Appeal Nos. UKEAT/0283/19/AT
UKEAT/0284/19/AT

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 4 June 2020
Judgment handed down
On 17 June 2020

Before

THE HONOURABLE MR JUSTICE KERR

(SITTING ALONE)

GTR LIMITED — APPELLANT
(Respondent below)

MR CHRIS RODWAY AND OTHERS — RESPONDENTS
(Claimants below)

APPROVED JUDGMENT

APPEARANCES

For the Appellant	MR PAUL GOTT QC (of Counsel) Instructed by: Eversheds Sutherland (International) LLP, 1 Wood Street, London EC2V 7WS
For the Respondents	MR NICHOLAS TOMS (of Counsel) Instructed by: Thompsons Solicitors LLP, Condor House, 5-10 St Paul's Churchyard, London EC4M 8AL

SUMMARY

BLACKLISTING REGULATIONS
JURISDICTIONAL POINTS – Extension of time: just and equitable
PRACTICE AND PROCEDURE – Amendment
PRACTICE AND PROCEDURE – Striking out/dismissal

It had not been open to an employment judge to decide that the claimants merely sought to re-label their claims when seeking an amendment to claims alleging discrimination on the ground of religion and belief and non-payment of holiday pay. The amendment sought to introduce, based on largely but not entirely the same facts, claims for compensation for breach of the **Employment Act 1999 (Blacklisting) Regulations 2010** (**the 2010 Regulations**).

When applying the well known **Selkent** guidelines, the judge had correctly discerned that the factual basis of the claims was largely unchanged, other than by developments since they were originally presented; but she failed to take into account the substantial differences between the nature of the causes of action asserted in the original claims and those advanced in the draft amended claims; and, in consequence, the change in the remedies sought.

A claim under the **2010 Regulations** requires the existence and use of a prohibited list. The cause of action is a form of discrimination quite unlike discrimination on the ground of religion or belief. The initial claims appeared to rely on non-payment of holiday pay but did not, unlike the draft amended claims, make clear that the remedy sought in respect of the non-payment was not the payment of the sums due but compensation for breach of the **2010 Regulations**.

The judge had also omitted to address the respondent's contention that the claims, as originally presented, had been brought out of time. Although she had appreciated that the **Selkent** guidelines included consideration of time limits, she had considered the time limits issue on the basis that it was appropriate to treat the original claims as having been made under the **2010 Regulations** at the time they were presented.

The judge's exercise of discretion to allow the amendment was therefore flawed. The application for permission to amend the claims would be remitted for reconsideration by a different employment judge. Time limits would also need to be revisited as part of the reconsideration exercise, including consideration of whether the claims as originally presented had been brought out of time.

THE HONOURABLE MR JUSTICE KERR

Introduction

1. The appeal in this case is against a decision of an employment judge permitting an amendment to claims arising out of a dispute over backdated holiday pay and deciding that the claims were brought in time and that they had a reasonable prospect of success and should not be struck out. The amendment sought to characterise the claims as claims for alleged breach of the **Employment Relations Act 1999 (Blacklists) Regulations 2010** (**the 2010 Regulations**). When first presented, the claim forms did not refer to the 2010 Regulations but to unpaid holiday pay and discrimination on the ground of religion or belief.

2. The appeal proceeds after some revision of the grounds of appeal following a preliminary hearing. The decisions appealed against arose from a preliminary hearing and case management hearing on 5 June 2019 at the London South employment tribunal. EJ Sage dismissed an application to strike out the claims as having no reasonable prospect of success. She decided that the claims were in time and allowed the amendment to characterise them as claims under the 2010 Regulations. She gave case management directions for a full hearing over two days in October 2020, some 16 months later.

3. The judge issued a short confirming written judgment without reasons, dated 28 June 2019 and sent to the parties on 5 July 2019. Later, on 22 July 2019 she gave full written reasons at the request of the respondent (the appellant in this appeal). Those were not sent to the parties until 4 September 2019. By then the appeal had already been brought. Following the sift and a preliminary hearing which resulted in the grounds being amended and narrowed down, it now comes before me. The full hearing listed in October 2020 has not yet taken place.

The Facts

4. In October 2016, a collective agreement was reached between the respondent and the National Union of Rail, Maritime and Transport Workers (**RMT**) in respect of backdated holiday pay for its members in the employment of the respondent, relating to the years 2015 and 2016. However, at the time, there was an ongoing dispute over the use of driver only operated trains, to which the RMT objected. Industrial action was taking place.

5. Under the collective agreement, payments of backdated holiday pay were to be made in November and December 2016. However, on 31 October 2016, the respondent wrote to the RMT saying that since its conductor members taking part in the action were breaching their contracts and causing loss to the business, the respondent:

> **"will (without prejudice to our rights) withhold payment of any backdated holiday pay from conductors. Any conductors who have either worked normally during the dispute, or confirm that they will now work normally during the remainder of the dispute and will not participate in further industrial action, will receive payment … ."**

6. The RMT was not happy about that. On 9 November 2016, its general secretary wrote complaining that the respondent had not previously referred to withholding payment and that to do so would breach Part 3 of the **Trade Union and Labour Relations (Consolidation) Act 1992**

(**the 1992 Act**) and infringe article 11 of the **European Convention on Human Rights** (**ECHR**). The letter warned that unless payment were made, employment tribunal proceedings would be likely to follow.

