EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110343/2021

Preliminary Hearing held in chambers in Glasgow on 11 May 2022

Employment Judge Ian McPherson

Mr Andrew McAllister	**Claimant** **Written Representations by:** **Ms Miranda Hughes** **Solicitor**
Forestry and Land Scotland	**Respondents** **Written Representations by:** **Mr Scott Milligan** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal, having considered parties' written representations in chambers, and without the need for an attended Hearing, is to: -

(1) **refuse** the claimant's opposed application of 29 April 2022 to amend the ET1 claim form to label incidents 20 to 24 in the claimant's Scott Schedule as being discrimination arising from disability, being a complaint in terms of **Section 15 of the Equality Act 2010,** on the basis that it is not in the interests of justice to allow that amendment, nor is it in accordance with the Tribunal's overriding objective to deal with this case fairly and justly to allow that amendment ; and

(2) confirm that the case shall proceed to the 6-day Final Hearing in person before a full Tribunal at Glasgow Tribunal Centre as already listed for 24 / 26 and 30 / 31 May, and 1 June 2022.

REASONS

Introduction

1. This case called again before me on the morning of Wednesday, 11 May 2022, for an in chambers Preliminary Hearing to consider the claimant's opposed application to amend the ET1 claim form. In light of the proximity of the listed 6-day Final Hearing, commencing on Tuesday, 24 May 2022, I have dealt with the matter, on the papers only, and without the need for an attended Hearing, by considering both parties' written representations held on the Tribunal's casefile.

Background

2. The claim was originally presented to the Tribunal, on 7 July 2021, following ACAS early conciliation between 27 April and 8 June 2021. Thereafter, on 10 August 2021, an ET3 response, defending the claim, was lodged, on the respondents' behalf, by Mr Scott Milligan, solicitor with Harper Macleod LLP, Glasgow.

3. On 11 August 2021, Strathclyde University Law Clinic advised that they were representing the claimant. The case first called before me, in private, for a telephone conference call Case Management Preliminary Hearing, held on 29 September 2021. The claimant's representative, Ms Morrison, student adviser at the Law Clinic, and the respondents' solicitor, Mr Milligan, both attended. I made various case management orders, which were set forth in my written Note & Orders dated 4 October 2021, as issued to both parties under cover of a letter from the Tribunal.

4. Specifically, I then made orders for further and better particulars of the claims made by the claimant to be provided and, of consent of both parties, the case was continued to another date (1 December 2021) for a further telephone conference call Case Management Preliminary Hearing.

5. In the event, that further PH on 1 December 2021 was postponed, and relisted, on application by the Law Clinic. On 20 December 2021, the case called again before me, for the second time, for that further telephone

conference call Case Management Preliminary Hearing. I heard again from the claimant's representative, Ms Morrison, student adviser at the Law Clinic, and the respondents' solicitor, Mr Milligan, and I made various case management orders, which were set forth in my written Note & Orders dated 21 December 2021, as issued to both parties under cover of a letter from the Tribunal.

6. On 23 December 2021, the claimant's representatives, at the Law Clinic, emailed the Glasgow ET, with copy to Mr Milligan, the respondents' representative, attaching a covering letter dated 22 December 2021 requesting leave to amend the claim form, along with a final Scott Schedule, ET1 paper apart, as amended with tracked changes, and separate clean copy.

7. The amendments sought were opposed, in part, by the respondents, leading to the need for an in chambers Preliminary Hearing held on 31 January 2022. Insofar as not opposed, the claimant's amendment application was granted by me, and parties so advised by email from the Tribunal on 17 January 2022.

8. As regards the opposed parts of the amendment application, after further written representations from parties, and further deliberation in chambers, on 17 February 2022, I refused the claimant's opposed application of 23 December 2021 to amend the ET1 claim form as regards incidents 14 and 18, and that for the reasons set forth in my written Judgment dated 18 February 2022, as issued to both parties on 21 February 2022.

9. On 13 March 2022, the Law Clinic advised the Tribunal that they were no longer representing the claimant. On my instructions, the Tribunal wrote to the claimant, by email sent on 20 April 2022, seeking an update from him, as to whether or not he intended to proceed with his claim against the respondents, or withdraw it, whether in whole or in part, and , if he intended to proceed, to clarify whether he intended to proceed by representing himself, or instructing a new representative.

