Appeal No. UKEAT/0089/15/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 29 July 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR A KUZNETSOV APPELLANT

THE ROYAL BANK OF SCOTLAND RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MARC DELEHANTY (of Counsel) Free Representation Unit
For the Respondent	MS ALICE MAYHEW (of Counsel) Instructed by: Berwin Leighton Paisner Adelaide House London Bridge London EC4R 9HA

SUMMARY

PRACTICE AND PROCEDURE

Case management

Amendment

Appeal by the Claimant on two bases: (1) the limitation of the issues on his unfair dismissal complaint to preclude his contention that the real reason for his dismissal was not redundancy but was a reason connected with a wish to avoid paying him a bonus; and (2) the refusal of his application to amend to rely on a complaint of making a protected disclosure relating to the failure to pay him bonus or proposed relocation and his assertion that this was the real reason for his dismissal and/or selection for redundancy.

Held:

Allowing the appeal on the first basis. Recognising that the EAT should be slow to interfere with the ET's case management role in drawing up the list of issues, the decision to exclude the Claimant's positive case as to the reason for his dismissal or selection for redundancy was wrong and could not stand: (1) it failed to take into account that which was relevant (the lack of concession as to a fair reason for dismissal on the face of the ET1 and the Claimant's earlier raising of the question whether the reason given/his selection for redundancy was a sham); and (2) took into account that which was irrelevant (in terms of treating Employment Judge Deol's record of the strike out hearing as containing a list of issues when it did not).

Further, having not conceded the reason for dismissal in his ET1, the Claimant was entitled to test the Respondent's case on this question. The Respondent was entitled to know of any positive alternative case but that would have been apparent as and when the issues were identified. The Claimant had raised the question of the redundancy being a sham in August

2012. If the list of issues had been drawn up at that stage, there was no reason to think he would not have relied on bonus avoidance as the real reason for his dismissal and there could have been no objection to him having done so. The only real objection was of delay but that was not solely the Claimant's responsibility. He should not have been restricted in how he put his case on the reason for dismissal.

The ET's Decision would be replaced with a direction that the Claimant was able to contend the reason for his dismissal was a reason connected with a wish to avoid paying his bonus. The appeal on the second basis was, however, dismissed.

The matters relied on in respect of the whistle blowing allegations were raised as new claims before Employment Judge Glennie and, as the Claimant accepted, that required an amendment of the ET1. That being so, the ET was bound to consider the question of the timing of the raising of these claims and the time limit in issue ran from the date of Claimant's dismissal. The claims were out of time. There was no reason why it had not been reasonably practicable for the Claimant to have raised those claims in time (subsequent disclosure from the Respondent did not give the Claimant any new information that changed the position for him in this regard). More generally, the ET was entitled to take into account the relevant procedural history, including the Claimant's earlier clarification that he was not raising any further claims and his failure to mention the possibility of a whistle blowing claim at any earlier stage.

Whether or not the Claimant might be able to rely on some of the matters relevant to such a claim as part of the evidential material on the unfair dismissal case in any event (although that was more doubtful in relation to the relocation disclosure/s), the question of possible prejudice went far wider than this. Further legal and evidential issues were raised by the whistle blowing claims (not least in respect of the question of the (still unparticularised) disclosures themselves).

In the circumstances, the ET reached an entirely permissible conclusion, with which it was not open to the EAT to interfere.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent, as below. The appeal is that of the Claimant against a Judgment of the London Central Employment Tribunal (Employment Judge Glennie, sitting alone on 12 January 2015; "the ET"), sent to the parties on 16 February 2015. The Claimant then appeared in person but before the EAT has had the benefit of representation pro bono by Mr Delehanty of counsel acting through the Free Representation Unit. Before the ET the Respondent was represented by Ms Belgrove of counsel and now is represented by Ms Mayhew of counsel, who appeared at an earlier hearing before the ET.

2. The Claimant appeals against two aspects of the ET's Judgment: (1) that he was not able to contend that the reason for his dismissal was a reason connected with a wish to avoid paying him a bonus, and (2) that he was not able to rely on a complaint of making a protected disclosure or of his dismissal being related to that. The appeal against the first of those rulings was permitted to proceed to a Full Hearing by Langstaff P after considering this matter on the papers. The second aspect of the appeal was permitted to proceed to a Full Hearing after a hearing before HHJ Serota QC on 8 June 2015, under Rule 3(10) of the **EAT Rules 1993**.

