Appeal No. UKEAT/0190/17/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 February 2018
Judgment handed down on 12 April 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR S PATKA — APPELLANT

(1) BRITISH BROADCASTING CORPORATION
(2) MS L LANDOR — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SALEEM PATKA (The Appellant in Person)
For the Respondents	MR THOMAS LINDEN (One of Her Majesty's Counsel) Instructed by: BBC Employment Law Department BC2 A6 Broadcast Centre 201 Wood Lane London W12 7TP

SUMMARY

PRACTICE AND PROCEDURE - Amendment

Application to amend - race discrimination - complaint of unequal pay - whether direct or indirect race discrimination

The Claimant - acting in person - had put his case of race discriminatory unequal pay as a complaint of direct discrimination, albeit relying on general statistical evidence in support. After taking legal advice, he subsequently sought to amend: to add details about a subsequent decision on his internal grievance; to add a claim of indirect discrimination in the alternative; to include a further basis for his complaint of direct discrimination. The ET permitted the application to amend in respect of the internal grievance but only to the extent this was background information; it otherwise refused the amendments, concluding these were not simply different labels but added substantively new causes of action and arguments that had been raised too late (the parties had fully prepared their respective cases on the basis of the claim as already pleaded) and had already led to the postponement of the listed Full Merits Hearing; in the circumstances, the balance of prejudice supported the refusal of the application. The Claimant appealed.

Held: *dismissing the appeal*

The ET permissibly understood the application to amend in respect of the internal grievance to have been limited to adding an update to the factual background; on this basis the Respondents had not objected to the amendment and it had been allowed. That was an entirely appropriate exercise of the ET's case management powers and there was no proper basis of challenge.

As for the indirect discrimination case, the ET was entitled to conclude this was not previously identified by the Claimant as part of his claim. Although the fact that it might still be in time was a potentially significant factor (**Gillett v Bridge 86 Ltd** UKEAT/0051/17 applied), the ET had permissibly taken the view that whether or not there was a continuing act could only be determined at the final Merits Hearing. It was, moreover, open to the ET to conclude that the

different issues raised by the indirect discrimination claim meant the balance weighed against hearing that together with the existing direct discrimination claim, in particular given the prejudice caused to the Respondents.

Similarly, the ET had been entitled to see the new argument raised in respect of the direct discrimination claim as giving rise to substantively new issues for determination such as to cause unfair prejudice if this amendment was permitted. To the extent the Claimant was only seeking to make this amendment to explain how he argued that the burden of proof shifted to the Respondent, that remained open to him given he had always made it clear he intended to rely on the statistical evidence to this purpose.

HER HONOUR JUDGE EADY QC

Introduction

1. The appeal in this matter concerns an application to amend in what might be described as an equal pay case based on the protected characteristic of race. The underlying claim raises potentially interesting issues relating to a case of race-based pay discrimination but the present appeal is concerned with a refusal by the Employment Tribunal ("the ET") to permit amendments to the claim - an exercise of judicial discretion on the part of the ET and thus a decision with which the EAT should not interfere unless it discloses an error of approach, can properly be characterised as perverse or failed to take account of that which was relevant or had regard to that which was irrelevant.

2. The appeal is pursued by the Claimant against the Judgment of the London Central ET (Employment Judge Baty sitting alone on 13 December 2016), sent to the parties on 25 January 2017. Both parties were represented by counsel before the ET: the Respondents appearing by Mr Linden QC, as now; the Claimant then represented by Ms Tether of counsel, but today appearing in person. By its Judgment, the ET allowed that the Claimant might amend his claim to add paragraphs 10 to 16 of his proposed amended grounds but refused leave to add additional paragraphs 17 to 25.