7. The respondent produced a written form of undertaking to work normally until the dispute was resolved and that:

> **"in return for GTR releasing to me early a payment in respect of backdated holiday pay, I undertake to GTR that … I will not take part in any more strikes or industrial action … called by the RMT in this dispute [and] … will work all my rostered hours during this dispute."**

8. The undertaking also included confirmation of the signatory's understanding that in the event of participation in industrial action gross backdated holiday pay otherwise payable may be deducted in future on account of participation in the industrial action; although the document also stated that the undertaking "does not change my terms and conditions of employment".

9. On 14 November 2017, over a year after the RMT's letter before claim, the respondents to this appeal (the claimants) presented the claim in this case, in the Bristol employment tribunal. The first claimant is a conductor. He represented himself and the other 57 claimants. The RMT were not involved, nor were solicitors at that stage. The claim form stated that the claimants had been discriminated against on the grounds of religion or belief and that they were owed holiday pay. There was no mention of the **2010 Regulations**.

10. The narrative in box 8.2 recited the collective agreement and that the back pay "should have been paid in October 2016". The narrative then went on to state:

> **"Every other grade employed by the respondent has been paid this money except one group of People. Included in this group are the applicants to this claim. They are employed by the respondent as Conductors, Conductors Instructors and On Board Service Supervisors.**
>
> **Since April 2016 this group have been involved in a legal Trade dispute with the employer and have taken Strike Action.**
>
> **This Strike Action has been lawful under current legislation, the applicants have been subjected to many forms of harassment and bullying by the Respondent because they have supported the Strike action called by their Trade Union the RMT.**
>
> **This has included withholding of the Payment agreed under the bargaining machinery, in relation to this claim.**
>
> **The respondent has made it clear that they will not be fulfilling their obligations to the agreement until each of the applicants signs a pledge not to participate in any action called for by their Trade Union in relation to the dispute**
>
> **Not only does this violate the respondents obligations under the agreed bargaining machinery but by continuing with this discrimination they are in breech [sic] of the following**
>
> **Freedom Of Association under Article 11 of European Convention on Human Rights**
>
> **1996 Employment Rights Act"**

A The remedy sought was compensation and a "recommendation", which can be claimed only "if claiming discrimination" (in the words of the ET 1 template).

11. The respondent submitted its ET 3 response on 30 November 2017. The respondent said it did not understand on what basis the claims were made. It asserted that the claims were out of time because the non-payment complained of was of holiday pay said to have fallen due in October 2016, over a year earlier. It also stated that two individuals had received their payment B and a third would shortly do so and so their claims should be struck out.

12. The response stated that whatever the basis of the holiday pay claims, they were out of time and should be struck out. The complaint of discrimination on the ground of religion or belief should be struck out because there was no basis for it. Breach of Article 11 of the **ECHR** was denied and the respondents said the claim for breach of that provision "is not understood".

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13. The respondent, accordingly, sought a preliminary hearing for the tribunal to consider striking out the claims. That took place by telephone on 6 March 2018 in Bristol before Employment Judge Harper. The respondent was represented by counsel, Ms Lord. The first claimant represented the claimants. The respondent applied to transfer the case to Croydon, which the claimants did not oppose. The judge explained that he could not give advice but the "religion or belief" claim did not appear to be supported, while a tribunal could not hear a free D standing claim under article 11 of the **ECHR**.

14. The first claimant explained that the RMT's legal department would be taking over representation. He did not know the position about the three claimants who had been or would soon be paid holiday pay. The judge gave case management directions for a further one day preliminary hearing to consider (so far as relevant for present purposes) time limits and jurisdiction, striking out, clarification of the issues, further case management orders and any E withdrawals or dismissals of cases that would not proceed.

15. The next day, the claims of the three claimants mentioned in the ET 3 response were withdrawn by the first claimant, on their behalf. He also withdrew any discrimination claim based on religion or belief. Five days later on 12 March 2018, the RMT's solicitors went on the record in the claims. The matter came before Employment Judge Ford QC on 16 March 2018. F He gave orders embodying those developments and transferred the case to London South.

16. As recorded in a letter of 16 March 2018 from the Bristol tribunal office, EJ Ford QC noted that as solicitors were now acting, "it would be helpful if the bases of the claims were clarified". He directed that by 6 April 2018 the claimants should "clarify the bases of the claims and the statutory provisions under which they are brought". After a delay due to counsel's commitments, on 16 April 2018 the claimants produced a draft form of amendment to the claim, G settled by Ms Naomi Ling of counsel.

17. In those draft amended grounds, it was asserted that the respondents were continuing to withhold the backdated holiday pay "until each of the relevant employees signs an undertaking not to participate in any action called for by their Trade Union in relation to the dispute"; and that the undertaking provides for "repayment of any backdated holiday pay … in the event of future participating in industrial action". That was then said, for the first time, to be a breach of the H **2010 Regulations**.

18. The respondent, it was said in the draft amended grounds, had compiled or used or were currently using a list prohibited by regulation 3 and had subjected the claimants to a detriment, withholding holiday pay, for a reason related to that list, namely their presence on the list, giving rise to a claim under regulation 9. Article 11 of the **ECHR** was relied on for the purposes of encouraging a Convention-compliant interpretation of the **2010 Regulations**, in line with section 3 of the **Human Rights Act 1998**.

