Neutral Citation Number: [2024] EAT 170

Case No: EA-2024-000129-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19th June 2024

Before:

JUDGE KEITH

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Between:

LILIANA VASSALLO

Appellant

-and-

(1) MIZUHO INTERNATIONAL PLC
(2) MIZUHO BANK LTD

Respondents

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MS A BROWN appeared on behalf of the Appellant
MR GREAVES (instructed by **Matrix Chambers) for the Respondents**

Hearing date: 19th June 2024

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE – whether EJ's findings not supported by the evidence but instead on erroneous assumptions

The Employment Judge was entitled to refuse an application to amend the particulars of claim, including to add claims of whistleblowing detriment and dismissal, in circumstances where the Claimant's representatives had presented a Claim Form which made no reference to such claims, but another version of the Claim Form had been created, which referred to whistleblowing detriment and unfair dismissal, but which had not been presented. The ET was entitled to conclude that an informed decision had been taken when the Claim Form was presented, not to pursue such claims. The EJ reached his conclusion after the Claimant's representative had made submissions to him. The EJ was not obliged to carry out an inquisitorial role and to ask the Claimant to consider giving evidence. It was a matter for the Claimant, on legal advice from her representative at that hearing, to decide whether to waive privilege as to the circumstances in which her previous solicitors presented her Claim Form and adduce evidence.

JUDGE KEITH:

1. These written reasons reflect the full oral reasons which I gave at the end of the hearing.

2. I will refer to the parties as they were before the Employment Judge. I will refer, largely, to dividers, rather than to pages in the version of the Claimant's bundle before me. The reason is because the bundle filed by the Claimant was not paginated, and instead, had tab numbers. Shortly before the beginning of the hearing, I received a paginated index, to which the Respondents sought to reply, and so on occasions, I refer to those page numbers. Obviously, it would have been preferable if there had been a single bundle which was paginated, but I say no more.

Background – the Judge's decision under challenge

3. The Claimant challenges a decision of Employment Judge Plowright, sent to the parties on 20th December 2023. At divider [8], at paragraph [6], the EJ refused the Claimant's application to amend her grounds of claim. He gave his reasons for doing so at para [40] onwards. He recorded that the Claimant had presented a Claim Form on 3rd March 2023 in respect of employment for the period from 2nd June 2021, until her dismissal on either 4th or 5th October 2022. He recorded that, at that stage, the claims were for breach of contract, indirect associative disability discrimination, and failure to comply with the ACAS Code of Practice. On 27th April 2023, the Respondents filed a Response. Of note, the Claimant says that she did not personally receive a copy of the full Response, as opposed to a partial one, until June 2023.

4. On 21st August 2023, with new representatives, the Claimant applied to amend her particulars of claim, to include claims of detriment arising from the making of protective disclosures, a claim of automatic unfair dismissal, arising from the same protective disclosures, and a claim of indirect associative sex discrimination. On 27th October 2023, the Respondents objected to that application.

5. Following an initial adjournment of a case management hearing, the EJ considered the application at a Preliminary Hearing on 19th December 2023, having received a substantial and detailed hearing bundle, which he had recorded as running to some 309 pages. At paras [47] to [48] of his reasons, he reminded himself, briefly, of relevant cases, including the well-known authorities of **Selkent Bus Co Ltd v Moore** [1996] ICR 836, **Vaughan v Modality Partnership**: UKEAT 0147 20 BA, and **Cox v Adecco** [2021] ICR 1307. I do not recite the law in any further detail, as there is no suggestion that there is a misdirection of the law. Rather, the challenge that I was asked to consider was to the EJ's findings.

6. At para [51], the EJ recognised that the Claimant was legally represented at the time that the Claim Form was presented. At para [52], the EJ found that it was clear from email correspondence provided in the hearing bundle, that an earlier version of the Claim Form had been prepared but not presented, which contained a reference to a whistleblowing claim in box 8.1. This is an important part of the finding, which the Claimant seeks to challenge. The EJ stated that consideration must have been given to a whistleblowing claim by the Claimant and her legal representatives at the time the Claim Form was submitted. Given that the Claim Form that was submitted did not contain any reference to a whistleblowing claim, the EJ was satisfied that an informed decision must have been made not to pursue a whistleblowing claim when the Claim Form was submitted.