3. On the initial paper sift, the Claimant's appeal was considered by Soole J to disclose no reasonable basis to proceed. At a subsequent hearing under Rule 3(10) **EAT Rules 1993**, however, HHJ Shanks gave permission for this matter to continue to a Full Hearing on amended grounds of appeal, specifically: (1) whether the ET had failed to recognise that permitting the amendments at paragraphs 15 and 16 already included a complaint of indirect race

discrimination; (2) whether the ET erred in not permitting an amendment to include a claim of indirect race discrimination relating to matters occurring before 31 October 2016 when that was already part of the Claimant's case; (3) whether the ET erred in not permitting paragraphs 18 to 20 of the amended grounds when the "**Danfoss**" arguments there raised (referring to the case **Handels og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss)** [1989] IRLR 532 ECJ) merely addressed the burden of proof question and added no new claim.

4. The Respondents resist the appeal, largely for the reasons given by the ET but also referring to the procedural history since that decision.

The Relevant Background and the ET's Decision and Reasoning

5. The Claimant works for the First Respondent's World Service Languages unit, based in London. By his ET claim, lodged on 2 January 2016, he complained he had suffered pay related race discrimination since May 2010. Relying on information provided in response to a **Freedom of Information Act** request, he contended that World Service Languages staff were paid an average of £7,400 less than staff on the same grade working for Network News in London; specifically, at his level (SM2), the difference in average pay was more than £18,700 per annum. He believed the main reason for these pay differentials arose from the fact that 74.4% of World Service Languages staff in London were from black and minority ethnic backgrounds, whilst 80.2% of Network News staff were from white majority ethnic backgrounds.

6. The Claimant was representing himself when he presented his claim and continued to do so until he obtained assistance from Ms Tether between the second and third Preliminary

A Hearings before the ET; the present appeal is concerned with the ET's decision at the third Preliminary Hearing.

B 7. In responding to the proceedings, on 9 February 2016, the Respondents characterised the Claimant's claim as one of direct race discrimination (the Claimant had not previously attached a specific label to his allegation of "discrimination") and contended that pay at SM (senior manager) level was "*determined on an individual basis taking into account a number of*

C *factors including responsibility, experience, skills, the appropriate rate for the role taking into account competition from the market, existing salary and comparison to relevant peers*". While accepting the statistics referenced by the Claimant, the Respondents contended these were not

D drawn from truly comparable groups of employees.

8. An initial Preliminary Hearing took place before Employment Judge Glennie on 24 June

E 2016. During the discussion of the claim at that hearing, the Claimant referred to the Birmingham City Council equal pay claims, apparently drawing from his general understanding of the news reports relating to those cases. That said, although the Birmingham cases involved claims of what might be described as indirect pay discrimination, Employment Judge Glennie's

F note of the Preliminary Hearing recorded as follows:

> **"1. The complaint is of direct discrimination because of race. The Claimant gave the following further particulars of his complaint:**
>
> > **1.1. The complaint is of direct, not indirect discrimination. The allegation is that the First Respondent paid employees (including the Claimant) in World Service Languages in London less on average than their equivalents in Network News in**

G **London because the majority of them were not White British. The Claimant contrasts this with the employees in Network News, the majority of whom are White British. …"**

9. Employment Judge Glennie's record from the Preliminary Hearing then set out three

H specific allegations made by the Claimant of less favourable treatment in relation to salary, detailing the individuals he identified as being responsible for the three pay decisions that thus

formed the basis of his complaint. Otherwise, Employment Judge Glennie gave directions for the further conduct of the case and listed it for a Full Merits Hearing from 13-16 and 19 December 2016.

10. A further Preliminary Hearing took place on 6 September 2016, this time before Employment Judge Grewal, who was invited by the Respondents to strike out the Claimant's claims of direct race discrimination or make deposit orders in this regard. Employment Judge Grewal declined to do so, explaining her understanding of the Claimant's case as follows:

> **"The Claimant's case … is that on the grounds of race the salary he was offered at the three managerial roles that he held since 2010 was at a lower level than that which was offered or would have been offered to white managers in Network News at the same level doing the same work as him. He says that it was on racial grounds because the decisions as to the level of salary were made in accordance with the policy or practice to pay those in World Service (the overwhelming majority of whom were not white British) at a lower level than those in Network News (the overwhelming majority of whom were white British). His case is that that policy or practice was racially discriminatory because the difference in pay between the two groups was due to the difference in the racial composition of the two groups."**

11. Digressing from the narrative at this stage, it might seem that the Claimant's case, as recorded by Employment Judge Grewal, could more naturally be categorised as one of indirect, rather than direct, discrimination. That, however, was not a label that the Claimant sought to adopt at that hearing and, while he made an application to amend his claim to include a complaint of victimisation (allowed, subject to a deposit order), there was no application at the second Preliminary Hearing to amend to clarify that the claim was being put as one of indirect race discrimination.

