Appeal No. UKEAT/0103/20/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 2 & 3 December 2020

Before

MRS JUSTICE STACEY

(SITTING ALONE)

MS M MARRUFO APPELLANT

BOURNEMOUTH CHRISTCHURCH AND POOLE COUNCIL RESPONDENT

JUDGMENT

(FULL HEARING)

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APPEARANCES

For the Appellant

MS M MARRUFO

(Party in Person)

For the Respondent

MS DANIELLA GILBERT

Instructed by
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SUMMARY

Topic No: 8 PRACTICE AND PROCEDURE

The ET had not exceeded the wide ambit of its wide discretion and case management powers when it dismissed some of the Appellant/Claimant's applications to amend her claim. In considering an amendment application, whether the proposed amendment would still be in time is only one factor and is not determinative.

Parties must make clear in correspondence with the Tribunal when they are making an application in their correspondence and comply with rule 30 and some procedural rigour is necessary.

Appeal dismissed.

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MRS JUSTICE STACEY

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1. The Appellant, Ms Marrufo, appeals against the order of Employment Judge Emerton following a two-day preliminary hearing in the Southampton Regional Employment Tribunal office on 10 and 11 October 2019, when he refused to allow a number of amendments to Ms Marrufo's claim against her former employer, Bournemouth Christchurch and Poole Council. The Appellant was the Claimant before the Employment Tribunal, and the council was the Respondent below and is also the Respondent to this appeal. I shall refer to the parties either by their name or by reference to their status before the Employment Tribunal.

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2. The proposed appeal was initially rejected on the sift under Rule 3(7) by HHJ Auerbach but partly allowed following a Rule 3(10) oral renewal hearing on refined grounds before Deputy High Court Judge Gullick QC, when Ms Marrufo was represented by Jeremy Mills under the ELAAS Scheme. Deputy High Court Judge Gullick QC considered it was arguable that the Employment Judge had erred in rejecting ten of the 54 allegations contained in a Scott schedule prepared by the Claimant. This is a challenge to the Employment Tribunal's exercise of its case management powers and the proper approach to amendment applications and the construction and interpretation of the statement of case or pleadings. The grounds of appeal were precise and specific.

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3. Four grounds of appeal were permitted to proceed to full hearing, each with detailed subparagraphs. Ground one was that the Employment Tribunal had erred in rejecting allegations of associative direct disability discrimination in allegations 16, 17, 18, 21, 23, 35 and 36, since firstly, it was argued they were apparent on the face of the ET1 form and therefore no amendment was required; secondly, they disclosed arguable grounds contrary to the Employment Judge's conclusion; thirdly, that although allegations 16, 17 and 35 were now

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framed as instructions to discriminate, they had been apparent from the earlier iterations of the statement of case; and fourthly, that allegation 18 arguably disclosed a case and should have been allowed as an amendment.

4. The second category of permitted grounds related to the allegations of protected interest disclosure or whistleblowing, at paragraphs 23, 25, 46, 49 and 51 of the Scott schedule, none of which were allowed to proceed by the Employment Judge. It was said that he had wrongly refused the amendment applications since he had firstly wrongly proceeded on the basis that the claims had first been made on 13 May 2019, when in fact they had been referred to in an email of 25 March 2019. Secondly, they had been referred to in substance if not in name in the Claimant's emails of 20 and 21 February. Thirdly, they were alleged as continuing acts and were therefore not out of time. Fourthly, in relation to allegation 46, it was merely a change of label and should have been granted. Finally, fifthly, in relation to allegation 51, the Tribunal had reached a perverse conclusion and had taken an irrelevant consideration into account, namely that it was a weak and illogical claim and they had failed to take into account a material factor, which was that the Claimant had stated that she had been mocked and ignored.

5. The third permitted ground concerned allegation 49 in which the Claimant alleged that her reduction in sick pay to half pay constituted victimisation, breach of contract, wrongful dismissal and disability discrimination and public interest disclosure detriment. The Employment Tribunal allowed this as a breach of contract and constructive dismissal complaint but refused to allow further amendments to allow it to be argued on other grounds. This was challenged on perversity grounds.

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6. The fourth permitted ground of appeal was a challenge to the Tribunal's refusal to allow the Claimant to rely on protected act number 4, an email to her MP, and the Tribunal's reasons for doing that had been that it had not been shown to be capable of being a protected act within the meaning of section 27 of the Equality Act 2010 and that there was no evidence that the Respondent was aware of it at the material time.

