EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110343/2021

Preliminary Hearing held in chambers in Glasgow on 31 January 2022; with further written representations from parties on 2, 7, 14 and 16 February 2022; and further deliberation in chambers on 17 February 2022

Employment Judge Ian McPherson

Mr Andrew McAllister	**Claimant** **Written Representations by:** **Ms Carly Morrison & 2 others** **Student Advisors** **Strathclyde University** **Law Clinic**
Forestry and Land Scotland	**Respondents** **Written Representations by:** **Mr Scott Milligan** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal, having considered parties' written representations in chambers, and without the need for an attended Hearing, is to: -

(1) **refuse** the claimant's opposed application of 14 February 2022 for the Tribunal to make an Anonymisation Order in terms of **Rule 50(3) of the Employment Tribunals Rules of Procedure 2013.**

(2) **refuse** the claimant's opposed application of 23 December 2021 to amend the ET1 claim form **as regards incident 14 (insofar as it refers to a presentation on 19 January 2021), and as regards incident 18**.

(3) confirm that the case shall proceed to the 6-day Final Hearing in person before a full Tribunal as already listed for 23 / 26 and 30 / 31 May 2022.

REASONS

Introduction

1. This case called again before me on Monday, 31 January 2022, at 10:00am, for an in chambers Preliminary Hearing to consider the claimant's opposed application to amend the ET1 claim form. As previously agreed with both parties' representatives, I dealt with the matter, on the papers only, and without the need for an attended Hearing, by considering both parties' written representations held on the Tribunal's casefile.

Claim and Response

2. The claimant, acting through his then representative, Gary Sutherland of Employment Law Services (ELS) Ltd, Glasgow, presented his ET1 claim form in this case to the Tribunal, on 7 July 2021, following ACAS early conciliation between 27 April and 8 June 2021. His claim was accepted by the Tribunal administration, and served on the respondents by Notice of Claim issued by the Tribunal on 13 July 2021.

3. Thereafter, on 10 August 2021, an ET3 response, defending the claim, was lodged, on the respondents' behalf, by Mr Scott Milligan, solicitor with Harper Macleod LLP, Glasgow. That response was accepted by the Tribunal administration, on 11 August 2021 and, at Initial Consideration by Employment Judge Peter O'Donnell, on 12 August 2021, it was ordered that the case proceed to the listed telephone conference call Case Management Preliminary Hearing scheduled to be held on 29 September 2021.

4. On 11 August 2021, Strathclyde University Law Clinic advised that they were now representing the claimant. They sought, and they were granted, a one-week extension of time to lodge the claimant's completed PH Agenda. The case first called before me, in private, for a telephone conference call Case Management Preliminary Hearing, held on 29 September 2021. It was held remotely given the implications of the ongoing Covid-19 pandemic. Ms

Morrison represented the claimant, and Mr Milligan represented the respondents.

5. I made various case management orders, which were set forth in my written Note & Orders dated 4 October 2021, as issued to both parties under cover of a letter from the Tribunal. Specifically, I then made orders for further and better particulars of the claims made by the claimant to be provided within 4 weeks, as well as for a disability impact statement, and a schedule of loss regarding his claim for compensation against the respondents, and, of consent of both parties, the case was continued to another date (1 December 2021) for a further telephone conference call Case Management Preliminary Hearing.

6. I had relisted the case for a further telephone conference call Case Management PH on Wednesday, 1 December 2021, as mutually agreed with both parties' representatives. In the event, while relisted by Notice of Preliminary Hearing issued on 18 October 2021, that further PH on 1 December 2021 was postponed, by Employment Judge David Hoey, on 30 November 2021.

7. That postponement, on less than 24 hours' notice, was on the claimant's representative's application, Ms Morrison being unavailable on account of University exams, and there being no objection by the respondents' solicitor, although with reluctance he did not object to the postponement and relisting later in December. It was relisted on 3 December 2021 for 20 December 2021.

8. On 20 December 2021, the case called again before me, for the second time, for that further telephone conference call Case Management Preliminary Hearing, again held in private, and again remotely given the implications of the ongoing Covid-19 pandemic. I heard again from the claimant's representative, Ms Morrison, and the respondents' solicitor, Mr Milligan, and I made various case management orders, which were set forth in my written Note & Orders dated 21 December 2021, as issued to both parties under cover of a letter from the Tribunal.

9. On 23 December 2021, the claimant's representatives, at the Law Clinic, emailed the Glasgow ET, with copy to Mr Milligan, the respondents' representative, attaching a covering letter dated 22 December 2021 requesting leave to amend the claim form, along with a final Scott Schedule, ET1 paper apart, as amended with tracked changes, and separate clean copy.

10. The amendments sought were opposed, in part, by the respondents, leading to the need for this Preliminary Hearing. Insofar as not opposed, the claimant's amendment application was granted by me, as regards incidents 13 and 16, and incident 14 (insofar as not objected to) and parties so advised by email from the Tribunal on 17 January 2022.

Preliminary Hearing before this Tribunal on Opposed Amendment Application

11. This Preliminary Hearing took place in my chambers at Glasgow Tribunal Centre. Before the start of this Preliminary Hearing, I had pre-read and considered the papers from the Tribunal's casefile being the ET1, ET3, Scott Schedule, and respondents' response to that Scott Schedule, and the claimant's and respondents' correspondence of 7 and 14 January 2022 **about** the claimant's application to amend the ET1 claim form.

12. Having consider the papers, I proceeded to draft a Judgment. Promulgation of my Judgment has been delayed on account of the need to deal with a late request for anonymisation of this Judgment by the claimant's representatives, at the Law Clinic, as discussed in the next section of these Reasons.

Claimant's Application for a Rule 50 Anonymisation Order

13. On 2 February 2022, i.e., after my in chambers Hearing, when I had reached my decision to refuse the amendment application, but before I had finalised the drafting of this Judgment and Reasons, I received, from the Tribunal administration, an email that had been sent by the Law Clinic on 2 February 2022, saying as follows:

"We write with regard to the recent hearing in Chambers on the issue of amendment in the above case.

We would be grateful if this email could be forwarded to EJ Ian McPherson.

The reason we write is that we anticipate that EJ Ian McPherson will have made a decision regarding amendment and it now occurs to us that this may be issued in the form of a judgment. This may not be the case and he may just advise the parties of the outcome of his private deliberations.

The Tribunal is aware that the Claimant had considered making an application under Rule 50 re privacy in this case. When the issue of disability was conceded this felt less important at this stage of the case given that the detailed discussion of the Claimant's health issues at would not be getting discussed at this stage. In addition, given all the of the issues to be discussed at the last case management hearing and the fact that the only judgement being issued at that point was dismissal of claims we did not make an application. We did however say we would reserve our position to make one as the Claimant is entitled to do at any stage of the proceedings.

We have not given the matter further consideration at this stage as the final hearing is some way off.

We did not think about the amendment application becoming a judgement particularly as the matter was being held in chambers further to written submissions by both parties.

The application to amend arose out of the need to provide a Scott schedule in which the individual incidents of discrimination were set out, and the issue of whether or not these were already flagged up in the ET1. In the event it was agreed between parties that most were and that only a few matters required formal amendment. We are also aware that there was only 1 full incident that was challenged by way

of agreement around amendment and part of another. Thus, the issues to be determined are very narrow and for the purposes of clarification of the claims proceeding.

It strikes us that it may be that in determining this particularly discreet matter a narrative relating to the details of the case and history could appear in the judgement that was issued thus if this judgment is released without any consideration under Rule 50 a lot of information relating to the Claimant could be disclosed albeit that the judgement relates to relatively narrow matters to be determined.

For this reason we feel that for any such judgement to go into the public domain at this particular time with the disclosure that may be involved is not proportionate to the issue being determined, and the public interest in this.

We are therefore asking that any judgment or full written reasons for the outcome of the PH in chambers is not issued into the public domain at this stage and until the matter can be clarified and an application under Rule 50 be fully made out should this be necessary.

We are grateful for your assistance and have copied the Respondent representative into this email."

14. I decided, in the circumstances, to seek comments from the respondents' representative, and they were requested of him by email from the Tribunal on 3 February 2022. Mr Milligan responded to the Tribunal, on 7 February 2022, saying as follows:

"I refer to the above claim, in which we represent the Respondent, and the correspondence below, being the email from the Claimant's representatives of 2 February 2022, and the Tribunal's correspondence of the same date, seeking comments on such correspondence.

I would note the following on behalf of the Respondent:

1. *The email of 2 February 2022 is requesting that a judgment not be put into the public domain "at this stage and until the matter can be clarified and an application under Rule 50 be fully made out should this be necessary."*

2. *In the absence of any application under Rule 50 which is granted, or the Tribunal making an order under Rule 50 on its own initiative, it must be the case that no such restriction of public disclosure is competent under the Employment Tribunal Rules of Procedure.*

3. *It is also noted that the potential of such an application was initially noted by the Claimant's representatives in their Preliminary Hearing Agenda provided on 15 September 2021. It has been discussed at the Preliminary Hearing of 29 September 2021 (paragraph 14 of the Note), referenced in the Tribunal's email of 29 November 2021, and discussed again at the Preliminary Hearing of 20 December 2021 (paragraphs 47 – 51 of the Note). No application has yet been made notwithstanding the repeated reference to the potential of the application.*

4. *Accordingly, the Respondent's position is that the Tribunal should consider, determine, and issue its decision in relation to the application to amend the claim in its usual way, as no Rule 50 determination has been made or applied for."*

15. In all the circumstances, having considered both parties' further representations of 2 and 7 February, I decided to proceed to issue my Judgment, without any anonymisation, in the absence of any **Rule 50** application from the claimant's representative. Parties were so advised by the Tribunal by email sent on 10 February 2022 that it was intended to issue the Judgment & Reasons on the opposed amendment application in the course of the next week.

