Appeal No. UKEAT/0119/17/DM
UKEATPA/0335/17/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 15 June 2017

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR G MECHKAROV APPELLANT

CITIBANK, NA RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING (UKEAT/0119/17/DM)
&
RULE 3(10) APPLICATION - APPELLANT ONLY (UKEATPA/0335/17/DM)

APPEARANCES

For the Appellant in UKEAT/0119/17/DM only	MR GEORGI MECHKAROV (The Appellant in Person)
For the Respondent in UKEAT/0119/17/DM only	MR SIMON FORSHAW (of Counsel) Instructed by: Messrs CMS Cameron McKenna LLP 78 Cannon Street London EC4N 6AF
For the Appellant in UKEATPA/0335/17/DM only	MR NATHANIEL CAIDEN (of Counsel) Appearing under the Employment Law Appeal Advice Scheme

SUMMARY

PRACTICE AND PROCEDURE - Application/claim

PRACTICE AND PROCEDURE - Amendment

The Employment Judge did not err in law in holding that the Claimant had not made a claim of public interest disclosure detriment in his ET1 claim form. The Employment Judge did not err in law in refusing permission to amend in order to introduce such a claim.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. This hearing is concerned with two decisions by Employment Judge Foxwell sitting at the East London hearing centre of the Employment Tribunal. They concern a claim brought by Mr Georgi Mechkarov ("the Claimant") against Citibank NA ("the Respondent"). The first decision was made at a Preliminary Hearing on 13 March 2017 and is recorded in a Preliminary Hearing Summary dated 21 March 2017. This was a decision that the Claimant's ET1 claim form did not contain a claim of public interest disclosure detriment, popularly called "whistleblowing" detriment. The second decision was made following a Preliminary Hearing on 26 April 2017 and is recorded with Written Reasons in an Order dated 16 May 2017. This was a decision to refuse the Claimant permission to amend the claim form to introduce such a claim.

The Factual Background

2. The Claimant is Bulgarian by nationality and origin. He was employed by the Respondent with effect from 6 August 2006, first in Bulgaria and then from July 2010 in London. Following a period of absence from work his employment terminated with effect from 30 September 2013. He had signed a settlement agreement. On 19 January 2015, some 15 months after the termination of his employment, the Claimant brought proceedings in the Employment Tribunal. These proceedings were recognised as including complaints of unfair dismissal, breach of contract, wages and unlawful race discrimination, including direct race discrimination, victimisation and harassment, both pre-termination and post-termination. I shall refer to the claim form in more depth later in this Judgment.

3. At a Preliminary Hearing in July 2015 Employment Judge Warren determined: (1) that the settlement agreement was not vitiated by duress and therefore effectively compromised the complaints of unfair dismissal, breach of contract and wages; (2) that the pre-termination discrimination claims were out of time; and (3) that the post-termination discrimination claims had no reasonable prospect of success and should be struck out. The Claimant appealed against these rulings. As regards (3), his appeal was successful. By a Judgment given in May 2016 Mitting J held that the post-termination claims ought not to have been struck out. He remitted the Respondent's application to strike them out for rehearing by a differently constituted Employment Tribunal. As regards (1) and (2), however, the Claimant's appeal was unsuccessful. His avenues of appeal were exhausted when the Supreme Court refused permission to appeal on 2 February 2017.

4. Although the Respondent's application to strike out had been remitted for rehearing, the Respondent confirmed to the Employment Tribunal that it did not wish to pursue the matter further. The Preliminary Hearing listed before Employment Judge Foxwell on 13 March became a case management hearing dedicated to defining the issues and giving further directions. It was in the context of this exercise that Employment Judge Foxwell determined that the ET1 claim did not include a claim of public interest disclosure detriment.

