Appeal No. UKEAT/0187/13/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 13 December 2013
Judgment handed down on 13 February 2015

Before

HIS HONOUR JEFFREY BURKE QC

(SITTING ALONE)

MS T CANAVAN APPELLANT

GOVERNING BODY OF ST EDMUND CAMPION CATHOLIC SCHOOL RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS SALLY ROBERTSON (of Counsel) Free Representation Unit
For the Respondent	MR EDMUND BEEVER (of Counsel) Instructed by: Birmingham City Council Legal Services 10 Woodcock Street Aston Birmingham B7 4BL

SUMMARY

VICTIMISATION DISCRIMINATION - Detriment

PRACTICE AND PROCEDURE - Amendment

By this appeal the Claimant attacked a lengthy and detailed decision of the Tribunal at a Pre-Hearing Review at which the Respondents sought to prevent the Claimant from pursuing to trial a large number of allegations of detriment for making protected disclosures and for trade union activities set out in a "Further Information" document put forward months after the ET1 and an "Amended Particulars" document put forward well over a year after the ET1.

The Judge permitted most of the disputed allegations in the former to proceed but did not allow most of the disputed allegations in the latter to proceed.

The appeal involved, in large measure, the application to many paragraphs, on which the Claimant sought to rely, of familiar principles as to interference on appeal with interlocutory orders and as to time limits. The only possibly unusual point was the application of the decision of the Court of Session in **Miklaszewicz v Stolt Offshore Ltd** ([2002] IRLR 344) that in a protected disclosure case, time runs from the occurrence of the alleged detriment and not from the alleged disclosure.

HIS HONOUR JEFFREY BURKE QC

The History

1. This is an appeal by the Claimant, Ms Canavan, against interlocutory orders made by Employment Judge Dean at the Birmingham Employment Tribunal in a judgment sent to the parties on 15 August 2012, after hearings earlier in that year. It is necessary, if the orders made by the Employment Judge are to be properly understood, for me to set out a brief description of the proceedings in which those orders were made, before setting out the orders and then, in more detail, setting out the basis on which they were made. I will then consider the grounds of appeal against each relevant order.

2. The Claimant had been employed by the St Edmund Campion Catholic School since July 2005 as an Administrative Assistant. The school is a publicly funded secondary school in Erdington: it is, as its name denotes, a Catholic school which is part of the state education system. It has its own Governing Body; but in these proceedings, it is represented by and is, no doubt, responsible to the Birmingham City Council who were the education authority. In formal terms, the Respondents are the school's Governing Body; but I shall treat them and the school as one for present purposes.

3. In October 2010 the Claimant presented an ET1 to the Employment Tribunal in which she claimed sex discrimination and "discrimination" - i.e. detriment - for making protected disclosures. In the body of the ET1, at paragraph 5.2, she set out a narrative, in which, in summary, she claimed that a member of the staff and staff Governor of the school, Mr McCormack, had in 2009 made public interest disclosures about problems at the school and was harassed by the Head Teacher and her "associates". As a result, there was an investigation co-ordinated by a Mr Rogers, by whom the Claimant was interviewed. There was then a more

formal investigation by a Mr Smalling; she claimed that she had made protected disclosures to him in confidence; but the confidence was not maintained. She was then interviewed again by a Mrs Higgins as part of a wider investigation, and again gave information about what she saw as malpractice in the school. She claimed that, as a result, she had been subjected to detriment in a number of different ways which she set out in very general terms. One specific allegation was particularised at paragraph 9(1); it was that she had been treated unfairly by having her role and her salary reduced in September 2010.

4. The Respondents sought particulars of the Claimant's allegations. In their response to the claim, they admitted that Mr McCormack had raised complaints in June 2009, that he had been suspended as a result of complaints against him by other employees that they had been harassed by him and that the Claimant had been interviewed as part of the investigation of that alleged harassment. The generality of the complaints of discrimination and detriment made by the Claimant were denied; the Respondents said, unsurprisingly, that they would be seeking further particulars. They pleaded that they had implemented a "single status exercise" and that, as a result of their exercise, the grade for administrative staff had been changed; the Claimant had, it was said, an outstanding appeal against that change.

5. At a Case Management Discussion (CMD) on 16 March 2011 Employment Judge Hughes ordered the Claimant to provide by 18 April a document identifying the date and nature of the protected disclosure or disclosures relied upon and summarising the acts and/or omissions which she said were detriments resulting from making disclosures and specifying the approximate dates thereof.

6. On 27 April 2011, there was a further CMD to decide whether the Claimant's claim and other claims brought by Mr McCormack and a third Claimant, Mr Mitchell, should be heard together. It was decided that the cases of the Claimant and Mr Mitchell should be heard consecutively by the same Tribunal and that Mr McCormack's case should be heard separately thereafter. The Claimant said that she was finalising her document in response to the order of 16 March but was seeking the guidance and representation of her trade union. Her time was therefore extended to 8 June. Mr Mitchell subsequently withdrew his claim.

7. The Claimant then provided a document headed "Further information, pursuant to orders made 27/4/11 and 22/7/11". She identified in that document four occasions on which she had made disclosures; they were:

1. Her report to Mr Rogers on 26 June 2009
2. Her report to Mr Smalling on 12 July 2000
3. Her report in a witness statement to Mrs Higgins and others on 19 February 2010
4. A further interview on 22 February 2010

The detriments on which she relied were identified under 29 different paragraphs, each with the date and details of what were alleged to be the detriment to which she had been subjected.

8. On 30 September 2011, there was a further CMD before Employment Judge Hughes. The Respondents had reacted to the Further Information document by seeking to have the claim, or parts of it, struck out or an order for payment by the Claimant of a deposit. Their position was recorded as being that the claims now set out in the Further Information document went beyond the ET1, both in terms of the disclosures relied upon and in terms of the detriments relied upon. It was directed that there should be a Pre-Hearing Review (PHR) on 6

January 2012 in order to determine whether the document contained further allegations or simply further information in relation to the existing allegations.

9. The PHR came before Employment Judge Dean on 6 January 2012, as directed. On that occasion the Claimant was represented by Counsel, Mr McGrath; the Respondents were also represented by Counsel, Mr Beever. Unfortunately, before the submissions were completed, the Judge was taken ill; and the hearing was adjourned to 10 April 2012. During the adjournment the Claimant presented another document, entitled "Claimants Amended Particulars", a lengthy document of 12 A4 pages and 48 paragraphs. At paragraph 4 of that document the Claimant said:

> **"These amended particulars are submitted to: (i.) get the issues into shape to progress to a hearing; and (ii.) to amend / add causes of action. These particulars (without prejudice to all matters referred to in my further information previously submitted) seek to comply with orders made on 27/04/11 and 22/07/11 in that they refer to: (i.) exemplar disclosures I submit qualify for protection under the Public Interest Disclosure Act 1998 / Employment Rights Act 1996 … and (ii.) the most serious causes of action giving rise to detriments."**

10. At paragraph 3 of that document the Claimant said:

> **"My claim was prepared in narrative form without the benefit of professional legal advice. The causes of action have occurred between May 2009 to the present. I submit the matters complained of are linked and contribute to a similar and continuous pattern of detrimental treatment."**

11. Thereafter the document took the form of a narrative account or witness statement, setting out events from May 2009 to February 2012. In the last paragraph, paragraph 48, the Claimant said that the victimisation and detriments complained of, as set out, were not exhaustive but were "exemplar" of a continuing pattern of familiar and linked detrimental treatment.

12. When the hearing was resumed on 10 April 2012 the Claimant had dis-instructed Mr McGrath, but was accompanied by Mr McCormack who assisted her; the Respondents were

represented by Mr Beever, as before. The Employment Judge saw the new document and took the view that a significant part of it went beyond the Further Information document and sought to introduce new information and documents which had not been referred to in the ET1 or in the Further Information document. It had been intended that the Claimant should give evidence at the PHR; and she did so in order to explain why the particulars containing new claims had been presented when they were and to enable the Employment Judge to decide whether she should be permitted to pursue new claims.

