Appeal No. UKEAT/0094/18/LA
UKEAT/0213/18/LA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 24 May 2019
Judgment handed down on 4 October 2019

Before

THE HONOURABLE MR JUSTICE LAVENDER

(SITTING ALONE)

UKEAT/0094/18/LA

(1) PONTOON (EUROPE) LIMITED
(2) OLSTEN (UK) HOLDINGS LIMITED — APPELLANTS

(1). MR P SHINH
(2). NATIONAL GRID PLC — RESPONDENTS

UKEAT/0213/18/LA

PONTOON (EUROPE) LIMITED — APPELLANT

(1). MR P SHINH
(2). NATIONAL GRID PLC — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DESHPAL PANESAR (of counsel) Adecco Group Legal Services Millenium Bridge House 2 Lambeth Hill London EC4V 4BG
For the Respondents	No appearance or representation by or on behalf of the Respondents

SUMMARY

PRACTICE AND PROCEDURE - Amendment

There was no error of law on the part of the Employment Tribunal in deciding to permit the amendment of the claim form and the addition of a second respondent to:

(1) the original claim, which was brought in time against the original respondent; and

(2) a new claim, which the Employment Tribunal found was brought in time against both respondents.

THE HONOURABLE MR JUSTICE LAVENDER

Introduction

1. This is an appeal against a decision to allow an amendment, together with an appeal against a decision not to reconsider the original decision. Both decisions were taken by EJ Coaster sitting at Midlands West.

2. The amendment decision followed a hearing on 16 November 2017 and was contained in a judgment which was dated 6 December 2017 and sent to the parties on 7 December 2017 ("the Amendment Judgment"). The reconsideration decision was contained in a judgment which was dated 15 February 2018 and sent to the parties on 16 February 2018 ("the Reconsideration Judgment").

(2) Background

3. There was a contract ("the Contract") between the Claimant's company, Global Sourcing Company International Limited ("Global"), and Pontoon Europe Limited ("Pontoon") by which Global agreed to provide the Claimant's services at National Grid Plc ("National Grid") from 27 September 2016 to 31 January 2017. Clause 9.3.1 of the Contract provided that Pontoon was entitled to terminate the Assignment forthwith without notice or liability at any time in the event that National Grid requested that the Service cease or that the Claimant be removed from the Assignment for any reason.

4. The Claimant did not have a contract of employment with National Grid or Pontoon. However, he contends that, pursuant to section 43K of the **Employment Relations Act 1996**, he was a worker for the purposes of Part IVA of that Act and his employer included the person who substantially determined the terms on which he was engaged.

5. The Claimant contends that he made protected disclosures in October 2016 and that, as a result, he was asked to leave National Grid's premises at a meeting on 1 November 2016.

6. National Grid contends that:

(1) On a number of occasions in October 2016 the Claimant: (i) failed to attend National Grid's premises as agreed; and (ii) displayed an uncooperative attitude and behaviour.

(2) There was a meeting on 1 November 2016 attended by Annette Edmonds and Kirsten Pickering of National Grid and a representative of Pontoon. The Claimant was rude and aggressive and was asked to refrain from his duties and to leave National Grid's premises.

7. Pontoon terminated the Contract on 11 November 2016.

(2)(a) The Letter Before Action

8. On 11 November 2016 the Claimant sent a letter before action to Pontoon. I have not seen this letter, but it appears that he asserted a claim for £100,000 against Pontoon.

9. A letter dated 15 November 2016 was sent to the Claimant, denying that the Claimant had any cause of action against Pontoon. This letter was signed "Group Legal Services, Pontoon Europe Limited" and was written on notepaper headed "Adecco Group". At the foot of the notepaper was a statement that, "The Adecco Group comprises ..., Pontoon, …, Spring Personnel and Spring Technology". Olsten Holdings (UK) Limited ("Olsten") is the holding company for the Adecco Group.

10. A further such letter dated 21 November 2016 was sent to the Claimant. This contained the assertions that:

(1) Even if the Claimant had made a protected disclosure, his assignment was not terminated as a result of a protected disclosure.