16. On 10 February 2022, the Law Clinic wrote to the Glasgow ET, with copy to the respondents' representative, in reply to the Tribunal's email, saying as follows:

> *"We note the terms of the email below and thank you for the update. We write to intimate that we shall proceed to make an application for privacy under Rule 50 in respect of the judgement on the amendment by Monday 14th February 2022 given that a judgement is to be issued at some point in the next week. We would ask that this is withheld pending the application. We had thought it appropriate to clarify whether there would be a judgement issued failing which no such application would be needed at this time. It may also have been that the Respondent would have been willing to consent to the judgement on amendment not being issued publicly. We note that the Respondent representative does not believe that to be competent, but in any event, had they been willing to cooperate then the matter may have been capable of being determined by the EJ on the basis of parties submissions or such other agreement reached. That not being the case we shall now proceed to make an application that being necessary. We have copied the Respondent representative into this email."*

17. Thereafter, on Monday, 14 February 2022, the Law Clinic intimated an application for a **Rule 50** Order, in the following terms:

> *"We write with regard to the recent hearing in Chambers on the issue of amendment in the above case.*
>
> *We would be grateful if this email could be forwarded to EJ Ian McPherson.*
>
> *The reason we write is that we understand that EJ Ian McPherson has made a decision regarding amendment and it occurs to us that this will be issued in the form of a judgment.*

The Tribunal is aware that the Claimant had considered making an application under Rule 50 re privacy in this case. No such application has been made yet. This is because we have not deemed it yet necessary based on the progress of the case albeit it was intimated that it was something that the Claimant may wish to seek.

Initially it was thought that there may be a preliminary hearing on disability and any judgment relating to this would likely have disclosed personal details related to the Claimant and his disability. When the issue of disability was conceded this felt less important at this stage of the case and rather something to keep under review.

It was for this reason that we did not make a written application in advance of the second case management hearing. Given all of the issues to be discussed at that case management hearing and the time constraints attached to the hearing along with the fact that the only judgement now being issued at that point was dismissal of claims we did not consider that such an application was an effective use of the Tribunal's time and unlikely to be successful.

We did however say we would reserve our position to make one as the Claimant is entitled to do at any stage of the proceedings.

We had not yet given the matter of an application further detailed consideration at this stage as the final hearing is some way off.

In terms of the application to amend we did not think about the amendment application becoming a judgement particularly as the matter was being held in chambers further to written submissions by both parties.

The application to amend arose out of the need to provide a Scott schedule in which the individual incidents of discrimination were set out, and the issue of whether or not these were already flagged up in the ET1. In the event it was agreed between parties that most were and that only a few matters required formal amendment. We are also

aware that there was only 1 full incident that was challenged by way of agreement around amendment and part of another. Thus, the issues to be determined are very narrow and for the purposes of clarification of the claims proceeding.

It strikes us that it may be that in determining this particularly discreet matter a narrative relating to the details of the case and history could appear in the judgement that is to be issued thus if this judgment is released and entered onto the register without any consideration under Rule 50 significant personal information relating to the Claimant and his disability could be disclosed albeit that the judgement relates to relatively narrow matters to be determined.

We are therefore now formally making an application for an anonymity under Rule 50(3) of the Employment Tribunal Procedure Rules.

In terms of Rule 50(1) we note that the ET is entitled and has a wide discretion to prevent or restrict the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person identified in Section 10A of the Employment Tribunals Act 1996.

We are seeking this Order to in relation to this particular judgment (amendment application) and to any judgement regarding this Rule 50 application given the discreet point in hand. We may seek this on a permanent basis in due course but at this stage are content to seek it in relation to the particular judgments forementioned. We would ask that the Claimant's name is anonymised and also that the Respondent's name be anonymised at this time as well. If there is reference to any other employee of the Respondent in the judgment then we ask that they are anonymised. This is to prevent identification of the Claimant indirectly through the disclosure of the Respondent and or any employee of the Respondent.

We are aware of the need for the ET to weigh up the requirement for open justice and the Convention right of freedom of expression as against an individual's right to privacy in terms of Article 8 of the ECHR. (Rule 50(2). For reasons set out above we do not think that an anonymity order in relation to an amendment application on a very discreet point inhibits open justice as compared with the disclosure of personal information relating to the Claimant and his disability and how this disability impacts on his job. It is submitted that there are no significant substantive issues of public interest at stake in this decision.

For these reasons we seek the anonymity Order in terms of Rule 50(3) as set out above. If we can be of any further assistance we are happy to be so.

We are grateful for your assistance and have copied the Respondent representative into this email. If he objects to this application he should write to the ET indicating his objection as soon as possible and copy this to ourselves."

18. Having considered their application, I requested urgent comments from the respondents' representative, Mr Milligan, by no later than 4pm on Wednesday, 16 February 2022. Mr Milligan replied on 16 February 2022, in the following terms:

"I refer to the above case, in which we represent the Respondent, and the correspondence below, being an application by the Claimant's representatives under Rule 50 of the Employment Tribunal Rules of Procedure, and our invitation to comment upon it by the Tribunal.

It is understood that the application is under Rule 50(3)(b), being that the identity of (i) the Claimant; (ii) the Respondent; and (iii) any other employee of the Respondent is anonymised in any judgment regarding the Claimant's application to amend the claim. The rationale for seeking the anonymisation of the Respondent and any other employee

of the Respondent is not to protect their identities, but in case the Claimant can be identified indirectly through such disclosure.

It is understood that the ground for such application is that "significant personal information relating to the Claimant and his disability could be disclosed".

The Respondent objects to such application.

As has been noted by the Claimant's representatives, Rule 50(2) is relevant to the Tribunal's consideration, and requires "full weight to the principle of open justice and to the Convention right to freedom of expression" to be given.

The recent case (previously referred to by Employment Judge Ian McPherson in an email of 29 November 2021) of ***A v Burke and Hare, EA-2020-SCO-000067-DT*** *(attached) contains a useful summary of the legal principles regarding open justice. I refer, in particular, to paragraphs 31 – 37 of the judgment.*

Looking at each part of the ground for application in turn:

(i) ***Significant personal information relating to the Claimant***

The application does not provide any detail as to what "significant personal information" relating to the Claimant would be disclosed in the judgment. Without such detail, it is respectfully submitted that the Tribunal cannot make the Order sought.

In addition to not identifying what the "significant personal information" that is being referred to, there is no detail of the alleged harm that would be caused to the Claimant in the disclosure of such information. Again, without such detail, it is respectfully submitted that the Tribunal cannot make the Order sought.

(ii) ***Significant personal information relating to the Claimant's disability***

No detail is provided as to how the disclosure of the Claimant's disability would impact the Claimant in any way. It is relevant that the condition is dyslexia, which, according to the NHS website, is a condition which affects 1 in 10 people in the UK (https://www.nhs.uk/conditions/dyslexia/). Without specific detail about how disclosure of a condition of this nature would impact the Claimant adversely and why anonymity is accordingly required, it is respectfully submitted that the Tribunal cannot make the Order sought.

There is reference within the application to disclosure of how disability impacts upon the Claimant's job being a matter that should be weighed up by the Tribunal in its considerations. It is not clear what is meant by this. Given the subject matter of the claim, it is respectfully submitted that it cannot simply be accepted by the Tribunal that there is any such (unspecified) impact on the Claimant's job that must be taken into account.

Further comment

*As outlined at paragraph 35 of the **A v Burke and Hare** judgment, derogations from the principal of open justice must be shown to be necessary. It is not sufficient that derogation is desirable.*

*Further, as outlined at paragraph 34 of **A v Burke and Hare**, open justice is of paramount importance in the context of employment law, and derogations from it are only justified when necessary in the interests of justice.*

It is the Respondent's position that the Claimant's application falls far short of providing justification for the anonymisation of any and all parties, as sought. It may be the Claimant's preference, or desire, for anonymisation, but that is not sufficient to defeat the requirement for

open justice, and the public nature of Employment Tribunal proceedings. It is not necessary.

The Respondent therefore seeks that the requested Order is not granted.

It is also noted that the Claimant's representative may seek any discrete Rule 50 Order on this aspect of the claim to be extended on a permanent basis. The Respondent puts the Claimant on notice that any further application will again be objected to.

I have copied the Claimant's representatives into this correspondence and therefore complied with Rule 92 of the Employment Tribunal Rules of Procedure."

19. Having, on Thursday, 17 February 2022, had further, private deliberation in chambers, in respect of the **Rule 50** application by the claimant's representative, as opposed by the respondents, I decided to refuse the claimant's request for an Anonymisation Order. I did so for the following reasons:

(1) The manner and timing of the application was after the listed Preliminary Hearing, although before my Judgment and Reasons were finalised.

(2) Against the background of the earlier procedural history of the case, I found this unfortunate, as I had indicated, in paragraph 14 of my earlier Preliminary Hearing Note dated 29 September 2021, that while the claimant, at that stage, sought an Anonymity Order, details needed to be provided, so that the respondents could reply, and matters be decided by the Judge at the next Preliminary Hearing.

(3) In the event, on 20 December 2021, the matter was not further pursued by the Law Clinic, despite the Tribunal's email of 29 November 2021 stating that if the Law Clinic was still seeking any

Rule 50 Order, then they should provide detail of the basis on which it is sought, any case law relied upon in support of their application, and he precise terms of the Order they would be inviting the Judge to consider granting.

