EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104534/2017

Held in Glasgow on 1 November 2018
(Preliminary Hearing)

Employment Judge: Ian McPherson

Mr Urfan Dar	**Claimant** **In Person**
Beltrami & Company Ltd	**Respondents** **Represented by:** **Mr Kenneth McGuire** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

(1) Having heard the claimant in person, and counsel for the respondents, at the Preliminary Hearing held on 1 November 2018, in respect of the claimant's opposed applications to amend his ET1 claim, dated 7 September (and his earlier application dated 27 June) 2018, the Tribunal has **refused** the claimant's applications, it not being in the interests of justice, nor in accordance with the Tribunal's overring objective to deal with the case fairly and justly, to allow the amendments sought by the claimant;

(2) As regards (a) the respondents' application to Strike Out the claim; and (b) the respondents' application for Expenses against the claimant, both applications dated 19 September 2018, as read together with the respondents' skeleton arguments of 22 and 25 October 2018, the Tribunal notes and records, **of consent of both parties' representatives**, that these

matters were held in abeyance, pending the Tribunal's reserved Judgment on the opposed amendment application being issued; and

(3) Both parties should now reflect on their respective positions as regards those matters, and further Case Management Orders in those respects have been issued under separate cover, by letter from the Tribunal, and they accompany the copy of this reserved Judgment sent to both parties.

REASONS

Introduction

1. Further to an amended Notice of Preliminary Hearing issued to both parties, under cover of the Tribunal's letter dated 24 October 2018, this case called again before me, on Thursday, 1 November 2018, for a Preliminary Hearing to determine the claimant's opposed application to amend his ET1, and the respondents' opposed applications for Strike Out of the claim / Deposit Order.

2. That amended Notice of Preliminary Hearing superceded an earlier Notice, issued to both parties, under cover of the Tribunal's letter dated 18 September 2018, for a Preliminary Hearing to determine the preliminary issues outlined in Order (6) of my written Note and Orders dated 14 September 2018, issued to both parties, under cover of the Tribunal's letter dated 17 September 2018.

3. That Note and Orders was issued following a Case Management Preliminary Hearing held before me, in private, on Friday, 7 September 2018, and it followed upon a long and detailed earlier procedural history in this litigation, since the ET1 claim form was first presented to the Tribunal on 10 September 2017.

4. That Order (6) stated that:

*"(6) The Tribunal notes and records that that public Preliminary Hearing will be to address the claimant's opposed applications to amend the ET1 claim form, as per (a) his application dated 27 June 2018 to add "**post-termination claims**", further to his earlier document, intimated on 21 January 2018, being his response to the respondents' application for reconsideration, and as per (b) his application made at this Hearing, by e-mail sent at 11:33, seeking to augment the existing ET1claim form by adding the **Scott Schedule** previously intimated on 21 January 2018."*

5. While, at that time, Mr Stephen Smith, the respondents' representative, had given notice, at that Case Management Preliminary Hearing, on 7 September 2018, that there would be an application by the respondents seeking Strike Out of the claim, which failing a Deposit Order, and for Expenses against the claimant, formal application was not made until 19 September 2018, when he intimated an application, in 7 parts, including the respondents' applications for Strike Out, Deposit Order, and Expenses.

6. Thereafter, on 15 October 2018, by letter from the Tribunal to both parties, sent on my instructions, I ruled that certain of those 7 matters (Nos. 2 to 5, seeking Strike Out and Deposit Orders) be added to the agenda for the already listed Preliminary Hearing on 1 November 2018, assigned to determine the claimant's opposed application to amend his ET1 claim form.

7. Those matters, Nos. 2 to 5, read as follows:

"2. The Respondents seek an Order in terms of Regulation 37 (1)(a) of the ET Regulations that the Claim be struck out, in whole or in part, as it is scandalous or vexatious, or has no prospect of success;

3.The Respondents also seek an Order in terms of Regulation 37 (1)(b) of the ET Regulations that the Claim be struck out, in whole or in part, as the manner in which the Claimant has conducted proceedings has been scandalous, unreasonable or vexatious, in particular by seeking to amend the Claim by introducing an 81-page

schedule, consisting of 15,000 words of substantially irrelevant material, which the Claimant is aware the Respondents will be put to disproportionate cost to answer;

4. The Respondents also seek an Order in terms of Regulation 39 of the ET Regulations that the Claimant pay a deposit of £1000 to continue with the parts of his claim relating to the Equality Act, as it has little reasonable prospects of success as pled;

5.The Respondents also seek an Order in terms of Regulation 39 of the ET Regulations that the Claimant pay a deposit of £1000 to continue with the parts of his claim relating to the Employment Rights Act, as it has little reasonable prospects of success as pled;"

8. I also ruled that the respondents' 19 September 2018 application for a Documents Order in respect of documents to show the claimant's disability status, and for Expenses against the claimant, being matters Nos. 1, and 6 and 7, in Mr Smith's application for Orders, should be addressed separately, and by way of written representations from both parties, and without the need for an oral Hearing, and I made case management orders in that regard.

9. So far as material for present purposes, I note that those matters Nos. 6 and 7, remitted for consideration at this Preliminary Hearing, were as follows:

"6. The Respondents also seek an Order in terms of Regulation 76 (1)(a) of the ET Regulations for expenses against the Claimant in favour of the Respondents, due to the Claimant having acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the claim;

7. The Respondents also seek an Order in terms of Regulation 76 (1)(a) of the ET Regulations for expenses against the Claimant in favour of the Respondents, due to the Claimant having acted vexatiously, abusively, disruptively or otherwise unreasonably in the manner in which the Claimant has conducted the claim, in particular by seeking to amend the Claim by introducing an 81-page schedule,

consisting of 15,000 words and substantially irrelevant material, which the Claimant is aware the Respondents will be put to disproportionate cost to answer."

Disability Status

10. Following an in chambers day, on 11 October 2018, having taken account of parties' written representations dated 10 and 11 September 2018,I refused the claimant's earlier application of 27 June 2018 for a Documents Order, as I was not satisfied that it was in the interests of justice to grant such an Order at that stage.

11. I felt that the relevance and necessity of the extensive range of documents sought by the claimant was not established, on the basis of the claim as then pled in the ET1 claim form, and the application constituted "***a fishing expedition"***, which it was not appropriate to grant. My supplementary written Note and Order, dated 15 October 2018, was issued to both parties under cover of a letter from the Tribunal dated 16 October 2018.

12. The respondents' 19 September 2018 application for a Documents Order has been the subject of correspondence between the parties, and the Tribunal, but no formal Order has yet been made. My written Note and Order, dated 8 November 2018, was issued to both parties under cover of a letter of 12 November 2018 from the Tribunal.

13. In terms thereof, pending issue of this reserved Judgment, and given the claimant's opposition to the respondents' application, I suggested both parties might wish to seek to progress voluntary disclosure of information / medical records related to the claimant's disputed disability status. I suggested that, given that, if the case is not struck out, there will need to be a Preliminary Hearing on the disputed preliminary issue of disability status, and the respondents' state of knowledge of any disability on the part of the claimant.

Timetabling Order

14. Further, as this Preliminary Hearing was listed for only one full day, in order to accommodate both the claimant's amendment application, and also the claimant's opposition to both Strike Out and Deposit Orders, I made a detailed Timetabling Order, under **Rule 45 of the Employment Tribunals Rules of Procedure 2013**, restricting parties' oral submissions to certain defined time slots, and, to assist in the efficient and effective conduct of this Preliminary Hearing, I also made further case management orders, acting on my own initiative.

15. At this Preliminary Hearing, having heard the claimant in person, and counsel for the respondents, and it being in the interests of justice to do so, I varied my Timetabling Order, previously made under **Rule 45** on 15 October 2018, so as to allow both parties an extension of time for their oral submissions to the Tribunal, in accordance with **Rules 2 and 5**, to allow both parties to fully address the Tribunal in respect of the claimant's opposed application to amend his ET1 claim.

Private Hearing

16. While originally assigned, as per standard practice, as a public Hearing, on joint application of both parties, as per Mr Smith's application of 12 October 2018, and the claimant's email of 16 October 2018, confirming he was content to conduct this Hearing in private, and Mr Smith's email of 19 October 2018, confirming it was now a joint motion, I ordered that this Hearing should be a private Hearing, and that details of clients of the respondents, referred to by the claimant in his Scott Schedule, should not be disclosed to the public, whether in the course of the Hearing, or in any documents entered on the Register or otherwise forming part of the public record.

17. My written Order dated 1 November 2018, copy issued to both parties at the start of this Preliminary Hearing, under cover of a letter from the Tribunal of that date, was made pursuant to my powers under **Rule 50(3)(a) and (b) of the Employment Tribunals Rules of Procedure 2013**. I considered it appropriate to so order in the circumstances narrated in parties' joint

application, notwithstanding the principle of open justice, but having regard to the Convention rights of clients of the respondents.

Claimant's Application to Amend the ET1 and his Scott Schedule

18. In the course of the Case Management Preliminary Hearing, on 7 September 2018, I allowed an adjournment for the claimant to consider his position, after I had provided him with a copy of the EAT President's judgment in **Chandhok v Tirkey [2015] IRLR 195**, which Employment Judge Declan O'Dempsey had specifically referred him to in his Judgment of 22 February 2018, substituting Beltrami and Company Ltd as respondent in lieu of Mr Gary McAteer, as per **Rule 34.**

19. Employment Judge O'Dempsey had then suggested that the claimant might consider applying to amend his pleadings. After the adjournment at this Hearing, the claimant sent an e-mail to the Tribunal, with copy to Mr Smith for the respondents, at 11:33am, in the following terms:

> ***"I wish to make an application to formally amend the ET1.***
>
> ***The ET1 states on page 7 at paragraph 8.2:***
>
> ***"My claim for unfair or constructive dismissal is based upon my former employer's conduct towards me and others over a sustained period of time which led to me becoming unwell in 2016.***
>
> ***I am also claiming discrimination and victimisation in that once I became ill I was subjected to further harassment in an attempt to undermine my position and force me to leave.***
>
> ***I lodged a formal grievance which shall be submitted in full. A biased and flawed report was issued in response which shall also be disclosed. I formally appealed the decision and that document shall also be disclosed. The appeal was unilaterally ended by my former employer.***

During the grievance process, my former employer provided no formal response to the investigator , refused to issue an apology for his conduct, despite recommendation and further fabricated a story that he loaned me £1,000 offering no specification whatsoever about the time, purpose and manner of payment alleged.

The grievance document, decision and appeal cannot be attached due to formatting issues but can be emailed upon request."

The grievance documents were later lodged as part of the Agenda for the initial Preliminary Hearing.

Since that date the Scott Schedule attached has augmented the grievance document and has provided greater specification of the pleadings.

It is sought to amend the ET1 by adopting the attached Scott Schedule as part of the ET1 at para 8.2 so that it represents the comprehensive pleadings relied upon. There are no deletions sought.

It is considered that this is the most efficient way to progress in light of the overriding objective set down in Rule 2. The grievance document has already been responded to historically, the Respondent is not taken by surprise, the document was always intended to comprise part of the pleadings and is referred to repeatedly, and was only not included at the outset due to technical difficulties with the (online) application. The grievance was provided timeously thereafter as was the Scott Schedule in line with the relevant case management order."

20. The claimant attached to that email a copy of his **Scott Schedule**. Running to 81 pages, it shows, in tabular form, 53 incidents relied upon by him between October 2012 and August 2017. At the Preliminary Hearing, on 7 September

2018, Mr Smith, the respondents' representative, referred to the claimant as a "***trade professional pleader***", and he alleged that the claimant had simply put into his Scott Schedule as such material as possible ***"to trouble the respondents".***

21. Further, Mr Smith described the claimant's Schedule as an "***impossible"*** document for him to reply to, describing it as containing "***irrelevant material"*** and "***repetition",*** and he argued that the respondents could not reasonably respond to the Scott Schedule. He asked that I take into account the fact that the claimant, while representing himself, is a solicitor-advocate, and so trained in being succinct in presenting a case, but he had chosen not to do so, but put in this voluminous document.

