EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102107/2017

Held in Glasgow on 25 April 2018

Employment Judge: Ian McPherson

Mr Edward McCluskey	**Claimant** **Represented by:-** **Mr Tony McGrade – Solicitor**
North Lanarkshire Council	**Respondents** **Represented by:-** **Mr Stephen Miller – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

(1) Having considered the claimant's representative's applications dated 19 January, 21 February and 6 April 2018 for leave to amend the ET1 claim form, revised paper apart intimated on 6 December 2017, by adding yet further and better particulars, there being no objection intimated by the respondents to the amendments proposed at paragraphs 1 and 2 of the application dated 21 February 2018, the Tribunal **allows** those amendments to the ET1;

(2) In respect of the other applications, all opposed by the respondents, as per their representatives' objections of 7 February, 1 and 15 March and 18 April 2018, the Tribunal, having heard from both parties' representatives at this Preliminary Hearing, in respect of their grounds

for the applications, and grounds of resistance to the proposed amendments, **allows** those other proposed amendments in full, being satisfied that it is in the interests of justice, and in accordance with the overriding objective to deal with the case fairly and justly, to allow these amendments to the ET1 claim form, revised paper apart;

(3) Having allowed the claimant's amendments, the Tribunal **orders** that, **within a period of no more than 7 days, following issue of this Judgment**, the claimant's representative shall intimate to the Tribunal, by e-mail, with copy sent at the same time to the respondents' representative, a Word document (not PDF) setting forth the revised terms of the paper apart to the ET1, as now amended, thus consolidating the amended pleadings for the claimant at section 8.2 of the ET1 claim form into a single document for use by the Tribunal and both parties;

(4) Further, having allowed these amendments, the Tribunal also allows the respondents, if so advised**, a period of no more than 3 weeks from the date of issue of this Judgment,** to lodge with the Tribunal their own further and better particulars in reply, with copy to be sent at the same time to the claimant's representative, so as to answer the claimant's additional averments added by these amendments allowed by the Tribunal;

(5) Further, the claimant having confirmed, at this Preliminary Hearing, that, in the event of success with his claim, he still seeks re-instatement to his old job with the respondents, as per his ET1 claim form, and the respondents' ET3 response not having addressed that preferred remedy, the Tribunal **orders** that the respondents shall, **within that same period of no more than 3 weeks from date of issue of this Judgment,** lodge with the Tribunal their own further and better particulars in reply, with copy to be sent at the same time to the claimant's representative, so as to answer the claimant's request for re-instatement and, if that remedy is to be opposed by the respondents, to

detail their grounds of objection having regard to the terms of **Sections 114 to 117 of the Employment Rights Act 1996**;

(6) The Tribunal **orders** that the claim and response, as so amended, now be listed for a Final Hearing, for full disposal, including remedy, if appropriate, on dates to be hereinafter assigned by the Tribunal, in the proposed listing period of **July, August or September 2018,** following the issue of date listing letters to both parties' representatives by the clerk to the Tribunal;

(7) Further, the Tribunal **orders** that, **within a period of no more than 2 weeks from the date of issue of this Judgment**, parties' representatives shall write to the Tribunal, with copy sent at the same time to the other party's representative, to indicate, with reasons:

(a) whether or not they seek a full Tribunal, or an Employment Judge sitting alone, to hear the defended unfair dismissal complaint at that Final Hearing;

(b) whether or not they consider that it would be helpful for witness statements to be used at the Final Hearing, and, if so, why?, and if so, whether they would propose that such statements be taken as read, or not; and

(c) whether or not, in light of the Judge's declaration of interest as a retired local government officer, and previous working relationship with the claimant's solicitor, and one identified possible witness for the respondents, there is any objection to Employment Judge McPherson hearing this case, whereby he should consider recusing himself;

(8) The claimant's application for documents produced, under cover of a sealed envelope, by the respondents' representative, on 15 March 2018m, further to part (2) of the Documents Order granted by the Tribunal on 22 February 2018, not being insisted upon by the claimant, in light of additional information provided voluntarily to the claimant and

his representative, at the start of this Preliminary Hearing, by the respondents' representative, no further Order is made by the Tribunal, and the Judge **instructs** that the sealed envelope will remain sealed on the casefile, and not be made available to the Tribunal hearing the case at Final Hearing; and

(9) The Tribunal notes and records that the claimant's application dated 19 April 2018 for a Documents Order to be granted against the respondents is not insisted upon by the claimant, the respondents' representative having given an **undertaking** at this Preliminary Hearing, on behalf of the respondents, that they will produce to the claimant's representative, **by close of business on Friday, 27 April 2018**, a copy of the letter concerned dated 16 September 2016.

REASONS

Introduction

1 This case called before the Employment Judge sitting alone for a Preliminary Hearing on the morning of Wednesday, 25 April 2018, further to Notice of Preliminary Hearing (Preliminary Issue) issued by the Tribunal to both parties' representatives, under cover of a letter of 10 March 2018, advising that 3 hours had been set aside for a Preliminary Hearing.

2 While that Notice of Preliminary Hearing identified the preliminary issue as the Tribunal having to determine the application to amend the ET3, that was an administrative error, and as per the Tribunal's subsequent letter of 26 March 2018, issued on directions from Employment Judge Jane Garvie, it was confirmed that the Preliminary Hearing was to consider the claimant's application to amend the ET1 claim form.

3 Subsequently, and following further developments in the case, amended Notice of Preliminary Hearing was issued to parties on 20 April 2018, confirming that the Preliminary Hearing had been increased to one day's

duration, in order that it could determine (1) the contents of a confidential envelope lodged by the respondents' representative, in terms of an earlier Order of the Tribunal, for production of documents, and (2) the claimant's applications to amend the ET1 claim form.

4 In the event, while the Preliminary Hearing was listed for a full day, proceedings concluded within the morning session and the only matters left for determination by the Tribunal were the opposed parts of the claimant's various applications to amend the ET1 claim form.

Claim and Response

5 The claimant was formerly employed by the respondents as a Property Maintenance and Improvement Manager, until his employment was ended on 11 April 2017. Following ACAS early conciliation, between 30 June and 5 July 2017, the claimant, then acting on his own behalf, presented his ET1 claim form, on 7 July 2017, complaining of unfair dismissal by the respondents.

6 By way of setting out the background and details of his claim, rather than complete Section 8.2 of the ET1 claim form, the claimant attached a separate, 5 page typewritten paper apart. At Section 9.1, he stated that, if his claim was to be successful before the Tribunal, the remedy he was seeking was re-instatement, to get his old job back and compensation from the respondents.

7 His claim was accepted by the Tribunal, on 25 July 2017, when Notice of Claim was served on the respondents, requiring them to lodge an ET3 response by 22 August 2017 at the latest. Thereafter, on 22 August 2017, Mr Stephen Miller, Solicitor with Clyde & Co (Scotland) LLP, Solicitors, Glasgow, acting on behalf of the respondents, lodged an ET3 response on their behalf, defending the claim, and attaching, in reply to Section 6.1 of the ET3, a separate 5 page paper apart, extending to 26 paragraphs, entitled "***DRAFT***".

8 That response was accepted by the Tribunal, on 23 August 2017, and, following initial consideration by Employment Judge Mary Kearns, on 1 September 2017, she having considered the file, and not dismissed the claim or response, ordered that the claim would proceed to a Final Hearing on dates

to be determined, and she also issued standard Case Management Orders dated 30 August 2017 on her own initiative for the purposes of the Final Hearing in these proceedings.

