions on the Appeal

The Claimant's Case

42. For the claimant it is contended that the issue of alternative employment was a material part of his case, as made clear both in his original claims to the ET and in the list of issues, at paragraphs 6.1.2, 6.1.3, 8.1.2, 8.1.3, and 4.6. It was, in any event, inherent in the claim of unfair dismissal given the redundancy context (**Langston v Cranfield University** [1998] IRLR 172 EAT). Specifically, issues relating to the post of SPO Director and to the appointment of Ms Cheli were part and parcel of the claimant's case, both in respect of unfair dismissal and as shifting the burden of proof for the purposes of his claims of discrimination. In this regard, the claimant relies on his application for specific disclosure made on 1 February 2021, paragraph 60 of his witness statement before the ET, his clarification at the outset of the full merits hearing (albeit Ms Elves acknowledged the weakness of this point in oral argument), his evidence in cross-examination, and his closing submissions.

43. It is the claimant's complaint that he was prevented from developing his case on alternative employment during the hearing before the ET (during the cross-examination of the respondent's witness, Mr Wright, and by way of supplemental questions of his witness, Ms Champaneri). The claimant further submits that the ET failed to address his case on alternative employment, stating (in response to his question on this point after oral judgment had been given) that this was not an issue before the ET. In its written reasons, the ET had referenced the SPO Director role only when dealing with the claimant's complaint about the suspension of his IT access.

44. The claimant says that the ET's failure to understand the claimant's case on alternative employment infected its decision, which did not engage with this issue. To the extent that the ET had referenced alternative employment, that was inadequate to explain its reasoning (see **Meek v City of Birmingham District Council** [1987] IRLR 250 CA and the principles stated at paragraph 47 **Frame v Governing Body Llangiwg Primary School** [2020] UKEAT/0320/19). Moreover, although the ET correctly approached the discrimination claims on the basis that the burden of proof would not

shift to the respondent simply on the claimant establishing a difference in protected characteristic and a difference in treatment – there must be something more (**Madarassy v Nomura International plc** [2007] IRLR 246), it had failed to ask the relevant question: whether there was something more (that is, arising from Ms Cheli's appointment to the SPO Director post) that was capable of shifting the burden of proof in this case.

The Respondent's Case

45. The respondent submits that the facts established by the specific disclosure relating to Ms Cheli (her CV and covering letter of application post-dating the claimant's dismissal) had not been relied on by the claimant and, in any event, were insufficient to shift the burden of proof. Although the claimant had referred to the SPO Director post, there was at least an evidential burden on him to provide some evidence as to how his dismissal had been unfair in this regard/how this was relied on in terms of his claims of discrimination; there was insufficient for the respondent to be on notice that Ms Cheli's appointment was part of the case it had to meet. It was for the claimant to ensure that all relevant evidence was before the ET; there was no obligation on the ET in this regard, even where one of the parties was not legally represented; **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531 CA, per Peter Gibson LJ at paragraphs 14-22, and **Efobi v Royal Mail Group Ltd** [2019] IRLR 352.

46. The claimant had not been prevented from developing his case. He had had the opportunity to provide further particulars and had input into the list of issues; after he had obtained the specific disclosure he had sought, he had not applied to amend the list of issues, still less his claim. As for the ET's conduct of the hearing, the restrictions on the claimant's questions had to be seen in the light of similar restrictions on the respondent: the ET could not be criticised for keeping its focus on the issues it was required to determine and to ensure the hearing was time-tabled in such a way as to ensure that all relevant matters could be addressed. As for the duty of the ET to assist a party in the presentation of their case, the determination of the appropriate level of assistance or intervention must

be a matter for the judgement of the ET; see **Drysdale v Department of Transport (Maritime and Coastguard Agency)** [2014] IRLR 892 at paragraph 49, and (to similar effect), **Muschett v HM Prison Service** [2010] IRLR 451 CA per Rimer LJ at paragraphs 30-31. More specifically, there was no duty on an ET to trawl through the documents to find evidence going to a party's case, when that had not been referred to by either party; **Joseph v Brighton and Sussex University Hospitals NHS Trust** UKEAT/0001/15. Equally, the ET did not have a proactive or inquisitorial role in determining the case that a party was seeking to advance; **Derby County Council v Marshall** [1979] IRLR 261 EAT, **McNichol v Balfour Beatty Rail Maintenance Ltd** [2002] IRLR 711 CA.