7. At para [53], the EJ concluded that no good reason had been put forward as to why the proposed additional claims were not included in the original Claim Form, which were the subject of the amendment application not made until five months after the original claim, on 21st August 2023 (see para [54]). At para [55], the EJ noted and analysed the Claimant's assertion that it was only as a result of disclosure of a reply to the Claimant's email of 28th September 2022, of which she was aware for the first time in the Respondent's Response, that it was apparent that she may have been

dismissed as a result of whistleblowing, and only at that stage, did she learn that earlier detriments may have been caused by other protective disclosures.

8. However, at para [56], the EJ rejected that contention, noting that, as already pointed out, consideration had been given to including a whistleblowing claim in the Claim Form, in a draft prior to one presented to the ET, and an informed decision had been made not to pursue such a claim. Furthermore, in the original Claim Form which was presented, the Claimant made no reference, at all, to her email dated 28th September 2022, which she could have done, had she thought that it amounted to a protected disclosure, and had she thought that her dismissal was, in any way, connected to the protected disclosures.

9. In further analysis, at para [57], the EJ stated that although the Claimant had said in the Claim Form to have had feelings as though she had been punished, she was legally represented at the time, and could have, but had not, suggested, that those concerns amounted to protected disclosures. That was in spite of the fact that consideration must have been given to this because whistleblowing was raised as a head of claim in the earlier version of the Claim Form.

10. In terms of the remainder of the analysis, at paras [58] to [60], the EJ had noted the Respondent's submission of their Response on 27th April 2023, at a time when the Claimant was legally represented. However, the EJ corrected a point given in his oral reasons that the Claimant had time to take advice, noting that the Claimant had only received an email from her representatives on 26th May 2023, which contained an incomplete copy of the Response, and she did not receive a complete copy until early June 2023, at which point she was no longer legally represented, because her solicitors had come off the record on 31st May 2023.

11. At para [60], the EJ concluded that the Claimant could have instructed alternative lawyers if she wanted to, but did not, in fact, instruct her new lawyer until shortly before 21st August 2023, when the application to amend the particulars of claim was made. The EJ acknowledged that the Claimant's mother had health issues, and that would have impacted on the Claimant's ability to focus, but that that did not explain the delay until 21st August 2023. The EJ went on to consider possible prejudice to the Claimant, and carried out what was emphasised by His Honour Judge Tayler, in the recent decision of **Vaughan,** as a 'balance of injustice' analysis. In particular, I noted (because it touches on the grounds before me), at para [62], the EJ concluded that the injustice and hardship to the Respondent outweighed the injustice and hardship to the Claimant, because the claims could have been included in the original Claim Form as presented, or in any event, at a much earlier stage in the proceedings. The Claimant contends that the analysis was based on an error in the EJ's reasoning and findings, specifically that the Claimant could and ought to have presented her full claim at an earlier stage.

12. At para [63], the EJ considered the amendments, which sought to introduce an indirect associative sex discrimination claim and which, in the EJ's view, were based largely on the facts as already pleaded. The Claimant had been legally represented at the time the Claim Form had been filed, and careful thought must have been put into drafting the Claim Form and particulars of claim, because there was at least one earlier version of the Claim Form. Had she wished to do so, the Claimant could have presented such claims at that stage.

13. I add that, before me, Mr Greaves on behalf of the Respondents referred to the hardships to the Respondents if the amendments were permitted to proceed. I do not dwell on them in any detail, other than to say that it was not as simple as a witness who since left employment between the period of the presentation of the original Claim Form and the amendment application, having to produce some form of additional statement, in circumstances where they would otherwise always have to

have done so. The Respondents say that the nature of the amendments substantially altered and expanded upon the original claim, and remain vague, so that the nature of the scope of the claim, and the delay in bringing it, also prejudiced the Respondents.