(4) The grounds of objection stated by Mr Milligan in his email of 16 February 2022 are, in my view, well-founded, and, in the interests of brevity, I gratefully adopt them as my own.

(5) Having regard to the judicial guidance from Lord Summers, the EAT judge, in **A v Burke and Hare**, to which I referred the Law Clinic in my Preliminary Hearing Note dated 21 December 2021, at paragraph 49, referring back to the Tribunal's email to parties of 29 November 2021, the law regarding **Rule 50** and the legal principles regarding open justice is clear.

(6) As Mr Milligan highlights, the application made by the Law Clinic does not meet the statutory test. In deciding this matter, I have also considered the judgment of His Honour Judge James Tayler in another EAT judgment, **Queensgate Investments LLP and others v Millet [2021] UKEAT/0256/20**, where **Rule 50** was considered.

(7) **Leicester University v A [1999] ICR 701** also refers. In that EAT judgment, it was held that corporate respondents cannot benefit from anonymity via a restricted reporting order.

(8) There is also the appellate guidance provided by Mrs Justice Simler, then EAT President (now Lady Justice Simler) in **Fallows v Nes Group Newspapers Limited [2016] ICR 801**, confirming, at paragraph 48, that the power to make **Rule 50** Orders is wide, but there are relevant principles to be considered, including that the burden of establishing any derogation from the fundamental principle of open justice or full reporting lies with the person seeking that derogation. It must be established by clear and cogent

evidence that harm will be done. As such, there is a high evidential threshold to support the making of a **Rule 50** Order.

(9) In the present case, the application made by the Law Clinic fails to explain why an anonymisation is necessary in the interests of justice. I do not find, considering the competing arguments from both parties, and in view of the case law, that the claimant, through the Law Clinic, has discharged the burden on them to explain why a derogation from the fundamental principle of open justice and full reporting should be allowed by anonymisation as sought here by the claimant.

(10) In all the circumstances, I have refused the claimant's application as it falls far short of providing any clear and cogent argument to justify anonymisation of any and all parties, and fails to disclose how disclosure of the claimant's disability would impact on the claimant's job.

(11) This refusal is of the present application, and the claimant, through the Law Clinic, retains the usual liberty to apply, if so advised, although the respondents have now put it on record that any further application will again be objected to.

Claimant's Application to Amend

20. As indicated earlier in these Reasons, the claimant's application for leave to amend the ET1 claim form was intimated by the Law Clinic by email on 23 December 2021, enclosing letter dated 22 December 2021, along with a final Scott Schedule, ET1 paper apart, as amended with tracked changes, and separate clean copy.

21. While the Law Clinic's letter says that the Judge granted leave to amend, at the Case Management Preliminary Hearing on 20 December 2021, that was not so, as the Preliminary Hearing Note issued on 21 December 2021 clearly shows that the Judge allowed the claimant's representative, Ms Morrison, the

usual liberty to apply: paragraph (2) of the Judge's Orders at that PH refers, as also paragraphs 20 to 31 of the written Note.

22. The application for leave to amend set forth the claimant's position, as follows:

"*We act for the Claimant in the above proceedings.*

In accordance with rule 29 of the Employment Tribunals Rules of Procedure 2013 (ET Rules), we request an order for leave for the Claimant to amend their claim.

We attach a copy of the claim showing the amendments the Claimant wishes to make, a clean copy of same and the Scott schedule referred to below.

The Claimant requests leave to amend their claim for the following reasons.

The Claimant has raised a complaint of disability discrimination. A full outline of the nature of the claims and facts relied on was set out in the original ET1. Following a case management discussion on 29th September 2021 the Claimant was asked to prepare a Scott schedule specifying the nature of each incident relied upon and has duly done so in terms of the Scott schedule attached.

The Scott schedule has clarified the nature of each incident relied on and the section of the disability provisions of the Equality Act 2010 relied on. It has also identified where in the ET1 paper apart the reference to the incident is to be found.

A further case management hearing was held on 20th December 2021 the purpose of which was to review the Scott Schedule and determine whether the incidents relied on were to be found in the original ET1 or whether they amounted to amendments to the ET1. Details of this approach are set out in the PH note following the PH on 29th September 2021 and a letter to the parties from EJ Ian McPherson on

29th November 2021. It was anticipated that the EJ would go through each incident on the 20th December 2021 at the PH re arranged from 3rd December 2021, as had been intimated in order to determine whether any amendment was required. It was not known until the case management hearing whether or not the Respondent considered any amendment necessary in relation to each incident relied on. As stated the purpose of the hearing was to determine this. Thus, it was not possible in our view to make an application for amendment until these matters were clarified. There was some frustration that we did not do so at the PH itself but it is for the reasons above that this could not in our view be prepared.

The ET has not at this stage, during or following the case management discussion of 20th December 2021, given any indication of whether they are satisfied that any amendment is necessary or not in relation to the incidents. Leave to apply to amend has however now been given in the PH note of 21st December 2021.

The Claimant representative stated at the case management discussion that with the exception of an incident no 18 on the Scott schedule it was their position that all matters relied on were in effect contained within the body of the ET1 which sets out the full chronology of incidents as well as intimating that complaints are brought under Sections 13,15, 19, 20,26 and 27 of the Equality Act, and then further setting out in more detail within the body of the ET1 paper apart and at the end further details in relation to the basis of complaints. As such it was argued that no amendment would be necessary. It has also been clarified that the Claimant was not proceeding with claims under either Sections 13 or 19 of the Equality Act for direct or indirect discrimination. Further, the Claimant representative sought to have it agreed that the ET1 and the Scott schedule be read alongside each other- thus ensuring that the Scott schedule be considered part of the pleadings, it being considered that this would be an effective way of providing full notice of the claims relied on as further specified from the

ET1 paper apart. In addition, the Respondent representative has taken each of the incidents and amended their ET3 grounds of resistance to answer these and ensure that their pleadings address each matter raised. This request does not appear to have been fully understood and is referred to at paragraph 20 of the PH note. We apologise if the nature of the submission was not sufficiently clear.

The Claimant representative on noting that the Respondent representative had identified four incidents which it believed required amendment, and the ET not having expressed a view at that time or later as to whether any amendment is in its view required, sought leave to amend the ET1 at the PH on 20th December 2021.

That leave having been granted in the PH note of 21st December 2021 as stated above and an application is now made today for an amendment of the ET1 to incorporate the Scott schedule as an addendum to the ET1 paper apart and to revise the ET1 paper as attached.

Particular amendments to be considered

It is noted that it is only in respect of incidents 13,14 16, and 18 that any application to amend in respect of what have been identified as new claims or incidents requires to be made.

Our position in relation to these is as follows: -

Incidents 13 and 14

There was reference to alleged discriminatory acts in relation to a report called the DOLTA Gourdie report in the original ET1 paper apart. At incidents 13 and 14 further specification is provided of the nature of this issue and in particular reference is made to the fact that there has been some confusion in the pleadings as to the fact that there were two separate reports that the Claimant prepared and that he felt that there were omissions and conduct by managers in relation

to both that he considered to be discriminatory. This also led to some confusion as to dates when events took place. However, clarification has been provided that there were two separate reports which bore some relation to each other and both of which the Claimant had to circulate / produce without the benefit (he says) of manager input and review and after which he was in more public forums criticised (he says) in respect of these.

Our primary position in relation to these matters is that the Scott Schedule at incidents 13 and 1 (sic- presumably meant to read 14) *has merely provided better clarification of the position around these incidents and made clear that we are referring to two reports than one and as such no amendment is needed*

In the event that that is not accepted then it is submitted that the further incident in relation to the development strategy is so closely intertwined with the matters relating to the DOLTA Gourdie report that this amendment be allowed so that all these incidents be included their being around the same time, arising out of the same issues and amounting to the same complaints in terms of the Equality Act.

Incident 16

It is accepted, as indicated in the Scott schedule against which there is no reference in this incident to a relevant paragraph in the ET1 paper apart, that there is no specific reference to this matter in the paper apart. As such it is a new fact introduced in relation to a specific matter in which the Claimant raises concerns relating to the nature of the comments made by his manager regarding his mid-term review. Given the nature of all the other incidents and allegations which relate to the way in which the Claimant's line manager is assessing and commenting on his performance for issues that the Claimant says relate to his known condition of dyslexia and in respect of which he says that significant adjustments have been identified but not yet provided, this is just a further specification of the criticisms that he

feels have been levelled at him and is no different in substance to many of the other incidents. Further at paragraph 24 of the ET1 paper apart reference is made to continuing criticisms of the Claimant during the course of 2020 and as such it is submitted that this does not raise anything new but is merely a further specification and should be allowed by way of amendment.

Incident 18

The incident at 18 is a general proposition that the Claimant has received continuing criticism from December 2019 from his line manager which he says amounts to discrimination arising as a consequence of his disability and or harassment. It is argued that this is not specific enough to give the Respondent due notice and requires to be amended in.

This 'incident' is really a reference to an ongoing state of affairs that the Claimant argues starts on 28th October 2019 and then continues to take place at work for the period from 20 December 2019 after an informal performance plan is put in place despite, from his perspective, there being an identified need for a workplace needs assessment that has now reported as of this date the need for a number of highly desirable reasonable adjustments. Reference is made to this at paragraphs 10 to 13 of the ET1 paper apart.

