Appeal No. UKEAT/0096/14/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 May 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

THE SECRETARY OF STATE FOR HEALTH — APPELLANT

MRS K VASEER & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR J CHEGWIDDEN (of Counsel) Instructed by: Treasury Solicitors DH Employment Team Room 1N18 Quarry House Quarry Hill Leeds LS2 7UA
For the First Respondent	MISS N NEWBEGIN (of Counsel) Instructed by: Thompsons Solicitors Congress House Great Russell Street London WC1B 3LW
For the Second to Fourth Respondents	MISS T BARSAM (of Counsel) Instructed by: Mills & Reeve LLP Solicitors Francis House 112 Hills Road Cambridge CB2 1PH

SUMMARY

PRACTICE AND PROCEDURE – Amendment

In a claim which asserted unfair dismissal, focussing upon unfair selection for redundancy and a failure to provide suitable alternative employment, an EJ allowed an amendment by which the Claimant sought alternatively to argue that her dismissal was automatically unfair because the rest of her team (with one of whom she had compared herself for the purposes of establishing unfair selection) had been transferred under TUPE whilst she had not. The exercise of her discretion was flawed, because the Judge materially thought that the original claim asserted that the team had been transferred to new employers, when it did not; that the new claim was simply a re-labelling of the same facts as the original; and the Appeal Tribunal could not reasonably interpret her to be saying merely that much of the same factual background would have to be explored. This was an error of law. Exercising its own discretion, especially in the light of **Selkent v Moore**, the EAT held nonetheless that the amendment should be allowed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. It is rare for the exercise of a discretion by an Employment Tribunal to be the subject of successful appeal. That has long been recognised (see the opening words in **Jesuthasan v London Borough of Hammersmith and Fulham** [1998] ICR 640 per Mummery LJ). Where the discretion is to permit the amendment of a claim, for it to be successfully appealed it must be shown that there is some error of law, which includes material misapprehension of material fact or that the Judge has taken into account something which she should not have done, left out of account something she should have reckoned in, or come to a conclusion which no reasonable Judge could reach. It is particularly a pity if discretionary decisions made in the course of ongoing proceedings should be subject to appeal because they are liable to delay the ultimate resolution of those proceedings and divert the energies of the parties into subordinate litigation.

2. This appeal lies in respect of Reasons given on 8 January 2014 by Employment Judge Brown at East London, who permitted the Claimant to amend her claim to plead that her dismissal was automatically unfair because the sole or principal reason for her dismissal was a transfer of undertaking or a reason connected with the transfer contrary to Regulation 7(1) of what was described as TUPE 1996 but was in fact 2006.

3. Where an amendment is sought, it relates to the way in which a claim is presented to a Tribunal. In the course of the discussion before me it is plain both that the Judge had to deal with a lot of assertions as to the facts of the case, which had yet to be established in evidence if ever they might be, and asked to consider as if fact and as if was part of "the case" that which had never actually been put in writing. It should not be thought that an ET1 or, for that matter,

an ET3 is simply a document there to set the ball rolling and that what really matters is in some way only hinted at in the words which are used. The document has a real purpose to fulfil, which should not be undervalued. It sets out the nature of the case so that a Respondent or, for that matter, the Claimant may understand the case of the other. It enables a Court of Appeal, the Tribunal in the first place, to see essentially what is being alleged. It is particularly useful for advance preparation by a Judge and Tribunal members. It helps the administration to know how long might be needed for the case so that it may make appropriate arrangements to ensure that justice is best done. It is right that Tribunals have a degree of informality which is not true of civil courts. That owes a lot to their historical origin. It makes them more amenable to litigants who have no legal experience and may be presenting their cases in person. For that reason it is important not to be so technical about the wording of an originating application as to lose sight of the context in which it necessarily will be set. A Judge or reader is entitled to have regard to context insofar as it is familiar or known to the parties, or must be known to the parties, in understanding what is alleged, but it is still the job of the document to make those allegations. The parties cannot expect the Tribunal or, for that matter, each other to understand that a case is being made which has not in fact been referred to in the document concerned or sufficiently indicated by that document albeit taken in context.

