Appeal No. UKEAT/0050/17/DM

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 July 2017
Judgment handed down on 4 October 2017

**Before**

**HER HONOUR JUDGE EADY QC**

**(SITTING ALONE)**

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MINISTRY OF DEFENCE APPELLANT

MRS V DIXON RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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| For the Appellant | MR GEORGE ROWELL<br>(of Counsel)<br>Instructed by:<br>Government Legal Department<br>One Kemble Street<br>London<br>WC2B 4TS |
| For the Respondent | MR HENRY DIXON<br>(The Respondent's husband) |

**SUMMARY**

**UNFAIR DISMISSAL**

**UNFAIR DISMISSAL - Dismissal/ambiguous resignation**

**PRACTICE AND PROCEDURE**

**PRACTICE AND PROCEDURE - Application/claim**

**PRACTICE AND PROCEDURE - Amendment**

**PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke**

*Unfair dismissal - dismissal - fixed-term employee*

*Practice and procedure - claim - application to amend - whether raised below - appellate jurisdiction*

The Claimant, not legally trained and acting in person (assisted by her husband, also not legally trained), lodged a claim with the Employment Tribunal ("the ET") before the termination of her employment with the Respondent; that claim ("the first ET1") related to her status as a fixed-term worker. By the time of the initial case management Preliminary Hearing ("PH"), the Claimant had been dismissed and she therefore sought to apply to amend her claim to include a complaint of unfair dismissal - indicating her intention to make that application when completing the ET's pro forma case management document, which she sent to the Respondent's solicitors and to the ET. The Respondent's solicitor did not complete a separate pro forma document but provided a draft list of issues, which he stated included the matters raised by the Claimant. The unfair dismissal claim was included in the draft list. At the case management PH, the Claimant was not asked about her application to amend but the Respondent's solicitor confirmed that it understood that the claim included a complaint of unfair dismissal. Although asking for further particulars regarding another aspect of the claim, the Respondent did not seek further information about the unfair dismissal complaint. Subsequent to the case management PH, the Claimant sought to lodge a another ET1 ("the second ET1"), this time ticking the box

to show that she was claiming unfair dismissal; she confirmed, however, that this was simply the complaint that had already been referred to and the ET did not treat this as a new claim.

Subsequently, after the time limit for making a complaint of unfair dismissal had passed, the Respondent objected that the ET had no jurisdiction to hear that claim as the Claimant had not been dismissed when she lodged her first ET1 ("the prematurity argument"). It appeared that those advising the Respondent had only spotted this point at or around that stage. A further PH was therefore listed to consider the prematurity argument. At that PH, the ET accepted that the Claimant had never intended to include a claim of unfair dismissal in her first ET1 but, in any event, considered she could rely on an earlier letter sent to her by the Respondent as notice of dismissal and thus the ET would be afforded jurisdiction to hear the claim by virtue of section 111(3) **Employment Rights Act 1996** ("ERA"). In the alternative, the ET considered the procedural history meant it had not been reasonably practicable for the Claimant to present her complaint of unfair dismissal earlier and so time would be extended for her to do so at that stage.

The Respondent appealed. In resisting the appeal, the Claimant relied on the ET's reasoning and additional grounds, referring back to her intention when lodging the first ET1 and her earlier application to amend.

*Held*: dismissing the appeal on the alternative basis relied on by the Claimant.
It was correct that the ET had fallen into error in identifying the Respondent's letter as notice of dismissal: the Respondent had written to the Claimant about the forthcoming expiration of her fixed-term contract but that contract only terminated later, by effluxion of time and that was how the Claimant had been dismissed (not by notice) - *after* the lodgement of her first ET1. The ET's decision could not be upheld on this basis. Equally, although a point raised in

argument rather than the Notice of Appeal, the Respondent was correct to object to the alternative basis for the ET's decision - its purported extension of time in respect of a claim that had not yet been made. That also disclosed an error of law on the part of the ET.

Although the Respondent objected to the Claimant's alternative ground for resisting the appeal on the basis that it was not a point she had taken below, even if that was correct (which was unclear) given the procedural history it would be unjust not to permit her to rely on her earlier application to amend the first ET1. Moreover, it was apparent that the ET at the second PH had accepted that the Claimant had never intended to include a complaint of unfair dismissal in her first ET1 (even if the Respondent had mistakenly thought that she had) and the application to amend itself had been validly made and the ET would have had jurisdiction to consider it. Although the amendment (adequately particularised given that the Claimant was merely attaching a label to matters already raised) would introduce a cause of action that had arisen only after the first ET1 was lodged, that was not fatal: the ET would need to consider the application on normal **Selkent** principles (see **Selkent Bus Company Ltd v Moore** [1996] IRLR 661 EAT) (**Okugade v Shaw Trust** UKEAT/0172/05 and **Prakash v Wolverhampton City Council** UKEAT/0140/06 applied).

**HER HONOUR JUDGE EADY QC**

## Introduction

1. This appeal arises from the unusual procedural history of a claim relating to fixed-term contracts. It offers a salutary lesson in the need to pay attention to what an unrepresented party is trying to say, rather than making assumptions on their behalf. In my Judgment, I refer to the parties as the Claimant and Respondent, as below.

2. The Claimant has at all times acted in person, assisted by her husband (who is not legally qualified); the Respondent by solicitors from the Government Legal Department and Mr Rowell, of counsel. This is Respondent's appeal from a Judgment of the London Central Employment Tribunal on a Preliminary Hearing (Employment Judge Gay, sitting alone on 16 January 2017; "the ET"), sent out on 23 February 2017. The oral hearing of the appeal took place before me on 3 July 2017, although, at the Respondent's request, I permitted the parties to lodge further written submissions on the amendment point (see below), which explains why my Judgment is only now being handed down.

3. By its Judgment, the ET ruled as follows:

> **"1. The claim for unfair dismissal was not presented prematurely and the tribunal has jurisdiction. This claim continues to a hearing.**
>
> **2. In the alternative, if it were premature, it would not have been reasonably practicable for the claimant to present it in time and I would extend time so as to permit further presentation.**
>
> **3. The claim for a declaration of permanent status cannot succeed because the claimant was not a permanent employee at the time she made the internal request or presented the claim form. It is dismissed.**
>
> **4. Any claims other than the two mentioned above … are dismissed on withdrawal by the claimant."**

4. The Respondent appeals against the first two parts of that Judgment. The Claimant resists the appeal, relying on the reasoning of the ET and further grounds, in particular:

> **"1) … the Respondent points out that the claimant did not indicate at box 8 [of her ET1] that she was bringing an unfair dismissal claim. At that stage in August 2015, the claimant had not been dismissed so it would have been illogical to do so. However, at box 9 she did indicate that she was seeking compensation and/or reinstatement. Knowing that there was little practical chance of an ET hearing being carried out by the likely date of dismissal of 31st August, it was also logical to tick this box in anticipation that there was likely to have been a dismissal by the time an ET hearing considered the facts.**
>
> **2) … the Respondent points out that the Claimant filed a Case Management Agenda sought to bring a claim for unfair dismissal. Again, this is perfectly logical given that the dismissal had then occurred as the hearing regarding the FTA declaration had not taken place earlier. But in fact, the point about unfair dismissal was raised by the Respondent's solicitor and Mr Pearl EJ at the first preliminary hearing.**
>
> **…**
>
> **8) … the Respondent raises the matter of the second claim form. The Claimant believed that it was necessary to submit another ET1 on the same facts but with the effluxion of time having led to an actual dismissal. This was then not treated as a fresh claim by the ET on the advice of the Claimant on the advice of the ET brought about by the apparent advice and actions of the Respondent. In the circumstances, it was clearly not logical for the Claimant to pay the claim fee having being informed that the Respondent that they were not treating it as a new claim - and on the facts, it was not.**
>
> **…"**

