EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 February 2020

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MR G JUMBO APPELLANT

ZONAL RETAIL DATA SYSTEMS RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAVID GRAY-JONES (of Counsel) Instructed By: Direct Public Access
For the Respondent	MR HARRY SHEEHAN (of Counsel) Instructed By: Addleshaw Goddard Cornerstone Glasgow G2 2BA

SUMMARY

PRACTICE AND PROCEDURRE

An appeal against a refusal to allow amendments to a Claimant's ET1 was allowed, and remitted for rehearing.

Following a relatively short hearing, at which the ET was not provided with written copies of relevant authorities, it gave a ruling in which inadequate analysis was provided as to how the competing arguments for and against the making of an amendment were evaluated.

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HIS HONOUR JUDGE MARTYN BARKLEM

1. In this Judgment I shall refer to the parties as they were below. This is an appeal against the decision of an Employment Tribunal ("ET") sitting at Reading, Employment Judge Jenkins sitting alone, following a hearing on 21 March 2019 in which the ET refused the Claimant's applicant to amend his claim to add four separate claims. The hearing was a relatively short one lasting, I am told, about two hours and was the first hearing in the case, an earlier listing for the previous October having been cancelled for lack of an available judge.

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2. At the hearing the ET was required to deal with a variety of case management issues as well as hearing the application to amend. No witness statements were put before the Judge and no copies of authorities were provided. The Reasons record that the Judge was referred to the Presential Guidance and to **Selkent Bus Company Ltd v Moore** [1996] ICR 836. He seems to have raised the case of **Cocking v Sandhurst (Stationers) Ltd** [1974] ICR 650 himself.

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3. In marked contrast, in the appeal against the refusal to allow the amendments, skeleton arguments have been served running to 17 pages in the case of the Claimant and 14 in the case of the Respondent, augmented by oral submissions totalling one hour and 40 minutes on the part of the Claimant and a hour on the part of the Respondent. Some 24 authorities are in the authorities bundle and the appeal bundle itself runs to 139 pages. It has occupied at least 10 hours of my time including pre-reading and judgment writing.

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4. The Claimant was employed by the Respondent as a Field Services Engineer in August 2014. There is a dispute between the parties as to the geographical scope of those duties. He maintains that he was advised to work only within the M25. The Respondent disagrees.

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5. The Claimant maintains in these proceedings that he has a disability in the form of anxiety which arises when he drives on motorways, hence the importance of the geographical limitation he contends for. The question of disability is contested and there will be a hearing, listed for four days, at which that, along with other live issues, will be resolved.

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6. Following events which I need not recount, the Claimant was dismissed for gross misconduct, a decision being made following a meeting on 6 December 2017. An appeal was unsuccessful.

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7. On 10 January 2018, the Claimant lodged an ET1 in the Glasgow ET. The Particulars of Claim ran to six pages. On 7 February 2018, he lodged a second ET1 at the Watford ET, this being substantially the same as the original ET1 but with additional details in the narrative and a claim for unfair dismissal as well as the earlier claims of disability discrimination. The amended grounds of complaint attached to the second ET1 contained a further 10 pages of information.

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8. By letter dated 11 October 2018, the Claimant applied to further amend his claim to include additional complaints. In the letter he stated that he had not been aware of his right to bring claims of wrongful dismissal and holiday pay until after he took legal advice on 27 September 2018. He also said that he had been misled - I am paraphrasing - by the Respondent, into a belief that he was not entitled to claim accrued holiday pay having been dismissed for gross misconduct. He went onto to say that he had had advice on disability discrimination at a meeting at a law centre prior to the presentation of his first complaint but this did not include advice on victimisation and that he was not aware of his right to bring such a claim until 27 September 2018.

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9. At the ET hearing the parties were represented by the same counsel as appeared before me on the appeal, Mr Gray-Jones for the Claimant and Mr Sheehan for the Respondent. I am grateful to each for their skeleton arguments augmented with the oral submissions yesterday. I considered with care the many cases cited but have not found it necessary to analyse each case referred to.

