Appeal No. UKEAT/0207/16/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 January 2017
Judgment handed down on 22 November 2017

Before

HIS HONOUR JUDGE HAND QC

(SITTING ALONE)

MR L GALILEE — APPELLANT

THE COMMISSIONER OF POLICE OF THE METROPOLIS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS BETSAN CRIDDLE (of Counsel) Instructed by: Pattinson & Brewer 4th Floor 11 Pilgrim Street London EC4V 6RN
For the Respondent	MR JESSE CROZIER (of Counsel) Instructed by: Clyde & Co LLP Chancery Place 50 Brown Street Manchester M2 2JT

SUMMARY

PRACTICE AND PROCEDURE - Case management

PRACTICE AND PROCEDURE - Amendment

PRACTICE AND PROCEDURE - Time limits

Neither the procedural common law doctrine of "*relation back*" (now defunct - see **Beecham Group plc v Norton Healthcare Ltd** [1997] FSR 81, **Liff v Peasley** [1980] 1 WLR 781 and **Ketteman v Hansel Properties Ltd** [1987] AC 189) nor section 35(1) of the **Limitation Act 1980** apply directly to amendments to pleadings in the ET, which introduce new claims or causes of action. These take effect for the purposes of limitation at the time permission to amend is given and do not "*relate back*" to the time when the original proceedings were commenced and in so far as the reasoning in the cases of **Rawson v Doncaster NHS Primary Care Trust** UKEAT/0022/08, **Newsquest (Herald and Times) Ltd v Keeping** UKEATS/0051/09 and **Amey Services Ltd and Another v Aldridge and Others** UKEATS/0007/16 is based on the "*relation back*" doctrine, this is inconsistent with statements in **Potter and Others v North Cumbria Acute Hospitals NHS Trust and Others (No 2)** UKEAT/0385/08, [2009] IRLR 900 and **Prest v Mouchel Business Services Ltd** UKEAT/0604/10, [2011] ICR 1345. Alternatively, **Rawson**, **Newsquest** and **Amey Services** were wrongly decided (on that point). On either basis they would not be followed (see **Lock and Another v British Gas Trading Ltd** (No 2) UKEAT/0189/15, [2016] IRLR 316).

The refusal of permission to amend in the instant case turned on the doctrine of "*relation back*" and this was a critical error of law and not simply one of a number of factors considered in "*the generous ambit within which reasonable disagreement is possible*" (**Gayle v Sandwell and West Birmingham Hospitals NHS Trust** [2011] IRLR 810, **Kuznetsov v Royal Bank of Scotland** [2017] EWCA Civ 43, **Broughton v Kop Football (Cayman) Ltd and Others**

[2012] EWCA Civ 1743, **HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd and Another** [2014] UKSC 64, [2014] 1 WLR 4495, **Bellenden (formerly Satterthwaite) v Satterthwaite** [1948] 1 All ER 343 and **CICB v Beck** [2009] EWCA Civ 619, [2009] IRLR 740 considered).

The guidance given by Mummery J in **Selkent Bus Co Ltd v Moore** [1996] ICR 836 and his use of the word "*essential*" should not be taken in an absolutely literal sense and applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues must be decided before permission to amend can be considered. The judgments in both **Transport and General Workers Union v Safeway Stores Ltd** UKEAT/0092/07 and **Abercrombie v AGA Rangemaster Ltd** [2014] ICR 209 emphasised that the discretion to permit amendment was not constrained necessarily by limitation.

The Opinion of the Inner House of the Court of Session in **City of Edinburgh Council v Kaur** [2013] CSIH 32 should not be confined to granting an extension of time in "*continuing act*" but should be applied as well to cases involving consideration of whether it would be "*just and equitable*" to grant an extension of time. Whilst in some cases it may be possible without hearing evidence to conclude that no "*prima facie*" case of a "*continuing act*" or for an extension on "*just and equitable*" grounds can arise from the pleadings, in many cases, often, but not necessarily confined to, discrimination cases, it will not be possible to reach such a conclusion without an evidential investigation and, as indicated in the Opinion in **Kaur**, sometimes it may be necessary to hear a significant amount of evidence and sometimes it may not be possible or sensible to deal with the matter at a Preliminary Hearing and decisions may need to be postponed until all the evidence has been heard.

In the instant case EJ Foxwell had refused permission to amend without hearing any evidence. His evaluation of the likelihood of any subsequent extension of time on the grounds that it was "*just and equitable*" and the lack of resolution of the issue as to whether or not there was a "*continuing act*" both amounted to errors of law and the case was remitted for re-consideration in the light of the above decision.

HIS HONOUR JUDGE HAND QC

Introduction

1. This is an appeal from the Judgment and Written Reasons of an Employment Tribunal ("ET"), comprising Employment Judge ("EJ") Foxwell, sitting at East London Hearing Centre on 11 September 2015, the Decision having been sent to the parties on 30 September 2015. At the hearing of the appeal the Appellant was represented by Ms Criddle of counsel, who did not appear below and the Respondent by Mr Crozier of counsel, who did not appear below but did represent the Respondent at an ET hearing subsequent to that under consideration here.

The History of the Proceedings

2. The Appellant, who was the Claimant below, had been a police officer until his dismissal from the Metropolitan Police by the Respondent on 5 February 2015. On 10 March 2015 these proceedings were commenced at a time when the Appellant was representing himself. Later, possibly shortly before 16 June 2015, he retained solicitors and by 31 July 2015, the day fixed for a Preliminary Hearing, and at a time when the Appellant had been represented by those solicitors for some weeks, it became clear as a result of the service the previous day of Further and Better Particulars and service that day of an extensive list of issues that the Appellant was seeking to amend his pleaded case.

3. As a result, EJ Pritchard adjourned the Preliminary Hearing to a later date. Together with other issues, the application for amendment came before EJ Foxwell on 11 September 2015. He refused that application (see paragraph 2 of the Judgment) and also dismissed the unfair dismissal claim on withdrawal (see paragraph 1 of the Judgment).

4. What survived came before EJ Jones on 2 October 2015. The Respondent, represented then by Mr Crozier, applied successfully to strike out the surviving claims of disability related discrimination and victimisation on grounds of lack of jurisdiction and that the claims had no reasonable prospect of success. EJ Jones accepted that the proceedings of the statutory Police Misconduct Panel attracted judicial immunity and that the instant case was indistinguishable from the decision of the Court of Appeal in **Heath v Commissioner of Police for the Metropolis** [2004] EWCA Civ 943, which had concluded that such a body acts in a judicial capacity and so is immune from suit. She also accepted that the doctrine of res judicata (of the **Henderson v Henderson** abuse of process variety) also applied because there had been previous proceedings which had settled.

The Written Reasons

5. As EJ Foxwell well understood (see paragraph 7 of the Written Reasons), a decision as to an application to amend a pleading involves the exercise of a judicial discretion. He reminded himself of the judicial guidance given by a division of this Tribunal presided over by Mummery J in **Selkent Bus Co Ltd v Moore** [1996] ICR 836 (see also paragraph 7 of the Written Reasons). It is not contended that what might be described as the "self-direction" contained in paragraph 7 of the Written Reasons was of itself erroneous, although a challenge was made by Ms Criddle to the way in which subsequent authority has interpreted **Selkent** and in particular to the interpretation of it as requiring that out of time points must be determined before or at the same time as a decision is made as to granting or refusing permission to amend. In considering these matters it is important to note that he neither read nor heard any evidence (see paragraph 6 of the Reasons).

6. The proposed amendments, in the form of Further and Better Particulars and the list of issues asserted claims of direct disability discrimination, discrimination arising from disability, indirect disability discrimination, reasonable adjustments disability discrimination, harassment and victimisation. The factual context of each of these causes of action were set out in a list of issues, a summary of which is to be found at paragraphs 9 and 10 of the Written Reasons. At paragraph 11 there is a summary of the "*PCPs*" relied upon in connection with indirect disability discrimination.

7. In so far as these factual matters gave rise to new causes of action it was accepted on behalf of the Appellant that an amendment, if allowed, would have had the effect of adding a cause (or causes) of action in respect of which it was arguable that proceedings had not been commenced within the appropriate time limit, although it should be made clear it was always the Appellant's case that he had been the victim of a series of acts extending over a period.

8. In support of the application to amend and dealing with the out of time point, it was submitted to EJ Foxwell that if the circumstances had been different and extensions had been made under the early conciliation procedure, then the claim submitted in late July might well have been in time, thus illustrating that the Respondent could have suffered no prejudice (see paragraph 15 of the Written Reasons). In any event the Respondent had suggested in the ET3 form that the existing claim required clarification. Moreover, allowance ought to be made for the fact that when the proceedings had been commenced the Appellant, who was known to suffer from depression, had been representing himself. The obvious prejudice to the Appellant by refusing the application would be the restriction of the scope of his case (see paragraph 16 of the Written Reasons).

9. The Respondent relied on the fact that the claims were out of time, that no evidence had been put forward to illustrate that it might be just and equitable to allow the claims to proceed notwithstanding that they had been commenced out of time, that the application was late and took the Respondent by surprise, that the evidence was likely to be less cogent because of delay, thus resulting in prejudice to the Respondent and that, in any event, the conduct of the Respondent, through his officers, servants or agents, in relation to disciplinary procedures was the subject of judicial immunity, so the merits of the proposed amended claims were doubtful (see paragraphs 18 to 20 of the Written Reasons).

10. EJ Foxwell refused the application. He did not regard the fact that on the ET1 form both the "*Unfair dismissal*" and "*Disability*" boxes had been ticked but the "*Discrimination*" box had not been ticked as being conclusive (see paragraph 23 of the Written Reasons). He considered what he described as the "substance" of the Appellant's original complaint as being that set out in box 8.2 of his ET1 form and he quoted the text of that at paragraph 24 of the Written Reasons.

11. Later in the Written Reasons, at paragraph 33, EJ Foxwell accepted the Respondent's analysis of the original claim as comprising five components, namely a failure to deal promptly with an issue arising in 2012, a failure on the part of the misconduct panel to take into consideration the Appellant's ill health, disclosure to the misconduct panel of hearsay evidence and opinion that had been redacted from a report, repetition of a superior officer's inferences about absence, when absences had in fact been addressed previously, and the dismissal itself.

12. Whilst EJ Foxwell accepted that it was "*arguable*" that the original complaint raised issues of victimisation contrary to section 27 of the **Equality Act 2010** and also disability

related discrimination under section 15 of the **Equality Act**, on his reading of it the overall context of those complaints was the dismissal itself so the thrust of those allegations was a failure by the Respondent to take account of the Appellant's mental fragility when reaching the decision to dismiss. Given that the issues being raised by the proposed amendments involved much more of the recent history of the Appellant's service as a police officer (see again paragraph 9 of the Written Reasons), the existing complaint could not be construed so as to include direct, indirect or reasonable adjustment disability discrimination, all of which, therefore, must be regarded as new claims amounting to "*an attempt to recast the claim substantially*" (see paragraphs 25 and 26 of the Written Reasons).