## The Relevant Background and the ET's Decision and Reasoning

5. This appeal is concerned with the Claimant's underlying complaint that she was unfairly dismissed. The ET summarises the background to this claim at paragraph 3 of its Judgment:

> **"3. The case arises out of the termination of the claimant's employment with the respondent as a teacher at a school in Germany. She was employed from 1 September 2012 until 31 August 2016 on a series of fixed-term contracts. As Mr Rowell today properly conceded, on the last day of her employment she reached four years' continuous employment and the regulation 8 provisions applied. That is, the claimant became a permanent employee unless the respondent was justified on objective grounds in employing her on a fixed-term contract when it last renewed the contract. Once she learned that the respondent did not intend to treat her as a permanent employee the claimant took steps to maintain her position and this case is the result."**

6. The Claimant's original claim form ("the first ET1") was lodged on 1 August 2016. At that stage, the Claimant did not tick the box at Part 8 of the ET1 form claiming unfair dismissal but ticked that appearing under the separate sub-heading "*I am making another type of claim …*"; explaining this was for a "*Declaration of permanent status after a series of fixed-term contracts amounting to 4 years*". At box 8.2 - where a complainant is asked to provide details of the claim - the Claimant explained she was attaching her internal appeal letter, which "*summarises the issues*". That letter addressed issues broader than simply the status - fixed-

A term or otherwise - of the Claimant's contract of employment; it raised matters that might be read as going to the fairness of the termination and non-renewal of the contract, although it was not due to terminate until 31 August 2016 (after the presentation of the first ET1).

B

7. Prior to this, the Respondent had written to the Claimant on 11 March 2016, stating:

> **"I am writing to give you notice that your FTA contract with the Ministry of Defence is due to come to an end on 31.08.16.**
>
> **I will write to you again three months before the expiry date to invite you to an end of contract meeting."**

C

8. There was an "end of contract meeting" on 24 May 2016, after which the Claimant received a letter confirming her fixed-term appointment would end on 31 August 2016. Her appeal against that decision was rejected (after a hearing on 4 July) by letter of 13 July 2016.

D

9. Returning to the first ET1, while the Claimant had not ticked the box to say she was claiming unfair dismissal, at Part 9 of the form - dealing with remedy issues - she ticked all four boxes, two of which are stated to arise "*If claiming unfair dismissal …*".

E

F

10. In a statement lodged for this appeal (in response to a statement from the Respondent's solicitor), the Claimant's husband, Mr Dixon, explained the thinking behind the completion of the first ET1 as follows:

> **"2. I assisted my wife in completing the first ET1, whilst she was still employed by the MoD, requesting a declaration of status as a permanent employee. This was done so knowing, from the reading that we had done, that we could not logically make a premature claim for unfair dismissal before she was dismissed. We were, at that stage, still clinging to a small hope that the MoD would move my wife to permanent status as there was a suitable vacancy for her.**
>
> **3. On this first ET1 we were also asked to identify what remedies my wife was seeking. We were mindful that the chances of having the case for a declaration heard before the date at which my wife's contract ended … were very slim indeed. We therefore anticipated that by the time the case came to the tribunal, there was at least a chance that my wife would have been dismissed and that, at that stage, we would then be claiming unfair dismissal. For this reason, we ticked the boxes relating to unfair dismissal remedies, so to speak, 'in anticipation' of the circumstances of the case that it could become given the likely delay in the case being heard. This appeared to us at the time, and still does, to be an entirely logical and sensible step."**

G

H

11. The first ET1 was, in any event, treated by the ET administration solely as a claim for a declaration under regulation 9 **Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002** ("the Regulations"), and was listed for a case management Preliminary Hearing ("PH").

12. In the meantime, the Respondent had lodged its response to the first ET1; this was dated 13 October 2016, by which time the Claimant's contract of employment had come to an end. The particulars of the response dealt with matters more broadly than necessary to address simply the characterisation of the Claimant's contract and observed:

> **"12. The Respondent contends that the Claimant's claims are currently insufficiently clear, for example, no indication has been given at paragraph 8.1 of the ET1 as to the type of claim, the Claimant is making. Nor has she named any Comparators. She is therefore invited to consent to a direction that the parties endeavour to agree a concise list of issues to be determined at any final hearing of this action in keeping with the "overriding objective". Further, that if deemed appropriate, she is also ordered to serve an amended pleading better setting out her claims, which the Respondent should then be given the opportunity to respond to.**
>
> **13. In the premises, the Claimant's apparent claims:**
>
> > **i) That her fixed term employment was not made permanent on objective grounds**
> >
> > **ii) That her fixed term employment was not renewed**
> >
> > **iii) for a redundancy payment**
> >
> > **iv) for unfair dismissal**
> >
> > **v) And/or that she has been discriminated or less favourably treated by the Respondent or anyone else it is vicariously liable for on account of her fixed-term employment**
>
> **are denied. In the alternative, any less favourable treatment of the Claimant under the Regulations can be objectively justified by the Respondent."**

13. At that stage, the Respondent did not seek to argue that any complaint of unfair dismissal included within the Claimant's claim would have been presented prematurely (the Claimant's final fixed-term contract not having expired at the date she lodged her first ET1), albeit it did raise other points going to the ET's jurisdiction to determine the Claimant's claims.

14. In advance of the case management PH (listed for 17 October 2016), on 12 October (the day before the Respondent's ET3 was finalised), the Claimant completed the ET's pro forma "*Agenda for Case Management at Preliminary Hearing*". Under the heading "*2. The claim and response*", she stated she was bringing complaints of:

> **"2.1. … unfair dismissal - declaration of permanent employment."**

In the next box, in answer to the question - "*Is there any application to amend the claim or response? If yes, write out what you want it to say. Any amendment should be resolved at the ph, not later*" - the Claimant answered:

> **"2.2. … 'Unfair Dismissal' (originally I applied for a declaration of permanent employment, but have subsequently been dismissed)."**

Under the heading "*4. The issues*", the Claimant then set out the matters she considered the ET would need to determine, which included the question whether she had been unfairly dismissed. She then forwarded the form to the Respondent's solicitor (Mr Jezierski) and the ET.

15. On 14 October 2016, Mr Jezierski responded, saying he considered it might be of most assistance if he forwarded a proposed list of issues, which could then be discussed at the PH. He did not complete another version of the ET's pro forma document or respond to the document drafted by the Claimant, observing that doing so would not "*add any more to what you have stated in yours*" and the draft list of issues, which he attached to his email. The Respondent's proposed list of issues included the following questions:

> **"6. Was the Claimant fairly dismissed by the Respondent by reason of redundancy or some other substantial reason?**
>
> **7. If the Claimant was unfairly dismissed should:**
>
> **i) she be reinstated or re-engaged?**
>
> **ii) should there be a reduction in compensation on *Polkey*/just and equitable grounds?"**

Whilst the Respondent's proposed list of issues raised jurisdictional questions relating to the place of the Claimant's employment and her length of service (relevant to her claim for a declaration), it still took no point as to the prematurity of any unfair dismissal claim so as to give rise to a question whether the ET had jurisdiction to determine such a complaint.

