



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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Case Nos: 4114755/2019 & 4107034/2020

Written Submissions

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Employment Judge: M A Macleod

Mr G Timothy

Claimant  
In Person

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Dell Corporation Ltd

Respondent  
Represented by  
Ms D Reynolds  
Solicitor

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

25 The Judgment of the Employment Tribunal is that the claimant's application to amend his claim dated 25 January and 16 February 2021 is refused.

### **REASONS**

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1. In these combined proceedings the claimant claims unfair dismissal and discrimination on the grounds of disability under sections 15, 19, 20/21 and 27 of the Equality Act 2010.
2. Following a Preliminary Hearing on 15 January 2021 before Employment  
35 Judge Porter, the claimant submitted a document on 25 January 2021 in which he made an application to amend his claim.

3. That application was opposed by the respondent, and following further correspondence it was agreed by the parties that the application would be determined by the Tribunal on the basis of written submissions.

4. In this Judgment, I set out the application, and the basis upon which it is made; the grounds upon which the application is opposed; the parties' respective submissions; the relevant law, and the decision reached by the Tribunal.

### **The Application**

5. The claimant set out his application to amend his claim based on three points:

*(a) Failure to properly investigate ethics complaint. (Adding other label for facts already pleaded).*

*(b) Upper management's failure to properly investigate complaint regarding Ethics Committee's failure to investigate original complaint properly. (Adding other labels for facts already pleaded).*

*(c) Adding the respondent's anti-mental health discrimination initiatives/policy. (Adding factual details to existing allegations).*

6. The claimant requested that points (a) and (b), which fell under his existing victimisation claim, should be added to indirect discrimination, duty to make reasonable adjustments and discrimination arising from disability.

7. He said that the reason why the claims were not included in the original ET1 was that the ethics complaint was ongoing and unresolved.

8. The claimant then addressed the indirect discrimination claim, and set out his understanding of what he required to show. In particular he said that he had to show that the PCP was not a one off decision, and that he had to be able to show that the PCP was not specific to him, but dealt with a generic approach to the non-adherence of the Ethics Policy. He said he believed he would be able to show that the non-adherence to the Ethics Policy went

wider than the specific department into the organisation as a whole as he considered that the evidence was there for him to do so. He observed that his complaint about Mr Galpin, his direct line manager, already sat within the indirect discrimination claim, and that the ethics complaint had common threads which bound it together with that complaint. The two common topics within each complaint were mental health and the ethics policy

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9. He considered that the relevant questions were: who had visibility of the complaints? How were these individuals obligated to respond? And in what way did they respond? He suggested that “this” dealt specifically with section 19(2)(b) of the 2010 Act. If he were not able to include this complaint about the ethics policy within his indirect discrimination claim, he maintained, that claim would be weakened and he would not be able to present a full and complete picture to the Tribunal.
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10. He argued that the respondent would not be disadvantaged were he permitted to add this complaint to the indirect discrimination claim, as the evidence which would be required for his victimisation claim would be the basis for his indirect discrimination claim. The defence open to the respondent would be the same for both claims.
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11. The claimant then referred to the claim under duty to make reasonable adjustments, pointing to section 6.2 of the Code of Practice as requiring employers to take positive steps to ensure that disabled people are able to access and progress in employment. He submitted that this element of the overall claim is fundamental and almost central to all other elements of the entire claim.
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12. He suggested that it would be an injustice to be able to argue disability discrimination but be prevented from asking the question – why were things done in that particular way by the employer, and why did they choose not to do the small things which would have made a difference? In particular, it is necessary to allow the claimant to pursue this claim when there is an obligation, he said, for the employer to treat a disabled person more favourably than others.
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13. He argued that the respondent would not be at any disadvantage if the claim were permitted to proceed in this way. The respondent's argument is that they did not, nor could they reasonably be expected to, know that the claimant was a disabled person at the material time. As a result, no further  
5 action is required by the respondent to defend this additional aspect of the case, and so they would suffer no disadvantage.

14. With regard to the section 15 claim, the claimant endeavoured to clarify the amendment sought. He maintained that the "something" referred to in section 15 would be "pursuing the ethics issue as persistently as I did and  
10 involving and pressing senior members of staff within the organisation".

15. He then said that the causal link was that for people like the claimant who have a mental health condition, the ethics policy and anti-mental health discrimination policies are so important, and he relies upon such policies in order to make him feel secure and safe. When such policies are not  
15 adhered to, it hits those suffering from a mental health condition much harder than it would people who do not suffer from such a condition. Trying to understand why that safety and security are not there becomes an obsessive matter. He argued that it would be an injustice to disallow this amendment as it dovetails into all other aspects of the claim and provides  
20 the Tribunal with a more complete picture of the grievances which have been raised.