10. Directions were given as regards the case management orders for the Final Hearing, as made by me on 21 December 2021, as set forth in my written PH Note & Orders of that date, and requesting an update from both the claimant, and the respondents' representative, Mr Milligan.

11. On 29 April 2022, Ms Miranda Hughes, associate at Clyde & Co, solicitors, Glasgow, advised the Tribunal (with copy to Mr Milligan for the respondents) that she had taken over conduct of this matter, that the claimant was decreasing the number of alleged incidents being relied upon (as set out in the Scott Schedule) from 24 to 15, and making an application to amend the ET1 claim form as regards the labelling of incidents 20 to 24.

12. By email sent to the Tribunal, on 3 May 2022, Mr Milligan intimated the respondents' objections to the application to amend. As I was on annual leave between 2 and 9 May 2022, both dates inclusive, I made arrangements to deal with the opposed amendment application as soon as possible after I returned to the office.

13. Having another Hearing to conduct, on Tuesday, 10 May 2022, I made arrangements to deal with this matter this morning, Wednesday, 11 May 2022, the earliest opportunity I could do so.

Preliminary Hearing before this Tribunal on Opposed Amendment Application

14. This Preliminary Hearing took place in my chambers at Glasgow Tribunal Centre. Before the start of this Preliminary Hearing, I had pre-read and considered the papers from the Tribunal's casefile, in particular Ms Hughes' amendment application of 29 April 2022, and Mr Milligan's objections of 3 May 2022.

15. Although, in her application, Ms Hughes had stated that she could expand on the basis of her application should it be objected to, there was no reply or comments from her, further to the respondents' objections of 3 May 2022. Having considered the papers to hand, I proceeded to draft this Judgment and Reasons for early promulgation to both parties.

Claimant's Application to Amend

16. As indicated earlier in these Reasons, the claimant's application for leave to amend the ET1 claim form was intimated by Ms Hughes on 29 April 2022, and it was in the following terms:

Narrowing of Claims

As previously indicated, we have only recently taken over conduct of this matter but since then have been carrying out a thorough review of the claims in order that the number of discriminatory acts/incidents relied upon in the Final Hearing can be narrowed. For the avoidance of doubt, this exercise had been undertaken not because the Claimant does not believe all of the discriminatory acts/incidents have taken place but because he does not want to detract time and focus away from the incidents that he deems to be more serious and to have had a larger impact on him and his health.

To that end, the Claimant is now able to confirm that the number of alleged incidents relied upon (as set out in the Scott Schedule) has been decreased from twenty four to fifteen. These are set out in the attached Scott Schedule. The numbers attached to the incidents has been kept the same for consistency in light of the previous discussions around these in the Preliminary Hearing Judgement of 18 February 2022. The Appendix relating to the Workplace Needs Assessment also remains unchanged as attached.

Whilst the number of individual incidents is fifteen, these can be helpfully grouped into four overall allegations relating to:

1. *Performance review, report and management*
2. *Gourdie DOLTA Report and Development Strategy documents*
3. *Failure to implement workplace needs recommendations*
4. *Ultimatum to move role and moving role*

The document attached assists in this regard.

In respect of the ultimatum to move role and moving role, this encompasses incidents 20 to 25. The Claimant avers that these incidents are intrinsically linked in that they all relate to the discussions between the Claimant and John Mair in January 2021 whereby it was suggested the Claimant move role and if he did not, he would have to undergo a formal performance improvement plan, which culminated in the Respondent moving the Claimant from his role. At present, only the moving of the Claimant itself (incident 25) has been set out in the Scott Schedule as Discrimination Arising from Disability.

Application to Amend – Labelling of Incidents 20 to 24

The Claimant now makes an application for incidents 20 to 24, which he avers all form the same overall allegation, also be labelled for the purposes of the Final Hearing as discrimination arising from disability. This is highlighted in yellow in the documents attached. Whilst the Claimant does not strictly believe this to be an amendment, such an application is made under Rule 30.

As is clearly set out in paragraph 26 of the ET1 Paper Apart, the Claimant was informed that if he did not move role he would have undergo a Performance Improvement Plan (incident 24). As set out in paragraph 27 of the ET1 Paper Apart the Claimant alleges that this was unwanted conduct related to disability and that he was treated less favourably because of his disability. Incidents 20 to 24 all relate to these conversations which resulted in him moving job role (incident 25) and this has already been labelled as discrimination arising from disability.