The Factual Background and the Relevant Procedural History

3. The Respondent describes itself as a global financial services provider for institutional investors, individual and corporate clients. It records that the Claimant, who commenced its employment with it on 25 October 2010, held the corporate rank of Director employed within the Respondent's Global Banking and Market division. He was dismissed on 31 December 2011. The Respondent contends the dismissal was by reason of redundancy.

4. The Claimant's claim in the ET was presented on 29 March 2012. In his ET1 he ticked the box at 5.1 to make clear he was complaining unfair dismissal. In the box at 5.2 he recorded:

> **"The Respondent failed to consult me adequately in my redundancy dismissal as there were more than 100 redundancies taking place and I was only provided with a one month consultation. The Respondent did not elect an employee representative or consult an employee representative with respect to the redundancies. I was, therefore, dismissed prior to the end of the statutory consultation period. The Respondent failed to pay me my full notice pay as they did not take into account my full non-discretionary compensation in calculating my notice pay entitlement."**

5. Under "Additional information" the Claimant observed:

> **"Unfortunately, my experience at RBS was particularly misfortunate. As an incentive to join RBS as well as to compensate for the forfeited bonus at my previous employer, the global head of research (e.g. the boss of my direct manager) promised me a 100,000 pound bonus for the FY2010. Although he commented that he was unable to put this in writing, he stressed that he was on recorded lines and he guarantees me [sic] the payment. Unfortunately, the bonus has not been paid but the response was that this issue will be taken into account when bonuses for 2011 will be allocated. As you know, instead of getting a bonus, I was made redundant at the most difficult time for finding an alternative job. If the management of RBS were not sure in the ability to pay the promised bonus, it would have been much more reasonable to wait until I receive [sic] the bonus for the hard work at my previous employer.**
>
> …
>
> **Having received a notification that my redundancy has been confirmed on December 8, 2012, I have been also forced to take my annual leave during my notice period, essentially forfeiting the accrued annual leave. Due to my planned relocation abroad, it had been decided that from both business and personal perspective, it would be beneficial to take most of the accrued vacation days between the time of me leaving RBS London and the start of my international assignment. Thus, I have taken very few vacation days during the year. However, instead of the planned relocation abroad, I received a redundancy notice. Furthermore, I was essentially forced to forfeit the accrued vacation days since I was requested to use them during the notice period."**

6. In its ET3 the Respondent complained:

> **"2. It is not clear from the Claimant's Particulars of Complaint the precise nature of the claims against the Respondent and as such it is not possible to provide a detailed response. The Respondent intends to seek further particulars of the Claimant's claims and/or apply to the Employment Tribunal for an order that the Claimant properly formulates his claims against it. The Respondent reserves the right to amend these Grounds of Resistance following receipt of the Claimant's fully particularised complaints."**

It, however, asserted a positive case that the Claimant was dismissed for redundancy and that the dismissal was fair in all the circumstances (see paragraph 18).

7. No request for Further Particulars of the claim was, in fact, made, but there was an initial telephone CMD on 12 June 2012. One of the points of concern for the Respondent was as to how the Claimant could bring what appeared to be a claim for a protective award. It indicated it would be making out a strike-out application. Apparently in anticipation of the hearing of such an application on 13 August 2012, the Claimant served a further document entitled "Grounds supporting the claim". Much of that document concerned the protective award claim but, at paragraph 8, the Claimant also complained:

> **"8. Since the respondent has not provided any ground for redundancy other than the overall economic difficulties and "the business restructure with GBM", I would not rule out that the decision was related to my unwillingness to relocate to Russia. Not only I was pushed to relocate to Russia but also *the respondent wanted me to accept a massive reduction in my compensation along with forfeiting nearly all benefits stipulated in my employment contract.*" (Claimant's emphasis)**

8. There followed a Pre-Hearing Review before Employment Judge Dr Auerbach on 14 August 2012, at which the Claimant's complaints were identified as being of unfair dismissal, protective award, and claims for notice and holiday pay. The ET further ruled that a forfeited earnings claim could not be raised in those proceedings. That referred to the Claimant's complaint that he had lost earnings as a result of a delay in his start date with the Respondent caused by security checks (paragraphs 5 to 6 of Employment Judge Auerbach's Judgment). The ET further recorded that the Claimant raised no complaint other than those it had identified, albeit he said he believed he had a bonus claim that he might pursue elsewhere (paragraph 7).

