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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100519/2017

Held in Glasgow on 6 November 2017
(Preliminary Hearing)

Employment Judge: Ian McPherson

Ms Cheryl McFarlane	Claimant Represented by:- Mr Stephen Connolly - Solicitor
South Lanarkshire Council	Respondent Represented by:- Mr Gordon Stewart - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

(1) Having heard parties' representatives in Preliminary Hearing on the claimant's opposed application for leave to amend the ET1 claim form, as set forth in the tracked change version of the paper apart to the ET1, as intimated to the Tribunal on 17 October 2017, and notwithstanding the respondents' objections to amendment to the claim being allowed, as per the objections intimated on 23 October 2017, it being in the interests of justice to so order, the Tribunal allows the claimant leave to amend the ET1 claim form by amending the existing text at paragraph 15, inserting a new paragraph 16, and amending the existing text at the original paragraphs 16, 17 and 18, now re-numbered 17, 18 and 19;

(2) Further, having allowed the claimant's amendment, the Tribunal allows the respondents, by no later than 3 weeks from the date of issue of this Judgment, 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 his information, their response to the amendment for the claimant, as allowed by the Tribunal, by giving detailed grounds of resistance to the amended paragraphs 15 to 19 inclusive of the claimant's amended particulars of complaint, and providing any further and better particulars from the respondents in reply to those amended paragraphs, where the respondents 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;

(3) Accordingly, having allowed the claimant's amendment, and taking account of the period of time allowed to the respondents to reply, the Tribunal, on the respondents' application made at this Preliminary Hearing, postpones the previously assigned Final Hearing, commencing Monday, 13 November 2017, for 4 days, for full disposal, including remedy if appropriate, all as previously ordered by Employment Judge Gall, and as per the Notice of Final Hearing issued to both parties' representatives under cover of the Tribunal's letter of 3 October 201 7 ; and

(4) Instructs the clerk to the Tribunal, when issuing this Judgment, to send to both parties' representatives' fresh date listing stencils, for completion and return to the Tribunal, for the proposed new listing period of January to March 2018.

REASONS

Introduction

1. This case, which involves the claimant's disputed allegations against the respondents of alleged unfair constructive dismissal, called before me on

the morning of Monday, 6 November 2017, at 10.00am, for a 3 hour Preliminary Hearing, as previously intimated to parties' representatives by the Tribunal by Notice of Preliminary Hearing dated 2 November 201 7.

2. This Preliminary Hearing was assigned, as a matter of urgency, by Employment Judge Laura Doherty, on 31 October 2017, when she directed that there should be a 3 hour, in person, Preliminary Hearing fixed to discuss the claimant's application to amend her statement of claim and the respondents' objections thereto.

3. As such, at the start of this Hearing, I clarified that notwithstanding the Tribunal's letter of 2 November 2017 referring to this as a Case Management Preliminary Hearing to be held in private, it was being conducted as a public Preliminary Hearing to deal with the claimant's opposed amendment application.

4. The urgent listing for this Hearing was occasioned by Employment Judge Doherty's consideration of parties' correspondence of 23 and 24 October 2017, further to the claimant's application of 17 October 2017, for leave to amend the ET1 claim form, because the case is listed for a 4 day Final Hearing before an Employment Judge sitting alone, in Glasgow, commencing on Monday, 13 November 2017.

Background

5. Following ACAS early conciliation between 21 December 2016 and 21 January 2017, the claimant, acting through her solicitor, Mr Stephen Connolly of Miller Samuel Hill Brown LLP, Solicitors, Glasgow, presented a ET1 claim form on 30 March 2017, complaining of alleged unfair constructive dismissal by the respondents, all said to be arising from the termination of her employment as Acting Principal Teacher at Chatelherault Primary School, Hamilton, on 28 November 2016.

6. A detailed, 7 page (18 paragraph) paper apart was attached to the ET1 claim form, lodged by the claimant's solicitor, Mr Connolly. It provided her statement of her case. In the event of success, the claimant sought an award of compensation only from the Tribunal. Her claim was accepted by the Tribunal, and Notice of Claim sent on to the respondents, on 31 March 2017, for them to lodge an ET3 response by 28 April 2017 at latest if they wished to defend the claim brought against them.

7. Thereafter, on 28 April 2017, Mr Gordon Stewart, in-house Litigation Solicitor with the respondents, South Lanarkshire Council, lodged an ET3 response, on behalf of the respondents, defending the claim, and attaching detailed grounds of resistance in an attached 3 page (10 paragraph) paper apart drafted by their solicitor, Mr Stewart.

Preliminary Hearing on Time Bar

8. Mr Stewart submitted that the claim was time-barred, and, if it was not time-barred, then the respondents did not accept that the claimant had been dismissed from their employment, but she had resigned by letter dated 28 November 2016, and it was denied that the respondents had breached any of the terms and conditions of the claimant's contract of employment with them.

9. That ET3 response was accepted by the Tribunal on 2 May 2017, and, following Initial Consideration by Employment Judge Robert Gail, on 3 May 2017, he sought comments from the claimant's representative upon the time-bar issue raised by the respondents.

10. Following Mr Connolly's reply of 15 May 2017, submitting that the ET1 was lodged timeously with the Tribunal, and so the claim is not time-barred, Mr Stewart, the respondents' solicitor, contested that, in his reply of 23 May 2017, so Employment Judge Gall thereafter instructed, on 25 May 2017, that the case be listed for a Preliminary Hearing to determine whether or not the claim is time-barred.

11. Thereafter, the case proceeded to a public Preliminary Hearing, held on 29 June 2017, before Employment Judge Jane Garvie. Mr Connolly appeared for the claimant, and Mr Stewart for the respondents.

12. Having heard argument from parties' representatives, and taken account of their written submissions on time-bar, by written Judgment and Reasons dated 19 July 2017, entered in the register and copied to parties on 21 July 2017, Employment Judge Garvie decided that the claim was presented in time and accordingly it should proceed to a Final Hearing.