16. The claimant submitted that this claim already sits in the victimisation claim, and therefore that the respondent would not be at any disadvantage if the amendment were allowed. In addition, the respondent has already had  
25 access to all the evidence.

17. With regard to "adding the respondent's anti-mental health discrimination initiatives/policy", the claimant submitted that he seeks to add this in order to avoid confusion or challenges that it is a new pleading when referred to in future. This particular "piece of evidence" is covered by the ET1 but without  
30 a title, and it is simply evidence which will be used to support the allegations of discrimination already made.

18. He maintained that it would be an injustice for the amendment to be refused because irrefutable evidence would be presented at the final hearing which would show that it is impossible for the respondent to argue that they did not know that the anti-mental health discrimination policy/initiatives was a cornerstone of the organisational culture. It is therefore logical to say that the respondent has already taken this into account in the response to the claim they have submitted. There will be no disadvantage to the respondent in defending an argument which has already been presented in the ET1 on that basis.
19. On 29 January 2021, the claimant submitted further and better particulars which he said were based on the Order issued by Employment Judge Porter.
20. Firstly, the claimant set out his further particulars under the heading "Duty to Make Reasonable Adjustments". He said the PCP was "Failure to consider the mental health of the applicant (sic) and adjust accordingly". As to the substantial disadvantage, he said that where a person with anxiety or depression required to face a redundancy process, the impact was much worse than for others, and argued that symptoms could be worsened as a result.
21. He then put forward a number of reasonable adjustments which he considered the respondent should have put in place for him, from 14 July 2020 until the confirmation of redundancy on 18 August 2020.
22. For example, when the claimant received a letter on 14 July 2020 informing him that he was at risk of redundancy, he proposed that the respondent should have:
- researched the employment status and history of the claimant before starting the process;
  - enquired about the current health status of the claimant;
  - enquired of the claimant how he would want the process to be handled given his mental health condition;

- enquired about the preferred method of consultation;
- arranged an initial call with the claimant to explain the process and answer any questions before commencing the consultation process; and
- 5 • offered counselling during and after the redundancy process.

23. The claimant's further particulars outlined a large number of adjustments which he considered should have been put in place at different stages in the process.

10 24. Secondly, the claimant submitted that act of being selected for redundancy was an act of retaliatory victimisation in relation to the pressure applied by the claimant to the respondent to address mental health discrimination.

25. He set out a list of 19 alleged protected acts upon which he sought to rely, from 3 May 2019 until 20 July 2020.

15 26. He then asserted that the detriments to which he was subjected as a result were:

- being selected for redundancy and his employment terminated;
- redundancy process not being carried out properly;
- no reasonable adjustments (as set out in the first part of his further particulars); and
- 20 • his employment being terminated.

27. He alleged that between July 2020 and 31 August 2020, these detriments were applied to him by Mr Galpin, direct line manager; Mr Bowen, manager to Mr Galpin; and Ms Lisa Harvey, HR "Generalist", the dismissing officer.

25 28. On 4 February 2021, following a reminder by the respondent, the claimant submitted further and better particulars of his unfair dismissal claim, attaching a document which incorporated both those particulars and the particulars of his reasonable adjustments and victimisation claims.

29. He stated that his claim for unfair dismissal was based on his claim that the respondent failed to adopt a proper redundancy process. Essentially, he asserted that there was no group consultation informing the staff that their jobs were at risk, prior to the letter of 14 July 2020 advising him that he was at risk of redundancy; that the letter of 14 July 2020 itself contained procedural flaws; that no consultation process actually took place; that at the end of the consultation process on 18 August 2020, no final consultation nor redundancy dismissal meeting took place; and that the respondent presented no evidence throughout that they made any effort to look for alternatives to redundancy.

30. Finally, on 16 February 2021, the claimant sought to add a further paragraph to his amendment application, namely:

*(d) Adding email sent to former manager requesting HR investigate Mr Dave Mackie. (Adding factual details to existing allegations).*

### **The Respondent's Opposition**

31. On 26 January 2021, the respondent's solicitor, Ms Reynolds, wrote to the Tribunal to oppose the application to amend. She observed that the application was insufficiently clear so that the respondent did not understand properly what amendments the claimant wished to make.

