Appeal No. UKEAT/0258/13/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 July 2014
Judgment handed down on 1 September 2014

Before

THE HONOURABLE MR JUSTICE WILKIE

(SITTING ALONE)

MRS I DE SOUZA AND OTHERS — APPELLANT

CARILLON SERVICES LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR O SEGAL QC (One of Her Majesty's Counsel) MS M TETHER (of Counsel) Instructed by: Messrs Bindmans LLP 236 Gray's Inn Road London WC1X 8HB
For the Respondent	MR D TATTON BROWN (of Counsel) Instructed by: Clarkslegal LLP 2 Caspian Point Caspian Way Cardiff Bay Cardiff CF10 4DQ

SUMMARY

PRACTICE AND PROCEDURE - Amendment

The Employment Appeal Tribunal accepted that the Employment Judge had erred in law in her application of the **Selkent** principles on whether to allow certain applications to amend the claims in this litigation but upheld her application of those principles in respect of other applications to amend.

THE HONOURABLE MR JUSTICE WILKIE

Introduction

1. The appellants (Mrs Irene De Souza and fifty others) appeal against certain decisions made by Employment Judge Harper, with reasons, dated 13th March 2013 after a pre-hearing review held on the 12th and 13th December 2012 and 18th January 2013.

2. She dismissed claims made against a second respondent, Ms Christine Woods, on the grounds that they were presented out of time and it was not just and equitable to extend time. That decision is not the subject of appeal.

3. The Employment Judge also considered applications, dated respectively 24th August and 5th October 2012, to amend the grounds of claim. In accordance with the approach which she took, and explained in her decision, she allowed a number of those amendments and refused others. The appellants, in their grounds of appeal, seek to overturn her decision to refuse amendments and invite the EAT to set aside that judgment and substitute a decision that all applications to amend should be allowed. Alternatively, they ask that the EAT remit those applications to amend to a differently constituted Employment Tribunal.

4. These decisions were made in the context of the claims being made, at different times by different claimants and against the background of the respondent having received, at an earlier stage, a number of multiple grievances on which it had conducted an investigation, and had come to a number findings. I set out below the relevant sequence of events in respect of these two elements comprising the context of this appeal.

The ET claims

5. The appellants are all employed by the respondent in the Housekeeping Department at Great Western Hospital (GWH). The vast majority originate from Goa, most are practising Roman Catholics and all are now members of the GMB Trade Union which supports their claims.

6. There are currently fifty one claims. Originally there were fifty nine but eight have been withdrawn. The claims were presented in a number of tranches.

7. Forty one were presented on various dates between 28th February and the 21st March 2012. A further eight were presented on the 11th May 2012. One further claim was presented on 31st May 2012 and a final claim was presented on the 29th June 2012.

8. Of those claims, some were individual and some were multiple where the claims were identical.

9. Ms R Estrocio and eight others put in one multiple claim ("the Estrocio claims"). Mr Paulo Fernandes was one of those claimants and he gave evidence at the pre-hearing review.

10. Ms N Gonsalves and seven others put in a different multiple claim. Ms B Fernandes and Ms N Fernandes put in two claims together. Ms F Fernandes and six others put in another multiple claim, as did Ms C Fernandes and three others and Mr C Rodrigues and seven others.

11. Mrs Irene De Souza, the lead appellant, put in an individual claim as did the remainder of the claimants. I will return to the various claims below.

12. On 30th May 2012 the respondent made requests for further information in respect of the claim brought by Mrs Irene De Souza and the Estrocio claims.

13. On the 11th June the respondent submitted ET3's in respect of all the claims brought in February and March and, on the 13th June, ET3's in respect of all the claims brought in May.

14. Prior to the middle of June 2012, all the claimants instructed Thompsons Solicitors through the good offices of the GMB but, in mid June, they withdrew instructions from Thompsons. Henceforth, from the 2nd July 2012, Bindmans were instructed by the GMB on behalf of the claimants.

15. On 6th July 2012 there was a case management discussion before EJ Parkin at which, by consent, it was ordered that the further and better information requested would be provided in 3 tranches between the 24th August and the 5th October 2012. Thereafter, on the 7th September, at a second case management discussion before EJ Parkin, an order was made that the remaining further and better information would be provided by the 5th October 2012.

16. Pursuant to those orders, the claimants duly provided the further and better information requested in two tranches, on the 24th August and the 5th October 2012.

17. On the 24th August 2012 the claimants served the first version of their draft amended claims, in respect of the first tranche of claims, and, on the 5th October 2012, the claimants served the draft amendments in respect of all remaining claims. The consolidated amended grounds of claim appear to be in a form produced initially on the 24th August 2012 in respect of the Estrocio claims and further amended on the 5th October 2012. The draft amended grounds of claim in respect of Mrs De Souza are dated 5th October 2012.

18. On the 30th October 2012 the respondent made a further request for further and better information and the response to that request was served on the 10th December 2012.

19. The pre-hearing review, out of which the decision the subject of this appeal arose, was ordered to take place on 12th and 13th December 2012. It took place on those days plus a further date on the 18th January 2013. Judgment was reserved and gave rise to the reserved judgment of EJ Harper on the 13th March 2013.