13. EJ Foxwell was not persuaded by the argument that the claim could well have been in time had certain steps been taken under the early conciliation procedure. He described the argument as "*ingenious*" but was otherwise unimpressed by it because no such steps had in fact been taken. Indeed, he took the view that if the argument about judicial immunity was correct then all that could be justiciable would be allegations predating February 2015 so that the application to amend would be even more out of time than it appeared to be at first sight. He accepted that in those circumstances, however, it was likely that point would count in the Appellant's favour in any analysis as to whether the ET should exercise its discretion to extend time on "*just and equitable*" grounds; see paragraph 27 and the first part of paragraph 28 of the Written Reasons, the relevant parts of which read:

> **"27. With that in mind I turn to the issue of time limits. … I find that whichever way you look at it the claims were out of time on 31 July 2015. The reason for this is that the last act relied on is the dismissal of the Claimant's appeal which is said to have occurred on 20 April 2015: based on this the relevant time limit for the last act expired on 19 July 2015. The position could be worse than this from the Claimant's perspective if Ms Bell's submissions on *Heath* are correct: if dismissal and appeal lie outside the Tribunal's jurisdiction because of the principle of judicial immunity, then it is only the allegations which pre-date 5 February 2015 which would remain as justiciable issues and therefore the claim would be more substantially out of time.**
>
> **28. The issue of judicial immunity is a difficult and developing one, particularly for a litigant in person, so if the *Heath* point was the only issue in respect of a just and equitable extension of time I think it likely that time would be extended but there are other factors which militate against a just and equitable extension of time in this case. … My problem with this is that, in**

the absence of evidence from the Claimant about what he did and did not do to pursue his own case, I cannot find confidently that a just and equitable extension would be granted in these circumstances."

14. Summarising the rest of paragraph 28 (i.e. passages omitted above) EJ Foxwell found there to be "*other factors which militate against a just and equitable extension of time in this case*". Firstly, the Appellant had received "*interim legal advice*" as stated in box 8.2 of his ET1 form, although EJ Foxwell acknowledged he did not know what that amounted to. Secondly, he concluded that "*on the face of it*" there had been "*inaction between 16 June and 30 July 2015*", which was the period after the Appellant had retained solicitors. An explanation of difficulty in communication due to him having moved and not having access to the Internet during this period was given but EJ Foxwell had a problem with that explanation, characterising it as amounting to "*the absence of evidence from the Claimant about what he did and did not do to pursue his own case*" and consequently he concluded that he could not "*find confidently that a just and equitable extension would be granted in these circumstances.*" Subsequently at paragraph 31 of the Written Reasons EJ Foxwell appears to have accepted that he could not "*rule out this possibility*" of an extension of time on the grounds that it was just and equitable to do so but he could not say there was "*a good chance*" of it.

15. Whilst the EJ Foxwell accepted that the fact a claim was out of time was not decisive on the question of amendment it was, however, a relevant consideration (see paragraph 29 of the Written Reasons). He also identified a delay in making the application to amend, which delay he found not to have been fully explained. He accepted that there had been a prompt application to vacate the Preliminary Hearing, which had been listed to be heard on 19 June 2015, but thereafter there was a six-week period and further particulars had not been supplied until immediately before the hearing on 31 July 2015. If the Appellant was not keeping in

touch with his solicitors in that period then he only had himself to blame (see paragraph 30 of the Written Reasons).

16. EJ Foxwell also accepted that it might be thought the Appellant had "*acted hastily in lodging his claim*" and that an allegation of "*victimisation*" had been raised in the original ET1 form, although he did not accept that was a means by which all the other subsequent claims could enter the case (see paragraph 32 of the Written Reasons). He refused the amendments setting out his reasoning at paragraphs 35 to 37 of the Written Reasons as follows:

> **"35. I have come to the conclusion that the deciding factor in this case is the balance of hardship. If I refuse the amendment, then it denies the Claimant the opportunity to pursue causes of action within these proceedings but similarly and equally if I permit the amendment it will deprive the Respondent of its jurisdictional defence: it seems to me that those factors balance each other out where there is a wholesale re-casting of a claim to include new claims which are out of time.**
>
> **36. I do not find that the cogency of the evidence will be affected by the delay that flows from the fact that this case was not fully pleaded at the outset.**
>
> **37. When I weigh all of the factors, I find that the balance tips in favour of refusing permission to amend. It seems to me that the critical issue here is that of time (although I have had regard to all the circumstances); whether it is, in fact, just and equitable to extend time could have been (and, indeed, still can be) tested by issuing further proceedings and having that matter resolved. If I grant this application now, it simply sets out a case which is entirely different, with the exception of dismissal, from the case that was originally advanced in the Claim Form. For those reasons, I refuse permission to amend in the form set out in the list of issues."**

17. The other issue put before EJ Foxwell was whether the statement made in Further and Better Particulars served on 30 July 2015 that the Appellant withdrew his Unfair Dismissal claim was itself capable of withdrawal in that it was in some way conditional on the application for an amendment succeeding. EJ Foxwell concluded that there had been an unconditional and unequivocal withdrawal and on that basis dismissed that claim on withdrawal (see paragraph 22).

The Appeal

18. The appeal proceeds by way of an amended Notice and grounds of appeal as a result of the oral hearing pursuant to Rule 3(10) conducted by HHJ Eady QC on 5 July 2016. Ground 1 challenges the conclusion in paragraphs 35 to 37 of the Written Reasons as set out above at paragraph 16 of this Judgment on the basis that the correct exercise of judicial discretion would have been to allow the amendment and to leave to a future hearing whether or not to extend time on the basis that it was just and equitable to do so. Ground 2 is to an extent dependent upon ground 1 in that if the out of time point is dealt with in that way, then there is no competing prejudice, as EJ Foxwell thought there was, because the Appellant has the opportunity to put forward his case and the Respondent can still defend the time point.

The Issue on the Appeal

19. I explain below how the argument in this case developed. The result has been that what appeared to be an issue about the correct exercise of judicial discretion in a case management context has thrown up another issue, what might be termed as the prior question, as to what, in the context of ET procedure, is the effect of allowing an amendment? Putting it another way, does the common law doctrine of "*relation back*" apply so that allowing an amendment must have the consequence of defeating any limitation point the Respondent would otherwise have?

20. Ms Criddle, however, put the issues sequentially. In summary, on her analysis there were the following four issues. Firstly, at the time of considering the application to amend, was the ET required to decide whether the claims introduced by the amendment were in or out of time? Secondly, does the granting of permission to amend without deciding the out of time points have the effect of depriving the Respondent the opportunity subsequently to challenge whether the claims are out of time? Thirdly, in this case had the ET ever determined whether

A the proposed additional claims were out of time? All three propositions, she submitted, must be answered in the negative, and if they were then they would produce a positive answer to the fourth issue, had there been an error of law by the ET in refusing permission to amend on 11 September?

B

The Arguments

C 21. I have had the advantage on this appeal of, as usual, reading skeleton arguments prepared in advance of the hearing, and of hearing oral arguments from counsel at the hearing, which, I should say were, on both sides of the argument, of high quality and skilfully presented. Those arguments occupied the whole of the day allotted to the hearing of the appeal and, being

D concerned that the "*relation back*" concept had not been fully explored, I directed that counsel should make further written submissions on that topic and they duly did so. But that was not the end of it because by March, as a result of a further decision of this Tribunal on amendment, the parties wished to make further submissions, which they did in written form in March 2017.

E I am grateful to counsel for all their assistance, both oral and written, on this appeal. This extended the appeal into the period before my retirement, when I am sorry to say that I became rather preoccupied with various matters relating to it and, indeed, I have only been able to

F return to this Judgment recently. I apologise for the fact that it has been so long delayed.

22. In her oral submissions, Ms Criddle pointed out that the general context of whether or

G not the claim had been submitted in time was that of an already existing issue as to limitation. The Respondent had raised that issue in the ET3. The proposed amendment, with its introduction of a broader factual matrix, added to the limitation problems because it could be

H argued the complaints were "*continuing acts*"[1]. In short, what the Appellant wished to argue

[1] i.e. "conduct extending over a period" - section 123(3)(a) **Equality Act**

was that there was a continuing discriminatory state of affairs and Ms Criddle submitted that the way in which the ET approached the matter had deprived him of that argument.

23. Ms Criddle accepted that issues as to whether or not claims were in or out of time were a factor to be considered in exercising the discretion as to whether or not to extend time; in other words, she accepted the orthodoxy of the analysis of Mummery J in **Selkent**. But she did not accept that an issue as to whether or not a claim was out of time must be determined before the ET decided the question of permission to amend. That had not been settled by **Selkent** and she did not accept that it could be decided on a provisional basis, as it had been in the instant appeal, which illustrated the shortcomings of such an approach. What EJ Foxwell had done in the instant case amounted to deciding on a provisional basis whether or not it might be just and equitable to extend time without any actual decision on that issue having been made. This was a discrete issue, which must be dealt with by making a final decision on a proper evidential basis, which, in the case of a "*continuing act*" might require consideration of the whole of the evidence before a decision could be made.

24. She relied upon passages from the judgment of a division of this Tribunal given by Underhill J in 2007 in **Transport and General Workers Union v Safeway Stores Ltd** UKEAT/0092/07. At paragraph 6 he said this:

> **"6. Apart from authority, it might have been thought that there was a strong case for disallowing as a matter of law any amendment which would allow a claimant to bring a fresh claim outside the time within which he could have brought it in free-standing proceedings. …"**

In the rest of the paragraph the learned Judge considered both the position under the **ET Rules** then applicable as well as the position in civil litigation under the **Civil Procedure Rules** ("CPR") but he pointed out that the specific provision of the **CPR**, Part 17.4 (2) and its

statutory progenitor, section 35(5) of the **Limitation Act 1980** "*were not replicated in the legislation applying to … [ET] … proceedings*". He then considered the judgment of the then President of this Tribunal, Lindsay J, in **Harvey v Port of London (Tilbury) Ltd** [1999] ICR 1030, which suggested that out of time amendments ought not to be permitted and commented:

> **"… it is hard to see why claims presented by way of amendment are not as much subject to that restriction[2] as claims presented by way of originating process."**

Logical though he thought the approach of Lindsay J might be, Underhill J, however, regarded it as precluded by authority, the result of which was "*an ET has a discretion in any case to allow an amendment which introduces a new claim out of time*" (see paragraph 7). In the rest of the judgment he analysed what he regarded as the relevant authorities and as part of that analysis he declined to follow the judgment of Lindsay J in **Harvey** on the basis that Underhill J regarded it as at odds with the other authorities. So, argued Ms Criddle, whilst an important factor in deciding how to exercise discretion on permission to amend is that the proposed amendment might be adding a new cause of action out of time, such a factor cannot be decisive.

25. In 2008, in the case of **Rawson v Doncaster NHS Primary Care Trust** UKEAT/0022/08, His Honour Judge Peter Clark decided that consideration of the out of time point cannot be postponed. This was a case bearing some resemblance to the instant appeal. Initially the only claims made were those of unfair dismissal and "*whistleblowing*", but later an application to amend to add claims of direct disability discrimination or disability related discrimination was made. The application was refused and, having considered the Reasons and the history of the appeal, HHJ Clark concluded that the EJ never considered "*the question of a just and equitable extension*" (see paragraph 13 of the judgment) probably because he had been

[2] The restriction referred to is the stipulated time limit.

"*persuaded by both representatives that the just and equitable extension issue fell to be decided if permission to amend was granted*" (see also paragraph 13).