Applying the principles set out in ***Selkent Bus Company Ltd v Moore 1996 ICR 836 EAT*** *the Claimant submits that it would be in keeping with the overriding objective for this application to be granted. This is for the following reasons:*

- *The nature of the amendment is such that incidents 20 to 24 would also be labelled as Discrimination Arising from Disability. The Claimant avers that this*

is not a new cause of action but rather a re-labelling of the current facts and allegations made. Paragraphs 26 and 27 of the ET1 Paper Apart clearly set out the link between the conversations that took place, the threat of a Performance Improvement Plan and the Claimant's Disability. The link to incident 25, which is already labelled as Discrimination Arising from Disability, also demonstrates this.

- *The Claimant acknowledges that it would have been preferable for this to be clarified at an earlier stage, including during the finalisation of the Scott Schedule. However, as the Tribunal is aware we only recently took over conduct of this matter and have only now had the opportunity to extensively review the claims and relevant papers.*

- *The Claimant submits there would be little or no prejudice to the Respondent in allowing this amendment as the incidents relied upon really form part of an overall allegation relating to the Claimant moving job role, which is already claimed as Discrimination Arising from Disability. However, the prejudice to the Claimant would be great if he is not able to rely on the claims as they were intended and to rely on the acts as set out in the ET1 Paper Apart. The Claimant is of the view he has a strong case of Discrimination Arising from Disability in respect of these incidents.*

- *This shall have no impact on proceedings, including in the Final Hearing, as the allegations remain unchanged and no further documentary or witness evidence should be required from the Respondent. The incidents clearly relate to the threat of a Performance Improvement Plan and therefore any documentation relating to this is required to be in the bundle in any event.*

We can expand on the basis of this application should it be objected to but hope that it will not be objected to as it assists the Tribunal and the Respondent.

The Respondent has been copied into this correspondence and is advised if they have any objections to send these to the Tribunal as soon as possible, copying us in.

Respondents' Objections

17. Objections were intimated by Mr Milligan for the respondents, on 3 May 2022, in the following terms:

Claimant's representative's correspondence – Respondent's objection to application to amend

We note that the correspondence contained an application to amend the claim, in respect of incidents 20-24, seeking them to be also brought as discrimination arising from disability claims. This application is objected to by the Respondent.

*In terms of the **Selkent** factors:*

Nature of amendment

It is accepted that no new factual allegations are being raised. However, the application is entirely lacking in specificity. It is, in the Respondent's submission, not sufficient for the Claimant to simply add the wording "Discrimination arising from disability" into the Scott Schedule at sections 20-24 and that amount to a competent and fair amendment to the claim. There is no explanation as to how the incidents amount to a Section 15 claim by way of the amendments sought in the Scott Schedule or the ET1 itself. It is noted that reference is made to Paragraph 27 of the ET1 in the application to amend. This paragraph refers expressly to victimisation and harassment. It does not refer to discrimination arising from disability.

Further, it is not the case that the addition of a different head of discrimination is a "re-labelling of facts". There requires to be a different legal exercise in

*terms of consideration of a Section 15 claim. Reference is made to the case of **Reuters v Cole UKEAT/0258/17/BA** (attached). For example, The Respondent has the ability to defend this claim on the basis of Section 15(1)(b), which will require specific evidence to be led on this matter.*

It is the Respondent's position that the comparison with Incident 25 (where discrimination arising from disability is pled) is not on all fours – Incident 25 is the Claimant's move of role; Incidents 20 – 24 relate to allegations surrounding statements said to be made by Mr Mair. It is submitted that the Claimant's position that these form part of the same overall allegation regarding the change to job role is not sustainable in terms of this being sufficient to simply allow the addition of this head of claim.

Applicability of time limits

*Again, it is acknowledged that no new factual allegations are being raised and therefore it cannot be said that the factual allegations are being raised outwith the time limits. However, as per the **Reuters v Cole** case above, it cannot be said that it is a "re-labelling of facts" alone. Therefore, the applicability of time limits, it is respectfully submitted, is relevant, and it is significantly out of time.*

*Further, the Claimant has had extensive time and ability to particularise his claim, throughout the case management process. These incidents 20-24 have been particularised as "harassment" and "victimisation". Whilst it is acknowledged the Claimant has new representatives appointed, this is the third set of representatives in place and we refer – again – to the case of **Chandhok v Tirkey 2015 ICR 527 EAT**, and the comments of Mr Justice Langstaff at paragraphs 14 – 18, particularly, paragraph 18 (as quoted at paragraph 33 of the Judgment of the ET in this case issued on 21 February 2022).*

Timing and manner of the application

As noted above, it is the Respondent's position that the application to amend is lacking in specification. The timing is also relevant. Given that the application to amend will require to be determined by the Employment Tribunal, in light of the proximity of requiring to exchange witness statements, produce a List of Issues, and of the hearing itself, we would submit that it is not in the interests of the overriding objective for the application to be granted.