The collective grievances presented to the respondent

20. On 21st December 2011 one hundred and nine members of staff, all of Goan origin, with the assistance of the GMB, sent a collective grievance to their line manager. It was entitled "Two weeks annual leave restriction." It focussed on the introduction of a restriction of two weeks annual leave only, to be taken at any one time, and restrictions over taking annual leave over the Christmas period. The grievance claimed that the respondent's actions amounted to discrimination and victimisation on grounds of colour, nationality, or religious belief. In that grievance, Ms Woods was described as being "intimidating and threatening the Goan employees at work". It alleged that many of the Goan employees were afraid for their livelihood and easily manipulated. A further grievance, on behalf of four employees, was

lodged on the 27th January 2012 alleging that two named white managers had permitted two named white staff to take extended breaks and annual leave when Goan workers were not permitted to do so.

21. On 7th January 2012, Ms Woods commenced a two week period of annual leave, prior to which she was out of the office for a time on compassionate leave and following which she commenced a period of sick leave on the 25th January 2012.

22. The respondent held a series of interviews with individual employees as part of the grievance investigation. On the 17th February 2012 Ms Woods attended her only interview as part of that grievance investigation.

23. From late March to early April the respondent held a second series of grievance interviews with individuals who were making the grievance. In April 2012, a further collective grievance was raised by twenty five employees (the grievance itself being dated 20th March 2012) alleging bullying, discrimination and harassment, witnessed by those making the grievance. They claimed that they were not being treated with dignity and respect at work. Those individuals wished their grievance to be considered alongside the one hundred and nine others who had made the initial collective grievance on 21st December 2011. There was yet a further collective grievance on behalf of nine employees made in early April. Ms Woods and two other white managers, Miss Bowden and Miss Coulson were also named in that grievance.

24. In late April 2012, the respondent held a third set of grievance interviews. On 27th April 2012 the respondent announced interim findings of its investigation into the 21st

December collective grievance, which were published to all staff. On 15th May a collective grievance was raised by twenty eight Ward Hostesses concerning a change to the reporting structure without consultation. Areas of concern included:

(1) the impact of the new holiday system

(2) the availability of opportunity for overtime

(3) the potential discrimination in the new reporting structure given the racial composition of the hostess workforce. In particular, concerns that Ward Hostesses and the rest of the catering department would be working different hours.

25. On the 31st May, the respondent announced its final findings in respect of its investigation into the 21st December collective grievance to all staff and, on the 14th June, the respondent delivered a more detailed summary of its final findings on that grievance to the employees who were signatories to it.

26. On 21st June another collective grievance was launched on behalf of one hundred employees covering the same substantive issues as the December 2011 grievance. Further allegations were made in respect of annual leave, overtime and shift pattern distributions.

27. The Employment Judge, in respect of the grievances, at paragraphs 33-37 set out a chronology which broadly coincides with that provided for the purposes of the appeal.

28. At paragraphs 38-39 she said as follows:

> **"38. Ms Woods was interviewed early on in the process in February 2012 but at that stage the meat of the allegations which formed much of the additional factual allegations in the amended grounds of complaint were not made known until later on in the investigation. By May 2012 after Ms Woods' employment had terminated she declined to be interviewed any further on health grounds. The first response to the collective grievance was issued by the first respondent on 27th April 2012. There was a further response issued on 31st May 2012 and another further response on 19th June 2012. The final response to the grievance concluded there was sufficient evidence to suggest that the behaviour of a junior manager**

(Ms Woods) was at times inappropriate and not unreasonable to suggest that employees may have perceived this as bullying/intimidation, that there was no ban on taking extended leave, that there was a culture of gift giving and in relation to gift giving for advantage a conclusion that:

"it seems likely that such practices are likely to have occurred."

39. The first respondent also reached a conclusion that there were likely to have (been) isolated incidents of racist language and behaviour at the premises concerned and this was attributed to Ms Woods, who had already left the respondent. That conclusion was set out in the conclusion of 31st May 2012. Those various conclusions were reached on the basis of the interviews which the first respondent held with the individual complainants and without the benefit (of) hearing from Ms Woods as to her response to the allegations. I therefore find that were those allegations set out in the amended grounds of complaint allowed to proceed there would necessarily need to be further investigation into the allegations, because the first respondent has not heard Ms Woods response to the detailed allegations. I conclude that it would be very difficult for the respondent to obtain the necessary evidence on those detailed allegations involving Ms Woods due to her fragile health and the fact that she is no longer an employee of the respondent. I find that the first respondent would be severely prejudiced were it now to have to deal with the additional factual allegations set out in the amended grounds of complaint."

The structure and substance of the Employment Judge's decision

29. After introductory paragraphs, the EJ addressed the application to dismiss the claims against the second respondent, Ms Woods. One of the main issues which had to be decided was the credibility of the witness called for the claimants, the applicant Mr Paulo Fernandes, who gave evidence of the reasons for not commencing proceedings against the second respondent until the time permitted by the rules had lapsed. His evidence, on behalf of himself and the others, was that they did not raise specific allegations against her whilst she remained an employee of the respondent because they were fearful of her. The Employment Judge, for the reasons given, particularly in paragraph 10, concluded that he was not a credible witness.

30. Having dealt with that application, she turned, at paragraph 30, to deal with the application to amend the claim. Once again, she declined to accept the evidence of Mr Fernandes wherever there was a dispute between him and Miss Lynch, who gave evidence for the respondent.

