EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110023/2019 (V) Preliminary Hearing by Cloud Video Platform at Edinburgh on 10 August 2020

Employment Judge: M A Macleod

Mr Jacob Cohen	Claimant In Person
Faculty Services Limited	Respondent Represented by Mr D Hay Advocate Instructed by Mr S Miller Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's applications for strike out of the respondent's response and amendment of his claim are both refused.

REASONS

1. In this case, the claimant presented a claim to the Employment Tribunal on 13 August 2019 which he made a variety of complaints, including that he had been unfairly dismissed from his employment by the respondent.

2. The respondent resists all claims made by the claimant.

3. A number of procedural steps have taken place between August 2019 and the date of this hearing. It is unnecessary for the purposes of this Decision to outline in detail those steps. However, the purpose of this Preliminary Hearing was set out in a Note following Preliminary Hearing before the sitting Employment Judge on 28 May 2020, the Note being dated 29 May 2020.

4. At paragraph 7 of that Note, it was stated that the two preliminary issues to be addressed at this Hearing were:

   1. *"Whether the claimant's application to amend his claim, dated 8 January 2020, should be granted; and*

   2. *Whether the claimant's application, in effect, for strike out of the respondent's response, dated 20 February 2020, should be granted, on the basis that he submits that the terms of the ET3, in relation to the identity of the respondent, were such that the Tribunal should have rejected it on presentation."*

5. Owing to the constraints prevailing as a result of the ongoing coronavirus pandemic, this Hearing was convened by CVP (Cloud Video Platform) in order to allow parties to remain at remote distance from each other.

6. The claimant appeared on his own behalf, and the respondent was represented by Mr Hay, advocate, instructed by Mr Miller, solicitor, and Ms Fitzpatrick, in attendance as instructing client.

7. Parties presented separate sets of documents to which reference was made in the course of the hearing, and had presented submissions in writing in advance of the hearing.

8. No evidence was presented at the hearing, on the basis that neither party considered it necessary to do so. It was agreed that should either party consider, following the presentation of submissions, that evidence was required of the claimant, an application to that effect could be made, but no such application was made, as it turned out.

9. The two issues were dealt with chronologically, with the claimant speaking firstly to his application for strike-out of the respondent's response, to which Mr Hay was then permitted to reply, with a short opportunity for the claimant to respond to Mr Hay's submission; and secondly to his application to amend his claim, to which Mr Hay then replied and again the claimant was permitted to make a response to that submission.

10. Judgment was reserved in order to allow the Tribunal the opportunity to review the relatively large number of documents and reach a conclusion on each application.

11. I deal, therefore, with each application in turn.

The Claimant's Application for Strike-Out of the Response

12. This application was made on 20 February 2020 by the claimant (C1) in the form of a "Preliminary Issue" which he wished to raise.

13. The claimant noted that the claim was properly directed against his former employer, Faculty Services Limited, and that that matched the identification of the respondent on the Early Conciliation Certificate which he had obtained from ACAS.

14. The claimant pointed out that this matter had arisen during the course of a Preliminary Hearing in October 2019 before the sitting Employment Judge, and referred to paragraph 15 of the Note following that Hearing, in which the following is recorded:

"Mr Hay also clarified, in passing, that the claim properly designated the respondent as Faculty Services Limited, and that that is the correct respondent in this case."

15. Under reference to Rule 17 of the Employment Tribunals Rules of Procedure 2013, the claimant pointed out that the Tribunal should have rejected the response when submitted as it failed to include the respondent's correct name and address. He referred to the case of **EON**

Controls Solutions Ltd v Caspall UKEAT/0003/19/JOJ, and submitted that "in line with" that decision, the respondent's failure to provide the correct name and address on the ET3 should have led to rejection of the ET3. He argued that while there was an "escape clause" for an ET1 presented with a minor error of some sort, in Rule 12, there was no corresponding Rule allowing the Tribunal the discretion to permit the response to be admitted notwithstanding the error in the name on the ET3.

16. His application concluded by submitting that he wished to raise this matter as a preliminary issue before the Tribunal, insisting that the Tribunal remained bound to reject the ET3 by reference to Rule 17(1)(b)(i).

17. By email dated 25 February 2020, the respondent opposed the application in the following terms:

"In this particular case, Rule 17 was complied with as the name and address of the respondent were included on the response form. It just so happened that the information was incorrect at the point of submission. The position was rectified during the October case management preliminary hearing with no objection from the claimant."

18. The claimant expanded upon his application at the hearing before me. He noted that the application was being treated as an application for strike-out of the ET3 under Rule 37.

19. He reiterated that the respondent was obliged to provide their details, including name and address, in the ET3 when it was submitted. The ET3 entered the name of the respondent as Faculty of Advocates, whereas the correct respondent is Faculty Services Limited. The ET1 and the Early Conciliation Certificate make this clear. The claimant was employed by Faculty Services Limited, and was never employed by the Faculty of Advocates at any stage.

20. In the Note following PH produced on 17 October 2019, he saw that a note had been made by the Employment Judge that a comment was made "in passing" by counsel for the respondent about the identity of the respondent. The claimant said that he did not recall such a comment having been made at the time, but observed that nothing further was recorded about this matter.

