Neutral Citation Number: [2022] EAT 67

Case No: EA-2021-000178-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 February 2022

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MR M ARIAN	**Appellant**
- and -	
THE SPITALFIELDS PRACTICE	**Respondent**

- -
- -

Darryl Hutcheon for the **Appellant**
Graeme Lomas (Instructed under the auspices of Advocate) for the **Respondent**

Hearing date: 22 February 2022

- -

JUDGMENT

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SUMMARY

WHISTLEBLOWING, PROTECTED DISCLOSURES

It was common ground that the claimant in ongoing proceedings in the employment tribunal had brought complaints of detrimental treatment on grounds of protected disclosures and ordinary unfair dismissal. The tribunal erred in refusing his application to amend to add a complaint that he had been unfairly dismissed for the reason or principal reason that he had made protected disclosures.

In particular the tribunal (a) proceeded on an erroneous factual basis that the first occasion on which the claimant had identified that he was seeking to pursue such a complaint was at a preliminary hearing in May 2020, when he had in fact expressly identified this in a draft list of issues tabled, in accordance with a direction of the tribunal, in February 2020; (b) attached significant weight to what it took to be the delay in raising the application, without properly considering the implications of this for the balance of hardship; and (c) erred in its approach to the significance of whether a freestanding complaint would have been out of time. **Abercrombie v Aga Rangemaster UK Limited** [2014] ICR 209 applied; **Reuters v Cole Limited**, UKEAT/0258/17 and **Pruzhanskaya v International Trade & Exhibitors** (JV) Ltd, UKEAT/0046/18 considered.

The tribunal also erred in its approach to an application to add an additional alleged protected disclosure to those already pleaded.

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HIS HONOUR JUDGE AUERBACH:

Introduction and Litigation History

1. I will refer to the parties as they are in the employment tribunal as claimant and respondent. This matter is ongoing, and no findings of fact or substantive conclusions have yet been reached by the tribunal. This is the claimant's appeal against the decision of the tribunal to refuse applications by him to amend his claim.

2. I will start by setting out the relevant litigation history. The respondent is a GPs' practice. The claimant was employed by the respondent as a healthcare assistant, later a senior healthcare assistant, from November 2016 until, following a meeting which he did not attend, he was dismissed by letter on 19 July 2019. Prior to his dismissal, the claimant began the ACAS early conciliation process in July 2019, obtaining a certificate on 4 August. Then, on 15 August, he began a second period of ACAS early conciliation.

3. On 1 September 2019 the claimant presented a claim to the employment tribunal, acting as a litigant in person. He identified in box 5 that his employment had ended on 19 July 2019. He did not tick any of the boxes in box 8 to indicate what types of complaint he was seeking to pursue. He attached to his claim form a narrative statement extending over some pages, which began by stating that he had sought professional help and support in order to "make a public interest disclosure in the way it is official, accurate and acceptable. Since I have not succeeded in doing so, I am going to make an attempt myself".

4. His narrative chronological account began by setting out his case that he had raised what he described as four professional concerns with the practice manager on 24 October 2018, which he identified as relating to matters to do with flu vaccination protocol, calibration of medical devices, booking in of ear irrigation patients without prior authorisation, and the care of chronically ill patients with certain particular conditions. He went on to state that he had handed

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in a written list raising these matters on 5 November 2018.

5. Over several pages, his narrative then gave an account of events in the ensuing months, including the respondent having treated the matters he had raised as a grievance, leading to an investigation, periods of sickness absence on his part, a grievance appeal, the respondent raising an issue with him about working relationships and inviting him to a meeting to discuss that, further matters of sickness absence and ill health. The narrative concluded with an account of the respondent convening a meeting to discuss the working relationship, and issues that it had raised, and indicating that a possible outcome of that meeting could be termination of his employment, the claimant not attending that meeting but it being convened in his absence, and his subsequently receiving the letter of dismissal.

6. On 15 September 2019 the claimant obtained a second ACAS early conciliation certificate. On 5 October the claimant received what appears to be a standard letter from the tribunal directing that there would be a case management hearing in respect of the first claim on 13 January 2020, including to consider the issues and make directions.

7. On 4 November the respondent's representative, Citation Ltd, submitted its response and grounds of resistance to the first claim. This gave the respondent's own chronological account of events, covering the same period and events as the claimant's account, from its perspective. This included a description of the contents of the dismissal letter, indicating that working relationships had broken down and that there were no feasible alternatives to terminating the claimant's employment; and it was noted that he had not exercised his right to appeal.

8. The respondent noted that the claimant was claiming to have raised four professional concerns amounting to protected disclosures; and it stated that if the tribunal found that they did amount to protected disclosures, it denied subjecting him to any detriment as a result. There was a request for further particulars and clarification of the particular matters said by the claimant to

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amount to detrimental conduct because of those claimed disclosures.

9. The final two paragraphs of the grounds of resistance read as follows:

> **"43. It is also unclear whether the Claimant alleges that his dismissal was as a result of making a protected disclosure and accordingly the Respondent seeks further information of this claim if indeed the Claimant is making such a claim.**
>
> **44. If, which is denied, the Claimant has made a protected disclosure then in light of the facts set out above, the Respondent will aver that the reason for the Claimant's dismissal was not connected to any such protected disclosure as alleged or at all."**

10. On 9 November 2019 the claimant presented a second claim form, again as a litigant in person. This time he ticked box 8.1 to indicate complaints that he was unfairly dismissed and that he was discriminated against on the grounds of disability. The particulars of the disability discrimination claim are not relevant to this appeal. The claimant again included a narrative of events, ending with a reference to the dismissal, albeit that this narrative was much shorter than in the first claim.

11. On 18 November the tribunal wrote again what appears to have been a standard letter directing a case management hearing in respect of the second claim, to take place on the same date as that which had been directed in respect of the first claim. On 3 December the tribunal wrote a further letter at the direction of a judge, listing the first claim for a three-day hearing in October 2020 and giving specific directions, including for the claimant to provide a schedule of loss by 17 December and a first draft schedule of issues by 27 December 2019.

12. On 10 December the respondent's representative put in a response to the second claim. The grounds of resistance opened by applying for consolidation of the two claims to be considered at the forthcoming case management hearing. They then set out in the same terms as the first grounds of resistance the respondent's chronological narrative of events, to which was added a

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response to the disability discrimination claims, including a denial that the dismissal was due to disability and a statement that the reasons for dismissal were as set out in the paragraph that, for the most part, described the contents of the dismissal letter.

