IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

Judgment of the Employment Tribunal in Case No 4121871/2018 Issued Following Open Preliminary Hearing Held at Edinburgh on 17 June 2019

Employment Judge J G d'Inverno, QVRM, TD, VR, WS

Mrs R Wyse	**Claimant** **Appeared in person**
Healthcare Improvement Scotland	**Respondent** **Represented by** **Mr R Davies, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment and Direction of the Employment Tribunal is that:

(First) The claimant is granted Leave to Amend in terms of the wording appearing at page 1 commencing with "***CONSTRUCTIVE/UNFAIR DISMISSAL…***" to page 17 ending with the words – "***He did not investigate my grievance***", of the tendered Minute of Amendment intimated by her on 7 February 2019 but under deletion of what are described by the claimant as "embedded PDFs" references to which appear in the right hand margin of those pages.

(Second) The claimant is granted Leave to Amend in terms of the words appearing at and commencing with "***REDUNDANCY***" where it appears in the last line of page 41 up to and ending with the words "*The employee mentioned the*

role had not been achieved", where they occur in the last line on page 46 of the tendered Minute of Amendment intimated by the claimant on 7 February 2019; but under deletion of the references to what are described by the claimant as "embedded PDFs" which appear in the right hand margin of those pages.

(Third) The claimant to write to the respondent's representative, with a copy to the Tribunal, within 14 days of the date of this judgment being sent to the parties directing precisely where the words, in respect of which Leave to Amend has been granted in terms of paragraphs **(First)** and **(Second)** of this judgment are to be located within the paper apart to the initiating application ET1 first presented on 19 October 2018.

(Fourth) There is allowed to the respondent's representative a period of 21 days thereafter within which to answer the Minute of Amendment by way of adjusting the paper apart to response form ET3 if so advised, the same to include the articulation of any preliminary issues which the respondent's representative asserts remain notwithstanding, or are focused by, the amendment process.

(Fifth) Following the expiry of the days allowed to the respondent's representative to answer the Minute of Amendment, that date listing stencils be issued to parties/their representatives with a view to appointing the case to a final hearing.

(Sixth) With the exception of those parts in respect of which unopposed Leave to Amend is granted in terms of paragraphs **(First)** and **(Second)** above, Leave to Amend, in terms of the tendered Minute of Amendment, is otherwise refused.

(Seventh) There is allowed to the claimant a period of 28 days, from the date of promulgation of this judgment within which to take advice and, if so advised, to lodge with the Tribunal and to intimate to the respondent's representative, insofar as she may wish to insist upon the same, a further recast tendered Minute of

Amendment together with a written application made and intimated in terms of the Rules of Procedure, for Leave to Amend.

(Eighth) Allows to the respondent's representative a further period of 14 days thereafter to consider the terms of any such recast and retendered Minute and to write to the Tribunal and to the claimant confirming whether the application for Leave to Amend is to be opposed in whole or in part and, if in part, identifying by reference to paragraph and line number those parts of the amendment to which respectively no objection is taken and those parts in respect of which the application for Leave to Amend is opposed while also setting out their proposal for further procedure in the case.

(Ninth) Directs that thereafter the case file be brought up to the Case Managing Judge (Judge Porter) for determination of further procedure in the case.

REASONS

1. This case called for Open Preliminary Hearing at Edinburgh on 17 June 2019 for hearing and determination of the claimant's opposed application for Leave to Amend in terms of a tendered Minute of Amendment intimated by her on 7 February 2019. The claimant who had been legally represented in the preparation, drawing and presentation of her initiating application ET1, first presented on 19 October 2018, appeared in person. The respondent Healthcare Improvement Scotland were represented by Mr R Davies, Solicitor.

Procedural History

19 October 2018

2. The claimant first presented her initiating Application ET1 to the Employment Tribunal on 19 October 2018 having previously determined her Contract of Employment with the respondents by resigning, with immediate effect, on 12 October 2018. At the time of first presenting her application the claimant enjoyed the benefit of legal representation. Her initiating application form ET1 and the 2½ page paper apart attached to it were drawn and presented by her legal representative with the claimant's input and approval and on her instructions.

11 January 2019 PH(C)

3. The case called for Closed Preliminary Hearing (Case Management Discussion) before Employment Judge Porter on 11 January 2019. At paragraph 3 of the note attached to her case management orders issued to parties following that Closed Preliminary Hearing, Judge Porter records as follows:-

> "*3 There was discussion regarding the jurisdictions under which the claimant brings her claims. To this end, the claimant has provided extensive Further and Better Particulars annexed to her Agenda. Much of the information contained within the Further and Better Particulars annexed, is not foreshadowed in the ET1. In these circumstances it was determined that the claimant would prepare and intimate a Minute of Amendment to the respondents which will contain all particulars of her claims which she wishes to rely upon. The Minute of Amendment will, in effect, be a rewrite of the ET1.*"

Open Preliminary Hearing 17 June 2019

4. The 46 page document entitled "Minute of Amendment to ET1 form (claimant)" tendered by Mrs Wyse ("The Tendered Amendment") on or about 8 February 2019 cannot readily be read as a rewrite of the ET1 designed to be substituted for the paper apart to the application form. In the course of Case Management Discussion conducted at the outset of today's hearing of 17 June Mr Davies, for the respondent, indicated that it had been his understanding and expectation, from

the terms of Judge Porter's orders and notes that the tendered amendment would be drawn in the form of a rewrite. Mrs Wyse for her part indicated that she had not interpreted Judge Porter's direction and note in that manner and that she had not drawn it in that way but rather intended it to be something that would sit alongside and supplement the existing paper apart to ET1.

The Issue

5. The Employment Judge confirmed with parties for the purpose of today's Open Preliminary Hearing, that the issue before the Tribunal for consideration and determination was whether the claimant be granted Leave to Amend in terms of the tendered Minute of Amendment pages 1 to 46 inclusive first intimated by her on 7 February 2019, the granting of such Leave being in part opposed by the respondent.

6. The Employment Judge having discussed with the claimant and the respondent's representative the order in which submissions might most helpfully be presented, Mr Davies agreed to address the Tribunal first on the grounds upon which he objected to the application for Leave to Amend in respect of certain elements of the tendered amendment and, upon which, in the alternative let it be assumed that Leave to Amend in relation to such objected to elements was to be allowed, upon which he would seek strike out of particular claims on the grounds that they disclosed no reasonable prospect of success (Rule of Procedure 37(1)(a)), which failing the making of deposit orders in terms of Rule 39. Mrs Wyse for her part confirmed that she was agreeable to proceeding in that order and having enjoyed the benefit of first listening to Mr Davies confirmed that she had indeed found it helpful to so proceed.

7(a) Mr Davies for his part had sent to the claimant on 15 March 2019 a written note of arguments directed at those parts of the proposed amendment to which he maintained objection, which note the claimant had had available to her in the intervening three month period.