Statutory Provisions

5. This is a convenient moment to refer to the statutory provisions most material to the appeal. I shall begin with the statutory provisions concerned with what are generally known as public interest disclosures (see Parts IVA and V of the **Employment Rights Act 1996** ("ERA")). A worker has the right not to be subjected to detriment by any act or any deliberate failure to act by his employer or his employer's workers done on the ground that he has made a

protected disclosure: see section 47B. He may present a complaint to an Employment Tribunal that he has been subjected to such a detriment: see section 48. A disclosure qualifies for protection if it falls within section 43B. It is sufficient to set out section 43B(1):

> **"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following -**
>
> **(a) that a criminal offence has been committed, is being committed or is likely to be committed,**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
>
> **(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,**
>
> **(d) that the health or safety of any individual has been, is being or is likely to be endangered,**
>
> **(e) that the environment has been, is being or is likely to be damaged, or**
>
> **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."**

6. A qualifying disclosure will be protected if it falls within one of a number of categories set out within Part IVA. The relevant category here is disclosure to the employer under section 43C.

7. Section 43L(3) provides that any reference to disclosure of information has effect where the person receiving the information is already aware of it, as a reference to bringing the information to his attention.

8. The **Equality Act 2010** ("EqA") contains provisions relating to victimisation. An employer is prohibited from victimising an employee by subjecting the employee to detriment (see section 39 **EqA**). The definition of victimisation is found in section 27, which, so far as material, provides as follows:

> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because -**
>
> **(a) B does a protected act, or**

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act -

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."

The ET1 Claim Form

9. The Claimant had prepared a detailed ET1 claim form. The form contains a heading for type and details of claim. The Claimant ticked "unfairly dismissed", "race" discrimination, "arrears of pay", "other payments" and the box that said, "I am making another type of claim which the Employment Tribunal can deal with". He completed that box by saying that he had attached a detailed description of the claims as an attachment.

10. Attached to the ET1 claim form was such a document, entitled "ET1 - Section 8.1: Type of Claims". This contained headings for breach of contract, race discrimination and personal injury, and under the heading "Race Discrimination" there was a section entitled "Victimization". This section read:

"My manager at Citi subjecting me to continued duress by threatening me not to take any action, including legal action, over a period of time, most recently in a phone call on the 28th of November, 2014 and in a face-to-face meeting on the 1st of December, 2014. Furthermore, by asking my colleagues not to communicate with me in December, 2014 and January, 2015, Citibank, N.A. is influencing potential witnesses, providing a direct impediment to building my case."

11. The only reference to complaints in this document appears under the heading of "Personal Injury". It is said that the Respondent repeatedly disregarded and failed to consider his complaints and grievances as to the effect of the work environment on his health. There is

reference to similar internal complaints by other members of the team, and it is said that on that basis his personal, medical and health problems were a "foreseeable event" that the Respondent failed to take adequate action to prevent.

12. Also attached to the ET1 claim form was a document entitled "ET1 - Section 8.2: Details of Claims". This was a résumé in chronological order of the matters about which the Claimant was complaining. It ran to some 18 pages. It made reference to complaints by employees concerning aggressive and stressful management techniques in the period 2010-2012 (see section 4); it made no reference there to any complaint by the Claimant.

13. Section 7, however, made particular reference to a meeting between the Claimant and Mr Gelis on 7 March 2013. The Claimant said:

> **"In the beginning of March, I had serious doubts if I could continue working in this atmosphere, which I found extremely harmful and very unhealthy. I asked for a meeting with Mathieu Gelis through his Personal Assistant, which we had at 11 am on the 7th of March, 2013. I told him that I 'surrender' and that I could not take all of this anymore and that something needed to change as I found the atmosphere in the team completely unbearable and deeply offensive. I asked him to assist me in finding a less-stressful job within the bank and his precise words were: 'You need to deal with your s**t first!'.**
>
> **I tried to explain to him that my issues were not personal but professional, that I had been given an enormous amount of work, which was disproportionate to the work of any other member of the team, and this was now continuing for more than one year. Apart from a very confusing and unproductive meeting with a Citi Occupational Health Officer who asked me self-contradicting questions, there was no further action by Mathieu or anyone else in Citi."**