7. **The Background**

Ms Marrufo worked as a Business Support administrator in the adult social care department of the Respondent council. She commenced employment in July 2017 and resigned less than two years later in May 2019. Prior to her resignation, she had brought a grievance in October 2018 of bullying and harassment of her by the business support team under the Dignity at Work policy. She also complained that a learning-disabled colleague, who we will refer to as X, was being bullied in the workplace. The colleague, X, had not been in the workplace since July 2018, but had been in the workplace between February and July 2018.

8. The grievance was not upheld, and an internal appeal outcome also rejected the allegations on 15 February 2019. Three days later, on 18 February, Ms Marrufo commenced Employment Tribunal proceedings. On the ET1 form she ticked the boxes identifying that the type of claim claimed was discrimination on grounds of race, disability and sex, and under the heading - "Other claims" set out “victimisation, harassment, bullying, direct disability discrimination by association”. No mention of whistleblowing was set out on that form. The box in the form where the background and details are to be set out in paragraph 8.2 made general assertions of "bullying and harassment for myself and a vulnerable employee with learning disabilities" and merely reiterated that she had been discriminated against on grounds of disability, sex and subject to racial discrimination in the form of racist jokes and shouting out on a number of occasions. No other facts or matters were relied on or mentioned.

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9. Two days later, she emailed the ET with further details, explaining in her email that she had completed the form on her phone. She set out once again the same list of claims and enclosed an eight-page summary, a six-page timeline and a copy of the Dignity at Work appeal hearing outcome letter of 15 February mentioned above. The documents supplied were thin on detail but contained plenty of generalised assertions. The claim was referred to the Regional Employment Judge, who directed that before service on the Respondent, the Claimant should provide four categories of information about her claims: firstly, what happened; secondly, when did it happen; thirdly, who was said to be responsible; and, fourthly, why it was said to be discrimination, in relation to each of the causes of action she had mentioned. She was to provide the information within seven days.

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10. The ET1 clearly was a document incapable of being sensibly responded to, which explains the Regional Employment Judge's entirely sensible direction. The Claimant promptly replied in four separate emails on the same day, each purporting to address one of the four questions posed by the Tribunal and then sent a further document on 26 February 2019.

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11. All those documents were accepted as an amendment to the ET1 on 26 February, and I shall refer to that group of documents together as "the amended ET1". The amended ET1 was then duly served on the Respondent, who filed an ET3 raised jurisdictional issues, time limits and lack of sufficient detail of claim but responded as best as it said it could to the claims as it understood them. The Claimant then sent a number of unsolicited emails to the Tribunal, which has been a pattern throughout this case, and one on 25 March 2019 enclosed a document which she explained she was still working on but asserted that it "clearly shows my response all in one document". The enclosed document was partly a repeat of her email of 20 February 2019 (it is apparent on the face of the document that it has been copied and pasted from the 20 February 2019 email) and then raised a number of additional and new matters including, for

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the first time, a mention of whistleblowing. There was no indication in the Claimant's email of its purpose or what she wanted the ET to do with her email. There was no request for an amendment or a request for a case management hearing. There was no compliance with rule 30(2) ET Rules of Procedure. It was just an email supplied to the Tribunal unsolicited without any clue as to what the Tribunal was expected to do with it.

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12. The Tribunal did not reply to that email, but the case was listed for a telephone case management preliminary hearing with directions for the Claimant to provide an impact statement and medical evidence concerning her disability discrimination claim. An agenda was sent to the parties to be completed by each of them in advance of the hearing. I have not seen the letter giving the listing for that hearing, but I assume it contained the standard directions about how the case management discussion was going to clarify the issues and make appropriate further directions and orders to enable the parties to prepare in anticipation for an eventual hearing.

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13. Meanwhile, the Claimant resigned on 4 May 2019 after her pay had been reduced on 15 April under the Respondent's contractual sick pay provisions.

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Preliminary hearing 12 June 2019 before Employment Judge Midgley

14. At the preliminary hearing, which came before Employment Judge Midgley on 12 June 2019, the Employment Judge spent one and a half hours going through the amended ET1 with the Claimant in some considerable detail. They discussed the term "associative disability discrimination" that had been used by the Claimant frequently in her correspondence, and the judge explained that he understood the complaint to be more one of harassment related to disability, rather than direct disability discrimination by association, and it would appear from that document that the Claimant agreed with him. The allegation was certainly framed in the

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language of harassment. There were references to a hostile environment, bullying, unwanted conduct et cetera, and the Employment Judge carefully explained at paragraph 7.7 of the order following the hearing:

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> **"The claimant seeks to bring a claim of associative direct discrimination, relying on the protective characteristic of disability in respect of bullying and derogatory comments made to X, the colleague of the claimant with Asperger's syndrome and mental health difficulties. The difficulty with this claim is that the claimant does not complain that she suffered unfavourable treatment because of her association with X but complains that she found the treatment of X to have compounded the hostile atmosphere in the workplace. The claim may be better identified as one of harassment as a result of the hostile and degrading atmosphere that resulted. For this reason and for the avoidance of doubt, there is no claim of direct associative disability discrimination."**

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15. The Employment Judge set out and carefully recorded the issues with clarity and precision to enable the Respondent to know and understand the case it had to meet by reference to all the causes of action identified with specific incidents of alleged detriments or detrimental conduct occasioned by, caused by or related to the cause of action complained of. In relation to the disability-related harassment complaint, there were seven incidents set out at paragraphs 27.1.1 to 7. The claims were identified as disability, harassment, sex harassment, direct sex discrimination, victimisation and failure to make reasonable adjustments for a disabled person and the issue of whether or not the Claimant was herself disabled within the meaning of the Act was also a live issue, relevant to some, but not all of the causes of action relied on.

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16. The Claimant had mentioned further matters, however, in the many documents that she had submitted to the Tribunal since 26 February 2019, including a reference to whistleblowing and further particulars of various discrimination claims. So, whilst Employment Judge Midgley had correctly analysed, identified and set out clearly the extant issues arising from the amended ET1 form, he decided that the case should be listed for a further open preliminary hearing to determine, amongst other things, any amendment application that the Claimant might seek to

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make if she was going to rely on new allegations beyond those set out in the amended ET1 that he had been clarified and codified in his case management order. At that stage the Tribunal was already aware that the Claimant wished to introduce a whistleblowing claim.

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17. Employment Judge Midgley also listed the case for a five-day hearing in March 2020. One can see the wisdom in that approach of getting a hearing date in the diary to prevent any further delay and to enable everyone to have a date to work towards, so that the preparation could be structured and any unnecessary delay would be avoided. The aim at that stage was to case-manage the claim so that the substantive hearing including liability and remedy could take place in the spring of the following year. In a clear and helpful direction at paragraph 5 of the Judgment, the Claimant was directed to provide a detailed table, (which is the Scott schedule referred to), setting out any further allegations that she wanted to make outside the ambit of those recorded in Employment Judge Midgley's order. The purpose was to identify with some specificity what exactly the Claimant wanted to allege so that a Tribunal could determine whether the amendments should be allowed or not and whether they constituted amendments requiring an order, so that the Tribunal and the Respondent could understand and determine the amendment application.

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18. The Claimant, as noted above, has been such a prolific correspondent with the Tribunal. For example, on 26 May 2019 she submitted five emails. Between 13 and 14 June there were three emails (just two days after the Employment Judge Midgely preliminary hearing) with various iterations on the Scott schedule, and they were followed by a lengthy Word document four days later, duplicating much of the contents of the Scott schedule but in narrative form. These documents were hard to follow and confusing. The Claimant did not properly comply with the order initially, but after much further correspondence with the Tribunal, the Tribunal

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eventually prepared a blank table for her to complete to assist her to provide the required information in the correct format.

Open Preliminary Hearing October 2019

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19. By the time of the Open Preliminary hearing on 10 and 11 October before Employment Judge Emerton, which is the subject of this appeal, a 44-page Scott schedule had been completed by both sides containing 54 allegations, nine protected disclosures in support of an application to amend to include a whistleblowing complaint which were, argued in the alternative, as protected acts for the purposes of the victimisation complaint over a period of October 2018 to May 2019. There were also a number of other causes of action which are not relevant for the purposes of this appeal which went way beyond the scope of the original claim and the amended ET1, such as a refusal to allow a companion under section 10 of the Employment Relations Act 1999.

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20. The preliminary issue relevant to this appeal at the Open Preliminary Hearing was whether the Claimant should be permitted to amend her claim to add new claims. Other issues were also listed to be determined at the Open Preliminary Hearing which are outside the scope of this appeal. The Tribunal had before it a bundle consisting of 699 pages, and the full two days was spent going through each and every allegation in the Scott schedule to clarify the nature of the allegations, to determine whether or not an amendment was required, and to hear the parties submissions. The judge did not give an ex tempore ruling at the end of the hearing but reserved his decision to give the matter more thought.