13. The Employment Judge made findings of fact which she set out at paragraphs 10 to 16 of her Judgment. She found, in summary, that:

(i) At the time of the ET1 the Claimant was assisted by and the ET1 was completed by a trade union; her representative was said to be Mr Robinson of Unison.

(ii) She had represented herself at the CMDs before Employment Judge Hughes in 2011.

(iii) The Further Information document had been approved by Counsel on the Claimant's behalf.

(iv) In December 2011, a year after the claim had been presented, the Claimant had met a representative of NUT and, as a result, understood that, when she informed Mr McCormack of her concerns, she was making a protected disclosure to him and suffered detriment as a result; she had at the first PHR been represented by Counsel and claimed that she had told him of this further act of disclosure, but he had said nothing about it; found in place in the ET1 or the Further Information document. (As to (i) to (iv) see paragraphs 10 to 11 of the Reasons.)

(v) The Claimant also said that she had been told by the NUT representative that she had been victimised because of her trade union activities. She had not told Mr McGrath about that and had not raised it (paragraph 11).

(vi) The Employment Judge found that the Claimant had not told Mr McGrath of the additional disclosure to Mr McCormack and that she had not said anything to Mr McGrath about the suggestion of victimisation from trade union activities (paragraph 12).

(vii) The Claimant had in the Amended Particulars at paragraph 44 referred to a further disclosure made in a letter of grievance in September 2011 (paragraph 13).

(viii) At the January 2012 hearing, Mr McGrath had put forward four disclosures: three to Mr Rogers in June 2009 and one to Mr Smalling in July 2009. The first three were said to have been repeated to Ms Higgins (paragraph 14).

(ix) In her claim form the Claimant had identified eight detriments; in the Further Information document she pleaded detriments at paragraphs 1 to 30. Those paragraphs post-dated the presentation of the claim (paragraphs 15 to 16).

(x) The material set out in the Further Information document in large part was based upon the information in the ET1, except the matters which post-dated it (paragraph 170).

(xi) Employment Judge Hughes had stated in her decision on the CMD on 27 April 2011 that the Claimant:

> **"… alleges that she made a protected disclosure in giving information to an investigation that was undertaken as a result of allegations made by [Mr McCormack]. She contends that as a consequence of this she was subjected to a course of detrimental treatment. …"**

Self-directions

14. At paragraphs 19 to 28 the Employment Judge set out the relevant law, as she saw it, in some detail. I will not repeat those self-directions at this stage. Insofar as she is said to have erred in making decisions based on those self-directions, I will refer to them when considering individual grounds of appeal as necessary.

The Further Information Document

15. The Employment Judge then analysed the contents of the Further Information document ("the FI") and the Amended Particulars document ("the AP") on a paragraph by paragraph basis. As to the FI, she considered that it contained further information in relation to existing allegations, save in two respects, which, she decided, contained new claims which had been presented out of time. They were to be found in paragraph 8 of the FI where the Claimant, for the first time, alleged that she had been victimised for trade union activities, and in paragraphs 24 to 30 where the Claimant set out details of the treatment of her by the Respondents which occurred after the date of the presentation of her ET1. The Judge decided that the Claimant should not be allowed to pursue the new allegations in paragraph 8 of the FI but that she should be allowed to proceed with the allegations in paragraphs 24 to 30; the Claimant had said that she had been off work with stress from February 2011; and the Judge held that it had not been reasonably practicable for her to put forward an amendment encompassing those allegations in time and that when the amendment was put forward it had been presented within such further period as she considered to be reasonable. See paragraph 34 of the Decision.

The Amended Particulars Document

16. The allegations in the AP met with greater difficulty than those in the FI. Because I will need to go through in what follows individual paragraphs within the AP, in considering the

grounds of appeal, at this stage, I will simply summarise the Judge's conclusions, which were that of the 48 paragraphs of the AP:

(i) Paragraphs 5, 8, 10, 11, 13, 14, 15, 21, 23 to 25, 26 in respect of events of 28 June, 29 and 32 to 34 were disallowed; see paragraphs 38 to 56 of the Decision.

(ii) All allegations of detriment or victimisation because of trade union membership activity were disallowed; see paragraphs 37 and 62.5 of the Decision.

(iii) Paragraphs 38 to 46 were disallowed as raising a separate complaint which did not arise from those so far pleaded; see paragraph 65 of the Decision.

Grounds of Appeal

17. At the sift stage of the Employment Appeal Tribunal's procedures, permission to proceed to a Full Hearing was refused; but the Claimant, as she was, of course, entitled to do, sought an oral hearing which took place before Keith J on 19 April 2013; and he allowed the appeal to proceed to a Full Hearing on three broad grounds. Although the formal Judgment, which followed the hearing before Keith J is, on the face of it, unrestricted as to grounds, it was agreed by Counsel at the Full Hearing, and it appears from Keith J's judgment, that the three grounds which the Claimant was permitted to pursue were:

(1) (a) Paragraphs 5, 8, 10, 25 and 34 of the AP document were allegations of the making of protected disclosures, not of the happening of the detriments to which the Claimant said she had been subjected to as a result. Time ran from the occasion of the detriment which followed from those descriptions and not from the making of the disclosures themselves; the Employment Judge was in error in regarding those allegations as out of time; in law they were not.

(b) Paragraphs 11, 13, 15, 21, 24 and 33 were not new allegations of disclosure or of detriment but set out the events on which the Claimant would be relying in support of her already pleaded case.

(c) Paragraphs 14, 23, 24, 26, 32 and 34 could be said to be new allegations of detriment but were not out of time because they formed part of a series of similar acts, the last of which occurred within three months before the presentation of the ET1; therefore all were in time.

(2) Where an alleged detriment was said to be attributable both to protected disclosure and the Claimant's membership of and participation in the actions of her trade union ("trade union activities), she should have been allowed to proceed with the trade union activities alternative, leaving it to the Tribunal to decide whether the detriment was attributable to one or the other (or both) causes.

(3) As to paragraphs 38 to 46 the Employment Judge erred in concluding that the Claimant could not rely upon them; they were capable of being relied upon as part of a continuing course of detriment.

18. I shall consider this appeal on the basis of the above classification of the grounds to be pursued, and on the basis of the Notice of Appeal from which the above classification, insofar as the appeal was permitted to go forward, was distilled.

Appellate Principles

19. Before considering those grounds, it is important that I should remind myself that the extent to which the Employment Appeal Tribunal can or should go behind the conclusions of an Employment Tribunal on issues such as those to be resolved at the PHR, which were essentially

case management issues, is very limited. As Elias J said in the EAT in **ASLEF v Brady** ([2006] IRLR 576) at paragraph 55:

> **"… The EAT must respect the factual findings of the employment tribunal and should not strain to identify an error merely because it is unhappy with any factual conclusions; it should not 'use a fine toothcomb' to subject the reasons of the employment tribunal to unrealistically detailed scrutiny so as to find artificial defects; it is not necessary for the tribunal to make findings on all matters of dispute before them nor to recount all the evidence, so that it cannot be assumed that the EAT sees all the evidence; and infelicities or even legal inaccuracies in particular sentences in the decision will not render the decision itself defective if the tribunal has essentially properly directed itself on the relevant law."**

20. Mr Beever also referred to the statement of established principle set out at paragraph 30 of the judgment of the Court of Appeal in **Fuller v London Borough of Brent** ([2011] ICR 806):

> **"… The tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an employment tribunal 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."**

21. An exercise of the Tribunal's discretion, particularly in case management decisions, should not be overturned on appeal unless the Appellant is able to establish an error of legal principle or perversity. That principle applies to cases in which the issue is whether or not permission to amend should be granted. In what for nearly 20 years has been regarded as the leading authority on amendment issues before an Employment Tribunal **Selkent v Moore** ([1996] ICR 836) the EAT, presided over by Mummery J, said at pages 842F to 844C:

> **"Procedure and practice for amendments**
>
> **The rival submissions of the parties state the position at opposite extremes. Before we state our conclusions on this appeal, it may be helpful to summarise our understanding of the procedure and practice governing amendments in the industrial tribunal.**
>
> **(1) The discretion of a tribunal to regulate its procedure includes a discretion to grant leave for the amendment of the originating application and/or notice of appearance: see rule 13 of Schedule 1 to the Regulations of 1993 and *Cocking v. Sandhurst (Stationers) Ltd.* [1974] I.C.R. 650, 656G-657D. That discretion is usually exercised on application to a chairman alone prior to the substantive hearing by the tribunal.**
>
> **…**
>
> **(3) Consistently with those principles, a chairman or a tribunal may exercise the discretion on an application for leave to amend in a number of ways.**

(a) It may be a proper exercise of discretion to refuse an application for leave to amend without seeking or considering representations from the other side. For example, it may be obvious on the face of the application and/or in the circumstances in which it is made that it is hopeless and should be refused. If the tribunal forms that view that is the end of the matter, subject to any appeal. On an appeal from such a refusal, the appellant would have a heavy burden to discharge. He would have to convince the appeal tribunal that the industrial tribunal had erred in legal principle in the exercise of the discretion, or had failed to take into account relevant considerations or had taken irrelevant factors into account, or that no reasonable tribunal, properly directing itself, could have refused the amendment: see *Adams v. West Sussex County Council* [1990] I.C.R. 546.

(b) If, however, the amendment sought is arguable and is one of substance which the tribunal considers could reasonably be opposed by the other side, the tribunal may then ask the other party whether they consent to the amendment or whether they oppose it and, if they oppose it, to state the grounds of opposition. In those cases the tribunal would make a decision on the question of amendment after hearing both sides. The party disappointed with the result might then appeal to this appeal tribunal on one or more of the limited grounds mentioned in (3)(a) above.

(c) In other cases an industrial tribunal may reasonably take the view that the proposed amendment is not sufficiently substantial or controversial to justify seeking representations from the other side and may order the amendment ex parte without doing so. If that course is adopted and the other side then objects, the industrial tribunal should consider those objections and decide whether to affirm, rescind or vary the order which has been made. The disappointed party may then appeal to this appeal tribunal on one or more of the limited grounds mentioned in (3)(b) above.

(4) Whenever the discretion to grant an amendment is invoked, the tribunal should take into account <u>all</u> the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

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

(b) <u>The applicability of time limits.</u> If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g., in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978.

(c) <u>The timing and manner of the application.</u> An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

22. The EAT subsequently, in **TGWU v Safeway** (UKEAT 0092/07/LA Underhill J, Judgment 6 June 2007), pointed out that, in the last sub-paragraph of the judgment in **Selkent** which is quoted above, Mummery J should not be taken to have been deciding that, in the case of an application to amend to add a fresh claim which was out of time and time did not fall to be extended, there was an absolute rule which did not permit such amendment; whether the Claimant was out of time was said to be a factor, albeit an important and potentially decisive factor, in the exercise of the Tribunal's discretion. At paragraph 13 of his judgment, Underhill J addressed the often argued point as to whether what was sought to be introduced by amendment could be categorised as a clear re-labelling of that already pleaded or was a wholly new claim. He said:

> **"The paragraph goes on to discuss precisely how the line between a "wholly new claim" and a mere "change of label" is to be drawn. Although not explicit, the implication of the passage as a whole is that if the out-of-time claim cannot be categorised as a mere re-labelling of facts already pleaded then as a matter of law the amendment cannot be permitted. If that is indeed its effect, I agree with Mr. Rose that it goes too far. I do not wish to cast any doubt on the proposition that amendments that involve mere re-labelling of facts already fully pleaded will in most circumstances be very readily permitted: there is plenty of authority to this effect, fully cited in *Harvey*. But, as I have sought to show, *Kelly* and *Selkent* are inconsistent with the proposition that in all cases that cannot be described as "re-labelling" an out-of-time amendment must automatically be refused: even in such cases the Tribunal retains a discretion. No doubt the greater the difference between the factual and legal issues raised by the new claim and by the old the less likely it is that it will be permitted, but that will be a discretionary consideration and not a rule of law."**

23. These principles apply to this appeal.

Grounds Category 1(a)

24. This category of the grounds of appeal applies to paragraphs 5, 8, 10, 25 and 34 of the Amended Particulars document; the essence of the ground of appeal is that the Employment Judge applied the statutory time limits to the disclosures relied upon rather than to the detriments which the Claimant alleged she had suffered by reason of making those protected disclosures. Miss Robertson, on behalf of the Claimant, began her submissions on this category by referring me to the decision of the Court of Session in **Miklaszewicz v Stolt Offshore Ltd**

([2002] IRLR 344). In that case, disclosures relied on by the Claimant occurred before, but the detriment relied upon dismissal, occurred after the introduction into law of the remedies for detriment, and in this case dismissal, allegedly caused by the disclosures. The Employment Tribunal concluded that it did not have jurisdiction to consider the Claimant's complaint. That conclusion was held to have been in error by the EAT; and that decision was upheld by the Court of Session. At paragraph 19 of its Judgment the Court of Session said:

> **"… The principal purpose for which the 1998 Act was passed was, as its long title makes clear, to protect individuals who make certain disclosures of information in the public interest. The main protection conferred on such an individual is the protection against unfair dismissal provided by [section] 103A of the 1996 Act. An employee who, in terms of that section, is unfairly dismissed may apply under [section] 128 for interim relief, and under [section] 129 this may take the form of an order for the continuation of his contract of employment. Clearly, therefore, the point of time which has greatest significance for the purposes of the legislation is that at which the employer dismisses the employee. This is because it is the dismissal which triggers the employee's entitlement to invoke the statutory remedies conferred by the provisions of the 1996 Act inserted by the 1998 Act … The making of the disclosure requires to be considered at that point of time; and it is then that the criteria for treating it as a protected disclosure are applicable, on a proper construction of the relevant statutory provisions. While, therefore, an event which has taken place in the past may be relevant for the purpose of establishing that a dismissal has been unfair, the legislation is not in our opinion truly to be regarded as retrospective. What is affected by the legislation is not the original act of the employee in making the disclosure, but the act of the employer in dismissing the employee. …"**

25. I do not doubt that the general principle there set out applies to detriment said to have been caused by a protected disclosure other than dismissal; and I accept that, in considering time limits in a protected disclosure case, the Tribunal should consider the point of time at which the alleged dismissal or detriment is said to have occurred and not the point of time at which the disclosure or disclosures relied upon were made.

26. Mr Beever submitted that the Employment Judge should not be taken to have excluded the relevant paragraphs solely on the basis of time limits; but, as an experienced Judge, she must be taken to have been fully aware of the generality of the discretion which she was called upon to exercise in deciding whether to permit the Claimant to add new claims to the ET1; and she demonstrated that she was exercising or proposing to exercise a general discretion at paragraph 19 of the Decision in which, in the course of her self-directions, she said:

> **"… In the event that I considered new allegations do amount to a new claim, I have to consider whether I will allow the claimant to amend her claim and have regard to the question as to whether the claim is within time or out of time that are determined."**

And at paragraph 23:

> **"… I am required to consider whether the proposed amendments falls [sic] within the existing claims or constitutes an entirely new claim."**

27. He accepted that he had not referred the Employment Judge to **Miklaszewicz**, but he had submitted that she had a general discretion, which was not limited to considerations of time limits and had submitted that she should exercise her discretion against the Claimant, who had had the benefit of legal advice in the formation of the FI, which took the extent of the allegations well beyond those in the ET1, that the Claimant who had had one "bite of the cherry" when she put forward the FI should not be permitted to rely on new allegations put forward seven-and-a-half months later by a further and substantially developed "bite of the cherry".