Claimant's Application to Amend the ET1 claim form

13. Following an initial attempt to list for Final Hearing in September to November 2017, the case was then proposed for listing in October to December 2017, resulting in the 4 day Final Hearing assigned by Employment Judge Gall, and intimated to both parties' representatives in the Tribunal's Notice of Final Hearing dated 3 October 2017, assigning Monday to Thursday, 13 to 16 November 2017, as the dates set aside for full disposal, including remedy, if appropriate.

14. Thereafter, on 17 October 2017, the claimant's solicitor, Mr Connolly, applied to the Tribunal, by e-mail, with copy sent at the same time to Mr Stewart, as the respondents' solicitor, making application to the Tribunal to allow the claimant's statement of claim as set out in the paper apart to the ET1 to be amended.

15. That amendment application was in the following specific terms, subject to one redaction, which the Tribunal has made, as shown below, where underlined:-

> "H/e *write in respect of the above matter and to make an application for a case management order on behalf of the Claimant.*
>
> *The Claimant makes an application under the terms of Rule 30 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1. The Claimant's application is to allow her statement of claim as set out in the paper*

apart to the ET1 to be amended. The nature of the amendment is as set out by track change on the attached version of the paper apart to the ET1.

The application relates to the background events which led to the claimant resigning her position with the respondent. The amendment seeks to introduce one further event upon which the claimant will rely at the hearing in support of her assertion that her terms and conditions of employment were fundamentally breached by the respondent. The amendment made makes reference to the fact that upon conclusion of the respondent's disciplinary process and their having arrived at the view there was no evidence to substantiate any allegations raised against the claimant, it still sought to remove her from her normal post as a result of the allegation being raised. The claimant considered this to be the last straw in respect of matters and it was this particular action on the respondent's part which prompted her resignation.

The application is made so as to ensure that the respondent has full and proper notice of the arguments to be advanced on behalf of the claimant at the hearing. The additional matters which would be introduced by the amendment were not initially included in the claimant's ET1 due to the claimant not being able to provide full and proper instructions to us in regards to the terms of the same. This was due to extenuating personal circumstances which the claimant required to deal with at that time….[The Tribunal has, on its own initiative, redacted the detail of the claimant's extenuating personal circumstances, given this Judgment will appear on the public website.] Accordingly, it was not possible for us to obtain proper and detailed instructions in regards to the terms of the ET1 prior to this being submitted to the tribunal.

The amendment made should not cause the respondent any particular prejudice. Whilst the application seeks to amend the claim, it does not seek to introduce any new information which is not

already available to the respondent. It is in respect of the respondent's decision as taken on 14 October (as was confirmed in their letter of 26 October) that the claimant seeks to introduce in respect of her claim. Should the amendment be allowed, it will not alter in any material way the claim before the tribunal. It should not require the respondent to call any additional witnesses, nor put forward any further evidence. The application is being made 4 weeks in advance of the hearing to allow the respondent proper time to prepare its case to respond to the amended pleadings.

Accordingly, the claimant would request that the application to amend be granted and believes that it would be in keeping with the overriding objective to allow the application. "

16. The nature of the claimant's proposed amendment was as set out by track change on the attached version of the paper apart to the ET1. Paragraphs 1 to 14 of the original paper apart, submitted with the ET1 on 30 March 2017, were unaffected by the proposed amendments, where the claimant's solicitor sought leave to amend the ET1 claim form by amending the existing text at paragraph 15, inserting a new paragraph 16, and amending the existing text at the original paragraphs 16, 17 and 18, now re-numbered 17, 18 and 19, as follows, where the additional text is shown below underlined for ease of reference:-

15. The Claimant attended a disciplinary hearing on 14 October 2016 that was chaired by Jim Gilhooly and was also attended by Alan Scott (trade union representative). At the hearing, witnesses were questioned regarding the allegations against the Claimant. No substantive evidence was put before the hearing to support any suggestion that the Claimant had been made aware of any child safety concerns in respect of Ms Mackie's practice (or otherwise). Again the Claimant denied the allegations. Since there was no evidence to support the allegation, formal proceedings weren't taken any further and the

Claimant was notified of this at the conclusion of the hearing, that decision being confirmed in a letter dated 26 October 2016.

16. *Following the conclusion of the disciplinary hearing, the Claimant was spoken to by Mr Gilhooly. Mr Gilhooly indicated that even although he was not upholding any allegation, the Claimant was not going to be permitted to return to Chatelherault Primary School as Acting Principal Teacher. Mr Gilhooly explained this was on the basis there would be a conflict of interest due to parents being upset at matters which had formed the basis of the Respondents disciplinary investigation into the Claimant's alleged conduct. Mr Gilhooly's decision in this regard was confirmed in his letter of 26th October which stated:*

> *7 also advised that it would not be appropriate for you to return to Chatelherault base and you will be advised in due course of your new work location. "*

The Claimant was dismayed at Mr Gilhooly's decision to remove her from her role despite there being no evidence or finding of wrongdoing on her part. The Claimant viewed this as the "last straw" in respect of the way in which the Respondent had addressed matters since August 2015.

17. *Although the Claimant was cleared of the allegations that were made against her, she was dismayed and angry with the whole investigation process carried out by the Respondent. There was never any evidence to support any allegation of wrongdoing, the Claimant was unreasonably removed from her post as Acting Principal Teacher at Chatelherault and the Respondent took unreasonable delay in handling the investigation and disciplinary process. The Respondent's handling of the*

investigation and disciplinary process was heavy handed and unjustified. Despite there being no evidence to support the allegations raised against the Claimant, the Respondent refused to allow her to return to her post of Acting Principal Teacher at the conclusion of its disciplinary process. For these reasons, the Claimant believes that the Respondent fundamentally breached the implied term of trust and confidence that existed in the employment relationship. The Claimant subsequently made the decision to resign with immediate effect from her employment with the Respondent by a letter on 28 November 2016.