26. HHJ Clark considered this to be wrong in principle saying this at paragraph 14:

> **"14. In my judgment that is a wrong approach, as is made clear in the passage earlier cited in *Selkent*. The effect of an amendment is to backdate the new claim to the date on which the original claim form is presented. Once the amendment is granted, the Respondent is thereafter prevented from raising the limitation defence. That is why consideration of the extension of time point is essential when deciding whether or not to grant permission to amend. As Mr Mackenzie submits, if it would be just and equitable to extend time that would be a strong, although in my view not necessarily determinative, factor in favour of granting permission. If it is not just and equitable to extend time that would be a powerful, but again not determinative factor, against see per Underhill J in *Transport and General Workers Union v Safeway Stores Limited* … What is clear is that the point must be considered at the amendment stage."**

So it was "*essential*" to consider limitation because, once permission had been given, the limitation point is "*prevented*" from being raised. This, submitted Ms Criddle, must be because of the "*relation back*" doctrine.

27. Ms Criddle argued that this was obiter dictum because the conclusion at paragraph 13 was that the ET had not considered the limitation question and therefore not considered the just and equitable issue, which was a sufficient error without any need to infer why that had happened, which is what is discussed at paragraph 14. In any event, as a matter of principle, it was wrong. Also, it was inconsistent with the judgment of a division of this Tribunal presided over by Slade J in **Potter and Others v North Cumbria Acute Hospitals NHS Trust and Others (No 2)** UKEAT/0385/08, [2009] IRLR 900. This was an equal pay case in which an application was made by the employees to amend in order to rely on different comparators to those relied upon in the originating application(s). The ET refused permission to amend. One ground (it appears to have been an alternative ground) for that refusal was the prejudice in terms of arrears of salary which would be suffered by the employer as a result of the amendments being deemed to take effect from the start of the proceedings (i.e. the "*relation*

back" doctrine). This Tribunal regarded that as a misunderstanding by the ET of the Respondent's position on the law, which had been an acceptance that there was no "*relation back*" doctrine in the ET because it had ceased to exist at common law and Slade J said at paragraph 116:

> **"116. … In our judgment, on the basis of authority, the 'relation back' theory is indeed defunct and has no application to this case. …"**

28. Therefore, submitted Ms Criddle, **Potter** is inconsistent with **Rawson**. So too, submitted Ms Criddle, is the judgment of Underhill J presiding over a division of this Tribunal in **Prest v Mouchel Business Services Ltd** UKEAT/0604/10, [2011] ICR 1345. This was also an equal pay case in which the introduction of a new comparator had given rise to potential prejudice for the Claimants in terms of the calculation of arrears of salary. Before the ET it had been suggested that "*the common law doctrine of relation back*" applied, but separate reliance on that was expressly abandoned on the appeal (see paragraph 11 at page 1349G) and the issue was, therefore, one of statutory interpretation. Nevertheless, at paragraph 12, Underhill J, having outlined the alternative contentions as to the date when what might be described as the new claims had commenced, said this:

> **"12. The starting point in choosing between those alternatives is that in my judgment Parliament in enacting section 2ZB(3) must have been concerned with when the substantive claim which attracts the liability for arrears was first formally brought before the tribunal. In the case of a claim introduced by way of amendment to existing proceedings, the date at which those proceedings were first instituted is logically an accident, and it does not make sense to determine the relevant time limits by reference to it. If the claim is new in substance then it is artificial and unreal to regard it as having been instituted at some earlier date simply because an earlier claim with which it has become procedurally entwined was instituted at that date: cf the reasoning, albeit the specific statutory provisions are different, of Brandon LJ in disapproving the "relation back" theory in *Liff v Peasley* [1980] 1 WLR 781, 799-803, subsequently approved by the House of Lords in *Ketteman v Hansel Properties Ltd* [1987] AC 189. My view on this point is in accordance with the decision of Slade LJ in *Potter v North Cumbria Acute Hospitals NHS Trust (No 2)* [2009] IRLR 900: see paras 114-116 (at p913)."**

29. Ms Criddle relied also on the judgment of the Court of Appeal in **Radakovits v Abbey National plc** [2009] EWCA Civ 1346, [2010] IRLR 307. This illustrated the proposition that unless a judgment was entered on an issue then that issue was always open for further

consideration by the ET. In this case EJ Foxwell had made no final decision either as to "*continuing act*" or as to an extension on "*just and equitable*" grounds.

30. So far as the guidance given by paragraph 5(2) in a section on amendment in the "*Presidential Guidance - General Case Management (2014)*" (set out below at paragraph 35 of this Judgment) was concerned, Ms Criddle submitted that it was all a question of how one read the text. Alternatively, insofar as the passage must be derived from paragraph 14 of **Rawson**, she submitted it did not accurately set out the law.

31. Therefore, the error made by EJ Foxwell, submitted Ms Criddle, was that the ET had concluded that granting permission to appeal would deprive the Respondent of a limitation defence and effectively had treated that as decisive of the question of the granting of permission to appeal. She recognised that, at paragraph 35 of the Reasons, EJ Foxwell appeared to have treated the prejudice to the Appellant of not being permitted to advance a broader case by way of amendment and the prejudice to the Respondent of being deprived of a limitation defence as being in a state of equilibrium. But she submitted that was inconsistent with paragraph 37 of the Reasons. If "*the critical issue here is that of time*" (see paragraph 37 of the Reasons) and permission was refused, it follows logically that permission must have been refused because of the out of time point. In other words, EJ Foxwell's ultimate conclusion was not a state of equilibrium as paragraph 35 suggested at first sight. Indeed, this was also illustrated by paragraph 37, because the prospect of being able to argue whether or not it was just and equitable to extend time if any further claim was launched subsequently must have been advanced by EJ Foxwell as an amelioration of the prejudice suffered by the Appellant and an indication as to why the balance of prejudice was tipped against him.

32. The reasoning at paragraph 37, submitted Ms Criddle, illustrates two things. Firstly, it must flow from an acceptance of the "*relation back*" theory. Secondly, EJ Foxwell did not believe that he had decided the "*just and equitable*" issue because if he had, then any attempt to argue it again in other proceedings must be an abuse of process and inevitably would be dismissed as such. Moreover, the reasoning ignored the fact that the proposed amendment, if allowed, would require a decision as to whether or not there had been a "*continuing act*. That was something which should have involved an evidential investigation. Thus, the ET had misdirected itself into the position of exercising its discretion to refuse permission to amend, whilst, at the same time, not deciding the time point evidentially. Instead the ET had dealt with it by evaluating whether any Tribunal considering the time point would be likely to exercise its discretion to extend time on the grounds that it was just and equitable to do so. The Tribunal had considered the point and, in one sense, decided it against the Claimant, yet had recorded no judgment in favour of the Respondent on the time issue and instead had disposed of the matter by refusing permission to amend. Irrespective of the breadth of discretion afforded to the ET in terms of permission to amend, and Ms Criddle accepted it was a broad discretion, that approach amounted to an error of law.

33. Mr Crozier agreed that whether or not to permit amendment of the ET1 form involved the exercise of a broad discretion by the ET. Where the granting of the proposed amendment, however, involved new causes of action, which would be added to the case notwithstanding the fact that they would be out of time, that factor had to be given very particular prominence in the reasoning of the ET. Thus, it was "*essential*", as had been made clear by Mummery J in **Selkent** at pages 843H and 844A (of the ICR report), to consider:

> **"(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 …"**

This would be particularly so where the claim introduced by the proposed amendment was wholly different from the claim originally pleaded; then, as Underhill LJ had said at paragraph 50 of his judgment in **Abercrombie v AGA Rangemaster Ltd** [2014] ICR 209, such amendments "*should not absent perhaps some very special circumstances, be permitted to circumvent the statutory time-limits*". Therefore, the discretion was limited by the need for an applicant for permission to amend to demonstrate "very special circumstances" without which the application to amend to add different causes of action out of time must be refused. He went on to refer specifically to the position in the High Court under section 35(5) of the **Limitation Act 1980** and the requirement there for the new cause of action to "arise out of the same facts or substantially the same facts" before amending to add a new cause of action would be permissible.

34. Mr Crozier emphasised it was particularly important to understand that once permission is granted and the ET1 is amended, any time limitation point, which could otherwise be relied on by the Respondent, evaporates. This had been made clear by HHJ Clark in the case of **Rawson v Doncaster NHS Primary Care Trust** UKEAT/0022/08 at paragraph 14 of the judgment (set out above at paragraph 26 of this Judgment).

35. Mr Crozier described this as a "*mandatory approach*" and pointed to the passage in the section of the "*Presidential Guidance - General Case Management*" that deals with amendment (paragraph 5(2)) and reads:

> **"Time Limits - if a new complaint or cause of action is intended by way of amendment, the Tribunal must consider whether that complaint is out of time and, if so, whether the time limit should be extended. Once the amendment has been allowed, and time taken into account, then that matter has been decided and can only be challenged on appeal. An application for leave to amend when there is a time issue should be dealt with at a preliminary hearing to address a preliminary issue to allow all parties to attend, to make representations and possibly even to give evidence."**

A He did not accept that the prescription set out above was capable of more than one meaning. He accepted that it exemplified paragraph 14 of **Rawson** and that the passage was an entirely correct statement of the law.

B

36. The broad discretion afforded to EJ Foxwell, submitted Mr Crozier, had entitled him to adopt the approach of, on the one hand, evaluating the likelihood of the proposed amendments being out of time, and, on the other hand, of evaluating the likelihood of an extension being C granted. Moreover, given that subsequently EJ Jones had ruled in relation to the dismissal that the ET had no jurisdiction to hear complaints as a result of judicial immunity and that other complaints had no reasonable prospect of success because they were an abuse of process, the D argument about any "*continuing act*" was entirely artificial. Because of those two conclusions there was no in time point that could constitute the last of the series.

37. As Ms Criddle pointed out in her subsequent written submission on "*relation back*", the E difference in wording between the then **ET Rules** and the **CPR** had been discussed by HHJ Clark in 2005 in the case of **Lehman Brothers Ltd v Smith** UKEAT/0486/05. He dealt with the respective Rules at paragraphs 17 to 20 of his judgment[3] and went on to discuss the primary F submission being addressed to him that the ET Rule was to be read as if it contained the same principle as set out in the **CPR**, namely that a new claim out of time would not be permitted unless it arose out of the same or substantially the same facts.

G

38. Having analysed the relevant case law HHJ Clark gave this answer at paragraphs 42 and 43:

H

[3] The ET Rule was materially different to the current version. The then Rule 10(1) referred to case management powers, examples of which were given by Rule 10(2) and 10(2)(q) specifically referred to giving leave to amend a claim. These examples were not repeated in the **2013 Rules** (see paragraph 61 of this Judgment below for a brief summary).

> **"42. … Nothing in the cases after Fairhurst causes me to alter the approach which I took in that case. Whilst the question as to whether an amendment application seeking to add a new claim (as opposed to a minor amendment) is itself made out of time, is an important factor, it is not determinative of the question. The balance of hardship and justice as between the parties must also be considered in carrying out the exercise of discretion to grant or refuse the amendment.**
>
> **43. Not only is that the correct approach on the whole of the authorities, but also reflects, in my judgment, the contrast between the current Employment Tribunal Rules and the CPR. Had Parliament wished to preclude amendments in Employment Tribunal proceedings which were out of time when made (but would not have been had they been contained in the original claim form) it would have limited the general wording in … [the relevant ET Rule] … to amendments based on the same or substantially the same facts as were contained in the original claim form (cf CPR Rule R17.4(2)).**"

This was not inconsistent with what Underhill J had said in **TGWU v Safeway** nor was it inconsistent with his judgment in the Court of Appeal in **Abercrombie** where, although, as Mr Crozier pointed out he had suggested the need for "*special circumstances*" he had, above all emphasised the need for flexibility.

