EMPLOYMENT APPEAL TRIBUNAL

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Your Reference:
Our Reference: UKEAT/0060/20/VP

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30 September 2021

Mr Robert Gray
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ET Sheffield - 2802764/2012

Dear Sir

Mr P Roddis v Sheffield Hallam University

I refer to the above matter and enclose a sealed copy of the Judgment.

Yours faithfully

Yatish

for Registrar

Encl

Case No: UKEAT/0060/20/VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 February 2021

Before :

MATHEW GULLICK, DEPUTY JUDGE OF THE HIGH COURT
(SITTING ALONE)

- -

Between :

MR P RODDIS	**Appellant**
- and -	
SHEFFIELD HALLAM UNIVERSITY	**Respondent**

- -
- -

Mr T Brown (instructed by Thompsons Solicitors) for the **Appellant**
Ms K Barry (instructed by Eversheds LLP) for the **Respondent**

Hearing date: 4 February 2021

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

PART TIME WORKERS

The Employment Appeal Tribunal dismissed the Claimant's appeal against the Employment Tribunal's decision that certain paragraphs of further particulars of claim provided by the Claimant pursuant to an earlier order of the Employment Tribunal were new matters which required an application to amend to be made, rather than further particulars of the claim already made. However, the Claimant's appeal against the Employment Tribunal's decision to refuse permission to amend in respect of those paragraphs was allowed. When determining the application to amend, the Employment Tribunal had treated the fact that the Claimant was raising new allegations as decisive rather than balancing the relative injustice and hardship of allowing or refusing the amendments (**Vaughan v Modality Partnership** [2021] IRLR 97 considered and applied). The application to amend was remitted to a differently constituted Employment Tribunal for rehearing.

MATHEW GULLICK, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. In this judgment, I shall refer to the parties using their titles from the proceedings below: that is, as "the Claimant" and "the Respondent".

2. This is an appeal by the Claimant from the judgment of an Employment Tribunal sitting at Sheffield (Employment Judge Shulman, sitting alone) dated 1 August 2019 and sent to the parties on 7 August 2019, following a hearing on 23 July 2019. By that judgment, the Employment Tribunal granted permission to amend the Claimant's claim in respect of one matter, but refused permission to amend in respect of two other matters.

3. The Claimant now appeals to this Tribunal against the refusal to permit those two matters to proceed, on the basis, firstly, that permission to amend was not required and, secondly, in the alternative, that the Employment Tribunal erred in law in refusing permission to amend. There is no cross-appeal.

4. Before me, the Claimant was represented by Mr Tom Brown of Counsel, who appeared at the hearing before the Employment Tribunal. The Respondent was represented by Ms Kirsten Barry of Counsel, having been represented before the Employment Tribunal by a Solicitor, Mr Robert Gray, who now instructs Ms Barry. I am grateful to both Counsel for the clarity of their arguments.

5. The appeal proceeded as a remote video hearing in accordance with the arrangements adopted during the COVID-19 pandemic. The public were able to access the video hearing remotely, which was also relayed to an open courtroom in the Rolls Building at the Royal Courts of Justice. There were no difficulties arising from the use of video technology.

Background

6. The claim was presented as long ago as 14 December 2012. At that point, the Claimant was a litigant in person. He was at the material time an associate lecturer at the Respondent university, having commenced employment on 30 January 2006. He was employed under what the Respondent describes in its grounds of resistance as a "zero hours contract". In section 5.2 of the ET1 claim form, the Claimant made a number of complaints about the conduct of the Respondent, relating to what he described as taking work away from him without consultation and giving it to others. The Claimant set out four instances in which he contended that work was improperly removed from him. There was then the following concluding paragraph:

> "In October 2012 the university failed twice to safeguard my timely payments of salary. These were the latest of several such occurrences and I am on record as having said on several occasions over the past five years that there are systemic failings in the way the university processes the payment of part time academic staff, insofar as its systems are geared towards claims validation - even where this is at the expense of failing to safeguard my right [t]o be paid on time - these failures form part of a wider pattern of discrimination against me as a part time employee."

The Respondent filed an ET3 response form and separate grounds of resistance settled by its Solicitors. At paragraph 11 of those grounds, it was denied that there had been any less favourable treatment of the Claimant as a part-time worker contrary to regulation 5 of the **Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000** ("the PTWR").

