Neutral Citation Number: [2026] EAT 44

Case No: EA-2024-001029-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 3 March 2026

Before:

HER HONOUR JUDGE RUSSELL

- -

Between:

MR SUJITH MANUEL

Appellant

- and –

NETDUMA LIMITED

Respondent

- -
- -

Rad Kohanzad (instructed by Direct Access) for the **Appellant**
Francis Mortin (instructed by Aeris Employment Law Ltd) for the **Respondent**

Hearing date: 3 March 2026

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JUDGMENT

SUMMARY

Practice and Procedure; Amendment.

The ET1 contained an express reference to a claim of detriment for making a health and safety disclosure, s.44 Employment Rights Act 1996. The Employment Judge erred in law in considering this an amendment. In the alternative, the Employment Judge erred in law in his approach to the balance of prejudice and amendment should have been allowed.

HER HONOUR JUDGE RUSSELL:

1. The parties are referred to as Claimant and Respondent as they are in the Employment Tribunal proceedings.

2. The Claimant appeals against the Order of Employment Judge Ord sent to parties on 2 July 2024 that:

> "**The Claimant's Application to Amend his Claim to include, in relation to those alleged acts of detriment for making protected disclosures the alternative Claim of detriment for Health and Safety reasons contrary to s.44 of the Employment Rights Act 1996 is refused."**

3. The Claimant relies upon six grounds of appeal. The first three are essentially that the Employment Judge erred in law because leave to amend was not required as the s.44 Health and Safety disclosure claims were pleaded in the ET1. This was the Claimant's primary argument at the Employment Tribunal hearing. Grounds 4 and 5 are that the Employment Judge erred in assessing the balance of prejudice when refusing the application to amend (made in the alternative), in particular by attaching undue weight to the timing of the application. Ground 6 is that the Employment Judge erred in failing to give any or any adequate weight to the Claimant's circumstances as a litigant in person.

EMPLOYMENT TRIBUNAL BACKGROUND

4. The Claimant presented an ET1 on 23 October 2022. As is sadly not uncommon in the Employment Tribunal, the grounds of claim are lengthy and discursive rather than focusing on the precise heads of claim and the detriments alleged to have been caused.

5. In summary, the Claimant was employed by the Respondent as a Linux Systems Developer from 9 February 2021 until 27 May 2022. The Claimant ticked box 8.1 on the ET1 form for unfair dismissal, discrimination on grounds of age, disability, marital status and religion or belief, as well as for redundancy payment, notice pay, holiday pay and other payments. He also completed the box

asserting that he was making other claims which the Employment Tribunal could deal with, these he listed as:

> **1) wrongful dismissal and breach of contract**
>
> **2) victimisation following whistle blowing on multiple occasions (on (a) Health and Safety Risk and effect on my health, (b) illegal pension postponement, Missing Pension contributions, having to go to pension regulator, (c) campaign of discriminatory conducts, harassment and victimisations affecting health (d) lack of Health and safety etc),**
>
> **3) Automatically unfair dismissal on each of these grounds**
>
> **4) automatically unfair dismissal for making a flexible working request on 21/04/2022 to be in effect on 06/06/2022.**
>
> **6) Unlawful deduction of pension contributions**
>
> **7) Unlawful deductions from Pay by artificially increasing PAYE Tax & NI**
>
> **8) Victimisation and detriment for going to pension regulator and ombudsman.**

6. The Claimant attached a document running to some 11 pages which set out the particulars of his complaints. In summary, the Claimant says that in early March 2021, a mobile air conditioning unit was installed with the exhaust blower facing his desk. This caused him serious health problems and affected his breathing. He complained to the CEO and asked that the unit be removed. He then faced a campaign of harassment and discrimination, culminating in a sham redundancy dismissal. The details of the alleged detriments are set out at length. I do not need to mention all of them here, save to say that principally the Claimant says that he was criticised for briefly falling asleep, for being 15 minutes late for work on one occasion, his performance was unfairly criticised, he was given work with unreasonable deadlines, his grievance was ignored and he was ultimately dismissed. The document also sets out the money claims arising from dismissal.