39. The phrase "*the same or substantially the same facts*" is to be found in section 35(5)(a) **Limitation Act**. It forms part of an extensive and complex statutory regime applying to all forms of litigation in the civil courts of England and Wales and is provided for by **CPR** Part 17.4. As Ms Criddle points out in her written submission on "*relation back*", it reiterates the procedure previously set out in RSC Ord 20, r 5 which **CPR** 17.4 has replaced. Jacob J explained in **Beecham Group plc v Norton Healthcare Ltd** [1997] FSR 81 at page 94 that, as a result of the obiter dictum of Brandon LJ (see 801C to 803E-F) in **Liff v Peasley** [1980] 1 WLR 781 "*the doctrine of "relation back" … is now dead*" and see also House of Lord's decision in **Ketteman v Hansel Properties Ltd** [1987] AC 189 (per Lord Keith at 201G-H, Lord Brandon at 210D-G, Lord Templeman at 217D, Lord Griffiths at 223C and Lord Goff at 223D-E), which essentially confirms the obiter dictum as a correct statement of the law. Jacobs J went on to point out, however, that for the purposes of limitation in civil proceedings section 35(1) **Limitation Act** imposed "*a statutory deeming of a relation back*". So, submitted Ms

A Criddle, whilst there is a specific statutory provision relevant to civil proceedings there is no longer a general common law doctrine.

B 40. Therefore, submitted Ms Criddle, although HHJ Clark cites no authority at paragraph 14 of **Rawson** for his proposition that because "[t]*he effect of an amendment is to backdate the new claim to the date on which the original claim form is presented. … the Respondent is thereafter prevented from raising the limitation defence*" that proposition must be based on the C doctrine of "*relation back*". She reiterated that I ought not to follow it both because it is obiter dictum, repeating her earlier submission, and because it is based on the unsound premise that "*relation back*" applies.

D 41. She summarised the correct position as being that it is not mandatory for the ET to decide an out of time point when considering an application for permission to amend. Where a E "*continuing act*" is advanced as a possible answer to a limitation point it will be necessary to consider evidence and often in that context the correct approach may be one of not deciding that issue until after all the evidence on the merits has been heard (see paragraph 21 of the Opinion of the Inner House of the Court of Session in **City of Edinburgh Council v Kaur** F [2013] CSIH 32, to which I will return later in this Judgment). On the contrary, albeit in the context of a professional negligence action, in the Court of Appeal Laws LJ had said this at paragraph 70 of his judgment in **Chandra and Chandra v Brooke North (a firm) and Others** G [2013] EWCA Civ 1559:

> **"70. I turn now to the second option. This is for the court to determine the question of limitation as a preliminary issue at the same time as considering whether to give permission to amend. In practice, this course will seldom be appropriate. Before ordering any trial of preliminary issues, the court must carefully consider the ramifications of such an order. Will the same witnesses have to give evidence on related topics at two different trials? What will be the consequence if there is an appeal on the preliminary issue? Will the separation out of** H **preliminary issues ultimately lead to a saving or wastage of time and costs? Particular problems attach to an order for the trial of preliminary issues before the pleadings are complete. Having said all that, I must accept that there are some rare cases where the court will order trial of the limitation issue before deciding whether to give permission to amend."**

42. In her submission, in cases before the ET, and particularly in a discrimination case, the proper course would be to grant permission to appeal and determine the time point later. Otherwise the refusal of permission in effect determines the limitation issue without the point itself having been determined, as it should be, by a decision being made on the evidence and, in most cases, by hearing evidence, which is the preferable way to determine such an issue.

43. In Mr Crozier's written submissions on the "*relation back*" doctrine, he pointed out that the current **ET Rules** not only make no provision for amendment but now make no express reference to amendment. In contrast both by statute (section 35 **Limitation Act 1980**) and by rules made under that statute (**CPR** Part 17.4) the procedure in the civil courts deems causes of action brought by amendments made after the claim originated to have been brought on the date that claim was originated. He cited **Bank of Scotland plc v Watson** [2013] EWCA Civ 6 as an example of this and reminded me that at paragraph 5 of his judgment Lloyd LJ set out how a litigant should proceed when a proposed amendment raises new causes of action out of time:

> **"5. … Mrs Watson ought not to be permitted to amend her Defence and Counterclaim by substituting the new draft. If she is to maintain a claim against the bank along the lines set out in the draft statement of case, she must start yet further proceedings of her own. They would be at risk of being met with the defence that the claims are barred by limitation. That may not be an insuperable obstacle for her, in the case of some claims, but it is one which she would avoid if she could bring the claims by way of counterclaim in the existing county court proceedings. In my judgment she cannot bring herself within the rules which permit such an amendment."**

As he pointed out this bears a strong resemblance to EJ Foxwell's suggestion at paragraph 36 of the Reasons that the answer for the Appellant was to bring new proceedings.

44. The cases of **Potter** and **Prest**, submitted Mr Crozier, were not really cases of amendment introducing new causes of action. Both related to arrears of pay calculations in the context of equal pay claims, a very specific issue. Neither case had really considered either the

Limitation Act or the **CPR** and both would be inconsistent with **Selkent** and **Abercrombie**, if they were to be treated as authority for the proposition that allowing a potentially out of time amendment did not "*circumvent the statutory time-limits*" because that issue could be raised later.

45. The real line of authority supporting his argument, submitted Mr Crozier, was **Selkent**, **Rawson** and **Abercrombie**. He submitted that they must be read as together requiring out of time points to be considered and evaluated whenever an application for permission to amend was being considered. His argument was not that the **CPR** must be followed "*slavishly*" but that generally the **CPR** approach should be followed. He relied on what Smith LJ said at paragraph 47 of her judgment in **Governing Body of St Albans Girls' School and Another v Neary** [2009] EWCA Civ 1190, [2010] ICR 473:

> **"47. I would accept Mr Green's submission that it should be inferred that Parliament deliberately did not incorporate CPR 3.9(1) into employment tribunal practice when it chose to incorporate the overriding objective. There is, to my mind, an obvious reason why Parliament did not do so. It has always been the intention of Parliament that employment tribunal proceedings should be as short, simple and informal as possible. We all know that that intention has not been fulfilled and that employment law and practice have become difficult and complex. But where Parliament has apparently decided not to incorporate into employment tribunal practice a set of requirements such as those in CPR 3.9, I do not think it proper for the courts to incorporate them by judicial decision. It is one thing to say that ETs should apply the same general principles as are applied in the civil courts and quite another to say that they are obliged to follow the letter of the CPR in all respects. It is one thing to say that ETs might find the list of CPR 3.9(1) factors useful as a checklist and quite another to say that each factor must be explicitly considered in the employment judge's reasons. I would overrule the line of EAT authority which, in effect, requires specific consideration of all the CPR 3.9(1) factors on an application involving relief from a sanction in the ET."**

46. On 7 March 2017 the judgment of Lady Wise sitting alone in a division of this Tribunal in Scotland in the case of **Amey Services Ltd and Another v Aldridge and Others** [2017] UKEATS/0007/16 was handed down. Both parties sought permission to make further written submissions in relation to it and I acceded to that request.

47. Before turning to it, I should mention an earlier decision made by Lady Smith also sitting alone in Edinburgh in this Tribunal in **Newsquest (Herald and Times) Ltd v Keeping** UKEATS/0051/09. This is referred to and relied on by Lady Wise in the **Amey Services** case but it had not hitherto been drawn to my attention. In **Newsquest**, an equal pay case, an application was made to amend the ET1 to add an earlier period when the Appellant had been in a different post and two new comparators from that time. Although some facts already pleaded might have been relevant to the amendment, the EJ regarded it as a new claim. Even so the ET allowed the amendment. In doing so Lady Smith concluded the EJ had misdirected herself that the proposed amendment was not out of time when it manifestly was. Accordingly, the exercise by the EJ of her discretion was vitiated by her having wrongly excluded from consideration the fact that the new claim raised by the proposed amendment was out of time. Consequently, she allowed the appeal, refused to remit and directed that the proposed amendment be refused.

48. In the subsequent and recent case of **Amey Services** Lady Wise allowed an appeal against the decision of an ET to permit amendments "*subject to time bar*". This had been opposed by the employer on the basis that it was not permissible having regard to the authorities of **Selkent** and **Rawson**. EJ Gall accepted that the proposed amendments to make further claims for unlawful deductions amounted to a new claim (or claims) even though the subject matter was similar to, if not the same as, the complaint about unlawful deductions made in the original claim. Nevertheless, he felt able to distinguish those two cases on the basis that they involved factual situations present at the time the original claim had been filed whereas the **Amey Services** case involved the addition of complaints about alleged deductions occurring after that time. He did not feel it necessary to consider the out of time point, regarding it as not relevant then because it could be addressed at a later stage. He gave other reasons for

exercising his discretion in favour of permitting an amendment and these are discussed at length in the judgment.

49. Lady Wise examined the authorities quoting the passage from the judgment of Mummery J in **Selkent**, which is set out above at paragraph 33 of this Judgment and quoting from part of paragraph 14 of the judgment of HHJ Clark in **Rawson** (set out above at paragraph 26 of this Judgment). She also quoted the following passages from the judgment of Lady Smith in **Newsquest** (paragraph 22), as being "*a Scottish perspective*":

> **"22. The fact that to allow an amendment would, in effect, enable a claimant to elide a statutory time bar does not necessarily prevent an Employment Tribunal granting the application. It does not operate as an absolute bar … It is, however, as I said in the case of *Argyll and Clyde Health Board v Foulds & Others* UKEATS/0009, a highly relevant factor. … Underhill J referred to it as "potentially decisive" in *TGWU v Safeway Stores Ltd* UKEAT/0092/07 at paragraph 10. Furthermore, a Tribunal requires to consider why the application was not made at an earlier date, why it is being made at that point in time and what are the whole circumstances of the lateness … The overall task of balancing the injustice and hardship that will result from granting the amendment against that which will result from refusing it, must, in the case of an amendment to introduce a fresh claim which would be time barred if presented independently, be carried out in that context."**

50. In allowing the appeal Lady Wise concluded at paragraph 21 "*these authorities*" make clear "*that the usual principles for amendment of a claim include a requirement to determine at the stage of exercising discretion*" whether the proposed amendment would "*bring in a claim that would otherwise be time barred*" and if it would "*whether there are good reasons, taking into account injustices and hardship that may be the result*" to grant the application and allow an amendment even though "*the effect will be to allow the amending party to avoid the usual consequences of presenting a claim out of time*". This was an "*approach … of general application*" and so it applied irrespective as to whether the claims to be introduced had existed at the time of the originating application or had arisen since (i.e. disposing of the distinction relied upon by EJ Gall).