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10. The scope of the original hearing was set out succinctly in the reasons as follows, omitting the first sentence which is not relevant:

> **"1. I also however considered an application made by the Claimant to add in four additional paragraphs to his particulars of claim. These essentially sought to amend his claims in the following manner:**
>
> **1.1 By the addition of a claim of victimisation under section 27 of the Equality Act 2010 ("EqA") by reference to an alleged protected act in the form of a comment made by the Claimant to two of the Respondent's managers at a meeting on 27 July 2017. The Claimant contended that the acts he complained of in his original claim form as giving rise to claims of disability discrimination should also be considered to be complaints of victimisation on the basis that they arose from that asserted protected act.**
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> **1.2 By the addition of a claim in respect of accrued but untaken holiday under regulation 30 of the Working Time Regulations 1998 ("WTR") and/or as a breach of contract. The basis of that claim was the Claimant's assertion that he had been entitled to 11 days' accrued but untaken holiday at the point of the termination of his employment, but that the Respondent had refused to make a payment to him in lieu of that leave, and had, incorrectly, stated to him, in an email dated 28 December 2017, that he was not entitled to payment in respect of accrued annual leave because he had been dismissed by reason of gross misconduct.**
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> **1.3 That alleged failure to pay the Claimant in respect of accrued but untaken holiday was also asserted to amount to direct discrimination under section 13 EqA, and/or a detriment because of something arising in consequence of the Claimant's disability under section 15 EqA, and/or an act of victimisation under section 27 EqA.**
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> **1.4 By the addition of a claim for wrongful dismissal on the basis that the Respondent had terminated the Claimant's employment without notice or payment in lieu of notice when it did not have grounds to do so."**

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11. Following what is accepted to be a brief but accurate direction as to the law encompassing **Selkent** and **Cocking** and the relevant sections of the Presidential Guidance on case management, the ET refused each of the amendments, considering each in turn. It is from each such refusal that the Claimant appeals.

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12. The parties are in broad agreement as to the effect of those authorities which was succinctly summarised by the Employment Judge as follows:

> **"2. The parties' representatives both made cogent submissions to me in relation to the tests to be applied in relation consideration of applications to amend. Both made reference to the sections of the Presidential Guidance on Case Management dealing with applications to amend. I was also referred to the case of Selkent Bus Company Ltd v Moore [1996] ICR 836, and I was also myself mindful of the direction provided by the case of Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650.**

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> **3. The guidance provided by that case was that the key principle when considering the exercise of the discretion to allow an amendment is to have regard to all the circumstances, and in particular any injustice or hardship which would result from the amendment or refusal to amend.**

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> **4. In Selkent, the Employment Appeal tribunal set out a non-exhaustive list of relevant factors which are to be taken into account in considering the balancing exercise of all the relevant factors, having regard to the interests of justice and the relative hardship that would be caused to the parties by the granting or refusing of the amendment. These were; the nature of the amendment, the applicability of time limits, and the timing and manner of the application.**

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> **5. The Presidential Guidance reaffirms the Cocking and Selkent guidance, noting that relevant factors include the three matters outlined in Selkent, and also noting that tribunals draw a distinction between amendments which seek to add or substitute a new claim arising out of the same facts as the original claim, and those which add a new claim entirely unconnected with the original claim.**

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> **6. With regard to time limits, the Presidential Guidance notes that the fact that the relevant time limit for presenting the new claim has expired will not exclude the discretion to allow the amendment, and also that it will not always be just to allow an amendment even where no new facts are pleaded. In particular, the Guidance notes that where there is no link between the facts described in the claim form and the proposed amendment, the tribunal must consider whether the new claim is in time and will take into account the tests for extending time limits. In this case, those were; the just and equitable formula in relation to the victimisation claim and the expanded detrimental treatment claim, and the not reasonably practicable formula in relation to the failure to pay unpaid holiday and wrongful dismissal."**

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13. Mr Gray-Jones submits that, notwithstanding the correct self-direction, the ET failed to have regard to the correct principles when dealing with the application. He acknowledges that this was a case management decision with which the EAT will not likely interfere: see **O'Cathail v Transport for London** [2013] ICR 614 in which Mummery LJ said that an ET's decisions can only be questioned for error of law which only arises in relation to their exercise, when there is an error of legal principle in the approach or perversity in the outcome."

