Appeal No. UKEAT/0405/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 January 2015
Judgment handed down on 24 April 2015

Before

HIS HONOUR JUDGE SEROTA QC

(SITTING ALONE)

REMPLOY LIMITED — APPELLANT

(1) J ABBOTT AND c1600 OTHERS
(2) UNITE THE UNION
(3) GMB
(4) R HEALTHCARE LIMITED — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR THOMAS LINDEN (One of Her Majesty's Counsel) Instructed by: Capital Law LLP Capital Building Tyndall Street Cardiff CF10 4AZ
For Unite the Union & Unite Claimants	MR PHILIP ENGELMAN (of Counsel) Instructed by: Thompsons Solicitors 17 Wellington Street Leeds West Yorkshire LS1 4DL
For GMB & GMB Claimants	MR DESHPAL PANESAR (of Counsel) Instructed by: Thompsons Solicitors 17 Wellington Street Leeds West Yorkshire LS1 4DL
For J Abbott & c1600 others	No appearance or representation by or on behalf of the Respondents
For R Healthcare Limited	No appearance or representation by or on behalf of the Respondents

SUMMARY

PRACTICE AND PROCEDURE

Amendment

Case management

1. These proceedings involve approximately 1,600 individual claims for unfair dismissal arising out of mass redundancies when the Respondent, "Remploy", closed some 60 plants in 2012 and 2013.

2. The Employment Tribunal had carefully and effectively managed the case on the basis of proceeding with a limited number of lead or test cases, raising generic issues that applied across the board to all Claimants, as a result of there having been national policies applied across the country to redundancies in all Remploy facilities.

3. The Claimants were members of trade unions and represented by experienced solicitors and counsel. The claims forms had been professionally drafted. The allegations of unfairness included the allegation that the Respondent had failed to consult with the Claimants in relation to possible redeployment to other factories. Prior to September 2014 the parties had been working on the basis of the case management model; the process of preparing witness statements and giving disclosure was well under way and a hearing date had been set for November 2014.

4. In September 2014 the Claimants applied to raise further issues as to unfair selection for redundancy and failure to consider various possible redeployments other than to "other factories". These issues did not arise out of any national policies but arose on a plant by plant basis. The Claimants maintained that the new allegations were simply further Particulars of

allegations already pleaded and that permission to amend was not required. However they sought, and were granted, permission to amend. The Respondent argued that the effect of allowing the amendments would be to fracture the existing case management model as the new issues (which had not been particularised, nor were the Claimants concerned identified) were not capable of being determined on the basis of the existing case management model and would lead to delay (the proceedings were in fact adjourned on two further occasions) and added expense of providing further witness statements and disclosure. The Respondent also claimed that it was prejudiced by the proposed amendments as its work force, including managers with the relevant knowledge had been dispersed and documents and email archives were no longer available.

5. The Employment Judge considered that he was bound by the decision in **Langston v Cranfield University** [1998] IRLR 172 to investigate in any case of unfair dismissal by reason of redundancy, as implicit in that claim, that the unfairness incorporated unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer, even if not specifically pleaded or raised as issues by the Claimants.

6. The Employment Appeal Tribunal held that the Employment Judge had fallen into error, firstly by allowing amendments that had not been fully formulated or particularised and by considering them together rather than examining each proposed amendment separately. Without properly formulated and particularised draft amendments it was impossible for the Employment Tribunal (or the Respondent) to consider how the amendments would affect the existing case management model and whether or not they could be accommodated by a limited number of lead or test cases, the effect on existing hearing dates, prejudice to the Respondent, for example in identifying necessary witnesses and having access to relevant documentation and information. The Employment Tribunal should also have considered the reasons for the

delay by the Claimants in putting forward the suggested amendments and when they or their legal representatives were first aware of the relevant factual basis for the "new" allegations. It was also necessary to consider the effect on any increase in likely costs to the parties and on expenditure of the resources of the Employment Tribunal.

7. The decision in **Langston** had no blanket application and no application to a case such as the instant case in which the parties were legally represented, had defined in their pleadings the issues they wanted decided by the Employment Tribunal and where there had been extensive and comprehensive case management on the basis of the pleadings.

8. The permission of the Employment Tribunal was necessary to add new Particulars in any event and it had to consider whether or not to allow amendment on conventional principles as set out for example in **Selkent Bus Co Ltd v Moore** [1996] IRLR 661, [1996] ICR 836.

9. Notwithstanding the reluctance of the Employment Appeal Tribunal to interfere with discretionary case management decisions of Employment Tribunals, the decision in the instant case to grant permission to amend was sufficiently flawed as to require being set aside

HIS HONOUR JUDGE SEROTA QC

Introduction

1. This is an appeal by the Respondent (which I shall refer to as "Remploy") against a Decision of the Employment Tribunal at London Central (Employment Judge Tayler) of 26 September 2014 to allow amendments in claims for unfair dismissal. The Notice of Appeal was referred to a Full Hearing by me on 21 November 2014.

Factual Background

2. In these proceedings there are approximately 1,660 separate Claimants, who were all former employees of Remploy. Remploy is a non-departmental public body sponsored by the Department of Work & Pensions under the **Disabled Persons (Employment) Act 1944**. The operations of Remploy included heavily subsidised factories providing employment for disabled persons. I believe that Remploy was established to provide work for persons injured during the Second World War, but in more recent times its employment has extended to disabled persons beyond ex-servicemen.

3. In about March 2012 a decision was made by the Government to cease funding for Remploy and consequently Remploy decided to propose closure of some 36 of some 54 sites. At the time there were approximately 1,750 employees who were at risk of redundancy. The precise number of sites is not known to me, but it was suggested during the course of the hearing that some 60 sites were closed in all. The claims arise out of the closure of various factories that commenced on 18 August 2012 (stage one), and stage two took place in August 2013. As a result of the closure of the factories the staff dispersed to the four winds.

4. The Respondent's case is that it cannot trace all of the former managers and that although some documents relevant to these proceedings have been retained, others unsurprisingly cannot be traced. Email accounts were closed, and the archive cannot be retrieved. All of the redundancies arose from the complete withdrawal of Government funding. There was a centrally directed consultation and closure process with a uniform approach across all of the Remploy factories. However, it does appear from what I was told during the hearing that there was some redeployment to other facilities. A few posts were available in facilities not being closed; these facilities were not manufacturing facilities but included an employment agency for disabled persons and an organisation engaged in the operation of CCTV operations. There was also some redeployment for "closing-down teams", which, as their name suggested, were responsible for the physical closure of the various sites. The first ET1s were lodged on 15 November 2012. I refer to the notice of claim of the Claimant Mr M Briggs, which I am told is an example of the claims. It can be seen from paragraph 5 that the claim is for unfair dismissal (including constructive dismissal). The grounds of the application include breach of what is referred to as the Remploy Accord, which was a collective agreement expressly stated to be legally binding that provided, *inter alia*, that in a redundancy situation where a reduction in jobs could not be avoided Remploy would in the first instance invite volunteers from the factory or area affected.