The Facts

4. Turning from those general remarks to the facts of the present case: the Claimant here complained about her dismissal. She had been employed, working for the NHS, by NHS Northeast London and the City, as she called it, until 31 March 2013. In her originating application she said at paragraph 1 that she had then been made redundant. Under the heading on the second page of her grounds of complaint, which were drafted professionally, she set out from paragraphs 9-13 the particulars of her case, essentially that she had been told that she was

at risk of redundancy in October 2012 and was the only employee in her team, a team of eight, placed at such risk. A colleague, Ms Peerum, who had the same job title in the same job band as her, was not placed at risk of redundancy. Paragraphs 12 and 13 suggest that the reason given to her for her selection for dismissal was related to her capability, that she did not have the right skills mix "going forward".

5. The paragraphs from 14-23 dealt with job applications and interview and what happened in March 2013, when she recorded her attempts to obtain suitable alternative employment with her employer. Those contentions were summed up in three paragraphs, under the heading "unfair dismissal";

> **"24. In view of the above, the Claimant contends that the circumstances leading to her dismissal were unfair and unreasonable.**
>
> **25. In particular, the Claimant questions the selection process adopted by the Respondent, and contends that the Respondent has failed to act reasonably in offering her suitable alternative employment.**
>
> **26. The Claimant therefore contends that her dismissal was procedurally and/or substantively under section 98 of the Employment Rights Act ..."**

6. As Mr Chegwidden, who appears for the First Respondent observes, those pleadings are reminiscent of cases in which what is in issue is the question of fairness of selection for redundancy, and the fairness otherwise of the dismissal insofar as the employer has failed to ensure that suitable alternative employment is provided.

7. There are two references only to the Claimant being part of a team. One of those is at paragraph 10 where she refers to her being part of a team of eight. The other is at paragraph 23, where she refers to part of the history which does not seem particularly relevant to the issues before me.

8. That claim was made on 17 June 2013. It was listed for a Full Merits Hearing on 9 October that year. On that day the Claimant, once she had learned that the Tribunal could not accommodate the case that day and it would have to be adjourned until the following spring, indicated that she wished to apply to amend her claim. The terms of the amendment, for which the Claimant sought permission before Judge Brown in December were as follows:

> **"In the alternative the Claimant contends that her dismissal was automatically unfair by operation of Regulation 7(1) of TUPE because of the sole or principal reason for her dismissal [sic] was the transfer itself or a reason connected with the transfer that is not an economic technical or organisational reason entailing changes in the workforce. The Claimant contends that the transfer of her function from the employer to the Barking, Dagenham, Havering & Redbridge CCG on 1 April 2013 amounted to a relevant transfer for the purposes of Regulation 3."**

CCG stands for "Clinical Commisioning Group."

9. Before Judge Brown, Barking, Dagenham, Havering and Redbridge CCG was represented. But the constituents of that unincorporated group pointed out they were in fact three separate legal entities: Barking and Dagenham, Havering, and Redbridge CCGs. Redbridge is the Second Respondent, Barking and Dagenham the third, and Havering the fourth.

10. The Judge recorded the oral submissions that had been made to her at paragraph 10 where she said that the Claimant alleged that her team, including Miss Peerum, had transferred to the proposed Second Respondent and she was not transferred when they were.

11. The Judge set out the relevant law. There is no criticism of the law which she set out. It is, however, said that she displayed a material misapprehension of fact and an error material to the exercise of her discretion in what she said in paragraph 17, taken in the context of the Judgment as a whole. The relevant paragraphs read as follows:

> **"In this case, the Claimant's amendment is based on the same facts as already pleaded in the ET1. In her pleaded ET1, the Claimant compares the Respondents' treatment of her to the**

