Appeal No. UKEATS/0038/13/SM

EMPLOYMENT APPEAL TRIBUNAL
52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 12 February 2014 and 13 May 2014

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

THE RANGERS FOOTBALL CLUB LIMITED (FORMERLY SEVCO SCOTLAND LTD) — APPELLANT

PROFESSIONAL FOOTBALLERS ASSOCIATION SCOTLAND — FIRST RESPONDENT

R F C 2012 PLC (IN LIQUIDATION) — SECOND RESPONDENT

JUDGMENT

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APPEARANCES

For the Appellant	Mr I Truscott (One of Her Majesty's Counsel) Instructed by: DWF LLP Dalmore House 310 St. Vincent Street Glasgow G2 5QR
For the First Respondent	Mr B Napier (One of Her Majesty's Counsel) Instructed by: Bridge Litigation UK Carlton Building 63 Carlton Place Glasgow G5 9TW
For the Second Respondent	Mr P Tominey present to observe on 12 February 2014 and the Second Respondent was neither present nor represented on 13 May 2014

SUMMARY

Case management; amendment of pleadings; proof of status of independent trade union;

In the ET1 the claimant asserted that it was a representative body for professional footballers, appointed as an employee representative under regulation 13 (3)(b)(i) of TUPE. The ET allowed the claimant to amend by adding an alternative case to the effect that the claimant was an independent trade union for the purpose of TUPE. The respondents argued that the amendment was a change in the basis of the case, that it came too late, and that the claimant could not prove retrospectively that it was an independent trade union. Thus the ET had erred in law by allowing the amendment. Further, the ET had erred by setting directions for responses to the amendment to be lodged. The ET had shown bias in favour of the claimant by advising the claimant's counsel on the content of the amendment, and by appearing to have decided the case in advance of hearing the submissions.

Held: the allegations of bias were not made out. The ET was entitled in the exercise of its discretion to allow the amendment and make appropriate case management decisions. The proof of the status of an independent trade union could be undertaken retrospectively.

THE HONOURABLE LADY STACEY

1. This case was part heard on 12 February 2014 and had to be continued due to illness. The adjourned hearing was on 13 May 2014. The Court of Appeal judgment in the case of **Bone** came out shortly afterwards and further submissions were invited from parties. I regret the delay initially caused and the delay in producing this judgment.

2. This is an appeal by Rangers Football Club Limited against a decision copied to parties on 18 June 2013 following a hearing in Glasgow on 4 and 5 June 2013. In the ET, Rangers Football Club Limited was the first respondent, RFC 2012 plc was the second respondent and the Professional Footballers Association Scotland was the claimant. I shall refer to them in those terms, as they were in the tribunal below. Before the ET and before me Mr B Napier QC appeared for the claimant, Mr I Truscott QC for the first respondent. Before the ET both counsel appeared and Mr B Campbell, solicitor, appeared for the second respondent. The second respondent did not oppose the appeal and did not make any submissions.

3. The judgment of the ET was as follows: –

> **"1.The claimant is permitted to amend its claim in the terms of the draft paper apart to its ET1 as submitted to the tribunal on 4 April 2013, with the following further amendments thereto: –**
> **(i) the deletion therefrom of the following: –**
>
> > **(a) in paragraph 2, all but the first and last bullet points; and**
> > **(b) in paragraph 5, the words 'and/ or associations of employers' immediately following the words 'between the claimant and the respondents.' In the first sentence, all of the penultimate sentence following the words 'the respondents' and in the final sentence the words 'those organisations, including'.**
>
> **(ii) the addition at the end of the draft of a further paragraph stating as follows: –**
>
> > **'At all material times for the claim under Regulation 13 (3) (a) the claimant was an independent trade union and was recognised for the purposes of collective bargaining by the 2nd respondent in respect of the professional players employed by them. The said players were 'effected (sic) employees' within the meaning of Regulation 13 (1).**
>
> **2. The claimant is to serve copies of the amended paper apart, further amended as aforesaid, on each respondent and the tribunal by 12 June 2013.**
>
> **3. The respondents are each to serve amended responses on each of the other parties and the tribunal by 3 July 2013, such amended responses to include specification of any grounds, facts or**

matters to be relied on in disputing the claimant's claims (a) that it was at the material time an independent trade union and (b) that it was at the material time recognised for collective bargaining by the first respondent through its then administrators; and specification of all facts and matters intended to be relied on by that respondent as evidencing that the first respondent informed and consulted the claimant about the transfer of its undertaking to the second respondent on 14 June 2012 in accordance with Regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006, and separately, all facts and matters relied on to support the contention, if made, that there were special circumstances precluding for compliance with the first respondent's duties under the said regulation 13.