12. Employment Judge Grewal had made the Claimant aware of the ET Litigant in Person Support Scheme ("ELIPS") and, at some point before 1 November 2016, he obtained advice from Ms Tether of counsel under this scheme. As a result of that advice, on 1 November 2016, the Claimant wrote to the ET making an application to:

"amend the list of issues in this case to make clear that my complaint of discrimination against the Respondents is a complaint of direct and/or indirect discrimination on grounds of race."

13. By email of 2 November 2016, the Respondents objected to that application, arguing that the Claimant needed permission to introduce a complaint of indirect discrimination (something that was apparently not disputed when the point was considered by the ET at the hearing on 13 December 2016).

14. During the course of November 2016, the parties engaged in judicial mediation. During this process - when fixing a further date for the mediation - it was observed that if this did not succeed and the Claimant still sought to pursue his application to amend, the Full Merits Hearing would need to be postponed. That is what occurred: the mediation was ultimately unsuccessful and the Claimant made a more formal application to amend on 5 December 2016, this time attaching draft amended grounds of claim. Again, the Respondents objected to this application.

15. Alongside his ET claim, the Claimant had also pursued an internal grievance. This had initially been refused but, on 30 October 2016, the First Respondent's Deputy Director, Radio, (Mr Graham Ellis) partly upheld the Claimant's grievance: whilst concluding that the difference in pay of which the Claimant was complaining was neither directly nor indirectly discriminatory, Mr Ellis considered his pay should more appropriately be set at around £100,000, which was around the average pay for an SM2 manager in Network News.

16. Returning then to the application to amend, this was considered at the third Preliminary Hearing on 13 December 2016. Employment Judge Baty characterised the amendments as falling into three main categories, as follows:

> **"1. Further background to the claim (paragraphs 10-16);**
>
> **2. An amendment to the direct discrimination complaints to include a "*Danfoss*" complaint (paragraphs 17.1 and 18-22); and**
>
> **3. The introduction of indirect discrimination complaints both under the principles in the case of *Enderby v Frenchay Health Authority* C-127/92 [1994] ICR 112 and more conventional indirect discrimination complaints (paragraphs 17.2 and 23-25)."**

17. Employment Judge Baty recorded the Respondents' position as follows:

> **"28. Mr Linden stated that he objected to the application to amend in relation to the "*Danfoss*" complaint, the "*Enderby*" complaint and the other indirect discrimination complaints based on PCPs, but that he was "fine in relation to" the background elements. …"**

18. On that basis, Employment Judge Baty allowed the amendments as set out at paragraphs 10 to 16.

19. The remaining amendments were refused. Having referred to the guidance provided by Mummery J (as he then was) in **Selkent Bus Co Ltd v Moore** [1996] ICR 836, Employment Judge Baty considered the timing and manner of the application were factors weighing against the Claimant, not least as it had led to a postponement of the Full Merits Hearing of the claim and there had been no new factors such that the proposed amendments could not have been included in the original claim. The ET did not see this as simply a case of re-labelling. Accepting that the Claimant was self-represented prior to obtaining advice from Ms Tether, the ET observed that he was not a poorly educated shop floor worker but a highly intelligent and well-paid professional with some understanding - albeit as a journalist and not a lawyer - of equal pay cases such as those in Birmingham; moreover his delay in approaching ELIPS was his own doing. Although Ms Tether argued that the way in which the Claimant's case had been characterised before Employment Judge Grewal might in any event be seen as including a claim of indirect discrimination, the ET disagreed: allowing that the factual basis of the complaints may not have changed, the ET considered that it was clear that the case had been pursued as one of direct discrimination and permitting it to be re-labelled as one of indirect discrimination

would mean further factual considerations would arise and "*there will be a whole raft of additional and complex legal issues*" (ET, paragraph 45), specifically:

> **"47. … the existing complaints of direct discrimination invite the Tribunal to consider the reasons why the various managers made their decisions in relation to the Claimant's pay and whether or not those decisions were because of the Claimant's race. However, the addition of the proposed additional complaints will considerably expand the evidence which the Tribunal has to consider and the legal arguments that need to be made and is likely to involve the rewriting of witness statements which are currently substantially complete in relation to the existing claim, potentially calling further witnesses and potentially further disclosure and more time required for the Tribunal to hear the claim. That would substantially prejudice the Respondents."**

20. As for the proposed amendment suggesting reliance on the case of **Enderby v Frenchay Health Authority** C-127/92 [1994] ICR 112, the ET doubted whether this could extend beyond pay related sex discrimination but, in any event, noted this would involve a claim of equal value, which was a very different claim to that already made. That, the ET considered, was also the case in respect of the purported reliance on **Danfoss**, albeit that related to an equal value claim in a direct discrimination context.

21. The ET did not consider the question of time limits could assist in determining the application, it not being possible at the preliminary stage to determine whether there was an act extending over time and thus whether any of the proposed amendments might be said to be out of time. Ultimately, the Respondents would be prejudiced if the amendments were allowed and the fact that Mr Ellis had considered issues of both direct and indirect discrimination when determining the Claimant's grievance appeal did not change this. Although the Respondents would have to adduce evidence going back to 2010 and 2011 in any event, this was a lesser task in respect of the claim as originally drafted as compared to what would be required if the amendments were allowed. The Respondents had already been prejudiced by the postponement of the Full Merits Hearing and granting the amendments would lead to substantial extra work and thus considerable prejudice, not least as they would have to attempt to obtain witness evidence going back over a number of years when passage of time would inevitably mean that

memories would have faded. As for the prejudice to the Claimant, the ET considered it was unclear as to whether equal pay principles could be applied to a race discrimination case in any event. Meanwhile, the Claimant still had his existing claims and it could not be said that his existing claim of direct race discrimination was minimal in its scope.

Subsequent Events

22. Although I am concerned only with the ET Judgment promulgated on 25 January 2017, it is relevant to have some regard to subsequent events in these proceedings, specifically to the further Preliminary Hearing that took place before Employment Judge Tayler on 8 February 2017, at which the Respondent ultimately agreed to an amendment to add a complaint of direct discrimination in respect of Mr Ellis' decision on the grievance appeal, but resisted the Claimant's further attempt to add a claim of indirect discrimination. That further application was refused by Employment Judge Tayler and I am told there has been no appeal against that decision.

The Relevant Legal Principles

23. As part of its general powers of case management (see Rule 29, Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**), an ET can allow a claim to be amended - something that involves an exercise of judicial discretion. Guidance as to the approach that an ET should adopt in this regard was laid down in **Selkent Bus Co Ltd v Moore** [1996] ICR 836 EAT: relevant considerations would include the nature of the amendment, whether a minor matter or a substantial alteration, pleading a new cause of action; if a new complaint or cause of action, the applicability of relevant time limits; the timing and manner of the application, although an application should not be refused solely because there has been a delay in making it; and, most importantly, the balance of hardship:

> **"… the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision." (Page 844)**

24. I have already observed that the EAT has a very limited jurisdiction in respect of case management decisions of the ET; as the Respondents have noted, in **Adams v West Sussex County Council** [1990] ICR 546 EAT (Wood P presiding), the only permissible bases of interference were identified as follows:

> **"(a) Is the order made one within the powers given to the Tribunal?**
>
> **(b) Has the discretion been exercised within guiding legal principles? …**
>
> **(c) Can the exercise of the discretion be attacked on *Wednesbury* principles?"**