7. The following passages are relevant to this appeal (words underlined are for emphasis in this Judgment and do not appear in this way in the document itself):

> **There were complaints made on 21/06/2021, 05/06/2021, 21/02/2022 and 23/02/2022 all fall under disclosure's classified under law as 'Protected Disclosure'. These explain the health issue that I have following the installation of the AC Exhaust FAN. Noticeably this fan wasn't removed until end of July. <u>Further all those disclosures except that of 23/02/2022 (Pension contribution & enrolment) are also Health and Safety Disclosures (S.44(1) of ERA1996)</u>**

Whistle blowing acts

1) Health and Safety Concerns and how my health was affected by a AC exhaust blower put under my desk (root cause of all problems)

2) On the victimisation, harassment and discrimination I faced because of the first Whistle blowing and how it affected my health - high blood pressure etc

3) Why my pension postponement was illegal and why I am owed pension contributions for 4 months and how I believe I was denied pension contributions for May 2021 was because of the victimisation on the first whistle blowing act. (was made at the same meeting as (2) above)

And stated by the Claimant to be a list of legal claims (of which there are 31):

3) Detriment for making Protected Disclosure in good faith (PIDA 1998)

4) Detriment in violation of S.43B(1) of ERA 1996, for making Health and Safety Disclosure

16) Further Detriment for making Protected Disclosures in good faith (PIDA 1998) – grievance

17) Further Detriment for informing about going to pension regulator - PIDA - Anticipated Disclosure (Bilsbrough v Berry Marketing Services, Employment Tribunal 1401692/2018, about Health and Safety at work, non-compliance etc

18) further Detriment in violation of S.43B(1) of ERA 1996, for making Health and Safety Disclosure

23) Automatically Unfair dismissal - For Protected disclosure/Health and Safety Disclosure/Pensions non-compliance disclosure, Flexible working request

8. The Respondent resisted the claims. In its Grounds of Resistance, under the heading **S43B Protected Disclosures/Health and Safety**, the Respondent addressed the alleged qualifying disclosures withing section 43B of the Employment Rights Act 1996 as a disclosure of information which tended to show that the health and safety of any individual has been, is being or is likely to be endangered. It did not expressly address any claim of detriment or automatic unfair dismissal for making a health and safety disclosure pursuant to s.44 of the Employment Rights Act 1996.

9. There was a Preliminary Hearing before Employment Judge Warren on 5 May 2023. In preparation, as is commonly the case, the legally represented Respondent produced a draft List of Issues to be discussed. This was a very lengthy and detailed document. It did not contain any s.44

health and safety claim. In the Summary of the hearing, it is recorded that the Claimant had prepared a note of the claims which he wished to bring. This was discussed and the heads of claim were identified in the Respondent's draft List of Issues. The Summary records that nothing was missing. In the event, there was insufficient time to finalise the List of Issues and further information was required. The Employment Judge directed the parties to liaise to agree a List of Issues as best they could and identify areas of dispute in advance of a further Preliminary Hearing.

10. That further Preliminary Hearing took place on 25 August 2023 before Employment Judge Forde. The Summary records that the Claimant had not provided the required information and describes his contribution as unsatisfactory; he had failed to prepare adequately for the hearing and had not considered the draft List of Issues circulated to him by the Respondent.

11. As a result, yet a further Preliminary Hearing was required. This took place before Employment Judge Ord on 14 December 2023. In preparation, on 30 October 2023 the Claimant presented a 58 page document setting out the details of his claim. On 6 November 2023, he presented a further 79 page document setting out 130 alleged acts of unlawful treatment. Both were unhelpful – the contents were unfocused, discursive and not clearly structured.

12. The first of the documents referred at points to "**detriment for making protected disclosures in good faith (PIDA 1988) + detriment for health and safety disclosures"**. This expressly made the distinction between two different heads of claim. Similarly, the latter document also distinguished between the two heads of claim. Two examples show the distinction. The reference to the "**cumulative effect of protected disclosures, health and safety disclosures and grievances and anticipated disclosures."** and "**event 98 – full grievance made orally which qualifies as health and safety disclosures, protected disclosures and breach legal obligations."**

13. The Respondent had also prepared an updated draft List of Issues. It did not include a s.44 health and safety disclosure detriment claim. Employment Judge Ord sought to make progress as best he could in finalising the List of Issues. However, the Summary describes the hearing as:

> "**difficult because notwithstanding the lengthy submissions in writing which the Claimant had made and his listing 130 allegations of discrimination, the Claimant persisted in seeking to add yet further issues to the draft List of Issues which the Respondent had prepared."**

14. Employment Judge Ord recorded that the Claimant also relied upon the protected disclosure detriments as detriments for having made health and safety disclosures. In identifying the claims and detriments, Employment Judge Ord made clear his view that some would require leave to amend.