13. On 12 December the claimant wrote to the tribunal in respect of the first claim. He observed that he was a litigant in person and was asking for postponement of the deadlines for him to provide a schedule of loss and schedule of issues. He referred to having received a recent diagnosis of cancer and being scheduled to have an operation on 4 February 2020 and an estimated recovery period of six weeks thereafter, and he attached a consultant's letter referring to that recent diagnosis.

14. On 13 December the respondent's representative wrote asking for the hearing dates listed in respect of the first claim to be vacated because of witness availability issues. On 19 December the tribunal wrote to the parties setting new deadlines for the claimant to provide a schedule of loss and draft list of issues, the latter now being required by 3 February 2020, and also postponing the case management hearing until 13 March.

15. On 8 January 2020 the tribunal wrote in respect of both claims, indicating that a judge was considering directing they be heard together and confirming again that the case management hearing was now listed for 13 March. On 10 January the tribunal wrote with further directions, including for the respondent to provide a draft preliminary list of issues in both cases by 10 February 2020. It is not clear to me whether this was written in ignorance of the fact that a direction had already been given to the claimant to provide a first draft list by 3 February 2020.

16. Be that as it may, on 3 February the claimant wrote to the tribunal and the respondent's representative, attaching a draft list of issues, on the face of it therefore acting in compliance with the revised deadline that the tribunal had given him to do that. In that list, question 1 began: "Did the claimant make a public interest disclosure when he raised a grievance on 24

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October 2018?", and then set out the four matters that he claimed to have disclosed, and then asked whether he had made such a disclosure when the same items were handed to the practice manager on 5 November 2018. Over succeeding paragraphs, the alleged detriments were listed out. Paragraphs 20 and 21 read as follows:

> **"20. Was the Claimant's dismissal on 19 July 2019 fair?**
>
> **21. Was the dismissal connected to the Claimant's grievance submitted to the practice manager on 24 October 2018?"**

17. On 6 February the respondent's representative emailed the claimant, including the following:

> **"As a consequence of receiving your list, I have formatted your list of issues and have outlined the further information that I require from you, which I have highlighted in bold.**
>
> **Please can you review the attached to make sure it is accurate and to provide me with the information I have requested in bold? Please can you provide this to me by 14 February 2020"**

18. The attached draft list of issues identified the protected disclosures relied upon by the claimant, although it asked for information about which sub-paragraphs of section 43B(1) he relied upon. It listed out the detriments identified by the claimant, although it included some questions seeking further details of certain aspects. It then went on to deal with the disability discrimination claims, and then, under the heading, "**Unfair dismissal: section 98 of the Employment Rights Act**", began:

> **"19. What is the reason for dismissal?**
>
> **20. The Respondent states that the reason for dismissal was the Claimant's capability and/or some other substantial reason, a potentially fair reason."**

19. It then set out some questions about the fairness of the procedure and concerned with what an employment lawyer would recognise as **Polkey** and/or contributory fault. Finally, there were some questions concerned with time limits. I observe that this document did not include any counterpart of paragraph 21 of the claimant's list of issues.

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20. The preliminary hearing due to take place in February was relisted to take place on 13 March 2020, but then postponed at the claimant's request, as he was still recovering from the surgery that he had undergone in February. On 13 May the claimant emailed Citation Ltd a document giving his answers to the specific questions that they had asked of him when tabling their draft list of issues. On 14 May Citation Ltd sent him an amended version of the list of issues that they had previously drafted, taking on board those replies.

21. On 19 May 2020 a case management preliminary hearing took place before EJ Gardiner, by telephone. The claimant was in person. The respondent was represented by Mr Lomas of Citation Ltd. The tribunal's narrative referred to the two claim forms, stating that in the first the claimant did not expressly complain of unfair dismissal, nor did he allege that his dismissal was unfair by reason of his having made protected disclosures, and describing the second claim form as complaining of ordinary unfair dismissal and disability discrimination. It adopted the amended list of issues that had been tabled by Citation Ltd. It referred to the claimant having indicated that he wanted to bring claims of automatic unfair dismissal for making protected disclosures as well as further disability discrimination claims, and he was ordered to set out his proposed amendments. The tribunal clearly proceeded, in giving those directions, on the footing that these matters had been raised by the claimant for the first time only at this hearing.

22. There was also an issue as to whether certain material should or should not be referred to at the final hearing, as there was a dispute as to whether it was covered by the without prejudice rule. The tribunal gave directions for a further preliminary hearing to give consideration to the claimant's application to amend, and to deal with that matter as well.

23. On 1 June 2020 the claimant wrote to the tribunal indicating that he wished to add to his original claim, a claim for automatically unfair dismissal "on the ground that I had made protected

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disclosures" and claims for indirect disability discrimination and in respect of reasonable adjustments. On 15 June Citation Ltd responded opposing those applications, including observing that the claimant was not suggesting that the automatically unfair dismissal claim was already contained within his ET1, and submitting that there had been no sufficient explanation put forward as to why not. On 16 June the claimant wrote making a further submission in response and indicating that he intended to provide medical records in support. He referred to his ill health and having acted without the benefit of legal advice when he put in his first claim.

24. There was then further correspondence leading up to a preliminary hearing on 28 July 2020, held by CVP. The claimant for the first time had a representative, Ms Ngo-Pondi of Employee Rescue Ltd. The tribunal heard and. determined the without prejudice point. It then gave further directions in relation to the amendment issue, which it was not able to deal with at the same hearing. The judge on this occasion effectively took his lead from the directions and list of issues that had been adopted at the May preliminary hearing.

25. The next preliminary hearing, which gave rise to the decision that is the subject of this appeal, took place on 12 November 2020 before EJ Reid. There was correspondence in the run up to it about the application to amend. This culminated in the tabling by Ms Ngo-Pondi of a draft amended grounds of complaint on 9 November 2020. This included identifying the proposed automatically unfair dismissal complaint under section 103A **Employment Rights Act 1996**, although footnotes indicated that this was advanced by way of clarification of the original claim and in response to the respondent's request in its grounds of resistance for such clarification.

26. That document also identified an additional proposed occasion on which the claimant wished to say that he had made a protected disclosure. It was common ground before me that the tribunal rightly noted that this had been raised for the first time, in a document that had been

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tabled in between the preliminary hearings, during August. This sought to add an assertion that the claimant had made a disclosure in or around 31 October 2018 to a Dr Desai about problems with a blood pressure machine and its use on a particular occasion.

27. It was common ground before me that, as well as that document, other material before the judge at the hearing on 12 November included a witness statement from the claimant dated 10 November which was signed by him, an undated statement from the claimant's wife and a letter from the claimant's GP attaching an extract from the GP's electronic records dated 18 June 2020. The claimant's witness statement gave an account of his ill health, including the cancer diagnosis and what on his account had been at times severe depression, and his account of how his various ill health had affected his ability at times to deal with the management of his claims.