25. The Claimant, however, places reliance on a decision of the EAT in **Gillett v Bridge 86 Ltd** UKEAT/0051/17, in which Soole J allowed an appeal against an ET's refusal of an amendment, specifically observing that an amendment to introduce an in-time claim gave rise to an important factor for the ET to take into account:

> **"29. This leads to the weight to be given to the fact that an application to amend is made in time. I accept of course that factor may not be decisive. However, it must be a factor of considerable weight, as Employment Judge Wallis acknowledged when identifying it as an "*important factor*". This factor is relevant to the *Selkent* balance of hardship and injustice. The Judge concluded that the Respondent would suffer some hardship and injustice if required to deal with the new claim. However, the Respondent would have been in just the same position if the Appellant had taken the alternative course on 18 July 2016 of issuing a fresh claim. Once again, the logic of this conclusion would require a Claimant to take that course rather than to make a timely application to amend."**

26. In this regard, the Claimant draws my attention to section 123(3)(a) of the **Equality Act 2010** ("the EqA"), which concerns time limits in claims under that Act, and relevantly provides:

> **"123. *Time limits***
>
> **(1) … proceedings … may not be brought after the end of -**
>
> > **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
> >
> > **(b) such other period as the employment tribunal thinks just and equitable.**
>
> **(2) …**
>
> **(3) For the purposes of this section -**

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

…"

Submissions

The Claimant's Case

27. By way of overview, the Claimant observes that his case has essentially remained the same throughout, as stated in the opening paragraph of his ET1: "*I believe I am being, and have been since May 2010, discriminated against on the grounds of race when it comes to my salary*". That said, he accepted he had not always clearly labelled his claim in terms of the statutory language, indeed he had only appreciated that he could complain of direct *and* indirect race discrimination, in the alternative, when he received advice from Ms Tether. When he had then made his application to amend to make those alternative complaints clear, he had also engaged with the outcome of his grievance appeal and thus added paragraphs to his complaint that expressly addressed that matter.

28. Turning to the particular grounds appeal, the Claimant argued as follows:

(1) Ground 1: When giving permission to amend to add paragraphs 10 to 16, the ET had failed to recognise that paragraphs 15 and 16 were not "background" but introduced new complaints of direct and indirect race discrimination, arising from Mr Ellis' decision announced on 30 October 2016.

(2) Ground 2: The ET then erred in refusing permission to allow paragraphs 23 to 25 of the amended grounds by (i) failing to recognise that paragraph 16 already included a complaint of indirect race discrimination, and (ii) failing to take this into account when considering whether to give permission to allow complaints of pre-31 October 2016 indirect race discrimination. Moreover, the Claimant's claims related to a

series of decisions regarding pay made between 2010 and 30 October 2016. Applying section 123(3)(a) **EqA**, he was entitled to bring a new claim of indirect discrimination, spanning the full period of time under consideration, and that was a significant factor that the ET ought properly to have taken into account (see **Gillett** paragraph 29, *supra*).

(3) Ground 3: The ET further erred by construing paragraphs 18 to 20 of the amended claim as a new complaint when these paragraphs simply set out his argument regarding the burden of proof.

The Respondents' Case

29. For the Respondent it is submitted that the Claimant had been clear before Employment Judge Glennie that his case was of direct and not indirect race discrimination. Although his initial complaint might have suggested there was a practice, it had been clarified at the hearing before Employment Judge Glennie that he was complaining of specific pay decisions taken (he alleged) because of race.

30. As for the specific grounds of appeal:

(1) Ground 1: The ET correctly allowed paragraphs 10 to 16 of the amended grounds on the basis that these were relevant background; that was the basis on which the Respondents had agreed to the amendment and that had obviously informed the ET's decision. If it was now being said that these paragraphs raised a new complaint against Mr Ellis' decision then: (i) that was not made clear as being the Claimant's case below, and (ii) the ET rightly rejected the amendment as adding a new claim

(2) Ground 2: In any event, it did not follow that allowing a claim against Mr Ellis' decision meant all other proposed claims should be allowed in by way of amendment. Further, even if the Claimant might still have been in time to make his complaint of indirect discrimination, as **Gillett** made clear, that was a relevant but not determinative factor. The ET *had* considered this factor but had not felt able to reach a concluded view that this was a continuing act case - a permissible position for it to take given the case was still being put on the basis of particular decisions taken in relation to the Claimant's pay (in 2010, 2011 and 2015). There were, moreover, other matters the ET had been entitled to take into account, such as the timing of the application given the two previous Preliminary Hearings and the impact on the listing of the Full Merits Hearing.

