Appeal No. UKEAT/0086/13/LA
UKEAT/0026/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 & 2 May 2014

Before

THE HONOURABLE MRS JUSTICE SIMLER

(SITTING ALONE)

MRS P REDHEAD APPELLANT

LONDON BOROUH OF HOUNSLOW RESPONDENT

Transcript of Proceedings

JUDGMENT

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<u>**APPEARANCES**</u>

For the Appellant	MS KATE GALLAFENT (One of Her Majesty's Counsel) & MR JASON POBJOY (of Counsel) Bar Pro Bono Unit
For the Respondent	MR DAVID MASSARELLA (of Counsel) Instructed by: Weightmans Solicitors LLP 6 New Street Square New Fetter Lane London EC4A 3BF

SUMMARY

PRACTICE AND PROCEDURE – Amendment

Practice and Procedure: Claimant seeking to challenge refusal to vary unless order or to give relief from sanctions. Effect of those refusals was that case struck out when period for compliance expired and she had not complied. No error of law in Tribunal's order; appeal failed. Further, the Claimant seeking to challenge refusal to allow amendments raising new unlawful direct race discrimination claims. No error of law in Tribunal's approach; appeal dismissed.

THE HONOURABLE MRS JUSTICE SIMLER

1. This is an appeal from two orders of an Employment Judge sitting alone. The first in time was a case management decision of Judge Grewal at a hearing on 21 and 22 June 2012 when she refused the Claimant's application to amend her claim forms, presented on 6 July 2010 ("the first claim") and subsequently on 21 February 2011 ("the second claim"). The second in time is a judgment of Judge Grewal whereby she refused to vary an unless order made on 10 December 2012 and, having refused to vary that order, refused relief from sanctions in respect of it, with the consequence that the Claimant's claims remained struck out with effect from 4 January 2013 as a result of her failure to comply with the unless order.

2. I shall refer to the parties in this judgment as the Claimant and the Respondent, as they were before the Employment Judge. The Claimant has been represented before me by Ms Gallafent QC and her junior, Jason Pobjoy. I am particularly grateful to both of them for their assistance and for the fact that they appear pro bono on this appeal following an earlier appearance under the ELAAS Scheme. The EAT is always particularly grateful for the assistance provided by counsel in this way. The Respondent has been represented by David Massarella of counsel, and again I am grateful to him for his clear and helpful submissions.

3. To succeed in her appeal, the Claimant must establish that the Employment Judge erred in law in making the decisions and orders appealed. The amendment appeal raises four grounds:

(i) the Employment Judge failed to consider the proposed amendments to the first claim individually;

(ii) she misdirected herself in finding that "all the complaints were significantly out of time";

(iii) the Employment Judge erred by failing to take into account relevant considerations when balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it;

(iv) and as to the proposed amendments to the second claim, that she erred in treating a number of those amendments as amendments to the second claim when they were in fact amendments to the first claim and otherwise erred for reasons already referred to.

4. The unless order appeal raises three grounds of appeal:

(i) the Employment Judge erred in law in her characterisation of the effect of an application to vary an unless order under rule 12(2)(b) of the 2004 Rules of Procedure;

(ii) she erred in refusing the application to vary the unless order; and

(iii) the Employment Judge erred by refusing to grant the Claimant relief from the sanction of strike-out by wrongly taking into account a number of factors and failing to consider other more proportionate sanctions including the fact that the Claimant was a self-represented litigant.

5. I have given some thought to the appropriate course to adopt in dealing with this appeal (and I use that term to encompass both separate appeals). In my judgment, the appropriate course is to consider and determine the unless order appeal first. I say that for this reason. If the Claimant's cases stand struck out as a consequence of my decision in relation to the unless order appeal, it is difficult to see how the amendment appeal can serve any practical purpose. The amendment appeal concerns proposed amendments to existing claims. If the unless order appeal fails, those existing claims will stand struck out, effectively striking the trunk of the tree from which the branches of the amendments would otherwise hang. Nevertheless, given that I have heard full argument on the amendment appeal and the case may be considered elsewhere. I propose in to give short reasons irrespective of the outcome.

The facts

6. The facts of the underlying claim pursued by the Claimant by her first and second claims are yet to be decided. I deal with those facts in summary on that basis.

7. The Claimant is a black African Caribbean woman who was, from 2005 until late 2010 employed by the Respondent Council as the Education Development Manager for Looked After Children. In May 2009 she presented a grievance to her employer complaining of racial discrimination and victimisation by the Assistant Director of the Council's Children's Services Department. That grievance was followed by the presentation of further complaints. In September 2009, the Respondent decided that the grievances were not upheld. The Claimant appealed from that decision but in December 2009, an appeal hearing affirmed the decision that the grievances were not upheld.

8. Whilst the grievance appeal was outstanding, the Claimant brought her concerns of discrimination to the attention of the Council's Chief Executive Officer and the Lead Member for Education in a series of letters. Those letters were said subsequently to amount to protected disclosures within the meaning of the **Public Interest Disclosure Act 1998** and associated legislation.

9. The Claimant was away from work from May 2009 until January 2010. On the day of her return to work in January 2010, she was given an instruction to leave the workplace pending the holding of a return to work meeting. She did not leave immediately, and her alleged refusal to comply with that instruction led to the institution of disciplinary proceedings. Those proceedings culminated in a written warning and an appeal against the making of that sanction.

10. On 6 July 2010 the Claimant lodged her first claim form (the first case). That claim was reviewed at a case management hearing by Employment Judge Balogun in October 2010 and at that point the case was fixed for a six day hearing on its merits to take place in May 2011. At that hearing the Claimant clarified her claims as "victimisation and Public Interest Disclosure Act detriments" as recorded at paragraphs 3 and 6 of the order produced by Judge Balogun.

11. In the course of the CMD hearing, the Claimant confirmed that she was not pursuing complaints of direct race discrimination, as subsequently recorded by Judge Grewal in her Reasons following the hearing on 21 and 22 June 2012, dealing with the amendment applications. Judge Grewal said this at paragraph 20:

> **"There was a Case Management Discussion on 21 October 2010 before Employment Judge Balogun. At that stage the Claimant was no longer represented by solicitors and was representing herself. At the outset of the CMD, Employment Judge Balogun confirmed with the Claimant that she was not pursuing complaints of direct race discrimination but only of victimisation. The Claimant confirmed that that was the case. Employment Judge Balogun**

> **then set out in detail the issues to be determined. In particular she identified the protected acts and protected disclosures and the eleven detriments to which the Claimant had been subjected."**

12. The issues as described by Judge Grewal in that paragraph are reflected in the order made by Judge Balogun, and in particular, schedule A to that order.

13. The first case was listed for hearing in May 2011. In the meantime, the Claimant resigned from her employment with effect from 24 November 2010 and on 17 February 2011 she lodged a second originating application (the second case). Those two cases were then consolidated and, as a consequence of the second claim, the May 2011 hearing was postponed. The first day of the hearing, 3 May, was converted into a further CMD.

14. Around that time, the Claimant instructed counsel, Chandra Sekar, and on 12 April 2011, Mr Sekar served a document described as "Further and Better Particulars" of the Claimant's two claims. That document, although described as Further and Better Particulars of the two claims, cannot be described other than as an entire re-pleading of the claims. There was no reference back to the original claim beyond the introduction at paragraph 1. At paragraph 11, in 16 separate subparagraphs, new allegations of unlawful direct race discrimination were made for the first time.