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21. The Employment Judge rejected an application to amend the claim to include direct associative disability discrimination as an alternative to the disability harassment claim, since he considered that Employment Judge Midgley had correctly identified that it was more properly

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framed as a complaint of harassment, and the matters sought to be relied on were already set out in subparagraphs 27.1.1 to 27.1.7 of EJ Midgley's judgment together with a few further allegations identified elsewhere in the case management summary which Employment Judge Emerton concluded should be added to that list at 27.1. It included a complaint that there was a vendetta against employee X, which Employment Judge Emerton considered was already covered within the harassment complaint.

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22. EJ Emerton directed himself in accordance with the lead authority, *Selkent Bus Co. Limited v Moore* [1996] ICR 836, and in general terms considered the relevant circumstances were that the claim was already very full and all parties wanted the five-day hearing to proceed and that the original claim was very unclear and remained so notwithstanding the careful direction and case management given by the Tribunal. Employment Judge Emerton noted that he had had some difficulty making sense of some of the claims, and he reminded himself that the acts now sought to be relied on needed to be discernible from the original claim in order to be in time, as set out in paragraphs 32 to 35 of his judgment. However, he permitted some allegations to be included that had not previously been identified in allegations number 7, 49 in part and 50, but refused the others where an amendment order was required.

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23. It appears to have emerged during the discussion in that hearing that allegation 16, bullying of X, was intended to be a complaint of instruction to discriminate. The Claimant explained that her reference in that allegation to regular reporting on trivial matters and exaggerating them referred to being told by the team leader to report on X as part of the vendetta against X that the Claimant had mentioned elsewhere. Employment Judge Emerton considered that allegation 16 was already part of the disability-related harassment claim, but the application to expand the complaint to cover instructions to discriminate as a freestanding allegation under

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section 111 of the Equality Act 2010 should be refused since such an allegation could not be gleaned from the existing amended ET1 and should have been pleaded properly earlier. He applied the same reasoning to allegations 17, 18, 21 and 25 save that he considered the

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arguments were even weaker for allegations 18 and 21, and the complaints were now well out of time. Allegation 23 was not arguable as a case of direct disability discrimination by association, he found, and it was refused as a whistleblowing claim. He considered it was a new claim, well out of time, poorly crafted and would widen the scope of the claim, need

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further particulars and was inherently weak.

24. He found that allegation 35, a complaint of direct disability discrimination by association,

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which was also alleged as whistleblowing, was a repetition of allegation 23 and the same considerations applied. Allegation 36 was also covered by the harassment allegation set out at 27.1.5 of the EJ Midgley order, and there was no arguable complaint of direct discrimination by association. In any event, it had not been properly particularised or coherently pleaded, he

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found.

25. Allegation 46 was of whistleblowing and victimisation and an alleged failure to follow the

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ACAS code of conduct by not questioning witnesses and by failing to treat the Claimant fairly, and a failure to conduct a fair and impartial investigation, which was said to be because the Claimant had raised a grievance. EJ Emerton noted that the Claimant was seeking to not only argue this matter as victimisation but also whistleblowing, which was entirely new, and the

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victimisation claim had already been covered by the issues identified in the first case management summary at paragraphs 8.2 and 27.1 and/or 30.2. So, he did not permit the allegation to be allowed as an amendment. It was too late, and the protected disclosure

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detriment was not set out in the Scott schedule. The whistleblowing allegation in relation to

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allegation 46 I understand was only first raised by the Claimant during the actual hearing itself and at no point had it ever been committed to writing.

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26. Allegation 49 concerned the reduction of the Claimant's pay on 15 April 2019, which she says led to her subsequent resignation in circumstances she considered to be constructive unfair dismissal, and her not having been informed in advance of the imminent pay cut. This was alleged as victimisation, breach of contract, wrongful constructive dismissal, failure to make adjustments, direct disability discrimination, based on depression and anxiety, which was a condition that had not previously been mentioned. Previously deafness had been relied on as the impairment causing the Claimant to be disabled.

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27. During the course of the preliminary hearing on 11 October, the Claimant for the first time sought to expand to add a whistleblowing complaint in allegation 49 which concerns the Claimant's pay cut on 15 April 2019. The Respondent's response was that the pay cut had simply occurred by operation of the contract of employment and the provisions relating to sick pay given her short length of service. Employment Judge Emerton found that the Scott schedule did not set out any coherent or arguable claim for direct discrimination on any of the grounds raised. The victimisation claim was not adequately pleaded. No protected acts had been referred to, and the whistleblowing and reasonable adjustment claims were not pleaded at all. However, the wrongful dismissal complaint and breach of contract allegation were both allowed, but he considered that the others simply did not pass muster.