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14. It was also Mummery LJ who described perversity in **Yeboah v Crofton** [2002] IRLR 634 at paragraph 93 when he said that it required an overwhelming case to have been made out

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that the tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the law, would have reached. . Even in cases where the Appeal Tribunal has ‘grave doubts’ about the decision of the Employment Tribunal, he said, it must proceed with ‘great care’

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15. It is accepted to be a high hurdle for an Appellant to surmount. However, Mr Gray-Jones says, and it is not disputed, that the mere status of a hearing as being one for case management does not mean an error of law cannot vitiate it.

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16. Mr Gray-Jones prays in aid Underhill’s LJ comments in **Abercrombie & Others v Age Rangemasters Limited** [2014] ICR 209 at paragraphs 48 and 50 when he said:

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> **“48. Consistently with that way of putting it, the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted: see the discussion in Harvey on Industrial Relations and Employment Law para. 312.01-03. We were referred by way of example to my decision in Transport and General Workers Union v Safeway Stores *Ltd* (UKEAT/0092/07), in which the claimants were permitted to add a claim by a trade union for breach of the collective consultation obligations under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 to what had been pleaded only as a claim for unfair dismissal by individual employees. (That case in fact probably went beyond "mere re-labelling" – as do others which are indeed more authoritative examples, such as British Printing Corporation (North) Ltd v Kelly (above), where this Court permitted an amendment to substitute a claim for unfair dismissal for a claim initially pleaded as a claim for redundancy payments.)**

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> **50. As to point (b), it is true that fresh proceedings under section 34 of the 1996 Act would have been out of time. Mummery J says in his guidance in Selken*t* that the fact that a fresh claim would have been out of time (as will generally be the case, given the short time limits applicable in employment tribunal proceedings) is a relevant factor in considering the exercise of the discretion whether to amend.7 That is no doubt right in principle. But its relevance depends on the circumstances. Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time-limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded – and a fortiori in a re-labelling case – justice does not require the same approach: NB that in High Court proceedings amendments to introduce "new claims" out of time are permissible where "the new cause of action arises out of the same facts or substantially the same facts as are already in issue" (Limitation Act 1980, section 35 (5)). In the circumstances of the present case the fact that the claim under section 34 would have been out of time if brought in fresh proceedings seems to me to be a factor of no real weight. There is, as I have already said, no question of any specific prejudice to the Respondent from the claim being reformulated after the expiry of the time limit.”**

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17. Mr Sheehan, in turn, relies on the second paragraph and in particular the comment regarding circumventing time limits.

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18. Mr Gray-Jones summarises the errors of law which he says the ET made as follows:

> "(a) The ET failed to have regard to the fact that every amendment applied for had a close connection to the original claim legally and factually.
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> (b) The ET regarded the delay in bringing the amendment as decisive when there was no basis to do so. In particular the ET erred by failing to look at the delay in the context of the proceedings, and in particular the stage the proceedings had reached at the date of the application to amend.
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> (c) The Tribunal did not apply the balance of prejudice test properly or at all.
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> (d) the Tribunal erred in its approach to the relevance of time limits when considering an application to amend and also erred in its approach to extending time."

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19. Mr Sheehan replies that the weight placed on the various factors which fell to be balanced was a matter entirely for the Tribunal. He cites Lord Allanbridge in the Inner Court of Session (on appeal from the EAT) Tribunal in **Eclipse Blinds Ltd v Wright** [1992] IRLR 133 where he stated as follows at paragraph 14:

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> **"…The weight to be attached to any evidence in any case is a matter for the Tribunal determining the facts. It can never be for an appellant Tribunal concerned only with the errors of law, to decide to take upon itself the task of deciding what weight should be attached to the particular facts…"**

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20. Mr Sheehan also reminded me of Rule 62 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, and in particular sub-rule 4) which provides that the reasons given for any decision shall be proportionate to the significance of the issue and for decisions other than judgments may be very short. The decision under appeal is not, of course, a judgment. However, that does not mean that in a case such as this the factors in play do not have to be set out and analysed; see for example **Transport and General Workers Union v Safeway Stores Ltd** [2007] UKEAT/0092/07/0606 in which Underhill J, as he then was, criticised the ET considering an amendment application for failing to apply the decided case law and failing to

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review the overall circumstances including the relative balance of injustice: see paragraph 15 of that case.