19. After that, nothing of note happened until 25 January 2019, when the respondent paid the claimants the backdated holiday due to them pursuant to the collective agreement made back in October 2016. Between April 2018 and January 2019, I am told that the parties contacted the London South employment tribunal but that did not list the case for the further hearing which EJ Ford QC had directed.

20. It was EJ Sage who evidently decided that it was time to get on with the case. She caused a letter to be sent, on 1 March 2019, confirming that the case had been transferred and the respondent was to indicate within seven days what issues it sought to have dealt with at the preliminary hearing.

21. The response from the respondent's solicitor by email dated 6 March 2019 stated that all the issues already mentioned (i.e. those relevant for this appeal) were still live. The solicitor added that in light of the draft amended grounds of the claims, the tribunal should consider (so far as material now) "whether the proposed amendment should be allowed; and "whether the new claim is out of time and should therefore be dismissed." The email ended by pointing out that the relevant arrears of holiday pay had been paid.

22. On 19 March 2019, the claimants' solicitors confirmed that the claimants intended to pursue the claims and confirmed that whether the amendment should be allowed was one of the issues. Dates for a hearing were proposed and eventually the hearing took place before EJ Sage on 5 June 2019, leading to the decisions appealed against in this appeal.

23. Mr Andrew Allen of counsel, for the respondent, produced a skeleton argument for the hearing, a copy of which I have. He asserted that the claims were out of time; that they were poorly pleaded and "even in the proposed amended claim" the claimants "had not made fully clear what the cause of action is". He said the claims "have no reasonable prospects of success". He complained that the respondent had "never seen a proper amendment application". He said the respondent still did not understand the basis of the claim "in general" and in light of the fact that the holiday pay had been paid.

24. In paragraph 15 of his skeleton argument, he said:

> **"The tribunal is referred to the Presidential Guidance based on the Selkent guidelines. These are substantial amendments (essentially the substitution of the original case for a new case). There is no hardship to the Claimants if the amendment is refused because the Claimants have received the HPA [Holiday Pay Agreement] money. There is substantial hardship for the Respondents in dealing with multiple claims in relation to matters that have now been satisfied. The original claims were out of time and the amendment application is even more out of time. The Claimants have not taken any of the ample opportunities to explain why their amendment application was made at the time and in the manner that it was."**

25. Mr Nicholas Toms, counsel for the claimants, explained in his skeleton argument the basis of the claims under the **2010 Regulations** in terms consistent with the draft amended grounds settled by Ms Ling the previous April. He contended that the new claim was a mere re-labelling exercise. He too referred to the **Selkent** guidelines, setting them out step by step. He pointed out that the respondent first had sight of the draft amended grounds in April 2018.

26. Mr Toms also pointed out that the time limit in regulation 10 of the **2010 Regulations** was subject to extension where it was "just and equitable" to extend time and that within regulation 10 the familiar provision was included where an "act extends over a period", treating the start of the running of time as the last day of the period; and treating a failure to act as done when it was decided upon.

27. This was a case of an act extending over a period, Mr Toms submitted in his skeleton. The non-payment had been used to exert ongoing pressure not to support the industrial action. The act was ongoing because the decision was not one to refuse payment outright or pay a lesser amount; the employer was "looking to use holiday pay to coerce … members into compliance"; and "the detriment is not just the non-payment of the money but also the ongoing pressure to comply in order to get the money."

28. The detriment was therefore "either ongoing or had only ceased recently within the three month period", said Mr Toms in his skeleton argument below. It is not entirely clear what three month period was there referred to. The detriment relied on appears to have ceased when the arrears of holiday pay were paid on 25 January 2019. Three months later, the claims had recently been awakened by EJ Sage in March. The hearing then took place on 5 June 2019.

The Judge's Decision

29. After hearing argument, the judge gave oral reasons along the following lines. I take these from Mr Allen's note, which Mr Toms accepted as accurate. The judge considered the amendment application first. She noted that the first claimant had been unrepresented and that the nub of the claim was bullying and harassment of those who supported strike action. She considered that the only incongruous element was the ticking of the box marked "religion or belief". Changing it to a "blacklisting" claim was consistent with the original claim. She therefore allowed the amendment.

30. She then went on to consider time limits. She referred to the disagreement over whether the withholding of holiday pay in late 2016 was a one-off act with continuing consequences, or an act extending over a period, within regulation 10 of the **2010 Regulations**. She pointed out that the respondent had stated in its letter that it would continue to withhold payment of backdated holiday pay while the claimants continued to engage in strike action. She accepted that payment of the backdated amounts had been made in January 2019.

31. She rejected the respondent's argument that the withholding of backdated holiday pay was "done and dusted" in November 2016 and agreed with the claimants that the act of withholding the pay was a continuing one because the respondent had stated that it would continue to withhold payment unless and until the undertaking was signed. She went on to say that the claims were not out of time but that the respondent could raise the issue of time limits again at trial, after disclosure, if it wished to do so.

32. The judge then went on to consider the question of whether the blacklisting claims had a reasonable prospect of success on their merits and concluded that they did; there was little case law on the **2010 Regulations** and the respondent had been aware to whom to pay and to whom not to pay the backdated holiday pay. She then gave oral case management directions leading to a two day full merits hearing in October 2020.