18. *Although the Claimant was aggrieved by the Respondent's decision to take her through disciplinary procedures, the Claimant did not feel that it was appropriate to resign from her employment whilst disciplinary procedures were outstanding. Once the disciplinary process had ended and the Claimant was cleared of all allegations, she felt it was then appropriate for her to resign from her position with the Respondent. The "last straw" was the Respondent's decision not to allow the Claimant to return to her post despite no allegations being upheld against her.*

19. *The Claimant considers that the Respondent's conduct set out in paragraphs 4-17 amounts to a breach of the implied duty of trust and confidence which should have been found within the employment relationship. The acts carried out by the Respondent amounted to a continuing course of conduct which culminated in the resignation of the Claimant. The Claimant relies on the following specific acts in this regard:*

- *The redeployment of the Claimant to Harleeshill Primary School into a demoted position as further specified in paragraph 7 above.*

- *The Respondent's breach of confidentiality when a letter that was meant for the Claimant was sent in error to another employee of the Respondent as specified at paragraph 9 above.*

- *The postponement of the investigation of the allegations against the Claimant and the further delays in the procedure adopted by the Respondent as specified in paragraphs 10, 11, 12 and 13 above.*

- *The Respondent's comments at the meeting on 15 June 2016 regarding the fact that despite no evidence had been found against the Claimant, the Respondent was progressing with a disciplinary hearing, as specified in paragraph 14 above.*

- *The Respondent's decision to proceed with the disciplinary hearing on 14 October 2016 in the absence of supporting evidence. This amounted to the "last straw" from the Claimant's perspective.*

- *The Respondent's decision to prevent the Claimant from returning to her role of Acting Principal Teacher at Chatelherault Primary School following the disciplinary hearing, despite no allegation being upheld.*

The Respondent's breach of the implied term of trust and confidence constituted a repudiatory breach. By the Claimant's resignation, she accepted the breach. Accordingly, the termination of the Claimant's employment amounts to a dismissal within the meaning of section 95(1)(c) of the Act. In the circumstances the Claimant contends that she has been unfairly dismissal in terms of section 94 of the Act and seeks compensation accordingly.

Respondents' Opposition to the Proposed Amendment

17. On 23 October 2017, Mr Stewart, the respondents' solicitor, e-mailed the Tribunal, with copy sent at the same time to Mr Connolly, as the claimant's solicitor, intimating the respondents' opposition to the claimant's amendment application. Those objections were in the following specific terms:-

> *7 refer to the application made by the Claimant for leave to amend her Statement of Claim.*
>
> *The Respondent opposes that application on the following grounds: -*
>
> *- When considering an application for amendment the Tribunal must carry out a balancing exercise of all relevant factors, having regard to the interests of justice and to the relative hardship caused to the parties by granting or refusing the application. (Selkent Bus Co. Ltd v Moore 1996 ICR 836)*
>
> *- It is submitted that the nature of the amendment sought by the Claimant is a fundamental change to the basis of her Claim. The Claim has been presented on the basis that the resignation of the Claimant was the result of a repudiatory breach of the employment contract by the Respondents. In a Claim for constructive dismissal, the essential averments are that there has been a repudiatory breach of contract by the Respondents, what that repudiatory breach is, and that the Claimant has resigned as a consequence of such breach. In the Statement of Claim, the Claimant specifically avers what she considered to be the act which she considered to be the 'last straw' resulting in her resignation.*
>
> *- The ET1 was submitted on 30 March 2017, the last date for the Claim to have been lodged in time (per Judgment of the Employment Tribunal dated 19 July 2017).*

- The amendment seeks to introduce averments relating to a fundamental element of the Claim. There is no reason why the Claimant would have been unaware of the averred act at the time of preparing her Statement of Claim, which is specific and detailed regarding the acts which were considered repudiatory breaches.

- Leave to amend the Statement of Claim has first been sought on 17 October 2017, almost six months after the expiry of the timebar for lodging the Claim with the Tribunal. In those circumstances, it is submitted that the Tribunal must consider the issue of whether the amended claim has been brought within the statutory time limit and if not whether the time limit should be extended (Selkent Bus **Co** *Ltd v Moore).*

- The ground of complaint sought to be introduced by the amendment has clearly been introduced outwith the statutory time limit. The Respondents are sorry to hear of the tragic personal circumstances of the Claimant, however it is submitted that there is no reason disclosed within the application for leave to amend which would allow the Tribunal to consider that the time limit should be extended on the grounds that it was 'not reasonably practicable' to aver the ground within the time limit. A Preliminary Hearing in respect of this claim was held on 29 June 2017, the Claimant was personally present at that Hearing and the Claimant's solicitor had sufficient instructions to make detailed submissions on the issue of timebar. There has been no indication given that the Claimant's solicitor was not in receipt of full instructions prior to the email of 17 October 2017.

- The Claimant has submitted that there would be no particular prejudice caused to the Respondent by allowing the amendment. It is submitted that that assumption by the Claimant is incorrect. A hearing on this Claim is due to take place on 13 - 16 November 2017. The Respondents have prepared their defence of the action on the basis of the case pled within the Statement of Claim lodged on 30

March 2017. The Respondent has been preparing for that Hearing and witness availability was checked at the time of issuing the date listing response on 22 August 2017. The proposed amendment may require additional witnesses to give evidence for the Respondent and proper time to prepare has not been provided by the late intimation of the proposed amendment. Allowing the amendment will result in the Respondent seeking to discharge the Hearing already assigned, in order that appropriate investigations can be carried out, witnesses precognosed and a response to the proposed amendments lodged with the Tribunal. The information contained within the proposed amendment is not new information to the Claimant and there is no reason why those averments were not made in the detailed statement of claim lodged with the Tribunal on 30 March 2017. The events which those witnesses may be asked to recall occurred almost one year ago and one individual named within the proposed amendment is no longer in the employment of the Respondents. There is no reason why those averments were not sought to be introduced at an earlier stage than three weeks prior to the commencement of the Hearing.

- In circumstances where the amendment seeks to fundamentally alter the grounds of the Claim; the proposed new ground of Claim has first been presented almost six months after the expiry of the statutory time limit; there has been insufficient information provided in the application to enable the Tribunal to consider whether it was "not reasonably practicable" to present those grounds of claim in time; and there will be significant prejudice caused to the Respondent in the preparation of its defence by the timing and manner of the application, the application should be refused."