7. There was then a case management hearing by telephone on 30 January 2013 before Employment Judge Little. The Claimant appeared in person; the Respondent was represented by a Solicitor, Mr O'Hara. The claim was listed for a three-day hearing before a full panel of the Employment Tribunal. The record of the case management hearing sets out that the Claimant was complaining of four matters: unfair dismissal, less favourable treatment as a part-time worker, age discrimination, and of detriment as the result of making a protected disclosure. The record of the

hearing states at paragraph 9 that it was considered necessary for the Claimant to provide further information and clarification about his case and for the Respondent to be able to revise its response accordingly. Employment Judge Little made the following order:

> "3. The Claimant will confirm which of the four complaints … he in fact intends to proceed with and he will then provide full details of those complaints. That confirmation and those particulars will be provided to the Respondent (with a copy to the Tribunal) no later than 27 February 2013."

8. The Claimant then provided the required further details of the claim in a document signed by him and dated "February 2013". I shall refer to this document as "the February 2013 Particulars". In that document, the Claimant stated that he was pursuing claims for unfair dismissal, discrimination as a part-time worker and age discrimination. The February 2013 Particulars ran to just over three pages of closely typed text, and insofar as material to this appeal contained the following:

> **"Particulars of my Part Time Worker Discrimination Claim.**
>
> As an 'associate lecturer' - part-time worker - I was treated less favourably compared with actual full time workers, either as regards my terms of contract or by being subjected to other detriment. Particulars of my part time worker discrimination claim, which applies in all the four roles for which I claim dismissal (two of them unfair) - plus a fifth role - are:
>
> a) **Zero hour contracts**. I await a response to a Freedom of Information Request on this but to the best of my knowledge such contracts, intrinsically insecure for the worker, are issued *always* to associate lecturers, who are *always* part time. Zero hour contracts are *never* issued to their full time peers.
>
> b) **Patronage**. Full time academics at the Respondent are *always* selected by competitive process, usually interview. SHU associate lecturers are *rarely* selected thus. More commonly they are "given" the work by the *fiat* of SHU managers acting alone, their decisions not subject to scrutiny. The ensuing dependence on good will, in a culture where full time academics practise and value intellectual freedom, exacerbates the insecurity of zero hours (part time) workers relative to their full time peers.
>
> c) **Unfavourable terms of payment**. The Respondent pays full time academics monthly and automatically but obliges zero hour workers to make specific claims, even when their contracts are in reality for a set number of hours every week. Comparative unfavourability arises from the fact that the Respondent's systems for processing zero hour claims are excessively biased towards wrongful claim detection at cost of safeguarding timely payment. Its procedures unrealistically assume no human error across extended communication chains. Payment of my genuine claims was on five occasions in six years **either** delayed **or** made only by my going to great lengths and incurring *risk* - points (a) and

(b) above - to forestall impending delay. As zero hours contracts are only used by the Respondent with part time tutors, this added insecurity - "*will I be paid this month?*" - is part time worker discrimination.

d) **Same work/worse conditions**. For example: for seven years prior to non renewal at start of the current academic year, I have successive zero hour contracts to teach. Professionalism & Communication Skills throughout the academic year. I did the same work (including attending and wholeheartedly participating in many unpaid meetings to develop the curriculum) as the two full time members of the teaching team and was equally qualified and experienced. Yet my terms and conditions were demonstrably worse, including but not confined to point (e) below.

e) **No development support**. Full time academics at SHU are annually appraised by line managers. Feedback is given; development plans agreed. In none of my zero hours work have I had a single appraisal meeting or other form of staff development. Similarly, full time academics have part of their workload ring-fenced as "self managed time", to update their knowledge base and enhance their employability. Despite my length of continuous service I have had no *pro rata* self managed time.

f) **No operational support**. Last year my work under contract DEC1115019 put me in a difficult role in a faculty new to me. Some full time colleagues (it quickly transpired) were hostile to my role yet I was not warned, adequately briefed or, when things went wrong, given the due process and other safeguards my full time peers enjoy. Inadequate briefing and denial of due process also apply to work, under a contact not previously cited, delivering study skills classes to PGCE students. In each case the behaviour was unusually egregious, and the consequences for me were severe. **NB** both occurred more than three months prior to my claim, so would normally lie outside the time limit for Employment Tribunals. But for reasons I will set out in my witness statement, they only came to light in November and December 2012 and are by this fact within the time limit.