33. The case management directions were embodied in a written "case management summary" dated 5 June 2019 and sent to the parties on 11 June 2019. It included some brief reasoning. There were three paragraphs of reasoning supporting the application to amend. The amendment was described as "replacing the label of religion and belief with that of the [**2010 Regulations**]." She noted that the case was "essentially about the non-payment of holiday pay and the factual and legal position have not changed".

34. She rejected the respondent's submissions, recorded by her as follows:

> **"It was stated that this application to amend changed the entire nature of the claim. … there was no hardship to the Claimants as they had already been paid their holiday pay but substantial hardship for the Respondent. The respondent stated that the time limit issue and the amendment should be taken together. Time limits were relevant but not determinative. On the ET1 there is no reference to blacklists, the Claimant has not identified what is relied on under Regulation 3(2) or what that might be (in relation to prohibited lists), there is no reference to a detriment. The Respondent stated that the test is in Selkent and it is about a single (historical payment)."**

35. She then stated reasons for her "decision on the amendment". She took into account that the first claimant had been unrepresented. The ticking of the "religion and belief" box had been inconsistent with the claim. The focus of the claim had been the bullying and harassment for supporting strike action, which was stated to include withholding payments. Article 11 of the ECHR had been cited. The claim:

> **"… has not changed, it remains precisely as set out in Box 8.2, the only difference being the clarification of the correct legislative position which was consistent with the factual basis of the claim form. The only incongruity was the box ticked for religion and belief. The Claimant clarified the claims after a case management hearing on the 6 March 2018 and provided clarification of his claims on the 16 April 2018. I conclude that this amendment should be allowed."**

36. She did not in that document deal separately with the issue of time limits. In a short formal judgment dated 28 June 2019 and sent to the parties on 5 July 2019, she ruled that the claims were in time and that the strike out application was unsuccessful. The respondent sought full reasons; indeed, Mr Allen's note indicates that he did so at the hearing on 5 June 2019. The full reasons were provided by the judge on 22 July 2019 but were not sent to the parties until 4 September 2019, by which time the present appeal had been brought.

37. The judge set out the facts, which were not in dispute. At paragraph 7 she referred to having seen in the bundle "lists of those who had signed the undertakings". The respondent had "compiled lists of those who were entitled to receive their holiday pay allowance and those who were not entitled because of the reasons stated above", i.e. participation in industrial action. She commented on one annotation, noted a correlation between those on the list and the claimants

and noted that the record of those who had signed the undertaking gave dates from November 2017 onwards.

38. The judge then recited the claims as originally presented and the procedural history of the hearings involving EJs Harper and Ford, the RMT's solicitors coming on the record, the provision of the draft amendments to the claim in April 2018, the transfer of the case from Bristol to London South and the payments of backdated holiday pay to the claimants in late January 2019, at which point the industrial dispute was still ongoing.

39. She recited the submissions of the parties in detail, an exercise I need not repeat. She referred to the **Selkent** guidelines and the guidance document based on them (**Presidential Guidance on Case Management - Guidance Note 1 (Amendment)** of 22 January 2018). She then set out section 3 of the **Employment Relations Act 1999** (**the 1999 Act**) and regulations 3, 9 and 10 of the **2010 Regulations**, among other statutory provisions.

40. The judge quoted from certain March 2010 guidance from the then Department for Business Innovation and Skills, on the **2010 Regulations**, at the time they were enacted. That guidance – called **the Blacklisting of Trade Unionists** - is not directly relevant in this appeal because it was not argued before me that a blacklisting claim on the facts here would necessarily be doomed to failure on its merits if allowed to proceed. The guidance states the view of the department about what documents could qualify as a list under the Regulations.

41. The judge gave reasons for her decision from paragraph 44 onwards. Her reasons were consistent with the briefer version she had already given. She added the further point that the focus on bullying and harassment including by withholding pay was "consistent with the letter before action" sent by the RMT. She stated that "the factual basis of the claim has not changed, it remains precisely as set down in the claim form, no additional facts were added, and the scope of the claim was not widened." The effect of the amendment was that it "gives clarification of the correct legislative provisions that apply to the facts of the case".

42. The judge went on to acknowledge that "there may be times when citing a different area of law can result in a change in the nature of the claim", but she said that was not so here; the amendment was "a mere relabelling of the claim". She went on to note that the clarification had been given at the request of EJ Ford QC and at a time when the proceedings were still at an early stage. The claimants could not be criticised for complying with directions of the tribunal. The judge went on:

> **"There appeared to be no detriment caused to the Respondent by any delay in pursuing the application to amend and no evidence that the Respondent was prejudiced by the delay in considering this application or by granting the application."**

43. She therefore concluded that the application should be granted and went on to consider the question of time limits. She explained that she accepted the claimants' characterisation of the respondent's demand for an undertaking as a continuing act and not a one-off act with continuing consequences. Her reasoning was the same as already set out above.

44. Further, she added, "a course of conduct that was revisited on a monthly basis as the list … showed that the undertakings had been submitted up to the 6 April 2018". The judge concluded, on that basis, that the claims brought on 17 November 2017 were in time. As at that

date "the Respondent had decided during each pay run from October 2016 to November 2017 to withhold payment of the holiday pay allowance from the Claimants".