16. On 17 October 2016, the case management PH took place before the ET (Employment Judge Pearl sitting alone). The Claimant appeared in person, assisted by her husband; the Respondent was represented by Mr Jezierski. During the course of the hearing there was an attempt to properly identify the claims being pursued, expressly assisted by reference to the Respondent's list of issues, which were recorded as including a claim of unfair dismissal (Employment Judge Pearl's notes from that hearing state "*Udl [unfair dismissal] not disputed [section] 98(4)*").

17. At the subsequent PH, Employment Judge Gay accepted the Claimant had not intended to include a claim for unfair dismissal in the first ET1 (see paragraph 32); she explored how this claim came to be identified, finding as follows:

> **"30. In terms of how the unfair dismissal claim was apparently identified by the respondent and Judge Pearl at the first preliminary hearing, Mr Rowell (who was not then present) relied upon the fact that the claimant had ticked boxes seeking an unfair dismissal remedy and that the content of the internal appeal document that she had annexed as the details of her claim was sufficient to make a claim for unfair dismissal. So she did not need to amend to do so. …**
>
> **…**
>
> **32. … It was the respondent and then, at the preliminary hearing, Judge Pearl who identified an unfair dismissal claim, the judge apparently taking his lead from the respondent's solicitor.**
>
> **33. Thereafter, the claimant, throughout a litigant in person, legitimately understood from the respondent and Judge Pearl that a timely unfair dismissal claim had been made. …"**

18. As was apparent from the Claimant's completion of the ET's pro forma case management questionnaire, her understanding had in fact been that she needed to apply to amend the first ET1 to add the unfair dismissal claim that she then wished to pursue (having by

then been dismissed). As Employment Judge Gay found (see above and paragraph 37.2), it was only after the PH before Employment Judge Pearl that the Claimant was caused to understand (given what was said by the Respondent and duly re-stated and recorded by the Employment Judge) that she was to be treated as having included a valid claim of unfair dismissal in the first ET1. Although certain jurisdictional issues had been flagged up by the Respondent, nothing had been said about this unfair dismissal claim having been presented prematurely.

19. Pursuant to Employment Judge Pearl's directions, on 1 November 2016 the Claimant provided better particulars of her claim. Then, on 20 November, she emailed the ET directly with the subject heading "*Further claims*", attaching another ET claim form ("the second ET1"), observing:

> **"Please find attached an additional further ET1 and letter setting out the claims subsequent to [the first ET1]"**

20. Mr Dixon has again explained the thinking behind the second ET1, as follows:

> **"7. The judgement and subsequent orders from Mr Pearl EJ required us to clarify our claims in relation to discrimination of my wife as against other (already) permanent employees which we did.**
>
> **8. Mr Jezierski provided a template in which to complete some of the information required. In this template there was a column entitled "Raised in ET1? If so where?". I was conscious that we had not specifically mentioned unfair dismissal in our [first] ET1 for the reasons set out in paras. 2 and 3 above so my wife and I agreed to submit another ET1 in order to ensure that everything in our claims was indeed contained within an ET1.**
>
> **9. As a layperson, we were unclear about whether this constituted a completely new claim or was an extension or development of the existing claim. My sense at the time was that it was the latter, for two reasons:**
>
> > **a. We had submitted the original ET1 without claiming unfair dismissal in the certainty that one cannot claim for something that had not yet happened (and in order to give the MoD the opportunity not to dismiss my wife) and in the near certainty that the case would not be heard before the date at which there was a chance my wife would be dismissed.**
> >
> > **b. More importantly at the hearing before Mr Pearl EJ it had been decided as far as we were concerned there was a potential claim for 'ordinary' unfair dismissal as discussed and agreed between himself and Mr Jezierski."**

21. In her second ET1, the Claimant ticked the box to show she was claiming unfair dismissal, gave the date on which her employment had ended (which had been left blank on the first ET1) and provided brief particulars of her complaint, saying that the claim followed on from her previous request for a declaration that she was a permanent employee, but otherwise the details were as she had set out in her letter of 1 November 2016.

22. The second ET1 included no new ACAS Early Conciliation ("EC") number and the Claimant did not pay a lodgement fee. She had, however, written to the ET querying whether she needed to pay two fees, "*despite the second being related to the first*", or just the original invoice (relating to the first ET1). She received no response but the ET administration referred the second ET1 to Employment Judge Pearl who directed that the Claimant be asked to clarify her position:

> **"Are you intending to lodge a new claim (for which there is a fee) or are these further particulars of your original claim? It seems to the Employment Judge that the Respondent has not treated this as a fresh claim. It has not been processed by the Tribunal staff as a new claim. Could you clarify please?"**

23. On 29 November 2016, the Claimant responded:

> **"… I can confirm that this is not a new claim but I was anxious to ensure that everything relevant was submitted with an ET1, given that the original submission was only for a declaration of permanent status. A number of issues have arisen subsequently since that claim; most notably that I have been made redundant."**

24. The ET then communicated to the Respondent that there was no new claim.

25. On 15 December 2016, the Respondent applied for the Claimant's claims to be struck out or made subject to deposit orders, raising - for the first time - the point that the unfair dismissal claim had been presented prematurely, so the ET did not have jurisdiction to decide it; the Respondent making the point that the Claimant's dismissal had arisen from (and upon) the expiry of her fixed-term contract for the purposes of section 97(1)(c) **Employment Rights Act**

**1996** ("ERA"). This question was then listed for determination at the PH before Employment Judge Gay on 16 January 2017, to which I now turn.

26. On this issue, Employment Judge Gay identified the first question as being whether the Claimant's case fell within section 111(3) **ERA**, which provides as follows:

> **"(3) Where a dismissal is with notice, an employment tribunal shall consider a complaint under this section if it is presented after the notice is given but before the effective date of termination."**

27. In order to answer that question, the ET noted it was necessary to determine whether the Claimant was dismissed under section 95(1)(a) or (b) **ERA**, which provide:

> **"(1) For the purposes of this Part an employee is dismissed by his employer if … -**
>
> **(a) the contract under which he is employed is terminated by the employer (whether with or without notice),**
>
> **(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, …"**

28. That, in turn, required the ET to determine whether the letters sent to the Claimant stating that her employment would end on 31 August 2016 actually gave notice of termination or merely recorded and reminded her of the date of the expiry of her fixed-term contract and thus the impending end of her employment.

29. In this regard, the ET noted that yet further complexity arose from the particular circumstances of this case, as follows:

> **"16. The situation is complicated by the fact that on 31 August 2016 the claimant completed four years' continuous employment on successive fixed term contracts. If regulation 8(2) Fixed Term Employee (Prevention of Less Favourable Treatment) Regulations 2002 has the effect that the claimant became a permanent employee on 31 August 2016, having completed four years' continuous employment, her employment will not have ended by reason of the expiry of a limited term. Whether or not the claimant became a permanent employee on achieving four years' service depends, in this case, upon whether the respondent can establish objective justification for not treating the claimant as a permanent employee. The respondent has always asserted that it has such objective justification, but for an employee who has four years' continuous employment and brings a claim in time, the matter falls to the tribunal objectively to determine. So it appears that there is some circularity to matters here. If the claimant's employment relationship was not in law automatically terminated by the expiry of the fixed-term appointment, because she had four years' employment and became a**

> **permanent employee, was the employment terminated by one of the letters which the respondent sent? On the other hand, if the respondent can make out objective justification, the claimant did not become a permanent employee and the appointment ended automatically on 31 August 2016 with the expiry of the then fixed term contract. …"**

30. As objective justification was a matter going to the heart of the case, the ET left that question open - it was not a matter to be determined as a preliminary issue in the case. Thus allowing that the Claimant may, or may not, have become a permanent employee by operation of law as at 31 August 2016, the ET considered the two options. If she had, she would not have been covered by section 95(1)(b) **ERA**: her dismissal would not have arisen from the expiration of a limited-time contract; the earlier notification given by the Respondent on 11 March 2016 was apt to constitute notice in those circumstances and the Claimant could thus rely on section 111(3) as allowing that the lodgement of her first ET1, before the expiration of that notice, was to be treated as valid. If, on the other hand, the Claimant had *not* become a permanent employee it appears (at least implicitly) that the ET accepted that section 111(3) would not be engaged and the first ET1 would have been lodged prematurely.

