EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105592/16

Held in Glasgow on 22 September 2017 (Preliminary Hearing)

Employment Judge: Ian McPherson

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| Ms Amanda Fergusson | Claimant<br>Written Representations - per Ms Helen Donnelly - Solicitor |
| Combat Stress | Respondents<br>Written Representations - per Ms Rachel Blythe - Solicitor |

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

(1) amendment of the ET1 claim form is required to enable the claimant to rely on an incident on 29 June 2015, as a further alleged protected disclosure being relied upon by her to pursue her claim against the respondents alleging automatically unfair dismissal by making protected disclosures;

(2) notwithstanding the respondents' objections to amendment to the claim being allowed, it being in the interests of justice to so order, the Tribunal allows the claimant leave to amend the ET1 claim form by

adding thereto the Further and Better Particulars already intimated to the Tribunal by the claimant's representative, as set forth in the claimant's Further and Better Particulars intimated on 9 May 2017, and 21 June 2017, and the revised paper apart, with the claimant's particulars of complaint, including an amended paragraph 23, as intimated on 12 September 2017;

(3) having allowed the claimant's amendment, the Tribunal allows a period of 14 days from date of issue of this Judgment for the respondents to draft and intimate to the Glasgow Tribunal office, by e-mail, with copy sent at the same time to the claimant's representative for her information, their response to the amendment for the claimant, as allowed by the Tribunal, by giving detailed grounds of resistance to the amended paragraph 23 of the claimant's amended particulars of complaint, and providing any Further and Better Particulars from the respondents in reply to that amended paragraph, where they consider it appropriate to do so, so as to augment their existing ET3 response, by providing Further and Better Particulars answering the claimant's additional averments added by that amendment allowed by the Tribunal; and

(4) the claim and response, as so amended, shall proceed to Final Hearing before a full Employment Tribunal at Glasgow on the dates previously assigned, commencing Monday 20 November 2017, for 14 days, for full disposal, including remedy if appropriate, all as previously ordered by Employment Judge McPherson in his written Note and Orders of the Tribunal dated 2 June 2017, following upon the further Case Management Preliminary Hearing held before him on 1 June 2017, and the Notice of Final Hearing issued to both parties' representatives under cover of the Tribunal's letter of 6 June 2017.

## REASONS

### Introduction

1. This case, which involves the claimant's disputed allegations against the respondents of alleged unfair dismissal, automatically unfair dismissal by making protected disclosures, and unlawful deduction from wages, called again before me on the morning of Friday, 22 September 2017, at 10.00am, for a 3 hour Preliminary Hearing, in chambers, as previously intimated to parties' representatives by the Tribunal by Notice of Preliminary Hearing dated 28 July 2017, identifying two preliminary issues:-

   *(1) to determine whether or not the claimant's 21/06/2017 addition to the Further and Better Particulars requires to be progressed as an amendment; and,*

   *(2) if so, whether or not to grant leave to amend to allow the claimant to rely on an incident on 29/06/2015.*

2. It had previously called before me, on 1 June 2017, for a Case Management Preliminary Hearing, held in private, when the claimant was represented by Ms Helen Donnelly, Solicitor, from Thompsons Solicitors, Glasgow, and the respondents by Mr Seamus Sweeney, Barrister, instructed by (but not accompanied by) Ms Rachel Blyth, Solicitor at Rrada Limited. Both representatives had previously attended an earlier Case Management Preliminary Hearing held before me, on 7 April 2017, conducted by telephone conference call,

3. There had been two earlier Preliminary Hearings before that, firstly a Case Management Preliminary Hearing before Employment Judge Robert Gall, on 19 January 2017 and then a Preliminary Hearing on time bar before Employment Judge Susan Walker on 1 March 2017, resulting in her written Judgment Reasons dated 3 March 2017, entered in the Register and copied to parties on 6 March 2017, finding that although the claim was presented out of time, Employment Judge Walker was satisfied that it was not

reasonably practicable for it to have been presented in time and that it was then presented within a reasonable time. Accordingly, she allowed the claim to proceed to further procedure before the Tribunal.

4. At that Case Management Preliminary Hearing before me, on 1 June 2017, I made various Case Management Orders, including an Additional Information Order for the respondents' representative to provide certain information, to help clarify the factual and legal issues in dispute between the parties, as regards alleged protected disclosures made by the claimant, and allowing the claimant's representative to intimate any Further and Better Particulars for the claimant replying to the respondents' additional information.

5. I also ordered the claimant's representative to provide certain further information, to reply to the respondents' Counter Schedule of Loss, and there being no preliminary issues, or jurisdictional issues, requiring a further Preliminary Hearing to be held, I ordered that the case should proceed to listing before a full Tribunal for a Final Hearing on its merits, ordering the claimant to lead her evidence first.

6. Her complaint is of unfair constructive dismissal, and the respondents do not accept that she was dismissed, nor unfairly dismissed but they argue that she resigned from their employment, and that she was not automatically unfairly dismissed for making protected disclosures, where they dispute she made protected disclosures, and they further dispute that she was the subject of any unlawful deduction from wages, stating that she was paid her full entitlements on the expiry of her notice.

7. A 14 day Final Hearing is currently listed to proceed before the Glasgow Employment Tribunal, between 20 November and 7 December 2017. Notice of Final Hearing was issued to both parties' representatives by the Tribunal, under cover of letter dated 6 June 2017. 14 days have been set aside for full disposal of the case, including remedy if appropriate. At the Case Management Preliminary Hearing held before me, on 1 June 2017, there was discussion with parties' representatives about evidence to be led,

where evidence for the claimant was estimated to be 3 days, and the respondents have an estimated 12 to 14 witnesses to lead on their own behalf. My written Note and Orders from that Case Management Preliminary Hearing, dated 2 June 2017, were issued to parties' representatives under cover of a letter from the Tribunal dated 5 June 2017.

Background

8. Following ACAS early conciliation between 14 July and 14 August 2016, the claimant presented a ET1 claim form on 18 November 2016, complaining of alleged unfair constructive dismissal, alleged automatically unfair dismissal by reason of making protected disclosures, and alleged unlawful deduction from wages, all said to be arising from the termination of her employment as a CBT Therapist on 11 August 2016. A detailed, 4 page (34 paragraph) paper apart was attached to the ET1 claim form, lodged by the claimant's then Solicitor, Mr Allan Argue from Thompsons Solicitors, Glasgow.

9. Her claim was accepted by the Tribunal, and Notice of Claim sent on to the respondents, on 23 November 2016, for them to lodge an ET3 response by 21 December 2016 at latest if they wished to defend the claim brought against them. Thereafter, on 21 December 2016, Ms Rachel Blythe, Solicitor with Rrada Limited, Hessle lodged an ET3 response, on behalf of the respondents, defending the claim, and attaching detailed grounds of resistance in an attached 9 page (29 paragraph) paper apart drafted by a Mr Dominic Bayne, Barrister. That response was accepted by the Tribunal on 22 December 2016, and the case proceeded to the Case Management Preliminary Hearing held before Employment Judgment Gall on 19 January 2017.

10. Employment Judge Gall's written Note and Orders, dated 19 January 2017, were issued to parties' representatives under cover of a letter from the tribunal dated 20 January 2017. Mr Argue, Solicitor, appeared for the claimant, and Mr Bayne, Barrister, appeared for the respondents. An issue of time bar arose that had not been highlighted in the ET3 but which, as a

matter of jurisdiction, the respondents wished to argue, and 1 March 2017 was identified as a half day Preliminary Hearing to determine the time bar point.

11. Having heard argument from Mr Tinnion, of Counsel for the claimant, and Mr Bayne, Barrister for the respondents, Employment Judge Walker issued her Judgment dated 3 March 2017, as discussed elsewhere in these Reasons, at paragraph 2 above.

Claimant's Further & Better Particulars - Protected Disclosures

12. The case thereafter proceeded to the telephone conference call Case Management Preliminary Hearing before me, on 7 April 2017, when I fixed a further, personal attendance Case Management Preliminary Hearing before me on 1 June 2017. Specifically, in terms of the respondents' request for further specification of the claim, on 24 April 2017, Mrs Donnelly, Solicitor for the claimant, provided Further and Better Particulars for the claimant, extending to some 6 pages, relating to 6 alleged protected disclosures made by the claimant These Further and Better Particulars were later updated by Mrs Donnelly, on 9 May 2017, by a revised version.