9. On 7 November 2012, there was a further Pre-Hearing Review before Employment Judge Deol, at which the claims for notice and holiday pay were struck out as having no reasonable prospects of success. The claim of unfair dismissal was, however, permitted to proceed, the Respondent's application for a strike out or a deposit order in respect of that being rejected. On the unfair dismissal claim Employment Judge Deol recorded that the Claimant:

> **"28. … complained that the selection criteria for redundancy and the basis for selecting those at risk of redundancy had not been shared with him. He argued that there was no reduction in the type of work he carried out and that his redundancy was a sham and had been predetermined before consultation had taken place. He argued that he had been summoned to a meeting with a senior person and not informed about what was to be discussed. At that meeting he was told that he was to be made redundant and asked not to return to his desk."**

10. In declining to strike out the unfair dismissal claim, Employment Judge Deol reasoned:

> **"43. The Claimant's claim for unfair dismissal should be allowed to proceed without a deposit being required. The Respondent's arguments that the Claimant's pleadings are insufficient to base an unfair dismissal claim are not accepted. The Claimant has clearly indicated that he is pursuing a claim for unfair dismissal at paragraph 5.1 of the Claim Form and the references to defective consultation can apply equally to an individual unfair dismissal claim as it can to a claim for a protective award.**
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> **44. It is quite possible that the Claimant's lack of particularisation both in his original ET1 and at subsequent opportunities will cause him difficulties when his unfair dismissal claim is eventually heard. That said it is not surprising that a Claimant who argues that there has been no consultation is unable to spell out the detail of his complaint before there has been full disclosure.**
>
> **45. Likewise it is possible that the Claimant's failure to appeal the decision to dismiss him is unhelpful to arguments that he would then pursue at an Employment Tribunal hearing but that is not enough to say that the claim has no or little prospect of success. There are clearly arguments to be had in relation to the unfair dismissal claim, and it would be inappropriate to seek to determine those arguments at this preliminary stage."**

An appeal against Employment Judge Deol's Decision was subsequently dismissed by consent.

11. A further Case Management Hearing was then listed for 12 November 2014. On 10 November 2014, the Claimant made an application for further disclosure in a letter in which he also made observations about his unfair dismissal claim, including a contention repeated on at least two occasions that there had been agreement at the time he accepted his job with the Respondent to pay him a bonus but that he had been "dismissed to avoid making the payment".

12. On 12 November 2014, Employment Judge Pearl canvassed the issues with the parties, recording that these had not yet been agreed but that the Respondent's counsel (Ms Belgrove) would be drafting a list which would then be put to the Claimant for agreement with recourse to the ET if the list could not be agreed (see paragraph 1, Schedule A to Employment Judge Pearl's Judgment). The case was set down for a Merits Hearing to commence in April 2015.

13. During the course of November 2014, the Respondent drew up a first draft list of issues but could not agree the Claimant's additions, hence the ET hearing on 12 January 2015.

The ET Hearing and Reasoning

14. In considering the Claimant's proposed additions to the draft list of issues, the ET noted:

> **"14. The next group of issues, which are 2(g), 3, 4, 5 and 6, relate to the argument to which I have already referred about the bonus. However, in particular in paragraphs 3, 4, 5 and 6 the Claimant seeks to make what amounts to a whistle blowing complaint, saying that his grievance about the bonus was a protected disclosure. It is described as a "protected act" but I read it as a protected disclosure. He goes on to say that the reason for his dismissal and/or his redundancy was the raising of that protected disclosure."**

15. On the protected disclosure claim this was new: there was no reference to it in any of the records of the earlier ET hearings and such a case went beyond what was fairly in issue in an unfair dismissal complaint (paragraph 15). The raising of such a complaint required an amendment to the claim made some two years and ten months ago. It would require further evidence to be obtained dating back to what had or had not been said in 2010 and 2011. Applying the principles laid down in **Selkent Bus Co Ltd v Moore** [1996] ICR 836, the ET was satisfied it would not be just to allow the amendment at that stage in the proceedings.