9 While, on 14 September 2017, Employment Judge Robert Gall instructed, and parties were advised under cover of a letter from the Tribunal, that the case was to be listed for a 4 day Final Hearing in the event, to date, the case has not yet been listed for a Final Hearing.

Amended Paper Apart to ET1

10 On 8 November 2017, Mr Tony McGrade, Solicitor with McGrade & Co, Employment Lawyers, Glasgow, advised the Tribunal, and the respondents' representative, that he had been instructed by the claimant, and he wished to review matters carefully. He further anticipated that he would wish to amend the paper apart to the original ET1, as it was drafted by the claimant without the benefit of legal advice.

11 Mr McGrade advised that once he had undertaken that exercise, he expected to be in a better position to identify which witnesses he wished to call and the length of evidence of each of these witnesses, and he appreciated that any amendment that he might make may have a bearing on the witnesses to be called by the respondents.

12 Further, Mr McGrade's e-mail of 8 November 2017 advised that he appreciated this case had been ongoing for some time, but he explained that the claimant had taken steps to progress matters, he was advised by his insurers that he had legal expenses insurance, and he was reluctant to appoint a solicitor until this issue was resolved, and this had caused some delay.

13 On 14 November 2017, Mr Miller, acting for the respondents, advised the Tribunal, and Mr McGrade, that the respondents did not oppose Mr McGrade's application that date listing period be extended for 4 weeks to enable him to investigate more fully the background to the claimant's dismissal, to amend the original application, if necessary, and to confirm the

position regarding the identity of witnesses that he wished to call on the claimant's behalf.

14 On 6 December 2017, Mr McGrade e-mailed the Tribunal office, with copy to Mr Miller for the respondents, attaching an amended paper apart that he wished to have accepted as Further and Better Particulars of the claim. He advised that it was intended that this document replaced the information presented along with the original application. He enclosed a separate, typewritten, 6 page document extending to 41 separate paragraphs of text.

15 Following referral to Employment Judge Shona MacLean, she directed, as set forth under cover of the Tribunal's letter of 8 December 2017, that Mr Miller should indicate, by no later than 14 December 2017, whether he had any objections to the claimant's proposed amendment to the claim, as per Mr McGrade's correspondence dated 6 December 2017.

16 No reply was forthcoming from Mr Miller and, as he confirmed to me at this Preliminary Hearing, the respondents had no objection to that 6 December 2017 amended paper apart to the ET1 being accepted, and replacing the paper apart presented by the claimant along with the ET1 claim form on 7 July 2017.

Claimant's subsequent applications to lodge Further and Better Particulars/amend the ET1 claim form

17 On 19 January 2018, Mr McGrade, when intimating a request for documentation on behalf of the claimant, also submitted a separate document, entitled "***Further and Better Particulars for the Claimant***", which he asked to be treated as further particulars of the claim.

18 That application was in two separate parts, as follows:-

> "***1. At the end of paragraph 6 of the revised paper apart add the following sentence:-***
>
> ***A full copy of the Respondent's internal audit department report was issued to all councillors.***

2. In place of existing paragraph 7, insert the following paragraph and renumber the existing paragraphs accordingly:-

7. At some point around 2017, Internal Audit were instructed to carry out a full investigation/audit in to the activities carried out by North Lanarkshire Leisure LLP, a not for profit company wholly owned by the Respondent. A report was produced by them. It is believed the report commented upon the activities of Councillor Logue. A full copy of the Respondent's internal audit department report was not issued to all councillors, despite request that it do so by the SNP Group's business manager, Allan Stubbs. The Respondent's Chief Executive sought to justify the decision to refuse to issue the full report on the basis that the Respondent had a long-standing practice of retaining investigative reports. This practice was not followed in the case of the Claimant."

19 Mr McGrade, by an e-mail of 7 February 2018 responding to a letter from the Tribunal of 31 January 2018, issued on instructions from Employment Judge Claire McManus, replied stating:-

"I also wish the claim to be amended in terms of the further and better particulars that I recently provided. I am not aware of this being opposed by the Respondent's solicitor. I would ask that the claim be amended in terms of the further and better particulars on the basis that it provides additional information regarding inconsistency of treatment, which may support the claimant's position that there was an agenda against him. No hearing has yet been fixed and therefore the Respondent will have sufficient

opportunity to consider and answer the additional information provided."

20 Thereafter, by e-mail sent on 7 February 2018, Mr Miller, solicitor acting for the respondents, advised as follows:-

"The Respondent has noted that the Claimant seeks to introduce his additional particulars by way of amendment.

That amendment application is opposed by the Respondent.

The additional particulars are irrelevant. The audit report in relation to North Lanarkshire Leisure (NLL) has no bearing on the audit report regarding Corporate Property and Procurement (CPP) which triggered the instigation of disciplinary proceedings against the Claimant. There is an attempt to link these two unrelated matters by reference to inconsistent practice, but the point is tenuous with respect and of insufficient materiality to support the allowance of the amendment."

21 Further, by e-mail of 12 February 2018, Mr McGrade advised the Tribunal that:-

"I refer to previous correspondence and have received the attached e-mail from the Respondents' solicitor opposing my application to amend the ET1 in term of the further and better particulars previously provided, which are also attached. The further and better particulars provided indicate that the Respondent's chief executive took steps to prevent publication of an internal audit report that related to the activities of Councillor Logue, the leader of the Council, while an audit report relating to the Claimant and others was released. It is the Claimant's position that he was dismissed because of ill-will towards him by Councillor Logue. This information tends to show that the Chief Executive of North Lanarkshire Council sought to take steps to protect

Councillor Logue from criticism, while adopting a very different course of action in relation to the Claimant. While I accept that this in itself may not be sufficient to render the dismissal unfair, it is simply one more adminicle of evidence that supports the general position taken by the Claimant, namely that he was treated differently from those around him because of Councillor Logue's ill-will towards him. I would respectfully submit that the weight to be attached to this is a matter that is better determined by the Tribunal, having heard all the evidence in this case. No Hearing has yet been fixed in this case and therefore the Respondent has more than sufficient time to carry out any investigation in relation to this matter."

22 On 20 February 2018, as intimated to parties' representatives, under cover of a letter from the Tribunal, issued on my instructions, parties were advised that the case would be listed for a 3 hour Preliminary Hearing, in person, to consider the issue of the claimant's application to amend the ET1, and that a formal Notice of Hearing would be issued in due course.

23 Thereafter, by e-mail of 21 February 2018, Mr McGrade provided a further document, entitled "***Further and Better Particulars for the Claimant***", asking that the claim be amended to incorporate these Further and Better Particulars. He referred to the Tribunal's letter dated 20 February 2018, advising that a Hearing was to be fixed to determine the outstanding application to amend the claim, in light of Further and Better Particulars that he previously submitted, and he stated that if the respondents intended to oppose this amendment application, he would ask that this matter also be considered at the Hearing that was to be fixed very shortly.

24 The terms of those second, Further and Better Particulars / proposed amendments for the claimant, were as follows:-

1. At the end of paragraph 21 of the amended paper apart add the following:-

"He also asserted (at para 4.4) that that the Claimant stated "that he could not disagree with the position outlined by Mr Steenson, Investigating Officer," when this was not the case.