Paragraph 5

28. With those general submissions in mind, I turn to consider the individual paragraphs. The Employment Judge considered paragraph 5 of the AP at paragraph 37 of her Decision. She said of it:

> **"37. Paragraph 5. The claimant asserts for the first time that she reported information to Mr McCormack, the elected staff governor serious matters of concern on 13 May 2009. The claimant has made no reference to that discussion in her ET1, at any of the case management discussions nor in the further information provided (page 59a-59f). The disclosure has not previously been referred to, it is not one of the original heads of claim. To the extent that the claimant suggests this is a new alleged protected qualifying disclosure the claimant has not previously asserted that that was a disclosure qualifying for protection in respect of which she has been caused to suffer detriment and such a complaint is out of time and there are no grounds upon which I consider it was not reasonably practicable for the claimant to make such an assertion before March 2012 and the claimant's complaint that she has been subject to victimisation or caused to suffer detriment because of that disclosure is one that is out of time. It goes beyond the pleaded case."**

If that paragraph stood alone, Miss Robertson's argument as to the effect of **Miklaszewicz** would win the day; it appears that the Employment Judge was excluding paragraph 5 on the basis that the disclosure to Mr McCormack was a new allegation without referring to the application of the time limits to the detriment said to have been caused by that newly alleged disclosure.

29. Similar reasoning appears at paragraph 62.1 of the Decision. There is no sign in those paragraphs of the exercising of a discretion to allow amendments which are sought to be made so as to introduce new matters out of time, either in terms of the primary time limit, or the statutorily permitted extension to that time limit.

30. However, in paragraphs 59 to 60 the Employment Judge specifically turned to the detriments allegedly flowing from disclosure to Mr McCormack; and there she undoubtedly did exercise a general discretion. She was critical of the Claimant's evidence that she had not seen the ET1 until July 2011 and that she had understood the ET1 to have been incomplete. She referred to the fact that the alleged disclosure to Mr McCormack, and therefore the detriments flowing from it, took place long before those issues were raised by the AP in March 2012; yet the Claimant had had the input of competent Counsel in 2011. She concluded, after reviewing the factual material, at paragraph 60 in these terms:

> **"I have considered the claimant's suggestion that she did not appreciate that the disclosures that she asserts were made to Mr McCormack was not one she appreciated to be a qualifying disclosure. Taking that view at face value, any complaint that the claimant suffered the detriments that she asserts she did contained in the original claim form were also as a result of a protected disclosure to Mr McCormack ought to have been presented as soon as was reasonably practicable after she came to that knowledge. I am mindful that after being informed by an NUT representative, that such a disclosure was one which he or she considered was qualifying the protection, the claimant had the benefit of legal advice and did not seek to make any amendments sooner than 6 March 2012. The claimant has confirmed that she had no compelling reasons which prevented her from presenting a complaint sooner than 6 March and in the circumstances any complaints in respect of detriments flowing from an alleged qualifying disclosure to Mr McCormack are not presented within time and are not accepted as amendments to the complaint in respect of being a qualifying disclosure in respect of alleged detriments. The claimant has not satisfied me it was not reasonably practicable to present the claim in time. The claimant was advised by her union when presenting her complaint, has had the benefit of counsel in the intervening period, and even if it was not**

reasonably practicable to present a complaint before an NUT representative expressing an opinion in November 2011 she did not present the amendment within such further period as was reasonable."

31. In my judgment the Employment Judge was plainly, in that paragraph, exercising a general discretion, not only in relation to the late allegation of disclosure to Mr McCormack. Although because **Miklaszewicz** was not cited to her, she may have made an error in paragraph 37, her decision was not essentially or solely founded on the lateness of the allegation of disclosure to Mr McCormack. She reached the same decision, applying her general discretion in relation to the detriments said to have flowed from that additional disclosure. That exercise of discretion has not been shown to have been perverse or outside the range of options permissibly open to her.

Paragraph 8

32. Paragraph 8 of the AP contains two allegations: the first is that the Claimant had reported to Mr Rogers what she had previously reported to Mr McCormack; the second is that that caused her to be victimised in the manner set out. There is nothing new in the first allegation; and that the Claimant was being deliberately ignored as a result appears in the ET1. The Employment Judge did not refer to this paragraph in her decision; I cannot find any reference to it in the Employment Judge's reasons and suspect - for she was meticulous in dealing with each contentious point in some detail - that it found its way into the list of paragraphs which were not permitted to proceed, at paragraph 4(1) of the formal judgment at the beginning of the decision, by accident. Putting that suspicion aside and looking at the decision in a more formal manner, the exclusion of that paragraph is not reasoned and cannot stand. In any event the allegations in it do not appear to me to go beyond a further description of what had already been pleaded in outline elsewhere.

Paragraph 10

33. In paragraph 10 of the AP, the Claimant set out her account of her meeting with Mr Smalling, to whom, according to the ET1, she had made her second disclosure on 12 July 2009; she alleged she had informed him of acts of harassment, discrimination and less favourable treatment towards Mr McCormack. She said that confidentiality had not been maintained and that as a result she was herself ignored and adversely treated by her colleagues. None of that was said to have fallen outside the ET1 or FI. What was new, as the Employment Judge said, at paragraph 38, was an allegation that Mr Smalling himself was terse and hostile and left the Claimant feeling victimised. At paragraph 62.2 the Judge declined to permit the Claimant to amend to make that new allegation on the basis that, to the extent that the allegation was of detriment caused by Mr Smalling, the Claimant had failed to explain why it had not been reasonably practicable to present that claim earlier. Miss Robertson submitted that the Judge had erred by deciding to exclude paragraph 10 of the AP on the basis of an absolute rule that an amendment should not be permitted if it was sought to be made outside the primary time limit and not within a reasonable time thereafter, and in failing to consider whether the act of Mr Smalling was part of a series of acts. I will return later to the second of those two points; the answer to the first is to be found, in my judgment, at paragraphs 44 and 45 of the decision, in which the Judge said:

> **"44. Subject to my findings above paragraphs 8, 9, and 11 of the Amended Particulars reflect in large part events set out in the essential facts contained in the ET1 with one significant exception. Paragraph 10 refers to the claimant having a meeting with George Smalling on 12 July 2009. The claimant has made no suggestion in her claim form nor in the further particulars provided on 11 July 2011 any suggestion that Mr Smalling's conduct towards the claimant was a detriment.**
>
> **45. I am mindful that the claim form was presented in November 2010 and some 16 months thereafter a suggestion is raised for the first time that Mr Smalling has behaved in a way that causes the claimant to suffer a detriment."**

34. In those paragraphs the Judge can be seen to have looked at the circumstances in the round and to have concluded that the new allegation was made too late. The references in her

judgment to the fact that the Claimant had had professional assistance in relation to the FI - e.g. at paragraphs 59 and 60 - should also be regarded as part of the Judge's decision on this issue; her reasons must be viewed as a whole. The principle in **Miklaszewicz**, upon which this category of the Claimant's criticisms of the Judge's decision is founded, does not have any bearing on this paragraph; the disclosure and Mr Smalling's adverse treatment of the Claimant are said to have occurred at the same time; and in any event, in my judgment, the Judge exercised her discretion in relation to paragraph 10 in a manner which was open to her.

Paragraph 25

35. Next in this category is paragraph 25, in which the Claimant asserts that she had submitted a complaint on 28 June 2010 to the chair of the governors that she had been singled out for demotion and reduction in pay in January of that year because she had made protected disclosures and because of her involvement in trade union activities; but, she asserted, the Chairman omitted to respond or grant redress promptly or in a reasonable time. This allegation was not in the ET1 or in the FI.