The Claimant's reconsideration application and appeal

14. The Claimant applied for reconsideration of the EJ's decision on 4th January 2024. The EJ rejected this in a decision sent to the parties on 29th January 2024, a copy of which is at divider [7]. The decision erroneously refers to a decision of 11th September 2023. I say little more about the reconsideration decision, as when considering the later application for permission to appeal, the President of this Tribunal, the Honourable Mrs Justice Eady, regarded the reconsideration decision as not having significantly addressed and engaged with the Claimant's challenge.

15. The Claimant then filed a Notice of Appeal on 30th January 2024, (at divider [2]), arguing on two specific points. The first point, in para [7] of the grounds of appeal, was that the EJ had erred by making findings of fact which were not supported by evidence. The second was that EJ made findings based on erroneous assumptions. The grounds then referred to the reconsideration request.

16. I canvassed with the representatives, during the hearing before me, whether they accepted that the precise scope of the appeal in respect of which permission had been granted was limited to para [7] of the grounds, namely, a challenge to the findings, as opposed to omitting to make findings, and that the challenge to the findings was that they were not based on evidence, but supposition. What the Respondents argue, in my view, correctly, is that the President's grant of permission was, indeed, limited to those two specific grounds, cross-referenced to the application for reconsideration. That much is clear from the President's order, where it states, at paragraph (1), that:

> "By this appeal, the Claimant seeks to challenge the ET's refusal to permit her applications to amend her claim, to include complaints of automatic unfair dismissal, by reason of having made a protected disclosure, and of indirect associative sex discrimination. The grounds of appeal are twofold: (1) that the ET erred in law by makings of findings of fact that were not supported by any evidence; or (2) were founded on erroneous assumptions. The particulars relied on in support of these grounds are set out in the Claimant's application for reconsideration."

17. The President's grant of permission continued, referring to the EJ's reconsideration judgment not answering the application, and considering that the two grounds set out were reasonably arguable. Ms Brown accepted that the reference to the reconsideration application was by way of background, rather than adding further grounds, specifically a failure to make findings, or the proportionality of refusal. Were I to conclude that the EJ had erred in law, these matters could potentially be relevant matter in any remaking. This is consistent with paragraph [3.8.5.f] of the **EAT Practice Direction 2023**, namely, that the grounds should not seek to incorporate any other documents, such as an application for a reconsideration, and they would not be part of the grounds, as opposed to background.

The parties' submissions

18. I then turn to the respective parties and submissions, and I do no more than summarise them. The submissions included skeleton arguments.

The Respondents' Answer

19. First, I summarise the Respondents' Answer, (at divider [23]), dated 15th March 2024. At para [2.2] of the Claimant's reconsideration application, the Claimant had referred to the EJ not receiving oral or written submissions as to what had transpired between the Claimant and her then legal representatives, or, at para [2.3], submissions as to the Claimant's awareness of the contents of the original presented Claim Form. The Claimant argued that there had been no submissions to the EJ as

to whether the Claimant had taken an informed decision not to pursue an element of the claim (para [2.4]), and the Claimant argued that the EJ had made that finding in the absence of evidence. In reply, the Respondents said that any suggestion that the EJ had not received submissions on why there had been a delay in presenting what the Claimant regarded as the correct Claim Form, was not correct. It relied on notes of the Respondents' representatives of the hearing before the EJ.

20. For completeness, because the President referred to this when granting permission, I also refer to the passage at para [3.2] of the reconsideration application, where the Claimant submits that she had attended the hearing, was in a position to give evidence, and had the EJ indicated that he wished to receive oral evidence, the Claimant would have told the EJ that she was not aware that the whistleblowing claim had been removed from the Claim Form as presented. The same passage challenges the EJ's finding at para [53], that no good reason had been put forward as to why the proposed additional claims were not included in the Claim Form, and it was clear from the email correspondence provided, that an earlier version of the Claim Form had been prepared, which the Claimant then sought to explain, including in challenging the reasoning, and which the EJ recorded at para [56].

21. The Respondents say that following the reconsideration judgment, and despite objections from the Claimant, this Tribunal had asked the EJ to provide notes of the hearing. The reason for this was that while the Respondent's representatives had, themselves, provided a detailed note of the hearing, which was contained in the bundle before me, the Claimant disputed the accuracy of those notes.