21. He said that the Tribunals Rules of Procedure insist that certain information must be provided. He accepted that in the decided cases on this matter, the focus was often on an error made by the claimant in presenting their claim. He referred to Rule 10, in which it is provided that the Tribunal "shall" reject the claim form if it does not contain the whole information. He submitted that in many cases on this subject it is implicit that the minimum information must be provided accurately.

22. Rule 12, he said, deals with the rejection of the claim form due to substantive defects in it. The Tribunal can refer the claim form to an Employment Judge to consider whether there are substantial differences from the Early Conciliation Certificate. He pointed out that there is a distinction, drawn in Rule 12(2) between those errors which require the claim to be rejected, and those where the Tribunal has a discretion as to whether or not to reject the claim.

23. Rule 17 requires the Tribunal to reject the response if it does not contain the respondent's full name and address. There is no discretionary rule where a similar error to that envisaged in Rules 10 and 12. Rejection shall be the outcome, he insisted, in all cases where the information is not contained in the form.

24. Referring to the **EON Controls** case, he asked the Tribunal to refer both to the summary at the outset and to paragraphs 40 to 42, 45 to 49 and 51 to 54. He maintained that the principles set out in that case, which concerned the presentation of an ET1, are "plainly transferable" to the presentation of an ET3. The error falls under Rule 17(1)(b)(i). There is no escape clause, and the rule is black and white. He argued that the

ET3 should have been rejected and returned to the respondent. He maintained that this is what should be done now, with the effect of striking out the respondent's response to this claim.

25. He disputed the respondent's point, in C2, that the matter was rectified at the October PH without any objection from the claimant. He said that all that happened at that hearing was that it was mentioned; there was no amendment to the ET3 and it still remains incorrect.

26. He submitted that **EON** says that amendment is mandatory and therefore there is no defence to the claim. It is evident that rectification cannot happen without rejection. There should be resubmission of the ET3 with a request for an extension of time under Rule 20, or a reconsideration of the decision to reject, and it would then be for the Employment Judge to consider the reason for the inaccuracy at the time. Rejection is "plainly mandated".

27. For the respondent, Mr Hay accepted that what is at issue in this matter is the proper interpretation of Rule 17. He noted that reliance has been placed upon the terms of Rules 10 and 12, and upon the **EON** decision.

28. He stated that the following points are not in dispute between the parties:

- The claimant was employed by Faculty Services Limited, as opposed to the Faculty of Advocates, that is, the respondent convened by the claimant;
- The claimant obtained the Early Conciliation Certificate correctly naming the respondent as his employer;
- The claimant has correctly named the respondent as the employer in the ET1; and
- The ET3 erroneously designated the Faculty of Advocates as the respondent, giving that body's full name and address instead of the respondent's.

29. Mr Hay said that the matter was addressed in passing by the Employment Judge in October 2019 during the PH. The claimant says that he did not pick up on that at the PH, which may explain why he has only raised the matter in February 2020. The mismatch between what was on the ET3 and what should have been set out there would have been obvious when he received the ET3.

30. With regard to the content of an ET3, it is important, he said, to consider the terms of Rule 16, under the heading "Response to the Claim". Rule 16 refers to the prescribed form and the timescale within which it must be provided. That Rule is expressed in mandatory terms by the use of the word "shall".

31. It is then important to look at the terms of Rule 17(1)(b)(i). What is being targeted, he submitted, is a matter of quantitative information, as opposed to qualitative. It is well recognised that prior to the 2013 Rules of Procedure, there was considerable flexibility as to what may be counted as a claim or a response. All that Rule 17(1)(b)(i) requires, he argued, is that *ex facie* there is a full name and a full address; it does not follow that the fact that they may be incorrectly identified results in non-compliance. He submitted that the respondent has in fact been validly convened. He drew a distinction between a matter of administrative expediency and a mandatory requirement which cannot be excused.

32. He went on to say that even if he were wrong about his interpretation of Rule 17, it is not correct to say that there is no escape route provided by the Rules. That escape route is provided in Rule 6. Failure to comply with particular Rules – including Rule 16 but not 17 – falls within Rule 6. The drafters of the Rules must be taken to have considered this, and therefore Rule 17 must benefit from Rule 6. There are expectations placed upon parties but Rule 6 puts in place exceptions to excuse the failure to meet those expectations. This is consistent with the general dispensing power of the civil courts when confronted with procedural non-compliance by a party.

33. Mr Hay also pointed to the terms of Rule 2, which sets out the overriding objective of the Rules of Procedure, and noted that the desire to avoid excessive formality and the need to apply the Rules in a manner which is proportionate to the complexity and importance of the issues are of significance in this argument. The parties have been correctly convened, and the issues between those parties, as set out in the ET1 and the ET3 correctly are clear.

34. He took issue with the claimant's submission that the ET1 and the ET3 are to be treated the same, in effect. The provisions with regard to the detail to be set out in the ET3 differ from those relating to the ET1. The decision in **EON** is not in point, he submitted. That dealt with the very specific provisions in place relating to the insertion of the Early Conciliation number, and it is useful, he said, to consider the convoluted sequence of events in that case at paragraphs 4 to 12 of the Judgment. The requirements relating to Early Conciliation stem from primary legislation: the claimant's obligation to undergo Early Conciliation prior to presenting his claim is a jurisdictional matter, and it is a burden only carried by the claimant. Rule 16(1) contains a mandatory requirement to submit the ET3 within 28 days from its receipt, but that does not amount to a question of jurisdiction on whether the claim is validly before the Tribunal.