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21. I turn to each of the proposed heads of amendment. Paragraph 11 of the original ET1 reads as follows|:

> **"The Appeal meeting was held on 27 July 2017 and I highlighted the fact that as yet nothing had been done to provide me with any assessment, support, advice or adjustments to assist me to carry out my work to the best of my ability taking into account my anxiety condition."**

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22. The proposed amendment at paragraphs 58 and 59 are in these terms:

> **"58. In the alternative, I would like to bring a complaint of victimisation under Section 27 of the Equality Act 2010 . I informed Mike Hood and Catriona Dick in the meeting of 27 July 2017, that I considered I was being discriminated against by the respondent because of my anxiety condition. I believe that this statement amounted to a protected act under Section 27 of the Equality Act 2010. I believe that I have been subject to the detriments set out in paragraphs 18 to 21, 24 - 25, 27, 29 - 30 and 47 and dismissed and my appeal against dismissal dismissed (paragraph 54) because of the protected act.**
>
> **59. I also believed that the Respondent's decision not to pay me in respect of my accrued and untaken holiday pay notified to me in an email from Catriona Dick dated 28 December 2017 was a detriment because of something arising in consequence of my disability under Section 15 of the EqA or in the alternative an act of victimisation under Section 27 of the Equality Act 2010."**

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23. The Tribunal found (paragraph 8.1) that the proposed amendment "had no link to the facts initially included in the claim form." That is an odd statement because the proposed amendment is quite clearly saying that the detriments pleaded were acts of victimisation. The reasons go on (paragraph 8.2) to say that the same acts as pleaded in relation to the disability discrimination claim were those said to amount to victimisation. However, there was no reference in paragraph 11 of the original ET1 to a "protected act" and the test applied to victimisation was fundamentally different to one of direct discrimination, with the Claimant not being required to establish that he was disabled or that any claim of disability discrimination succeeded. Paragraph 8.3 concluded that "the amendment was a substantial one with no clear link to the facts described in the usual claim form." I repeat my earlier concerns as to this form of words.

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24. So far as time is concerned, the just and equitable test applied. All possible acts of victimisation (other than non-payment of holiday pay had taken place by 5 December 2017. The ET concluded:

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> **"8.5. I considered the tests for exercising the just and equitable extension, noting the Claimant's contention that the applicability of time limits is only a factor and is not conclusive. I noted that the test for extending time on this basis was clarified by the case of British Coal Corporation v Keeble [1997] IRLR 336, which confirmed that it would be appropriate to consider the terms of section 33 of the Limitation Act 1980, which applies in relation to applications to extend time in civil cases.**
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> **8.6. That section requires consideration of the prejudice which each party would suffer as a result of the decision reached, and regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. Considering those elements, I was not satisfied that it would be appropriate to extend time to allow the claim to proceed.**
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> **8.7. The Claimant, in his covering letter with which the application to amend was submitted, on 11 October 2018 just prior to the previously scheduled preliminary hearing which had been postponed, noted that he had taken advice on disability discrimination from a law centre just prior to the submission of his first complaint in January 2018, but that this did not include advice on victimisation. Nevertheless, the factual background to the Claimant's alleged victimisation claim would have been in his knowledge prior to the termination of his employment. The Claimant had therefore delayed significantly in submitting any victimisation claim, notwithstanding that he had taken advice at a relatively early stage in the process.**
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> **8.8. I noted that the Claimant had submitted a comprehensively worded claim form in January 2018, and that that had been supplemented by further complaints relating to unfair dismissal in March 2018. He had then done nothing further until taking advice on 27 September 2018."**

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25. In support of ground 1, which asserts that the ET erred in law in refusing to grant the amendment, Mr Gray-Jones argues that there was a protected act at the meeting of 27 July, in that the Claimant had provided information which should reasonably have been construed as informing the Respondent that he suffered from a disability (an impairment with a substantial and long-term adverse effect on his ability to carry out day-to-day activities) and that the Respondent had failed to make adjustments to take account of his condition.