13. After an extension of time allowed to the respondents' representative, the respondents' response to those Further and Better Particulars for the claimant, of 9 May 2017, were intimated to the Tribunal in a short, 1 page response from the respondents' representative, Ms Blythe, on 30 May 2017. These then were the Tribunal "pleadings", as it were, that were before me at the Case Management Preliminary Hearing on 1 June 2017.

14. On 21 June 2017, by e-mail sent to the Tribunal, and copied to Ms Blythe for the respondents, Ms Donnelly advised that the claimant had forgotten, in providing the Further and Better Particulars updated on 9 May 2017, that she had submitted an incident report relating to 29 June 2015 and "as *it is* a *report which relates to the incident for which she was suspended, I submit that it should be included as an amendment."*

15. It appears from that sentence that Ms Donnelly meant an amendment to the Further and Better Particulars, previously submitted for the claimant, because, in the following sentence, she expressly further stated:-

> "IVe *do not seek to amend the ET1 as this matter has already been pled but has not been specified as yet in the Further and Better Particulars. "*

16. On 27 June 2017, Employment Judge Jane Garvie directed that Ms Donnelly's correspondence of 21 June 2017 would be considered once the respondents' representative had had the opportunity to comment. Also, on 30 June 2017, Ms Blythe, the respondents' representative, e-mailed the Tribunal, with copy to Ms Donnelly, attaching a copy of the respondents' response to the claimant's Further and Better Particulars in accordance with the Order dated 2 June 2017, made at the Case Management Preliminary Hearing before me.

17. She enclosed a 4 page typewritten document, running to 9 separate sections, noting that as the claimant had only provided initials in relation to the service users referred to in her own Further and Better Particulars, the lack of specific dates and provision of initials had caused the respondents difficulty in investigating the alleged incidents. The respondents' reply further denied that any of the alleged disclosures had any connection to the fundamental breaches cited by the claimant as the reason for her resignation.

18. By e-mail of 11 July 2017, Ms Blythe replied, referring to the claimant's further protected disclosure *"dated 21 June 2017, received whilst the writer was on annual leave"* and so referring to Ms Donnelly's e-mail of 21 June 201 7. Ms Blythe wrote with her client's comments. Further, on 14 July 2017, Ms Donnelly forwarded her own response to Ms Blythe's response, and stated that the claimant wished to respond to Ms Blythe's e-mail of 11 July 2017.

19. In particular, Ms Donnelly stated that the application of 21 June 2017 was to amend her Further and Better Particulars of 9 May 2017, and that:- "

> ***However, we submit, as we did at the time of our request to amend, that this is not a new allegation. The claimant had cited as a breach of her contract, the Respondents' response to her actions in relation to a patient who had run out of medication. This had all arisen from the incident reports written at the time of the incident and the disclosure my client had made regarding her concerns about the lack of protocol she observed at the time. We would submit that this matter was already in the knowledge of the Respondent and ask the Tribunal to permit the amendment to the Further and Better Particulars requested on 21 June, as it is simply an elaboration of a matter already in dispute. The Respondent has already been able to respond to this amendment on 11 July. And the claimant can provide a response to this."***

20. Further, also in that same e-mail of 14 July 2017, Ms Donnelly further stated that:-

> ***"Given that, as has already been specified in the ET1 and the claimant's cited Breaches of Contract, 37 days after this incident occurred, and she had been praised for her actions, the Respondent made a conscious decision to pursue disciplinary action against her for this incident which led to her suspension, we submit that it is central to the claimant's case that this matter is included in the list of protected disclosures particularised at the Further and Better Particulars.***
>
> ***We also submit that as the Respondent has been able to provide a response to it already, the inclusion of this amendment is not contrary to the overriding objective and it does not prejudice the Respondent as issues arising from the incident are already under consideration in respect of the breaches of contract "***

Preliminary Hearing assigned by the Tribunal

21. Following consideration by me, on 27 July 2017, of parties' correspondence dated 30 June 2017, and 5, 11 and 14 July 2017, I instructed that I did not accept the claimant's addition to the Further and Better Particulars, and that I had directed a 3 hour open Preliminary Hearing, to determine whether or not the claimant's 21 June 2016 additions to the Further and Better Particulars required to be progressed as an amendment; if so, whether or not to grant leave to amend to allow the claimant to rely on an incident of 29 June 2015, and that Notice of Hearing would be issued in due course. That direction by me, communicated to parties' representatives, under cover of the Tribunal's letter of 27 July 2017, was the genesis for this Preliminary Hearing being arranged, as per the Notice of Preliminary Hearing issued to parties' representatives on 28 July 2017.

22. I had envisaged that this Preliminary Hearing would have proceeded, in the usual way, at a public Preliminary Hearing, with both parties represented. However, on 31 July 2017, Ms Blythe, the respondents' representative e-mailed the Tribunal, with copy to Ms Donnelly, acknowledging that the claimant's claim form had been accepted out of time, but stating that, however, the claim form as drafted was, in the respondents' view, insufficiently pleaded as it did not give enough information to enable the respondent to understand the public interest disclosure allegations.

23. Further, Ms Blythe's e-mail also stated that:-

> *"Due to the passage of time and a re-organisation at the Respondent charity means that a number of witnesses are no longer available and to allow the claimant to submit a fourth amended to their Particulars of Claim would, we respectfully submit, unfairly prejudice the Respondent. It will also put the Respondent to additional costs, including investigation of the matter, providing witness evidence, etc.*

*The Respondent will be put to further costs in attending the Preliminary Hearing on 22 September 2017. We respectfully wish to put the Tribunal and the claimant's representative on notice that we intend to make an application for our costs in relation to this"*

24. Having had Ms Blythe's e-mail of 31 July 2017 referred to me, I gave further direction, as set forth in the Tribunal's letter to both parties' representatives dated 4 August 2017. Parties were advised that the respondents' application for costs would be considered once the claimant's representative had had the opportunity to provide comments/objections. While I had fixed a public Preliminary Hearing for 22 September 2017, the Tribunal's letter further provided my direction that it was a matter for the respondents to decide whether to attend in person or, alternatively, to consider submitting written representations only, no later than 15 September 2017 to the Tribunal, and copied to the claimant's representative, and that Ms Blythe should clarify whether the respondents intended to appear on 22 September 2017, or submit written representations only, no later than 15 September 2017.

25. On 8 August 201 7, the claimant's representative, Ms Donnelly, replied to the Tribunal's letter of 4 August 2017, with copy sent to Ms Blythe. In her reply, Ms Donnelly stated that:-

*"The Claimant wishes to clarify that the original Particulars of Claim have never been subjected to amendment, as suggested by the Respondent, and the causes of action pled within have not changed.*

*The Particulars of Claim provide a clear, broad outline of the concerns raised by the Claimant in respect of health and safety of service users.*

*It is normal and appropriate in the course of Case Management for the Claimant to provide Further and Better Particulars of the claims pled.*

*At no point has the Claimant sought to amend the claim to add additional causes of action, simply to provide more detail on the causes of action already specified. The purpose of this process is to provide more detail to the Respondent so that they have sufficient notice to respond to the details of the causes of action before a Final Hearing begins and the Claimant's actions to date have been carried out with this objective in mind.*

*The claimant's latest proposed addition to the Further and Better Particulars of 21 June 2017 (further commented upon on 14 July 2017) seeks to provide more detail, not add a new head of claim. The matter to which it refers was a matter that the Respondent would already have to investigate."*

26. Further, Ms Donnelly's e-mail also stated as follows:-

*"No additional witnesses require to be interviewed and the passage of time is no more a factor in this matter than for any other that the Respondent already has to consider. The Claimant made a protected disclosure in the form of an incident report to Paul Lawson. Paul Lawson was then directed 37 days later to investigate the Claimant for this very incident. Paul Lawson is already cited as a witness for the Respondent This is a matter the Respondent should already be undertaking to investigate as part of their resistance to the claim and the incident report would form part of the events surrounding this incident. The only detail the Claimant wishes to add is that the incident report she wrote amounted to a protected disclosure. The provision of more detail concerning the Further and Better*

***Particulars is not an amendment to the Particulars of Claim and is not an added cause of action."***

27. Finally, as regards the respondent's intention to seek Costs, Ms Donnelly's reply stated that:-

***"The Respondent places the Claimant on notice that they intend to apply for costs in relation to attending the 3 hour hearing but makes no application for the hearing to be discharged or to provide written submissions.***

