EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4109987/2015 & 4123241/2018

Held in Glasgow on 3 & 4 September 2019

Employment Judge: C McManus

Ms K Harper **Claimant**

Chief Constable of the Police Service of Scotland **Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal in respect of the preliminary issues for determination at this Preliminary Hearing is that:-

- The date of Chief Superintendent Main's decision which is relied upon by the claimant in her amendment of 21 November 2018 to case number 4109987/2015 and in her ET1 now registered under case number 4123241/2018 is 27 August 2018.

- Relative to that date of 27 August 2018, on application of section 48(3) of the Employment Rights Act 1996, the expiry of the end of the relevant three month period was 26 November 2018.

- Both the claimant's amendment of 21 November 2018 to case number 4109987/2015 and her ET1 now registered under case number 4123241/2018 were presented before the end of the period of three months beginning with the date of the last of a series of similar acts or failures to which the complaint relates to, in terms of section 48(3)(a) of the Employment Rights Act 1996.

- The Claimant's amendment of 21 November 2018 to claim number

4109987/2015 is allowed.

- The claimant's ET1 in case number 4123241/2018 is not time barred.

REASONS

Background

1 This Preliminary Hearing ('PH') was arranged for determination on issues in respect of amendment and time bar, in respect of the proposed amendment made on 21 November 2018 to the ET1 in case number 4109987/2015 ('the 2018 proposed amendment') and the ET1 lodged on 23 November 2018 and registered under case number 4123241/2018, ('the 2018 ET1'). It is agreed that the substantive terms of the 2018 proposed amendment are the same as those in the 2018 ET1.

Issues for Determination

2 It was agreed at the outset of this PH that the issues to be now determined by the Tribunal are:-

- **Amendment – claim number 4109987/2015**

Should the Claimant's amendment of 21 November 2018 to claim number 4109987/2015 be allowed, having regard to the principles set out in (1) Cocking v Sandhurst (Stationers) Limited 1974 ICR 650 and (2) Selkent Bus Company Limited (trading as Stagecoach Selkent) v Moore 1996 IRLR 661?

- **Time bar – claim number 4123241/2018**

In the event that the Claimant's amendment to claim number 4109987/2015 is refused, then in respect of the Respondent's contention that the claim 4123241/2018 has been presented out of time:

(a) On what date or dates did Chief Superintendent Main either carry out the act or acts complained of or fail to act?

(b) Relative to such date or dates, on what date would the Claimant

have required to bring her claim, pursuant to section 48 of the Employment Rights Act 1996?

(c) Has the claim been presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates to, or if a series of similar acts or failures, the last of them? (section 48(3)(a) of the Employment Rights Act 1996)

(d) If not, was it reasonably practicable for the Claimant to present the claim before the end of that period of three months? (section 48(3)(a))

(e) If not, was the claim presented within such further period as the Tribunal considers reasonable in circumstances where it is satisfied that it was not reasonably practicable to present the claim before the end of that period of three months? (section 48(3)(b) of the Employment Rights Act 1996).

Proceedings at this PH

3 At the outset of this PH, it was discussed, and parties' representatives were in agreement, that the issue of time bar is a material factor in both the determination of whether the 2018 proposed amendment should be allowed and in respect of any time bar issue re the 2018 ET1. It was agreed that both those substantive issues for determination at this PH require findings in fact as to the relevant date(s) and application of the law to those facts. It was agreed that the Tribunal requires to determine the date of Ex CS Main's decision in respect of the claimant's allegations of misconduct against former colleagues ('the claimant's complaint') and that that date will be determinative to the issue of time bar.

4 The parties' representatives had helpfully liaised to produce a Joint Inventory of Productions, numbered consecutively from page number 1 – 287. Parties' representatives confirmed that this inventory contained all the documentary

evidence relied upon at this PH. Documents from that inventory are referred to in this Judgment by their page number, prefaced with 'P'.

5 Parties' representatives were in agreement that the history of these cases as set out in the Note of the Case Management PH which took place on 15 March 2019 was accurate. I have therefore extracted that history and included it, where material and relevant, in these findings in fact.

6 Evidence was heard before me on 3 September 2019. For the claimant, evidence was heard from the claimant herself. For the respondent, evidence was heard from former Chief Superintendent Paul Main (now retired from the respondent's organisation, now referred to herein as 'Ex CS Main'). On 4 September 2019 submissions were heard, with both parties' representatives speaking to their prepared written submissions, which are summarised below.

7 At the stage of close of those submissions I sought clarity from both parties' representatives as to their positions on whether the 2018 proposed amendment raised a new claim or not. It was not in dispute that a public interest disclosure claim was first brought by the claimant in her amendment of 4 November 2016 to the 2015 claim, which was unopposed. Time was given for both representatives to consider their respective positions with regard to that. After lunch on 4 September 2019, both parties' representatives then gave further submissions on the content on the 2018 proposed amendment, which are set out below.

8 I informed parties' representatives that for around a year in approx. 1996 I worked at the same legal firm as the claimant's former legal advisor, referred to in these proceedings, Margaret Gribbon. Parties and their representatives were content that no issue arose from that.

9 I was grateful to both representatives for their professional representation of their respective clients in this matter.

Comments on Evidence

10 My findings in fact are made in consideration of the evidence before me and on assessment of the credibility and reliability of the witnesses. I required to make a finding in fact of the date of Ex CS Main's decision in respect of the claimant's allegations of misconduct against former colleagues. That complaint ('the claimant's complaint') had been made by her on 26 May 2016. There were included among the productions two version of the written decision on that complaint. It was not in dispute that the version dated 27 August 2018 (at P111 – P156) was that issued to the claimant and her former legal representative. It was the respondent's position that Ex CS Main reached his decision in respect of the claimant's complaint on an earlier date than the date the written decision was sent to the claimant's former legal representative. In particular, it was the respondent's position that the relevant date when Ex CS Main reached his decision was 21 August 2018, when he had sent a version of the written decision by email to certain individuals (email at P63 and decision at P64 – P109). Given the nature of the decision, which contained a number of aspects, it was not in dispute that Ex CS Main's decision was taken incrementally. I considered the extent of the differences between the versions of the decision as at 21 August and 27 August to be material in establishing the date when Ex CS Main reached his concluded decision on the claimant's complaint. For the reasons set out herein, that date was then the relevant date for consideration of time bar in respect of both the 2018 proposed amendment and the 2018 ET1.

11 I found both witnesses to be generally credible and reliable. I found the claimant to be straightforward in giving her evidence. She did not seek to avoid any questions or to embellish her position. Although I found Ex CS Main to be generally credible and reliable, I did find him to be careful in his responses. I did consider some aspects to be significant in respect of changes under cross examination to his initial position in examination in chief.

12 It was not in dispute that there are differences between the version of Ex CS Main's decision dated 21 August (at P63 – P110) and that issued to the claimant's representative, dated 27 August and sent on 28 August (P111 – P156). It was not in dispute that those differences were in respect of changes

made by Ex CS Main. In coming to a conclusion as to when Ex CS Main reached his decision on the claimant's complaint, I required to consider the extent of those changes. I did so, and found the extent of the changes, as carefully explored by the claimant's representative in his cross examination of Ex CS Main, to be significant. These changes were not just to '*complete the introduction and top and tail'* and to obtain CI Hargreaves' permission to share the conclusions, as was Ex CS Main's first position in his evidence before me. Ex CS Main's position in examination in chief was that he *'would top and tail the response and have it sent the following week or later that week'*. I took into account the terms of Ex CS Main's email of 21 August 2018 at P61. Ex CS Main's position in examination in chief was that the decision attached to that email (P63 - P110) with '*minor alterations'* was the decision letter he sent to the claimant's then representative on 28 August 2018, dated 27 August 2018. Later in his examination in chief, Ex CS Main was asked to give examples of the '*minor amendments'* he said he had made to his decision at P63 - P110. Ex CS Main's evidence was *"I was told I should make it clear in each head of complaint if it was upheld and use a very specific form of words, being 'I do / do not uphold your complaint' "* . His position was that he then changed the wording in the version at P63 – P110 to use that phraseology. Ex CS Main's position in examination in chief as to when he made his decision in respect of the claimant's complaint was '*on or before 21st August, when I sent the email on page 61'.* It was not in dispute that the decision sent to the claimant and her then legal representative was the version at P111 – P156 and was sent by Ex CS Main to the claimant's representative on 28 August 2019, with the letter which set out the decision being dated 27 August 2019.

