Neutral Citation Number: [2023] EAT 111

Case Nos: EA-2020-000978-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 August 2023

Before :

MICHAEL FORD KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

MRS E MACFARLANE **Appellant**

- and –

COMMISSIONER OF POLICE OF THE METROPOLIS **Respondent**

- -

Mr Gorasia (instructed via Direct Access) for the **Appellant**
Mr Martin (instructed by Directorate of Legal Services, Metropolitan Police Services) for the **Respondent**

Hearing date 20 July 2023

- -

JUDGMENT

Revised

SUMMARY

PRACTICE AND PROCEDURE - AMENDMENT

The claimant brought a claim of constructive unfair dismissal against the respondent. At a case management hearing she clarified that she was not bringing a whistleblowing claim. Shortly afterwards she sought to amend her claim to bring complaints of being subject to a detriment and unfair dismissal because of making protected disclosures, contrary to section 47B and section 103A of the Employment Rights Act 1996. In refusing her amendment application, the employment judge placed some weight on what the claimant had said at the earlier hearing and decided that she was bringing a new type of legal claim, raising new factual allegations. The employment judge also decided that the balance of hardship was in favour of the respondent because he considered it was unlikely the claimant would succeed in her claims.

The appeal was dismissed. First, in considering the nature of an amendment or the applicability of time limits for the purpose of an amendment application, a tribunal should focus on the substance of the amendment and whether it raises new legal or factual allegations. Consequently, there is no legal rule that a claim of automatically unfair dismissal under section 103A is the same cause of action or same type of legal claim as an existing complaint of unfair dismissal. The decision of the EAT in ***Pruzhanskaya v International Trade and Exhibitors***, UKEAT/0046/18/LA (17 July 2018), holding there was such a legal rule, was inconsistent with the overarching principle based on justice which governs amendment applications, with the judgment of the EAT in ***Selkent Bus Co Ltd v Moore*** [1996] ICR 836 and with Court of Appeal judgments, including ***Abercrombie v Aga Rangemaster*** [2014] ICR 209. The approach in ***Arian v The Spitalfields Practice*** [2022] EAT 67 was correct and in accordance with the authorities.

Second, in deciding that the amendments were raising new complaints in substance, the EJ was entitled to place some weight on the claimant's clarification of her claim at the earlier case management hearing. A claim form does not sit in a vacuum and its author is often in the best place to explain what the claim is meant to allege factually, even if its proper legal classification may fall more to the employment judge. Third, the EJ was entitled to have regard to the merits of the claim in assessing the balance of hardship and his approach to this factor did not display any error of law.

MICHAEL FORD KC, DEPUTY JUDGE OF THE HIGH COURT

Introduction

1. This appeal is brought by Mrs MacFarlane, who was the claimant in the employment tribunal, against a judgment of London Central employment tribunal (the "ET") sent to the parties on 15 October 2021. It was a CVP hearing before Employment Judge James (the "EJ"), sitting alone. He refused the claimant's application to amend her claim to include claims of being subject to a detriment and of unfair dismissal because of making a protected disclosure for the purpose of sections 47B, section 48 and section 103A of the Employment Rights Act 1996 ("ERA").

2. In an order dated 16 March 2022, HHJ Beard gave the claimant permission to appeal on two grounds only. They were originally grounds (1) and (3) set out in appellant's amended grounds of appeal dated 9 December 2020 but I refer to them below as grounds (1) and (2) respectively.

3. I shall refer to the parties as the Claimant and Respondent, as they were before the Tribunal.

4. Before me, the Claimant was represented by Mr Gorasia and the Respondent by Mr Martin. I am grateful to both for their clear submissions.

Background and the Tribunal Judgment

5. The Claimant worked for the Respondent as a "Community Assessor" between 3 August and 10 December 2019. Her job was to assess candidates for police service. She resigned after making complaints about health and safety.

6. She brought a claim to the tribunal which was received on 18 February 2020. At box 8 of her claim form she ticked the box against "I was unfairly dismissed", adding below that she was claiming "A type of constructive dismissal because of failures of health and safety, and lack of support after an incident".

7. The Claimant also ticked box 10 of the claim form, by which where a claim consists or includes "a claim that you are making a protected disclosure under [ERA] (otherwise known as a 'whistleblowing' claim)", a claimant can request that the form be forwarded to a relevant regulator.

8. Under later sections of the form the Claimant set out the background and details of her claim. This is quoted in full by the EJ at §3 of his judgment. In summary:

(1) The Claimant explained the nature of her work, which was to assess candidates for police service, as part of a team of 50 assessors and two or three Assessment Centre Managers ("ACMs"). She assessed them at an early stage in the process, which she referred to as "Early Intervention".

(2) She described an incident on 19 November 2019 when she assessed a candidate whom she described as "alarming, dangerous and threatening". She listed various potential problems which, she said, had made her workplace unsafe and dangerous, such as the absence of panic buttons or security presence.

(3) She said that she had "reported these points, many others, and possible solutions to my HR contact, Mr Camilleri, multiple times, but no action was taken".

(4) She referred to 10 December 2019, which according to box 5 of her claim form was her last day of work, stating:

> "On 10/12/19 I was assigned to Early Intervention but I knew there was still nothing in place if anything went wrong. I felt complete dread, alarm and loss of trust. I felt forced to leave the building and the job that day. I'd repeatedly asked HR for Whistle-blowing and Grievance procedures, with no response."

9. At box 15 of her claim form, under the heading "Additional Information", the Claimant provided further information. This is also quoted in full by the EJ, but in summary:

(1) The Claimant explained that the dangerous candidate had not been properly "Red Flagged" - a system by which candidates who act inappropriately were escorted out by security - adding that "Other assessors told me they were forbidden by an ACM from discussing the incident or issues of personal safety".

(2) She said this, it appears referring to the three weeks she worked after the incident on 19 November until she left:

> "I spent 3 further weeks working at ESB and communicating my concerns with HR. The Met and HR throughout have accepted that my experience and the lapses in health and safety and security I reported were appalling and unacceptable. HR promised to escalate and address them, but ultimately without any result. During this time I worked for 2 days in unacceptable working conditions - I informed HR, but there has still been no response to that. This just added to my distress."

(3) After giving more details of how she was affected by the incident on 19 November, she continued:

> "I was told my Grievance had been dropped because I wasn't a Met employee, although the Met's own Grievance document states that the process is for all employees, workers, volunteers and contractors, highlighting problems with the Community Assessor contract. Worker or self-employed, that makes no difference to the Met's duty of care in my place of work. I had to walk out of my job and my income through lack of support and complete loss of confidence".

(4) She concluded by saying she felt "embattled, unsupported, used and ignored".