31. That was not, however, an end of the matter. At an earlier stage, the ET had observed:

> **"34. It would not seem proper for a respondent to lure a claimant into making a premature claim (that is, by identifying and accepting one as having been made when that had not been the claimant's intention) and to keep silent on the issue of prematurity until after the last possible date for presentation of a timely claim had elapsed. Even if initially innocently done, that would not seem to me to be consistent with the fair, just conduct of litigation or with the obligation that rests upon respondents who are legally represented to assist the tribunal in levelling the playing field (ensuring that the parties are on an equal footing) in accordance with the overriding objective … All this is set out not in order to determine the exercise of a flexible discretion, which I do not have since this is not an Equality Act complaint, but to assist in the determination of what actually happened and what was reasonably practicable. … although I agree with Mr Rowell that employment judges are generally very careful with claimants to establish what claims they are making, it was specifically recorded by Judge Pearl that he did so *with the assistance of Mr Jezierski for the respondent,* rather than that he did so with the claimant. Of course, it could not be any part of an employment tribunal's role to encourage or permit a claimant to agree that she had brought an unfair dismissal claim which the tribunal had no jurisdiction to accept, because it was premature. The parties who were supposed to know the law, the Judge and the respondent's solicitor, either did not consider it or were silent on it. The claimant appears perhaps to have gone along with what the Judge recorded, but remained unsure and therefore not only wrote with further particulars relevant to the declaration claim, as ordered, but took further action, drawing attention to relevant subsequent events, completing and submitting a further claim form."**

32. The ET then turned to the status of the second ET1, finding as follows:

> **"35. Thus, because she understood that she had to make her claim clear, the claimant wrote on 20 November, sending directly to the tribunal (as is still permitted) a second claim form. That clearly made the claim for unfair dismissal. It was in time. It could probably, bearing in mind *Compass Group UK and Ireland Ltd v Morgan* UKEAT/0060/16 … have used the existing ACAS early conciliation certificate number, because *Compass* is authority that a certificate can cover matters which happen later if based on the same facts. The second case clearly was based on the same facts. The absence of a fee could have been addressed in accordance with the rules. So too, if not within *Compass*, could the absence of an early conciliation certificate number. … Instead, the claimant was given cause to understand that there was no need for her to present a further claim form. The tribunal was not treating it as such: she was told that the respondent specifically was not treating it as such. Having done her best, as a lay person, the claimant responded to the effect that it was not a new claim. In one sense it clearly was not, because it had been identified by the Judge and the respondent's solicitor earlier. Had the claimant identified it and paid the fee at that time, this claim would have been in time."**

33. Noting that the Respondent had only raised the "prematurity issue" after the primary time limit for a claim of unfair dismissal had expired - although it was not suggested this was done deliberately - the ET further observed:

> **"36. … If neither the tribunal nor the respondent recognised that the claim was not within time, … [then] it was not reasonably practicable for the claimant to know that the first claim was not in time. As to the second claim, in circumstances where it was only after the expiry of time that anybody made an attack on the propriety of the first claim, I would accept that it was not reasonably practicable for the claimant, over the apparent position of the tribunal and the position asserted by the Judge on behalf of the respondent … to persist with its presentation at that time."**

34. Returning to this point in its conclusions, the ET held that if the first ET1 had not validly presented a claim of unfair dismissal, it would find that it had not been reasonably practicable for the Claimant to have presented that claim in time:

> **"37.2 … I consider that in circumstances in which this litigant-in-person did not initially consider that she was making an unfair dismissal claim; was caused to understand that she had done so by the respondent and the tribunal judge accepting it had been made; and was only alerted to the fact that it might have been made prematurely after the expiry of the primary limitation period, it would not be [reasonably] practicable for her to go against what had been suggested by the respondent and the employment judge. This conclusion is strengthened by the correspondence she received from the Judge when she sought to provide a timely claim for unfair dismissal in November 2016. Had she been separately legally represented the matter may have been different, but she was not and has had [only her] own advice and that of her husband. That has not been unreasonable. …"**

Employment Judge Gay concluded:

> **"… I would extend time, if proceeding under this separate and alternative finding, so that the claimant could still present a claim for unfair dismissal on receipt of this decision."**

## The Appeal and the Parties' Submissions

*The Respondent's Case*

35. By its appeal in this matter, the Respondent seeks to challenge (1) the ET's conclusion that the first ET1 was not filed prematurely and (2) what is stated to be its alternative finding that the second ET1 amounted to a valid free-standing claim and it had not been reasonably practicable for the Claimant to present it in time. It further resists any alternative ground relied on by the Claimant in her response to the appeal.

*The First ET1 and the Prematurity Argument*

36. In pursuing its challenge to the ET's decision on prematurity, the Respondent contends that, as a matter of law, there is a clear distinction between (i) reminding an employee that her contract will end by effluxion of time and (ii) exercising a power to bring the contract to an end by notice (see section 95(1) **ERA** and **Throsby v Imperial College** [1977] IRLR 337 EAT and **London Underground Ltd v Fitzgerald** [1997] ICR 271 EAT). The letter of 11 March 2016 could not have been intended to terminate a permanent employment relationship was not yet in existence: even if the Claimant became a permanent employee on 31 August 2016 (which was denied), that letter could not be construed as the instrument by which that employment relationship was terminated. Furthermore, notice of dismissal must be unambiguous and unconditional; the letter of 11 March was neither. As the evidence made clear (in particular, the Respondent's internal guidance), such a letter would be issued where the manager was considering ending a fixed-term appointment; in this case, the parties remained in discussions as to the Claimant's future employment relationship until the Respondent notified her of its final decision not to renew the contract after the "end of contract" meeting of 24 May 2016. In any event, the ET's decision on this point was predicated on the Claimant's contract of employment having become permanent on 31 August 2016 by virtue of regulation 8 of the

**Regulations**. The Respondent denied that regulation 8 had this effect - the use of a fixed-term contract had been objectively justified for the purposes of regulation 8(2)(b) - and whilst the Claimant had previously sought a declaration in relation to this issue that claim was dismissed by the ET: it was perverse and/or procedurally irregular for the ET to dismiss this claim and yet nonetheless proceed on the assumption that the issue had been determined in the Claimant's favour for other purposes. In the yet further alternative, even if, contrary to the foregoing, the Claimant's fixed-term contract became permanent on 31 August 2016, the contract would not have been terminated by effluxion of time on 31 August; the Respondent's failure to pay the Claimant or otherwise have treated her as employee would have constituted a repudiatory breach and the Claimant would had have accepted the repudiation by failing to attend for work - this would have been a constructive dismissal and the letter of 11 March would still not have constituted notice of dismissal.