28. The letter from the GP referred to the diagnosis of depression, recording that the claimant had been first seen for this in March 2019 and describing the symptoms as at times very severe, and the cancer diagnosis, and an ischemic heart disease diagnosis dating from 2014. The unsigned statement from the claimant's wife gave her account of aspects of his illnesses and their impact on his tribunal claims and other aspects of the impact on their domestic circumstances.

The Tribunal's Decision and the Reconsideration Decision

29. The tribunal sent its reserved decision to the parties on 18 November 2020. In the opening paragraphs, it identified that the original claims were for detriment for having made protected disclosures, ordinary unfair dismissal and direct disability discrimination. It referred to the claimant's amendment application having started at the preliminary hearing on 19 May 2020 and to what it described as a final list of issues attached to the minute of that hearing. The judge also observed that the claimant had not attended the hearing and that what he said in his witness statement could not therefore be tested by questioning.

30. The judge then referred to the course of the litigation between the May hearing and the

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November hearing, including that the alleged further disclosure to Dr Desai was first raised in a document of 11 August 2020, that the final version of the draft amendments was tabled on 9 November and that Ms Ngo-Pondi had withdrawn the application to amend in respect of the disability discrimination claims. At paragraph 8 the tribunal stated that the claimant's witness statement indicated in summary that the reason why he had not included the automatic unfair dismissal claim and fifth protected disclosure sooner was because he had been unable to get advice at the time and had been unwell when preparing both of his claims.

31. There followed a self-direction as to the law in which the tribunal cited **Selkent Bus Co Ltd v Moore** [1996] ICR 836 and **Cocking v Sandhurst (Stationers) Ltd and Anor** [1974] ICR 650, identified the three sub-themes referred to in **Selkent**: nature of the amendment, time limits and manner of application, and balance of hardship and assessing all of the circumstances. It gave itself further directions about each of these, including by reference to the Presidential Guidance on amendments and **Abercrombie v Aga Rangemaster Ltd** [2014] ICR 209. The tribunal also observed: "Time limits are required to be considered where there are entirely new claims unconnected with the original claim as pleaded".

32. The tribunal continued as follows:

> **"Decision on amendment of application**
>
> **20. Having taken into account all the submissions of the parties and applied the relevant law, I decide that:**
>
> ***Nature of application***
>
> **21. The amendment application in respect of an automatic unfair dismissal claim (an amendment to the second claim and which is a new claim) is in part a relabelling of the facts of the detriment/protected disclosure claim (the first claim) because it in effect adds dismissal to the list of detriments claimed; this means that the many of the facts to support the automatic unfair dismissal claim were already identified when reading the first claim in conjunction with the second claim; this was identified by the respondent at the time as unclear even for his first claim (page 38, para 43) and so the respondent has not been taken surprise by this issue because it was already aware, even before the**

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claimant brought his ordinary unfair dismissal claim (the second claim), that he could be arguing automatic unfair dismissal on the basis if protected disclosures in the first claim.

22. The amendment application in respect of the claimed fifth protected disclosure to Dr Desai on 31st October 2019 involves adding a new factual allegation but not a new claim. This disclosure was to a different person to whom the claimant raised the other matters claimed as protected disclosures - see list of issues - Dr Uddin and Ms Stanford). This involves a new area of enquiry for the respondent about a specific incident of which the claimant has provided the date and linked it to an identified email.

23. The amendment application in relation to the automatic unfair dismissal claim was first raised by the claimant at the hearing on 19th May 2020, some six months after he presented his ordinary unfair dismissal claim and six months after the respondent had already flagged up the possible issue in its response to his first claim. The claimant had brought the second claim of ordinary unfair dismissal knowing that the respondent had already in practice asked him whether he was claiming automatic unfair dismissal in his first claim – the claimant has not said that he did not have the response to the first claim by the time he made his second claim. Even if he had not received it, as soon as he did there was a clear question for him to answer. There was a clear opportunity on an already identified issue to include the automatic unfair dismissal claim in the second claim form or, if he had not by then received the response to the first claim, to make the application to amend promptly after receiving the response on the first claim. By the time the claimant raised this in May 2020, a claim for automatic unfair dismissal was out of time.

24. The amendment application in relation to the fifth claimed protected disclosure was not mentioned at the hearing on 19th May 2020 and did not feature in the final agreed list of issues which was the claimant's opportunity to speak up if he wanted to apply to add anything further. The fifth claimed protected disclosure appeared in the draft sent on 11th August 2020 without explanation and was raised some 11 months after his first claim setting out the claim protected disclosures. His witness statement for this hearing does not even refer to it, though he does explain why he says he could not make the other amendment applications sooner.

25. In his witness statement the claimant referred to his ill health as being the reason for the delay referring to test results received on 30th October 2019 (para 8). Whilst I accept this was difficult news to receive, the claimant had already presented his first claim setting out the four protected disclosures on 1st September 2019 and so dealing with this news did not explain why he had not included the fifth in his first claim form taking into account he was able on the 9th November 2019 to present a second detailed claim form despite being unwell (para 12).

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26. The claimant was able to send a detailed draft list of issues to the Tribunal on 3rd February when not represented (page 169) and then review a draft list of issues prepared by the respondent's representative (page 175) and provide further requested particulars in May 2020 (page 181) prior to the 19th May 2020 hearing. There were therefore further clear opportunities to raise any amendment issues at this time and the claimant was not too unwell to deal with his claim. He had surgery on 10th February 2020 (para 16) but had been dealing with the draft list of issues in the days prior to this.

27. The claimant managed to get legal advice during the first lockdown (page 94) and so any delay in raising the fifth claim protected disclosure was not due to being unable to get legal advice for this reason as claimed (page 144). In any event any problems of this type did not explain why he took no action before March 2020.

28. The claimant says he was 'very, very sick' when he wrote his first claims (para 17). However I find that he was able to deal with two sets of ACAS conciliation and prepared two detailed claim forms. He has not provided medical evidence to the effect that he was too unwell to deal properly with his claims and his claimed inability is inconsistent with what he was in fact doing at this time.

Balancing hardship or justice

29. The Claimant would lose out on the possibility of unlimited compensation on his unfair dismissal claim if the automatic unfair dismissal claim amendment is not allowed. Although it is a new claim and is out of time it is a relabelling to a degree of existing facts (as to what were the protected disclosures) when looking at both claims together. It was a possible claim the respondent was alert to form the time of his first claim even though that claim was not the unfair dismissal claim. It will not involve a substantial area of new enquiry or substantial amendments to its grounds of resistance although the respondent will have to deal with the reasons for dismissal issue given the claimant is saying the reason for dismissal was not the reason given by the respondent at the time, but was protected disclosures.