15. At a further Preliminary Hearing on 28 February 2024, Employment Judge Ord dealt with the amendments previously identified in relation to the draft List of Issues – some he permitted, some he refused. The section 44 health and safety detriment amendment was not dealt with at this hearing. However, by consent, the Claimant was permitted to amend his claim to include a claim of automatically unfair dismissal for having made a health and safety disclosure, section 100 Employment Rights Act 1996.

16. At the Preliminary Hearing on 2 April 2024, the Claimant was legally represented for the first time. Mr Kohenzad, who appears today, relied upon the parts of the ET1 which referred to health and safety disclosures, including the express reference to s.44 ERA. Employment Judge Ord set out the unattractive procedural history of the claim and the repeated attempts to finalise a List of Issues.

17. At paragraph 4 of the Summary, Employment Judge Ord said that the Preliminary Hearing on 14 December 2023 was the first time that the Claimant had alleged that he had made health and safety disclosures, some 17 months after presentation of the claim and 22 months after his dismissal. The Employment Judge's conclusion was:

> **5. There is oblique reference in the ET1 to Health and Safety disclosures. The Respondent's reading of that was that that related to the reference to Health and Safety in s.43B(1)(d) ERA 1996 as part of the claimant's complaints relating to protected disclosures.**
>
> **10. I am not satisfied that the reference to Health and Safety in the Claimant's Claim Form was intended to, nor could it reasonably be read as meaning that the disclosures and detriments related to Health and Safety other than by reference to Health and Safety of an individual being the basis of the disclosures being protected disclosures.**

18. In dealing with amendment, he concluded that:

> **11. The application to amend is made considerably out of time. It is not made with any draft amended pleading and there is no explanation as to why, given that the draft lists of issues have been provided by the respondent (and checked with the claimant by Judge Warren) since 5 May 2023, the claimant had not sought to advance the suggestion that some of those matters which he raised as being protected disclosures (relating to his Health and safety in part) were also Health and Safety disclosures.**
>
> **12. The balance of prejudice lies in favour of the Respondent here. It is seventeen months since the Claimant's Claim Form was submitted to the Tribunal. The Application to Amend the Claimant's complaints to include a new complaint of detriment for making disclosures relating to Health and Safety is refused.**

LAW

Claims, Lists of Issues and Abandonment

19. In **Moustache v Chelsea and Westmister Hospital NHS Foundation Trust** [2025] EWCA Civ 185, the Court of Appeal provided helpful guidance for Employment Tribunals in identifying claims to be determined. In that case, the Employment Tribunal was concerned with whether a claim which was not in the agreed List of Issues still required determination but the guidance applies equally to this appeal.

20. From paragraphs 32 to 47, four general points arise:

(1) Employment Tribunal proceedings are adversarial. The primary onus is on the parties to identify the claims and answers.

(2) The issues raised by the parties are those which emerge clearly from an objective analysis of their statements of case. It does not involve reference to other documents

which do not have the status of pleadings or which come later. The analysis does not require an elaborate or complex interpretative exercise. The ET1, whether drafted by a legal representative or a lay person, must be readily understood at its first reading by the other party.

(3) The Employment Tribunal must address all issues which emerge from an objective analysis of the statements of case.

(4) The Employment Tribunal's role is arbitral, not inquisitorial or investigative. It must perform its functions impartially, fairly and justly, in accordance with the overriding objective, the law, and the evidence in the case. It has no general duty to take pro-active steps to prompt expansion or modification of a claim where it might be to the advantage of a party.