15. There was, as a consequence, a case management hearing before Employment Judge Sage. In the course of that hearing, the Claimant sought to argue that the claims of direct race discrimination contained in that Further and Better Particulars document, should be allowed to proceed, either because they were already contained in the first ET1, or alternatively because she should be permitted to amend the claim in any event. Both those arguments failed and the amendments were rejected by Judge Sage. The Claimant appealed to

the EAT and, albeit unsuccessful on the first argument, namely that these allegations were already contained in the first ET1, the Claimant was successful in relation to the second argument, which had in any event been conceded by the Respondents before the hearing of the appeal. Accordingly, the EAT remitted the question of whether the Claimant should be permitted to amend her case to include claims of unlawful direct race discrimination as set out at paragraph 11 and in particular the 16 subparagraphs within that.

16. Notwithstanding that the remission to address the amendments was confined expressly to the further and better particulars document that had been served in April 2011, in March 2012 the Claimant presented a further originating application form, maintaining that she had been told to lodge this by the EAT. That document was not a fresh claim, nor treated as a fresh claim; it was in fact a further complete re-pleading of the Claimant's case without again reference back to her previous applications or to her application to amend as recorded in the document dated April 2011. The document was treated by the Tribunal as a further application to amend. Although the Claimant was acting in person and allowance must accordingly be made, this was a most unhelpful manner of applying to amend, and the document itself is confusing, prolix, and has headings that add to the general confusion.

17. The two amendment applications were considered at a two-day PHR in June 2012. At that hearing, Judge Grewal refused the Claimant's application to amend her claims to add complaints of unlawful direct race discrimination, and the Claimant lodged an appeal against that decision. The appeal was initially rejected on the EAT sift, but the President, Langstaff J, gave permission for those appeals to proceed at a rule 3(10) hearing thereafter. By that stage the remaining claims had come before a Tribunal for a full merits hearing, which had been

postponed because the Claimant did not attend and had then been struck out, as I shall come to describe in a moment.

18. That decision of Judge Grewal taken in June 2012 refusing the Claimant's applications to amend her claims to add complaints of unlawful direct race discrimination also resulted in a case management order by Judge Grewal dealing with issues for the substantive hearing. The claims already on foot involving victimisation, Public Interest Disclosure Act detriments and constructive dismissal, were set down for a nine-day full merits hearing beginning on 10 December 2012. Directions were made in relation to disclosure and preparation of bundles, together with a direction that there should be exchange of witness statements on 12 November 2012.

19. On 2 August 2012, the Respondents' solicitors wrote to the Claimant enclosing a draft updated index for a hearing bundle. There was no response to that letter. Correspondence between the Claimant and the Respondents was, at her request, conducted by post; she having indicated either that she was unwilling or unable to communicate by email.

20. By a further letter dated 10 October 2012, the Respondents' solicitors wrote again to the Claimant, noting that she had an outstanding appeal in the EAT in relation to her amendment application. Given the delays in dealing with such appeals, the Respondents' solicitors suggested that it was unlikely that the appeal would be concluded prior to the start of the full merits hearing listed for 12 December. In those circumstances they indicated that they had written to the Tribunal suggesting that the full merits hearing be postponed, pending the outcome of the appeal. They invited her agreement or written objections.

21. The Claimant responded by letter dated 12 October, received on 15 October by the Respondents' solicitors, stating:

> **"As there are a further nine weeks before the hearing is due to commence, it is my view that such an application could be made at a later date."**

It is clear from that response that she neither accepted nor rejected what was at that stage a perfectly sensible proposal. She is not to be criticised for doing so then; she was entitled to wait to see how things transpired. But the question is how long she was entitled to wait and it is there that she may be criticised.

22. By letter dated 25 October, the Respondents' solicitors wrote again enclosing a copy of the paginated hearing bundle for use at the hearing on 10 December and making it clear that, should the Claimant require additional documents to be included in the bundle, she should identify the document, identify the issue to which it was relevant and explain why it was relevant to the issue. The Claimant did not respond. Thereafter, by letter dated 8 November 2012, the Respondents' solicitors wrote indicating that, although the Tribunal had ordered that witness statements be exchanged by 12 November 2012, a number of their witnesses had left employment and it was proving difficult to communicate with them so that preparing witness statements was taking longer than anticipated. They asked if the Claimant would agree an extension for exchange of witness statements to 28 November 2012, which would still give just under two weeks before the hearing was due to commence.

23. The Claimant, once again, did not reply. She could have written back, as she had done previously, stating that she objected to any extension. Alternatively, she could have written stating that she was prepared to agree an extension as suggested or a shorter period. She could

equally have written stating that she herself had complied with the Tribunal's orders and was ready to serve her witness statement and insisting on exchange taking place in accordance with the Tribunal's extant order. She did none of those things. She simply failed to respond; instead waiting until 29 November, when she wrote to the Tribunal complaining about the Respondent's failure to exchange witness statements and inviting the Tribunal to postpone the hearing scheduled to commence on 10 December 2012. She said she had been told the Respondents were not in a position to exchange witness statements as required by the Tribunal; that they had not done so and that there was now little over one working week before the hearing was to commence, so that she would be at a serious disadvantage in terms of the time available to review the Respondent's witness statements and, as a litigant in person, this would be unfair and unjust and was causing her stress which was affecting her health.

24. That letter crossed with a letter from the Respondents also dated 29 November in which they suggested exchange by placing the witness statements in the post on Monday 3 December so that the parties would receive them on the morning of 4 December and asking for confirmation that that was agreeable. On 30 November, the Respondent's solicitors wrote again to the Claimant, again raising the question of exchange and making clear that they were content to put the witness statements in the post on Monday, 3 December but would wait to hear that she was going to do the same before doing so.

25. The Claimant responded to that suggestion made initially on 29 November and repeated on 30 November in a letter dated 1 December which said that she had noted the contents of 29 November letter and referred the Respondents to her letter to the Tribunal. That was not a particularly constructive approach to adopt in the circumstances.

26. By letter dated 3 December 2012 to the Tribunal, she set out the history and made a further request to postpone the full merits hearing on the basis that she was prejudiced, had had insufficient time to prepare and, as a litigant in person, without the legal skills, knowledge and the resources available to the Respondents, would be put at a serious disadvantage. A yet further application to postpone was made by letter dated 7 December and on this occasion the Claimant supported her application by a medical certificate which referred to stress and anxiety.