10. The Respondent denied the claim in the "grounds of resistance" attached to its response lodged on 25 March 2020. The Respondent said that several allegations were too unclear to respond to, indicating she would make a request for further and better particulars (§3). The document explained that the Respondent had contracted with an outside contractor, Shared Services Connected Ltd ("SSCL"), to manage the recruitment process and the Claimant was engaged on a "casual basis" without guaranteed hours (§§4,7-8). It dealt with the claims against the Respondent under two headings:

(1) The first was "Unfair Dismissal". The Respondent said she was not the employer but in any case the Claimant had insufficient qualifying service for "ordinary" unfair dismissal. The grounds of resistance added:

> "the Claimant does not appear to allege that she has suffered detrimental treatment because of having made a protected disclosure and/or that she resigned in response to such treatment and in those circumstances the Respondent contends that s.103A ERA cannot be relied upon by the Claimant".

(2) Under the second heading, "Another Type of Claim", the grounds stated the following at §15:

> "At box 8.2 the Claimant appears to foreshadow a claim for whistleblowing but again fails to set out the legal basis for such a claim. To the extent the Claimant seeks to bring a claim pursuant to s.47B(1) ERA, the Respondent

> contends that the Claimant has never alleged she suffered a detriment by any act or omission done by the Respondent on the ground that she has made a protected disclosure and so the Respondent contends that such a complaint would have no reasonable prospect of success and so should be struck out".

(3) After asserting that, to the extent the Claimant relied on s.47(1A)(b) of ERA and contended she was subject to a detriment by employees of SSCL, those persons were not "agents" of the Respondent for the purpose of that provision, the response went on to admit that the Claimant had expressed concerns to Mr Camilleri, an employee of SSCL; that she had met with him because she was not satisfied with his response; that after the meeting she had e-mailed to say she felt the response was tardy and inadequate but "did not assert their response to have been a consequence of her having raised the original alleged protected disclosure"; and that she had asked for details about the grievance and whistleblowing process, which were provided to her (§§18-20).

(4) The grounds denied that the Claimant raised complaints multiple times, denied no action was taken and asserted that any omission was "in no way whatsoever on the grounds that she had raised any alleged protected disclosure" (§§21-2).For good measure, the grounds stated that the Claimant told Mr Camilleri she was leaving because of her working conditions and not as a result of making a protected disclosure (§23). After she raised a grievance, it was closed not because she had made a protected disclosure but, rather, because she was a "worker", to whom the Respondent's grievance procedure did not apply (§25). The grounds accept that she also made a complaint to the "Right Line" (a team which dealt with anonymous reporting), was given whistleblowing status, and was given a written response on 3 January 2020.

11. A phone case management discussion ("CMD") took place on 16 June before EJ James. The Claimant was not legally represented but Mr Martin represented the Respondent. In §4 of the summary of the hearing, the EJ said that the Claimant:

> "stated at the hearing that her claim was purely about what she argues was her constructive dismissal by the respondent. She clarified at the hearing that she is not pursuing a whistleblowing claim".

12. As a result, it seems that the focus switched to a potential claim under s.100 of ERA, relating to health and safety. According to the EJ's reasons of 15 October 2021, at this hearing the

Claimant asserted she did had been told by ACAS she did not need to be an employee to bring such a claim.[1] After discussion on the point, the EJ made orders for the Claimant to write to the tribunal (i) to explain why she asserted she was an employee and (ii) to clarify which provisions of section 100 she was relying upon. The case was also listed for a preliminary hearing to consider the question whether the Claimant was an employee and whether her claim under section 100 stood no reasonable prospect of success.

13. According to §7 of the EJ's reasons, at the CMD there was further discussion about the claim:

> "I specifically asked the claimant on 16 June 2020 whether she was saying that the alleged failure of the respondent to act on her complaint was due to the nature of the complaint? The claimant replied that she was forced to leave her job because her complaint was not taken seriously and no action was taken about the health and safety concerns she raised. I again asked the claimant why she thought that was the case. She replied that when she emailed SSCL and reported the incident she asked if there was any help available. She spoke to Mark Camilleri a manager and asked him for support. It took him two weeks to provide the EAP telephone number. The claimant specifically told me that she was not suggesting that the lack of response was due to her raising a health and safety issue. She did not know why Mr Camilleri did not respond. I ''would have to ask him that'. The claimant confirmed that her complaint was solely about the dismissal itself."

14. Very soon after the CMD hearing, on 16 June the Claimant wrote to the tribunal saying that she wanted to amend her claim to bring a whistleblowing claim. The tribunal made an order, requiring her to send draft amended details of claim to the tribunal and Respondent, and providing for subsequent responses.

15. Accordingly, on 25 June the Claimant sent a document seeking to amend her claim. It made clear that she now wished to claim automatically unfair dismissal under section 103A and that she had been subject to a detriment for making a protected disclosure contrary to section 47B, saying that she had "now been able to clarify the legal basis of the claim under Whistleblowing Law". The document stated that workers and not just employees were protected under these provisions, including by the extended definition of "worker" in section in 43K; that the disclosures were made in the reasonable belief that they were in the public interest and fell within section 43B(1)(d), relating to health and safety; and that they were made in phone calls, meetings and in various e-mails, the dates of which she gave. The document listed "multiple

[1] The source of that advice is not clear. At the time, both section 100 and the sister provision on detriments, section 44 of ERA, were restricted to "employees". Some elements of section 44 (but not section 100) were subsequently extended to workers by SI 2021/618, made on 24 May 2021 in order to comply with the judgment in ***IWGB v Secretary of State for Work and Pensions*** [2021] ICR 372, handed down on 13 November 2020 – that is, after the tribunal hearings.

failures" of health and safety and asserted that the Respondent's failure to act on the protected disclosures was in breach of the "implied expectation" that the Respondent would take reasonable steps to protect all workers and visitors to the premises. It also alleged that the Respondent had provided the Claimant with a useless reference.

16. Under the heading "Automatically unfair constructive dismissal", the Claimant said that on 10 December 2019, when she was assigned to the same exercise as on 19 November, the Claimant was very alarmed at the lack of action and the lack of response to her complaints about intolerable working conditions, forcing her to resign. Next, under the heading "Detriment" she again stated that the Respondent had failed to act on her concerns, leading her to have no choice but to resign, and that she also suffered detriments on 4 and 5 December 2019 owing to the intolerable working conditions. Towards the end of the document she explained:

> "The Claimant had previously assumed that the days of intolerable working conditions were happenstance and due to poor practice and general lack of care to the wellbeing of Assessors demonstrated by other failures in the Health and Safety reported. However, remarks in the Preliminary Hearing have made the Claimant question if the Respondent's lack of response to those days was not merely poor practice, but deliberate because she had made the protected disclosure."