36. The Judge addressed this paragraph, together with paragraphs 23, 24 and 26, at paragraph 62.7 of her Decision. She said of all those paragraphs that the Claimant had not satisfied that her that it was not reasonably practicable to present the claims in those paragraphs in respect of detriment within time; and the proposed amendments were not allowed. Miss Robertson makes three points about this paragraph, namely: (1) the detriment alleged in paragraph 25 was already pleaded, (2) what was alleged here was a disclosure to which the principles in **Miklaszewicz** applied, and (3) the series of acts point. She went on to accept that the Claimant was not excluded from seeking to establish that nothing was done about her complaints; and if the complaint to the Chairman of the governors was being put as yet another

protected disclosure (which was far from clear) and, therefore, the **Miklaszewicz** principles did apply, the time limit applied to any detriment specifically said to arise from such disclosure; and the Judge was entitled to see this as another complaint of detriment made long after both the ET1 and the FI which could and should have been put forward earlier, as, when her Decision is read as a whole, she plainly did. It is to be noticed that the Judge, in the last sentence of paragraph 62.7, was considering the relationship between the time limits and the allegations of detriment and not the new allegation of disclosure.

Paragraph 34

37. Here the Claimant asserts that she submitted a complaint to the Respondent about the appeal procedure held on 24 September 2010, in particular about not being allowed to be accompanied by a colleague of her choice, and did not receive prompt redress. In her decision the Judge did not expressly address this paragraph, save in passing at paragraph 54. However, the same allegation appears at paragraph 21 of the FI and survived the PHR. Thus, the perhaps accidental inclusion, at paragraph 34 of the AP in the list of paragraphs in that document excluded by the Judge, can have no effect on the Claimant's claim; and I decline to spend more time on what appears to be a wholly academic issue, to which, incidentally, the **Miklaszewicz** principle would appear to have no part to play.

Category 1(b)

38. The ground permitted by Keith J to proceed to a Full Hearing in respects of paragraphs 11, 13, 15, 21, 24 and 33 of the AP was that the allegations in those paragraphs were not new but set out evidence to be adduced in support of the existing allegations.

Paragraph 11

39. In this paragraph of the AP, the Claimant asserts that Ms Steele of the Respondents had on 29 July 2009 (1) entered the Claimant's work area and told her that there had been complaints about her and that she had created an atmosphere in the office, and (2) she was required to remain behind after her colleagues had left at the end of the day and to write letters to students in her own time. The Judge said at paragraph 39 that the date of that event was 31 July and that the first allegation was included in the FI (at paragraph 5); but, in paragraph 40, the Judge said, accurately, that the second allegation was a wholly new allegation of detriment. Miss Robertson submits that that detriment fell within the general terms of the detriments described in the ET1; I have to say that I am far from sure that it did; but even if it did, the Claimant had been ordered to provide particulars, had done so in the FI and had not put this detriment forward in the FI. The Judge was, in my judgment, entitled to treat this not as merely an expression of evidence in support of other allegations but as a belated complaint of a specific detriment; and the ground of appeal which has to be considered under this category does not get the Claimant home.

Paragraph 13

40. In paragraph 13 of the AP, the Claimant claims to have been intimidated by the Respondents into not attending a trade union meeting on 9 November 2009. The issue of the Judge's decision as to the Claimant's case that she suffered detriment as a result of trade union activities will be addressed later, under Category 2. As to the Category 1(b) ground there was no reference to this new complaint in the ET1 or the FI. The Judge was entitled to treat this as a new allegation made out of time, as she did. She considered it at paragraph 42 of her Decision. I see no reason why she must have treated this as only evidence in support of other allegations. While the AP bears resemblance to a witness statement, it is described as "Amended

Particulars" intended "(i) get the issues into shape to progress to a hearing; and (ii) to amend/ add causes of action" and were put forward as compliant with the orders for particulars made earlier.

Paragraph 15

41. In this paragraph, the Claimant alleges that on 15 December 2009 Ms Feeney (temporary Deputy Head Teacher) made untruthful and disparaging remarks about the Claimant to Ms Higgins in order to discredit and stigmatise the Claimant because of her earlier disclosures and because of her trade union activities. Here too I put the trade union activities part of paragraph 15 aside for the moment; of greater significance is that the events set out in paragraph 15 can be seen to have been included in the FI at paragraph 8, albeit in different words. Thus, leaving aside the trade union activities issue, the failure of this paragraph in the AP to survive the PHR does not adversely affect the Claimant's case; and again I decline to become involved in an academic argument about this paragraph.

Paragraph 21

42. I do not need to say much about this paragraph in which the Claimant set out a complaint of detriment occurring on 11 February 2010. The Judge justifiably described the allegation as new; it was not merely a recital of evidence in support of another allegation or allegations (see paragraph 47 of the Decision).

Paragraph 24

43. This paragraph raised an incident on 18 May 2010 which does not appear in the ET1 or FI. The Judge said, at paragraph 48 of her Decision, that this was a new claim; she was justified in so doing. The last two sentences of that paragraph recite the Claimant's general

complaint about detriment caused by her making disclosures. The disappearance from the Claimant's case of two sentences as a result of the Employment Judge's Decision as to paragraph 24 can make no possible difference to what she can put forward evidentially in support of her surviving allegations or the way in which she can do so at trial. Putting aside those sentences, this paragraph was far from simply evidential; it raised new allegations.

Paragraph 33

44. Finally in this category paragraph 33 has to be considered. The Claimant there asserted that on 24 September 2010 after her appeal hearing she was told on returning to the building by a member of management in a terse manner "Be careful, be very careful what you're doing Teresa". Miss Robertson accepted that the only arguable point on this point was the series point (although I shall subsequently decide it was not); and I will for the present say no more about this paragraph.

Category 1(c)

The series issue

45. Miss Robertson's Skeleton Argument correctly listed paragraphs 14, 23, 26, 29 and 32 of the AP as having been permitted to proceed to a Full Hearing on the ground that, although they contained new allegations of detriment, the detriment formed part of a series of similar acts falling within section 48(3) of the **Employment Rights Act 1996**, with the effect that, provided that the last act in the series occurred less than three months before the presentation of the ET1, all would be in time.

46. Section 48(3) of the 1996 Act provides:

> **"An [employment tribunal] shall not consider a complaint under this section unless it is presented –**

> **(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure to act is part of a series of similar acts or failures, the last of them, or**
>
> **(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."**

47. As can be seen from my description of the arguments presented in relation to Categories 1(a) and (b), which I have addressed above, the series issue appeared to be raised on a wider basis than in relation to those paragraphs alone. Miss Robertson did not seek to argue that in some way the limited permission to argue this ground could be extended from the paragraphs to which that permission was confined in Keith J's Judgment; her Skeleton Argument is wholly devoted to the specific paragraphs set out above; and I intend to limit my consideration of this issue to those paragraphs.

48. The Judge set out sections 48(3) and (4) of the 1996 Act at paragraph 20 of her Decision, as part of her self-direction on law; however, thereafter, as Mr Beever accepted in argument, she did not make specific reference to the application of section 48(3)(a) to the allegations in the five paragraphs referred to above.

49. In **Arthur v London Eastern Railways Ltd** ([2007] ICR 193) the Claimant claimed that he had suffered detriment at the hands of his employer as a result of protected disclosures which he made to them and to the police about shortcomings in the employer's provision of protection against assault to train staff. He complained of a series of acts and failures by a number of different representatives of the employers over a substantial period of time. The employers denied the allegations against them and claimed that all but one were out of time. It was conceded that there were no grounds for extending the primary time limit; the issue was whether the acts or failures on which the Claimant sought to rely were part of a series of similar

acts or failure, the last of which had occurred less than three months before the presentation of the ET1; if they were, the primary time limit had not expired.