> **treatment of her team, and of Asmi Peerum, who was not made redundant. The Claimant contends that they were transferred. I consider that the Claimant's claim is attaching a different label to the same facts already pleaded. She is saying that there was, not simply an unfair redundancy process in this case, but also that what happened to Ms Peerum and to the team amounted to a transfer and that, therefore, her dismissal was automatically unfair.**
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> **18. I consider that, on the facts already pleaded, what happened to the others in the team, including Ms Peerum, will have to be examined in any event by the Tribunal. The Respondent will have to establish a reason for dismissal and the reason that the Claimant was treated differently from the others in her team.**
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> **19. Applying** *New Star Asset Management Holdings v Evershed* **[2010] EWCA Civ 870], I consider that there is an overlap between the facts which will have to be examined in the unfair redundancy claim and the automatically unfair dismissal claim arising under TUPE.**
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> **20. I do not accept Mr Chegwidden's submission that the disclosure exercise and the facts to be considered by the Employment Tribunal are likely to be multiplied by the factor of a thousand or a million.**
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> **21. The factual enquiry by Employment Tribunal [sic] and the documents to be supplied on disclosure will be limited specifically to the team in which the Claimant was employed. The issue will be whether it was an economic entity which retained its identity following changes, or whether the activities of that team, as an organised group of individuals, and the transfer of them, amounted to a service provision transfer. I do not accept that complex and wide-ranging documents relating to other parts of any transfer will be required to be subject to disclosure, or to be examined in evidence."**

12. Her reference to the claim being based on the same facts and relabelling is a clear reference to the law as set out in the seminal case of **Selkent Bus Company v Moore**. That case was decided in the Employment Appeal Tribunal [1996] IRLR 661, but it has been relied upon or accepted without any criticism in subsequent hearings before the Court of Appeal (see **Jesuthasan** for one example). Accordingly it has unusual status for an Appeal Tribunal Decision, which it fully justifies. Mummery J was careful to note that there were no time limits laid down in the rules for making an application to amend. He identified the relevant circumstances telling on the exercise of discretion, which had, he said, to be exercised like any judicial discretion with regard to relevance, reason, justice and fairness, first by identifying the nature of the amendment. He supposed a spectrum:

> **"...ranging, on the one hand, from the correction of clerical and typing errors, the additions 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."**

13. He dealt with applicability of time limits in these terms:

> **"If a new complaint or cause of action is proposed to be added by way of amendment, it is essential [I note that word] 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 eg, in the case of unfair dismissal [what was then] S.67 of the 1978 Act.**

On the timing and manner of the application:

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

14. Accordingly, it was important for the Judge to decide how different the proposed claim was from that which had been vented in the originating application. Read textually, paragraph 17 appears to say that the amendment is, in effect, a re-labelling of what the Judge calls the same facts already pleaded. The sentence "The Claimant contends that they were transferred" is positioned within the paragraph at a place which suggests that she is identifying that as having been said in the pleading. The paragraph as a whole appears to be dealing with the question of how far the amendment differs from the claim originally made and does not, on the face of it, purport to identify what the Claimant is saying now as being different from that which the Claimant was saying before. However, the text needs to be read in context. Mr Chegwidden accepts that the last sentence of paragraph 17 is capable of referring to the argument which Miss Newbegin for the Claimant was advancing, identifying what the Claimant's case was as to the TUPE point. Miss Newbegin suggests that the words in the third sentence are making the same reference and that what follows needs necessarily to be read in the context of paragraph 18, which demonstrates that the Judge saw that other matters would have to be looked than those which had been set out in the original application. And at paragraph 19, far from saying that no new fact was necessary, she appears to be saying that

there was an overlap, that is that new facts would have to be established in addition to those which had been asserted. That fits with paragraph 21, which envisaged that there would be a need for a wider factual enquiry. I have to ask whether the Judge, in saying what she did at paragraph 17, was in error. I cannot escape the conclusion that she thought that the original application, in its words or for that matter in the necessary context shown by the words, was contending that there had been a transfer of the team, undertaking, service (whatever it might be), of which she was part. The word "transfer" does not appear in that context at all in the originating application. The originating application could not, on the basis of the facts set out, give rise to a claim that there had been a transfer of undertaking. The claim is simply not there.

15. The approach, at 17, 19-21 is somewhat muddled. Tempting though it would be to make sense of it by supposing that the Judge was, though not clearly indicating it, referring at one time to what she was being told in argument by Miss Newbegin and on the other what was actually in the original pleading, I cannot do this without too much violence to the language she actually used. Take the words "I consider that the Claimant's claim is attaching a different label to the same facts already pleaded." Those words suggest that a transfer of staff, of which she should have been part, was something which was asserted in her ET1. It was not.