(3) Ground 3: If the further amendments did no more than make a point regarding the burden of proof, they were unnecessary and the Claimant had suffered no prejudice (it was still open to him to rely on the statistical material to the extent he contended this shifted the burden of proof). To the extent, however, that the Claimant was seeking to say something different (effectively relying on the statistics as a cause of action), the ET had been right to refuse this on the basis that it would significantly change the way the case was being put and would put the Respondents at too great a disadvantage.

Discussion and Conclusions

31. This appeal relates to an ET's exercise of judicial discretion in refusing the Claimant's application to amend his complaint of race discriminatory pay. The points of challenge can sensibly be considered under three main headings: first, whether the ET erred in failing to permit amendments to add complaints of direct and/or indirect race discrimination in respect of

Mr Ellis' decision on the Claimant's grievance appeal at the end of October 2016; second, whether the ET erred in not permitting an amendment to include a claim of indirect race discrimination relating to matters occurring before 31 October 2016, when (the Claimant contends) that was already part of the case; third, whether the ET erred in not permitting the Claimant to add paragraphs 18 to 20 of the amended grounds when the "**Danfoss**" arguments there raised merely addressed the burden of proof question and added no new claim.

32. The submissions made on the oral hearing of the appeal tended to focus on the first of these questions - the potential further claims relating to Mr Ellis' decision on the Claimant's grievance appeal. To the extent the Claimant seeks to complain that Mr Ellis directly discriminated against him because of race in failing to increase his pay between May 2010 and September 2015 and/or to increase it by a larger sum post-September 2015, he has now been permitted to add those claims by Employment Judge Tayler's Order, made subsequent to the decision under challenge on the appeal. The question for me remains, however, whether Employment Judge Baty erred in law in failing to permit the Claimant's claim to be amended to add complaints of direct and/or indirect race discrimination in respect of Mr Ellis' decision on the grievance appeal.

33. On this issue I consider the answer to the appeal is simple: Employment Judge Baty permissibly did not understand paragraphs 10 to 16 of the proposed amended grounds to include any new claim and thus did not err in the decision to permit these paragraphs to be added as part of the background to the existing claim. The paragraphs in question update the history - explaining what happened on the grievance appeal - and end with the complaint that, in the Claimant's view, Mr Ellis' decision did not get rid of the pay discrimination put in issue in the ET proceedings. It is notable that these paragraphs come before the heading "*My*

complaint of discrimination because of and/or in relation to race", under which the amended grounds set out how the Claimant puts his case as a complaint of direct and/or indirect race discrimination. On the natural reading of paragraphs 10 to 16, these are part of the background narrative; they do not set out any separate basis of claim (and it is significant that Ms Tether's skeleton argument in support of the application to amend did not seek to suggest otherwise). As such, the Respondents did not object to these paragraphs being added to the particulars of claim and, on that basis, Employment Judge Baty permitted the amendment in this regard. The decision thus reached was an entirely appropriate exercise of judicial discretion and there is no basis on which it would be open to an appellate tribunal to interfere.

34. The second question raised by the appeal is potentially more difficult. At paragraph 17 of the proposed amended grounds the Claimant put his case as follows:

> **"17. I contend that at all times since May 2010 the level at which my pay has been set has been caused or influenced by:**
>
> **17.1. direct discrimination because of race, contrary to section 13 of the Equality Act 2010 (EqA); and/or**
>
> **17.2. unlawful indirect discrimination in relation to race, contrary to section 19 of the EqA."**

35. The way in which the indirect discrimination case would be put was particularised at paragraphs 23 to 25, suggesting the complaint would be akin to that in **Enderby** (albeit that was an equal pay claim in which the pay differences were said to be sex-discriminatory) and/or that the First Respondent had applied various practices ("PCPs") that saw those employed as World Service Languages staff paid salaries lower (on average) than those employed in Network News.