21. In **Moustache,** the Court of Appeal cited with approval the Judgment of the Employment Appeal Tribunal in **McLeary v One Housing Group Ltd** UKEAT/0124/18 that a claim is before the Employment Tribunal even if not expressly identified if, on an objective analysis, it was "**plainly being asserted**" and "**shouted out**" from the particulars of claim. If so, it should be treated as a complaint already advanced rather than as a new claim requiring amendment.

22. In **Mervyn v BW Controls Ltd** [2020] EWCA Civ 393, the Court of Appeal adopted the language of HHJ Auerbach in **McLeary**. Even though the agreed List of Issues did not include a claim for constructive dismissal, on a proper analysis, it shouted out from the contents of the particulars of claim. At paragraph 46 of **Moustache**, Warby LJ stated that his reading of **Mervyn** was that the constructive dismissal claim had been sufficiently pleaded and, in all the circumstances, the Claimant ought not to be held to have waived or abandoned the claim by agreeing to the List of Issues.

23. The Employment Tribunal must take the greatest of care to explain to a party, especially one without legal representation, the effects of abandoning or withdrawing a point. It should not accept such a withdrawal unless it is clear, unequivocal and unambiguous, **Segor v Goodrich Actuation Systems Ltd** (unreported but cited at paragraph 55 of **McFarlane v Commissioner of Police of the Metropolis** [2023] EAT 11). Similar language was used in **Drysdale v Department of Transport** [2014] EWCA Civ 1083.

Amendment.

24. In **Vaughan v Modality Partnership** UKEAT/0147/20/BA, HHJ Tayler considered the well-known authorities on amendment (**Cocking, Selkent, Abercrombie** and **Safeway**) but made clear that the well-known and oft cited **Selkent** factors should not be taken as a checklist to be ticked off but rather are facts to be taken into account in conducting the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment.

25. The starting point will be to consider the real practical consequences of allowing or refusing the amendment. The Tribunal must consider the practical importance of the amendment – the real question is not whether refusal prevents the party from getting what they want, rather will they be prevented from getting what they need. The balancing exercise requires consideration of the injustice to both sides (allowing or refusing) both quantitively and qualitatively, looking at the relative and cumulative significance of the relevant factors. Maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations but the key factor remains the balance of justice.

26. Applying the above, the following factors are likely to be relevant when exercising discretion and in assessing the balance of injustice:

(1) whether or not the application proposed is minor or substantial;

(2) the application of time limits and whether there should be any extensions; where the claimant proposes to include a new claim by way of amendment, the tribunal must have regard to the relevant time limits and, if the claim is out of time, to consider whether the time should be extended under the appropriate statutory provision (reasonable practicability or on the just and equitable ground, as the case may be).

(3) the timing and manner of the application, including why an application was not made earlier and why it is being made at this stage. However, delay in itself should not be the sole reason for refusing an application.

DISCUSSION

27. Both Counsel had prepared very helpful skeleton arguments which they expanded upon in oral submissions.

28. Mr Kohanzad for the Claimant did not suggest that the Respondent had deliberated omitted the s.44 claim from the draft List of Issues which it prepared but had simply overlooked its inclusion in the ET1 and attached particulars of claim. He relied upon the first paragraph of the particulars which referred to whistle blowing before then listing Health and Safety risk and the effect on his health. At times, the Claimant would refer to a health and safety disclosure on 2 June 2021 without identifying it as a qualifying disclosure, yet it was also relied upon in the whistle-blowing detriments claim. This interchangeability of terms shows that distinct claims were nevertheless intended.

29. The key paragraph is that which refers to s.44(1), not only because it is an express reference to the specific legislative source for a health and safety disclosure detriment claim but also because in the language used the Claimant distinguishes it from the protected disclosure claim in his express recognition that the pension disclosure (relating to a legal obligation) was not relied upon in the health and safety disclosure claim. The objective analysis of the statement of case does not take place in a

vacuum but requires a textual analysis of the claim form, **Moustache** at paragraph 34. Irrespective of any confusion elsewhere, Mr Kohanzad submits that on a clear and objective analysis, this was a properly pleaded claim for detriment for having made a health and safety disclosure.

30. Mr Kohanzad pragmatically did not object to the abandonment point being considered today despite it not having been raised below or, even, in the Answer. He accepted that he was not prejudiced as he had anticipated that this would be argued as it was included in the Respondent's skeleton argument.