***With due respect the Employment Tribunal we would propose that the matter could be decided by written submissions and this would save on Tribunal time and resources. The submissions would include, as a suggested alternative, an application to amend the ET1 in line with the Selkent principles, so that all possibilities can be considered by the Tribunal without the need for a hearing.***

***The claimant understands that, ordinarily, no permission from the Tribunal is necessary in order to make an application for leave to amend the ET1, however the Claimant does not wish to take measures to sidestep any direction already made by the Tribunal without approval from the Tribunal to do so.***

***Should the Tribunal decide that a 3 hour hearing remains the best way to determine how best to deal with this issue, we will provide oral submission at the hearing and will oppose the Respondent's costs application."***

28. Following consideration of Ms Donnelly's e-mail of 8 August 2017, I gave further direction, as intimated to both parties' representatives, under cover of a letter of 16 August 2017 from the Tribunal, advising that her correspondence had been referred to me, and that I had directed that the Preliminary Hearing would proceed in person, as per the Tribunal's letter of

4 August 2017, unless both parties agreed the matter could be dealt with by written submissions.

29. That letter of 16 August 201 7 was issued, on my instructions, but without me having had sight of Ms Blythe's e-mail of 15 August 2017 where, in referring to the Tribunal's letter of 4 August 2017, she stated that the respondents were grateful to the Tribunal for the option of providing written submissions, and she advised that the respondents would provide written submissions as an alternative to personally attending the Hearing listed for 22 September 2017.

30. By letter to both parties' representatives, sent on my instructions on 18 August 2017, the Tribunal advised that the respondents having stated they would provide written submissions, as an alternative to personally attending the Preliminary Hearing on 22 September 2017, that Preliminary Hearing would proceed with the claimant's side only in attendance, unless the claimant's representative proposed to submit written submissions only, in which case the Preliminary Hearing would proceed in chambers by an Employment Judge sitting alone with written representations from both parties.

31. Thereafter, by e-mail from Ms Donnelly, on 12 September 2017, she advised that the matter would be best dealt with by written submissions, and she forwarded her submission to amend the Further and Better Particulars, and her submission to amend the ET1 claim form, by amending paragraph 23, all as per a draft revised paper apart for ease of reference, enclosing the proposed amended wording, by adding a sentence, to the existing paragraph 23 of the claimant's Particulars of Claim.

32. Finally, by e-mail of 14 September 2017, Ms Blythe, the respondents' representative, forwarded to the Tribunal, with copy to Ms Donnelly, for the claimant, the respondents' written submissions for the Preliminary Hearing on 22 September 2017, as per a 5 page (31 paragraph) typewritten paper apart prepared by Mr Seamus Sweeney, Barrister, as Counsel for the respondents.

33. By letter from the Tribunal, dated 20 September 2017, issued on my instructions, both parties' representatives were advised that the Preliminary Hearing set down for 22 September 2017 would proceed in chambers (without the need for either party to attend), and if either party had any further submissions to make, in light of parties' correspondence of 12 and 14 September 2017, then they should be submitted by e-mail by no later than 4pm on Thursday, 21 September 2017, for my urgent attention.

34. By e-mail sent at 15:54 on the afternoon of Thursday, 21 September 2017, Ms Donnelly forwarded to the Tribunal, with copy sent at the same time to Ms Blythe, further submissions on behalf of the claimant for consideration at the in chambers Preliminary Hearing the following morning.

Claimant's Written Submissions

35. Ms Donnelly's written submissions for the claimant, as intimated on 12 September 2017, reads as follows:

*'We refer to correspondence from the Employment Tribunal of 16 August 2017.*

*It concerned the matter of the Claimants request of 21 June that further Further and Better Particulars could be added to those already submitted.*

*In this correspondence, Judge McPherson directed that a 3 hour preliminary hearing would proceed to decide the matter unless parties can agree that the matter can be resolved by written submissions.*

*On behalf of the Claimant we have written to the Respondent's representative and she has confirmed that in order to make best use of the parties' and the Employment Tribunal's time and resources, the matter would be best resolved by written submissions. She can of course verify this by email.*

*Submission to amend Further and Better Particulars*

*Accordingly, on behalf of the Claimant, we request that the Employment Tribunal grants permission to the Claimant to specify as part of her Further and Better Particulars that she classifies the incident report of 1 July 2015 as a Protected Disclosure within the meaning of s43B Employment Rights Act 1996 and is granted permission to amend the Further and Better Particulars accordingly.*

*The report was drawn up following an incident which occurred 29 June 2015 and the report sought to highlight the lack of protocol in place when a patient arrived on site without his medication. The Claimant's position is that her line manager, Paul Lawson, told her at the time of the incident that she had acted correctly However more than a month later he submitted a separate Incident Report on the direction of another staff member. The content of this Incident Report lead to the lengthy suspension and disciplining of the Claimant.*

*It is the Claimant's position that the incident has already been referred to paragraph 23 of the ET1 paper apart: specifically "The Claimant had herself completed an incident form the day after the incident in order to highlight the risk of harm to the client that had presented as a result of the nurse's actions".*

*As the matter has clearly been pleaded in the ET1 we submit that the Respondent has been given notice that the Incident Report and the incident itself as a whole plays a central role in the Claimant's case and should already be featuring in Respondent's investigations. It is not a new head of claim, it does not introduce new evidence to the claim or even introduce new facts to the claim, rather it is further specification of a claim already pleaded. If the incident report is permitted to be added to the Further and Better Particulars and explicitly outlined as a Protected Disclosure, this*

*would serve to set the matter out in a more logical fashion but would not alter the claim itself.*

*Submission to amend ET1*

*As the Claimant seeks only permission to include the Incident Report as a Protected Disclosure among her Further and Better Particulars we would submit that an amendment to the ET1 is not required. However, should the Tribunal Judge disagree with this, we offer the following submission to request that leave is granted in order for the ET1 to be amended.*

**We** *seek leave to amend para 23 of the ET1 so that the following wording can be inserted: "The Claimant contends that this incident report was a Protected Disclosure within the meaning of 43B Employment Rights Act 1996, as were the disclosures outlined in paras 4 and 5 above".*

**We** *attached a draft revised paper apart for ease of reference.*

*This amendment is sought in order to add another label to facts already pleaded and is a minor amendment made in terms of the guidance provided by the Court of Appeal in Selkent Bus Company Limited v Moore ([1996] UKEAT 151_96_0205). There is no additional prejudice caused to the Respondent by granting this request. The amendment does not seek to introduce entirely new factual allegations which change the nature of the existing claim. The balance of hardship would be greater to the Claimant if this application was refused and its granting would allow the Claimant to present the claim with improved clarity, which is in keeping with the overriding objective.*

*As this is a request to relabel facts already pleaded, it is not a matter of concern as to whether his amendment is brought within the timeframe for this particular claim, in terms of the EAT's ruling in Foxtons Ltd v Ruwiel EAT 0056/08."*

36. While Ms Donnelly included a revised paper apart, with all 34 paragraphs of the ET1 claim form, for present purposes, it is only necessary to reproduce the proposed, amended paragraph 23, shown below in bold and underlined for emphasis, reading as follows:

> *" 23. Included in the documentation is an email dated 4 August 2015 confirming that management within the Respondent's employ requested that a member of staff report the Claimant to management via an incident form 37 days after the incident. The Claimant had herself completed an incident form the day after the incident in order to highlight the risk of harm to the client that had presented as a result of the nurse's actions. "The Claimant contends that this incident report was a Protected Disclosure within the meaning of 43B Employment Rights Act 1996, as were the disclosures outlined in paras 4 and 5 above". The member of staff who was asked to complete this form (the Claimant's Line Manager) had told the Claimant on the day of the incident, when she informed him about it, that she had done "exactly the right thing" in the circumstances. "*

Respondents' Written Submissions

37. Mr Sweeney's written submissions for the respondents, as intimated by Ms Blythe on 14 September 2017, reads as follows:

> *RESPONDENT'S SUBMISSIONS IN RESPONSE TO THE CLAIMANT'S SUBMISSIONS OF 12 SEPTEMBER 2017 IN RESPECT OF AN APPLICATION DATED 21 JUNE 2017 TO AMEND THE CLAIM FORM*
>
> *1. The Claimant and Respondent are herein referred to as 'C' and 'R' respectively. R objects to the application to amend for the reasons set out below. Before turning to those reasons, R believes it is important to consider the procedural history of the proceedings to date.*