51. Lady Wise said that:

> **"21. … The accepted principle is that where timebar is an issue in a proposed amendment, it is considered as an integral part of the overall decision to grant or refuse the amendment. That is the position in both Scotland and England and Wales, the absence of any reference to consideration of time limits in the relevant Presidential Guidance in Scotland being of no moment standing the clear statement of principle enunciated by Lady Smith in *Newsquest.* …"**

At paragraph 22 of her judgment she said of the decisions in **Selkent** and **Rawson** that "*the principles … set down are of general application*" and that:

> **"22. … In any event, the error in this case was in attempting to carve out the issue of time bar from the decision on whether to allow the amendment. A determination on the grant or refusal of an amendment is a single stage exercise. Once the tribunal allows the amendment the new claim is subject to the jurisdiction of the tribunal and a substantive decision will be made on the claims within it. The Judge's misunderstanding of the legal position in this case is best illustrated by his reference, in paragraph 179, to the issue of time bar being "***… of relevance in the ultimate determination of the applications to amend***". It seems that he regarded the decision to allow the amendment "subject to time bar" as some sort of tentative conclusion, to be revisited later. That is not, on the basis of the established principles, a permissible approach. The Presidential Practice Directions do nothing to assist the claimants on this issue. On the contrary, the 2015 Direction serves to emphasise the importance of any amendment being considered on its merits. The Judge in this case has not determined as part of the overall hardship test whether or not the amendments seek to introduce time barred claims and for that reason alone his decision cannot stand. There were other options available to the Judge in the situation presented to him. In particular, he could have deferred his decision on the amendment until a later date. There may be situations in which a decision on an amendment can be deferred pending enquiry. It may sometimes be appropriate to defer a decision pending resolution of the legal issue by a higher court or tribunal. If a Judge is concerned that he cannot determine whether an amendment application should be allowed without more information, whether by way factual inquiry or otherwise he can raise that with the parties' representatives. What the Judge in this case was not entitled to do was *allow* the amendments at the same time as deferring the timebar issue. That was in my view a material error that justifies interference with his decision."**

The succeeding paragraphs of the judgment deal with specific issues in the case, which to my mind cast no helpful light on the problems here and I do not propose to go into them.

52. Mr Crozier's written submission on **Amey Services** can be summarised shortly. He regarded it as the keystone in the arch of his submissions that EJ Foxwell had been correct to deal with the issue of time rather than postpone it. **Amey Services** post-dated the decision by EJ Foxwell but it was the latest in a considerable body of authority to this effect at this level from distinguished Judges. He had clearly followed the earlier cases in the line of authority and **Amey Services** confirmed the correctness of his decision. It demonstrated, therefore, that

his judgment was beyond challenge. If, which Mr Crozier did not accept, previously there had been any lack of clarity, **Amey Services** put the matter beyond doubt; when any question of amendment arose prior or simultaneous consideration of the out of time point was in the words of Lady Wise "*a requirement*", i.e. it was mandatory.

53. Ms Criddle submitted that there were two major shortcomings in the **Amey Services** decision. Firstly, it did not consider how the Tribunal should approach this question if, in respect of limitation, either a "*continuing act*" was relied or if there was a discretionary basis for extending time on the basis of whether it was just and equitable to do so. Secondly, she submitted that the judgment, rooted as it was in the "*relation back*" doctrine, was plainly wrong. She referred me to **Lock and Another v British Gas Trading Ltd** (No 2) UKEAT/ 0189/15, [2016] IRLR 316 in which a division of this Tribunal comprising Singh J was invited to take a different course to that which had been adopted by another division of this Tribunal.

54. At paragraphs 72 to 75 of his judgment there is a very helpful exposition of, and explanation as to how "*stare decisis*" or "*the hierarchy of precedent*" applies to this Tribunal. Normally, previous decisions of this Tribunal are of persuasive authority and will generally be followed by subsequent divisions of this Tribunal unless one of the established exceptions applies. These are identified in paragraphs 72 to 75. She submitted the first two exceptions were obviously engaged here. These are firstly where a decision can be said to be "*per incuriam*" (i.e. made without proper consideration of relevant legislation or another binding authority) and secondly where there are two or more inconsistent decisions of this Tribunal. Also, the fourth consideration, namely where it is possible to say a previous decision is manifestly wrong, may also have some relevance in the present context.

Discussion

55. In this appeal, before I come to a consideration of the correctness of the exercise by EJ Foxwell of his judicial discretion, I must first look at what I referred to earlier as the "*prior question*", namely the applicability of the doctrine of "*relation back*" in the context of the practice and procedure of the ET.

56. It seems to me that in **Rawson** HHJ Clark made two assumptions. Firstly, that the "*relation back*" doctrine did apply in the ET and secondly, that it was the application of the doctrine which prompted Mummery J in **Selkent** to emphasise the importance of dealing with any out of time aspect of the proposed amendment of a claim when considering whether to grant permission to amend it.

57. In **Selkent** Mummery J stated no reasoning for the conclusion that it was "*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*". It seems to me that in paragraph 14 of his judgment in **Rawson** (set out above at paragraph 26 of this Judgment) HHJ Clark bases the conclusion to be found in the first sentence of that paragraph, namely that the approach of the EJ in **Rawson** case had been wrong, on the premise that approach was contrary to **Selkent**. But in the second sentence of that paragraph, namely that "[t]*he effect of an amendment is to backdate the new claim to the date on which the original claim form is presented*" HHJ Clark appears to me to be, at least implicitly, both basing his own conclusion on, and also justifying the reasoning of Mummery J in **Selkent** by, the doctrine of "*relation back*". In other words, not only did he take the view that the "*relation back*" doctrine applies in the ET but also that Mummery J must have been of the same mind. In neither case was the Tribunal referred to **Liff v Peasley**, **Ketteman v Hansel** or **Beecham Group plc**.

58. That "*relation back*" applies in the ET has clearly been accepted subsequently both by Lady Smith in **Newsquest** and by Lady Wise in **Amey Services**, although it seems to me that, looking at both judgments closely, neither Judge regarded the effect of "*relation back*" as an "*absolute bar*", to adopt the expression used by Lady Smith in **Newsquest**, to an amendment. This is consistent with the judgment of Underhill J in **TGWU v Safeway** that there is no absolute bar to amendment arising from the fact that an out of time claim would be added as a result of the amendment being permitted (see paragraph 7 of his judgment discussed above at paragraph 24 of this Judgment) and, of course, HHJ Clark accepted as much in the last sentence of paragraph 14 of the judgment in **Rawson** where he refers expressly to Underhill J's judgment. Nevertheless, as Lady Wise puts it in **Amey Services**, when taken together, **Rawson** and **Newsquest** constitute an "*accepted principle … that where timebar is an issue in a proposed amendment, it is considered as an integral part of the overall decision to grant or refuse the amendment*".

59. But why should "*relation back*" apply? As Jacob J put it in **Beecham Group plc** "*the doctrine of "relation back" … is now dead*". He pointed out it had been resurrected by section 35(1) of the **Limitation Act 1980** imposing "*a statutory deeming of a relation back*" and that has been given procedural effect by the **CPR** (now **CPR** Part 17.4) but I agree with Ms Criddle that whilst there is a specific statutory provision there is no longer a more general common law procedural rule to that effect.

60. I accept Mr Crozier's submission that the proposition that the **ET Rules of Procedure** generally should follow the **CPR** derives some support from Smith LJ's judgment in **Neary** (see above at paragraph 45 of this Judgment). That support seems to me, however, to be somewhat limited, given that **Neary** was dealing with the correct approach to relief from

A sanction in the ET. When I analysed the relationship between the **CPR** and the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** in **Serco Ltd v Wells** UKEAT/0330/15 (see paragraphs 25 to 43), I referred to the judgment of the then President, Langstaff J, in **Harris v Academies Enterprise Trust and Others** UKEAT/0097 & 0102/14 which rejected the argument that the **2013 Rules of Procedure** are coupled to the **CPR**. According to Langstaff J, this is, at least in part, because the overriding objective contained in the **ET Rules** is not the same as that in the **CPR**, although Langstaff J recognised "*there is much of principle that applies to both*" (see paragraphs 32 and 33 of the judgment).

61. There, Langstaff J seems to me to express accurately the relationship between the two sets of Rules, but I would add that, as a matter of statutory interpretation, the starting point must always be the wording of the relevant ET rule. In the present context, however, there is now no specific rule dealing with, or even referring to, amendment; there is the general case management rule (Rule 29), in which it can be argued amendment must be subsumed, and there are the rules relating to rejection of an application or of a response to it (Rules 10, 12 and 13), something which might or might not involve amendment. Although Rule 13(4) is therefore by no means confined to amendment, it may be worth noting it does not appear to me to adopt the "*relation back*" doctrine when it deals with timing.

62. I must accept, however, that HHJ Clark, Lady Smith and Lady Wise plainly espoused the "*relation back*" doctrine. I regard **TGWU v Safeway** as travelling in the other direction, although I accept "*relation back*" was never considered. I also accept that what was said in both the cases of **Potter** and **Prest** might be analysed as obiter dictum and the potential to characterise many of these decisions, including these two, as being "*per incuriam*" is almost ubiquitous.

63. In **Potter** there was confusion as to whether "*relation back*" had been an issue before the ET. Although **TGWU v Safeway** was referred to in the judgment of the Tribunal in **Potter**, **Rawson** was not. It seems highly likely it was not cited, not only because of its absence from the list of cases referred to, but also because I think it improbable that such a distinguished Judge would not have mentioned it in her careful judgment, particularly given that there appears to have been a misunderstanding by the ET about the arguments being addressed to it on "*relation back*". In that sense it might be said that **Potter** was "*per incuriam*". But both on the appeal and at first instance the employer accepted that the "*relation back theory was dead*" and Slade J decided the case on that basis.

64. In **Prest** although the "*relation back*" point was argued at the ET, it was not pursued on appeal. Therefore, it is not surprising that **Rawson** was not cited and it might be said that the decision was also "*per incuriam*" (**Rawson** and what might be described as its progeny are, of course, also open to the challenge of having been decided "*per incuriam*", the cases of **Liff v Peasley** etc). Nevertheless, at paragraph 12 of **Prest** Underhill J approved the statement made by Slade J in **Potter** and he did so, not only on the authority of **Liff v Peasley** and **Ketteman v Hansel**, but on a brief logical analysis, which I find compelling (paragraph 12 is set out above at paragraph 28 of this Judgment). I agree that in the case of an amendment to existing proceedings introducing a new cause of action "*the date at which those proceedings were first instituted is logically an accident, and it does not make sense to determine the relevant time limits by reference to it* [i]*f the claim is new in substance then it is artificial and unreal to regard it as having been instituted at some earlier date simply because an earlier claim with which it has become procedurally entwined was instituted at that date*". This seems to me to be a very sound basis for rejecting the "*relation back*" doctrine in principle.

65. I must accept, however, that the "*relation back*" theory has gained a foothold, or, perhaps, rather more than that, because it is supported by three decisions of this Tribunal. But against that, in two other decisions it has been accepted the doctrine has no application to the ET, essentially because it does not exist. To my mind it is not significant that these were equal pay cases and that the point essentially went to compensation rather than jurisdiction and I reject Mr Crozier's attempt to distinguish them on that basis. "*Relation back*" no longer has any existence as a common law procedural rule and there is, to my mind, no compelling reason why the **Limitation Act** should be applied by analogy to the ET. Above all I can see no reason in logic why it needs to be applied.

66. In my judgment, it would be an odd jurisprudence that required the silence of the **ET Rules** to be supplemented by reference to a common law principle of procedure pronounced defunct over 30 years ago. Further, any interpretation that "*relation back*" must be implied into the **ET Rules** seems to me to sit uncomfortably with the judgment of HHJ Clark himself in the **Lehman Brothers** case (see above at paragraphs 37 and 38) where he rejected the argument that **CPR** Part 17.4(2) (no amendment adding a new claim to be permitted unless it arises out of the same or substantially the same facts) should be "*determinative*" of permission to amend in the ET. If there is no warrant for importing **CPR** Part 17.4(2), which derives from section 35(4) of the **Limitation Act**, I cannot understand why one should import another part of the **Limitation Act**, section 35(1), particularly when there is nothing in that or any other act to extend its scope to litigation in the ET.