14. Later, having dealt with his illness and the termination of his employment, the Claimant made reference in section 13 of the document to "Launching Internal Investigation (November, 2014 - Present)". He said that on 26 November he sent a formal message "asking for assistance". He said he was contacted by a senior investigator and gave him a thorough account of the events surrounding his departure. He complained that he did not receive any response to this investigation. Furthermore, he said:

> **"As of the date of this claim, I have not had any further communication from Citi and I feel that I have been cut off from communicating with my former colleagues, which I find unfair and extremely disturbing. By prohibiting Citi employees from talking to me, Citi had disconnected me from the great majority of my professional network at the moment, where I need it most.**
>
> **Whatever Citibank had told those employees (including some of the most junior ones with whom I have always had cordial and friendly relationship), Citi had already severely and irreparably tarnished my professional and personal reputation."**

15. The final section of this document was entitled "Motifs of Citibank's Managers" (section 14). The Claimant described two "motifs/reasons" to explain the behaviour of those whom he regarded as the chief perpetrators. One "motif" was to sideline and inhibit him as a potential competitor for higher roles; the other was because of his Bulgarian origin. He did not suggest that he had been subjected to any action for complaining of wrongdoing either in 2013 or 2014.

16. There is no mention of whistleblowing or public interest disclosure in these documents. The ET1 claim form itself, however, contained another box. The box labelled 10.1 reads as follows:

> **"If your claim consists of, or includes, a claim that are you are making a protected disclosure under the [ERA] (otherwise known as a 'whistleblowing' claim), please tick the box if you want a copy of this form, or information from it, to be forwarded on your behalf to a relevant regulator (known as a 'prescribed person' under the relevant legislation) by tribunal staff."**

The Claimant ticked that box.

The Employment Tribunal's Decision about the Claim Form

17. At the Preliminary Hearing the Claimant argued that his ET1 claim form included a claim of public interest disclosure detriment (see paragraphs 12 to 14 of the Employment Judge's Reasons). The Employment Judge reached the following conclusion:

> **"16. I understand and have taken account of the fact that this is not of itself determinative of whether a whistle-blowing claim is being made in the same way that ticking box 10 is not determinative of the existence of a whistle-blowing claim. I therefore looked at the substance**

> **of the allegations in the Grounds of Claim. Firstly, it is notable that the Claimant set out his complaints with some care at section 8.1 of his Grounds. He did not identify whistle-blowing as one of the causes of action pursued there: the highest it gets is an allegation under the heading "personal injury" that the Respondent had disregarded and failed to consider his complaints and grievances. Secondly, the disclosure the Claimant has identified under paragraph 4 of section 8.2 of his Grounds of Claim is not his disclosure but that of Alastair Rose-Smith. In response to my question the Claimant acknowledged frankly and fairly that he had not referred to his own disclosures in his Grounds of Claim at all and it is only by reference to a later document, the statement of Mr Pannu, and the tick in box 10 of the ET1 that he now seeks to construct this claim.**
>
> **17. I find that this is insufficient to ground a separate and distinct cause of action such as whistle-blowing, which is one requiring careful particularisation. Such a claim is not the same claim as one of victimisation under the [EqA] as a public interest disclosure must relate to information which falls within the categories set out in section 43B of the [ERA]."**

The Employment Tribunal's Decision about Amendment

18. At the hearing on 26 April 2017 the Employment Judge first drew up a list of issues. He expressed the list of issues to be agreed subject to the question of amendment. In respect of **EqA** victimisation, the protected acts relied on were defined as follows:

> **"4.2.1. His verbal and written complaint to Mr Gelis made on or dated 7 March 2013.**
>
> **4.2.2. Emails sent by the Claimant to Brian Magos, Maybel Saleh, Christopher Blin, James Bardrick and David Walker on 26 November 2013 and an earlier email sent at about that time to Catherine Pierre and/or HR.**
>
> **4.2.3. Comments made by the Claimant to Christopher Blin in a meeting on 28 November 2014.**
>
> **4.2.4. Comments made by the Claimant to Catherine Pierre in a meeting on 1 December 2014.**
>
> **4.2.5. The complaint made by the Claimant to the Respondent's internal investigation department by email on or about 4 December 2014."**

19. The treatment relied on was the same as for direct discrimination: it was a series of acts or omissions from August 2014 onwards centred upon the alleged unhelpfulness of employees of the Respondent to assist him in obtaining work, cutting him off from contact and failing to investigate his grievances.