30. Weighed against that is the claimant's prolonged failure to make the application until 19th May 2020 despite being well enough to do so and despite clear opportunities to do so: in November 2019 when presenting his second claim (or shortly thereafter) (which was about his dismissal) when already being aware of the automatic unfair dismissal claim issue and in February 2020 when dealing with the draft list of issues (even though it was by then out of time). He can claim injury to feelings via his detriment claim and so does not lose out on that possibility entirely. The claim was brought out of time and the claimant has not shown that it was not reasonably practicable to bring the automatic unfair dismissal claim in time. It would be an overall significant injustice to the respondent to allow the claim to be brought now given it raised the issue with the claimant when he brought his first claim and given his

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> **silence in the second claim and the throughout the period until May 2020 when the clamant eventually raised it, despite being in a position to do so before then. The respondent asked the question in November 2019 but there was silence from the claimant until May 2020. The respondent was therefore reasonably entitled to conclude that the claimant was not pursuing it.**
>
> **31. Weighing this up I do not allow the automatic unfair dismissal claim amendment taking into account the clear opportunity to include this claim in his second claim form (or shortly thereafter) already being aware of the issue; even putting that to one side there was then a continued failure throughout the period until May 2020 to make the application.**
>
> **32. The Claimant would lose out on the possibility of including the fifth claimed protected disclosure if the amendment is not allowed. It will involve the respondent in a new enquiry, though that is not substantial.**
>
> **33. Weighed against that is the claimant's failure to mention this amendment at the preliminary hearing on 19th May 2020 (when he raised the others and agreed the draft list encompassing the four claimed protected disclosures) and only raise it by including it without notice in a draft in August 2020. He made the second claim and did not make the application to amend the first claim then. He does not explain this delay in relation to this amendment in his witness statement and it is out of time. To deal with it now would involve witnesses having to recall something from over two years ago which they did not know they would have to factually respond to. He has other protected disclosures he relies on and does not lose out on the possibility of being awarded injury to feelings because his detriment claim remains.**
>
> **34. Weighing this up I do not allow the fifth protected disclosure amendment talking [sic] into account it was raised only in August 2020. The respondent was entitled to know the case against it and reasonably concluded at the latest by May 2020 that all claimed disclosures had been raised.**
>
> **35. I therefore do not allow (i) the amendment to add a claim for automatic unfair dismissal claim under s103A Employment Rights Act 1996 or (ii) the addition of a fifth claimed protected disclosure made on 31st October 2018."**

33. On 2 December 2020 the claimant applied for a reconsideration. That application referred to him having been a clinically vulnerable litigant in person and the medical evidence. It also took issue with the tribunal's assessment of the nature of the amendment raised in respect of automatically unfair dismissal, arguing that all of the factual allegations relied upon were

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contained within the original claim form and noting that the respondent had recognised that that claim form might be seeking to raise an automatically unfair dismissal claim, and had sought clarification on the point. It also took issue with the tribunal relying on the list of issues which had been determined when the claimant was a litigant in person.

34. In a judgment and reasons sent on 23 December 2020 the tribunal refused the application on the basis that there was no reasonable prospect of the original decision being revoked. It observed that the health problems and the impact of the pandemic had been considered, that the point about the medical evidence was that it did not show that the claimant could not deal with his claims throughout the period from September or October 2019 to May 2020, and that the tribunal was concerned with the whole period and not just particular times. The tribunal noted that the claimant had not attended the hearing, so his evidence could not be tested, and it was not suggested that he had failed to attend because he was not well enough to do so.

35. The decision went on to note that the amendment application had not in fact been properly made until after the May 2020 hearing and observed that this was a new type of unfair dismissal claim, not merely a change to the remedy sought, and had been raised some six months after bringing the ordinary unfair dismissal claim. The tribunal had taken into account that the facts needed to support the automatic unfair dismissal claim were already identified in the first claim. It went on to assert that the fifth disclosure was said to have been made on a discrete occasion from the earlier disclosures, and it had not been mentioned at the May 2020 preliminary hearing.

The Appeal and the Arguments

36. The claimant put in his notice of appeal against the tribunal's substantive decision as a litigant in person, raising primarily issues concerned with what he said was the failure properly to address or take account of the medical evidence, and that of himself and his wife. Those grounds were considered at the sift stage not to be arguable, but amended grounds of appeal

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against the original decision were permitted to proceed at a rule 3(10) hearing, at which the claimant was represented by Mr Hutcheon of counsel as his ELAAS representative. He has appeared again today for the claimant, and Mr Lomas of Citation Ltd has appeared for the respondent. I have had the benefit of considering skeleton arguments and hearing oral argument this morning from them both.

37. The amended grounds of appeal that were permitted to proceed are expressed as follows:

> **"(1) The Tribunal erred in law by rejecting the Claimant's application to amend exclusively, or almost exclusively, on grounds if delay, rather than treating delay as merely one factor to be balanced against all of the others: Tribunal judgment at paras 23-34. See e.g. Kelly v British Newspaper Printing Corp [1989] IRLR 22 and Baker v Commissioner of Police of the Metropolis UKEAT/0201/09/CEA.**
>
> **(2) The Tribunal erred in law by treating the application to introduce a case based on section 103A of the Employment Rights Act 1996 as *"new claim"* and/or as claim which required consideration of time limits: Tribunal judgment paras 21, 23 and 29-30. See e.g. Pruzhanskaya v International Trade & Exhibitors UKEAT/0046/18/LA.**
>
> **(3) The Tribunal erred in law and/or in fact by erroneously concluding that the Claimant could have, but did not, raise the issue of dismissal on grounds of protected disclosures prior to 19 May 2020 (Tribunal judgment paras 26 & 30), when in fact he raised is in a list of issues sent to the Tribunal on 3 February 2020.**
>
> **(4) The Tribunal erred in law by failing to take account evidence submitted on behalf of the Claimant, in particular the 18 June 2020 letter of his GP describing his health problems and their impact on his abilities and the witness statement of the Claimant's wife. The Tribunal judgment failed to mention, let alone to engage with or to offer any reasons for its views of, this evidence, albeit reaching factual conclusions contrary to that evidence. See further the Notice of Appeal in respect of this Ground."**

38. Mr Hutcheon confirmed that these grounds were maintained both in respect of the refusal of the application to add a section 103A complaint and in respect of the so-called fifth disclosure. Grounds 1 and 4 were, he said, applicable to the latter, and all four were applicable to the former. In discussion, I agreed with Mr Lomas that this could and perhaps should have been more clearly set out in the wording of those amended grounds, but I also could see Mr

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Hurcheon's point that this was what had always been intended, and indeed permitted by HHJ Martyn Barklem, who presided at the rule 3(10) hearing, and Mr Lomas fairly accepted that he was content that he would be able to address this strand of the appeal as well today, which indeed he did.