67. Therefore, my answer to the "*prior question*" is that there is no doctrine of "*relation back*" in the procedure of the ET. I am, of course, discomforted that this conclusion means I cannot follow the previous decisions of this Tribunal, **Rawson**, **Newsquest** or **Amey Services**,

in so far as those decisions must be based on the "*relation back*" doctrine. Notwithstanding their limitations, I prefer the conclusions of Slade J in **Potter** and Underhill J in **Prest** on this question. In particular, I agree with the logical analysis of the latter mentioned above at paragraph 64 of this Judgment. I regard the "*per incuriam*" option as leading me into a maze out of which I might never escape, but, looked at more simply, these are inconsistent decisions of this Tribunal and I am therefore at liberty to choose between them.

68. Alternatively, for the reasons set out above, I am bound to say that I regard **Rawson**, **Newsquest** and **Amey Services** as wrong on the point that, as a matter of law, out of time points must always be determined prior to or at the same time as an application for permission to amend to add a new cause of action is being considered and I am not prepared to follow them on it. I should make it clear, however, that this does not mean it will be wrong in many cases to decide the matters together. I do not for one moment take issue with the proposition that in order to exercise properly the discretion as to whether to permit or refuse an amendment it will be necessary to know whether the new claim is out of time. What I am concerned about is that it may not always be possible to know that until evidence, and sometimes, usually in discrimination cases, a great deal of evidence, has been heard. I will return to this later in this Judgment.

69. I turn now to the fundamental question as to whether EJ Foxwell erred in law in the exercise of his discretion. At paragraph 56 above, I said that I regarded HHJ Clark as having made two assumptions in **Rawson**. I have just dealt with the first, that "*relation back*" applies to amendment in the ET, and rejected it. The second was the implicit assumption that the reason why Mummery J regarded it as "*essential*" for the issue of limitation to be decided before or at the same time as the question of amendment was evaluated was because the

doctrine of "*relation back*" applied to the amendment once permission was granted for it. The wording of the judgment of Mummery J at this point in **Selkent** says nothing about the underlying reasoning but his use of the word "*essential*" suggests he regarded it as very important.

70. I accept that one view of it is that he intended it to be mandatory because of the application of the "*relation back*" doctrine to the timing of any amendment. If so, given my view that the procedural doctrine does not apply, I do not shrink from stating that in my view he was wrong.

71. But that is not the only potential reason for regarding it as very important. It seems to me there is another sense in which it might be regarded as "*essential*" not to decide one without deciding the other and that is because in the ET the issue of limitation goes to jurisdiction. But I think if that is what Mummery J had in mind then I must also say he went further than was necessary in regarding it as an absolute requirement and I think that is illustrated by consideration of the **Abercrombie** case.

72. This is a case which Mr Crozier regarded as supporting his argument that out of time amendments should not be permitted save in special circumstances. I agree that it does but that seems to me an entirely conventional view. I think, however, that another aspect of **Abercrombie** is even more important. In order to understand this it is necessary to go a little way into the detail, although before embarking on that I remind myself Underhill LJ described the case as straightforward but "*wrapped in a miasma of procedural technicality*" (see paragraph 3 of his judgment) so I will try to summarise the case without being entangled in its procedural byways.

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73. The case concerned the somewhat rare phenomenon of a controversy over entitlement to "*guarantee payments*" arising under section 28 in Part III of the **Employment Rights Act 1996** ("ERA"). By section 34 **ERA**, an ET has jurisdiction to consider a complaint about the failure to make such a payment; that jurisdiction is subject to a three-month time limit. Part II of the **ERA** deals with the topic of "*unlawful deduction from wages*"; this too is within the jurisdiction of the ET. There is also a three-month time limit in respect of such claims although, unlike "*guarantee payments*", there is also a "*continuing act*" provision in cases involving a series of deductions (see section 23(3)(b) **ERA**). This featured only at the end of the judgment in paragraphs 65 and 66 where it had some influence on the terms of the remission but it was not really under consideration in respect of the substance of the appeal.

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74. The claim made in **Abercrombie** was formulated as an "*unlawful deductions*" claim. The employer put in issue whether, as a result of agreements entered into, the employees were, within the meaning of section 28, "*normally*" required to work on a Friday, which would have a bearing on the legality of any deductions. The employees had filed a claim in respect of payments in 2009 and a further claim in respect of subsequent payments in early 2010. In respect of the latter the employer contended there had been an unreasonable refusal of alternative work, which would have afforded it a defence, and that the 2010 claim was out of time.

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75. At the hearing an application was made on behalf of the employees to amend the 2009 claim to make it, in the alternative, a "*guarantee payments*" claim under section 34 **ERA**. This was refused by the ET both on the basis that a section 34 claim would be a new cause of action and that to allow the new claim would avoid the fact that the 2009 claim was not within the jurisdiction of the ET because of a failure to comply with the provisions of the statutory

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A grievance procedure then in force as a result of Schedule 2 of the **Employment Act 2002**, the provisions of which would not apply to the new section 34 claim.

B 76. In **Abercrombie**, in the judgment of the Court of Appeal given by Underhill LJ, the Court concluded that on the question of amendment the ET had exercised its judicial discretion unlawfully in refusing the application. This was for following reasons: firstly, because it was "*very doubtful*" that seeking to change the "*statutory gateway*" raised "*a new cause of action*" C but in any event raising a new cause of action is not "*impermissible*", the judgment of Mummery J in **Selkent** is not "*advocating so formalistic an approach*" (see paragraph 47 of the judgment); secondly, because factually the case was one of "*mere re-labelling*" (see paragraph D 49 of the judgment); thirdly, because although whether the new cause of action might be out of time was a relevant factor, its significance would depend on the circumstances (see paragraph 50 of the judgment set out above); fourthly, because delay in making the application was not E open on the facts (see paragraph 51). Three of the above are specific to the case; the fourth, the third listed in the previous sentence, is a matter of general principle.

F 77. Counsel for the Respondent in **Abercrombie** did not seek to argue that there was an absolute bar to the grant of permission to amend to add a new cause of action which was out of time (to do so would have involved a challenge to the judgment of Underhill J in the **TGWU v Safeway** decision referred to above at paragraph 24 of this Judgment - see footnote 7 to G paragraph 50 of the judgment in **Abercrombie**). What was argued on the appeal in **Abercrombie**, however, was what was called the "*jurisdiction point*". In the context of **Abercrombie** that was whether the ET had jurisdiction to consider a case when there had been H a failure to comply with the statutory grievance procedure, which Schedule 2 of the **Employment Act 2002** and Regulations made to give effect to it prescribed as mandatory,

A although, as Underhill LJ pointed out in footnote 8 to paragraph 54 of the judgment, it could apply to other circumstances, "*an obvious example* … [being] … *time points*".

B 78. Given that footnote, it is worth setting out Underhill LJ's analysis on the nullity/want of jurisdiction point (see paragraph 54):

> **"54. … But I do not agree that the fact that a claimant has commenced proceedings in respect of a claim which the tribunal decides in due course that it has no jurisdiction to determine is an absolute bar to an amendment which would remove that difficulty. Silber J's view to the contrary seems to depend on his characterisation of the claim as a "nullity". I can see the force of the argument that if the claim were indeed nullity in the full sense of that term, ie ab initio, there would be no proceedings in being that could be the subject of an amendment. But that is not the case here. It is necessary to understand how section 32 worked. As appears from section 32(6), the tribunal was only prevented from considering a complaint if either (a) the claimant's non-compliance was apparent on the face of the ET1 or (b) it decided that there had been non-compliance with section 32(2) in response to the respondent raising that issue "in accordance with … employment tribunal procedure regulations" (which in practice means by an amendment under the Rules). In the present case head (a) did not apply: the claimants said nothing in their ET1 to indicate non-compliance, because they (like the respondent) believed that a valid collective grievance had been lodged. As for head (b), it was only at the hearing itself that the employment judge gave permission to amend and was "satisfied of the breach" asserted by the respondent. Until that moment the tribunal had full jurisdiction and the proceedings were entirely valid. There is thus no question of nullity."**

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79. The analysis continued in paragraphs 55 and 56 by reference to **Cocking v Sandhurst (Stationers) Ltd** [1974] ICR 650, which had been relied on by the EAT as supporting the ET's decision but which Underhill LJ did not regard as relevant and **Capek v Lincolnshire County Council** [2000] ICR 878, which Underhill LJ accepted provided some support for the Appellant's argument but, given that no "*jurisdiction point*" as such had been argued, could not be regarded as conclusive. However, part of the last sentence of paragraph 56 reads:

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> **"56. … and I prefer to decide the issue as one of principle rather than treat *Capek* as binding authority."**

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In my view, therefore, the reasoning in paragraph 54 (set out above in the preceding paragraph) must be "*one of principle*" and I think it applies also to a challenge to the jurisdiction of the ET on the grounds that the claim has not been brought within the time limit for doing so. Such a claim is not a nullity "*ab initio*"; it is a valid claim unless and until the ET decides that it is out

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of time either because of a mathematical computation as to the period between the act complained of and the date when the proceedings were commenced or between the last act in a series of acts and the date of the commencement of the proceedings or, in discrimination cases, because the ET concludes that it is not just and equitable to extend that period. Accordingly, if want of jurisdiction was what Mummery J had in mind when he used the word "*essential*" I do not think that the reasoning in paragraph 54 of the judgment in **Abercrombie** supports it being "*essential*", in the sense of it being mandatory, to dispose of limitation issues before granting permission to amend.

80. The third possible reason as to why Mummery J regarded it as "*essential*" is that to exercise discretion without the out of time issue having been decided would be to risk conducting a balancing exercise on an imperfect factual matrix. I regard this as the most likely basis for this part of Mummery J's guidance in **Selken**t and the *Presidential Guidance* (set out above at paragraph 35) seems to me to approach it from the same direction. The language used by Mummery J - "*whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions*" - implies, to my mind, the necessity for making a final decision on the out of time issue before considering whether or not to grant permission to amend.

81. Ultimately Ms Criddle challenged the correctness of this guidance that the ET is obliged to resolve the out of time point before granting permission to amend and in doing so she also challenged the correctness of the *Presidential Guidance*. Alternatively, she submitted that EJ Foxwell had not followed this guidance and had erred by adopting a provisional approach to the question. Mr Crozier submitted that this amounted to no more than an attempt to persuade

me to interfere on the basis that EJ Foxwell was wrong because I might have approached the matter differently myself.

82. At this point the parties diverged on the approach which this Tribunal should take to interfering with the exercise of a judicial discretion at first instance. Mummery LJ in a well-known passage at paragraph 21 of his judgment in **Gayle v Sandwell and West Birmingham Hospitals NHS Trust** [2011] IRLR 810 said this:

> **"21. … If the ETs are firm and fair in their management of cases pre-hearing and in the conduct of the hearing the EAT and this court should, wherever legally possible, back up their case management decisions and rulings."**

The parties accepted that the decision under consideration in the instant appeal was a case management decision.