7(b) Mrs Wyse, for her part, put up, via the clerk on the morning of the hearing, a folder of documents containing approximately 295 pages of unnumbered documents in divided section the dividers bearing the following descriptions:-

(1) Minute of Amendment to ET1 form
(2) Evidence: documents
(3) Evidence: emails

The documents were otherwise unsupported by an inventory or contents table and no further description or particularisation of the documents was contained in the folder. The bundle of documents was not proactively referred to by either party in the course of submissions but, in answer to a question posed by the Employment Judge the claimant confirmed that there was to be found within the folder the various documents described by her as "embedded documents" reference to which appeared in the margin of the 46 pages of the tendered Minute of Amendment.

The Respondent's Submission

8. At the outset of his submissions the respondent's representative confirmed that he accepted in relation to the complaints of; constructive unfair dismissal and the claim for a redundancy payment, that the averments which were contained respectively at pages 1 to 17 and at the foot of page 41 to 46 respectively of the tendered Minute of Amendment could properly be regarded as providing more specification of the complaints already given notice of in the initiating application ET1. On that basis and subject provision by the claimant of clarification of precisely where, in the paper apart to the initiating application ET1, it was intended by the claimant that those averments be placed, he confirmed that he did not maintain objection to the granting of Leave to Amend in respect to those particular averments, as opposed to the various "embedded documents" which were referred to in the margins of those pages in respect of which he did oppose leave to amend.

Overview

9. By way of overview the respondent's representative confirmed that he maintained objection to the granting of Leave to Amend in terms of the remainder of the tendered Minute of Amendment relating as it did to alleged:-

    (1) Health and safety duty of care breaches, pages 23 to 28 of the tendered Minute

    (2) Disability discrimination claims, pages 29 to 33 of the tendered Minute

    (3) Complaints of having suffered detriment in consequence of protected interest disclosure, pages 33 to 41 of the tendered Minute and

    (4) Sex discrimination claims, pages 17 to 22 of the tendered Minute.

10. In respect of all four areas of objected to proposed amendment the test to be applied was that set out in the seminal case of *Selkent Bus Company Limited v Moore* [1996] ICR 836 per, as he then was, Mummery J which involved distinguishing between amendments which constituted "the addition or substitution of other labels for facts already pleaded" from "the making of entirely new factual allegations which changed the basis of the existing claim" and involving the consideration of relevant factors including:-

    - The nature of the proposed amendment
    - The applicability of time limits
    - The timing and manner of the application

11. Before dealing with each of the four identified sections of proposed amendment, Mr Davies made the following general observation:-

(a) In relation to the structure of the tendered Minute of Amendment Mr Davies observed that the Minute comprised a preamble followed by an extensive list of bullet points which taken together lacked coherence such as to fail to disclose understandable claims from which an issue/issues could be identified for determination, (a) by the Tribunal and (b) such as to provide the respondent with fair notice of the case which it had to meet.

(b) In each of the objected to sections that preamble and set of bullet points was followed by a number of boxes under the heading "Detail and Evidence" and it was to these that he looked and submitted the Tribunal should look in an attempt to ascertain the purpose and effect of the amendment and which, in his submission upon application of the *Selkent* test and factors led to the conclusion that Leave to Amend should not be allowed.

(c) While accepting that the extent to which it would be practicable to advance such alternative arguments at today's hearing on a contingent basis without first knowing which, if any, of the objected to elements were ultimately granted Leave to Amend, Mr Davies gave notice of the respondent's position as follows:-

(i) That Leave to Amend should not be granted in respect of each of the elements to which objection was maintained;

(ii) In the event that Leave to Amend were to be granted and to the extent that it was, the respondent sought (would seek) the strike out of all or each of the said amended in claims on the grounds that they enjoyed no reasonable prospect of success (Rule of Procedure 37(1)(a)) and which failing, and in the alternative

(iii) That any such amended in claims should be the subject of a deposit order in terms of Rule 39, on the grounds that they enjoyed little reasonable prospect of success

12. While accepting that the extent to which it would be practicable for the Tribunal to hear full argument on those alternative propositions at today's hearing on a contingent basis and without first knowing which elements, if any, of the objected to averments were ultimately the subject of Leave to Amend, Mr Davies submitted that the particular application was one in which it would be relevant for the Tribunal, in exercising its discretion on the granting or refusal of Leave to Amend, to consider and to take into account the extent to which the various claims against which objection was taken would enjoy reasonable prospect of success upon the averments advanced.

13. Against the above general submission the respondent's representative came in turn to each of the four remaining and objected to elements.

"Health and Safety Duty of Care Breaches"

14. These claims were set out at pages 23 to 28 of the Minute of Amendment.

15. He maintained objection to these claims being amended in as follows:

(a) Objection to amendment (the *Selkent* test)

Nature of Proposed Amendment

16. This proposed amendment was a substantial one. It was not a simple re-labelling of existing factual assertions. It included entirely new factual allegations which would require extensive evidence. More significantly it was not possible to clearly discern from the proposed amendment the type of claim which was being advanced. At page 24 the preamble referred back to paragraph 6 and 12 of the

paper apart to the ET1. In that paper apart paragraph 6 described the outcome from the internal investigation whereas paragraph 12 was headed "Whistleblowing".

17. The preamble went on at page 24 to refer to sections 14 (Dual Characteristics) and 20 (Reasonable Adjustments) of the Equality Act 2010 and also to the 1994 Extension of Jurisdiction Order. No clear notice of which statutory jurisdiction has been relied upon was given.

18. If what was set out in pages 23 to 28 was intended to be whistleblowing claims then they were incoherent since they lacked any clear explanation of relevant protected disclosures and consequent alleged detriments. Such claims, let it be assumed that it was these in which notice was being given, accordingly enjoyed no reasonable prospect of success. Under reference to *Olayemi v Athena Medical Centre and others* EAT0613/10 and *Cooper v Chief Constable of West Yorkshire Police* and another EAT0035/06 he submitted that that lack of prospect was a factor to be weighed in the balance in the instant case.

Applicability of Time Limits

19. In the instant case, submitted Mr Davies the question of time limit was relevant since this was, in his submission, not merely a relabelling of the existing factual allegations (*Selkent*).

20. The issue of jurisdiction (by reason of potential time bar) was exacerbated by the circumstance in which the nature of the claims being advanced was unclear. So, for example, if it be the case that what it was intended to give notice of were whistleblowing claims then to establish jurisdiction it would be necessary to give specific notice of when the alleged detriments, if any were said to have occurred. That specification was absent. However, standing the fact that the claimant's employment terminated on 12 October 2018 such claims appeared likely, on their face, to be time barred at first instance and thus the claimant would require to satisfy the "not reasonably practicable test" were there to be any prospect of them

being heard and there was no offer or attempt to do so in circumstances where there is a requirement to do so at the time of making application to amend.

Timing and Manner of the Application

21. In the respondent's representative's submission this was the third attempt that the claimant had made in relation to setting out her claim; the first being in the preparation, drafting and presenting of her initiating application ET1 in which process she had the full benefit of legal advice, the second being by way of Agenda return in advance of the Case Management Discussion of 11 January 2019. On each occasion the respondent required to consider the detail presented, to attempt to extract from it notice of relevant claims and consider, investigate and prepare responses thereto. Each such occasion involved the incurring of time and cost by the respondent, who were convened to the action by the claimant. The Minute of Amendment tendered on this third occasion extends to some 46 pages, and, under reference to the general submissions made by him was unclear and difficult to read and discern.