22. While, in that application, the claimant refers to the Scott Schedule being provided "***in line with the relevant case management order***", the fact of the matter is that is his view, but it is not borne out by the record of proceedings in the Tribunal's case file.

23. As I stated in my earlier Preliminary Hearing Note, dated 14 September 2018, written following the Case Management Preliminary Hearing held on 7 September 2018, at my paragraphs 13 and 33 respectively, neither Employment Judge Gall, on 9 December 2017, nor Employment Judge O'Dempsey on 7 February 2018, had ordered a Scott Schedule.

24. Employment Judge Gall had observed that the claim would require to be specified, through a Scott Schedule, as it was unclear to him what is within and what is not within the claim as presented, and Employment Judge O'Dempsey had suggested that the claimant consider applying to amend his pleadings, and the respondents should consider indicating which parts of the Scott Schedule (by then lodged) they were objecting to.

Preliminary Hearing before this Tribunal

25. At this Preliminary Hearing, which started at just before 10.10am, the claimant again appeared, unaccompanied, and representing himself, as he has done to date. For the respondents, whilst Mr Smith was in attendance, as was Mr Gary McAteer, they were both there instructing counsel, Mr McGuire, who appeared for the respondents.

26. Having clarified with both parties' representatives, from the Tribunal's letter of 15 October 2018, the issues for this Preliminary Hearing, and the **Rule 45** Timetable set by the Tribunal, I noted the many documents provided for the Tribunal, at the start of this Preliminary Hearing, being:

(a) A large black ring binder folder produced by the claimant, and containing 30 legal authorities, related to Amendment of the Claim, Disability, Expenses, and Strike Out.

(b) A large red ring binder folder produced by Mr Smith, being volume one of the respondents' productions for the Strike Out application, containing 392 pages, with tabbed documents 1 to 54; and

(c) A small blue ring binder folder produced by Mr Smith, being volume two of the respondents' productions for the Strike Out application, containing tabbed documents 1 to 23, but not consecutively paginated to aid navigation, but being a chronology of the claimant's emails with the Judicial Appointments Board for Scotland between 16 June 2016 and 29 August 2017.

27. Further, in terms of my previous case management orders, parties' representatives had previously submitted the following documents for my consideration:-

(a) 16 October 2018 : the claimant's response to respondents' applications for Orders dated 19 September 2018 (6 pages) ; claimant's disability impact statement (11 pages); his submissions

in respect of amendment of the ET1 (5 pages); and his statement of means and assets, together with vouching documents (14 pages).

(b) 22 October 2018 : respondents' skeleton argument from Mr Smith in relation to application for Expenses against the claimant (14 pages).

(c) 23 October 2018: respondents' response, from Mr Smith, to claimant's medical aspects, and in support of an application for a Documents Order on disability status (2 pages).

(d) 25 October 2018 : respondents' skeleton argument from Mr Smith in relation to application for Strike Out of the claim (43 pages).

(e) 25 October 2018; respondents' list of authorities on Strike Out (1 page).

(f) 26 October 2018 : claimant's response to respondents' application for Orders, and skeletal argument for Expenses (9 pages),

(g) 30 October 2018: claimant's response to respondents' argument for Strike Out, (39 pages), and claimant's inventory of authorities (1 page).

28. Mr McGuire, counsel for the respondents, advised that he had a revised version of the respondents' skeleton argument for the Strike Out application, dated 1 November 2018, which differed from the previously intimated version submitted by Mr Smith by the cross references to pages in the respondents' Bundle being shown in bold for ease of reference.

29. Further, Mr McGuire stated that, while aware of the Timetabling Order previously made by me, he felt it was tight (a concern not previously intimated to the Tribunal, by either the claimant, or Mr Smith, the respondents' representative), and that it might not be possible for him to keep within the

timeslots allocated, and that his Strike Out application for the respondents assumed the claimant's amendment was allowed.

30. Mr McGuire added that he had a "***speaking note***" containing his oral submissions in opposition to the claimant's amendment application, but he did not offer to hand up a copy to me, and he explained that he would be adding criticisms to the amendment application over and above what was already in Mr Smith's skeleton for Strike Out, intimated on 25 October 2018, and, in essence, he would be saying that there was no case pled by the claimant, and that the amendment application should not be allowed by the Tribunal.

31. In reply, the claimant stated that he was keen to keep to the timetable set by the Tribunal, and that any additional matters are for evidence, and at a Final Hearing, and not to be raised at this stage.

32. Mr McGuire, counsel for the respondents, in response, stated that he was aware that the case law authorities urge caution where there is factual argument but, if it can be shown that certain allegations do not add up, or that facts are not sustainable on a preliminary perusal of documents, the Employment Tribunal is entitled and should strike out a claim, or part of a claim, notwithstanding that it is a discrimination claim.

33. Referring to the respondents' two volume Bundle, counsel stated that no evidence was being given by the respondents, at this Preliminary Hearing, but the documents were there for reference, ex party, but they were important to the respondent's application for Strike Out of the claim.

Claimant's Submissions on his Amendment Application

34. At just after 10.25am, where I called upon the claimant to speak to his amendment application, he invited me to accept it *verbatim.* He then talked

me though its five typewritten pages, running to 18 detailed paragraphs, and citing his references to the case law authorities being relied upon by him.

35. It is convenient, at this point, to refer to the full terms of his written submissions, in support of his application for an amendment of his ET1, which I reproduce here, *verbatim*, as follows:-

1 The Claimant's initial position is that notwithstanding the application, the ET1 does not require amendment. The claim is intelligible in the absence of the amendment. The amendment is being made in an attempt to 'pin down' the Respondent's and not afford them further 'wriggle room' in evading these proceedings. It is respectfully submitted, the claim could still proceed in the absence of the amendment.

2 It is respectfully submitted that the Tribunal requires to form an initial view as to what lies within the terms of the claim by virtue of the ET1 application. The summary provided and the explicit references to the grievance and other documents referred to at paragraphs 8.2 and 15, require to be considered. It is submitted that at the time the Claimant made the application on 10 September 2017, the difficulty in being unable to attach the three principal documents referred to is not the fault of the Claimant and as a consequence there should not be any resulting prejudice. The on-line facility would not allow for any word document to be attached to the submission of the application, which is why the specific intention to attach was stated at paragraphs 8.2 and 15, respectively.

3 The Claimant's intention to attach the documents and specifically, the grievance, which details the allegations and basis of the claim, is repeatedly mentioned in the ET1 and efforts were only frustrated for technical reasons which the Claimant cannot be held accountable for. This clear and explicit intention was recognised by Employment Judge

Dempsey in his judgment dated 16 March 2018, where states at paragraph 43 that the claim was intelligible even in the absence of the grievance document and that it could be sensibly responded to. The paragraph also notes that the Claimant "explicitly mentions" the grievance in the ET1 and that he "clearly intended" to attach it.

4 It is submitted that if the application by the Claimant is out of time, that is not determinative and that the paramount consideration is the relative injustice and hardship in refusing or granting an amendment. (Selkent Bus Company Ltd v Moore [1996] ICR 836) In the Selkent case, the EAT confirmed that the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the hardship of refusing it. It is respectfully submitted that there is no hardship in allowing the amendment whilst there would be grave prejudice in refusing it and affording the Respondent's a further opportunity to evade their responsibilities.

5 The amendment should be permitted after considering any relative prejudice in accordance with the guidance laid down in Mist v Derby Community Health Services NHS Trust [2016] ICR 543 and Ladbrokes Racing Ltd v Traynor [2007] UKEAT 0067/06. The authorities relied upon by the Respondent can be distinguished on the merits in this case, based on the specific facts and circumstances narrated below.

6 This amounts to an amendment to an existing claim and as such, by analogy with Science Warehouse Ltd v Mills UKEAT/0224/15/DA and Mist v Derby Community NHS Trust [2016] ICR 543 should be allowed on the basis there is no prejudice or hardship and the Claimant should be entitled to pursue a legitimate claim, whether or not made out of time. It is a matter for judicial discretion.

7 A recent case has ruled that it may be possible in certain

circumstances for a claim to be sensibly responded to even if it contains no particulars of claim. In SoS for BEIS v Parry [2018] EWCA Civ 672, the Claimant's Solicitors attached the wrong particulars to the claim form i.e. they wrote 'please see attached' in the relevant section of the ET1 and attached particulars which related to an entirely different case. Despite the fact that the ET1 did not contain the correct particulars of claim, the Employment Judge decided to accept the claim. This decision was upheld by the Court of Appeal, which held that an Employment judge should only reject a claim if s/he is sure that it cannot be sensibly responded to – if there is any doubt, an Employment judge should accept the claim. The Respondent in this case knew the details of the claim made against it and therefore it was arguable that the Respondent could have reasonably responded to the claim without the attached particulars.

8 In Parry, the Court of Appeal made it clear that this decision should not be laid down as a general rule and that a respondent to a claim should not always be treated as having detailed knowledge of everything that has occurred between the parties. The Court gave an example of a claim for discrimination and stated that if a claimant did not provide particulars in such a case, the ET1 might well be held to be in a form to which the employer could not sensibly respond and thus properly rejected. The Court of Appeal also clarified that it will not always be the case that an ET1 without particulars can sensibly be responded to and that it will depend on the circumstances and the facts of each case. Despite these findings it is likely to be in the interests of the claimant to provide full details of his or her claim in the ET1 to reduce any likelihood of the claim being rejected.

9 In the present case, the Respondent's have known the substance of the claim prior to the lodging of the ET1 on the basis that the grievance has been in their possession from April 2016 and has been responded to by various parties including the Respondent's. They are not taken

by surprise. The grievance document contains all of the necessary specification of the claim and has been with the Respondent's from the outset. In addition, they have received legal advice in respect of the grievance from multiple parties. It is respectfully submitted that upon an interpretation of the facts and circumstances of this particular case, the position is strongly aligned, if not relevant to a greater degree to the situation in Parry. The Respondent's had actual knowledge of the position, were in possession of all three of the relevant documents and had a special or even enhanced knowledge of the circumstances and detail of the claim and should not be allowed to defeat the overriding objective by pleading ignorance of the facts.

10 Employment Judge Dempsey states at paragraph 63 of his judgment dated 16 March 2018, that "the Respondent should indicate to which part of the schedule it objects and for which it argues an amendment will be needed" and are reminded of the overriding objective. Despite this, the Respondent's position appears to be at odds with the direction. The stated position infers that there is perhaps too much specification for them to respond to and is both peculiar and inappropriate. Judge Dempsey further states at paragraph 64 of the decision that "If a matter needs further specification, that should be sought. It should not become a pretext for taking a technical or sterile points or bogging the court down in sterile applications."

11 The Respondent's ET3 claims the Claimant's ET1 is lacking in specification. In subsequent procedure, the Respondent's have made no application for further particulars nor have they responded to a more detailed Scott Schedule (produced by way of Tribunal order and lodged on 21 January 2018). The Claimant wrote to the Respondents on 16 April 2018 offering to provide "clarification of any aspect of the application in the interests of the overriding objective." Another offer was made in person at a meeting at the Claimant's office with the Respondent's representative on 31 July 2018. Despite these offers,

the Respondent has deliberately avoided the issue. It is submitted that the Respondent's conduct is redolent of an attitude of avoidance, frustration and resistance setting out to do exactly what parties have been warned not to do. It is submitted that it is the Respondent's conduct that has been scandalous, unreasonable and vexatious.