*Procedural history*

2. *C terminated her contract of employment on 11 August 2016. C presented a claim to the Employment Tribunal on 18 November 2016. The claim was presented outside the statutory time limits. The Tribunal held a Preliminary Hearing on 01 March 2017. The Tribunal found that although out of time, it was not reasonably practicable to present the claim within the statutory period and that it was presented within a further reasonable period thereafter.*

*The original Particulars of Claim*

3. *In paragraphs 4 and 5 of the Claimant's Paper Apart, she identified that she had made protected disclosures (PIDS').*

4. *In its Grounds of Response, at paragraphs 4 and 5, R considered the alleged PIDS to be insufficiently particularised and sought further specification as set out in the Grounds of Response.*

5. *In preparation for the Preliminary Hearing (PH') on 07 April 2017 C completed an Agenda in advance wherein she identified in box 2.2 the disclosures that she says she made, when made and to whom.* **C** *said: 'please see paras 4 and 5 of ET1 paper apart'.*

6. *In preparation for the same PH, R indicated that it sought details of the alleged protected disclosure as outlined in pages 1 & 2 of its Grounds of Resistance (see box R2.8).*

7. *Subsequently, at the telephone PH Judge McPherson issued orders, including order (2) that C's representative, on or before 4pm on Friday, 28 April 2017:*

> *"in respect of each call for further specification made by the respondents in their ET3 response form, paper apart, with their grounds of resistance, at paragraphs 4 and 5, and the*

SO

*respondents' comments of 6 April 2017, on the claimant's Further and Better Particulars intimated on 27 March 201 7, the claimant will provide additional information answering the calls for further specification at paragraphs 1 to 13 of those comments of 6 April 2017. "*

*8. In accordance with the above order, C served on R Further and Better Particulars of her claim.*

*9. Subsequently, and without leave of the Tribunal, C served an amended version of those Particulars on 09 May 2017.*

*10. The parties then attended a Preliminary Hearing (case management discussion) on 01 June 2016 whereupon further directions were issued with a view to preparing the case for a final hearing in November 2017.*

*11. By email dated 21 June 2017, C's solicitors wrote to the Tribunal attaching a document entitled Amendment to Further and Better Particulars dated 21/06/2017'. The email was in the following terms (emphasis added):*

*"Please accept my apologies for this late submission, however my client has recalled a further protected disclosure and wishes to add the attached amendment to the Further and Better Particulars already submitted.... She had forgotten that she had submitted an incident report reporting this fact until this week, but as it is a report which relates to the incident for which she was suspended, I submit that it should be included as an amendment.*

*….We do not seek to amend the ET1 as this matter has already been plead but has not been specified as yet in the Further and Better Particulars"*

*Respondent submissions*

12. *C submits that she does not seek to amend the ET1 as the matter set out in the Amendment to the Further and Better Particulars is already pleaded.*

13. *R respectfully disagrees. Permission to amend is required in R's submission. Further, although it is correct that in paragraph 23 of the original claim form C refers to having submitted an incident report form, nowhere is it pleaded that in submitting this form C made a protected disclosure. R respectfully submits that C is now for the first time alleging that, in that incident report form:*

    (a) *She conveyed information in that incident report form which tended to show that the health or safety of an individual has been, is being or is likely to be endangered; and*

    (b) *That she has been constructively dismissed on the ground of having made that protected disclosure (in addition to the other disclosures)*

14. *Therefore, the proposed amendment clearly contains a new substantial allegation against R, which C had not previously asserted and in circumstances where she has had numerous opportunities to do so.*

*C's representative's email of 21 June 2017 (see paragraph 11 above)*

15. *C recognises that this is an amendment to the Further and Better Particulars yet maintains it is not an amendment to the original claim form. R respectfully submits that this is semantics. The question is whether it is an application to amend the original claim form. If so, it must fall to the discretion of the Employment Tribunal.*

16. *Secondly, it appears from the email to be an afterthought of C that the submission of the incident report form constitutes a PID, which is*

*surprising given that the thrust of C's claim has from the outset been that she was constructively dismissed because she made certain disclosures. That she may have been constructively dismissed for making a disclosure contained in the incident report form had never previously been part of her case.*

*17. Thirdly, the application to amend is made on the basis that It relates to the incident' [in respect of which C's conduct was investigated]. That it relates to this incident is no basis for allowing the amendment.*

*18. Fourthly, the amendment which is attached to C's email of 21 June 2017 does not in terms identify what information C says she conveyed which tended to show that the health or safety of an individual was being, or was likely to be endangered.*

*Selkent Bus Co. Ltd v Moore [1996] I.C.R 836*

*19. R agrees that the applicable legal principles are to be found in Selkent [at pages 843 F-H and 844 A-C). The Tribunal is very familiar with those principles which, in summary are that in the case of any application to amend a claim form, the Tribunal should consider:*

*(1) The nature of the amendment,*

*(2) Applicable time limits,*

*(3) The timing and manner of the application before balancing the hardship and injustice of allowing the amendment against the injustice and hardship of refusing it.*

*20. Some cases will involve straightforward minor amendments, others will very clearly be amendments to add new complaints or causes of actions, and some will be a relabeling of matters already sufficiently pleaded.*

*21. However, there will be some cases where the position is not as clear. R respectfully submits that this is one such situation. R submits as follows:*

*(1) The Nature of the amendment.*

*(a) The amendment does not in fact identify what, if any protected disclosure was made. All that it says is 'The Claimant subsequently completed an incident report to highlight this lack of a protocol to deal effectively with such a situation'.*

*(b) That does not identify the information conveyed which tends to show that an individual's health is or safety is likely to be 'endangered'*

*(2) Applicable tim e limits.*

*(a) It is agreed that no new cause of action is being added by the amendment, because the claim that C was unfairly dismissed by reason of making protected disclosures is already pleaded. Therefore, R submits that whether the application should be permitted or refused should not turn on whether the claim is out of time as such.*

*(3) The timing and manner of the application*

*(a) If the lateness of the application is a relevant consideration (which R submits it is) then it should be considered under this heading. The application to amend is very late - it comes some 7 months after a complaint (which itself had been presented out of time) was sent to the Tribunal.*

*(b) Further, it comes after C was ordered to specify the disclosures on which she relied.*

(c) The application also comes after C's representatives had only ever identified the matters in paragraphs 4 and 5 of the Claim Form as the PIDS in respect of which C maintains she was constructively dismissed.

(d) The application lacks clarity (in not particularising the public interest disclosure which is said to be made)

22. R respectfully invites the Tribunal to consider the above matters, in accordance with the Selkent principles, before turning to the question of hardship.

23. In C's representative's submissions to amend it is stated that:

> "The balance of hardship would be greater to the Claimant if this application was refused and its granting would allow the Claimant to present the claim with improved clarity, which is in keeping with the overriding objective. "

24. R respectfully disagrees strongly with this submission. C does not identify what hardship she would suffer if the application was refused. It is to be implied that the hardship which C is referring to is the mere fact of refusal.

25. Refusal does not preclude C from advancing the claim which she has advanced to date; the claim which she and her legal representatives have previously given considered thought to in setting out the PIDS relied upon.