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26. The ET should, he submits, have first determined whether the facts relied upon had been pleaded, bearing in mind that this was a disability discrimination claim, a term which encompasses victimisation. Had this been done, he argues, it must inevitably have been regarded

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as a re-labelling exercise. Alternatively, the fact that the alleged detriments were almost wholly those already pleaded was sufficient for there to be a close connection between the existing and the new complaints. Both the original complaints and the complaint of victimisation would involve a determination of whether the Respondent had subjected the Claimant to detriment and dismissed him.

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27. At the hearing before me Mr Gray-Jones also pointed to paragraphs 15 and 20 of the original claim form in which the words "punitive" and "punishment" were used to describe the treatment he had suffered, although he conceded he had not drawn the ET's attention to these.

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28. So far as time limits are concerned, Mr Gray-Jones argues that, in the circumstances of the case, the Tribunal was wrong to hold that the question of delay (the amendment application was made in October 2018) and when legal advice was taken were factors which should have been given any weight. He says that it is the degree of prejudice that arises from the delay which is material and not the delay itself. The amendments were proposed in October, before the first preliminary hearing. Nothing had happened by that stage in the case other than the exchange of pleadings.

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29. Finally, he points to the absence to any evaluation of the relative hardship, something which in **Selkent** was said to be at the heart of the decision. All relevant facts were in the ET1 and it would add little to the length of the merits hearing to canvas the additional question whether the Claimant having raised the issue at the meeting concerned was the reason for subsequent actions.

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30. In response, Mr Sheehan pointed the fact that at paragraph 8.2 the ET said that there was no reference to any form of "protected act", not that there was no reference to any event that

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"could be" a protected act. He submits that, correctly read, paragraph 8.2 indicates that the ET placed weight on the fact that the Claimant had not described either the meeting as including a protected act or relied on this as such, rather than making a conclusive finding that it was not a protective act. Relying on **Housing Corporation v Bryant [1998] ICR 123**, Mr Sheehan says that as there was no link in the claim form between the meeting and the alleged detriments, the consequence is that the amendment gives rise to a claim not made in the original claim forms. He accepts that the ET's reference in the reasons to there being "no clear link to the facts described in the initial claim form" was infelicitous, but the **Selkent** issue with which the ET was engaging was whether the amendment was a substantial one.

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31. Dealing with the amendment as a whole, he submits that the decision to refuse the amendment was an appropriate exercise of discretion. The amendment was substantial, it introduced a wholly new cause of action well outside the statutory time limits and there had been considerable delay before the application to amend was made.

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32. I must be careful not to step over the bounds imposed on this Appellant Tribunal by **Yeboah**. I must not substitute my own views for those of the ET unless I consider them to be ones which it could not legitimately have reached.

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33. My principal concern in regard to this ground is that, although the ET has set out the relevant legal tests, both as to general principles as well as the relevant factors in this particular amendment application, it has merely recited what those factors are but has given no indication at all as to how it evaluated the pros and cons, none such having been set out in paragraph 8.6. The Respondent had pleaded to the allegation concerning the meeting in terms which suggest that - see paragraph 16 of the Grounds of Resistance - paragraph 72 may not greatly be in dispute. How then, I ask rhetorically, is the Respondent adversely affected by the delay? Is the cogency

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of evidence likely to be affected when there seems to be a note of a meeting? The prejudice suffered by the Claimant is, on the other hand, self-evident.

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34. It is true that there was little before the ET as to the reason for the delay, but for the purposes of this appeal I accept that a sensible interpretation of the letter seeking the amendment is that the concept of "victimisation" was only learned by the Claimant a fortnight before he sought the amendment. I entirely accept Mr Sheehan's point that the letter is not clear as to what legal advice had initially been sought, but there seems to have been no request by anyone for the hearing to be adjourned and/or for further details to be provided, notwithstanding that several months had elapsed between receipt of the letter and the eventual hearing in March.