16. The ET then allowed the parties to make further submissions on the outstanding, disputed unfair dismissal issue; the argument the Claimant was dismissed in order to allow the Respondent to avoid paying the bonus that had been promised to him (paragraph 16). In this regard the ET was persuaded by the Respondent that this argument:

> **"19. … could have been, but was not, raised as an issue back in November 2012 before Judge Deol. … Judge Deol was concerned to ascertain exactly what the unfair dismissal case was about because he was considering whether it should be struck out or made the subject of a deposit order. He recorded the elements of the claim as the Claimant put them to him, and they did not include an argument of the sort that I have just mentioned. It seems to me that at that point when facing an application to strike out the claim the Claimant must have been putting forward the case as fully as he could in order to avoid such an order being made.**
>
> **20. Therefore it seems to me that Judge Deol's record of the way in which the case was put stands as the quivalent [sic] of a list of issues, and that since November 2012 the Respondents have been entitled to continue with their preparation of the case on the basis that what was identified there was the case that they had to meet. That being so, I find that it would not be**

just to allow the Claimant to raise the issue that he now seeks to raise by way of argument as to the reason for the dismissal, and that the issues should be as recorded in Judge Deol's reasons at that hearing."

Submissions

The Claimant's Case

17. By way of overview, in respect of the ET's ruling that the Claimant could not contend as part of his unfair dismissal claim that he was dismissed for the reason that the Respondent could thus avoid paying him a bonus, that was founded upon an erroneous holding that a Claimant who does not advance a particular positive case as to the reason for their dismissal is precluded from advancing that case at the final hearing of the claim. On the ET's Decision that the Claimant could not pursue a protected disclosure claim - relating to disclosures raised in the form of complaints and/or grievances relating to (1) the non-payment of bonus and (2) the Claimant's relocation to a foreign branch on lower pay - the ET incorrectly applied the test for an amendment of an unfair dismissal claim to include a whistle blowing element, and took into account that which was irrelevant, failing to take into account that which was relevant.

18. On the Claimant's positive case - bonus avoidance - on the reason for his unfair dismissal, the ET's ruling amounted to a *de facto* strike out. As Langstaff P had recognised in letting this matter proceed to a Full Hearing, in his ET1 the Claimant had not conceded that the reason for his dismissal was redundancy. Implicit was the possibility that he was dismissed for an ulterior motive. The reason for the dismissal being in issue, the burden of proof rested on the Respondent. The Claimant was not required to advance a positive case as to the real reason and the argument did not give rise to a separate head of claim. The ET would determine the question in the light of all the circumstances and the evidence. The Claimant should not be constrained in presenting his case provided he had put the reason for the dismissal in issue.

19. Further, the ET erred in considering that the record of the strike-out hearing before Employment Judge Deol was tantamount to a list of issues. As Langstaff P had cautioned in **Chandhok & Anor v Tirkey** [2015] IRLR 195 (paragraph 18), an ET should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings. Further, Employment Judge Deol was concerned with Rule 37 of the **ET Rules 2013**, which required only that he was satisfied the claim had a reasonable prospect of success. The Claimant was not obliged to raise all matters he was intending to argue at the Full Hearing, he had made no concession as to the reason for his dismissal.

20. Even if the ET's Decision in this regard failed to be considered as an exercise of case management discretion then regard should have been had to the fact that the Claimant had raised the point in his document "Grounds supporting the claim", drawn up in August 2012. Further, the Claimant had not been made aware that the ET would treat the argument before Employment Judge Deol (on the strike-out hearing) as comprising all the issues. As for the possible prejudice to the Respondent, it had to be seen in context: the draft list of issues had been formulated in November 2014, some four and a half months before the Full Hearing of the claim had been listed. The Claimant had put the reason for dismissal in issue some time before.

21. This point did not give rise to a new cause of action and so no amendment to the ET1 was strictly necessary. If it had been then any rejection of such an implicit application would have to be perverse. The matter had been sufficiently raised before by the Claimant and the prejudice to the Claimant outweighed that suffered by the Respondent.

22. On the second Decision in issue, the Claimant accepted that this did raise a new cause of action (put on two alternative bases) and, therefore, required an amendment. On this point,

however, the ET erred in its application of **Selkent**. The first error was in considering whether evidence would have to be given as to what was said and what occurred in 2010 and 2011; if the appeal was successful against the first Decision that material would have to be considered in any event. Second, the ET failed to recognise that an amendment to raise a whistle blowing claim as part of an existing unfair dismissal claim (as distinct from a separate whistle blowing detriment claim), gave rise to less objection given that the reason for dismissal was bound to be in play at the final hearing (see per HHJ Richardson in **Makauskiene v Rentokil Initial Facilities Services (UK) Ltd** UKEAT/0503/13 at paragraph 31). Even if there was any question as to whether the Claimant had properly put the reason for dismissal in issue, it was apparent that he had challenged his selection for redundancy in any event.