We agree that there is no end date, and we are happy to amend the Scott schedule to give an end date of 29th January 2021 We have in the Scott schedule set out a significant number of incidents that contribute to this ongoing state of affairs and the Claimant would in evidence speak to this ongoing state of affairs and what has happened in this period. It is our view that sufficient notice has been given of the ongoing situation and that to go into each and every communication and potential criticism that may be disclosed in evidence is akin to providing a complete witness statement, which the EAT has recently in made clear that it does not seek in the ET1.

Thus our primary position is that no amendment is needed in so far as it is suggested that this is a new matter and that sufficient specification has been provided of the circumstances in which this complaint is brought as a whole and more specifically. This matter is dealt with in the ET1 paper apart and should remain in the Scott schedule and as part of the pleadings such that the ET can determine whether the Claimant was working in such an environment over the stated period of time about which it can make findings in fact and in law should it choose to do so.

Effect of the amendment

If leave is given, then incorporating the Scott schedule and the revised ET1 will set out the further specification that has been provided by the Claimant. It will not alter or change in any material way the nature of the case as is effectively conceded by the Respondent representative in only advising that a requirement for amendment in respect of anything new relates to the incidents addressed above. The incorporation of those in our view also does not change anything materially and in our view the revised ET1 which merely incorporates the information in the Scott schedule as it was not clear following the case management hearing whether this would suffice and the revised ET3 gives everyone and the ET notice of the nature of each incident and the potential claims.

It is of note that the Respondent has already answered each of the incidents detailed in the amendment in their amended grounds of resistance and as such there is no further work required to respond to what has been set out in the revised ET1 or by way of incorporation of the Scott schedule.

Thus, we consider that an order in the terms requested would assist the tribunal in dealing with the proceedings efficiently and fairly and in accordance with the overriding objective for the reasons set out above.

Intimation

We confirm that we have complied with rules 30(2) and 92 of the ET Rules by providing a copy of this letter to the Respondent representative and we are advising that any objection to this application must be sent to the tribunal office within 7 days albeit this will need to take account of the holiday period, copied to ourselves. We have set out the 7-day period for comment as ordered in the PH note of 21st December 2021 but do understand that this may prove difficult with the holiday period and it may be that a response cannot be provided until the return to business in January. We however do not wish to delay in making this application.

We have no intention to delay, frustrate or make more difficult the nature of these proceedings and genuinely have set out our understanding of how matters have proceeded to date at the outset of this application and make this application at the first opportunity thereafter.

We are grateful for your assistance and look forward to hearing from you."

Respondents' Objections

23. Objections were intimated by Mr Milligan for the respondents, on 7 January 2022, in the following terms:

"*We refer to the above claim, in which we represent the Respondent, and the Claimant's representatives' correspondence received December 2021, together with Employment Judge Ian McPherson's directions of the same date, and respond to such correspondence as follows.*

Claimant's representatives' letter dated 22 December 2021

In the second paragraph of the second page of this correspondence, it is stated that "It was not known until the case management hearing

whether or not the Respondent considered any amendment necessary in relation to each incident relied on". It is respectfully noted that this is not correct. The Respondent had, within the revised Paper Apart to the ET3 submitted on 16 December 2021, noted that incidents 13 (para 172), 14 (para 180) and 16 (para 192) would require amendment. It also noted the issue about fair notice regarding incident 18 (para 203).

The correspondence states at the final paragraph at page 4 "the Respondent has already answered each of the incidents detailed in the amendment in their amended grounds of resistance and as such there is no further work required to respond to what has been set out in the revised ET1 or by way of incorporation of the Scott schedule." Whilst this is correct to an extent, in that the Respondent sought to answer the allegations to the best of its ability, notwithstanding the noted requirement to amend the claim, it is not correct to say that there is no further work required if the amendments are allowed, specifically in relation to Incident 18, below.

Application to amend claim

The Claimant's representatives' correspondence of 23 December 2021 contains applications to amend the claim. The Respondent's position on each of the applications and proposed amendments is stated below. However, it is noted that no reference has been made by the Claimant's representative to the relevant case law (such as ***Selkent Bus Co Limited (t/a Stagecoach Selkent) v Moore [1996] IRLR 661, Ladbrokes Racing Limited v Traynor [2007] UKEATS/0067/06)*** *and* ***British Coal Corporation v Keeble 1997 IRLR 336).*** *This is surprising, given the nature of the amendments sought.*

Whilst not overtly stated, it is understood that the wording of the proposed amendments (as noted as necessary to be provided by Employment Judge Ian McPherson at Paragraph 30 of the Note Following the Preliminary Hearing) is that within the Scott Schedule.

Incident 13

It is noted that that the Claimant's primary position is no amendment is required, because the Scott Schedule provides clarification only. This is disputed. As has been intimated within the Paper Apart to the ET3, the relevant paragraph of the ET1 referenced within the Scott Schedule (para 21) refers to a different report – the Gourdie DOLTA report; not the development strategy report. These are two different reports, and therefore it cannot be the case that reference to one report is simply able to be the subject of "clarification" to include reference to a different report on a different date.

The Respondent's position remains that amendment is required.

However, in the circumstances, and as (i) it is accepted that there is a general reference at paragraph 21 to "written work"; (ii) this incident involves the witnesses who are already being called; and (iii) the factual nature of this amendment is relatively limited; the Respondent does not object to this amendment being made.

This is without prejudice to the Respondent's denials of discrimination outlined in the Paper Apart to ET3, and also in respect of time bar

Incident 14

Again, the Claimant's primary position is that no amendment is required, because the Scott Schedule provides clarification only. Again, this is disputed by the Respondent. The incident refers not only to the different report (development strategy), but also a presentation on 19 January 2021. The Respondent's position is that no such presentation took place on this date – a presentation was given by the Claimant on 14 December 2020 (see para 80 of the Paper Apart to the ET3).

The Respondent's position remains that amendment is required.

However, in the circumstances, and as (i) it is accepted that there is a general reference at paragraph 21 to "written work"; (ii) this incident involves the witnesses who are already being called; (iii) the factual nature of this amendment is relatively limited; and (iv) 14 December 2020 was referenced in the Paper Apart to the ET3; the Respondent does not object to this amendment being made to the extent that it references the events of 14 December 2020.

This is without prejudice to the Respondent's denials of discrimination outlined in the Paper Apart to ET3, and also in respect of time bar.

If the Claimant wishes to continue to refer to a presentation of 19 January 2021 or any further matter beyond 14 December 2020, then this is objected to by the Respondent.

Incident 16

The Claimant's representative's position appears to be somewhat contradictory, in that it is accepted that there is no specific reference to this incident in the ET1, but also that it does not raise anything new.

The Respondent's position remains that amendment is required.

However, in the circumstances, and (i) this incident involves the witnesses who are already being called; (ii) the nature of this amendment is relatively limited, and (iii) the incident was referenced in the Paper Apart to the ET3 (para 70/71); the Respondent does not object to this amendment being made.

Incident 18

This does not give fair notice of the claim against the Respondent. It cannot be the case that an allegation of "Continued criticism and challenging of Claimant's performance associated with dyslexia in absence of identified reasonable adjustments" from the period of 12 December 2019 (or 28 October 2019 as outlined in the third column in this incident), with an end date now stated to be 29 January 2021,

constitutes fair notice of (i) a discrimination arising from disability claim; and (ii) a harassment claim. It is noteworthy that no attempt is made to address the fundamental matters required for a Section 15 or Section 26 claim.

This appears to be an attempt by the Claimant to state that any criticism or challenging of his performance in a period of at least 13, and perhaps 15 months, is an act of discrimination, but that no further specification of any actual action by the Respondent or its employees is required.

The position within the correspondence from the Claimant's representative is that "sufficient notice has been given of the ongoing situation and that to go into each and every communication and potential criticism that may be disclosed in evidence is akin to providing a complete witness statement". This is disputed. A respondent must be given the opportunity to know the case against it, and to answer such a case. An outline of the relevant actions or omissions that are alleged to amount to discrimination, it is submitted, must be provided in order that the allegations can be answered. Indeed, that was the purpose of the Scott Schedule.

The Claimant has listed 24 other separate incidents that are alleged to be acts of discrimination within this time period. These are appropriately specified (subject to comments above). It is not clear to the Respondent why a separate allegation such as this is being pursued.

Reference is made to the case of ***Chandhok v Tirkey 2015 ICR 527, EAT,*** *and the comments of Mr Justice Langstaff at paragraphs 14 – 18, particularly, paragraph 18: "In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on*

time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

Accordingly, it is the Respondent's position that such a general allegation cannot be allowed to proceed.

Summary position

Any application to amend must be determined by the Employment Tribunal, as noted by Employment Judge Ian McPherson's Direction 4 of 23 December. To aid the Employment Judge's consideration, in reference to each incident, it is confirmed:

1. *No objection to amendment is made in respect of Incidents 13 and 16.*

2. *To the extent that Incident 14 references the presentation on 14 December 2020, no objection to the amendment is made. If further allegations are to be included, these will be objected to, including with reference to the Respondent's position that no presentation was given on 19 January 2021.*

3. *Incident 18 does not constitute fair notice of a harassment or discrimination arising from disability claim, and should not be allowed to proceed.*

Future procedure

With reference to Employment Judge Ian McPherson's Directions of 23 December 2021, it is agreed by the Respondent (as per Direction 6 and 7) that parties should have 7 days from today to lodge written representations for the Employment Judge's consideration, and that it is dealt with in chambers, without the need for a hearing.

We have copied this correspondence to the Claimant's representatives and have therefore complied with Rule 92 of the Employment Tribunal Rules of Procedure."