12 In relation to the last Preliminary Hearing on 7 September 2018, I feel I should clarify a couple of matters. I note the Employment Judge's concerns raised in paragraphs 29-33 of the Order dated 17 September 2018. I apologise for any inconvenience to the Tribunal. I was unaware of the requirement to produce an updated Agenda. In any case, I wrote to the Respondent's on 23 July 2018 seeking to discuss matters in light of the overriding objective. I specifically made an observation that I considered "it may well take longer than an hour." I indicated I wanted to discuss "disclosure and the agreement of evidence." A meeting was suggested and took place on 31 July 2018 at the Claimant's offices. The Respondent's agent offered very little to the meeting and simply stated no disclosure would be provided. There was no response to the request for specification or in relation to the agreement of evidence.

The Respondent's advised that they would likely be seeking a postponement of the hearing on 7 September 2018. Indeed on 9 August 2018 the Respondent's advised by email that they would be applying for a postponement of the hearing on the basis of the outstanding EAT matter. I later received a conflicting message they would not be seeking a postponement but lacking any more specification or addressing the points previously raised. The Respondent' knew I was unavailable during that period until the day of the hearing itself but nevertheless was not interested in progressing any matters previously raised. It is submitted that the Respondent's conduct is again redolent of an attitude of avoidance, frustration and resistance and is scandalous, unreasonable and vexatious.

13 In the case of Adebowale v Isban UK Limited & Others

UKEAT/0068/15/LA, the status of the Scott Schedule is discussed and is said to be a legal matter. It is the Claimant's principal position that now the Claimant has been ordered to produce the document the Respondent's should be under a legal obligation in furtherance of the overriding objective to answer the Scott schedule by way of response. The Scott Schedule is provided in a form very similar to the grievance and what has been produced is largely, a re-labeling exercise as in the case of Patka v BBC UKEAT/0190/17/DM.

14 The Claimant's original grievance contained 45 paragraphs. The Scott schedule contains 53 paragraphs. The first 45 paragraphs are the same, verbatim. Paragraphs 46-52 deal with the unfair grievance procedure, which is specifically mentioned in the ET1 and comprises the background to the claim for unfair dismissal. Specific examples are foreshadowed in the ET1. Therefore the only new matter contained in the Scott Schedule is paragraph 53 which relates to the post termination claim made as soon as was reasonably practicable on 20 January 2018. A second post termination claim has now been made on 27 June 2018 after the Respondent made a false allegation re the Claimant in March 2018 but is not yet within the Scott schedule as both applications are yet to be considered. On that basis, it is submitted there are no new matters within the Scott Schedule that the Respondent's have not been provided fair notice of.

15 It is respectfully submitted that there is no prejudice to Respondent's. The grievance focuses upon the same central issues as the Scott Schedule and sets out the essence of case. The production of the Scott Schedule was directed by the Employment Judge as an expansion of the grievance, but is predominantly a cut and paste job produced in tabular form with explanations of the legal principles attaching to each issue and specific detriments. The Claimant should not be penalized for complying with an order or direction by the Tribunal as that would lead to a perverse outcome and contravene the

overriding objective. The Scott Schedule, with the exception of the post termination matter has been produced timeously as an expansion of the grievance document, detailing the same facts already pled.

16 The Claimant, who has no employment law experience, was of the view that the Scott Schedule is a formal part of proceedings now it has been ordered and produced. The view taken that it is considered a more efficient and comprehensive way to include the Scott Schedule as part of the ET1, may be novel (or even redundant if it has a distinct separate legal status) but is simply an advancement given that the Scott Schedule is more detailed than the grievance referred to. The Respondent's have been provided with fair notice. The position has not changed. All parties have been given fair notice. The application was not made earlier as the Claimant considered the Scott schedule to comprise part of the proceedings and placed reliance upon this fact. The only matters that fall to be excluded from the Schedule if parties consider it should be dissected are the post termination claims mentioned above. The Claimant is not trying to introduce new matters not already foreshadowed by the grievance and the ET1, when viewed together.

17 It is submitted that is not obvious to a layperson or qualified solicitor, unfamiliar with employment law that the status of the Scott Schedule in this particular case should be left unclear, that the Respondent's should fail to comply with a direction to respond to that Schedule and that the Claimant should be placed in a position that a formal application requires to be made to incorporate its terms. It is submitted, that even if the amendment is refused, which it should not be, the Scott Schedule is capable of standing alone and should be responded to. The court or tribunal should have regard to the overriding objective and avoid undue formalism as stated in the case of Chandhok v Tirkey UKEAT/0190/14/KN. As long as the ET1 sets out the essence of the case, as it does here, that should be a sufficient basis for the

Respondent's to provide answers. An application to amend can be made at any time. There have been numerous delays in this case, and in getting the case back on track towards a final hearing. It is respectfully submitted that sterile technical points have no merit and the Respondent's are merely seeking to avoid liability and frustrate the process.

18 The tribunal should take into account all of the circumstances and balance the facts against the injustice and hardship of refusing the amendment. It is submitted that to order the drafting of a lengthy Scott Schedule in December 2017 only to later refuse its admittance would be unduly oppressive to the Claimant and against the overriding principles. The nature of the amendment is consistent with the original application and is a re-labeling exercise. Once the claim has been accepted, the minor error re designation excused, and the decision reconsidered and confirmed, the case should proceed to a full hearing in light of the additional information provided. It is respectfully submitted that the previous judgments recognise the validity of the claim and the Claimant's intention in respect of the grievance document. The Respondent has had a copy for over a year now and any suggestion it cannot be responded to is both disingenuous and evasive.

36. In speaking to his written submissions, the claimant made the following points of emphasis :-

(a) The claimant opened by stating that it is not in dispute that there is a need for amendment. He further stated that the respondents say that the claim cannot sensibly be responded to, yet they have responded to it in their skeleton argument in support of their strike out application, and that is a response to the Scott Schedule.

(b) The amendment was intimated at the last Preliminary Hearing, on 7 September 2018, and the respondents have been on notice long

before the ET1 was lodged, given the grievance brought by the claimant to his employer. As per paragraphs 8.2 and 15 of the ET1, there was a technical issue that meant he could not attach the grievance document to the ET1 at the time of presentation to the Tribunal.

(c) There has been deliberate conduct by the respondents not to answer the claim, and they have acted improperly. The claimant accepted that there was some dubiety about the status of the Scott Schedule, but explained that if he is asked to do something in this forum, he does it, although he is not experienced with the Employment Tribunal. He explained that he had produced the Scott Schedule in good faith in January 2018, and it was "***disingenuous for the respondents to say that it is too lengthy".***

(d) Looking at the **Selkent** factors, the claimant then stated that there is no prejudice to the respondents in allowing this amendment. Although the claimant knew he had said it was a "**relabelling exercise**", he explained that it was not a relabelling exercise, and that the facts had not changed that he was relying upon.

(e) The case had got off the ground, in September 2017, and it had been "***continually interrupted by preliminary objections by the respondents***", which stated that the claim had no reasonable prospects, and which frustrated the timetable in this case. If the respondents are complaining that the amendment has been made at a late stage, then the claimant submitted it is down to the procedural history of the case, and their two appeals about the "***minor error***" in the identity of the respondent, originally sued as Mr McAteer.

(f) The claimant further stated that he had proceeded on the basis that his Scott Schedule was "***in process",*** a term from Sheriff Court civil

practice, and not in this Tribunal, and that it required an answer, but it got no answer from the respondents. He added that any attempt at this Preliminary Hearing to go into evidence is not appropriate, and as matters are contested, that is for a Final Hearing.

(g) With reference to the documents lodged in the respondents' Bundle, the claimant noted that some were partly redacted, and so only tell part of the story. He stated that the essential facts are in dispute, and they will continue to be in dispute, and that we could be "***here for weeks***" looking at these documents from the respondents.

(h) The claimant repeated that there is no prejudice to the respondents in allowing this amendment, and that the respondents "***should have seen it coming".*** Once the Scott Schedule was produced, he stated that the respondents were clearly on notice, and the major part of his Scott Schedule is a "***cut and paste from the grievance***", and not further facts being relied upon by him.

(i) The claimant then stated that his Scott Schedule, by its content, and tabular form, is a relabelling, and that it gives specification of the legal basis of the claim as best as he could do in January 2018. He referred to how the case was accepted by the Tribunal in short focus, and it was sufficient, if its skeletal, but fair notice of his legal claim against the respondents. He further stated that, at that stage, he was very unfamiliar with employment law knowledge, and this is his first experience of the Employment Tribunal forum.

(j) The claimant then stated that this was "***one claim***", and ***"a course of conduct, with a series of incidents, with bullying and harassment",*** but come to the fore prior to his grievance to the employer. Apologising for the error in paragraph 9 of his written submission, where he had referred to "***April 2016***", which should be

"***April 2017***", the claimant stated that ***"the respondents were not taken by surprise".***

(k) Despite paragraph 63 of Employment Judge Dempsey's judgment, the claimant stated that the respondents did not react, and indicate which parts of the Scott Schedule they objected to, and for which they argued an amendment would be needed, and the respondents had adopted that approach, "***with technical and sterile points***", and they had made no application for further and better particulars, and neither did they reply to his Scott Schedule.

(l) The claimant further stated that he felt that the respondents had "***deliberately avoided the issue***", and "***their conduct was redolent of an attitude of avoidance, frustration and resistance, and thus scandalous, unreasonable and vexatious".***

(m) The fact that the respondents had made significant responses, in their Strike Out application, backed by evidence in their Bundles, shows that the respondents understand the claim brought against them intelligibly and can respond to it, submitted the claimant.

(n) While accepting the respondents' point that he is legally qualified, the claimant described himself as "***somewhere between a lay person, and an employment expert"***, as he has no Employment Tribunal experience. He stated that he relied on the Tribunal's overriding objective, and that the significant delays in this case are such that he should not be held responsible for them.

(o) The claimant further stated that there were ***"no new facts in this case, except for the two post termination claims",*** that had been added, and that his Scott Schedule is a "***relabelling exercise***". With the respondents' skeleton argument, he further submitted that the respondents know, and they have always known, what this case

is about, and that it has not changed, for they had a qualified lawyer to distil the information to prepare their internal grievance report.

(p) As regards his "***post termination claims***", intimated on 27 June 2018, the claimant submitted that these are matters for evidence, and not for a ruling on at this stage, as they are disputed matters and, as per the ACAS guidelines on bullying, the Tribunal should take matters in the round. He submitted that this was a course of conduct designed to bully, harass and intimidate him, but "***collectively its one single claim".***

(q) Referring to the respondents' two Bundle folders, the claimant stated that their contents were "***totally contested areas of fact***", and not for this Preliminary Hearing, and it was not appropriate for the respondents to produce *ex parte* evidence from witnesses who were not at the Tribunal.

(r) The claimant further stated that his lack of employment law experience is a factor to be taken into account, and that the respondents have given "***excuses***", but, in his view, his Scott Schedule can be responded to by them, and there is no injustice or hardship to the respondents in allowing this amendment, as the Scott Schedule is "***easy to understand***".

(s) Adding to his written submission, the claimant referred to the Eat Judgment in **Kedzoria**, at paragraphs 6 and 9, and stated that was a direct comparison to his disability discrimination claim, and the respondents' managing director's comment to him was clearly capable of being understood as a derogatory comment, and that is what had caused the grievance to come into play.

(t) In closing, the claimant described the respondents' position as "***disingenuous, and evasive***", and he invited the Tribunal to accept

his amendment, and allow him to proceed with his case to a Final Hearing.

Respondents' Objections and Reply

37. It then being just after 11.10am, the claimant's oral submissions having been given extra time, in the interests of justice, I called upon Mr McGuire, counsel for the respondents, to address me on his client's objections to the claimant's amendment application, and his reply to the claimant's submissions to the Tribunal on the amendment application.