35. The effect of the mistake in the ET3 does not, he submitted, require the Tribunal to take the action pressed upon it by the claimant.

36. In any event, he submitted that the matter was dealt with in a flexible and appropriate manner in the October PH, consistent with Rules 2 and 6. He argued that there was a divergence between the name of the respondent and the name set out in the ET3 but that did not amount to non-compliance with Rule 17. If the Tribunal were minded to strike out the respondent's ET3, that would lead to an immediate application for reconsideration to accept the ET3 in its current terms with the exception of the name of the respondent. It would be draconian to take such a step and refuse to accept the ET3.

37. He concluded by confirming that the respondent's position is that the respondent in these proceedings is Faculty Services Limited.

38. The claimant replied briefly to the submission of Mr Hay. He reminded the Tribunal that the terms of Rule 17 are almost identical to the terms of Rule 10. There is no Rule equivalent to Rule 12 available for the interpretation of Rule 17.

39. He observed that there are a number of cases in which a party has sought to have the Tribunal grant relief through Rule 6 but that has been refused. It is not possible to import discretion into a Rule which requires mandatory compliance.

The Claimant's Application to Amend

40. The claimant spoke then to his application to amend his claim, which was set out in C4.

41. He referred to the original particulars of claim, and stressed that since the respondent did not establish any fraud or embezzlement on his part, he was innocent of misconduct. The respondent found that he was guilty of misconduct, which led to his unfair dismissal. Within the particulars of the claim, ground 4 falls under the label of unfair dismissal, he said. Breach of contract was not mentioned in that ground. The claim focused on the basis upon which the respondent found him guilty of the allegations.

42. In the Preliminary Hearing of 6 January 2020 before Employment Judge Meiklejohn, a number of issues were addressed, following which the Employment Judge issued a Judgment dated 20 January 2020.

43. The claimant drew my attention to paragraphs 28 and 29 of that Judgment, which I set out here:

"28. I raised at the hearing my view that the claimant's position as set out in his particulars of claim was that he had done nothing wrong and so, logically but not pled by the claimant, the respondent in dismissing him for gross misconduct had to be acting in breach of contract. At paragraph

233 of his particulars of claim (page 47) the claimant stated: 'This was a case where there was a sufficiency of evidence … that established that the Claimant had not acted improperly at any time.' It seemed to me that this foreshadowed what might be described as a 'normal' breach of contract claim where the employee denies the alleged wrongdoing for which he was dismissed.

29. I invited the claimant to consider whether he wished to seek to amend his particulars of claim to express his breach of contract claim in this way. Mr Hay quite properly said that this was not something the respondent would be prepared to agree prior to seeing any such proposed amendment. I have expressed my Judgment in terms which anticipate that the claimant will seek to amend his breach of contract claim."

44. The claimant argued that the amendment proposed is a re-labelling of the head of claim of unfair dismissal simply to encompass unfair dismissal/wrongful dismissal, and adding the point that if this were not an unfair dismissal, the dismissal would be a wrongful dismissal. There are no new facts relied upon, and the claim is unaffected otherwise.

45. He said that the amendment was brought as soon as it was reasonably practicable when the claimant became aware of it. It would be time-barred, he conceded, if it were brought as an entirely new claim, but this amounts to a re-labelling of the existing claim, and it is based on the same facts already pled.

46. He pointed out that the amendment has set out the wrong value for the claim. He accepts that the notice period for which he claims is that of 11 days commencing the day after he was dismissed until 1 May, plus one further day for outstanding annual leave.

47. The total claim for wrongful dismissal would therefore be £1,130.25.

48. The claimant submitted that the Tribunal had to carry out a balancing exercise in relation to the relative hardship accruing to the parties in the event that the application were allowed or refused.

49. With regard to the respondent's position on prejudice and hardship, the claimant submitted that as the amendment does not introduce any new facts, no additional witnesses are to be called and no new questions are required to be asked. The question of the respondent's factual findings, whether they followed a fair procedure and whether the dismissal was fair meant that examination of the disciplinary and appeal chairs will already be taking place in the hearing on the merits before the Tribunal in this case. Although he conceded that the test to be applied is a different one, the basis upon which the test is to be applied is very similar.

50. Even without the amendment, he submitted, the respondent will require to show that their actions were reasonable, including that there was a basis upon which the finding could have been made. He argued that this would not lead to a lengthening of the Employment Tribunal hearing in any meaningful way, and would not require substantially different areas of inquiry.

51. The claimant noted that the respondent argues that the claim is "near valueless". He did not accept that. Aside from the amount not being valueless in itself, the claim is not simply about monetary value. He said that the impact of the decision to dismiss him has prevented him becoming a solicitor, and that dismissal has damaged his reputation. He submitted that whether the decision was of unfair dismissal or wrongful dismissal the impact may be that he could recover his practising certificate and then pursue a legal career.

52. If the Tribunal cannot address the question of wrongful dismissal, they would be fettered in their considerations, he argued. He observed that in an unfair dismissal claim, the Tribunal cannot substitute its own decision for that of the employer; it is possible that a finding could be made that the claimant was not guilty of the allegations but yet that the dismissal can stand and be found not to have been unfair. This would be an injustice which could be removed by the addition of the amendment proposed. There would be hardship for the claimant in the event that the amendment were not allowed to proceed.