24. Further, on 14 January 2022, Mr Milligan further advised the Tribunal, with copy to the Law Clinic, that:

"We refer to the above claim, in which we represent the Respondent, and the Claimant's representatives' correspondence received 23 December 2021; together with Employment Judge Ian McPherson's directions of the same date; and our correspondence of 7 January 2022 below in reply to such correspondence and directions.

As per Employment Judge Ian McPherson's directions, this email is the Respondent's comments on the Claimant's applications to amend. It is understood that Employment Judge Ian McPherson will then consider and determine the application to amend in respect of all 4 incidents in chambers.

As noted in the correspondence of 7 January 2022 below, the Respondent's position in reference to each incident, is as follows:

1. *No objection to amendment is made in respect of Incidents 13 and 16 for the reasons explained in the correspondence of 7 January 2022.*

2. *To the extent that Incident 14 references the presentation on 14 December 2020, no objection to the amendment is made. If further allegations are to be included, these will be objected to,*

including with reference to the Respondent's position that no presentation was given on 19 January 2021.

3. *Incident 18 does not constitute fair notice of a harassment or discrimination arising from disability claim, and should not be allowed to proceed as an amendment to the claim.*

Relevant procedural background

This claim was submitted by the Claimant, advised by his former representative, on 7 July 2021. The Respondent's ET3 was submitted on 10 August 2021. The Claimant appointed his current representatives with effect from 11 August 2021.

A case management Preliminary Hearing was fixed for 29 September 20021. At this hearing, the Claimant's representatives sought further time to clarify the terms of the Claimant's claim. This was to be by way of a Scott Schedule. Various iterations of this required to be produced by the Claimant's representatives due to omissions of information. The final version was submitted on 15 December 2021. The Respondent accordingly submitted an updated Paper Apart to the ET3 on 16 December 2021. This Paper Apart noted where the matters contained within the Scott Schedule went beyond those pled in the ET1 itself.

A further case management Preliminary Hearing was held on 20 December 2021 (having been postponed from 1 December 2021 on the Claimant's representatives' application).

Thereafter, the Claimant's representatives made an application to amend the claim on 23 December 2021 in respect of four incidents outlined in the Scott Schedule (albeit their primary position communicated appeared to be all four incidents were validly pled in the ET1 and the Scott Schedule offered only clarification). A partial objection to the application for leave to amend was lodged on behalf of the Respondent on 7 January 2021 (below).

Objection to application for leave to amend

It is accepted that an application for leave to amend the claim can be made at any point of proceedings.

*The principles set out in **Selkent Bus Company Ltd v Moore 1996 ICR 836, EAT** apply to such an applications. The Tribunal is therefore required in considering this application to have regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mr Justice Mummery in Selkent identified the following relevant factors for the Tribunal to consider: nature of the amendment; applicability of time limits; and the timing and manner of the application. In relation to the latter, it is relevant to consider why the application was not made earlier and why it is now being made.*

*Reference is made to in the case of **Ladbrokes Racing Ltd v Traynor UKEATS/0067/06/MT** at paragraph 40*

> *"Each party is entitled to approach the hearing on the basis that the case they have to meet is that of which notice is given in the ET1 or 3. As regards the second of these propositions, whether or not the Respondents were familiar with the facts that the Claimant sought to rely on was not the point. The point was that it was not until in the course of the hearing, some eight months after the dismissal and some five months after the receipt of the ET1, that the Respondents were being made aware that the Claimant sought to rely on those facts for a distinct purpose, so as to present a case of which, hitherto, no notice had been given. Knowing the facts is quite different from knowing that a Claimant is seeking to rely on them."*

*In **De Souza and ors v Carrillon Services Ltd EAT 0258/13** the EAT upheld a Tribunal's decision to not allow an amendment to a claim where the claims sought to be added would not have significantly*

added to the quantum of the claimant's compensation but would have required the respondent to undertake a substantial amount of work. Reference is made to paragraph 86 of the Judgment.

These matters, where relevant, are considered in respect of the objection to the application for leave to amend in each incident below:

Incident 14

As outlined in the correspondence, to the extent that this proposed amendment relates to a presentation on 14 December 2020, an objection is not made to this, as it was a matter referenced in the ET3. For the avoidance of doubt, the allegation of discrimination is denied. An objection is made to an amendment with reference to a presentation on 19 January 2021.

1. *Nature of the amendment: The Claimant's primary position is that no amendment is required, because the Scott Schedule provides clarification only. This disputed by the Respondent. The incident refers not only to the different report (development strategy), but also a presentation on 19 January 2021. The Respondent's position is that no such presentation took place on this date – a presentation was given by the Claimant on 14 December 2020 (see para 80 of the Paper Apart to the ET3).*

   Accordingly, it is the Respondent's position that this is raising new factual allegations. No details have been given of the alleged presentation on 19 January 2021. The Respondent's position is that there was no presentation on this date.

   Therefore, it is the Respondent's position that this is a substantial, as opposed to minor, amendment. It is not a "re-labelling of facts" already pled. It raises a new factual matter on a date not previously referred to by the Claimant with respect to any allegation. It is also noteworthy that limited detail is provided by the Claimant within the Scott Schedule as to how the alleged

actions meet the statutory requirements of the discrimination arising from disability and harassment claims pled.

If the Claimant's representatives seek to state that this was an error in the Scott Schedule, and the reference to 19 January 2021 is in relation to some other action, not the presentation, then reference is made to ***Ladbrokes Racing Ltd v Traynor UKEATS/0067/06/MT*** *as noted above. It is not for the Respondent to interpret or assume what the Claimant may have intended to plead. It is entitled to answer the case before it. It would require a further application for leave to amend to be presented by the Claimant.*

2. *Applicability of time limits: the allegations relate to 19 January 2021. Early conciliation commenced on 27 April 2021. Any acts or omissions of the Respondent before 28 January 2021, being 3 months prior to the commencement of early conciliation are prima facie time barred under Regulation 123 of the Equality Act 2010 (subject to the application of 123(1)(b)/123(3)).*

Therefore, this allegation was out of time when the claim was raised in July 2021. The application to amend was made on 23 December 2021.

The Respondent would submit that the amendment is significantly out of time. We do not consider that the Tribunal requires to determine the question of time bar in its considerations, which can be reserved for the full hearing, but only that it is a relevant factor to be taken into account when determining the application to amend.

3. *Timing and manner of application: it is accepted that the application to amend was made at the latest, at least 2 months before the final hearing (which has not yet been fixed, but is to be between March – May 2022). However, the timeline above is*

noted. The Claimant has had the benefit of representation both in raising the claim and throughout the case management process.

In relation to the manner of the application, again the limited information provided regarding the sought amendment is noted, as is the omission of reference to the relevant case law in the application to amend.

4. *Compensation available: no loss of earnings forms part of the schedule of loss. Up to 25 different allegations of discrimination are being pursued, under various heads of claim. It is submitted by the Respondent that there would be negligible impact on the Claimant's potential compensation if this amendment is not allowed.*

5. *Relative prejudice: it is the Respondent's position that the balance of prejudice favours the Respondent. If the amendment is allowed, further cost will be incurred in amending the ET3, further witness evidence will require to be heard at the Employment Tribunal (albeit that it will be from a witness already giving evidence). In addition, given the lack of detail in the proposed amendment, further detail will be required from the Claimant to properly respond to the allegation, which it is submitted therefore strengthens the Respondent's position that leave to amend should not be granted.*

For all of the reasons provided, we invite the Tribunal to reject the Claimant's application to amend.

Incident 18

This is the allegation of "Continued criticism and challenging of Claimant's performance associated with dyslexia in absence of identified reasonable adjustments" from the period of 12 December 2019 (or 28 October 2019 as outlined in the third column in this

incident), with an end date now stated to be 29 January 2021. It is the Respondent's position that this allegation is not within the ET1 (affirmed by the Claimant's position in the Scott schedule as not paragraph of ET1 reference is identified), therefore to proceed with this allegation would require an amendment to the claim made on the basis of the factual and legal assertions.

1. *Nature of the amendment: This appears to be an attempt by the Claimant to state that any criticism or challenging of his performance in a period of at least 13, and perhaps 15 months, is an act of discrimination, being pled as (i) a discrimination arising from disability claim; and (ii) a harassment claim.*

   Therefore, it is the Respondent's position that this is a substantial, as opposed to minor, amendment. If an allegation was outlined within any initial ET1 in the terms within the Scott Schedule quoted above, it is submitted that any Respondent would be entitled to seek further information and specification of the particular allegations raised and actions relied upon.

   To include such an allegation within a Scott Schedule is not a further specification of the claim (as required), but the opposite – it becomes so wide-ranging and extensive, it does not give fair notice of the claim. The Claimant has had a significant period of time to particularise his claim, and has done so in the Scott Schedule in respect of the remainder of the allegations. This is not a particularised allegation, limited in scope – it would be a substantial amendment to the claim.

2. *Applicability of time limits: the allegations relate to the period from 28 October 2019 to 29 January 2021. Early conciliation commenced on 27 April 2021. Any acts or omissions of the Respondent before 28 January 2021, being 3 months prior to the commencement of early conciliation are prima facie time barred*

under Regulation 123 of the Equality Act 2010 (subject to the application of 123(1)(b)/123(3)).

Therefore, only 2 days (28 and 29 January 2021) fall within the relevant time period when the claim was raised. Some 15 months of allegations fall outwith the time period. The application to amend was made on 23 December 2021.

The Respondent would submit that the amendment is significantly out of time. We do not consider that the Tribunal requires to determine the question of time bar in its considerations, but only that it is a relevant factor to be taken into account when determining the application to amend.