*The Second ET1*

37. As for the ET's finding in respect of the second ET1, at the time she sent this to the ET, the Claimant had intended it only to provide further particulars of her existing claim and not to constitute a free-standing claim in its own right - as she confirmed in answer to the ET's letter of 28 November 2016. Her intention in that regard was further evidenced by the fact that she did not pay an issue fee despite the ET notifying her that such a fee would be required if the second ET1 was to be treated as a fresh claim. In any event, the ET had no jurisdiction to entertain the second ET1 as it was not accompanied by a fee or fee remission application as required by Rule 11 **ET Rules**. Further or in the alternative, it had no jurisdiction to treat the second ET1 as a free-standing claim as it did not contain a valid EC certificate number and the EC provisions did not permit a Claimant to use the same certificate number to bring multiple successive claims. In the yet further alternative, the finding that it was not reasonably

practicable for the Claimant to lodge a second ET1 in time was perverse: the Claimant had plainly intended the first ET1 to raise a complaint of unfair dismissal and if she was capable of filing that claim on 1 August, it was reasonably practicable for her to do so by 30 November 2016. Separately, the ET's decision in relation to the second ET1 was made in a procedurally unfair manner: the Respondent had been given no notice that the Claimant wished to treat the second ET1 as a free-standing claim and to seek an extension of time; that suggestion was only made by Employment Judge Gay during the course of the hearing. In the alternative, to the extent the ET purported to allow the Claimant an open-ended extension of time to present a further claim, that impermissibly anticipated a claim that had not been made (and had still not been made by the Claimant) and failed to state the period within which any extension of time would last.

38. In respect of the final point set out above, I observe that (having returned to the Notice of Appeal for the purposes of the writing of this Judgment) it appears this was not an issue raised in the grounds of appeal; it first appears in the Respondent's skeleton argument.

*The Alternative Ground*

39. As for the alternative basis on which the Claimant sought to resist the appeal - in reliance upon her earlier suggestion that she was seeking to amend the first ET1 at the case management PH - the Respondent contended this too must fail. First, because it was not a point taken by the Claimant below and, in the absence of exceptional circumstances, it was not open to her to raise it on the appeal (see, for example, **Kumchyk v Derby County Council** [1978] ICR 1116 EAT, **Jones v Governing Body of Burdett Coutts School** [1998] IRLR 521 CA and **Glennie v Independent Magazines (UK) Ltd** [1999] IRLR 719 CA). In any event, the Claimant could not rely on her completion of the ET's pro forma case management document

as amounting to an amendment application; alternatively, any such application was invalid as it did not comply with the **ET Rules**. In the further alternative, any such amendment would have been a nullity because a complaint of unfair dismissal had already been presented (prematurely) by way of the first ET1. And, finally, the ET had no jurisdiction to permit presentation of a complaint of unfair dismissal by means of an application to amend the first ET1 (and to the extent that cases such as **Chaudhary v Royal College of Surgeons** [2003] ICR 1510 CA (obiter); **Prakash v Wolverhampton City Council** UKEAT/0140/06, **Okugade v Shaw Trust** UKEAT/0172/05 and **Science Warehouse Ltd v Mills** [2016] ICR 252 EAT suggested otherwise, they were wrongly decided and the obiter observations in **McKay v London Probation Board** [2005] All ER (D) 125 EAT should be preferred).

*The Claimant's Case*

*Generally and the Alternative Ground*

40. In resisting the appeal, the Claimant relied on the reasons provided by the ET but also set out further grounds, in particular observing that, when lodging her first ET1, she had not stated she was bringing an unfair dismissal claim because she "*had not been dismissed so it would have been illogical …*" (paragraph 1, Respondent's answer); she sought to introduce that claim when setting out the agenda for the case management PH, by way of her proposed amendment; that was logical because she had by then been dismissed and yet there had still been no hearing of her claim under the **Regulations** (it made sense to seek to add the unfair dismissal claim to the claim already before the ET). At the case management PH before Employment Judge Pearl, the Claimant had been required to say very little but had, however, understood it had been accepted she was raising a claim of unfair dismissal, perhaps because of the first ET1, perhaps because of the case management agenda. The second ET1 was lodged to ensure that claim was fully particularised. The Claimant received no response to her enquiry

about the fee but also received nothing to say the second ET1 had not been accepted and so had not understood there was any problem.

*The First ET1 and the Prematurity Argument*

41. The ET's finding that the 11 March letter constituted notice should be upheld: the Claimant was contractually entitled to notice; she had had a series of four one-year contracts and should have received a letter six months before the expiration of each but that had never happened before. The on-doing discussions were simply the result of the Claimant's grievance and grievance appeal. As for the dismissal of the declaration claim under the **Regulations**, the Claimant had asked if she could not raise that point as part of her unfair dismissal claim (if a permanent employee as from 31 August, she would have been entitled to a different process under the Respondent's procedures), albeit there was little time to properly record this part of the discussion - the ET ran out of time (having adjourned for over an hour for the Respondent to investigate cases relevant to its argument), as reflected in the case management Orders at paragraph 6.2 ("*This was done quickly, at the end of a long day, and Mr Dixon was responding ad hoc to my enquiry. If that has led to the exclusion of any matters already pleaded and still intended to be relied upon, that is my error and the claimant should be permitted to rely on those matters*.").

*The Second ET1*

42. As for the second ET1, the Claimant thought it was necessary to submit another ET1 on the same facts but this was then not treated as a fresh claim by the ET on the advice of the Claimant, who was herself acting on the advice of the ET itself, apparently informed by the Respondent. In those circumstances, it would not have been logical to pay the claim fee having been informed that the ET and the Respondent were not treating it as a new claim (which, on

A the facts, it was not). Employment Judge Gay had found it was the Respondent's action at the first PH that had caused confusion and thus it would be fair to extend any deadline for a fresh claim to be made. As a lay person, the Claimant had tried to do her best, acting logically and in accordance with the **ET Rules** and common sense; she was still not aware of having done anything incorrectly.

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**Discussion and Conclusions**

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*The Claimant's Alternative Ground - A New Point?*

43. The history of this matter causes me concern. The problem is identified in the Claimant's answer to the appeal: she had never intended to include a claim of unfair dismissal when she lodged the first ET1 (she "*had not been dismissed so it would have been illogical to do so*"), but sought to add that claim by way of amendment at the case management PH (that being "*perfectly logical given that the dismissal had then occurred*"). Thus, a non-legally trained litigant in person, had correctly understood she could not claim unfair dismissal prematurely but, once she had been dismissed, had thought it sensible (a lawyer might say proportionate and in accordance with the overriding objective) to apply to amend her existing ET claim to add a complaint of unfair dismissal, not least as the existing claim already included particulars of how she said she had been treated unfairly. In her alternative grounds for resisting the Respondent's appeal, the Claimant then cross-references the pro forma document provided by the ET, which she had completed (and sent to the ET and the Respondent) prior to the case management PH, and which included her application to amend the first ET1, to include a complaint of unfair dismissal, to be considered (if contested) at that hearing, still within the time limit for making such a claim. At that stage, it is hard to see that the Claimant was doing anything other than adopting an entirely correct approach; a lawyer, adopting a belt and braces approach to the litigation, might also have advised her to lodge a second ET1 (in case the ET

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did not allow her application to amend) but equally might have suggested she first see whether her amendment application would be allowed: after all, she would still be within time to lodge a second ET1 if necessary.