2. At the end of paragraph 24 of the amended paper apart add the following:-

"The Claimant also believes his dismissal was used by the Respondent as a reason for not awarding a contract to a contractor known as Skylight, as the Claimant had worked on the tender process for Skylight and his involvement could be used to suggest the tender process was flawed."

3. Insert new paragraph 41 and renumber the existing paragraph 41 as paragraph 42:-

"The Respondent also acted inconsistently. It is believed that two members of staff, namely Arthur Crossley and Joseph Brady were both disciplined by the Respondent for accepting and/or not declaring gifts and hospitality. Neither of them was dismissed."

25 In response, by e-mail of 1 March 2018, Mr Miller stated that he had noted that there was to be a Preliminary Hearing scheduled to consider the amendment application dated 21 February 2018, and he confirmed that the respondents opposed that amendment in part, stating that: "***paragraph three would insert a new comparison-based case and should not be admitted without further explanation for the late lodging, and consideration of the implications for the full Hearing."***

26 Further, by another e-mail from Mr Miller, dated 15 March 2018, he stated the respondents' objections to the terms of paragraph 3 of the claimant's proposed amendment of 21 February 2018, in the following terms:-

"The objection to this part of the amendment is that the circumstances there invoked for comparison are not truly parallel or sufficiently similar, the disciplinary proceedings referred to by the claimant happened quite some time prior to the termination of his employment and any comparison-based case could have been made before now."

27 At this Preliminary Hearing, Mr Miller confirmed that the respondents' objection to the application dated 21 February 2018 related only to paragraph (3), and that there was no objection to paragraphs (1) and (2). In those circumstances, there being no objection by the respondents, I have **allowed t**hose two paragraphs to be added to the amended paper apart to the ET1 claim form.

28 Finally, after the original Notice of Preliminary Hearing was issued, on 10 March 2018, assigning this Preliminary Hearing, Mr McGrade submitted a third set of Further and Better Particulars for the claimant, by e-mail sent on 6 April 2018, asking that the claim be amended to incorporate those Further and Better Particulars.

29 The terms of those third Further and Better Particulars / proposed amendments for the claimant, were as follows:-

"24. On or around 12 January 2018, the Claimant spoke by telephone with Tony Kane, who was latter appointed as a director of Securus Group Limited (10489886). He advised the Claimant that he had seen the letter that McGrade & Co had forwarded to Steven Kelly, requesting Steven Kelly contact them regarding the unfair dismissal claim being pursued by the Claimant. Steven Kelly was formerly employed by Mears and was by then employed by Securus Group Limited. He advised the Claimant that Steven Kelly's involvement could cause a significant difficulty for him. He also advised the Claimant that he had been told that if Steven Kelly appeared as a witness on behalf of the Claimant, Securus Group Limited would not be awarded the contract with North Lanarkshire

Council for which it had recently tendered. He did not disclose the identity of the person who had made these remarks. He also advised the Claimant that if Steven Kelly appeared as a witness, he would have to let him go, i.e. dismiss Steven Kelly."

30 In his covering e-mail of 6 April 2018, Mr McGrade noted that a Preliminary Hearing had been fixed for 25 April 2018 to determine outstanding applications to amend the claim, in light of Further and Better Particulars that he had previously submitted, and he suggested that if the respondents intended to oppose this further amendment application, he asked that this matter also be considered at that Hearing.

31 By letter to parties' representatives, sent on my instructions, on 11 April 2018, I directed that, if opposed, this further application to amend, dated 6 April 2018, would also be considered at this Preliminary Hearing.

32 Thereafter, by e-mail of 18 April 2018, Mr Miller, the respondents' representative, advised that the most recent amendment application made on the claimant's behalf dated 6 April 2018 was opposed by the respondents, on the following basis:-

"Even if the facts described in the proposed new paragraph 24 are correct, they will add nothing to the disputed issues. The new averments are irrelevant.

At his highest, the new averments suggest that Tony Kane was provided with information which for reasons unknown would mean that Tony Kane would have to discuss (sic) ***Steve Kelly from his employment with Securus Group Limited, if he testified in this case. The averment does not suggest far less say that the person making the call/s to Tony Kane did so on behalf of the Respondent."***

33 The word "***discuss"*** is a clear typographical error, and the appropriate word, read in context, should have stated "***dismiss***". By letter to both parties' representatives, dated 23 April 2018, the Tribunal confirmed that I had

instructed that the issues raised in the respondents' objections dated 18 April 2018 would be dealt with at this Preliminary Hearing.

Preliminary Hearing before this Tribunal

34 When the case called before me, shortly after 11.00am, on the morning of Wednesday, 25 April 2018, the claimant was in attendance, represented by his solicitor, Mr McGrade. The respondents were represented by Mr Miller, their external solicitor, from Clyde & Co, instructed by Ms Rachel Blair, in-house solicitor at the Council, and they were accompanied by a trainee solicitor, Mr C. Knudsen.

Matters not determined at this Hearing

35 On 22 February 2018, having considered the claimant's application for a Documents Order against the respondents, and the respondents' objections, I granted to the claimant an Order for the respondents to provide certain documents on or before 2 March 2018.

36 Subsequently, by letter dated 15 March 2018, hand delivered to the Tribunal office, from Mr Miller, at Clyde & Co, he attached the respondents' answers to the Documents Order dated 22 February 2018, but, in respect of one item, at paragraph 2, the respondents claimed "***confidentiality"*** in relation to the document falling within the description in the Tribunal's Order, and accordingly the document was sent to the Tribunal in a sealed envelope.

37 By letter from the Tribunal, dated 5 April 2018, issued on my instructions, parties' representatives were asked to confirm, by 12 April 2018, whether they wished that document 2, enclosed in that sealed envelope, to which the respondents asserted confidentiality, to be considered by the Employment Judge at this Preliminary Hearing or, separately, at a closed chambers Hearing.

38 By e-mail sent on 12 April 2018, Mr Miller stated that it was the respondents' preference that consideration of the issues arising from the confidentiality point take place at this Hearing, rather than in the Judge's chambers.

Accordingly, by letter to parties' representatives, sent by the Tribunal, on my instructions, on 17 April 2018, parties were advised that this Preliminary Hearing, listed for 3 hours, would be extended to one day, to hear the issue of the confidential envelope first, and thereafter the claimant's application to amend the ET1 claim form, and that amended Notice of Hearing would be issued in due course.

39 In the event, I was not required to consider the sealed envelope, at this Hearing. Mr Miller, at the start of the Hearing, tendered to Mr McGrade, with a copy for the Tribunal, which I have placed on the casefile, a typewritten document, stating as follows:-

> "***At the interview on 20 December 2016 JM did say: -***
>
> ***"In JM's office in March 2016, Councillor Logue had expressed the wish / intent to get rid of JG."***

40 Following an adjournment of proceedings, so that Mr McGrade could take instructions from his client, when the Hearing resumed, I was advised that subject to clarification by Mr Miller of the identity of the two individuals, JM and JG, the claimant was no longer insisting on production of the documents in the sealed envelope, and that the information supplied by Mr Miller would be sufficient.

41 Mr Miller advised that ***"JM"*** was June Murray, the respondents' then Executive Director of Corporate Services, and "***JG"*** was John Gordon, the claimant's line manager. In those circumstances, Mr McGrade confirmed that the claimant was no longer insisting on production of the documents in the sealed envelope, and so that matter did not fall to be determined at this Preliminary Hearing.

