EMPLOYMENT TRIBUNALS

Claimant: Mrs S Walker

Respondents: 1. Cooperative Group Limited
2. Richard Pennycook

HELD AT: Manchester (in private by CVP) **ON:** 14 December 2022

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: Ms S Aly, Counsel
Respondents: Mr Andrew Burns, one of His Majesty's Counsel

RESERVED JUDGMENT ON APPLICATION TO AMEND

It is the judgment of the Tribunal that:

1.The claimant requires permission to amend her claims by amending para. 24.3 of the Claim Form , to add claims that by reason of the act of direct sex discrimination found by the Tribunal, she suffered loss in the form of loss of LTIP entitlements.

2. The Tribunal grants the claimant permission to so amend her claims to add, (deleting parts of the previous text), at para. 24.3 of the Re – Amended Claim Form the following:

"24.3 Financial Loss, e.g. in respect of (i) the difference between the AIP bonus she has received for 2015 based on a "partially achieved" rating and the AIP bonus she would have achieved on an "exceeds" rating, and/or (ii) any LTIP entitlements she lost out on as result of being off work due to ill health during her notice period because of the 2015 "partially achieved" rating. For the avoidance of doubt, it is the Claimant's case that had she been well enough to attend work during her notice period, she would have been offered the role of Chief People Officer (given to Helen Webb), or in the alternative, treated in the same way as Mr Asher and allowed to enter into an arrangement, either by prolonged employment or by being deemed a "Good Leaver" under the Co-Op's LTIP plan, or a combination of the two so as to allow her to retain and benefit from her LTIP awards for 2014-2016 and 2015-2017 and be awarded and benefit from an LTIP award for 2016-2018. "

CASE MANAGEMENT ORDERS

It is the Order of the Tribunal that:

1.The respondents have permission to file and serve an amended response to the Re-Amended Claim Form by **15 May 2023**.

2.The claimant do serve an updated Schedule of Loss by **12 June 2023**, and the respondents do serve any Counter-Schedule of Loss by **26 June 2023**;

3.The parties do exchange copy documents relevant to remedy by **10 July 2023** , and the respondents do prepare the remedy hearing bundle, to be agreed by **24 July 2024**.

3.There be exchange of witness statements in relation to remedy by **14 August 2023**.

4.The parties are to notify the Tribunal by **21 August 2023** of their estimated length of hearing for the remedy hearing , and dates to avoid for the ensuing 12 month period.

5.The parties do by **21 August 2023** agree and provide to the Tribunal a List of Remedy Issues, a timetable for the remedy hearing, and request any further case management orders for the remedy hearing as they deem fit.

REASONS

1. The Tribunal convened , pursuant to a preliminary hearing held on 29 April 2022, to :

a). Determine whether the claimant requires permission to amend her claims to advance a claim in respect of remedy that she is entitled to seek to recover losses she claims to have sustained in respect of the first respondent's LTIP scheme(s) as a result of the direct sex discrimination found by the Tribunal, and if so, whether such permission should be granted;

b). Make any further consequential case management orders as may be required for the remedy hearing; and

c). List the remedy hearing.

2. In preparation for the hearing the Tribunal made orders which the parties had complied with.

3. There was therefore before the Tribunal a Skeleton Argument in support of the application to amend or submission that no permission to amend is required, a Skeleton Argument opposing the application, and an agreed bundle.

Background.

4. By a reserved judgement sent to the parties on 13 November 2018, following a hearing in August 2018, the claimant's claims of unfair dismissal and direct sex discrimination (against both respondents) were upheld, as was her claim for equal pay. In a subsequent appeal to the Employment Appeal Tribunal the respondent successfully overturned the Tribunal's finding on equal pay, with the result that the only claims in respect of which the claimant had succeeded were those of unfair dismissal and direct sex discrimination. The claimant's subsequent appeal to the Court of Appeal was unsuccessful, and consequently the Tribunal now needs to determine remedy in respect of the two claims in which the claimant has succeeded. Whilst the claimant did seek permission to appeal to the Supreme Court in respect of the pay claim, this permission was refused, and by letter of 19 November 2021 the claimant's solicitors notified the Tribunal and the respondent of this development.

4. The claimant now makes application, if needed, for permission to amend her claims in relation to remedy to seek recovery of sums that she will allege would have been paid to her pursuant to the respondent's Long Term Incentive Plan (LTIP"). These sums , the Tribunal understands , the claimant will claim as losses arising from her successful complaint of direct sex discrimination.

5. The claimant's intention to seek compensation on this basis was indicated in her solicitor's letter of 19 November 2021 , but at that stage no formal proposed amendment was advanced. By letter of 21 April 2022 the claimant's solicitors set out further details of her proposed additional claim, and enclosed a draft Re – Amended Claim Form. A preliminary hearing was listed and held on 22 April 2022. It was not feasible to determine the application to amend in that hearing, so the Employment Judge (Holmes) postponed it, and made case management orders for its determination in a full hearing before him.

6. The claimant was represented by Ms Aly of Counsel in this hearing, and the respondents by Mr Burns KC. There was an agreed bundle for this preliminary hearing, running to some 275 pages. Both Counsel had prepared Skeletons to which they spoke in their oral submissions. The parties' respective arguments will be apparent from the ensuing discussion of the application.

7. Suffice it to say, in summary, that the claimant's position is , firstly, that permission to amend is not, in fact, required, and secondly, that if it is, then on the principles amendment laid down in ***Selkent*** the Tribunal should exercise its discretion in favour of the claimant . The respondent's position is that what the claimant is seeking to add to her claims on remedy does indeed amount to an amendment, for which permission should not, applying the ***Selkent*** principles , be granted.

8. The Tribunal reserved its judgment, which is now given, with apologies for the delay occasioned , in part, by the Tribunal bespeaking the original hearing bundle, and , in particular the claimant's witness statement, and in part by pressure of judicial business.

The application and its history.

9. By way of further context, the Tribunal will set out the salient features of the litigation, and how this application comes before it. The claim form was presented on 8 September 2016 by solicitors acting for the claimant , who was formerly employed as Chief Human Resources Officer of the respondent, a very senior position, which made her a member of the respondent's Executive Committee. In her claims, in which she has at all times been legally represented , the claimant claimed unfair dismissal (in both ordinary and automatic species), protected disclosure detriments, equal pay, sex discrimination (direct, indirect and victimisation), and associative disability discrimination. Attached to the ET1 was a 12 page document (rather inaccurately entitled "Claim Form", which it was not, it was grounds of , or particulars of, claim) drafted by the claimant's lawyers setting out the details of her claims as they were at that time.

10. Para. 24 of that document sets out the claimant's claims for compensation in respect of losses sustained by reason of the foregoing alleged acts of discrimination, including financial losses, of which more will be said below. Para. 25 pleads in respect of the claimant's losses as a result of being unfairly dismissed, and/or being dismissed discriminatorily, the same losses (save where they would not be recoverable) as are set out under para. 24. Finally, at para. 27 , there is a indication that the claimant will serve a schedule of loss and of recommendations in relation to her equal pay claim.

11. After some delay, and a stay pending internal grievance procedures, a preliminary hearing was held on 1 September 2017. The claimant was intending to amend her claims, and was to do so by 1 October 2017. She was also by that date to serve a schedule of loss, with provision for the respondent to serve a counter schedule. The final hearing was listed to commence on 13 August 2018. Orders were made for disclosure in late 2017, and preparation of the hearing bundle by January 2018.

12. The claimant amended her claim by sending to the Tribunal her "Amended Claim Form" (which is what appears in the bundle for this hearing at pages 15 to 29) on 29 September 2017. At the same time, as directed, she served her schedule of loss, which is at pages 60 to 68 of the bundle.

13. The amendments to the claim form were to incorporate further allegations which potentially went to issues of liability, but no amendments were made to para. 24, and only a minor one to para. 25 which has no bearing on this application.

14. In the section headed "Equal Pay Claim", at para. 2.4 this is pleaded:

"For the avoidance of doubt, the Claimant (i) was contractually entitled to a guaranteed level of bonus (or AIP) as a percentage of salary for 2014, (ii) was given a partially achieved rating for her performance in 2015, which impacted on the level of AIP she was awarded for that year, and (iii) was given notice of dismissal at the beginning of April 2016, which disentitled her from receiving AIP and LTIP awards in that year and up to the date of her dismissal. The figures given in this section assume the 'lawfulness' of both the 2015 performance rating and the giving of notice, and reflect only the pay differentials between the Claimant and the Comparators on

that assumption. The Claimant contends, however, that the 2015 performance rating and the decision to give her notice were themselves acts of victimisation and/or discrimination, with adverse financial consequences for her. The losses consequential upon this are set out in the following section of this Schedule."

15. The next section of the schedule headed "Compensation for detriment suffered pre – dismissal" (pages 62 to 64 of the bundle) sets out the sums that the claimant was claiming in respect of payments of AIP and LTIP bonuses. The basis for these claims is set out in paras. 3.1 and 3.2 as follows:

"3.1 The Claimant will contend that at all material times her performance was, and should have been rated as "exceeds", as a result of which she should have been granted an AIP of 65% of salary (an "exceeds" rating equates to 60-75% of salary). In any event, the Claimant will contend that her performance was at least as good as that of her Comparators and should at least have been rated as such.

3.2 The figures given at 3.3 below reflect (in respect of AIP – LTIP figures to follow when known): (i) the difference between what she was paid in 2015 and what she should have been paid (with an "exceeds" rating), and (ii) what she should have been paid in 2016 and 2017 in circumstances where she was paid nothing (ostensibly because she was an employee under notice). They assume that the Claimant should have enjoyed the same salary and benefits as her Comparators (i.e that the equal pay claim succeeds)."