5. It is also said that Remploy failed to consult with the Claimants as individuals in relation to the proposed redundancies and as to the method of selection. It is then said (paragraph 12):

> **"Further, the Respondent failed to make any, or any reasonable, investigation as to the possibility of the Claimants being employed at other factories." (my underlining)**

6. Remploy maintains that it understood this as meaning that Claimants from stage one closures were seeking redeployment to the factories closing in stage two rather than to transfer

to closing-down teams (or to the employment agency or CCTV operation). This is apparent from paragraph 48 of Remploy's response:

> **"The Claimants have alleged that Remploy "failed to make any, or any reasonable, investigation as to the possibility of the Claimants being employed at other factories". This is denied."**

7. I also refer to paragraph 50:

> **"Remploy was unable to offer automatic transfer due to the nature of the process as described above. Individuals were, however, redeployed where possible, including through "bumped" redundancies."**

8. The Claimants maintain that in the light of the allegations of breach of the Remploy Accord, paragraph 12 of the notice of claim could be construed as being a complaint about an unfair redundancy process generally. In this case the Claimants have been represented by highly competent legal advisers, solicitors and counsel, and I am reluctant to accept that particular construction; had a more generalised complaint been made it would have been clearly expressed without reference to employment at other factories.

9. Most of the Claimants are members of the Unite trade union represented by Thompsons. However, there is a subset of Claimants represented by Messrs Simpsons. These are mainly GMB Claimants with modernisation claims. There are approximately 160 "modernisation Claimants", who assert that in 2008 they were guaranteed a job for life as part of a modernisation process and that accordingly they could not be made redundant prior to their retirement dates. The bulk of the claim, as I have said, relates mainly to Claimants represented by Messrs Thompsons.

10. On 22 January 2014 Mr Neil Johnson of Thompsons emailed Mr Iestyn Morris of Capital Law, acting for Remploy, in advance of a Directions Hearing fixed for 14 February suggesting

that it would be sensible if directions were to be given for there to be lead Claimants. This led to an agreement in February 2014 for a centralised approach to the litigation involving test cases and that all English and Welsh cases should be transferred to the Employment Tribunal at London Central. Separate arrangements were made for Scottish cases.

11. A Preliminary Hearing (Case Management) was held on 14 February 2014 (order dated 14 February 2014) when the case was listed for 15 days between 10 and 28 November 2014 with one lead case to be nominated for each of five categories. There were various interlocutory hearings between April and June and agreed adjustments to the timetable, but no suggestion was made that the Claimants wished to raise new issues or that the approach of proceeding by way of a test case or cases was no longer appropriate. Neither was it suggested that the November hearing was no longer feasible. The Employment Tribunal was assured that amendments to the timetable did not impact on the trial date. There was considerable correspondence passing between solicitors; case management issues were raised, but the possibility of new issues being raised or a departure from the agreed approach to determination of the claims or any doubts about the viability of the November hearing were not raised. The parties continued up until the end of August 2014 preparing for the hearing on the agreed basis.

12. Prior to 3 September 2014 the parties had engaged in disclosure and trying to agree a list of issues. The list of issues was largely agreed informally, but there was never any final agreement and no agreed list of issues as such.

13. As at the beginning of September 2014 the parties were broadly agreed that there should be six categories of claim: (1) a claim under section 188 of the **Trade Union and Labour Relations (Consolidation) Act** ("TULRCA") by Unite and GMB Claimants about failures to

inform and consult (the GMB Claimants no longer pursue this claim, but the Unite Claimants still do so); (2) claims for unfair dismissal in relation to redundancy raising various points as to fairness of the procedure; (3) breach of contract claims concerning alleged entitlement to enhanced redundancy pay (these claims are no longer being pursued); (4) modernisation claims relating to the alleged agreement in 2008 offering employees "jobs for life"; (5) **Transfer of Undertakings (Protection of Employment) Regulations** ("TUPE") claims against R Healthcare; and (6) a separate claim by Mr Gledhill, who claimed he had been dismissed for trade union activities.

The Original Case Management

14. The case as originally pleaded raised generic "national" issues and therefore lent itself to the test case approach and a determination by one Employment Tribunal centrally; see **Employment Tribunals (Constitution and Rules of Procedure) Regulations** Rule 36. It was not suggested that there was any local or individual differentiation between the claims and the issues raised. Prior to September 2014 the parties had been working on the basis of the original case management directions with a view to the hearing taking place in November 2014. The process of taking witness statements and giving disclosure continued, and no difficulties or potential difficulties were raised at various interlocutory hearings that took place.

15. On 3 September 2014 the first intimation of possible problems was given when Messrs Thompsons wrote to Messrs Capital Law that the case had been transferred to a new team and an adjournment of the November hearing would be sought. On 5 September 2014 Ms Nadia Motraghi, junior counsel for the Claimants, produced a note on behalf of the GMB and Unite English and Welsh Claimants for a Preliminary Hearing due to take place on 5 September 2014. This note was prepared on the basis that it might form a basis of an application for an

adjournment. Ms Motraghi suggested that the Claimants were in some difficulty in identifying lead Claimants because the task was much more complex than previously anticipated. The Claimants' legal advisers were having difficulty in contacting individual potential lead Claimants; secondly, they appeared to have underestimated the time needed to be spent with each individual Claimant; and thirdly, because as a result of information thus far gathered, the Claimants now understood that there was a much broader range of lead Claimant categories than originally anticipated. Ms Motraghi explained that the Claimants were disabled and the majority may have had some form of mental ill-health or learning disability, making contact with individual Claimants "much more difficult". Some Claimants had difficulties in communicating orally, others had difficulties reading and writing, and some had difficulties with both. Therefore, communication by telephone and in writing was more difficult and slower than anticipated. The Claimants "are spread across the length and breadth of the country", and Ms Motraghi suggested that the emerging picture showed significant differences in the handling of the redundancy process at stage one and stage two of the plant closures as regards modernised and non-modernised Claimants and as between different factory sites. This would have to be reflected in the selection of lead Claimants. There is also a reference to unfair selection for the closing-down teams. There appeared to be no national guidance, and there were variations on a factory-by-factory basis. It was suggested that there had been unfair selection of modernisation Claimants to work in particular factories and failure to transfer Claimants to the CCTV operations or to employment services. Ms Motraghi at paragraph 32 had this to say:

> **"This case is unprecedented. Not only is the scale of the litigation very large for a claim brought in the Employment Tribunal, but this case features additional difficulties in case management due to the particular needs of the Claimants, who are mostly disabled and the additional matter that the stewardship of this case involves two trade unions. For the reasons set out above, it also appears that there are significant local variation [sic] in how Claimants were treated."**

16. It was said by Ms Motraghi that it was impossible to meet the timetable and the parties were already behind. New solicitors had been appointed for both the Unite and GMB Claimants. A Case Management Hearing took place on 5 September 2014 (order dated 9 September 2014), at which various directions were given, and the Claimants were required to set out their proposed amendments to the current draft list of issues and put forward any proposed lead Claimants. A further Preliminary Hearing was fixed for 26 September 2014.