42 The sealed envelope remains in the Tribunal's case file, and it remains sealed, and it will <u>not</u> be made available to the Tribunal hearing this case at any Final Hearing.

43 Mr Miller, solicitor for the respondents, stated that, in light of the terms of paragraph 11 of the claimant's revised paper apart to the ET1, he would seek, in response, to answer the allegation made there by the claimant, by way of Further and Better Particulars for the respondents, which he would invite the Tribunal to allow, rather than merely seeking to deal with the matter in an agreed Joint Statement of Facts.

44 Mr McGrade confirmed that he, and his client, were content with this approach, and so Mr Miller is at liberty to lodge Further and Better Particulars, for that purpose, on behalf of the respondents.

45 Further, the Tribunal did not determine the claimant's application for a Documents Order, as per Mr McGrade's application of 19 April 2018, seeking production of a copy of a letter submitted to the respondents around September 2016, relating to a procurement approved by the respondents' Policy and Resources Committee, and which letter was referred to by Paul Jukes, the respondents' Chief Executive, during the course of the claimant's appeal against dismissal.

46 By letter sent to both parties' representatives, on my instructions, on 24 April 2018, they were advised that this request for a Documents Order would be considered once the respondents' representative had had the opportunity to provide comments or objections.

47 Further, as Mr McGrade had suggested, in that e-mail of 19 April 2018, that it had proved difficult to fix Final Hearing dates in this case, and he thought it would be helpful if an attempt could be made to fix Final Hearing dates at this Preliminary Hearing, the Tribunal's letter of 24 April 2018 directed that parties' representatives should bring their availability for setting the Final Hearing for June, July or August 2018.

48 In the event, it was agreed that, until the matter of the opposed amendments had been determined, and the identity of relevant and necessary witnesses ascertained, by both parties, it would be premature to fix dates for a Final Hearing at this Preliminary Hearing.

49 Accordingly, it was agreed that matters would need to resort to the usual date listing process by exchange of letters. I have so instructed the clerk to the Tribunal to issue those letters, but for a revised proposed listing period of **July, August or September 2018**, given the further procedure directed in this Judgment, and the Tribunal's existing commitments already for June 2018.

Submissions from parties' representatives

50 At this Preliminary Hearing, I heard oral submission from Mr McGrade, in respect of each of the three applications for leave to amend the ET1, and from Mr Miller in reply, allowing Mr McGrade a final right of reply. Rather than rehearse those oral submissions, in detail, I deal with the points raised by both parties' representatives in my discussion and deliberation section of this Judgment below.

51 Given both parties were represented by experienced, and specialist employment lawyers, I was not addressed on the relevant law relating to amendments and, other than Mr Miller's one reference to **Selkent**, for which, fortuitously, he did not provide a copy judgment, given it is such a well known, and familiar case law authority, there was no reference by either party's representative to the relevant rules of procedure, or case law authorities. That said, in considering the opposed applications for amendment, I have given myself a self-direction on the relevant law.

Relevant Law

52 In terms of **Rule 29 of the Employment Tribunals Rules of Procedure 2013**, the Tribunal may at any stage in the proceedings, on its own initiative or on the application of a party, make a Case Management Order. This includes an Order that a party is allowed to amend its particulars of claim or response. The usual starting point for consideration of any application to amend is the guidance given by the Employment Appeal Tribunal in the seminal case of ***Selkent.***

53 In many instances where there is an application to amend a claim form, it is done because a particular head of claim has not been fully explored or

clarified in the initial claim. **Harvey on Industrial Relations and Employment Law** ("***Harvey"***) at section P1, paragraph 311.03 distinguishes between three categories of amendments:-

(1) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint;

(2) amendments which add or substitute a new cause of action but one which is linked to, arises out of the same facts as, the original claim; and

(3) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

54 In ***Transport and General Workers Union v Safeway Stores Ltd UKEAT/009/07***, Mr Justice Underhill, President of the Employment Appeal Tribunal, noted that although **Rule 10(2) (q) of the then Employment Tribunal Rules of Procedure 2004** gave Tribunals a general discretion to allow the amendment of a claim form, it might be thought to be wrong in principle for that discretion to be used so as to allow a claimant to, in effect, get round any statutory limitation period. He went on to say that the position on the authorities however is that an Employment Tribunal has discretion in any case to allow an amendment which introduces a new claim out of time.

55 In a detailed review of the case law, Mr Justice Underhill considered the appropriate conditions for allowing an amendment. In particular, he referred to the guidance of Mr Justice Mummery (as he then was) in ***Selkent Bus Company Ltd v Moore [1996] IRLR 661*** where he set out some guidance. That guidance included the following points:-

"(2) *There is no express obligation in the Industrial Tribunal Rules of Procedure requiring a Tribunal (or the Chairman of a Tribunal) to seek or consider written or oral representations from each side*

before deciding whether to grant or refuse an application for leave to amend. It is, however, common ground for the discretion to grant leave is a judicial discretion to be exercised in a judicial manner, i.e. in a manner which satisfies the requirements of relevance, reason, justice and fairness and end in all judicial discretions.

……

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

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

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

(b) ***The applicability of time limits.*** *If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether the complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g. in the case of unfair dismissal, Section 67 of the 1978 Act.*

(c) ***The timing and manner of the application.*** *An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made; for example, the discovery of new facts or new information appearing from documents disclosed in discovery. Whenever taking any factors into account, 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."*

56 In that ***Safeway*** judgment, Mr Justice Underhill also referred to the judgment of the Court of Appeal in England and Wales in ***Ali v Office of National Statistics [2005] IRLR 201*** where Lord Justice Waller referred to Mr Justice Mummery's guidance in ***Selkent***, pointing out that, in some cases, the delay in bringing the amendment where the facts had been known for many months made it unjust to do so. He continued : ***"There will further be circumstances in which, although a new claim is technically being brought, it is so closely related to the claim already the subject of the originating application, that justice requires the amendment to be allowed, even though it is technically out of time."***

57 Further, Mr Justice Underhill also considered the relevant extract from ***Harvey*** in relation to the threefold categorisation of proposed amendments. He referred to the fact that the discussion in ***Harvey*** points out that there is no difficulty about time-limits as regards categories 1 and 2 , since one does not

involve any new cause of action and two, while it may formally involve a new claim, is in effect no more than "***putting a new label on facts already pleaded".*** He went on to clarify that the decision in ***Selkent*** is inconsistent with the proposition that in all cases which cannot be described as "***relabelling"*** an out of time amendment must automatically be refused; even in such cases he stated that the Tribunal retains a discretion.

58 A further authority that is of assistance to a Tribunal considering an amendment application is ***Ahuja v Inghams [2002] EWCA Civ 192.*** At paragraph 43 of the Court of Appeal's judgment in ***Ahuja,*** Lord Justice Mummery stated that: ***"the tribunal has a very wide and flexible jurisdiction to do justice in the case, as appears from [old] Rule 11 of their regulations and they should not be discouraged in appropriate cases from allowing applicants to amend their applications, if the evidence comes out somewhat differently than was originally pleaded. If there is no injustice to the respondent in allowing such an amendment, then it would be appropriate for the Employment Tribunal to allow it rather than allow what might otherwise be a good claim to be defeated by the requirements that exist - for good reasons - for people to make clear what it is they are complaining about, so that the respondents know how to respond to it with both evidence and argument."***

59 Further, there is the Judgment of the Employment Appeal Tribunal in **Chandhok –v- Tirkey [2015] IRLR 195**, and in particular at paragraphs 16 to 18 of Mr Justice Langstaff's Judgment in **Chandhok**, where the learned EAT President referred to the importance of the ET1 claim form setting out the essential case for a claimant, as follows:-

> *16. …. The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not*

required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.