27. The applications for adjournments made in the letters of 29 November and 3 December were refused respectively by Regional Employment Judge Potter on 4 December 2012 and Employment Judge Lewzey on 5 December 2012. The further application of 7 December was not received by the Employment Tribunal until after the staff had left the building for the weekend, as is made clear by paragraph 11 of Employment Judge Lewzey's Reasons for her decision given on 10 December. She stated:

> **"No further application was received from Mrs Redhead until the letter which she sent on 7 December by recorded delivery which was received here today [that is to say on 10 December]. That application was made by fax at 16:08. That fax was not drawn to the judge's attention until this morning. The recorded delivery letter has been delivered to us within the last hour. All that is attached to either of those applications are the statement of fitness to work dated 7 December 2012 which states that the GP advised Mrs Redhead:**
>
> > **'You are not fit for work this will be the case for 1 month'.**
>
> **The reason is stated to be 'stress' and 'anxiety'. It is not a statement that states that Mrs Redhead is unfit to attend the Employment Tribunal hearing."**

28. Whilst that correspondence was being pursued in relation to the exchange of witness statements and the full merits hearing that was due to take place on 10 December, the Claimant was also focused on pursuing the amendment appeal which, as I have indicated, was rejected initially on the sift on 12 October 2012. Having received that decision, the Claimant lodged a second appeal on 8 November 2012, albeit without making that clear to the Respondents, and that appeal was also rejected on the sift by HHJ Peter Clark. The EAT listed an expedited rule

3(10) hearing for 7 December, no doubt with the aim of preserving the nine day full merits hearing listing to commence on 10 December, but on 5 December the Claimant applied for a postponement, and that application was granted.

29. In the week before 10 December, having heard nothing from the Claimant about proposals for exchange, the Respondents served their witness statements unilaterally on her on the Friday before the full merits hearing. The Claimant received an envelope containing the witness statements, but returned those statements unopened by hand to the Tribunal that same evening.

30. On 10 December, the first day of the full merits hearing, the Respondents attended the Tribunal prepared to commence the hearing of the two claims, with witnesses. The Tribunal was present, comprised of Judge Lewzey and two lay members. The Claimant did not attend but was represented by her friend, Dr Davidson. Dr Davidson informed the Tribunal that she was unwell and referred to the medical certificate and additional documents. Judge Lewzey and her members took the view that the medical evidence provided was inadequate to demonstrate that the Claimant was unfit to attend the hearing. The Respondents invited the Tribunal to adjourn the hearing, to treat the following day as a reading day and to reconvene the full merits hearing on 12 December. In order to ensure that progress could be made, the Respondents also sought an unless order requiring the Claimant to serve her witness statement by Special Delivery to arrive at their solicitor's offices on the Tuesday morning and to attend the Tribunal at 9.45 on the Wednesday morning prepared to begin the hearing, failing which her claims would stand struck out.

31. These applications were resisted by Dr Davidson on the Claimant's behalf. He argued that there would not be sufficient time for the Claimant to recover given her ill-health. He submitted that she felt pressured to attend the full merits hearing, that she had felt in a corner and unsupported; that she had received calls demanding that she attend the hearing and that she was by no means seeking to avoid the hearing going ahead, but the position was that there was not a level playing field and that she was being treated unfairly. He made a counter-proposal that the case be postponed entirely pending the EAT's decision on her amendment appeal, and he made clear that, in his view, there would not be sufficient time for her to obtain further medical evidence if that was what the Tribunal required. At paragraph 16, Judge Lewzey recorded Dr Davidson's argument that there was not enough time between 10 December and 12 December to determine whether or not Mrs Redhead was ill. She had not produced evidence that she was unfit to attend that day and would therefore be required to produce such evidence.

32. The Tribunal rejected both applications. Judge Lewzey explained that the Tribunal considered the fact of an outstanding appeal to the EAT was not good grounds to postpone the full merits hearing. Nevertheless, the Tribunal did require a full medical certificate from the Claimant in order to substantiate the fact that she was too unwell to attend the hearing, and the Tribunal for that sole reason decided that the full merits hearing should be postponed so that satisfactory medical evidence could be provided. The consequence was that the Tribunal made the following unless order under rule 13(2) of the Employment Tribunal Rules 2004:

> **"Unless by Friday, 4 January 2013 the Claimant serves the following documents on the Tribunal and the Respondent -**
>
> **1.1 a medical certificate issued by the Claimant's General Practitioner or a medically qualified practitioner ...**
>
> **1.2 the Claimant's witness statement in these proceedings**
>
> **this unless order will become an unconditional Judgment striking out the claim in its entirety without further notice or the need for a Pre-Hearing Review pursuant to rule 13(2) of the Employment Tribunal Rules of Procedure 2004."**

That warning about the draconian effect of that order was repeated in the order itself at paragraph 2 of the important notes to the order.

33. The Employment Judge gave full reasons for making the unless order and at the hearing also orally instructed the Respondents to serve their statements on the same day as the Claimant served hers. That is a matter that the Claimant does not now accept, but Mr Massarella who appeared before Judge Lewzey on behalf of the Claimant has told me that is what happened, and that furthermore, Dr Davidson expressed that he was content with that approach. I accept that account.

34. By letter dated 17 December 2012, the Claimant applied to vary that unless order on three bases. First, on the basis that there should be simultaneous exchange of witness statements between the parties. Secondly, that the Respondents should be required to disclose all documents that adversely affected their case, adversely affected her case or supported her case. Thirdly, the Respondents should be required to confirm the names of the witnesses on whose evidence they intended to rely. None of those reasons seems to me to afford any sustainable basis for a variation of the unless order. So far as simultaneous exchange is concerned, that was a matter dealt with orally at the hearing, as Mr Massarella has indicated, and, as I will come to explain, I am satisfied that this was well understood by the Claimant. So far as disclosure is concerned, that had been dealt with. There had been provided to the Claimant a full bundle of documents relied upon and she had been invited to disclose any additional documents or identify any additional documents she wished to rely upon. So far as the provision of names of witnesses was concerned, that would not be a reason for varying the unless order. In any event, I am satisfied that the Claimant had a pretty good idea which

witnesses the Respondents intended to call. On 27 December 2012 the Claimant provided a medical certificate in accordance with paragraph 1.1 of the unless order, confirming that she had not been fit to attend the hearing on 10 to 12 December. She was not unnaturally, concerned, about her position in relation to the unless order and sent a number of further letters to the Tribunal chasing up her application to vary or review the order. In particular, on 27 December, she wrote to the Tribunal asking, in effect, what was being done to deal with her application and stating:

> **"I am also mindful of the serious legal implications of the Tribunal order for me and the requirement that I adhere to the Tribunal order to provide the Respondent with my witness statement by 4 January 2013."**

35. That letter was followed by a letter dated 31 December to the Tribunal where she copied a letter that she had written to the Respondent's solicitors and by letters dated 3 and 7 January chasing up the position so far as her application was concerned. The letter to the Respondent's solicitors dated 31 December indicated that she was awaiting the Tribunal's response to her letter of 27 December 2012, but in the meantime she said:

> **"Could you please let me know your arrangement for the simultaneous exchange of signed witness statements by Friday, 4 January 2013 if the Tribunal were to reject my request."**

36. Ms Gallafent argues that the letter made absolutely plain that the Claimant's understanding was that there was no need to comply with the Tribunal's order pending a consideration and determination of her application for a variation or revocation of the order and that her suggestion that there should be a discussion about arrangements for simultaneous exchange was only made on the basis that the Tribunal might reject her request. I do not accept that reading of her letter. Rather, the letter suggests that the Claimant was well aware that there was to be an arrangement for simultaneous exchange of signed witness statements by 4 January,

and that accordingly the first ground for her review application was something that she was already aware had been dealt with satisfactorily as between the parties.

37. The Claimant finally received responses to her letters in a letter from the Employment Tribunal dated 8 January 2013 in which the Claimant was told that Judge Lewzey was treating her document as an application to vary the date for compliance with the unless order. A subsequent letter from the Tribunal made clear that the application to vary was an application, not only to vary the date of compliance but to vary the order itself. That application was then scheduled to be heard on 13 February 2013, but was postponed until 27 February as a result of Mr Massarella's unavailability.