17. The Respondent replied by a letter of 8 July, stating that the amendment made new factual allegations, the detriment claims were out of time and that the amendments should not be allowed as part of the balancing exercise because they had no reasonable prospect of success. (I should point out that some of the complaints of the respondent about the document making new allegations were withdrawn; they arose because, at that stage, the Respondent had not been sent section 15 of the original claim form).

18. As envisaged by the tribunal's directions, the Claimant submitted a full response to the Respondent's letter in a document dated 15 July 2020, contending in summary that, save for the complaint about the reference, which she was prepared to withdraw if necessary, the amendments were only clarifying the legal basis of her claim. She reminded the tribunal that she was unrepresented, stated that she had not been required to set out the legal basis of her claim until the direction made at the CMD hearing, and repeated her belief that the Respondent's failure to act on her complaints was deliberate and was done on the ground that she had made protected disclosures.

19. The Claimant also submitted a further document dated 1 September, but it was not in the EAT bundle.

20. The EJ sensibly decided that because a refusal to allow the amendment would effectively ended the Claimant's claims, there should be a hearing to consider the matter, following the guidance in ***Smith v Gwent District Health Authority*** [1996] ICR 1044: see reasons §27. Accordingly, the preliminary hearing originally listed to deal with employment status was converted into a preliminary hearing to consider, first, whether permission to amend should be granted and, second, whether the claims or any remaining claims should be struck out because they had no reasonable prospect of success.

21. It is the amendment aspect of the reasons which is relevant to this appeal. After setting out the background, in his reasons the EJ summarised the principles on amendment set out in ***Selkent Bus Co Ltd v Moore*** [1996] ICR 836. He then considered each of the familiar factors which were said to be relevant in ***Selkent***. His reasoning is full and thorough. It is subject to specific challenges on this appeal and so I only summarise it below.

22. First, as to the nature of the amendment, the EJ decided that the amendment proposed by the Claimant in the documents of 25 June and 15 July was not simply a relabelling but added to the factual and legal bases of her claim. In reaching that conclusion, he placed some weight on the Claimant's statement at the 16 June CMD hearing that she was not bringing a whistleblowing claim:

> "35. The amendment proposed by the claimant is not in my view simply a relabelling, or a clarification of existing claims. If allowed, it would substantially alter the existing factual and legal basis of her claim. Whilst the essence of the claim is still the alleged 'constructive dismissal', the contents of the 25 June and 15 July documents substantially add to the factual and legal basis upon which that is argued.
>
> 36. At the CMPH on 16 June 2020, the claimant stated that her case was not a whistleblowing case and appeared to take exception to the suggestion by the respondent in its ET3 that it might be. Her position changed on 19 June 2020. Whilst that was only three days after that hearing, her express disavowal of any whistleblowing claim on 16 June does in my view mean that the claimant's application to amend her claim to a whistle-blowing claim does introduce a new type of legal claim.
>
> 37. The claimant has today explained why her position changed. She says she is not a lawyer and was not aware that she had to set out the legal basis of her claim in the ET1. I accept that and no criticism is intended of the clamant in making the point. Nevertheless, her express disavowal of a whistleblowing claim on 16 June is clearly of some importance to the consideration of this factor."

23. Comparing the original claim and the documents of 25 June, 15 July and 1 September setting out the amended claim, the EJ considered that only five of the alleged protected disclosures were set out in the claim form and some details were still missing (though this could be dealt with if necessary by the provision of further information). He briefly dealt with the reference, saying he would have refused an amendment: §§38-40. He returned to what the Claimant had said at the CMD hearing in the concluding paragraphs on this matter (§§41-42).

24. Second, the EJ turned to the applicability of time limits. Because the Claimant had indicated at the hearing on 16 June that she was not pursuing a whistleblowing claim, the EJ decided that claim was out of time by over two months. He considered, without deciding the matter, that a tribunal was likely to find that it was reasonably practicable to have made a claim in time, even allowing for the fact the Claimant was a litigant in person.

25. Third, as for the timing and manner of the application, the EJ decided the application was made reasonably promptly after the CMD hearing but still six months after her employment had ended.

26. Fourth, turning to balance of hardship, the EJ's view was that the Claimant had "little prospect" of persuading a tribunal that the failure to take steps to protect her health and safety was <u>because of</u> her making protected disclosures: §51. He drew attention to how the Claimant had originally put her case and, he said, continued to put her case - that she had resigned because of the failure to act on her concerns. In light of the prejudice to the Respondent of defending a claim which was likely to fail on time limits or on the merits, the EJ concluded that the balance of hardship was very much in favour of the respondent and refused the application to amend.

27. At the end of his judgment, the EJ recorded that the Claimant withdrew her claim of ordinary unfair dismissal because she did not have two years' service and confirmed she was also withdrawing any claim under section 100 ERA. Both these claims were therefore dismissed on withdrawal.

28. The EJ later refused an application for reconsideration under rule 72 of the Employment Tribunal Rules of Procedure 2013 (the "ET Rules") in a decision sent to the parties on 22 June 2021. While he once more accepted there was an overlap between the allegations in the claim

form and those in the later documents, he again placed reliance on the Claimant's assertion on 16 June that she was not bringing a whistleblowing complaint but considered that in any event the "substantial expansion of the facts relied on mean that this was far more than a simple re-labelling of the same facts" (§18).

Legal Framework and Principles

29. There is no express power to grant amendments in the ET Rules, but its sources are the power to make case management orders in rule 29 coupled with the power a tribunal has to regulate its own procedure in rule 41. As with other matters of case management, tribunals have a broad discretion in this area. An appeal to the EAT will only succeed if there is an error of law in the decision: for example, that a tribunal made an error of principle in its approach, failed to take account of relevant considerations, took account of irrelevant considerations or reached a conclusion no reasonable tribunal could reach within the generous ambit given to employment judges in this area: see ***Selkent*** at 843A-C, ***Carter v Credit Change*** [1979] ICR 908.

30. ***Selkent*** remains a clear guide on what are the relevant factors tribunals should take into account, subject always to the overarching principle that the tribunal must take account of all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice of refusing, and the observations of the EAT were endorsed by the Court of Appeal in ***Kuznetsov v Royal Bank of Scotland*** [2017] IRLR 350, per Elias LJ at §20. The three factors which were said to be "certainly relevant" in ***Selkent*** are (a) the nature of the amendment; (b) the applicability of time limits; and (c) the timing and manner of the application. The arguments on this appeal were mostly about the correct meaning and application of factors (a) and (c), though they strayed into the implications for factor (b).