31. The EJ dealt with the history and outcome of the grievance pursued by employees, including the claimants, at paragraphs 30-39. She then set out the legal principles applicable to her decisions at paragraphs 40-42 including the then leading case, **Selkent Bus Company v Moore** [1996] ICR 836 EAT, to which I will return. She summarised her approach in paragraph 41 in the following terms:

> **"… the Tribunal in determining whether to grant an application to amend must carry out a careful balancing exercise of all the relevant factors having regard to the interests of justice and to the relative hardship there will be caused to the parties by granting or refusing the amendment. Relevant factors would include the nature of the amendment. The Tribunal has to decide whether the amendment sought is one of minor matters or a substantial alteration pleading a new cause of action and the applicability of time limits if a new complaint or cause of action is proposed to be added by way of amendment. It is essential for the Tribunal to consider whether that complaint is out of time and if so whether the time limit should be extended and the timing and manner of the application. An application should not be refused solely because there has been a delay in making it, as amendments may be made at any stage of the proceedings. Delay in making the application is 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. I also note that the fact that the relevant time limit for presenting a new claim has expired will not prevent me exercising my discretion to allow the amendments."**

32. She identified that it was common ground that she should follow the approach identified in **Selkent**. She recorded that she had not been referred to each individual claim and the proposed amendment to it. The claimants had asked her to consider the applications to amend on a collective basis, although examples in some claim forms had been highlighted and the focus had been on the evidence of Mr Fernandes. She recorded that the respondent focused on the claim of Mrs De Souza and that hers was the first in time. She considered that she should consider the proposed amendments to Mr Fernandes' and Mrs De Souza's claims. However, at the end of paragraph 42 she said this:

> **"… When I have carried out that exercise I will determine whether the amendment applications can be dealt with on a generic basis or whether I need to consider each individual claim form."**

33. She then summarised the respective submissions in the following terms:

> **"44. Essentially the claimants' submission is that the amendments in respect of all the claims should be allowed because it is said that the proposed amendments are "*much more by way of an exercise in collation, particularisation and clarification, than by way of seeking to***

> ***introduce new allegations*". It is accepted … that allegations of racist language and tone from the supervisor were not explicitly referred to in the original claims and the allegation of employment of new white staff on preferable terms, thereby reducing the claimants' opportunity to work overtime, was not in the original claims but more recent and ongoing. The collective submission on behalf of the claimants is that the balance of prejudice favours the claimants and the amendments should be allowed."**

34. She then summarised the respondent's submissions that the amended grounds introduce new factual allegations and new causes of action. They amounted to substantial alterations to the existing pleadings and many of the new allegations were out of time. They contended that there was no good explanation for the late application to amend and the claimants would not suffer great injustice if not granted leave to amend, but to do so would be disproportionate, increasing the time and expense in respect of dealing with those claims. The respondent did not, however, object to any amendment which provided a narrative background information or which purported to remove a specific allegation.

The Employment Judge's approach

35. She first analysed the original claim presented by Mr Fernandes and the proposed amendment in order to identify the types of amendment being sought, following the guidance in **Selkent**. She then carried out a similar exercise in relation to Mrs De Souza's original claim and her proposed amended grounds.

36. In paragraphs 46-62 she identified, paragraph by paragraph, the factual allegations made by Mr Fernandes and identified the nature of the claims made. In paragraphs 63-82, she conducted a paragraph by paragraph analysis of the way in which that claim was sought to be amended, identifying whether the amendment was to clarify, or to expand on, factual allegations, or deleted allegations, or set out the background to allegations, or duplicated that which was contained in the original claim. Where that was the case she allowed the proposed amendment. She identified those amendments which amounted to making new factual

allegations, or which added a new head of claim, in which case she disallowed the amendment.

37. Having conducted that process of analysis she set out her conclusions at paragraphs 83-88.

38. She first addressed the nature of the amendment. She recorded that that analysis had identified that some paragraphs amounted to clarification of the existing grounds of claim, or removing paragraphs in the original grounds of claim, whereas others introduced new factual allegations or heads of claim, all of which, except for the allegation of employment of new white staff, were known by the claimants when the complaints were originally made (paragraph 83).

39. In respect of the allegation of the employment of new white staff, that was known in March 2012. The application to amend, being 5th October 2012, was outside the time limit for bringing such a claim. She recorded that, throughout, the claimants were supported by the Union and were legally represented. She repeated that she did not accept the evidence of Mr Fernandes of the reason for the delay, nor was there any satisfactory evidence that the previous solicitors were at fault by not including, in the original ground of complaint, some of the matters now in the amended grounds.

40. In paragraph 85, she said as follows:

> **"I have asked myself what impact the delay has had on these proceedings. I conclude that the delay has had a significant effect since many of the new allegations pleaded, for example, the allegation of racial harassment and the culture of fear, has not been fully investigated by the first respondent. Although an investigation was carried out, the conclusions were reached without hearing a substantive response from Ms Woods and therefore likely to have been reached on incomplete evidence. Were those matters to proceed to hearing, I accept that there would inevitably be the need for further substantial enquiry by the first respondent into the new allegations set out in the amended grounds of**

> **complaint. I also conclude that the first respondent's ability to recover evidence in relation to these matters is likely to be substantially compromised by the fact that many of the individuals who would be able to give relevant evidence have since left the employment of the respondent and the task of collating relevant evidence would be made extremely difficult."**

41. She considered the respective prejudice to the parties in paragraph 86. She records that the claimants remain employees of the respondent. There were no claims for compensation beyond an award for injury to feelings. The further allegations in the amended grounds would add little to the level of compensation and it was likely that significant costs would need to be incurred by both parties in respect of lengthier hearings to cover the additional allegations.