Alternative Application for Strike Out/Deposit Order

22. As generally, submitted let it be assumed that amendment of this aspect were to be allowed, the resultant claims would, in the respondent's representative's submission enjoy little or no reasonable prospect of success and accordingly should be struck out which failing made the subject of a deposit order.

The Second Element – "Disability Discrimination Claims"

23. Notice of these claims was to be found at pages 29 to 33 of the tendered Minute.

24. The respondent maintained objection to these claims being amended in.

25. In the event that amendment were to be allowed the respondent sought their striking out of any such amended in claims on the grounds that the claims thus

introduced enjoyed no reasonable prospect of success which failing that they be made the subject of a deposit order on the basis that they enjoyed little reasonable prospect of success.

Objection to Amendment

Nature of Proposed Amendment

26. Although, in the preamble the claimant makes reference to sections 14, 15 and 20 of the Equality Act 2010, the nature of the claims which it is sought to introduce remains unclear. The factual averments which are set out under the heading "Detail and Evidence" and commencing at page 31 do not appear to potentially support any relevant claim. In the respondent's representative's submission, no notice of a competent claim is disclosed by them. He accordingly submitted that such claims as it may be intended to introduce via this element of the amendment could enjoy no reasonable prospect of success that being a factor which should weigh against the granting of Leave to Amend.

27. Separately, disability discrimination were it to be introduced fell into the category of an entirely new claim there being no reference to it whatsoever in the initiating application ET1 whether in the paper apart or at section 8.1 of the form itself. It was not a relabelling and accordingly the issue of time limits was sharply focused.

28. While the various events referred to under the heading "Detail and Evidence" did not bear to disclose allegations of discrimination, the latest date referred to amongst them was 14 August 2018 (the date of an Occupational Health Report) whereas the Minute of Amendment was first tendered on 7/8 February 2019. On any view, let it be assumed the events referred to fell to be regarded as disclosing complaints of discrimination, which he submitted they did not, they would be matters which were time barred at first instance.

29. Accordingly, the claimant would require to satisfy the Tribunal that it would be just and equitable that the claims be heard notwithstanding their lateness and no attempt or offer to do so was disclosed in the amendment in circumstances where,

regardless of whether such a preliminary issue was ultimately left over for determination at final hearing, there was requirement to give notice of an offer to prove and of *prima facie* grounds upon which it would be "just and equitable" to hear the claims, at the time of making application to amend.

Timing and Manner of Application

30. Under this heading the respondent's representative reiterated the submission made in respect of the previous health and safety claims elements of the amendment.

Application for Strike Out/or Deposit Order

31. Under this heading the respondent's representative reiterated the submission made by him earlier in respect of the health and safety claims elements of the tendered amendment. He further made the point that there was no concession on the part of the respondents in respect of disability status which separately would remain a preliminary issue which required to be addressed.

The Third Element Protected Interest Disclosure Claims

32. Notice of these claims was to be found at pages 33 to 41 of the Minute of Amendment. The respondent maintained objection to these claims being amended. Likewise, in the event that amendment were to be allowed in this regard, he sought the striking out of any such amended in claims, on the grounds of them enjoying no reasonable prospect of success which failing that they be the subject of a deposit order on the grounds that they enjoyed little reasonable prospect of success.

Objection to Amendment

Nature of the Proposed Amendment

33. The respondent's representative acknowledged that whistleblowing claims were made in the paper apart to the initiating application ET1 where they were to be found at paragraph 12. In that paragraph it is stated that the alleged protected disclosures were set out in the claimant's grievance of 21 November 2017 and repeated thereafter throughout the grievance procedure. The alleged detriments relied upon in the ET1 were said to be:-

- Failure to take action against the staff complained about,
- Moving the claimant from her substantive post and,
- Failing to take action to resolve the issue which would have allowed her to return to her post or find a suitable alternative post

34. The claim set out at pages 33 to 41 of the Minute of Amendment, however, appear to be entirely new claims based on entirely new factual allegations. In the respondent's representative's submission, therefore, this was not a case of relabelling, or of simply providing Further and Better Particulars of what was already alleged in the claim form. In his submission each combination of disclosure and detriment amounts to a standalone claim. Accordingly, any such claim which was not within the pre-existing ambit of paragraph 12 of the paper apart to the ET1 was a new claim.

35. Insofar as they can be identified from the wording of the proposed amendment the respondent's representative observed that each making of a disclosure referred to in the Minute of Amendment appears to precede in time or at least be separate from, the making of a disclosure referred to in the ET1 paper apart which latter disclosure is said to have been contained in the claimant's grievance dated 21 November 2017 and repeated thereafter throughout the grievance procedure.

36. In the respondent's representative's submission the term "making of a disclosure" was the appropriate term, distinguishing that act from the subject matter of the

disclosure, since a successful claim relies upon a disclosure being made and upon the establishment of consequent detriment. Whilst the subject matter of any of the disclosures referred to in the Minute of Amendment may have been repeated in the claimant's grievance process, in the Minute of Amendment the claimant relies upon disclosures made on dates other than during the grievance process thus clearly identifying them as different and new claims.

37. The respondent's representative further submitted that several of the purported claims could be seen, on their face, to enjoy little or no reasonable prospect of success, a factor which weighed against Leave being granted to amend them in.

38. While the claimant summarised in a very general way "less favourable treatment" and "detriment" using bullet points, the detail was provided from page 35 onwards in the Minute of Amendment under the heading "Detail and Evidence" and in respect of which the respondent's representative made the following observations:

    (a) Public disclosure 1. No corresponding detriment was pled

    (b) Public disclosure 3. No corresponding detriment was pled

    (c) Proposed public disclosure 4: second paragraph thereof headed 2nd October 2017: no disclosure was pled

    (d) Proponed public disclosure 6: second incident/paragraph thereof on 24th 10th 17: no disclosure is pled

    (e) Public disclosure 6: third incident/paragraph thereof described as "Subject Access Request": no corresponding detriment was pled

    (f) Proponed disclosure 7: no disclosure was pled

    (g) Proponed disclosure 8: no disclosure was pled

Applicability of Time Limits

39. The lack of prospects in respect of the proposed new claims together with the issue of the Tribunal's jurisdiction to consider them, insofar as not subject to the criticisms set out at sub-paragraphs (a) to (g) above and in the case of the majority separately and in any event, were exacerbated and further undermined by the issue of time bar:-

    (a) Proposed public disclosure 2 relates to an incident said to have occurred at its latest on 15 November 2017

    (b) The proposed public disclosure for second paragraph thereof is tied to the claimant's further observation of alleged unfair recruitment practices on 2 October 2017

    (c) Proposed public disclosure number 4 (first paragraph thereof) is said to occur at or about the time of the claimant's observing what she considered to be unfair recruitment practices on 17 January 2017

    (d) In (a) and (b) above. Also reverse the order of (b) and (c)]

    (e) In relation to public disclosure 4 first paragraph thereof the detriment, such as may be capable of being identified, is said to have occurred in the context of the recruitment process which proceeded on 17 January 2017