4. There will be a further preliminary hearing within the meaning of rule 35 of the Employment Tribunal's Rules of Procedure 2013 to be held in private before Employment Judge Wallington QC at 10:00 a.m. on 31 July 2013 at the Glasgow Offices of the Employment Tribunal, to consider what further case management directions should be made for the progression of the proceedings, including the terms of a sist of the proceedings in accordance with section 8 of the Trade Union and Labour Relations (Consolidation) Act 1992, whether the question whether the claimant is or was at material times an independent trade union within the meaning of that Act should be referred by the Tribunal to the Certification Officer for determination pursuant to the said section 8; and whether the case should be referred for Judicial Mediation or some other form of alternative dispute resolution. This hearing will be listed with a time estimate of two hours."

4. Thus it can be seen that the ET decided to allow a minute of amendment under certain deletions and an addition, and it gave case management directions requiring the respondents to serve amended responses. Mr Truscott, counsel for the first respondent argued that the employment judge had been wrong to allow the amendment. The question related to whether or not the claimant is and was an independent trade union. He explained that the position taken by the claimant prior to the hearing was that they were not a trade union; this view was expressed by counsel for the claimant in documents in respect of which professional privilege had been waived. The ET1 was to the effect that the claimant was an employee representative in terms of regulation 13(3)(b)(i) TUPE. At the hearing, however, a minute of amendment was produced making averments that they were a trade union. The Employment Judge (EJ) pointed out that in terms of the legislation they required to be an independent trade union and suggested that further amendment should be drafted. Counsel argued that the case management directions concerning the further responses should not have been made, and lastly he argued that the EJ displayed bias towards the respondents.

5. The underlying facts of the case as found by the ET, are that the claim was made on

2 September 2012 by the claimant, which is a body representing the interests of around 800 members who are professional footballers affiliated to various football clubs within Scotland. The claim arises from the sale of Rangers Football Club by the second respondent to the first respondent in June 2012. According to the claimant, and by concession of both respondents, that was a relevant transfer within the TUPE regulations. Some at least of the professional players are accepted by the respondents to be "affected employees" for the purposes of the application of regulation 13 of TUPE which requires the transferor to inform, and in certain circumstances consult with, representatives of affected employees, long enough before a transfer in order to enable such information to be given and consultation to take place.

6. The claimant claimed to be an "appointed employee representative" within regulation 13 (3) (b) (i) TUPE. That regulation so far as relevant is in the following terms: –

> **"(3) For the purposes of this Regulation the appropriate representatives of any affected employees are –**
> **(a)if the employees are of a description in respect of which an independent trade union is recognised by the employer, representatives of the trade union; or**
> **(b) in any other case, which ever of the following employee representatives the employer chooses –**
> > **(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this regulation who… have authority from those employees to receive information and to be consulted about the transfer on their behalf**
> > **(ii) employee representatives elected by any affected employees for the purposes of this regulation."**

7. When the claimant first lodged the form ET1 its position was that it was an appropriate representative by reason that it had been appointed as a representative as described in regulation 13 (3)(b)(i). The respondents took issue with that contention and in their responses put in issue both the factual question whether the claimant was appointed within the terms of that regulation and more generally whether an employee representative could be an entity or person other than an employee of the relevant respondent. That response engages the terms of regulation 15 of TUPE which provides that if an employer is alleged to have failed to comply with the requirements of regulation 13 a complaint may be presented on that ground by any of the employee representatives to whom the failure related, or if there is a failure to consult a

trade union, by the trade union. Thus if there are employee representatives or if there is a trade union the affected employees cannot make the complaint on their own account.

8. A case management discussion was held on 7 February 2013 at which a decision was made to fix a pre-hearing review to determine the issue whether the claim is competent, in as much as it was in dispute whether the claimant was an appropriate representative within regulation 13. The solicitor for the first respondent expressed concern at the lack of specification of the claimant's factual case to be an appointed representative and sought further and better particulars, which were ordered. When those further and better particulars were served, they took the form of an amendment. It was asserted that the claimant's new primary case was that it was a recognised trade union and for that reason an appropriate representative; it gave particulars supporting that contention. The amendment included an alternative position on the basis of the claim originally pled, in the event that the first claim did not succeed. Both respondents objected to the proposed amendment and all parties agreed that the pre-hearing review originally listed to determine the issue of the competency of the claim under regulation 13 should instead be devoted to determining whether permission should be granted to make the amendment sought.

9. At the hearing, the EJ raised with senior counsel for the claimant the fact that the amendment as drafted did not assert that the claimant was an independent trade union. He did so because of the wording of regulation 13 (3) (a) which is in the following terms: –

> **"For the purposes of this regulation the appropriate representatives of any affected employees are –**
> **(a) if the employees are of a description in respect of which an independent trade union is recognised by the employer, representatives of the trade union…"**

10. Mr Napier having indicated that he wished to further amend to include averments that the claimant is and was an independent trade union, discussion ensued about the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act").