53. For the respondent, Mr Hay addressed briefly the claimant's intention to amend further in order to clarify the value of the claim, and observed that the respondent has no objection to him doing so, as this is not something which requires to be addressed by way of amendment at this stage.

54. Mr Hay then turned to the application itself. He observed that the Tribunal may think that there is little difficulty in this matter, since wrongful dismissal often runs as an alternative to unfair dismissal, and can be a "consolation prize" if the unfair dismissal claim fails.

55. He outlined two bases for objection, however: firstly, that what the amendment seeks to do is truly more than a re-labelling exercise, and secondly, that the consequence of permitting the amendment would be to broaden substantially the scope of inquiry of the Tribunal, in a way which is out of proportion to the damages which could be awarded for a breach of contract.

56. With regard to his first point, Mr Hay submitted that the claimant had misunderstood the scope of the Tribunal's inquiry in an unfair dismissal claim. It is not, he said, for the Tribunal to determine whether or not the claimant was guilty of misconduct when deciding on liability, but for the Tribunal to satisfy itself that the employer had genuinely believed that misconduct had occurred, based on reasonable grounds, following a reasonable investigation; and that the employer's decision to dismiss the claimant was then reasonable.

57. In an unfair dismissal claim the Tribunal cannot substitute its own reasoning for that of the employer, but can only draw conclusions about the reasonableness of the decision to dismiss the claimant. Mr Hay submitted that the claimant in his submissions suggests that the respondent will require to address the question of the claimant's guilt in the Tribunal hearing, which is an incorrect understanding of the role of the Tribunal. He also said that the claimant has suggested that there will be forensic questioning of the witnesses, but that appears to be inconsistent with the terms of section 98(2) of the Employment Rights Act 1996.

58. Referring to the claimant's production C14(1), and to the last paragraph on page 2, Mr Hay pointed out that the claimant maintains his innocence in relation to the allegations.

59. A wrongful dismissal claim would involve the Tribunal in deciding whether or not there was a breach of contract by the respondent. This is an issue of substantially greater scope, in that such a claim may involve a trial of the allegations themselves to scrutinise the process leading to the claimant's dismissal.

60. This may require more witnesses beyond those already envisaged by the respondent. Mr Hay expressed his concern that the extent of the forensic questioning anticipated by the claimant would be into the fine details of the allegations as if in a trial or a civil proof.

61. He then addressed the nature of the amendment, which he submitted was more than just re-labelling. Although the factual story is the same, the inquiry required would be much wider. The claim is also out of time, though that is not determinative of the matter itself, since the Tribunal has the discretion to allow the case to proceed though presented late. In that regard, he argued that the claimant should have made it much clearer than he did at the outset that the scope of the inquiry was to be much wider than an unfair dismissal claim, so that evidence could be preserved.

62. The claimant would enjoy a longer prescriptive period in the Sheriff Court, and if what he is seeking is truly a declarator, the Sheriff Court would be the appropriate forum in which to raise proceedings.

63. Mr Hay then submitted that it would be disproportionate to allow the amendment due to the scope of inquiry required on the one hand against the monetary value of the claim on the other. That tips the matter strongly against the amendment being allowed.

64. Taking all of these points together, he submitted that there is substance to the respondent's point, that there would be substantial hardship to them in allowing the amendment to proceed. He said that in the claim

there is a whiff of stigma damages, seeking compensation for the manner of the claimant's dismissal, which would not be open to the Tribunal. While he understood the claimant's desire for vindication it is not appropriate to allow the amendment.

65. With regard to the claimant's point that these proceedings may allow him to recover his practising certificate, Mr Hay observed that there is no detailed information about the fitness to practise proceedings in the Law Society of Scotland, nor why his certificate had been withdrawn or removed in the first place. That is a matter which is remote to the legality of the dismissal, in any event.

66. The claimant sought to respond briefly to the respondent's submission. He said that he considered that Mr Hay's submission had underlined the injustice which would arise in the event that the application to amend were not granted. The finer detail of the evidence speaks to the reasonableness of the decision to dismiss the claimant and could underline the unfairness of the misrepresentation of that evidence. To consider reasonableness the Tribunal must consider the reliance placed on the evidence and the decision made as a consequence.

67. He submitted that there is no evidence which he is looking to lead which is outwith the material presented within the internal disciplinary and appeal proceedings at the time. The examination of that evidence can be undertaken, he said, by a very few people, and any evidence to be heard already exists within the disciplinary process. Aside from the respondent's witnesses, he thought he would potentially call a witness from the Finance Department and a colleague from within the unit where the claimant worked, but no others.

The Relevant Law

68. 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;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense."

69. 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:

> **"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."**

70. 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.

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

(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 action.

(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.

(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. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision".

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

*"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 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 states…"*

72. 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 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…"*

73. Parties also had reference to the Employment Appeal Tribunal decision in **Reuters Limited v Cole UKEAT/0258/17/BA**, and I was directed to paragraph 27 to 29:

"27. I am persuaded that the addition of the section 13 claim is not a mere relabelling exercise in the sense understood in the authorities. First, I do not accept that the authorities establish that a mere relabelling exercise extends beyond a new claim based on facts which are already pleaded. Their discussion about the degree of difference in the factual area of enquiry, see e.g. Abercrombie & Others v Aga Rangemaster Ltd at paragraphs 48 and 50, relates to the exercise of discretion when it is not a mere relabelling.