39. In relation to ground 1, Mr Hutcheon's principal arguments seem to me to have been as follows. The tribunal had overly focused on what it regarded as the significant and unacceptable delay by the claimant in raising the amendment issue. However, the authorities make it clear that this should not be treated as an overriding or exclusive reason for refusing to grant an application to amend. He referred me to what Mummery J said in **Selkent** at paragraph 24(c), that this was not an automatic factor but a discretionary factor, and to examples of other authorities where tribunals had erred in this regard: **British Newspaper Printing Corporation v Kelly** [1989] IRLR 222 and **Baker v Commissioner of Police of the Metropolis** UKEAT 0201/09.

40. In this case, he submitted, the tribunal had made a similar error, excessively focusing on what it regarded as the unacceptable delay to the exclusion of proper consideration of the overall balance of hardship and what impact the delay had or had not had on that. There was, for example, no consideration of the fact that the May preliminary hearing was in fact the first case management hearing in the litigation. Further, in the paragraphs ostensibly considering the balance of hardship, the tribunal in reality focused on the issue of delay, but without identifying whether or how that the delay had caused any particular hardship to the respondent. There was also a failure properly to consider the hardship to the claimant of precluding him from advancing this claim, which, submitted Mr Hutcheon, had the artificial effect of allowing him to complain of protected-disclosure detriment all the way up to and including the decision to proceed with the final internal hearing in the claimant's absence, but yet not to pursue such a challenge to the decision to dismiss taken at that hearing.

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41. In oral argument, Mr Hutcheon accepted that the tribunal had identified that there was some prejudice to the respondent if the fifth-disclosure amendment were to be granted, in as much as this would impact on the scope of the witness evidence required; but he submitted that this was very minor in the scale of things, and that the tribunal had still erred in this regard given its overall focus on the factor of delay.

42. In relation to ground 2, Mr Hutcheon submitted that the tribunal erred by treating the addition of a section 103A complaint to an ordinary section 98 complaint as the introduction of a new or discrete claim, and hence had erred by considering it to be a relevant consideration that a freestanding complaint under 103A would have been out of time. He relied on **Pruzhanskaya v International Trade & Exhibitors (JV) Ltd** UKEAT/0046/18/LA. He also said there was support in **Street v Derbyshire Unemployed Workers' Centre** [2004] ICR 213 at paragraphs 35 to 36. He submitted that **Pruzhanskaya** established that in a case where the application is to add a section 103A point to an ordinary unfair dismissal complaint, whether the complaint would otherwise have been in time is legally irrelevant; though he stressed that he was not submitting that that meant that therefore such an application had necessarily to be granted.

43. On this point Mr Lomas relied on **Reuters Ltd v Cole** UKEAT/0258/17/BA, but Mr Hutcheon submitted that that case was distinguishable as it concerned disability discrimination complaints of different types. Mr Hutcheon also submitted that the analysis in **Pruzhanskaya**, of the earlier authorities of **Evershed v New Star Asset Management** UKEAT/0249/09, [2010] EWCA Civ 870 and **Conteh v First Security Guards Ltd** UKEAT/0144/16/JOJ, rightly concluded that they were not at odds with the analysis reached in that case.

44. As to ground 3, Mr Hutcheon submitted that the claimant had, in his third February draft list of issues, clearly identified what amounted in substance to a section 103A complaint. The tribunal had erred by failing to address this fact despite having the document before it and indeed

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referring to it in paragraph 36 of its reasons. It was simply wrong to state that the claimant did not take the opportunity of that occasion to raise this complaint. He did. Therefore, the tribunal's findings as to delay were reached on an erroneous factual premise, because, at worst for the claimant, the matter had been first raised by him in February and not May. Nor was it fair to rely on the fact that the claimant had not at any point raised this issue when confronted with the respondent's draft list of issues. The claimant was a litigant in person, and there was nothing in the correspondence to alert him to the fact that this point had been omitted.

45. In relation to ground 4, the tribunal had before it at the November 2020 hearing significant evidence about the claimant's ill health, including his depression. The tribunal effectively cast doubt on the claimant's own credibility but gave no consideration to the objective medical evidence and the evidence of his wife which supported his account. Given the criticism of his credibility and the significance which the tribunal attached to the question of delay, the reasons, which dealt very briefly with this aspect in paragraph 28, were not **Meek**-compliant. The tribunal failed to mention the wife's evidence at all. Whilst the claimant had not attended the hearing, nor had the respondent requested that he attend. Mr Hutcheon submitted that the reconsideration decision should not be regarded as curing these defects. It was questionable whether a reconsideration decision was an appropriate vehicle to do so, particularly where reconsideration had been refused upon preliminary consideration, and in any event the reconsideration decision reasons did not suffice to address the issue properly.

46. Mr Lomas's principal points, it seemed to me, were as follows. As to ground 1, the tribunal did not overly or exclusively rely on the question of delay. It gave itself a proper self-direction as to the law, all strands of the **Selkent** guidance were considered in turn, and, reading the decision as a whole, a number of other features were referred to. The tribunal was properly entitled to weigh the factor of delay into the balance.

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47. In relation to the so-called fifth disclosure amendment, the tribunal had properly made the point that, if allowed, this would call for further witness evidence from the respondent's witnesses, requiring them to recollect further events some two years down the line.

48. In relation to ground 2, there was no claim of protected-disclosure unfair dismissal in either of the first two claim forms. This was a new complaint giving rise to new factual enquiries, if permission to add it were granted. It was therefore proper to take into account that as a freestanding complaint introduced at the same point, it would have been out of time. Although **Reuters v Cole** concerned the introduction of a direct discrimination complaint in addition to a discrimination arising from disability complaint, he relied upon it for its general approach, and the authorities cited there, including in particular **Abercrombie v Rangemaster** at paragraphs 48 and 50.

49. As to ground 3, Mr Lomas did not accept that the claimant had properly raised a protected-disclosure unfair dismissal complaint in his 3 February draft list of issues. In any event, the claimant had been invited to comment upon the draft sent by the respondent, which did not deliberately omit this point. Had the claimant been concerned, he had had ample opportunity to raise it; but he did not do so when responding to the request for further information to enable the list of issues to be completed, or at any other time. The tribunal was also entitled to take the view that the claimant had not at any point sufficiently explained why the proposed fifth-disclosure amendment had not been raised until August.