42. She reminded herself of the overriding objective and, at paragraph 87, said:

> **"… I consider that it is proportionate to allow the amendments which are merely clarification and add nothing new and to refuse the application to amend where it adds a new head of claim or new factual allegations. I consider that this will ensure that the progress of these proceedings proceeds expeditiously and fairly and will save expense for both parties."**

She then carried that statement of intent in to practice by dealing with the proposed amendments paragraph by paragraph. Those decisions are set out in a schedule form annexed to the decision.

43. It is to be observed that, in particular, she refused the amendments proposing, at various points, to add claims of harassment or indirect discrimination, where the complaint made originally was one of direct discrimination. She refused the amendments set out at paragraphs 20-23 which are entirely new. Paragraph 20 sets out, in ten numbered sub paragraphs, contentions that the department was managed in a way which gave rise to a "culture of fear". Paragraph 21 concerned the allegation about employment of new white staff. Paragraph 22 is a contention that the discriminatory policy practices and acts all

involved conduct extending over a period. Paragraph 23 is an allegation that the respondent knew or ought reasonably to have known of the discrimination being practised, but failed to carry out any proper investigation.

Mrs Irene De Souza

44. The Employment Judge then conducted a similar exercise in respect of the claim of Mrs De Souza. She went through the original claim form, paragraph by paragraph, in paragraphs 89-92 of the decision. Having done so, in paragraphs 93-104, she analysed the proposed amendments in accordance with her stated approach. At paragraphs 101-2, she observed that paragraphs 12-22 of the proposed amended pleading were entirely new. She summarised her conclusions arising from that analysis at paragraph 105, in the following terms:

> **" … (I) allow those paragraphs of the amended grounds of claim, that merely provide background information or clarification of claims already foreshadowed in the original grounds of claim, and to refuse the application to amend to include new factual allegations not previously pleaded and new causes of action. I am satisfied that the prejudice to the respondent, if I were to grant the application to amend, to be significantly greater than that suffered by the claimant. If I refuse the application, the claimant can still proceed with her claim of discrimination on the grounds of race, in respect of the refusal to grant her annual leave requests in 2011, and in relation to the requirement to move wards which have been highlighted by her as being less favourable treatment on the grounds of race."**

She then identified, paragraph by paragraph, the amendments she was prepared to allow and those she refused which are set out in the schedule.

The Employment Judge's approach to the remaining claims

45. The claimants' contention was that she should consider the remaining claims as a whole rather than determining each individual claim. The respondent indicated that the law required she undertake an analysis of each original claim form and proposed amendments. The EJ preferred the latter submission. She says:

> **"109. None of the claim forms are identical … I consider that I need to identify from each claim form the heads of complaint pursued, the summary of the factual allegations relied upon, and what is proposed to be introduced by amended grounds of claim. …"**

46. She then proceeded to deal with the claim forms taking the lead forms where the claims were multiple claims and, in all other cases, taking the individual claims.

47. The first set of claims was that of Ms N Gonsalves and seven others. She dealt with those paragraph by paragraph between paragraphs 111-130 of the decision. She followed the same course as she had identified in relation to Mr Fernandes and Ms De Souza as expressed in paragraph 131:

> **"… I propose to allow the amendments which relate to clarification of existing heads of claim and clarification of the factual basis for those heads of claim, but I refuse those amendments so far as they relate to introducing new factual allegations … and new heads of claim for the reasons I have already given."**

Ms B Fernandes plus one

48. She conducted, between paragraphs 134-139, a similar analysis to that conducted in the other cases and at paragraph 140 she said:

> **"For the reasons already given I will allow amendments where the amended grounds of claim clarify the factual basis for the claim already pleaded but I refuse the amendments so far as they relate to introducing new heads of claim for these two claimants and new factual allegations …"**

Ms F Fernandes plus six

49. She conducted a similar paragraph by paragraph analysis and applied the same approach at paragraphs 143-157.

Ms C Fernandes plus three

50. She adopted the same approach in respect of those.

Mr C Rodriguez plus seven

51. She adopted the same approach as previously noted.

Ms L Aguiar

52. This was different from the others because she claimed pregnancy and sex discrimination in relation to her pregnancy related sickness. The amended grounds expanded the factual allegations in respect of those claims, but paragraphs 10-16 added totally new factual allegations in relation to less favourable treatment on grounds of race and, in similar terms to the amended claim form for the main multiple claim. Her approach was, therefore, consistent with the previous approaches and identified as such at paragraph 169.

Ms Betito

53. At paragraph 170 she described this claim as highlighting three specific causes of action:

> **"Direct discrimination on the grounds of race … indirect discrimination on the grounds of race in respect of the respondent's annual leave policy and less favourable treatment on the grounds of her Trade Union membership …"**

At paragraph 171 she says:

> **"The amended grounds … clarify the factual basis of the allegations of discrimination in respect of the request for annual leave and the factual basis of the claim for indirect discrimination …"**

At paragraph 172 she says:

> **"Paragraphs 7-12 of the amended grounds … add completely new factual allegations of harassment in respect of an alleged culture of fear … All these are completely new factual allegations and heads of claim."**

54. Her conclusion in respect of this claim was to allow the amendment which clarified the contentions of discrimination in respect of the request and refusal of annual leave but to refuse in respect of new allegations and new causes of action.

55. It is important, therefore, to record that the EJ allowed the claim of indirect discrimination, as amended, in respect of the annual leave policy to proceed in the case of this claimant.