22. The EJ provided his notes, which support the Respondent's contention that the Claimant's representative before the EJ, Ms Brown, did make submissions on the nature of the claims, why the Claim Form had not initially included any reference to whistleblowing, including at page [2] of the EJ's notes, that the Claimant did not know that she had a claim, and then a reference to speculation

that the Claimant appeared to have been poorly represented previously, which is why the whistleblowing claims were not included in the Claim Form. The EJ's notes also referred to submissions on the Claimant's mother not being in good health, and later assertions on page [3], that the Claimant did not realise that she could bring a whistleblowing claim, and that she was not represented when she received the Respondents' Response or 'ET3'. Ms Brown was recorded as arguing before the EJ that when she was sacked, the Claimant had not recalled her own email of 28th September 2022, now relied on as a protected disclosure, and the fact that the Claimant could sue her lawyers was not in accordance with the overriding objective as a basis for refusing the amendment application.

23. In summary, the Claimant's representative had made detailed submissions to the EJ as to why there was no whistleblowing claim in the original Claim Form. This was an unusual case, in that when the Claim Form was initially presented, there were two version of the Claim Form. One version, which was the one presented, did not refer to whistleblowing. The second, which was not presented, did. While it is suggested that the Claimant believed that it was this version which was presented, she did not give witness evidence before the EJ.

24. The Respondent says that contrary to the grounds of appeal, the EJ did not proceed to make findings without evidence and on erroneous assumptions. The EJ had evidence provided by the Claimant, that an earlier version of the Claim Form had been prepared, but not presented, which referred expressly to whistleblowing detriment, and she had been poorly represented. The EJ's finding that an informed decision must have been made not to pursue a whistleblowing claim, did not involve an explicit or implicit finding, that this was an informed decision of the Claimant, personally, as opposed to that of her legal representative. If the latter, there was no need for the EJ to make findings, as the Claimant was fixed with responsibility for her representative's actions, as

per the well-known authority of **Dedman v British Building and Engineering Appliances Ltd** [1974] ICR 53.

The Parties' submissions at the hearing

The Claimant's submissions

25. I turn to the respective skeleton arguments and the oral submissions. The skeleton argument raises issues substantially wider that the permitted grounds of appeal. In the skeleton argument, the Claimant asserts that the EJ erred by failing to consider a number of factors, including not making a finding that the Claimant could not have connected her own email of 28th September 2022 to her dismissal, until it was revealed in the Respondent's Response. The EJ had failed to consider that the Claimant had not retained a copy of her email of 28th September. The Claimant was not aware of its circulation among employees of the Respondent. The Claimant was not aware of those employees' responses, and their view taken on her email. Those matters were not referred to in the Respondent's letter dismissing her. The Claimant did not have legal representation for a period. The Claimant would not have been aware of the need to make an application to amend, until she instructed her second legal representative in August 2023, and consequently, would not have been aware that her claim was defective.

26. At the time that her Claim Form was initially presented, neither he, she, nor her lawyers, would have been aware of its defects. She had sought legal representation subsequently, because of the case management hearing which was listed 1st September 2023. She had also had a period of illness, on which she had based an earlier adjournment application. On the question of prejudice, there was no prejudice to the Respondent in responding with witness evidence, in contrast to the loss of an uncapped whistleblowing claim.

27. In relation to the amendment to add a claim of indirect sex discrimination, the EJ had no evidence as to what advice had been received in formulating the Claim Form which was presented. A suggestion that the Claim Form was based on settled instructions was merely an assumption.

The Respondent's submissions

28. Mr Greaves reminded me that the permitted grounds of appeal were to the EJ's findings, as opposed to an absence of findings, in relation to drafting the Claim Form.