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28. Allegation 51 was of whistleblowing, the complaint being a failure by the Respondent to recognise her complaint as a whistleblowing complaint and their failure to follow any of their whistleblowing procedures. The Claimant referred in this allegation to her grievance of 30 October 2018 and the decision of the council on 9 January 2019 not to treat it as a

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whistleblowing matter. Employment Judge Emerton found that the complaint was well out of time, poorly particularised and made little logical sense. In his words, it was "a weak claim, and it is hard to see how it could succeed".

29. The Protected Act number 4 referred to an email that the Claimant had sent to her MP on 9 January 2019 in which she complained about being subjected to bullying at the borough and having witnessed bullying against a vulnerable adult with mental health problems and learning difficulties. The Claimant had not supplied the email to the Respondent. She simply sent the letter to her MP. The Respondent denied knowing about it or having received it from the MP or having a copy of it in their HR file. The Claimant however asserted that the email was in her HR file, and she was mystified as to how it had got there. She stated that when she made a data access request in April 2019, she received a copy of it, but that is disputed by the Respondent. The Tribunal found that there was no explanation for Protected Act 4 not being included in her claim but added:

> **"41.3…..In any event, the limited information provided by the claimant is inadequate to show that it was capable of being a protected act, and there is no evidence that the respondent was aware of it. There is no merit in relying on this act."**

For the avoidance of doubt, I should clarify that Protected Act 4 in the Scott schedule is relied on as both a protected disclosure for the whistleblowing complaint and also a protected act for the victimisation complaint, but for the purposes of this appeal it is only being challenged in relation to the protected act for the victimisation complaint.

30. The Tribunal went on in paragraphs 42 to 49 to discuss its approach to the amendment application in more general terms, having dealt with the specifics in relation to each amendment application. It noted that there was no medical evidence supporting the Claimant's submission that her medical condition affected her ability to present a claim within time limits

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and then directed itself again under the *Selkent Bus Co* principles and considered the balancing exercise between the injustice and hardship of allowing the amendments balanced against the injustice and hardship of refusing them. It then quite correctly set out the factors it considered to be relevant that it had weighed in the balance: that the claim was already very detailed and much of the ground was already covered in the existing claims that had been permitted to proceed; the hearing had already been listed, and there would be a very substantial delay if the hearing were to be postponed; many of the proposed amendments were substantial; some were entirely new. All were out of time, and the timing and manner of the amendment application was unfortunate. There had been a lack of compliance with clear orders and a lack of clarity, many matters arising almost casually in the claim. Even during the two-day preliminary hearing, the Employment Judge found that the claims were still "extremely unclear and unparticularised". Most of the allegations had little merit, and some disclosed little or any arguable case at all. He considered that the Respondent would be put to considerable effort and expense in responding to new or reformulated allegations and that there would inevitably be a delay of approximately six months. In a case such as this which was fact-sensitive, there would be a risk of memory fade and the respondent would be prejudiced in meeting what would be by then very stale allegations. He also considered that there would be minimal advantage to the Claimant and it would overburden her claim with poorly-drafted additional claims at a time when she had already indicated that she found the process stressful and she herself did not want the hearing to be delayed. The Employment Judge also considered it would require additional, considerable work on the Claimant's part and it would not be in the interests of justice, he concluded, to permit the Claimant to amend the claims beyond the three amendments that he had permitted.

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Parties' arguments

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31. Today before me, the Claimant relied on the very helpful amended grounds of appeal prepared by Jeremy Lewis. She also explained that she considered that the amendments sought to be made had been sufficiently identified in the amended ET1 and that she had not agreed for the disability discrimination by association as a complaint of direct discrimination to be abandoned and to proceed only as a harassment claim. When asked by me, however, she was unable to identify any tactical or substantive advantage to her in arguing it as both. She said she definitely wanted to rely on section 111, instructions to discriminate and encouragement, and considered that the reference to a vendetta in the workplace was sufficient to establish the bones of this claim and that it ought to have been readily apparent from the ET1. She said that EJ Emerton had been wrong to conclude that whistleblowing had only been mentioned in the iteration of the Scott schedule of 13 May 2019, when she had already set it out in the document discussed above on 25 March 2019. She considered that matters had been adequately set out so far as was possible for a lay person and the Tribunal should have done more to ensure that she was on an equal footing as required by the overriding objective, and all things considered the claims were sufficiently particularised and apparent to enable the Respondent to know the case it had to meet.

