

PALLANT

C H A M B E R S

LIST OF ISSUES

In [Parekh v London Borough of Brent \[2012\] EWCA Civ 1630](#) Mummery LJ had the following to say about lists of issues at paragraph 31 (my underlining).

“A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see Land Rover v. Short Appeal No. UKEAT/0496/10/RN (6 October 2011) at [30] to [33]. As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence: see Price v. Surrey CC Appeal No UKEAT/0450/10/SM (27 October 2011) at [23].”

The recent case of [Yorke v GlaxoSmithKline Services Unlimited EAT/2019/0962](#) is a timely reminder of the importance of getting the list of issues right.

What was this about?

The claimant was employed as a Mover by the respondent. She was regularly absent from work because she had rheumatoid arthritis. The claimant contended that the Mover role was not suitable for her because of her arthritis, but that there was a role, First Line Leader, that she could have undertaken, and would have prevented her eventual dismissal for medical incapability.

The claimant, acting in person at the time, then brought a claim that she had been dismissed because of ill health absence that resulted from her disability and that this could have been avoided by transferring her to an alternative role. The claimant was represented at a preliminary hearing for case management and the final hearing. The parties agreed a list of issues that was convoluted and, in some respects, simply did not work. The claimant's claims were dismissed.

What did the Employment Appeal Tribunal think?

The claimant's appeal was permitted to proceed, limited to the contention that she should have been transferred to a specific alternative role. HHJ Tayler found that the tribunal could not properly be criticised for determining the case on the basis of the agreed list of issues. The tribunal had made factual findings that the role was not suitable for the claimant. Even if the issues had been better set out, the contentions that transferring the claimant to the alternative role would have been a reasonable adjustment, and that the failure to do so prevented her dismissal being justified, would not have been made out. Her appeal was dismissed.

HHJ Tayler went on to make some helpful comments about lists of issues and I would suggest that this judgment should be required reading for anyone who has to carry out this task when making a claim for disability discrimination.

HHJ Tayler observed in paragraph 39 that identifying the correct PCP can be difficult for litigants in person and even for lawyers. Nonetheless, it is clear that an appropriate PCP can be framed in a case in which a disabled person is not able to perform the functions of her role and seeks an adjustment of being moved into an alternative role.

Further at paragraph 51 HHJ Tayler said the following about lists of issues generally (my underlining):

"When engaged in case management it is easy to become beguiled by a list of issues that is reasonably concise and well set out. A list of issues is a tool to assist the tribunal to do its job and it is always worth considering carefully whether it actually works. Where the parties are represented it is the representatives that bear the principle responsibility for ensuring that the list of issues is up to the job."

What can we take away?

The most important point made in this case is that the list of issues must actually work i.e. ask the right questions.

Identifying a list of issues has been standard practice in the Employment Tribunal for a number of years. However this is not always a straight forwards task when dealing with discrimination claims. There is much merit in trying to keep a list of issues concise in appropriate cases however this is not always possible and so practitioners should not skimp on detail when it is necessary to fully express the respective party's pleaded case.

It is also worth noting that it has become quite common for the Claim and the Response in the Employment Tribunal to adopt a narrative style which

can obscure the case being brought. A practice that has come in for some criticism most recently in [C v D UKEAT/0132/19](#). I would always recommend that anyone drafting a Claim or a Response has at least one eye on the list of issues which the Tribunal will be asked to determine at the final hearing before finalising these documents.

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