16. Para. 3.3 then goes on to set out figures, with those for the LTIP element left as "TBA" , because they were not at that time ascertainable. Para. 3.4 then pleads in the alternative on the basis that the claimant should have been granted a *"bonus/AIP based on (at least) an 'achieved' rating for 2016 and the start of 2017'*. In the ensuing calculations reference is again made to both AIP figures, the former being given, the latter being again "TBA". Para. 3.5 repeats this exercise , but on the alternative basis that the claimant's equal pay claim did not succeed, and was given an 'exceeds' rating. Para. 3.6 does the same thing in the same alternative, but on the basis of the claimant only receiving an 'achieved' rating.

17. Para. 4 et seq. of this document (pages 64 to 65 of the bundle) sets out the claimant's losses consequential upon dismissal (not, be it noted, confined to unfair dismissal, but including the possibility of the dismissal having been discriminatory) . Her losses are set out in para.4.5 , and are likewise predicated on the two alternative bases of her equal pay claim either succeeding or failing. Losses are sought in respect of the period from the EDT (4 April 2017) up to the date of the hearing being concluded (31 October 2018) and then continuing.

18. In these figures, for the initial period up to 31 December 2017, the claimant has not provided figures for the loss of the LTIP element, again they are "TBA", but in respect of the later periods from 1 January 2018 onwards , she has.

19. The respondent's counter schedule (pages 69 to 70 of the bundle) does not touch specifically upon the LTIP bonus but does set out the levels of AIP bonus actually paid, and what these would have been if the claimant had been rated as 'achieving' or 'exceeding'.

20. The Tribunal, at the preliminary hearing on 1 September 2017, listed a further preliminary hearing on 19 February 2018. Its purpose was to review the List of Issues which was to have been provided shortly before that hearing, consider the effects of the amended claims and response that had been ordered, and generally to review the case prior to the hearing listed for August 2018, and to consider, if necessary, any issues with the bundle, pursuant to the orders made for disclosure.

21. In the event, the preliminary hearing listed for 19 February 2018 was held, in fact on 20 February 2018. That hearing (to which neither party has referred in this application) considered a number of matters, predominantly an application by the claimant for specific disclosure, which was granted in part . No mention was made in that hearing of any intention to amend the claims in respect of the LTIP bonus loss. Indeed, none of the documentation of which disclosure was sought by the claimant related to these issues.

22.The claimant was represented by Leading Counsel at that hearing, and he prepared a Note for use in it. From that Note, and indeed the Tribunal's Orders, there appears to have been no reference to issues of loss and damage, and no mention appears to have been made of, or requests for disclosure of any material relating to, the LTIP bonus scheme, and what the claimant's entitlements under it would have been .

23. The history of the claims thereafter is as follows. The liability hearing was held between 13 to 31 August 2018, with deliberations thereafter in chambers, and a reserved judgment then being sent to the parties on 13 November 2018. The Tribunal did not consider remedy, it being agreed that the hearing would only determine issues of liability at that stage. The claimant's claim of unfair dismissal against the first respondent, and for equal pay against that respondent, and her claim of direct discrimination against both respondents, in relation to the decision to grade her performance as only 'partially achieved' for 2015 , succeeded , all other claims were dismissed. The parties were invited to seek to agree remedy, and, in default, the claimant was to apply for a remedy hearing.

24. The respondents appealed to the EAT. The first respondent was successful in its appeal against the finding that the claimant was entitled to equal pay, but the appeal of both respondents in respect of the finding of direct sex discrimination was unsuccessful. The claimant cross – appealed the dismissal of her other direct sex discrimination claims (in respect of her dismissal) , but this was unsuccessful. The judgment of the EAT was handed down on 11 October 2019.

25. The claimant then appealed to the Court of Appeal against the EAT's dismissal of her equal pay claim, and again against its dismissal of her cross - appeal before the EAT of her other direct discrimination claims. The respondents did not appeal the EAT's decision in respect of the one finding of sex discrimination that it had upheld. The claimant's appeal on the equal pay claim failed, as did her appeal on the dismissal of all other direct discrimination claims. The date of the Court of Appeal's judgment is 14 August 2020.

26. On 28 September 2020 the Tribunal wrote to the parties asking them to confirm a time estimate for a remedy hearing. The claimant , however, then made an application for permission to appeal to the Supreme Court, and it was not until the Tribunal chased the parties for an update by letter of 5 November 2021 that the respondents' solicitors informed the Tribunal by letter of 19 November 2021 that permission to appeal to the Supreme Court had been refused (pages 200 to 201 of the bundle). The Employment Judge has since learned from the Supreme Court Registry that the application for permission to appeal was refused on 26 July 2021.

27. The respondents' letter went on to refer to communications from the claimant' solicitors, which suggested that the claimant was seeking to raise an issue that had not previously been pleaded or particularised, the "LTIP issue", as they called it. They indicated that they would oppose any such attempt to add these to the issues on remedy. They sought a preliminary hearing in order to clarify and identify the remedy issues, and reserved their position to argue that the LTIP issue had not been pleaded, and should not form part of any remedy in the case.

28. The claimant's solicitors also wrote to the Tribunal the same day, albeit slightly later than the respondents' email, confirming the position, and, indeed, declaring an intention to add "Loss of AIP and LTIP" to the remedies sought (pages 202 to 205 of the bundle). They did so by setting out in the letter the basis upon which the claimant would claim compensation, thus:

"1 Unfair Dismissal

1.1 Basic Award.

1.2 Compensatory Award

1.2.1 As a result of the Claimant's unfair dismissal, she remained unemployed for a significant period and she has still not been able to secure alternative employment. The Tribunal accepted the Respondents' argument that the Claimant's dismissal was by reason of a reorganisation which would result in the loss of the roles of both the Claimant and their in-house counsel, Alistair Asher. In fact, the Claimant's role did not disappear but was taken by another employee, Helen Webb, who remains in that role but with an increased salary and benefits package. Mr Asher remained in post for many months after the Claimant's contract was terminated and eventually exited the business with a substantial settlement package. The Claimant will contend that were it not for her unfair dismissal, she would have remained in her role until she retired. Alternatively, at the very least, she should have remained in post until the date Mr Asher's contract was terminated. In either event, the Claimant's loss of salary and benefits significantly exceeds the statutory maximum which the Claimant claims.

2 Sex Discrimination

2.1 Loss of AIP and LTIP arising directly from the sex discrimination

2.2 Injury to feelings

2.2.1 The Claimant will contend that she is entitled to damages at the higher end of the "Vento" middle band. "

The letter continues with other heads of claim, but none of these are germane to this application. It goes on to propose case management directions for a remedy hearing.

29. The respondents' solicitors wrote again on 6 December 2021 (page 206 of the bundle) renewing their request for a preliminary hearing.

30. A preliminary hearing was listed (after an initial postponement) on 29 April 2022. In the meantime on 21 April 2022 the claimant's solicitors wrote to the Tribunal (pages 207 to 212 of the bundle) , providing further particulars of , or effectively making, if one is necessary, application to amend the claims to include, the LTIP issues, and seeking other orders. A draft Re – Amended "Claim Form" was attached, with the proposed amendments in red tracked changes (reproduced by underlining in this monochrome judgment, and omitting the deletions) . Those changes to para. 24.3 are as follows:

24.3 Financial Loss, e.g. in respect of (i) the difference between the AIP bonus she has received for 2015 based on a "partially achieved" rating and the AIP bonus she would have achieved on an "exceeds" rating, and/or (ii) any LTIP entitlements she lost out on as result of being off work due to ill health during her notice period because of the 2015 "partially achieved" rating. For the avoidance of doubt, it is the Claimant's case that had she been well enough to attend work during her notice period, she would have been offered the role of Chief People Officer (given to Helen Webb), or in the alternative, treated in the same way as Mr Asher and allowed to enter into an arrangement, either by prolonged employment or by being deemed a "Good Leaver" under the Co-Op's LTIP plan, or a combination of the two so as to allow her to retain and benefit from her LTIP awards for 2014-2016 and 2015-2017 and be awarded and benefit from an LTIP award for 2016-2018. "

The First Respondent's Bonus Structure

31.The First Respondent does not use the word "bonus" within its internal bonus structures. It nevertheless has two schemes in place that can be described as bonus structures; the Annual Incentive Plan (AIP) and the Long Term Incentive Plan (LTIP). The AIP was paid to employees each year based on their performance. It is not in dispute that the Claimant would be entitled to assert her claim for these losses at the remedy hearing.

32. The LTIP was awarded to employees annually and vested 3 years later, at the end of the performance period. The award would be paid to employees in or around the following March. For example, an LTIP which was awarded on 1 January 2015 would vest on 31December 2017 and be paid in or around March 2018. It is also not in dispute that in September 2015, the terms of the First Respondent's LTIP changed to include a performance element to apply to subsequent bonus awards. At page 254 of the bundle paragraph 2.7 of the LTIP terms states:

"The committee may impose a performance condition or conditions on the vesting of awards ("Performance Condition"). Participants will be notified of any Performance Condition at the Grant Date. The Committee has the absolute discretion to adjust the Performance Condition and/or the performance targets before the vesting dates should this be deemed necessary to ensure that eligible employees are appropriately challenged to deliver the development of the Group and are appropriately rewarded for delivering the underlying principles behind each target"

33.At paragraph 5.3 of the terms, it is stated that:

"An award shall only vest to the extent that any Performance Condition is satisfied as determined by the committee"

34. Ms Aly submitted that the Respondents may seek to argue that these awards would not apply to leavers and/or that these were company performance metrics only. However, he pointed out, within its own terms, it is stated that at paragraph 6.2 of the terms:

"The Committee may at its absolute discretion apply Good Leaver stated in limited circumstances which might include termination of employment on the grounds of redundancy or ill health retirement, in which case the Award shall be:

(a) pro-rated to reflect the time they were employed by the Group;

(b) Subject to the original performance period and shall not Vest any earlier than the Award will Vest for those participants who remain in the LTIP;

(c) Subject to the original Performance Condition which attaches to the award.