50. That issue was considered at a PHR, and the Employment Judge concluded that some of the complaints were not part of a series of similar acts or failures which had a "significant degree of linkage" between them. That approach was supported by the EAT; but the Court of Appeal took a different view. Mummery LJ, with whom on this issue Sedley LJ agreed, took into the area of protected disclosures the principle which he had applied to discrimination claims in **Commissioner of Metropolitan Police v Hendricks** ([2003] ICR 530), he considered that there needed to be no more than some relevant connection between the acts in the three-month period and those outside it. He said, at paragraphs 29 to 31 of his Judgment:

> **"29. Parliament considered it necessary to make exceptions to the general rule where an act (or failure) in the short 3 month period is not an isolated incident or a discrete act. Unlike a dismissal, which occurs at a specific moment of time, discrimination or other forms of detrimental treatment can spread over a period, sometimes a long period. A vulnerable employee may, for understandable reasons, put up with less favourable treatment or detriment for a long time before making a complaint to a tribunal. It is not always reasonable to expect an employee to take his employer to a tribunal at the first opportunity. So an act extending over a period may be treated as a single continuing act and the particular act occurring in the 3 month period may be treated as the last day on which the continuing act occurred. There are instances in the authorities on discrimination law of a continuing act in the form of the application over a period of a discriminatory rule, practice scheme or policy. Behind the appearance of isolated, discrete acts the reality may be a common or connecting factor, the continuing application of which to the employee subjects him to ongoing or repeated acts of discrimination or detriment. If, for example, an employer victimised an employee for making a protected disclosure by directing the pay office to deduct £10 from his weekly pay from then on, the employee's right to complain to the tribunal would not be limited to the deductions made from his pay in the 3 months preceding the presentation of his application. The instruction to deduct would extend over the period during which it was in force and the last deduction in the 3 months would be treated as the date of the act complained of.**
>
> **30. The provision in section 48(3) regarding complaint of an act which is part of a series of similar acts is also aimed at allowing employees to complain about acts (or failures) occurring outside the 3 month period. There must be an act (or failure) within the 3 month period, but the complaint is not confined to that act (or failure). The last act (or failure) within the 3 month may be treated as part of a series of similar acts (or failures) occurring outside the period. If it is, a complaint about the whole series of similar acts (or failures) will be treated as in time.**
>
> **31. The provision can therefore cover a case where, as here, the complainant alleges a number of acts of detriment, some inside the 3 month period and some outside it. The acts occurring in the 3 month period may not be isolated one-off acts, but connected to earlier acts or failures outside the period. It may not be possible to characterise it as a case of an act extending over a period within section 48(4) by reference, for example, to a connecting rule, practice, scheme or policy but there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them. Section 48(3) is designed to cover such a case. There must be some relevant connection between the acts in the**

3 month period and those outside it. The necessary connections were correctly identified by HHJ Reid as (a) being part of a 'series' and (b) being acts which are 'similar' to one another."

51. At paragraphs 33 to 35 of his judgment he considered whether the Employment Tribunal had erred in determining the time limit point without hearing evidence at a PHR. He said:

> **"33. The question is whether the tribunal erred in law in determining the important time limit point in the way that it did, solely on the basis of legal argument and without hearing any evidence or making any findings of fact. In my judgment, it did. The difficulty with the decisions of the tribunals below is that, in my view, it is not a particularly enlightening exercise to ask whether, as a matter of construction, "the motive" for the acts is a relevant link between acts to make them part of a series or to make them similar acts. Nor does it advance matters much to ask in the abstract what makes acts part of a series or what makes one act similar to another act.**
>
> **34. In my judgment, it is preferable to find the facts before attempting to apply the law. I do not think that this is a strike out situation in which assumptions have to be made as to the truth of the facts in order to decide whether there is a cause of action. It is assumed at this stage that the acts (and failures) alleged occurred and that the complainant may be able to establish a cause of action in respect of the acts within the 3 month period. The question is whether he can bring in pre-14 April 2004 acts as part of the claim.**
>
> **35. In order to determine whether the acts are part of a series some evidence is needed to determine what link, if any, there is between the acts in the 3 month period and the acts outside the 3 month period. We know that they are alleged to have been committed against Mr Arthur. That by itself would hardly make them part of a series or similar. It is necessary to look at all the circumstances surrounding the acts. Were they all committed by fellow employees? If not, what connection, if any, was there between the alleged perpetrators? Were their actions organised or concerted in some way? It would also be relevant to inquire why they did what is alleged. I do not find "motive" a helpful departure from the legislative language according to which the determining factor is whether the act was done "on the ground" that the employee had made a protected disclosure. Depending on the facts I would not rule out the possibility of a series of apparently disparate acts being shown to be part of a series or to be similar to one another in a relevant way by reason of them all being on the ground of a protected disclosure."**

Sedley and Lloyd LJJ both agreed with that part of Mummery LJ's judgment.

52. It has not been suggested that the issue whether the various acts or failures on which the Claimant relied or some of them could not be regarded as part of a series of similar acts or failures, or that there was no alleged act or failure within three months prior to the presentation of the ET1. The effect of the single status exercise upon the Claimant was said in the ET1 to have been notified to her on 27 September 2010, and the ET1 was presented on 25 November. The series of acts issue was, therefore, a live issue and no doubt that is why the Employment

Judge set out sections 48(3) and 48(4) in full at paragraphs 20 and 21 of the Decision. It may well be that **Arthur** was not cited; but the Claimant was, at least at the hearing on 10 April 2012, not represented; and Mr Beever did not rely upon the absence of such citation. However, the Judge does not appear to have addressed the issue, perhaps because of the complexity of the numerous issues raised by the Claimant in her successive documents and the Respondent's natural endeavours to have those issues resolved in their favour without or before a Full Hearing.

53. Mr Beever submitted that the fact that the Employment Judge did not expressly say that she had considered the issue - in relation to the paragraphs now being considered or generally - did not demonstrate an error of law. The Judge, he submitted, had approached the tasks set by the parties at the PHR in a careful and considered way; she set out the facts, in particular of the post-ET1 allegations, but also in respect of many of the other allegations in detail and must be taken to have considered all the allegations to which the series of acts or failures principles could apply in the same way; as Mummery LJ had said in **Hendricks** at paragraph 48, there must be some element of linkage for it to be considered that the relevant acts were part of the series of such acts (albeit that in **Hendricks**, the Court of Appeal was considering "an act extending over a period").

54. I have come to the conclusion that on this issue the Judge must be taken to have erred; the detailed and meticulous nature of her decision as a whole is such that, if the issue now being considered had been in her mind, she would surely have dealt with it expressly; but it is accepted that she did not; and I have found myself unable to infer from what she did say in the Decision as a whole that she considered this point and resolved it against the Claimant.

55. I have looked at each of the five paragraphs to which this ground of appeal applies; it is not, in my judgment, possible to conclude from them that the argument that each formed part of a series of similar acts must fail; and I cannot, or at least do not, infer from the fact that the Judge excluded those paragraphs on time grounds at paragraphs 42 to 53 of her Decision, that she must have done so having considered the series of acts issue.

56. I do not need to say anything about the argument that to exclude those paragraphs at PHR without the full evidence having been heard amounted to an error of law. How this litigation will proceed in the light of this judgment I cannot predict. I need only say that the judgment of the Court of Appeal in **Hendricks** and in **Arthur** put difficulties in the way of an employer who seeks victory on a series of acts issue at an interlocutory stage. There may be cases in which the facts are clear enough for a decision to be made at that stage; they are not likely to be frequently met; see the Judgment of Lloyd LJ in **Arthur** at paragraph 43.

Category III – post ET1 Allegations

57. Miss Robertson addressed Category III before Category II both in her Skeleton Argument and orally; Mr Beever followed suit orally. I will do the same.