38. In opening his oral submissions, Mr McGuire stated that the amendment should not be allowed, and that the claimant appeared to put his amendment application on ***"an all or nothing basis***", with section 8.2 of the paper apart from the ET1, his Scott Schedule and the post termination claims. He also commented how the claimant had told us at this Hearing, for the first time, that his case is "***a course of conduct designed to bully, harass and intimidate***", and that "***collectively it is one single claim***".

39. That said, commented counsel for the respondents, what is that one claim, is it for unfair constructive dismissal, or for something more? He stated that he was at a loss to see what the claimant's single claim is, or where it crystallises? We were here one year after the claim had started and listening to submissions where it is unclear what the claimant means by one claim, a single claim.

40. Referring to the claimant's Scott Schedule, Mr McGuire described that as ***"remarkable***" as the claimant had never taken the Tribunal to it, and counsel had never done an application to amend, or opposition to an application to amend, where the amendment document is not the central focus of the application before the Tribunal.

41. Referring to the claimant's reference to the **Kedzoria** judgment, where the claimant had sought to draw a parallel with this claim, counsel pointed out that

the claimant had pointed only to one incident shortly before he terminated his employment with the respondents.

42. Counsel then referred me to the case law authorities, on amendments, that he was relying upon, being **Ladbrokes v Traynor; Chandhok v Tirkey;** and **Selkent**. Reading **Chandhok**, Mr McGuire submitted that the claimant should be in no doubt that the pleadings are his ET1, and nothing else.

43. Looking at the **Selkent** factors, he then made the following points:-

(a) On the nature of the application, the claim would now be as substituted, from an ET1 with less than a half page of text, to one with 81 pages.

(b) On time limits, counsel thought that the claimant accepted that all his allegations are way out of time, and he had argued nothing about why time should be extended.

(c) On the timing and manner of the application to amend, counsel queried why there had been such a delay, and a substantial delay in making the application to amend.

(d) On the relative injustice and hardship involved in refusing, or granting, the amendment, the claimant had stated that there would be no injustice, or hardship to the respondents, in granting the amendment, and counsel submitted that is "***simply not sustainable***".

(e) Developing that part of his oral submission, Mr McGuire stated that, notwithstanding the preliminary work done to investigate what the claimant says, that is a hardship, with much more needing to be done, if this amendment is allowed in its current form.

(f) Much of what is in the amendment is two or three years old, and there are real issues about the availability of documents, and

witnesses, and memories fading, and that is a substantial hardship to the respondents if this amendment is allowed.

44. Further, if the amendment is allowed, the Scott Schedule would become part of the ET1, and he would spend time going through that in what we were now being told was one claim or a single claim.

45. Mr McGuire then proceeded to go through a detailed criticism of the claimant's Scott Schedule, incident by incident, from No.1 to No.53. I record here the salient points of his lengthy submissions, and note and record that that right throughout the Scott Schedule, the same or similar points kept being mentioned by counsel, as follows: -

(a) Items 1 to 3 (15/10/12 to 2014/17) – is this reference to "***harassment***" a complaint under **Section 26 of the Equality Act 2010**, or something else, as it gives no indication whatsoever. The ET1 mentions "***discrimination***", but it is not clear whether it is being prayed in aid in a claim for constructive dismissal, which does not appear sustainable, given the claimant worked for the respondents for a considerable period of time until his grievance was raised.

(b) Item 4 (2014 – 2016) – again this is a historical allegation, and it is unclear whether it relates to harassment or discrimination, and we are not told what is the protected characteristic relied upon by the claimant, and while he seems to be relying on disability, we are not told what type of discrimination it is, unless it is all types of discrimination, yet the claimant wants his claim listed for a Final Hearing.

(c) At item 4e, there is reference to "***PIDA 1998 disclosure, section 43B",*** but there is no reference to that in the ET1 claim form, and it is impossible to tell what is the qualifying disclosure, and what is the

detriment, being relied upon by the claimant. These are very serious allegations against a firm of solicitors, and involving Mr McAteer, a director with some thirty years' experience, and yet the claimant says this is fit to go to a Final Hearing, which counsel submitted is "***just nonsensical".***

(d) At item 5 (January 2016), the claimant's first column states "***not being relied upon in claim"***, yet it is described as "***harassment, undermining authority",*** without further specification.

(e) At item 6 (14 March 2016), there is a reference to "***failure to support employees, discrimination, and detriment",*** but there is a question mark over what that means, and whether it is a claim under the **Employment Rights Act 1996**, or the **Equality Act 2010**, or something else.

(f) Further, what type of discrimination, is being complained of. The claimant's attitude is "***you know what this is all about",*** and, counsel submitted, the claimant had confirmed that at this Preliminary Hearing by his own submissions.

(g) At item 7 (June 2016), there is again reference to harassment, and discrimination, and detriment, but it is not explained what type of discrimination, and there has been no attempt whatsoever by the claimant to analyse the legal basis of his claim, and to refer to the facts pled.

(h) Given the claimant is a qualified solicitor, and we know he received legal advice in connection with these proceedings, as part of his documents vouching his statement of means and assets, he has produced various invoices from his former solicitors.

(i) Further, the claimant's reference to "***comparator"*** suggests that it is not a harassment claim under the **Equality Act 2010**, which begs the question what is it?

(j) At item 8 (2013 – 2017) covering a five year period, there is a reference to **Section 1 of the Employment Rights Act 1996**, about no employment contract or initial employment particulars, and also to the employee's pay being adversely affected, but there is no reference to a **Section 1 complaint** in the ET1 claim form, and it is not clear whether, in respect of pay, the claimant is complaining of an unlawful deduction from wages, or a breach of contract claim. Counsel submitted "***it is just impossible to tell".***

(k) At item 9 (2013 – 2014), there are more allegations, but not facts, and no indication of what type of discrimination is being talked about by the claimant.

(l) At items 10, 11 and 12, being February 2014, June/July 2015, and April 2017, there is again reference to harassment, and discrimination, but we are not told what type of discrimination, and effectively the claimant leaves it to the respondents to figure it out themselves.

(m) At items 13 and 14, being 2013 – 2017, again a five year period, there are references to discrimination, harassment, and the employees pay being adversely affected, as well as a **Section 1 complaint**, under the **Employment Rights Act 1996**, similar points arise in relation to items 15 and 16, again covering the period 2013 to 2017.

(n) At item 17 (November 2016), there is a specific complaint about an alleged remark by Mr McAteer, which is described as ***"harassment/discrimination***", but there is not any merit to it, counsel submitted, and the claimant has not taken the time to offer the respondents an explanation of what he is meaning in legal terms, as he is not citing from any section of the **Equality Act 2010**, and he does not explain why what is stated is said to amount to discrimination.

(o) At item 18 (2016), the claimant refers to harassment, discrimination, and failure to provide reasonable support and make reasonable adjustments. Despite being told, at this Preliminary Hearing, that it is one, single claim, various matters are raised here, but the respondents are not told what is the "***PCP***" for any reasonable adjustments, and it is just not sufficient in terms of fair notice to the respondents.

(p) Counsel submitted that the claimant has to plead his claim with fair notice and a proper claim on a legal basis, and that legal basis has to be stated, or readily apparent from the narrative story, and Mr McGuire submitted that it is not there.

(q) At item 19 (2014 – 2017), the claimant refers to ***"failure to provide reasonable support/equipment"*** ,but no fair notice is given of what type of claim he is bringing against the respondents. The same point arises at items 20, 21, 22.

(r) At item 23, which is not dated, but refers to failure to provide reasonable support/equipment, the first column of the claimant's Scott Schedule states that this is "***not part of his claim"***.

(s) Next, at item 24 (2013 – 2017), there is again reference to failure to provide reasonable support/equipment, failure to make reasonable adjustments, and "***breach of the implied duty of trust***", as well as discrimination, but it is not clear what the claimant means, and no proper indication is given as to the type of claim he is bringing against the respondents. He refers to a failure to give him a replacement mobile phone in April 2017 as amounting to constructive dismissal.

(t) On the matter of the claimant's asserted disability status, counsel referred to how the claimant says that around 2016 he started to have panic attacks, but much in this Scott Schedule goes back before the claimant says he was disabled.

(u) In items 25, 26, and 27, covering 2015/17, and 2013/17,the latter being a five year period, there are similar references to failures to provide reasonable support/equipment, failure to make reasonable adjustments, and breach of the implied duty of trust, and discrimination, but the legal basis of the claim against the respondents is unclear.

(v) Also, at paragraph 27, there is a reference to "***victimisation due to PIDA 1998",*** but that is not in the ET1 claim form, and it is not clear, and it is not possible to tell what is the basis of any claim of victimisation, what is the qualifying disclosure, and what is the detriment being relied upon.

(w) While not trying to hold the claimant to a high standard, counsel for the respondent stated it was "***just impossible to tell***" what is the basis of the claim.

(x) Items 28 and 29, spanning 2014/17, and 2016/17, refer to ***"discrimination***", and "***detriment",*** but it is not clear how the alleged refusal of Mr McAteer to sanction the claimant's membership of the Society of Solicitor Advocates, is discrimination, or detriment, and his complaint must cover an area when he says he was not disabled. All in all, submitted counsel for the respondents, this part of the Scott Schedule is***" not properly set out, not clear, nor intelligible***".

(y) Item 29 (2016 – 2017), relating to an extant request for business cards, refers to discrimination, and detriment but the respondents have no idea what the claimant is talking about, nor how this can amount to discrimination.

(z) In relation to item 30 (referring to harassment, and 2014 – 2017), it is not clear whether this is harassment in the discriminatory sense, or related to the employer's duty to provide a safe system of work and a safe workplace, as referred to by the claimant.

(aa) At items 31, 32 and 33, covering November 2016 – 2017 and August – September 2016, referring to harassment, disability discrimination, failure to make reasonable adjustments, breach of duty of care, and actual/constructive knowledge of illness, these are "just unintelligible".

(bb) There is no indication of any PCP, or reasonable adjustments, nor is it clear what is the detriment, nor how is any victimisation due to making a qualifying disclosure. Right throughout the Scott Schedule, submitted counsel, the same points arise.

(cc) At item 39, dated 22 March 2017, the claimant refers to his particular disappointment at Mr McAteer's conduct during a telephone conversation on that date, which is described as being harassment, bullying, and disability discrimination, and given as a ***"final straw example"***.

(dd) That needs to be viewed in light of the claimant's resignation not being given until 5/6 July 2017, and two days later, he starts to work for another legal firm. Further, noted counsel, the claimant later says in his Scott Schedule that there are other "***final straws***".

(ee) At item 48, dated May 2017, the claimant refers to "***impartial report SW, interference from GM".*** Here, the claimant refers to harassment, discrimination, unfair grievance procedure, and victimisation due to PIDA 1998 and refers to this as another ***"final straw"*** example.

(ff) It seems to be a final straw running from March to May 2017. While the claimant had used the word "***impartial***", in relation to the grievance report, counsel for the respondents suggested that perhaps the claimant meant to use the word ***"partial***". The

respondents, for their part, agree that the grievance report was impartial.

(gg) As regards item 49 (May – July 2017), and the suggestion of "***support too little, too late***", referring to unfairness, criticism of the quality of the investigation, and denial of knowledge of the claimant's illness, this is described as a further "***final straw***", and a breach of mutual trust and confidence. The respondents suggested that this proposition was "***quite remarkable***", and that the Tribunal has a selection of final straws.

(hh) At item 53, July – August 2017, "***post termination claim / bad faith / harassment",*** counsel stated that the same arguments applied as before, given the lack of definition of harassment, discrimination, unfair grievance procedure, etc, and that this too was described as an example "***final straw***".