56. Although the Employment Judge went on to analyse each of a number of individual claims and the proposed amendments thereto, she was not addressed in argument about them. The appeal has been conducted on the basis that I should focus on the overarching issues of principle which informed the individual decisions of the Employment Judge, together with the individual proposed amendments in respect of one multiple claim, the Estrocio claims, and the individual claim of Mrs Irene De Souza.

57. I do not, therefore, do more than record that the Employment Judge did conduct an individual analysis of each of the individual claims.

58. Suffice it to say that, in a claim of Ms Francisca Pereira, one of the two original claims she submitted, she claimed indirect discrimination in respect of a refusal of a request for annual leave; so too did Miss Luisa Pires and Lidia Vas. The amendments were permitted which clarified these original claims. Thus, on any view, the Tribunal would have to consider, and the respondent have to prepare to answer, in four cases, allegations that the adoption of the policies in respect of annual leave operated to indirectly discriminate against these applicants.

59. In each of the cases the Employment Judge made her orders in respect of the individual proposed amendment, by reference to the original grounds and the proposed amendments, applying the principles which she had identified. Those decisions are tabulated in the schedule attached to the decision. The criticisms made of the Employment Judge are criticisms of principle as applied to the claims as a whole, and there is no suggestion that there are individual errors in the application, by the EJ to the individual cases, of the principles which she identified as being applicable.

The Law

60. The powers to manage proceedings are given to Employment Judges pursuant to Rule 10 (1) of Schedule 1 to the Employment Tribunals Constitution and Rules of Procedure Regulations 2004.

61. Rule 10 (1) empowers the Employment Judge at any time to make an order in relation to any matter which appears appropriate. Examples of such orders are given and include, at (2) (q), giving leave to amend a claim or response.

62. The leading case on amendment at the time of the decision of the EJ was **Selkent Bus Company Ltd v Moore** [1996] ICR 836 EAT. Since this case was decided there has been further authority in the Court of Appeal, **Abercrombie and others v AGA Rangemaster Ltd** [2014] ICR 209. At paragraphs 47 and following, in the judgment of Lord Justice Underhill, His Lordship set out the relevant passage in **Selkent** in the following terms:

> **"(4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account *all* the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.**
>
> **(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant.**

(a) *The nature of the amendment.* Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) *The applicability of time limits.* If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions …"

63. Lord Justice Underhill went on to say as follows:

"If the final sentence of point (5) (a) is taken in isolation it could be understood as an indication that the fact that a pleading introduces "a new cause of action" would of itself weigh heavily against amendment. However it is clear from the passage as a whole that Mummery J was not advocating so formalistic an approach. He refers to "the … substitution of other labels for facts already pleaded" as an example of the kind of case where (other things being equal) amendment should readily be permitted – the contrast being with "the making of entirely new factual allegations which change the basis of the existing claim". (It is perhaps worth emphasising that head (5) of Mummery J's guidance in *Selkent's* case was not intended as prescribing some kind of a tick-box exercise. As he makes clear, it is simply a discussion of the kinds of factors which are likely to be relevant in striking the balance which he identifies under head (4).)"

64. A little further on Lord Justice Underhill says as follows:

"… As to point (b), it is true that fresh proceedings … would have been out of time. Mummery J says in his guidance in *Selkent* that the fact that a fresh claim would have been out of time … is a relevant factor in considering the exercise of the discretion of whether to amend. That is no doubt right in principle. But its relevance depends on the circumstances. Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded – and *a fortiori* in a re-labelling case – justice does not require the same approach …"

65. I am also reminded by the respondent of the often stated obligation on the parties to be proportionate in the conduct of the proceedings (see **Hendricks v Metropolitan Police Commissioner** [2003] ICR 530 at paragraph 54):

"… Attempts must be made by all concerned to keep the discrimination proceedings within reasonable bounds by concentrating on the most serious and the most recent allegations …" (Mummery LJ)

And in **Gayle v Sandwell and West Birmingham Hospitals NHS Trust [**2011] IRLR 810 that:

> **"The parties and their advisers themselves have duties to discharge personal and professional responsibilities in the preparation and the presentation of the cases in the Tribunals. They must keep a proper sense of proportion in the issues raised for decision, in the selection of legal points worth taking and of relevance in the quantity and quality of the evidence that they need to call." (Mummery LJ)**

The parties' submissions

The general approach

66. As I have indicated above, the argument, before the EJ and before me, has been focussed on the overarching principles identified by the Employment Judge and her general approach in applying them rather than on detailed examination of each and every form of claim which was sought to be amended.

67. By way of example, however, the Employment Judge received, as have I, detailed submissions on two of the forms of claim and the proposed amendments to them namely: the Estrocio claims and the individual claim of Mrs Irene De Souza.

68. The parties are agreed that I should consider whether, and if so to what extent, the EJ erred in law in identifying or applying the principles upon which she acted and, to a limited extent, identifying in respect of these two forms of claim any such particular errors of law there may have been. If, and to the extent that, the appellants succeed in that endeavour, I am invited to identify what those errors of law were, and where I am able to conclude what the outcome, without the error, must have been, to substitute a particular decision for that of the Employment Judge, but otherwise to remit the case to the Employment Judge for further consideration in the light of the identified error(s) of law. That would leave it open to the parties to consider the other forms of claim in the light of those findings and either, agree amendments to reflect those findings, or structure their arguments before the EJ.