Section 8 (4) of that act provides that in any proceedings before a Tribunal, if the question arises whether a trade union is independent and there is no certificate of independence in force and there is no refusal, withdrawal of cancellation of the certificate recorded in relation to that union, the question is not to be decided in the proceedings before the Tribunal, but instead the proceedings are to be sisted until a certificate of independence has been issued or refused by the Certification Officer. By section 8 (5) the ET has power to refer the question to the Certification Officer. As the respondents disputed, should the amendment be allowed, that the claimant was an independent trade union, all parties accepted that the issue for the Tribunal ultimately determining the substantive case in the proceedings would not be whether the claimant could obtain a certificate of independence at some point, but whether it was independent at the material time namely June 2012.

11. The ET was then faced with a motion from Mr Napier for the claimant to amend his pleadings to include, amongst other things, an averment that the claimant was an independent trade union in June 2012. As stated above that was an averment that had not previously been made and was a contradiction of the existing averments which were that the claimant was not a trade union at all but was an employee representative on one of the other bases set out in regulation 13.

12. All parties were agreed that the EJ should approach his decision on the principles set out in the case of **Selkent Bus Co Ltd v Moore [1996] ICR 836**. As the EJ said in paragraph 16 of his reasons, the essential point deriving from that case is that permission to amend is a matter of discretion and that in order to exercise discretion the EJ required to take into account all the circumstances, and to balance the relative injustice and hardship that would be done to the claimant by refusing, or to the respondents by permitting, the amendment. The EJ notes that all parties were agreed that on the basis of a recent line of authorities, of which the leading case is

Transport & General Workers Union v Safeway Stores Ltd UKEAT/0092/07 it is not a bar to permitting an amendment that the application for permission to make it is made after the expiry of the time limit for presenting a substantive claim when the amendment raises a new claim. That is a relevant matter, but is not a"knock-out point." The EJ also referred to the case of **Enterprise Liverpool Ltd v Jonas UKEAT/0112/09,** noting in that case that substitution of a claimant was allowed. .

13. Both respondents identified a number of factors which should be weighed in the balance and submitted that the permission to amend should be refused. These were delay, the amendment being submitted seven months after the claim form had been presented and five months after the expiry of the primary limitation period from the claim. Further there was a lack of any good explanation for the delay; and there was an additional burden that would be placed on the first respondent in having to defend a claim without knowing properly the case it had to meet, with potentially extremely wide-ranging evidence extending over a lengthy period of time which would be difficult to have to address by way of response. Further, Mr Truscott argued that the amendment represented a new claim; if the amendment was not allowed, the claimant would still have its second case (accepting that it was disputed) and would not therefore be prejudiced. The solicitor then appearing for the second respondent pointed out that the issues of consultation for the purposes of TUPE could not extend beyond the period between the club going into administration in February 2012 and the sale in June 2012 but the proposed amendment was not confined to that period. That would affect the cost of responding to it.

14. Mr Napier for the claimant argued that the amendment as further amended was based on the same facts and was not a new claim. He relied on the case of **Enterprise Liverpool Ltd v Jonas** in which the facts were similar. Permission to amend was allowed. Mr Napier argued

that the original claim raised a claim under regulation 13 TUPE. The amendment was not a new claim brought out of time, but was rather a reformulation of the existing claim, which did not even change the identity, but merely the capacity, of the claimant. He explained that the claimant's case was essentially to be focused on recognition being established by the interaction between the claimant and the administrators of the second respondent between the appointment in February 2012 and the sale to the first respondent in June 2012.

15. The EJ enquired from Mr Napier if he objected to the excision from the amendment of parts of that which appeared to foreshadow either irrelevant or unduly wide evidential enquiries relating to interaction between the claimant and bodies other than the administrators of the second respondent. Mr Napier confirmed that he did not. He agreed that the parties might be assisted by a direction to produce an agreed statement of facts and of matters of relevant factors in dispute and that evidence might be given by way of witness statements. Mr Napier argued that the only hardship that the respondents would suffer would be the need to fight the case on two fronts rather than just on one front. He argued that if the amendment was refused, the affected employees might have some form of redress against the solicitors in negligence, which weighed against the allowance of the amendment. However, he argued that in the particular circumstances of this case, where the affected employees were members of the claimant, it was not a point of much weight. The EJ noted that Mr Truscott and Mr Campbell accepted that the possibility of redress against advisers might be of more limited relevance than in other cases.