29. In contrast to the Claimant's assertions that Ms Brown had made no submissions, and no evidence had been adduced in relation to the drafting of the Claim Form, and the EJ could have made further enquiries, the answers are first that Ms Brown did make submissions to the EJ. Second, to the extent that the EJ did not have more detailed submissions or evidence, that was a matter for the Claimant, when considering the interests of justice (see **Pereira v GFT Financial Ltd** [2023] EAT 124). Mr Greaves argued that **Pereira** is not authority for the proposition that even for a legally represented Claimant, there was a positive obligation on a Judge to consider what evidence was available and whether a party wished to give witness evidence. Mr Greaves said that the EJ was entitled to consider the application in the normal way, namely, based on an adversarial process, not an inquisitorial one. There were potential restrictions on the Claimant giving evidence (contrary to what she alleged) as she might otherwise inadvertently waive legal privilege. In fact, Ms Brown had commented on the poor quality of that advice. If it were said that there was evidence that could and should have been adduced, that was a matter for the Claimant.

30. The Respondents point out that the application to amend was initially only a two-page document, on 21st August 2023. It was only after the ET's orders on 31st October 2023, that the Claimant was directed to provide a document, clearly identifying the amendments sought, and

importantly, for why those amendments should be granted. Those comprise the written amendments at divider [12], and the justification.

31. The Respondents observe that the Claimant's initial explanation for why she had not presented claims based on protected disclosures earlier, was a comment at para [36] of the Claimant's amendment submissions, that it was not until the Claimant had the benefit of additional legal representation until 21st August 2023 that she appreciated she could have such claims. However, having received the Respondent's written submissions on 1st December 2023, in advance of the Preliminary Hearing before the EJ on 19th December 2023 it was only at that stage, that having alternatively asserted that the original Claim Form had included references to whistleblowing, did she assert that a different version of the Claim Form had been filed from the version she believed to have been filed.

32. The Respondent observes that at the Preliminary Hearing of 19th December 2023, Ms Brown provided two alternative explanations for why no whistleblowing claim had originally been presented. First, the Claimant did not know she had a claim – see the EJ's note at page [2]. Or second, albeit, potentially speculative, that the Claimant was poorly represented. What the EJ also recorded, at page [5] of his notes, was the Claimant's alleged ignorance of the ability to bring a whistleblowing claim, about which she only became aware when she received the Respondent's Response.

33. In summary, this was an unusual case, in that there had been two versions of the Claim Form, only one having been presented, although, to be clear, there was never more than one version of the particulars of claim. The Claimant has never waived legal privilege, so it is unknown whether there was an earlier version of the particulars of claim. Nevertheless, the Respondent argues that in the circumstances where there were two different versions of the Claim Form, both of which could have

been submitted in time, there had to have been consideration given to a whistleblowing claim, based on the evidence available to the Claimant at that time.

34. The Claimant unfairly sought to criticise the EJ for making a finding of fact which that he did not make. The EJ did not find as to a 'choice' of what version of the Claim Form had been presented. Indeed, the EJ could not and did not need to do so, first because there was an absence of evidence on that particular point (the Claimant had not waived privilege) and second, because the Claimant was, effectively, fixed by the Claim Form which was presented and the actions of her former legal representatives.

35. In response to ground (1) and the challenge that the EJ's findings had been made in the absence of evidence, the Respondents says that the EJ unarguably had evidence to conclude that an informed decision must have been taken not to pursue a whistleblowing claim. The EJ had submissions from the parties and all of the evidence which had been disclosed, and it had been open to the Claimant to have provided further evidence as to what had transpired at the time that the Claim Form, or a version of it, had been presented, for example, in a witness statement, but she had not done so.

36. In terms of ground (2), namely that the EJ had impermissibly speculated, there were no erroneous assumptions. The EJ had invited submissions from the Claimant's Counsel, Ms Brown. The EJ was not obliged, contrary to the grounds of appeal, to invite the Claimant to give oral evidence, particularly in circumstances where she had not provided a statement and was legally represented. The EJ was entitled to conclude that careful thought had been given about the drafting of the Claim Form. That was based on evidence, not merely speculation, and whilst, specifically, the Claimant asserted that she did not recall the existence of her own email until 28th September 2022, until it was revealed in the grounds of resistance, this was a submission expressly made in the amendment application, and expressly considered at paragraphs [55] to [57], and rejected.

Effectively, the Claimant was seeking to reargue the case which had been assessed by the EJ as part of the balance of prejudice.