    (f) In respect of proposed public disclosure 4 second paragraph thereof, such detriment as may be discerned is said to have occurred either on or about 2 October 2017 which failing at the latest on the Effective Date of Termination of the claimant's employment in October 18

    (g) In relation to proposed disclosure 5 the proposed wording goes to identify the date of the alleged harassment sufficient to make clear

the issue of jurisdiction but, on any view, can be seen to have concluded at the latest on the Effective Date of Termination the claimant's employment 12 October 2018 and arguably at an earlier date namely February 2018 at which latter time the claimant stopped working with the fellow employees whose treatment of her she identifies as the potential detriment relied upon

(h) In relation to potential public disclosure 6 incidents 1, 2 and 3, the respective dates identified for the occurrence of the alleged detrimental conduct were respectively on or about 2 February 2016 and, on or about 24 October 2017 and, in relation to the third incident, while no date is identified neither is any detriment pled

(i) In relation to proposed disclosure 7 the dates mentioned are 13 February, 27 September and at the latest the date of the claimant's resignation 12 October 2018. In this regard neither disclosure nor correlative detriment is pled.

(j) In relation to proposed disclosure 8 while no disclosure is in fact pled the factual matrix which is the subject of averment is said to have occurred on or about the date of the receipt by the claimant of her grievance outcome letter on 31 May 2018.

40. On the above basis any of the claims which would otherwise have the potential to amount to relevant public interest disclosure/detriment claims, a category restricted to one or two of the proposed claims at the most, could be seen to be time barred at first instance on their faces and thus there would be a requirement that the claimant meet the "not reasonably practicable test". Notwithstanding that requirement the proposed amendment contained no offer or attempt to do so in circumstances where there was requirement to have made such averments at the point at which Leave to Amend was sought.

Regarding the timing and manner of the Application, insofar as it related to the addition of Protected Interest Disclosure Claims

41. The respondent's representative adopted and reiterated the observations and submissions earlier made by him in relation to the health and safety breach of duty of care claims.

Application for Strike Out/Deposit Order

42. The respondent's representative likewise reiterated that in the event that the Tribunal were to grant Leave to Amend in respect of all or any of the protected interest disclosure claims he sought, in the alternative, the strike out of those claims on the grounds that they enjoyed no reasonable prospect of success, which failing the making of deposit orders on the grounds that they enjoyed little reasonable prospect of success.

43. He separately observed that in the last of these alternatives, were it to be the disposal arrived at by the Tribunal there would be a requirement for any such claims amended in, to be further particularised.

The Fourth Element Sex Discrimination Claims

44. The respondent's representative submitted, in relation to these claims which are to be found at pages 17 to 21 of the proposed Minute of Amendment that it was unclear from the wording of these paragraphs whether the alleged incidents were in fact new claims or were simply intended to be better specification of the existing claims. In the event that they fall to be regarded as new claims, in terms of his primary submission, he objected to those specified below being amended in. Separately and, in the alternative, let it be assumed amendment was allowed, he sought the striking out of any such claims amended in, on the grounds that they enjoyed no reasonable prospect of success which failing the making of a deposit order on the basis that they enjoyed little reasonable prospect of success.

Objection to Amendment

Nature of the Proposed Amendment

45. In the respondent's representative's submission several of the purported claims appearing in the proposed amendment fell to be regarded as enjoying no, which failing little reasonable prospect of success a factor which should weigh significantly against Leave to Amend and be permitted.

46. The only references to discrimination because of the protected characteristic of sex which appear in the ET1 are to be found firstly at paragraph 3 in the third and fourth line where the claimant states "*Her grievance related to concerns about the leadership and management of the service and bullying and harassment (including sexual harassment, relating to a variety of remarks that were made to the claimant by employees of the respondent).* Those averments are not further particularised."

47. Secondly, at paragraph 10 of the paper apart sub-paragraph (3) where, in the context of providing reasons for her resignation the claimant lists amongst nine other reasons "*(3) She was the victim of harassment on the grounds of sex from Dr Fernie.* There is no further particularisation of that averment.

48. Lastly, at paragraph 13 of the paper apart under the heading "**Sex Discrimination**" where, again in relation to her constructive dismissal claim it is said "*The sexual harassment … amounted to sex discrimination and constituted a fundamental breach of trust and confidence entitling the claimant to resign with immediate effect.*" There is no further particularisation of the bald reference to sexual harassment.

49. In the proposed Minute of Amendment the claimant again refers to "sexual harassment", "sex discrimination" and also to the "Equality Act section 13(6)(a) (breast feeding)" and section 36 (services of public functions).

50. Whilst the claimant summarised in a very general way "less favourable treatment" and "detriment" using bullet points as part of the preamble in the amendment, the

detail is provided from page 20 onwards under the heading of "Detail and Evidence".

51. In relation to the issue of prospects of success, the respondent's representative made the following observations:-

(a) In relation to the alleged event of 14 January 2015 nothing is pled by way of an offer to prove that the alleged event was related in any way to the protected characteristic of sex or, let it be assumed that it was intended to give notice of a complaint of direct discrimination, that any alleged less favourable treatment was connected with the protected characteristic. Separately the allegation was on its face time barred.

(b) In relation to the alleged incident of 28 May 2015 again, on its face nothing was pled by way of an offer to prove that the alleged events were related to the protected characteristic of sex or, let it be assumed it was intended to be a complaint of direct discrimination that any alleged less favourable treatment was because of sex. Separately the allegation was, on its face time barred.

(c) In relation to the June/July 2016 alleged events on the face of it nothing was pled offering to prove that the alleged events were related to the protected characteristic of sex. Separately the allegations appear to be time barred.

(d) In relation to the allegation which appears at page 21 of the proposed amendment said to have occurred at an unspecified time in 2017 but placed in terms of the claimant's chronology prior to the next listed incident of 1 March 2017, the allegations were on their face time barred, the same in circumstances in which the claimant in terms of the proposed amendment makes reference to her taking a conscious decision at the time not to pursue the matter.

(e) In respect of the alleged incident of 20 November 2017, the proposed amendment did not offer to prove that the conduct referred to occurred or was connected with the claimant's protected characteristic of sex. The remainder of the allegation relating to the periods 2016 to 2017, 6 September 2017, October 2017, 23 October 2017 variously failed to offer to prove that they were related to or connected with the claimant's protected characteristic of gender or were collateral matters not relating to the claimant and in relation to all appeared on their face to be time barred. Thus, insofar as they fell to be regarded as new claims required the claimant to meet the just and equitable test in circumstances where the amendment contained no offer to prove the same as at the point of seeking Leave to Amend.

52. On the above alternative and cumulative grounds, the respondent's representative invited the Tribunal to refuse the application for Leave to Amend in respect of the fourth element Sex Discrimination Claims. Particularly so in circumstances in which because of the lack of clarity in the terms of the proposed amendment it remained unclear, in relation to some of the alleged incidents, whether they properly fell to be regarded as new claims, in which case the question of time limits was relevant, or simply better specification of the largely unparticularised complaint of sexual harassment which is briefly referred to and in passing at paragraphs 3, 10(3) and 13 of the paper apart to the ET1.