16. The EJ set out his reasons for allowing the amendment from paragraph 25 to paragraph 33. He reminded himself of the legal principles set out in the case of **Selkent Bus Co Ltd v Moore**, to the effect that he required to consider all of the circumstances, which included when the application was made, and any explanation for delay. He stated that the balance was not clearly in favour of either party. He accepted and applied the reasoning of the

Enterprise Liverpool Ltd case, in which it had been found that substitution of a trade union for individual employees as claimant in a case alleging breach of regulation 13 was a re-labelling exercise, for which permission would be given. He found that the complaint advanced under the amendment is exactly the same complaint, namely a failure to inform and consult with the claimant. He noted that the claimant is the same entity but seeks to claim relying on a different capacity. He found that there was no new claim and no issue of time therefore arose. He nevertheless found that delay, particularly with no persuasive explanation, was a factor he must consider in weighing the relative injustice to the parties. He did so, finding that the case had not progressed very far in the nine months since proceedings were commenced; he found that it was unlikely to be progressed to the point of a final hearing for some time. He found therefore that the only real prejudice likely to arise from delay would be the loss of evidence, caused by passage of time reducing the cogency of evidence. He found that that prejudice could be mitigated by careful case management. He also found that it appeared to him to be unlikely that there would be serious issues of dispute about the primary facts concerning the interactions between the claimant and the second respondent and its administrators within the relatively short period of the administration up to June 2012. He noted that that would be factual in any event and would have to be explored in relation to the issue of whether the duty to inform and consult was substantially complied with or not.

17. The EJ found that there was still room for residual concern on the part of the respondents about the diffuse nature of the factual claims made in the proposed amendment. That would be addressed by the excision of the parts of the amendment which Mr Napier had agreed to take out. He noted that Mr Campbell accepted that if matters were to proceed on the basis that the amendment would be permitted with excision then he would have no further proposals to make. Mr Truscott declined to comment and reserved his position.

18. The EJ gave his decision (at paragraph 32) to the effect that he concluded that the interests of all parties would be better served by appropriate excisions from the amendment; thereafter, the balance of hardship and injustice would be in favour of allowing the amendment. He was particularly affected by his acceptance of Mr Napier's point that there is a significant difference between being allowed to advance a case on two alternative bases and being limited to only one of the two bases and thereby a lesser prospect of the claim succeeding.

19. The EJ then proceeded to consider case management questions. He invited submissions on the further progress of the case. All parties agreed that the case would require to be sisted at some point for the question of the independence of the claimant as a trade union to be determined by the Certification Officer, both respondents putting that point in issue. That being so, he took the view that at some stage the respondents would require to amend their responses to address the claimant's amendment. Until that was done there would not be a clear exposition of the basis on which they dispute that the claimant is a trade union, or that it was at the material time independent within the meaning of the 1992 Act. Mr Napier wished the respondents pleadings to be set out before determining the question whether the tribunal should exercise its power to refer the question of independence to the Certification Officer, or whether the claimant should elect to make that application itself. Mr Truscott and Mr Campbell objected to any requirement for their clients to take any further steps in the proceedings. Mr Campbell in particular raised the issue of additional expense.

20. The EJ considered the submissions. He came to the view that it was to the advantage of all parties that the case be properly pled as soon as possible. He recognised that both respondents would incur some expense, but took the view that that expense would need to be incurred at some stage before the matter came to a hearing. He noted that the case was said to have a value of several million pounds, and took the view that the saving of expense referred to

was a relatively minor consideration. He also noted that in due course an application could be made for expenses thrown away if the respondents were of the view that the claimant had caused them to incur needless expense. He stated that he was mindful that properly pled cases facilitate progress toward settlement. He regarded it as an appropriate exercise of his discretion in case management to make directions which may facilitate any action the parties may wish to take to explore avenues of settlement. Thus he decided that Mr Napier's submissions should be upheld and the respondent should be directed to submit amended responses.

21. The EJ decided that once the updated pleadings were available it would be necessary to consider the further progression of the case and he fixed a case management discussion for 31 July 2013. Finally, he told parties that he intended to pursue the duty that would be placed on tribunals by 31 July 2013 to explore opportunities for alternative dispute resolution. Therefore he would wish to invite the parties to address the possibility of such, including judicial mediation. He asked parties to obtain instructions on that issue so that that matter could be on the agenda for the preliminary hearing on 31 July 2013.

22. The claimant's grounds of appeal may be summarised as follows: –

1. the ET erred in law by deciding that the proposed amendment amounted to a change of label of a case already pled. In doing so it ignored the issue of time bar. No excuse was provided for the delay in taking the point but that failure did not appear to weigh with the employment judge.

2. the proposed amendment concerning the claimant being an independent trade union was an attempt to introduce an argument which was incompetent as the claimant had no certificate of independence at the date of the alleged failure to consult. Further, the ET erred in law by requiring the first respondent to make averments about the independence of the trade union; it was incumbent on the

claimant to establish its independence and the only means whereby that could be established was outwith the ET.

3. the ET erred in law by allowing the claimant to add averments concerning its being an independent recognised trade union which were irrelevant.

4. the ET erred in law by failing to weigh properly the benefit to the claimant on one hand of being able to pursue two separate claims without looking at the prejudice that would be caused to the first respondent by having to consider two claims instead of one.