13 In cross examination, Ex CS Main accepted that nowhere within the body of the letter at P111 - P156 is there any reference to him having reached his decision on or around 21 August 2018. Ex CS Main's position in cross examination was initially consistent with his position in examination in chief, being that the changes between the version at 21 and 27 August were to use the '*precise form of words'* of *'I uphold / do not uphold your complaint'* . Ex CI Main was then taken in detail to particular parts of the two versions, and

on each occasion accepted that he had made changes as shown. These are as set out in the findings in fact.

14 I considered it to be material, and took into account Ex CS Main's position in cross examination that he could not be certain as to when he received the additional material which he referred to in the changes accepted as having been made when comparing P99 to P148. When Ex CS Main was first asked about that in cross examination, he accepted that P148 shows an additional three substantive paragraphs to the version at P99. Those changes related to information in an email from Sgt Bell dated 10 February 2015. Ex CS Main's evidence was that he '*couldn't say for certain' w*hen that email dated 10 February 2015 was received by him. His evidence was "*I can't say if I received it prior to 21st of August. I took a decision at some point to add it in to the response. The email of 10 February 2015 was not in the early or intermediate information I had."* And *"I seem to recall the claimant's solicitor highlighted this as an email, which was not previously disclosed in a subject access, or data access request*." When pressed by the claimant's representative, Ex CS Main's evidence was *"I'm minded to say that that information came in late between 21st and 27th of August, but I can be in no way certain. There is as much of a chance that it came in before and I took this opportunity to amend. I can't say which is most likely."* Ex CS Main maintained that position during his cross examination.

15 In his cross examination, the claimant's representative took Ex CS Main to a number of sections within the two versions and drew his attention to the differences. Ex CI Main did not dispute that he had made these changes. It was put to Ex CI Main that as at 21 August 2018 his decision was still a 'work in progress'. His evidence was:-

> "*In respect of the first paragraph, my thinking was then incomplete in respect of top and tailing. My recollection is that at that point there were two things to do: to top and tail and include I uphold / do not uphold each complaint. I have clearly made differences. They all have provenance to the single email from February 2015."*

16 The claimant's representative put to Ex CS Main that at the time he sent the email of 21 August his intentions may have been just to top and tail, but that something more than that happened. Ex CI Main's reply was:-

> "*I can't say with certainty if the information re the February email came into provenance before or after 21st of August. I hope that answers your question."*

17 I found that to be an avoidance of the question. The claimant's representative then asked Ex CS Main if he would accept that the changes between the two versions suggests that that at P63 – P110 is a provisional determination on complex matters, but that his final determination, with finalised reasoning, was not until 27 August 2018. Ex CS Main's response to that was:-

> "*Forgive me if I'm splitting hairs. That's a difficult question to answer without knowledge if I had detail of the February email before 20th August or not."*

18 It was then put to Ex CS Main that his final determination was on 27 August. His evidence was:-

> *"I think I had a finalised determination. I can't say these were my finalised reasons without knowing if I had the email prior to 21st August or not. I clearly changed what was in writing after 21st of August Whether that had been in my mind before, I don't know. My conclusions did not change. I clearly added in reasons in the 27 August letter. As to the date I got the information. I can't be certain."*

19 In re-examination, Ex CS Main was asked if the substance of his decision changed at any point. His evidence was:-

> *"No. The additional information in the 27 August letter either adds information to the decision or to the explanation of the decision. There was no new information which caused me to change the decision I previously reached."*

20 Ex CS Main was then asked what was the purpose of adding to the 21 August version. His evidence was:-

> "*Providing more explanation I think. The decision was unchanged. It was more information as to why I came to that decision."*

21 I accepted the claimant's representative's submissions on the reliability of Ex CS Main's evidence and the lack of documentary evidence produced in respect of the progress of the claimant's complaint, which had been made on 26 May 2015 and on which the decision was issued in August 2018.

22 On the balance of probabilities, and taking into account the content of the change made to the preamble paragraph in the decision (at P63 & P111) and the position in the conclusion sections (at P108 & P158), I did not accept Ex CS Main's position in evidence that it was equally as likely that the February 2015 email referred to in his changes was received by him before 21 August 2018, as after 21 August 2018. I applied the appropriate burden of proof to come to my findings in fact. On the balance of probabilities, I found that that email was received after 21 August 2019, and changes were made to the decision letter to include Ex CI Main's comments and considerations on that email. On the face of the undisputed content of the 21 August and 27 August versions of the decision, there are clear differences between these versions which substantively relate to that February 2015 email. It was not disputed that the version at P63 – P110 does not include any reference to the email of February 2015 and the version at P111 – P158 does contain substantial reference to that, in respect of a number of heads of complaint. For these reasons, I concluded, on the balance of probabilities that the February 2015 email referred to in the decision was received by Ex CS Main after 21 August 2018. I attached significant weight to the fact of those changes having been made after 21 August in coming to my finding on the date of Ex CS Main's decision on the claimant's complaint.

23 Having found that new relevant evidence was received by Ex CS Main after 21 August 2018 (being the email of February 2015), there then was then at

least a chance of some difference to the decision on consideration of that evidence. That is reflected in the changes to the preamble at P111. If new relevant evidence was received by Ex CS Main after 21 February 2018 (which I have found on the evidence before me was so received) and that evidence was considered by him (which the changes set out in the findings in fact show that it was, at least to some extent) then the final concluded decision could not have been reached until after consideration of that evidence. That is significant in my conclusion that the decision was made on 27 August 2018 and not on 21 August 2018. I took into account Ex CS Main's position that his decision was, as he put it '*iterative'*. I found that the conclusion of his decision making process was on 27 August 2018.

24 Ex CS Main's evidence was that the decision in respect of the claimant's complaint was entirely his own. He was asked in cross examination if he had had any input from anyone after 21 August 2018 which informed his decision. His evidence was-

> "*No. I can say with certainty that I didn't. I had an independent role. There was no pressure or influence on me to come to any conclusion. If on the final analysis, my decisions were wrong or ill-conceived, they are entirely my own."*

Findings in Fact

25 The following facts are material to the issues for determination at this PH and were not in dispute or were found to be proven.

26 As set out in the Note of the PH in these conjoined cases on 15 March 2019, the ET1 in case number 4109987/15 was lodged on 10 July 2015, bringing claims under :-

- Reg 7 of the Part Time Workers (Part-time Workers (Prevention of Less Favourable Treatment) Regulations (detriment)
- Section 13 Equality Act 2010 (direct discrimination)

- Section 26 Equality Act 2010 (harassment)
- Section 27 Equality Act 2010 (victimisation)

27 Those claims were responded to in an ET3 lodged on 12 August 2015. On 4 December 2015, the claimant's then representative withdrew the claims then lodged other than claims under :-

- Reg 7 of the Part Time Workers (Part-time Workers (Prevention of Less Favourable Treatment) Regulations (detriment)
- Section 27 Equality Act 2010 (victimisation)

28 Those claims proceeded to a PH before EJ Paul Cape on 18 December 2015. Both parties completed an Agenda prior to that PH. EJ Cape directed that further specification of the claimant's claims was necessary. Lengthy Further Particulars were lodged by the claimant's then representative on 19 February 2016 (themselves amended on 3 March 2016) (P212 – P235). Those further particulars were accepted as an amendment to the ET1, not having been objected to by the respondent's then representative. A response was lodged on behalf of the respondent to those further and better particulars (P236 – P252).

29 On 26 May 2016, the claimant's then representative made a complaint on behalf of the claimant to the Chief Constable and to the Scottish Police Authority in respect of allegations of misconduct against a number of then serving and retired Police Officers. Those allegations of misconduct ("the claimant's complaint") were in respect of the handling of investigations against the claimant.