45. The judge then went on to consider whether, on their merits, the claims under the **2010 Regulations** would have a reasonable prospect of success and concluded that they would, for reasons that I need not go into, as the prospect of success on the merits was not an issue directly arising in this appeal.

Grounds of Appeal (Amended)

*First and second grounds: amendment; failure to follow **Selkent** guidelines or give adequate reasons; perversity*

46. Mr Paul Gott QC, for the respondent, submitted that it was not open to the judge to characterise the amendment as merely relabelling and clarifying the nature of the claim, rather than altering its substance. The original "religion or belief" discrimination claim was qualitatively different from a blacklisting claim. The original holiday pay claim was for an amount due as a debt, not a claim for compensation. That was shown by the withdrawal of three claimants on being paid their holiday pay.

47. Mr Gott complained that the judge had given too much weight to the fact that the claimant had been acting in person in November 2017 (and for the other claimants). Further, the claimants had the resources of the RMT available; indeed, the RMT had sent the letter before claim over a year before the claim was made.

48. He submitted that the original claim had said nothing about any list. He explained the necessary elements of a blacklisting claim, which he said included not one user but two – one to compile the list and another to receive and use it. (It is unnecessary to express a view on whether that is correct; it does not appear to have been argued below by Mr Allen and may be an issue in the main proceedings if they go further. Mr Toms pointed to passages in the government guidance from 2010 which, he said, supported a broader interpretation of "list".)

49. Mr Gott submitted that a claim under the **2010 Regulations** is a form of discrimination claim requiring a comparator, probably hypothetical. He would not accept that the correct comparator is a person willing to sign the undertaking and abjure industrial action. Again, this could be an issue in the main proceedings, if they proceed further.

50. He also argued that for the purposes of a blacklisting claim, industrial action could not be a trade union activity, applying the analogy of cases involving dismissal or detriment imposed for taking part in union activities at an appropriate time (although the words "at an appropriate time" do not appear in the **2010 Regulations**). Furthermore, he said that in a blacklisting claim, for some reason the claimants would have to show that the industrial action had been undertaken in circumstances conferring immunity in tort for the organisers, through compliance with the statutory ballot requirements.

51. More to the point, Mr Gott observed that the remedy sought in respect of the non-payment of backdated holiday pay would be transformed by the amendment into a claim for uncapped compensation at large, rather than a liquidated claim for sums in the region of £1,000 to £2,000 per claimant. He noted, in this connection, the provisions in the **2010 Regulations** providing for

a statutory award of at least £5,000 except where it is just and equitable to reduce it, for example, by reason of industrial action breaching a claimant's employment contract.

52. Mr Gott urged these points on me not because I was asked to decide in this appeal whether they are well founded but to impress upon me the width of the chasm which, he says, separates a claim for holiday pay due and owing (or for that matter a claim for religion or belief discrimination) and a blacklisting claim. This is highly relevant, he submits, because as Underhill LJ observed in the course of his consideration of the **Selkent** guidelines in **Abercrombie v. Aga Rangemaster Ltd** [2014] ICR 209, at [48], the focus is:

> **"not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry 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…"**

53. Mr Gott went on to submit that the judge did not properly address time limits. She did not consider whether the blacklisting claim, first made by amendment in June 2019, was out of time. She did not consider whether the claims as originally presented were out of time. Her analysis of the alleged detriment as an act that extended over a period proceeded from the false premise that the claims as originally presented were already, in substance, blacklisting claims.

54. Furthermore, Mr Gott complained, while the judge noted that the payments made in January 2019 had caused the alleged detriment to cease on the claimants' case, she did not address the point that more than three months elapsed between the making of those payments and the hearing on 5 June 2019, when the application to amend was first made.

55. The judge therefore failed, Mr Gott contended, to take account of all the circumstances and properly to "balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it", in the words of Mummery J (P) in **Selkent** (see **Selkent Bus Co. Ltd. v. Moore** [1996] ICR 836, at 843F).

56. Mr Gott also argued that the reasoning of the judge was inadequate and (in a separate second ground) that her decision that the nature of the claim had not changed was perverse. I do not think these further submissions add anything. The reasons are not deficient in the sense that they are too brief to tell the losing party why it lost. And the perversity challenge could only succeed if the judge fell into error of law in the ways asserted in the first ground of appeal. The flaws asserted are better described as errors of law than perversity.

57. In defence of the judge's reasoning and conclusion that the amendment should be allowed, Mr Nicholas Toms submitted as follows for the claimants. He emphasised that the function of the appeal tribunal is limited and that the matter was one of discretion for the judge below; the scope for interference on appeal is narrow. It was plain that the judge had the **Selkent** guidelines and the **Presidential Guidance** in mind. She dealt appropriately with the nature of the amendment; its timing; and the issue of prejudice to the parties.

58. Mr Toms argued that it was legitimate to take into account that the first claimant is not legally qualified. Furthermore, he submitted that it must have been obvious from the factual narrative and the reference to Article 11 of the **ECHR** that the "religion or belief" label was incorrect, as the judge found. The judge, said Mr Toms, was right to find that the exercise was one of applying the correct legislative label to unchanged facts.