5. the ET's discretion was exercised in a manner which would have led a fair minded and well-informed observer to conclude that there was a real possibility of bias. The EJ referred to "the disintegration of Rangers". From the outset of the hearing he expressed the view that the amendment would be likely to be allowed and that he should make consequential case management orders. The ET allowed the claimant to cure a fundamental defect in the amendment by pointing out to counsel for the claimant that the omission of the word "independent" rendered it incompetent. The EJ commented at several stages that judicial mediation may be appropriate. He further stated that if the amendment was not allowed it would be open to all affected employees to raise individual claims which might be accepted although late. The EJ discussed the amendment with the counsel for the claimant, allowing him to excise portions of it which would otherwise have lead to its being refused. The EJ was inconsistent as he did not accept on the first day of the hearing the first respondent's submissions concerning fair notice but in the end did accept those by requesting excision of the irrelevant material from the amendment. Further, the EJ refused the first respondent's request for time limits for lodging amended pleadings to run from the date of issue of his written judgment in order to give time for consideration

of possible grounds of appeal. Further the EJ rejected Mr Truscott's request that the forthcoming prehearing review be fixed earlier than the date proposed by the EJ because he would be unavailable for health reasons at the date proposed. The ground of appeal on bias was summed up by counsel saying that the employment judge decided, regardless of anything he heard in the hearing, to ensure that the appellant was the subject of a factual enquiry into a failure to consult and would be encouraged to settle the claim.

6. the employment tribunal erred in law in setting further procedure for the case to include the determination of whether or not there had been a failure to consult with the claimant, when it had not established its status.

23. As there were allegations of bias, affidavits were lodged from the solicitors who had been present at the hearing in support of those allegations. A response was sought from the EJ. He confirmed that he did raise with Mr Napier the point that the right to be consulted under TUPE applies only to an independent trade union and that the proposed amendments seem to be defective without making such a reference. He states that he considered that there was no point in hearing the parties' submissions on any application to amend if the amendment permitted would not result in a competent claim. He understood that both parties were agreed that the amendments to the minute of amendment should be made prior to his hearing and determining the motion for permission to make the amendment. He drew parties' attention to the case of **Enterprise Liverpool v Jonas** as he was aware of it and considered it to be in point. It being an EAT case he regarded himself as bound by it. He considered that the points made by Mr Truscott in opposition to the proposed amendment about the burden that would be placed on the first respondent of having to prepare a wide-ranging response would be lessened by excision of parts of the amendment. He raised the matter, regarding it as a potentially useful means of promoting effective case management. The EJ confirms that he did refer to "disintegration" of

Rangers Football Club and he makes the point that that was intended as nothing more than shorthand for the very well publicised events surrounding and following the placing of the Club's proprietor company into administration. He did not intend the comment to be offensive and he states that he cannot see how it could indicate any animus towards the first respondent which had no part in the club going into administration, having purchased the club from the administrators. So far as case management following the decision is concerned, the EJ states that he indicated the orders to be made in the presence of the legal representatives of all parties and therefore did not consider it is normal practice, nor necessary, to delay the start of the running of time for compliance with orders until a full written judgment was issued. The EJ was aware that the date, 31 July 2013 which he fixed, was a date on which he had been told Mr Truscott would be unable to attend due to health reasons. He notes however that Mr Truscott did not say that it was essential for the hearing to be listed in a date on which he would be available. He noted that Mr Napier stated he was not going to be present no matter what date it was. He concluded that progression of the case was more important than the availability of a particular advocate to represent one of the parties. There was also a suggestion raised by Mr Truscott that the EJ had stated that he could not sit during a week when the open golf competition was being played as he would find it difficult to negotiate traffic and get to the hearing. The EJ confirmed that he did make that remark; he states that there had been warnings of significant traffic disruption, close to his home, and his explanation was genuine and not facetious.

24. At the EAT, both Mr Truscott and Mr Napier lodged helpful skeleton arguments. For the first respondent, Mr Truscott submitted that the possibility of settlement had blinded the ET to doing justice to both parties. He turned then to his argument of competency in which he relied on the case of **North Essex Partnership NHS Foundation Trust v Bone [2013] UKEAT/0352/12**, at that stage decided by the EAT. Counsel explained that his position on that

case was that it was not possible for the claimant to establish that it was an independent trade union at the relevant time. He argued that the status of independent trade union could not be conferred retrospectively. The only explanation given for the change of tack was that different counsel had been instructed, a statement had been obtained from a witness, and a different view had been taken. He argued that the EJ should not have allowed the claimant to changes position radically at so late a stage.

25. Counsel argued that the EJ had erred in law by seeking excision of the irrelevant matter, and telling counsel what ought to go in concerning independence. Further, he argued that the EJ had not considered whether what remained was relevant, as it was necessary for the criterion of "recognition" to be met that there would be recognition for collective bargaining, that is negotiations relating to matters specified in section 178 (2) of the 1992 Act.