50. In relation to ground 4, the evidence plainly was considered. The original decision referred to the claimant's witness statement at several points (paragraphs 3, 25, 26 and 28). The medical evidence plainly was considered, and the reconsideration judgment clarified the point that the tribunal was making about this in the original decision. The tribunal was entitled to take the view, looking at all the material before it, including the content of the claim forms and the

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content of the GP's letter, that this did not persuade the tribunal why these matters had not been raised in the original claim forms. The tribunal was not wrong not to refer to the claimant's wife's statement, given that it was unsigned, undated and she did not attend the hearing. The claimant's own witness statement had also not referred to it.

Discussion and Conclusions

51. I will consider the challenge to the section 103A amendment application first. It is convenient to start with ground 3. It is clear from various passages throughout its decision arising from the hearing in November 2020 that the tribunal proceeded on the footing that, as a matter of fact, the claimant had not raised his wish to pursue a section 103A complaint at all prior to the case management hearing in May 2020 and that this was despite having prior to that date had previous opportunities to do so.

52. I agree with Mr Hutcheon that in proceeding on that basis the tribunal made a material error of fact. It did not consider whether the claimant had in his 3 February 2020 document identified that he was seeking to pursue such a complaint. It seems to me that, had it done so, it would have been bound to conclude that in substance that document plainly did so. It identified in terms that the claimant was stating that in October 2018 he had made what he claimed were protected disclosures. It set out what they were, and it identified in terms that he was raising an issue as to whether he was dismissed for a reason connected with having made protected disclosures on that occasion. It does not matter that he did not refer to section 103A and did not formulate the statutory test in precisely the right words, by referring to whether his dismissal was for the sole or principal reason of having made protected disclosures. The substance of the complaint was in my view clearly identified at paragraph 21 of that document. The tribunal should have identified that, if not before, the claimant was therefore seeking to put the issue into play when he tabled that document in February.

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53. I note also that this came on top of the respondent having itself detected that there might be such a complaint intended to be brought in the first claim form; and that in his witness statement put before the tribunal for the November hearing, the claimant said that his raising of the second claim form, including ticking the box for unfair dismissal, had been designed to address this. The 9 November document, whilst not specifically referring back to the 3 February document, also submitted that the section 103A claim was being identified in response to the respondent having sought clarification in its original grounds of resistance. That point was raised again by the claimant in his reconsideration application but not addressed by the tribunal in its decision refusing it. But even if these features had not also been present, I consider that the content of the 3 February document was by itself enough to amount to the claimant having raised this issue, even if only for the first time then.

54. As to the point that the claimant had not at any stage taken objection to the list of issues produced by Mr Lomas not identifying this feature, it is relevant that, although, in the covering email, the claimant was asked to review Mr Lomas' list for accuracy, it was said that the claimant's list had been formatted, and further information required added and highlighted. That description of the attachment did not suggest that there was, or was intended to be, any substantive alteration to the claimant's earlier list. Further, the claimant indeed then responded to the requests for further specific information.

55. It is fair to make clear that Mr Lomas in the course of argument said that the omission of any counterpart of paragraph 21 of the claimant's list of issues was not in any way deliberate, that Mr Hutcheon did not suggest otherwise and neither do I. But I mention these points because they are relevant to the question of whether the tribunal could safely and properly rely on the claimant not having raised this issue again in the aftermath of Mr Lomas's draft list of issues being tabled. Once that version was tabled, it appears to me that it then carried through the May and July hearings on to the hearing in November. True it is that the claimant was

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represented from July, but his representative only came on board at that stage. The fact remains that the tribunal proceeded at the November hearing on the basis of an error of fact in relation to the timing of when the claimant first raised this proposed amendment. It attached such significance to that aspect, that this error renders its decision unsafe, and it cannot stand. Ground 3 therefore succeeds in relation to the section 103A point.

56. I will turn next to ground 1. Mr Hutcheon's submission by reference to **Selkent** was essentially well made. The mere fact that an application to amend may come very late, or even that the tribunal considers that there was no good or sufficient reason why it was not made sooner, is not by itself necessarily enough to warrant the refusal of the application. As **Selkent** identifies, there is no automatic time limit on applications to amend. They can be made at any time until a decision on the claim is given. Where an application is made very late, this often is in practice fatal; but in every case the tribunal has to consider what the implication of the timing in fact is for the balance of hardship. The two authorities cited to me by Mr Hutcheon are examples of cases in which the error of the tribunal was to fail to consider that aspect before rejecting the application on the basis that it had come too late.

57. I note also that an application may be described as late in two different senses. It may come at a very late stage in the litigation, or it may be late simply in the sense that it comes after a very significant passage of time. But in all cases what is required is a consideration of the specific implications in the case at hand, of the timing of the application for the balance of hardship. In this case, I agree with Mr Hutcheon that, despite its correct self-direction as to the law, the tribunal did not actually identify any specific hardship to the respondent caused by the timing of the application to add the section 103A complaint, over and above of course the fact that, if granted, the respondent would then have to defend that complaint on its merits. Further, the tribunal referred to the claimant losing the opportunity of compensation being uncapped, were the application to be refused, but did not address the fact that he would lose the opportunity to

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run the complaint as such.

58. The tribunal also relied on the delay, despite its own findings at several points that the respondent apprehended from the very outset that it may be facing such a complaint, albeit that it considered that this required clarification. The tribunal did not consider how this impacted on the question of hardship. I also agree that the tribunal seems to have focused heavily on the absolute period of delay, which it put at around six months, without taking into account what stage the litigation had reached and that the May case management hearing was in the event the first case management hearing. Added to this is the error that I have identified under ground 3, of failing to recognise that in fact the matter was first raised, at worst for the claimant, in February. For all of these reasons, I would have allowed the appeal on ground 1 even if ground 3 had not succeeded.

59. I turn to ground 2. In **Pruzhanskaya** it was said at [36] that section 103A

> **"… does not create a separate head of complaint to which a separate time limit applies. It is an aspect of the right not to be unfairly dismissed under Part X of the 1996 Act. The Claimant had brought an in-time complaint of unfair dismissal; I do not think that alleging a further potential reason for dismissal, whether it be an "ordinary" reason such as conduct or an "automatic" reason such as the making of a protected disclosure, involves a new complaint with a new time limit."**

60. I agree with Mr Hutcheon that the implication of this reasoning is that, where there is an existing section 98 complaint, the addition of an allegation of contravention of section 103A is not the introduction of a new complaint for the purposes of time limits. But it seems to me, with great respect to a distinguished EAT judge, that HHJ David Richardson's decision on this occasion was out of kilter with other authority of both the EAT and the Court of Appeal.