28. Secondly, I consider that the section 13 claim does involve a greater area of factual enquiry and thus takes it outside the relabelling category. Thus:

(1) section 13 involves a more onerous test than section 15, and thus a more demanding factual enquiry. The set of facts which is necessary and sufficient to establish liability under section 15 will not be sufficient to satisfy section 13.

(2) the existing claim has been framed to establish the ingredients of a section 15 claim not a section13 claim. Thus, it does not contend, expressly or by implication, that Mr Cole suffered direct discrimination by Mr Foley or otherwise, because of his disability.

(3) to the extent that inferences can be drawn which establish the further ingredients of a section 13 claim, they are inferences of new fact.

29. I conclude that the Judge was wrong to hold that the section 13 claim involved no new facts or matters and was a mere relabelling exercise."

74. With regard to the claimant's application for strike out of the respondent's response, I was directed to the Judgment in **E.ON Control Solutions Ltd v Simon Caspall UKEAT/0003/19/JOJ**.

75. I was also directed to the Employment Tribunals Rules of Procedure 2013, and in particular to the following Rules:

Rule 6: *"A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following—*

(a) waiving or varying the requirement;

(b) striking out the claim or the response, in whole or in part, in accordance with rule 37;

(c) barring or restricting a party's participation in the proceedings;

(d) awarding costs in accordance with rules 74 to 84."

Rule 10: "*(1) The Tribunal shall reject a claim if—*

(a) it is not made on a prescribed form; or

(b) it does not contain all of the following information—

(i) each claimant's name;

(ii) each claimant's address;

(iii) each respondent's name;

(iv) each respondent's address.

(2) The form shall be returned to the claimant with a notice of rejection explaining why it has been rejected. The notice shall contain information about how to apply for a reconsideration of the rejection."

Rule 12: "*(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—*

(a) one which the Tribunal has no jurisdiction to consider; or

(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process.

(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a) or (b) of paragraph (1).

(3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection."

Rule 13: *"(1) A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration on the basis that either—*

(a) the decision to reject was wrong; or

(b) the notified defect can be rectified.

(2) The application shall be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. It shall explain why the decision is said to have been wrong or rectify the defect and if the claimant wishes to request a hearing this shall be requested in the application.

(3) If the claimant does not request a hearing, or an Employment Judge decides, on considering the application, that the claim shall be accepted in full, the Judge shall determine the application without a hearing. Otherwise the application shall be considered at a hearing attended only by the claimant.

(4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified."

Rule 16: *"(1) The response shall be on a prescribed form and presented to the tribunal office within 28 days of the date that the copy of the claim form was sent by the Tribunal.*

(2) A response form may include the response of more than one respondent if they are responding to a single claim and either they all resist the claim on the same grounds or they do not resist the claim.

(3) A response form may include the response to more than one claim if the claims are based on the same set of facts and either the respondent resists all of the claims on the same grounds or the respondent does not resist the claims."

Rule 17: "*(1) The Tribunal shall reject a response if—*

(a) it is not made on a prescribed form; or

(b) it does not contain all of the following information—

(i) the respondent's full name;

(ii) the respondent's address;

(iii) whether the respondent wishes to resist any part of the claim.

(2) The form shall be returned to the respondent with a notice of rejection explaining why it has been rejected. The notice shall explain what steps may be taken by the respondent, including the need (if appropriate) to apply for an extension of time, and how to apply for a reconsideration of the rejection."

Discussion and Decision

76. I deal with the two issues in the same order as that in which they were presented to me.

Application for Strike-Out of Response

77. The basis upon which the claimant seeks to argue that the respondent's ET3 should be struck out is, essentially, that he considers that it should never have been accepted on presentation by the Tribunal, and that it should have been rejected at that time.

78. The claimant relies upon the Employment Tribunal Rules of Procedure 2013 and also the **E.On** decision.

79. The claimant referred to Rules 10, 12 and 13 and insisted that their terms could be drawn across to the circumstances in which the respondent has been allowed to participate in these proceedings. The difficulty for the claimant, and for the Tribunal in understanding this argument, is that it is plain that these Rules address the presentation of a claim, not a

response. While there are clearly similarities between the different sets of rules, I am not persuaded that it would be safe to apply the rules which relate to the claim to the presentation of a response. The reason for that conclusion is that there are different Rules which apply to the different procedures, and the drafters of the Rules must be taken to have determined that different considerations, and therefore different parameters, should apply. Since the Rules of Procedure contain rules for the presentation of responses, it would amount, in my Judgment, to an error in law to ignore those rules in favour of rules which relate to the presentation of claims.

80. It is also plain that the procedure and timescales for presenting claims are different to those in respect of presenting responses, and in particular given the requirement placed upon claimants to ensure that they engage with Early Conciliation prior to presenting their claims. The Rules which the claimant relies upon deal with the difficulties which can arise where that obligation is not complied with by a claimant. Those issues simply do not arise for a respondent.

81. The claimant's reliance upon the **E.On** judgment is also, while understandable, misguided. The decision is not on all fours with the facts with which the Tribunal is confronted in this case, and again I am not prepared to sustain the claimant's submissions suggesting that the principles to be drawn from that decision can be applied here.