31. I should say a little about the elements of a claim for being dismissed or subject to a detriment because of making a protected disclosure, which are relevant to the application to amend.

    (1) The provisions of Part IVA of ERA adopt a unique and wide definition of "worker": see section 43K.

    (2) The basic right not to be subject to a "detriment" on the ground of making a protected disclosure is found in section 47B. It extends to both acts and "any deliberate failure

to act". The term "detriment" has a wide meaning, and a deliberate failure to investigate a matter or to respond to a reasonable request to improve safety standards might fall within the section. So may giving a poor reference. In addition, section 48(4) says that, in the absence of evidence to the contrary:

> "an employer...shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done".

It seems, however, that this provision only concerns the operation of time limits in section 48(3) and does not affect the need for a deliberate failure to act as an essential element of the claim.

(3) The detriment must be done "on the ground" that the worker made a protected disclosure, both where the act or failure to act is by the employer or by another worker or agent of the employer: see section 47B(1) (1A). This requires a causal link between the protected disclosure and the detriment to which the worker was subjected. It is sufficient that the protected disclosure materially influenced the employer's treatment of the worker: see ***Fecitt v NHS Manchester*** [2012] ICR 372.

(4) Section 48(2) contains provisions on the burden of proof. Where the worker shows that he or she made a protected disclosure and was subjected to a detriment, then "it is for the employer to show the ground on which any act, or deliberate failure to act, was done".

32. An employee may bring a claim of automatically unfair dismissal under section 103A where the reason or principal reason for the dismissal is that he or she made a protected disclosure. Section 47B (2) states that this section does not apply where (i) the worker is an employee and (ii) the detriment is a dismissal. It is implicit in that provision that a worker who is not an employee can bring a claim for dismissal under the detriment provisions.

33. Precisely how constructive dismissal fits with these provisions is not always straightforward. In the case of an employee, if the reason for the treatment which breached the contract and led to the employee resigning is the making of a protected disclosure, then this should fall within section 103A: see ***Berriman v Delabole Slate*** [1985] ICR 546. In the case of a "worker" alleging that dismissal is a "detriment" under section 47B, when there is no need to

identify the reason for the dismissal, it may well be a more flexible approach should apply, based on whether the resignation was part of the detrimental treatment which flowed from the protected disclosure.

34. It is against that background that I consider the two grounds of appeal.

Ground (1)

35. The first ground of appeal is that the EJ erred in law in that:

> "He held that the amendment was a substantial alteration or a new complaint by giving undue weight to the Appellant's alleged "disavowal" of whistleblowing during the preliminary hearing on 16 June 2020 and too little weight to what was stated in her ET1. He erred in considering that the extent of the legal and factual enquiry was significantly extended by the application to amend and/or ought to have considered restricting any amendment to dismissal only due to protected disclosures or some other proportionate manner (**Nature of Amendment**)"

This ground was, therefore, expressly linked to factor (a) in ***Selkent***.

36. **The point of legal principle**. There was one significant disagreement of legal principle which I should deal with at the outset because it concerns conflicting EAT authorities. Mr Gorasia argued that the EJ erred in deciding at §§35-36 of his reasons that the section 103A claim did not amount to a mere relabelling and was a new type of legal claim. This was because, he submitted, the Claimant had already brought a claim of unfair dismissal in her claim form – she ticked the box for unfair dismissal in section 8 - meaning that a complaint of unfair dismissal under section 103A was not a new claim as a matter of law. For this submission he relied upon the decision of HHJ Richardson in ***Pruzhanskaya v International Trade and Exhibitors***, UKEAT/0046/18/LA (17 July 2018).

37. If correct, this argument has general implications for tribunal practice in considering amendment applications. According to Mr Gorasia, the effect of the decision in ***Pruzhanskaya*** was that once a claim for unfair dismissal was brought in time, any other complaint of unfair dismissal based on a different reason was also necessarily in time. Consequently, in such a case the second relevant factor in ***Selkent*** – factor (b), the applicability of time limits - would not arise at all and a tribunal ought not to consider it. (This specific point was not raised as a ground of appeal against the EJ's decision here because ground (1) was restricted to an argument based on the first ***Selkent*** factor, factor (a), and not factor (b). But it was the logic of the submission.).

38. Mr Martin's response was that ***Pruzhanskaya*** was wrong if it established the principle which Mr Gorasia sought to derive from it. He relied on the recent EAT authority, ***Arian v The Spitalfields Practice*** [2022] EAT 67, in which HHJ Auerbach considered that ***Pruzhanskaya*** was not compatible with other EAT and Court of Appeal authorities and declined to follow it.[2]

39. In ***Pruzhanskaya***, the claimant had brought a complaint of ordinary unfair dismissal. She sought to add a new complaint of dismissal for whistleblowing, contrary to section 103A: see §13. The employment judge refused the amendment, saying it raised a "substantial new issue which plainly is brought considerably out of time": §19. The submission for the claimant, echoing Mr Gorasia's argument, was that the claim was in time owing to the existing complaint of unfair dismissal. HHJ Richardson agreed:

> "35. The Employment Judge was certainly entitled to say that the proposed amendment added a significant new issue by raising the question whether the principal reason for dismissal was the making of protected disclosures. But I have real difficulty with the words "which plainly is brought considerably out of time". One would expect an Employment Judge, dealing with an application for amendment, to consider whether it introduced a new complaint out of time and if so whether the time limit should be extended: see paragraph 5(b) of *Selkent* which I have already quoted. Was the Employment Judge addressing this question, and if so was he right?
>
> 36. I will first consider whether Ms Balmer [counsel for the respondent] is correct in her submission that the amendment involved a new cause of action brought outside a relevant time limit. I do not think she is correct. I have already explained how section 103A finds its place in unfair dismissal law. It does not create a separate head of complaint to which a separate time limit applies. It is an aspect of the right not to be unfairly dismissed under Part X of the 1996 Act. The Claimant had brought an in-time complaint of unfair dismissal; I do not think that alleging a further potential reason for dismissal, whether it be an "ordinary" reason such as conduct or an "automatic" reason such as the making of a protected disclosure, involves a new complaint with a new time limit."

40. In support of that conclusion, at §§37-41 HHJ Richardson went on to reject the cases upon which the respondent's counsel had relied, including the decision of Underhill P (as he then was) in ***New Star Asset Management Holdings v Evershed***, UKEAT/0249/09/CEA (31 July 2009) and the EAT decision in ***Conteh v First Security (Guards) Ltd***, UKEAT/0178/17 (. He decided that neither authority supported the proposition that amending an existing complaint

[2] In reply, Mr Gorasia referred to the decision in ***Makauskienne v Rentokil Initial Facilities Services (UK) Ltd***, UKEAT/0503/13/RN (29 April 2014), in which HHJ Richardson applied the same approach as in ***Pruzhanskaya***. But the matter was alluded to very briefly - see §30 - and neither party submitted it assisted in the analysis.

of unfair dismissal to allege a new reason amounted to bringing a new complaint outside the time limits. His conclusion was that the employment judge had therefore erred in considering time limits (or had given insufficient reasons to explain the principle he was applying).