Balance of hardship and prejudice

The Claimant has claims based on the Incidents. These have been previously particularised by the Claimant, who has been given extensive opportunity to do this. As previously noted on behalf of the Respondent and as quoted at paragraph 60 of the Judgement of the ET in this case issued on 21 February 2022, in line with the ***De Souza*** *case, it is difficult to see how the claims would add to the quantum of the Claimant's compensation, but will require the Respondent to take further work.*

In conclusion, if the application is refused, the Claimant can pursue his existing case (including in respect of these Incidents), which has had the ability to be particularised over a significant period of time. There appears to be very little injustice or hardship. If it is granted, then the Respondent will – in short order – require leave to amend its response, and consider whether and to what extent further evidence is required in respect of the different type of claim raised. As noted above, the allegations at incidents 20-24 do differ in terms of their nature from allegation 25. This is therefore a real consideration for the Respondent, not just a perceived prejudice, in terms of the balance referred to in ***Mrs G Vaughan v Modality Partnership [2020] UKEAT/0147/20, [2021] ICR 535,*** *quoted at paragraph 38 of the Judgement of the ET in this case issued on 21 February 2022.*

The Respondent is content that the Employment Tribunal determines the matter on the basis of the application and this objection. If the Tribunal does

determine the amendment is allowed, the Respondent would seek a period of 5 working days to amend its ET3 response.

We have copied this correspondence to the Claimant's representative and therefore have complied with Rule 92 of the Employment Tribunal Rules of Procedure.

Relevant Law

18. 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.***

19. 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"***) at section P1, paragraph 311.03 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.

20. 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.

21. 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] IRLR 661*** 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.*
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> *(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:*
>
> *(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."*

22. In that ***Safeway*** judgment, Mr Justice Underhill also referred to the judgment of the Court of Appeal in England and Wales 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."***

23. 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 1 and 2, 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.

24. 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."***

25. Further, 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, as follows: -

> *16. …. 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. I readily accept that Tribunals should provide straightforward, accessible and readily understandable for a 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."

26. 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. As Lord Justice Underhill pointed out in **Abercrombie,** at paragraph 47, the **Selkent** factors 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.

27. 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.)*
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> *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.*

28. 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.

29. Further, despite it being unreported, there is also Lady Smith's EAT judgment in the Scottish appeal of **Ladbrokes Racing Ltd v Traynor [2007] UKEATS/0067/07.** It is detailed in chapter 8 of the **IDS Handbook on Employment Tribunal Practice and Procedure**, at section **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 or is of lesser quality than it would have been earlier."

30. Finally, there is the judgment of the Employment Appeal Tribunal in **Mrs G Vaughan v Modality Partnership [2020] UKEAT/0147/20, [2021] ICR 535,** by His Honour Judge Tayler, who stated as follows, at paragraphs 21 to 28: -

*"21. Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting the **Selkent** factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives*

have a duty to advance arguments about prejudice on the basis instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim.

22. *Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence. This is not a risk-free exercise as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek a discretionary amendment later.*

23. *As every employment lawyer knows the **Selkent** factors are: the nature of the amendment, the applicability of time limits and the timing and manner of the application. The examples were given to assist in conducting the fundamental balancing exercise. They are not the only factors that may be relevant.*

24. *It is also important to consider the **Selkent** factors in the context of the balance of justice. For example:*

    24.1. *A minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing.*

24.2 An amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim.

24.3 A late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs.

25. No one factor is likely to be decisive. The balance of justice is always key.

26. Rather like Charles Darwin who, when pondering matrimony, wrote out the pros and cons, there is something to be said for a list. It may be helpful, metaphorically at least, to note any injustice that will be caused by allowing the amendment in one column and by refusing it in the other. A balancing exercise always requires express consideration of both sides of the ledger, both quantitively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice.