Discussion and conclusions

37. I deal first with an aspect of the Claimant's skeleton argument, at paras [2] to [4], that the EJ failed to appreciate that a distinction between a 'whistleblowing detriment' claim, and a 'whistleblowing dismissal' claim. While in her Claim Form she says that she had referred to having been 'punished' for 'raising concerns', the Claimant argues that the EJ failed to distinguish between detriments and her later dismissal, the reason for which she cannot have been expected to know about until she received the complete Response.

38. I accept Mr Greaves' submission that that is not a ground of appeal that has been permitted to proceed, in the sense that it is not a challenge to a finding based on an absence of evidence, or erroneous assumptions. It was a challenge to the basis on which the EJ approached the amendment application. In the alternative, (namely had this been a permitted ground), I accept Mr Greaves's submission that the EJ did not err in failing to appreciate the distinction between claims of detriment and dismissal. As Mr Greaves pointed out, at the beginning of the findings, at para [49], the EJ had referred, expressly, to the summary of the amendment application to add three new claims, namely, detriment arising from the making of protective disclosures, dismissal arising from the making of protective disclosures, and indirect associative sex discrimination.

39. Moreover, at para [55], the EJ unarguably considered that distinction, when he referred to the Claimant seeking to rely on the fact that it was only a result of a reference in the Respondent's Response to her Claimant's email of 28th September, that the Claimant believed that she may have been dismissed as a result of whistleblowing, and at that same stage, believed that earlier detriments

may have been caused by other protected disclosures. The EJ's appreciation of the distinction between detriment on the one hand, and dismissal on the other, cannot have been clearer.

40. I turn next to paras [5] to [7] of the Claimants skeleton argument, where she challenges the EJ's findings at para [53] of the judgment that no good reason had been put forward as to why the proposed additional claims were not included in the original Claim Form, and para [56], that the Claimant had made no reference, at all, to her email, dated 28th September 2022, which she could have done, had she thought it amounted to protected disclosure. For the reasons outlined in her reconsideration application and elsewhere, the Claimant says there were good reasons advanced to the EJ.

41. The answer to this is in the nature of the proposed amendments and the EJ's reasons in the judgment, when read as a whole. First, I accept, as Mr Greaves pointed out, that the reference is to no 'good' reason, not any reasons at all. Second, on the nature of the amendments and related submissions, I turn to para [36] of the Claimant's submissions to the EJ, (page [110]) and the proposed additional claims at page [131] of the bundle. The nature of the additional claims were to include detriment claims and a dismissal claim, which were related to, or were done on the ground of a whole host of alleged protected disclosures, all of which predated the Claimant's email of 28th September 2022, the reaction to which the Claimant claimed to have been unaware until receiving the Respondent's response.

42. The EJ was unarguably conscious of the Claimant's assertion that she had not known of the Respondent's reaction to her disclosures until the Respondent's Response. The EJ expressly considered that assertion. This was not a case where the EJ failed to make relevant findings. Instead, the EJ concluded that he did not accept the Claimant's explanation, where, as set out in para [56] of the judgment, consideration had already been given to a whistleblowing claim, prior to the Claim

Form being sent to the ET. The EJ recognised that the Claimant did not receive the full Response until after she was no longer legally represented, but concluded that on the facts of this case, this did not support the argument that that whistleblowing claims could not have been made at a far earlier stage.

43. As to the Claimant's challenge elsewhere in Ms Brown's skeleton argument before me, at paras [8] to [14], that the Claimant had no reason to envisage or be aware of the need to make an amendment application at an earlier stage, and was only prompted to do so in the context of the Case Management Hearing, I accept Mr Greaves's submission, that this is a challenge to an absence of a specific finding (not a permitted ground of appeal) rather than a challenge to a finding made in the absence of evidence, or based on speculation.

44. I turn next to the EJ's consideration of the balance of injustice to the parties. I have been careful, bearing in mind the President's comments in granting permission, to consider what, if any, discernible grounds relate to the EJ's findings, as opposed to an absence of findings, which are not within the grounds, or alternatively, a challenge to the EJ's analysis. On first review, paras [15] to [19] of the Claimant's skeleton argument are a challenge to the balance of injustice, for which no permission to appeal has been granted. In the alternative, Mr Greaves made submissions, and I have considered, whether some of the factors now relied on could have been argued before the EJ by the Claimant but were not e.g. the potential value of claims.