35. At page 263 of the bundle, a further reference is made to performance insofar as it relates to "good leaver" status, which indicates that:

"…..they shall retain "Good Leaver" status provided there were no performance issues".

36. The change in terms in late 2015 was reiterated to the Claimant by a letter to her from the First Respondent dated 19 October 2015 at page 258 of the bundle, which states:

"The purpose of the 2015-2017 LTIP is to incentivise senior colleges in Grade A and Grade B on the achievement of longer term goals which focus on and support the continuing rebuilding of the group"

"Any payments under the 2015-2016 LTIP awards are subject to the achievement of performance metrics at the end of the 3 year performance period as assessed by Remco"

37. The documents contain a worked example at page 272 of the bundle, which states:

"For example, a Group Executive member on a base salary of £500,000, with a target incentive opportunity of 50%, receiving an individual performance rating at or above "Achieving", and with the combined achievement of the performance measures would achieve the following award" (emphasis added)

38. There is also a handwritten reference at page 267 of the bundle under "committee discretion" to indicate that the company intention was that the LTIP award would apply "only in years where you achieve". It is acknowledged that this is the Claimant's handwriting, as it was part of her role to assist in drafting these policies for the First Respondent.

39. These performance elements to the LTIP did not exist in the earlier version of the LTIP policy (pages 241-251 of the bundle).

40. The award of the LTIP was also affected by an employee's attendance at work, as outlined at 6.5 of the terms which state:

"Where a participant had a period of absence in any performance period, any Vested Amount will be pro-rated based on their time worked and any periods for which they are in receipt of enhanced Group paid leave (in excess of the statutory entitlement) relating to that period of absence during the performance period."

41. The Claimant had a period of sick leave following her partially achieved performance rating, due the claimant claims, to the distress flowing from the discriminatory acts of the Respondents as outlined in the Claimant's solicitor's letter to the Tribunal of 21st April 2022.

42. The Claimant was paid her LTIP in 2015 at a rate of 50% (the maximum entitlement being 100% of salary). Her ET1 was submitted on 8 September 2016. At this date, the 2016 element of her LTIP was not yet due. It is also not in dispute that the Claimant was not ultimately paid any LTIPs, following the submission of her claim.

Appropriateness of including LTIP loss into the remedy hearing – the claimant's case.

43. The Claimant's primary assertion was that she should be entitled to claim all heads of loss that were applicable to her at her remedy hearing (as would be the ordinary case for any remedy hearing), rather than the Respondents being able to "cherry pick" certain heads of loss to exclude ahead of such a hearing. The Claimant asserts that such an exclusion is not only highly unusual, but not in accordance with the overriding objective in relation to fairness. It is wholly inappropriate to exclude such an issue from a remedy hearing, simply because the Respondents may have to disclose more evidence or because a remedies hearing may take longer. The fact remains that the Claimant should be entitled to put forward a claim for all her losses as opposed to just the ones the Respondents wish to deal with. If the Respondents genuinely do not believe that an LTIP loss could not flow from its discrimination of the Claimant in relation to her performance, it would have the opportunity to challenge the Claimant's evidence on the applicability of the LTIP.

44. Hearing the matter properly at a remedy hearing would also allow the Tribunal to hear adequate evidence on the issue and decide whether the loss did flow from the Claimant's performance review, as opposed to making a decision on the matter without the Claimant having the full opportunity to give evidence on it and argue her case. In particular, if determined at a full remedy hearing, the Tribunal would have the opportunity to assess:

1. The terms of the LTIP, as outlined at paragraphs 4-16 of this skeleton. It is the Claimant's position that it is obvious that performance became a key part of the award for LTIPs and that her discriminatory rating would therefore play a part in the fact that she was not awarded any LTIPs after the terms changed.

2. The Claimant's & Respondents' evidence, which would undoubtedly include the issue of where such awards were made in the past and/or at the time of the Claimant's departure. A bare assertion by the Respondents at this hearing that they simply could not apply to the Claimant is completely inadequate without giving the tribunal an opportunity to properly analyse the evidence at a full remedy hearing.

3. The fact that 4 males who exited the business at around the same time as the Claimant (including Mr. Pennycook and Mr. Asher) all kept their LTIPs upon leaving the First Respondent, indicates that the Respondents cannot simply rely on the Claimant's employment being terminated for such an award to cease to apply. The distinguishing feature is that the Claimant was the only female, and the only person who received a "partially achieved" rating. The Claimant would also state that the terms of the LTIP would support her keeping them given the reason for her termination, and/or that she would have been offered the role offered to Ms. Webb and not have been required to leave.

45. It is therefore averred that it would be wholly inadequate to make such important determinations on the basis of skeleton arguments only, and that matters should be properly argued before the Tribunal at a full remedy hearing.

Pleadings Issues – the claimant's position.

46. The Tribunal is to make a determination as to whether the LTIPs issue can be argued in any event on the basis of whether it was properly included in the Claimant's original pleadings or whether an amendment application is necessary to include these. The Claimant asserted that:

1. This issue had already been pleaded before the Tribunal and therefore is a matter to be properly considered in relation to the remedy hearing; or

2. In the alternative, if the Tribunal is of the view that this matter had not been properly pleaded, the Claimant should be permitted to amend her ET1 in order to reflect the LTIPs as an additional head of loss.

(1) Matter already pleaded

47. The Claimant pleaded her damages claim at paragraph 24 of her original ET1. The relevant pleading at paragraph 24.3 states as follows:

"Financial Loss, e.g. in respect of (i) the difference between the bonus she has received for 2015 based on a "partially achieved" rating and the bonus she would have achieved on an "exceeds" rating, and/or (ii) any contingent bonus and/or LTIP entitlements she loses as a result of being given notice, and/or (iii) the disadvantage she has suffered and will suffer in the labour market by reason of her removal from the EC and/or her illness and absence from work and/or any negative publicity associated with the fact that she has had to make this claim."

48. The Claimant has been successful in her claim as it relates to discrimination as a result of her "partially achieved" rating. Part (i), relating to the losses that she would have received based on her 2015 ratings simply uses the word "bonus" as opposed to distinguishing the two types of bonuses that existed within the First Respondent .It was therefore submitted that this should be read to include all bonuses that she would be entitled to and not simply limiting the types of bonus as the pleaded paragraph makes no such distinction.

49. It was acknowledged by Ms Aly that part (ii) does make a distinction between contingent bonus and/or LTIP requirements in relation to being given notice. However, this phrasing is in relation to a separate head of claim and is not relevant to section (i), which the tribunal would be concerned about at the remedy hearing.

50. The date of the issue of the ET1 form predated the Claimant's 2016 LTIP payment date, which would have been in October 2016. At the time of submitting her ET1, it was therefore not possible to quantify fully what her loss would be or indeed to particularise or distinguish between the types of applicable bonus that would be withheld (hence the use of the general term "bonus" in relation to this paragraph).

51. Furthermore, the fact that the Claimant's comparators were awarded their LTIPs, despite also leaving the First Respondent only came to light during the Claimant's liability hearing and preparation of the tribunal bundle in 2018. It was therefore argued that the only matter distinguishing the awards made were the Claimant's sex, flowing from her discriminatory performance review and not simply her dismissal.

52. The Respondents further admitted at that hearing that Ms. Webb was offered the role of Chief People Officer. This is confirmed in the First Respondent's 2017 Annual Report (published in April 2018). The Claimant's position is that this would have been a natural role to have been offered to her, given her position as Chief Human Resources Officer.

Amendment – the claimant's alternative position.

53. If, however, the Tribunal was not of the view that the original pleading is wide enough to encompass the Claimant's LTIPs, the Claimant proposed the amendment to her original paragraph 24.3 in the terms set in para. 30 above.

54. Although it was the Claimant's primary case that her original pleading was wide enough to cover the LTIP issue at the remedy hearing, her proposed amendment does delete the parts of her claim that are no longer relevant given the findings made by the Tribunal, and adds further clarity to the LTIP element of her claim, which

would not be pleaded fully in 2016, given that the LTIP payments were not due for vesting at the time of her original claim.

55. The Claimant asserted that her application to amend fulfils all the ***Selkent*** principles, which the Tribunal will be very familiar with, and are quoted for ease of reference:

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.

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.

56. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal had to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits.

57. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g., in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978.

(c) The timing and manner of the application.

58. 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 on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

Hardship – the claimant's case.

59. It was undeniable Ms Aly submitted, that the Claimant would suffer the greater hardship in not being permitted to amend her claim if required than the Respondents

would. The LTIP element of her claim is valued as described in her Solicitor's letter to the Tribunal of 20 April 2022, and forms a substantial element to her remedies claim. This would undoubtedly result in a substantial loss to her, particularly in light of the fact that the First Respondent's own terms in relation to LTIP specifically refer to performance, which the Tribunal has already found to be applied to the Claimant in a discriminatory way. Although the Respondents may be liable for a greater sum if this element is allowed, it would only be found liable if it is properly determined by the Tribunal that it would be liable, and therefore it cannot be said that the Respondents would be suffering from hardship in facing a higher value claim.