(2) **"We are advised that there are a number of contributing factors which led to the termination of your assignment. However, the salient factors were; (a) your poor timekeeping, (b) your habit of promoting your own company during working hours rather than focussing on your work, (c) uncooperative attitude and behaviour towards National Grid staff and (d) the fact that a full time member of staff became available to assume your duties."**

(3) Pontoon terminated the Assignment upon National Grid's request by giving the Claimant two weeks' notice, which Pontoon claimed was in accordance with the Contract.

(2)(b) The Alleged Blacklisting

11. The Claimant also contends that on 11 January 2017 he was informed by an employee of "Spring recruitment" that his name was "blacklisted" by Pontoon and the Adecco Group. However, as noted by the Tribunal in paragraphs 5 and 21 of the Amendment Judgment, he contends that:

(1) He did not believe that this comment by one employee was sufficient to support a claim against Pontoon.

(2) He was not aware until May 2017 of the connection between Pontoon and the Adecco Group.

(3) Documents provided by Pontoon in August 2017 pursuant to a subject access request confirmed that instructions had been given by senior management within Pontoon/Adecco which percolated across the whole Adecco group not to engage the Claimant.

12. The Claimant contends that his alleged blacklisting preventing him from finding work for a considerable period of time.

(2)(c) The Claim Form

13. The Claimant submitted a claim form on form ET1 which was received by the Tribunal on 19 February 2017. In answer to question 2.1 ("Give the name of your employer or the person or organisation you are claiming against") he gave the name "National Grid". He did not identify any other respondents in section 2.5 of the form. In section 8.1, he described the nature of his claim as follows:

> **"I whistle blew on concerns about the security of a new SMART metering service being launched in Nov 2016 within 24 hours I was called into a meeting given my notice with immediate effect. When I cited the public disclosure act as I had in the emails on the previous day 31/10/2016 I was asked to leave the organisation, stay at home and not conduct any work for them, within c5 days I was given my notice."**

14. He gave further details in section 8.2 as follows:

> **"I joined National Grid on the 27/9/2016.**
>
> **Within 2 weeks I noticed that there were minimal security provisions for technology, information protection and safety of consumers for the launch of a new SMART meter rollout by NG.**
>
> **I raised these concerns with my line manager, Raminder, the commercial lead – Annette who indicated there had been a contractor security advisors on the project for over the past 10 months.**
>
> **On requesting documentation to support the previous contractors advice nothing was provided.**
>
> **I then created a document highlighting the risks to launching the new service, to the information to the consumers…**
>
> **This was in effect ignored with a view to address these issues post live.**
>
> **When communicated this to senior management on 31/10/16 I was asked to attend a meeting on 1/11/16 where as was told my contract was terminated with immediate effect.**
>
> **On citing the email of the 31/10/16 which clearly indicated a public disclosure the two NG staff asked me to leave the premises and they would be in touch (Annette and Kirstine).**
>
> **5 days later I was given my notice period. NG indicate a permanent member of staff had taken over the role.**
>
> **As this role had been done for 10+ months contractors this was unlikely. In Jan 2017 the same role was re-advertised. Advert can be issued to the tribunal.**
>
> **I contacted a senior executive at NG who confirmed this role had been re-advertised and was in the process of being filled. Date 13/1/17 issued by Kerri Matthews.**
>
> **I believe my contract which should have ran for many months was terminated due to the whistleblowing as it incriminated specific NG staff Who did not take the steps ensuring consumer data, technology and NG reputation from being compromised."**

15. He did not refer to Pontoon by name in his claim form, but he referred to the Contract, which was with Pontoon, and to the termination of the Contract, which was done by Pontoon. He also referred to the meeting on 1 November 2016, which was attended by a representative of Pontoon, although he did not expressly mention that in the claim form.

(2)(d) The Preliminary Hearings and the Draft Amended Statement of Claim

16. There was a preliminary hearing by telephone on 22 May 2017. In advance of the hearing, the Claimant completed his case management agenda, in which he stated that Pontoon should be added as a respondent.

17. In an order sent to the parties on 23 May 2017 EJ Camp ordered the Claimant to provide further and better particulars of his existing claim. The order did not deal with the question of adding Pontoon as a respondent.