27. Where the prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it.

28. An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice."

Discussion and Deliberation

31. The Tribunal's overriding objective is set forth at **Rule 2 of the Employment Tribunals Rules of Procedure 2013** as follows:

Overriding objective

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

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

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

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

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

32. In considering, in the present case, whether it is appropriate to allow the amendment sought by the claimant's new solicitor, Ms Hughes, I have considered the ***Selkent*** principles, as well as the more recent case law authorities referred to earlier in these Reasons, and the ***Reuters Ltd v Cole*** case cited by Mr Milligan.

33. In particular, I have noted the judgment of Mr Justice Soole in that case, where an appellant, who had issued an ET1 including a claim under **Section**

15 of the Equality Act 2010, then applied out of time to add a claim under **Section 13**, contending that it raised no new facts or matters and thus was a mere relabelling exercise, per ***Selkent.*** The Employment Judge accepted that argument and granted leave to appeal. On appeal to the EAT, the appeal was allowed, as the **Section 13** claim involved more than relabelling, and the application was remitted back to the Employment Judge to consider the exercise of discretion. As is evident from this summary of that EAT judgment, the facts and circumstances of that case, and the present case, are different.

34. Further, in considering the present, opposed amendment application, I have taken 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 under **Rule 2**.

35. It is plain that the claimant, previously with the help of the Law Clinic, and latterly with legal advice from Ms Hughes, has sought to refine and narrow down the issues for the benefit of the respondents and the Tribunal, but while Ms Hughes has described the amendment "***as assisting the Tribunal and respondents"***, the difficulty for the respondents, as identified in Mr Milligan's objections by the respondents, relates to the nature of the amendment, the applicability of time limits, the timing and manner of the application, and the balance of hardship and prejudice.

36. The fundamental difficulty for the claimant is that this proposed change to his pleading of his case comes very considerably after the claim was instituted, and it seeks to revise his claims as previously set forth in the Scott Schedule, against a background where Clyde & Co are his third set of representatives, and where parties were to have finally agreed the List of Issues by 9 May 2022.

37. The nature of the amendment sought is significant, in my judgment, not just a mere re-labelling, because it seeks to open up new matters, which have not

previously been included within the heads of claim, and it does so in a way which provides no fair notice to the respondents, nor to the Tribunal.

38. As Mr Milligan's objections state : "***the application is entirely lacking in specificity",*** and there is "***no explanation as to how the incidents amount to a Section 15 claim"***, and while the claimant refers to para 27 of the ET1, it expressly refers to "***victimisation and harassment***", being complaints under **Sections 26 and 27 of the Equality Act 2010**. Discrimination arising from disability is a very different head of claim in terms of **Section 15**.

39. The timing and manner of this amendment application is unsatisfactory. I appreciate, of course, that Ms Hughes at Clyde & Co has only come on record, as from 29 April 2022, and her application to amend has, in those circumstances, been presented promptly.

40. However, no satisfactory explanation has been provided to the Tribunal as to why there was no earlier application to amend, made after the Tribunal's Judgment issued on 21 February 2022, particularly in circumstances where the Law Clinic were still acting for the claimant, until they withdrew from acting on 13 March 2022.

41. Further, no explanation has been given as to why the claimant, as an unrepresented, party litigant, could not himself have sought to make this amendment application at an earlier stage.

42. It is plain, in my view, that the balance of prejudice would fall heavily upon the respondents in the event that the amendment application sought by Ms Hughes for the claimant were to be granted. It would require Mr Milligan to seek further detail from the claimant's solicitor as to matters not fully particularised, and for him to make further enquiries of the respondents, perhaps even further witnesses, and / or documents, for the Final Hearing, with the potential that either party might seek a postponement of the listed Final Hearing, with consequent delay in seeking to relist it at a later date.

43. Further, and again as articulated by Mr Milligan in his objections, if the amendment were allowed, the respondents would need to consider bringing

specific evidence to address **Section 15(1)(b) of the Equality Act 2010**, to show that the respondents' treatment of the claimant was a proportionate means of achieving a legitimate aim. The scope of the enquiry before the Tribunal would be expanded accordingly, even if an existing listed witness could deal with this point, rather than another, and further witness for the respondents.

44. Given that this application to amend requires to be judicially determined by the Employment Tribunal, the respondents having objected, as is their right to do so, and in light of the proximity of both parties requiring to exchange witness statements, produce a List of Issues, and of the Final Hearing itself, I agree with Mr Milligan that it is not in the interests of the overriding objective for the application to be granted.