45. The one issue on which I can see that there is cross-over to the permitted grounds is at para [19] of the Claimant's skeleton argument before me, where it is argued that the EJ erred at para [62] of his judgment in concluding that the Claimant could have brought the whistleblowing claims at an earlier stage. For the reasons that I have already explained, the EJ made findings based on the evidence which was before him, and which he was unarguably entitled to make, and was not

speculative or based on the absence of evidence. Reframing this as a challenge to the analysis of the balance of injustice does not take the Claimant's appeal further forward and does not disclose an error of law.

46. I turn, finally, to the Claimant's challenge, at paras [20] to [22] of the skeleton argument, about the EJ's refusal to allow the addition of a claim of indirect associative sex discrimination. The Claimant argues that the EJ's decision that an informed decision must have been made not to pursue such a claim originally, as the Claimant had legal representation, was an error of law. As with the challenge to the EJ's refusal to allow the addition of the claim of unfair dismissal, I accept Mr Greaves's submission that the ground seeks to challenge a finding that was not made. There was a decision to present a Claim Form which did not include claims of automatic unfair dismissal and sex discrimination. Whether that was a decision taken by the Claimant, or by her legal representatives, was not a finding that the EJ did or should have made, particularly where, as here, there was no waiver of privilege and no evidence given in respect of the point. Instead, I accept that the EJ was entitled to conclude that the Claimant bore ultimate responsibility for the actions of her former solicitors. Beyond that, I make no comment on the balance of injustice analysis, where I emphasise again, the grounds relate to the findings, rather than the weight that the EJ attached to those findings.

47. In response to the Claimant's suggestion that the EJ erred by failing to adopt an inquisitorial role, this was a case where it was argued that the EJ erred in speculating as to what the Claimant knew and when. The Claimant applied to amend her Claim Form, and Respondent had opposed this. There had been two versions of a Claim Form, which begged the question why. The EJ asked the Claimant's representative for a response, and without criticism of Ms Brown, she answered as best she could. I accept Mr Greaves' submission, that what the Claimant adduced by way of evidence was a matter for her, and it was not for the EJ to adopt an inquisitorial role. The Claimant could, have she

wished on advice from her new legal representative, have waived privilege in respect of her former solicitors' advice.

48. In the circumstances, the appeal before me discloses no error of law.

49. I have been asked to make a specific finding on whether the appeal before me was misconceived. I largely reject that, save for one set of arguments. The set of arguments were contained in the Claimant's reconsideration application, to which the Claimant has made reference in her Notice of Appeal, and to which the President herself referred when granting permission. They included that the EJ did not receive submissions as to what had transpired between the Claimant and her then legal representatives as to what should or should not be in the Claim Form; whether the Claimant had been aware that the Claim Form as presented did not contain reference to her whistleblowing claims; and whether the Claimant had taken an informed decision not to pursue a claim for unfair dismissal.

50. The pursuit of the grounds on that basis necessitated production of notes of the hearing before EJ, from the Respondent's representative, and when those notes were not agreed, from the EJ himself. While for the avoidance of doubt, I do not know the circumstances in which the reconsideration application was settled, and I make no criticism, at this stage, of Ms Brown, that element of the reconsideration was, in my view, clearly misconceived. What it sought to convey, and ultimately, was not correct, was that no submissions had been made to the EJ on the question of Claimant's knowledge of the issues set out, and as a result, that the EJ's findings had been made in the absence of any submissions.

51. I am satisfied, as the EJ's notes reveal, (which are consistent with the notes of the Respondent's solicitor, who is an officer of this court and who is professionally obliged not to mislead me) that those submissions were factually incorrect, as there were such representations. I do not accept that

the remainder of the grounds were misconceived, bearing in mind the complexity of the appeal. I make these comments as the Respondents have indicated that they will be seeking to make an application for costs, which remains to be decided.