38. On 18 February 2013, the Claimant applied for the matter to be determined on paper rather than at an oral hearing. On 26 February, that is to say the day before the hearing of that application was due to take place, she wrote to the Tribunal to "withdraw my request for a review hearing and therefore withdraw the need to attend such a hearing tomorrow”. The Claimant did not copy that letter to the Respondents and did not inform the Respondents that she had taken that approach until 8.45 on the morning of 27 February. The Respondents informed her that they would be attending and she was urged to do the same.

39. When the hearing started at 10 o'clock on 27 February the Claimant did not attend. Judge Grewal, before whom the matter was listed, was unhappy about continuing in her absence, given the seriousness of the Claimant's position and in circumstances where she was not confident that the Claimant was aware of the consequences of withdrawing her application, namely that the case would stand struck out because the unless order period for compliance would have expired. In due course, information was received that the Claimant was on her way

to the Tribunal and she arrived at about 11 o'clock. Judge Grewal explained that she proposed to hear the Claimant's application to vary the unless order and to consider her application, if that was refused, as an application for relief from sanctions. The Claimant addressed the Tribunal for some time, explaining her actions at length, and then asked for the hearing to be adjourned. That application was declined. There was a degree of disruptive behaviour on the Claimant's behalf during which Judge Grewal had to indicate on a number of occasions that she was not prepared to postpone the application, and in due course the Claimant stood up saying that she had palpitations and left the hearing room. She went to the Tribunal's waiting room and did not in the event return to the hearing thereafter. Later in the morning, however, Dr Davidson arrived and made submissions on her behalf, both in relation to variation and in relation to relief from sanctions.

40. Judge Grewal reserved her judgment on these questions and on 6 March, in a written decision, she ruled, first, that the application to vary the unless order of 10 December 2012, if that application remained extant, was refused. Second, the Claimant's complaint was automatically struck out on 4 January 2013 as a result of her failure to comply with the unless order of 10 December 2012 by that date. Third, the application for a review (or for relief from sanction) was refused.

Appeal against unless order

41. The factors relevant to an application for relief from sanctions are inevitably case-sensitive and dependent upon the context of the particular case being considered. In **Governing Body of St Albans Girls' School v Neary** [2010] IRLR 124, at paragraphs 60 to 62, the Court of Appeal said:

> **"It is well established that a party guilty of deliberate and persistent failure to comply with a court order should expect no mercy."**

This was so, even where a trial remained possible. But factors regarded as important were:

> **"... the effect which the failure to comply had had and the effect which the grant of relief would have on the parties. It is true that the [Employment Judge] did not expressly consider those factors. But it seems to me that those factors will be far more important in the context of a case of non-deliberate or partially excusable non-compliance. Where the circumstances were such that the failure was at least to some extent excusable, those considerations may well be determinative. However, where the non-compliance is deliberate and persistent, I do not think those factors are likely to be important in the exercise of judgment."**

42. Reference was made to **Blockbuster Entertainment Ltd v James** [2006] IRLR 630, and the Court of Appeal observed (at paragraph 38):

> **"... Sedley LJ said that, when making a strike-out order, there were two cardinal conditions at least one of which must be met. Either the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps or it has made a fair trial impossible. If one of these conditions is met, the court must then consider whether striking out is a proportionate response. This was an employment case. However, Sedley LJ observed that the principles to be followed were more fully set out in *Arrow Nominees Inc & Another v Blackledge* [2000] 2 BCLC 167 (CA), which was a High Court case to which the CPR applied. Beatson J observed that, although not spelled out in *Blockbuster,* the Court of Appeal was implicitly saying that CPR principles should be applied in the employment jurisdiction."**

43. In **Neary** the Court of Appeal reached the conclusion that the CPR principles were not to be applied in the employment jurisdiction, albeit that those principles provide a useful checklist. It is also to be noted that **Blockbuster Entertainment v James** is a case concerning strike-out but not against the background of a prior unless order having been made. It is easy to see why, in a case where there has been no unless order made, the threshold is very high and it is necessary to show deliberate and persistent failure to comply with orders or steps in the action.

44. The position is different where an unless order has been made because an unless order is itself a draconian sanction, and before such a sanction can be applied, any judge, whether in the

Employment Tribunal or elsewhere, must consider the proportionality of doing so. He or she must consider the nature of the conduct and whether it has reached that threshold of deliberate and persistent non-compliance or other contumelious conduct. The position, when one comes to consider questions of relief from sanctions or the question of whether a variation of an unless order should be made, is a different one. At that stage, the party affected by the order has already behaved so seriously in breach that the draconian sanction of an unless order has already been made and the question then is whether there is any reason to hold back from the brink by varying the order or affording relief. Moreover, the term "deliberate and persistent" is simply a description of the seriousness of the behaviour: it is one end of the spectrum of sufficiently serious misbehaviour. It is not a gateway.

45. It is also instructive to consider the tribunal's reasons for refusing relief in **Neary** and the way in which those reasons were regarded by the Court of Appeal. In **Neary** the reasons were in extremely short form in the following terms:

> **"The Claimant's application for a review of the strike out order is refused. The Claimant admits receiving the Tribunal's Unless Order dated 5 September, which clearly states at paragraph 2 the order to be complied with. Further the Claimant was present when the initial order was made. In those circumstances, the failure of the Claimant to comply justified striking out his claim."**

46. All members of the Court of Appeal considered the reasons, whilst short, were sufficient to show the tribunal had weighed the factors affecting proportionality and reached a tenable decision. The tribunal was not required to adopt a particular form of words or mantra, so long as it was possible to see that the tribunal asked itself whether in the circumstances, the sanction was a just one. Smith LJ at paragraph 62, made clear that the question of the effect which the failure to comply had had and the effect which the grant of relief would have on the parties, was unlikely to be determinative in a case where the non-compliance was deliberate and persistent

and certainly was less likely to be important. She took the view that the reasons were adequate. Sedley LJ adopted the same view and, in even shorter terms, Ward LJ said:

> **"This was not a difficult case. As the employment judge stated in his short but understandable judgment, Mr Neary was present when the order was made and admitted receiving it. Any confusion about its terms should have evaporated on receipt ... As the employment judge held, 'in those circumstances' the failure to comply justified the strike out."**

Ward LJ concluded that there was nothing wrong with that conclusion.

47. In **Thind v Salvesen Logistics Ltd** [2010] UKEAT 0487/09/1301 (13 January 2010) Underhill J, President (as he then was) held at paragraph 14:

> **"The fact that an unless order has been made, which of course puts the party in question squarely on notice of the importance of complying with the order and the consequences if he does not do so, will always be an important consideration. Unless orders are an important part of the tribunal's procedural armoury (albeit one not to be used lightly), and they must be taken very seriously; their effectiveness will be undermined if tribunals are too ready to set them aside."**

48. But he went on to say at paragraph 36:

> **"I wish to close by emphasising, in case this judgment is referred to in other cases, that, as I have already observed, all these cases turn on their own facts. I certainly would not wish it to be thought that it will be usual for relief to be granted from the effect of an unless order. Provided that the order itself has been appropriately made, there is an important interest in employment tribunals enforcing compliance, and it may well be just in such a case for a claim to be struck out even though a fair trial would remain possible. As has been pointed out, the case of Blockbuster Entertainment Ltd v James [2006] IRLR 630 did not concern an unless order; and the facts of Neary illustrate that a claim may be struck out even though a hearing is still possible – see in particular paragraphs 63 and 64 of the judgment."**

49. Before leaving **Thind**, where the EAT reversed the effect of the tribunal's order, it is instructive to look at the factors on which particular reliance was placed in reaching that conclusion. Firstly, the default in that case was in no sense deliberate. Secondly, the default was not one within the claimant's control. Thirdly, there was solicitor error. Fourthly, there had been a prompt application for a variation of the unless order and (and I emphasise this) the

order had been complied with at the date of the variation hearing. Finally, given that there were some five months remaining before the full merits hearing, there was no serious prejudice if a variation was made.