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35. The criticism at paragraph 8.8 that the Claimant did nothing between submission of this form in March and then seeking advice on 27 September suggests that delay *simpliciter* was the guiding force in reaching that conclusion. There is no analysis of the effect of the delay in the context of the proceedings as a whole.

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36. Taken in the round, I conclude that the ET's failure properly to identify and weigh the competing factors such as to demonstrate that it carried correctly the legal test before it are such as to amount to an error of law.

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37. I consider the question whether the victimisation claim was in reality one of re-labelling to be finely balanced. The ET clearly erred in its twice-repeated statement that the proposed amendment had no link with the facts initially included in the claim form. It seems to me that as this ground is going to have to be reconsidered by an ET, that issue should be resolved by it together with the other relevant factors.

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38. The second ground of appeal concerns a refusal to allow what is accepted to be a wholly new claim for accrued holiday pay due on termination of employment. It is formulated at paragraph 60 of the proposed claim in these words:

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> **"I further wish to bring a claim for accrued holiday pay under Regulation 30 of the Working Time Regulation 1998 and/or as a claim for breach of contract. On the date of termination of my employment with the Respondent I was entitled to 11 days of accrued annual leave. The Respondent has refused to make the payment to me in the year of this accrued annual year and Catriona Dick claimed in an email to me dated 28 December 2017 that I was not entitled to any payment for accrued annual leave because I was dismissed for gross misconduct."**

39. The Tribunal found as follows:

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> **"9.1. As with the victimisation claim, I considered that the claim in respect of accrued but untaken holiday pay was not connected to anything within the initial claim forms, and indeed the Claimant's representative conceded that. The issue of the compliance with time limits was therefore material.**
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> **9.2. Whether considered as a claim under the WTR or as a claim of breach of contract under the Extension of Jurisdiction Employment Tribunals (England & Wales) Order 1994, the test for extending time is that of reasonable practicability. That required me to consider whether it had been reasonably practicable for the Claimant to have submitted the claim within time, and, if it was considered not to have been reasonably practicable, whether the claim had been submitted within a reasonable time thereafter.**

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> **9.3. I considered closely the underlying direction provided by <u>Cocking</u> and <u>Selkent</u> and the Presidential Guidance which is to have regard to all the circumstances and in particular any injustice or hardship which would result. In that regard, I noted that the comment made by the Respondent's manager in December 2017 was very likely to have been incorrect, unless the wording of the Claimant's contract was worded very specifically to allow for no payment, or only very limited payment, to be made. The Claimant would therefore seem to have had a fairly compelling case in relation to his claim in respect of accrued but untaken holiday.**

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> **9.4. However, as has been made very clear on many occasions, notably by the Court of Appeal in <u>Bexley Community Centre v Robertson</u> [2003] EWCA Civ 576, albeit in the context of a just and equitable extension, employment tribunal time limits are there to be complied with. No cogent rationale was advanced as to why the Claimant had not brought this claim at an earlier stage, and I noted that the Claimant had taken advice prior to the presentation of his first complaint, i.e. in January 2018. Bearing in mind that the Claimant included significant detail relating to various claims; of discrimination, unauthorised deduction from wages and disability discrimination in January 2018, and then unfair dismissal in March 2018; and delayed by a further seven months before asserting this claim, I did not consider that this amendment should be accepted."**

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40. Mr Gray-Jones submits that the Tribunal failed properly to apply the test of whether the claim was "closely linked" to the existing complaints and argues that, as it relates to the termination of employment, it must have been. He argues that the fact that the statutory time limit had passed was not determinative and that in paragraph 9.3 the ET confused the balance of hardship test with that of the reasonable practicability of bringing a claim. As the ET had found that the Claimant had a "fairly compelling case" in relation to the holiday pay claim, he submits,

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it showed that he would suffer considerable prejudice while any such suffered by the Respondent was not identified. Mr Sheehan's submissions merely summarises saying that this was a classic case of the ET weighing opposing arguments and reaching a decision which has to be respected.

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41. I am mindful of paragraph 50 of **Abercrombie** set out above and in particular the passage in which Underhill LJ says that where a claim is closely connected with the claim already pleaded - *a fortiori* in a re-labelling case, justice does not require the same approach to statutory time limits.