47. Turning to the ET's decision, its reasoning was sufficient given the nature of the claims identified before it and the evidence the claimant had adduced. In relation to the unfair dismissal claim, the ET had considered the fairness of the redundancy process and measured it against the respondent's own policy, expressly considering the issue of alternative employment (see paragraph 103). This was sufficient for the purposes of Langston. As for the complaints of discrimination, the ET's reasons demonstrated that it did not simply stick slavishly to the list of issues but had tried to understand how the claimant was putting his case and had been unable to see that he had adduced any evidence that would serve to shift the burden of proof.

Analysis and Conclusions

48. The claimant's claims before the ET had ranged widely across a number of areas, including claims of detriment and automatic unfair dismissal due to his having made protected disclosures, and various allegations of discrimination. In contrast, the focus of this appeal, stated in the ground of appeal permitted to proceed to a full hearing, is very limited: to the extent that the claimant relied on the respondent's differential treatment of Ms Cheli, did the ET fail to permit him to develop this aspect of his case and/or did it fail to address this issue in its judgment, in so far as it was relevant to the question of alternative employment either as part of his complaint of unfair dismissal or in demonstrating that the burden of proof had shifted for the purposes of his discrimination claims? (for

completeness, I note that although the ground of appeal also referred to this point as going to the question whether the claimant was denied opportunities to remain in the workforce, it is apparent that his only comparator in that regard was Ms Cozens; there is no appeal against the ET's findings in that regard). In seeking to answer that question, the first stage must be to consider whether (and, if so, how) the claimant had relied on Ms Cheli as a comparator in the ET proceedings.

49. Ms Cheli had not featured as a comparator in either of the claimant's ET claims. That is unsurprising as the documentary evidence suggests that she only applied for appointment to the SPO Director post on or around 23 September 2019 (at that stage, as maternity cover for Ms Pasternak); the claimant's dismissal had, of course, taken effect nearly nine months before. That said, the claimant had made a complaint about the respondent's failure to appoint him to the SPO Director position after his interview in January 2019; it was essentially his case that the post had deliberately been put on hold until after his employment had ended. Although the claimant had also made a complaint that this position had been used by the respondent to retain another employee, Ms Pasternak, the respondent had explained how Ms Pasternak had been on maternity leave at the time and (pursuant to the **Maternity Regulations**) it had therefore been required to appoint her to one of the two SPO Director vacancies in the Global Health department; the claimant had applied for the other vacancy then available, but it was decided not to proceed with recruitment to that position at that time (see paragraph 29.3 of the consolidated grounds of resistance, paragraph 14 *supra*).

50. On the face of the claim and response, therefore, to the extent that any comparative exercise was required in this regard, the issue for the ET in relation to the SPO Director post seemed to relate to the differential treatment of the claimant and Ms Pasternak. Certainly, this was how the claimant's case was then clarified in early 2020, as he thereafter identified Ms Pasternak as a comparator in his further particulars, making clear that he was relying on her appointment into an alternative role, in contrast to his displacement and dismissal by reason of redundancy.

51. In the list of issues, this focus on the SPO Director role, and the differential treatment of Ms Pasternak, might not have been identified as a specific point of dispute in respect of the unfair

dismissal claim, but I accept that the issue of alternative employment can generally be seen to be inherent in a claim of unfair dismissal in a redundancy context (see **Langston v Cranfield University** [1998] IRLR 17 EAT) and the claimant could be seen to have raised a concern as to an inconsistency in the respondent's approach in this regard – there would all be matters falling under issue 4.6 (see paragraph 17 *supra*). As for the claims of discrimination, specific comparators were not named but it had been identified that the claimant was complaining (i) that he had not been provided with an opportunity to remain within the workforce until an alternative role became available (in respect of which (according to the further particulars he had provided) his named comparator was Ms Cozens); and (ii) that he had been denied other roles (which, from the further particulars provided, related to the SPO Director role and the comparison with Ms Pasternak). Although a list of issues is a case management tool and not a pleading (**Moustache v Chelsea and Westminster NHS Foundation Trust** [2022] EAT 204 at paragraph 33), seen in the context of the claim and further particulars in this case, this list can be seen as fairly summarising the matters the claimant had identified for determination. Certainly, the respondent's pleaded case had addressed the relevant details of the claimant's claims and further particulars, and it could be taken to have understood the list of issues in this context. As at November 2020, the claims might thus be said to have been reasonably clearly articulated, and understood by all concerned.