17. The Claimants duly responded to the order by presenting proposed amendments for list of issues:

> **"[1] <u>Unfair Selection re Close down teams</u>**
>
> > **a. "Were the Claimants fairly selected for redundancy as at their date of dismissal, given the availability of roles on the close down teams [which provided additional work for a small team per site for weeks or months]?"**
>
> **[2] <u>Failure to offer suitable alternative employment re Close down teams</u>**
>
> > **b. "Was there a reasonable search for suitable alternative employment in the circumstances? Namely, did the First Respondent offer Claimants the opportunity to apply to work on the close down team?"**
> >
> > **c. "Was there a fair set of criteria produced in relation to the personnel to be assigned to the close down teams?"**
> >
> > **d. "Were those criteria fairly applied to the claimant[s]?"**
>
> **[3] <u>Unfair selection re Wigan / Blackburn sites</u>**
>
> > **e. "Were the Claimants fairly selected for redundancy as at their date of dismissal, given the availability of roles allocated to Modernisation employees in the St Helen's area, to work at the Wigan and/or Blackburn sites?"**
>
> **[4] <u>Failure to offer suitable alternative employment at Wigan / Blackburn sites</u>**
>
> > **f. "Was there a reasonable search for suitable alternative employment? Did the First Respondent failure [sic] to inform/offer Claimants the opportunity to apply/work in the Wigan and/or the Blackburn sites as undertaken by the (selected) Modernisation Claimants??"**
>
> **[5] <u>Failure to offer suitable alternative employment in CCTV / ES</u>**
>
> > **g. "Was there a reasonable search for suitable alternative employment, did the First Respondent permit interested Claimants to train/work in CCTV/Employment Services?"**
>
> **[6] <u>Failure to offer suitable alternative employment, by reason of failure to inform of opportunities</u>**
>
> > **h. "Was there a reasonable search for suitable alternative employment, i.e. were the Claimants notified of the vacancies?"**

[7] ***Other recruited [sic] during the redundancy process***

> **8. We have also been told, and are in the process of following up, that despite the redundancy situation, other individuals were being recruited into the factories, at the expense of departing employees. We are actively investigating this matter.**
>
> **9. The Thompsons Claimants are actively pursuing these matters to identify lead Claimants who best represent these groups. Unfortunately we cannot do so at this time."**

18. It can be seen that none of these allegations are particularised and the particular Claimants concerned are not identified. On 24 September 2014 the Claimants filed a witness statement by Mr Birrell, the solicitor at Thompsons in charge of the case, in which he explained the reasons for delay and his clients' disabilities. He proposed 42 new lead Claimants. I need not refer to Mr Birrell's witness statement in any detail. Remploy responded to Mr Birrell's statement with a statement of Ms Mary Goldsbrough, a senior associate solicitor at Capital Law (she had previously acted as in-house employment lawyer for Remploy). She had conduct of Remploy's case. She expressed concern that the Claimants were seeking to alter the basis of their claims and suggested that the trade unions were well aware of all issues in the redundancies by reason of their close involvement in the collective consultation process. She went through in some considerable detail the consultations and identified those involved and pointed out that it had not been suggested at any stage there had been a failure to offer suitable alternative employment. Further, there had been various collective redundancy appeals, and the point had not been raised. She stated:

> **"13. If the issues which the Claimants now seek to raise were issues of any significance, it is inconceivable that they would not have been picked up by the Claimants and/or their representatives during the 9 months of the redundancy process, during the course of the redundancy appeals, during preparation of their claims at the end of 2012, at any time in 2013 or, apparently, until shortly before 5 September 2014."**

19. On 26 September 2014 a further Preliminary Hearing took place; I shall refer to the Reasons of the Employment Tribunal in due course but for the moment note that the final hearing (then listed for 10-28 November 2014) was vacated and re-fixed for 6-26 January 2015,

and has since been further adjourned. The Claimants were given permission to amend their claims in the form set out in the response document, which I have set out *in extenso* at paragraph 17. The Claimants were required to provide further information, and further case management directions were given. If it were to be contended that more than 15 test Claimants were required, the Claimants were required to set out the reason for the additional proposed test Claimants and the issues their claims raised. The Respondents were to respond to the proposed test Claimants and propose any alternatives. Directions were given in relation to preparing a bundle of generic documents and additional bundles for test or lead Claimants. Finally, the time for exchange of witness statements was extended.

20. A further Preliminary Hearing took place on 27 November 2014, and various applications were adjourned pending the outcome of this appeal. I was told by Mr Engelman, appearing on behalf of the Unite Claimants, that he now estimated that the final hearing would last some six weeks.

The Decision of the Employment Tribunal

21. The Employment Tribunal set out the background, including the procedural background. The principal issue was set out by the Employment Tribunal at paragraph 7:

> **"The first issue was that of whether the Claimants should be permitted to make an amendment to their claims. The proposal is set out as an amendment to the current draft List of Issues at pages 102 and 103 of the Claimant's bundle for the preliminary hearing. The Claimants contend that an amendment is not required, but that they should be permitted to make it as a clarification of claims that they already bring. The Respondent objects to the amendment. They contend that it raises substantial new factual allegations that will require consideration of a number of individual issues that are unlike the generic issues that had previously been put forward. They note that [it] was not until 3 September 2014 that they were informed of the possibility of an application for an amendment and that they were told of the proposal to add these additional claims in a note [provided] at a preliminary hearing for case management on 5 September 2014. That hearing was listed for a one hour hearing which did not provide sufficient time to deal with the substantive applications. I fixed this preliminary hearing to determine the substantive applications for amendment and/or for postponement of the hearing."**

22. The Employment Tribunal noted that in paragraph 12 the generic Particulars of Claim, which I have already referred to, the Claimants complained that the Respondent had failed to make any or any reasonable investigation "as to the possibility of the Claimants being employed *at other factories* [my emphasis]". Mr Thomas Linden QC, who appeared on behalf of the Respondent at the Preliminary Hearing on 26 September 2014, submitted to the Employment Tribunal that the proposed amendments were unparticularised and appeared to raise issues that were not generic (paragraph 10):

> **"This is an allegation of a failure to investigate the possibility of redeployment. During the course of Counsels' attempts to finalise the list of issues the allegation was expanded until it appeared in a draft list of issues, which had come very close to agreement by 23 June 2014, as follows:**
>
> **Was there a reasonable search for suitable alternative employment in the circumstances, in particular:**
>
> > **Was the search for suitable alternative employment reasonable in the light of the vulnerable nature of the majority of the Claimants?**
> >
> > **Was the search for suitable employment reasonable in the light of repeated assurances allegedly given to the Claimants by the Respondent and by the Government that there would be no compulsory redundancies?**
> >
> > **Did the Respondent explore the possibility of the Claimants being employed at other factories of the Respondent and if not, why not?**
> >
> > **Were employees redeployed where possible as asserted by the Respondent?"**

23. At paragraph 11 the Employment Tribunal noted that the Respondent did not either by way of seeking further information or by raising queries during the course of the attempts to agree the list of issues seek more detail of the generic allegations in the circumstances in particular:

> **"Was the search for suitable alternative employment reasonable in the light of the vulnerable nature of the majority of the Claimants?**
>
> **Was the search for suitable employment reasonable in the light of repeated assurances allegedly given to the Claimants by the Respondent and by the Government that there would be no compulsory redundancies?**
>
> **Did the Respondent explore the possibility of the Claimants being employed at other factories of the Respondent and if not, why not?**
>
> **Were employees redeployed where possibly as asserted by the Respondent?"**

24. The Employment Tribunal went on to observe at paragraph 11 that the Respondent did not seek greater particularity of the precise claim that was made in respect of alternative employment. At paragraph 12 the Employment Tribunal refer to the proposed amendments in which the Claimants:

> **"… raise a number of specific allegations in respect of alternatives to dismissal by reason of redundancy. …"**

25. The Employment Judge continued:

> **"While I accept that these are particular to which the Respondent is entitled, and I consider that this specific information has been provided lamentably late in the day, I do consider on application of the *Selkent* [*Bus Co Ltd v Moore* [1996] ICR 836] test and of the overriding objective that although the application to amend to provide specifics in respect of the alternative employment allegations are made late in the day, the interests of justice require that the Claimants have the opportunity to put forward their full case in circumstances where they are not adding a new course of action or, indeed, a new head of unfairness, but are providing the particularity a ground of alleged unfairness [sic]. These are particulars that could have been requested at an earlier stage by the Respondent. *The Tribunal was bound to investigate whether there were any alternatives to dismissal either at the stage of liability or remedy.* Accordingly, with regret at the late timing of the application, I permit allegations to go forward in respect of the close down teams, the unfair selection at Wigan and Blackburn, possible alternative employment in CCTV or the Employment Service and/or recruitment of new employees." (my emphasis)**

26. The Employment Judge continued, after a reference to adjournment (paragraph 13):

> **"… While the delay will cause the Respondent some prejudice I do not consider that this outweighs the injustice that would be done were the Claimants not able to put forward the particularity of their generic allegations in respect of alternative employment."**

27. The Employment Judge went on to refuse to grant applications by the Claimant for third-party disclosure against the Department of Work & Pensions. This is not a matter that is relevant to the appeal, and I say no more about it.