18. The Claimant produced a draft amended statement of his claim on about 8 June 2017. This was a document which set out what he had said in sections 8.1 and 8.2 of his claim form and showed his proposed additions as tracked changes. He named the respondents as National Grid and ""Pontoon"/Adecco Group". In this draft amended statement of claim he claimed that his contract had been terminated as a result of his protected disclosures and he claimed that he was entitled to damages for being blacklisted.

19. He said that his claim was being brought under section 48(1A) of the **Employment Rights Act 1996** and he also cited sections 43B, 47B and 103A of that Act. He also claimed that he was a worker under sections 43K and 230 of that Act.

20. There was a further preliminary hearing, this time in person, on 3 August 2017. EJ Camp gave directions for the determination of the Claimant's application for permission to amend his claim form so as to add claims against Pontoon.

(2)(e) The Amendment Judgment

21. There was a hearing on 16 November 2017 to determine that application. Pontoon was represented by counsel and the Claimant appeared in person. As was recorded in paragraph 18 of the Tribunal's judgment dated 6 December 2017, Pontoon opposed the application.

22. The decision of the Tribunal, which was announced at the hearing, was that Pontoon was added as a respondent and that the amendments to add what were described as claims of unlawful termination of contract and detriment against Pontoon were allowed. On 6 December 2017 the reasons for that decision were set out in the Amendment Judgment.

23. The Tribunal analysed the Claimant's proposed amendments as follows:

(1) The claim as originally pleaded against National Grid was described as the "unlawful termination of contract" claim. The Claimant sought permission to add Pontoon as a respondent to that claim.

(2) The Claimant also sought permission to add a claim against National Grid arising out of his alleged blacklisting. The Tribunal referred to that as the "detriment" claim. The Tribunal gave permission to the Claimant to add the detriment claim against National Grid, and there has been no appeal against that decision.

(3) The Claimant also sought permission to add Pontoon as a respondent to the detriment claim.

24. The Tribunal's terminology is potentially misleading, since both claims which the Claimant wished to bring against Pontoon involved an allegation that the Claimant had suffered a detriment as a result of a making a protected disclosure. I will refer to them as "the termination claim" and "the blacklisting claim".

25. In paragraph 14 of the Amendment Judgment, the Employment Tribunal reminded itself of the well-known passage from ***Selkent Bus Co v Moore*** [1996] ICR 836 ("*Selkent*") which I will cite later. In paragraph 15, the Tribunal reminded itself of the provisions of section 48(3) of the **Employment Rights Act 1996**, i.e. the primary 3-month limitation period for "whistle-blowing" claims, and the provision for the extension of that period in certain cases. In paragraph 17, the Employment Tribunal noted, *inter alia*, that the termination claim was filed in time.

26. In paragraph 26 of the Amendment Judgment, the Tribunal stated that this was clearly not a case which was manifestly hopeless and without merit. That assessment was not challenged on this appeal.

(2)(e)(i) The Termination Claim

27. The Tribunal said relatively little in the Amendment Judgment about the Claimant's application to add Pontoon as a respondent to the termination claim:

(1) In paragraphs 19 and 20, the Tribunal said as follows:

> **"19. Pontoon oppose the application. In respect of the termination of the contract with GSI by Pontoon, it was conceded that the amendment would have little effect on the overall length and cost of proceedings as the point engages the same evidence as the in time claim already pleaded against the First Respondent.**
>
> **20. However, Pontoon submits that the application to amend to include a claim for detriment is a new and substantial cause of action which is also substantially out of time. The claimant was aware of the comment that he had been blacklisted on 11th January 2017 and could have brought a new claim within the statutory time limit which expired on 10th April 2017. No reasonable explanation had been given for the delay in making the application to amend and several opportunities to make an earlier application had not been taken – for example the filing of the original ET1 in February 2017, the preliminary hearing in May 2017. The prejudice to Pontoon includes the cost of defending the new claim, time and expense in making further disclosure and the taking of statements from witnesses implicated in the allegation of blacklisting. The Appellant had drafted his amended pleading in June 2017 and reference thereafter to SAR disclosure is irrelevant."**

(2) In paragraph 25, the Tribunal said as follows:

> **"Pontoon do not dispute that they were fully aware of the alleged protected disclosures made in October 2016. I find that it is highly likely to be the case that Pontoon was instructed by the First Respondent to terminate its contract with GSI regarding the provision of the claimant's services to the First Respondent. Pontoon must have been aware throughout (although the claimant was not aware until September 2017) that the claimant had been 'blacklisted' across the Adecco group of companies. Pontoon were aware of the claimant's wish to add Pontoon as**

a second respondent by 10th May 2017 when it received his case management agenda for the preliminary hearing case management on 22nd May 2017. It could have come as no surprise to Pontoon that there was such an application by the claimant. They must have been expecting such an application having been already expressly referred to in the ET1 as being present at the termination meeting and escorting the claimant from the premises. The amended pleading dated about 8th June 2017 also could not therefore have been a surprise to Pontoon, both as to the being joined as the second respondent and the allegation of detriment."

(3) In paragraph 27, the Tribunal said as follows:

"27.With regard to the first amendment relating to Pontoon terminating the engagement, as Pontoon were already referred to in the ET1, I allow the amendment."

28. I have already noted that Pontoon was not referred to by name in the claim form, but that the contract, the meeting and the termination of the contract were referred to.

(2)(e)(ii) The Detriment Claim: Limitation

29. The Employment Tribunal held that the blacklisting claim was a new head of claim and held that it had been raised within the time limit provided for in section 48(3) of the **Employment Rights Act 1996**, which provides as follows:

"An employment tribunal] shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of *a series of similar acts or failures* , the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

30. Pontoon contended that the primary time limit expired on 10 April 2017 (i.e. 3 months after 11 January 2017) and should not be extended. The Tribunal dealt with this issue in paragraphs 29 to 38 of the Amendment Judgment. It held that:

(1) It was not reasonably practicable for the Claimant to file proceedings by 10 April 2017.

(2) He did not delay unreasonably thereafter.

31. By ground 2 in the Grounds of Appeal, Pontoon contended that these were decisions which no reasonable tribunal properly directing itself as to the law could have arrived at. However, that ground of appeal was dismissed by Slade J at the rule 3(10) hearing on 25 September 2018. Accordingly, there was before me no challenge to the Employment Tribunal's finding that the blacklisting claim was brought in time.

(2)(e)(iii) The Detriment Claim: Discretion

32. In the alternative, the Tribunal held that it would have allowed the Claimant to add the detriment claim against Pontoon even if that claim was out of time. The Tribunal referred to ***Selkent*** and ***Transport and General Workers Union v. Safeway Stores Limited*** (2007) 6 June, UKEAT/0092/07/LA. It then said as follows in paragraphs 42 to 44 of the Amendment Judgment:

> **"42. As I have stated above, Pontoon must have anticipated being joined to the proceedings on the question of dismissal as they had the contractual connection to the claimant and his personal service company GSI. It must have been a surprise initially that they were not a respondent to the original claim. Furthermore, if as the claimant submits, it is true that Pontoon were blacklisting the claimant then they could and should have anticipated that they would also in due course be party to the proceedings for detriment caused by their alleged conduct.**
>
> **43. I have read and taken into account the submissions ably made by Mr Hayes on behalf of Pontoon. I do not accept that the addition of the detriment necessarily will result in the substantive hearing of 5 days 19th-23rd March 2017 being too short. I am satisfied that there is an arguable claim against Pontoon/Adecco; much of the evidence relating to the termination of the claimant's engagement would be heard in any event and a substantial degree of disclosure has already taken place through the SAR relating to the detriment claim.**
>
> **44. In conclusion, had I found that the application to amend was out of time, I would not hesitate to find that the hardship and injustice to the claimant of not allowing the claim would far outweigh the hardship and injustice to Pontoon in allowing the claim for the reasons stated above."**

33. In the event, in addition to Pontoon, Olsten was added as a Respondent to the blacklisting claim. No separate issue arises on this appeal as to the position of Olsten.