31. Whilst he drew my attention to various references to the health and safety detriment claims included in the further information provided by the Claimant, he did not rely on these as showing that the claim had initially been pleaded, simply that it had not been abandoned at the Warren Preliminary Hearing or in the various draft Lists of Issues exchanged between the parties.

32. Finally, and in the alternative, he submits that when considering the application to amend, the Employment Judge failed to identify any prejudice to the Respondent and impermissibly relied only upon delay and the manner of the application.

33. By contrast, Mr Mortin for the Respondent submitted that the health and safety detriment claim was clearly not in the claim form. The Employment Tribunal has objectively to analyse the entirety of the claim form, not to take paragraphs in isolation. He relied upon paragraphs 11 to 14 of **Foxtons Ltd v Ruwiel** UKEAT/0056/08 - for the claim to be pleaded, the Claimant must identify the factual matrix relied upon, the detrimental treatment alleged and the causal link, it is not enough to make observations.

34. As for abandonment, Mr Mortin submitted that Employment Judge Warren carefully took the Claimant through the note of claims that he had prepared, compared it with the Respondent's draft

List of Issues and clarified that nothing was missing. The onus was on the Claimant to set out his claims and he did not identify a s.44 claim. Applying paragraph 59 of **McFarlane**, it was not realistic or practical for Employment Judge Ord to ignore this fact, the ET1 does not sit in a vacuum.

35. In considering the application to amend, Employment Judge Ord was entitled to have the history of the case in mind. It is clear from the level of detail with which he engaged and his decision that he was entitled to conclude that the Claimant was seeking to expand further his claim. The Claimant did not make the application to amend when he provided the further particulars of his claim and there was no draft amended pleading, as referred to by the Employment Judge at paragraph 11 of the Reasons, clearing showing that he had in mind the timing and manner of the application. As for prejudice, the Employment Judge had in mind the cost to the Respondent of preparing ever changing Lists of Issues. In his earlier decisions on amendment, Employment Judge Ord clearly set out the relevant authorities on amendment, including reminding himself that time was one factor but not determinative. Mr Mortin submitted that the Employment Judge must therefore have clearly had them in mind when deciding the s.44 amendment application. As made clear at paragraph 38(6) of **Moustache**, the Employment Tribunal has a wide margin of appreciation when deciding an application to amend and the Claimant must show that the decision was essentially perverse.

36. Whilst the Claimant is a litigant in person, the Employment Judge was told about a previous claim against another employer in which he had similarly brought discrimination and whistle blowing claims said to arise from a sham redundancy. Mr Mortin submitted that the Claimant's successful appeal to the EAT in that case showed familiarity with Employment Tribunal procedure.

CONCLUSIONS

37. I have considerable sympathy with Employment Judges faced with a claim such as this, one which is set out as an unstructured and discursive narrative which the Claimant then seeks to expand further as proceedings progress. The ET1 is not simply a document to "get the ball rolling" which

then can be added to at will. It is imperative for the parties in the case, and other Employment Tribunal users, that Employment Judges exercise their case management tools robustly to manage cases of this sort so that they do not take a disproportionate share of tribunal time and incur disproportionate costs for the other party. The Employment Judges dealing with this case all made the commendable attempt required of them to roll up their sleeves and try to impose some structure to a claim which seemed to develop at every turn.

38. I have had the benefit of experienced Counsel making focussed submissions about a narrow issue – is the s.44 claim already pleaded and, if not, should leave to amend be given. The Employment Judges below did not have this luxury. My conclusions on this appeal should not be taken as a criticism of them in any way.

39. Having objectively analysed the ET1 and the attached particulars, I am satisfied that the s.44 health and safety disclosure claim was plainly being asserted. To use the language of **McLeary,** it shouted out. In addition to the paragraph citing s.44 of the Employment Rights Act 1996, the Claimant used language which distinguished between health and safety and protected disclosure claims (albeit that they naturally overlap at times). Item 23 in his list of claims asserts automatically unfair dismissal for making a health and safety disclosure. This was sufficiently clear for the Respondent later to consent to the amendment to include a s.100 claim in the List of Issues on the basis that it was already in the claim form despite it having previously been omitted. I consider that the s.44 detriment claim is also already included.