69. This is an agreed approach which I am happy to adopt. It is in accordance with the guidance given by the Court of Appeal in **Jafri v Lincoln College** [2014] IRLR 544 paragraph 21.

The appellants' submissions

The first ground

70. The first main ground of attack on the Employment Judge's decision was her conclusion that she would decline to amend or introduce new factual allegations where those allegations were foreshadowed by the subjects of and the outcome of the collective grievance. Her reasoning was that the allegations had not been fully investigated by the respondent as grievances because it had not been able to obtain a substantive response from a junior manager, Ms Woods, who was central to many of those complaints. The Employment Judge accepted that, if those new factual allegations were added by way of amendment, there would be a need for further substantial enquiry by the respondent into them, and that their ability to recover and/or present evidence on them would be substantially compromised by the fact that many of the individuals complained of had since left their employment. On the other hand, the claims were for declarations and compensation limited to injuries to feeling. Accordingly, she concluded, those amended grounds of complaint would add little to the level of compensation, but, if the amendments were granted, it would result in significant costs and lengthier hearings to consider the additional allegations.

71. The background to this conclusion is that there was a series of collective grievances raised by well over a hundred members of staff, including the claimants, on various dates starting in December 2011. Ms Woods was named initially as being "intimidating and threatening to Goan employees at work" but no more detailed complaints were made at that

stage. The respondent investigated the grievances thoroughly, each of those making the complaints was interviewed and many of them more than once. Ms Woods was interviewed for about an hour in February 2012 towards the beginning of the investigation and before the catalogue of complaints arriving from the individual complainants had emerged.

72. Ms Woods was absent from work from the 25th January 2012 and her employment ceased by her resignation which took effect on 20th April 2012. Thereafter she declined to co-operate with the respondent in their investigation of the grievances. Other persons named in the complaints had left the respondent's employment during early 2012. Nonetheless, the respondent completed the investigation, as far as they could, and, having issued some interim conclusions on the 27th April 2012, published final findings on the collective grievance on the 31st May 2012. Thereafter it responded to the individual grievances by the end of June 2012.

73. The conclusions in respect of the collective grievance are couched in general terms as reflects the fact that, although furnished with a wealth of information from the complainants, those who were the subject of the complaints had not responded to the detailed complaints, save in the case of Ms Woods on one early occasion, when the allegations were highly generalised.

74. It is said by the appellants that, given the extent of the investigation conducted by the respondent into the grievance raising these matters and the respondent's ability to issue final conclusions on them, albeit in general terms, the Employment Judge was in error in concluding that the fact that the respondent was unable to obtain the detailed responses of individuals who were accused but who had left their employment, for the purposes of that investigation, meant that the respondent would be so prejudiced in seeking to defend itself

against the proposed amended claims, that the balance of prejudice and hardship was against granting those amendments.

The second ground

75. The second ground addressed to this issue is that the Judge erred in concluding that there was no good reason for the claims now sought to be added, not to have been pleaded originally. The Employment Judge had rejected that argument based upon her conclusion that the only witness put forward by the claimants in support of this contention, Mr Fernandes, was not credible. She also rejected the contention that the claimants had been badly served by their previous solicitors. She concluded that there was an absence of any satisfactory evidence to support the contention that Thompsons were at fault by not including those matters in the original grounds of complaint. It is said that this conclusion flies in the face of the documentary evidence in the form of the claim forms themselves and the findings of inappropriate behaviour made by the respondent in their conclusions on the investigation into the collective grievances.

The third ground

76. It is also said that the Employment Judge erred in taking into account the fact that addition of the amended claims would not significantly add to the compensation recoverable by the claimants. It is said that this ignored the importance of the other remedies being sought such as declarations or recommendations.

The "labelling" point

77. The next ground of appeal concerns the refusal by the Employment Judge to permit claims that the annual leave policy, which was at the forefront of the original claims,

constituted indirect discrimination and/or harassment related to race in addition to the claim that it was directly discriminatory. It is said that the Employment Judge misunderstood that the nature of this amendment was not to add a new claim but rather to attach a different label to claims already being made on the same factual basis. In particular, reliance is placed on the later decision of the Court of Appeal in **Abercrombie** and in particular the passage cited above.

The post claim events

78. The final general ground of appeal is that the Employment Judge failed adequately to consider the balance of prejudice and hardship where the subject of the amendment was a complaint about matters which post dated the original claim. It is said that she was in error in failing properly to consider the distinction between those claims and the claims which were based on factual allegations which existed at the time of the original claim. It is also said that she was wrong in law in concluding and having regard to the fact that some of those complaints were now out of time by the date of the amendment, whereas the amended claim pleaded that those matters of complaint were of a continuing nature so as not to be out of time.

The respondent's general submissions

79. The respondent says that the reasoning of the Employment Judge is sufficient, clear and sustainable. The Employment Judge was entitled to conclude that the investigation of the grievance although, to the extent it was conducted, was thorough, was incomplete because the respondent did not have the benefit of the detailed responses of those who were the subject of criticisms because they were either off sick or had left their employment and so were unavailable. In order to defend claims including the allegations the subject of the proposed

amendments, the respondent would need to seek to obtain evidence from the managers the subject of criticism. This would entail a substantial amount of additional work and, if that evidence were not forthcoming, they would be significantly prejudiced.