60. On the other hand she asserted that the Respondents would suffer no hardship, and that the disclosure in relation to this element was largely complete, save for the items of disclosure that the Respondents have refused to provide as outlined in the letter to the Tribunal of 20 April 2022. It is not accepted that a remedy hearing would need to be lengthier if the LTIP element was permitted to proceed, but even if presuming this is the case, this was not sufficient to suggest that it would be a meaningful hardship to the Respondents, indicating that the amendment should not be made.

61. If the Respondents had any further genuine evidence to suggest that LTIP should not have been properly awarded to the Claimant in any event, they should be required to disclose such information, alongside that requested by the Claimant in the ordinary way, as opposed to absolving themselves from being properly liable for it on any technicality. It was nevertheless contended that the majority of disclosure in relation to this element has already been done. The Claimant suspects that the Respondents do not have reasonable evidence to argue properly that it was justified in withholding her LTIPs, and are able to give further oral evidence in relation to why she should have been entitled to these. It was therefore argued that the balance of hardship clearly favours the Claimant in relation to this element of ***Selkent***.

Nature of the Amendment

62. It was asserted by the Claimant that the proposed amendment is minor in nature, which falls into "the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to" in this particular case. As stated at paragraph 3 of the Skeleton, the term "bonus" was not one that was used at the First Respondent in relation to either of its bonus schemes. The Claimant relied on the arguments put forward in paragraph 19 of the Skeleton in that "bonus" was simply used as a general term for all bonuses she would have been entitled to, and this amendment was therefore nothing more than a re-labelling of her claim.

63. Furthermore, the Claimant accepts that her proposed amendment does add more detail to the factual matrix which forms the basis of her claim. However, it was submitted that the argument in relation to this was already pleaded, and that she was only able to add more detail at this stage following the non-payment of her LTIPs and subsequent admissions made by the Respondents at the liability hearing. Such detail and precision in relation to this pleading was therefore not possible at the time she wrote her ET1.

Time Limits & Timing of application

64. If the Tribunal were to agree with the Claimant's primary assertion that this amendment application is a simple re-labelling or addition to already pleaded facts, then it was unnecessary for the Tribunal to consider time limits. However, if the Tribunal was not persuaded by that, the applicable test in relation to time limits would be whether it would be just and equitable to allow the Claimant to make the amendment at this time under the discretion afforded to the Tribunal in section 123(1)(b) Equality Act 2010 (EqA).

65. The circumstances as to whether time limits should be extended on just and equitable grounds has been recently considered by the EAT in ***Wells Cathedral School Ltd v Souter & Leishman [EA-2020-00801].*** The Tribunal's attention was drawn in particular to paragraph 30-33 of the decision, which dissuade the Tribunal from taking a "mechanistic approach" to the decision as to whether to extend time or not. It also refers to the list of factors originally stated in ***British Coal Corporation & Keeble***, but that these should not simply be used as a checklist.

66. In this particular case, it was argued that the following factors would be particularly relevant for the Tribunal to consider, but that the facts and circumstances should be considered as a whole, as opposed to seeing each of these factors as a checklist for the Claimant to fulfil:

1. Delay
2. Cogency of evidence
3. The Claimant's knowledge
4. Subsequent promptness of the application
5. Prejudice to the parties

Delay, Knowledge & Promptness

67. It was acknowledged that the Claimant has not received her LTIPs since 2017. However, at the time of her original pleading, the Claimant was not aware that the Respondent was in fact going to withhold her remaining LTIPs, given that that the next LTIP was not due to be paid until March 2018.and it was unclear whether she would be permitted to retain them. Her liability hearing took place in August and October 2018 and the Judgment in her Court of Appeal decision was handed down on 14 August 2020.

68. At the liability hearing, the Respondents made further admissions as to the payment of LTIPs to other male staff that were leaving, and the true extent of the scope Claimant's remedy hearing would have been unknown until the Court of Appeal's decision in her case.

69. Furthermore, the Claimant had been completely unaware that the Respondents would seek to suggest that LTIPs were not part of her pleaded definition of bonus until 19 November 2021 when they first admitted the same.

70. Therefore, although on the surface, the matters appeared to have suffered from a delay, it is relevant for the Tribunal to balance against this the Claimant's ability to bring such an amendment application prior to this year, given that her knowledge at

the time of the ET1 submission was extremely limited. The Respondents have made subsequent concessions and raised new matters raised in relation to construction of her original particulars which had not been raised prior to 19 November 2021.

71. Once the Respondents had made clear their intention to argue that it was their view that LTIPs were not included in the Claimant's pleadings, the position as to amendment remained unclear, given that a PHR was requested on this point. The Claimant was also in need of complex technical legal advice in relation to the same. Unfortunately, the Claimant's original Counsel contracted covid during this period and was ultimately unable to assist more expediently, resulting in a change of Counsel. The Claimant was simultaneously also exploring the issue of whether she could continue to argue whether an equal pay audit could form part of her remedy. Under all the circumstances, it was contended that the Claimant's application for amendment has been as prompt as it could have been once the Respondents' position was clarified.

Cogency of evidence

72. The parties have been in litigation in relation to this matter since 2016. This is therefore not a case where the parties are suddenly faced with new litigation years after the event, but a case where the parties have remained alive to the issues between them. The issue of LTIPs would have still been necessary for the Respondents to deal prior to the Court of Appeal decision given that the Claimant had also originally been successful in relation to her equal pay claims. The matter then required a listing for a remedies hearing.

73. This was therefore an issue for which the Respondents have already been prepared to deal with for some time, and would only be benefitting from having an issue excluded for which information would already be available. The Claimant has already disclosed the relevant policies, which were in any event in the Respondents' possession.

74. Given the Respondents' admissions at the liability hearing, they are also already fully aware of the circumstances in which the Claimant's comparators were paid their LTIPs and had indeed given some evidence on this point. It is therefore not accepted that the Respondents would be at any disadvantage in relation to having to disclose further evidence, or the evidence not being fresh in their minds, given that it is evidence that they were already prepared for, and presumably remained prepared for until at least August 2020.

Prejudice to the parties

75. The Claimant relies on the points made above in relation to the hardship that she would suffer in relation to this amendment not being made, as opposed to the minimal hardship the Respondents would suffer in potentially having to have a longer remedy hearing (which is not accepted would be the case). The Claimant would clearly suffer from the greater prejudice, therefore favouring an extension of time.

Timing of Application

76. The Tribunal was reminded that there are no time limits in relation to the question of amendment itself. It was argued that the application to amend is appropriately made at this time, as it falls at a point in time where the Tribunal, Employment Appeal Tribunal and Court of Appeal have clarified the scope of the claims. Furthermore, it was patently obvious that the Claimant has been actively pursuing her claims, and has been until recently focused on the liability elements of the claim as opposed to the remedy elements of the claim which have only become due for determination at this stage.

77. The proposed amendment therefore deletes factors which were no longer relevant to the claims, and clarifies any alleged ambiguity raised by the Respondents this year.

78. Finally, in the course of the oral submissions, reference was made to the email exchanges at pages 231 and 232 of the bundle from March 2016 about the options for the claimant's remuneration in the event of her departure.

The respondents' submissions in reply.

79. In response, Mr Burns KC referred the Tribunal to the new, proposed, wording of para. 24.3 of the Claim Form document, as set out at para. 30 above. He pointed out how in the original pleading the loss of any contingent and/or LTIP bonus was expressly pleaded to be resultant upon the claimant being given notice, not as a result of any act of discrimination. This was thus a wholly new case on causation of loss from that which had originally been pleaded.

80. That clearly showed that there was a need to amend for which permission was required, which the respondent would oppose, and would require the Tribunal to consider the ***Selkent*** principles.

81. The claimant was successful on the detriment claim that "Mr Pennycook's failure to give the claimant an adequate year end appraisal and his decision to grade the claimant's performance as only 'partially achieved' for 2015" amounted to direct sex discrimination (Judgment, para 366, p.155). The failure to carry out an adequate appraisal may result in an award for injury to feelings or personal injury for stress. It may be found to have affected her 2015 AIP (Annual Incentive Plan) bonus, pleaded as financial loss at para 24.3(i). It is common ground that the remedies hearing must consider these limited points.

82. That claim will require little, if any, new evidence as the ET has already found that Mr Pennycook sought approval for a higher appraisal rating (Judgment, para 382, p.157) but found (para 162, p.114) that was not agreed by Stevie Spring (Chair of the Remuneration Committee) whose decision was not alleged or found to be tainted with discrimination.

83. As any compensation arising from her only successful claim is so limited, the claimant has ambitiously, he claimed , applied to re-amend her claim to try to add the enormous LTIP claim. The re-amendment, if allowed, will turn a relatively simple 2 (perhaps 3) day remedies hearing into a 7-9 day hearing. The claimant was trying

to get the Tribunal to reopen questions of liability and causation that were decided at the main hearing. Such an approach is impermissible, he submitted.

The Pleaded Claim

84. The pleaded claim is that:

a) The claimant did not have a year-end appraisal and was subject to a proposal to reduce her role and remove her from the Executive Committee (para 15, p.23).

b) The claimant received a "partially achieved" performance rating for 2015 (para 18, p.25)

c) On 24 March 2016, Mr Pennycook told the claimant that her imminent role change would not be at Executive team level (para 19, p.25).

d) The respondent's behaviour in response to her requesting equal pay and flexible working was to demote her and remove her from the Executive which made her ill, and she was signed off sick with stress for 1 month then another 3 months from 25 March 2016 (para 19).

85. The claimant's pleaded case on compensation is pleaded at para 24 (p.27). She pleads that "in consequence of… direct discrimination… Mrs Walker is entitled to compensation for: Hurt

86. It was common ground that the claimant did receive a bonus for 2015 – that was her AIP bonus that she has pleaded should have been paid on an 'exceeds' basis if there had been no discrimination in the appraisal. It was common ground that this is an issue for the remedies hearing.