41. ***Arian*** also involved an application to add a section 103A complaint to an existing complaint of unfair dismissal.[3] The employment judge refused that application. As one of the grounds of appeal, the claimant/appellant relied on ***Pruzhanskaya*** in support of a submission that the tribunal had erred in treating the section 103A complaint as a new complaint which was out of time: §42. HHJ Auerbach rejected that argument. After citing §36 of ***Pruzhanskaya***, HHJ Auerbach stated as follows:

> "60. I agree with Mr Hutcheon [counsel for the appellant] that the implication of this reasoning [*in* ***Pruzhanskaya***] is that, where there is an existing section 98 complaint, the addition of an allegation of contravention of section 103A is not the introduction of a new complaint for the purposes of time limits. But it seems to me, with great respect to a distinguished EAT judge, that HHJ David Richardson's decision on this occasion was out of kilter with other authority of both the EAT and the Court of Appeal.
>
> 61. ***Selkent*** does not itself specifically get into any detail as to how to identify what counts as a new or different complaint for these purposes….
>
> 62. I also respectfully disagree with HHJ David Richardson's reading of the ***New Star Asset Management*** decision. That was a case concerned with an application to add a section 103A complaint to one under section 98. It seems to me that the approach of Underhill P (as he then was), in particular, at [15] and [35] – [36] and [38], was that whether a free-standing claim made at the point when the amendment application was made, would have been out of time, and if so, by how much *was* a factor; but that the substantive focus should be on whether, or what, the proposed amendment sought to add to the substance of the case advanced, rather than on the particular form that it took. I note that his decision was upheld by the Court of Appeal.
>
> 64. The decision in ***Conteh***, it seems to me, does not assist either way, because, as HHJ David Richardson himself identified, in ***Pruzhanskaya*** at [41], there the proposal was to add public interest disclosure detriment and unfair dismissal complaints where no protected-disclosure complaints of any sort had previously existed at all. Also consistent with the ***New Star Asset Management*** approach is the approach in ***Abercrombie*** (Underhill LJ) in paragraphs 48 and 50; and the analysis in ***Reuters v Cole*** [UKEAT/0248/17] is also to similar effect."

42. HHJ Auerbach went on to cite passages from the Court of Appeal's judgment in ***Abercrombie v Aga Rangemaster*** [2014] ICR 209, to support his ultimate conclusion that he was not bound to follow ***Pruzhanskaya*** on the point because it was "out of kilter" with other EAT and Court

[3] In fact there were two claim forms in ***Arian***, one of which ticked the box for unfair dismissal; but that is not material to the EAT's judgment.

of Appeal authorities (§66).

43. In agreement with HHJ Auerbach, and with the respect to HHJ Richardson, I too consider the analysis in ***Pruzhanskaya*** is wrong and should not be followed. My reasons are essentially the same as Judge Auberach's but because it is an issue of principle, affecting tribunal practice and involving conflicting EAT authorities, I add some reasons of my own.

44. First, the overarching principle on amendments is the balance of justice, as ***Selkent*** itself makes clear: tribunals should "take account of *all* the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it" (at 843F). The overriding objective in rule 2, which governs the exercise of powers and discretions, now underscores such an approach. The nature of the amendment is a relevant consideration to that issue precisely because it affects the case which will be argued, the evidence to be presented and so on. That is why in ***Selkent*** Mummery J referred under factor (a), the nature of the amendment, to a spectrum of amendments, ranging from minor clerical and typing errors at one end to entirely new factual allegations at the other. His focus was on the substance of the amendment, not its legal form. Arguments about whether a cause of action is "new" or not risk producing legal rules on the classification of causes of action, detracting from the overarching principle based on weighing the justice of granting or refusing the amendment.

45. The same approach counts against rules on whether a cause of action is "new" or not for the purpose of considering the applicability of the time limits, factor (b) in ***Selkent***. Statutory time limits are a relevant, but not decisive, factor because an amendment application should not too easily become a means of circumventing the limitation periods which Parliament has laid down for tribunal claims. The weight to be given to that consideration equally depends upon the extent to which the new claim is in substance the same as, similar to, or wholly different from the originally pleaded claim: see ***Abercrombie*** per Underhill LJ at §50.

46. Second - and confirming that interpretation of ***Selkent*** - the decision in ***Pruzhanskaya*** is inconsistent with the exercise the EAT undertook in ***Selkent*** itself. Just as in ***Pruzhanskaya***, the application in ***Selkent*** was to add a complaint of automatically unfair dismissal - dismissal for taking part in the activities of a trade union, contrary to section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 - to a claim form which had already pleaded

ordinary unfair dismissal. In overturning the tribunal which had granted the amendment and refusing leave to amend the ET1, the EAT said this at 844F-G (my emphasis):

> "There is no dispute that the amendment pleads facts which have not been pleaded previously in support of a new positive case of automatic unfair dismissal for trade union reasons within the meaning of section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992. Fresh primary facts will have to be established by evidence and inferences made from them, if appropriate".

The EAT's focus throughout was on the substance of the new case and whether it relied on new facts; it was not on whether, formally, the new claim was the same cause of action.

47. Third, I also agree with HHJ Auerbach's analysis of the judgments in ***New Star Asset Management***, upon which HHJ Richardson appeared to rely at §§39-40 of ***Pruzhanskaya***. The judgments of both the EAT and Court of Appeal undermine rather than support the reasoning and result in ***Pruzhanskaya***.[4]

48. ***New Star Asset Management*** also involved an application to add a complaint of whistleblowing dismissal under section 103A to a claim form in which ordinary unfair dismissal was pleaded. In the EAT at §15, Underhill P (as he then was) was clear that it was "not a point of any significance" whether a section 103A claim was a new cause of action or not because the correct focus should be on whether the amendment is a "mere relabelling" or introduces "very substantial new areas of legal and factual inquiry" - echoing the approach based on substance not form in ***Selkent***. Moreover, having decided to allow the appeal, with the agreement of the parties, Underhill P decided himself to allow the amendment, and he proceeded on the basis that the section 103A claim was out of time and so the time limits were relevant (though, as it turned out, not of sufficient weight to disallow the amendment): see §38(3). His approach to this question was endorsed by the Court of Appeal: see ***New Star Asset Management Holdings Limited v Evershed*** [2010] EWCA Civ 870, per Rimer LJ at §52.