59. The factual foundation of the claim, he submitted, did not change with the proposed amendment. The common factual elements were continuing discrimination; differentiation between those who signed the undertaking and those, including the claimants, who refused to do so; the singling out of the latter for non-payment of the holiday pay; the "harassment and bullying" because of the claimants' support for strike action; and the Article 11 complaint that this was a violation of their right to freedom of association.

60. Those elements of the claim, as originally presented, made it clear that even at the start the claim could not be treated as just a claim for holiday pay, coupled with a misconceived discrimination claim that was doomed to fail. Putting together the elements of the original claim, they added up to what the judge fairly found to be the substance of the claim as amended.

61. While Mr Toms accepted that the claim as originally presented had not included any overt reference to a list maintained by the respondent, it was obvious that one must have been maintained because the original claim asserted that the respondent differentiated between signers and non-signers of the undertaking and that meant they would need a list to keep a record of which workers to pay and not to pay.

62. Mr Toms also defended the judge's analysis of the continuing act argument. She had rightly accepted the contention that the pressure to sign the undertaking was ongoing and had continued up to January 2019. She was aware that it had ceased then, and said so. That was a clear and correct basis for her decision that the claims as originally presented had been presented in time.

63. She was not bound to address the time lag between January and June 2019 in her decision; it was open to her to defer that issue until the substantive hearing, as she said she would in her oral reasons. While that was not replicated in her written judgment and reasons, the claimants were content not to oppose the raising of an argument at trial that the claims, as amended, are out of time.

64. As for the requirement to balance the prejudice to the respective parties, Mr Toms submitted that the judge had done so correctly. She had noted that the draft amended grounds had been supplied at an early stage, in response to the tribunal's direction. The respondent was not taken by surprise. The only prejudice relied on by Mr Allen had been his contention that if the amendment were allowed, the respondent would face multiple major claims rather than just holiday pay claims which had been paid.

65. That was no more than having to answer to the law. There was no prejudice of the more usual kind relied on, such as unavailability of departed witnesses, fast fading memories, or lost documents, Mr Toms pointed out. Consequently, the judge was right not to attach weight to any prejudice to the respondents; there was none; while the claimants would lose their substantive rights under the **2010 Regulations** if the amendment was not allowed.

66. Mr Toms said that Mr Allen had not advanced below the elaborate analysis of the cause of action under the **2010 Regulations** now advanced on appeal by Mr Gott; hence the absence of such an analysis from Mr Allen's skeleton argument. The analysis was, in any case, overblown and wrong, Mr Toms argued. There was no requirement to prove immunity in tort in respect of

A the industrial action; nor was there any problem with finding a comparator; the comparators were, obviously, those who had signed the undertaking and been paid early on.

67. I come to my reasoning and conclusions in relation to the first and second grounds of the appeal. I will start with the nature of the cause of action and remedy under the **2010 Regulations**, since they are not well known. The following is a very brief overview confined to those parts of the Regulations that are relevant in this appeal.

B

68. Section 3 of the **1999 Act** empowers the Secretary of State to make regulations prohibiting the compilation and use of lists that contain details of members of trade unions or persons who have taken part in the activities of trade unions, and are compiled with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers. A "list" includes any index or other set of items whether recorded electronically or by any other means.

C

69. The power was exercised by enacting the **2010 Regulations**. Regulation 3 prohibits the compilation, use, sale or supply of a prohibited list. The prohibition mirrors the enabling power in section 3 of the **1999 Act**. Regulation 3(3) defines discrimination as "treating a person less favourably than another on grounds of trade union membership or trade union activities." The notion of less favourable treatment of one person than another on a prohibited ground borrows from mainstream discrimination law.

D

70. By regulation 9(1), there is a right of action in an employment tribunal if a person's employer by any act or deliberate failure to act subjects the person to a detriment for a reason which relates to a prohibited list and (so far as relevant for present purposes) contravenes regulation 3. Therefore, putting it broadly, if a list is prohibited and is used by the employer and an employee on the list is treated less favourably by the employer than another by reason of trade union activities, and thereby subjected to a detriment, that is actionable.

E

71. Again borrowing from mainstream discrimination law (see section 136 of the **Equality Act 2010**) regulation 9(2) enacts a burden of proof provision putting the onus on the employer to disprove contravention of regulation 3 "[i]f there are facts from which the tribunal could conclude, in the absence of any other explanation, that D [the employer] contravened regulation 3."

F

72. Regulation 10, as already mentioned, enacts a standard time limit clause of the type used in the **Equality Act 2010**, including a power to extend time on the "just and equitable" ground and the usual provision where an "act extends over a period" and a deliberate failure to act being treated as done when decided upon.

G

73. The cause of action is, therefore, a hybrid. It is in part an anti-discrimination law, for it includes the notion of treating the claimant employee less favourably than a comparator, real or hypothetical. It also borrows from provisions in the **Employment Rights Act 1996** (**the 1996 Act**) and the **Equality Act 2010** making actionable the subjection of a person to a detriment on a prohibited ground such as the making of a protected disclosure or the doing of other kinds of protected act, e.g. alleging discrimination, raising a health and safety concern or taking part in trade union activities at an appropriate time.

H

74. The remedy in a blacklisting claim, by regulation, is compensation at large, with no statutory maximum and a normal minimum starting point of compensation of £5,000 per claim, subject to deductions that may be made on various grounds such as contributory fault or conduct causing loss.