3. *Timing and manner of application: it is accepted that the application to amend was made at the latest, at least 2 months before the final hearing (which has not yet been fixed, but is to be between March – May 2022). However, the timeline above is noted. The Claimant has had the benefit of representation both in raising the claim and throughout the case management process.*

In relation to the manner of the application, we would note again the extensive time period, the limited detail of the allegation, and there being no attempt is made to address the fundamental matters required for a Section 15 or Section 26 claim, with respect to the legal tests set out in these sections in the Equality Act 2010.

As noted in my correspondence of 7 January 2022, the position within the correspondence from the Claimant's representative is that "sufficient notice has been given of the ongoing situation and that to go into each and every communication and potential criticism that may be disclosed in evidence is akin to providing a complete witness statement". This is disputed. A respondent

must be given the opportunity to know the case against it, and to answer such a case. An outline of the relevant actions or omissions that are alleged to amount to discrimination, it is submitted, must be provided in order that the allegations can be answered. Indeed, that was the purpose of the Scott Schedule.

4. *Compensation available: no loss of earnings forms part of the schedule of loss. Up to 25 different allegations of discrimination are being pursued, under various heads of claim. It is submitted by the Respondent that there would be negligible impact on the Claimant's potential compensation if this amendment is not allowed. In contrast, there would be substantial work for the Respondent in seeking to defend this claim as is pled.*

5. *Relative prejudice: it is the Respondent's position that the balance of prejudice favours the Respondent. If the amendment is allowed, fundamentally this would allow the Claimant to reference any matter during this period within his witness statement, notwithstanding the specific facts or incidents were not pled in the ET1 and point to it as discrimination. The Respondent would not be in a position to lead evidence on it at the Hearing, or at best would require additional evidence to led, perhaps requiring the Hearing to be postponed. It cannot be that such uncertainty can be allowed in the claim process.*

Conversely, the Claimant can still proceed with a wide-ranging and extensive claim on the grounds validly pled and particularised, even if leave to amend is refused.

Reference is again made to the case quoted in my email of 7 December below, of ***Chandhok v Tirkey 2015 ICR 527, EAT****, and the comments of Mr Justice Langstaff at paragraphs 14 – 18, particularly, paragraph 18: "In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their*

perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

For all of the reasons provided, we invite the Tribunal to reject the Claimant's application to amend.

As the cases of ***Selkent*** *and* ***Ladbrokes v Traynor*** *are authorities that are commonly cited, I have not attached copies of these cases, but have attached copies of the other two cases referred to.*

This correspondence has been copied to the Claimant's representatives and therefore Rule 92 of the Employment Tribunal Rules of Procedure has been complied with."

Claimant's Reply to Objections

25. Further to Mr Milligan's emails of 7 and 14 January 2022, the Law Clinic responded, on 14 January 2022, to the Tribunal, with copy to the respondents' representative, in the following terms:

"*We write further to Mr. Milligan's responses dated 7th and 14th January 2022 with regards to the application for amendment.*

Firstly we understand, and have checked with Mr. Milligan that he has no objection to the amendment of the ET1 paper apart to incorporate the references to the incidents set out in the Scott Schedule and the Scott Schedule being considered incorporated into the pleadings.

The only other amendment removes reference to indirect and direct discrimination complaints which have been withdrawn, at paragraph 6 of the ET1 paper apart.

It was our understanding, and we have confirmed with him, that the only matters which Mr Milligan considers require a formal amendment to be included as part of the pleadings (as opposed to offering further specification) are Incidents 13,14,16, and 18.

We note that he is not objecting to incident 13 and 16 being incorporated by way of amendment and so we do not comment further and ask that these incidents are amended in to the claim.

We note that he has no objection to the inclusion of the alleged incident on 20th December 2020 in respect of Incident 14, and ask that this be amended in to the claim, but note that any further incidences related to this matter are objected to. In particular any allegation of discrimination arising on 19th January 2021 which is the only other matter referred to at Incident 14.

We will address this first: -

Incident 14

Application to amend.

The Claimant has set out at Incident 13 of the Scott schedule as follows: -

In addition to working on the DOLTA Gourdie report the Claimant was working on producing a draft development strategy in the same period (April to November 2021). The Claimant sought to discuss with LW

and the line manager above, John Mair, the order in which these reports should be released. See emails of 6th June 2020 and 30th October 2020, for example. As with the DOLTA Gordie report the Claimant did not receive the expected input from his line manager, LW, before being asked to pass to John Mair. He had no opportunity to discuss with LW and Mary, was told it looked polished by LW, and had to forward to JM. There were then two occasions when the Claimant received negative feedback about this report, namely a discussion on the draft on 14th December 2020 and a presentation. The Claimant had to do a presentation of the paper to LW, JM and Mary Lindsay. He then got written feedback on 19th January 2021 which he considered to be surprisingly critical and was told not to do any further work on the paper by JM. In earlier discussions regarding the report between the Claimant and his line manager in or around June 2020, she had asked him to prioritise the DOLTA Gourdie report as it was recognised that the Claimant needed the adjustments still to be implemented and which would be relevant to drawing up the development strategy. The adjustments in the form of the agreed technology were not in place when either report were issued. The software package was just delivered on 20th November 2020.

Incident 14 therefore relates to feedback on the draft development strategy the Claimant was working on after giving a presentation- which Mr. Milligan has no objection to being included as an incident to determine, and written feedback which the Claimant received on 19thJanuary 2021 from John Mair together with an instruction to stop working on this paper.

It is our view that this is so inextricably linked to the earlier event on the 14th December 2021 that it should be allowed by way of amendment. It is an extension of what happened on the 14th December 2021. There is a mistaken reference at Incident 14 to a presentation on 14th December and 19thJanuary - when in fact it was a presentation on the 14th and written feedback on the 19th, hence we note that Mr.

Milligan says there was no presentation on the 19th. That is clear from the narrative which is referred to at incident 14 - as in 'see above'.

We see that Mr Milligan has anticipated the correction we make above in his submissions and refers to ***Ladbroke Racing Ltd v Traynor UKEAT/0067/06/MT.***

While we understand what he says we do note that the terms of the narrative referred to at Incident 14 and to be found at Incident 13 above means that the case has been made clear to the Respondent and indeed he has anticipated this correction. As such we ask that this amendment is allowed as closely associated with that which is conceded in relation to the presentation on 14thDecember, and it being accepted by the Respondent in terms of the amendment they are not objecting to at Incident 13.

Timebar

The Claimant alleges a continuing course of conduct and as previously agreed and accepted again by Mr. Milligan, any such issue will be determined at the final hearing. In our submission there is clearly an arguable course of conduct here involving two specific members of staff on one particular issue; namely the Claimant's performance over a period of time.

Timing and manner of application

It is submitted that the application has been made as quickly as possible once the issues requiring amendment had been set out as stated in the initial application. Mr. Milligan has noted that there are at least 2 months to the final hearing date. It is also noted that the amendment in of the incident of 19th January 2021 links to that to which there is no objection on 14th December 2020.

Compensation

The incident of 19th January 2021 is one of many we accept. It is significant in the chronology relied on in so far as it is the prelude to the suggestion that the Claimant moves jobs and links to the then involvement of John Mair in managing that process and the incidents that follow. We therefore believe it will have some relevance to any global award made.

Relative prejudice

For the reasons stated above- that while there is an error in the specification of the incident at 14 is clear from the narrative above this incident is as set out above. There is therefore notice of what had happened and it causes relatively little prejudice we say to add this in given all that is said above.

We will now address the second matter on which there is an objection to amend.

Incident 18

Nature of the amendment

This is not as stated a wish to allege that every single act of criticism or challenge to the Claimant's performance in the period outlined by Mr. Milligan is an act of discrimination but it is as stated earlier the basis for alleging that there was ongoing state of affairs during which efforts have been made to specify specific incidents and examples that are said to amount to discrimination.

This has been alleged from the outset in the ET1 - the timeframe has been clarified.

Timebar

Reference is made to what is said above regarding a continuing course of conduct ending with matters that are within time.

Timing and manner of application

We say that this matter - this ongoing state of affairs has been pled from the outset. We make an application to amend but in our view this is a matter that does not necessarily require amendment and if it is it is a minor relabelling of facts that were already pled, made at the earliest opportunity as stated above. See paragraph 24 of the ET1 paper apart.

Compensation

We imagine in this case that the ET will determine what incidents it finds to amount to discrimination, if any, and also whether there was a continuing course of conduct following which it will determine what compensation is awarded if any. If it finds that there was a continuing course of conduct and an ongoing state of affairs this may we submit affect the level of award given.

Prejudice

We understand the Respondent concerns but what we say is that what is alleged here is what has always been alleged - that there was continuing criticism and challenges to the Claimant's work that he had made clear were in his view related to his disability and which was then recognised by the need for a Workplace Assessment and these criticisms and challenges continued through a period without recognition of the fact that adjustments were not yet in place and the delay in achieving them. A significant number of individual incidents have been identified and the ET is asked to look at what the overall pattern was having heard evidence in relation to these and we see limited prejudice by allowing this amendment if required.

We thank Mr. Milligan for clarifying his position and narrowing down the areas of dispute in relation to the amendment application and finalisation of the pleadings and Scott schedule.

We thank him for referring to the relevant case law and concur with his approach to determining these matters.

We note that this matter will now be determined in Chambers and are content that this should be the case."