49. The approach of the Court of Appeal in ***Asset Management v*** also appears inconsistent with ***Pruzhanskaya***. Before the Court of Appeal, counsel for the employer argued that the section 103A claim was a new cause of action and this was a factor which the judge was entitled to take into account: see §29. But the decision of Rimer LJ, with whom Sir Scott Baker and

[4] It was common ground in both ***Pruzhanskaya*** and ***Arian*** that the EAT decision in ***Conteh***, to which HHJ Richardson referred at §41, did not assist either way because it involved an application to add a complaint of detriment.

Sedley LJ agreed, was based on a comparison of the allegations in the amendment with the factual allegations in the original claim; he concluded the employment judge was wrong to conclude that the amendment would require "wholly different evidence": see §§50-51. Once again, Rimer LJ did not consider whether the judge was right or not to consider the allegation was a new cause of action: his focus was on the substance of the new allegations, not on the legal classification of the causes of action.

50. Fourth, just as HHJ Auerbach held in ***Arian***, I too consider that the reasoning of ***Pruzhanskaya*** is inconsistent with the approach of the Court of Appeal in ***Abercrombie***. In ***Abercrombie*** the claimants sought to amend their existing claims for guarantee payments, brought under the unlawful deductions from wages provisions in section 23 of ERA, to bring the same claims under section 34 of ERA. The claims were legally identical; the only reason for seeking the amendment was because claims under section 23 were governed by the "unlamented"[5] compulsory pre-claims statutory grievance procedure, which had not been complied with, whereas claims under section 34 were not subject to that procedure. The employment judge had decided the claim (a) involved a new cause of action, (b) raised a cause of action out of time and (c) should have been made sooner. Underhill LJ doubted whether the case involved a new cause of action but said that "ultimately it does not matter" because an amendment could involve a new cause of action (§47).

51. Next Underhill LJ cited the familiar guidance in ***Selkent*** including the statement by the EAT at point (5)(a) of ***Selkent*** that, in considering the nature of the amendment, tribunals "have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action". In deciding that the employment judge had erred, Underhill LJ's analysis was as follows (my emphasis; footnotes excluded):

> "47. If the final sentence of point (5) (a) [*of* ***Selkent***] is taken in isolation it could be understood as an indication that the fact that a pleading introduces "a new cause of action" would of itself weigh heavily against amendment. However it is clear from the passage as a whole that Mummery J was not advocating so formalistic an approach. He refers to "the … substitution of other labels for facts already pleaded" as an example of the kind of case where (other things being equal) amendment should readily be permitted – the contrast being with "the making of entirely new factual allegations which change the basis of the existing claim". (It is perhaps worth emphasising that head (5) of Mummery J's guidance in ***Selkent*** was not intended as prescribing some kind of a tick-box exercise. As he makes clear, it is simply a discussion of the kinds of factors which are likely to be relevant in striking the balance which he identifies under head (4).)

[5] Per the EAT in ***Brett v Hampshire CC***, UKEAT0500/08/JOJ (25 January 2010) at §8.

> 48. Consistently with that way of putting it, the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted…
> ……
> 49. It is hard to conceive a purer example of "mere re-labelling" than the present case. Not only the facts but the legal basis of the claim are identical as between the original pleading and the amendment: the only difference is, as I have already said, the use of the section 34 gateway rather than that under section 23. In my view this factor should have weighed very heavily in favour of permission to amend being granted. As the present case only too clearly illustrates, some areas of employment law can, however regrettably, involve real complication, both procedural and substantial; and even the most wary can on occasion stumble into a legal bear-trap. Where an amendment would enable a party to get out of the trap and enable the real issues between the parties to be determined, I would expect permission only to be refused for weighty reasons – most obviously that the amendment would for some particular reason cause unfair prejudice to the other party. There is no question of that in the present case.
>
> 50. As to point (b) [of the employment judge's reasoning], it is true that fresh proceedings under section 34 of the 1996 Act would have been out of time. Mummery J says in his guidance in ***Selkent*** that the fact that a fresh claim would have been out of time (as will generally be the case, given the short time limits applicable in employment tribunal proceedings) is a relevant factor in considering the exercise of the discretion whether to amend. That is no doubt right in principle. But its relevance depends on the circumstances. Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time-limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded – and *a fortiori* in a re-labelling case – justice does not require the same approach: NB that in High Court proceedings amendments to introduce "new claims" out of time are permissible where "the new cause of action arises out of the same facts or substantially the same facts as are already in issue" (Limitation Act 1980, section 35 (5)). In the circumstances of the present case the fact that the claim under section 34 would have been out of time if brought in fresh proceedings seems to me to be a factor of no real weight. There is, as I have already said, no question of any specific prejudice to the Respondent from the claim being reformulated after the expiry of the time limit.

52. These passages emphasise, in my judgement, that the correct approach is to examine the allegations in the amended claim, and the extent to which they are in substance different from those in the existing claim. If a claim on automatically unfair dismissal is in substance wholly different from the case originally pleaded, that is a factor counting against permission to amend, both under factor (a) and factor (b) of ***Selkent***. On the other hand, if in substance the new claim is a "mere" relabelling or is closely connected to allegations in the existing claim, justice and the ***Selkent*** factors are likely to point in favour of amendment. The exercise

involves the application of principles and weighing different factors, not applying rigid rules on what constitutes a new cause of action.

53. For these reasons, I do not consider that the EJ erred here, as a matter of law, in deciding that the section 103A claim was a new "type of legal claim". There is no rule of the sort proposed in ***Pruzhanskaya*** which required him to treat a section 103A claim as the same type of claim as the existing claim of unfair dismissal when it came to considering factor (a) of ***Selkent*** (nor for that matter factor (b)). All the EJ was saying, when his decision is read fairly, was that the whistleblowing claim was new in type because it changed the factual and legal basis of the previous claim (see §35 of the reasons).

54. **Discussion and conclusion on ground (1)**. On that legal premise, I turn to consider the other elements and arguments of ground (1).

55. The first and principal criticism is that the EJ was wrong to placed weight on the Claimant's alleged disavowal of the whistleblowing claim at the hearing on 16 June. Mr Gorasia drew attention to the fact that the Claimant was acting as a litigant in person. He relied on cases such as ***Segor v Goodrich Actuation Systems***, UKEAT/0145/11/DM (10 February 2012), in which Langstaff J emphasised the importance of tribunals taking the greatest of care to explain to a party, especially one without legal representation, the effects of abandoning or withdrawing a point and not accepting such a withdrawal unless it was clear, unequivocal and unambiguous. The EJ here did not, he submits, sufficiently clarify the nature of a potential whistleblowing claim before relying on the Claimant's statements about it: see, by analogy, ***Cox v Adecco***, UKEAT/0339/AT(V) at §§28(7), 29-30, on the importance of carefully analysing the nature of a claim before striking it out.