17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

60 Also of assistance to a Tribunal considering any amendment, there is the Court of Appeal's Judgment in **Abercrombie & Others v Aga Rangemaster Ltd [2013] EWCA Civ 1148; [2013] IRLR 953**, and in particular, the Judgment of Lord Justice Underhill, at paragraphs 42 to 57. As Lord Justice Underhill pointed out in **Abercrombie,** at paragraph 47, the **Selkent** factors are neither intended to be exhaustive nor should they be approached in a tick-box fashion. There is nothing in the Rules or the case-law to say that an amendment to substitute a new cause of action is impermissible.

61 Further, at paragraphs 48 and 49 of the **Abercrombie** judgment, Lord Justice Underhill went to say as follows:-

48. Consistently with that way of putting it, the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater

the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted: see the discussion in Harvey on Industrial Relations and Employment Law para. 312.01-03. We were referred by way of example to my decision in Transport and General Workers Union v Safeway Stores Ltd (UKEAT/0092/07), in which the claimants were permitted to add a claim by a trade union for breach of the collective consultation obligations under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 to what had been pleaded only as a claim for unfair dismissal by individual employees. (That case in fact probably went beyond "mere re-labelling" – as do others which are indeed more authoritative examples, such as British Printing Corporation (North) Ltd v Kelly (above), where this Court permitted an amendment to substitute a claim for unfair dismissal for a claim initially pleaded as a claim for redundancy payments.)

49. It is hard to conceive a purer example of "mere re-labelling" than the present case. Not only the facts but the legal basis of the claim are identical as between the original pleading and the amendment: the only difference is, as I have already said, the use of the section 34 gateway rather than that under section 23. In my view this factor should have weighed very heavily in favour of permission to amend being granted. As the present case only too clearly illustrates, some areas of employment law can, however regrettably, involve real complication, both procedural and substantial; and even the most wary can on occasion stumble into a legal bear-trap. Where an amendment would enable a party to get out of the trap and enable the real issues between the parties to be determined, I would expect permission only to be refused for weighty reasons – most obviously that the amendment would for some particular reason cause unfair prejudice to the other party. There is no question of that in the present case.

62 As is evident from the observations of Mr Justice Mummery, as he then was, in **Selkent,** 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. 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.

63 Further, despite it being unreported, there is also Lady Smith's EAT judgment in the Scottish appeal of **Ladbrokes Racing Ltd v Traynor [2007] UKEATS/0067/07.** It is detailed in chapter 8 of the **IDS Handbook on Employment Tribunal Practice and Procedure**, at section **8.50.** At paragraph 20 of her judgment, Lady Smith, as well as noting the **Selkent** principles, stated as follows:

> *"When considering an application for leave to amend a claim, an Employment Tribunal requires to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing. That involves it considering at least the nature and terms of the amendment proposed, the applicability of any time limits and the timing and the manner of the application. The latter will involve it considering the reason why the application is made at the stage that it is made and why it was not made earlier. It also requires to consider whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs whether because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if they are unlikely to be recovered by the party who incurs them. Delay may, of course, in an individual case have put a respondent in a position where evidence relevant to the*

new issue is no longer available or is of lesser quality than it would have been earlier."

Discussion and Deliberation

64 It is well recognised, if not trite law, that a Tribunal must not adjudicate on a claim that is not before it: ***Chapman v Simon*** **[1993] EWCA Civ 37**. In ***Amin v Wincanton Group Ltd*** ***[2012]*** **UKEAT/0508/10/DA***,* His Honour Judge Serota QC distinguished between a claim that is ***"pleaded but poorly particularised",*** and a ***Chapman v Simon*** case, where the complaint is not pleaded at all. In the former case, the claimant is not required to amend the claim. The lack of proper particulars does not affect the Tribunal's jurisdiction. The remedy in an appropriate case would be to strike out the relevant part of the claim. It is, HHJ Serota observed, at paragraph 48 of his judgment, "***clearly undesirable that important issues in Employment Tribunal proceedings should be determined by pleading points."***

65 The Tribunal's overriding objective is set forth at **Rule 2**, as follows:

Overriding objective

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

66 In considering, in the present case, whether it is appropriate to allow the amendment, I have considered the ***Selkent*** principles, as well as the more recent case law authorities referred to earlier in these Reasons, and I have to take into account not just the interests of the claimant but also those of the respondents. So too have I considered hardship and injustice to both parties in allowing or refusing the amendment, as also the wider interests of justice in terms of the Tribunal's overriding objective to deal with the case fairly and justly.

67 Having considered parties' written representations, as detailed earlier in these Reasons, making and objecting to the amendment applications before me, the oral arguments presented to me at this Preliminary Hearing by both parties' solicitors, and also my own obligations under **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, I consider, after careful reflection, that it is in the interests of justice, and in accordance with the overriding objective, to allow all of these proposed amendments to the ET1 claim form.

68 An amendment can be proposed at any time in the course of a claim before the Tribunal, and the applicability of time-limits only relates to the situation where a new complaint or cause of action is proposed to be added by way of amendment. In this case, Mr McGrade, on the claimant's behalf, does not seek to add any new complaint or cause of action – the claim is what it always was on presentation, namely a complaint of unfair dismissal by the respondents.

69 As Mr McGrade stated in his oral submissions at this Hearing, none of the further and better particulars seek to introduce new claims, and no statutory time limits are applicable. It is a claim of unfair dismissal, and the claimant seeks to present additional facts to support his claim. He accepted that the ET1 was submitted some time ago, but that was when the claimant was unrepresented, and he had taken steps, since being instructed, to lodge further and better particulars of the claim, as and when the claimant had brought him additional information.

70 Mr McGrade described it as a fairly complex claim, and that it was not so obvious as to say that these further and better particulars should have been there from the beginning, as, in some cases, matters were not known to the claimant when he presented his ET1, and / or he had some, but not detailed, knowledge of certain matters, but he had subsequently got some additional information since the claimant had instructed him.

71 In his view, there was no substantial prejudice to the respondents by these further and better particulars being accepted now, as no Final Hearing was yet fixed here, and the respondents would have sufficient time to consider these further and better particulars, and provide a response, and he accepted that they would need time to do that. In weighing matters in the balance, Mr McGrade submitted that allowing these amendments would mean better information before the Tribunal, and it would be appropriate to give the respondents time to respond to that additional information.

72 As regards his first proposed amendments, Mr McGrade stated that they were highlighting an inconsistency in practice by the respondents, and while he accepted that, even if established, there was no direct evidence that pressure was applied to Mr Dukes by Councillor Logue, the claimant was seeking to bring to the Tribunal's attention his contention that there was an inconsistency in practice, as the Chief Executive was taking steps to protect the Leader of the Council, and he would intend to cross examine Mr Dukes on this point,

and the amendment gives the respondents fair notice of the claimant's position.

73 Further, added Mr McGrade, there was a very strong reason to allow these further and better particulars, as he had to be entitled to cross-examine Mr Dukes on the respondents' process, and he must be able to question him, and clarify if there was an Internal Audit report, and, if so, was it issued to all councillors, and was that standard practice.