20. The Claimant applied for permission to amend the claim form. The application rolled up both victimisation under the **EqA** and public interest disclosure detriment. It is important to set out the terms of the proposed amendment as a whole:

"Proposed Amendment

4. I would like to make an application to amend by ET1 claim to clearly particularise the whistleblowing victimisation claims and to include them as part of my case. The following information is proposed to be added to the ET1 claim form:

---ET1 Claim Form Proposed Amendment---Begin---

***Victimisation:* Detriments suffered as a result of Protected Acts in accordance with the [EqA] and Protected Disclosure in accordance with the Public Interest Disclosure Act**

Protected Acts

Complaints by the Claimant, submitted initially to Mr. Mathieu Gelis on 7 March 2013 and then in writing and verbally to employees of the Respondent in the period 26 November 2014 - 8 December 2014, about how the Claimant was discriminated [sic], harassed and bullied by Mr. Mathieu Gelis and Ms. Catherine Pierre in the period July, 2010 - December, 2014.

Protected Disclosure

Complaints by the Claimant, submitted initially to Mr. Mathieu Gelis on 7 March 2013 and then in writing and verbally to employees of the Respondent in the period 26 November 2014 - 8 December 2014 about:

i) Management issues in the Transaction Execution Group that resulted in a number of employees being unfairly treated and discriminated [sic].

ii) Lack of priority given to bond executions within the Transaction Execution Group, which could result in lack of proper due diligence and costly mistakes.

iii) Manipulation of Risk Weighted Assets by Ms Catherine Pierre.

***Detriments Suffered* (as a result of Protected Acts/Protected Disclosure)**

i) Conduct by Ms. Pierre in meetings, phone calls, text messages and e-mails in August-December 2014.

ii) Conduct and failure of Catherine Pierre and the Respondent in considering the Claimant for new employment at Citi and assisting him in finding new employment externally in the period August-December, 2014.

iii) Actions taken by Catherine Pierre, Mathieu Gelis, Amin Pannu and Sonnal Shah in particular and the Respondent in general, in connection with the internal investigation of the Claimant's complaints, including sending an e-mail to employees of the Respondent asking them to inform the Human Resources department prior to any communication with the Claimant and installing a firewall blocking the e-mails of the Claimant.

iv) Failure of the Respondent in general, and of Mr. Amin Pannu and the Human Resources Department in particular, to carry out a fair internal investigation and grievance procedure and to reach the correct conclusion following the complaints of the Claimant."

21. The Employment Judge evidently did not consider that amendment was required so far as **EqA** victimisation was concerned. He simply listed the issues in the way I have already described. As regards public interest disclosure detriment, he refused the application. He summarised the law at paragraphs 7 to 11 of his Reasons. He summarised evidence that he

heard from the Claimant, mainly as to delay, at paragraphs 12 to 14. He summarised the arguments of the parties at paragraphs 15 to 17. He turned to his conclusions at paragraphs 18 to 25. He found that the Claimant was seeking to introduce a new cause of action; that it was relabelling ("at the more serious end of relabelling" (paragraph 20)); that it would have been reasonably practicable to have brought the claim in time; that it was two years out of time; that the Claimant was confused about the concepts of whistleblowing and victimisation; and that he had had access to legal advice.