75. I come next to the judge's exercise of discretion. She acknowledged and was aware that the exercise she was required to undertake was to follow the **Selkent** guidelines. In deciding whether to allow the amendment, she had to consider all the circumstances and balance the hardship to the respondent if the amendment were allowed and the hardship to the claimants if it were not allowed.

76. The judge was clearly aware that such was the task she was required to undertake. She was equally clearly aware that she must consider, at least, the mandatory relevant considerations mentioned by Mummery J (P) in **Selkent**, namely the nature of the amendment, the applicability of time limits and the timing and manner of the application to amend. The question is whether she performed that task properly, without going wrong in law.

77. In considering the nature of the amendment, she was evidently persuaded by Mr Toms' eloquence that the exercise was merely relabelling the claim. I consider next whether she was justified in accepting that contention.

78. The claims as originally presented were, indeed, for compensation at large, without any statutory limit. The allegation of discrimination on the ground of religion or belief was an allegation which, if made good, would sound in compensation without limit. The respondent was, therefore, on notice from the start that it faced such a claim. It did not face only a claim for a relatively small and liquidated amount.

79. However, the part of the claim that could generate compensation at large was obviously unsustainable; the facts in box 8.2 could not begin to support an argument that the claimants had been discriminated against on the ground of their religion or any belief. The claims also included the allegation that the claimants were "owed" holiday pay. That was a clear allegation that a debt was payable to the claimants in a fixed or ascertainable and relatively small amount of money per claimant.

80. A legally qualified reader of the facts alleged in box 8.2, conversant with employment law, would be likely to suspect strongly that the reference to religion or belief was a mistake; particularly since the first claimant laid no claim to any legal expertise and was unrepresented and because it made no sense. The notion of "discrimination", however, was conveyed in the words used in box 8.2. The facts included less favourable treatment of one class than another by reference to taking part in industrial action, but not because of religion or belief.

81. The reference to article 11 of the **ECHR** made it probable that the intended cause of action was some sort of detriment or penalty imposed for supporting the strike action, from which those who signed the undertaking were spared. A possible candidate would have been a claim for detriment imposed by reason of taking part in trade union activities at an appropriate time (see section 146 of the **Trade Union and Labour Relations Act 1992** (**the 1992 Act**)).

82. Another possibility was a blacklisting claim. That would make more sense from the claimants' point of view because of the difficulty in establishing (in the light of well known case

law) that taking part in industrial action is not taking part in trade union activities at "an appropriate time", a phrase that must be interpreted in accordance with section 146(2) of the **1992 Act**. But there was no mention of any list in box 8.2.

83. The judge was, in my view, right to observe that the basic factual elements of a blacklisting claim were stated in box 8.2 from the outset, apart from the absence of any allegation of use of a prohibited list. However, that is quite a major omission if one intends to make a claim for blacklisting, especially when the omission sits alongside the allegation of religion or belief discrimination and a claim for holiday pay "owed".

84. I do not think it was sustainable for the judge to say that the amendment was merely a re-labelling of the claims and that the nature of the claims had not changed at all. The original claims were conceptually and factually related to the blacklisting claims pleaded in the draft amended grounds, but this was no mere re-labelling.

85. It was not open to the judge to treat the "religion or belief" discrimination claim as if it were a slip or typographical error, which should have stated "use of a prohibited list". Nor was the holiday pay claim explained as part of the detriment supporting the blacklisting claim. The remedy for a blacklisting claim is compensation with a normal starting point of £5,000, whereas the holiday pay claim as pleaded was for a considerably lower fixed sum for each claimant.

86. I conclude that the judge went wrong in law by characterising the amendment as merely putting a different label on the claim. She recognised that "there may be times when citing a different area of law can result in a change in the nature of the claim"; but she erred by not concluding that this was manifestly such a case.

87. The second aspect of the **Selkent** guidance is that the question of time limits must be considered. In **Selkent** itself, emphasis was laid on whether the claim as amended would be out of time. But it must also be relevant to consider whether the claim as originally presented was, when presented, already out of time. If it was and time is not extended, there is nothing to amend.

88. It is common ground that it was open to the judge to defer determination of time limit points until the substantive hearing, applying the reasoning of HHJ Hand QC in **Galilee v. Commissioner of Police for the Metropolis** [2018] ICR 634, EAT. There the original unfair dismissal claim had been brought in time; whereas here the respondent denies that the original claims were brought in time. Nonetheless the respondent accepts (rightly in my view) that the judge was entitled to park that dispute until the main hearing.

89. Mr Gott complains that she should at least have addressed the arguments that the claims as originally presented were out of time and that she failed to do so. Further, she baldly stated in her short judgment that the claims (presumably meaning all the claims) were "in time", without repeating what she had said orally, and inconsistently with her short written judgment: that the respondent could address the time limits at the main hearing.

90. I was slightly troubled that in Mr Allen's note of the judge's reasons given orally, she said she was allowing the amendment and only then went on to consider "the next point", time limits. The time limits position should form part of her consideration of whether to allow the amendment. But I think that could be and was cured in the full written reasons, where time limits were considered as part of the decision on whether to allow the amendment.

91. In the full written reasons, at paragraph 48, the judge did address the question whether the claims as originally presented were in time. Mr Gott complains that she treated the claims as if already amended. Her analysis of the continuing act issue was indeed influenced by her finding that the factual basis of the claims was already fully present when it was made.