23. In approaching the question of amendment it was important to bear in mind the guidance of the Court of Appeal, per Underhill LJ, in **Abercrombie & Ors v Aga Rangemaster Ltd** [2013] EWCA Civ 1148:

> **"48. … the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. …"**

24. Although he had not fully particularised the detail of his whistle blowing claims, the Claimant could have done so if asked. In any event that was not the basis of the Respondent's objection, nor of the ET's reasoning. As for the objection that the new course of action would give rise not only to new evidential issues but also new legal issues, that really only prejudiced the Claimant; he bore the burden of producing evidence to support his positive case.

25. Even if the Claimant was not allowed to amend his case to include a whistle blowing claim, it would be open for him to raise these arguments as part of his unfair dismissal claim. The factual material would all be before the ET in any event.

26. On the balance of prejudice, the delay could not properly be attributed simply to the Claimant. The delays in the proceedings were not of his making. There was no earlier stage where he might have considered he was obliged to set out the issues.

27. As for the whistle blowing claim being out of time, there was a difference between knowing the facts to support the claim and knowing of the link between those facts and the dismissal; evidence of the latter only became apparent on disclosure of documentation from the Respondent on 23 August 2014 in response to the Claimant's subject access request.

The Respondent's Case

28. The first question was to clarify the issues before the EAT on the appeal. The whistle blowing complaint was apparently understood by Employment Judge Glennie to be limited to a complaint characterised as a disclosure relating to the non-payment of bonus. The relocation point would give rise to an entirely new and different factual and evidential matrix.

29. For the Respondent the Decisions of the ET in this matter amounted to permissible exercises of discretion. That being so, the power of the EAT was necessarily limited, see the cases of **Bastick v James Lane (Turf Accountants) Ltd** [1979] ICR 778 EAT, as approved by the Court of Appeal in **Carter v Credit Change Ltd** [1979] ICR 908.

30. The Claimant had not properly put the reason for dismissal in issue in his ET1; he should be held to the way in which his case had been pleaded, not permitted to shift his position (see per Langstaff P in **Chandhok & Anor v Tirkey**, in particular at paragraph 18).

31. Turning then to the procedural history of the claim, this was unusual because there had been a number of times when the ET had attempted to clarify the Claimant's complaints and the issues raised. The ET1 did not make clear that the reason for dismissal was in issue. The Claimant then had the opportunity to clarify his case, for example, both before Employment Judge Dr Auerbach and Employment Judge Deol. Specifically on the whistle blowing claims Employment Judge Dr Auerbach had recorded that the Claimant was not pursuing any other claims save those expressly identified, which did not include a whistle blowing claim. In the document entitled "Grounds supporting the claim", produced by the Claimant prior to the hearing of the strike-out application, he had not raised bonus avoidance as a positive case.

32. Employment Judge Glennie plainly did not accept that bonus avoidance was a positive alternative reason for dismissal raised by the ET1 and his Decision had to be seen in that light. That was why the Claimant's position in the subsequent hearings was of relevance. That was part of the weighing of prejudice and the ET had reached a permissible conclusion in this regard. Relying on the approach adopted by the Court of Appeal in **Maund v Penwith District Council** [1984] IRLR 24, the Respondent was entitled to see the evidential case put forward by the Claimant on dismissal and that case should have been discernible from the ET1.

33. On the whistle blowing claims these required an amendment and the approach had to be as laid down in **Selkent**. The ET had specifically directed itself in accordance with that authority. When considering other cases, they were inevitably fact-specific. For example, in

New Star Asset Management Holdings Ltd v Evershed [2010] EWCA Civ 870 the original pleading had contained the factual allegations relied on for the amendment and that was plainly persuasive. Similarly, in **Makauskiene** the amendment relied on factual matters that had already been pleaded; it was essentially a relabelling exercise.

34. Even if the alternative bonus avoidance reason case was permitted to proceed on the unfair dismissal claim, that would not mean the factual basis of the whistle blowing case would also be before the ET. Specifically as regards the disclosures relied on by the Claimant - which would inevitably impact on the evidence and disclosure - even now it was unclear as to what matters the Claimant relied on in this regard. That was true of the whistle blowing claim in respect of bonus complaints but all the more so in respect of any disclosure to relocation issues. It was not just a matter of evidence but would give rise to separate legal issues as well.