Claimant's Comments on Respondents' Objections

18. On 24 October 2017, Mr Connolly, the claimant's solicitor, e-mailed the Tribunal, with copy sent at the same time to Mr Stewart, as the respondents' solicitor, intimating his further points in light of the respondents' opposition to

the claimant's amendment application. Those further points for the claimant were in the following specific terms:-

" I/We *refer to our email of 17th October making an application to amend the claim raised by the Claimant and the Respondent's representative's email opposing that application as was intimated to us on 23rd October. Having considered the matters raised by the Respondent's representative, we would wish to make the following points in support of the application which has been made:*

- Firstly, the Claimant does not dispute that the relevant principles which the tribunal should consider in determining whether or not to allow the application are those laid out in Sei ken t Bus Co. Ltd v Moore 1996 ICR 836.

- The Claimant would highlight that if the application to amend is allowed, it will not introduce any new claim to proceedings. The application initially lodged with the tribunal was to pursue a claim of unfair constructive dismissal. This remains the sole claim which the Claimant wishes to pursue and the amendment does not seek to introduce any new cause of action. On this basis, we do not see that this application involves the Claimant seeking to introduce any new claim outside of the relevant statutory time limit.

- In regards to the nature of the amendment sought, the Claimant would highlight that the extent of this is to simply introduce one further factual averment. As stated in our initial application, this averment relates to matters which are already within the Respondent's knowledge. Furthermore, the new factual averment which the Claimant seeks to introduce is entirely related to the other matters which are pled within the initial ET1. The further averment which the Claimant wishes to introduce relates exclusively to the disciplinary process which the Respondent convened and which (in broad terms) is being relied upon by the Claimant in support of her

claim of unfair constructive dismissal. The Claimant would submit that the application does not seek to change the basis of the existing claim to any material extent and simply seeks to introduce one further matter which the Claimant will speak to and which will say resulted in her tendering her resignation.

- In our initial application, we have already explained why the amendment now sought was not included in the initial ET1 application. This was on the basis that we were unable to obtain full and detailed instructions from the Claimant in respect of the application due to extenuating personal circumstances.

- The Claimant would highlight that the proposed amendment relates to a matter which does not appear to be in factual dispute between the parties. As set out in the amendment to the paper apart which is proposed, the Claimant simply seeks to rely on a decision taken by the Respondent at the conclusion of the disciplinary process. The Respondent's objection to our application does not indicate that they do not accept this decision was taken.

- The Claimant would submit that even although the application to amend has been made 6 months after the claim was raised, this of itself is not a reason as to why the application should not be granted. Following on from submission of the ET3 in this matter, a preliminary hearing was fixed to deal with a time bar point. It that time bar point had been successful, it would have disposed of proceedings. Accordingly, with reference to the overriding objective, it was not felt appropriate to make any application to amend until that preliminary issue had been determined. The preliminary hearing took place on 29th June and the Employment Tribunal's judgment was issued on 19th July 2017. As a result of the Claimant resisting the preliminary point raised and the claim proceeding to a final hearing, we commenced with further preparation in early August. This is a claim in which the Claimant's legal expenses are being funded by an

insurer. As is common when a Claimant has the benefit of legal expenses insurance, following on from written pleadings being lodged with the tribunal there was a requirement for us to obtain counsel's opinion so as to satisfy the insurer that the claim had reasonable prospects of succeeding. The Claimant's insurer would not authorise any further significant work in respect of matters until such a positive opinion was received. A letter of instruction was sent to Counsel to obtain such an opinion and this opinion was subsequently received on 5th September 2017. Following on from receipt of that opinion, it was intimated to the Claimant's insurer who then subsequently authorised to carry our further work. This allowed us to commence detailed preparation for the hearing. The initial stages of that preparation involved our meeting with the Claimant to take detailed instruction in respect of all matters. It was only at this meeting (which took place on 13th October) that we were able to clarify the Claimant's position in regards to the reasons for her resignation and, following on from that meeting, make the application to amend as is now before the tribunal. Accordingly, whilst there has been delay in the making of this application, we would submit that for the above reasons that delay is not unreasonable. Furthermore, it has been made just shy of 4 weeks in advance of the hearing so as to give the Respondent time to be in a position to respond to the amended claim. As indicated above, given that the amendment which the Claimant seeks to introduce deals with one further small factual averment which was already within the Respondent's knowledge, it is submitted that such a time period is more than sufficient to allow the Respondent to respond to the claim which the Claimant will seek to advance at the hearing.

The Claimant submits that in determining this application, the tribunal should carry out a careful balancing exercise of all relevant factors, having regard to the interests of justice and to the relevant hardship that will be caused to the parties in the granting of refusing the amendment. The Claimant submits that refusing the application

would cause greater hardship and injustice to the Claimant than any which the Respondent may suffer from (if any). The Claimant does not agree with the penultimate bullet point in the Respondent's representative's email that the amendment would result in their having to carry out any further significant investigation or preparation in the defence of the claim, for the reasons set out above. Again, reference in particular is made to the fact that the factual averment which the Claimant seeks to introduce is not in dispute and has been known to the Respondent throughout. Given that there appears to be no factual dispute of the decision taken by the Respondent which forms the basis of this application to amend being made, the Claimant cannot see what significant further investigation needs to be carried out. There is documentary evidence to confirm that the Respondent took the decision to refuse the Claimant the opportunity to return to her substantive post and it would seem as if the Respondent is not in a position to argue otherwise.

Accordingly, the Claimant's submits that it is in the interests of justice that the application to amend be granted for the reasons set out above and in our initial application. "

Preliminary Hearing before this Tribunal

19. When the case called before me, for this Preliminary Hearing on the claimant's opposed application for amendment of the ET1, the claimant, who was not present, was represented by her solicitor, Mr Connolly, accompanied by a trainee, as an observer, while Mr Stewart, solicitor for the respondents, appeared, unaccompanied, on their behalf.

20. I clarified, at the start of this Hearing, that notwithstanding the Tribunal's letter of 2 November 2017 referring to this as a Case Management Preliminary Hearing to be held in private, it was being conducted as a public Preliminary Hearing to dealt with the claimant's opposed amendment application, as previously directed by Employment Judge Doherty.