58. It is to be noted that, at paragraph 34, the Judge permitted the Claimant to amend to include the allegations, set out in paragraphs 24 to 28 of the FI, of detriments said to have occurred between 1 February and 16 February 2011, on the basis that, because she had been off work from 16 February to 22 July and had presented these additional allegations on 22 July in the FI (the text at paragraph 34 says 2012, but that is clear a typographical error), the Claimant had presented these claims within a reasonable further period after the expiry of the primary

time limit. The Employment Judge was clearly not applying time limits in an excessively strict manner.

59. Paragraphs 38 to 46 of the AP presented, however, a different problem. Those paragraphs set out what the Claimant regarded as detriments which occurred on 1 March 2011, 24 March, 22 August, 3, 9 and 16 September, 11 and 16 October 2011, and finally 21 February 2012. The AP was put forward on 6 March 2012. All but the first two of those paragraphs were based on events which occurred well after the Claimant's return to work. At paragraph 65 of her Decision the Employment Judge said:

> **"Paragraphs 38 to 46 of the claimant's Amended Particulars she seeks to extend the complaints against the respondent. The particulars presented on 6 March 2012 and the matters complained of relate to the respondent's treatment of the claimant following her return to work on 22 August 2011. The complaints relate to matters arising from her return to work and a grievance raised on 11 October 2011 (paragraph 44). The claimant's sickness absence was an intervening event. I do not consider that the matters complained of by the claimant which relate to further disclosures and detriments allegedly flowing therefrom are part of a continuing course of conduct. The claimant at this hearing remains employed by the respondent and any complaints relating to return to work arrangements, grievances in that regard and later allegedly protected disclosures and detriments are matters for separate complaints. I do not consider it to be consistent with the overriding objective for such complaints to be heard with this complaint, subject to the amendments to what I have considered to be acceptable."**

60. Miss Robertson submitted that the Judge should have regarded these new allegations as part of the continuing course of conduct as had existed before she went off work, or as part of the same series of acts, and should have allowed these allegations to stand by way of amendment. The error, she argued, lay in the Judge's treating the sickness absence as an intervening event which prevented such continuity. She took me back to **Hendricks**, in which Mummery LJ, at paragraph 48, had said that a sickness absence of a year did not necessarily rule out the possibility of continuing discrimination, and to **Tait v Redcar and Cleveland Borough Council** (EAT 0096/08 Underhill J, Judgment 2 April 2008) and **Nageh v David Game College Ltd** (EAT 0112/11 HHJ Richardson, Judgment 22 July 2011) as support for her argument.

61. In **Tait**, the EAT held that the suspension of the Claimant for over a year was "an act extending over a period" within the meaning of section 48(3)(a) of the 1996 Act (although that did not avail the Claimant because he had not presented his claim timeously after the suspension had ended); but the present case does not concern the issue which was considered in **Tait**; the issue in the present case is not whether suspension is an act which continues from its imposition to its termination, but whether the further allegations were part of a continuing course or series of acts over a period.

62. In **Nageh**, the Employment Judge declined to allow the Claimant to proceed on the basis of a continuing act or an act extending over a period (without prejudice to her argument that she should be granted an extension of time in any event) where there had been no contact between the employee and the employer for a lengthy period. She concluded that the Claimant had no reasonable prospect of establishing a case under section 48(3) or (4). Having referred to **Hendricks** and **Arthur**, the EAT's Judgment concluded that the Employment Judge had erred because she had taken too narrow a view of the Claimant's case, which was based not only on the lack of contact between the parties but also on the acts which the employers were said to have carried out during the period in which there was no contact, including replacing her, removing her possessions, and expunging her from their list of staff. The EAT's decision was based on a misunderstanding on the part of the Employment Judge of the true nature of the Claimant's case and does not, in my judgment, even by way of analogy, assist the Claimant on any point of principle.

63. It is to a point of principle which I now turn. It must not be forgotten that the Employment Judge was making case management decisions on an application made long after the presentation of the ET1 to add new allegations to her claim. As long as she did not base her

decision on an error of law or did not reach a perverse conclusion - and Miss Robertson did not espouse perversity - it was open to her, in my judgment, in the light of the history, even at a PHR at which the Claimant had given evidence, without hearing full evidence on both sides to reach the conclusion, at least in relation to the events said to have taken place after the Claimant had returned to work, that the allegations were not part of a continuing act or a series of acts; she did not expressly say that they were not part of a series of acts; but Keith J did not give permission for that to be argued and she would undoubtedly, if she had expressed a view, have reached the same conclusion. She did say that the sickness absence was an intervening event; but she did not say that her conclusion was based solely on that; the post-return to work complaints related, or were said to relate, to a new grievance raised on 11 October 2011 and new and separate disclosures; see paragraphs 44 to 46 of AP; and the Judge was entitled to take that into account as she was entitled to take into account the overriding objective when deciding whether or not to exercise her discretion to permit or refuse amendment to include the post-return to work allegations in the present claim. Her decision not to do so was a conclusion based on the exercise of a broad discretion; for the most part I do not consider that the Judge erred in principle and my conclusion is that the attack on her decision on this part of the case does not succeed.

64. I have used the words "for the most part" in the preceding paragraph because there is a distinction between paragraphs 38 and 39 of the AP and 40 to 46 on the other, namely the former alleged detriments occurred in March 2011 shortly after the last of the new allegations in the FI which the Judge permitted to proceed and the latter start from a point five months later. However I can find no trace of any separate arguments being addressed to paragraphs 38 and 39 either in the Skeleton Argument or orally; and although the length of the sickness absence does not apply to those two paragraphs, they could and should have been put before the

Tribunal in the FI, which it should be remembered was put before the Tribunal in July 2011 in a document to which the Claimant's Counsel had contributed. The Judge was entitled to regard it as inconsistent with the overriding objective for the allegations in those two paragraphs to proceed by way of amendment when the Claimant should and could have put them before the Tribunal in July 2011 in compliance with the Tribunal's order for Particulars of her claim.

65. Accordingly this head of the Claimant's appeal does not succeed.

Category II – Trade Union Activities

66. In paragraph 8 of the FI, the Claimant asserted that, on 15 February 2009, Ms Feeney, a temporary Deputy Head Teacher, made untruthful and disparaging remarks about the Claimant to Mrs Higgins in order to undermine the validity of the disclosures which the Claimant had made. She added that Ms Feeney also sought to victimise her for trade union participation. There had been no reference in the ET1 to any claim that she had been subjected to detriment on grounds related to her membership of or activities on behalf of her trade union, in breach of her right not to be subjected to such detriment set out in section 146 of the **Trade Union and Labour Relations (Consolidation) Act 1992** . The section 146 allegation was made for the first time by paragraph 8 of the FI in a very limited manner. It played a very small part in the total of the 28 detriments set out in that document at paragraphs 2 to 29 under the heading "Detriments".

67. In the AP, detriment for trade union activities was first raised at paragraph 13. The Claimant there asserted that she did not go to a trade union meeting because of intimidation and subsequently supported a collective grievance about working practices at the school which constituted a trade union activity. The detriments which follow paragraph 13 in the AP were in

many cases expressly attributed to the Claimant's disclosures and/or her trade union activities; see paragraphs 14 to 19, 21, 23, 25 to 27, 29, 32 to 37, and 39 to 41. Of those paragraphs, 21, 23, 25, 26 and 32 were not permitted to proceed for other reasons; and the appeal in respect of them (none fall into Category 1(c)) has failed, but the Claimant clearly wishes to seek to assert at trial in respect of many remaining paragraphs that she was exposed to detriment for making protected disclosures and/or for her trade union activities.

68. Thus she was seeking, by the AP, to raise a wholly new course of action which related to a comprehensive set of allegations which had been raised not at all in the ET1 and was raised in the FI in what was a very minor way; she sought by the AP to raise that course of action in respect of multiple alleged detriments over a period of just short of two years, from November 2009 to September 2011.