Applicability of Time Limits – see paragraph immediately above

Timing and Manner of the Application

53. Under this heading the respondent's representative incorporated and reiterated the submission made by him earlier in relation to the health and safety duty of care claims.

Application for Strike Out or Deposit Order

54. Under the above the respondent's representative intimated, in the event that amendment in of all or part of those claims were to be allowed on the grounds that the claimant was merely providing Further and Better Particulars of a claim already given notice of in the ET1, that the respondent sought their strike out which failing the making of deposit orders, on those grounds.

55. In the event that such claims, if Leave to Amend them in were granted and if they were not subsequently struck out as sought the respondent's representative reserved the right to seek further particularisation of any such surviving/subsisting claims.

The Claimant's Submissions

56. With a view to doing justice to Mrs Wyse's submissions I set them out, as I noted them in their entirety.

57. The claimant Mrs Wyse, commenced by confirming that she had found it helpful to have had the opportunity of hearing the respondent's representative present his submissions in respect of the particular parts of the proposed amendment to which he maintained objection. She noted that the respondent did not maintain objection in relation to pages 1 to 17 (the proposed amendment in relation to constructive dismissal) and in relation to "redundancy payment" commencing at the foot of page 41 to page 46 of the proposed Minute of Amendment. She invited the Tribunal to grant Leave to Amend in those particular terms standing the lack of objection on the part of the respondent.

58. In relation to the remaining elements, which constituted that balance of the tendered amendment, the claimant responded to the respondent's representative's submission as follows:-

(a) She stated that it had not been her intention to expand the claim beyond the terms of that given notice of in her initiating application and in the paper apart attached to it.

(b) The form ET1 and the paper apart had been prepared by her then legal representative, in consultation with herself, at a time when she had enjoyed the benefit of legal representation.

(c) She stated that when preparing her Case Management Agenda return she had tried to research her claim further and make sense of it.

(d) She stated that health and safety claims were referred to in the paper apart to the ET1.

(e) Regarding sexual harassment she had formed the view on researching matters that her claim related not just to sexual discrimination but also to sexual harassment.

(f) The documents which she described as documents embedded in the amendment contained what she believed was relevant evidence to prove the matters that she wished to add.

(g) She stated that at the Case Management Discussion which proceeded before Judge Porter on 11 January 2019 the Judge had discussed with her three sections of the Equality Act and had *recommended* [the claimant's choice of term,] that she produce a Minute of Amendment by which she explained she meant the Judge had suggested preparing a Minute of Amendment and seeking Leave to Amend was the appropriate procedure to follow.

(h) In relation to complaints of public interest disclosure and detriment she stated that the detriments which she intended to rely upon were

intended to be the same in respect of all of the public disclosures which she now identified.

(i) The claimant stated that she had thought to embed PDF documents in the proposed Minute of Amendment because the first Judge (Porter) had stated that it would be helpful for her to prepare a bundle of documents supporting the allegations.

(j) In relation to the challenges to jurisdiction by reason of time bar advanced by the respondent's representative the claimant responded only by stating that those were matters to be determined by the Tribunal adding only that in relation to disability discrimination although that was a matter which her then legal representative had discussed with her and had specifically asked her about at the time of preparing the ET1 she, the claimant, had come to realise only later that disability could encompass mental health issues and it was for that reason that she had not included such a complaint in the ET1.

59. The claimant confirmed, in response to enquiry by the Employment Judge, that there was nothing further which she wished to add either by way of response to the respondent's representative's objections or comments or in support of the granting Leave to Amend in respect of those parts of the tendered amendment to which objection was taken by the respondents.

Discussion, Overview of the Minute of Amendment

60. As is necessary to enable the Tribunal to consider the application for Leave to Amend the terms in respect of which Leave to Amend is sought is placed before the Tribunal by the claimant in a tendered Minute of Amendment, (in this case a document extending to some 46 pages and bearing in the margin across those pages reference to 126 documents, described by the claimant as "embedded documents").

61. The tendered amendment seeks to "expand" or add to the claimant's pleadings in relation to six categories of claims:-

    1. Health and safety duty of care breaches
    2. Disability discrimination claims
    3. Protected interest disclosure claims
    4. Sex discrimination claims
    5. Constructive/unfair dismissal
    6. Claim for a redundancy payment

62. It was a matter of acceptance, on the part of the respondent's representative, that the sections of the amendment which sought to add to the constructive unfair dismissal claim and to the claim for a redundancy payment properly fell to be regarded as adding specification to claims of which notice was already given in the initiating application ET1 and, on that basis he confirmed at the outset of the Open Preliminary Hearing that he did not oppose the granting of Leave to Amend in the terms proposed in the tendered Minute in respect of those two categories of claim. On consideration of the same the Tribunal was likewise satisfied that those elements of the amendment were properly so described and has granted Leave to Amend in terms of paragraphs **(First)** and **(Second)** of its judgment.

63. The application for Leave to Amend in respect of the other four categories of claim namely; health and safety duty of care breaches, disability discrimination claims, protected interest disclosure claims and sex discrimination claims, which together comprised the balance of the tendered Minute is opposed by the respondent.

Applicable Law and Discussion

64. The claimant's application for Leave to Amend comes before the Tribunal in terms of Rules of Procedure 30(1)(2) and (3).

65. Employment Tribunals have a broad discretion to allow amendments at any stage of proceedings either, on the Tribunal's own initiative or, as in the instant case on

the application by a party (Rule of Procedure 29). Such a discretion must be exercised in accordance with the Overriding Objective (which is set out in Rule 2,) of dealing with cases fairly and justly. Although various particular principles apply specifically to the assessment of an application to amend, the need to comply with the Overriding Objective subfuses the application of those principles.

66. In *Selkent Bus Company Limited v Moore* 1996 ICR 836, in the EAT, the then President, Mummery J, as he then was gave guidance as to how Tribunals should approach applications for Leave to Amend.

67. Any application to amend a claim must be considered in the light of the actual proposed amendment in order that the Tribunal may understand and give consideration to the purpose and effect of the amendment. It is important therefore that the application set out the terms of the proposed amendment in the same degree of detail as would be expected had it formed part of the original claim, that is to say, such as to give notice of a relevant and competent claim (in the case of a new claim) or to cure deficiency in that regard in respect of an existing claim; and, in addition, such as to give the other party fair notice of the case which it is to meet.

68. In approaching the question of allowance of Leave to Amend the key principle in exercising their discretion is that Tribunals must have regard to all the relevant circumstances and in particular to any injustice or hardship which would result from the amendment or a refusal to make it. That test first developed by Sir John Donaldson in *Cocking v Sandhurst (Stationers) Limited and another* 1974 ICR 650, NIRC was approved in subsequent cases and restated by the EAT in *Selkent Bus Company Limited v Moore* 1996 ICR 836 EAT.