74 Mr Miller, in reply, referred to his e-mail of 7 February 2018, and stated that while Mr McGrade's explanation of the need for amendment was helpful in him understanding the context, he queried if Mr McGrade was free to cross-examine Mr Dukes, as had been suggested, when this was a case managed litigation, where, with pleadings, and judicial intervention, disputed issues were still to be defined.

75 Further, Mr Miller submitted that the claimant needs to show that Mr Dukes was pressured in some way by Councillor Logue to make his case fit together, and he stated that he did not believe that what was being pled here assisted the claimant, as he stated it was irrelevant then, when the proposed amendment was first intimated, and still irrelevant now. There was a lack of specification about the date, at some point around 2017, but his fundamental objection was that this amendment was irrelevant, and should not be allowed by the Tribunal. If the Tribunal were, however, to allow it, he asked for 14 days to reply, with perhaps 21 days, if all the opposed amendments were to be allowed.

76 Finally, in response to the respondents' objections, Mr McGrade stated that he accepted entirely that the claimant's additional information is not conclusive that the respondents' Chief Executive had been got at by the Leader of the Council, but it is an adminicle of evidence, and it will be for the Tribunal hearing the case to consider this point along with all the other evidence in the case. He described it as "***being part of a jigsaw",*** and

submitted that it is a legitimate area of enquiry for him to raise on the claimant's behalf, and for the Tribunal to consider at the Final Hearing.

77 Turning then to his second set of proposed amendments, intimated on 21 February 2018, Mr McGrade noted that only part (3) was opposed by the respondents. He added that the claimant was aware of these 2 staff, Arthur Crossley and Joseph Brady, and that they had been dealt with a few years ago, but the claimant did not have detailed knowledge of the circumstances of their cases, and any disciplinary penalty imposed by the respondents, but the claimant having made further enquiries, earlier this year, that resulted in this particular proposed amendment.

78 In broad terms, Mr Mc Grade stated that there was an inconsistency of treatment argument to be run by the claimant, and while he accepted the respondents may well say those cases are not on all 4's with the claimant's circumstances, it is the claimant's position that he has been singled out, and there has been political pressure to dismiss him, and so the claimant is entitled to raise these matters which, even if not on all 4's with his circumstances, may go some way to enable questions to be asked about whether his dismissal was motivated by issues other than the alleged gross misconduct his employers found the claimant guilty of.

79 Mr Miller, in reply, referred to his e-mail of 1 March 2018, and stated that Mr McGrade had provided an explanation for the late lodging of this proposed amendment, but looking to the underlying framework of **Selkent,** he recognised that comparative justice is important in reaching disciplinary decisions, but while the claimant's case was going through the Chief Executive, the claimant knew of the circumstances of these two individuals, and he made no attempt to capitalise on those circumstances.

80 When I enquired whether Messrs Crossly and Bradley were contemporary employees, dealt with at or around the same time as the claimant, or historical cases, Mr Miller advised that Mr Brady's case was in 2009, and Mr Crossley

in 2010, to which Mr McGrade stated that he accepted those cases were not contemporary, and that the claimant accepts that the dates given by Mr Miller are approximately correct. Further, Mr McGrade accepted that the claimant accepts that he did not raise these issues during his disciplinary hearing, or at his appeal, but he stated that the claimant was not then represented by a solicitor, and he only had some, limited knowledge of those other cases at that time.

81 In reply, Mr Miller stated that, as per his email of 1 March 2018, I should have regard to the implications for the full Hearing, if this amendment were allowed, as he stated that Messrs Crossley and Brady had been employed in different Services within the Council's employment, and there had been separate decision makers, and one had retired, and the other was now at Fife Council.

82 As such, Mr Miller added, he would have to contemplate leading them as witnesses, and perhaps one days' evidence would be required, and the Tribunal would need to decide if there was any co-relation between their cases and the claimant's case here, when, he submitted, Messrs Brady and Crossley had admitted breach of the Council's gifts and hospitality policy, so, he argued, their circumstances were different from the present case.

83 Finally, in response, Mr McGrade stated that Mr Miller had fairly set out the respondents' position, if this amendment were to be allowed, and he would take instructions from the claimant, as his understanding was that those 2 other cases had not admitted breaches of the respondents' policy, but he accepted those other cases were historical, and he does not have very detailed information.

84 If the respondents can reply, in writing, as Mr Miller has done orally at this Hearing, Mr McGrade stated that he could then advise the claimant whether the terms of the respondents' formal response meant that this line of argument should proceed, or not. Meantime, he was insisting on this application to amend, and not withdrawing it.

85 Finally, Mr McGrade addressed his third proposed amendment intimated on 6 April 2018. In doing so, he recognised that the further and better particulars provided described "***a most unusual set of circumstances",*** and he explained that the details had come from a telephone conversation between the claimant and Tony Kane.

86 Knowing that Mr Miller had objected to this amendment application, Mr McGrade stated that the claimant did not know who had contacted Mr Kane, and he recognised it was possible that Mr Kane had invented this conversation, where it is alleged he was told that if a Steven Kelly appeared as a witness for the claimant, Securus Group Ltd would not be awarded a contract by the Council.

87 Further, added Mr McGrade, he assumed that Mr Kane had refused his request to provide a witness statement, as he had not replied to the request, but, as can be seen from the proposed amendment, it is very specific information that appears to have been disclosed which, If true, he will apply for a Witness Order for Mr Kane to attend and give evidence, and he may have to ask the Tribunal to allow him to treat Mr Kane as a hostile witness.

88 Mr McGrade then stated that the most likely source of the remarks made to Mr Kane has to be an employee of the Council who knows Securus Group Ltd has tendered for work. He added that, in his view, this fits into the jigsaw that the respondents are out to get the claimant, and this is a public body, where an employed official or elected member goes to the length of contacting tenders, so "***it rings the alarm bells, left, right and centre***".

89 Further, Mr McGrade submitted, what the Tribunal hearing this case will make of all this, if this amendment is allowed, we will have to wait and see, and he accepted that he does not know if Mr Kane is a Walter Mitty character, but if Mr McGrade was hearing the case, he would want to hear from Mr Kane, and

evaluate whether something is going on in the background that is rather too untoward.

90 When I enquired of Mr McGrade why this proposed amendment was only made on 6 April 208, when it referred to a telephone conversation on 12 January 2018, he explained that the claimant was concerned that Mr Kane would deny the conversation, and the claimant accordingly felt there was no point in bringing this matter forward, but Mr McGrade had advised the claimant that he should bring this matter forward to the Tribunal's attention, hence the application for this proposed amendment.

91 Having heard Mr McGrade's submissions, Mr Miller replied on behalf of the respondents, confirming their objection to this proposed amendment. Mr Miller stated that the purpose of pleadings is more than just fair notice, but for the claimant to show what facts he seeks to prove to the Tribunal. If the Tribunal were to find that the proposed paragraph 24 as a finding in fact, he submitted that it would not advance the claimant's case, even if the Tribunal found it to be true as the fact finding Tribunal. That is because, he added, there is no link between this proposed textual narrative and the respondents, far less to the respondents' decision maker, Mr Dukes.

92 While Mr McGrade had suggested the most likely source has to be an employee of the Council, Mr Miller submitted that that illustrates the weakness of the proposed amendment. To name the alleged person who advised Mr Kane of this would be to improve the text, but that would still not provide a link to the decision maker. Mr Miller described the elected members who heard the claimant's appeal as decision maskers, but stated that they ***"endorsed"*** Mr Dukes' decision, as he was the original decision maker within the Council, who had dismissed the claimant from the respondents' employment.