(ii) It is not clear how this is harassment, or how it is on the protected ground of disability. There has been no attempt to tie in the basis of the claim to what is pled, and, counsel stated, it is ***"just impossible for the respondents to know what claim is being brought against them".***

(jj) Jumping back to item 24, and matters in 2013/2017, and the claimant's narration that he had been asking for a new mobile phone since December 2015 and, by April 2017, he had still no replacement phone, the claimant had referred to this failure as ***"being indicative of his concerns, and this amounting to a constructive dismissal".***

(kk) Even taking the claimant's case at its highest, counsel submitted that this was not sufficient.

46. On account of the detailed criticisms made by counsel for the respondents, as regards the content of the claimant's Scott Schedule, Mr McGuire exceeded his allocated timeslot, as per the Timetabling Order, and, again in

the interests of justice, I allowed him extra time to make his oral submissions opposing the claimant's amendment application.

47. In summary, just after 12.05pm, Mr McGuire stated that the amendment should not be allowed. Further, he added, it is appropriate for the respondents to know the type of claim being brought and so given the Scott Schedule it is "***impossible to answer the claimant's claim***", and, in terms of the overriding objective, and fairness between the parties, and the interests of justice, counsel submitted that it is not in the interests of justice for this case as currently pled to be litigated.

48. Counsel further stated that this was "***not a delaying tactic by the respondents***", but it is a basic principle of fairness that a respondent must know the claim being made against them, and the claimant appears not to know his claim, or the appropriate type of claim, he is bringing against the respondents, which is not a reasonable state of affairs.

49. Further, Mr McGuire submitted, the claim has no reasonable prospects of success, it is wholly misconceived, and the Tribunal should refuse the amendment, on the basis of injustice and hardship to the respondents is not ended if the respondents are required to answer what is here in the Scott Schedule.

Reply by the Claimant

50. It then being just after 12.10pm, I invited the claimant to reply. His fifteen minute time allocation, as per the Timetabling Order was extended, in the interests of justice, to allow him to do so. He submitted that he knew the claim, and so do the respondents, and "t***he content of his Scott Schedule is a matter for evidence at a Final Hearing", and "this Preliminary Hearing exemplifies the danger of using a Scott Schedule".***

51. He submitted that there are ***"intrinsic essential facts***". and while the respondents, in their skeleton submissions about Strike Out, had suggested that the Scott Schedule cannot be properly responded to, the claimant submitted that they had made no attempt, and no request for further and better particulars, despite his repeated requests to the respondents to seek this clarification.

52. The claimant referred to the respondents' application for Strike Out, at paragraph 24, as an "***abuse of process***". If this had come months ago, he submitted that the respondents would have got an answer, and his response to their Strike Out application does that, and provides answers that they had previously not sought from him.

53. He submitted that I should not look at things in very narrow parameters, and that the respondents knew of his needs for the provision of a mobile phone as a reasonable adjustment, as they had been on notice, for nearly a year, of the claimant's lack of good health. He referred to that being in the grievance documentation, and that they had taken evidence from other staff members, and they had the background information which was essential to put the claim into context.

54. Further, the claimant submitted, the respondents had disclosed documents that the claimant had previously requested, but been refused, and whenever "***discrimination***" is mentioned, he clarified that it is "***only disability discrimination that is pled"*** in the ET1 claim form.

55. When I asked the claimant to comment, I having summarised the respondents' position, as I understood it from counsel's oral submissions (which is that his Scott Schedule is "***unclear, unintelligible, and cannot be meaningful replied to, and it is not a "less is more" narrative of the factual and legal basis of his claim***) the claimant's response to my enquiry was that the respondents' application for Strike Out is not an appropriate

mechanism for them to seek clarification of his ET1. In particular, he stated: ***"I can't gainsay what clarification they need if they don't tell me."***

56. The claimant then explained that the basis of his claim ***"clearly discloses relevant grounds",*** and that all the factual content is before the respondents, and while he can provide clarification, he had not been asked to do so. He further stated that ***PIDA*** is not specifically mentioned in the ET1, but he had provided factual content about qualifying disclosures in the first Case Management Preliminary Hearing agenda.

57. When I commented that a PH agenda is not part of the pleadings in a Tribunal case, being a point which I note I made to him at the Hearing before me on 7 September 2018, the claimant responded by stating that there had not been any complaint by the respondents that his agenda failed to give them notice. He added that there had been no reply to the Scott Schedule by the respondents, from January 2018, which put him as claimant ***"at a disadvantage".***

58. Referring to Employment Judge O'Dempsey's comments, at paragraph 63 of his Judgment, the claimant stated that those comments should not be ignored. That Judge had stated that the respondents should indicate matters, but while that was not an Order by that Judge, the respondents had not taken onboard that advice, and the claimant submitted that he should not be penalised for their failure.

59. The claimant further stated that the fact the respondents had not done that was ***"grossly unfair***" to him, and "***highly prejudicial***" to him that there had been no request for clarification, and now they were moving for a Strike Out of his claim. He described that as ***"unfair and insufficient notice***" to him, and not in line with the Tribunal's overriding objective.

60. The claimant accepted that he had narrated three "***final straws",*** and stated that ***"while that may be unusual, it is a factual set of circumstances to be argued",*** and he was sure that there may be issues that require further specification. He had invited the respondents to seek clarification, and they had chosen not to do so, despite two prompts from other Employment Judges, and two prompts from himself, and he described that as "***grossly prejudicial to penalise"*** him for that, as that would amount to "***an irregularity".***

61. At that point, Mr McGuire, counsel for the respondents, interjected, to state that the respondents did not accept that the claimant had "***reached out",*** on 16 April and 31 July 2018, in a way that the claimant had put matters, and been refused. Without any further particulars, counsel stated that 31 July 2018 had been a meeting with Mr Smith, while 16 April 2018 was an item of correspondence, that he could produce, if required to do so by the Tribunal.

62. It being just after 12.30pm, I asked the claimant to clarify if his application to allow the amendment was to invite the Tribunal to allow the whole of the Scott Schedule, to which he replied that he could not vary it now, and that his request is to be allowed to add the Scott Schedule ***"wholesale into the ET1".*** It then just being after 12.35pm, the Tribunal adjourned, for a one-hour lunch break.

Case Law Authorities on Amendment cited to the Tribunal

63. While, in my Case Management Orders of 15 October 2018, I had directed that parties' representatives should liaise, and co-operate, in producing for me, at this Preliminary Hearing, one hard copy, paper set, of any case law authorities, I did not receive a Joint Bundle of Authorities, but separate lists of authorities from each of the claimant, and the respondents' representative, Mr Smith.

64. In intimating the respondents' skeleton argument in relation to expenses, on 22 October 2018, Mr Smith included a list of six case law authorities. His further emails of 25 October 2018, enclosing his skeleton argument in support of his Strike Out application dated 19 September 2018, also included a further list of another six case law authorities on Strike Out.

65. Further, when the claimant intimated his own written submissions, on 30 October 2018, in response to the respondents' Strike Out application, he forwarded his own inventory of authorities, with nine cases cited on amendment of claim, seven on disability, seven on expenses, and seven on Strike Out.

66. For present purposes, I note and record here that the claimant's list of authorities on amendment of claim were as follows:

Amendment of Claim:

1. **Selkent Bus Company Limited v Moore [1996] ICR 836**
2. **Mist v Darby Community Health Services NHS Trust [2016] ICR 543**
3. **Ladbrokes Racing Limited v Traynor [2007] UKEAT 0067/06**
4. **Science Warehouse Ltd v Mills UKEAT/0224/15/DA**
5. **SoS for BEIS v Parry [2018] EWCA Civ 672**
6. **Adebowale v Isban UK Limited and others UKEAT/0068/15/LA**
7. **Patka v BBC UKEAT/0190/17/DM**
8. **Chandhok v Tirkey UKEAT/0190/14/KN**
9. **Kedzoria v Servest Group Ltd UKEAT/0099/16/RN**

67. When proceedings resumed, at 1.45pm, after the lunch break, I raised, as part of a general housekeeping discussion about authorities being relied upon by both parties, that neither of them had referred me to the familiar case law authority, from the Court of Appeal, in **Abercrombie & others v Aga**

Rangemaster Limited [2013] EWCA Civ 1148; [2013] IRLR 953; [2014] ICR 209, and as noted in the "***IDS Employment Law Handbook Employment Tribunal Practice and Procedure"***.

68. I stated that while I was familiar with that authority, which was regularly cited to me in opposed amendment applications, I wished both parties to consider it, in order that I might hear from them with their views. Mr McGuire, counsel for the respondents, stated that he was familiar with the **Abercrombie** Judgment, but the claimant stated that he was not aware of it, but he could read it, on his iPad, and, in that regard, so that parties were on an equal footing, I decided to adjourn proceedings for quarter of an hour, to allow parties' representatives to consider the **Abercrombie** Judgment, and address me on it, if so advised.

69. In the event, the adjournment, at 1.50pm, lasted longer than quarter of an hour, and proceedings did not resume until shortly after 2.15pm. In inviting the claimant to comment, he advised me that he sought to rely on the Abercrombie Judgment, particularly at paragraphs 47 to 56, and he focused on the words of Lord Justice Underhill in paragraph 47 that there is nothing in the case law to say that an amendment to substitute a new cause of action is impermissible.

70. The claimant further relied upon paragraph 49, where Lord Justice Underhill had commented that, where the facts and legal basis of a claim are identical as between the original pleading and the amendment, that should weigh very heavily in favor of permission to amend being granted but, as some areas of employment law can, however regrettably, involve real complication, both procedural and substantial, even the most wary can on occasion stumble into a "***legal bear-trap***", and where an amendment would enable a party to get out of the trap and enable the real issues between the parties to be determined, he would expect permission only to be refused for weighty reasons.

71. Further, stated the claimant, he sought to draw a direct comparison between what paragraph 49 says in the **Abercrombie** Judgment, and the facts and circumstances of this case, as he submitted that the claim effectively remains the same as in the ET1, by adding the Scott Schedule, although he did further state that there was no complaint under **Section 1 of the Employment Rights Act 1996** being pled, but that matter was pled by way of "***background only***", as it was not disputed that he was never given an employment contract by the respondents.

72. Referring then to paragraph 52 of the **Abercrombie** judgment, the claimant stated that this is a similar case to his case, and he sought to amend to plead ***"the best available case at this juncture***". In answer to the respondents' argument, which seemed to be advancing an argument that his claim is a "***fundamental nullity***", the claimant referred to paragraph 56 of the **Abercrombie** judgment, and cross referring to the Court of Appeal's Judgment in **Capek v Lincolnshire County Council [2000] IRLR 590**, the claimant suggested that this Tribunal is not deprived of jurisdiction to determine this matter.

73. In inviting Mr. McGuire to reply, at just after 2.25pm, counsel for the respondents stated that the **Abercrombie** judgment does not give any assistance to the claimant, as the facts there and now are different. It was a pure example of relabeling, with no additional facts being pled at all, whereas here, in the present case, the claimant is pleading additional facts, and that is to the prejudice of the respondents, as the facts and legal basis of the claim being advanced on amendment are not identical as between the original ET1 pleading and the proposed amendment.

74. Counsel also focused on the actual words of Lord Justice Underhill's judgment, at paragraph 49, in the penultimate sentence, where he stated that where an amendment would enable a party to get out of the bear trap and enable the real issues between them to be determined, he 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". Counsel laid particular emphasis on those weighty reasons for refusing an amendment.

75. Mr McGuire then referred to paragraph 49 of Lord Justice Underhill's Judgment in **Abercrombie** and it being a relabeling case, and even if the claimant's use of the word "***discrimination***" is disability discrimination, and being generous to the claimant, what is in the Scott Schedule does not plead on what statutory basis any heads of disability discrimination are bring brought against the respondents. On that basis, submitted Mr McGuire, the claimant's arguments fall down, and paragraph 49 of Lord Justice Underhill's Judgment in fact strengthens the respondents' position.