Relevant Law

26. In terms of **Rule 29 of the Employment Tribunals Rules of Procedure 2013**, the Tribunal may at any stage in the proceedings, on its own initiative or on the application of a party, make a Case Management Order. This includes an Order that a party is allowed to amend its particulars of claim or response. The usual starting point for consideration of any application to amend is the guidance given by the Employment Appeal Tribunal in the seminal case of ***Selkent.***

27. In many instances where there is an application to amend a claim form, it is done because a particular head of claim has not been fully explored or clarified in the initial claim. **Harvey on Industrial Relations and Employment Law** ("***Harvey"***) at section P1, paragraph 311.03 distinguishes between three categories of amendments: -

(1) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint;

(2) amendments which add or substitute a new cause of action but one which is linked to, arises out of the same facts as, the original claim; and

(3) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

28. In ***Transport and General Workers Union v Safeway Stores Ltd UKEAT/009/07***, Mr Justice Underhill, President of the Employment Appeal Tribunal, noted that although **Rule 10(2) (q) of the then Employment Tribunal Rules of Procedure 2004** gave Tribunals a general discretion to allow the amendment of a claim form, it might be thought to be wrong in principle for that discretion to be used so as to allow a claimant to, in effect, get round any statutory limitation period. He went on to say that the position on the authorities however is that an Employment Tribunal has discretion in any case to allow an amendment which introduces a new claim out of time.

29. In a detailed review of the case law, Mr Justice Underhill considered the appropriate conditions for allowing an amendment. In particular, he referred to the guidance of Mr Justice Mummery (as he then was) in ***Selkent Bus Company Ltd v Moore [1996] IRLR 661*** where he set out some guidance. That guidance included the following points: -

> "(2) *There is no express obligation in the Industrial Tribunal Rules of Procedure requiring a Tribunal (or the Chairman of a Tribunal) to seek or consider written or oral representations from each side before deciding whether to grant or refuse an application for leave to amend. It is, however, common ground for the discretion to grant leave is a judicial discretion to be exercised in a judicial manner, i.e. in a manner which satisfies the requirements of relevance, reason, justice and fairness and end in all judicial discretions.*
>
> ……
>
> *(4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.*
>
> *(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:*

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

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

(c) ***The timing and manner of the application.*** *An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made; for example, the discovery of new facts or new information appearing from documents disclosed in discovery. Whenever taking any factors into account, paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."*

30. In that ***Safeway*** judgment, Mr Justice Underhill also referred to the judgment of the Court of Appeal in England and Wales in ***Ali v Office of National Statistics [2005] IRLR 201*** where Lord Justice Waller referred to Mr Justice Mummery's guidance in ***Selkent***, pointing out that, in some cases, the delay in bringing the amendment where the facts had been known for many months made it unjust to do so. He continued: ***"There will further be circumstances in which, although a new claim is technically being brought, it is so closely related to the claim already the subject of the originating application, that justice requires the amendment to be allowed, even though it is technically out of time."***

31. Further, Mr Justice Underhill also considered the relevant extract from ***Harvey*** in relation to the threefold categorisation of proposed amendments. He referred to the fact that the discussion in ***Harvey*** points out that there is no difficulty about time-limits as regards categories 1 and 2, since one does not involve any new cause of action and two, while it may formally involve a new claim, is in effect no more than "***putting a new label on facts already pleaded".*** He went on to clarify that the decision in ***Selkent*** is inconsistent with the proposition that in all cases which cannot be described as "***relabelling"*** an out of time amendment must automatically be refused; even in such cases he stated that the Tribunal retains a discretion.

32. A further authority that is of assistance to a Tribunal considering an amendment application is ***Ahuja v Inghams [2002] EWCA Civ 192.*** At paragraph 43 of the Court of Appeal's judgment in ***Ahuja,*** Lord Justice Mummery stated that: ***"the tribunal has a very wide and flexible jurisdiction to do justice in the case, as appears from [old] Rule 11 of their regulations and they should not be discouraged in appropriate cases from allowing applicants to amend their applications, if the evidence comes out somewhat differently than was originally pleaded. If there is no injustice to the respondent in allowing such an amendment, then it would be appropriate for the Employment Tribunal to allow it rather than allow what might otherwise be a good claim to be defeated by the requirements that exist - for good reasons - for people to make***

clear what it is they are complaining about, so that the respondents know how to respond to it with both evidence and argument."

33. Further, there is the Judgment of the Employment Appeal Tribunal in **Chandhok –v- Tirkey [2015] IRLR 195**, and in particular at paragraphs 16 to 18 of Mr Justice Langstaff's Judgment in **Chandhok**, where the learned EAT President referred to the importance of the ET1 claim form setting out the essential case for a claimant, as follows: -

> *16. …. The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.*
>
> *17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable for a in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled*

licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

34. Also, of assistance to a Tribunal considering any amendment, there is the Court of Appeal's Judgment in **Abercrombie & Others –v- Aga Rangemaster Ltd [2013] EWCA Civ 1148; [2013] IRLR 953**, and in particular, the Judgment of Lord Justice Underhill, at paragraphs 42 to 57.

As Lord Justice Underhill pointed out in **Abercrombie,** at paragraph 47, the **Selkent** factors are neither intended to be exhaustive nor should they be approached in a tick-box fashion. There is nothing in the Rules or the case-law to say that an amendment to substitute a new cause of action is impermissible.

35. Further, at paragraphs 48 and 49 of the **Abercrombie** judgment, Lord Justice Underhill went to say as follows: -

> *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: see the discussion in Harvey on Industrial Relations and Employment Law para. 312.01-03. We were referred by way of example to my decision in Transport and General Workers Union v Safeway Stores Ltd (UKEAT/0092/07), in which the claimants were permitted to add a claim by a trade union for breach of the collective consultation obligations under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 to what had been pleaded only as a claim for unfair dismissal by individual employees. (That case in fact probably went beyond "mere re-labelling" – as do others which are indeed more authoritative examples, such as British Printing Corporation (North) Ltd v Kelly (above), where this Court permitted an amendment to substitute a claim for unfair dismissal for a claim initially pleaded as a claim for redundancy payments.)*

> *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.*

36. As is evident from the observations of Mr Justice Mummery, as he then was, in **Selkent, in** the case of the exercise of discretion for applications to amend, a Tribunal should take into account all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Factors to be taken into consideration include the nature of the amendment, so that for example an amendment which changed the basis of an existing claim will be more difficult to justify than an amendment which essentially places a new label on already pleaded facts; the question whether the claim is out of time and if so, whether time should be extended under the applicable statutory provision; and the extent of any delay and the reasons for it.

37. Further, despite it being unreported, there is also Lady Smith's EAT judgment in the Scottish appeal of **Ladbrokes Racing Ltd v Traynor [2007] UKEATS/0067/07.** It is detailed in chapter 8 of the **IDS Handbook on Employment Tribunal Practice and Procedure**, at section **8.50.** At

paragraph 20 of her judgment, Lady Smith, as well as noting the **Selkent** principles, stated as follows:

> *"When considering an application for leave to amend a claim, an Employment Tribunal requires to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing. That involves it considering at least the nature and terms of the amendment proposed, the applicability of any time limits and the timing and the manner of the application. The latter will involve it considering the reason why the application is made at the stage that it is made and why it was not made earlier. It also requires to consider whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs whether because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if they are unlikely to be recovered by the party who incurs them. Delay may, of course, in an individual case have put a respondent in a position where evidence relevant to the new issue is no longer available or is of lesser quality than it would have been earlier."*

38. Finally, and surprisingly not cited by either party's representative, in their respective written submissions lodged with the Tribunal, there is the now oft-quoted judgment of the Employment Appeal Tribunal in **Mrs G Vaughan v Modality Partnership [2020] UKEAT/0147/20, [2021] ICR 535,** by His Honour Judge Tayler, who stated as follows, at paragraphs 21 to 28: -

> *"21. Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting the **Selkent** factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of*

the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim.

22. *Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence. This is not a risk-free exercise as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek a discretionary amendment later.*

23. *As every employment lawyer knows the **Selkent** factors are: the nature of the amendment, the applicability of time limits and the timing and manner of the application. The examples were given to assist in conducting the fundamental balancing exercise. They are not the only factors that may be relevant.*

*24. It is also important to consider the **Selkent** factors in the context of the balance of justice. For example:*

24.1. A minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing.

24.2 An amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim.

24.3 A late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs.

25. No one factor is likely to be decisive. The balance of justice is always key.

26. Rather like Charles Darwin who, when pondering matrimony, wrote out the pros and cons, there is something to be said for a list. It may be helpful, metaphorically at least, to note any injustice that will be caused by allowing the amendment in one column and by refusing it in the other. A balancing exercise always requires express consideration of both sides of the ledger, both quantitively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice.

27. Where the prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it.

28. An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an

annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice."

Discussion and Deliberation

39. It is well recognised, if not trite law, that a Tribunal must not adjudicate on a claim that is not before it: ***Chapman v Simon*** **[1993] EWCA Civ 37**. In ***Amin v Wincanton Group Ltd [2012]*** **UKEAT/0508/10/DA***,* His Honour Judge Serota QC distinguished between a claim that is ***"pleaded but poorly particularised",*** and a ***Chapman v Simon*** case, where the complaint is not pleaded at all.