35. As for delay, the starting point on this question was why the claim was not pleaded in the ET1. This was not simply a matter of a list of issues but of the bringing of a substantive claim. No good reason had been provided for that. It was not a matter of subsequent disclosure. If the Claimant genuinely believed his dismissal was by reason of a protected disclosure he could have asserted that in his ET1. Certainly the document subsequently disclosed - pursuant to the subject access request - did not show anything which substantially changed the position for the Claimant.

The Claimant in Reply

36. On the whistle blowing claim, the relocation point was before Employment Judge Glennie. It was paragraph 6 of the list of issues before the ET, as referred (paragraph 14) and formed part of the submissions before HHJ Serota QC at the Rule 3(10) Hearing..

The Relevant Legal Principles

37. Where an ET is exercising a judicial discretion, it will not be open to an appellate court to interfere with the decision reached unless it is properly to be characterised as perverse or the ET failed to take into account that which was relevant or took into account that which was irrelevant (see **Bastick v James Lane (Turf Accountants) Ltd** [1979] ICR 778 EAT, approved in **Carter v Credit Change Ltd** [1979] ICR 908 CA).

38. Where the decision relates to the case management of proceedings, in **Gayle v Sandwell & West Birmingham Hospitals NHS Trust** [2011] IRLR 810, Mummery LJ further observed:

> **"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."**

39. The identification of the list of issues in the case is plainly one of the ET's case management functions. That list, however, does not permit new cases to be brought without regard to the original pleading or for claims that have been pleaded to be ignored or treated as withdrawn. As Langstaff P observed in **Chandhok & Anor v Tirkey** [2015] IRLR 195:

> **"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 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 s 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 as 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."**

40. Where an ET is concerned with an application to amend (Rule 29, Schedule 1 of the **ET Rules 2013**) it is exercising a judicial discretion; guidance in respect of which was laid down by Mummery J (as he then was) in **Selkent Bus Co Ltd v Moore** [1996] ICR 836 EAT. Pursuant to that guidance, where the amendment raises a new claim, the ET must have regard to the relevant time limits and, if the claim is out of time, to consider whether the time should be extended under the appropriate statutory provision; here, reasonable practicability. The ET would also need to have regard to the timing and manner of the application, although delay in itself should not be the sole reason for refusing such an application. The ET will, however, want to consider why it was not made earlier and why it is now being made. For example, whether it was because of the discovery of new facts or new information arising from disclosure. In each case, as Mummery J emphasised:

> **"… 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." (Page 844)**

41. As for the approach of an ET on an employee's positive case on the question of reason in an unfair dismissal claim, the Court of Appeal gave guidance in the case of **Maund v Penwith District Council** [1984] IRLR 24. Once an employer has produced evidence appearing to show a permissible reason for dismissal, a burden passes to the employee to show that there is a real issue as to whether that is the true reason. He or she cannot simply assert

another reason but has an evidential burden to produce some evidence casting doubt on the employer's reason. If an employee discharges that evidential onus then the burden reverts back to the Respondent to prove the reason for dismissal.

Discussion and Conclusions

42. I start with the Claimant's claim as particularised in his ET1. That specified that he was making a claim of unfair dismissal. It then referred to various other heads of claim. It is fair to say that the Particulars provided can be criticised for failing to clearly set out the Claimant's complaints under specific legal headings. Any such criticism would, however, need to take into account the fact that the Claimant was acting in person and, thus, presenting his complaints as a layperson without, I have assumed, experience in such matters and with, of course, the personal involvement in the events in question, making it all the more difficult to set out the case with the kind of dispassionate clarity a professional representative should be able to bring to bear.

43. What was apparent from the ET1 is that the Claimant did not consider his dismissal had been fair. Indeed, he complained of his experience with the Respondent in general terms and, one reading of the Particulars, expressed his belief that by his dismissal he had been deprived of a promised bonus payment. He also claimed that consultation had been inadequate.

44. In its ET3, the Respondent legitimately complained that the precise nature of the claims were unclear. It stated its intention to seek Further Particulars from the Claimant or an appropriate order from the ET. It did not do so. Instead, there were a series of hearings before the ET, at which the Claimant's claims were clarified as early as the Pre-Hearing Review before Employment Judge Auerbach on 14 August 2012. That is, as being claims for unfair dismissal and for a protective award, a claim for notice pay and a further claim for holiday pay.