26. Counsel's submissions concerning amendment were to the effect that the claimant's case should rise or fall on the complaints made in the ET1 and in any properly allowed amendments. It is not for the ET to discover other grounds. Fair notice should always be given to the respondent. In this case the ET1 had been lodged very close to the time limit specified by legislation, drafted by solicitors specialising in employment law and advised by senior counsel. He accepted that the question of amendment was one for the discretion of the ET and submitted that the case of **Selkent** was authority for that proposition, but drew my attention to the words of Mummery J (as he then was) to the effect that judicial discretion is to be exercised "in a manner which satisfies the requirement of relevance, reason, justice and fairness inherent in all judicial discretions." He accepted that delay in itself should not be the sole reason for refusing an application, but argued it was a relevant consideration. He argued that the claim was not the same claim as had previously been made but was a significant alteration of it. He referred to the case of **Ali v Office of National Statistics [2004] EWCA Civ 1363** as authority for the

proposition that one had to look at the whole of the form ET1 and not consider simply the general description of the complaint.

27. He argued that the current case was one in which there was a new case pled. He referred to the case of **Housing Corporation v Bryant [1999] ICR 123** in which the claimant in her original unfair dismissal claim did not refer to victimisation. The Court of Appeal overruled the EAT and upheld the decision of the ET to reject an attempt to amend to include a claim of victimisation. He made reference to the case of **Evershed v New Star Asset Management UKEAT/0249/09**. In that case the claimant tried to add a claim of whistleblowing to a claim of unfair dismissal. The Court of Appeal approve the ET's approach which was to allow the new claim on the basis that the evidence would be substantially the same as that given in respect of the original claim. He made reference to the cases of **Transport & General Workers Union v Safeway Stores Ltd** and **Enterprise Liverpool Ltd v Jonas** but argued that the ET in the present case while purporting to follow these cases had left out of account the completely different type of claim being made by a party which was in any event not competent and was made on facts which were completely different and arguably irrelevant to the new issue.

28. Considering other factors relevant to discretion, Mr Truscott argued that all the circumstances had to be taken into account and that the EJ had failed to do so. He had identified that the claimant would lose the benefit of being able to pursue two separate claims if the amendment was not allowed, but he did not weigh in the balance of the prejudice that the first respondent would suffer by having to defend two claims instead of one.

29. Mr Truscott then turned to the question of apparent bias. He made his submissions on this front with a good deal of care. He wished to put on record that he had great respect for the

EJ; he had considered very carefully and debated long and hard with those instructing him as to whether the ground of apparent bias should be withdrawn. With regret he had come to the view that it should not. He submitted that something did go wrong at the hearing as an informed and impartial observer would have the impression that any competing arguments against the claimant were swept aside. He accepted that it is commonplace in litigation for a good relevancy argument to result in nothing other than an improvement in the opposition's pleadings, but he still felt that he had to assert, following careful thought, that the impression given by the employment judge was that he had made up his mind and that it was obvious what was going to result from the hearing.

30. For the claimant, Mr Napier answered Mr Truscott's points. He referred to the ET decision paragraph 22 to show that the ET did pay attention to the lack of explanation for requiring to amend. That paragraph narrates that Mr Napier had explained that the evidential basis for the proposed claim did not become clear until the second advocate engaged in the proceedings was consulted and supplied with a witness statement, which did not happen until February or March 2013. Thus, Mr Napier argued, the ET was well aware of that the explanation, such as it was.

31. Mr Napier argued that the competency point was not as significant as Mr Truscott submitted it was. It appeared, he argued, that the first respondent assumed that as there was no certificate of independence in existence at the time of the alleged failure to consult it was impossible for the claimant to raise a valid claim under regulation 13 of TUPE. He argued however that the case of **Bone** was decided in a different context, that of section 146 of the 1992 Act. In the present case, the Certification Officer, on hearing a reference made by the tribunal under section 8 (4) could decide that at the relevant time the claimant had been independent. He argued that the criteria used for determining independence would include

matters such as history, membership, organisation, finance facilities and negotiating record. There was no reason why that could not be done retrospectively. He argued that the terms of section 8 (4) were such that such an enquiry would nearly always be retrospective.