21. Thereafter, having stated that I had earlier that morning, read the case file, and in particular parties' correspondence of 17, 23 and 24 October 201 7, I enquired whether either party's solicitor was proposing making any additional oral submissions, or whether they were content for me to proceed on the basis of their previously intimated written representations on file, and I also queried whether either party's solicitor proposed referring me to any further case law authorities on amendments, other than the well-known and familiar *Selkent* referred to in their respective written submissions.

22. In reply, I was then advised that neither party had any further written submissions to lodge, and that both parties' representatives were content to rely upon their respective written application and objections thereto, and that no further case law authorities were to be cited by either party's representative.

23. For the respondents, Mr Stewart then advised me that, if the ET1 were to be amended, he would need to make subsequent enquiries, and that would require what he referred to as adjournment of next week's Final Hearing, as the Mr Gilhooly referred to in the claimant's amendment is no longer in the Council's employment, and the claimant's amended averments referred to him. If the Final Hearing were to be postponed, Mr Stewart added that he would need then to check witness availability of all the Council's proposed witnesses,

24. In answer to a point of clarification asked by me, Mr Stewart stated further that he had not spoken to Mr Gilhooly since his retirement from the Council, over a year ago he thought, and as an agent for the respondents, he had other commitments until the end of this year, and so if the case had to be re-listed, it would need to be from early next year, and from January 2018 onwards.

25. Speaking for the claimant, her solicitor, Mr Connolly, stated that if the proposed amendment were to be allowed by the Tribunal, then the claimant had no issue with the respondents getting time to respond, and he

suggested that perhaps an amended ET3 response might be ordered by close of play by the end of this week, by which he clarified he was meaning by no later than 4.00pm on Friday afternoon, 10 November 2017.

26. Mr Connolly explained that the claimant wishes her case to proceed to Final Hearing, and the claim has already had a Preliminary Hearing on time-bar, and while he was aware from Mr Stewart that the respondents were likely to seek a postponement of the Final Hearing, if the amendment were allowed, he stated that it did not seem to him that the amendment would involve any substantial work by Mr Stewart to prepare for the Final Hearing.

27. Thereafter, in reply to Mr Connolly's comments, Mr Stewart advised me that he did not know where Mr Gilhooly is, as he had retired last year, and that he does not have contact details for Mr Gilhooly and no direct contact with him and, on the basis of the ET1 as it stands, unamended, there was no reason for him to call Mr Gilhooly to give evidence. Mr Connolly indicated that his wife is pregnant, and the baby due in January 2018, so he would need to look at his own availability to represent the claimant at any later listed Final Hearing.

28. At that stage, I tentatively suggested that, if the amendment were to be allowed, which was a decision I still had to come to a concluded view upon, whether or not to allow it, then perhaps one option was to see whether we could use next week's allocated 4 days and, if required, fix further days for Mr Gilhooly and closing submissions.

29. I then drew to the attention of parties' representatives that, from my own judicial experience of dealing with opposed applications seeking leave to amend an ET1, in addition to *Selkent,* I was very often referred to other, more recent authorities, and I specifically mentioned the following:

(1) Ali v Office for National Statistics [2005] IRLR 201 (CA);

(2) Ahuja v Inghams [2002] EWCA Civ 192 (CA), at paragraph 43, per Mummery LJ;

(3) Abercrombie & others v Aga Rangemaster Ltd [2013] IRLR 963 (CA), per Underhill LJ, at paragraphs 42 to 57; and

(4) Chandhok v Tirkey [2015] IRLR 195 (EAT), per Langstaff P, at paragraphs 16 to 18.

30. I asked both parties' solicitors to consider these case law authorities, and advise me whether they wished to make any further submissions to me as regards the opposed amendment application before me for consideration at this Preliminary Hearing.

31. Further, as they had already confirmed they were generally content to adopt their previously submitted written submissions, I suggested that we should adjourn to allow them an appropriate opportunity to consider those further case law authorities mentioned by me, which they confirmed they both could do with access to wireless mobile technology.

32. While *Vz* hour was suggested by Mr Connolly, I allowed % hours for this adjournment but, in the event, the adjournment of proceedings lasted for just over 50 minutes, before proceedings resumed in public Hearing, and I heard further oral submissions from both parties' solicitors.

Submissions for the Claimant

33. When proceedings resumed, Mr Connolly advised me that, having had the benefit of reviewing the authorities cited by me, there was no dispute that as the presiding Employment Judge my role is to deal with the opposed amendment application, and that includes balancing any hardship and injustice to the claimant and the respondents respectively, in allowing or refusing, as the case may be, the proposed amendments for the claimant.

34. He then submitted that any hardship and injustice here would be suffered by the claimant alone, if her amendment was refused, and he further stated that any hardship or injustice to the respondents could be addressed by other

means, by way of case management, even if the amendment was to be allowed by the Tribunal.

35. Mr Connolly then referred me to paragraphs 48 and 49 of the Court of Appeal's judgment in *Abercrombie,* and he submitted that the amendment was not a new cause of action, and that the legal basis of the claim still remains the same as before, as the case is still unfair constructive dismissal, and that is still the claim before the Tribunal.

36. He further added that, in his view, there is no limitation period argument relevant to this application to amend, and that, if allowed, the amendment would not require significant different lines of enquiry, as the claimant's case is still based around a disciplinary process adopted by the respondents, and all the claimant seeks to do is add in one further element at the end of that process.

37. Further, Mr Connolly submitted that Lord Justice Underhill's judgment in *Abercrombie,* at paragraphs 48 and 49, were supportive of this Tribunal allowing the amendment proposed to the ET1 in this case, as there are real issues to be determined, and an amendment should only be refused for a very weighty reason. In his view, the reasons for these additional averments by the claimant have been explained in his e-mail of 24 October 2017, after considering Mr Stewarts' objections intimated the previous day, and there is a very real issue between the parties that needs to be heard and determined by the Tribunal.

38. Mr Connolly then referred to the EAT President's judgment in *Chandhok,* and while he did not propose to comment in detail upon what Mr Justice Langstaff had had to say, at paragraphs 16 to 18 of that judgment, about the essentials of a case, that judgment does not say that this amendment should not be allowed, but that the additional averments need to be in the ETI, by amendment, to form part of the claimant's case before the Tribunal, and here he was seeking to amend the ET1 before the start of the listed Final Hearing next week.