32. She also pointed out that it was clear from both ET1s presented by the claimant that he was aware that of his right not be discriminated against and that he had claims for discrimination. It was also clear from the claimant's amendment to his claims, dealt with by written submissions on 15 September 2020, that he considered the Ethics complaint to be concluded (albeit not to his satisfaction). She asserted that he had delayed unreasonably in making this application.

### **Submissions**

33. The terms of the claimant's documents included within them submissions in support of his application. It appears that he also submitted to the Tribunal

a copy of the respondent's submitted objections with comments appended thereto, which have been taken into consideration.

34. The respondent provided a detailed response to the application to amend the claim. A summary of that response now follows.

5 35. Ms Reynolds submitted that the claimant sought to introduce new claims of indirect discrimination, duty to make reasonable adjustments and discrimination arising from disability, and adding factual details to existing allegations, which he intimated on 25 January 2021; and on 16 February 2021, adding a minor addition to the proposed amendment.

10 36. Ms Reynolds went on to set out the claimant's application to amend his first ET1 by intimating a "Minute of Amendment" on 20 March 2020, which averred, among other things, that the respondent failed to:

- 15 • deal with his ethics complaint, which amounted to a detriment because he had alleged the respondent had contravened section 27(2)(d) of the Equality Act 2010; and
- investigate their initial failure to deal with his ethics complaint, which amounted to a detriment because he brought proceedings in terms of section 27(2)(a) and alleged that the respondent had contravened section 27(2)(d) of the 2010 Act.

20 37. The claimant presented further particulars of the claim on 27 April 2020, and a Preliminary Hearing took place on 15 September 2020. The Tribunal determined that the application to amend should be granted, subject to deletion of the claim of direct discrimination.

25 38. Ms Reynolds then noted that the claimant presented a second ET1 to the Tribunal on 4 November 2020, bringing claims of unfair dismissal and disability discrimination. The respondent did not dispute that the claimant was dismissed on 31 August 2020.

39. The claimant then made an application to amend his second ET1 on 23 November 2020, averring that he had been selected for redundancy



because he had done a protected act. The respondent did not oppose this application as it was brought timeously.

5 40. Ms Reynolds then referred to the PH on 14 January 2021 following which the claimant was ordered to provide further and better particulars of his claim. In addition, the parties have been ordered to consolidate their pleadings.

41. Having set out a concise summary of the law, Ms Reynolds then turned to her objections to each part of the proposed amendment.

10 42. With regard to points (a) and (b) – the failure to properly investigate the ethics complaint and upper management’s failure to properly investigate the complaint regarding the Ethics Committee’s failure to investigate the original complaint properly – she pointed out that the claimant was very clear that this amounted to victimisation only. She maintained that the claimant was legally represented at that time.

15 43. She submitted that the claimant does not aver in his amendment any new or additional factual allegations that at any time from presenting the second ET1 he had attempted to make contact with the respondent about his ethics complaint and that the respondent had failed to respond, or responded in an unsatisfactory way. She said that it therefore appeared that the claimant  
20 was saying that the respondent’s failure took place some time between 23 May 2019, when he made a complaint to the Ethics Committee, and approximately 12 March 2019 when the claimant asked for copies of the investigation report into the matter, and there was no response.

25 44. Further she submitted that the claimant confirmed his understanding of the respondent’s position, that the matters pertaining to the claimant’s ethics complaint had been concluded. Thus, while the claimant may be unhappy with the handling of his ethics complaint, the process was nonetheless at an end in March 2019. It is therefore clear, she argued, that the claimant’s factual allegations remain unchanged from 12 March 2020 until 20 March  
30 2021 when the claimant intimated his current amendment.