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32. In relation to allegation 49, the wrongful dismissal complaint, she considered that it would have involved little additional work to allow it to be argued also as a whistleblowing complaint because of the close overlap with the wrongful dismissal complaint and the same applied to the other issues that had been prohibited from being included by EJ Emerton. In relation to the email to her MP, she was certain the MP must have forwarded the email to her employer as how else could it have got in their HR file? But overall she thought it was important for her to pursue all angles. She had not found it easy as a litigant in person, and there was so much she had to say on the matters, which were all in her mind constantly so it was sometimes

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hard to remember what had been committed to writing and what she had not articulated but was in her mind.

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33. The Respondent's argument was that there was nothing that Employment Judge Emerton had done in breach of his broad case management powers and relied principally on the EJ's reasoning set out in his decision. He had correctly applied the approach to amendments. In fact, had he done otherwise and had he allowed all the amendments to go forward, he may

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well have been susceptible to a successful challenge by the Respondent. He had gone through each of the documents in the suite of documents in the amended ET1 form and carefully considered whether they included the complaints now sought to be made and, having

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concluded that they did not, which he was entitled to do, applied the *Selkent* factors and all relevant factors, going way beyond the *Selkent* list itself as *Selkent* directs judges to do, to consider all relevant circumstances. The decision could not be faulted in any way. It was not perverse, he had not taken into account matters that he should have ignored, and nor had he

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ignored matters that he should have taken into account.

Conclusions

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34. The basic principle is that a person bringing a claim must take the responsibility for formulating it. It is their claim, and it is their obligation to articulate it in the ET1 form. The filed claim cannot be changed or altered willy-nilly unless and until permission has been given by the Tribunal to do so. There is no right that can be reserved to a Claimant or indeed a

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Respondent to provide further amendments or further particulars as and when they wish. There is detailed Presidential Guidance provided to assist the parties, such as the Claimant as a litigant in person. The Presidential Guidance 2018 helpfully sets out how a party can make

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an application in paragraphs 12-17. It is repeated here for ease of reference:

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"Action by Parties"

12. While any application for a Case Management Order can be made at the hearing or in advance of the hearing, it should ordinarily be made in writing to the Employment Tribunal office dealing with the case or at a Preliminary Hearing which is dealing with Case Management issues.
13. Any such application should be made as early as possible.
14. Where the hearing concerned has been fixed – especially with the agreement of the parties – that will be taken into account by the Employment Judge considering the application.

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15. The application should state the reason why it is made. It should state why it is considered to be in accordance with the overriding objective to make the Case Management Order applied for. Where a party applies in writing, they should notify the other parties (or other representatives, if they have them) that any objections should be sent to the Tribunal as soon as possible.
16. All relevant documents should be provided with the application.
17. If the parties are in agreement, that should also be indicated in the application to the Tribunal."

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35. It therefore follows that the party seeking an amendment must apply for it, and there is no presumption that an amendment application will be granted. A decision on whether or not to allow a Claimant to amend a claim is a discretionary one, and it is only where it can be shown that the Tribunal took account of an irrelevant factor, failed to take account of a relevant factor or reached a decision that no reasonable Tribunal would have reached in the circumstances that it can be interfered with on appeal.

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36. The principle enunciated in *Selkent Bus Co. Ltd v Moore* remains good law. The core test in considering an application to amend is the balance of injustice and hardship in allowing or refusing the application. The matter has recently been considered in the Employment Appeal Tribunal in November this year in *Vaughan v Modality Partnership* [2020] UKEAT/0147/20/BA (V) that reviewed and reinforced the principles in *Selkent*. *Selkent* itself identifies three factors to be considered, which are the nature of the amendment sought, the application of time limits and the timing and the manner of the application. But *Selkent* stressed that this is not an exhaustive list, and all relevant circumstances need to be considered, and it is not a tick-box exercise.

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37. In this case there is no doubt that the Tribunal considered each of the three matters listed in *Selkent* and many others beside. In *Vaughan* a matter that was stressed as being of

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importance is the real practical consequences of allowing or refusing the amendment. If the application to amend is refused, how severe will be the consequences in terms of the prospects of success of the claim or the defence? If permitted, what will be the practical problems in responding? It is a truism that specific acts are required in a complaint of discrimination, not mere generalised assertions see *Ali v Office for National Statistics* [2005] IRLR 201 in the Court of Appeal.