39. Next, Mr Connolly referred me to the Court of Appeal's judgment in ***Ahuja,*** per Lord Justice Mummery, at paragraph 43, and that the application to amend ought to be allowed, as it was giving fair notice of the case to be advanced by the claimant at the Final Hearing, and that required amendment to the ET1, and there would be no injustice to the respondents in allowing the proposed amendment, where amendment was being sought in advance of the start of the Final Hearing.

40. Finally, Mr Connolly stated that there was nothing specific he wished to comment upon, in respect of the Court of Appeal's Ali judgment, but generally, he felt that the balance of hardship and injustice is a greater injustice to the claimant if the amendment is not allowed by the Tribunal, and he closed by submitting that case management can address any injustice to the respondents.

Submissions for the Respondents

41. Mr Stewart opened his submission by stating that he adopted his written objections, already intimated to the Tribunal, and he adhered to his clients' objections to the claimant's proposed amendment being allowed by the Tribunal.

42. He submitted that the respondents' position, taking account of all the case law, is that they all refer to the discretionary test for the Employment Judge in deciding whether or not to allow any amendment application in any case, and he further accepted that a balancing exercise is the relevant test. From his reading of the judgments mentioned by me, Mr Stewart added that what was being proposed here by the claimant's solicitor was an amendment which goes far beyond any re-labelling amendment, and that it seemed to him to be introducing a ***"fundamental new element'*** to the case as already pled in the lodged ET1 claim form before the Tribunal.

43. Mr Stewart further submitted that in a constructive dismissal case, a claimant needs to plead a breach of contract, and fully detail what that breach of contract is, and the employee's resignation has to be a

consequence of that averred breach. Here, in the present case, he added, the ET1 claim form says inn terms what the claimant considers was the last straw that prompted her resignation. So too, he added, does her resignation letter, but he accepted my observation that I could have no regard to that letter, where it was not produced to me at this Hearing.

44. Developing his submission, and referring to the ***Chandhok*** judgment, at paragraph 16, Mr Stewart stated that to shift the sands of the claim, at this late stage, and seek to introduce a wholly different last straw, should not be allowed by the Tribunal. In his view, what is now being sought by the proposed amendment is a fundamental change to the case that the claimant relies upon in her ET1, and averments are being added which, in his opinion, best suit the claimant's case at this moment in time.

45. On the matter of unfair prejudice to the respondents, if the amendment were to be allowed by the Tribunal, Mr Stewart submitted that the respondents' difficulties related to Mr Gilhooly. He had long retired from the Council, towards the end of 2016, perhaps last December, and any evidence from Mr Gilhooly is by passage of time going to be less detailed than it may have been 8 months ago, if he had been mentioned when the ET1 was lodged. In answer to a point of clarification, asked by me, Mr Stewart advised that, notwithstanding the claimant's application to amend being intimated on 17 October 2017, he had not as yet taken any witness statement from Mr Gilhooly regarding this case.

46. He then further submitted that the claimant's amendment should be refused, on the basis of a fundamental change to the pled case, which in his view goes far beyond a slight amendment to the factual situation, where he accepted an amendment might be acceptable. In his view, he further stated that this amendment comes too late in the day, and it is long time-barred, and the Tribunal has not had sufficient information to make a finding whether it was reasonably practicable to raise t within the time-bar period.

47. Mr Stewart did accept that an explanation for the delay had been provided by the claimant's solicitor, in his correspondence to the Tribunal, after the respondents' objections, and he sympathised with the claimant's personal situation, but there were very detailed averments in the ET1, and instructions from the claimant had led to that level of detail, and legal representation had been available to her for the last 6 months, yet 17 October 2017 was the first time this matter was raised with the respondents on a fundamental aspect of the claimant's case, and that it had not been raised at the time of the previous Preliminary Hearing before Employment Judge Garvie.

48. Having started in March 2017, Mr Stewart commented how this was not a case sitting with no procedural action, there has been an earlier time-bar Preliminary Hearing, and he further submitted that he felt that there had been many opportunities for the claimant to seek to amend her pleadings, but she did not do so before 17 October 20127. While he accepted amendment is a discretionary matter, and that amendment can be allowed by a Tribunal at any time in a case ,up to and before final Judgment is issued, he restated his position that the claimant's application to amend should be refused by the Tribunal.

49. Further, commenting on prejudice and hardship to the claimant, if the amendment were not to be allowed by the Tribunal, Mr Stewart stated that there would be no hardship caused to the claimant, if her amendment were to be refused, as she can still plead her stated case, and progress her unfair constructive dismissal argument as currently pled.

50. If she were to be allowed to change the basis of her constructive dismissal case, then he submitted that the respondents would be subject to hardship, if they were not given time to investigate the circumstances behind the new proposed averments, and that would be hardship to the respondents in the presentation of their case. Until 17 October 2017, he added that there had been no notice from the claimant of a fundamental change to her case, and that was only some 3 &1/2 weeks before full evidence was to be led at the

listed Final Hearing, despite her case having been in process before the Tribunal since 30 March 2017, when the ET1 claim form was presented.

51. Drawing his submissions towards a close, Mr Stewart further submitted that the case law authorities cited by me do not take away from his arguments opposing the amendment sought by the claimant, nor do they change the fundamental points of *Selkent,* but it is a matter for balance by the Employment Judge

52. Under reference to paragraph 48 in *Abercrombie,* Mr Stewart laid emphasis on the judgment stating that the greeter the difference in lines of enquiry the less likely it will be that an amendment will be permitted. He added that the last straw on which the claimant relies upon she now seeks to change, and that is a fundamental change, and not a re-writing of the factual averments already made. In his view, it is a fundamental change, and this is a late application for amendment, and given the prejudice to be caused to his clients, he submitted that the claimant's amendment should not be allowed.

53. If, however, the Tribunal were to be minded to grant the amendment sought, then Mr Stewart submitted that then he would be seeking to adjourn the Final Hearing next week. He appreciated what I had said earlier, in the course of this Preliminary Hearing, about exploring a part-heard Final Hearing, with available witnesses, but there will be enquiries he needs to make on the respondents' behalf, and potential lines for cross-examination of the claimant, all of which he submitted will fundamentally alter his preparation to date.