g) **Exploitation of isolation**. A zero hours colleague, having complained last year of the situation in (c), was told no other zero hours worker had experienced any problem. But the Respondent knew from concerns raised by me over several years that this was not true. (That I came to hear of my colleague's complaint is pure fluke.) Here too, separate issues need to be joined up to tease out underlying realities. The links are: zero hours = payment insecurity; zero hours = job insecurity; zero hours = part time; part time = isolation; isolation = workers less able to verify information given as fact. Full time academics at the Respondent, not experiencing this isolation, are less easily misinformed. The Respondent is obliged to be more truthful with them.

h) **Seeming parity/hidden discrimination**. While investigating my grievances (some of them touching on issues raised here) the Respondent insisted on upholding its rule that only a trade union representative or colleague may accompany me to grievance meetings. Since zero hours workers seldom have colleagues in any meaningful sense of the word - point (g) - the rule limits my access to support in a way it does not limit my full time peers. My point has been 'heard' but not conceded by the Respondent." [Original emphasis]

9. The Claimant therefore purported to, and did, provide the particulars of his claim under the **PTWR** under eight separate subparagraphs. The February 2013 Particulars went on to identify the full-time lecturers who were cited as comparators. The Claimant also provided a schedule of loss, in which he claimed £21,182.93 as past loss for less favourable treatment under the **PTWR**. That claim was expressly in respect of loss of work. The calculation was expressed to be in respect of a total of 499.5 hours' work at several different hourly rates:

> **"Schedule of loss**
>
> **Past losses**
>
> Calculation of losses in academic year 2012/13.
>
> *For work lost due to unfair dismissal and less favourable treatment as a part time worker* in Professionalism & Communication Skills (contracts 28986 & 28990).
> Maximum (and actual) value of the work = 219.5 hours @ £45.34 = £9952.13
>
> *For work lost due to unfair dismissal and less favourable treatment as a part time worker* in Disability Support (contract 32084).
> Maximum (and actual) value of the 2011/12 work = 35 hours @ £40.11= £1403.85
>
> *For less favourable treatment as a part time worker* (contract DEC1115019)
> Maximum value of the 2011/12 work = 240 hours @ £40.11= £9626.40
>
> *For less favourable treatment as a part time worker* on PGCE (contract number TBC)
> Anticipated value of work denied through lack of due process = 5 hours @ £40.11= £200.55" [Original emphasis]

There was also a claim for injury to feelings for age discrimination and for future loss of earnings arising from the alleged unfair dismissal.

10. The Respondent filed amended grounds of resistance dated 18 March 2013 which again denied the claim, including for less favourable treatment under the **PTWR**. There was a hearing on 2 May 2014 before a panel comprising Employment Judge Little and two lay members, with a reserved judgment being sent to the parties on 5 June 2014. By that judgment, the Claimant's claim under the **PTWR** was dismissed because the Employment Tribunal considered that the claimant had

not identified a comparator employed under the same type of contract. At that point, all the claims made by the Claimant in his ET1 claim form, as later particularised in the February 2013 Particulars, had either been withdrawn or dismissed: the protected disclosure claim had not been pursued, the age discrimination had been withdrawn and the Employment Tribunal had dismissed the unfair dismissal claim because it found that the Claimant's employment had not been terminated.

11. The Claimant then appealed to this Appeal Tribunal against the decision to dismiss his claim under the **PTWR**. That appeal was itself struck out for non-payment of the fees that were applicable to appeals to this Tribunal, but it was later reinstated following the UK Supreme Court judgment in **R (on the application of UNISON) v Lord Chancellor** [2017] UKSC 51. The appeal against the judgment of 5 June 2014 then proceeded to a full hearing before Her Honour Judge Stacey, who held that the Employment Tribunal had erred in law in its determination of the issue relating to the Claimant's comparator. The appeal was allowed in a judgment given by Her Honour Judge Stacey on 26 March 2018 (UKEAT/0299/17/DM) and the claim under the **PTWR** was remitted back to the Employment Tribunal.