69. The Judge disallowed all of the allegations of detriment for trade union activities; see paragraphs 2 and 4(2) of her formal Judgment, at the beginning of the Decision. As to paragraph 8 of the FI, she said at paragraph 31:

> **"Paragraph 8 of the further information page 59c is not detailed in the ET1, it is not unreasonable treatment that could be referred to within paragraph 6.2 of the ET1 and the further information at paragraph 8 goes beyond the pleaded case."**

And at paragraph 61 she said that paragraphs 1 to 23 of the FI could go forward:

> **"… <u>subject to one exception</u> namely at paragraph 8 of the alleged detriments to the extent that the paragraphs refer to "[CM] has also sought to victimise me for trade union participation.""**

70. As to AP, the Judge said, at paragraph 62.1 to 62.6:

> **"62.1. The claimant asserts at paragraph 5 of the Amended Particulars that she made a qualifying protected disclosure to Mr McCormack on 13 May 2009. For the reasons I have set out above I do not consider that the claimant has, in presenting the original complaint to the tribunal made an assertion that such a qualifying disclosure was made. To the extent that she seeks to amend her claim and to assert that detriments followed because she made that protected disclosure the amendment is not allowed.**

62.2. The claimant at paragraph 10 of the Amended Particulars makes a new allegation that the investigator was "terse and hostile and left feeling victimised for reporting the truth". To the extent that the allegation is made in respect of alleged detriment arising from the detrimental treatment caused by Mr Smalling at the paragraph 11 the complaint has not previously been included. The claimant has not provided an account that it was not reasonably practicable to present such a complaint earlier and to the extent the claims are brought in respect of detriment suffered by the claimant for having made a protected disclosure against of Mr Smalling's treatment of the claimant the amendment is not allowed.

62.3. To the extent that the claimant seeks to assert that Mr Smalling's treatment of her was an act of victimisation in respect of providing evidence in support of a colleague in regard to a complaint of harassment, discrimination, victimisation because of characteristics of sex I am mindful in regard to the guidance of section 33 of the Limitation Act and *British Coal Board v Keeble* and consider that Mr Smalling, having previously featured as an individual in respect of the treatment of the claimant was alleged to be detrimental or victimising, I consider that it is not just and equitable in these circumstances to allow an amendment to the complaint to that extent.

62.4. The claimant had asserted that at paragraph 11 she was caused to suffer a detriment and be required to remain behind and write and send letters to students in her own time. That the detriment had not previously been alleged and in any event it is a detriment that the claimant asserts he suffered on 29 or 31 July 2009. The claim is not contained in the claim form nor in the further information and such a complaint as the claimant has not satisfied me that it was not reasonably practicable for her to present a complaint within time.

62.5. To the extent that the claimant alleges that she has been forced to suffer detrimental treatment because of her trade union activities and membership the claimant has raised the allegations in her original claim form ET1 page 25. She has not raised the assertion in the further information submitted on 22 July 2011 and such claims are out of time. Having regard to the statutory provisions that apply in this case, the claimant has not satisfied me that it was not reasonably practicable to present a complaint within time and moreover to the extent that such complaints were presented, were it not reasonably practicable to present in time until an NUT representative had expressed an opinion that such treatment was contrary to the provisions of TUL(C)RA. The claimant has failed to satisfy me that having failed to present the complaint prior to 6 March 2012 she presented such complaints within such a further period as was reasonable.

62.6. Amendments to the particulars which seek to assert that detrimental treatment was in any way because of the claimant's involvement in the trade union meeting, activities or membership or a collective grievance the amendment is not allowed."

71. At the preliminary hearing of this appeal, Keith J allowed the Claimant to argue at a Full Hearing that she should have been permitted to make her alternative allegations of detriment because of trade union activities, leaving it to the Tribunal to decide whether they were attributable to the protected disclosures or to trade union activities (or indeed to both). He said that the Claimant should be permitted to allege that she only discovered, after the presentation of the ET1, that some of the detriments may have been attributable to her trade union activities. In reliance on that, Miss Robertson submitted that the Claimant should have been permitted to run at trial her alternative case in respect of all detriments upon which she was being allowed to proceed on the basis that those detriments were attributable to protected disclosures. If those

claims were being allowed to go forward, as being in time or otherwise, the addition of a new course of action was merely a re-labelling, as contemplated in **Selkent**, and a re-labelling which did not involve the rejection of the original label but involved the adoption of an alternative label.

72. Mr Beever submitted that the Tribunal's approach in paragraph 62.5 was wholly appropriate; whether or not the claims to have been exposed to detriment by reason of protected disclosures were in time - and the Judge had already dealt with that issue - the Employment Judge found, having considered the Claimant's explanation that she had not known that what had been done to her could be said to have been done for trade union activity reason, that the Claimant had failed to satisfy her that she had put forward her alternative case within such further period as was reasonable.

73. I see the strength of Miss Robertson's argument that proof or disproof of the detriments would involve the same evidence from the Claimant and any witnesses as to the facts of what occurred who supported her; and it would appear to be contrary to justice if the Claimant were to prove that she was exposed to detriments but the evidence pointed towards her trade union activities being the motive for those detriments rather than her protected disclosures if she were then to fail because she had not been permitted to run her alternative case. On the other hand the Respondents, to a substantial extent, denied that the Claimant had been exposed to any of the detriments alleged; see their response to the FI; and if the protected disclosures relied upon were to be proved and the detriments were also proved, at least to a substantial degree, it may be thought, in reality, that the Respondents would be in considerable difficulty in successfully escaping from the conclusion that the detriments or a substantial amount of them were

attributable to the protected disclosures. The chance of the Claimants falling between two stools would be, realistically, small.

74. In addition, some further evidence will be needed as to the Claimant's trade union activities and as to whether the Respondent's representatives, who are said to have acted detrimentally towards the Claimant, knew of those activities and had acted as they did because of them; and there can be no doubt that the raising of the trade union activities issue was well beyond the primary time limit and, the Judge found, beyond any reasonable extension of the primary time limit. There is nothing to show that the Judge was not aware that she had a discretion to permit an amendment to an ET1 which would permit a Claimant to introduce a new claim out of time; see the principle in **TGWU v Safeway Stores** (reference above); that discretion was a broad one; it was for the Judge to exercise it and not for an appellate Tribunal to seek to re-exercise it or to oversee that exercise, save on the limited grounds which I have previously set out. The Judge did not set out all of the arguments on both sides, some of which I have referred to; but there is no reason to believe that she did not consider them or that she approached this issue on the basis that out-of-time allegations could never be allowed to proceed by way of amendment. In my judgment she has not been shown to have exercised her discretion on a basis which contains an error of law or in circumstances which require intervention at the appellate level.

75. Accordingly this category of appeal also fails.

Conclusion

76. For the reasons I have set out above the appeal fails and is dismissed, save in relation to paragraph 8 of the Amended Particulars document, which I have addressed at paragraph 32

above under Category 1(a), and the paragraphs to which Category 1(c) applies, paragraphs 14, 23, 26, 29 and 32 of the Amended Particulars. As to those paragraphs only, the Claimant's appeal is allowed.

77. At the end of the argument before me there was discussion of the potential consequences of the decision which I might reach. There were, in reality, many possible outcomes; and the discussion did not reveal much beyond a plain but readily understandable reluctance on Miss Robertson's part to contemplate any further interlocutory hearings. In the case of the Category 1(c) paragraphs, whether they form part of a series of acts falling within section 48(3) of the 1996 Act has not been considered. In the case of paragraph 8 that too has, in my judgment, not been considered. I shall, therefore, remit those paragraphs to the Tribunal for the interlocutory issues relating to them to be reconsidered; but it may be that the parties will agree that further interlocutory hearings would be inconsistent with the overriding objective - or that the Tribunal will reach the same conclusion and that the best way forward is for any remaining issues relating to those paragraphs to be addressed as part of the trial which will embrace a very large number of allegations other than those in respect of which this appeal has been successful.