28. I have emphasised the passage in which the Employment Judge suggests that even were a matter relating to unfair selection not to have been set out, the Employment Tribunal was nonetheless bound to investigate whether there were any alternatives to dismissal either at the stage of liability or remedy. It is apparent that no reference is made as to the effect of the

proposed amendment on case management and whether it would unravel in whole or in part previous case management directions with a view to there being a limited number of lead cases. It is clear that the Employment Judge in relation to the passage that I have underlined had in mind the decision in **Langston v Cranfield University** [1998] IRLR 172 as authority for the proposition that in the case of unfair dismissal in a redundancy situation an Employment Tribunal is bound to investigate all aspects of unfairness even if the parties have not specifically asked them to do so. I was told by the Respondent that this was said by the Employment Tribunal at subsequent Preliminary Hearings on 3 and 27 November 2014, and on 27 November 2014 he handed a copy of the decision in **Langston** to the Bar. This case was referred to by the parties in their submissions, and it is apparent that he took the view at paragraph 12 that even though issues as to alternatives to dismissal had not or may not have been pleaded, the Employment Tribunal was bound to investigate them in any event.

Notice of Appeal and Respondent's Submissions

29. It was submitted that it was for the Claimant to show that the proposed amendments were in accordance with the principles set out in **Selkent** and the overriding objective and for the Employment Tribunal then to scrutinise each carefully and their implications in context of the conduct of the proceedings as a whole, including such matters as (1) lateness and (2) the scale of costs of the litigation.

30. The principal complaint was that the Employment Tribunal had given permission to amend without having before it a draft of a properly formulated and particularised amendment. Until this was done, it was submitted, the Employment Tribunal could not properly evaluate the implications of the proposed amendment, and the Respondent could do no more than raise a general objection.

31. Mr Linden made submissions on the purpose of pleadings being to define issues, and he made reference to **Chapman v Simon** [1994] IRLR 124, to which I shall have to refer later. The Employment Tribunal wrongly approached the opposed amendment on the basis that it was merely particularising existing grounds, which was not the case. If professionally represented, Claimants in a case clearly identify issues that define the aspect of the complaint they seek to pursue, the Employment Tribunal and the Respondent are entitled to proceed on the basis that those are the issues, and the Employment Tribunal does not have a roving brief and Claimants do not have a blank cheque to add issues by reference to a list of issues. If that were the case, one could never manage this sort of litigation.

32. It was submitted that the Employment Tribunal placed undue reliance on the status of the list of issues. The purpose of the list of issues was to distil issues from a pleading, not to amend the claim. A list of issues may show how the parties understand that scope of the pleadings, and the list of issues must be construed in the light of the pleadings. However, the list of issues has no status under the rules and even less status if it is not finally agreed, in deciding whether or not permission to amend is required to add further grounds.

33. The "new" issues raised by the Claimants are not capable of being dealt with as generic issues because they are all "localised". Mr Linden drew my attention to Mr Birrell's witness statement and the suggestion that there should now be no fewer than 41 lead Claimants. He submitted that neither Mr Birrell nor the Employment Judge addressed the reasons for not raising these matters earlier when they first came to the notice of the Claimants' solicitors (whenever this was). Mr Linden submitted forcefully that what the Claimants were seeking to do was to amend their ET1s rather than simply provide additional Particulars; after all, Mr

Panesar, counsel for the Claimants below, had sought permission to amend, and the Employment Tribunal gave that permission.

34. The Employment Judge, it was submitted, should have looked at each proposed amendment separately rather than looking at them all together. He should have addressed, but failed to do so, the evidence of Ms Goldsbrough. The Employment Judge also failed to correctly address the principles set out in **Selkent** and to have regard to the overriding objective. The Employment Judge failed to take account of the fact that the parties had been preparing for months on the basis of the issues as pleaded; there was no explanation for the delay in informing the Respondent of the new issues, and this was a case in which all of the Claimants were represented by large trade unions.

35. The Employment Judge had failed to take account of the fragmentation that the amendments would cause, which would cause delay, expense, the need for new case management and the possible abandonment of the plan to proceed by way of centralised test cases rather than numerous local hearings. The Employment Tribunal has not explained how the claims were now to be litigated, what new witnesses might be required and what new disclosure might be required. The granting of permission to amend was no longer proportionate to the expense, delay and additional Tribunal time required.

36. The complaints had been raised late to the prejudice of the Respondent as the factories had closed and relevant witnesses (if they could be identified) had left employment and were difficult to trace. Documents were no longer available. Mr Linden did not dispute that the Employment Tribunal purported to exercise a discretion, but submitted that in the circumstances the discretion had not been exercised properly.

37. The "new" issues were not raised in the claim forms, and amendment therefore is required if they are to be argued. If as the Claimants say these "new" issues always formed part of the case, why were they not raised prior to 5 September 2014? If the Claimants were not aware of these claims prior to that date, then they could not have been part of the originally pleaded case. Mr Linden pointed out, as he had before the Employment Judge, that the "new" issues were not the subject of national guidance and an investigation would have to be carried out on a factory-by-factory basis; this was true in relation to the closing-down teams and unfair selection for "modernisation Claimants", similarly in relation to the issues at Wigan and Blackburn and in relation to failure to transfer to CCTV work and redeployment opportunities. Individual Claimants are not specified. Mr Linden submitted that **Langston** was not applicable to this type of case and the Employment Tribunal was wrong to treat it as authority for the proposition that it was bound to deal with the point regardless of whether it was argued and the subject of evidence or not. Mr Linden drew my attention to **Aifos v Buckland** UKEAT/ 0067/05, which I shall turn to later. Mr Linden submitted that the Employment Judge did not consider all of the circumstances in carrying out the balancing exercise referred to in **British Gas Services v Basra** [2015] ICR D5; again, I shall come to this case later in the Judgment.

38. In relation to the overriding objective, the Employment Judge simply said that regard had been paid to the overriding objective, but no elements were referred to save that of delay. The Employment Tribunal did not consider what the effect of allowing the amendment would be as it would not leave the parties on an equal footing because of the special prejudice suffered by the Respondent. The Employment Tribunal had failed to consider the issues of proportionality and costs implications.

39. It was submitted that the Employment Judge was wrong in criticising the Respondent for not seeking further Particulars. The Respondent submits that there was no reason why the Respondent should seek further Particulars, as the case had been pleaded quite clearly; it is wrong in principle, in those circumstances, to expect a Respondent to approach Claimants who are legally represented to ensure that they do not have further points they wish to raise, beyond those pleaded.

40. The Employment Tribunal was wrong to say that the Respondent did not raise the possibility of an adjournment; it is clear from the Skeleton Argument put forward by the Respondent at the Case Management Hearing (paragraph 19(e)) which in terms made clear:

> **"The new issues will likely require a postponement of the November Hearing, although this is for consideration in the light of which issues (if any) are permitted to be raised and what the case in relation to each of those issues actually is."**

The Claimants' Response and Submissions in Support

41. I had the benefit of both written and oral submissions from Mr Panesar, who appeared on behalf of the GMB Claimants and who took the lead; and Mr Engelman, for the Unite Claimants. Mr Engelman adopted Mr Panesar's submissions and added some short submissions of his own.