30 The claimant's complaint was relied upon by the claimant in a lengthy proposed amendment lodged by the claimant's then representative on 4 November 2016 (itself amended on 25 November 2016, at P253 – P257) ('the 2016 amendment') . In the 2016 amendment, the claimant relied on her allegations of misconduct by 11 Police Officers as set out in the claimant's

complaint of 26 May 2016. The claimant's position in the 2016 amendment is summarised in its final paragraph (number 16) as follows:-

> *" The claimant contends that in their handling of her allegations the respondent has further victimised her because of the first/ second/ third protected act, and / or subjected her to a detriment in breach of section 47B of the Employment Rights Act 1996."*

31 No objection was made to that 2016 amendment and the amendment was allowed. A response to the 2016 amendment was lodged (on 13 December 2016), setting out the respondent's position in respect of the claimant's factual allegations and denying victimisation or any detriment. The respondent's response to the claimant's position in the 2016 amendment is summarised in its final paragraph (number 16) (at P268 – P269) as follows:-

> *" It is denied that in its handling of her allegations the respondent has victimised the claimant because of any protected act that she may have done in terms of the Equality Act 2010, or that it has subjected her to a detriment in breach of section 47 of the Employment Rights Act 1996, in relation to any protected disclosure that she may have made ."*

From the time of the 2016 amendment being allowed, the claimant has had a live claim under section 47B of the ERA brought under case number 4109987/2015 (being in respect of the whistle blowing provisions of the Public Interest Disclosure Act ('PIDA')), to which the respondent has substantively responded.

32 On 25 October 2017, the claimant's then representative lodged a proposed amendment setting out allegations that the respondent had failed to comply with their new Complaints Handling Procedure in their investigation of the claimant's complaint ('the 2017 amendment'). Certain factual allegations in respect of the respondent's handling of the claimant's complaint are set out in the 2017 amendment. The claimant's position was then summarised in paragraph 7 of the 2017 amendment (at P271) as follows:-

> "*The claimant contends that the respondent's failure to deal with her complaint under the amended CHP and or to inform her of the existence of same amounts to an act of victimisation because of the first/ second/ third protected act, and / or a detriment in breach of section 47B of the Employment Rights Act 1996."*

33 The 2017 amendment was accepted, it having not been objected to. The respondent lodged a substantive response in respect of the 2017 amendment (P273 – P274). Their position in that response was summarised in their paragraph 7 of that response as follows (at P274):-

> "*The respondent denies that its initial decision not to deal with the claimant's complaint under the amended Complaints Handling Procedure or to inform her of the existence of that procedure amounts to an act of victimisation because of the first, second or third protected act, or that it amounts to a detriment to reclaim it in terms of section 47B of the Employment Rights Act 1996."*

34 The 2015 claim and the 2018 claim were conjoined, on consent of both parties, under Conjoining Order of 18 January 2019.

35 The claimant's complaint of 26 May 2016 was in respect of a number of matters. In August 2017, then Chief Superintendent Paul Main was appointed to investigate and reach a decision in respect of the claimant's complaint. Paul Main retired from Police Scotland in April 2019, as Chief Superintendent and after 30 years of service. Ex CS Main was appointed to deal with the claimant's complaint by the respondent's Professional Standards Department. At the time of this appointment he had no previous knowledge of the matter, or the people involved. Ex CS Main had some experience on investigating conduct matters. While with Strathclyde Police, Ex CS Main had worked within Compliance and Discipline for around nine months in 2003, and on two other separate periods, in 2001 and 2003, for a total of about 15 months. While dealing with the claimant's complaint, Ex CS Main had substantive duties in respect of his role as Local Policing Divisional

Commissioner for Ayrshire, with responsibility for approx. 850 staff, among other responsibilities.

36 Ex CS Main approached reaching a conclusion on the claimant's complaint by seeking to deal with the various matters raised by the claimant under the 59 heads of complaint which had been provided to him by the claimant's then legal representative, Margaret Gribbon. Ex CS Main sought to gather relevant procedures, documents and witness statements in respect of each of these heads of complaint. Ex CS Main then sought to make his made his own assessment on whether the relevant procedures were followed or not, and made his decision in respect of each head of complaint on whether to uphold / support the claimant's complaint or otherwise. He drafted his written decision by way of setting out his conclusions under each of the 59 heads of complaint. This led to some duplication in his written decision.

37 Ex CS Main's decisions on the 59 heads of the claimant's complaint were taken incrementally. On 21 August 2018, Ex CS Main sent an email to an external legal adviser to the respondent (Robert King), to certain senior HR professionals within the respondent's organisation (Kirsty Campbell and Elaine Williamson) and to Mark Gallagher. That email was intended to be sent to CI Mark Hargreaves rather than to Mark Gallagher. That email is at P61 and is in the following substantive terms:-

> *"My letter to Karen Harper is attached, although I have still to finalise the introduction to the letter where I shall apologise greatly for the time taken and the conclusion.*
>
> *I have also highlighted in yellow some points which are being conceded in favour of Karen's position. On the remainder of the issues I have been unable to find support for Karen.*
>
> *Mark Hargreaves is content for me to share the response in its current format with you.*
>
> *I am out the office the next couple of days but will be on mobile and able to answer / collect messages.*

I have had an email from Margaret Gribbon yesterday who wishes to update the Tribunal office. My intention is to email her a response indicating I shall send the letter to Karen by the end of the week."

38 The version of Ex CS Main's written decision re the claimant's complaint which was attached to that email of 21 August 2018 is at P63 – P109. The claimant and her representative were notified of Ex CS Main's decision by way of being sent the version of Ex CS Main's decision re the claimant's complaint which is in letter format addressed to the claimant and dated 27 August 2018 (at P111 – P158). That letter was sent to the claimant's then legal representative by email on 28 August 2018 (email at P275). On 20 August 2018 the claimant's then legal representative, Margaret Gribbon, had sent an email to Ex CS Main asking for an update in order that she could report back to the Employment Tribunal office (that email is at P278 - P279). Ex CS Main's emailed reply to that request was on 27 August 2018 (at P277). That indicated that his response to the claimant's complaint would be sent on 28 August 2018.

39 The date on which a concluded decision on all the matters which Ex CS Main considered that he required to address in his response to each of the 59 heads of complaint in the claimant's complaint was reached was the date of the decision letter issued to the claimant's then legal representative (P111 – P158). That date was 27 August 2018.

40 Nowhere within the letter at P111 - P156 or any communication to the claimant or the claimant's then legal representative around that time is there any reference to Ex CS Main having reached his decision on the claimant's complaints on any earlier date to the date of that letter. The version of CI Main's written decision attached to the email of 21 August 2018 (at P63 - P109) is materially different to the version in the letter from CS Main to the claimant dated 27 August 2019 and sent to the claimant and her then legal representative on 28 August 2019 (P111 – P158). There is no material difference to the outcome in respect of each of the 59 heads of complaint i.e. no difference to the decision on whether each complaint is upheld or not

upheld. There is a change of wording in respect of the decision on some heads of complaint. The version dated 27 August 2019 in the main uses the form '*I uphold / do not uphold your complaint'* . The version of 21 August 2019 does not. There are changes to what is set out as the explanation and reasoning, and additional information in respect of some of the heads of complaint. There are changes between the 21 August and 27 August versions which are material changes.

41 There are changes to the preamble of the decision at P63 and at P111. Significantly, the following additional paragraph is at P111:-

> " I have been reluctant to provide a partial or incomplete response and have only recently been able to gather evidence from final witnesses who had been unavailable for some time. Whilst I deeply regret the delay I hope that the detail in this response gives you a confidence that matters have been carefully examined."

42 There are changes to the decision at P66 to the issued version which is at P115. Those changes give some explanatory content in respect of the claimant's complaint number 4. In respect of the decision re the claimant's complaint number 47, which is at P99 and at P148, there are substantive differences, with some paragraphs in the version at P99 not being present in the issued version at P148, and three additional paragraphs being included at P148. Those changes relate to information first seen by Ex CS Main in the period between 21 August 2019 and 27 August 2019, being an email from Sgt Bell dated 10 February 2015. There are further changes between the 21 August version and the issued version which relate to that issue, being at P100, compared to P149; at P101, compared to P150; at P102, compared to P151 – P152 (where three paragraphs are replaced, and more information is inserted); at P102, compared to P152; at P103, compared to P153; at P104, compared to P153; at P107, compared to P157 (where the same thing is said in substance, but it is expressed differently); at P108, compared to P157;and also at P108, compared to P158.