32. As regards the allegation of bias, Mr Napier argued that the suggestion that the employment judge decided the claim regardless of the submissions he heard was an allegation of actual, not perceived bias. There was no basis for it. Allegations of perceived bias were made concerning the way in which the employment judge was said to have conducted the prehearing review. Mr Napier argued that the observations of the employment judge in his answers to the criticisms in the affidavits gave full explanations of the case management arrangements which he was entitled, if not bound, to consider and to apply. Mr Napier made reference to the well-known cases of **Porter v Magill (2001) UK HL 67** and **Ansar v Lloyds TSB bank plc (2007) IRLR 213** and **Re Medicaments and Related Classes of Goods (no. 2) [2001] 1 WLR 700**; he submitted that the court must ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. In the present case he argued that the judge had made criticism of the claimant's case, by pointing out that there was no averment that the claimant was an independent trade union and that there were averments which were irrelevant. Thus, he argued, a fair minded and informed observer would be far from concluding that there was a real possibility that the tribunal was biased. He accepted that no judge was perfect, as set out in the case of **The Partners of Haxby Practice v Collen UKEAT/0120/12**, but that even if on occasion a judge's manner was not as good as it should have been that would not justify a conclusion that he was not approaching the case with impartiality. Thus, Mr Napier argued that the claimant did not accept that there was anything wrong in any judge discussing the content and potential effect of the proposed amendment with counsel and allowing the opportunity of amendment of pleadings where that is needed. That amounted to good case management. If it were being suggested that the remarks about "disintegration of

Rangers" and suggestions that parties should take instructions on judicial mediation amounted to bias, then that was simply wrong. The EJ was entitled to make orders for the respondents to lodge their responses, and to fix a further hearing at a suitable date. It was accepted that Mr Truscott was unavailable for health reasons but that could never be decisive when the matter was going to go to a prehearing review.

33. The case of **Bone** was thought by both counsel to have ended in the EAT. That turned out to be mistaken, and shortly after the second hearing in this case, the Court of Appeal gave its decision. It overturned the EAT and I therefore asked for submissions in writing from parties.

34. The judgment of the Court of Appeal was to the effect that the EAT had erred in law in deciding that the Certification Officer was not empowered to make a decision retrospectively about the independence or otherwise of the trade union.

35. Mr Truscott submitted that this did not affect his case because his point on competency was that the issue should be addressed before any other issue was addressed. He submitted that the ET ought not to fix further procedure until the disputed matter of recognition of independence had been determined by the Certification Officer.

36. Mr Napier argued that the first respondent had relied on the EAT's decision in the case as part of its reasons why the decision of the ET to permit the disputed amendment was wrong in law. His own argument before me had been that the decision in **Bone** could and should be distinguished. He argued that the Court of Appeal decision, in which a different view from the EAT had been taken, was authoritative on two questions. The first was whether the independence of the trade union had to be established in order for the ET to have jurisdiction to

hear the complaint for detriment brought under section 146 of the 1992 Act. The second was whether a certificate of independence issued by the Certification Officer had retrospective effect. In relation to the first point, the Court of Appeal held that establishing independence was not a matter that went to jurisdiction but was rather one of the matters which had to be established by a person complaining of having suffered detriment because of his activities as a member of an independent trade union. Mr Napier argued that the first respondent had endeavoured to use the EAT decision to argue that the amendment was incompetent because the claimant was not an independent trade union at the time. While the Court of Appeal decision was that the EAT should not have allowed the question of independence to be raised for the first time on appeal, the Court of Appeal gave its views on a number of legal issues of wider importance. It stated at paragraph 39 that section 8 of the 1992 Act does not provide that, absent refusal, withdrawal or cancellation the lack of a certificate is conclusive evidence (or even evidence) that a union is not independent. The matter remains undecided. The union may satisfy the criteria set out in section 95 [of the 1992 Act] or it may not. He argued that in the current case there being neither certificate nor refusal, there is no basis for arguing that a complaint under regulation 15 cannot be made by the claimant. The claimant can make such a complaint, and if the question of independence is put in issue it is then for the claimant to show that it does meet the criteria, or that it did meet it at the relevant time. He submitted that that was his position and was wholly consistent with the view now expressed by the Court of Appeal.

37. Mr Napier argued that the Court of Appeal found that the fact that organisation's name was on the list of trade unions maintained by the Certification Officer under section 2 of the 1992 Act was evidence that an organisation was a trade union, but there was no suggestion that organisations not on the list cannot be trade unions. The Court found at paragraph 35 that it would be a "very odd reading" of the statute to say that an organisation which satisfied the

definition in section 1 and on making a successful application under section 2 was put on the list, was not a trade union to until the moment its name appeared on the list. His Lordship noted that it would be similarly absurd to say that if a trade union made an application for a certificate of independence which was successful that it was not independent until the moment when the ink dried on the certificate.

38. The Court of Appeal discusses the question of retrospection although it was not necessary for the decision in the case. At paragraph 60 Jackson LJ described as "absurd" the view, adopted by the EAT, that the effect of the legislation was that there was no way of determining, historically, whether a union was independent. That would be the result which would necessarily follow from arguing that only the Certification Officer could determine independence and that he could do so only by reference to the current state of affairs. His Lordship found that if a court referred the matter to the Certification Officer because it required to know in a historical context if a trade union was an independent trade union at a particular time then the Certification Officer will have to answer that question "doing the best he can".