82. Where the claimant's submission has greater force, in my judgment, is in two areas.

83. Firstly, the claimant argues that the provision in Rule 17 is a mandatory provision, and requires the Tribunal to reject a response which does not fulfil the requirements therein. That is correct, in my judgment. I shall return to the point, however, as that is not the end of the matter.

84. Secondly, the claimant disputed in strong terms the assertion by Mr Hay that the requirement, in Rule 17, that the ET3 must contain the

respondent's full name and address is a quantitative rather than a qualitative requirement.

85. In my judgment, to suggest that the requirement under Rule 17 merely requires a respondent to submit a name and an address, and that the requirement is thereby fulfilled, cannot be correct. I interpret Mr Hay as saying, however, that the rejection of a response will only arise where no full name or full address appears on the ET3, rather than that the correct name and address are set down therein. I think that amounts to his explanation as to why it was that rejection did not, and should not, have taken place when the administration of the Tribunal received the ET3.

86. Leaving that slightly obscure diversion aside, the reality here is that the response was not rejected by the Tribunal. What the claimant seeks is for that rejection to take effect now, with the consequence that the respondent's response would be struck out. He himself acknowledged that the consequence of that decision would be, as Mr Hay laid out, that the respondent would simply then seek to challenge that decision and ask the Tribunal to allow it to proceed.

87. It seems to me that the proper way to approach this matter is as follows.

88. The response which was presented in this case gave the name of the respondent, erroneously, as Faculty of Advocates, and the address as 17 George IV Bridge, Edinburgh EH1 1EE.

89. It is agreed by both parties that the Faculty of Advocates is not, and has never been, the respondent in this case. The correct name of the respondent, identified in the ET1, is Faculty Services Limited, and their address is Parliament House, Parliament Square, Edinburgh, EH1 1HF. As a result, the respondent has failed to comply with the requirements of Rule 17, because they have not provided the respondent's full name and full address, but that of another body.

90. It is my judgment that this is more than a qualitative difference. The response has failed to provide the name and address of the respondent, and has given the name and address of another body.

91. No explanation has been placed before the Tribunal as to why this was, other than that it was an error.

92. There are two important factors, however, which require to be taken into account in determining the claimant's application to strike out the response at this stage in the proceedings.

93. The first factor is that Rule 6, which does not exclude Rule 17 from its provisions, permits a Tribunal to take any actions which it considers just when faced with non-compliance with any Rule of Procedure. Mr Hay described this as a provision which provides the Tribunal with the discretion to excuse non-compliance with the Rules. He referred to the provision in Rule 6 which allows the Tribunal to vary or waive a requirement, though in this case, it is not clear to me what effect doing that would actually have. It appears to me that this matter falls under the general provision, of which variation or waiver is an example, of taking actions which it considers just when faced with non-compliance.

94. I should note that I do not consider the respondent to have been in breach of Rule 16, but only of Rule 17.

95. The second, and related, factor is that this matter was raised by Mr Hay at the Preliminary Hearing which took place in October 2019, and noted as follows:

"Mr Hay also clarified, in passing, that the claim properly designated the respondent as Faculty Services Limited, and that that is the correct respondent in this case."

96. The claimant's position is that he did not note this having been said at the time, and therefore did not raise any objection to it. That may be so, but it is a matter of fact and record that Mr Hay did raise it at the hearing, and no objection was taken to it by the claimant.

97. In addition, as Mr Hay points out, the ET3 sets out the defence which the respondent wished to place before the Tribunal in this case; there is no doubt as to the proper identities of the parties to this dispute; and other than the technical error made in presenting the ET3 there is no doubt that that dispute is clearly defined between the respective parties.

98. A considerable amount of time has passed between the statement made in the October 2019 PH and the point at which the claimant raised objections to the matter.

99. In reviewing all of these factors, it appears to me entirely just to refuse this application on the claimant's behalf. The respondent did make a mistake in the completion of the ET3, but sought to correct it at an early stage in the proceedings before the Tribunal. At that point, the claimant, who has demonstrated himself to be an intelligent person with a fine grasp of detail, had made no objection to the error, even though it seems unlikely that he did not notice it. Although it is true that the respondent did not seek to apply to amend the response in the PH of October 2019, it is reasonable to infer that that was what was sought at that time.

100. To unravel these matters would, it seems to me, apply far too draconian a penalty to the respondent whose error was made but noted and raised at an early stage, without comment by the claimant. The Tribunal must avoid undue formality, and act proportionately and in the interests of justice. To put it in simple terms, it would be grossly unjust to the respondent to reject their ET3 at this stage, when the matter has already been dealt with and when Rule 6 allows the Tribunal the discretion to take such action as it considers just in order to address the non-compliance with the Rules of Procedure.

101. In any event, it is appropriate to consider the effect of granting the claimant's application. Mr Hay made clear that the respondent would simply seek reconsideration of the strike out decision, and seek to rectify the error at that point. In my judgment such an application would very likely be granted in all the circumstances, and accordingly such a process

would be inefficient and would not take matters any further, other than to delay this process.

102. In my judgment, therefore, the application for strike out is refused, and, for the avoidance of any doubt, the respondent's name and address is amended to be Faculty Services Limited, Parliament House, Parliament Square, Edinburgh.