26. Clearly, the incident report form could not have been a substantial consideration of the Claimant's or her solicitors in these proceedings as it has only ever been given a passing reference before 21 June 2017. To suggest that C would now suffer a hardship in not being permitted to advance a case of PID in relation to a matter the significance of which 'she forgotten about' (see paragraph 11 above) and which is said only to 'relate to' the incident which was the subject

*of investigation by R, does not suggest that she will suffer any hardship by refusing to permit her to pursue a separate PID allegation in respect of it.*

*27. In terms of hardship to R, however, this has already been identified in the email of R's solicitors dated 11 July 2017 where it is stated:*

> *"... we submit that yet another amendment would prejudice the Respondent as Veronica Main no longer works for the Respondent and given the new significant passage of time (the incident concerns events between June and August 2015) It is increasingly difficult for other staff to recollect what has happened"*

*Overriding objective*

*28. C's solicitors state in their submissions that by granting the application It would allow the claimant to grant the claim with improved clarity, which is in keeping with the overriding objective'.*

*29. R respectfully disagrees. C has been provided with sufficient opportunity to present her claim with 'improved clarity'. Indeed, that was the purpose of R's request for particularisation of the PIDS. R does not understand what is meant by 'improved clarity' in any event. The Tribunal and the Respondent (as well as the Claimant) should expect 'necessary' clarity. As submitted above (paragraph 21(1)(b) and 21(3)(d) there is no 'improved clarity' as the proposed pleading is lacking in specification on the particulars of the disclosure.*

*30. R submits that it is not in keeping with the overriding objective to permit a claimant to make a substantial and new allegation many months after presentation of the claim form, after a series of case management preliminary hearings and after considered thought has been given to C's case. Considering the Selkent principles, and weighing the respective hardships/prejudices, R submits that the*

*prejudice it suffers with the passage of time and fading of memories and availability of witnesses outweighs any prejudice to C, which has not been identified in any event. This is amply demonstrated by the fact that C, herself, states in her application that she had forgotten about this incident report form. R has made submissions above that this shows how insignificant the matter was as a part of C's case. However, it also demonstrates the fallibility of memory. If C has forgotten, there is a substantially greater likelihood that those who have left R's employment or who may not have attached significance to the report would have forgotten.*

*31. R respectfully invites the Tribunal to exercise its discretion by refusing the application to amend."*

Claimant's Further Written Submissions

38. Ms Donnelly's further written submissions for the claimant, as intimated on 21 September 2017, reads as follows:

*"In response to the Respondent's written submissions of 14 September 2017 the Claimant provides the following further submissions:*

*1. Response to para 11. The Respondent cites the email of 21/06/2017 in which it was written on behalf of the Claimant. "She had forgotten that she had submitted an incident report reporting this fact until this week" We wish to clarify on behalf of the Claimant that it would have been more accurate had we stated that she had forgotten that the incident report should have been included among the Further and Better Particulars and we apologise for the inaccuracy of the wording of this email. Paragraph 23 of the ET1 clearly makes reference to the incident report, specifically "The Claimant had herself completed an incident form the day after the incident in order to highlight the risk of harm to the client that had presented as a result of the*

*nurse's actions" Clearly the incident report itself had not been forgotten, nor had the purpose of the report, which was to highlight the risk of harm to the client. We submit, again, that this requested amendment is to provide further specification of her protected disclosures and ask that our request to include it is granted.*

2. *Response to para 13, The Respondent states "nowhere is it pleaded that in submitting this form C made a protected disclosure". The Claimant submits that the wording of the original claim form, specifically "The Claimant had herself completed an incident form the day after the incident in order to highlight the risk of harm to the client that had presented as a result of the nurse's actions", provides all the necessary facts to classify this incident form as a protected disclosure within the meaning of s. 43B of the Employment Rights Act (ERA) 1996, in other words the facts in the pleadings show that she conveyed information in that incident report form which, in her reasonable belief, tended to show that the health and safety of an individual has been, is being, or is likely to be endangered. In other words this incident report has already been pleaded as a protected disclosure, just not labelled as such. If the tribunal permits the Claimant to add these facts already pleaded to the list of the Claimant's protected disclosures the effect will be to allow that Claimant to set out her case with a level of clarity which is in keeping with the overriding objective and prevents the Respondent from being ambushed with further specification at the hearing, rather than in advance of the hearing.*

3. *Response to para 15. The Respondent submits that in stating that this is an amendment to the Further and Better Particulars and not the ET1 that the Claimant is dealing in semantics. We submit that this is not a question of semantics, rather there is an*

*important distinction to be made between the two. Further and Better Particulars allow of further specification of facts already in the pleadings. Requested amendments to an ET1 require consideration of the Selkent guidance and is a higher test to satisfy for that reason. It is for this reason that the Claimant had requested to include this in her Further and Better Particulars rather than make changes to the ET1 as the Claimant submits that this change can be made without having to consider whether an ET1 amendment is appropriate or necessary. However, as Judge McPherson invited parties to consider whether the matter should be dealt with as an amendment to the ET1, we have provided submissions in respect of both viewpoints in that consideration.*

4. *<u>Response to para 18.</u> The Respondent states that the amendment attached to the Claimant's email of 21 June does not show that the health and safety of an individual was being or was likely to be endangered. This point is made explicitly in para 23 of the ET1, however the proposed amendment attached to the email of 21 June does highlight that the Claimant wrote the incident report to highlight that she had encountered a worrying lack of protocol for dealing with situations where a client has arrived without medication and medication has to be obtained on an emergency basis to prevent the client from suffering the effects of withdrawal. The Claimant would be willing to specify more explicitly the ways in which this incident report constituted a protected disclosure within the meaning of s.43B ERA 1996 in any final amendment submitted, but would submit that the contents of the proposed amendment of 21 June already provide enough information to satisfy this definition. The danger to health and safety presented by a client being unable to access emergency medication is self-evident.*

*SelkentBus* **Co.** *Ltd v Moore [1996] I.C.R 836*

5. *Should Judge McPherson conclude that it is more appropriate to consider this matter as an amendment to the ET1, we submit, again, that in keeping with the Selkent guidance, this a question of relabelling matters already pleaded.*

6. *The Claimant's ET1 form states that she was constructively unfairly dismissed, esto her dismissal was automatically unfair because she made protected disclosures. Those disclosures were listed in the ET1, with the disclosure which is the subject of this current question included in a separate paragraph. Nonetheless, it was pleaded with all the factual basis of a protected disclosure. The amendment does not add a new protected disclosure, this amendment allows the Claimant to further specify that disclosure.*

7. *Response to paras 23 and 24. The Claimant submits that the hardship suffered would be that she would be prevented from presenting her case in the clearest and most logical way available. This would Just serve to add unnecessary complication to her case presentation and would preclude her from providing greater specification in relation to the disclosure in question in advance of the hearing.* **We** *submit that there is no requirement for the greater clarity provided by this amendment to be 'necessary'. This clarity would be of help to the Claimant, the Tribunal and to the Respondent. This is the reason that further specification is sought in any claim.*

8. *Response to para 27. Accordingly, we submit that there is no hardship to the Respondent if the claim is allowed to be further specified at this point. The Respondent submits that the hardship to them lies in the fact that Veronica Main no longer works for the*

*Respondent and the passage of time makes it difficult for staff to recollect what happened. As is clear from the draft amendment attached to 21 June 2017, there would not be a requirement for the Respondent to contact Veronica Main. She was not present during the incident. The nurse who was present and to whom para 23 of the ET1 refers is Lisa Goodwin. Contemporary statements were taken from her for the purposes of the disciplinary that followed this incident. However, we submit that even this is irrelevant as all that is required to determine if this report constituted a protected disclosure is the content of the report and for a view to be formed on the reasonableness of the Claimant's belief that the health and safety of individuals was endangered. This very question lay at the heart of the disciplinary that followed the incident itself and which will be a matter under consideration at the final hearing. Whether or not it lead to her constructive dismissal is a question concerning management's reaction to the report - including Paul Lawson who is already appearing as a witness for the Respondent and who will need to give evidence in relation to this incident in any case.*

9. *Accordingly we submit that not only will the Claimant suffer the hardship of presenting a case which is precluded from being set out in a clear and logical fashion, all parties stand to suffer hardship if this amendment is not permitted, as it is in the interests of all parties for further specification of this part of the Claimant's claim to be provided as far in advance of the final hearing as possible.*

10. *To conclude, we ask that Judge McPherson grants permission for this protected disclosure, which was included at paragraph 23 of the ET1 paper apart, to be included among the list of protected disclosures on the Claimant's Further and Better Particulars and thereby further specified. However, should Judge McPherson*

*decide that the matter is more appropriately considered as an amendment to the paper apart, we submit that this amendment is permissible in accordance with the Selkent guidance as it is a re-labelling of facts already in the pleadings, it is in time and greater hardship is incurred by the Claimant and, indeed, all parties, if the amendment is refused."*

39. By email sent on the morning of the in chambers Preliminary Hearing, on Friday, 22 September 2017, at 10:45, Ms Blythe stated as follows:

*" We refer to the Claimant's solicitor's email below and note that the Claimant has attempted to serve yet further submissions without leave of the Tribunal.*

*We respectfully request that the Claimant's submissions are disregarded as they are not in accordance with the overriding principle which requires, amongst other matters, that the parties are on an equal footing. The Respondent will not be able to prepare counter-submissions to the Claimant's counter-submissions (received yesterday at 15.54) when Employment Judge McPherson is due to decide upon the issue today. As such the Respondent will be in a less favourable position than the Claimant.*

*Furthermore, the Claimant's latest submissions are yet another bid to 'clarify' the Claimant's claim. As the Tribunal will note from the Respondent's submissions, the Claimant has been permitted many attempts to provide Further and Better Particulars and it is putting the Respondent to additional time and expense to deal with each piecemeal amendment.*

*We wish to put the Claimant on notice that we consider their conduct of this case to be unreasonable and reserve our position in relation to expenses. "*

40. Ms Blythe's e-mail of 22 September 2017 was passed to me, after the Preliminary Hearing, in chambers, had started, but before it concluded. On my instructions, on Tuesday, 26 September 2017 (Monday 25th having been a local public holiday, and so the Glasgow Tribunal office was closed) a clerk to the Tribunal write to both parties' representatives, acknowledging receipt of that e-mail.