39. Mr Napier argued that the original ET decision, that is the decision under appeal, echoed those sentiments. At paragraph 12 the ET stated: –

> **"the issue for the Tribunal determining the substantive case in these proceedings will not be whether the claimant can obtain a certificate of independence at some point hereafter, but whether it was independent at the material time, namely in June 2012. The evidential issues arising in relation to that point are a matter that may fall for determination at a later stage in the proceedings, depending on the outcome of any reference to the certification officer."**

40. Mr Napier argued that the arguments in the supplementary note for the first respondent did not reflect the reality of the arguments at the EAT. They had argued that because there was no certificate of independence in force at the time of the alleged failure to consult, it was too late in 2014 to establish independence in 2012, and therefore the complaint was incompetent. That argument could no longer stand in light of the decision in the case of **Bone**. The first

respondent argued in its supplementary arguments that the ET had erred in law by allowing the amendment before the issue of independence had been determined. That was not a matter of competency but rather one of discretion. The ET had explained fully why it had taken that course.

41. This appeal is essentially concerned with case management, a matter within discretion of the ET, providing that it acts within the rules of procedure. Therefore decisions taken by an ET in its case management function are not likely to be overturned on appeal.

42. I will deal firstly with the question of bias, whether actual or perceived. It seems to me that there is no basis for the allegations made. The employment judge was entitled to take the point that it was necessary to have averments that the claimant was an independent trade union despite the fact that the claimant had not appreciated that, and the respondents were not seeking to argue that without such an averment the minute of amendment was irrelevant. It was good case management to take the point. It did not show a bias in favour of the claimant. The employment judge was also entitled to discuss with parties the prejudice that could be caused to the respondents by the original wide terms of the amendment. Having ascertained that the respondents did argue that the terms were wide, and would cause prejudice, it was then in order for the employment judge to seek to discover from the counsel for the claimant if he was prepared to restrict the terms of his amendment. It would not be conducive to good case management for the employment judge to have allowed the broad terms to proceed to a further hearing in order that the matter be discussed at some later stage. It was plainly conducive to good case management to discuss it then. I do not accept that by doing so the EJ showed bias in favour of the claimant.

43. The EJ was entitled to ask parties to seek instructions on the question of judicial

mediation. There is no indication of bias in so doing. He was also entitled to refer, in the circumstances of this case, to the "disintegration" of Rangers. It is hard to see why that should be thought to be offensive, when as the EJ commented, there was much comment in the media at the time using such terms. In any event, the first respondent had purchased assets from the administrators and so any reference to "disintegration" was not pejorative of them. It did not seem to me to be pejorative of anybody.

44. While it is difficult to expect other counsel to pick up cases especially those which are complicated on the facts and on the law, Mr Truscott did not suggest that there was evidence of bias simply because a date was fixed when he was not available due to health reasons. It may have been unfortunate that there was mention of difficulty in the EJ being present due to traffic which may have seemed trivial to Mr Truscott compared to his health difficulties. Nevertheless, the EJ was merely explaining that he had good cause to be concerned about his ability to attend at the hearing due to an unusual event. I do not accept that it can be argued that the informed observer would have regarded the employment judge as biased against the first respondents by his fixing the date that he chose.

45. My impression of Mr Truscott's arguments on the two days before the EAT was that the impossibility of proving retrospectively that a trade union was independent was a major part of his argument. I appreciate that his supplementary skeleton argument does not support that impression. Nonetheless it is clear from his original skeleton argument that even if it was not his major point it certainly was raised. While the decision in the case of **Bone** is in a context different from that of the case before me, it does seem to me that the Court of Appeal has given a view that the idea that the Certification Officer cannot decide the matter retrospectively can be described as absurd. On many occasions this question will be raised long after the events which require to be inspected. Therefore it seems to me that, with respect, the Court of Appeal must

be right that the Certification Officer can consider such evidence as is put before him to decide whether or not a trade union was an independent trade union at whatever date is required. If there is penury of evidence then that may be to the disadvantage of the person seeking the certification, but it does not make it incompetent.

46. I can see no reason why the employment tribunal can be said to have erred in law in deciding, having decided that the question of independence required to be adjudicated, that the responses to it should be fully pled before the matter was adjudicated. That would appear to me to be a decision entirely within the discretion of the ET, and it would seem to me that the written reasons, together with the explanation given by the employment judge are very clear in showing that he was carrying out good case management in so doing. He did consider the extra expense but in light of the value of the case he did not consider that significant.

47. Turning then to the question of allowing the minute of amendment, as further amended, I am of the opinion that each argument put up by the first respondent fails. There was no error in law in the ET deciding to allow the amendment. It is clear from the written reasons that the EJ was well aware of the line of cases and directed himself properly on them. In my opinion he was correct to consider that this was a re-labelling exercise but in any event he appreciated that even if it was properly so categorised he still had to consider prejudice to the respondents, delay, reason for the delay, and relevancy. He did all of these things. He has explained clearly that he did so and he has given his reasons for doing so.

48. This appeal has no merit and I will dismiss it.