69. Thus in determining whether to grant an application to amend an Employment Tribunal should endeavour to carry out a careful balancing exercise of all the relevant factors having regard to the interests of justice and to the levels of hardship that would be caused to the parties by granting or refusing the

amendment. In *Selkent* the then President of the EAT Mummery P explained that relevant factors would include:-

- ***Nature of the amendment*** *i.e. is the amendment, for example, one involving the correction of clerical or typographical errors, the addition of factual details to existing allegations and or the addition or substitution of other labels for facts already pleaded to on the one hand, or alternatively and on the other hand is the amendment one which involves the making of entirely new factual allegations that change the basis of the existing claim. Read short whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action.*

- ***Applicability of time limits –*** if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that claim/cause of action is out of time and, if so, whether the time limit should be extended.

- ***Timing and manner of the application –*** an application should not be refused simply because there has been delay in making it as amendments may be made at any stage of the proceedings. 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 identification of new facts or new information from documents disclosed on discovery.

70. The above is not an exhaustive list; there may be additional factors to consider in any particular case but the above basic factors should always figure in the Tribunal's consideration.

71. The hardship and injustice test is a balancing exercise as noted by the Lady Smith in *Trimble and another v North Lanarkshire Council and another* EATS0048/12 it is inevitable that each party will point to there being a downside for them if the

proposed amendment is allowed or not allowed. Thus, it will rarely be enough to look at the downsides or 'prejudices' themselves. These need to be put in context, and that is why it is important to look at all the surrounding circumstances.

Nature of Proposed Amendment

72. The first key factor identified in *Selkent* is that of the nature of the proposed amendment. It is important that this factor be considered first not least because of its interrelationship with potential time limitation issues. The same because it is only necessary to consider the question of time limits where the proposed amendment, by reason of its nature, seeks, in effect, to adduce a new complaint/new complaints, *in contra* distinction from 'relabelling' the existing claim. If it is a purely relabelling exercise then it doesn't matter whether the amendment is brought within the time frame for that particular claim or not – *Foxtons Limited v Ruweil* EAT0056?08.

73. Where, as in the case of new claims, the second key factor – the applicability of time limits is engaged, the Tribunal should properly determine, as part of the process of granting or refusing Leave to Amend whether the new claim is time barred at first instance measured against the date of first presentation of the amendment and, if it is, whether the time limit should, in the particular circumstances, be extended by reference to the appropriate test of "reasonable practicability" (here in the cases of health and safety and duty of care breaches and protected interest disclosure claims) or, "just and equitable" in the case of discrimination complaints.

74. *Per contra*, in a case where by nature the amendment properly falls to be regarded as one of merely the relabelling of an existing claim or of the further particularisation of a claim already given notice of, but in respect of which an argument arises as to whether the particular averments to be added may be the subject of some challenge of time bar, that may be a matter which may be only properly focused in the context of the amendment and answers thereto if at once allowed. It may be determined after the amendment process either at a discrete

preliminary hearing on the issue or at a final hearing to which it determination has been reserved, in the same way as it might have been had the averments been included at first instance in the initiating application but subject to the same challenge.

75. The third basic factor, namely the timing and manner of the application, is a discretionary factor which may be taken into account notwithstanding the competency of the making of an application at any time. In this context it is relevant to consider;

(a) why the application was not made earlier and why it is now being made, for example; the identification of new facts or new information not previously within the amending party's knowledge or the provision of real advice not previously available to the amending party or the removal of a prior state of ignorance in relation to the existence of a right in circumstances where it was reasonable not to have made any enquiry.

(b) Whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issues are allowed to be raised particularly if these are unlikely to be recovered by the party that incurred them; and

(c) Whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

76. Other relevant factors which may be taken into account and in the instant case which appear to be relevant on the face of the amendment, may include the merits of the claim, whether of a new claim if that is the nature of the amendment or of the original claim notwithstanding the amendment;

(a) It may for example be appropriate to consider whether the claim as amended has a reasonable prospect of success. Or again, whether the proposed amendment supports any of the claims sought to be pursued.

(b) The assessment of the balance of hardship and injustice and the balance of prejudice can, where focused by the pleadings, including in particular the terms of the proposed amendment may relevantly include such consideration on the grounds that it is neither proportionate nor in keeping with the overriding objective to allow an amendment to introduce a hopeless case.

Discussion and Disposal

77. The rules of natural justice require that each party give the other fair notice of the case which they are to meet. Such notice should further have the effect of focusing for parties (and of allowing the Tribunal to identify and record) the issues, including importantly any preliminary issues of jurisdiction, which require investigation and determination at an appropriate hearing. Until that is achieved it is difficult to substantially progress a case in keeping with the overriding objective towards hearing and an adjudication of its merits.

78. The tendered amendment is a document comprising some 46 pages but which contains marginal references to a further 127 documents;

(a) The extent to which these “embedded documents” are intended to form part of the amendment itself in respect of which Leave is sought or are intended to be no more than a cross reference to documentary evidence to be included in a hearing bundle, is not clear on the face of the amendment.

(b) The document contains no locating instructions by which one can be clear as to where, in the paper apart to the ET1, particular passages of averments are intended to be placed in the event that Leave to Amend them in were to be granted.

(c) Although the document in various places and under various general headings contains some reference to sections of the Equality Act 2010, there is no correlation between averments and statutory provisions such as to give sufficient or fair notice of the particular statutory complaint that is being made and in consequence the statutory jurisdiction which is being invoked.

(d) The document, in its various parts and design is difficult and onerous to read for the purposes of extracting relevant specification.

(e) It is not coherent such as to disclose understandable claims from which a relevant issue/issues can be identified for determination by the Tribunal or such as to give the respondents fair notice of the case/cases which they are to investigate and meet.

(f) In parts the tendered amendment amounts substantially to the pleading of evidence and is so broad in its scope as to fail to focus issues or to disclose, under the various headings contended for, relevant claims which can be seen to enjoy reasonable prospect of success.

(g) It seeks, in large part to introduce new claims not given notice of in form ET1 and based upon new averments of fact in relation to various unconnected acts the majority of which are said to have occurred at times, or within timescales, such as to result in them being time barred at first instance; and, if they are to fall within the

Tribunal's jurisdiction, would require to meet, as appropriate, the test of "not reasonably practicable" or "just and equitable". No relevant offer to prove that either of the tests is met as appropriate appears in the amendment or, is before the Tribunal at the time at which the application to amend is being moved.

(h) The effect of allowing amendment in terms of the whole document that is to say allowing the 46 page document to be received and incorporated into the pleadings would be:

(i) To at once obscure the issues substantially widen the scope of any evidential inquiry

(ii) To place a disproportionately onerous burden in terms of cost and scope of enquiry upon the respondent.

(iii) Be productive of a requirement for an evidential hearing of substantially greater duration.

(iv) Would not be proportionate in the circumstances.

(v) Would run the risk of essential issues being obscured in a volume of detail such as might require intervention prior to hearing to restrict the admissibility of evidence and in consequence, the scope of the pleadings.

(i) If received and allowed to form part of the pleadings would not assist the furtherance of the overriding objective.

(j) It is recorded that the ET1 contains no reference whatsoever to complaints on the ground of disability discrimination whether by use of the tick boxes at section 8.1 or in the paper apart. Complaints of

discrimination, insofar as it may be sought to introduce the same by way of amendment fall into the category of new claims in respect of which, in addition to consideration of other factors it would be necessary to consider and determine any preliminary issue of jurisdiction, by reason of apparent time bar.