54. Mr Stewart added that he could not see how he could run the respondents' defence next week if the amendment was granted, given the limited number of working days between now and next Monday. He hen stated that a period of 4 weeks is the minimum time that he would require to lodge further and better particulars for the respondents to augment the existing ET3 response to reply to the claimant's new averments, if the amendment sought were to be granted.

55. In answer to my request for clarification of why a 4 week period was the minimum required, Mr Stewart stated that he did not know Mr Gilhooly's location, or availability, which were matters outwith his control;, and while he was sure somebody in the Council would have at least Mr Gilhooly's last known address, the fact remains that he is no longer an employee of the respondents, and he does not know Mr Gilhooly's circumstances, or location, and therefore he does not know his availability to be precognosed and give a witness statement to the respondents' solicitor.

Reply from the Claimant's Solicitor

56. Having heard from Mr Stewart, I then invited Mr Connolly to make any further reply that he felt was appropriate. He stated that the case law authorities mentioned all show that the amendment he seeks can be allowed by this Tribunal, and as regards the lateness of his application to amend, the 6th bullet point in his e-mail comments of 24 October 20127 referred, and he relied upon Lord Justice Mummery's judgment at paragraph 43 in *Ahuja.*

57. As regards the respondents' need to call evidence from Mr Gilhooly, Mr Connolly stated that the claimant and he were both unaware that Mr Gilhooly had retired, but as regards issues arising from any memory gap, then that issue applies to all witnesses to be heard by any Tribunal, and all Mr Gilhooly would need to be asked about is an issue that is fairly narrowly focused.

58. At this point, I enquired of Mr Stewart, the respondents' solicitor, how long he estimated Mr Gilhooly's evidence might last if he was to be called as a witness for the respondents. Mr Stewart replied stating that perhaps *Vz* day, but rather than calling 4 witnesses, as per the previously submitted date listing stencil, the respondents now only proposed calling two witnesses, Michelle Milne, Personnel Services Adviser, and Carole MacKenzie, Head of Education, but not Alice Donaldson, Head of Education, nor Elaine Melrose, Personnel Officer, albeit the estimated duration of the evidence from those 2 persons was still 2 & % days, as before.

59. Returning then to Mr Connolly's further comments, he stated that as regards the suggested 4 week minimum period for the respondents to reply to the amendment, if allowed by the Tribunal, as proposed by Mr Stewart, if the Final Hearing next week was to be postponed, then that would be okay, but, as he did not know whether or not Mr Gilhooly could be contacted this week by Mr Stewart, he accepted that it is difficult for the respondents to set out their reply to the amendment, if allowed, by 4.00pm this Friday afternoon.

Reserved Judgment

60. Proceedings at this Preliminary Hearing concluded at around 12.15 pm on Monday, 6 November 2017, when I thanked both Mr Connolly and Mr Stewart for their attendance and contribution, and I stated that I was reserving my Judgment to be issued as soon as possible, given the close proximity of the dates listed for Final Hearing commencing next Monday, 13 November 2017.

61. I stated that I would give priority to my private deliberations on this matter, and try, if at all possible, to come to a determination on the opposed amendment application, and let parties' representatives know, hopefully the following day, Tuesday, 7 November 2017. Subject to writing time being made available, I indicated that, at minimum, I would seek to have a Judgment only issued, with Reasons to follow, but, if I could do so, I would issue both Judgment and Reasons.

Issues for the Tribunal

62. The issues for determination at this Preliminary Hearing were (1) the claimant's opposed application to amend the ET1 and (2), if the amendment were allowed, further case management of the claim and response, including consideration to whether or not the Final Hearing next week should be postponed, and relisted for later dates.

63. 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, and,

after my signposting of some other case law authorities, parties' representatives addressed me on those judgments too. The case management implications for the assigned Final Hearing, in the event that the amendment was to be allowed, were helpfully discussed at this Preliminary Hearing in the submissions made orally by both Mr Stewart, seeking a postponement, and Mr Connolly, in replying to that application.

Discussion and Disposal

64. In considering the opposed amendment application, I start by referring 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.

65. 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 answers 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. I 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 for a 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.***

66. At this Preliminary Hearing, on reviewing the content of the paper apart to the ET1 presented on 30 March 2017, I noted from the original paragraph 15 thereof that the claimant made express reference to having attended a Disciplinary Hearing with Jim Gilhooly on 14 October 2016, when she was accompanied by her Trade Union representative, Alan Scott.

67. The proposed new paragraph 16, which the claimant seeks to insert by inviting the Tribunal to allow her amendment, refers to what Mr Gilhooly is alleged to have said to her following the conclusion of the Disciplinary Hearing, and the claimant viewing this as the "last straw" incident.

68. That stands in contrast to the existing paragraph 18, fifth bullet point, where it is averred that it was the respondents' decision to proceed with the Disciplinary Hearing on 14 October 2016 in the absence of supporting evidence that, from the claimant's perspective, amounted to the "last straw."

69. On any view, it is clear that the claimant's asserted factual basis for her claim as to what constitutes the "last straw" has changed, or is at least ambiguous, for it is not clear whether what are now averred to be two "last

straws" are being pled as alternatives, or running concurrently, as two elements to a single "last straw."

70. To my mind, having carefully considered the full terms of the original ET1 claim form submitted on the claimant's behalf by her solicitor, Mr Connolly, on 30 March 2017, it makes no express reference to any alleged comments from Mr Gilhooly, following the conclusion of the Disciplinary Hearing, and what is now averred at the proposed paragraph 16 is all additional averments.

71. Nothing is said in the original ET1 about these alleged comments by Mr Gilhooly, and what effect they had on the claimant, 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

72. 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.*

73. 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.

74. 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.

75. 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 essentia/ 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. "

76. 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."*

77. 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.

78. 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. "*

79. 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.

80. 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, and so I simply refer back to those excerpts from the EAT President's judgment for the sake of brevity.

81. 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.

82. 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.

83. 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.