76. Further, added Mr McGuire, the **Abercrombie** Judgment does not change the **Selkent** principles, but equally it does not assist the claimant, as properly read, at paragraph 47 by Lord Justice Underhill, assists the respondents. While noting what Lord Justice Underhill had stated, after reviewing Mr Justice Mummery's guidance in **Selkent**, where Mr Justice Mummery was not prescribing some sort of a "***tick box exercise***", counsel stated that the claimant had still not told this Tribunal why it was not reasonably practicable to present these matters in time, nor why to extend time, if there were time bar issues, and there was the same prejudice to the respondents in attempting to answer the amendment as it currently stands. While a new cause of action is a factor to be considered by the Tribunal, in considering an amendment application, Mr McGuire stated it is not determinative.

77. When I asked Mr McGuire to comment specifically on the "***legal bear trap***", referred to by Lord Justice Underhill, in paragraph 49, and look at that in light of the Tribunal's overriding objective to deal with the case fairly and justly, in terms of **Rule 2**, and how that should impact on how I should approach the opposed amendment application, counsel stated that there were several new causes of action being raised here by the claimant, and that is a very relevant

factor in deciding whether or not the claimant's proposed amendment should be allowed.

78. Counsel added that the Tribunal is required to look at all the relevant facts and circumstances, and in the interests of justice between the parties, and to expect the respondents to reply to the amendment in its current state is not in the interests of justice to the parties. Further, he added the claimant had put in a very skeletal claim, and then sought to amend it way beyond what was originally put in and, ironically, the claimant's case, within the Scott Schedule, is even less clear than what was in the ET1 claim form.

79. It then being 2.40pm, the claimant stated that he could not see how the respondents can say that it is less clear, and that was "***an illogical position***" for the respondents to adopt.

Further Procedure

80. Having concluded parties' oral submissions on the claimant's opposed application to amend the ET1 claim form, I had discussion with the claimant, and Mr McGuire, as regards further procedure, having regard to the remaining time available, and the terms of the previous Timetabling Order, which had also envisaged that this Hearing would address the Strike Out application, as well as the amendment application.

81. In reply, Mr McGuire, counsel for the respondents, stated that he intended to take me to certain examples in the respondents' production Bundles, and notwithstanding the Strike Out application is contingent on the amendment being allowed, the respondents did not object to parking the strikeout application, and addressing other case management matters in the remaining time that afternoon.

82. The claimant confirmed that he saw sense in approaching matters in that way, and while the Strike Out application, and Expenses application, do have a significant impact upon him, and he was keen to deal with these matters as

soon as possible, he was also concerned that some documents, on which the respondents intended to rely in their application for Strike Out, were "***privileged***", and he regarded this as an attempt to get into the evidence, and pre-empt a final decision, and he did not know how he could get through the two volumes of documents produced by the respondents.

83. Further, explained the claimant, at pages 314 to 327 of the first volume of the respondents' Bundle, there was correspondence between the claimant and his solicitor, and the respondents' solicitors, and the claimant stated that he was "***perplexed as to why that had been produced at this stage, without any prior discussion, consent or waiver".***

84. As regards the contents of volume two of the respondents' Bundle, the claimant submitted that this is "***personal information, and of no relevance to the case before the Tribunal"*** at this Preliminary Hearing, and it has been produced without his consent, and it is not appropriate for the respondents to have trawled his former work email address in the search for documents now produced to this Tribunal.

85. In reply, Mr McGuire, counsel for the respondents, submitted that the documents in the two volumes are relevant, and under reference to two of his authorities on Strike Out, **namely Van Rensburg v The Royal Borough of Kensington-upon-Thames UKEAT/0095/07,** and **North Glamorgan NHS Trust v Eziaz [2007] ICR 1126**, he submitted that an Employment Judge is entitled to form a view on the facts, when coming to a decision as to whether a Strike Out, or a Deposit Order, should be granted.

86. Counsel further explained that the documents produced replied to certain allegations made by the claimant in the Scott Schedule and, on the face of these documents produced in the Bundle, Mr McGuire submitted that the respondents' position is clear, and that it is not as stated by the claimant.

87. Further, added counsel, the Tribunal is entitled to come to a preliminary view and, as identified by the Court of Session, in **Tayside Public Transport Company Limited (T/A Travel Dundee) v Reilly [2012] CSIH 46**, included in the respondents' list of authorities, paragraph 30 of the Lord Justice Clerk, Lord Gill's Judgment, while recognising that where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances, and where there is a serious dispute of crucial facts, it is not for the Tribunal to conduct an i*mpromptu* trial of the facts, there may be cases where it is instantly demonstrable that the central facts in the claim are untrue, for example, where the alleged facts are conclusively disproved by productions.

88. Mr McGuire also added that the claimant himself refers to privileged documents, in his Scott Schedule, where he refers to the respondents trying to force a settlement agreement on him, while the respondents would say, by reference to documents in their Bundle, the opposite, and that privilege has been waived by choice by the claimant.

89. Having stated that I was reserving judgment on the opposed amendment application, I invited both parties to consider how I should address the remaining items of business, regarding the Strike Out application, the Expenses application, and general case management of the case, including the disputed preliminary issue of disability status. At around 3.05pm, I allowed parties an adjournment, to consider their respective positions.

Reserved Judgment

90. At the close of this Preliminary Hearing, at 3.15pm, I reserved Judgment**,** in respect of the claimant's opposed application to amend his ET1 claim, to be issued in due course, in writing, after private deliberation in chambers.

91. The respondents' application for Strike Out of the claim, which failing a Deposit Order, was not considered at this Preliminary Hearing, due to lack of available time, and it was continued for consideration, at a later date, after

issue of my reserved Judgment in respect of the claimant's opposed application to amend his ET1 claim.

92. As regards other matters raised by both parties in correspondence with the Tribunal, of consent of both parties' representatives, they are held in abeyance, pending my reserved Judgment on the opposed amendment application being issued, and, thereafter, both parties reflecting on their respective positions as regards : (a) the respondents' application to Strike Out the claim; and (b) the respondents' application for Expenses against the claimant.

93. Finally, I indicated that further Case Management Orders in those respects would be issued by me when my reserved Judgment is issued. They have been issued under separate cover, by letter from the Tribunal, and they accompany the copy of this reserved Judgment sent to both parties.

94. They, together with my written Note and Orders dated 8 November 2018 refer in that regard, and I need say nothing further here.

Relevant Law

95. 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.***

96. 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.

97. 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) (g) 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.

98. 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."*

99. 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."***

100. 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.

101. 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."***

102. 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.

103. 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.

104. 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.

105. 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.

106. 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

107. In his amendment application, intimated on 7 September 2018, as reproduced earlier in these Reasons, at paragraph 19 above, the claimant stated that the Scott Schedule had ***"provided greater specification"*** of his pleadings, and that it represents ***"the comprehensive pleadings relied upon"***, and it is ***"the most efficient way to progress in terms of the overriding objective set down in Rule 2."***

108. In dealing with this case, I have taken note of the fact that the claimant is a party litigant, and that, while legally qualified and trained, as a solicitor-advocate, he has advised me that he has no experience of employment law, or this Tribunal and its practices and procedures. However, being a criminal court practitioner, I am satisfied that the claimant must be familiar with court practice, with its own legal procedures, and the need for fair notice and proper specification, and what is reasonably expected of a professional agent, even if he has no Tribunal experience.

109. While, under the Tribunal's overriding objective, under **Rule 2**, to deal with the case fairly and justly, I must take into account the need to ensure parties are on an equal footing, I have taken into account that this is not the case of the more frequently experienced situation of an unrepresented, party litigant, who is an ex-employee, out of employment, and living on State benefits, and appearing in an unfamiliar legal forum for the first time, with no knowledge of legal matters.

110. Here, I have a claimant who is an educated, professional person, who is far better placed than many unrepresented claimants who appear regularly before this Tribunal to use his legal training and qualifications to understand how to present his case, and pursue it actively through the Tribunal system, having the technical skills and ability to be expected of any lawyer to research the relevant substantive law and procedural rules.

111. Further, given the various earlier stages of these Tribunal proceedings, the claimant here has had appearances before three Employment Judges, including myself twice, in the course of these proceedings. As such, he is not a first-time attendee at a Tribunal Hearing.

112. In pre-reading the papers for this Preliminary Hearing, I had cause to note the terms of the claimant's email of 30 October 2018, responding to the respondents' skeletal submissions of 25 October 2018 seeking Strike Out of

the claim. While the Strike Out application was not considered at this Hearing, I have taken into account the claimant's introductory comments, on his page 1 of 19, stating that:

Claimant's response to Respondent's argument for Strike out

Introductory comments:

1. *The document lodged by the Respondent's is 43 pages long with 23,036 words. When read together with the expenses submissions, that amounts to nearly 30,000 words. The documents are therefore practically twice the length of the Scott Schedule lodged by the Claimant.*

2. *In their document the Respondent's appear to be providing substantive answers to the Scott Schedule, something which has been asked of them for some time now. The document appears to be an attempt to prematurely go to proof on the entirety of the claim in an attempt to avoid a final hearing with reference to evidence and incomplete productions, some of which were sought by the Claimant in his disclosure request but opposed by the Respondent's. It is submitted this is inappropriate as it does not provide the Claimant with fair notice and seeks to usurp the function of a final tribunal hearing.*

3. *Many parts of the Respondent's assertions cannot be answered in full in the absence of relevant disclosure, details of which shall be provided. That disclosure is now essential to afford the Claimant a proper opportunity to refute the assertions as the Respondent's seek only to rely on selective parts of files/correspondence including the personal correspondence of the Claimant. The Claimant is at a distinct disadvantage and cannot advance matters with any real specification in the absence of many documents foreshadowed in the opposed disclosure request. Nevertheless the Claimant shall attempt to seek to*

clarify any matters as best he can to assist the Respondent's and achieve the overriding objective.

4. *There are also real concerns about relevance and the Respondent's decision to disclose certain material relating to perceived complaints about the Claimant's conduct during his employment. There is a direct concern about disclosure of material protected by legal professional privilege. Many of the issues raised by the Respondent's now are not raised in the Respondent's ET3.*

113. Having made those preliminary points, and having carefully considered both parties' oral and written submissions on the claimant's opposed application to amend his ET1 claim form, as well as taking into account my own duty to further the Tribunal's overriding objective, I have decided to refuse the claimant's application, it not being in the interests of justice, nor in accordance with the Tribunal's overring objective to deal with the case fairly and justly, to allow the amendments sought by the claimant.

114. Put simply, the Scott Schedule, as drafted, confuses the situation, and it brings no clarity whatsoever to what is the factual and legal basis of the claims brought by the claimant against the respondents. As Mr Smith observed, in submitting the respondents' skeleton argument on Strike Out, dated 25 October 2018, which I had pre-read, along with the other case papers, prior to the start of this Preliminary Hearing: -

> ***"6. It is submitted that the Claimant has brought the claim in a manner which disregards the minimum legal standards that the Tribunal is entitled to expect of any litigant in general, and especially of a professional solicitor. In particular, <u>pleadings, relevancy, specification, use of language, lack of concision, inaccuracy and dishonesty."</u>***

115. Further Mr Smith's written submission, which counsel for the respondents adopted at this Preliminary Hearing, stated:

"33. There are numerous examples of misconduct in pleading:

a) It is submitted that the document itself is incomprehensible.

b) Reference is made to claims under Employment Rights Act and the Equality Act with no specification in many instances as to the basis of such claims.

c) Between pg 69 and pg 81, it impossible to discern which legal claim refers to which event, due to the lay-out.

d) References to legal claims appear to have been copied from an IDS brief, and are then simply copied again, even where the matter complained of appears to have no connection to the legal claim. In other words, there is no relevant claim made.

e) The term "discrimination" is used throughout the document with little or no reference to the protected characteristic which the Claimant says has been discriminated against,

f) Similarly, the term "comparator" is used without any explanation of what the characteristic is that the comparator shares or does not share

g) Reference is made to terminology such as "duty of care" and "negligence" that would appear to be relevant to a different type of claims, but no claim which the Claimant purports to make

h) At matter 26 there is no legal claim pled at all,

i) By simply copying the Grievance without any regard to the consequences, the result is that the language overall is unspecific, in many cases to the point of absurdity, e.g…..

j) At the same time as being unspecific, the length of each individual matter referred to does not lend itself to an understanding of what the "act" complained of was, as they frequently amount to no more than statements of opinion by the Claimant, broad generalisations, random comments and lack of a coherent structure.