44. An approach thus founded upon an entirely correct understanding of the law (the inability to lodge an unfair dismissal claim before having been dismissed) and procedure (the ET's ability to permit an amendment to add a complaint relating to an event post-dating the original claim - see further below) was, however, then derailed by the response of the Respondent, adopted by the ET. Failing to identify the "prematurity" point, the Respondent instead made clear it accepted that the extant ET proceedings included a claim of unfair dismissal; there was, therefore, no need for any engagement with the Claimant's application to amend, the ET could safely proceed on the basis that a claim of unfair dismissal was before it (albeit the Respondent was taking some other jurisdictional points that might need resolution). Had the Claimant been seeking to interpret the Respondent's position using legal language, she might have sought clarification as to whether this was the acceptance of her application to amend or a mistaken reading of the first ET1. As a non-lawyer, acting in person, it is, however, unsurprising that she accepted what she was told by those who had the advantage of legal training and experience in ET proceedings (both the Respondent's lawyers and the Employment Judge) and thus assumed it was indeed accepted that her claim of unfair dismissal would fall to be determined in the ET proceedings. For final certainty, however, the Claimant also lodged the second ET1 (still within time), making sure she ticked the box claiming unfair dismissal but otherwise adding nothing to what she had already said. She did not see this as a fresh claim but was trying to make sure she complied with any procedural technicality. In the event, neither the ET nor the Respondent saw this as anything other than an unnecessary reiteration of the claim that had already been made.

45. It was only after time expired for the lodgement of an unfair dismissal claim that the Respondent took the "prematurity" point in respect of the first ET1. Taking at face value the Respondent's explanation that it had previously overlooked this point, this alteration in its position gave rise to a procedural unfairness: there had been no formal adjudication upon the Claimant's application to amend the first ET1 because the Respondent had simply accepted there was a claim of unfair dismissal before the ET and now - when any new claim would be met with the objection that it was lodged out of time - it was saying the ET had no jurisdiction to determine that claim because it was premature. At that stage, having regard to the overriding objective and seeking to do justice between the parties, the appropriate course would have been for the ET to have returned to the Claimant the application to amend - an application that had apparently been overlooked because of the previous stance adopted by the Respondent. The Respondent having raised a new jurisdictional issue on prematurity, however, it was this point that was set down for determination by the ET at the second PH.

46. The Respondent objects to the Claimant raising the amendment point in her response to its appeal in part because it says she failed to raise it before Employment Judge Gay. That objection would fail to take account of any obligation on the Respondent to assist in furthering the overriding objective (see Rule 2 of Schedule 1, **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**; "the ET Rules") but I am not, in any event, entirely convinced that the point had not been raised; certainly Employment Judge Gay referred to the question of an amendment (and how this was unnecessary given the Respondent's position at the case management PH) at paragraph 30 of her Judgment.

47. If, however, it is correct that the Claimant did not herself raise the amendment point before Employment Judge Gay (and the Respondent did not draw the ET's attention to this

particular part of the procedural history), I remind myself of the approach I should adopt when considering whether to permit a new point to be taken on appeal, helpfully summarised by HHJ McMullen QC in **Secretary of State for Health v Rance** [2007] IRLR 665 EAT, at paragraph 50:

> **"(1) There is a discretion to allow a new point of law to be argued in the EAT. It is tightly regulated by authorities; *Jones* paragraph 20.**
>
> **(2) The discretion covers new points and the reopening of conceded points; ibid.**
>
> **(3) The discretion is exercised only in exceptional circumstances; ibid.**
>
> **(4) It would be even more exceptional to exercise the discretion where fresh issues of fact would have to be investigated; ibid.**
>
> **(5) Where the new point relates to jurisdiction, this is not a trump card requiring the point to be taken; *Barber v Thames Television plc* [1991] IRLR 236 EAT Knox J and members at paragraph 38; approved in *Jones*. It remains discretionary.**
>
> **(6) The discretion may be exercised in any of the following circumstances which are given as examples:**
>
> > **(a) It would be unjust to allow the other party to get away with some deception or unfair conduct which meant that the point was not taken below: *Kumchyk v Derby City Council* [1978] ICR 1116, EAT Arnold J and members at 1123.**
> >
> > **(b) The point can be taken if the EAT is in possession of all the material necessary to dispose of the matter fairly without recourse to a further hearing. *Wilson v Liverpool Corporation* [1971] 1 WLR 302, 307, per Widgery LJ.**
> >
> > **(c) The new point enables the EAT plainly to say from existing material that the employment tribunal judgment was a nullity, for that is a consideration of overwhelming strength; *House v Emerson Electric Industrial Controls* [1980] ICR 795 at 800, EAT Talbot J and members, followed and applied in *Barber* at paragraph 38. In such a case it is the EAT's duty to put right the law on the facts available to the EAT; *Glennie* paragraph 12 citing *House*.**
> >
> > **(d) The EAT can see a glaring injustice in refusing to allow an unrepresented party to rely on evidence which could have been adduced at the employment tribunal; *Glennie* paragraph 15.**
> >
> > **(e) The EAT can see an obvious knock-out point; *Glennie*, paragraph 16.**
> >
> > **(f) The issue is a discrete one of pure law requiring no further factual enquiry; *Glennie* paragraph 17 per Laws LJ.**
> >
> > **(g) It is of particular public importance for a legal point to be decided provided no further factual investigation and no further evaluation by the specialist tribunal is required; Laws LJ in *Leicestershire* paragraph 21.**
>
> **(7) The discretion is not to be exercised where by way of example:**
>
> > **(a) What is relied upon is a chance of establishing lack of jurisdiction by calling fresh evidence; *Barber* paragraph 20 as interpreted in *Glennie* paragraph 15.**
> >
> > **(b) The issue arises as a result of lack of skill by a represented party, for that is not a sufficient reason; *Jones* paragraph 20.**
> >
> > **(c) The point was not taken below as a result of a tactical decision by a representative or a party; *Kumchyk* at p.1123, approved in *Glennie* at paragraph 15.**

**(d) All the material is before the EAT but what is required is an evaluation and an assessment of this material and application of the law to it by the specialist first instance tribunal; *Leicestershire* paragraph 21.**

**(e) A represented party has fought and lost a jurisdictional issue and now seeks a new hearing; *Glennie* paragraph 15. That applies whether the jurisdictional issue is the same as that originally canvassed (normal retiring age as in *Barber*) or is a different way of establishing jurisdiction from that originally canvassed (associated employers and transfer of undertakings as in *Russell v Elmdon Freight Terminal Ltd* [1989] ICR 629 EAT Knox J and members). See the analysis in *Glennie* at paragraphs 13 and 14 of these two cases.**

**(f) What is relied upon is the high value of the case; *Leicestershire* paragraph 21."**

48. In my judgment, the circumstances of this matter can indeed properly be described as exceptional: here, a litigant-in-person adopted an approach that is hard to fault and went wrong (to the extent that she did) only in accepting what the Respondent's lawyers and the ET said was the case, i.e. that her first ET1 included a claim of unfair dismissal that she had never intended. I bear in mind that it is not the role of the Judge to step in to advise or direct a litigant-in-person in the conduct of their case or to take points on their behalf (see the guidance provided in cases such as **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531 CA; **Muschett v HM Prison Service** [2010] IRLR 451 CA and **Drysdale v Department of Transport** [2014] IRLR 892 CA) but equally it would be wrong to ignore what such a party has said in the litigation, in particular if that arises because the Judge is following the agenda of the represented party, which has failed to properly characterise the case of its self-represented, not legally trained, opponent. In many instances, lawyers involved in such cases will be seeking to assist both the court and their opponent by, for example, setting out a list of issues that is intended to capture what is being contested in the proceedings. What makes this case exceptional is that the Respondent's lawyers thereby *mis*characterised the Claimant's case, apparently overlooking her application to amend, and then sought to take a jurisdictional point against the case they had themselves identified, failing (I assume inadvertently) to draw the ET's attention to the earlier proposed amendment, which might have avoided the jurisdictional problem the Respondent had belatedly raised.