45. Prior to that hearing, the Claimant had served his “Grounds supporting the claim" document. That had included a reference, under the heading “Unfair dismissal and failure to consult”, to a possible questioning of the reason for the dismissal. Otherwise there was no particularisation of the issues raised by the unfair dismissal claim.

46. There then followed the hearing of the Respondent’s applications for strike out or for deposit orders. In considering these, Employment Judge Deol heard further from the Claimant as to the nature of his unfair dismissal case, but, was not then determining the list of issues, merely seeing whether the Claimant had raised sufficient to demonstrate his unfair dismissal claim had reasonable prospects of success (which the Employment Judge was satisfied he had, merely by asserting the inadequacy of consultation). Thus the particularisation of the issues raised by the unfair dismissal claim was left until the subject of direction by Employment Judge Pearl on 12 November 2014 and subsequent consideration by Employment Judge Glennie.

47. Blame for that state of affairs could be levied against the Claimant. He had failed to set out the claims with full particularity or volunteer a list of issues at an earlier stage, but he, of course, was acting in person. Blame could be levied against the Respondent. It had failed to make a request for Further Particulars or seek the appropriate order from the ET. It chose instead to go down the path of a strike-out application but when that was unsuccessful in terms of the unfair dismissal claim it did not then take steps to ensure the Claimant’s colours on that claim were pinned to the mast. Ms Mayhew says the Respondent was entitled to assume the Claimant’s case went no further than alluded to in his ET1; on unfair dismissal, it was all about lack of consultation as had been made clear at the hearing before Employment Judge Deol (whilst that hearing did not expressly record the issues raised by the claim, it did record the limited Particulars the Claimant had then given). I have some sympathy with that submission.

It can be difficult for a Respondent to know how far to push the particularisation of a claim by a litigant in person. In this case, however, by the time of the hearing before Employment Judge Deol, the Claimant had provided Particulars which suggested, if it was not already apparent, that he was raising a question as to the reason for his dismissal (paragraph 8 of his "Grounds supporting the claim"). His suggestion at that hearing was that the redundancy, or at least his selection for redundancy, was a sham.

48. Blame for not more clearly identifying the issues might also be levied at the ET. In an ideal world those exercising case management powers would have got a grip on the need for a list of issues far earlier. That, however, is a criticism easy to make with hindsight and does not fairly reflect on the care taken by each Employment Judge at the different hearings.

49. Ultimately, the question of blame is of little assistance. The parties did as they were directed and when they were directed in terms of seeking to formulate the list of issues. They were unable to reach agreement; that was in or around November 2014. To the extent that the ET considered something akin to a list of issues had already been laid down by Employment Judge Deol's record of the strike-out hearing, that was not a proper characterisation of the proceedings. To the extent such a characterisation informed the ET's reasoning and exercise of case management discretion it was tainted by an irrelevant consideration: the issues had not been recorded by Employment Judge Deol.

50. Even if the ET was not going that far but was simply having regard to how the Claimant had particularised his case at earlier stages - in particular before Employment Judge Deol - as generally relevant to the formulation of a list of issues, it needed to have regard to the fact that the Claimant had, since the lodging of his ET1, previously raised questions as to whether

redundancy was the real reason for his dismissal. Before the strike-out hearing he had raised the question in general terms; before the formulation of the list of issues he had raised his alternative positive case. The apparent failure to have regard to those facts (see the reasoning at paragraphs 19 and 20) was a failure to have regard to a relevant matter.

51. Can Employment Judge Glennie's Decision on the Claimant's positive case on the unfair dismissal claim still stand notwithstanding those criticisms? It is unclear as to whether he allowed that the original ET1 might be read so as to include a question as to the reason for the dismissal. On the face of the ET1 I would, however, agree with Langstaff P: it is not to be read as conceding the reason for dismissal; that would be for the Respondent to prove and it would be open to the Claimant to test the evidence called in that regard. That lack of concession as to the reason of itself can comprehend a positive alternative case as to the reason for dismissal. It is right to say (**Maund v Penwith**) that a Claimant seeking to put a positive case as to an alternative reason for dismissal will bear an evidential burden. It is equally right to say that a Respondent is entitled to know of that positive case in advance. Particularising the positive case does not, however, amount to the bringing of a new claim. Denying the Claimant the right to put a positive case in these circumstances can be seen as striking out of part of his case; at the least, it is a troubling restriction as to how he might put his case on the unfair dismissal claim.