36. In arguing for this amendment, Ms Tether essentially acknowledged this would add a new cause of action to the claim: in explaining the purpose of the proposed amendments, her

skeleton argument distinguished between the paragraphs dealing with the direct discrimination arguments (by which it was said the amendments were to "*clarify the legal basis for the Claimant's complaint*") and those dealing with the indirect discrimination case (the purpose of which was "*to frame [the Claimant's] claim in the alternative as a complaint of indirect discrimination in relation to race*"). That said, she characterised this as a *re-labelling* of the existing claim: the amendment would not "*alter the essential factual basis of the Claimant's claim*".

37. At the heart of his argument on this aspect of the appeal lies the Claimant's contention that the ET erred in refusing to accept that this was indeed a re-labelling exercise: although the claim had not previously been given the label "indirect discrimination", it was apparent from the substance of the pleaded case that this was part of the complaint and that was clearly understood given its distillation before Employment Judge Grewal. As I have already recorded, I have some sympathy with the argument that the way in which the Claimant had described his case before Employment Judge Grewal might be said to have flagged up that this included a claim of indirect discrimination. That said, as Employment Judge Baty observes, that is not how the case was actually categorised at the time; the Claimant was still putting his case as one of direct discrimination. Moreover, although the complaint was (at least in part) directed to an underlying pay policy or practice: the Claimant appeared to be saying that the policy or practice was itself directly - not simply indirectly - discriminatory on grounds of race. When taken together with the Claimant's earlier clear particularisation of his case (before Employment Judge Glennie) as one of direct race discrimination, I do not consider I can say Employment Judge Baty erred in finding this was more than a simple re-labelling of that which was already inherent in the Claimant's claim.

38. Seeing the addition of indirect discrimination claims as more than a re-labelling exercise did not, of course, mean that the ET was bound to refuse the application to amend. Employment Judge Baty recognised that and plainly took into account a range of factors relevant to this exercise of judicial discretion, as identified in **Selkent**. The Claimant contends, however, that the ET erred in failing to have proper regard to the fact that, even if an entirely new cause of action, the claim had still been brought in time and this was - per Soole J in **Gillett** - "*a factor of considerable weight*". Again, this is a point that weighed with me. Allowing for the limited nature of the EAT's jurisdiction when considering an appeal against an ET's exercise of judicial discretion, if it had simply been open to the Claimant to lodge a new claim, making the same complaints, would this not provide overwhelming support to the argument that the amendment should be allowed?

39. Although that seemed to me a strong point in the Claimant's favour, ultimately I consider the Respondents are correct in their contention that it does not provide a proper basis for allowing the appeal in this case. First, because the ET (both Employment Judge Baty and, previously, Employment Judge Grewal) had permissibly taken the view that the question whether the Claimant's claims were in time (which depended on whether it was found that there really was a continuing policy or practice or, rather, entirely separate pay decisions) needed to be resolved at a final Full Merits Hearing. Given the potential uncertainty as to whether the claim of indirect discrimination was thus still in time, the ET was entitled to treat this factor as neutral. Second, because although the fact that the proposed additional cause of action could simply be brought as a new claim will generally mean that it is best that it be heard as part of the existing proceedings, that was not so obvious in the present case. Here Employment Judge Baty permissibly took the view that very different evidential and legal considerations arose for determination on the existing complaints of direct discrimination in contrast to those that would

arise if the indirect discrimination claims were added. Whilst the direct discrimination claims might involve some consideration of the underlying pay practices within the First Respondent, the focus remained on the three particular decisions of which the Claimant had complained (see as particularised before Employment Judge Glennie); if the indirect discrimination claims were added, that focus would change and - whether or not I would have taken the same view - the ET was entitled to consider that this pointed against the consolidation of all these claims in the current proceedings. Related to that consideration, thirdly, the ET was also plainly influenced by the particular prejudice that would arise if these amendments were allowed. The application to amend had already de-railed the listing of the Full Merits Hearing and, given the additional evidence that would be required to address the indirect discrimination complaints, allowing further claims to be added would only add to the delay (the Respondents having, by this stage, effectively completed most of the preparatory work for the final hearing). Again these are factors that distinguish this case from the facts of **Gillett** and I am unable to say that the ET was not entitled to see these matters as highly relevant to the exercise of its discretion.