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42. At paragraph 9.3 the Tribunal noted the requirement on it to consider any hardship or injustice it could result, but went on to opine that the Claimant had a "fairly compelling case" and that the email which led to his not having pursued the claim earlier was "very likely to have been incorrect." Therefore, the prejudice to the Claimant in not being permitted to pursue his claim for monies, which the Employment Judge clearly thought would be due, was manifest. What was the competing prejudice to the Respondent? None was stated and it is hard to see that there could have been any prejudice in it having to pay sums which may have been contractually due, as distinct from having to face a claim for an award of compensation under statute brought outside the time limit.

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43. Instead, the ET went on to set out the timetable and repeated that the Claimant had taken legal advice, although the nature and extent of that advice had not been explored in any detail. The letter of 11 October says that his understanding that he was not entitled to claim holiday pay was based on the email from Ms Dick which the Tribunal had described as "very probably incorrect". Having regard to the interest of justice point in **Abercrombie**, which was not cited

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to the Tribunal, it seems to me that the Tribunal erred in law in failing to state or balance relative hardship to the parties instead focusing solely on the length of delay.

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44. It also failed to grapple with the important factor that it was the Respondent's own advice - "very likely to have been incorrect" - which was the stated reason for the delay in bringing the claim until, on recent advice, the error was correctly shortly before the amendment. As this was a new claim multiple factors fell to be considered and it is not appropriate for me to substitute my own decision for that of the Tribunal.

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45. Ground 3 concerns the proposed paragraph 59 in the Particulars of Claim set out above, namely the assertion that non-payment of holiday pay with an act of discrimination and/or victimisation. The Tribunal set out its conclusions very briefly:

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> **"10. Amendment to add in the failure to pay accrued but untaken holiday as matters of discrimination and/or victimisation**
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> **10.1. I can deal with this aspect very briefly in that I have already concluded that it would be inappropriate to allow the Claimant to amend his claim to include one of victimisation and also to amend his claim to include a claim in respect of accrued but untaken holiday.**
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> **10.2. Notwithstanding that the alleged act of victimisation, i.e. the failure to pay holiday pay, occurred slightly later than his earlier alleged act, it still took place some ten months before he first raised it as a possible issue. For the same reasons therefore, I did not consider it appropriate to allow the claim to be extended in this regard as well."**

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46. Mr Gray-Jones in his skeleton argument repeats the points which he made in relation to holiday pay and victimisation, above, and submits, compendiously that the Tribunal erroneously found that there is was no close connection between the new complaints and the complaints already pleaded, erred in its approach to delay, failed to apply the balance of prejudice test properly or at all and erred in its approach to time limits, which, in the case of the discrimination complaint would be whether it was just and equitable to extend time.

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47. Mr Sheehan in reply points out that the arguments in relation to this ground are merely a repeat of those in the first and second grounds. I agree and given my reasons for allowing the appeal in relation to the first two grounds, this aspect, too, must be remitted.

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48. The final amendment sought was at paragraph 61. It reads as follows:

> **"I further wish to bring a claim for breach of contract/wrongful dismissal as the Respondent terminated my employment without notice or payment in lieu of notice when it did not have grounds to do so. I did not act in the way alleged by my employer in support of their decision to dismiss me without pay or payment in lieu of notice. I rely on the matters set out in paragraphs 47 to 57 above in support of this claim."**

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49. The Tribunal held as follows:

> **"11. Wrongful dismissal**
>
> **11.1 Again, I considered that the claim in respect of wrongful dismissal was not connected to anything within the initial claim forms, which required me to consider time limits. The test for extending time in relation to a wrongful dismissal claim is also that of reasonable practicability. Again therefore, the fact that the Claimant had delayed so long in raising this issue, notwithstanding that he had taken legal advice from a law centre in January 2018, was a significant factor.**
>
> **11.2 I noted the Claimant's representative's submissions that the issues to be considered in relation to a wrongful dismissal claim already needed to be considered in the context of his claim of unfair dismissal which had been submitted in time. However, I could not agree with that.**
>
> **11.3 The test for wrongful dismissal is very different to that applying in an unfair dismissal claim, focusing on the tribunal needing to objectively form a view as to whether the Claimant had committed an act of gross misconduct which would have justified his summary dismissal. By contrast, the test for unfair dismissal will not encompass the question of whether the Claimant had or had not committed the stated act of misconduct, but on whether the Respondent had acted reasonably in concluding that he did and in dismissing him in that regard.**
>
> **11.4 Again therefore, I did not consider that it would be appropriate to allow the amendment to be made."**