116. I cannot comment on the claimant's alleged dishonesty, as referred to by Mr Smith for the respondents, but I have noted the claimant's response, on 26 October 2018, when he disputed that the bringing of the claim or the amendment sought is without proper legal foundation, and he submitted that he has acted appropriately throughout and in good faith, and that the respondents' assertions that he has prejudiced proceedings by his lack of specification, etc, are unfounded.

117. However, based on the papers before me, I can comment on the claimant's pleadings in the Scott Schedule as regards relevancy, specification, use of language, etc, because the claimant, at this Preliminary Hearing, has advised me, as I have recorded earlier in these Reasons, that the Scott Schedule is ***"easy to read"***, and that it "***clearly discloses relevant grounds"*** for his claim against the respondents.

118. Unfortunately for the claimant, I cannot agree with either of those positions he has advanced at this Hearing. In the course of his oral submissions, he has departed from his written submissions about ***"relabeling***", and changed position several times, so that his final position is unclear, as to what category of amendment he considers he is inviting this Tribunal to allow. His whole approach to pleading his case seems very much scattergun, and uncoordinated, where prolixity does little to assist clarity and ease of understanding his case.

119. In his PH Agenda, submitted on 14 December 2017, for the Case Management PH held on 19 December 2017, before Employment Judge Gall, the claimant resubmitted the Agenda that he had previously lodged on 19 October 2017.

120. As per the Scott Schedule, I am of the view that this amendment application is a **Harvey** type (3), which seeks to add new claims not foreshadowed in the original ET1 claim form, even if, as the claimant seems to suggest, they can

in some way or other be linked to, or said to arise out of the same facts as pled in the original ET1.

121. The Scott Schedule having been intimated on 19 October 2017, the respondents have had knowledge of its terms since that date, even although it was not until 7 September 2018, before me, that the claimant sought leave of this Tribunal to add it to his original ET1 by seeking leave to amend his claim form.

122. Counsel for the respondents argues that, as per **Abercrombie**, there are "***weighty reasons***" to refuse this amendment, because to allow it will cause unfair prejudice to the respondents.

123. Focusing on Lady Smith's approach, in **Ladbrokes**, to the need to balance injustice and hardship, refusing the amendment now leaves the claimant's position, as now, but subject to the respondents' application for Strike Out. Subject to Strike Out, he still has a claim to pursue within the parameters of the original ET1, and what is pled there.

124. I am not convinced that, if the amendment were to be allowed, there would be any unfair prejudice to the respondents, because, as presently is the case, there is still a disputed preliminary issue about the claimant's asserted disability status which, if not conceded by the respondents, will require to be the subject of a discreet public Preliminary Hearing on disability status, and extent of the respondents' knowledge of the asserted disability. If they are successful there, then, subject to any appeal by the claimant, the scope of the claim left to go to a Final Hearing would be less than is currently envisaged.

125. For that reason alone, notwithstanding the claimant's fervent desire to move to a Final Hearing, that is not going to happen first, because the preliminary issue needs determined before there can be any Final Hearing on the merits, if there is ever to be such a Hearing. I do not address the matter of time-bar in any depth here because, as the EAT recognised in **Miller and others v**

Ministry of Justice [2016] UKEAT/003/15, per Mrs Justice Elisabeth Laing DBE, at paragraph 12:

> **"….** ***There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses… "***

126. Going back to matters up to 5+ years ago is clearly likely to have an impact on such things as fading memories, loss of documents, and losing touch with witnesses. That is almost self-evident.

127. While counsel for the respondents addressed me briefly on that alleged prejudice, that was not at the heart of his objections, and likewise my reasons for refusing the claimant's application to amend do not major on that element, which is but one of several factors at play.

128. More significantly, as I have balanced the various factors, is the fact that the proposed amendment is not any improvement on the skeletal pleadings in the original ET1.

129. I am satisfied that, if the amendment, in its current format, were allowed, there will inevitably be further costs and expense, both monetary and in time spent, for both parties, and for the Tribunal, because of the extent to which the case against the respondents would be broadened, in scope and extent, and consequently a substantially longer substantive Hearing before the Tribunal is likely to be required to encompass the wider range of matters in dispute between the parties.

130. At section 2.1 of his PH Agenda, the claimant clarified that he is making a complaint under the **Equality Act 2010**, and he confirmed that, specifically, he was complaining of each of direct discrimination (**Section 13**), indirect discrimination (**Section 19**), harassment (**Section 26**), victimisation (**Section 27**), discrimination arising from disability (**Section 15**), and failure to make reasonable adjustments (**Section 20**). Not all of those possible heads of claim are foreshadowed in the original ET! Claim form.

131. In addition, the claimant completed the attached Schedules to the PH agenda, at Schedule 1, with further detail of his discrimination complaints, and at Schedule 2 regarding his disability.

132. Further, and again in that same Agenda, at sections 2.2 to 2.6, the claimant confirmed that he was making a whistleblowing complaint, and he commented that he had made a series of protected disclosures to Gary McAteer on 12 April 2017, when he lodged his grievance. He provided some further detail, averred that the making of each disclosure had been in the public interest, and that he had suffered disadvantage as a result of making each disclosure.

133. Finally, at section 2.7, the claimant had stated that : ***"my claim is for unfair or constructive dismissal but I am also claiming discrimination and victimisation in that once I became ill, Gary McAteer, in full knowledge of the circumstances, subjected me to further deliberate and targeted harassment in an attempt to undermine my position and force me to leave."***

134. At section 8.1 of the ET1, the claimant had ticked that he was making the following types of complaint: unfair dismissal (including constructive dismissal), discriminated against on the grounds of disability, claiming a redundancy payment, another type of claim which he identified as an "***apology for conduct***". He provided a brief narrative of the background and details of his claim, at section 8.2, and indicated, at sections 9.1 and 9.2, that

in the event of success, he was seeking compensation only from the Tribunal, and an apology for the conduct complained of.

135. He also ticked the box at section 10.1 that he wanted his ET1 claim form sent to the relevant regulator as he was making a "***whistleblowing claim***", although that was not flagged up at either section 8.1 or 8.2, which refer to unfair or constructive dismissal, discrimination and victimisation, and, at section 9.2, to a discriminatory course of conduct. In many ways, this mirrors what he says at section 2.7 of his PH agenda.

136. While section 12.1 of the ET1 claim form was completed by the claimant to answer in the negative, the question "**Do you have a disability**?", that flies in the face of a claim for discrimination on grounds of disability, and the claimant's PH agenda has supplied further details, and the respondents dispute disability status as alleged by the claimant.

137. At section 1.1 of his PH Agenda, the claimant had stated that, in submitting his ET1 online, he had made an inadvertent error on the form, and he confirmed that this was not a redundancy case. He did not seek to withdraw any other part of his original claim against the respondents.

138. At the Case Management PH held before me, on 7 September 2018, when the claimant advised me that he was "***a little unclear what formed his pleadings",*** I drew his attention , as recorded at paragraph 56 of my written Note, to the front page of the *pro-forma* PH agenda, which states that it "***does not form part of the case automatically."***

139. Further, at the Hearing before Employment Judge O'Dempsey, his Judgment had referred to the claimant's Scott Schedule being ***"excessive and at time vague."*** It was in that context that I stated, at the Hearing before me on 7 September 2018, that very often in an ET1 ***"less is more".***

140. At para 16 of his written submission for this Preliminary Hearing, the claimant stated that:

> ***"…. The application was not made earlier as the Claimant considered the Scott schedule to comprise part of the proceedings and placed reliance upon this fact. The only matters that fall to be excluded from the Schedule if parties consider it should be dissected are the post termination claims mentioned above. The Claimant is not trying to introduce new matters not already foreshadowed by the grievance and the ET1, when viewed together."***

141. The claimant was mistaken in considering the Scott Schedule to be part of the pleadings. It is not, unless and until the Tribunal either accepts it as further and better particulars of the claim, or it is allowed by amendment being granted.

142. Further, given the extent of matters covered over the 81 pages of the Scott Schedule, it is incredulous that the claimant suggests that he is not trying to introduce new matters not already foreshadowed in his ET1. He seeks to have the Scott Schedule and ET1 viewed together, when they are both separate documents, both different in date, content, and purpose. His PH Agenda included matters not foreshadowed in the ET1, yet at that stage, he did not seek leave to amend.

143. At para 17 of his written submission, the claimant further stated that:

> ***"… The court or tribunal should have regard to the overriding objective and avoid undue formalism as stated in the case of Chandhok v Tirkey…"***

144. In my view, fair notice and proper specification of a claim, and for that matter a response too, are <u>not</u> "***undue formalism***", because such matters are

important and a fundamental cornerstone of Tribunal proceedings. They are a necessary step to ensuring that a case is properly pled, so that both parties, and the Tribunal, have a clear and unequivocal common understanding of the factual and legal issues before the Tribunal for judicial determination.

145. At paragraphs 51 to 53 of my written Note of 14 September 2018, I drew the claimant's specific attention, as Employment Judge O'Dempsey had done before me at his Hearing in February 2018, to the judgment of the EAT President, Mr Justice Langstaff, **in Chandhok v Tirkey [2015] IRLR 195**, particularly at paragraphs 16 to 18, about the essentials of a claim being set forth in the ET1 claim form, and not elsewhere, as otherwise a case proceeds on "***shifting sands***", and that is not permissible.

146. Further, in my supplementary written Note, dated 15 October 2018, refusing the claimant's opposed application for a Documents Order, my paragraphs 23 to 28 refer to earlier judicial comments by my brother judges, EJs Gall and O'Dempsey, and, at my paragraph 29, I wholeheartedly endorsed as right, EJ O'Dempsey's statement, at paragraph 63 of his Judgment, that both parties should adopt a practical approach in accordance with their mutual duty under **Rule 2** to further the Tribunal's overriding objective, and "***should not become a pretext for taking technical and sterile points or bogging the litigation down in satellite applications."***

147. In his PH agenda**,** the claimant estimated possibly 14 witnesses , and perhaps a 2 weeks Final Hearing just to hear his side of the case, whereas the respondents' PH agenda stated that the claim was not pled in a way that allows a response, other than a denial, and accordingly they could not give either a list of witnesses, nor an estimated length of Hearing for their side of the case.

148. Perhaps not surprisingly, while the claimant seeks to get his case to a Final Hearing, the respondents are concerned by that prospect, given the current

state of the pleadings, as much as the likely duration for any Final Hearing on the merits, if they do not get the claim struck out.

149. In making my decision, and having regard to the Tribunal's overriding objective, I need to have an eye out for the possible implications of further delay and expense to both parties, as also the cost to the public purse of providing the Tribunal but, at this stage, it is only the claimant's opposed application for amendment that is before me.