80. The respondent contends that the completion of an internal grievance procedure, as best the respondent could achieve it, is not to be equated with the respondent seeking to defend serious and substantial new allegations made by way of amendment, at a time when their ability to do so was significantly inhibited by the difficulty of obtaining access to relevant witnesses. The respondent contends that the reasoning of the Employment Judge on this issue was clear and she was entitled, having balanced all the relevant factors, to come to the conclusion that she did.

81. As to the second ground, the Employment Judge had made adverse findings of fact on the credibility of the only witness put up by the claimants to give their explanation for why these claims had not originally been included. Those findings formed the basis of the decision to strike out the complaint against Ms Woods, which is not the subject of appeal. It was based on the evidence heard by the Employment Judge and, it is said, cannot properly be described as a perverse finding. The reasons for the Employment Judge's conclusion are sufficiently set out in her decision and it was a conclusion open to her on the evidence.

82. The respondent next contends that the fact that a proposed amendment would add little or, by contrast, would add a great deal, to the value of the monetary claim, is a factor which the Employment Judge was entitled to take into account as part of the balancing process.

83. On “relabelling”, it is argued that the Employment Judge was entitled to conclude that the “re-labelling” of existing claims as complaints of harassment and/or indirect discrimination would require further factual investigation and that no error of law is evidenced in her conclusion.

84. The respondent contends that, in the case of claims based on events which post dated the original claims, the Employment Judge was obviously right in concluding that they would require further factual enquiry, that the amendments proposed to add widespread allegations to already extensive allegations and that the Employment Judge was entitled to adopt the approach that she did.

My conclusions on the general submissions

The refusal to amend to add new factual allegations the subject of the collective grievance

85. In my judgment, the ground of appeal attacking the Employment Judge’s conclusion that no good reason had been shown for the complaints not being included in the original claim is not a good one. There was ample evidence upon which the EJ could find against the claimants based on the lack of credibility of Mr Fernandes as a witness. The findings by the respondent on the grievance, that Ms Woods behaviour was at times inappropriate and it was not unreasonable to suggest that employees may have perceived it as bullying and intimidation, falls a long way short of making the Employment Judge’s conclusion on this issue perverse. Furthermore, the Employment Judge was, on the material before her, entitled to conclude that the reason for these complaints not being included in the original claims was not the incompetence of the Union which had represented the claimants throughout and their original solicitors.

86. Nor, in my judgment, is the complaint that the Employment Judge erred in having regard to the fact that these amendments would not add significantly to the quantum of compensation of the claimants, an error of law which invalidates her decision on these proposed amendments. It was one of the factors to which she had regard and one to which she was entitled to have regard.

87. In my judgment the reasoning of the Employment Judge on this issue was clear and sufficient. It was to the effect that the investigation of the grievance, though thorough, was incomplete. The conclusions to which the respondent came on the grievance were made without the respondent having the opportunity to obtain the response of the various managers who had left their employment, or were too ill to respond before leaving their employment. The fact that, for the purposes of conducting the grievance, the respondent came to certain general conclusions, as best they could, as reflected in their document published at the end of May 2012, does not necessarily mean that the Employment Judge was wrong to conclude that, for them to respond adequately to these allegations now proposed as amendments to a claim against them in the Employment Tribunal, they would have to undertake a substantial amount of work and/or would be faced with significant prejudice by not having available potential witnesses who might support a defence to these new claims.

88. Not only was this the basis for the EJ's decision, clear and explicitly stated, it was a matter of substantial weight to be placed in the balance which the **Selkent** principles call for.

89. In my judgment the decision of the Employment Judge in this respect cannot properly be described as erroneous in law or perverse. Accordingly, these grounds of appeal do not succeed.

Errors of law in classification of amendments

90. In my judgment the Employment Judge did misclassify the proposed amendments seeking to add claims of indirect discrimination and harassment to claims of direct discrimination on the basis of factual allegations made in the original claims.

91. In particular, where the complaints were focussed on the adoption of policies in respect of the granting of leave, those allegations were well capable of being read as of indirect discrimination, regardless of the intention with which they were adopted or applied. The position of the respondent, when responding to the grievance raised on this issue, was that this policy was adopted across the relevant workforce and for operational reasons. That is a stance which is potentially centrally relevant to a claim of indirect discrimination.

92. Furthermore, a small number of individuals' claims, as originally made, contended that the adoption of the annual leave policy did amount to indirect discrimination. So these issues were already in place before the Tribunal and would have to be prepared for and addressed by the respondent in relation to those particular claims. In my judgment it would be irrational for the other claimants not to have had the benefits of those arguments; they were equally applicable to them as to those claimants who had included indirect discrimination as part of the original claim.

93. Yet further, the Employment Judge permitted an amendment in the Estrocio claims application which, in substance, amounted to, or was capable of amounting to, an assertion of indirect discrimination. The refusal to permit that label to be attached to that permitted amendment, in my judgment, was an error of classification.

94. So too was the refusal to allow the label of harassment to be attached to those factual allegations. The evidence as to how its adoption was perceived by the complainants, which is central to this formulation of the claim, would be a matter for their evidence, and not evidence called by or on or behalf of the respondent.

95. Accordingly, this aspect of the appeal succeeds.

The proposed amendment to add claims whose facts post date the original claim

96. The decision of the EJ on this aspect is focussed on paragraph 21 of the proposed amended Estrocio claims. At paragraph 80 the EJ simply says:

> **"Paragraph 21 through to 21.2 introduces new factual allegations and new causes of action which would require substantial further enquiry."**

At paragraph 83 she acknowledges the distinction between new factual allegations, which were known by the claimants at the time of the original claim, and the allegation of the employment of new white staff, which was not. That distinction was not addressed further, save that at paragraph 84, the Employment Judge points out that the application to amend the claim in October 2012 in respect of an allegation of employment of new white staff in March 2012, was outside the time limit for bringing the claim.