61. **Selkent** does not itself specifically get into any detail as to how to identify what counts as a new or different complaint for these purposes. Nor is any assistance to be derived from **Street v Derbyshire**. Mr Hutcheon relied on the EAT's remarks, in that case, at [35] and [36], that a

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complaint of unfair dismissal is made through the “single channel” of section 94, though it may take different specific forms. But that was a case where there was a section 103A complaint on foot, what was sought to be advanced also was a section 98 complaint, but it was asserted that the latter complaint was effectively already present and embraced within the original claim form, a submission that was accepted in the EAT. It was in that sense that the EAT’s remarks in that passage must be understood.

62. I also respectfully disagree with HHJ David Richardson’s reading of the **New Star Asset Management** decision. That was a case concerned with an application to add a section 103A complaint to one under section 98. It seems to me that the approach of Underhill P (as he then was), in particular, at [15] and [35] – [36] and [38], was that whether a free-standing claim made at the point when the amendment application was made, would have been out of time, and if so, by how much *was* a factor; but that the substantive focus should be on whether, or what, the proposed amendment sought to add to the substance of the case advanced, rather than on the particular form that it took. I note that his decision was upheld by the Court of Appeal.

63. The decision in **Conteh,** it seems to me, does not assist either way, because, as HHJ David Richardson himself identified, in **Pruzhanskaya** at [41], there the proposal was to add public interest disclosure detriment and unfair dismissal complaints where no protected-disclosure complaints of any sort had previously existed at all. Also consistent with the **New Star Asset Management** approach is the approach in **Abercrombie** (Underhill LJ) in paragraphs 48 and 50; and the analysis in **Reuters v Cole** is also to similar effect.

64. In **Abercrombie** at [48] Underhill LJ (for the Court) said:

> **“… 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**

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> **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…".**

65. At [50] he said:

> **"Mummery J says in his guidance in *Selkent* that the fact that a fresh claim would have been out of time (as will generally be the case, given the short time limits applicable in employment tribunal proceedings) is a relevant factor in considering the exercise of the discretion whether to amend. That is no doubt right in principle. But its relevance depends on the circumstances. Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time-limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded – and *a fortiori* in a re-labelling case – justice does not require the same approach: NB that in High Court proceedings amendments to introduce "new claims" out of time are permissible where "the new cause of action arises out of the same facts or substantially the same facts as are already in issue" (Limitation Act 1980, section 35 (5)). In the circumstances of the present case the fact that the claim under section 34 would have been out of time if brought in fresh proceedings seems to me to be a factor of no real weight. There is, as I have already said, no question of any specific prejudice to the Respondent from the claim being reformulated after the expiry of the time limit."**

66. Respectfully, therefore, I do not feel bound to follow **Pruzhanskaya** on this point, as it seems to me to be out of kilter with other EAT and Court of Appeal authority.

67. However, Mr Hutcheon fares better with his second, fallback, point under this ground, which indeed relies on the **Abercrombie** guidance. He submits that the tribunal itself found at several points that no new material factual enquiry would be generated by allowing the section 103A amendment. The questions of whether the alleged protected disclosures (putting to one side for a moment the proposed fifth disclosure amendment) were factually made, and whether, if so, they in law amounted to protected disclosures, were already in play because of the detriment complaints. The reason for dismissal was already in play. Of course, a different reason is asserted by a section 103A complaint, but the dismissing manager was going to have to give

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evidence about the reason either way.

68. Mr Hutcheon also I think fairly made the point that in paragraph 30 the tribunal appears to have taken an absolutist approach to whether the not-reasonably-practicable test could be met, whereas, even where time limits are in play as a factor, they are not a decisive factor, but something to be taken into account; see Underhill J (as he then was) in **Safeway Stores v TGWU** UKEAT/0092/07. Indeed, in its reconsideration decision, the present tribunal itself referred to the facts relied upon having been pleaded in the first claim. While it said that this was taken into account, it does not in fact appear to have considered whether the time-limit aspect provided a proper basis for refusing the amendment application. Once again, there is an error here under ground 1 which is compounded by the ground 3 error, because that error indicates that in any event the application to amend was not as severely out of time as the tribunal appears to have supposed.

69. I turn to ground 4. As Mr Lomas pointed out, the tribunal did in its first decision refer to the claimant's witness statement. I also agree with him that the observation it made at paragraph 28 does not demonstrate that it did not consider the medical evidence from the GP; rather, it is making a fair observation about something that the GP's letter did not address. I also do not agree with Mr Hutcheon that no regard should be paid to the reconsideration decision. The claimant raised this very point in the reconsideration application, and the tribunal responded to it. I do not agree that what the tribunal said should be discounted because it refused reconsideration on paper. It made substantive observations about it, which it needed to do in order to decide whether the point was arguable. There would be no purpose to the EAT allowing an appeal in respect of a matter that had in fact been properly addressed on reconsideration, and indeed I think it would be wrong to do so.

70. I appreciate that the claimant feels very strongly about, from his point of view, the devastating

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effects which serious ill health has had on him in a variety of ways over a considerable period. He also feels that the tribunal has impugned his credibility or integrity. But the tribunal properly examined how far the evidence before it took it with respect to the specific issue of the explanation for what was or was not raised in his original claim forms and the timing of when matters that were not raised there were only raised later.

71. It was also fair for the tribunal to take into account that there had been no opportunity for the claimant's evidence to be tested by cross-examination. Nor was it an error not specifically to have referred to the claimant's wife's statement, having regard to its content, the fact that it was unsigned and the fact that she also did not attend the hearing. I consider that, taking the original and reconsideration decisions together, the tribunal sufficiently addressed this aspect of the evidence for the purposes of what it had to decide. Perhaps the tribunal's words could have been a little better chosen, but I do not think its evaluation of this evidence should be treated as a slur on the claimant's integrity.

72. There is a slight ambiguity in the tribunal's approach insofar as in paragraph 28 of its original decision, it seems to be focused on the impact of ill health or not on the claimant's ability to articulate his complaints when he first presented them, whereas in paragraph 1 of the reconsideration decision, it refers to the relevance or not of the evidence of ill health over the whole period up to May. As to the latter, the tribunal does not appear to have taken account of the fact that he was granted a postponement on medical grounds of the original particulars timetable, but I am not sure that this in substance adds anything to what I have already said about the error in failing to recognise in any event that the claimant was able to, and did, raise the protected-disclosure 103A complaint in his February issues document.