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38. The underpin to the exercise of the wide powers of case management is the Tribunal's overriding objective which enables cases to be dealt with fairly and justly. Dealing with a case fairly and justly includes, so far as practicable, showing that the parties are on an equal footing, dealing with cases in a way which is proportionate to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delays so far as compatible with proper consideration of the issues and saving expense. Those are all important matters, some of which do not easily sit alongside each other. It is the duty of the Tribunal to have all those matters in its mind so that it can exercise its discretion fairly and justly. Precision, specificity and clarity are required in the statements of case or pleadings in the Tribunal, particularly in discrimination complaints and complaints where a number of causes of action are relied on. The Respondent has to know the case it has to meet to enable it to respond with equal precision, specificity and clarity and to enable both sides to understand the issues in dispute and prepare for an eventual hearing.

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39. The politest description of the Claimant's approach to her claim was that it was something of a moveable feast. It was an evolving concept in her mind which involved various iterations. It lacked specificity, it was not framed by reference to the applicable legal tests, did not set out the ingredients of the various claims or causes of action relied on and it thus made it extremely hard for the Tribunal, for the Respondent and indeed for the Claimant herself. To my mind

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the Employment Tribunal conducted a very careful and effective case management exercise in seeking to unknot, unravel and identify the claims from the morass of vague generalisation and correspondence that the Claimant had supplied them with. Employment Judge Midgley was acting in his duty under the overriding objective to ensure the Claimant was on an equal footing to assist the Claimant to accurately frame her complaint as one of disability harassment and was guiding her to the correct label to be applied to her complaint. He was well within his case management powers by doing so.

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40. There is a technical but an important point that is provided in the definitions section of the Equality Act at section 212 that a matter relied on as harassment cannot also be a detriment relied on for direct disability discrimination or any form of discrimination: they are mutually exclusive. I presume the reason behind the provision is to prevent a multiplicity of overlapping claims, to double recovery and to have clarity of terminology, and it is an uncontroversial drafting principle. It is possible that Employment Judge Midgley could have left direct disability discrimination as an alternative complaint to disability harassment in relation to the witnessing of the treatment of employee X, but he is not in breach of his discretion by not doing so, and given that the complaint was already muddled and contained a morass of assertion, simplification and clarity were paramount aims. I can see that it was a sensible decision to say at the case management hearing that the claim was better framed as harassment and there would be no advantage, tactical or substantive, in allowing it to proceed in the alternative as a complaint of direct disability discrimination. Furthermore, the Claimant appeared to accept this guidance from the Employment Judge and agreed to it.

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41. This was a case that was crying out for robust case management which would assist both parties. Employment Judge Midgley cannot be faulted for discussing with the Claimant, who

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apparently agreed during the course of the case management hearing, that the allegation should proceed only as a complaint of disability harassment.

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42. It therefore follows that there can be no criticism of Employment Judge Emerton for not revisiting Employment Judge Midgley's case management order in this regard. Had he done otherwise would be fraught with difficulties, both technical and substantive. If the Claimant had had a difficulty with Employment Judge Midgley's order, she should have asked for a reconsideration or, failing that, an appeal, and it is not for one Employment Judge to undo all the hard work of an earlier employment judge in a previous decision relating to the same case. But there was also a substantive difficulty in that if Employment Judge Emerton had done so, he would have risked unravelling all the progress made and the careful clarity that Employment Judge Midgley had managed to attain after his one-and-a-half-hour case management hearing. But there were no grounds for challenging EJ Midgley's order even if the correct procedural formalities for doing so had been followed in any event. Employment Judge Midgley was acting well within the scope of his case management powers, so too was Employment Judge Emerton by adopting the reasoning of Employment Judge Midgley.

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43. In relation to Employment Judge Emerton's approach to the other amendment applications, there are two factors to consider. One is whether the amendments sought to be made were sufficiently presaged in the amended ET1 so as to circumvent any time point, and the second is whether all the other factors relied on by Employment Judge Emerton were factors that he was entitled to take into account and whether there were any relevant factors that he omitted to consider. Whether one considers time limit points to be a question of fact or a question of law, or a mixture of both, either way there can be no criticism of Employment Judge Emerton's approach who correctly identified the claims that were out of time and were not alleged as continuing acts. Other than in respect of the wrongful dismissal, the complaints were out of

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time as at the date that he was considering them in October 2019. Allegation 49 is a little different and will be discussed later, but the other complaints were significantly out of time. In relation to the disability discrimination complaint, employee X had not been in the workplace since July 2018, and the Claimant had not been in the workplace since sometime in March or April 2019, long before the hearing before Judge Emerton.