22. Then he said:

> **"24. Finally, I turn to the balance of hardship. If I refuse this application to amend, the Claimant will have a strong sense of injustice and he will, of course, not be able to pursue complaints of whistleblowing detriment. Furthermore, his argument that his case is based on the same facts as the extant claims and will therefore not result in additional cost is superficially powerful and attractive. Equally, the Respondent's argument that it is prejudiced by the introduction of this claim at a late stage is superficially weak in the apparent absence of evidence of any specific prejudice. I noted, however, that in his closing submissions the Claimant referred to his disclosures as relating to transactions which might affect investors worldwide. In my judgment that submission significantly undermines his case that the facts are entirely coextensive with his current claims. Asserting a protected act arising from the exercise of claims or rights under the [EqA] is one thing, asserting that you have blown the whistle on the Respondent's conduct affecting customers all over the world is entirely different. A finding against the Respondent of either type of conduct would be prejudicial but in the latter case it would be far reaching in the extreme. In those circumstances time limits take on much greater significance, particularly the strict time limits under the 1996 Act.**
>
> **25. In my judgment, the Respondent is entitled to rely on the fact that the Claimant had not brought these claims within the basic time limit or indeed for many years and it will be significantly prejudiced by having to face such claims, pursued now in a public forum with all the risk and publicity which may be attendant on that. So, whilst I acknowledge the Claimant's likely sense of injustice, on my analysis the injustice to the Respondent outweighs that to the Claimant and, accordingly, the application to amend is refused."**

The Appeal Relating to the Claim Form

23. The Claimant submits that the test for deciding whether a particular complaint falls within a claim form is (see **Grimmer v KLM Cityhopper UK** [2005] IRLR 596 at paragraphs 15 to 16):

> **"15. … whether it can be discerned from the claim as presented that the claimant is complaining of an alleged breach of an employment right which falls within the jurisdiction of the employment tribunal. …"**

A

24. Applying that test, he submits that it can be seen that he is complaining of whistleblowing detriment. He relies on the ticking of box 10 and three particular elements of the chronological résumé: the meeting with Mr Gelis on 7 March 2013, a meeting with Ms Pierre on 1 December where he "reminded her of her promises and the events of the past", and a meeting with Mr Pannu on 8 December. He says he was reminding them of matters that he had set out earlier in the résumé in sections 2 and 4. The alleged detriments followed in the chronological résumé; he says he intended to indicate that they resulted from the disclosure and that is a natural reading of his grounds. Therefore, he argues, the necessary minimum of information was given; he was prepared to provide further detail when asked for it and he did so at a late stage only because of the appellate process, which interrupted his claim. He says it would be unfair and unjust to separate the discrimination and victimisation claims from the protected disclosure claims. He says that when the Employment Tribunal came to define the issues relating to victimisation, it defined them in a way that was closely linked; the protected acts were largely the same as the protected disclosures and the detriments were the same.

B

C

D

E

25. On behalf of the Respondent, Mr Simon Forshaw refers to **Housing Corporation v Bryant** [1998] ICR 123, **Smith v Zeneca (Agrochemicals) Ltd** [2000] ICR 800 and **Ali v Office of National Statistics** [2005] IRLR 201. Applying the standards set out in those cases, he submitted that the claim form plainly did not include a claim of public interest disclosure detriment. The Claimant's document setting out the types of claim referred to complaints only in the context of a personal injury claim; it did not suggest that the complaints were protected or that he had been subjected to detriment for making them. The document giving details of the claim likewise did not suggest that the complaints were protected or that he had been subjected to detriment for making them. As the proposed amendment makes quite clear, the Claimant's case about protected disclosure detriment is distinct from his case about **EqA** victimisation.

F

G

H

Discussion and Conclusions Relating to the Claim Form

26. When deciding whether an ET1 claim form contains a claim of a particular kind, the correct approach is to look at the claim form as a whole, giving it a generous construction to see whether it identifies an act complained of and the nature of the complaint made about that act. If that is the case, there will have been an effective complaint. If it is broad and general and nature, further detail may be given by way of further information. If that is not the case, an amendment will be required. For these propositions see **Smith** at paragraphs 58(d)-(f) and **Ali** at paragraph 39. I do not think **Grimmer** is inconsistent with this approach, although it is addressing a rather different issue, which arose under the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004**.

27. It is of course not necessary that the claim form should identify the complaint with the label that a lawyer would apply. If the act is identified and the nature of the complaint is identified, the fact that there is no label or the label is wrong or only one label is given where two would be applicable will not be determinative against the Claimant.