87. The claimant's skeleton argument made what he termed a "perfunctory" attempt at para 22-24 to suggest that LTIPs are already part of the pleaded claim in para 24.3(i). Of course, he submitted, that could not possibly be as:

a) no LTIP was 'received' in 2015 – only an AIP.

b) LTIP entitlements are claimed separately in (ii) as a result of the claimant's dismissal.

c) the amount of LTIPs do not vary depending on partially achieving/exceeding ratings.

d) The Schedule of Loss clarified that the bonus claimed in para 24.3(i) was the AIP and that her claim for LTIP was related to her dismissal.

88. As her only pleaded LTIP claim was for Financial Loss namely "any contingent bonus and/or LTIP entitlements she loses as a result of being given notice" (p.28), that is something on which the Tribunal ruled that the claimant lost.

89. Having lost on her LTIP claim, the claimant now seeks – after judgment – to re-amend her claim to attempt to bring a new LTIP claim and attach it by the most extraordinarily tenuous links to the one part of her various discrimination detriment claims that was successful. That was unreasonable conduct of the proceedings and has put the respondent to significant cost.

The Application to Re-Amend

90. The Tribunal's power to amend must be exercised in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions (***Selkent [1996] ICR 836)***. The Tribunal must balance the injustice and hardship of allowing the amendment against refusing it including the nature of the amendment (here, a new head of claim valued by the claimant at more than £800,000, and potentially much higher (p.209)), time limits (here, years out of time), the timing and manner of the application (here, after liability judgment and 6 years after the events that would need to be examined).

91. The re-amendment application seeks to replace the pleading that the claimant lost her LTIPs because of her dismissal with a contradictory claim (p.226) that she lost her LTIPs:

a) "as result of being off work due to ill health during her notice period"

b) "because of the 2015 "partially achieved" rating" and

c) had she been well enough to attend work during her notice period, she would not have been dismissed but would have been offered the role of Chief People Officer (rather than the present incumbent, Helen Webb);

d) alternatively, the claimant would have been treated in the same way as her comparator Alistair Asher (i.e. not dismissed or deemed a "Good Leaver").

Re-Amendment that C would not have been dismissed but for discrimination

92. The most obvious objection was that it would be an abuse of process for the claimant to seek to re-amend to claim that she would have not been dismissed had there been no discrimination. She lost on the same or almost identical issue before the ET. Paragraph 369 of the ET Judgment (p.156) held the "*Claimant and/or a hypothetical comparator holding the CHRO position would have been given contractual notice to terminate their roles together with an invitation to find a new role during the notice period failing which they would leave at the end of it. We do not therefore conclude that the giving of notice was an act of direct discrimination against the claimant because of her sex"*.

93. The cause of her dismissal was also considered at para 380 (p.157) and her claim was rejected on that ground also. The claimant could have put this new claim before the ET , that even if wrong on her primary claims, her dismissal was still tainted by the appraisal discrimination. She did not. In a similar way to the rule in ***Henderson v Henderson*** the claimant could and should have put all her claims before the ET at the main hearing and it is too late to raise a new way of putting her

claim that she would not have been dismissed absent discrimination after she has had judgment and lost.

94. To re-amend to claim that the claimant would have retained her employment and been appointed as Chief People Officer – a role on the Executive – attempts to go behind the ET's findings of fact as well as on causation. The ET found (para 341, p.149) that *"it was the intention of Mr Pennycook to attempt to reduce and/or marginalise the claimant's role and/or to remove her from the Executive"*. The re-amendment attempts to reopen that decided factual issue. That is impermissible and would require extensive evidence about the decision to remove the claimant from an Executive role and the reasons for the decision to appoint Helen Webb as Chief People Officer on the Executive with an LTIP package.

95. Applying ***Selkent***, the nature of the amendment is a new (huge) claim that attempts to relitigate and undermine the principle of res judicata. It is brought years outside the usual 3-month time limit. It would be outrageously unjust to extend time in these circumstances.

96. The timing and manner of the application also militate against permission, it was argued. Not only was this an amendment application made after judgment, but is many years after the events that would need to be examined.

Re-Amendment that C would have been treated as a Good Leaver like Mr Asher

97. The claimant's alternative case is that she would have been granted the same exit package as one of her comparators, Alistair Asher, and she claims that but for her appraisal the respondent would have made the same discretionary LTIP awards as it made to Mr Asher.

98. Whether it was discrimination not to treat the claimant in the same way as Mr Asher has been considered and dismissed. The claimant cannot rely on Mr Asher as a comparator as the ET held at para 368 (p.156) that the circumstances in which Mr Asher left *"were different from the claimant because when they were given notice it was with a view to them leaving, whereas with respect to the claimant contractual notice was given with the possibility of her, during the notice period, agreeing a new role to take effect at the end of the period of notice. As things transpired there was no such agreement."* The re-amendment cannot succeed.

99. The claimant's skeleton argument summarises the issue as whether "it was justified in withholding her LTIPs" (para 33). That is a liability issue and judgment has been given. That is reinforced in para 46 which suggests that the respondent was *"fully aware of the circumstances in which the Claimant's comparators were paid their LTIPs and had indeed given some evidence on this point. It is therefore not accepted that the Respondents would be at any disadvantage in relation to having to disclose further evidence…".*

100. The claimant's skeleton argument does not address how a party can reopen a liability issue and call more evidence after judgment. That is a complete bar to the proposed re-amendment.

101. Even if there was a permissible basis for the claim, the claimant has delayed for 5-6 years in making this application which would usually be a bar to re-amendment in itself. The claimant suggests that her delay in raising this issue is because the claimant "was not aware that the Respondent was in fact going to withhold her remaining LTIPs, given that that the next LTIP was not due to be paid until March 2018 and it was unclear whether she would be permitted to retain them" (para 40). This makes no sense. The claimant had full knowledge of the LTIP terms as she was CHRO and indeed she was even part of the LTIP approvals process in March 2016 (p.266-268). She of course knew she had been dismissed. She knew that any 2014-16 LTIPs would vest and be paid out around March 2017 and yet made no claim in her amended claim (p.3-29) in September 2017.

102. In any event, it was too late for a party to raise a new claim which involves fresh liability issues after the liability judgment. The relevant provisions of the LTIP scheme are even quoted in the claimant's skeleton argument at para 7-10. As the claimant points out, LTIPs are only paid to leavers at the "absolute discretion" of the remuneration committee. There had never been - and cannot now be - any attack on the exercise of this discretion in the claimant's case. For this new claim to succeed she would have to show that the reason that the remuneration committee did not exercise its discretion in her favour was somehow related to the failure to give her an adequate appraisal and the exercise of discretion was itself tainted by discrimination. The only time to do that was at the liability hearing. It is far too late now. Even if there was some merit to the claimant's previous points, that is also a complete answer to this application.

103. In summary , he submitted that he claimant's application was an abuse of process and must be dismissed.

Discussion and ruling

i)Is permission to amend in fact required?

104. The first issue in this application is whether the claimant in fact requires permission to amend at all. The claimant's position is that she does not, it being contended (para.21.1 of Ms Aly's Skeleton) that "the issue had already been pleaded", and can therefore properly be considered in the remedy hearing. The respondent's position is that the claimant does need permission to amend (in fact it would be a re-amendment).

105. It is common ground that the claimant pleaded her damages claim at paragraph 24 of her ET1, where at paragraph 24.3 the followjng is pleaded:

"Financial Loss, e.g. in respect of (i) the difference between the bonus she has received for 2015 based on a "partially achieved" rating and the bonus she would have achieved on an "exceeds" rating, and/or (ii) any contingent bonus and/or LTIP entitlements she loses as a result of being given notice, and/or (iii) the disadvantage she has suffered and will suffer in the labour market by reason of her removal from the EC and/or her illness and absence from work and/or any negative publicity associated with the fact that she has had to make this claim."

106. Ms Aly's contention is that the use of the word "bonus", without differentiation between the two types of bonus that could be payable to the claimant is wide enough to encompass the LTIP bonus in any event, and all the claimant is now seeking to do is to provide further details of this broad head of loss that has already been pleaded. She also makes the point that when the ET1 was presented (on 8 September 2016) this was before the date upon which the claimant's entitlement to any 2016 LTIP would have been payable, which would have been October 2016. She also goes on to observe how the fact that the claimant's comparators were awarded their LTIPs for 2016 only came to light during the liability hearing, and the preparation of the trial bundle in 2018.

107. Mr Burns argues that the claimant has not already pleaded this head of loss. He argues:

a) no LTIP was 'received' in 2015 – only an AIP.

b) LTIP entitlements are claimed separately in (ii) as a result of the claimant's dismissal.

c) the amount of LTIPs do not vary depending on partially achieving/exceeding ratings.

d) The claimant' s Schedule of Loss clarified that the bonus claimed in para 24.3(i) was the AIP and that her claim for LTIP was related to her dismissal.

The claimant's only pleaded LTIP claim , therefore , is for Financial Loss namely "any contingent bonus and/or LTIP entitlements she loses as a result of being given notice" (p.28), that is something on which the ET ruled that the claimant lost.

108. Ms Aly, however, argues that the claimant was not aware , and could not have been, at the time that her claim form was issued that she would not get the LTIP bonus that would vest in 2017. She also relies upon the generality of the term "bonus", which did not differentiate between the two types of bonus.

The need to plead loss – special damage.