79. As stated above the rules of natural justice require that each party give the other fair notice of the case which they are to meet. Such notice should further have the effect of focusing for parties and of allowing the Tribunal to identify and record, the issues, including importantly any preliminary issues of jurisdiction, which require investigation and determination at an appropriate hearing. It is neither practicable nor appropriate that the Tribunal be required to attempt to extract from various source documents and construct a case for either party. That is not the function of an Employment Tribunal in adversarial proceedings. While the Employment Tribunal is a forum designed for the access justice by partie, without the need for professional representation, the Tribunal would be in real danger of acting partially and of being seen to do so if it were to undertake such an exercise.

80. It is for parties themselves, with the benefit of guidance given and in compliance with directions made by the Tribunal in the course of case management; and with the benefit of such external advice as they consider it appropriate to take, to respectively set out their claims and their responses. They should do so in a manner and with sufficient specification and precision such as to give the other party fair notice of the case which it has to meet and, such as, to allow the Tribunal to identify and record the issues requiring investigation and determination at hearing thus informing the nature and scope of the enquiry which is required. The obligation to do so is no less on parties who have the conduct of their own claims than it is on those who are represented. The great majority of litigants in person before the Employment Tribunal regularly discharge that obligation.

81. The Employment Tribunal is not a court of common law but rather is a statutory court possessing only such jurisdiction to enquire into matters as Parliament has given it. For that reason it is necessary that parties bringing claims before the

Employment Tribunal, sooner or later in the process and generally by the case management discussion stage or at the stage of compliance with case management directions subsequently issued, give notice of placing their claims within one or other of the many hundreds of statutory provisions in respect of which the Tribunal is possessed of jurisdiction. They should do so by reference to the statutory provision/provisions relied upon in respect of each claim which they seek to advance and do so by specifying, in a manner sufficient to give fair notice to their opponent and to the Tribunal, their title to advance such a claim and the Tribunal's jurisdiction to hear it.

82. The claims, including the new claims, of which the claimant appears to seek to give notice in terms of the tendered amendment, are all claims in respect of which her title to bring them and the Tribunal's collateral jurisdiction to consider them, is qualified by time limit. In the instant cases a primary time limit of three months, less one day subject to extension by operation of the early conciliation provisions applies and is subject to certain saving provisions; In the case of protected interest disclosure complaints a claimant may present such complaints and the Tribunal may consider [Mr d'Inverno – I'm not sure where to insert the following text - than despite the expiry of the time limit where the claimant satisfies the Tribunal that they meet] complaints the test of it being "not reasonably practicable to submit the claim within the initial three month period" and, in relation to complaints of discrimination by reason of satisfying the Tribunal that it is just and equitable, in the particular circumstances, that the claims be allowed to proceed though presented after the expiry of the initial time limit and have thereafter been presented within a reasonable time.

83. In her initiating application ET1, first presented to the Employment Tribunal on 19 October 2018 and which was drafted on the claimant's behalf by her then legal representative with the claimant's input, the claimant, in the boxes appearing at section 8.1 gives notice of an intention to advance complaints of:-

- Unfair dismissal (including constructive dismissal)
- Discrimination on the grounds of sex

- A claim for a redundancy payment
- A claim for notice pay
- One other type of claim, namely that she suffered detriment on the grounds of having made a protected disclosure during her employment and, separately that her dismissal was contrary to the provisions of section 103A of the Employment Rights Act 1996 and thus automatically unfair

84. Specification of those claims is to be found in a 16 paragraph paper apart attached to and incorporated in the initiating application.

85. Reference to sexual harassment and to sex discrimination appear in three places in the paper apart as follows:-

(a) In numbered paragraph 3 of the paper apart in the third and fourth lines thereof as part of the second sentence of numbered paragraph 3 which is in the following terms:- "*The claimant's initial grievance that had supporting documents attached was summarised in a second document on 13th November 2017, her grievance related to concerns about the leadership and management of the service and bullying and harassment "including sexual harassment, relating to a variety of remarks that were made to the claimant by employees of the respondent" that she had been subjected to personally";*

(b) at paragraph 10(3) of the paper apart where there is listed as one of the reasons for the claimant's decision to resign, in the context of her constructive dismissal claims the following – "*(3) She was the victim of harassment on the grounds of sex from Dr Fernie"*; and,

(c) At paragraph 13 of the paper apart in the following terms:-

"*13* ***Sex Discrimination***

The sexual harassment and the respondent's failure to deal with her grievance amounted to sex discrimination and constituted a fundamental breach of trust and confidence, entitling the claimant to resign with immediate effect"

86. Read together, in the context of the paper apart and the initiating application, these references objectively construed constitute notice of a complaint of sexual harassment (potentially in terms of section 26 of the Equality Act 2010) at the hands of Dr Fernie and said to have occurred on an unspecified date or dates prior to the 30th of November 2017. The claimant's initiating application was first presented to the Employment Tribunal on 19th October 2018 the claimant having first contacted ACAS for the purposes of early conciliation on 22nd August 2018 and the Conciliation Certificate being issued by ACAS on 22nd September 2018. The three month time period after which, in terms of section 123(1) of the Equality Act 2010 that complaint as presented expired on a date occurring not later than 28th February 2018 with the result that such a complaint could only be considered by the Tribunal in terms of section 123(1)(b) of the Act.

87. Turning to the tendered amendment the section headed up "Sex Discrimination Claims" commences at the foot of page 17 with that heading and extends to the end of page 22. As was submitted by the respondent's representative each of the four sections to which objection is taken commences with a general preamble and a series of bullet pointed general comments in relation to less favourable treatment and detriment which are in large part unspecific in terms of where, when and at whose hands, the conduct is said to have occurred and from which it is difficult to ascertain whether what is being brought forward is in the nature of new claims or intended to be seen as further specification of the existing claims. I consider, under reference to paragraphs (71-80) and further as above, that amendment in terms of these general summaries and bullet points is neither appropriate nor would it be productive of the focusing of issues.

88. There then follows a chapter commencing one third of the way down page 20 and extending to the end of page 22 under the heading "Detail and Evidence" under

which the claimant gives notice of ten specific incidents specified in time. The averments are set out in a table each incident appearing in an individual box. Before turning to consider each of those passages of averments I observe that at the beginning of the preamble on page 18 the claimant makes two general statements;

(a) The first is a reiteration of the bald statements made at paragraphs 3 and 13 of the paper apart to the ET1 and which when read together with paragraph 10(3) of the same, is to the effect that the claimant suffered sexual harassment at the hands of Dr Fernie. In the same sentence however the claimant seeks to extend that general allegation to Dr Bryan Robson, a person not mentioned in the context of sex discrimination or sexual harassment in the ET1.

(b) In the second sentence of the preamble, in contra distinction to that of sexual harassment the claimant introduces an allegation of "sex discrimination" by Dr Peter Currie stating, without any specification of incidents, that the discrimination occurred in the period between 2015 and 2018.