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44. But even if some of the amendments were in time or would have been in time if they had been lodged in a separate ET proceeding, that is not determinative of an amendment application. It is only one factor to be taken into account. Where a claim is out of time, particularly when it is significantly out of time, it will be a very powerful factor weighing in the balance, since there will be injustice and hardship to a Respondent having to meet a very stale claim. But it does not follow that just because a proposed amendment would not be out of time that it must automatically be granted. Given the extraordinarily messy procedural history in relation to this case and the difficulty that the Claimant had in complying with the case management orders and nailing her colours to the mast, Employment Judge Emerton was entitled to take a robust view. He was also entitled to conclude that the proposed amended claims in the Scott schedule were weak and had not made out some of the basic elements necessary for a claim. EJ Emerton was perfectly entitled to consider the merits of the proposed amendments when considering whether or not to grant the applications. It could lead to troubling results if that were not the case since a disgruntled Respondent (or disgruntled applicant if the boot was on the other foot) would simply apply under rule 37 or 39 for the amended part of the claim or amended part of the response that had no or little reasonable prospects of success to be struck out or only be allowed to be proceeded with on payment of a deposit. All the factors that Employment Judge Emerton took into account were relevant factors, and I find that there were no factors that he failed to take into account that were relevant.

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45. I have already mentioned in relation to 49 the fact that some of the claims would probably still have been in time in October 2019, but even if Employment Judge Emerton had said the victimisation and discrimination allegations in relation to the sick pay reduction might have been in time when they were first raised by the Claimant, he was entitled to conclude that given the allegations had no merit, the amendment would not be permitted. The reduction in the Claimant's sick pay was solely on account of the length of her sickness absence and the contractual sick pay provisions I cannot see any arguable case for saying that the EJ erred in that regard.

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46. In relation to allegation 51, which is the whistleblowing complaint, Employment Judge Emerton was correct to say that the complaint was out of time and it had not been alluded to in the amended ET1, and he was also correct that it would involve different considerations, different legal issues, and it could not simply be a bolt-on to the victimisation complaint. He was within the scope of his powers in this regard.

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47. In relation to Protected Act 4, which is one of nine protected acts relied on, the Employment Judge again was entitled to conclude that it should not be allowed to be relied on. It did not set out the bare bones of a victimisation complaint and it did not demonstrate any link between the alleged protected act and the behaviour complained of. For that reason alone, EJ Emerton was entitled to refuse the amendment application. But Employment Judge Emerton also considered that there was no evidence that the Respondent knew of the complaint to the MP and did not have a copy on their file until the Claimant gave them a copy sometime late. That was entirely consistent with the documentary evidence and indeed it would have been inherently implausible for it to have been otherwise.

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48. So, for all those reasons, I dismiss the Appeal. Cases such as this require robust case management to assist the parties to keep on track and to identify the important issues. It is not a disadvantage to the Claimant but to assist her and the Tribunal to focus on her main and best points. The fact of the matter is that this case has now had four separate preliminary hearings all of which were necessary to achieve effective case management. It is over two and a half years since the claim was lodged. The substantive hearing in March of 2020 has been lost, it will take some considerable time for the case now to be relisted for hearing, and the delay is to everyone's disadvantage but most particularly, one might think, Mrs Marrufo, since she is the one bringing the claim and seeks a remedy.

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49. Some procedural rigour is necessary, even in the relative informality of the Employment Tribunal and it is not appropriate for a party to bombard the ET with repeat correspondence to no apparent purpose. If an application is being made it must clearly say so and rule 30 must be complied with. By way of reminder it provides that where a party applies in writing for a particular case management order, they shall notify the other parties that any objections to the application should be sent to the Tribunal as soon as possible. It is implicit in the rule that the application must make clear what case management order is being sought. If the requirements of rule 30 are not complied with the Tribunal is not required to treat a piece of correspondence as an application. The Tribunal cannot be expected to read the mind of the author of an email or letter and whether it is or is not an application unless it is apparent on the face of the correspondence. In this case the Claimant's chaotic approach to communications with the Tribunal made it extremely difficult for them and the Respondent. The Claimant cannot now turn to the Tribunal and assert that her email of 25 March 2019 should have been treated as an amendment application and somehow stop the limitation clock from running when she has not complied with rule 30 and informed the Tribunal and the Respondent that she was seeking a case management order.

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50. There is also specific guidance in Guidance Note 1 entitled Amendment of the Claim and Response Including Adding and Removing Parties, as well as the general case management guidance set out above which the Claimant would have done well to have read before submitting her various documents.

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51. So, for the above reasons, the claim is dismissed, and I pay tribute to the meticulous case management that both Employment Judge Midgley and Employment Judge Emerton undertook in pursuance of the overriding objective to identify and clarify the precise issues so that an effective hearing can in due course proceed.

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