42. The Claimants, of course, have relied upon the Decision of the Employment Tribunal as being correct. Mr Panesar observed that the Respondent could scarcely say it was unaware that the Claimants wished to take the points, because these were in the draft list of issues that had been passing between counsel for some time; see, for example, the draft list of issues at 27 March 2014 (supplementary bundle, at page 55). Mr Panesar submitted that this had been repeated on approximately seven occasions and had been shown to the Employment Tribunal at the PHR without objection being taken on 25 April 2014. Although no agreement had been

reached as to the list of issues, there was no specific objection from Mr Linden. The Claimants' proposed list of issues at 27 March 2014 at (c) sets out the substance of the matters that the Claimant has sought to add by amendment.

43. Mr Panesar submitted that the points to be found at page 161 of the supplementary bundle contained in the response provided in respect of the order of 5 September 2014 were all matters that would have had to be considered in any case, because offers of suitable alternative employment in all unfair-redundancy cases have to be considered even though they may not have been given a prominence in the list of issues. There was still sufficient similarity in the claims to justify lead cases. Mr Panesar submitted that case management is still at a relatively early stage and disclosure is still incomplete.

44. I put to Mr Panesar that if there were different approaches at each of some 60-odd factories, it might be necessary to have 60 test cases. I did not record Mr Panesar as having suggested otherwise.

45. Mr Panesar went on to submit that there was no need for there to be an amendment and pointed to paragraph 7 of the Employment Tribunal Decision, which recorded just such a submission. Although the Claimants maintained that they were doing no more than providing "clarification" of existing claims, they agreed to seek permission to amend because there was no harm in doing so, and the Employment Tribunal at paragraph 12 found that the Claimants were not:

> **"… adding a new course of action or, indeed, a new head of unfairness, but are providing the particularity … that could have been requested at an earlier stage by the Respondent. The Tribunal was bound to investigate whether there were any alternatives to dismissal either at the stage of liability or remedy. …"**

46. I pause to note that this is not a submission I am able to accept, because permission is required in any event to add new Particulars, and the Claimants were wholly correct to seek permission to amend. I do not consider that a party has a right to add to the factual issues to be determined by reference to "voluntary" Particulars. The addition of such Particulars requires permission from the Employment Tribunal.

47. The Claimants submitted that if the Respondent did not have all of the information, including documents and access to email accounts, that is the fault of the Respondent, which should have maintained that material. The Respondent could not criticise the Claimants for being unable to point to particular unfairness if the Claimants did not know what criteria had been applied to selection or why some employees were selected for alternative employment and others were not because of what is said to be the Respondent's incomplete or inadequate disclosure and failure to provide information. That compounded the Claimants' admitted difficulties in getting their case together, because there were so many Claimants widely dispersed throughout the country.

48. Mr Panesar had been referred to the decisions in **City Facilities Management v Ling** [2014] Eq LR 399 and **Basra**, but Mr Panesar submitted they were not in point because the Employment Judge considered the possibility of adjournment and the parties then agreed an adjournment (I would observe at this point that that was scarcely surprising in view of the state of preparation and permission given to the Claimant to raise the "new" points). The Claimants relied heavily on the decision in **Langston** to support the case that no amendment was even necessary.

49. In view of the extensive and lengthy submissions to the Employment Tribunal by Mr Linden, when all points were raised by him in relation to delay and prejudice, the Employment Judge would have considered them, and thus it was unnecessary for him to make specific reference to the witness statement of Ms Goldsbrough. It was submitted that the Employment Judge considered the case management implications, considered the principles set out in **Selkent** and applied them. The reasons given by the Employment Judge were adequate, and all relevant matters were taken into account. Mr Panesar pointed out that the Respondent's initial stance before the Employment Judge was that no adjournment was required, although the Respondent had since changed its view.

50. I now refer to Mr Engelman's submissions. As I have said, he adopted Mr Panesar's submissions. He drew my attention to paragraph 20 of **Selkent Bus Co Ltd v Moore** [1996] ICR 836 and to **Adams v West Sussex County Council** [1990] IRLR 215 as to the limited circumstances in which the Employment Appeal Tribunal might set aside a Decision based upon the discretion of an Employment Tribunal, especially in matters of case management.

51. Mr Engelman made a curious submission founded on paragraph 50 of the Respondent's response. Paragraph 50 is found in a section of the response in which the Respondent responded to various specific issues. The response to each issue is in numbered paragraphs under a particular heading. Paragraph 50 follows a heading "Redeployment at other factories" and is in these terms:

> **"Remploy was unable to offer automatic transfer due to the nature of the process as described above. Individuals were, however, redeployed where possible, including through "bumped" redundancies."**

52. It was submitted, therefore, that all issues relating to redeployment were being considered. When it was pointed out that paragraph 50 must be understood, by reason of its

presence in that part of the response headed "Redeployment at other factories", only to relate to the question of redeployment at other factories, it was suggested that a form of interpretation or construction said to apply in cases of statutory construction should be adopted whereby one ignores headings. I can see no basis for this submission, which is both ambitious, ingenious and unpersuasive in the case of a legal document, where a heading is invariably used to define what follows. None of the proposed amendments relates to transfers to other factories.

Mr Linden's Reply

53. Mr Linden first of all made the same point as I have just made in relation to paragraph 50 of the response.

54. Mr Linden repeated that there is no mention in the ET1 of closing-down teams, of modernisation Claimants at Wigan and Blackburn or of the possibility of transfers of Claimants to CCTV work or employment services. Paragraph 12 of the ET1 is quite specific in referring to investigation of the possibility of the Claimants being employed "at other factories". The transfer of employment to CCTV services or employment services is very much an individual point and not suitable for a generic issue. Mr Linden submitted that if there were to be an investigation into selection for closing-down teams, this would have to be investigated on a factory-by-factory basis.

55. The new points raised in the amendments had fragmented the proceedings. If these points had been raised at the outset, the Respondent would not have agreed a 15-day hearing at London Central. The Employment Judge was required to know the implications of the amendments before carrying out the balancing act referred to in **Selkent** and in accordance with the overriding objective. Mr Linden submitted that the Respondent still did not know what the

Claimants' case was on the amendments in the absence of particularisation; no lead Claimants had yet been identified, nor were there any current proposals as to how the case should be managed save for an unrealistic suggestion of dealing with issues on a plant-by-plant basis.

56. The Respondent was prejudiced; they still did not know the case they had to meet, and they would have significant difficulties in addressing any case by reason of the closure, the dispersal of their employees and the absence of documentary records. The Respondent relied upon the evidence from Ms Goldsbrough and had gathered evidence including documents in accordance with the understanding of the case prior to the amendments. Witness statements had been prepared and a draft index to a bundle; disclosure was largely complete.

57. In relation to the question of delay Mr Linden pointed to **Selkent** at 844 in support of the proposition that the question whether to grant or refuse an application for an amendment had to be made at the time when the application was made; the fact that there has been an adjournment does not permit the Applicant to say that the Respondent now had had more time to deal with the amendment and so it should now be allowed.

The Law

58. I remind myself of the well-known principles in relation to the approach to be adopted by the Employment Appeal Tribunal to decisions of the Employment Tribunal, especially case management decisions, as well as the general principles applicable to amendment. The matter was put clearly by Mummery LJ in a well-known passage in **Gayle v Sandwell and West Birmingham Hospitals NHS Trust** [2011] IRLR 810:

> **"21. … If the ETs are firm and fair in their management of cases pre-hearing and in the conduct of the hearing the EAT and this court should, wherever legally possible, back up their case management decisions and rulings."**

59. For an appeal to succeed in relation to the exercise of discretion, the discretion must "exceed the generous ambit within which reasonable disagreement is possible"; see Asquith LJ in **Bellenden (formerly Satterthwaite) v Satterthwaite** [1948] 1 All ER 343 at 345.