52. By email of 1 February 2021, however, the claimant made an application for specific disclosure, relating to the appointment of Ms Cheli. Rather than focusing on the exception that had been made for Ms Pasternak, the claimant now seemed to be saying that the SPO Director position that he had sought to apply for had been put on hold until he had exited the respondent's employment and had then been offered to Ms Cheli. Allowing that the relative merit of Ms Cheli (and Ms Cozens) and the claimant was "*relevant to the question of why he was not retained/selected*", the ET granted the application. There may be some question as to the explanation provided by the ET for allowing this disclosure application: for entirely understandable reasons, the claimant had not in fact identified Ms Cheli as someone who had been appointed to the SPO Director post in direct competition with

him; she was thus in a different position to Ms Cozens. The decision to allow the application can, however, be understood on the basis that the claimant had been complaining that the decision not to proceed with the recruitment process in relation to this role had been unfair/discriminatory; the fact that an appointment had (as he understood it) subsequently been made to this position could thus be seen as potentially relevant to his claim.

53. Having received that documentation, however, the claimant did not then apply to amend his claim. Notwithstanding his application for specific disclosure, there was nothing to suggest that the claimant was now seeking to draw a specific comparison with Ms Cheli, who had been appointed to cover the SPO Director role in the autumn of 2019, some nine months after the termination of his employment. Although it is correct to say that the claimant referred to Ms Cheli's appointment in his witness statement, even then it is difficult to see that he was making a specific comparison to her: at paragraph 59 he recorded that, after his interview, he had been told that the role was being put on hold "*until the end of Q1*"; at paragraph 60 he expressed his view that this was done to prevent him from getting the role. In this regard, even on the claimant's own case, Ms Cheli's subsequent appointment (which, as this undoubtedly took place after the end of the first quarter, was entirely consistent with what he had been told after his interview) gave rise to no like-for-like comparison. On the respondent's case, in September 2019 Ms Cheli was just providing maternity cover and there was in fact no appointment to the second SPO Director role (the position for which the claimant had applied) until July 2020 (see the respondent's closing submissions, as set out at paragraph 31 *supra*). On either case, it is hard to see that the September 2019 appointment of Ms Cheli took matters any further forward.

54. In any event, faced with the claims before it, as presented by the claimant, I do not consider the ET erred by failing to understand that a specific issue had been identified in relation to Ms Cheli's appointment. At most, the claimant points to his application for specific disclosure in paragraph 60 of his witness statement, but, to the extent that these went any further than the list of issues (as understood in the context of the claim and further particulars), the ET would have been entirely

correct to consider that these raised nothing further that it was required to determine. As for the claimant's response in cross-examination (referenced at paragraph 30, *supra*), that did no more than repeat what he had said in his witness statement: essentially, the claimant believed that the respondent had not been candid about when the SPO Director post had been filled, albeit he had been told (in January 2019) that it had been put on hold "*until the end of Q1*". Although the claimant was aggrieved that the Employment Judge had lost connection during the hearing at some point during this cross-examination (notwithstanding her assurance that she would obtain a note from her colleagues of the evidence she had missed), this was merely a re-statement of his evidence-in-chief; it similarly took matters no further forward in terms of the issues the ET was required to determine.

55. Although proceedings before the ET do not require formal pleadings, a degree of formality is still required in starting the claim and in the response to that claim; the issues that the ET is to determine are defined by those formal documents, they do not simply develop as the case progresses. In this regard, it is helpful to re-state the observations made by Langstaff P in **Chandhok and anor v Tirkey** [2015] ICR 527:

> "16 ... The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made—meaning, under the Employment Tribunals Rules of Procedure 2013 (SI 2013/1237), the claim as set out in the ET1.
> 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 ET1 and 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 ET1 and ET3 have 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 ET1 or 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."