43 The decision in respect of complaint 58, at P157 contains the following substantive paragraph which is not included in the 21 August version in respect of complaint 58, set out at P107:-

> *"I am presented with two conflicting versions of events and am unable to determine whether one account is more credible than the other. On the balance of probabilities I am therefore unable to uphold your allegation. Accordingly, I am unable to support this complaint."*

44 The 'Conclusion' section of both versions at P108 and at P158 contain the following paragraph-

> " *It may be helpful for you to know that, where it has been deemed that the allegations are not upheld, this does not necessarily mean that I have judged the allegations to be untrue. It simply means that taking all of the available information into account, there is insufficient evidence to support the allegations*."

45 Ex CS Main's decision on the claimant's complaints was relied upon by the claimant in a public interest disclosure claim set out in both :-

- The proposed amendment submitted on behalf of the claimant on 21 November 2018 ('the 2018 proposed amendment', at P37 – P50)

and, in the same substantive terms

- The 2018 ET1, which was lodged on 23 November 2018 (at P1 – P180 (ACAS being notified of that on 23 November 2018)

46 The 2018 proposed amendment was sent to the Glasgow Employment Tribunal office and to the respondent's representative as an attachment to an email sent by Margaret Gribbon on 21 November 2018 (P37). Margaret Gribbon had professionally represented the claimant in this matter from September or October 2015. From that time Margaret Gribbon was in regular, usually weekly, contact with the claimant about her dispute with the

respondent. The terms of the 2018 proposed amendment are substantive and are set out in type over ten A4 pages (P39 – P49).

47 The respondent's response to that proposed amendment of 21 November 2018, was sent to the Glasgow Tribunal office and to the claimant's then representative Margaret Gribbon by email from the respondent's representative on 20 December 2018 (P51). The terms of the respondent's response to the 2018 proposed amendment are substantive and are set out in type over seven A4 pages. In that response, the respondent denies that in respect of the allegations made in the amendment the claimant has been subjected to detriments on the ground that she has made protected disclosures, as alleged or at all. A substantive defence to the specific allegations sought to be brought in the proposed amendment is set out in the response. The response also sets out the respondent's position in respect of time bar, being that "…*under section 47B of the Employment Rights Act 1996, time begins to run against a claimant relying on a detriment whether or not she is aware that a detriment has been suffered*." and "*Although CS Main's letter rejecting the claimant's heads of complaint was dated 27 August 2018 the alleged acts or omissions complained of occurred on or before 21 August 2018. As the claimant's amendment was not lodged until 21 November 2018 it is therefore out of time and should not be allowed…..*"

Relevant Law

48 The rules set out in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('The Procedure Rules') are relevant to these proceedings. That includes application of the overriding objective of the Employment Tribunal to deal with cases fairly and justly. The duty to deal with cases fairly and justly is a duty of the Tribunal towards all parties before it.

49 Section 48(3) of the Employment Rights Act 1996 ('ERA') provides that:-

> "*An Employment Tribunal shall not consider a complaint under this section unless it is presented:-*

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

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

50 It was not in dispute that the purposes of a claim under sections 47B and 48(3) of the Employment Rights Act 1996 ('the ERA'), time begins to run from the date a decision is made (the detrimental act is done) (*McKinney v LB Newham* per HHJ Peter Clark at paragraph 15(6), noting that certain acts might not be done unless communicated (paragraph 15 (3)).

51 Each representative relied on a number of authorities, as set out below in the summary of their respective submissions. The leading authority on proposed amendment applications is *Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [1996] IRLR 661,* [1996] ICR 836, where the EAT confirmed that the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it, and set out the factors to be considered as including:-

1. The nature of the amendment, which can be varied, such as correction of typing errors, the addition of factual details to existing allegations, the addition or substitution of other labels for facts already pled, or the making of entirely new factual allegations which change the basis of the existing claim;

2. The application of time limits, and in particular where a new claim is sought to be added by way of amendment whether that complaint is out of time and if so whether the time limit should be extended under the applicable statutory provisions;

3. The timing and manner of the application.

In *Selkent*, Mummery J, as he then was, set out at paragraph 26:

> *"…an application for amendment made close to a hearing date usually calls for an explanation as to why it is being made then, and was not made earlier, particularly when the new facts alleged must have been within the knowledge of the applicant at the time he was dismissed and at the time when he presented his originating application."*

52 In *Ladbrokes Racing Ltd v Traynor* UKEATS/0067/06MT, it became apparent to an Employment Tribunal in the course of a hearing that the claimant was seeking to pursue a line in evidence that had not been foreshadowed in the form ET1, and the Tribunal allowed the questioning to continue notwithstanding it being objected to. The issues raised on appeal gave rise to consideration of the procedure that an Employment Tribunal ought to follow when, at a hearing, it appears that a party is seeking to present a case that differs from that of which notice has been given in the form ET1:-

> *"30 We are persuaded that this appeal is well founded. The Tribunal seems, unfortunately, to have jumped too far too fast. What, in our view, it required to recognise before making its decision was as follows:*
>
> *31 Firstly, the Claimant had not, it seems, actually made any application to amend the ET1. The decision recorded in the written reasons is a decision to allow a line of cross Ex amination which was manifestly not foreshadowed in the Claimant's statement of his case in his ET1. The line which the Claimant sought to pursue was plainly a separate issue in law, as discussed, and involved different facts from any of which notice had been given in the ET1, albeit that it would not take the case outwith the 'unfair dismissal' umbrella. That being so, the allowance of the line of cross examination would have been extremely difficult to justify in the absence of amendment.*

32 Secondly, the Tribunal thus did need to turn its mind to the matter of amendment but the question is how? We see no difficulty in a Tribunal in such circumstances enquiring of the Claimant or his representative whether he seeks to amend the ET1 in the light of the line of evidence which he appears to seek to explore.

33 Thirdly, if the answer to that enquiry is that the Claimant does seek to amend, then the Tribunal requires to enquire as to the precise terms of the amendment proposed. If it does not do that, then it cannot begin to consider the principles that apply when considering an application to amend, as discussed above. Further, unless it does so, the fair notice obligations referred to in the quotation from Ali, above, will not be complied with.

34 Fourthly, it may be advisable, if not necessary, to allow the Claimant a short adjournment to formulate the wording of the proposed amendment.

35 Fifthly, it is only once the wording of the proposed amendment is known that the Respondent can be expected to be able to respond to it.

36 Sixthly, once the wording of the proposed amendment is known, the Tribunal requires to allow both parties to address it in respect of the application to amend before considering its response.

37 Seventhly, the Tribunal's response requires to be that of all members and requires to take account of the submissions made and the principles to which we have referred. The Chairman and members may require to retire to consider their decision.

38 Eighthly, the Tribunal requires to give reasons for its decision on an application to amend. Those reasons can be shortly stated and, as we have indicated, we would expect them to be given orally. They must, however, be indicative of the Tribunal having borne in mind all relevant considerations and excluded the irrelevant from its considerations."

53 There was reference made in *Ladbrokes Racing Ltd v Traynor* to *Ali v Office of National Statistics [2005] IRLR 201,* where LJ Waller commented on the importance of giving fair notice to an employer in the form ET1 of the case that the claimant alleges against him. He stated:

> "*39…….. …a general claim cries out for particulars to which the employer is entitled so that he knows the claim he has to meet. An originating application which appears to contain full particulars would be deceptive if an employer cannot rely on what it states."*

54 The position set out in paragraph 20 of *Ladbrokes Racing Ltd v Traynor UKEATS/0067/06MT*, is also relevant:-

> *"20. When considering an application for leave to amend a claim, an Employment Tribunal requires to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. That involves it considering at least the nature and terms of the amendment proposed, the applicability of any time limits and the timing and manner of the application. The latter will involve it considering the reason why the application is made at the stage that it is made and why it was not made earlier. It also requires to consider whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs whether because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if they are unlikely to be recovered by the party who incurs them. Delay may, of course, in an individual case have put a respondent in a position where evidence relevant to the new issue is no longer available or is of a lesser quality than it would have been earlier. These principles are discussed in the well known case of* ***Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [****1996] IRLR 661."*

55 Lady Smith's summarised the relevant law (at paragraphs 20 – 26) in *Margaret Forrest Case Management V Miss FS Kennedy*

UKEATS/0023/10/BI, which is with reference to the previous Tribunal Procedure Rules, but remains relevant, as follows:-