84. 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."

85. 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. IVe ***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."

86. The solicitors appearing at this Preliminary Hearing have both argued strongly for their respective clients, Mr Connolly inviting me to allow the amendment, and Mr Stewart arguing with equal vigour and commitment against me allowing the amendment sought by the claimant's solicitor.

87. 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.

88. Having most carefully considered parties' representatives written and oral 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.

89. 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.

90. In my opinion, the amendment proposed here by Mr Connolly on behalf of the claimant is more category 2, seeking to add a further alleged "last straw" to an existing claim, linked to and arising out of the same facts as the original claim, rather than a wholly new claim. I do not accept, as well-founded, Mr Stewart's argument that the amendment is a fundamental change, and a wholly new cause of action.

91. I have 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, on 30 March 2017, and the application to amend being intimated on 17 October 2017. Mr Connolly, in his written submissions, particularly his comments dated 24 October 2017, augmenting his amendment application, in light of Mr Stewart's stated

grounds of opposition, has provided me with a cogent explanation for why he feels it necessary for the claim to be amended, and in so doing he has addressed the delay in lodging this application to amend.

92. 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.

93. 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. They have been on notice since Mr Connolly's application was intimated to Mr Stewart on 17 October 201 7.

94. While Mr Stewart asserted 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, I do not consider that that feature of itself is sufficient for me to find that a Fair Hearing cannot be held.

95. The fact that Mr Gilhooly has retired from the Council's service does not mean that he cannot be called to give evidence, if necessary under compulsion of a Witness Order granted by the Tribunal, so long as the respondents have a 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 him being called to give evidence at the Final Hearing.

96. The Employment Judge sitting alone, hearing the case on its merits, will need to come to his / her 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 the Tribunal's fact finding role at the Final Hearing.

97. 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 31 March 2017, 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, but not upheld by Employment Judge Garvie. All of that earlier 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.

98. Since Employment Judge Garvie allowed the claim to proceed to Final Hearing, following the time-bar Preliminary Hearing, these Tribunal proceedings have progressed as if both parties, but for this one further alleged "last straw", are satisfied that they otherwise know the other party's case, as they had pled it, and without the need to call for any further and better particulars to supplement the pleadings in the ET1 and ET3 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.

99. 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 "last straw" clear, and thus, it would be reasonable to anticipate, should serve to prevent any further unnecessary procedure prior to the start of the Final Hearing. 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.

100. 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.

101. Given that the respondents have been on notice of the proposed amended claim from 17 October 2017, when Mr Connolly intimated it to Mr Stewart and the Tribunal, 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.

102. 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.

103. The claim, as now amended, is closely related to the claim originally lodged, and, in my view, the amendment allows the issues in dispute to be better focused, and looking forward to a Final Hearing before the Tribunal, 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, and that in advance of the start of any evidence being led from witnesses at a Final Hearing.

104. 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 while I considered whether

it would be practicable to allow the listed Final Hearing to proceed as scheduled next week, I have come to the conclusion that that Final Hearing requires to be cancelled, and re-listed. The respondents require adequate time to make enquiries of Mr Gilhooly and then reply to the claimant's amended claim, and it is not appropriate, in those circumstances, to proceed until their position in reply is intimated.

105. While, with a view to making some progress, I did give consideration to shortening the respondents' time for reply, and / or proceeding only with the claimant's evidence, she and any witnesses on her behalf to be led first, this being a case where dismissal is denied by the respondents, and the onus is on the claimant to demonstrate that she has been unfairly, constructively dismissed by the respondents, I have discounted that as being potentially problematic.

106. If Mr Stewart has not conducted his enquiries and ascertained Mr Gilhooly's position, he is likely to be hampered in progressing his cross-examination of the claimant to a conclusion, and equally, if the claimant does not know the respondents' position, parties are not on an equal footing.

107. Even if the respondents' position were made clear before the end of the week, which seems highly unlikely, there is no guarantee that Mr Gilhooly will be available to give evidence next week, so a part-heard Final Hearing would be likely in any event. In a case of alleged, unfair constructive dismissal, as with any contested evidential Hearing before the Tribunal, it is far better to arrange matters so that there is a single diet of Final Hearing, of whatever many days may be required, rather than several, disparate diets spread over various dates, with time gaps between the start and finish of the Final Hearing.

108. Finally, this amendment as allowed does not affect the ability of the Employment Tribunal to conduct a fair hearing of the case, albeit not now on the 4 days already assigned by the Tribunal for a Final Hearing next

week. Postponement of the Final Hearing is an inevitable consequence of the timing of this Preliminary Hearing. It will however allow the claimant's solicitor to consider whether, in light of whatever is to be the respondents' reply to the claimant's amendment, there is a need for the claimant to call Alan Scott, her Trade union representative, to speak to events at, and in the immediate aftermath of, the Disciplinary Hearing on 14 October 2016.

Further Procedure

109. 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.

110. Any such further and better particulars should seek to answer the claimant's amended paragraphs in 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 2 May 2017.

111. While Mr Stewart sought a minimum period of 4 weeks, I consider that a period of three weeks from date of issue of this Judgment is a reasonable period for lodging any such further and better particulars for the respondents, and I have so ordered.

112. I do so because while I noted his position that he has not made enquiries regarding Mr Gilhooly's whereabouts, as he was awaiting this Preliminary Hearing and my Judgment, and the amendment only has consequences if and when allowed by the Tribunal, I consider that a somewhat naive view for a professional agent to take because, especially where dates for Final Hearing are set, any follow up action will require to be taken with appropriate speed and diligence, and it should always be assumed that, if opposition to an amendment is not successful, there needs to be a plan B, as the Tribunal is likely to require the opposing party to deal with the

amended claim by way of a. written reply before the start of the listed Final Hearing.

113. Given postponement of the Final Hearing next week, I have given appropriate directions about relisting in the first 3 months of the New Year. Should any other matters arise between now and the start of the Final Hearing, on dates to be hereinafter advised to both parties, after receipt of their returned date listing stencils, 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.

114. 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 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: **I McPherson**
Date of Judgment: **08 November 2017**
Entered in register: **08 November 2017**
and copied to parties