83. More recently, in **Kuznetsov v Royal Bank of Scotland** [2017] EWCA Civ 43 the Court of Appeal refused to interfere with the rejection by the ET of an application for permission to amend a claim. Elias LJ, in giving the judgment of the court, said this at paragraphs 18 to 20:

> **"18. … I will summarise the relevant and undisputed legal principles in issue in this case.**
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> **19. First, employment tribunals have a broad discretion in the exercise of case management powers and the appellate courts will not interfere unless there is an error of law or the decision is perverse: *Carter v Credit Change Ltd* [1980] 1 All ER 252 (CA). Errors of law include failing to take into account relevant considerations and having regard to irrelevant ones.**
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> **20. Second, in the case of the exercise of discretion for applications to amend, a tribunal should take into account all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it: see the observations of Mummery J, as he then was, in *Selkent Bus Co v Moore* [1996] ICR 836 (EAT). Factors to be taken into consideration include the nature of the amendment, so that for example an amendment which changed the basis of an existing claim will be more difficult to justify than an amendment which essentially places a new label on already pleaded facts; the question whether the claim is out of time and if so, whether time should be extended under the applicable statutory provision; and the extent of any delay and the reasons for it. As Underhill LJ pointed out in *Abercrombie v Aga Rangemaster Ltd* [2013] EWCA Civ 1148; [2014] ICR 209 at para.47, these are neither intended to be exhaustive nor should they be approached in a tick-box fashion."**

84. But experience on this and other appeals suggests to me there may be developing an undesirable tendency to regard case management decisions as being in a special category or that the fact the discretion can properly be described as a "*broad discretion*" renders its exercise immune from scrutiny. I am confident that is not what either Mummery LJ or Elias LJ intended by the above remarks. Mummery LJ's qualification "*wherever legally possible*" means that a judicial discretion unlawfully exercised cannot stand.

85. In my judgment, challenging the exercise of judicial discretion on appeal depends on exactly the same principles as any other challenge on appeal to this Tribunal: if the challenge is to succeed, it must be based on an error of law and if there is such an error then the appeal will succeed notwithstanding that the order under appeal is a case management decision. In **Broughton v Kop Football (Cayman) Ltd and Others** [2012] EWCA Civ 1743 Lewison LJ said this:

> **"51. Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained."**

At paragraph 13 of his judgment in **HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd and Another** [2014] UKSC 64, [2014] 1 WLR 4495 Lord Neuberger referred to that passage in these terms:

> **"13. … The essential question is whether it was a direction which Vos J could properly have given. Given that it was a case management decision, it would be inappropriate for an appellate court to reverse or otherwise interfere with it, unless it was "plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree" as Lewison LJ expressed it in *Broughton v Kop Football (Cayman) Ltd* [2012] EWCA Civ 1743, para 51."**

86. The provenance of the above quotation is actually much older than the **Broughton** case. Its origin is the observations of Asquith LJ in **Bellenden (formerly Satterthwaite) v Satterthwaite** [1948] 1 All ER 343:

> **"… It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere. …" (Page 345B)**

87. This passage was restored to prominence by Lords Fraser and Bridge in the House of Lords in the child care case of **G v G** [1985] 1 WLR 647, which is also the origin of the concept of the "*least worst solution*" also referred to by Lewison LJ in the passage from his judgment in **Broughton** quoted above (see Lord Fraser in **G v G** at p.651D-F). That concept, which may be particularly apt in the context of child care, has not found its way into the jurisprudence of employment law but the passage from Asquith LJ has via the judgment of Wall LJ in **CICB v Beck** [2009] EWCA Civ 619, [2009] IRLR 740 at paragraph 23 of his judgment.

88. In that case, His Honour Judge McMullen QC had overturned a case management decision on disclosure by an ET on the basis that the exercise of discretion had been "*plainly wrong*" and that was upheld by the Court of Appeal. In subsequent cases, Judge McMullen frequently cited the last sentence of the passage from the judgment of Asquith LJ set out above and, as a result, this Tribunal has become very familiar with the expression "*the generous ambit within which reasonable disagreement is possible*". It has been repeated recently in paragraphs 1 and 2 of Langstaff J's judgment in **Harris** (see above at paragraph 60 of this Judgment for the citation) and at paragraph 59 of the judgment of HHJ Serota QC in **Remploy Ltd v Abbott and Others** [2015] UKEAT/0405/14.

89. The exercise of judicial discretion occurs in many different contexts, but in my judgment the same approach applies whatever the context, even though the analysis of that approach has sometimes been differently expressed. The approach Asquith LJ articulated, and the House of Lords approved in **G v G**, is a specific perspective as to how one might approach the issue of deciding whether the Judge was wrong and not just wrong but "*plainly wrong*", as Lewison LJ has suggested in the passage cited above. In effect, the words of Asquith LJ are a powerful antidote to the natural impulse to interfere from which an appellate tribunal might suffer when its own inclination might have led to a different conclusion. I have noticed, however, a trend of late to regard that as all that needs to be said about an error of law in connection with the exercise of a judicial discretion. Part of Mr Crozier's submissions about whether there had been an error in the instant case had something of that flavour.

90. But the scope of appellate scrutiny is much wider than "*the generous ambit within which reasonable disagreement is possible*" as the passage from the judgment of Lewison LJ in **Broughton** shows. I should mention that much the same thing appears at paragraph 8 of the more recent judgment of Arden LJ in **City West Housing Trust v Massey** [2016] EWCA Civ 704, a case about the exercise of discretion in relation to suspending possession orders.

91. These broader expressions of the basis upon which an appellate court can interfere with the exercise of discretion derive from the Court of Appeal decisions in **Alltrans Express Ltd v CVA Holdings Ltd** [1984] 1 WLR 394 (per Griffiths LJ at p.403G), **Roache v Newsgroup Newspapers Ltd** [1998] EMLR 161 (per Stuart-Smith LJ at p.172) and **AEI Rediffusion Music Ltd v Phonographic Performance Ltd** [1999] 1 WLR 1507 (per Master of the Rolls, Lord Woolf MR at p.1523B-C). These all emphasise that misdirection as to law, perversity,

consideration of the irrelevant and lack of consideration of the relevant are just as much a basis for interference as concluding that the decision was "*plainly wrong*".

92. In deciding whether a decision to give or refuse permission to amend was erroneous, I recognise that there is a broad discretion vested in the ET. But that does not mean the exercise of a broad discretion, particularly when it arises in a case management context, such as a decision about amendment, must be regarded as inviolate.

93. As Wall LJ pointed out at paragraphs 24 and 25 of his judgment in **CICB v Beck**:

> **"24. There is no particular magic in the fact that we are here dealing with an appeal from the ET to the EAT and then to this Court. *G v G* principles apply in the instant case as they would apply to any other appeal which involves the exercise of a judicial discretion.**
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> **25. We make this point because Mr Oudkerk, for the Bank, came near to submitting that it was simply not open to Judge McMullen QC to reverse the ET on a case management decision. In our judgment, that submission is manifestly untenable. Whilst, of course, a judge who makes a case management decision exercises a very broad judicial discretion and such decisions will be treated with deference by superior courts, the exercise of a judicial discretion which falls foul of *G v G* is an error of law and is capable of being corrected on appeal."**

I would add, as I have endeavoured to explain above, that scrutiny is not, in my judgment, to be confined only to consideration of "*the generous ambit within which reasonable disagreement is possible*". It applies also to any of the other varieties of error of law identified in the cases I have referred to.

94. With all that in mind, I now return to the competing submissions. Ms Criddle's primary submission was that EJ Foxwell had misdirected himself. Firstly, he had approached the exercise of his discretion on the basis of the "*relation back*" doctrine and this was erroneous because it does not apply to amendments to pleadings in the ET. The result was a distorted view as to the balance between competing factors. In the light of my conclusion above that the "*relation back*" does not apply to amendments to pleadings in the ET, I must accept this

submission. On an analysis of paragraph 37 of the Reasons the "*critical issue*" was said to be that of "*time*" and that must refer back to paragraph 35 and to the fact that "*the amendment will deprive the Respondent of its jurisdictional defence*". I agree with Ms Criddle that this must be based on the doctrine of "*relation back*" and that constitutes an error of law at the heart of EJ Foxwell's reasoning. He was, of course, blameless in this regard because, unlike me, he was bound to follow **Rawson**.

95. Secondly, Ms Criddle argued that EJ Foxwell had erred by accepting that it was essential to reach a decision as to the out of time point. Reaching a decision at a preliminary stage was not always possible, particularly in discrimination cases. It should never have been attempted here because there was an argument as to "*continuing act*".

96. This was not discussed by Mummery J in **Selkent** and I agree with Ms Criddle that in some cases it might present a significant difficulty to deciding the out of time point at a preliminary stage in the proceedings. In **Kaur** (referred to above at paragraph 41 of this Judgment), amendment was not under consideration, although the case did concern the correct approach towards dealing with out of time points in discrimination cases. It was argued before the Second Division of the Inner House of the Court of Session that the authorities supported the approach of establishing whether there was a "*prima facie*" case of a "*continuing act*" (see paragraphs 14 and 15 of the Opinion) and that if a Claimant failed to establish such a "*prima facie*" case then an ET was entitled to dismiss the claim at a preliminary stage without evidence being heard or considered.

97. The Inner House rejected the argument, although, in explaining how it thought the matter should be approached, the Inner House continued to use the expression "*prima facie*". I

A regard myself as bound by decisions of the Inner House but, speaking for myself, I am not confident that an expression such as "*prima facie*", is entirely apt to describe a "*threshold*" the crossing of which marks out the difference between being able to make a summary decision on paper without hearing any evidence and the need for an evidential investigation before making a decision. The phrase "*prima facie*" means different things in different contexts. In the criminal jurisdiction of England and Wales it usually relates to an examination as to what the evidence, which has been heard, amounts to and likewise in deciding whether the burden of proof has shifted in discrimination cases. It was the test adopted in the civil jurisdiction of England and Wales for many years in deciding whether or not to grant an interlocutory injunction (now interim relief) until in many, but not all, contexts it was rejected by the House of Lords in the **American Cyanamid** case ([1975] AC 396) in favour of asking whether there is "*a serious question to be tried*". In **CPR** Part 24 (Summary Judgment) the test formulated by the rule is that of "*no real prospect of success*", which after what the editors of the "*White Book*" describe as "*a series of unsatisfactory cases*" (see note 24.2.3 at page 743 of Vol 1 of the 2017 Edition) has been expressed by Lord Hobhouse in **Three Rivers DC v Bank of England (No 3)** [2001] 2 AC 513 as being a criterion "*not of … probability …* [but of] *… an absence of reality*". What one is groping for is a workable test that allows the Tribunal of first instance to identify which cases can be disposed of on a summary basis and which call for an evidential investigation. Whether alternatives such as "*arguable*" or "*substantial*" would serve the concept better is debatable and in any event I must regard myself as bound by the Opinion of the Inner House. But whatever the test is and whatever "*prima facie*" means I am confident from a reading of the Opinion that it does not mean "*probability*".