> *'20. An Employment Tribunal has power to grant leave to amend a claim at a hearing (see: Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 Rules 10(2)(q) and 27(7)). Thus, if a claimant's representative seeks permission to alter, add to or subtract from what is written in the claimant's form ET1, the Tribunal may, in its discretion, allow the representative to do so. The Tribunal does not have power itself to amend a claim."*

Claimant's Submissions

56 The claimant's representative relied on the following authorities, copies of which were produced in the claimant's List of Authorities for this PH :-

McKinney v London Borough of Newham 2015 ICR 495

Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore 1996 ICR 836

Transport and General Workers Union v Safeway Stores Ltd UKEAT/ 0092/07/LA

Cambridge and Peterborough Foundation NHS Trust v Crouchman 2009 ICR 1306

Northamptonshire County Council V Entwhistle 2010 IRLR 740 EAT

Galilee v The Commissioner of Police of the Metropolis UKEAT/ 0207/16/RN

Southwark London Borough Council v Jiminez 2003 EWCA Civ 502

57 The claimant's representative focussed on the issue of time bar as being a matter of dispute evidentially between the parties. He accepted that the relevant date from which time began to run in respect of the issues for this PH was either 21 August or 27 August 2018, as being the last day in the series of acts which was Ex CS Main's incremental decision making process on the

claimant's complaint. The claimant's representative relied on the determination of the claimant's complaint as being a positive act, and the last day of the act of investigation and determination of the claimant's complaint being 27 August 2018. The claimant was not seeking to rely on the date of communication (28 August 2018).

58 The claimant's representative relied on the claimant's complaint having itself being relied upon in the accepted amendment made on 4 November 2016 (itself amended on 25 November 2016), as set out at paragraph 10 in the Note following upon the PH in these cases on 15 March 2019 (at P163) (the 2016 amendment). The claimant's representative relied on the 2018 proposed amendment as providing an update, based on the outcome of the claimant's complaint.

59 The claimant's representative sought to distinguish this case from *McKinney* because the date of the decision is in dispute and, strikingly, the contended date of decision by the respondent is one that is different from what is on the face of the finalised decision. It was noted that the date of communication to the claimant's then legal representative was 28 August. It was the claimant's representative's position that the relevant date for application of the three month time period in terms of section 48(3) ERA was 27 August 2018.

60 The claimant's representative asked the Tribunal to make a finding in fact in respect of the date when Ex CS Main's decision on the claimant's complaint was made, and to find on the balance of probabilities, that the final expression of that decision was on 27 August 2018, which, it was submitted, was the date when that decision was actually made. He sought to draw comparison with a provisional view by a judge not necessarily being treated as a determination of the claim (*Southwark London Borough Council v Jiminez).* His submission was that although investigations by employers are not to be treated as of the same status as the judicial processes, there are clear similarities and the situation is generally analogous. His submission was that a preliminary view is open to change, and is also capable of remaining in place as a finalised view, depending on an evaluation of material and evidence

beyond the point of expressing a preliminary view. He submitted that that evaluation might change, it might confirm the preliminary view for essentially the same reasons as at the time the preliminary view was expressed, or it might confirm the view or conclusion for different reasons. He submitted that in any of those three scenarios the determination of the matter is made at the point of final determination, the preliminary view being part of the iterative process in reaching the final decision. The claimant's representative asked the Tribunal to make its finding in fact on the basis of Ex CS Main's evidence, Ex CS Main's decision as communicated to the claimant (P111 – P158) and the contemporaneous materials relevant to the decision, including drafts and internal correspondence or records (as included in the Joint Inventory of Productions).

61 The claimant's representative submitted that Ex CS Main gave his evidence generally in a careful manner and was generally credible. He relied on the concessions made by Ex CS Main in cross examination and the specific chapter of evidence in respect of the point by which he had reached a concluded view on the determination of all of the claimant's substantial complaints. It was submitted that Ex CS Main's evidence was not entirely reliable with regard to that point. Reliance was placed on the lack of documentary evidence produced by the respondent and the apparent lack of a system for recording progress in the investigation. It was noted that Ex CS Main was relying on his own recollection, beyond which only the 21 August draft and covering email and the finalised report were produced. Reliance was placed on this being unsatisfactory in general terms, given the length of the process and that in the context of other PSD investigations, a computer data recording system was potentially available, and in light of Ex CS Main's substantive other duties at the time. The claimant's representative submitted that while Ex CS Main was doing his best to assist the ET in respect of dates and times, inevitably some of his evidence on that was vague and, it was submitted, unreliable and of very limited weight. It was not disputed that Ex CS Main did not have access to or training in the Centurian computer data recording system, which was potentially available in other PSD investigations.

62 Reliance was placed on there being nothing in the documentary evidence before the Tribunal to suggest that the date of Ex CS Main's finalised determination on the claimant's complaint was 21 August 2018.

63 The claimant's representative submitted that Ex CS Main 'had to accept' that there were substantial additions in respect of his decision on the claimant's heads of complaint numbers 47, 48 and 49, in respect of new evidence in the form of an email of 10 February 2015. Reliance was placed on Ex CS Main being unable to say he had received that email prior to the 21 August 2018 draft, but accepting that that draft did not reference the email of 10 February 2015. Reliance was placed on Ex CS Main's acceptance that there were substantial differences between the 21 August version and the 27 August version, and his acceptance that those changes must have been made between 21 and 27 August 2018.

64 It was submitted that the weight of evidence does not support a factual conclusion that the claimant's complaint was determined prior to 27 August 2018. The claimant's representative's position was that whilst the draft of 21 August 2018 was substantially complete, as Ex CS Main himself said in evidence, the process of investigating and reaching conclusions on the complaint was iterative. It was submitted that the draft of 21 August 2018 was not a concluded determination, for the concluded reasons, of the claimant's complaint. It was submitted that there were revisions of substance between 21 and 27 August 2018 to complaints 47, 48, 49, 51, 52, 53 and 54 and some more minor changes in expression to the decision on other heads of complaint. The claimant's representative submitted that the fact that some reasoning was substantially altered demonstrates that the reasoning was still being actively considered by Ex CS Main after 21 August 2018. He submitted that given Ex CS Main's uncertainty in respect of dates when the changes were made between 21 and 27 August, and also as to the date of his receipt of the email of 10 February 2015, the reliable and rational factual conclusion to be drawn from the evidence is that such finalised determination were reached on, or shortly before 27 August 2018.

65 The claimant's representative submitted that the fact that some conclusions were reached by 21 August 2018, and others were later, indicates that this determination was one that occurred over a period, and as such the relevant point by which one should conclude that time began (on application of section 48(4) ERA), is the last day of that period, being 27 August 2018. His submission was then that the claim was presented within time, on 23 November 2018.

66 The claimant's representative submitted that if the Tribunal were to find that the relevant date was 21 August 2018, rather than 27 August 2018, then there should be consideration of the issue of reasonable practicability for compliance under section 48(3)(b) ERA. He placed reliance on *Cambridge and Peterborough Foundation NHS Trust v Crouchman 2009 ICR 1306* and *Northamptonshire County Council V Entwhistle 2010 IRLR 740 EAT.* Reliance was placed on Underhill J, as he then was, in the ET summary of the relevant principles at paragraph 11 in *Cambridge and Peterborough Foundation NHS Trust v Crouchman* (particularly at 11(1)-(3)). Distinction was made in the present case, were the claimant did not learn of another date being suggested as being the date of the decision until it was pleaded in the ET3 submitted in response. The claimant's representative submitted that the circumstances of the present case are analogous to those in *Northamptonshire County Council V Entwhistle because,* as a matter of fact, no other date for the decision was provided to the claimant and her solicitor other than 27 August 2018.

67 It was submitted that if the relevant date for the decision is found by the Tribunal to be 21 August, then the claim ought to have been presented on 20 August, and was three days out of time, being presented on 23 August. It was submitted that that was not unreasonable.

68 In respect of the 2018 proposed amendment application, the claimant's representative relied on the *Selkent* principles. He was submitted that even if, based on the Tribunal's finding in fact on the relevant date for calculation of time bar, the Tribunal were to find that the claim was submitted out of time

(on the basis of the date of the decision being 21 August 2018), then the Tribunal has discretion to permit the amendment. It was submitted that the nature of the 2018 proposed amendment, which is in the same terms as the 2018 ET1, is to bring new factual allegations and new aspects of existing claims, which are closely related to the facts of the existing claims, and are a development in the narrative of a complex dispute. Reliance was placed on a claim for detriment arising from making a public interest disclosure having been brought on 4 November 2016 (in the 2016 amendment).