41. The Tribunal clerk's reply stated that the Tribunal's letter of 20 September 2017, e-mailed to both parties' representatives at 13:05 that afternoon, clearly stated that if either party had any further submissions to make, in light of parties' correspondence of 12 and 14 September, then they should be submitted by e-mail for my urgent attention by no later than 4pm on Thursday, 21 September.

42. The Tribunal's letter of 26 September 2017 further advised that Ms Donnelly's email on Thursday, 21 September, sent at 15:54, and copied to Ms Blythe, as per **Rule 92,** was duly sent before the Judge's time for compliance. In these circumstances, it is not appropriate for the Judge to disregard it, as it was on time, and it was submitted with leave of the Tribunal, notwithstanding Ms Blythe's contrary assertion otherwise.

43. I took the view that Ms Blythe had the same opportunity as Ms Donnelly to make further written submissions. She did not do so, and it was not appropriate to allow her to do so then. The Tribunal's letter confirmed that I had taken both parties' written submissions, already on file, into account, and, having carefully considered them, I was making private deliberation, on the issues before the Tribunal at this Preliminary Hearing, and my full written Judgment and Reasons would follow as soon as possible.

44. That reply from the Tribunal, on 26 September 2017, was issued on my instructions, without me having had sight of Ms Donnelly's e-mail of 22 September 2017 at 11:30, after she had had sight of Ms Blythe's email earlier that morning at 10:45. Ms Donnelly had stated that she had

submitted her further submissions with the permission and at the invitation of the Judge, and that this conduct in no way was unreasonable.

45. That correspondence having been brought to my attention, the clerk to the Tribunal wrote again, to both parties' representatives, later on 26 September 2017, stating that Ms Donnelly's points had already been addressed by me, in the Tribunal's letter sent earlier that afternoon, and no further communication from the Tribunal was required.

Issues for the Tribunal

46. The issues for determination by the Tribunal at this Preliminary Hearing were the two preliminary issues set forth in the Notice of Preliminary Hearing issued by the Tribunal to parties' representatives on 28 July 2017, as recorded earlier, at paragraph 1 of these Reasons, to which I refer again, for the sake of brevity.

47. As per the Tribunal's letter of 26 September 2017, detailed earlier in these Reasons, at paragraphs 36 to 39 above, I rejected Ms Blythe's application, received after the start of this Preliminary hearing, but while it was still ongoing, that I should disregard Ms Donnelly's further written submissions intimated timeously on 21 September 2017.

48. As per the Tribunal's letter of 21 September 2017, I was satisfied that the claimant's further written submissions were submitted by Ms Donnelly with my permission, and at my invitation to both parties' representatives, to submit by 4pm on 21 September any further submissions that either party's representative wished to intimate to the Tribunal by that set date and time for compliance.

49. Ms Donnelly's further written submissions were sent in time, and they were in compliance with my earlier Order, and it was not in the interests of justice

to reject her further written submissions for the claimant, as Ms Blythe had invited me to do. .

Discussion & Deliberation: Need for Amendment

50. In both parties' written submissions, the Tribunal was referred to the EAT's well-known guidance in Selkent Bus Co Ltd v Moore [1996] ICR 836, although Ms Donnelly referred to it as Court of Appeal guidance, which it is not. Otherwise, with the exception of the EAT's ruling in Foxtons Ltd v. Ruwiel EAT 0056/08., cited by Ms Donnelly, at the end of her written submission on 12 September 2017, both parties' submissions were silent on referring me to any relevant statutory provisions, or any other case law authorities. No copy Judgment transcript in Foxtons was provided to the Tribunal, by Ms Donnelly, but I did manage, on my own initiative to find two references to that judgment in the IDS Employment Law Handbook on Employment Tribunal Practice and Procedure (May 2014), at paragraphs 8.23 and 8.33 . Having read both those references, I see that Ms Donnelly's written submission is obviously based on the text at IDS paragraph 8.23.

51. Somewhat to my surprise, neither party's representative referred me to the 19 December 2014 judgment of then President of the EAT, Mr Justice Langstaff, in his Judgment handed down in Chandhok v Tirkey [2015] IRLR 195 (EAT), where at paragraphs 16 to 18 of the EAT's Judgment, he emphasised the importance of the claim as set out in the ET1 claim form.

52. For that reason, I consider that it is appropriate here and now for me to record the learned EAT President's observations, from paragraphs 16 to 18, as follows:-

> *"16. I do not think that the case should have been presented to him in this way or that it should have formed part of his determination. That is because such an approach too easily forgets why there is a formal claim, which must be set out in an*

*ET1. The claim, as set out in the ET1, is not something Just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made - meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.*

*17.1 readily accept that Tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put*

*had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed Justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.*

*18. In summary, a system of Justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost Jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed fora case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.*

53. In the pro-forma Preliminary Hearing Agenda issued by the Tribunal for completion by a claimant, it states as follows ***(my emphasis added):***

***"This document sets out the agenda for the preliminary hearing ("PH") that is to take place in your case. You should complete this document as far as possible and as relevant to***

your case *and send a completed copy to the respondent and the tribunal at least 21 days before the PH. The respondent will be asked to complete a similar form and send a copy to you and to the tribunal at least 7 days before the PH. This timetable has been fixed so that the respondent can use information provided by you to identify areas of agreement and disagreement. The accompanying guidance is designed to assist you in completing this document.*

*Your answers and those of the respondent will form the basis of the discussion at the PH. They do not form part of the claim or response at this stage. Following discussion, some of your answers may be accepted as further details of your claim/'*

54. Mr Argue, the claimant's original solicitor, completed a Preliminary Hearing Agenda for the claimant on 5 January 2017, for use at the first Case Management Preliminary Hearing held on 19 January 2017 before Employment Judge Gall. It was noted, at that first Preliminary Hearing, that the respondents wished specification of the claim, and the details which they then sought were specified in paragraph 4 of their ET3 response form, seeking further specification of the alleged protected disclosures. Yet further specification was called for, by the Additional Information Order that I made at the subsequent Case Management Preliminary Hearing held before me on 7 April 2017, Ms Donnelly provided Further and Better Particulars on 28 April 2017, with an update on 9 May 2017.

55. At this Preliminary Hearing, Ms Donnelly's written submissions argue that there is no need for amendment, as the matter has already been pleaded, while Mr Sweeney, counsel for the respondents, submits that there is such a need, and amendment is opposed. Having carefully considered the competing arguments, I have preferred those advanced by counsel for the respondents, Mr Sweeney, on this point.

56. To my mind, having carefully considered the full terms of the original ET1 claim form submitted on the claimant's behalf by her solicitor, then Mr Argue, make no express reference to an incident on 29 June 2015., nor is the incident report of 1 July 2015, referred to in recent correspondence, referred to in that ET1, let alone it being a further alleged protected disclosure made by the claimant.

57. Nothing is said tn the original ET1 about an incident on 29 June 2015, nor about an incident report of 1 July 2015, so for that reason, I take the view that the claim, as presented, contains no complaint of that nature. In my view, such a claim is not included in the ET1, either expressly, or by necessary implication, so that I find that amendment is required to enable the claimant to advance such a head of claim now against the respondents.