45. As an observation at this stage, these parts of the respondent's objections are difficult to follow: reference is made to both 12 March 2019 and 12 March 2020, and also to 20 March 2021 when the claimant intimated his current amendment, which of course was 25 January 2021 (20 March 2021 remaining a date in the future as this Judgment is being drafted).
46. Ms Reynolds argued that if the less favourable treatment, failure to make reasonable adjustments and/or detriment arising from his ethics complaint did not take place until his dismissal on 31 August 2020, which she denied, the factual allegations remained unchanged from November 2020 when he submitted his second ET1, and 15 January 2021, when he confirmed to the Employment Judge at the PH that he was bringing a claim of unfair dismissal and section 20/21 and 27 claims under the 2010 Act.
47. The respondent's position is that the additional claims of indirect discrimination, failure to make reasonable adjustments and discrimination arising from disability are time-barred. The additional claims arise from the actions of the respondent prior to, and in or around 12 March 2019.
48. Considering the timing and manner of the application to amend, it was made some 8 months after acts complained of took place and some 3 months after presenting the second ET1. While the claimant may not be happy about the handling of the ethics complaint he is complaining about acts which took place around 12 March 2019 or before. No reason has been given as to why the claimant has delayed in bringing his new claims.
49. The claimant was legally represented when he submitted his application to amend in November 2020, and his claim was limited to victimisation only, and at the PH on 15 January 2021 he failed to mention the new claims, having been asked to confirm the discrimination claims he was bringing.
50. She submitted that amendments (a) and (b) seek to introduce claims which pre-date the second ET1 and which do not contain the necessary averments to support the claim, which would cause considerable prejudice if the claimant were permitted to pursue such claims. Further and better particulars would be required. In any event, the averments in the current

application are lacking in specification. She argued that the indirect discrimination claim does not specify a PCP, nor the group to which it applied, nor the disadvantage arising; the duty to make reasonable adjustments again fails to specify a PCP, the group to which it applies and the disadvantage arising; and the section 15 claim fails to specify what was the unfavourable treatment and the reasons arising from disability for that treatment, and how that reason arose from disability.

51. The parties are not, she said, at an early stage in the proceedings. The respondent does not accept that there are common threads binding his amendments to existing claims. The respondent would also require to ask the Tribunal to vary its order to consolidate the pleadings.

52. With regard to allegation (c), the respondent does not understand the amendment the claimant wishes to make. It is not known which facts the claimant intends to rely upon, nor which of his claims would be affected by his amendment. If the facts are not new, the claimant should have known of them by the time he presented his second ET1, and no reason is advanced as to why he has delayed in presenting this amendment.

53. She said that if the claimant can provide further specification and no new claim is being sought, the respondent may not have any objection to it.

54. Finally, Ms Reynolds confirmed that the respondent did not object to the introduction of amendment (d).

### **The Relevant Law**

55. It is appropriate to refer to the overriding objective of the Employment Tribunal, set out at Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:

*“The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –*

(a) *ensuring that the parties are on an equal footing;*

- (b) *dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) *avoiding unnecessary formality and seeking flexibility in the proceedings;*
- 5 (d) *avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) *saving expense.”*

56. There is a useful formulation of the types of amendment which are typically put forward by parties in Tribunal proceedings in *Harvey in Industrial Relations and Employment Law*, Division T at paragraph 311.03:

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**“A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim; and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.”**

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20 57. An important authority in this area is **Selkent Bus Co Ltd v Moore** 1996 ICR 836. At p.843, Mummery J, as he then was, said:

*“(4) Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.*

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*(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant.*

5 (a) *The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of*

10 *action.*

15 (b) *The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g. in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978.*

20 (c) *The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment.*

25 *Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be*

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*recovered by the successful party, are relevant in reaching a decision”.*

58. The Tribunal was also referred to **Office of National Statistics v Ali [2004] EWCA Civ 1363**. At paragraph 39, Lord Justice Waller states:

5       *“In my view the question whether an originating application contains a claim  
has to be judged by reference to the whole document. That means that  
although box 1 may contain a very general description of the complaint and  
a bare reference to the particulars to an event..., particularisation may make  
it clear that a particular claim for example for indirect discrimination is not  
10       being pursued. That may at first sight seem to favour the less particularised  
claim as in **Dodd**, but such a general claim cries out for particulars and  
those are 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  
15       states...”*

59. In paragraph 40, he went on: *“One can conceive of circumstances in which,  
although no new claim is being brought, it would, in the circumstances, be  
contrary to the interests of justice to allow an amendment because the delay  
in asserting facts which have been known for many months makes it unjust  
20       to do so... There will further be circumstances in which, although a new  
claim is technically being brought, it is so closely related to the claim already  
the subject of the originating application, that justice requires the  
amendment to be allowed, even though it is technically out of time...”*

### **Discussion and Decision**

25       60. This case has a somewhat lengthy and complex history, involving two  
separate ET1 claim forms and a previous application to amend, in the first  
ET1 proceedings, which was, to a large extent granted. The claimant now  
seeks to amend his new claim, which is combined with his old claim, and  
that application is opposed.