16. I have accordingly come to the view that the Judge here was in error and, since the discussion and decision which followed built on that and it was plainly part and parcel of her decision as to the way in which she should exercise her discretion, that there was, exceptionally, an error of law in her approach. It follows that the appeal on this ground by the First Respondent, which the Second to Fourth Respondents, though not appealing, are nonetheless present through Miss Barsam to support, succeeds.

The Consequences

17. This Tribunal has the power to make an order which the Tribunal could make. Mr Chegwidden asks me to exercise that discretion. Miss Newbegin maintains a neutrality but does not actively oppose that course. I take it. I do so because this is one of those cases in which, like many, it is important that interlocutory matters be dealt with with expedition. The overriding objective suggests it. It does not help that in this case it would be difficult to return this particular issue to a Judge who has given her conclusion on a matter of discretion, and another Judge would have to start again without the advantage which I have had of the submissions of all Counsel and the detailed examination of the facts.

18. Counsel ask me to exercise that discretion as if I were in the shoes of the Judge below. I am content to take that course.

19. The first question posed in the list of relevant considerations specifically mentioned in **Selkent v Moore** is that of the extent of the amendment. I shall come to that later in my discussion. But first I must emphasise that all the circumstances of the case are relevant. It should not be thought that if in this Judgment, particularly given the hour, I do not refer to a particular point, that I have missed it. There are substantial reasons for disallowing the amendment. It was advanced out of time. If it had been advanced before 30 June, it would have been in time, but it was not until just over three months later, on 9 October, that it first drew breath. This was an unfair dismissal claim. Accordingly, if it had stood on its own, the Claimant would have had to show that it was not reasonably practicable to advance it beforehand. The reason she gave for making the application to amend when she did to Judge Brown was that the failure to plead automatic unfair dismissal under TUPE was an oversight. That is what the Judge said, and it accords with the notes which Miss Barsam took.

Miss Newbegin had thought that she might have said to the Judge that it was because a letter had been received just before the hearing in October, which appeared to indicate that the transfer of others in what the Claimant regarded as her team had been effected under TUPE and therefore appeared to recognise, categorically, that TUPE applied, and she had this in mind. Given that she cannot say for sure that she did mention this to the Judge, and she acknowledges that there was no reference to it in the documentation that accompanied the application, I have concluded that the Judge was told that it was an oversight and I shall treat it as such. The explanation was commendably honest and brief.

20. Those matters tell with considerable weight against granting the amendment. The other matters depend more critically on the degree to which the claim as now to be advanced differed from the claim as originally formulated. Here there is a wide divergence between the submissions of Miss Newbegin, who sought to uphold the Judge's decision upon the basis that it was not really necessary to add new facts to what had been claimed, that the background was inevitably understood by the parties to be that of the transfer of a number of functions from previous Health Service bodies to new Health Service bodies and that, it being the case, as she would wish to put it, that the Claimant's team had all bar her been transferred, the Respondent's duty, in defending section 98 claims, of establishing what was the reason for dismissal would legitimately have exposed it in any event to the contention that the reason for the dismissal was the transfer.

21. For his part Mr Chegwidden, supported by Miss Barsam, argued that the new claim is a fundamentally new cause of action.