45. It is true, of course, that, if refused, the claimant would lose the opportunity to expand upon his pleadings, but in my judgment the fact that he will be allowed to proceed with those existing claims which he has already made to the Tribunal should not be overlooked, and therefore the prejudice to him will be limited by comparison.

46. In any event, in my view, it would not be just to allow the claimant to continue to expand his claim in this way, given the history of the proceedings to date. Accordingly, it is my judgment that the application to amend this claim should be refused, on the basis that it would not be in the interests of justice to allow it.

47. Having considered parties' written representations, as detailed earlier in these Reasons, making and objecting to the amendment applications before me, and also my own obligations under **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, I consider, after careful reflection, that it is not in the interests of justice, and not in accordance with the overriding objective, to allow all of these proposed amendments to the ET1 claim form. As such, I have refused the amendment sought by Ms Hughes on the claimant's behalf. I regard the objections set forth by Mr Milligan to be well-founded, and in accordance with my own views on the matter.

48. In refusing the claimant's application to amend, it is appropriate that I further explain my reasoning. An amendment can be proposed at any time in the course of a claim before the Tribunal, but, in my view, the claimant's amendment proposed here by Ms Hughes does change the fundamental legal basis of the claim, and goes much, much further than simply re-labelling the factual basis of the existing complaints before the Tribunal, as per the ET1 claim form originally presented. It seeks to re-label the legal basis of claim for those particular incidents.

49. I have considered the timing and manner of this application to amend. It is, of course, correct to note that an amount of time has already elapsed between the ET1 claim form having been presented (on 7 July 2021) and the application to amend the ET1 being made by Ms Hughes on 29 April 2022, after two earlier Case Management Preliminary Hearings on 29 September and 20 December 2021, and the earlier Amendment PH Judgment issued on 21 February 2022.

50. 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.

51. In my view, this case is not a case very much in its early stages, where, if an amendment were allowed, both parties would have reasonable time to reflect before the evidential Hearing, and prepare accordingly, as regards necessary witnesses, productions, etc, but a case where a 6-day Final Hearing has already been ordered following the second Case Management Preliminary Hearing held on 20 December 2021.

52. The parameters of the factual and legal dispute between the parties have been set in the ET1 and ET3 to that date, as updated after the Amendment Judgment issued on 21 February 2022. To open up the claimant's pled case, and allow him to relabel incidents 20 to 24 as a **Section 15** complaint, is very likely to require further enquiry, and thus time and expense to the

respondents, impact on evidence to be led, and time for questioning of witnesses, and all that at a relatively late stage in the proceedings.

53. While the claimant has reduced the number of overall incidents being relied upon, in the Scott Schedule, from 24 to 15, and that should have an impact on the amount of evidence to be led, neither party has (as yet) suggested that the 6-day diet of Final Hearing should be revisited.

54. Further, the amendment having been refused, it is important to remember that the claimant still retains the right to pursue his claim against the respondents, as already expanded by the earlier amendments not opposed by the respondents in December 2021.

55. In coming to my decision on this opposed application for leave to amend, 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.

56. The claimant has had a significant period of time to fully particularise and give fair notice of all his allegations against the respondents, yet it is **297 days** after presenting his claim (on 7 July 2021) before an application to amend is intimated on his behalf by Ms Hughes on 29 April 2022, some **9 months, 23 days** later.

57. In my view, there would undoubtedly be a greater hardship to the respondents if the claimant was able to relabel incidents 20 to 24 as proposed by his amendment application, and I consider that the injustice to the claimant in refusing his proposed amendment is less than the hardship and injustice to the respondents, if I allowed the amendment, given the claimant can still pursue his existing, pled case.

Disposal: Amendment Refused

58. In these circumstances, I have **refused** the claimant's opposed application to amend the ET1 claim form. The case shall proceed to the listed 6-day Final

Hearing, in terms of the Tribunal's orders and directions already issued to both parties.

59. It will be of assistance to both parties and the Tribunal, and assist the good and orderly conduct of the Final Hearing, if both parties' representatives can liaise and ensure that the Joint Bundle to be lodged and used at the Final Hearing contains appropriately updated and revised papers apart for both ET1 claim and ET3 response to reflect the claimant's removal of incidents no longer being relied upon, but keeping the same incident numbering as used in the Scott Schedule for the sake of consistency.

Employment Judge: Ian McPherson
Date of Judgment: 11 May 2022
Entered in register: 11 May 2022
and copied to parties