92. I have declined to endorse that reasoning fully in this judgment. Much but not all the facts were in place and the omissions and later modifications were significant for reasons already given. The time limits arguments in respect of the unamended claims as they stood in November 2017 may have been addressed differently if it had been acknowledged that the second formulation of the claim in April 2018 was more than mere re-labelling.

93. There are time limit provisions in the **1996 Act** where deduction from wages is alleged. There are also time limit provisions in the **Working Time Regulations 1998** (**the 1998 Regulations**) where holiday pay is claimed. There is no broad power to extend time on just and equitable grounds. On the other hand, a claim for discrimination on the ground of religion or belief and a blacklisting claim both feature a power to extend time where it is just and equitable to do so; and in both types of claim, the continuing act analysis is relevant.

94. When the judge came to consider time limits in relation to the draft amended claims, she accepted the claimants' submissions in relation to the continuing act issue. There is no apparent flaw in her analysis but it is predicated on a seamless continuing act from November 2016 down to January 2019, which again assumes that the original claims can be regarded as, in substance, blacklisting claims, which I have not accepted as correct in law.

95. I also agree with Mr Gott that the judge did not adequately engage with the argument that more than three months elapsed between 25 January 2019, when the holiday pay owing was paid to all claimants, and 5 June 2019, when the amendment was considered and allowed. The judge needed to consider that point as relevant to the exercise of her discretion whether to allow the amendment.

96. To do that, the judge either had to determine whether to extend time for the blacklisting claim (on just and equitable grounds) or defer consideration of that issue to the main hearing (applying the reasoning in the **Galilee** case). It appears that she may have done the former in her short written judgment and the latter in her earlier oral reasons. That is a worrying inconsistency, not fully answered by Mr Toms' generous concession that he would not oppose the respondent reopening the time limits issues at the main hearing.

97. I conclude that there remain difficulties with the judge's treatment of time limits, which are linked to her erroneous characterisation of the amendment as one of labelling only.

98. The third and final mandatory relevant consideration referred to in **Selkent** is the timing and manner of the application. The judge did not apparently err in her treatment of this aspect of the matter. She was entitled to attach such weight as she thought fit to the fact that the claimant was acting in person for himself and the other claimants; albeit against the background of the RMT's letter before claim just over a year earlier. She was entitled to take into account that the draft amendment was produced early on, in April 2018; and that it was produced at the behest of the tribunal.

99. It was also relevant that the bundle used at the hearing before the judge on 5 June 2019 included, as the judge noted, "lists of those who had signed the undertakings". The respondent, she said, had "compiled lists of those who were entitled to receive their holiday pay allowance and those who were not entitled" because they had taken part in the industrial action.

100. On the issue of balancing hardship to the respective parties if the amendment were refused or permitted, it was relevant that Mr Allen asserted no more than that the respondent would have to face more substantial claims if the amendment were allowed; he did not rely on any specific prejudice such as missing documents or witnesses.

101. The balancing exercise was done, but the scales might have come down differently if it had been undertaken without the initial legal error of treating the amendment as mere re-labelling. It is not certain that the outcome would have been the same if that error (and its possible knock-on effects on timing issues) had not been made. The balancing exercise will therefore have to be done again.

Third, fourth and fifth grounds: time limits; internal contradiction in reasoning; act extending over a period; failure to engage with the arguments

102. These grounds were advanced separately but I have dealt with the substance of them already. It is unnecessary to address them again.

Remedy

103. The decision to allow the amendment to introduce a claim under the **2010 Regulations** is, for those reasons, flawed. I will remit the application to amend the claim, to be reconsidered in the employment tribunal. I doubt whether any further evidence is required at this stage but it is open to the tribunal to permit further evidence, on the application of either party. Subject to that possibility, a one day hearing should be enough to hear argument based on the existing written evidence.

104. I do not think the re-determination should include whether the claims, if allowed to proceed in amended form, have a reasonable prospect of success on their merits. There is no flaw in the judge's determination that they have a reasonable prospect of success. This appeal may originally have encompassed that issue but it was not argued before me. The issue is whether the amendment should be permitted.

105. Thus, the reconsideration will need to include the nature of the original claim, the nature of the proposed amendment, whether the original claims were out of time and whether the application to amend was made after expiry of the relevant limitation period. That is likely to require, in addition, further examination of whether the detriment relied on was an act extending over a period and, if it proves necessary to decide the issue, whether it is just and equitable to extend time.

106. The reconsideration exercise will focus on whether the application to amend should be granted in the circumstances obtaining "at the time when it was made" (per Mummery J (P) in **Selkent** at 844E-F). It will be for the employment judge undertaking the reconsideration to decide whether, applying the reasoning in **Galilee v. Commissioner of Police for the Metropolis**, to defer one or more of the time limit questions until a later stage in the case, or

whether there is already sufficient evidence before the tribunal to determine the time points, or one or more of them, at this stage.

107. With respect to the judge, taking into account the factors mentioned by Burton J (P) in **Sinclair Roche & Temperley v. Heard** [2004] IRLR 763, I think it would be appropriate for the reconsideration of the issue to be undertaken by a different employment judge. I bear in mind in particular that the description of the amendment as merely re-labelling the claim without introducing any new element was expressed in markedly forthright language.