97. The Employment Judge did not have the benefit of the further elaboration of the **Selkent** principles by Lord Justice Underhill in **Abercrombie**, and in particular where he says that:

> **"Where it is closely connected with the claim originally pleaded … justice does not require the same approach",**

Nor to his reference to the **Limitation Act** 1980 Section 35 (5) to the effect that, in the High Court, amendments to introduce new claims out of time are permissible where:

> **"The new cause of action arises out of the same facts or substantially the same facts as are already in issue".**

98. In addition, the Employment Judge did not address the fact that the complaint of discrimination made in paragraph 21.1 concerns not the initial engagement but the ongoing impact of their engagement, a matter which is explicitly alleged in the proposed amendment, at paragraph 22.1, to be a continuing matter.

99. In my judgment, the criticism of the appellants is well made that the Employment Judge appears, having identified general principles, to have applied them across the board, and in particular in respect of this proposed amendment, without specifically applying her mind to the merits and demerits of permitting this category of amendment making allegations which post dated the original claim. In particular, the concerns, which had informed the ruling in respect of the allegations the subject of the internal grievance, that the respondent would be prejudiced because evidence it might wish to deploy to resist a claim would not be available does not apply to this type of proposed amendment.

100. In my judgment, therefore, the appellant has succeeded in identifying errors of law in the approach of the Employment Judge to this aspect of the case and the appeal in respect of these proposed amendments is allowed.

The application of these conclusions to the Estrocio claims and Ms De Souza's claim and the consequential orders

101. I first take the Estrocio claims:

(1) The proposed amendments 2.2 and 2.3. These amount to applying different labels and should be allowed without further reference to the Employment Judge.

(2) Proposed amendment 5 – clocking out. The appeal in respect of this refusal is dismissed. It is the introduction of a new factual allegation which either was the subject of a collective grievance or, it appears, not even the subject of a collective grievance.

(3) Proposed amendment 7. The appeal is allowed. It is hard to see that this proposed amendment amounts to the introduction of a new factual allegation. The words "reprimand" and "threatened with disciplinary action" are so akin to the word "disciplined" that, in my judgment, it was an error of law to fail to identify this as mere clarification or elaboration of allegations already made. The amendment should be allowed without further reference to the EJ.

(4) Proposed amendment 9.1. This is a mislabelling amendment and should have been allowed without further reference to the EJ.

(5) Proposed amendment 11.1-4. This is a new factual allegation, some particulars of which post date the original claim (11.2 (c-g)). The appeal is allowed to the extent that the proposed amendments relate to the factual allegations arising after the original claim had been submitted. These matters will be remitted to the Employment Judge to hear argument on whether, applying the **Selkent** principles as explained in **Abercrombie**, these new

allegations, post dating the original claim, should be added by way of amendment.

(6) Proposed amendment 12.3 and 12.4. These proposed amendments apply the label "harassment" to what was already a permitted claim of direct discrimination. The appeal is allowed. These proposed amendments should be allowed without further reference to the EJ.

(7) Proposed amendment 20-20.10 "The culture of fear". The appeal in respect of this proposed amendment is dismissed.

(8) Proposed amendment 21-21.2. This ground, which relates to allegations of fact arising after the original claim, is allowed. Consideration of this proposed amendment is remitted to the EJ for further consideration in the light of **Selkent** and **Abercrombie** having received further submissions from the parties.

(9) Proposed amendment 22.1 (b and c). The appeal is allowed in respect of these and it is remitted to the Employment Judge to consider as part of her consideration of proposed amendments in respect of paragraphs 11 and 21.

(10) Proposed amendment 23. The appeal is dismissed in respect of this proposed amendment. These are new factual allegations well known at the time of the original claim.

102. I now consider Mrs De Souza's proposed amendments but only insofar as they are different from the Estrocio multiple claim.

(1) Paragraph 6. The appeal in respect of the amendment to add specific complaints in respect of 2007 and 2010 is dismissed.

(2) Paragraph 6.1, 6.3, 6.4, 6.5. The appeal in respect of these proposed amendments are allowed. This is a misclassification on the same basis as paragraph 2 of the Estrocio proposed amendment.

(3) Paragraph 6.2. I remit this to the Employment Judge for her to consider whether this proposed amendment is in fact a clarification of the allegation originally made in paragraph 6, and therefore whether that amendment should be allowed.

(4) Proposed amendment 11.8 and 11.9, 12 and 13. The appellants withdrew their appeal in respect of these paragraphs.

(5) Proposed amendment 16, 16.1, 16.2, 16.3, 18, 18.1-5, 19, 19.1-4. The appeal in relation to all of these proposed amendments is dismissed.

(6) Proposed amendments 14, 15, 17, 20-20.2 and 21-21.3. Appeal allowed and to be remitted to the Employment Judge for further consideration. Paragraphs 14 and 15, 20 and 21 are, or contain, new allegations post dating the

original claims. Paragraph 17 contains the same allegations as were allowed by amendment in the Estrocio claims at paragraph 6.

(7) Proposed amendments 22.1 (b and c) appeal allowed. Further consideration remitted to the Employment Judge on the same basis as the Estrocio claims.

(8) Proposed amendment 23 appeal dismissed.