60. Lawrence Collins LJ put the matter very clearly in the case of **Walbrook Trustee (Jersey) v Fattal** [2008] EWCA Civ 427:

> **"33. … These were case management decisions. I do not need to cite authority for the obvious proposition that an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."**

61. I draw attention to paragraph 13 of the **Employment Appeal Tribunal Practice Direction**, as this is sometimes overlooked, as the passage is in that part of the Practice Direction relating to bias and procedural irregularity:

> **"13.** ***Complaints about the Conduct of the Employment Tribunal Hearing or Bias***
>
> **…**
>
> **13.6. Parties should note the following:**
>
> **…**
>
> **13.6.2. The EAT recognises that employment judges and Employment Tribunals are themselves obliged to observe the overriding objective and are given wide powers and duties of case management (see Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004 (SI No 1861)), so appeals in respect of conduct of Employment Tribunals which is in exercise of those powers and duties, are the less likely to succeed."**

62. Rather than refer to a number of authorities that are well known, I refer to observations I made in **Basra**:

> **"44. I now turn to the relevant legal principles. I derive the following principles from the authorities on appeals from Employment Tribunals [including *Noorani v Merryside Tec* [1999] IRLR 184 referred to by Mr Linden]. These Decisions are entrusted to the discretion of the court of first instance. Appellate courts must recognise that in such Decisions different courts may disagree without either being wrong, far less having made a mistake in law. Such Decisions are essentially challengeable on what loosely may be called *Wednesbury* grounds, when the court at first instance exercised the discretion under a mistake of law, disregard of principle or under a misapprehension as to the facts, where they took into account irrelevant matters or failed to take into account relevant matters or where the conclusion reached was outside the generous ambit within which a reasonable disagreement is possible. If Employment Tribunals are firm and fair in the management of cases pre-hearing and in the**

> **conduct of the hearing, the Employment Appeal Tribunal should, wherever legally possible, back up their case management decisions and rulings.**

63. I shall return to this case shortly when considering general principles applicable to granting permission to amend in the Employment Tribunal and shall also make references to passages in the **Selkent** and **Adams** cases.

Amendment

64. If a party wishes to add to his claim something not already pleaded, he will require permission to amend if the point is to be raised. The principle in **Chapman v Simon** [1994] IRLR 124 is well known; in litigation before the Employment Appeal Tribunal, a point not set out in the ET1 cannot be taken on appeal by a Claimant. The point was taken further in **Ahuja v Inghams** [2002] EWCA Civ 1292. This was an unusual case in which evidence was adduced by the Claimant for three allegations of separate incidences of discrimination. The evidence was the subject of cross-examination and submissions, but in the Court of Appeal Sedley LJ observed at paragraph 49:

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

65. In that case Mummery LJ had said at paragraph 35:

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

66. It is only in exceptional cases that a point not raised in the Employment Tribunal may be raised in the Employment Appeal Tribunal on appeal; see **Kumchyk v Derby City Council**

[1978] ICR 1116. The importance of cases being presented to the Employment Tribunal on the basis of the formal claim has more recently been the subject of the observations of Langstaff J in **Chandhok v Turkey** [2015] IRLR 195. In that case an Employment Tribunal had determined a point raised in a witness statement rather than in the ET1. Langstaff J stressed the importance of confining cases to what was pleaded in the ET1:

> **"16. I do not think that the case should have been presented to him in this way or that it should have formed part of his determination. That is because such an approach too easily forgets why there is a formal claim, which must be set out in an ET1. 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 upon 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 Rules of Procedure 2013, 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."**

67. In my opinion, the judgment of Langstaff J is highly material to my considerations in this appeal and points to the importance of requiring "new" claims, or claims not set out in the ET1, to be subject to the discipline of an application for amendment before they can be raised.

68. The principles applicable to the grant of permission for an amendment in the Employment Tribunal are well known and clearly set out in the decision of Mummery J (then the President of the Employment Appeal Tribunal) in **Selkent**. I specifically draw attention to the following. At page 844 he said:

> **"(5) …**
>
> **(c) *The timing and manner of the application.* An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision." (my underlining)**

And at page 843:

> **"(3) Consistently with those principles, a chairman or a tribunal may exercise the discretion on an application for leave to amend in a number of ways. (a) It may be a proper exercise of discretion to refuse an application for leave to amend without seeking or considering representations from the other side. For example, it may be obvious on the face of the application and/or in the circumstances in which it is made that it is hopeless and should be refused. If the tribunal forms that view that is the end of the matter, subject to any appeal. On an appeal from such a refusal, the appellant would have a heavy burden to discharge. He would have to convince the appeal tribunal that the industrial tribunal had erred in legal principle in the exercise of the discretion, or had failed to take into account relevant considerations or had taken irrelevant factors into account, or that no reasonable tribunal, properly directing itself, could have refused the amendment. …"**

69. Mummery J referred to **Adams**, to which I shall come shortly.

70. Mummery J continued in conclusion:

> **"(2) … an application for amendment made close to a hearing date usually calls for an explanation as to why it is being made then, and was not made earlier, particularly when the new facts alleged must have been within the knowledge of the applicant at the time when he was dismissed and at the time when he presented his originating application.**

71. In **Adams** Wood J (then the President of the Employment Appeal Tribunal) explained the principles upon which Employment Tribunals (then Industrial Tribunals) should exercise their discretion:

"15. In giving its decision in interlocutory proceedings an industrial tribunal is exercising its discretion, but that discretion must be exercised within the powers given to the industrial tribunal on that issue and within the relevant legal principles which have been evolved largely through decisions of appellate courts. It is the exercise of a judicial discretion.

16. It seems to us desirable, and indeed we would have expected, that the same principle would apply to interlocutory appeals as for final appeals even though the former will in the main be the result of the exercise of a discretion. Thus, in examining an interlocutory order of an industrial tribunal or of a chairman sitting alone we would define three issues:

(a) Is the order made one within the powers given to the Tribunal?

(b) Has the descretion [sic] been exercised within guiding legal principles? eg as to confidential documents in discovery issues.

(c) Can the exercise of the discretion be attacked on *Wednesbury* principles?