61. Before considering whether or not the application should be granted, it is worth saying that this is a case in which the pleadings have already spread into a very complex form, in respect of which Employment Judge Porter emphasized the need for clarity in the pleadings. Regrettably this amendment has succeeded in adding complexity to the case, and the claimant in particular should note that the Tribunal cannot permit the constant refining of the pleadings at each stage of the proceedings. There must be clarity and finality in the litigation. While it is understood that the claimant is not legally qualified and does not have the benefit of legal advice, I have considerable concerns about the ability of the parties, and particularly the Tribunal, to understand the precise shape of the case which will be brought before it.

62. In any event, the claimant's application, which was presented on 25 January 2021, seeks to add to the pleadings in the following way:

(a) *Failure to properly investigate ethics complaint. (Adding other label for facts already pleaded).*

(b) *Upper management's failure to properly investigate complaint regarding Ethics Committee's failure to investigate original complaint properly. (Adding other labels for facts already pleaded).*

(c) *Adding the respondent's anti-mental health discrimination initiatives/policy. (Adding factual details to existing allegations).*

(d) *Adding email sent to former manager requesting HR investigate Mr Dave Mackie. (Adding factual details to existing allegations).*

63. The document in which the claimant set out his amendments proceeds to argue the basis upon which the amendment should be granted.

64. In order to determine whether or not the application should be granted, it is appropriate, in my judgment, to consider the nature of the amendment sought first.

65. As I understand it, the four paragraphs (a) to (d) seek to summarise the amendments sought. The significant new material appears to me to be found in (a) and (b). The claimant seeks to complain that the respondent failed to carry out a proper investigation of his ethics complaint, and that upper management of the respondent failed to investigate his complaint about the Ethics Committee's failure to investigate the original complaint.

66. The difficulty for the Tribunal is that the claims in these two paragraphs are now said to be claims of indirect discrimination, duty to make reasonable adjustments and discrimination arising from disability, but that no further specification of the claims is provided.

67. If the claimant wishes these complaints to be categorised as indirect discrimination, he requires to set out much more detail as to the basis upon which he makes that claim: by specifying the PCP upon which he relies, the substantial disadvantage to which a group bearing his protected characteristic would be subjected by the application of that PCP, and the substantial disadvantage to which he was subjected by the application of that PCP.

68. If he wishes these complaints to be categorised under the duty to make reasonable adjustments – and it is of importance to emphasize that his claim must specify not the duty but the alleged failure to comply with that duty – he must, again, set out the PCP, and the substantial disadvantage which occurs, as above.

69. If he wishes these complaints to be categorised as a complaint of discrimination arising from disability, the claimant must identify the unfavourable treatment to which he has been subject, and the basis upon which he says that he was discriminated against because of something arising in consequence of his disability.

70. His application makes a good deal of the reasons why the amendment should be allowed, as has been noted by the Tribunal, but it fails to set out a proper basis upon which the claims have been specified so as to allow the



Tribunal to consider them, or to give fair notice to the respondent of the basis of the claims.

5 71. In essence, the claimant has simply invited the Tribunal to reclassify his complaint about this ethics complaint under sections 19, 20/21 and 15 of the Equality Act 2010, without actually pleading claims under those sections in any meaningful way.

10 72. The Tribunal acknowledges that the claimant, while an articulate and intelligent individual, lacks legal qualification and experience, albeit that he may have benefited from legal assistance in the past, but it is essential that, in the interests of justice, any claim which is brought before the Tribunal is set out in a way which is comprehensible to the Tribunal and to the respondent.

15 73. The respondent has suggested that the claimant requires to provide further and better particulars of the amendment before it can be permitted. That is not a matter for me. What I require to determine is whether or not the application may be granted in the form in which it is presented. As I have already indicated, it concerns me that further detailed correspondence may be needed before the pleadings are finalised in this case, and the claimant should not assume that the Tribunal will grant any further applications to amend his claim.

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74. It is therefore my conclusion that the nature of the amendment sought in paragraphs (a) and (b) is so inspecific and unclear that it cannot be granted, as it does not, in its current form, amount to a meaningful development of the claim.

25 75. Paragraphs (c) and (d) do not appear to me to amount to an application to amend his claim, but merely an indication that there are additional facts on which he will wish to rely in presenting his claim to the Tribunal at the final hearing. These are therefore matters which may be addressed by the Tribunal at that stage.

76. Accordingly, it is my judgment that the claimant's application to amend his claim dated 25 January and 16 February 2021 is refused, on the basis that the application does not adequately specify the claims which the claimant wishes to add.

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Employment Judge: Murdo Macleod  
Date of Judgment: 15 March 2021  
Entered in register: 15 March 2021  
and copied to parties

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