22. These contentions require careful examination. On the original claim, although it had the flavour of a claim in which what was in issue was not the reason for dismissal but the way in which that dismissal was effected, the reason was not conceded. I do not think that the reference to dismissal for redundancy was such a concession, made at the outset of the claim. It was therefore in issue as to what the reason for dismissal was. The Claimant did draw a comparison with her colleague. It would therefore be relevant to explore why she kept a job and the Claimant did not. In doing so, it would as in most redundancy claims be necessary to identify the appropriate pool within which comparisons needed to be made. Though likely in the way in which it is pleaded that the pool consisted of two people, it is quite feasible to see, on the face of the documents (that is, the court documents) that it might have been larger. Those essential matters were thus going to be common to both the claim as originally anticipated and as sought to be amended. Though, therefore, much of the evidence is common to both claims, they do not entirely overlap. In order to establish what is a relevant transfer, the Tribunal would have to have regard to whether or not there was the transfer of an undertaking or part of an undertaking. To do so, it would need to establish whether there was an economic entity prior to transfer and whether it had retained its identity. It would need to establish, if not, whether there was a service provision change. The very fact that there are four Respondents, three of whom occupy their position because it is said they were each transferees or between them effectively the transferee, indicates some of the uncertainties which inevitably would occur. There might be issues, though they were not raised at the time before the Judge, as to the applicability of Regulation 3(5) of the 2006 Regulations. The claim would involve establishing that the reason for the dismissal was the transfer or a reason related to it and not that contended for by the Respondent, namely redundancy.

23. However, the context in which these new facts and legal arguments, which I accept were of some difference from the original claim, arose was indicated in part of originating application which must not be forgotten (paragraphs 1-7). They show, albeit not very specifically, that this was a time of considerable upheaval in the way in which Health Service commissioning was configured. The Health and Social Care legislation being introduced was responsible for that, and required no pleading for the Judge to consider it.

24. In short, I have come to the conclusion that, although there are some differences which are significant between the facts and legal arguments relating to both the old and amended claims, they are factually very closely related. The overlap of facts is not complete but it is significant. This is so to the extent that, to adopt words which found favour with Underhill J when he differed from the decision of the Tribunal in the case of **Evershed v New Star Asset Management** (see the employment appeal decision UKEAT 249/09 at paragraph 38(2)), if the case were to proceed without a claim (under, in that case, section 103A Employment Rights Act 1996) being advanced, the Tribunal would be placed in an artificial position. I think that is so here too. If the true position is, as the Claimant asserts on a credible basis – I can say no more about it than that – that the reason was or was related to a transfer of undertaking – it would be artificial to explore only part of the reality of the case, a possible redundancy, which on that basis would never actually have happened, without being allowed to deal with the matters which related to the transfer.

25. Accordingly I do not accept that the difference is as significant as Mr Chegwidden's submissions argue. I have concluded that the relationship between the new and the old claim on the facts is close, to the extent that this is highly persuasive in favour of granting the amendment.

26. As to the time at which the application was made, though out of time, as I have noted, it was made reasonably quickly after expiry of the time limit. As to prejudice, the Respondent was alerted in October to it. Mr Chegwidden points out that there was prejudice, to which the Employment Judge did not refer. His argument is that, first, this was a fundamentally new claim, a matter with which I have dealt, that the only reason for not bringing it earlier was oversight, which could be no very good reason, and that significant prejudice was caused to the First Respondent. Instead of there being two parties to the claim, there were now to be a further three. There were practical problems. The Secretary of State would have to disclose documents more widely and deal with the wider issues. He would have to defend the claim by reference to employees who had been transferred, a team rather than simply one comparator, who were no longer in his employment as Secretary of State. The Secretary of State's status as an employer was, in any event, only transitory and statutory because of the background of transfiguration of the Health Service in what was called "the NHS transition process". Some staff were no longer available to give factual detail. Whereas he did not and could not contend that those difficulties would not have existed to some extent had the claim been brought before 30 June, the fact is it was not, and the additional time therefore had some effect.

27. I pause there. One of the factors in this case has been that there has been no evidence, given in familiar form, about the prejudice or indeed about the reasons for delay in submitting the claim, and the Tribunal Judge was asked to deal with matters on the basis of documents, that which they revealed, and submissions. If a serious issue arises in respect of which particular facts are relevant, especially where prejudice is alleged, they should in my view be recorded in writing, with a Statement of Truth at least, so that there is a sounder evidential basis on which a Tribunal can rely. But I have no reason to suppose that I have been told anything which would not have been recorded in such a document, and what I say is for future guidance.