109. There are, perhaps, two issues to consider here. The first is a general one – to what extent is a party obliged to "plead" specific heads of loss at all ? In civil claims in general considering how the claimant must deal with damages in the particulars of claim, a basic distinction is made between general damage or damages and special damage or damages. General damage consists in all items of loss which the claimant is not required to specify in their pleadings in order to permit proof and recovery in respect of them at the trial. Special damage consists in all items of loss which must be specified by them before they may be proved and recovery granted. The basic test of whether damage is general or special is whether particularity is necessary and useful to warn the defendant of the type of claim and evidence, or of the specific amount claimed, which the defendant will be confronted with at the trial.

110. "Special damage", said Bowen LJ in ***Ratcliffe v Evans [1892] 2 Q.B. 524***:

"… means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the claimant's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial."

Or, in the words of Lord Donovan in ***Perestrello v United Paint Co [1969] 1 W.L.R. 570*** :

"… if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into court. The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case."

He added:

"If the claim is one which cannot with justice be sprung upon the defendants at the trial it requires to be pleaded so that the nature of that claim is disclosed."

111. In ***Arroyo v Equion Energia Ltd [2013] EWHC 3150*** , Stuart-Smith J held:

"In my judgment, the level of precision that is required when pleading an issue or case, including a particular head of damages, should be determined by the need to provide a fair and sufficient indication to the Court and the opposing party of the case that is being brought and that the opposing party has to meet. Although I am not aware of specific authority on the point, modern pleading practice should not be and is not constrained by whether the label 'general' or 'special' damages is given to a particular item of claim."

112. Whilst the provisions of the CPR do not apply to Employment Tribunals, which are, pursuant to para. 2 (c) of the Overriding objective , to deal with cases in a manner which avoids unnecessary formality and seeks flexibility in the proceedings, the trend has been towards rather greater formality than may have been the case several years ago, as illustrated by the approach of the Employment Appeal Tribunal in ***Chandhok v Tirkey [2015] ICR 527*** where Langstaff P. said this :

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I do not think that the case should have been presented to him in this way or that it should have formed part of his determination. That is because such an approach too easily forgets why there is a formal claim, which must be set out in an ET1. The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013 , the claim as set out in the ET1.

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I readily accept that tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before employment tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a 'claim' or a 'case' is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was 'their case', and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

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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."

113. That was, of course, in the context of claim forms . Much the same, the Tribunal considers , can be said in respect of a schedule of loss. That too should not be something to "get the ball rolling". Furthermore, when considering issues of pleading, context is everything, and the Tribunal is entitled to take a very different view and approach when both parties are legally represented, and have produced what can properly be regarded as "pleadings". The Tribunal's view is there should be no differentiation between the need to plead causes of action, and to plead heads of loss. A claim comprises of both. A claimant has to establish a cause of action, but only has a claim if there is something that he or she can seek as a remedy for that cause of action. In the case of compensation, that will be the remedy which is the subject of the "claim". Losses therefore need to be "pleaded" in the same way as

causes of action. Whilst it may be going too far to start importing notions of general and special damage into Employment Tribunal proceedings , the rationale for the civil litigation principles that draw these distinctions applies just as much to Employment Tribunal proceedings. The purpose of requiring a party to plead its losses is , as it is with matters of liability, to enable the respondent and the Tribunal to understand the claimants case, on all aspects of her claims. Loss is no different from liability, and the same requirements apply to the pleading of loss as they do to pleading matters which go to liability.

114. Thus , being satisfied that particulars of loss do need to be pleaded, the Tribunal's next task is to examine Ms Aly's contention that the current pleading does already satisfy this requirement. She relies upon the wording of para.24 of the Claim Form document, and the schedule of loss. These, she submits, being couched in broad terms , do enough to encompass the claims for the specific heads of loss that the claimant wishes to advance, so that what is being added is only further particularisation of what is already pleaded.

115. The Tribunal does not agree. It accepts Mr Burns' submissions. The crucial factor is that the claimant is now seeking to claim loss of LTIP bonus not as a consequence of her dismissal, but of the one act of discrimination that the Tribunal has found, namely her rating for 2015 as 'partially achieved'. To the extent that this head of loss has been pleaded previously at all, it has been as a consequence of her dismissal, which has not been found to have been discriminatory.

116. It is also instructive to look at how the proposed additional claims are put. The losses are not alleged to be direct consequences of an act such as dismissal, rather they are said to arise by reason of her being off work due to ill health during her notice period because of the 2015 "partially achieved" rating, the act of discrimination. She then postulates that if she been well enough to attend work during her notice period, she would have been offered the role of Chief People Officer (given to Helen Webb), or in the alternative, treated in the same way as Mr Asher and allowed to enter into an arrangement, either by prolonged employment or by being deemed a "Good Leaver" under the Co-Op's LTIP plan, thereby enabling her to retain and benefit from her LTIP awards for 2014-2016 , 2015-2017 and 2016-2018.

117. This is very different from the basis upon which the loss of LTIP, to the extent that it was at all, was put previously. In that context, there were no such complex causation issues, such losses appeared simply to be financial losses arising directly from the fact that the claimant was no longer employed, they were predicated as losses flowing from her dismissal from the post that she held, not from any postulated change of role had she not gone off work sick, allegedly as a consequence of the one proven act of discrimination that was not her dismissal.

118. The Tribunal cannot therefore agree with Ms Aly's contentions that these heads of loss are already pleaded in the broad terms of the existing pleading and schedule of loss. Context is everything, and these claims were pleaded professionally and fully at an early stage. They are sufficiently precise where they are needed to be. The claimant has not omitted specific reference to these claims because they appeared

to be already covered , they were omitted because the claimant , and/or her legal team, did not , whether for good reason or not, appreciate that she had, or potentially, had them.

119. Amendment is accordingly required, and the Tribunal accordingly turns to determine whether permission should be granted.

Should the amendment sought be granted?

120. As both counsel agree, and is now trite law, the principles to be applied are set out in ***Selkent* Bus Co Ltd v Moore *[1996] IRLR 661*** . In making clear that, when 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, Mummery J in ***Selkent*** identified a number of relevant circumstances on a non-exhaustive basis as follows (at section (5)):

(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 additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded, to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) *The applicability of time limits*. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions eg, in the case of unfair dismissal, s 67 of the Employment Protection (Consolidation) Act 1978.

(c) *The timing and manner of the application*. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the 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 on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

121. Whilst the matters to be taken into account may vary depending on the particular circumstances of each case, it is clear that these factors will often be taken into account. In ***Pontoon (Europe) Ltd v Shinh UKEAT/0094/18*** Lavender J observed that ***Selkent*** lays down 'relevant circumstances *on a non-exhaustive basis*'.

122. Somewhat surprisingly , neither counsel took the Tribunal to the relatively recent EAT judgment on the topic of amendment ***Vaughan v Modality Partnership [2021] IRLR 97*** in which HHJ James Tayler reviewed the ***Selkent*** principles, and how Tribunals should apply them. at paras. 12 to 25 of his judgment he sets out the principles and the caselaw that has developed around them, cautioning against their application in a "tick – box" manner. The focus, he reminded Employment Tribunals, must be on the balance of hardship and injustice.

123. He made reference to the judgment of Underhill LJ in ***Abercrombie v Aga Rangemaster [2013] IRLR 953*** and the passage where he said this:

'Consistently with that way of putting it, the approach of both the Employment Appeal Tribunal 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.'

HHJ Tayler went on his judgment to say this:

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.

At paras. 26 to 28 , HHJ James Tayler concluded his review of the law with this:

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.

124. The Tribunal will now consider each of the ***Selkent*** factors in turn, but bearing in mind the guidance set out in the caselaw above.

The nature of the amendment.

125. Whilst it is not a new cause of action, or claim, in terms of liability, the proposed amendment does seek to add a significant and new head of loss. Whilst as a type of loss , LTIP bonus has been mentioned in the previously pleaded claim and schedule of loss, as discussed, that has been as a direct consequence of the dismissal which has no been found to have been discriminatory. To the extent that it has been found (conceded, it seems) to have been unfair, the statutory cap would make amendment to add this head of loss pointless, and it is not pursued in that context.

126. The quantum of these heads of loss has been estimated by the claimant in her solicitors' letter of 21 April 2022 (subject to disclosure which it is said the claimant still requires in order to precisely value them). There are two options, depending upon whether the correct approach is to compare the claimant to Alistair Asher, and only take her potential post – termination employment as continuing up to the date that his did, in March 2020, in which case the value put on loss of the LTIP bonuses for these three years is £810,120.83. If, however, Option 1 applies, and the claimant did not leave in march 2020, but worked until retirement , the claim is for £578,000 up until March 2018, but continuing thereafter. The claimant was aged 49 at the date of her dismissal. She planned to work until she reached 65, but anticipated reducing to a shorter working week (3 days) at age 55 in 2022. On this Option, the potential

value of the LTIP claims would be in the region of £280,000 per annum, for 6 years, and possibly for a further 10 at a lower rate.

127. These, even in the context of a high value case, are significant sums. Further, as will be apparent, they are not simply a set of given numbers which were obvious contractual entitlements, they are subject to a number of considerations, and are predicated on the claimant remaining in different employment with the respondent, and her inability to do so being establish to be causally connected to the one act of established discrimination.

128. The Tribunal cannot agree with Ms Aly's submission (para.34 of her Skeleton) that "the proposed amendment is minor in nature" falling into the first category of ***Selkent***. Just because the claimant has previously referred to claiming "bonus", and the this is a general term , the Tribunal does not accept that these amendments are nothing more than re-labelling. Rather they seek to assert a new factual foundation for a new specific head of loss, which has not previously been before the Tribunal The Tribunal accepts that there is some to the position of Alistair Asher in para. 237 of the claimant's witness statement for the liability hearing, but this reflects that the claimant was aware even then that he had retired and "has had all bonuses and LTIP honoured". No mention, however, at all is made of the appointment of Helen Webb as Chief People Officer.