28. A complaint of public interest disclosure must to my mind state, so that it can be discerned on a generous reading, that the worker concerned made one or more public interest disclosures and that he was subject to detriment for doing so. An essential element of a complaint of public interest disclosure detriment is that the Claimant should be complaining that he has suffered detriment on the grounds of the public interest disclosure. The claim form, read generously, must therefore identify the detriment complained of, the public interest disclosure alleged and the linkage between the two. If it does this, even in very broad terms, further detail may be given by Particulars; if it does not, amendment will be required.

29. This last point - the necessity for linkage - seems to me to follow from **Bryant**, a victimisation claim: see pages 130F (Buxton LJ) and 132G (Peter Gibson LJ)). In this respect, public interest disclosure and victimisation are similar. They both require a linkage between the protected disclosure or act and some subsequent treatment such as the imposition of a detriment. In the case of victimisation, it is sufficient that the subsequent treatment is by virtue of a belief that there may be a protected act, but the link must still be there.

30. Giving the ET1 claim form and its attached documents a generous construction, I cannot see that it made a claim of detriment on the grounds of public interest disclosure. Such a claim is missing from the carefully prepared document headed "Types of Claim". There are references in the chronological document to complaints, but these are included as part of a narrative the purpose of which is to establish that the Respondent was guilty of a want of care for the health of employees leading to what he describes as foreseeable personal injury. Moreover, they are complaints by other people not the Claimant. The complaint by the Claimant to Mr Gelis relates to his alleged harassment, victimisation and bullying. It is not easily read as a complaint about the kinds of public interest disclosure which the Claimant seeks to claim. The Claimant now says that in December 2014 the complaints he made encompassed issues set out earlier in his chronology, but this is not apparent from the chronology itself.

31. The concept that the Claimant was adversely treated because he was complaining is entirely absent from the ET1 claim form. It is telling that, in section 14, when he dealt with the motives of the principal protagonists, the Claimant alleged that their motives were to sideline competitors and also were racial in nature. The notion that he was subjected to treatment for being a whistleblower, however expressed, is to my mind absent from the details given. Nor do

A I think the tick box in box 10 of the ET1 claim is in any way decisive. The claim form must be looked at as a whole (see **Ali** above). When it is looked at as a whole, I do not think it can fairly be read as including a complaint of public interest disclosure detriment.

B

32. I therefore agree with the Employment Judge that the ET1 claim form did not include such a claim. I would add that I have approached this looking for myself at the ET1 and the details given, but it may well be that the true question is whether the Employment Judge erred

C in law in *his* assessment of the ET1 claim form. I do not think he did.

33. There are two final points to add on this part of the case.

D

34. Firstly, when giving a direction that the appeal concerning this issue should go through to a Full Hearing, HHJ Eady QC was concerned that it might be reasonably arguable that the

E Employment Judge should have considered the matter as an application to amend. I see no error of law in that respect. The Claimant was not at that stage applying for permission to amend, and the Employment Judge was not required to treat him as making such an application. There was indeed then no formulated amendment at all.

F

35. Secondly, although the Claimant has stressed the similarity between the **EqA** victimisation claim and the public interest disclosure detriment claim, it is to my mind clear that

G they are significantly different. The terms in which the Claimant applied for leave to amend clarify this point. The **EqA** victimisation claim rested upon his assertion that he was bullied, harassed and less favourably treated by reason of his Bulgarian origin. The public interest detriment claim rests upon wholly different foundations: the treatment of others, alleged risk

H

taking in the financial area and alleged manipulation in the financial area. These are not the same at all.

36. It follows that the appeal against the decision made in March must be dismissed.

The Appeal About Amendment

37. The Claimant's appeal against the Employment Judge's decision was found by HHJ Eady QC on paper to disclose no reasonable grounds for appealing. The Claimant has applied under Rule 3(10) for an oral hearing, and that oral hearing has been listed today with the Claimant's existing appeal. Today the Claimant has had the advantage of representation under ELAAS by Mr Caiden. He has produced a skeleton argument and has addressed me in support of it. The Claimant has not withdrawn any of his grounds of appeal. I shall deal first with Mr Caiden's points, and then I shall return to the grounds of appeal.