56. The upshot was, Mr Gorasia submitted, that the EJ took into account an irrelevant consideration when he decided, at §36 of his reasons, that the Claimant's "disavowal" of a whistleblowing claim a the CMD on 16 June meant she was applying to add a new claim. Instead, Mr Gorasia argued, the EJ should have simply examined the Claimant's case as stated in her ET1 and compared that with the complaints which she sought to introduce in the documents of 25 June and 15 July: what was referred to at the hearing before me as a "textual analysis". Had the EJ correctly examined the ET1, he ought to have concluded that section 103A or section 47B claim was only a relabelling or an amendment to substitute a cause of

action linked or related to facts already pleaded.

57. In his consideration of factor (a) in ***Selkent***, there is no doubt that the EJ placed significant weight on what the Claimant said at the CMD hearing: that much is clear from both §36 and the EJ's statement at §37 that her earlier "disavowal" of a whistleblowing claim was "clearly of some importance". But these comments must be read in context. The EJ referred to the original details of claim in which the Claimant had complained about disclosures but never asserted that the reason for her treatment was because she had made disclosures. The closest it came, as Mr Gorasia accepted, was when she stated in box 8.2 of her claim that she had complained "but no action was taken", a statement which was consistent with her resigning simply because nothing had been done to address what described as unacceptable working conditions.

58. In addition, according to the reasons, at the 16 June hearing the EJ was at pains to seek to clarify exactly what the Claimant said, factually, was the cause of her resigning, and she had said it was not due to her raising health and safety issues: see §§7, 9. That, it seems to me, was a sufficient clarification of the sometimes nice legal distinction between (i) resigning because of the failure to address the Claimant's concerns and (ii) resigning as a result of a deliberate failure to take steps which arose <u>because</u> the Claimant had made protected disclosures. The Claimant's own amendment application of 25 June 2020, cited by the EJ at §18, reinforced the view her original case was based on (i), because it, too, indicated that she had originally assumed the intolerable conditions were due to "happenstance" and poor practice and it was only later that she changed her mind.

59. In that context, in my judgement, the EJ was entitled to take into account what the Claimant had said on 16 June. The claim form itself did not assert that the disclosures themselves played any part in the unsafe conditions which led to her resignation. To the extent the claim form was unclear or ambiguous, the EJ had sensibly made enquiries of the Claimant at the earlier hearing, to see if she was complaining that the lack of response was due to her making disclosures, and her answer was that she wasn't. I do not consider it is realistic or practical for an employment judge to ignore such a clarification of the claim form, provided always that a proper attempt is made to understand the actual basis of the claim. In order to act justly and fairly, at a case management hearing an employment judge may need to clarify exactly what is being alleged in a claim or response (compare ***Cox***, above); by the same token, however,

the answers given may be relevant to the interpretation of the form and whether an amendment is necessary. The claim form does not sit in a vacuum and its author is often in the best place to explain what the claim is meant to allege factually, even if the proper legal classification of the complaints may fall more to the employment judge.

60. The second principal error of law alleged under ground (1) is that the EJ gave too little weight to what was stated in the claim form. However, at §§38-42 of his reasons the EJ compared what was said in the documents provided by Claimant on 25 June and 15 July with what was stated in the original claim form. He considered that, in some respects, missing details could be provided by further information (§§38-9) and that the reference allegation was a side issue (§40). His comparison of those documents, coupled with what the Claimant said at the hearing on 16 June, both supported his conclusion that the Claimant was now asserting a new factual case, that the failure to protect her health and safety arose because she had made protected disclosures (rather than being the result of simple inaction on the part of the Respondent): see §41.

61. Mr Gorasia raised strong arguments why the claim under section 103A was substantially foreshadowed in many respects within the existing claim form, and why the detriment claim under section 47B was closely linked to or related to facts within the claim form. But the EJ carefully compared the factual allegations in the existing claim form, as clarified by the Claimant, with the allegations being made in the amendment application. His approach accorded with the analysis of the Court of Appeal in ***New Star Asset Management*** per Rimer LJ at §50. On the premise that the EJ was entitled to take account of the Claimant's clarification of her claim at the hearing on 16 June, it cannot be said that the EJ took account of irrelevant factors in making the comparison he did. Nor do I consider the decision can be categorised as perverse, given the generous width of the discretion given to employment judges in this area. Another employment judge might have permissibly decided that the amendment should be granted because of the similarity of the new claims to the original claim being advanced to the facts alleged in the existing claim form; but the assessment of the difference between the new claim and the original claim is the exemplar of a question of degree to which there is often more than one answer.

62. As a further argument, it was submitted that the EJ should have considered the provision of further information as an alternative to refusing amendment, or he should only have allowed

the amendment for the existing protected disclosures. Mr Gorasia did not press these points and I consider he was right not to do so. The EJ considered that in some respects further information could resolve any lack of detail in the amended case: see §§38-39. If he only gave permission to amend for some of the alleged protected disclosures, a future tribunal might be faced with the impracticable task of having to disentangle the factual part played by pleaded disclosures and that played by other, unpleaded disclosures. More fundamentally, I do not consider these particular complaints begin to show an error of law in the approach of the EJ.

Ground (2)

63. The second ground of appeal, which was originally ground (3) in the notice of appeal, is put shortly - that the EJ "erred in holding that the balance of hardship fell in favour of the Respondent". This is a reference to factor (c) in ***Selkent***. Here the notice of appeal contends, in amplifying this ground, that (i) the EJ gave "insufficient weight" to the fact that the Respondent had foreshadowed a whistleblowing claim in its response (§15); (ii) when it came to assessing the merits of the new claims, he gave only "minor consideration" to the fact that the Claimant was a litigant in person and/or that the provision of further information would have improved the merits of her case (§16); (iii) he failed to appreciate some matters, such as that the Claimant had received legal advice on the amendment (§17 of Notice of Appeal); and (iv) he "overemphasised the issue of time limits" and wrongly concluded the balance of hardship was against the Claimant (§18 of Notice of Appeal).