Mr Chegwidden argues that in addition, on 9 October, when the Secretary of State attended the abortive hearing, ready to go, as he put it, with the witnesses, the Claimant had not then indicated she would seek to amend her claim. As Miss Barsam points out, when this was taken up by the bench with Miss Newbegin, she accepted that it was not until it was clear that there would be an adjournment, that she sought to make the amendment. Miss Barsam reads into this that which it is permissible to infer, that is that it was not so significant in reality to the Claimant that it would prejudice her significantly to be refused permission to advance it. Miss Newbegin was not at liberty to disclose, or chose not to disclose, why precisely that forensic decision was taken. But I strongly suspect it may have been to do with the costs of the adjournment and paying the witnesses, which would be an inevitable expense, to be set against the much more uncertain prospects for the claim itself had it proceeded. An adjournment would have been inevitable, and it would be almost inevitable that costs would follow. That is, I accept, something which I infer only from my knowledge of the context, but it seems to me realistic. I take into account nonetheless that her need to make the amendment was not so compelling, so far as the Claimant was concerned, that she wished to incur the costs of an adjournment to run it.

28. The final point on prejudice that Mr Chegwidden made was the extent of disclosure to which amendment would give rise. He said it was significantly greater. Though I did not see in his submissions a reflection of the hyperbole apparent to the Employment Judge, I note that immediately following the hearing, and therefore no doubt reflective of the views of the parties as well as the Judge, the matter was set down for six days' hearing rather than the three days which had originally been allocated. Some additional time, therefore, is to be taken as a consequence of amendment, but it is not limited, and a quantum leap further.

29. I think that the extent to which disclosure would be needed will depend upon the extent to which the relevant facts relating to what became of the team (if it can be called a team) can be agreed or established. I am not persuaded that additional disclosure causes as great a degree of prejudice as he would claim.

30. Miss Barsam, though precluded because there had been no appeal by the Second to Fourth Respondents from arguing that it was prejudical that they should be added at all to the claim, accepted that the position of Miss Peerum, both before and after 31 March, would have had to have been examined but complained that there would have been no need prior to the change to look at what had happened to other members of the team. The evidence was thus (to that extent) extended.

31. She argues that the extent of enquiry was also significantly increased. She reminded me of the approach that Miss Newbegin took on 9 October and referred to **Walsall MBC v Birch** (UKEAT 376/10, a decision of 17 February 2011) as an example of a case in which Judge Richardson, in this Appeal Tribunal, had dealt with applications involving the joinder of new parties. In particular, there, the expiry of a relevant limitation period was of the greatest importance (see, in particular paragraph 37 of the Judgment).

32. Finally, Mr Chegwidden submitted that there was a degree of incompatibility between the claims as advanced. To allege that the reason for dismissal was the transfer, and the dismissal was automatically unfair for that reason, would be contradictory of a claim that the reason was redundancy asserting that there had been unfair selection for that purpose and no suitable alternative employment. Though I suspect the reality is that, though expressed as an alternative and therefore supposedly a secondary claim, the TUPE claim, giving rise in any event to an

automatic finding of unfair dismissal should it succeed on the facts, would be first run, with the redundancy claim as a fallback, taking the old common law position often adopted in pleading equivalent to "If, which is denied, X is not the case, then Y". I do not think that this is anything more than a technical point without any real substance but I take it into account for what it is worth.

33. I turn, then, finally to my conclusions. I take into account the balance of prejudice. To a very large extent the prejudice against the Claimant in losing what might be a good claim is balanced by the prejudice to the Respondent in having, after the expiry of a relevant time limit, to face what is a new claim. But there is a value, undoubtedly, recognised implicitly in the cases in matters which are really in dispute between the parties being resolved. I have balanced the various considerations. The conclusion to which I have come, heavily influenced by my view that there is such a close relationship between the claims, not in their intrinsic nature as legal claims but in the particular facts of this case, is that I should allow the amendment. This outbalances the degree of prejudice to the Respondents, which is not great. In doing so, I do not rely upon the Judgment of the Employment Judge but take some comfort from the fact that, on a number of the points which I have made, she came to the same view as I did, though I have allowed the appeal upon the basis that her approach was flawed. Accordingly there will be an order that the appeal will be allowed. In the exercise of the discretion which this Tribunal is entitled to exercise, the amendment will nonetheless be permitted for the reasons I have given.