40. In the former case, the claimant is not required to amend the claim. The lack of proper particulars does not affect the Tribunal's jurisdiction. The remedy in an appropriate case would be to strike out the relevant part of the claim. It is, HHJ Serota observed, at paragraph 48 of his judgment, "***clearly undesirable that important issues in Employment Tribunal proceedings should be determined by pleading points."***

41. The Tribunal's overriding objective is set forth at **Rule 2**, as follows:

Overriding objective

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
>
> *(e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.*

42. In considering, in the present case, whether it is appropriate to allow the amendments sought by the Law Clinic, I have considered the ***Selkent*** principles, as well as the more recent case law authorities referred to earlier in these Reasons, and I have to take into account not just the interests of the claimant but also those of the respondents. So too have I considered hardship and injustice to both parties in allowing or refusing the amendment, as also the wider interests of justice in terms of the Tribunal's overriding objective to deal with the case fairly and justly.

43. It is plain that the claimant, particularly with the help of the Law Clinic, has sought to refine and narrow down the issues for the benefit of the Tribunal, but in doing so, he has introduced new aspects to the claim. It is necessary for me to determine the extent to which the Scott Schedule does so, whether that involves the introduction of material which would involve substantially different areas of inquiry than those made in the original claim and then to decide whether or not the application to amend should be granted, in whole or in part.

44. The difficulty for the claimant is that these incidents have been added very considerably after the claim was instituted, and indeed after the point when the Law Clinic, as his representative, was ordered by the Tribunal to clarify his claims in the form of a Scott Schedule. There must be finality to these pleadings, and it is unsurprising that it has caused the respondents' representative some consternation that the Law Clinic has sought to amend

the claimant's position, only after the second Case Management Preliminary Hearing on 20 December 2021.

45. It is clear to me that the respondents' representative, Mr Milligan, has conducted himself, as their legal representative, in a professional manner by pragmatically agreeing to certain amendments, and trying to bring finality to the list of issues to be determined at the Final Hearing. The nature of the amendment sought is significant, in my judgment, because it seeks to open up new matters, which have not previously been included within the heads of claim, and it does so, particularly as regards incident 18, in a way which provides no fair notice.

46. The timing and manner of the introduction of these incidents in the Scott Schedule, and incorporating it into the amended statement of claim, is unsatisfactory. It is plain, in my view, that the balance of prejudice would fall heavily upon the respondents in the event that the amendment application was granted. It would require Mr Milligan to seek further detail from the claimant's representatives as to matters not fully particularised, and for him to make further enquiries of the respondents, perhaps even further witnesses, and / or documents, for the Final Hearing.

47. It is true, of course, that, if refused, the claimant would lose the opportunity to expand upon his pleadings, but in my judgment the fact that he will be allowed to proceed with those existing claims which he has already made to the Tribunal should not be overlooked, and therefore the prejudice to him will be limited by comparison.

48. In any event, in my view, it would not be just to allow the claimant to continue to expand his claim in this way, given the history of the proceedings to date. Accordingly, it is my judgment that the application to amend this claim, insofar as relating to incidents 14 and 18 in the Scott Schedule, should be refused, on the basis that I have ordered on the basis that it would not be in the interests of justice to allow it.

49. Having considered parties' written representations, as detailed earlier in these Reasons, making and objecting to the amendment applications before me, and also my own obligations under **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, I consider, after careful reflection, that it is not in the interests of justice, and not in accordance with the overriding objective, to allow all of these proposed amendments to the ET1 claim form. As such, I have refused the amendments **as regards incident 14 (insofar as it refers to a presentation on 19 January 2021), and as regards incident 18**.

50. In doing so, it is appropriate that I explain my reasoning. An amendment can be proposed at any time in the course of a claim before the Tribunal, but, in my view, the various amendments proposed here by the Law Clinic on behalf of the claimant do change the fundamental factual and legal basis of the claim, and go much, much further than simply providing additional information regarding the factual basis of the existing complaints before the Tribunal, as per the ET1 claim form originally presented.

51. I have considered the timing and manner of these applications to amend. It is, of course, correct to note that an amount of time has already elapsed between the ET1 claim form having been presented (on 7 July 2021) and the application to amend the ET1 being made by the Law Clinic on 23 December 2021, after two earlier Case Management Preliminary Hearings on 29 September and 20 December 2021.

52. While originally represented by another organisation, the claimant has enjoyed the benefit of advice and representation from the Law Clinic since 11 August 2021, i.e., before the first Case Management Preliminary Hearing. The claimant’s student advisors have invested much time and energy in providing further and better particulars of the claim, and various iterations of a Scott Schedules, seeking to clarify the heads of complaint that the claimant intends to pursue against the respondents.

53. So too have they been pragmatic and withdrawn certain heads of claim, for direct and indirect disability discrimination, contrary to **Sections 13 and 19 of the Equality Act 2010**, and intimated that they are only proceeding with

discrimination arising from disability, failure to make reasonable adjustments, harassment, and victimisation, contrary to **Sections 15, 20, 26 and 27 of the Equality Act 2010.**

54. As is made clear in ***Selkent*****,** an application to amend should not be refused solely because there has been a delay in making it, and there are no time limits for considering an application to amend. Of paramount consideration is a relative injustice or hardship involved in refusing or granting the application.

55. In my view, this case is not a case very much in its early stages, where, if an amendment were allowed, both parties would have reasonable time to reflect before the evidential Hearing, and prepare accordingly, as regards necessary witnesses, productions, etc, but a case where a 6-day Final Hearing has already been ordered following the second Case Management Preliminary Hearing held on 20 December 2021.

56. The parameters of the factual and legal dispute between the parties have been set in the ET1 and ET3 to that date. To open up the claimant's pled case, and allow in further incidents, at this stage, is likely to require further enquiry, and thus time and expense to the respondents, and that at a relatively late stage in the proceedings.

57. While, on 16 December 2021, Mr Milligan lodged the respondents' updated paper apart containing the response to the claimant's Scott Schedule, as his objections of 7 January 2022 make clear, it is correct, <u>to an extent</u>, that the respondent answered each of the incidents detailed in the amendment in their amended grounds of resistance, but it is not correct say (as the Law Clinic did) that there is no further work required if the amendments are allowed, specifically in relation to incident 18.

58. Further, the amendments having been refused, it is important to remember that the claimant still retains the right to pursue his claim against the respondents, as already expanded by the amendments not opposed by the respondents.

59. As the respondents submit, there are up to 25 incidents being pursued, under various heads of claim within the Scott Schedule, and so, if this amendment were refused, as I have refused it, there is likely to be negligible impact on the claimant's potential compensation, in the event that his complaints were to be upheld by the Tribunal, in whole, or in part, after the evidentiary Final Hearing.

60. Mr Milligan's citation of paragraph 86 of the EAT judgment of Mr Justice Wilkie in **De Souza and ors v Carillon Services Ltd [2014] UKEAT 0258/13** refers, and where, as here, the claims sought to be added would not be likely to add significantly to the *quantum* of the claimant's compensation, but would have required the respondents to undertake further work, then that is a factor taken into account in refusing the amendments sought by the claimant.

61. In my view, the process followed to date will allow the factual and legal issues for determination by the Tribunal at Final Hearing to be identified by parties' solicitors, and intimated to the Tribunal in an agreed List of Issues to be drafted by parties' solicitors, and provided to the Tribunal, in advance of the start of the Final Hearing. In terms of case management, that process should assist the effective and efficient conduct of the Final Hearing.

62. In coming to my decision on these opposed applications for leave to amend, I considered all the relevant factors, and balanced the injustice and hardship to the claimant in refusing the applications, against the injustice and hardship to the respondents in allowing the applications.

63. That the claimant has been represented by the Law Clinic, a *pro bono* organisation, is another factor borne in mind, and while I do not hold them to the same high standards as I would expect of a professional legal agent, the fact of the matter is that the claimant has had the benefit of their representation throughout the case management process, yet the amendment application was not made until 23 December 2021, some 19 weeks after they were first instructed and came on record as his representative on 11 August 2021.

64. The claimant has had a significant period of time to fully particularise and give fair notice of all his allegations against the respondents, yet it is 24 weeks after presenting his claim before an application to amend is intimated on his behalf by the Law Clinic, notwithstanding the need for possible amendment was flagged up at the first Case Management Preliminary Hearing.

65. In my view, there would undoubtedly be a greater hardship to the respondents if the claimant was able to pursue the full extent of his claim as per the totality of his proposed amendments, and I consider that the injustice to the claimant in refusing his proposed amendments is far less than the hardship and injustice to the respondents, if I allowed the amendments in their entirety, given the claimant can still pursue his existing, pled case.

66. The claim, as now amended, allows the issues in dispute to be better focussed, and looking at the Final Hearing before the Tribunal, in a few months' time, both parties will be on an equal footing in that all relevant information has been disclosed so as to allow preparation for a Final Hearing to progress on the basis that all the claimant's cards are now on the table, and the respondents should be able to prepare accordingly.

67. By refusing to allow in a wholly unparticularised incident 18, it also obviates the need for interlocutory skirmishing at or before the start of the Final Hearing, and objections to evidence being outwith the scope of the Final Hearing. That too should help ensure that the case is heard on its merits, and concluded within the allocated 6-day listing, and that without the need for interruption to deal with objections to evidence, and / or the possibility of relisting for additional days.

Disposal: Amendment Refused

68. In these circumstances, I have **refused** the claimant's opposed application to amend the ET1 claim form, **as regards incident 14 (insofar as it refers to a presentation on 19 January 2021), and as regards incident 18**. The case shall proceed to the listed 6-day Final Hearing on 23, 24, 25, 26, 30 and 31

May 2022, in terms of the Tribunal's orders and directions already issued to both parties.

Employment Judge: I McPherson
Date of Judgment: 18 February 2022
Entered in register: 21 February 2021
and copied to parties