103. This is not to say that the respondent has covered itself in glory in this episode. The presentation of the ET3 with the wrong name and address of the respondent was an unaccountable error, for which no explanation has been provided, and it has caused a degree of inconvenience which has been unhelpful. However, it is my judgment that the overriding objective and the interests of justice are satisfied by permitting the respondent to continue to participate in these proceedings.

Application to Amend

104. The claimant seeks to amend his claim, in order to introduce a claim for wrongful dismissal, in addition to his existing claim of unfair dismissal.

105. Although there are a number of incidental amendments put forward, the essence of the amendment is as follows:

"196. In the alternative, the Claimant submits that the finding of the Chairperson on the 20th May 2019, to uphold the allegations against him in respect of receipts 1, 2 and 3 was perverse. It is submitted that standing that perversity, the consequent decision of the Chairperson to summarily dismiss the Claimant constituted a breach of the Claimant's contract of employment.

Accordingly, it is submitted that the Claimant was subject to wrongful dismissal under common law."

106. The claimant therefore seeks to advance a claim that not only was his dismissal unfair, but also wrongful, that is, in breach of contract. The heart of that claim is that the decision to uphold the allegations against

him, in relation to “receipts 1, 2 and 3” was perverse and to dismiss him summarily amounted to a breach of his contract of employment.

107. The respondent objects to this application.

108. As both parties identified, it is necessary to consider the guidance provided by the authorities in determining whether or not an application to amend should be granted.

109. Firstly, it is necessary to consider the nature of the amendment. Is this a minor matter or a substantial alteration of the claim? It is plain that no new facts are alleged by the claimant, but that a new head of claim is to be added by this application.

110. The parties diverge widely at this point. The claimant maintains that the difference between the two cases is minimal, relating to the same facts but requiring a different approach by the Tribunal in determining whether or not the claim should succeed.

111. The respondent maintains that the difference is substantial, and that it seeks to introduce a major alteration to the claim.

112. It appears to me that, although the respondent argues that this is a substantial alteration to the claim, it is not this aspect of the matter which causes them the greatest concern, but the prejudice to which they say they will be put if the addition is allowed. I deal with that aspect of the case below.

113. Mr Hay very fairly acknowledged that in many unfair dismissal cases presented to the Tribunal, a wrongful dismissal claim will be attached in the ET1, almost as a “fall-back” in the event that the unfair dismissal claim does not succeed. His point, of course, is that in this case no such claim was introduced in the ET1, and it is the fact that such a significant difference would be wrought to the case at such a late stage that gives rise to their objection.

114. The claimant stresses that the claim simply involves the re-labelling of facts already pled, and therefore does not amount to a significant change for the respondent.

115. It is my judgment that this is an amendment which falls into category (ii) of the three-fold summary provided by Harvey (above). This is a case which involves the addition of a new head of claim, but based on no additional averments of fact.

116. However, that is not the end of the matter. The **Reuters** decision makes plain that the effect of the amendment upon the scope of the inquiry may well be of significance. In that case, on the same facts, an application to amend a new claim under section 13 of the Equality Act 2010 to a claim under section 15 of that Act was allowed by the Employment Tribunal as a mere re-labelling of the claim. The Employment Appeal Tribunal took a different view. They noted that section 13 provides a different test to that under section 15, which is more onerous for the respondent and which requires a considerably wider scope of inquiry. It was of particular concern to the EAT that if inferences were to be drawn in the section 13 claim, they would be inferences of new fact.

117. In order to determine whether or not the claimant succeeds in his wrongful dismissal claim, the Tribunal would require to decide, on evidence, whether or not the respondent was entitled to conclude that the claimant was in repudiatory breach of his contract of employment such as to justify dismissal without notice; and the Tribunal would require to evaluate the evidence of wrongdoing and reach its own conclusions as to what the claimant had or had not done.

118. The scope of inquiry is therefore wider than that in an unfair dismissal claim, in which the Tribunal must not substitute its own decision for that of the employer, and must be restricted to considering the information available to the respondent at the time, and taken into account by them in reaching their decision. It is not for a Tribunal, in an unfair dismissal

claim, to "step into the shoes" of the decision makers and reach its own conclusions.

119. The respondent's objection to this amendment being allowed is that the scope of the inquiry would be significantly broadened, and that evidence could justifiably be led from a number of additional witnesses not relevant to the unfair dismissal claim, so as to allow the Tribunal to determine whether or not the claimant was actually guilty of conduct amounting to a repudiatory breach of the contract of employment, rather than simply whether the respondent had reasonable grounds for its belief that the claimant had committed an act of gross misconduct.

120. The claimant's response to this was that he did not envisage a significant widening of the inquiry if the amendment were allowed. He anticipated that perhaps two additional witnesses would be called, but that most of the "forensic" questioning would be directed at the management witnesses who are already to be led, namely the investigating, dismissing and appeal officers.

121. Underpinning this application is, plainly, a desire on the part of the claimant to "clear his name". He considers that the impact of his dismissal led to the withdrawal of his practising certificate – he may mean his entrance certificate – by the Law Society of Scotland, thus frustrating his ambition to enter the legal profession and qualify as a solicitor in Scotland.

122. It is appropriate, before drawing further conclusions, to consider the other factors which must be taken into account in deciding whether or not to grant the application to amend.