40. Finally, I turn to the question whether the ET erred in not permitting the Claimant to add paragraphs 18 to 20 of the amended grounds. By paragraph 18, the Claimant simply referred back to the earlier narrative, as set out in the original particulars of his claim, including the reference to the statistical differences in pay between World Service Languages staff and Network News staff; he stated: "*For the reasons set out above, I believe that the BBC has discriminated against me because of race in setting my salary as an SM2 manager*". From paragraph 19, however, the amended grounds went further ("*Further or alternatively, ...*"), building an alternative argument based on **Danfoss** - another equal pay case (involving allegations of sex-discriminatory pay) before the ECJ, in which it had been held that it is for an employer to justify pay differentials arising from a pay system that lacks transparency. Ms

Tether characterised this as a clarification of the Claimant's existing complaint of direct discrimination: "*in particular to make clear what the Claimant says about the burden of proof in this case*" (see paragraphs 20.1 and 26 of the Claimant's skeleton argument below).

41. The ET did not see the **Danfoss** argument as a mere clarification; in seeking to import the principles applied in a sex-based equal pay case, the ET considered this raised questions as to whether the Claimant was doing work of equal value to his comparators (presumably those employed in Network News) - this was not simply a re-labelling exercise.

42. In his challenge to the ET's decision on appeal, the Claimant argues that its error was in seeing this as adding a new complaint when it was really just setting out his argument regarding the burden of proof. The Respondents counter that, if that is the case, the Claimant has suffered no prejudice as a result of the ET's decision: it remains open to him to argue that the statistical evidence is such that he has discharged the initial burden for the purposes of section 136 **EqA** (the burden of proof provision under the **EqA**); the ET's ruling meant only that he was not entitled to raise an entirely separate argument that would (i) amount to a complaint about pay systems rather than (as the Claimant had previously characterised his case) individual pay decisions; and (ii) give rise to a separate preliminary enquiry as to whether the Claimant and his comparator/s within Network News were doing like work or work of equal value.

43. Given how the Claimant puts his case in this regard on appeal, the answer is simple: the ET's decision to refuse his application to amend does not prevent him relying on the statistical evidence he has obtained to say that this shifts the burden of proof under section 136 **EqA** - he has never lost the ability to run that argument. To the extent that his real intention is to resurrect the **Danfoss** argument identified by the proposed amended grounds, however, the

Claimant faces similar objections to his appeal against the ET's decision on the indirect discrimination claim. Again, the ET permissibly concluded that the new way of putting the Claimant's case was not simply a re-labelling exercise; the **Danfoss** argument was a substantively new way of putting his complaint. Although I see no reason in principle why there should not be a read-across from sex-based equal pay cases such as **Danfoss** into race-based pay discrimination complaints, I am unable to say that the ET was other than entitled to take the view that this would give rise to materially different issues, turning the focus from individual pay decisions regarding the Claimant's remuneration to an enquiry into the pay systems relating to different groups of employees. And, as the Claimant's case on appeal appears to have implicitly acknowledged, once it is accepted that the new argument raises substantively different issues, it is hard to see that the ET did other than reach a permissible view on the balance of prejudice.

44. The real difficulty in this case is that the Claimant was seeking to amend his claim to add substantively new causes of action and ways of putting his case at a very late stage in the proceedings and after he had previously nailed his colours to one particular - and different - mast. Ultimately the ET's decision says nothing about the potential merit of the new arguments; it was simply an exercise in case management discretion by the first instance Tribunal and, as such, I am unable to see that the appeal has identified any proper basis on which it would be open to the EAT to interfere. For all those reasons, I therefore dismiss this appeal.