17. This approach seems to us to follow from the reasoning of Arnold J in *Bastick v James Lane (Turf Accountants) Ltd* [1979] ICR 778. That case concerned an appeal from a refusal by a chairman of tribunals to adjourn proceedings. In considering the question of discretion Arnold J at p.782A says this:

"Now we think that when we, in this appellate tribunal, approach a consideration of the validity of a decision by an industrial tribunal, or by the appropriate officer of an industrial tribunal, upon a matter of discretion, we must look for two things, the discovery of either of which would be sufficient to entitle us to overturn the exercise of that discretion. Either we must find, in order so to do, that the tribunal, or its chairman, has taken some matter which it was improper to take into account or has failed to take into account some matter which it was necessary to take into account in order that discretion might be properly exercised; or, alternatively if we do not find that, that the decision which was made by the tribunal, or its chairman, in the exercise of its discretion was so far beyond what any reasonable tribunal or chairman could have decided that we are entitled to reject it as perverse." "

72. I return to **Basra**, in which I referred to other considerations to be borne in mind by the Employment Tribunal. I noted that the authorities are helpfully and comprehensively collected by HHJ Eady QC in a case very similar on the facts (**City Facilities Management v Ling** [2014] UKEAT/0396/13). The case had been decided in the Employment Tribunal by the same Employment Judge as in **Basra**. At paragraph 47 in **Basra** I said in relation to the principles upon which permission to amend should be given:

"47. When an application for amendment is made close to a hearing date, it will usually call for an explanation as to why it is being made then and was not made earlier, particularly when the new facts alleged must have been within the knowledge of the applicant at the time he presented his originating application. This does not mean that an amendment raising issues out of time is to be treated in the same way an application to extend time for presenting an application either on just and equitable grounds or on the grounds of reasonable practicability, as the case may be. In amendment cases, the test that is applied is the hardship test. It will involve, however, the Employment Tribunal considering the reason why the application was made at the stage when it was made. Why was it not made earlier? It requires the Employment Tribunal to consider whether, if the amendment was allowed, delay would ensue as result of adjournments, whether there were likely to be additional costs, whether because of the delay or because of the extent to which the hearing might be lengthened if the new issue was allowed to be raised, particularly if the costs were unlikely to be recovered by the party who incurs them. Delay may, of course, in an individual case have put a Respondent in a position where evidence relevant to the new issue is no longer available

> **or was of lesser quality than it would have been earlier. The paramount considerations are the relative injustice and hardship involved in refusing granting an amendment or refusing to do so.**
>
> **48. It is essential before allowing an amendment that it must be properly formulated, sufficiently particularised, so the Respondent can make submissions and know the case it is required to meet. In this regard, I refer to the decision of Mr Recorder Luba QC in *Chief Constable of Essex Police v Kovacevic* UKEAT 0126/13. It was the practice of the former President of the Employment Tribunal, Burton J, in cases where he granted permission to amend not to allow the advocates to leave the building before producing at least a manuscript draft. That has also always been my almost invariable practice: I always ask advocates not to leave the court building without leaving a written document draft for approval, if they wish to amend."**

73. When is an amendment not required? There are circumstances in which a point is so well known and obvious that an Employment Tribunal may be expected to determine the point in any event even if not specifically advanced by the parties. This may well be so in a case in which either or both of the parties are not represented.

74. The high water mark of such cases is perhaps **Langston v Cranfield University** [1998] IRLR 172, in which the Claimant had been unrepresented at the Employment Tribunal and remained unrepresented in the EAT; the Respondent did not appear. It appears that the Claimant was not up to the challenge and told the EAT, "I understand I probably made a mess of the Tribunal". The Claimant claimed that the dismissal for redundancy was unfair at the Employment Tribunal. The only issue identified by the Employment Tribunal was whether the Claimant was fairly selected for redundancy. However, on appeal he sought to raise issues relating to alleged inadequate consultation prior to dismissal and whether the employers had taken reasonable steps to find alternative employment for him. The Respondent opposed this on the grounds that these issues had not been raised before the Employment Tribunal and could not, therefore, be argued in the Employment Appeal Tribunal, relying on such authorities as **Kumchyk**, to which I have already referred. HHJ Peter Clark held that:

> **"30. … Where an applicant complains of unfair dismissal by reason of redundancy we think that it is implicit in that claim, absent agreement to the contrary between the parties, that the unfairness incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer."**

He later added:

> **"34. … We would normally expect the industrial tribunal to refer to these three issues on the facts of the particular case in explaining its reasons for concluding that the employer acted reasonably or unreasonably in dismissing the employee by reason of redundancy."**

The EAT permitted the appeal to proceed on the new points on the basis that the Employment Tribunal should have considered these points regardless of whether the parties had referred to them.

75. This decision was considered by the Employment Appeal Tribunal (HHJ Ansell) in **Buckland v Aifos** [2005] All ER (D) 40 (Oct). In that case the Employment Tribunal took the view that it was not appropriate for an Employment Tribunal to deal with issues that were not raised by the parties in circumstances where the parties had themselves defined the issues and not identified those ones as issues for consideration. The Employment Tribunal was not obliged to go outside the nature of the inquiry as it had been defined by the parties, and declined to follow **Langston**.

76. I do not consider that the decision of **Langston** is of blanket application. Whether an Employment Tribunal is bound to take a point not raised by the parties will depend on the circumstances, and I shall consider this matter further when I come to my discussion and conclusions. If a point was not raised by the parties, the necessary evidence upon which a decision may be based may well not have been adduced.

77. I have heard substantial argument as to the effect of the list of issues and whether the presence of an issue in the list of issues will give the Employment Tribunal jurisdiction to determine that issue even if not raised in the ET1, nor has it been the subject of amendment.

78. The point may be academic, because although there may have been some consensus as to the list of issues, no list of issues has ever been agreed let alone approved by the Employment Tribunal. The starting point of consideration must be the well-established rule in **Chapman** and the other authorities I have cited that stresses that for an Employment Tribunal to have jurisdiction to decide a particular claim it must be pleaded.

79. Lists of issues are valuable case management tools widely used in Employment Tribunals. However, even when a list of issues is approved by the Employment Tribunal, it is not an order of the Employment Tribunal nor a pleading. In **Parekh v London Borough of Brent** [2012] EWCA Civ 1630 Mummery LJ stated:

> **"31. 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 …"**

If a party subsequently disagrees with the list, the proper course is to query it with the Tribunal, not to seek to appeal to the Employment Appeal Tribunal.

80. While a list of issues may limit the issues to be determined, consistently with the authorities the list of issues cannot extend the list of issues to be determined beyond those contained in the pleadings. Any addition to those issues will require an amendment.

81. Employment Tribunals are also obliged to have regard to the overriding objective, including the avoidance of delay, dealing with cases in ways proportionate to their complexity

and the importance of issues, in exercising their very wide case management powers, including in particular the giving of permission to amend.

Discussion and Final Conclusions: Taking points not in the ET1

82. In my opinion, it is contrary to principle to permit a point to be taken in the Employment Tribunal or on appeal unless it has been pleaded. As a general rule the addition of further Particulars of an existing allegation will require an amendment to be made. If the fresh points can properly be considered to be particularisation of an allegation already pleaded, a more liberal approach may be taken in considering whether to grant permission to amend, than in cases where the point is a "new" point, or will require the parties to produce further evidence or disclosure and prejudice the timetable set for the proceedings or cause further delay. Further as I have already observed, it is not easy to see how the Employment Tribunal could take a point that depends on factual investigation unless the parties have prepared and led some evidentiary material. The question, for example, of whether the Respondent was in breach of its obligations in relation to seeking suitable alternative employment cannot be determined in a factual vacuum. In straightforward cases it may properly be left to the Employment Tribunal to determine for example all the **Burchell** points or various heads of compensation for unfair dismissal, but in a complex case such as the present case where the parties are legally represented and have pleaded their case with some particularity, any addition to the Particulars will require an amendment, which will have to be applied for and considered in the usual way on conventional grounds. I ask forensically how the Employment Tribunal might have been expected to consider the question of alternative employment if the parties had not raised it. The point could only properly be determined, if the Employment Tribunal were bound to determine the point, if it had been drawn to the attention of the parties, who would then have had to consider what evidence if any might be required and to make appropriate submissions.

83. I do not consider that the principle in **Langston** has any application to the present case, because of its complexity, history of case management and professionally drawn notices of application. I am supported in my view that an amendment was necessary because the Claimants evidently accepted this was the case by making an application (even if they now assert they may not have needed to) to amend, and the Employment Tribunal acceded to the application.