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50. Mr Gray-Jones submits, first, that the ET should have treated this application to amend as one of re-labelling, as the basis of the claim is clearly pleaded in the original grounds of complaint, which state that the alleged misconduct did not occur. Second, that it was wholly wrong and/or perverse to find such a claim had no connection to the claims originally pleaded when the original claims contained complaints of unfair and discriminatory dismissal. Third, that the ET failed to apply the balance of prejudice test, failing to identify any prejudice to the

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Respondent. As the Respondent was already facing claims for unfair and discriminatory dismissal, it was fanciful, he submitted, to suggest that it would be prejudiced by having to address the test for wrongful dismissal when preparing its case. In any event, the test is not whether the issues were different but whether the amendments would require the raising of "wholly different evidence." Finally, insofar as time limits are concerned, he submits that the ET erred in failing to take account of the Claimant's assertion in an email that he was not aware of his right to bring a wrongful dismissal claim.

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51. Mr Sheehan submits (as the ET identified) that a wrongful claim involves a different investigation on the part of the ET, focusing on whether a fundamental breach of contract actually occurred as distinct from the question whether the Respondent acted reasonably in dismissing him. He points out that in the present case each of the matters for which the Claimant was disciplined took place from away the Respondent's premises and complaints were received from members of the public. He accepts that the ETs 'use of language - saying that proposed amendment was "not connected to" matters within the claim form - was clearly incorrect, but that the use of that expression does not detract from the findings as a whole. The fact that this was a matter to which the "reasonably practicable" test applies was, he submits, a material factor, as the ET found. It emerged during the appeal hearing that the potential evidential difficulties advanced before had not been raised before the ET.

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52. The amended grounds are plainly closely connected to the pleaded facts. The Claimant had asserted that the incident for which he was dismissed was a fabrication and the ET's assertion that they were "not connected to anything within the initial claim forms" cannot bear scrutiny. Moreover, rather than setting out the relative hardships of the parties and weighing them up before reaching a conclusion, the ET simply stated that the fact that the Claimant had received legal

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advice at the law centre was a "significant factor" without enquiry or explanation as to the scope of that advice. It was unfortunate that the parties were content to rely solely on the documentation before the ET and not to suggest that evidence be taken.

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53. However, I consider that the ET erred in law in placing such weight on the legal advice when the information before it on the scope of that advice was so limited. It follows that that ground of appeal succeeds as well.

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54. The question of disposal was canvassed at the hearing. It was common ground that, in the event of my making the findings which I have, the matter would have to be remitted to the

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ET. Mr Sheehan submitted that the matter should be remitted to the same Judge. Mr Gray-Jones that it should be remitted to a different Judge. He relied principally on the description given by Mr Sheehan on "infelicitous language" having been used in parts of the reasons and that the

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perception that the same Employment Judge would be having a "second bite at the cherry."

55. I commented at the outset at the wholly different way in which this appeal was conducted compared to the material placed before the ET. I have considerable sympathy for the Employment

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Judge and have no doubts as to his professionalism.

56. Given the lapse of time, however, I doubt that any time would be saved at the rehearing

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by what are bound by now to be dim recollections of the case. Having regard to the principles in **Sinclair Roche & Temperley & Ors v. Heard & Anor** [2004] IRLR 763, I take the view that the case need not be reserved to the original Employment Judge, but equally that he need not be

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precluded from dealing with the rehearing if the Regional Employment Judge so decides.

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57. I make no directions as to the form the rehearing is to take. However, given the breadth of submissions which were advanced before me on appeal and the comments as to the limitations of evidence supporting some of the ET's conclusions, it may be that evidence will be required. I am sure that the parties will liaise in relation to that in due course.

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