98. The substance of the Opinion is to be found at paragraphs 18 to 21, which, for the sake of brevity, I have edited as follows, without, I hope, any distortion of their meaning:

> **"18. … In this case, time bar was raised by the respondents as a preliminary issue to be decided at a Pre-Hearing Review. The Employment Judge's task at that stage was simply to ascertain the nature of the complaint from the terms of the claimant's form ET1; the relevant question being "what the ET1 meant to the reasonable reader" (*Charles v Tesco Stores Ltd* [2012] EWCA Civ 1663. Mummery LJ at para 20). Where it is clear, on a fair and reasonable reading of the ET1 as a whole, that a claimant is alleging continuing discrimination and that the final specific allegation in that context is at a time within the primary time limit, that may be sufficient, to determine that a claimant's case is potentially timeous (paras 18, 22, 24).**
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> **19. It is not enough for a claimant to make a bare assertion that specific acts are part of a continuing act … The claimant has to set out a "reasonably arguable basis" for that contention … The Employment Judge, therefore, need only have concerned herself with whether the claimant had set out a *prima facie* case that the allegations were capable of forming part of a continuing act extending over a period … Proof of a continuing discriminatory act is notoriously fact-sensitive. Where the essential facts are in dispute, it will generally be necessary to hear evidence …**
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> **20. A tribunal may be entitled to find that discrimination has been established on the basis of inference alone … Had the … [final act in the series] … not come within the primary statutory time limit, the claimant would have been bound to fail … [h]owever, where, as here … [the final act] … does fall within the time limit, the issue centres not on the dates of the other discriminatory acts but on whether those acts are linked to one another and to the … [final act] …**
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> **21. It is sufficient that the claimant has asserted the nature of the overarching act of the respondents and supported that assertion with adequate specification of the acts of the individual employees that are said to form the basis upon which a continuing act may be established. The respondents have been given fair notice of the substance of the claimant's case … The claimant did not need to go any further than that in order to satisfy the requirement to set out a prima facie case. However, the Tribunal is under a continuing obligation to satisfy itself that a claim falls within its jurisdiction. Thus, there is nothing to prevent the time bar issue in relation to a particular act being determined after a full hearing … Indeed there is a particular advantage in considering time bar after such a hearing especially where it appears that little by way of time or expense will be saved in attempting to segregate the issues at the outset …"**

99. Despite the use by Mummery J of the word "*essential*" in **Selkent**, absent any doctrine of "*relation back*" and on the basis that jurisdiction raises no special problems, both of which propositions I have accepted above, I cannot see why the approach described in the above Opinion of the Inner House in **Kaur**, should be any different where the issue of "*continuing act*" arises by, or in the context of, a proposed amendment. On the contrary logic dictates that the same approach should be adopted.

100. In his Reasons, EJ Foxwell dealt with "*time limits*" explicitly at paragraphs 27 and 28 (partly quoted and partly summarised above at paragraphs 13 and 14 of this Judgment). Explicitly he was dealing with the possibility of a "*just and equitable*" extension, to which I will come next, but it seems to me he was also implicitly touching on the concept of

"*continuing act*" because he was considering the possibility that the final in time act which might constitute the last in a series of acts would be excluded as not being justiciable as a result of the concept of judicial immunity.

101. For present purposes, however, what is significant about these passages is that they appear to me to contain no discussion along the lines indicated by the Opinion of the Inner House in **Kaur** at paragraphs 18 to 21 as to whether the proposed pleaded case gave rise to a "*prima facie*" case that the conduct of the Respondent amounted to a continuing act. It is true, as EJ Foxwell observed, that logically if the final act or acts in an alleged series of acts were not justiciable as a result of judicial immunity then the earlier acts would be mathematically more out of time but that had not arisen at the time he made the decision under appeal although it poses a problem in terms of disposal to which I will come at the end of this discussion.

102. It does not seem to me, however, that this implicit reference to the concept of "*continuing act*" amounts to anything like a proper consideration of it. At the very least, on EJ Foxwell's logic, the question of amendment ought to have been postponed until the issue of judicial immunity had been resolved. Accordingly, I accept Ms Criddle's argument that EJ Foxwell erred in law in not considering properly or sufficiently whether or not the proposed amendment amounted to a "*prima facie*" case that there were a series of acts, which needed to be considered further, and, possibly, considered evidentially, at a later stage.

103. Ms Criddle's last argument related to the approach adopted by EJ Foxwell to the issue of whether or not it was "*just and equitable*" to extend time. It seems to me that this was an alternative submission in the sense that it was not dependent on the success of her other submission.

104. At the ET the Respondent's case had accepted "*the possibility of a just and equitable extension of time*" but argued "*no evidence had been adduced to support the likelihood of this being granted*" (see paragraph 18 of the Reasons). EJ Foxwell dealt with this at paragraph 28 of the Reasons (summarised above at paragraph 14 of this Judgment). I accept that there he considered a number of factors concluding "*… that, in the absence of evidence from the Claimant about what he did and did not do to pursue his own case, I cannot find confidently that a just and equitable extension would be granted in these circumstances*" and he reiterated this in a slightly different form at paragraph 31 of the Reasons when he said "*… the causes of action are now out of time in circumstances where I cannot say that there is a good chance of a just and equitable extension of time (although I do not rule out this possibility)*". Mr Crozier submitted that this was the kind of balancing exercise the ET should undertake; in effect it was in the area of "*the generous ambit within which reasonable disagreement is possible*".

105. In my judgment Ms Criddle is correct in her submission that EJ Foxwell never made any decision on this issue. I agree with her that this is put beyond doubt by the suggestion at paragraph 37 of the Reasons that "*whether it is, in fact, just and equitable to extend time could have been (and, indeed, still can be) tested by issuing further proceedings and having that matter resolved*".

106. I think it would be unfortunate if that became a regular procedural feature of decisions in this jurisdiction in this context. I doubt that the suggestion of Lloyd LJ in **Bank of Scotland plc v Watson** (set out above at paragraph 43 of this Judgment) was intended to establish a general procedural rule in the civil jurisdiction and I do not think it should be welcomed as a usual procedure in the ET. Be that as it may, the sentence quoted above from paragraph 37 of the Reasons illustrates that EJ Foxwell regarded the correct approach to the issue of whether or

not it was "*just and equitable*" to extend the time limit in this case to be one of making an evaluation of the likelihood of any argument succeeding. In other words he was adopting a "*probability*" test.

107. I conclude that was an erroneous approach. I accept that in the Opinion of the Inner House in **Kaur** in some circumstances it may be possible to make a decision about whether or not there is a "*prima facie*" (one could say "*arguable*" or "*substantial*" or "*realistic*") case of a "*continuing act*" raised by the pleadings, but in my judgment the tendency of the core of that Opinion, as set out in paragraphs 18 to 21, is to limit that to only the clearest of cases and that in other cases it will be necessary to consider the matter at a specific hearing where evidence can be taken and the matter decided on that evidence.

108. Likewise, I think the issue of whether or not it is "*just and equitable*" to extend time usually should be the subject of a final decision reached after hearing the evidence. It seems to me that the alternative approach adopted by EJ Foxwell leaves the issue in an unsatisfactory state of limbo. I do not discount the possibility, in clear circumstances, that it might be possible to make a proper decision without hearing evidence but I think that should be an unusual procedural event. Regarding it as unusual seems to me consistent with **Kaur**, which I accept is not a case about an extension on "*just and equitable*" grounds but which seems to me to apply by analogy, and it would also be consistent with the *Presidential Guidance*.

My Conclusions

109. From the above, my conclusions are:

a. amendments to pleadings in the ET, which introduce new claims or causes of action take effect for the purposes of limitation at the time permission is given to amend and there is no doctrine of "*relation back*" in the procedure of the ET;

b. in so far as the reasoning in the cases of **Rawson**, **Newsquest** and **Amey Services** must be based on the "*relation back*" doctrine, I regard them as wrongly decided (on that point) and do not feel obliged to follow them;

c. although EJ Foxwell had considered other factors as well, I regard his refusal of permission to amend as having turned on the doctrine of "*relation back*", which was a critical error of law and not simply just one of a number of factors considered in "*the generous ambit within which reasonable disagreement is possible*";

d. the guidance given by Mummery J in **Selkent** and his use of the word "*essential*" should not be taken in an absolutely literal sense and applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues must be decided before permission to amend can be considered;

e. in so far as **Rawson**, **Newsquest** and **Amey Services** state the contrary I regard them as overstating the position and as being wrongly decided and do not feel obliged to follow them;

f. the Opinion of the Inner House of the Court of Session in **Kaur** should be applied to cases involving consideration of whether it would be "*just and equitable*" to grant an extension;

g. whilst in some cases it may be possible without hearing evidence to conclude that no "*prima facie*" case of a "*continuing act*" or for an extension on "*just and equitable*" grounds can arise from the pleadings, in many cases, often, but not

necessarily confined to, discrimination cases, it will not be possible to reach such a conclusion without an evidential investigation;

h. as indicated in the Opinion in **Kaur** sometimes it may be necessary to hear a significant amount of evidence and sometimes it may not be possible or sensible to deal with the matter at a Preliminary Hearing and decisions may need to be postponed until all the evidence has been heard;

i. in such cases permission to amend can precede decisions as to whether any new claim raised by the amendment is out of time; in other cases a decision on whether to grant permission to amend can be postponed;

j. here EJ Foxwell had refused permission to amend without hearing any evidence on his evaluation of the likelihood of any subsequent extension of time on the grounds that it was "*just and equitable*" and without resolving the issue as to whether or not there was a "*continuing act*" (save that if the doctrine of judicial immunity applied that would eliminate the in time acts from consideration and then there could be no series of acts, the last of which was in time) and he erred in law in both respects.

Disposal

110. Ms Criddle submitted that this was an unusual case in which I was in as good a position as EJ Foxwell to consider the issue of granting permission to amend and that I should dispose of the appeal by granting that permission. This is an attractive submission in that it might save costs but I cannot accept it. Even though I have found that EJ Foxwell erred in law and even though I can say what the correct self-direction should be, the discretion remains that of EJ Foxwell. I should not attempt to put myself in the position of a Judge at first instance and it would be wrong in principle for me to exercise a discretion, which is not mine to exercise.

111. Ordinarily that must lead to a remission to the ET, whether to EJ Foxwell or another ET, to consider the terms of this Judgment and, in the light of it, re-consider the application for permission to amend. Ms Criddle's alternative submission supported that disposal on the basis that the matter should be remitted to a differently constituted ET and that all that should be considered was the question of permission to amend and that issues as to limitation should be postponed. Whilst I accept that I should consider the former in the context of disposal, I think that to consider the latter would expose me to the same flaw identified in the last paragraph. The scope of what should be considered and the sequence of addressing various issues depends on the view taken of the pleadings not by me but by the ET. Unless I have misunderstood his position, Mr Crozier supported that and argued that I should remit the issue of permission to amend and that the ET should decide when and how the issue of limitation should be addressed.

112. Also Mr Crozier relied upon the effect of the later Judgment and Reasons of EJ Jones as being the elimination of "*continuing act*" from further consideration although he said during oral submissions that he did not regard the instant appeal as "*entirely academic*". I understand that Ms Criddle's position is that the Judgment of EJ Jones striking out all of the original claim as set out in the ET1 form is not relevant because the practical issue is whether the amended claim should go forward.

113. Even so, I wonder whether the striking out of the original claim by EJ Jones might place this case in the same category discussed hypothetically in the Opinion of the Inner House in **Kaur** at paragraph 20 (see above at paragraph 98 of this Judgment) on the basis that, given the strike out, there is now no in time act to constitute the last act in the alleged series. But,

anxious though I am to save unnecessary further costs and further delay, on balance I think all these matters must be left for the ET to deal with on remission.

114. This being an error of law in a case where no evidence has been heard I regard it as appropriate to remit it to EJ Foxwell to reconsider in the light of this Judgment the application for permission to appeal and to consider how and when the issue of time limits should be determined.