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49. I would, further, not consider that any failure on the Claimant's part to identify this point before Employment Judge Gay arose from a tactical decision on her part or simply through her lack of skill: she had been told in clear terms (by the Respondent's lawyers and the ET itself) that her first ET1 included a complaint of unfair dismissal; the issue was not whether it had been raised, but whether it was premature. On the other hand, I do consider that if the Claimant is not permitted to refer back to her amendment application in these circumstances, there is a real risk that an injustice will be done. Whilst it may not have sought to mislead the ET or the Claimant, I cannot see that it would be other than unfair if, as a result of the positions adopted by the (legally represented) Respondent, the entirely proper course adopted by a litigant-in-person had been obstructed with the effect of derailing her claim. Moreover, I can see no prejudice in allowing the point to be taken at this stage; there is nothing further needed in terms of evidence and both parties have been able to fully address me on the issue raised in their respective submissions (which have, at the Respondent's request, included further written representations on the point).

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50. Having taken the view that it is open to the Claimant to rely on the amendment point in resisting this appeal, I turn now to the matters raised by the Respondent's grounds of appeal; I return to the amendment question below.

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*The First ET1 and the Prematurity Argument*

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51. As the ET found (see paragraph 32), when lodging her first ET1 the Claimant had not intended to include a claim of unfair dismissal as this would be premature; as the Respondent belatedly submitted, that was a correct understanding of the legal position. As the ET appears to have accepted: if the Claimant was employed under a fixed-term contract and the dismissal arose from the expiration of that contract without renewal, she had no right to bring a claim of

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unfair dismissal, that could only arise once she had been dismissed (section 111(1) **ERA** and see **Throsby v Imperial College** [1977] IRLR 337 EAT). Although section 111(3) allows that an ET can consider a claim lodged after notice of dismissal has been given but before that dismissal has taken effect (so, before the effective date of termination, as defined by section 97(1) **ERA**), if the dismissal merely arose from the termination of a fixed-term contract by the effluxion of time, no notice would have been required and section 111(3) would have no application (and see **London Underground Ltd v Fitzgerald** [1997] ICR 271 EAT).

52. Recognising this difficulty, the ET considered the alternative possibility: the Claimant in fact became a permanent employee on 31 August 2016 and thus the dismissal of which she was complaining was not brought about by mere effluxion of time but had to be ended by the Respondent. This would still not help the Claimant - the first ET1 having been presented before 31 August 2016 in any event - unless she could rely on notice of that dismissal having been given by the Respondent prior to 1 August. The ET, with little explanation, apparently considered that the Claimant could rely on the letter of 11 March 2016 for these purposes but I am unable to agree. That letter - given consistently with the Respondent's understanding that it was dealing with an employee working under a fixed-term contract - gave "notice" only of the anticipated end date of the Claimant's fixed-term contract; it was not notice of a dismissal (indeed, any decision on the possible renewal of that contract was taken only after the "end of contract" meeting that subsequently took place in May) and certainly not of a dismissal of a permanent employee (not least as, on any case, the Claimant could not have been a permanent employee until 31 August).

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53. On the "notice" issue, I therefore agree with the Respondent and would not uphold the ET's decision on this basis. In those circumstances, it is unnecessary for me to address the Respondent's other arguments on "prematurity".

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*The Second ET1*

54. The difficulty with the Respondent's second point of challenge is that it attacks a finding the ET never made: the ET did not find that the second ET1 had validly presented a

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free-standing claim; it simply left it open to the Claimant to present a claim for unfair dismissal "*on receipt of this decision*" (see paragraph 37.2), holding it would not have been reasonably practicable for her to have presented such a claim in time. That the ET was not making its

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ruling in respect of the second ET1 is apparent from its observation that the Claimant had understandably not pursued that claim (notwithstanding it would still have been in time) after "*the correspondence she received from the Judge when she sought to provide a timely claim for unfair dismissal in November 2016*" (again, see paragraph 37.2).

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55. The Respondent's better point - raised in argument rather than in the Notice of Appeal - relates to the ET's error in purporting to extend time (on an almost open-ended basis) in respect

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of a claim that was not before it.

56. Again I agree: an ET's (limited) discretion to extend time under section 111(2)(b) **ERA**

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arises in respect of a complaint that has been presented (albeit, outside the three month time limit provided by section 111(2)(a)). On the ET's alternative reasoning in this case, no such claim had been presented.

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57. If I were to adopt an overly technical approach to the grounds of appeal, a difficulty arises here because this is a point that I am unable to find in the Notice of Appeal. Not to take account of what I would agree was an obvious error on the part of the ET would, however, seem to give rise to an injustice in these circumstances. On this basis, I further allow the appeal against the ET's alternative finding. Having done so, I now return to the Claimant's alternative ground and the application to amend.

*The Alternative Ground - the Merits*

58. Having accepted that the Claimant was able to refer back to her earlier application to amend (in support of her contention that the ET's decision should be upheld on alternative grounds), I turn to the substantive objections made by the Respondent in this regard.

59. It is, first, the Respondent's contention that the Claimant never in fact made an application to amend: allowing that, if read in isolation, the statement at box 2.2 of the case management agenda form could be viewed as making such an application, it objects that other circumstances - specifically, the preceding entry on the form and the parties' communications before and at the first PH - suggest otherwise.

60. To the extent that the Respondent relies on the preceding box 2.1 of the case management pro forma, I do not see that this assists: given that the Claimant was seeking to amend to bring a claim of unfair dismissal, the preceding entry is ambiguous as to whether it is referring to that which was already claimed or that which she was seeking to claim. Further, whilst the Respondent did not specifically address the amendment point in its response to the Claimant, it is hard to know precisely what it had in mind at the time as it chose not to complete the case management pro forma but to instead submit a draft list of issues, which it suggested

included all the matters raised by the Claimant; as that list included a claim of unfair dismissal - the claim she wanted to add by way of amendment - that was correct. The Respondent certainly did not respond by stating that it did not understand the reference to an application to amend, still less that it would object to any attempt to amend the claim or that such an amendment was unnecessary because the unfair dismissal claim had already been made. And whilst it is also right to observe that the Claimant did not then object to the Respondent's list of issues, it is equally hard to see why she should, given it included the claim of unfair dismissal that she wanted to make. As for the discussion before Employment Judge Pearl, the Claimant's account (accepted by Employment Judge Gay) was that she and her husband were "*not required to make contributions to the legal discussions regarding what kind of case it was*". And, to the extent that assistance is provided by Employment Judge Pearl's notes from the case management PH, it seems that early on the unfair dismissal claim was discussed but was "*not disputed*". I appreciate that this would have to be read subject to the Respondent having raised certain jurisdictional issues (other than prematurity) but that does not detract from the point that it had apparently accepted that the Claimant was pursuing a claim of unfair dismissal - something she understood she had raised by way of proposed amendment. If the Claimant understood that there was no issue about her pursuit of an unfair dismissal claim under section 98 **ERA** in these circumstances, it is hard to see what more she was meant to do or add.