(2)(f) The Reconsideration Judgment

34. Pontoon applied for the reconsideration of the Tribunal's judgment. This application was refused for the reasons set out in the Reconsideration Judgment of 16 February 2018. In

particular, in relation to the termination claim, the Tribunal said as follows in paragraphs 8 to 11 of the Reconsideration Judgment:

> **"8. The complaint of termination of claimant's services in response to raising a whistleblowing complaint was expressly referred to in the ET1. The ET1 was filed in time complaining of dismissal, albeit filed against the wrong respondent.**
>
> **9. The second respondent was added to the proceedings on 16th November 2017 at the preliminary hearing. No objection has been made in relation to the addition of the second respondent. It begs the question what was the second respondent added to the proceedings for in relation to the original ET1, if not for the termination of the claimant's services? Time limits do not apply where the complaint, which is not a new head of claim relates back to the original in time claim form. In any event short submissions on the First Amendment were heard, with the bulk of submissions relating to the Second Amendment.**
>
> **10. Furthermore, and in the alternative, allowing the claim of 'dismissal' against the second respondent is effectively correctly substituting the second respondent for the first respondent in respect of the dismissal of the claimant's services. Again, the claim is therefore not a new head of claim, it relates back to the original claim form which was submitted in time. The first respondent still remains answerable to the allegation of detriment in that they instructed the second respondent to terminate the claimant's services which constitutes a detriment.**
>
> **11. In the further alternative, if the First Amendment application is out of time, as both First and Second Amendments are detriments and are inextricably linked, I would unhesitatingly allow the First Amendment based on the reasons applying to the Second Amendment set out in paragraphs 39-42 and 44 namely that the balance of injustice and hardship between the claimant and second respondent clearly falls in favour of the claimant."**

35. There is a factual inaccuracy in paragraph 9 in that, as I have already stated, Pontoon did object to being added as a respondent.

(3) The Law

36. This appeal concerns two related matters, namely the Employment Tribunal's discretion to allow an amendment to a claim form and its discretion to add respondent to a claim. In particular, an Employment Tribunal has a discretion:

(1) to allow an amendment which introduces a new claim out of time: see ***Transport and General Workers Union v. Safeway Stores Limited*** (2007) 6 June, UKEAT/0092/07/LA; and

(2) to add a respondent to a claim after the time limit for commencing that claim has expired: see ***Gillick v BP Chemicals Ltd*** [1993] IRLR 43; and ***Drinkwater Sabey Ltd v Burnett*** [1995] ICR 328.

37. There is no specific provision in the **Employment Tribunals Rules of Procedures 2013** (as amended) which governs amendments, but the Employment Tribunal is required by rule 2 to seek to give effect to the overriding objective of dealing with the case fairly and justly. In relation to the addition of parties, rule 34 of the **Employment Tribunals Rules of Procedure 2013** (as amended) provides as follows:

> **"The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included."**

38. In relation to amendments generally, the Employment Appeal Tribunal said as follows in ***Selkent***, at 843F-844C:

> **"(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 for 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 the minor matters 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 that 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 Employment Protection (Consolidation) Act 1978.**
> >
> > **(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 Regulations of 1993 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 on discovery. Whenever taking any factors into account, the paramount considerations are**

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

39. In relation to an amendment involving the addition of a party after the expiry of a time limit, the Employment Appeal Tribunal held in ***Gillick v BP Chemicals Ltd*** [1993] IRLR 43 and ***Drinkwater Sabey Ltd v Burnett*** [1995] ICR 328 that the Employment Tribunal is not obliged to deal with the issue in the same way as a court would under what is now CPR 19.5. The Employment Tribunal has a discretion and should have regard to all the circumstances of the case, including any injustice or hardship which may be caused to any of the parties, including the party proposed to be added, if the proposed amendment were allowed, or as the case may be, refused.

(4) Ground 1: The Termination Claim

40. Ground 1 in the grounds of appeal is as follows:

> **"The ET erred at paragraph 27 in granting the Claimant leave to amend to add a claim of termination of his contract for having made protected disclosures, without having considered the matters required for amendment as set out in Selkent Bus Co. v Moore [1996] IRLR 661.**
>
> **3. The ET's reasons and decision are at paragraphs 19-27.**
>
> **The ET do not perform the exercise of balancing the prejudice and injustice to the parties of permitting the amendment. Save for noting at paragraph 20, R2's submission that they are prejudiced by the amendment, that exercise is not carried out.**
>
> **Furthermore, the ET do not determine whether the claim of termination is a new claim against R2 (as opposed to a re-labelling). In the alternative, if they find it was not, they erred in so doing, as it is plainly a new claim against R2.**
>
> **Thirdly, (and in consequence of (b)), this being a new claim against R2, the ET fail to consider whether the claim was brought in time as required by Selkent. For the avoidance of doubt the claim form was provided in June 2017 in relation to a termination that occurred in November 2016 and was plainly out of time with no reasonable basis for the extension of time."**