50. Finally, before turning to the grounds of appeal, it is well-established that an unless order which provides for strike out in the event of non-compliance by a particular date has effect on that date if there has been non-compliance in any material respect. Authority for that, if necessary, is **Marcan Shipping (London) Ltd v Kefalas** [2007] 1 WLR 1864 at 34. There are no exceptions to that rule. The Court of Appeal also observed at paragraph 34:

> **"If it is thought that the court should not have made an order in those terms in the first place, the right course is to challenge it on appeal, but it may often be better to make all reasonable efforts to comply and to seek relief in the event of default."**

51. The unless order in this case was made pursuant to rule 12(2), and the Claimant's application dated 17 December 2012 to vary that order was an application made expressly pursuant to rule 12(2)(b). Ms Gallafent advances the argument that on its proper construction, the effect of any rule 12(2)(b) application is to stay the requirement for compliance with the rule 12(2) order pending its determination whatever that application might be. There is nothing in the express words of the rule to this effect. On its plain wording, the affected party is entitled to be notified and told of his or her right to apply to the tribunal in relation to any such order, and secondly, is entitled to apply to vary or revoke the order.

52. The right to apply is a right to apply before the expiry of the period within which the order was to be complied with, but it may also be exercised outside the period in circumstances where rule 12(3) is expressly made subject to rule 10(2)(e). The provision therefore affords a right to apply to have an order varied or revoked in circumstances where otherwise such an

application might not have been entertained. For example, rule 11(1) provides a general right to apply to vary or revoke an order, but although not stated within the rule, practice establishes clearly that in the absence of some change of circumstance or other significant matter altering the position previously understood, such an application is unlikely to be entertained by a tribunal.

53. Accordingly, what rule 12(2) does is afford an express right for a party who did not appear and have the opportunity to make representations in relation to a 12(2) order, to have that opportunity. That is the policy rationale for rule 12(2). It provides an affected party with the opportunity to make such written or oral representations as they might have wished to make, and they are able to do that, either prior to the expiry of the time for compliance with the rule 12(2) order, or after time for compliance has expired. There is nothing in the wording of the provision that requires or entails suspension of the unless order in the meanwhile. Had Parliament intended that result, it would have been easy for that to have been expressly stated. Nor do I regard the fact that the application is ordinarily contemplated as being required to be made before the expiry of the 12(2) order as altering that conclusion. The requirement to act promptly is understandable in circumstances where an order has been made that is expected to be complied with, but an opportunity is offered (to ensure natural justice) for an affected party to come along and make representations about the appropriateness of that order.

54. This interpretation does not deprive rule 12(2) of any meaning, even if it is unlikely that an application to vary will be heard by the tribunal before the deadline for compliance with the rule 12(2) order. The period for attempting to comply is, in effect, extended by the mere fact that the application is made. At the hearing the affected party can make representations to vary or revoke the order and will have had, in effect, the benefit of that extended period in which to

comply and to offer evidence of compliance, or substantial compliance. There can, however, be no expectation of any particular outcome.

55. Rule 34 has no application in this context because it applies only to judgments. Until the unless order takes effect as a judgment because the period for compliance has expired, it is an order that cannot be reviewed under rule 34. Similarly, as I have indicated, a party would not ordinarily be able to bring an application to review or vary under rule 11(1), absent some compelling basis for saying that circumstances had changed or there was some other compelling basis for entertaining such an application.

56. This construction is consistent with the overriding objective set out in regulations 3(1) and (2) of the 2004 Regulations which guide the construction of the 2004 Rules of Procedure. It affords an affected party the opportunity to be heard by a tribunal on an application to vary or revoke a rule 12(2) order. Tribunals have ample power to do justice, if it transpires that any unless order has been wrongly made or should be varied or if relief from sanctions should be given.

57. The "unless order" power is a salutary power designed to ensure compliance with tribunal orders and to ensure that the particular case is dealt with expeditiously and fairly. A party affected by it cannot avoid its consequences or the consequences of disobedience simply by making an application to vary or discharge. A party who chooses not to comply and instead relies on an application to vary does so at real and significant risk that the order will remain in effect as originally made. A party whose conduct has already attracted the sanction of an unless order cannot be entitled unilaterally to disarm it. That would be the consequence of

Ms Gallafent's construction. Accordingly, attractively and persuasively as she has advanced this construction, I cannot accept it. The construction argument therefore fails.

58. In any event, I am persuaded by Mr Massarella in this case that, as a matter of fact, although there was a reference in the notes to the unless order to the opportunity to apply under rule 12(2), this was not in fact an order made under rule 12(2). I say that for two reasons. Firstly, the Claimant was a represented party, albeit not represented by legal representatives. Dr Davidson was there as her friend and representative and was recorded as such. He made submissions on her behalf, both as to the form of order he proposed and objecting to the form of order proposed by the Respondents. He had the opportunity to persuade the Tribunal, and indeed was successful in persuading the Tribunal, not to make the order sought by the Respondents. Secondly, I am not satisfied that this was an order made on the Judge's own initiative. This was an order made by the Judge in circumstances where she was invited to make a different unless order and different case management orders by both parties; Dr Davidson, opposing any unless order altogether. Having heard submissions and determined what was the fair and just approach to take in this particular case, the Employment Judge made the unless order in light of those submissions and representations. This was not a case where she acted on her own initiative.

59. In the alternative, Ms Gallafent submits that the Judge erred in refusing the Claimant's application to vary the unless order by wrongly taking into account three matters. I do not accept that these matters give rise to any error of law by the Employment Judge, whether taken alone or together. First, the Employment Judge was entitled to refer to what she described as "apparent indications that the Claimant did not have a completed witness statement ready to be exchanged". There was no evidence to the contrary. An unless order had been made. If the

Claimant attending a hearing at which she was seeking a variation or revocation of that order or some relief in relation to it, had prepared a witness statement ready for exchange, it was incumbent on her to say so and to make that clear. She did not do that, either through Dr Davidson when he attended on her behalf previously on 10 December, and nor did she do it when she attended in person on 27 February. In fact, Dr Davidson informed Judge Lewzey that the witness statement was not ready and that the Claimant required disclosure before she was in a position to provide her witness statement. These submissions were repeated before Judge Grewal, who was told that the reason the Claimant did not proceed to exchange was that she wished to have disclosure of the notes of Colin Peake's investigation before doing so. That point in particular is reflected by paragraph 35 of Judge Grewal's decision and, although the Claimant through Ms Gallafent rejects that understanding and says that that was not the case, I am bound by Judge Grewal's finding and cannot go behind it. Moreover, it appears to me to be consistent with the Claimant's own letter of 3 January where she told the Employment Tribunal in terms that such disclosure was necessary "for the writing of witness statements and before exchange of witness statements".