The applicability of any time limits.

129. Loss, of course, unlike a cause of action, is not subject to any time limit. To that extent Ms Aly's submissions at paras. 36 to 39 of her Skeleton are not applicable. Nor can Mr Burns pray time limits in aid in respect of heads of loss, save to the extent that he says that these proposed amendments really trespass onto liability issues , which have already been determined.,

The timing and manner of the application.

130. The claimant has given some explanation for the delay in making this application. Firstly it is said that the claimant had not received her LTIPs since 2017. However, at the time of her original pleading, the claimant was not aware that the respondent was in fact going to withhold her remaining LTIPs, given that that the next LTIP was not due to be paid until March 2018. and it was unclear whether she would be permitted to retain them. The Tribunal accepts that was the case, and probably explains why these claims were not made in the original claim form.

131. That said, the liability hearing then took place in August 2018, when the position was clearer. At the liability hearing, the respondents made further admissions as to the payment of LTIPs to other male staff that were leaving, so at that point, or soon after , the potential for such claims would, or should, have been known. As observed above, the claimant was clearly aware of the position of Alistair Asher at the time of her liability witness statement, but did not seek to amend her claims to include losses on the basis of comparing her situation with his.

132. Reference is then made to the Judgment in the Court of Appeal decision being handed down on 14 August 2020, and it is contended that the true extent of the

scope claimant's remedy hearing would have been unknown until the Court of Appeal's decision in her case. The Tribunal does not agree. The respondent appealed the finding of sex discrimination and equal pay to the EAT, and the claimant cross-appealed the dismissal of her other claims of sex discrimination. Once the EAT, on 11 October 2019 however, had dismissed the respondent's appeal against the one finding of sex discrimination which gives rise to the remedy to which the amendments apply, a remedy hearing was going to be necessary. There was thus , from that point at the latest always going to be a remedy hearing required. That the equal pay claim may have been overturned on appeal was not a good reason for not notifying the respondents of this further head of claim, as the claimant had, in her original schedule of loss calculated her awards on alternative bases, allowing for her equal pay claim not succeeding.

133. Thereafter, it was the claimant who appealed, to the Court of Appeal on her equal pay claim, and the other dismissed clams. The respondent , however, did not appeal the direct sex discrimination finding.

34. It was then the claimant who again unsuccessfully sought permission to appeal to the Supreme Court. That permission was refused on 26 July 2021, the Tribunal has ascertained from the Registry. It took, however, the Tribunal chasing the matter up in November 2021 to prompt any response from the parties, the duty being in particular on the claimant to pursue the remedy hearing that she had applied for. There has been no explanation whatsoever for the lack of any activity in informing the Tribunal of the position and pursuing the remedy hearing, in this further four month period, still less for why notification of these additional heads of remedy (whether amounting to an amendment or not) was not finally made until November 2021.

135. None of this adequately explains or excuses the claimant's failure to inform the respondent during this time that these further claims were to be advanced. The claimant has attempted an explanation , it is appreciated, in that it is claimed that because the claimant did not know until the correspondence in November 2021 that the respondent was disputing that the heads of loss relating to the LTIP bonus were already pleaded , she did not think she needed to make any such application.

136. That may be so (although the fact that the respondents were able to make reference to the claimant's intentions in their letter to the Tribunal of 19 November 2021 suggests prior communication between the parties which is not before the Tribunal, but Mr Burns informed the Tribunal that the issues were first raised in a conversation between the parties' solicitors on 13 September 2021). The claimant's letter of 19 November 2021 was sent only 30 minutes after the respondents' email , and does not refer to any need to amend, or any of the contentions that the respondents made in their email.

137. Whether the claimant realised that the respondents were or were not of the view that what she was advancing was new is, with respect, beside the point. The claimant should have appreciated that. She had gone to the trouble of fully pleading her case on loss in para. 24 of the Claim Form, and in the schedule of loss. She knew, or ought to have known, and had clearly indicated to the respondents by then, that there was to be some further particularisation , at the very least, of her losses.

Her letter to the Tribunal of 19 November 2021 rather skates over all this, as all that is said (page 203 of the bundle) under section 2.1 “Sex Discrimination” is “Loss of AIP and LTIP arising directly from the sex discrimination”. The claimant’s other heads of loss are set out, an estimated length of hearing is given, and case management directions are proposed. No indication is given that claims worth potentially £800,000 to £2m are to be put before the Tribunal.

138. The claimant asserts that until the respondents had made clear their intention to argue that it was their view that these claims for loss of LTIPs were not included in the claimant’s pleadings, the position as to amendment remained unclear, given that a PHR was requested on this point. The Tribunal fails to see why this prevented the prompt making of the application, or at the very least, on the claimant’s own case, the provision of some further particulars of these claims.

139. It is explained , of course, that the claimant was also in need of complex technical legal advice in relation to the same, and that her original counsel contracted covid during this period and was ultimately unable to assist more expediently, resulting in a change of counsel. That is unfortunate, and the Employment Judge sympathises, but, presumably the whole of the firm of solicitors instructed by the claimant was not so afflicted during this period, and someone would presumably have been available to communicate with the respondents to keep them updated on the likely application, or the provision of further particulars.

140. It is also said that the Claimant was simultaneously also exploring the issue of whether she could continue to argue whether an equal pay audit could form part of her remedy. With respect, this rather undermines the previous reasons given for the delay. That issue should not have delayed the urgent preparation of the claimant’s proposed case , be it by way of amendment or further particulars, on these new significant additional heads of loss. The Tribunal does not therefore accept that the claimant’s application for amendment has been as prompt as it could or should have been, even once the respondents’ position was clarified.

141. As it was , no properly pleaded application/ further particulars were provided until 20 April 2022 , five months after the exchanges in November 2021 which, at the very latest , was the time for taking urgent action.

142. Ms Aly submitted that the facts giving rise to the potential for making these claims only first became known in the course of preparation for the hearing of August 2018, upon disclosure and the claimant going through the bundle. That suggests that the facts were known during the hearing, but no intimation was given then that these further heads of claim would be added to the remedy claims. That may be explained, and perhaps excused to some extent, by the fact that there was to be a separate remedy hearing. That said, the parties were asked to seek to resolve remedy without a hearing, and one have expected the claimant to have raised this further potential head of claim at that stage, if only for the purposes of negotiation. Regardless of any appeals, the claimant knew that she had been successful and would require a remedy for sex discrimination.

143. No such indication of these additional claims , however, was given for the next three years. It is appreciated that the parties were appealing and cross – appealing,

but that is, with respect, no reason why a significant potential increase in the value of the remedies to be sought in the event that the claims remained successful (and certainly the significant and uncapped claim that did has remained successful) should not be notified to the respondents as soon as possible. As it was, whilst the respondents appealed the equal pay and the direct discrimination finding to the EAT, when the claimant then appealed the EAT decision to the Court of Appeal , they did not cross – appeal on the direct discrimination finding.

144. Even then, it took until April 2022 for a fully reasoned application to be made. All this, it is to be noted has taken place over three years following the Tribunal's judgment, and from when, on her own case, the claimant was aware of the facts and evidence upon which to base these additional claims.

145. It should also be observed that despite the Supreme Court refusing the claimant permission to appeal on 26 July 2021, the Tribunal was not notified by the claimant of this until the Tribunal wrote to the parties on 5 November 2021, when it was told by the respondents. It is difficult not to harbour the suspicion that had the Tribunal not done this, it may have been even longer before the claimant sought a remedy hearing. There has been no explanation for this inactivity between dismissal of the application for permission to appeal and the next contact with the Tribunal, which the Tribunal needed to initiate. The claimant could not have been surprised had the Tribunal not simply in November 2021 issued a strike out warning under rule 37(1)(d) on the grounds that the claims were not being actively pursued.

146. In short, the timing of, and the manner of the application is, bearing in mind that the claimant is professionally represented, a very significant and serious consideration, which weighs against granting the application.

147. Ms Aly submits (para.18 of her Skeleton) the claimant should be entitled to claim all heads of loss that were applicable to her at her remedy hearing rather than the respondents being able to "cherry pick" certain heads of loss to exclude ahead of such a hearing. She asserts that such an exclusion is not only highly unusual, but not in accordance with the overriding objective in relation to fairness.

148. With respect , Ms Aly misses the point. This is not the respondent cherry – picking, it is the claimant , very late in the day seeking to add considerably more cherries to the bowl. It is the claimant who has to ask the Tribunal's permission to do that.

Re – litigating decided issues.

149. The respondent makes a further point , that the re-amendment amounts to a contention that the would not have been dismissed but for discrimination. The objection is taken that it is an abuse of process for the claimant to seek to re-amend to claim that she would have not been dismissed had there been no discrimination. Mr Burns submits that she lost on the same or almost identical issue before the ET. Paragraph 369 of the ET Judgment (p.156) held the "Claimant and/or a hypothetical comparator holding the CHRO position would have been given contractual notice to terminate their roles together with an invitation to find a new role during the notice period failing which they would leave at the end of it. We do not therefore conclude

that the giving of notice was an act of direct discrimination against the claimant because of her sex". The cause of her dismissal was also considered at para 380 (p.157) and her claim was rejected on that ground also.

150. The claimant, Mr Burns argues, could have put this new claim before the ET that even if wrong on her primary claims, her dismissal was still tainted by the appraisal discrimination. She did not. In a similar way to the rule in ***Henderson v Henderson*** the claimant could and should have put all her claims before the ET at the main hearing and it is too late to raise a new way of putting her claim that she would not have been dismissed absent discrimination after she has had judgment and lost.