41. I am not persuaded that the Employment Tribunal failed to carry out the necessary balancing act. The Employment Tribunal expressed its conclusions very briefly in paragraph 27 of the Amendment Judgment, but that paragraph followed paragraphs in which the Employment Tribunal reminded itself of the relevant passages in ***Selkent*** and noted Pontoon's submissions on

prejudice. The Employment Tribunal did not expressly state the potential prejudice to the Claimant of refusing his application, but that prejudice was obvious, i.e. the loss of a claim which was not "manifestly hopeless and without merit."

42. The Employment Tribunal's discussion of the issue of limitation in relation to the termination claim was brief, especially when compared to its discussion of the issue of limitation in relation to the blacklisting claim, but that may be because the position was not disputed and/or because the submissions on that issue were comparatively brief. The Claimant brought the termination claim against National Grid in time, as the Employment Tribunal noted in paragraph 17 of the Amendment Judgment, and it appears that he did not attempt to dispute that the limitation period as against Pontoon had expired when he sought to add Pontoon as a respondent. Paragraph 19 of the Amendment Judgment can be read as proceeding on the assumption that the termination claim was out of time as against Pontoon.

43. Understandably, the Employment Tribunal appears to have regarded an amendment involving the addition of a new respondent to an in-time claim as more readily permitted than an amendment involving a new and, arguably, out-of-time, claim against both the existing and a new respondent.

44. In all the circumstances, I do not consider that there was an error of law on the part of the Employment Tribunal.

(5) Ground 3: The Blacklisting Claim: Discretion

45. Ground 3 in the grounds of appeal is as follows:

> **"The ET erred at paragraphs 39-41 in finding that limitation notwithstanding it would have permitted in the Claimants amendment.**
>
> > **5. In so finding the ET (a) Fail to actually balance the prejudice and injustice to the parties (b) in the alternative if they did so, failing to take into account the relevant matters required by Selkent."**

46. As set out in Pontoon's skeleton argument, the allegedly irrelevant considerations were that: (1) Pontoon "must have anticipated being joined" as a respondent; and (2) that "if it is true that Pontoon were blacklisting the Claimant then they could and should have anticipated that they would also in due course be party to proceedings".

47. By this ground of appeal, Pontoon seeks to challenge what was an alternative basis for the Employment Tribunal's decision to permit the addition of the blacklisting claim against Pontoon, when the primary basis (i.e. that the blacklisting claim was brought in time) is no longer challenged on this appeal (ground 2 having been dismissed). It follows that this ground of appeal, even if successful, would not impugn the Employment Tribunal's decision.

48. In any event, I am not persuaded, in the light of paragraph 44 of the Amendment Judgment, that the Employment Tribunal failed to carry out the required balancing exercise. Nor am I persuaded that the Employment Tribunal took into account irrelevant considerations. It seems to me that it is relevant to consider whether a proposed respondent could, or could not, have anticipated that proceedings might be brought by the Claimant. For example, depending in the facts, the argument for refusing an amendment might be stronger if advanced by a proposed respondent for whom the proceedings had come as a complete surprise.

(6) Ground 4: The Reconsideration Judgment

49. Ground 4 in the grounds of appeal is as follows:

> **"The ET erred in law in failing to reconsider its decision granting leave to amend it its decision on reconsideration sent to the parties on 16th February 2017.**
>
> > **6. Notwithstanding the above errors having been brought to their attention the ET failed to correct the said errors on reconsideration of their judgment, in which they are submitted to have erred in law as set out above."**

50. The premise for this ground of appeal is that the Employment Tribunal made errors of law in the Amendment Judgment, but I have concluded that it did not. It follows that it is

unnecessary to consider this ground of appeal any further. Whatever errors may have been made in the Reconsideration Judgment, the Amendment Judgment did not require reconsideration.

(7) Conclusion

51. For the reasons which I have given, these appeals are dismissed.