60. Secondly, Ms Gallafent criticises Judge Grewal's finding that Judge Lewzey directed the Respondents to put their statements in the post. She does so on the footing that, at most, Judge Lewzey instructed the Respondents orally to give simultaneous exchange of those witness statements. Whether or not Judge Lewzey gave a direction or instruction is neither here nor there. The fact is at the hearing before Judge Lewzey, there was a discussion about whether that exchange would be simultaneous. That discussion resulted in an understanding and acceptance that the Respondents would do so and Dr Davidson expressed his satisfaction with that result. This is not surprising in circumstances where the Respondents had already sent their witness statements to the Claimant in an envelope which she returned. There could have been

no doubt that the Respondents were ready to exchange and that they were prepared to exchange and, in those circumstances, I do not find it surprising that the matter was dealt with in the way it was by Judge Lewzey. Nor can I accept that the Claimant was under any misapprehension as to this position; indeed, her correspondence with the Respondent's solicitors already referred to, makes plain that she understood that there would be simultaneous exchange.

61. The third matter criticised is Judge Grewal's reliance on the fact the Claimant sought to make arrangements for simultaneous exchange of witness statements which I have dealt with above.

62. Further, Ms Gallafent argues that the Judge erred in refusing to grant the Claimant relief from sanctions by wrongly taking into account a series of matters set out at paragraph 20 of the substituted grounds. I have already dealt with the principles that apply to the question of relief from sanctions, and it is noted that the Judge (at paragraphs 38 to 43 of the Reasons) set out those principles and gave herself an appropriate legal direction.

63. The starting point in relation to any review of the Judge's refusal to grant relief must, as Mr Massarella submits, start with her finding at paragraph 48 that:

> **"This is not a case where there has been some misunderstanding or an inadvertent or technical failure to comply. This is a case where the Claimant has chosen consciously and deliberately not to comply with the unless order, fully understanding the consequences of not doing so."**

Those consequences were flagged up clearly to the Claimant in the order itself and her own correspondence reflected the fact that she was well aware of the seriousness of her position.

64. Taking the points raised at paragraph 20 of the amended grounds in turn, so far as exchange of witness statements was concerned, the Tribunal was, entitled to conclude that there had been a failure by the Claimant to cooperate with the Respondents. Her conduct was not constructive. A reasonable approach, as I have indicated, if she objected to the Respondent's proposed extension of time, was to say so. Instead, she remained silent until after the date proposed by the Respondents for exchange and only then wrote to the Tribunal complaining and seeking an adjournment. I have no doubt that this is what the Employment Judge had in mind, however she expressed it, when she referred to a lack of co-operation in this respect.

65. Secondly and similarly, the Judge was entitled to look at the correspondence and to interpret the correspondence as indicating an unconstructive approach. Thirdly, the Claimant criticises the Tribunal's reliance on her failure to disclose additional documents by 1 February, dealt with at paragraph 49 of the Reasons. She appears to suggest that, in circumstances where she had applied to vary this part of the 10 December order (which was not in fact part of the unless order) and that application had been listed for a hearing, that she was entitled to proceed on the basis that she need not comply with it in the meantime. This is a surprising approach for any litigant, but a particularly surprising approach for a litigant subject to an unless order to adopt. It indicates a degree of contempt for Tribunal orders. The fact that an application to vary had been made did not absolve the Claimant from compliance with the order and the Judge was entitled to have regard to that fact.

66. Fourthly, the Tribunal was critical of the fact that the Claimant did not at any stage indicate that her witness statement was complete and ready to exchange. An application for relief from sanction is normally accompanied by full or at least substantial compliance. The Judge was entitled to expect this if such compliance was available. The failure to proffer a

witness statement is particularly surprising in these circumstances and, in my judgment, the Tribunal was fully entitled to proceed on the basis that the Claimant was simply not ready to exchange her witness statement; all the more so where she left the hearing suddenly, refusing to return. It is right to record at this stage that, in response to a question I asked yesterday, the Claimant has produced a witness statement, but that witness statement does not take the matter any further at this stage since it was not produced at the time and she did not indicate its availability to Judge Grewal.

67. Fifthly, it is well-established that a potentially relevant consideration in deciding whether to grant relief is whether the trial date can be maintained. Whilst the delay in determining the relief application in this case was in no way the responsibility of the Claimant, the fact that, even as late as 27 February, no witness statement had been offered by her for exchange was nobody's responsibility but her own. Had she made such an offer, or effected exchange, it is quite possible that the trial date could have been preserved. It would certainly have been a factor that would have weighed in the balance in her favour. But the fact that a third listing of this nine-day full merits hearing would have to be aborted was a matter of serious concern that the Tribunal was entitled to have regard to, irrespective of where the fault lay in relation to previous adjournments.

68. Sixthly, the Tribunal had regard to the Claimant's failure to attend the Tribunal on a previous occasion resulting in the adjournment of the full merits hearing in circumstances where the Respondents had attended with witnesses and the Tribunal had convened with members. Whilst it is undoubtedly true that the Claimant provided a satisfactory medical certificate after the event, it is nevertheless the case that she could and should, have provided proper medical evidence in advance of that full merits hearing. She first applied to adjourn

raising issues of stress and ill-health on 29 November. The costs of the hearing on 10 December that were wasted might not have been incurred if she had made her application for an adjournment in good time, accompanied by proper medical evidence. I quite accept that it can be difficult to predict at what point ill-health issues are likely to cause an inability to attend, but as early as 29 November the Claimant was saying that ill-health issues were affecting her and she was seeking an adjournment. It was appropriate for the Tribunal to consider these matters as a factor in the balance of injustice and hardship in this case.

69. Seventhly, the Tribunal was entitled to consider, albeit not obliged to do so in these circumstances, whether further delay would make a fair hearing difficult. Whilst some of the delay in this case was not caused by the Claimant, some of it certainly had been. The claims and allegations stretched back to 2009, and even though it is right to say that the Respondents had obtained witness statements from witnesses and many of the matters the subject of the substantive hearing had been investigated during the course of the grievance and appeal hearing whilst the Claimant was still employed, further delay could have an impact on the ability of witnesses to deal with allegations being made in the course of a hearing.

70. In this case, with her knowledge of the detailed background and the facts, the Employment Judge was entitled to conclude that "it was inevitable that any *further* delay will lead to a further fading of memories and will make it more difficult for the Respondent to respond to new factual allegations" (emphasis added). This was a conclusion that was amply open to this Judge. Indeed, in the context of discrimination cases, the importance of recalling not only what is done but the thought processes involved make it all the more difficult, and more likely that memory fade will have an impact. The Judge also recorded the fact that the

Respondent's witnesses had had serious allegations hanging over them for a long time. That also, was relevant.