56. Accepting that the issue of alternative employment was certainly relevant to the question of fairness, and that the claimant had raised the question whether the SPO Director role had been deliberately put on hold to prevent him being appointed to this position (which might also be relevant to the question of fairness and which was suggested to raise an issue of discrimination by comparison with Ms Pasternak), I am unable to see that the ET erred in its understanding of the claimant's case as one which did not rely on a specific comparison with Ms Cheli. The ET was not required to search around amongst the interlocutory correspondence and applications to see if such a comparison might have been alluded to at an earlier stage (and see, by analogy, **Joseph v Brighton and Sussex University Hospitals NHS Trust** UKEAT/0001/15). It was entitled to determine the claimant's case by reference to the list of issues, seen in the context of his original claims as clarified by his further particulars. Had the claimant considered that the further documents disclosed to him relating to Ms Cheli provided a further basis of claim that he wished to pursue, it would have been open to him to apply to amend his case to do so; it was not incumbent on the ET to see if there might be some other case that he could advance and/or effectively undertake the task of amending the claim on his behalf,

during the course of the full merits hearing.

57. To the extent, therefore, that this appeal is limited to the question whether the ET erred in its approach to the claimant's case insofar as that relied on what was said to be the differential treatment of Ms Cheli, it must fail: the case that the ET was required to determine had not identified that any such reliance had been made.

58. Adopting a somewhat broader view of the appeal, I have, however, gone on to ask myself whether the ET can nevertheless be said to have erred in its approach to the question of alternative employment in relation to the claimant's non-appointment to the SPO Director role for which he had been interviewed in January 2019. This had been a matter he had identified in his original claims, further articulated in his further particulars. Regardless of any specific comparison with Ms Cheli, did the ET err in failing to allow the claimant to develop his case in this regard, and/or in failing to engage with this issue in its decision?

59. First addressing the way in which the claimant's case was advanced before the ET, in giving his evidence it is notable that, other than re-stating that which was agreed (that the post for which the claimant had applied had been put on hold, so no appointment would be made at that stage), the claimant merely asserted that this was to prevent his getting the role without providing any evidence in support. As already noted, the references to Ms Cheli did not advance his case in this regard, and the claimant made no reference to Ms Pasternak's position, apparently accepting what the respondent had said about the requirement not to make her redundant given that she was on maternity leave. Although the ET limited the supplementary questions the claimant was permitted to ask of his witness, Ms Champaneri, there is no suggestion that she could have given evidence relevant to the decision not to proceed with the SPO Director vacancy for which the claimant had interviewed, or that she would have been able to shed new light on what had happened in Ms Pasternak's case. In any event, had Ms Champaneri been able to give such evidence, that would have needed to have been included within her witness statement; the ET was entitled to limit supplemental questions to those matters that might not have been anticipated at the time the statement was compiled.

60. Turning then to the ET's decision, although it might be criticised for failing to specify that the question of the claimant's non-appointment to the SPO Director position in January 2019 was not an issue that it was required to address (given the absence of any evidence (i) that the post was held vacant simply to prevent the claimant getting the role, or (ii) that Ms Pasternak was retained for any reason other than the requirements of the **Maternity Regulations**), I cannot see that this can properly be said to render its decision unsafe. The case advanced by the claimant simply failed to provide any evidential basis for a specific allegation of inconsistent treatment in relation to this post, whether that is understood as relevant to the complaint of unfair dismissal (on which there was a neutral burden of proof) or to his various claims of discrimination (on which the claimant bore the initial burden of establishing facts from which the ET could decide, in the absence of any other explanation, that he had suffered such discrimination). Moreover, whilst not expressly explained by reference to the SPO Director post, the ET's reasoned decision made clear that the claimant had failed to advance any evidential basis for a comparison with Ms Pasternak: "*The claimant had done no more than to reference a protected characteristic and then has made vague allegations. What he has not done is to provide evidence or any other detail/particularisation at all*." (ET paragraph 45)

61. At most, the claimant's case of unfair dismissal raised the issue of alternative employment as a matter that was part and parcel of the ET's general consideration (applying a neutral burden of proof) of the fairness of his dismissal by reason of redundancy. In this regard, it is apparent that the ET considered the information that had been provided to the claimant regarding alternative opportunities, finding that he had been aware of relevant vacancies notwithstanding the early suspension of his IT access (see the ET at paragraph 37, as recorded at paragraph 43 *supra*). It also expressly considered the claimant's complaint that the employment of others (Ms Cozens) had been extended, when his had not: the ET finding that this was because Ms Cozens had made a specific business case in this regard when the claimant had not (ET paragraphs 63-64). In the circumstances, the ET's conclusion that the respondent had acted fairly and reasonably – including in relation to alternative employment (see ET paragraph 103) – provided an adequate explanation of its decision

on the basis of the claim before it.

62. For all the reasons stated above, I therefore dismiss this appeal.