151. To re-amend to claim that the claimant would have retained her employment and been appointed as Chief People Officer – a role on the Executive – also , he submits, attempts to go behind the ET's findings of fact as well as on causation. The ET found (para 341, p.149) that "it was the intention of Mr Pennycook to attempt to reduce and/or marginalise the claimant's role and/or to remove her from the Executive". The re-amendment attempts to reopen what he contends is that decided factual issue.

152. Ms Ally's response, in her oral submissions, to this was that the proposed amendment was not seeking to go behind findings of the Tribunal. The findings of the Tribunal in para. 368 were in the context of the claimant being given notice. The Tribunal found that for that purpose Alistair Asher would not be a comparator , but that would not preclude the Tribunal from considering what actually occurred in his case in terms of entitlement to LTIP , for the purposes of assessing what would have been likely to have been the position for the claimant had the discrimination not occurred. This was solely a remedy issue, and would not have been one that it would have been appropriate to explore in the liability hearing.

153. This is an unusual factor, but one which the Tribunal considers could be germane to the issue of its discretion, and illustrates how correct the dictum from ***Pontoon (Europe) Ltd*** cited above is.

154. The Tribunal considers that these issues may have some weight, but it is far from clear that the respondent's argument is on all fours with the doctrine of *res judicata* , or even that it is analogous to it. The finding that Alistair Asher was not a relevant comparator for the purposes of determining the direct discrimination claims does not, in the Tribunal's view, preclude evidence as to what happened in respect of his LTIP entitlements being relevant to the assessment of the claimant's losses.

155. In terms, however, of the findings in para. 341 of the judgment, in relation to the proposed amendment to the effect that, but for her sickness absence , the claimant "would have been offered the role of Chief People Officer" , the Tribunal takes Mr Burns' point that this rather flies in the face of the Tribunal's finding at para. 341 that he wanted the claimant off the Executive, which to appoint her to that role would not have achieved. Whether this truly amounts to any form of issue estoppel or res judicata argument is open to argument, but it highlights factual issues that the proposed amendments will raise, if permitted.

The balance of hardship.

156. This is, ultimately, the factor that the Tribunal has to take into account, the other factors are but facets of it. The respondent submits that if the amendment is permitted, what was likely to have been a 2 or 3 day remedy hearing will have to expand to 5 to 7 days. The claimant contends that this , even if correct, is irrelevant, as the remedy hearing should take as long as it needs. If the amended claims require longer, then this is unfortunate, but if the claimant should be allowed to advance these claims, she should not be deprived of them just because they will need a longer hearing.

The Tribunal's conclusions.

157. To recap, the basic and salient facts of this application are these. The claimant, almost three and half years after judgment was sent to the parties on 12 November 2018, has made application to add significant claims for loss of LTIP bonus , allegedly arising in consequence of the single act of sex discrimination that the Tribunal found. The evidence and information upon which she does so became available , on her own case, in the preparation for, and course of, the hearing in August 2018 . No application to add these claims was made until 21 April 2022, and they were first intimated in September 2021. In the period in between the respondent appealed to the EAT, successfully in respect of the equal pay claim, but unsuccessfully in respect of the direct sex discrimination claim upon which the claimant had succeeded, and she was unsuccessful is her cross – appeal on other dismissed discrimination claims. Then the claimant unsuccessfully appealed to the Court of Appeal , and then unsuccessfully sought permission to the Supreme Court. In all this time the claimant did, as far as the Tribunal can see, nothing to progress her case on remedy, and certainly gave no intimation of the addition (even by way of further particulars, on her case that there was already a pleading of this head of loss) of these claims until September 2021.

158. The claimant has not really explained this delay, other than by reference to the appeals process, the absence of appreciation that the respondent considered these matters had not been pleaded, and more recently, illness of legal representatives. The claimant has been legally represented at all times, and is herself a highly intelligent and capable person who occupied a very senior position. The final hearing itself was considering matters which went back to 2015 and 2016, and the ensuing 3 years after the judgment have delayed the remedy hearing, which it was the duty of the claimant to prosecute. The claimant did nothing to do that, not even notifying the Tribunal that the Supreme Court had refused her permission to appeal in July 2021.It took the Tribunal's enquiry of 5 November 2021 to prompt the claimant into seeking the listing of the remedy hearing, and to raise , for the first time, the possibility of claiming these additional further heads of loss. Then at a time when the urgency of position should have led to a prompt formal application, it took another 5 months for this to be made. Absence of any communication to the Tribunal or the respondent during this period explaining the delay rather exacerbates this further period of delay, and makes it hard to accept as excusing the claimant for this yet further delay.

159. Thus, by reason of these substantial factors, on the timing and manner of the application alone the Tribunal could well find that it should not exercise its discretion

in the claimant's favour. There are, however, others. There is, it is accepted, hardship to the claimant in being deprived of the chance to advance these significant additional heads of loss. There is, of course, also hardship to the respondents (for it is presumed these losses will be sought against both respondents on a joint and several basis) if the amendments are allowed in exposure to these additional claims.

160. These additional claims, however, are not , if amendment is allowed, a given. They are predicated not on the claimant's dismissal (they cannot be, as that was not found to have been discriminatory), but on the basis, as found, that her appraisal as 'partially achieved' for 2015 was an act of direct discrimination. The claimant's proposed amendments are predicated on the basis that:

a) Her performance rating caused her to be off work sick;

b) That sickness absence caused her not to be offered another role – that of the Chief People Officer – which would have meant her employment, and hence entitlement to LTIP payments would have continued; or

c) That sickness absence caused her not to be treated as a "good leaver" as Alistair Asher was.

It will be appreciated that this potentially involves the Tribunal being satisfied of "causation upon causation", and doubtless other issues as to what the position would have been, or will be, in respect of years that have now elapsed, or, on the claimant's case for continuing losses, have yet to pass.

161. Whilst Mr Burns has suggested that the proposed amendments actually have no prospects of success, the Tribunal would not go so far today, but considers that there is a high degree of speculation attached to them. Depriving the claimant of the chance to advance them, accordingly does not deprive her of what might be reasonable certainties if amendment was permitted. Conversely, if the respondent is so confident that the new claims are of no merit, they should be easy to rebut.

162. This degree of speculation, and the factual issues that these new claims , if permitted, would raise also highlights the potential for forensic prejudice to the respondent. If they are permitted the respondent will, on remedy, have to adduce further evidence addressing, at last 6 years after the relevant events, these new claims. It has not been said, however, that this will be impossible, and no specific forensic prejudice has been identified , such as the non – availability of any witness or other evidence. The new issues are, however, likely considerably to add to the complexity and the length of the remedy hearing. As, however, that hearing has still to be listed, the respondents are arguably in little worse position than they would have been had these matters been pleaded much sooner.

163. There are, if not res judicata issues, certainly issues in squaring the claimant's proposed amendments as to what would have happened if she had not gone off work sick , with the Tribunal's findings. The claimant claims she would have been offered this post, or been deemed a "good leaver". (Note the claimant's proposed case must be that notwithstanding their alleged discriminatory and victimisatory

treatment of her for a variety of reasons as she originally claimed in her claims, the respondents would still have offered her this post).

164. Any argument of res judicata, or issue estoppel, would , of course, be open to the respondents in the remedy hearing, allowing the amendment would not be a determination of those issues.

165. All that said, however, the Tribunal does pause, and reflects upon paras. 27 and 28 of the judgment of HHJ James Tayler in ***Vaughan v Modality Partnership*** cited above. Whilst not discussed in the hearing, given the fact that the claimant will be entitled to some substantial sums by way of remedy come what may, and may well also, given her previous levels of remuneration, be a relatively wealthy person, it is highly likely that she (or others, if responsibility for all this lies elsewhere) would be in a position to meet an award of costs. Unlike the civil courts where the costs regime is often operated to require the amending party to bear the costs of and occasioned by a late amendment, the Tribunal cannot make payment of such costs a condition of granting an amendment. That any prejudice to the respondent can be ameliorated by an award of costs is, however, clearly a relevant factor. A Tribunal should not ignore the key factor of the balance of justice, notwithstanding that the amendment was avoidable, unnecessarily took up Tribunal time, and resulted in additional cost, all of which , the Tribunal finds, is the case here. Looking at the respondents' objections in the round, they will be able to advance all their arguments that the claimant cannot establish these additional heads of loss at the remedy hearing, and the real and clear prejudice to them is the additional cost of having to deal with them. A further factor, not mentioned in the hearing, but likely to be relevant, is the effect that the delay occasioned by this application, and possibly other delay in prosecuting remedy, may have upon any awards of interest.

166. On that basis, and making the preliminary observation that the Tribunal, were a costs application to be made, would be likely to find that the threshold conditions of unreasonable , and disruptive conduct of the proceedings (this issue has delayed the remedy hearing), were satisfied so as to entitle the respondents to an award of costs are met, the Tribunal , with some diffidence, does grant the amendments sought.

Case Management for the remedy hearing.

167. Case management of the remedy hearing is required. The parties had proposed some orders, and the Tribunal has made some , as set out above, Clearly the respondents need to serve an amended response, further disclosure will be required, and witness statements going to the issues on remedy will need to be exchanged. A List of Remedy Issues would also be necessary.

168. The Tribunal has made the initial orders set out above, but cannot list the remedy hearing until then parries provide their estimated length of hearing, and dates to avoid.

169. As the orders were made without the benefit of representations from the parties, variation under rule 29 can, of course, be sought.

Employment Judge Holmes
12 April 2023

SENT TO THE PARTIES ON
14 April 2023

FOR THE TRIBUNAL OFFICE

(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.