93 Further, submitted Mr Miller, more has to be done by Mr McGrade with this proposed amendment, and the claimant has to say who is the source of information to Mr Kane, but even then, he added, there will still need to be a

link made between that somebody in the Council, and its Chief Executive, Mr Dukes.

94 Next, Mr Miller referred to how contracts are awarded in the public sector, and that interventions of the type suggested in the proposed amendment cannot be made without flouting public procurement rules, and here there has been no attempt by the claimant to develop that argument. In time, he suggested, this proposed amendment might best be taken away, and refreshed by Mr McGrade, and the claimant to make a specific allegation that those defending this litigation made attempts to prevent witnesses giving evidence for the claimant but, he further stated, that is a most serious allegation, and until that appears, he described this proposed amendment as "***just scuttle-buck, and mere speculation***" as currently drafted.

95 Further, Mr Miller added, this proposed amendment has been 3 months in gestation, from the date of the alleged telephone conversation, and while he accepted Mr McGrade had been trying to contract Mr Kane, he advised that a contract award is imminent, but not yet happened, but it would be awarded in the next week or so.

96 As such, Mr Miller invited me to refuse the application ***in hoc statu***, as they say in the Sheriff Court, i.e. for the time being, but to give Mr McGrade liberty to take the application away, and refresh it, after the contract was awarded by the Council; if Mr Kane's tender is accepted, Mr Miller suggested he might then be more amenable to speaking with Mr McGrade, and assisting with his enquiries, rather than him may well being nervous about the outcome of the tender process, and so not contacting Mr McGrade for that reason.

97 Replying to Mr Miller's points, Mr McGrade stated that the claimant can provide no more than he has done, and while Mr Miller had suggested that he refashion this proposed amendment, the claimant has no more information than this, at this stage, and he has no more information than the claimant has provided to him.

98 In particular, Mr McGrade stated that he had no information to show this instruction, as recounted by Mr Kane, came from Councillor Logue, or Mr Dukes, and while he had made efforts to get further information from Mr Kane, he had not responded, and so he still intended to call him as a witness for the claimant, if this amendment, and these further and better particulars, are allowed by the Tribunal. He also commented how the respondents themselves, having seen these particulars, could themselves approach Mr Kane too.

99 In closing, Mr McGrade stated that Mr Miller's points were good points, but for closing submissions, after evidence is led, and the Tribunal is weighing up the evidence led before it. Meantime, Mr McGrade stated that, as per these particulars, it appeared to him that "***something is rotten in the State of Denmark"***, and that is a matter of sufficient concern here which suggests that there is "***skulduggery of some sort going on here***". In his view, it is entirely appropriate that this matter go to the merits Hearing, and the Tribunal hearing the case then weighs up the evidence.

100 Mr McGrade accepted that the respondents may well say nobody in the Council had any conversation with Mr Kane, but he felt Mr Miller should go away and speak to Council officials and members, and ask them if anybody has spoken to Mr Kane, and it may be that somebody will be found, as he stated it was not impossible for the respondents to make some enquiry, and indicate their position in reply to these particular.

Conclusions

101 In my view, the various amendments proposed here by Mr McGrade do not change the fundamental legal basis of the claim, but they do provide additional information regarding the factual basis of the unfair dismissal complaint, in particular regarding the claimant's argument that there was an inconsistency of treatment by the respondents, which may support the

claimant's submission that there was an agenda against him, and that he was dismissed by Mr Dukes, the Chief Executive, because of ill-will towards him by Councillor Logue, the Leader of the Council.

102 I have considered the timing and manner of these applications to amend. It is, of course, correct to note that an amount of time has already elapsed between the claim having been presented (on 7 July 2017) and these three applications to amend the ET1, being made by Mr McGrade on 19 January, 21 February and 6 April 2018.

103 As is made clear in ***Selkent***, an application to amend should not be refused solely because there has been a delay in making it, and there are no time limits for considering an application to amend. Of paramount consideration is a relative injustice or hardship involved in refusing or granting the application.

104 While there has been delay between the issue of the proceedings and the lodging of these three applications to amend, a significant factor in considering the timing of the application is that this litigation is not yet at a stage where a Final Hearing has been fixed.

105 In my view, this case is very much in its early stages, and, as Mr McGrade commented in his e-mail of 7 February 2018, no Final Hearing yet having been fixed, the respondents will have sufficient opportunity to consider and answer the additional information provided by the claimant.

106 I also take into account the point made by Mr McGrade, on 8 November 2017, when he was first instructed by the claimant, that the paper apart to the original ET1 was drafted by the claimant, without the benefit of legal advice.

107 Indeed, when the amended paper apart to the ET1 was presented, on 6 December 2017, no objection was taken by the respondents, to that document replacing the information originally provided by the claimant when presenting the original ET1. The proposed amendments currently before the Tribunal are,

to my mind, a re-iteration of that process, seeking to put all the claimant's cards on the table, before the start of any Final Hearing.

108 Further, I recognise too that it has taken some time and Tribunal procedure to reach the stage that the parties are now at. If anything however allowance of the amendments makes the claimant's position clearer, and this, it would be reasonable to anticipate, should serve to prevent any further delay, or unnecessary further procedure.

109 At this Preliminary Hearing, Mr Miller did not articulate any specific prejudice to the respondents, and, I have to say, had he done so, I would have considered any prejudice to the respondents offset, in that if the amendments are allowed, as I have decided they will be allowed, the respondents are not being asked to face a wholly new claim of which they have no knowledge.

110 They now have further and better specification and fair notice of the factual and legal basis of the unfair dismissal complaint being pled against them. While the ET1 claim form, and the ET3 response, are often loosely referred to as the pleadings in a Tribunal claim, its is trite, but nonetheless worthy of restating, that they are there for each party to get from the other fair notice of the case that is being presented, and the grounds of resistance being advanced.

111 While, in the Scottish civil courts, there are often legal Debates held, by way of a formal Court hearing, to decide whether or not a pursuer's pleadings are fundamentally irrelevant and lacking in specification, such that the defenders have no fair notice of the case which they face at Proof at an evidentiary Hearing, the Employment Tribunal, while informal, still requires that a claimant needs to give an adequate degree of specification of the details of the case than gives the respondents fair notice of the facts that the claimant intends to prove relating to each element of the claim.

112 In essence, that is what these amendments, proposed by the claimant's solicitor, seek to do, for the assistance of the Tribunal hearing the case, and

of the respondents as the other party defending the claim brought against them. Further, the amendments having been allowed by me, it is important to remember that the respondents retain the right to defend the claim as amended in its entirety.

113 I am satisfied that, by giving them the opportunity to answer the claimant's additional information, in writing, albeit Mr Miller's oral submissions gave me some understanding of the respondents' position in reply, the pleadings in the ET1 and ET3 this case will be much better focussed, and the real issues in dispute will become much clearer.

114 In my view, this amendment and reply process will allow the factual and legal issues for determination by the Tribunal at Final Hearing to be clearly identified by parties' solicitors, and intimated to the Tribunal in an agreed List of Issues to be drafted by parties' solicitors, and provided to the Tribunal, in advance of the start of the Final Hearing. In terms of case management, that process should assist the effective and efficient conduct of the Final Hearing.