71. Eighthly, the Employment Judge concluded that the Claimant had "deliberately, knowingly and defiantly failed to comply with the unless order and that she fully understood the consequences of not doing so". That was a finding open to the Judge. The fact that the Claimant made an application to vary the unless order did not entitle her to sit back and do nothing in relation to the terms of the order whilst she waited for a determination of her application. Her explanations that this was her understanding and other explanations as to why she did what she did were rejected, and in the circumstances the Judge was entitled to reach this conclusion. In these circumstances, the Judge made a serious finding of deliberate and defiant failure to comply. That is a finding that justified her ultimate conclusion in relation to the unless order. Moreover, although she did not use the word "persistent" in relation to this non-compliance, as a matter of fact her findings demonstrate that this was a case of persistent non-compliance.

72. Ninthly, the Claimant's unreasonable and disruptive behaviour at the hearing on 27 February 2013, as recorded at paragraphs 50 and 54 of the decision, were relied upon by the Judge but are criticised by Ms Gallafent. In my judgment, that is not a criticism open to her. Whilst the Claimant does not accept that she behaved unreasonably or disruptively at the hearing, this was Judge Grewal's finding and it was one that was open to Judge Grewal to make. The fact that the Claimant was herself stressed and may have been feeling unwell does not excuse or justify behaviour that is unreasonable or disruptive. No Tribunal could have any difficulty with a claimant who is feeling unwell and who, in a reasonable and constructive way, asks for permission to leave and behaves appropriately, but to behave disruptively and

unreasonably, even if unwell, is a matter that the Judge was entitled to consider. To put it another way, nothing that the Claimant did at the hearing would have given the Judge the confidence to consider that the Claimant was going to behave appropriately going forward and was going to comply with orders that were made. Ms Gallafent points to the fact that bad behaviour was not treated as a relevant factor by the Tribunal in the **Neary** case, but that, in my judgment, is nothing to the point. It does not mean that where a tribunal regards such behaviour as relevant and takes it into account, that to do so is irrational or perverse.

73. Finally, Ms Gallafent points to the question of proportionality and says that what these Reasons lacked was a proper approach to the proportionality exercise required. As I have already indicated, I am not satisfied that the proportionality exercise identified in the **Blockbuster** case on a strike-out, features in quite the same way in an unless order case. In any event, although the Employment Judge did not use the word "proportionality", it is clear that she weighed all the matters for and against the grant or refusal of relief, and concluded ultimately that it was just to refuse relief in this case. In my judgment, that was a sufficient consideration of proportionality to the extent that this consideration applied.

74. Accordingly, as I have already indicated, the unless order was a sanction of last resort. There could have been no presumption that a failure to comply with it might lead to the grant of relief. The importance of enforcing compliance with Tribunal rules, consistently with the overriding objective, is a matter that is relevant both to justice between the parties involved in the particular proceedings and to other parties in other cases waiting to have their cases heard. In my judgment, this Tribunal was entitled to take the view that the Claimant's conduct was obstructive in the period leading to the 10 December full merits hearing and its vacation, and the unless order was one that was justified in the circumstances, as the Tribunal found. The

Claimant failed to comply with that unless order and did so, as the Judge was again entitled to find, knowingly, deliberately and defiantly. In those circumstances, having properly directed herself in accordance with the law on the question whether the order should be varied or revoked, the Judge's refusal to do so was both open to her and justified on the facts. Similarly, when it came to considering the question of relief from sanctions by way of review, in declining to make such relief available, despite the draconian consequences, the Judge reached a decision she was entitled to reach. Her conclusions show no error of law in her approach or reasoning and the appeal against this decision must therefore fail and be dismissed.

75. In light of that decision, the amendment appeal is strictly academic and I deal with it as briefly as I can in the circumstances having indicated that, having heard argument on it, I would give short reasons.

The amendment appeal

76. The approach to appeals against case management decisions has been set out in a number of cases. I need only refer to two of them. At paragraph 54 of **X v Z Ltd** [1998] ICR 43, Waite LJ stressed the importance of respecting decisions of Employment Judges in this context:

> **"This case provides a salutary example of the value of the rule that the tribunals themselves are the best judges of the case management decisions which crop up every day as they perform the function, an important but seldom an easy one, of trying to do justice with the maximum of flexibility and the minimum of formality to the problems that arise from the employment relationship and its termination. Decisions of the kind that the Chairman is required to make in this case frequently call for a balance to be struck between considerations of time, cost and convenience as well as fairness to the parties. The vast majority of cases can and should be left to the tribunals to resolve for themselves without interruption from the appellate process."**

77. More recently in **Fuller v London Borough of Brent** [2011] IRLR 414 at 31, Mummery LJ warned against an over-analytical approach to Tribunals' reasoning. He said:

> **"The reading of an ET decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."**

78. In this case, the Employment Judge dealt with the application to amend over a hearing that lasted two days. She heard evidence from the Claimant, and although the Claimant even now contests that she was cross-examined despite Mr Massarella having provided his notes of her cross-examination at that hearing, I accept she was cross-examined. The Tribunal, in light of that evidence and the cross-examination, made findings of fact which is a further reason for appellate caution in relation to the decision.

79. The principles applicable to amendments are set out in a number of authorities, starting with **Cocking v Sandhurst (Stationers) Ltd** [1974] ICR 650 followed by **British Newspaper Printing Corporation (North) Ltd v Kelly** [1989] IRLR 222 and ultimately being authoritatively set out in the case of **Selkent Bus Company Limited v Moore** [1996] IRLR 661 where the EAT at [22] (Mummery J, as he then was) identified the relevant circumstances and factors that ought to be considered when considering whether to exercise a discretion to permit or refuse an amendment. Firstly, there should be consideration of the nature of the amendment; secondly the question of time limits; and thirdly, questions concerning the timing and the manner of that application.

80. The EAT dealing with the rule 3(10) hearing in this case, having referred to paragraph 22 of **Selkent v Moore said**:

> **"All the circumstances must be taken into account. The matters he [Mummery J] identified were only some, but they were significant. He said they were 'certainly' relevant. The first was the nature of the amendment; the second the applicability of time limits, and the third the timing and manner of the application. As to the first, this needs to be said; first, that a cause**

of action is a set of facts that give rise to a legal remedy. The focus of any court therefore needs to be upon the facts that are alleged; the remedy may simply be a label, although most causes of action may involve some additional fact or a different emphasis to be placed upon the same facts. It is therefore well accepted that, if an amendment is in effect no more than or little more than applying a different legal label to the same set of facts, it is not a fresh cause of action; it is identifying rather a different way of looking at precisely the same facts for the convenience of the court and to enable justice to be done."

81. More recently, in a case called **Abercrombie & Ors v AGA Rangemaster Ltd** [2013] ICR 213, the Court of Appeal gave further guidance in relation to the question concerning the nature of the amendment at stake. What is required is a focus on the substance of the amendment and the extent to which it gives rise to, on the one hand, minor or technical amendments at the low end of the spectrum, or a wholly new allegation raising altogether new matters not previously raised at the other end of the spectrum.

82. Ms Gallafent argues that there is a significant difference between a re-labelling case and a wholly new allegation case. I agree. There is however, a spectrum between these two extremes. If the case is a re-labelling case, it is quite right that time limits are unlikely to defeat an amendment application because it is difficult to see how those time limits should properly be brought into play and difficult to see how prejudice can properly flow from an amendment that simply adds a new label. The position is otherwise where the amendment involves a substantial change in the case and the scope of enquiry that the Tribunal and the Respondents will have to address.