Relevant Law: Amendments

58. In terms of Rule 29 of the Employment Tribunals Rules of Procedure 2013, the Tribunal may at any stage in the proceedings, on its own initiative or on the application of a party, make a Case Management Order. This includes an Order that a party is allowed to amend its particulars of claim or response. The usual starting point for consideration of any application to amend is the guidance given by the Employment Appeal Tribunal in the seminal case of *Selkent.*

59. In many instances where there is an application to amend a claim form, it is done because a particular head of claim has not been fully explored or clarified in the initial claim. Harvey on Industrial Relations and Employment Law *("Harvey")* distinguishes between three categories of amendments:-

(1) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint;

(2) amendments which add or substitute a new cause of action but one which is linked to, arises out of the same facts as, the original claim; and

(3) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

60. In Transport and General Workers Union- v- Safeway Stores Ltd, UKEAT/009/07, Mr Justice Underhill, President of the Employment Appeal Tribunal, noted that although Rule 10(2) (q) of the then Employment Tribunal Rules of Procedure 2004 gave Tribunals a general discretion to allow the amendment of a claim form, it might be thought to be wrong in principle for that discretion to be used so as to allow a claimant to, in effect, get round any statutory limitation period. He went on to say that the position on the authorities however is that an Employment Tribunal has discretion in any case to allow an amendment which introduces a new claim out of time.

61. In a detailed review of the case law, Mr Justice Underhill considered the appropriate conditions for allowing an amendment. In particular, he referred to the guidance of Mr Justice Mummery (as he then was) in Selkent Bus Company Ltd -v- Moore [1996] ICR 836 (EAT), where he set out some guidance. That guidance included the following points:-

"(2) *There is no express obligation in the Industrial Tribunal Rules of Procedure requiring a Tribunal (or the Chairman of a Tribunal) to seek or consider written or oral representations from each side before deciding whether to grant or refuse an application for leave to amend. It is, however, common ground for the discretion to grant leave is a Judicial discretion to be exercised in a judicial manner, i.e. in a manner which*

*satisfies the requirements of relevance, reason, justice and fairness and end in all judicial discretions.*

.....

(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 of 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 a minor matter 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 the 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 1978 Act.*

*(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 Rules 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 in discovery. Whenever taking any factors into account, 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. "*

62. In that Safeway judgment, Mr Justice Underhill also referred to the judgment of the Court of Appeal in Ali v Office of National Statistics [2005] IRLR 201 where Lord Justice Waller referred to Mr Justice Mummery's guidance in Selkent, pointing out that in some cases, the delay in bringing the amendment where the facts had been known for many months made it unjust to do so. He continued : *"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."*

63. Further, Mr Justice Underhill also considered the relevant extract from *Harvey* in relation to the threefold categorisation of proposed amendments. He referred to the fact that the discussion in *Harvey* points out that there is

no difficulty about time-limits as regards categories one and two, since one does not involve any new cause of action and two, while it may formally involve a new claim, is in effect no more than "putting a new label on facts already pleaded". He went on to clarify that the decision in Selkent is inconsistent with the proposition that in all cases which cannot be described as "relabelling" an out of time amendment must automatically be refused; even in such cases he stated that the Tribunal retains a discretion.

64. A further authority that is of assistance to a Tribunal considering an amendment application is Ahuja v Inghams [2002] EWCA Civ 192. At paragraph 43 of the Court of Appeal's judgment in Ahuja, Lord Justice Mummery stated that: "the *tribunal has a very wide and flexible jurisdiction to do justice in the case, as appears from [old] Rule 11 of their regulations and they should not be discouraged in appropriate cases from allowing applicants to amend their applications, if the evidence comes out somewhat differently than was originally pleaded. If there is no injustice to the respondent in allowing such an amendment, then it would be appropriate for the Employment Tribunal to allow it rather than allow what might otherwise be a good claim to be defeated by the requirements that exist - for good reasons - for people to make clear what it is they are complaining about, so that the respondents know how to respond to it with both evidence and argument. "*

65. Further, also of assistance to a Tribunal considering any amendment there is the Court of Appeal's Judgment in Abercrombie & Others -v- Aga Rangemaster Ltd [2013] EWCA Civ 1148; [2013] IRLR 953, and in particular, the Judgment of Lord Justice Underhill, at paragraphs 42 to 57. Finally, there is the Judgment of the Employment Appeal Tribunal in Chandhok -v- Tirkey [2015] IRLR 195, and in particular at paragraphs 16 to 18 of Mr Justice Langstaff's Judgment in Chandhok, where the learned EAT President referred to the importance of the ET1 claim form setting out the essential case for a claimant. I have already made reference to

Chandhok above, at paragraphs 47 and 48 of these Reasons, and so I simply refer back to those excerpts from the EAT President's judgment for the sake of brevity.

66. As is evident from the observations of Mr Justice Mummery, as he then was, in Selkent, in the case of the exercise of discretion for applications to amend, a Tribunal should take into account all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Factors to be taken into consideration include the nature of the amendment, so that for example an amendment which changed the basis of an existing claim will be more difficult to justify than an amendment which essentially places a new label on already pleaded facts; the question whether the claim is out of time and if so, whether time should be extended under the applicable statutory provision; and the extent of any delay and the reasons for it.

67. Further, I have also had regard Lady Smith's unreported EAT judgment in the Scottish appeal of Ladbrokes Racing Ltd v Traynor [2007] UKEATS/0067/07. Despite it being unreported, it is detailed in chapter 8 of the IDS Handbook on Employment Tribunal Practice and Procedure, at paragraph 8.50. At paragraph 20 of her judgment, Lady Smith, as well as noting the Selkent principles, stated as follows:

> *"When considering an application for leave to amend a claim, an Employment Tribunal requires to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing. That involves it considering at least the nature and terms of the amendment proposed, the applicability of any time limits and the timing and the manner of the application. The latter will involve it considering the reason why the application is made at the stage that it is made and why it was not made earlier. It also requires to consider whether, if the amendment is allowed, delay will ensue and whether there are*

***likely to be additional costs whether because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if they are unlikely to be recovered by the party who incurs them. Delay may, of course, in an individual case have put a respondent in a position where evidence relevant to the new issue is no longer available oris of lesser quality than it would have been earlier."***

68. As Lord Justice Underhill pointed out in Abercrombie at paragraph 47, these are neither intended to be exhaustive nor should they be approached in a tick-box fashion. There is nothing in the Rules or the case-law to say that an amendment to substitute a new cause of action is impermissible. Further, at paragraphs 48 and 49 of the Abercrombie judgment, Lord Justice Underhill went to say as follows:-

48. ***Consistently with that way of putting it, the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted: see the discussion in Harvey on Industrial Relations and Employment Law para. 312.01-03. We were referred by way of example to my decision in Transport and General Workers Union v Safeway Stores Ltd (UKEAT/0092/07), in which the claimants were permitted to add a claim by a trade union for breach of the collective consultation obligations under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 to***

*what had been pleaded only as a claim for unfair dismissal by individual employees. (That case in fact probably went beyond "mere re-labelling" - as do others which are indeed more authoritative examples, such as British Printing Corporation (North) Ltd v Kelly (above), where this Court permitted an amendment to substitute a claim for unfair dismissal for a claim initially pleaded as a claim for redundancy payments.)*

*49. It is hard to conceive a purer example of "mere re-labelling" than the present case. Not only the facts but the legal basis of the claim are identical as between the original pleading and the amendment: the only difference is, as I have already said, the use of the section 34 gateway rather than that under section 23. In my view this factor should have weighed very heavily in favour of permission to amend being granted. As the present case only too clearly illustrates, some areas of employment law can, however regrettably, involve real complication, both procedural and substantial; and even the most wary can on occasion stumble into a legal bear-trap. Where an amendment would enable a party to get out of the trap and enable the real issues between the parties to be determined, I would expect permission only to be refused for weighty reasons - most obviously that the amendment would for some particular reason cause unfair prejudice to the other party. There is no question of that in the present case/'*

Discussion and Deliberation

69. Counsel and solicitor for the respondents have both argued strongly against allowing the amendment sought by Ms Donnelly, if amendment is required, while Ms Donnelly has herself argued with equal strength of conviction that the proposed amendment, if required, should be allowed, to properly address all relevant matters, in a way that the claimant has been further and better specifying her case in greater detail, for the assistance of the

respondents, and of the full Tribunal which is listed to hear it on its merits at the forthcoming Final Hearing..

70. In considering, in the present case, whether it is appropriate to allow the amendment, I have considered the Selkent principles, as well as the more recent case law authorities referred to earlier in these Reasons, and I have to take into account not just the interests of the claimant but also those of the respondents. So too have I considered hardship and injustice to both parties in allowing or refusing the amendment, as also the wider interests of justice in terms of the Tribunal's overriding objective to deal with the case fairly and justly.