61. In the alternative, the Respondent objects that the application to amend would have been invalid as it failed to comply with Rule 30 of the **ET Rules**, which provides:

> **"30. Application for case management orders**
>
> **(1) An application by a party for a particular case management order may be made either at a hearing or presented in writing to the Tribunal.**
>
> **(2) Where a party applies in writing, they shall notify the other parties that any objections to the application should be sent to the Tribunal as soon as possible.**
>
> **(3) The Tribunal may deal with such an application in writing or order that it be dealt with at a preliminary or final hearing."**

62. Although the Claimant had plainly sent her written notification of her intended application to amend to the Respondent, it is right to say she had not added the statement required by Rule 30(2). That omission was, however, venial: the Claimant was making her application on the ET's case management pro forma (a document which forms an Appendix to the **Employment Tribunals (England and Wales) Presidential Guidance on Case Management**), which she was sending to the Respondent in advance of the PH so it could respond to what she was seeking. The Respondent could not complain that it had not been sent the application or that it was in any way unsure of its ability to object to the ET. In any event, the Claimant's intention was that the application would be dealt with at the case management PH but - from her point of view - that proved unnecessary given the Respondent's acceptance that she could (subject to unrelated jurisdictional issues) pursue a claim of unfair dismissal.

63. In the further alternative, the Respondent objects that the application failed to set out the text of the amendment. In this case, however, the Claimant was relying on the content of the document she had already attached to her first ET1 - that was the substance of her unfair dismissal claim. For its part, the Respondent (on its primary case) had apparently already understood this document to stand as a complaint of unfair dismissal and, although it had sought a direction for further particulars of what it understood to be a detriment claim by the Claimant, it was apparently content to proceed without any further such clarification in respect of an unfair dismissal claim. In the circumstances (which can be contrasted with the cases relied on by the Respondent, **Chief Constable of Essex Police v Kovacevic** UKEAT/0126/13 and **Ladbrookes Racing v Traynor** UKEATS/0067/06), I do not accept that the substance of the proposed amendment was unclear or that it can reasonably be said that no application to amend had been made.

64. In any event, the Respondent contends that any such amendment would have been a nullity because a complaint of unfair dismissal had already been presented (prematurely) by way of the first ET1. That, however, is a submission that simply repeats the Respondent's assumption; it is not something that the ET accepted when the point was explored at the second PH (it was not a matter that was explored before Employment Judge Pearl as that hearing simply proceeded on the basis of the Respondent's concession that a claim of unfair dismissal had been raised in the proceedings) and it was not an assumption initially made by the ET administration. The most that can be said is that there was a degree of ambiguity on the face of the ET1, which would have been clarified had anyone sought to examine the issue with the Claimant (only done at the second PH).

65. Finally, the Respondent contends that the ET had no jurisdiction to permit presentation of a complaint of unfair dismissal by means of an application to amend the first ET1 given that the cause of action concerned had not existed at the point in time when the ET1 had been lodged. Whilst accepting that an ET has a broad discretion to permit amendments - a discretion that is to be exercised judicially, in accordance with the guidance laid down in **Selkent Bus Company Ltd v Moore** [1996] IRLR 661 EAT - the Respondent contends that does not extend to permitting an amendment to introduce a cause of action arising after the date of the original claim. In making this submission, the Respondent seeks to rely on the obiter observation of the EAT in **McKay v London Probation Board** [2005] All ER (D) 125 (May), that in such a case "*Any sensible solicitor … would have caused to be issued a protective Originating Application*".

66. **McKay** was, however, a case involving a premature claim, not an amendment, and I am unable to read it as addressing the point in issue: whilst the observation relied on might well

offer a sensible alternative course of action to a Claimant (to lodge a second ET1), I cannot see that the EAT was there ruling on the question of an application to amend. This was, however, the issue that concerned the EAT in **Okugade v Shaw Trust** UKEAT/0172/05 and **Prakash v Wolverhampton City Council** UKEAT/0140/06 (both cited in **Science Warehouse Ltd v Mills** [2016] ICR 252 EAT). Those cases drew support from the earlier Court of Appeal (obiter) observation in **Chaudhary v Royal College of Surgeons** [2003] ICR 1510, but also considered that permitting an amendment in these circumstances might be the most proportionate way forward and, as such, was a permissible option for the ET if it considered appropriate. I agree. Even if I did not consider myself bound by the earlier decisions of the EAT in **Okugade** and **Prakash** (and I note that the EAT in **Prakash** was taken to the decision in **McKay**) I would take the view that the decision whether to permit an amendment to add a cause of acting post-dating the original claim should be left to the ET, to be determined on **Selkent** principles. This, further, seems to me to be consistent with the approach adopted by the EAT in **Compass Group UK and Ireland Ltd v Morgan** UKEAT/0060/16 (albeit that related to an EC certificate). It also answers the Respondent's concern that the introduction of a new claim by amendment will mean that claim will be back-dated to the date on which the original ET1 was presented and thus a Respondent may be prevented from raising what would otherwise be a valid limitation defence: following the guidance laid down in **Selkent**, this would be one of the issues that an ET would need to take into account (and see per HHJ Peter Clark at paragraph 14 **Rawson v Doncaster NHS Primary Care Trust** UKEAT/0022/08).

67. For all those reasons, I consider that the Claimant is correct: whilst I cannot uphold the ET's decision on the basis of the grounds it relied on, that does not mean the end of her unfair dismissal claim, which still falls to be considered on the basis of her application to amend. The question that then arises is whether that is an application I can determine at this stage.

68. Both parties have made full submissions to me on the amendment question and I am unable to see that any ET would be better placed to make this determination. I also find it hard to see that there could be any other outcome than for the amendment to be permitted: (1) it was made well within the relevant time limit, so no limitation defence arises and there could have been no prejudice to the Respondent in finding out it faced such a claim at the time it was raised; (2) whilst the Respondent thereby loses the right to complain of prematurity, I am again unable to see any prejudice, given that it would have been open to the Claimant to simply present another ET1 if her amendment application had been refused at the time it was made; and (3) the amendment sought is simply to attach the label of unfair dismissal to the detailed particulars of complaint already lodged - given that the Respondent had been prepared to accept that the Claimant had already raised a claim of unfair dismissal (and had not sought further particulars in respect of that claim) - I am unable to see any real world objection to amendment being made on the basis that it was insufficiently clear.

69. All that said, I am mindful that it is not for the EAT to substitute its decision for that of the ET on matters of assessment on this nature (see **Jafri v Lincoln College** [2015] QB 781 CA and **Kuznetsov v Royal Bank of Scotland** [2017] EWCA Civ 43). The parties have not agreed to my determining the amendment application and (assuming it remains in dispute) I therefore consider the correct course is to remit this question to the ET, which - if it allows the application - might then usefully give new case management directions for the future conduct of the proceedings. Although my preliminary view would be that this matter need not be remitted to the same ET, I have not received representations on this point and therefore - to the extent that either party considers it should be - allow that further written submissions might be lodged, within seven days of the handing down of this Judgment, on this aspect of the Order. Any other applications should be made in accordance with the EAT's **Practice Direction 2013**.