150. Having dealt with **Chandhok v Tirkey**, I do not rehearse that again, but I do think it is appropriate for me to take into account earlier judicial guidance from Mr Justice Langstaff, then President of the Employment Appeal Tribunal in the unreported Judgment by him on 14 May 2014 in the **Secretary of State for Health v Mrs K Vaseer & Others UK EAT/0096/14.**

151. At paragraph 3 of that Judgment, the learned President of the EAT stated as follows: -

> ***"Where an amendment is sought, it relates to the way in which a claim is presented to a Tribunal. In the course of the discussion before me it is plain both that Judge had to deal with a lot of assertions as to the facts of the case, which had yet to be established in evidence if ever they might be, and asked to consider as if fact and as if part of "the case" that which had never actually been put in writing. It should not be thought that an ET1 or, for that matter an ET3 is simply a document there to set the ball rolling and that what really matters is in some way only hinted at in the words which are used. The document has a real purpose to fulfil, which should not be undervalued. It sets out the nature of the case so that a Respondent or, for that matter, the Claimant may understand the case of the other. It enables a Court of Appeal, the Tribunal in the first instance, to see essentially what is being alleged. It is particularly useful for advance preparation by a Judge and Tribunal Members. It helps***

the administration to know how long might be needed for the case so that it may make appropriate arrangements to ensure that justice is best done. It is right that Tribunals have a degree of informality which is not true of civil courts. That owes a lot to their historical origin. It makes them more amendable to litigants who have no legal experience and may be presenting their cases in person. For that reason it is important not to be so technical about the wording of an originating application as to lose sight of the context in which it necessarily will be set. A Judge or reader is entitled to have regard to context in so far as it is familiar or known to the parties, or must be known to the parties, in understanding what is alleged, but it is still the job of the document to make those allegations. The parties cannot expect the Tribunal or, for that matter, each other to understand that a case is being made which has not in fact been referred to in the document concerned or sufficiently indicated by that document albeit taken in context."

152. Having noted the Judgment of Mr Justice Langstaff in the **Secretary of State for Health v Vaseer,** as detailed above, I think it is also appropriate to have regard to further judicial guidance available to this Tribunal, this time from the Court of Appeal, on appeal from a Judgment of Mr Justice Langstaff at the Employment Appeal Tribunal, in the case of **Patricia Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374,** where Lord Justice Mummery (himself a former President of the EAT), at paragraph 28 of the Court of Appeal's Judgment, stated that :-

"Employment Tribunals should use their wide ranging case management powers, both before and at a Hearing, to exclude what is irrelevant from the Hearing and to do what they can to prevent the parties from wasting time and money and from swamping the ET with documents and oral evidence that have no bearing, or only a marginal bearing, on the real issues."

153. Further, Lord Justice Mummery agreed, at that same paragraph 28, with the constructive comments of Lord Justice Lewison, set forth at paragraph 33 of the **Davies** Judgment from the Court of Appeal, where that learned Court of Appeal Judge stated that: -

> ***"If the parties have failed in their duty to assist the Tribunal to further the overriding objective, the ET must itself take a firm grip on the case. To do otherwise wastes public money; prevents other cases from being heard in a timely fashion, and is unfair to the parties in subjecting them to increased costs and, at least in the case of the employer, detracting from his primary concern, namely to run his business."***

154. The **Employment Tribunal Rules of Procedure 2013**, at **Rule 8**, provide that a claim shall be started by presenting a completed claim form (using a prescribed form) and that prescribed form, at Section 8.2, states ***"Please set out the background and details of your claim in the space below."*** His narrative, at section 8.2 of the ET1, runs to 13 lines, spread over 5 small paragraphs, taking up less than ½ of the A4 sized page.

155. If a party cannot set out the details of their claim in the available space, on page 7 of the ET1 claim form, section 15 (additional information), on page 12, allows space for additional information. In the present case, the claimant stated there, at section 15, that he wished to email 3 principal documents referred to explaining the grievances complained of. He emailed the grievance and appendices to the Tribunal, on 19 October 2017, along with his PH agenda.

156. The respondents' skeletal ET3 response, presented on 26 March 2018, on behalf of Beltrami & Co Ltd, as the substituted respondents, contests all claims, submits that the claimant has not provided specification of the claims in a manner that allows them to be able to set out their response, fails to

provide fair notice of the dismissal claim, fails to specify the disability, the form of discrimination alleged, or the acts which the claimant alleges were discriminatory, and that the Tribunal should dismiss the claim for redundancy made in error, and their response also disputes that his claim consists of or includes a claim that he made a protected disclosure.

157. I am of the view that, given the amount of time and effort spent at previous Preliminary Hearings, in both my own judicial guidance to the claimant, and that of my brother judges before me, the claimant has had more than adequate opportunity to get his house in order, and provide clear and concise details of his claim, in an easy to read, and understandable format, that allows both the Tribunal and respondents to identify the issues in dispute between the parties, and decide upon further procedure, with a view to any arguable claims and defences proceeding to a Final Hearing, or Preliminary Hearing, as might be appropriate.

158. It is within my judicial experience that other, unrepresented party litigants can, and do, find themselves able to commit the details of their case into a Scott Schedule helpful to both the Tribunal and the respondents, and that they are able to do so within a reasonable time of any Order by the Tribunal, usually anything between 14 to 28 days.

159. Here, despite the passage of time from his claim first being presented on 10 September 2017, or even 7 September 2018, when this case first called before me, and this latest Preliminary Hearing, the claimant has still failed to do so adequately or meaningfully, and that despite him being a qualified lawyer, albeit with no prior experience of this Tribunal. His technical skills as a solicitor advocate in the criminal courts are such, however, that I would have reasonably have thought they were transferrable to him acting in this forum.

160. It is, of course, for the claimant to plead his case, and not for the Tribunal, or the respondents, to do that for him. While I must remain independent and objective, and not act as advocate for either party, I do consider it consistent with the overriding objective, and ensuring that parties are on an equal footing,

that I can signpost the claimant to Professor Charles Hennessy on ***"Civil Procedure and Practice".***

161. That well recognised and respected author's work on civil procedure in Scotland does not refer to the Employment Tribunal system, the title having been written with reference to the civil court system within Scotland, and the Sheriff Court in particular. That said, it does seem to me, from perusal chapter 3 of Professor Hennessy's work, in particular at paragraph 3.03, that written pleadings "***should be expressed in plain language as far as possible. They should be brief, based on a common sense approach to the issues which are seen to arise, give fair notice of the issues, focus on the issues which are in dispute, and be confined to expressing simple matters of fact and basic legal propositions to justify the action or the defence. A reading of the pleadings in record should enable anyone to understand the crux of the dispute between the parties and the kind of evidence which will probably have to be led to resolve these issues."***

162. Further, I would have thought that the claimant, as an unrepresented party litigant, could also have had regard to some of the fundamentals of written pleadings, as helpfully detailed by Professor Hennessy, at paragraphs 3.04 to 3.08, about (1) honesty or candour; (2) clarity; (3) the basic facts only; (4) fair notice; and (5) stating the basic legal justification for the case.

163. While the Sheriff Court and the Employment Tribunal are two quite distinct and different aspects of the legal system in Scotland, it does seem to me that the fundamentals of written pleadings, as identified by Professor Hennessy, are transferable from one jurisdiction, to the other, and, to take account of what the learned Professor states about fair notice, at paragraph 3.07, it means "***giving the opponents sufficient detail of the essential features of one's case to enable the opponent (and the court) to understand what the case is, to investigate the allegations made and to give him an opportunity to contradict it with his own allegations, if appropriate."***

164. It seems to me that Professor Hennessy's approach mirrors that applicable in the Employment Tribunal, as per the judicial guidance from Mrs Justice Slade DBE, sitting in judgment in the Employment Appeal Tribunal, on 20 March 2012, in **Fairbank v Care Management Group** and **Evans v Svenska Handelsbanken AB (PUBL) UKEAT/0139-141/12.**

165. As Mrs Justice Slade DBE, sitting alone, held in that EAT judgment, parties need to specify the claims they are making: **Chapman v Simon [1994] IRLR 124**. Without being prescriptive, at paragraph 13 of her judgment, she stated that the essentials to be pleaded are likely to be: (1) the legal basis of the claim;(2) what the act or omission complained of was;(3) who carried out the act; (4) when the act or omission complained of occurred; (5) why complaint is made of the act/omission; (6) anything affecting remedy.

166. Further, at paragraphs 15 and 16, the learned EAT Judge held that it is an error of law / perverse for an Employment Judge to limit what there is in an ET1, but if some paragraphs set out irrelevant matters etc. there could be an application to strike out the offending paragraphs. Further, she held, at the end of a Hearing questions of costs may arise if the ET1 or ET3 is unreasonably prolix leading to waste of costs.

167. She also identified (at paragraph 19) that the appropriate way of dealing with prolix pleadings is by identifying issues at a Case Management Discussion, as they were then known, now Case Management PH, (see Lord Justice Mummery in **Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530,** at paras 53 & 54), and (at paragraph 23) that issues must not be over elaborate or numerous (see Mummery LJ in **St Christopher's Fellowship v Walters-Ennis [2010] EWCA Civ 921**).

168. Indeed, throughout the course of these proceedings, first Mr Smith, and now Mr McGuire, for the respondents, have consistently advised this Tribunal that the respondents seek fair notice and proper specification so that the respondents can investigate the precise claims being brought against them by the claimant.

169. As matters presently stand, the respondent's position, as I understand it, is that they cannot meaningfully understand or answer the claim – even less so can they prepare for and proceed to a Final Hearing.

170. To allow the claim to go forward to a Final Hearing, which is what the claimant clearly wishes me to order, is not appropriate given the current situation, as that would be for the Tribunal to facilitate what would inevitably be a Hearing that could not, in any sense, be a fair hearing of the case, with no defined parameters to the extent and scope of the claim. That would, of course, be wholly at odds with my statutory duty under the overriding objective of **Rule 2**.

171. Equally, it would not be fair to the claimant to allow the respondents' resistance to his claim to proceed without it equally being set within defined parameters in an updated ET3 response. For them to clarify their grounds of resistance, however, the claimant needs to clarify the grounds of each head of claim he seeks to pursue against the respondents. He has failed to do so to date, and it is not in the interests of justice to allow this situation to continue indefinitely.

172. In my view, the claimant, despite all his correspondence with the Tribunal, seeking to progress his case to a Final Hearing, cannot properly be regarded as actively pursuing his case, if it has not been properly pled and specified.

173. However, I am bound to observe that, in the conduct of these proceedings, it is not only the interests of the claimant that need to be taken into account, but the Tribunal has to have regard to the use of judicial resource where there are other cases awaiting a Hearing, as well as the interests of the respondents as the other cited party in these particular proceedings.

174. That is an approach endorsed by Lord Justices Mummery and Lewison in the **Davies** judgment from the Court of Appeal which I cited earlier, and it is an approach that I regard as wholly in line with the overriding objective.

175. Having refused the claimant's application to amend, the ball is, so to speak, back in his court. He must now decide whether or not he seeks to make any further application to the Tribunal seeking leave to amend his ET1, but in a different format to that now refused by me, or he seeks to rely on the ET1 claim form as presented on 10 September 2017, without further amendment.

Update for Employment Appeal Tribunal

176. Given the Notice of Hearing dated 8 November 2018, received by the Tribunal from the EAT Registrar in Edinburgh, I understand that the respondents have been granted a **Rule 3(10)** Hearing to be heard on **17 January 2019**, before an EAT Judge.

177. As such, I have instructed the clerk to this Tribunal to send a copy of this Judgment, and my latest Note, to the EAT Registrar, at the same time as issuing to both parties, so that the EAT is updated as to my rulings in this case before the Employment Tribunal.

Employment Judge: I McPherson
Date of Judgment: 12 December 2018
Entered in register: 17 December 2018
and copied to parties