40. This is not a case where the Claimant simply makes observations about health and safety disclosures and detriments experienced, even if the claims are not set out with the precision or clarity one might hope for. Employment Tribunals often have to deal with claim forms which are not clearly pleaded, setting out facts, detriment and causation in a logical or linear manner. Instead, they will often be faced with a narrative of ill treatment, a box ticked for a type of discrimination and mentions

of discrimination or others without that protected characteristic being treated differently. This is a problem clearly demonstrated in disability claims where it is often not immediately apparent which type of discrimination is being asserted and the Employment Tribunal must discern it from the language used. If a section of the Equality Act were to be quoted in such a case, it would undoubtedly be seen as a claim which "shouts out". The citing of s.44 cannot be said to be simply an oblique reference to health and safety disclosures.

41. Irrespective of whether the Respondent's solicitors identified the claim in drafting the List of Issues, and I do not suggest any negligence or fault on their part, it is clearly stated in the ET1 and attached particulars.

42. I was concerned by the fact that three experienced Employment Judges had not identified the claim when considering whether this something which "shouted out". However, I consider that they were faced with a multiplicity of confusing information about the claims rather than the focused discussion in this appeal to which I have referred to above. Furthermore, they were also dealing with other applications which took up time and attention in the Preliminary Hearings.

43. The Claimant cannot be said to have agreed to a List of Issues which did not include the s.44 claim. Indeed, it is a matter of regret that the List of Issues has still not been finalised. The Claimant advanced health and safety disclosures and detriment as a discrete claim in his further information sent in October and November 2023. In his mind, he had not abandoned the claim. Employment Judge Ord clearly identified in December 2023 that the Claimant sought to bring the claim and abandonment was not asserted by the Respondent either then or in the subsequent application to amend. The Respondent also consented to the s.100 claim being added and did not seek to suggest that it had been abandoned, despite the Claimant not identifying that claim before Employment Judge Warren when agreeing that nothing had been missed in the first draft List of Issues which did not include such a claim.

44. A withdrawal should not be accepted unless it is clear, unequivocal and unambiguous. I do not consider that it is sufficient for a party to agree that a List of Issues is complete, without it even being finalised, for there to be withdrawal or abandonment of a pleaded claim. It follows that I do not accept that the Claimant abandoned the s.44 claim.

45. As the s.44 detriment claim is properly pleaded and has not been abandoned, the appeal succeeds. Leave to amend was not required.

46. Although not necessary for me to consider given my conclusion above, I would also have concluded that the Employment Judge erred in law in his decision on amendment. He did not cite the relevant authorities or the factors to be borne in mind when exercising his discretion. I do not consider it safe to say that he had them in mind in this application simply because he had done so when considering the previous applications to amend. From his reasons at paragraphs 11 and 12, it appears that he relied unduly on time, delay and the manner of the application given the unattractive procedural history of the claim.

47. There is no consideration of the nature of the amendment or the extent to which it would require a different factual investigation from the claims already before the Tribunal. The fact that there was a s.100 automatic unfair dismissal claim means that the Tribunal would already be required to consider whether there was a health and safety disclosure (the same requirements applying in s.44 as in s.100). Equally, the Tribunal would also have to find as a fact whether or not the asserted detriments had occurred by reason of the s.47B protected disclosure claim. The only additional issue raised by the amendment would be whether the causal link was established. This would not require different witnesses and is likely to be addressed shortly in the witness statements without more than additional minimum cost to the Respondent. As a result, the balance of prejudice was in favour of the Claimant.

DISPOSAL

48. I would ask that the learned Regional Employment Judge lists a further Preliminary Hearing to finalise the List of Issues and ensure that the case is ready for a full merits hearing, including setting a date if not already done. The Claimant has benefitted greatly from Mr Kohanzad's involvement to date in his claim and I suggested that he may consider it sensible to continue that involvement in the preparation of a List of Issues to be sent to the Respondent. If the parties can agree a List of Issues, it may be possible to avoid the need for a further hearing. The Claimant was warned in open court that any unreasonable conduct in relation to finalise the List of Issues may result in a costs application by the Respondent which may be difficult for him to resist.