69 It was submitted that the balance of injustice and hardship to the claimant in refusing the amendment would outweigh any injustice and hardship of permitting it. It was submitted that to refuse the amendment would deprive the claimant of the opportunity to assert her claim in respect of the last chapter in a substantial narrative. Reliance was placed on there being a substantial claim concerning earlier aspects of the claimant's allegations competently before the Employment Tribunal and awaiting determination. It was submitted that there is sufficient time before the proposed final hearing for the respondent to properly prepare its defence to those claims. It was submitted that if the claim is out of time, then it is only narrowly out of time (by three days) and there has been no prejudice to the respondent's ability to avert its position in response to it. It was submitted that inclusion of the claim is unlikely to impact substantially on the overall length of hearing in what is already a substantial and complex claim on its facts. Reliance was placed on a substantial defence having already been provisionally provided by the respondent. The Tribunal was invited to permit the proposed amendment.

Respondent's Submissions

70 The respondent's representative relied on the following authorities, copies of which were produced in the respondent's List of Authorities for this PH :-

Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53

Which Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore 1996 ICR 836

GMB v Michael Hamm EAT 0246/00

McKinney v London Borough of Newham 2015 ICR 495

Abercrombie and Others v AGA Rangemaster Ltd 2014 ICR 209 CA

71 It was the respondent's representative submission that the 2018 claim was lodged outside of time, pursuant to section 48(3)(a) ERA. She relied on the date of Ex CS Main's decision not to uphold the claimant's 59 heads of complaint being 21 August 2018. She submitted that on that basis the time limit for lodging a claim ended on 20 November 2018. Reliance was placed on the claimant not having contacted ACAS until 23 November 2018 in respect of that matter, and not having lodged the claim with the ET until 23 November 2018. Her submission was that the ACAS ECC, the 2018 ET1 and the 2018 proposed amendment were all out of time.

72 The respondent's representative relied on it being Ex CS Main's evidence that he adopted an iterative approach to his decision making on the 59 heads of complaint in the claimant's complaint, and that he reached his decision in respect of that complaint no later than 21 August 2018. Reliance was placed on the email of 21 August 2018 P61. It was submitted that the attachment to that email is Ex CS Main's substantive decision on the claimant's complaint. Reliance was placed on Ex CS Main's evidence that the recipients of that email were not advisors in respect of the decision being made. Reliance was placed on the substantive decision not having changed from 21 August to 27 August. It was submitted that the changes which were in addition to top and tailing and wording changes, related to the 10 February 2015 email. It was submitted that Ex CS Main's position that he could not recollect whether he had received that email prior to or after 21 August 2018 demonstrates his honesty and credibility as a witness. The Tribunal was asked to accept Ex CS Main's position in his evidence in chief that he had reached his finalised determination by 21 August 2018, and to accept his position under cross examination that his decision had not changed, and that the additional information inserted was to explain why he had come to his decision. The Tribunal was invited to find that the relevant date for application of section

48(3) ERA, being the date of Ex CS Main's decision on the claimant's complaint, was 21 August 2018.

73 Reliance was placed on the claimant having been professionally legally represented throughout the complaint process, including when the 2018 ET1 was lodged with the Employment Tribunal on 23 November 2018. Reliance was placed on the claimant's acceptance that her then legal representative, Margaret Gribbon, is a skilled legal adviser.

74 It was submitted that following *McKinney*, the clock begins to run for the purposes of time bar from the date of the decision of the alleged detrimental act, and not when the claimant learned of the act. It was the respondent's position that the decision not to uphold the claimant's 59 heads of complaint was taken by Ex CS Main no later than on 21 August 2018, and that decision was communicated to the claimant's representative on 28 August 2018. It was submitted that the claimant's knowledge is not relevant in respect of when time begins to run, on application of section 43(3)(a).

75 It was the respondent's representative's position that, on application of section 48(3)(a) ERA, it was reasonably practicable for the claimant to lodge her claim prior to the expiry of the primary time limit of 20 November 2018. Reliance was placed on the claimant having been represented by a solicitor throughout the entirety of her complaint, at the time of the outcome being issued on 28 August 2018, and subsequently on the lodging of the ET1 claim form on 23 November 2018. Reliance was placed on the claimant and her then legal adviser having had knowledge of the alleged detriments on or around 28 August 2018. Reliance was placed on the claimant's evidence that the claimant was in regular contact with her then legal adviser throughout this period, on a weekly basis. It was submitted that the claimant and her then legal adviser had the required information at their disposal to lodge the claim within the three month time limit. It was submitted that there was no deliberate act of the respondent to conceal the date of the decision or mislead the claimant. Reliance was placed on there being no explanation or evidence led

on behalf of the claimant explaining why her claim could not have been lodged at an earlier date.

76 On that basis, the respondent's representative submitted that the claimant has not overcome the first hurdle of the test in section 48(3)(b) ERA, that it was not reasonably practicable for her to submit her claim in time. It was submitted that it was not reasonable for the claimant's solicitor to wait until 23 November 2018 before submitting the ET1 claim form. Reliance was placed on Margaret Gribbon having represented the claimant since September or October 2015 in relation to Employment Tribunal proceedings progressing against the respondent since 10 July 2015. It was submitted that the principles in *Dedman* apply and the claimant's remedy is against her former solicitor.

77 The respondent's representative invited the Tribunal to find that it does not have jurisdiction to hear the claimant's claims set out in the 2018 proposed amendment and the 2018 ET1 as they have been submitted out of time.

78 The respondent's representative's submissions on the application of the *Selkent* principles were that the nature of the amendment is substantial, involving new facts and a new cause of action. It was the respondent's representative submission that the nature of the amendment will require new factual lines of enquiry to be determined by the tribunal at the final hearing, adding further complexity to what is already a complex case legally, procedurally and factually it was submitted that allowing the amendment would result in the requirement of additional witnesses being required on behalf of the respondent, likely resulting in the hearing being extended further from what is already a 20 day hearing. It was submitted that the proposed amendments are not minor amendments. Reliance was placed on them extending to 11 pages, including 22 alleged detriments in relation to Ex CS Main's decision and allegations in relation to PSD. It was submitted that allowing this amendment is disruptive to the preparations already undertaken by the respondent in defending this claim and would result in additional expense being incurred by the respondent. Reliance was placed on LJ

Underhill's position in *Abercrombie*. The respondent invited the Tribunal to determine that the claimant's proposed amendment should not be permitted, given the extent of the new factual areas of enquiry compared to the previous pleadings. It was submitted that allowing the proposed amendment would require the examination of Ex CS Main's handling of the claimant's 59 heads of complaint referred to at paragraphs 5, 6, 7 and 8 of the claimant's application to amend (P40 – P47).

79 It was submitted that as the respondent will require to invest additional time, resources and expenses in investigating this entirely new line of enquiry, allowing the amendment application would then cause greater prejudice to the respondent than the claimant in refusing the application. Reliance was placed on the claimant still being in a position to advance her claims which are currently progressing before the Employment Tribunal. The Tribunal was invited by the respondent's representative not to permit the claimant's proposed amendment.

Additional Submissions

80 I invited both representatives to address me on the particular terms of the 2018 proposed amendment, in consideration of the principles in *Ladbrokes Racing Ltd v Traynor.*

81 Following their considerations, the agreed position of both parties' representatives' position was as follows:-

82 What is set out in numbered paragraph 1 of the 2018 proposed amendment (at P39) is a statement relating to the allegations of misconduct present in the claimant's complaint to the respondent made on 26 May 2016 , which is also relied upon in the 2016 amendment (P253 – P262).

83 What is set out in numbered paragraph 2 of the 2018 proposed amendment overlaps with what is set out at paragraph 5 (both at P40). These contain allegations in respect of the timing of the respondent's investigation of the claimant's complaint. There is specific reference at paragraph 2 to

commencement of the investigation in November 2016 and to a letter dated 18 May 2017. The claimant contends at paragraph 5 that "…*the respondent's PSD unnecessarily delayed their investigations into her allegations…."*.

84 There are averments of facts on timing in the period from July 2016 to 1 September 2016 present in paragraphs 3 to 11 of the 2016 amendment (at P253 to P256).