64. In the legal section of his reasons, the EJ referred to ***Gillett v Bridge 86 Ltd*** UKEAT/0051/17 (6 June 2017), in which Soole J rejected an argument that an employment judge considering an amendment could only consider the merits of the new claim where it was hopeless. Rather, as part of the assessment of all the circumstances, an employment judge was entitled to consider whether a claim had reasonable prospects of success (§§25-27). No criticism is made of that self-direction. The EJ dealt with the balance of hardship at §§48-59. His principal conclusion was that the Claimant had "little prospect" of persuading a tribunal that the failure to protect her health and safety - the cause of her resignation - arose because of her making protected disclosures. He also had regard to the fact that the Respondent would be put to the time and trouble of defending claims which would probably be held to be out of time and which were likely to fail in any event.

65. I consider none of these points, which were dealt with shortly in oral submissions, shows an

error of law on the part of the EJ. It should be borne in mind that the tribunal decision should be read fairly and as a whole and that a tribunal is entitled to express its reasons in concise terms, provided always that a party knows why they have won or lost on a point: see ***DPP Law Ltd v Greenberg*** [2021] IRLR 1016 per Popperwell LJ at §57.

66. First, as to §15 of the notice of appeal, the EJ was aware that the Respondent had referred to a potential whistleblowing claim in her response (§8). The weight, if any, to be given to that was matter for the EJ and I do not consider he was required to refer to it when it came to the balance of hardship.

67. Second, as regards §16 of the notice of appeal, the EJ was aware that the Claimant was a litigant in person, a point he took into consideration when it came to her not having set out the legal basis of her claim in the claim form (§37) and in relation to time limits (§45). The weight given to that consideration was a matter for the EJ, not me on appeal. He gave sufficient reasons to explain why he considered the claim had little prospect of success - for example, that the Claimant had originally maintained that it was the failure adequately to protect her health and safety, and not her making protected disclosures, that led to her resignation - so that the Claimant knows why she lost on this point. He was not required to consider the hypothetical question whether the case might have been improved by the provision of further information, above all in circumstances where he had very extensive documents from the Claimant already addressing the amendments she sought.

68. As to the alleged errors at §17 of the Notice of Appeal, little if anything was said about these in written or oral submissions and so I deal with them briefly, adopting the lettering in that paragraph:

(a) The EJ reasons at §45 noted that the Claimant had obtained legal advice after the hearing on 16 June, an assumption which was justified because of the statement on the first page of her document of 25 June that she "had received legal advice", as the EJ explained at §23 of his reconsideration decision. I do not consider it can be said this was an incorrect assumption.

(b) At §39 of his reasons, the EJ recorded that the "Red Flag" reporting system was mentioned in the claim form, said there was a lack of detail about such a protected disclosure but, in any case, considered that any uncertainty about this allegation could be dealt with by the provision

of further information. Any misunderstanding about exactly what details the Claimant had provided about the "Red Flag" system, whether in her claim form or later, was therefore immaterial.

(c) I do not consider there is any error of law in the EJ not referring to a chronology or list of protected disclosures in his decision. The EJ explained in the reconsideration decision that the disclosures were all listed in a document of 1 September 2020 (which I was not shown) and the chronology was considered by him: see §10 of reconsideration decision.

(d) It cannot be said that the balance of hardship was in favour of the Claimant simply because her claim was liable to dismissed in its entirety if the application to amend failed. Nor was it an error of law for the EJ to give "emphasis" to the time and costs the Respondent would incur defending a claim which would probably fail: on the contrary, that was a matter which he was entitled, and no doubt, right to take into account.

69. Finally, I consider there was no error of law in the EJ considering time limits: see the discussion of ***Pruzhanskaya***, above. The emphasis or weight he gave to that factor was essentially a matter for him. Nor could it be said his conclusion on the balance of hardship was perverse, given the generous ambit given to tribunal decisions in this area. I therefore reject the submission made at §18 of the notice of appeal.

70. Additional points were made in the skeleton at the hearing under ground (2). There was no application to amend; but in any event I do not consider any of these points demonstrates an error of law. It was said that the EJ failed to take account of four relevant factors, which I consider in turn below:

(1) *The Claimant's "disavowal" of whistleblowing was explicable by her lack of legal representation*. As set out above, the EJ expressly took account of the fact that the Claimant was unrepresented when it came to considering her "disavowal" of whistleblowing. I do not consider the EJ was required to find or accept that the clarifications she gave of her claim – for example, that she was "not suggesting that the lack of response was due to her raising a health and safety issue" (§7 of the EJ's reasons) – was due to her being unrepresented.

(2) *The fact the Claimant had been advised by ACAS that workers could bring claims about health and safety signalled that she might have wished to bring a whistleblowing claim*. The discussion of the ACAS advice is dealt with by the EJ at §5 of his reasons. This might have suggested the Claimant was intending to bring a whistleblowing claim; but, according to the reasons, when this was discussed on 16 June the Claimant explained she was not seeking to suggesting this: see §§7-8. Moreover, in her application for reconsideration the Claimant did not assert that she had been advised by ACAS that she could bring a whistleblowing claim, as Mr Martin pointed out.

(3) *The Claimant had pleaded sufficient material within her ET1 to found a whistleblowing claim, as the respondent has already foreshadowed in its response*. True, as Mr Gorasia argued before me, the Claimant had set out in her claim form matters which supported an allegation of whistleblowing; but, as he accepted and as the Claimant clarified at the CMD hearing on 16 June, she did not assert in the original claim that the intolerable work conditions, or the deliberate failure to address them, arose because she made a protected disclosure. The response from the Respondent fell short of accepting there was a claim for whistleblowing and in fact asserted that there was no allegation that the Claimant was subject to a detriment on the ground that she made a protected disclosure: see the EJ's reasons §8. In any case, I do not consider it can be said the EJ was required to refer to this matter when it came to consider the balance of hardship.

(4) *The EJ could have allowed a limited amendment, restricted to the claims in her ET1*. I have already considered this point at §62 above: it may have been a recipe for chaos if the tribunal only allowed the amendment in respect of some protected disclosures but not others; and the EJ can hardly be criticised for considering the amendments proposed by the Claimant.

71. Finally, in the skeleton under this ground it is also said that the EJ gave too much weight to the Claimant's "disavowal" of a whistleblowing claim when the burden was on the Respondent to show the ground on which an act or failure to act was done: see section 48(2) of ERA. The skeleton draws a comparison with cases establishing that strike out should rarely be ordered where the central facts are in dispute. I do not consider that section 48(2) entails or requires that a claimant's explanation for his or her treatment, whether in the claim form or

during discussions at a case management hearing, must ignored. It may be relevant to whether the claim appears to have merit, which is a potentially relevant consideration on amendment. In my judgment the EJ was entitled - I put it no higher than that - to look at how the claim had been advanced and explained by the Claimant when it came to assessing the merits of her claim.

Conclusion

72. For the reasons set out above, I do not uphold either of the grounds of appeal and the appeal is therefore dismissed.