52. The Claimant's complaint is that he considers he was hard-done by in his employment with the Respondent and denied a promised bonus payment by his dismissal. That will be his assertion in his unfair dismissal case; as is apparent from the ET1. The ET was troubled by the fact that this had not been properly identified as an issue at an earlier stage, but, for the reasons I have stated, that was not solely the Claimant's fault. I can also see it was unfortunate that the

April 2015 hearing date had to be vacated, but that was always a possibility if the parties could not agree the list of issues and the ET could not list an earlier hearing to resolve that dispute.

53. Recognising that the EAT should be slow indeed to interfere with the ET's case management role in drawing up the list of issues in an unfair dismissal case, I consider the decision to exclude the Claimant's positive case as to the reason for his dismissal (or the real reason for his selection for redundancy) was wrong. It failed to take account of that which was relevant: the lack of concession as to the fair reason for dismissal on the face of the ET1 and the Claimant's earlier questioning whether the reason given (or his selection for redundancy) was a sham. It further took into account that which was irrelevant, in treating Employment Judge Deol's record of the strike-out hearing as containing a list of issues when it did not.

54. In my judgment the Decision cannot stand. The question then arises as to whether I should substitute my own view or is more than one view permissible? It seems to me that it is not. Once one appreciates that the ET1 did not concede the reason for the dismissal, the Claimant would be entitled to test the Respondent's case on this question. True it is that the Respondent was entitled to know of any positive alternative case, but that would have been apparent, as and when, the issues between the parties were identified. The Claimant had raised Further Particulars on this question back in August 2012. Had he then been pushed to particularise in more detail his positive case for dismissal and he had raised the bonus avoidance issue there could have been no proper objection. There is no basis for thinking that there was any deliberate avoiding of stating the case on his part; after all his complaint that his dismissal meant the Respondent avoided paying his bonus was made plain on his ET1. The only real objection to the point by the time of the hearing before Employment Judge Glennie was one of timing, but, as I have said, the delay was not solely the Claimant's responsibility.

55. On that basis I am satisfied that the Claimant should not have been restricted in how he put his case on the unfair dismissal claim. I accordingly substitute my decision for that of the ET. The Claimant is able to contend on his unfair dismissal complaint that the reason for his dismissal was a reason connected with a wish to avoid paying his bonus.

56. I then turn to the whistle blowing claim. I accept Mr Delehanty's submission that the issues being considered under this head by Employment Judge Glennie raised both the Claimant's alleged disclosures regarding the non-payment of bonus and those regarding the proposed relocation. As the Claimant acknowledges, however, these were being raised as new claims, new causes of action requiring amendment of the ET1. That being so, the ET was bound to consider the timing of the raising of these claims. The time limit in issue ran from the date of the Claimant's dismissal. The amended claims were, on their face, out of time. The Claimant suggests the ET ought to have found it was not really reasonably practicable for him to have brought these claims in time. His case on this being based on documentation provided to him by the Respondent pursuant to a subject access request in August 2014. There is, however, nothing in the documentation I have been taken to (and I have read all the material in question provided in the supplementary bundle), that provided the Claimant with anything new. There was no new information which would have made him realise he might have a whistle blowing claim of which he was not aware before. To the extent that he had a genuine concern that his dismissal (or selection for redundancy) related to his earlier raising of complaints or grievances (whether regarding bonus or relocation) he had all the information he needed to express that concern in his ET1 and, thus, make a protected disclosure claim. He did not.

57. Going further, and considering prejudice more generally, the ET was, I find, entitled to take into account the broader procedural history: the Claimant's clarification before

Employment Judge Dr Auerbach that he was not making any other claims; his failure to mention the potential whistle blowing complaints at any earlier stage. The Claimant says that overall there is no real prejudice to the Respondent; it will be open to him to raise these factual matters in his unfair dismissal claim in any event (all the more so if the bonus avoidance case is permitted to be run on the unfair dismissal claim). That, however, is only part of the picture. First, raising matters as background evidential points is a different thing to pursuing a separate head of claim. In any event, I am not persuaded that the same points would be run. That is certainly not obvious regarding the relocation complaint. Even as regards the bonus payment, additional issues arise relating to whether there were any actual disclosures on the Claimant's part. Those questions - which raise both new legal and evidential issues - would need to be explored, which might well add to the time and cost of the proceedings and which would be all the more unfair for the Respondent to have to deal with after such a delay.

58. On these points I consider, therefore, that the ET reached an entirely permissible conclusion in refusing the amendment and I dismiss this part of the appeal.