73. Pausing there, for all of these reasons, I allow this appeal in relation to the decision to refuse the amendment application in relation to the section 103A claim.

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74. I turn to the second proposed amendment, to add the so-called fifth protected disclosure, in respect of which only grounds 1 and 4 are relied upon. There was no dispute before me that the tribunal was right to say as a matter of fact that this was only raised for the first time in the document tabled in early August. The tribunal did not make any similar error here, as it did in relation to the 103A claim, about when this was raised for the first time. Nor do I think that the tribunal erred by concluding that the evidence before it did not sufficiently show that it was owing to the claimant's ill health that this matter was not raised prior to its being raised in the August document. Nor do I think it arguably erred in observing more generally that there had not been a sufficient specific explanation for why this was not raised sooner. But, as I have noted, that by itself would not necessarily be sufficient reason for refusing this application to amend. The tribunal needed to consider the balance of prejudice.

75. As to that, the tribunal did identify some potential prejudice to the respondent of a forensic kind, if the application were granted, because it fairly postulated that this would require some additional witness evidence. Mr Hutcheon says that the subject matter of the disclosure was the same as that of one of the disclosures already pleaded. But the claimant was seeking to add something which he would contend was an additional influence on the detrimental treatment complained of and/or, if he succeeded in his 103A amendment, the dismissal. It therefore carried the implication that the respondent might need to adduce further evidence to address whether that additional disclosure had influenced any of the detrimental treatment and/or possibly the dismissal over and above the existing claimed disclosures. Mr Hutcheon says that this was not a very substantial additional area of evidence for it to address; but the tribunal recognised that, it seems to me, at paragraph 33.

76. I do note, however, that the tribunal also said there that this amendment was out of time, and it also said that the claimant, were it to be refused, would not lose out on the possibility of being

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awarded injury to feelings. But it does not seem there to have addressed the fact that he would lose out on the possibility of seeking to rely in substance on a further disclosure being an influence on the treatment which he said had followed. There does also once again seem to be a heavy emphasis on delay in paragraph 34.

77. I have found the position relating to the additional protected disclosure to be more finely balanced, but I have concluded that those aspects, when set alongside the earlier errors that I have identified in relation to the section 103A claim, mean that, even though it properly identified some forensic prejudice, I cannot be confident that the tribunal properly considered how the question of delay and/or the time limit point should sit in the overall balance, when weighing up the competing hardships to either claimant or respondent of either allowing or refusing this amendment.

78. I have therefore concluded - just - that the tribunal's decision on this point is also unsafe; and therefore that the appeal is allowed in this respect as well.

Disposal

79. I have now heard argument on remission. In accordance with **Jafri v Lincoln College** [2014] ICR 920 and other authorities to similar effect, I must remit to the tribunal any matter that would require further investigation or findings to be made. Where no further findings are required, I must still remit to the tribunal unless I can confidently say that only one right answer is possible, or the parties agree that I have all the material I need and are content for me to determine the question without remission even if there isn't only one possible right answer.

80. In relation to the s103A amendment, Mr Hutcheon says I have all the material I need and there is only one right answer; Mr Lomas does not accept there is only one right answer but is content that I have all the material that I need and for me to determine the matter without remission. I,

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therefore, will determine whether this application to amend should, on fresh consideration, be granted. I am satisfied that it should. That, in particular, is having regard to the fact that, in my view, and in light of the findings that the tribunal itself made, there is, if not no, then almost no new significant area of enquiry which granting this application will require.

81. The question of whether the claimant made protected disclosures is already in play and will have to be determined for the purposes of the detriment claim. The question of the reason for dismissal will have to be determined for the purposes of the ordinary unfair dismissal claim and the focus will be on what influenced the mind of the manager who took the decision to dismiss, and who the respondent will need to decide whether to call to give evidence for the purposes of defending the ordinary unfair dismissal claim. The dismissal letter is the same and there is no suggestion that any more documentary or other witness evidence will be called for.

82. I say that the evidence and the factual issues are *almost* identical because that manager will be called upon, perhaps, to give some more evidence about what he knew or didn't know about the protected disclosures, and I can't rule out that there might be some additional ancillary evidence about that; but it is closely overlapping with the existing issues in the case and there has been no suggestion that there will be any inability on the part of the respondent to marshal that evidence. Further, applying the guidance in **Abercrombie** I do not consider that, even though the timing point, because of these differences, strictly does comes into play, it should outweigh the arguments in favour of permitting the amendment.

83. The other points of prejudice balance each other out. If I refuse the application, the claimant will not be able to run the section 103A point, and possibly win it, and receive uncapped compensation. If I grant it, then the respondent will have to defend it and will be exposed to the risk of losing that complaint and having to pay uncapped compensation. Those balance out.

84. The overall balance of prejudice is, therefore, firmly in favour of allowing the amendment.

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85. In relation to the fifth disclosure, I agree with Mr Lomas, and Mr Hutcheon came close to conceding in argument, that I do not have all the information that I would need in order to determine this application and I cannot be sure, in any event, that there would be only one right answer to it. Whether that amendment should be granted will have to be remitted to the tribunal, therefore, which will need to consider, in particular, with further substantive attention, what the practical implications of allowing it would be in terms of marshalling of evidence. I have said that the tribunal has already made the fair point that it would require *some* further evidence. I think that the practical implications of that now require closer scrutiny, so that the tribunal can come to a decision firmly rooted, ultimately, in the balance of hardship.

86. Having heard further submissions I will direct that the fifth-disclosure amendment application be remitted for consideration by a different judge. Mr Hutcheon has requested it, Mr Lomas does not object; and while I am sure that if it went back to EJ Reid, she would conscientiously consider it afresh in light of my decision, it is important that, whatever the decision is next time, both parties have confidence in it. It is a very limited, self-contained point. It is not essential that EJ Reid consider it, nor is there any huge practical advantage in her doing so. So I will direct remission of this aspect to any judge other than EJ Reid.

87. I make two final observations about that application. First, I leave it to the tribunal to consider whether it needs a further hearing to determine it or whether it could be dealt with, for example, by written submissions. I am not going to tie the tribunal's hands on that; and the parties might want to think about it.

88. Secondly, the parties will have an opportunity to take stock of where they are now generally in the litigation, including in relation to this point, and I merely raise the possibility that the parties might want to consider whether they can actually come to some proposed agreement as to how the tribunal might be invited to deal with this proposed amendment. I express no view on that.

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I merely encourage the parties to give some thought to it.

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