85 Averments of fact relating to dates in the period from September until November 2016 are set out in the proposed 2018 amendment and are not explicitly foreshadowed in the 2016 amendment.

86 There is no specific reliance on the delay or timing of the investigation into the claimant's complaint prior to the proposed 2018 amendment.

87 Paragraph 3 of the proposed 2018 amendment states as follows:-

> *"On the 25th May 2017 the respondent approved a whistleblowing policy and published same on the 21 June 2017. Despite the fact the claimant had made whistleblowing complaints, the respondent at no time made her aware of their new whistleblowing policy."*

88 There was no previous reliance by the claimant on that whistleblowing policy and those allegations are new.

89 Paragraph 4 of the proposed 2018 amendment is an aspect of the timing of the investigations. In that paragraph 4 there is reference to a letter dated 1 June 2017. That letter and its content is also referred to in paragraph 1 of the 2017 amendment (at P270).

90 No issue of time bar was raised at the time of the 2017 amendment.

91 In paragraph 6 of the proposed 2018 amendment, the claimant alleges that the respondent failed to impartially or independently investigate the allegations set out in the claimant's complaint. The 2017 amendment at

paragraph 2 (P270) first raises the broad point as to whether the respondent's investigation was sufficiently independent. There are some new factual averments then in the proposed 2018 amendment at paragraph 6. There is specific reference in that paragraphs 6 to the content of the 2016 amendment and the 2017 amendment.

92 Paragraph 7 of the proposed 2018 amendment relies on the findings of CS Main's investigation, which has been addressed in the parties' representatives' substantive submissions.

93 Paragraph 8 of the proposed 2018 amendment, in general terms, relates to the claimant's position in respect of alleged impartiality of the investigation, as also set out in paragraph 6 of the proposed 2018 amendment.

94 With regard to this analysis of the content of the proposed 2018 amendment, it was respondent's representative's further submission that what is set out in paragraphs 2 - 6 of the proposed 2018 amendment relate to allegations of delay and conduct of the respondent's investigation into the claimant's complaint 26 May 2016.

95 It was the respondent's representative position that the totality of the proposed 2618 amendment should be refused, *esto*, that paragraphs containing allegations which are not relied on in the previous amendments should be refused. It was her position that there are entirely new allegations set out in paragraph 3 and paragraph 7, and some new allegations in paragraph 6.

96 The respondent's representative relied upon *Entwistle* and the reasonable practicability of the claimant's legal representative, bringing a claim in time. Her position was that the claimant's then legal representative should have submitted the ET1 or proposed amendment on an earlier date and it would have been reasonably practicable for the amendment or ET1 to have been submitted in time.

97 With regard to this analysis, and the question of reasonable practicability, it was then the claimant's representative's further submission that one should

look at the totality of the period, and not just the three month period from when the respondent asserts is the relevant date of 21 August 2018. It was the claimant's representative's position that there has been sharp focus on the end period because it has been argued by the respondent that the date of the decision is earlier than the date of communication of the decision. The claimant's representative relied on the distinction in *Couchman* with regard to knowledge of the date. Reliance in the present case was placed on the fact that the claimant did not learn of an alternative date for Ex CS Main's decision until receipt of the respondent's ET3 in response to the terms of the 2018 proposed amendment / 2018 ET1. The claimant's representative submitted that that puts the claimant in a stronger position and that if that were not the case then an unscrupulous employer could deliberately delay the publication of a decision made some time previously.

98 The claimant's representative's submission was that the 2018 proposed amendment should be allowed in its entirety and he did not wish to depart from the general principles in his primary submissions. He relied on the proposed amendment in *Abercrombie* being very different in respect of the facts and nature of the claims.

Decision

99 These proceedings focussed in the main on what is set out in paragraph 7 of the 2018 proposed amendment. That paragraph forms the substantive part of the 2018 proposed amendment.

100 It was agreed that a determination on timebar is relevant to both the issue of whether or not the proposed amendment to the 2015 ET1 should be allowed and to whether the 2018 ET1 should be accepted. Prior to the analysis before me of the content of the 2018 proposed amendment, the relevant date for the assessment of time bar was taken by both representatives to be the date of Ex CS Main's decision on the claimant's complaint. There is no doubt that that is the relevant date for what is set out at paragraph 7 of the 2018

proposed amendment.

101 For the reasons set out above, I have made a finding in fact that the date of Ex CS Main's decision on the claimant's complaint is 27 August 2018. Ex CS Main's decision on the 59 heads of the claimant's complaint was taken incrementally. I have made a finding in fact that the email of 10 February 2015, which is referred to in the 27 August, version of Ex CS Main's decision was received by him in the period between 21 August and 27 August 2018. I reached that finding in fact, on application of the balance of probabilities, attaching significant weight to the fact of that email not being referred to in the 21 August version and being substantively referred to in the 27 August version, together with CI Main's position that that email had come in 'late' but that he could not say whether it was more likely that it was received before or after 21 August 2018. Taking into account all of the evidence before me. It is my conclusion on the balance of probabilities that it is more likely that the email was received after 21 August 2018.

102 There was no dispute that the February 2015 email was relevant evidence to the issues to be determined in the claimant's complaint. On that basis, and given that the introduction and conclusion to Ex CS Main's decision clearly refer to all evidence being considered, I concluded that Ex CS Main's decision on the claimant's complaint was finally reached on 27 August 2018, which is the date of the issued decision sent as an attachment to the claimant's then legal representative on 28 August 2018.

103 Certainly in respect of the allegations and averments set out at paragraph 7 of the 2018 proposed amendment, with regard to s 48(3)(a) ERA that is the last date in a series of dates when Ex CS Main either carried out the act or acts complained of (in reaching the decisions he did under the 59 heads of complaint)) or failed to act (in not reaching certain decisions under those heads of complaint). Those acts or failures to act are a series of similar acts or failures to act, being all part of the decision on the claimant's complaint. On the basis of my finding in fact that the date of Ex CS Main's decision was 27 August 2018, the last of those acts or failures was 27 August 2017. On

that basis, the date when a claim in respect of that series of similar acts or failures to act ought to have been submitted, on application of section 48(3)(a) of the Employment Rights Act 1996), was 26 November 2018 (within 3 months of 27 August 2018, taking into account the date of the relevant ACAS ECC). The proposed amendment was presented on 21 November 2018. The 2018 ET1 was lodged on 23 November 2018. In respect of the claim relying on Ex CS Main's decision, both the proposed amendment and the ET1 were presented within the relevant time period and are not timebarred, being presented before the end of the period of three months beginning with the date of the last of a series of similar acts or failures to act to which the complaint relates to.

104 Firstly dealing with the position set out at paragraph 7 of the 2018 proposed amendment, having determined on the issue of time bar on that aspect, I considered whether that part of the proposed amendment should be allowed, with regard to the principles set out in the relevant law. I considered it to be very significant that the 2016 amendment, submitted on 4 November 2016, specifically referred to and brought a claim under s47B of the ERA. That is public interest disclosure (whistleblowing) claim. The 2016 amendment relies on the claimant's complaint of 26 May 2016 alleging misconduct by 11 police officers as being a protected disclosure. There was no objection to that 4 November 2016 amendment. A response was lodged on behalf of the respondent setting out the respondent's position in respect of those factual allegations and denying victimisation or any detriment. There was no suggestion at the time of the 2016 amendment or the 2017 amendment (which also specifically refers to s47B ERA) that the claim under s47B was time barred or that the respondent would be in any way prejudiced by that claim being brought when it was. A substantive response has been lodged to the 2016 amendment, the 2017 amendment and to the 2018 proposed amendment. It was not argued before me that either the 2016 amendment or the 2017 amendment ought not to have been allowed (e.g. on the basis that the s47B claim brought therein was brought after the expiry of 3 months from the relevant date or dates on application of s48(3) ERA). I heard no evidence

on what were the acts or failures relied upon in the 2016 or 2017 amendments, and no evidence on the date or dates of any detriment suffered by the claimant as a result of any such acts or failures. For these reasons, I proceeded on the basis that the s47B claims set out in the 2016 amendment and the 2017 amendment were not time barred.