38. Mr Caiden's first argument is that the Employment Judge erred in law in classifying the whistleblowing claim as a new cause of action. I have taken into account his arguments, which the Claimant adopted, in dealing with that allegation as I have had to already. Mr Caiden stressed the similarity, as he would argue, between **EqA** victimisation and public interest disclosure detriment. As I have explained, in the circumstances of this case it is quite plain that the Claimant was seeking to raise significantly different issues in the public interest disclosure detriment claim. I see, as did the Employment Judge, that there could be a public interest disclosure detriment claim that rested entirely or mainly on discriminatory treatment of the Claimant; but that was not how he was putting his case.

39. Mr Caiden's second argument is that the Employment Judge erred in law in concluding that the amendment amounted to a claim brought outside the time limit. Since it was a claim that involved relabelling, it was not necessary to consider the time limit issue. He relied in particular on guidance given by Underhill LJ in **Abercrombie v Aga Rangemaster Ltd** [2014] ICR 209 at paragraphs 47 to 50. This argument arises out of the guidance given by Mummery J (as he then was) in **Selkent Bus Co Ltd v Moore** [1996] ICR 836 at pages 843 to 844:

> **"(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant.**
>
> ***(a) The nature of the amendment.*** **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) The applicability of time limits.*** **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) The timing and manner of the application.*** **An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the [Rules] for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."**

40. I do not think the Employment Judge's reasoning was inconsistent with the guidance given in **Selkent** or **Abercrombie**. He did not fall into the error of supposing that the amendment should be refused because the time limit had expired (see paragraph 9 of his Reasons for what appears to me to be a satisfactory statement of the position as regards time limits, and paragraph 25). It was not the time limit alone that caused him to reject the application but also delay and significant prejudice. I see no error of law in that approach.

41. Mr Caiden's third argument is that the Employment Judge erred in assessing the balance of hardship. He argues again that delay and the expiry of the time limit is irrelevant. I disagree. He accepts the force of the Employment Judge's point that the amendment would introduce new issues of wide import to the Respondent relating to events many years before. He submits that the Employment Judge might have allowed a narrower amendment; but the whole of the amendment, linked as it very clearly is by the Claimant in his submissions to sections 2 and 4 of his chronology, raises issues of this kind. The Claimant could no doubt have formulated a quite different amendment similar to his case on **EqA** victimisation, but he did not do so. I see no error of law in the Employment Judge's Reasons.

42. The actual grounds of appeal put forward by the Claimant overlap with Mr Caiden's submissions. His first ground is that Employment Judge Foxwell erred in law when he decided that the application to amend was out of time because he failed to consider the exact timing and the true reason for delay. I see no error of law of that kind in the Employment Judge's Judgment. He dealt correctly with the time limit point. The statutory provision, section 48(3), required him to consider whether it was reasonably practicable to have brought the claim within the primary limit and if not, whether the claim was brought within such further time as was reasonable. I see no error of law in the way he dealt with this.

43. Secondly, it is argued that it was legally perverse to say that the proposed relabelling was "at the more serious end" because the whistleblowing victimisation involved the same people, the same complaints, the same events and the same internal investigation. I disagree. One only has to prepare the proposed amendment relating to whistleblowing to that relating to **EqA** victimisation to see that the ways the case are put and the issues raised are very significantly different.

44. Thirdly, it is argued that the Employment Judge erred in law in balancing hardship to the parties. This is very much a matter for the Employment Judge's assessment. I do not accept that there is any error of law in the assessment.

Conclusion

45. I have done my best to consider all of the arguments of the Claimant on both the appeal and the Rule 3(10) application. I am not persuaded that there is any error of law or even any reasonable grounds for arguing that there is an error of law on the part of the Employment Judge; so, the appeal and the application will both be dismissed.