123. The applicability of time limits is of relevance if the Tribunal were to decide that this is not the mere relabelling of the case pled but a significant alteration to the claim. This is related to the nature and timing of the amendment. The nature of the amendment is in itself concise, and, as already established, does not aver any new facts.

124. As to the timing of the application to amend, the claimant submitted it on 8 January 2020, two days after the PH on 6 January at which Employment Judge Meiklejohn had raised with the claimant the question of whether he was, in reality, seeking to claim that he had been wrongfully dismissed. The original claim was presented to the Tribunal on 13 August 2019, and the claimant's dismissal took effect on 20 May 2019.

125. It is also important to weigh in the balance the relative prejudice to the parties, on the one hand to the claimant if the application is refused, and on the other hand to the respondent if it is granted.

126. The respondent also suggests that the effect of widening the scope of the inquiry would be, or could be, disproportionate to the likely value of the wrongful dismissal claim itself, at £1,120.35 (the figure contained in the claimant's supplementary application to amend his claim submitted following this Hearing). The claimant counters that by pointing not only to the monetary value of the claim but also the potential value to him of a finding of wrongful dismissal, in seeking to persuade the Law Society of Scotland to permit him to enter the profession.

127. Taking all of these factors into account, then, I have reached the following conclusions:

- The application to amend seeks to add a new head of claim, and while it does not aver any new facts, it is plainly a significant alteration which is likely to have a significant effect upon the scope of inquiry and thereby the length and complexity of the hearing on the merits in this case;

- The critical new allegation is that the decision on the evidence by the respondent was "perverse". If permitted to pursue that allegation, the claimant would be justified in introducing whatever relevant evidence he considers necessary to prove it. He speaks of his desire to ask detailed, forensic questions of the respondent's witnesses, but seems to misunderstand the potential effect upon the hearing. There is a very significant

difference between a claim of unfair dismissal and one of wrongful dismissal in the evidence which may be considered relevant. In a wrongful dismissal claim, the claimant would be entitled to seek to prove that he did not, as a matter of fact, do what the respondent found him guilty of doing, and to ask the Tribunal to find him, in effect, not guilty of the charges which they dismissed him upon. Since he regards the inquiries conducted by the respondent as inadequate, it appears to me very likely that he would not simply seek a re-hearing of the claim, but a more detailed inquiry into the facts;

- The amendment is sought some four months after the presentation of the claim, on facts which were or must have been known to the claimant at the time he lodged the ET1;

- The explanation for the timing of the application to amend is simply that the claimant did not realise that he could make such a claim until it was raised with him by the Employment Judge on 6 January, and he sought to clarify the matter within two days of that date. However, it is still presented approximately 7 months after his dismissal took effect;

- In my judgment, this application does not merely amount to a relabelling of the original claim. As the EAT found in **Reuters**, although no more facts are ostensibly relied upon in the application to amend, the factual matrix upon which the Tribunal could reach its conclusions is potentially much wider than that required for the unfair dismissal claim. The Tribunal would require to hear evidence from the claimant at greater length than necessary in an unfair dismissal claim, in order to decide whether or not he had been subjected to a breach of his contract in the decision to dismiss;

- The monetary value of the claim is relatively insignificant when placed alongside the potential cost to the respondent of requiring

to present more and longer evidence in defending the new claim. As to the claimant's wish to clear his name in order to persuade the Law Society of Scotland to allow him to commence his profession, it is unclear why and on what basis his registration with that body did not proceed. It is not clear, in my judgment, that a finding of wrongful dismissal would lead to the outcome which the claimant seeks. In any event, it is plain that until the PH of 6 January 2020, the claimant was content to proceed by way of an unfair dismissal claim only, as a way of seeking to obtain vindication.

- No explanation has been given by the claimant as to why he did not include a wrongful dismissal claim within his original ET1. He made reference to a breach of contract claim, though in a different context – and he does not suggest that that was the foundation of a wrongful dismissal claim in his submissions before me – and it appears that he has only done so because the matter was raised with him in that hearing.

128. It is therefore my conclusion that the claimant's application to amend his claim should be refused. The prejudice to the respondent of granting the application would, in my judgment, be greater than that to the claimant of refusing it: he retains his right to advance his claim of unfair dismissal, which is the main focus of his claim.

129. I am aware that Employment Judge Meiklejohn made reference to paragraph 233 of the claimant's particulars of claim, in which he stated that there was a sufficiency of evidence that established that the claimant had not acted improperly at any time, which appeared to the Employment Judge to amount to a foreshadowing of a breach of contract claim where the employee denies the alleged wrongdoing for which he was dismissed. However, such an averment is also not untypical of an unrepresented claimant in an unfair dismissal claim seeking to attack the basis upon which the respondent has decided to dismiss him. It was also made plain

in that Judgment that it had not been pled as a wrongful dismissal claim by the claimant in the ET1.

130. I am not persuaded that it is in the interests of justice, or proportionate in these proceedings, to allow the claimant's application to amend his claim to introduce a wrongful dismissal claim, for the reasons I have set out. Accordingly, the application is refused.

131. These proceedings have already acquired a rather convoluted and protracted history, and it is therefore appropriate that the case be listed for hearing as soon as possible.

Employment Judge: Murdo Macleod
Date of Judgment: 02 September 2020
Entered in register: 17 September 2020
and copied to parties