89. In the second paragraph of the preamble the claimant alleges, without further specification, that the respondent breached the terms of section 13(6)(a) and 36 of the Equality Act 2010 these being sections relating in the case of section 13(6)(a) to direct discrimination by reason of less favourable treatment related to breast feeding; and, in the case of section 36, a section which imposes a duty to make adjustments on those who let premises, common hold associations and those who are responsible for common parts of let or common hold premises in England and Wales. These are types of claim not previously given notice of in the initiating application ET1 and fall into the category of new claims albeit without specification.

90. Of the specific incidents given notice of in the table at pages 20 to 22 of the tendered Minute:-

(a) The incident of 14 January 2015 fails to give notice, on its face, of being related to the claimant's protected characteristic of sex and on its face appears time barred in terms of section 123(1)(a) with no offer to prove that it falls within the terms of section 123(1)(b) of the 2010 Act. Insofar as it is said to have occurred at the hands of Dr George Fernie and prior to November 2017 and let it be assumed that it falls to be regarded as disclosing a relevant complaint of section 26 sexual harassment, it falls to be regarded as the provision of further specification of a claim already given notice of and not as a new claim.

(b) There is no explanation beyond an explanation why the matter was not raised on 14 January 2015 as to the timing of giving notice of the complaint on 12 February 2019.

91. Applying the *Selkent* factors and the additional factor I consider that the averments relating to 14 January 2015 incident, although not constituting by nature a new claim, fail to disclose, on their face a relevant complaint of section 26 sexual harassment or section 13 direct discrimination. In assessing the balance of hardship and injustice and of resultant prejudice associated with granting or refusing Leave I consider that the claimant's existing complaint of section 26 harassment is not diminished by the non-allowance of amendment in these terms whereas the granting of leave would have to, on the one hand, results set out at 72 above. I consider that the balance lies in favour of refusing Leave to Amend in this particular respect and I refuse Leave to Amend. [Mr d'Inverno – I'm not sure I've amended this para correctly]

92. In respect of the 28 May 2015 incident

Leave to Amend insofar as the same was not opposed is granted in terms of paragraph **(First)**, **(Second)** and **(Third)** of this judgment. Otherwise Leave to Amend is refused.

93. The key principle underpinning the process of amendment is that in exercising its discretion to grant or refuse Leave to Amend the Employment Tribunal should have regard to all the circumstances and in particular to any injustice or hardship which would result from the allowance of the amendment or from a refusal to make it. Any application to amend must be considered and the Tribunal's discretion in allowing or refusing leave must be exercised in the light of the actual terms of the proposed amendment. For it is only when these are clearly and comprehensively set out that the parties and the Tribunal can see the nature and intended effect of the amendment. It is also essential that an application to amend set out the terms of the proposed amendment in the same degree of detail as would be expected had it formed part of the original claim and the Tribunal needs to be placed in a position where it can ensure that the terms of any such proposed amendment are clearly recorded so that:

    (a) The terms of the proposed amendment can be considered in the context of such notice of claims as is already given in the initiating application ET1.

    (b) That the *Selkent* factors of:

        - the nature of the amendment
        - the applicability of time limits
        - the timing and manner of the application; and,
        - any additional factors such as prospects of success of any contingent claim

    may be taken account of in the exercise of balancing of hardship and injustice, the same, in turn, informing the exercise by the Tribunal of its discretion in either granting or refusing Leave to Amend in whole or in part.

94. The Employment Tribunal is a forum designed by Parliament as one in which parties can access justice without the need for representation. Parties bringing claims before the Employment Tribunal must, nevertheless and whether represented or appearing in person must adhere to and comply with the rules of

natural justice, the Rules of Procedure and the Overriding Objective which include affording the other party fair notice of the claim which it has to meet. Parties must also bear in mind that tribunals are only able to adjudicate on specific complaints and it is therefore necessary that parties set out the specific acts complained of and do so by reference to where, when, between which parties, at whose hands and by which means of communication etc in relation to each. General descriptions of complaint will not suffice and should be avoided.

95. In the instant case, and with the exception of those parts in respect of which Leave to Amend is granted of consent, the 46 page tendered amendment;

    (a) for the reasons set out at paragraphs 72 and otherwise above; and

    (b) which must be considered as a whole and not as a document to be deconstructed and reconstructed by the Tribunal

    is not amenable to consideration in the light of the *Selkent* and other relevant factors and Leave to Amend in its terms is otherwise refused.

96. Sensible of the fact that the claimant although legally represented at the time of formulating and lodging her initiating application ET1 now appears without the benefit of legal representation, the Tribunal has allowed to the claimant, who advised in the course of her submissions that it had not been her intention to expand the claims already given notice of in her initiating ET1, a period of 28 days within which to take advice and, insofar as she wishes to insist upon the same to bring forward, and to intimate in accordance with the Rules of Procedure if so advised, a further recast Minute of Amendment and, relative application for Leave to Amend.

97. It is not the Tribunal's function to advise the claimant to do so. Insofar as the claimant may determine to do so the Tribunal offers the following observations regarding structure.

98. If the claimant wishes to bring forward claims which are not given notice of in the initiating application form ET1, beyond those in respect of which Leave to Amend has already been granted, the claimant will require to do so by tendering and formally applying for Leave to Amend in terms of a separate Minute of Amendment in which she sets out, in one single document, particularisation of the additional claims which she wishes to advance by reference to:-

    (a) The nature of each such claim.

    (b) The statutory provision founded upon in respect of each such claim.

    (c) The essential matters of fact which she offers to prove in respect of each such claim and which, if proved, would allow the Tribunal to conclude that the particular claim was well founded; that is to say the essential matters of fact which will require to be established if the claim is to enjoy a reasonable prospect of success. In doing so the claimant should avoid the use of lengthy narrative or the recounting of the same; she should avoid the use of general preamble; in relation to each such claim she should particularise it by reference to the same.

        - Where
        - When
        - What
        - How
        - At whose hands the particular acts which are said to have occurred;
        - Where applicable by reference to any particular words allegedly used; and by reference to
        - The sections and sub sections of the statutory provisions on which she relies

[Mr d'Inverno – not sure if I've amended this para correctly]

99. The exercise of drawing the content of any such amendment should be carried out by reference to the essential elements of each of the relevant statutory provisions upon which the claimant gives notice of relying.

100. Generalisations should be avoided. Nor should the Minute of Amendment bear to incorporate parts of other documents. Each passage of averments contained within the amendment should be preceded by locating instructions which make clear where, in the existing paper apart to the initiating application ET1, the particular words which follow in the amendment are to be read as inserted and on which words are to be removed if Leave to Amend is granted so that their effect upon and in relation to the existing notice of claim can be clearly understood.

101. Insofar as what is sought to be introduced by way of amendment relates to an incident or act or omission of the respondent's employees which is not already expressly given notice of in the paper apart to the ET1 and which is said to have occurred more than three months earlier than the date of intimation of the application for Leave to Amend and thus, on its face appears to be time barred, the amendment should include averments of the basis upon which the claimant offers to prove that the relevant savings provisions tests of 'not reasonably practicable' or 'just and equitable' are met, to enable the applicability of time limit to be considered in the course of exercising its discretion.

Date of Judgement: 18th July 2019
Employment Judge: Joseph d'Inverno
Entered in the Register: 19th July 2019
And copied to parties