84. Was it necessary to amend? It is clear therefore, in my opinion, that permission to amend in the circumstances of this case was necessary. What the Claimants seek to raise are not new Particulars of pleaded allegations, but new allegations. Even if they could simply be classed as Particulars, permission to amend would still be required. Even if permission to amend were not required, the Employment Tribunal has adequate case management powers to prevent an issue being raised unexpectedly that might cause the need for an adjournment or take the other side by surprise by reason of inability to call evidence or produce documents.

85. I do not take HHJ Peter Clark in **Langston** as saying that in any case where a point such as failure to seek alternative employment on the part of an employer in cases of alleged unfair dismissal in redundancy dismissals has not been taken in the Employment Tribunal, it can always be taken on appeal, or that the Employment Tribunal is required to take the point of its own motion. It may be that in some cases where the pleadings are sparse and a point is so obvious that an Employment Tribunal should take the point even if it has not occurred to the parties, provided the Employment Tribunal brings this to the attention of the parties so they can deal with it. On the other hand there will be, for example, cases in which there has been comprehensive case management and the parties have elected not to regard the point as being an issue that requires to be decided. Neither do I take HHJ Peter Clark to have said that if a

particular series of factual allegations related to a pleaded issue were not raised, the Employment Tribunal is nonetheless bound to determine them. The Judgment in **Langston** has no resonance at all in a complex case such as the present, where the parties are well represented and have engaged in extensive case management, and the addition of the new points would be likely to derail the previous case management and delay any trial. I do draw support from the decision of HHJ Ansell in **Aifos**, who came to a similar conclusion. I consider that the Employment Tribunal fell into error in holding that it was required by **Langston** to consider all aspects of unfair dismissal by reason of redundancy, whether raised by the parties or not.

86. The crux of the appeal, as it seems to me, relates to the Employment Tribunal's Decision at paragraph 13 of the Judgment where in assessing the balance of prejudice the Employment Tribunal considered that the prejudice to the Respondent did not outweigh the injustice that would be done were the Claimants not able to put forward the particularity of the "generic" allegations in respect of alternative employment. If and insofar as the Employment Judge placed any reliance upon the inclusion of these matters in the list of issues, that list was not agreed. The Employment Judge does not appear to have given any consideration to the effect of the amendments on previous case management and the delay this would entail. As a result of the amendments, if they are allowed to stand, comprehensive new case management will be required, and it may well be necessary to abandon the idea of centralised test cases and instead hold numerous more-local hearings. The Employment Tribunal has not explained how the claims are now to be litigated, neither has the Employment Tribunal considered the reasons for the delay in raising these issues but has approached the issue on the basis that they are merely particularisation of existing grounds, which I do not accept to be the case. The Employment Tribunal has not addressed the reasons that were given for not raising these matters earlier, nor has it ascertained when these matters first came to the attention of the Claimant's legal advisers.

87. The Employment Tribunal should have looked at each proposed amendment separately rather than lumping them all together and should have addressed the evidence of Ms Goldsbrough. These amendments, as can be seen, are not particularised as they should have been before permission to amend could have been granted. In the absence of particularised amendments it was impossible for the Employment Tribunal or for the Respondent to consider the effect of those amendments, in particular in relation to previous case management and whether the timetable for the hearing would be affected. These matters will require consideration of what further evidence from witnesses is available and what further disclosure may be necessary, regardless of whether or not what the Claimants seek to do is to add further Particulars of existing allegations. The case has progressed so far through extensive and effective case management on the basis of particular issues set out in the claims, and for those to be varied requires amendment. It is crucial, therefore, that the Employment Tribunal should have been in a position to consider the effect of any amendment. The Employment Tribunal and the parties had been preparing for months for a hearing on the basis of the case as defined in the ET1 and response, and it is clear that if new issues were to be raised, significant further case management would be required and the expenditure of further time and expense. These are matters the Employment Tribunal has scarcely dealt with. The Employment Tribunal has scarcely dealt with the prejudice the Respondent claims to have suffered in relation to the absence of witnesses and documentation, the increase in the length of the hearing, the additional witnesses and disclosure that might be required, together with the additional costs.

88. The Employment Tribunal was clearly wrong when it observed that the Respondent had not stated whether it considered the amendment would require a postponement. I have already drawn attention to paragraph 19(e) of Mr Linden's Skeleton placed before the Employment Tribunal: "The new issues will likely require a postponement of the November Hearing …", the

most significant effect of the amendment. The Employment Tribunal has simply said it had regard to the overriding objective, but the only specific matter it referred to was that of the possibility of delay. The Employment Tribunal does not appear to have considered what the effects would be of the parties not being on an equal footing because of the especial prejudice to the Respondent. It also does not appear clearly that the Employment Tribunal had regard to obligations of proportionality and dealing with the case expeditiously and to the saving of expense.

89. I recognise the restrictions on overturning case management decisions reached in the exercise of the discretion of the Employment Tribunal. I consider, however, that the Employment Tribunal placed itself in great difficulty by failing to ensure that before it granted permission to amend, it had before it a properly particularised proposed amendment. This failure in itself in sufficient to flaw the exercise of discretion. Without that the Employment Tribunal was simply not in a position to consider the effect of the proposed amendments on existing and future case management and in particular whether the previously agreed model was achievable in the light of the fragmentation of the issues. The effect of allowing the new issues to be raised is to leave existing case management in tatters, and the case is no nearer a hearing. The Employment Tribunal's careful and effective previous case management of a very complex set of proceedings is in great danger of being unravelled. The lead Claimants are still not identified, the Claimants have still not completed taking instructions, and the Claimants are still not in a position to particularise the "new" issues, let alone propose further issues appropriate to the efficient disposal of the actions by the mechanism of lead cases. Although clearly many of the issues for determination have been agreed as issues or are likely to be agreed, as yet there is no agreement or even proposals as to how the latest issues can be accommodated.

90. During the course of submissions I enquired of Mr Panesar and Mr Engelman in relation to the selection of closing-down teams and redeployment issues and whether there was any overall policy in relation to these matters. I learnt from them and Mr Linden that there was no overall policy; the method of selection was left to individual plant managers, there were some 60 plants, and so it could be there were 60 separate methods of selection. In my opinion, the investigation of procedures in 60 separate plants will not be capable of fitting into a generic issue or a small number of generic issues. It may be necessary, when the matter is further examined, that these matters will have to be examined on a plant-by-plant basis. This feeds into another issue. All the plants were shut several years ago, and the staff, including managers, have dispersed to the four winds (assuming they can be traced). I would not have expected documents to be retained and email accounts to be preserved, nor can I accept that the Respondent should have recognised the necessity of retaining documents and email accounts pending possible litigation, because of the enormous number of documents concerned. If the Claimants wish to pursue an application for adding the "new" issues, they should do so on the basis of properly formulated and particularised amendments. The Employment Tribunal will then have to consider whether the new issues are compatible with the retention of the current model of determining generic issues by lead cases. The Employment Tribunal will have to consider the likely trial date, the length of any proceedings, which include the new issues, and the ability of the Respondent to deal with the new issues when they have been particularised by reference to the need to call further witnesses and provide further documents. The Employment Tribunal will also need to consider the reason for the delay by the Claimants in raising the "new" points and when the Claimants first knew of them.

91. I had hoped to hear of further case management progress, as I was aware that there were further hearings, and I am also currently considering the "sift" of a Notice of Appeal by the Claimants in relation to disclosure issues.

92. I regard it as vital that this case is returned to the Employment Tribunal for comprehensive case management as soon as possible and a reconsideration of the application to amend (if proceeded with) in relation to overall case management.

93. For these reasons, I allow the appeal and set aside the order of the Employment Tribunal in relation to permission to amend.