71. Having most carefully considered parties' written submissions, and also my own obligations, under Rule 2 of the Employment Tribunals Rules of Procedure 2013, to ensure that this case is dealt with fairly and justly, I consider that it is in the interests of justice and in accordance with the overriding objective to allow this amendment of the original ET1 claim form.

72. An amendment can be proposed at any time in the course of a claim before the Tribunal, and the applicability of time-limits only relates to the situation where a new complaint or cause of action is proposed to be added by way of amendment.

73. The amendment proposed here by Ms Donnelly is more category 2, seeking to add a further alleged protected disclosure to an existing claim, linked to and arising out of the same facts as the original claim, rather than a wholly new claim.

74. I considered the timing and manner of the application to amend. It is, of course, correct to say that a significant amount of time has elapsed between the claim having been lodged and the application to amend being made. .Ms Donnelly, in her written submissions, has provided me with a cogent explanation for why she feels it necessary for the claim to be amended, and

in so doing she has addressed the delay in lodging this application to amend.

75. However, as is made clear in Selkent, an application to amend should not be refused solely because there has been a delay in making it, and there are no time limits for considering an application to amend. Of paramount consideration is a relative injustice or hardship involved in refusing or granting the application.

76. While there has been delay between the issue of the proceedings and the lodging of this application to amend, a significant factor in considering the timing of the application is that this litigation is not yet at a stage where a Final Hearing has actually started. Further, no evidence has yet been led by either party. On that basis, I consider that it is unlikely that the respondents will be seriously prejudiced because of the timing of this application.

77. While the respondents assert, as per paragraph 30 of Mr Sweeney's written submission of 14 September 2017, some prejudice will be caused to the respondents, on account of the passage of time and fading of memories, and the availability of witnesses who may well have forgotten things from 2015, I do not consider that that feature of itself is sufficient for me to find that a Fair Hearing cannot be held.

78. The fact that there has been a re-organisation of the Respondents' charity, and, as Ms Blythe says, in her email of 31 July 2017, "a *number of witnesses are no longer available",* does not mean that such witnesses cannot be called to give evidence, if necessary under compulsion of a Witness Order granted by the Tribunal, so long as the respondents have their contact address for service, and they can satisfy the Tribunal's need for any application for a Witness Order to show relevance and necessity of a particular person being called to give evidence at the Final Hearing.

79. The full Tribunal, hearing the case on its merits, will need to come to its own views on the credibility and reliability of witnesses for the claimant and for the respondents, based on the evidence they give at that Final Hearing, and how it is tried and tested in the Final hearing, and that is a key aspect of its fact finding role, as an industrial jury, at the Final Hearing.

80. I recognise, of course, there has been some prejudice to the respondents to date in that they have had to deal with this on-going litigation, where the claim was accepted and served on them as long ago as 23 November 2016, but part of the delay in getting this case to the now listed Final Hearing has resulted from the time-bar point taken by the respondents, and their need to have the claimant provide further and better specification of the factual and legal basis of the claim, and in that regard, through correspondence, and 3 Case Management Preliminary Hearings, the respondents have taken pro-active steps to seek to clarify matters via the Tribunal. All of that case management procedure has taken time, and the passage of time is as likely to impact the claimant and her witnesses as it is to impact the witnesses for the respondents.

81. Over recent months, since June / July 2017, to date, as the need for amendment has been discussed, and progressed to parties' submissions before me at this Preliminary Hearing, these Tribunal proceedings have progressed as if both parties, but for this one further alleged protected disclosure, are satisfied that they otherwise know the other party's case, as they had pled it, and without the need to call for any more Further and Better Particulars, to supplement those already intimated, and, with the exception of this one matter of amendment, there are no other preliminary issues requiring prior determination by the Tribunal, in advance of the start of the listed Final Hearing.

82. I recognise that it has taken a considerable amount of time and procedure to reach the stage that the parties are now at. If anything however allowance of the amendment makes the claimant's position about this further alleged

protected disclosure clearer, and this, it would be reasonable to anticipate, should serve to prevent any further unnecessary procedure prior to the start of the Final Hearing next month.. Further, any prejudice to the respondents is, in my view, offset, in that if this amendment is allowed, the respondents are not being asked to face a wholly new claim of which they have no knowledge.

83. In the event the amendment is allowed, and I have so ordered, the respondents retain the right to defend the claim as amended in its entirety. I have considered all the relevant factors, and balanced the injustice and hardship to the claimant in refusing the application, against the injustice and hardship to the respondents in allowing the application

84. Given that the respondents have been on notice of the proposed amended claim from 21 June 2017, when Ms Donnelly intimated Further and Better Particulars, recalling and detailing the further alleged protected disclosure from June / July 2015, I do not believe that the respondents are prejudiced in any meaningful way by including the amended part of the claim or that there is any question of hardship to the respondents. The respondents are simply going to have to address another aspect of a multi-facetted claim which has already been indicated to them, but that is unfortunately a fact of life in industrial relations claims.

85. In my view, there would undoubtedly be a greater hardship and prejudice to the claimant if she was unable to pursue the full extent of her claim as amended, and I consider that the potential injustice to her in refusing her amendment, as the respondents invited me to do, is far greater than a potential injustice to the employer if this matter is allowed to continue with the claim as amended.

86. The claim, as now amended, is very closely related to the claim originally lodged, and, in my view, the amendment allows the issues in dispute to be better focussed, and looking at the listed Final Hearing before the Tribunal,

next month, parties will be on an equal footing in that all relevant information has now been disclosed so as to allow preparation for a Final Hearing to progress on the basis that all the claimant's cards are now on the table.

87. The amendment which I have allowed will, in my view, have little impact on the cogency of the evidence to be heard at a Final Hearing as a result of the delay in applying to make this amendment, and the listed Final Hearing can proceed as listed, and it is likely to proceed with the same number of witnesses as originally envisaged, although both parties' representativeswill need to carefully reflect on their time estimates for evidence, to ensure the case can be concluded in the allocated 14 day sitting.

88. Further, in my view, the amendment allowed by the Tribunal does not seek to change the basic argument that the claimant submits that she was the subject of an unfair constructive dismissal by the respondents, and / or an automatically unfair dismissal by reason of making protected disclosures, but it does helpfully provide clarity around the alleged protected disclosures being relied upon which the claimant is offering to prove.

89. Finally, this amendment as allowed does not affect the ability of the Employment Tribunal to conduct a fair hearing of the case, on the 14 days already assigned by the Tribunal for a Final Hearing. In all of these circumstances, I have decided to allow the amendment sought by the claimant, and I have so ordered at paragraph (2) of my Judgment.

Further Procedure

90. Further, having allowed this amendment for the claimant, I have decided that it is likewise in the interests of justice to allow the respondents an opportunity to lodge Further and Better Particulars with the Tribunal on their own behalf, if so advised.

91. Any such Further and Better Particulars should seek to answer the claimant's amended paragraph 23 of the paper apart to the ET1 claim form, so as to fully specify the respondents' grounds of resistance to that amended part of the claim, and so augment the grounds of resistance originally set forth in their ET3 response form accepted on 22 December 2016. I consider that a period of two weeks from date of issue of this Judgment is a reasonable period for lodging any such Further and Better Particulars for the respondents. I have so ordered at paragraph (3) of my Judgment.

92. Finally, at paragraph (4) of my Judgment, I have ordered that the claim and response, as so amended, shall proceed to Final Hearing before a full Employment Tribunal at Glasgow on the dates previously assigned, commencing Monday 20 November 2017, for 14 days, for full disposal, including remedy if appropriate, all as previously ordered by me in my written Note and Orders of the Tribunal dated 2 June 2017, following upon the further Case Management Preliminary Hearing held before me on 1 June 2017, and the Notice of Final Hearing issued to both parties' representatives under cover of the Tribunal's letter of 6 June 201 7.

93. Should any other matters arise between now and the start of the listed Final Hearing, then written case management application by either party's representative should be intimated, in the normal way to the Tribunal, by e-mail, with copy to the other party's representative, sent at the same time, and evidencing compliance with Rule 92, for comment / objection within seven days.

94. Dependent upon subject matter, and any objection / comment by the other party's representative, any such case management application may be dealt with on paper by me as the allocated Employment Judge, or a Case

**Management Preliminary Hearing fixed, either in person, or by telephone conference call, as might be most appropriate.**

Employment Judge: Ian McPherson
Date of Judgment: 18 October 2017
Entered in register: 19 October 2017
and copied to parties