115 In coming to my decision on these opposed applications for leave to amend, I have considered all the relevant factors, and balanced the injustice and hardship to the claimant in refusing the applications, against the injustice and hardship to the respondents in allowing the applications.

116 As no evidence has been heard, I cannot come to any view on the merits of the case, but the claimant has submitted an arguable case, now with further and better specification, and it should proceed to an evidentiary Hearing at a Final Hearing as soon as possible.

117 Given that the respondents have, in effect, been on notice of the proposed amended claim since 19 January 2018, 21 February, and 6 April 2018, respectively, I do not believe that they are prejudiced in any meaningful way by including the amended parts of the claim or that there is any question of hardship to the respondents.

118 The respondents are simply going to have to address other aspects of an existing claim which has already been indicated to them, but that is unfortunately a fact of life in industrial relations claims brought before this Tribunal.

119 In my view, there would undoubtedly be a greater hardship to the claimant if he was unable to pursue the full extent of his claim as amended, and I consider that the potential injustice to him in refusing his proposed amendments, in full, is greater than any potential injustice to the respondents, as his former employer, if this matter is allowed to continue with the claim as now amended.

120 The claim, as now amended, allows the issues in dispute to be far better focussed, and looking at a Final Hearing before the Tribunal, in due course, both parties will be on an equal footing in that all relevant information has been disclosed so as to allow preparation for a Final Hearing to progress on the basis that all the claimant's cards are now on the table.

121 In my considered view, there are no weighty reasons to refuse the amendments sought here – it is in the interests of justice to allow the amendments and, in effect, enable the claimant, with the assistance of his solicitor, Mr McGrade, to present his case to the Tribunal at a Final Hearing, allowing the respondents to answer that case, by both parties leading relevant and necessary witnesses before the Tribunal at an evidentiary Hearing on the merits of the case.

122 The amendments allowed will, in my view, have little impact on the cogency of the evidence to be heard at a Final Hearing as a result of the delay in applying to make these amendments, and the Final Hearing can now proceed to be listed.

123 Finally, in my view, these amendments, as now allowed, do not affect the ability of the Employment Tribunal to conduct a fair hearing of the case, on dates to be assigned by the Tribunal for a Final Hearing in due course. In all of these circumstances, I have decided to allow the amendments sought by the claimant, and I have so ordered.

Further Procedure

124 Having reserved my decision on the opposed applications for amendment, discussion then ensued with both parties' representatives about future case management of this case moving towards a Final Hearing. Arising from that discussion, I made the various Case Management Orders, set forth above, in terms of my powers under **Rule 29 of the Employment Tribunal Rules of Procedure 2013.**

125 Having allowed these amendments for the claimant, I have ordered that, **within 7 days of issue of this Judgment**, the claimant's solicitor shall intimate to the Tribunal, a Word document (not PDF) setting forth the revised terms of the paper apart to the ET1, as now amended, thus consolidating the amended pleadings for the claimant at section 8.2 of the ET1 claim form into a single document for use by the Tribunal.

126 This will be of assistance to the Tribunal, and to both parties going forward. Further, I have decided that it is likewise in the interests of justice to allow the respondents an opportunity to lodge their own further and better particulars with the Tribunal on their own behalf, if so advised. I have so ordered.

127 Any such further and better particulars for the respondents should seek to answer the claimant's additional averments added by the various amendments allowed by the Tribunal, and to supplement the terms of the existing ET3 response presented on the respondents' behalf on 22 August 2017.

128 While, ordinarily, I would have considered a maximum period of 2 weeks for this purpose, Mr Miller sought 3 weeks, and Mr McGrade did not object. I consider that a period of 3 weeks from date of issue of this Judgment is a reasonable period for lodging any such further and better particulars for the respondents, and I have so ordered.

129 Further, I have ordered that claim and response, as so amended, now be listed for a Final Hearing, for full disposal, including remedy, if appropriate, but reserving for my determination, after hearing from both parties' representatives, **within 2 weeks of issue of this Judgment**, whether or not that Final Hearing should be before a full Tribunal, or an Employment Judge sitting alone, and whether not witness statements should be ordered for use at the Final Hearing and, if so, on what basis.

130 At this Preliminary Hearing, Mr McGrade stated that the claimant preferred a full Tribunal, while Mr Miller, for the respondents, indicated that I should follow the conventional policy of an Employment Judge sitting alone, as this was an unfair dismissal case, and so it does not need a full Tribunal.

131 On account of procedure to date, the case has not yet been listed for Final Hearing and so it is appropriate to do so as soon as possible, as both parties are entitled to have the case heard on its merits within a reasonable time of the claim having been raised, and defended. From the casefile, I see that, in terms of the Tribunal's Charter, the Hearing target date was 3 January 2018.

132 While, given ongoing correspondence between parties and the Tribunal, it was not possible to list the case for Hearing before that target date, I have ordered that it will be listed for Final Hearing, on dates to be hereinafter assigned by the Tribunal, in the proposed listing period of **July, August or September 2018**, following the issue of date listing letters to both parties' representatives by the clerk to the Tribunal for completion and return by parties' representatives.

133 Once those date listing letters are received back, I have instructed the Tribunal clerk that the case file will be referred back me to give specific listing instructions, having regard to both parties' stated availability, and their estimates for the duration of evidence from the various witnesses to be led by each of them at that Final Hearing.

134 Arising from discussion at this Preliminary Hearing, I have specifically ordered that, **within 2 weeks of issue of this Judgment**, both parties' representatives shall also advise the Tribunal whether or not, in light of the my declaration of interest as a retired local government officer, and previous working relationship with the claimant's solicitor, Mr McGrade, and one identified possible witness for the respondents, Mrs Murray, both of whom I worked with when employed pre-1 April 1996 by the former Strathclyde Regional Council, there is any objection to me hearing this case, whereby I should consider recusing myself.

135 Once responses from both parties' representatives are received back, I have instructed the Tribunal clerk that the case file will be referred back me to give specific instructions, having regard to both parties' written representations on that particular matter.

136 I have not ordered that there should be a Case Management Preliminary Hearing, arranged before the Final Hearing, as I consider that unnecessary. It seems to me that the case should proceed to Final Hearing as soon as can be arranged, but, of course, I recognise that in any case, things can emerge, whereby a Case Management Preliminary Hearing might become appropriate.

137 Accordingly, should any other matters arise between now and the start of the Final Hearing, on dates to be hereinafter assigned by the Tribunal, then written case management application by either party should be intimated, in the normal way to the Tribunal, by e-mail, with copy to the other party's

representative, sent at the same time, and evidencing compliance with **Rule 92,** for comment / objection within seven days.

138 Dependent upon subject matter, and any objection / comment by the other party's representative, any such case management application may be dealt with on paper by me as the allocated Employment Judge, or a Case Management Preliminary Hearing fixed, either in person, or by telephone conference call, as might be most appropriate.

Important Notice

139 Meantime, parties' representatives' attention is drawn to the Orders made in this Judgment, as set forth above, and the need for full and timeous compliance.

140 If these Orders are not complied with, the Tribunal may make an Order under **Rule 76(2) of the Employment Tribunal Rules of Procedure 2013** for expenses or preparation time against the party in default.

141 Further, if these Orders are not complied with, the Tribunal may strike out the whole or part of any claim or response under **Rule 37.**

Employment Judge: I McPherson
Date of Judgment: 15 May 2018
Entered in register: 22 May 2018
and copied to parties