105 On that basis then, what is set out at paragraph 7 of the 2018 proposed amendment is not a new head of claim. A claim under s47B ERA is specifically referred to in both the 2016 amendment and in the 2017 amendment. At the time of the 2018 proposed amendment, the 2015 claim included a claim under s47B ERA which relied on the claimant's complaint. Paragraph 7 of the 2018 proposed amendment relies on Ex CS Main's decision of 27 August 2018, which was the outcome of the claimant's complaint. Paragraph 7 of the 2018 proposed amendment is an update of a claim already brought under s47B ERA. The nature and terms of what is set out in that paragraph 7 is an update of the s47B claim as a result of the decision which was the outcome of the claimant's complaint.

106 The fact that what is set out in paragraph 7 of the 2018 proposed amendment is not a new head of claim is significant in applying the *Selkent* principles. The nature and terms of paragraph 7 of the 2018 proposed amendment are the updating of an existing claim under s47B ERA, with the addition of new facts arisen since the time of the 2016 and 2017 amendments. Paragraph 7 of the 2018 proposed amendment is more than the addition of a factual details to existing allegations because in updating in respect of the decision on the claimant's complaint, new factual allegations are made in respect of that decision itself, and from what is set out as the reasoning of that decision. That includes reliance on what is set out in the decision as having been done in respect of investigation into the claimant's complaint. The 2018 proposed amendment was lodged within 3 months of the relevant date in respect of those new factual allegations (27 August 2018).

107 Paragraph 1 of the 2018 proposed amendment sets out what the claimant relies upon as being protected disclosures. The claimant's complaint of 26

May 2016 is included as being relied upon as a protected disclosure. The other events relied upon as being protected disclosures appear to refer to allegations of delay and impartiality in the respondent's dealing with the claimant's complaint (I was not addressed specifically by parties' representatives on that). Events relied upon in paragraph 1 of the 2018 proposed amendment are also relied upon in the 2016 amendment.

108 In addition to what is relied upon from Ex CS Main's decision of 27 August 2018, the 2018 proposed amendment seeks to rely on the following as detriments said to have been because the claimant made what she says are protected disclosures.

- Non-application of the respondent's whistleblowing policy (paragraph 3)
- Unreasonable delay by the respondent in dealing with the claimant's complaint (paragraphs 2, 4 & 5)
- Alleged impartiality in the respondent's dealing with the claimant's complaint (paragraphs 6 & 8)

109 These are not new heads of claim. They are updating averments setting out allegations of fact which are relied upon as being detriments suffered. Parties' representatives are in agreement before me that the general issue of impartiality is relied upon in the 2016 and 2017 amendments. Parties' representatives are in agreement before me that that the general reliance on unreasonable delay and on non-application of the whistleblowing policy were not relied upon specifically before the 2018 proposed amendment.

110 I was not addressed on any link between the allegations of unreasonable delay and the outcome of the investigation into the claimant's complaint, being Ex CS Main's decision of 27 August 2018.

111 I applied s48(3) ERA to those aspects of the 2018 proposed amendment

which are in addition to what is relied upon directly in terms of Ex CS Main's decision of 27 August 2018.

112 Paragraph 3 of the 2018 proposed amendment states:-

> "*On 25th May 2017 the respondent approved a whistleblowing policy and published same on the 21st June 2017. Despite the fact the claimant had made whistleblowing complaints the respondent at no time made her aware of their new whistleblowing policy."*

113 On the face of what is set out in that paragraph 3 of the 2018 proposed amendment, the date of the last of the acts relied upon there is 21 June 2017. That paragraph must however be read in the context of the whole of the 2018 proposed amendment. Paragraph 9 of the 2018 proposed amendment is:-

> *"The claimant contends that the failures detailed above constitute detriments on the grounds that she made protected disclosures and so the respondent has breached s47B of the 1996 Act."*

What appears then to be relied upon is the respondent's failure to apply their whistleblowing policy to the claimant's complaint. On the basis of that failure being a continuing failure as at the date of the outcome of the decision on the claimant's complaint, and on the basis of no other date being argued before me as being the relevant date in respect of that paragraph 3 of the 2018 proposed amendment, I have concluded that the relevant date for application of s48(3) ERA to paragraph 3 of the proposed amendment is the date of Ex CS Main's decision on the claimant's complaint. That is on the basis that that decision did not deal with the claimant's complaint under the respondent's whistleblowing policy. If that aspect of the 2018 proposed amendment were allowed, it would then fall to be a matter of proof as to whether there was any detriment arising from the non-application of the whistle blowing policy, and if so whether that was a detriment as a result of the claimant having made a protected disclosure, as alleged by her.

114 The allegations of unreasonable delay and alleged impartiality appear to me to be intrinsically linked to the outcome of the claimant's complaint. The date of that decision was the last in a series of similar acts or failures to which the complaint relates (section 48(3)(a)). For these reasons, I have proceeded on the basis that the relevant date for the application of s 48(3) ERA to those aspects of the 2018 proposed amendment is also the date of Ex CS Main's decision i.e. 27 August 2018.

115 There is no suggestion that the respondent would not be in a position to properly prepare their defence to what is set out in the 2018 proposed amendment / 2018 ET1. There may be additional cost in terms of preparation and the length of the hearing may be extended. In all the circumstances, the injustice and hardship to the claimant of refusing the amendment is disproportionate to any injustice and hardship to the respondent of allowing the amendment. At the Final Hearing the claimant will require to prove that she has made the protected disclosures relied upon (although there may be some concession by the respondent in respect of some aspects of what is relied upon) and that she has suffered a detriment as a result of making such protected disclosures.

116 For all these reasons, having found that the relevant date for application on section 48(3) ERA for the entirety of what is set out in the 2018 proposed amendment is 27 August 2017, and the 2018 proposed amendment and the 2018 ET1 both having been lodged within 3 months of that date, I did not then require to consider whether it was reasonably practicable for the Claimant to present the claim before the end of the relevant period of three months. For the same reasons, I did not require to consider whether the claim was presented within such further period as I considered reasonable. It was not in dispute that the claim was presented within 3 months of 27 August 2018. On application of s48(3)(a) ERA the 2018 proposed amendment and the 2018 ET1 have been presented in time.

117 Had I determined the date relied upon by the respondent of 21 August 2018

to be the relevant date, on application of s48(3)(a) the 2018 proposed amendment and the 2018 ET1 would have been presented outwith the relevant 3 month period and I would have required to apply s48(3)(b). In that event, I would have preferred the respondent's representative's submissions that the 2018 proposed amendment and 2018 ET1 were time barred. Had I found the date of Ex CS Main's decision to be 21 August 2018, I would then have accepted the respondent's representative's submissions in reliance of *Dedman.* I would have found that in those circumstances, and where the claimant was legally represented throughout, it would have been reasonably practicable to present the claim before the end of the relevant period of three months. On that basis, having found that it was reasonably practicable for the complaint to be presented within 3 months from the relevant date of Es CS Main's decision, I would not have gone on to consider whether the complaint was presented within such further period considered to be reasonable (on application of s48(3)(b).

118 For all the above reasons, I allow the 2015 claim to be amended in terms of the 2018 proposed amendment (now referred to as 'the 2018 amendment'). For the above reasons the claim proceeding under claim number 4123241/2018 is not time barred.

Further Procedure

119 It was discussed at the conclusion of this PH that parties' representatives had received correspondence in respect of scheduling the Final Hearing in this case. It was the representative's agreed position that they wished to utilise the offered dates in December 2019, and that additional dates would be required. Parties representatives were liaising with the Employment Tribunal office with availability for scheduling in January or February 2020. It is noted that dates and availability may require to be updated in consideration of the outcome of this PH and further date listing letters will therefore be issued.

120 The case management Orders as set out in the Note of the PH on 31 May 2019 stand. Parties' representatives should seek to agree the issues which

are now for determination by the Employment Tribunal. Specific reference should be made of what is required to be determined in respect of the claims under:-

- Reg 7 of the Part Time Workers (Part-time Workers (Prevention of Less Favourable Treatment) Regulations
- Section 27 Equality Act 2010
- Section 47B ERA.

121 Identification of the issues for determination by the Tribunal will be discussed as a preliminary issue at the commencement of the Final Hearing. Should parties' representatives consider it to be helpful to have a further PH for the purpose of case management prior to the Final Hearing, they should liaise in respect of the matters which can be usefully progressed at that and contact the Employment Tribunal office with their position.

C McManus
Employment Judge

10 October 2019
Date of Judgment

Date sent to parties **11 October 2019**