83. Here, the Employment Judge (at paragraph 29) identified the complaints that were being proposed by way of the April 2011 and March 2012 documents, and categorised them as falling into three broad categories. First, complaints of direct race discrimination in respect of events that occurred in or around April 2009 leading to the raising of the grievance; secondly, similar complaints in respect of the grievance process itself between May 2009 and

3 December 2009; and thirdly, complaints of direct race discrimination in respect of suspension and the disciplinary process between January and June 2010. This was a reasonable approach to adopt.

84. At paragraph 31 Judge Grewal said:

> **"Other than the complaints relating to the suspension and the disciplinary process, all the other complaints raise new factual allegations. This is not a minor amendment but a substantial amendment that would completely change the way the case will have to be defended. Instead of dealing with a complaint of victimisation over a four monthly period, the Respondent would have to defend and the Tribunal would have to determine a different complaint, one of direct race discrimination involving a large number of allegations covering a period of up to two years."**

85. Leaving aside the period of years in respect of which these allegations were said to cover, where it is agreed that the Tribunal over-stated the position, Ms Gallafent submits that the Employment Judge recognised the third category of complaints (and she includes the second category also, although the Tribunal did not recognise this) as raising no new factual allegations and, although not expressly stated by the Employment Judge, so far as those allegations are concerned, this was a mere re-labelling exercise. But having reached the conclusion that this was a mere re-labelling exercise, the Judge failed to follow through with this analysis and instead lumped all the proposed amended allegations together in what followed when she carried out the necessary balancing exercise.

86. I do not accept that submission. It places undue weight on a single sentence and the use of the singular term "amendment" in paragraph 31 and fails to look at the decision as a whole. Seen in the context of the decision as a whole and not treating that sentence as an isolated or stand-alone sentence, what the Judge was saying at paragraph 31 was, despite the fact that some of the complaints raised no new factual allegations, all the proposed new allegations raised

substantial changes to the way in which the case would have to be defended. They amounted to a complete change and to substantial amendments. This was not a re-labelling exercise, whether in relation to the category (iii) or (ii) complaints at all.

87. Whether or not new factual allegations were raised, the finding that all the proposed amendments were substantial and would completely change the way the case would have to be defended, was a conclusion open to the Judge in this case. I agree with Mr Massarella that true re-labelling involves giving a different label or description to an allegation that raises all relevant factual issues. The example he gave was a case of unlawful deduction which could also be labelled breach of contract without any additional factual enquiry being required. To take another example, where a Claimant alleges in her claim, "I complained about race discrimination and because of that I was dismissed", it would be difficult to argue, if unfair dismissal only was pleaded, that an amendment to plead victimisation was not simple re-labelling.

88. Here, however, whilst the factual allegations may have been raised in some, but certainly not all respects in the original claims, the Claimant was seeking to argue for the first time that what had happened to her at each stage of this process was done on the grounds of her race. This was, as the Judge found, a complete change in her case. First, a fresh period of enquiry was opened up, namely March 2009 to November 2010. Secondly, the scope of the factual enquiry was significantly widened. She was now saying that there had been a campaign against her because she was black, starting in March 2009 and continuing until she left employment. The fact that this was alleged to be a continuing act, moreover, militates against the adoption of a fragmentary approach. Even if only one or two of these amendments were to have been permitted, all the amendment matters would be capable of being advanced by way of

background or by way of supporting evidence as part of her claims. Those were matters to which the Judge was entitled to have regard.

89. The point can be illustrated by reference to the March 2012 third ET1 produced by way of further amendment application, and the example, at paragraph 4, where the Claimant alleged that her position as a VSH involved acts of racial discrimination:

> **“"I was the only black member of the team at the time. Jacqui agreed that my staff salary should be increased. She instructed me to look at parity of salary with their colleagues in other authorities. However, my own salary increase on parity with colleagues in other authorities was rejected.”**

That greatly broadened the ambit of the factual enquiry that would be required.

90. Another example can be found at internal page 4 of the document where a complaint is made about the appointment of Mike Schlesinger and the Claimant says:

> **“I am a black African Caribbean woman and both management in general and Chris Hogan in particular subjected me to less favourable treatment than that which a white comparator would have received in similar circumstances.”**

91. The claim goes on, under the heading "Act of racial discrimination 5", to make allegations about the positive or otherwise, appraisals given to the Claimant during the course of her employment. There is also an allegation over the page in paragraph 10 that there was a failure to consult with her in the decision to delegate her duties to Sue Thompson, who is a white woman.

92. All of these allegations widen the scope of the factual enquiry that this Tribunal would have to undertake and that the Respondents would have to defend. The Respondents would have to positively rebut allegation of race discrimination and also, put forward positive

evidence as to why these decisions and actions were taken. That would involve an enquiry into potential comparators, people who were of a different ethnic background or a similar ethnic background and how they were treated in order to identify whether race tainted these decisions and actions. The Respondents would need to consider questions of equal opportunities training, the incidence of discrimination complaints, the racial composition of the work force and other surrounding circumstances. An Employment Judge experienced in dealing with these issues would have appreciated the factual enquiry that was being opened up, both as to primary facts and as to inferences to be drawn from those facts.

93. Moreover, the Tribunal expressly found in this case that the new complaints proposed by way of amendment were all within the Claimant's knowledge. This was a case where she had knowingly elected not to pursue any allegations of unlawful direct race discrimination. She fully understood the case that had been pleaded on her behalf by competent solicitors. She expressed satisfaction with that position at a case management decision hearing and confirmed that she was not making allegations of direct race discrimination, as reflected by the order setting out the outcome of the case management decision hearing. The fact that she had taken this deliberate decision in the context of the proposed amendments was one that the Tribunal was obviously entitled to consider.

94. Having concluded at paragraph 31 that this was not a minor amendment (and I see no significance in the use of the singular word "amendment" to reflect all of the amendments that were being proposed), the Tribunal went on to make findings about the way in which the Claimant had conducted herself, the fact that she had had legal advice, that she had deliberately chosen not to pursue those complaints at paragraph 33. The Tribunal dealt with the question of memory fade and the fact that the Respondents would, in effect, have to start afresh. They

would have to file another response; disclose additional documents and interview more witnesses.

95. The Tribunal addressed the second claim, and at paragraph 42 said:

> **"I adopt the same approach in considering this application to amend as I did for the first claim. In seeking to add claims for direct race discrimination, the Claimant is seeking to add entirely new causes of action."**

That, in my judgment, is consistent with the approach adopted by the Tribunal to the first claim. It is an approach that cannot be impugned.

96. Other criticisms made by Ms Gallafent regarding the Tribunal's approach to time limits and the questions of hardship, do not, in my judgment, justify the conclusion that this decision exceeded the generous ambit of discretion the Tribunal had in determining the amendment applications here.

97. On any view, even if there was a continuing act the proposed allegations were at least eight months or more out of time at the date of the amendment applications. The difference between eight months and the period identified by the Tribunal of 18 months to 2 years is not a significant one in the particular circumstances of this case. So far as hardship is concerned, these were conclusions open to the Judge, who had the benefit of a much more detailed knowledge of the facts of the case, and had explored these issues in detail with the parties over the two day hearing. The Judge correctly directed herself on the proper legal approach to the amendment application; she evaluated the competing factors carefully, and in a manner that was within the ambit of her discretion and reached conclusions that, in my judgment, revealed no error of law in approach or reasoning.

98. For those reasons, this appeal also fails and is dismissed.