12. There was then a hearing on 17 and 18 April 2019 before Employment Judge O'Neill to reconsider the issue relating to the comparator. At that hearing the Claimant was represented by Mr Tom Coghlin QC and the Respondent was represented by Ms Barry. Employment Judge O'Neill decided that the Claimant had identified a proper comparator so his claim under the **PTWR** would proceed. In addition to the judgment and reasons relating to that issue, a separate case management order was made, signed by the judge on 23 April 2019 and sent to the parties on 26 April 2019. The remaining issues falling to be determined in the claim under the **PTWR** were identified at paragraph 1 of the order as being whether the Claimant had been treated less favourably than his comparator, what the reason for the treatment was, and the questions of justification and remedy, if appropriate. Paragraph 4 of the case management order read as follows:

> "(4) **Further information**
>
> **On or before 7 June 2019** the Claimant is ordered to provide to the Respondent (with a copy to the Tribunal) further and better particulars of the claim including the Scot [sic] Schedule previously ordered." [Original emphasis]

No reasons were given by Judge O'Neill for making the case management order in these terms. Although I was not shown a copy of her judgment and reasons relating to the main issue before her as to the comparator, it was agreed by Counsel that the reasons for making paragraph 4 of the case management order were not apparent from that decision, either.

13. On 7 June 2019, the Claimant's Solicitors sent a document headed "Further and Better Particulars" to the Tribunal, copied to the Respondent. I shall refer to this document as "the June 2019 Particulars". The Claimant's Solicitors stated in the covering correspondence that they were not aware of any previous order requiring a Scott Schedule and asked whether, in light of the further and better particulars and the schedule of loss appended to the letter, such a schedule was still necessary. At paragraph 4 of the June 2019 Particulars there were the following six subparagraphs relating to the Claimant's claim of less favourable treatment or detriment on the ground of his part-time status:

> "4. The Claimant contends that he has been treated less favourably or subjected to a detriment on grounds of his part time status in comparison to [the Claimant's comparator] as follows:
>
> 4.1. Clause 6 of the Claimant's contract allows the Respondent to withdraw work and/or reduce his hours and provides that the Respondent is under no obligation to provide the Claimant with "*any work or to provide a minimum number of hours in any day or week*". This clause created a highly insecure environment for the Claimant. The Respondent only employed Associate Lecturers on part time basis on zero hours contracts. There is no equivalent term in [the Claimant's comparator]'s contract. This is less favourable treatment on grounds of the Claimant's part time status.
>
> 4.2. The Claimant was paid on an hourly basis. In comparison, as a full time lecturer, [the Claimant's comparator], was paid on an annual salary. In paying the Claimant on an hourly basis the Respondent breached the pro rata principle under regulation 5(3) PTWR. In accordance with the pro rata principle where a comparable full-time worker is in receipt of pay, a part-time worker should not receive less than the proportion of that pay than the amount of weekly hours they work in comparison to their full time comparator. As a result of being paid hourly

> the Claimant received less pay then he would have had he been paid as a proportion of the annual salary received by full time lecturers. The details are set out in the Claimant's schedule of loss dated 7th June 2019.
>
> 4.3. Unlike [the Claimant's comparator], the Claimant's hourly paid salary required the Claimant to submit specific claims for the work carried out. This sometimes led to delay and time spent chasing payment. [The Claimant's comparator], did not have to endure such a situation resulting in delayed payments.
>
> 4.4. Full time lecturers are annually appraised by managers and have personal development plans agreed. In comparison the Claimant did not receive any such appraisals nor any form of development.
>
> 4.5. As set out at 4.1 above, under Clause 6 of the Claimant's contract, the Respondent was not under any obligation to provide him with work or to provide a minimum number of hours. In the academic year 2012-13, after seven years of continuous teaching on it, the Professionalism & Communications Skills (PSC) module, was removed from the Claimant in order to provide teaching hours to full time lecturers who did not have their full load of 462 teaching hours. The work was removed from the Claimant arbitrarily in pursuant to Clause 6 of his contract of employment in favour of full time lecturers. Other work was also removed from him. The work was removed in September-November 2012. This resulted in a significant drop in the Claimant's income. In comparison, the Respondent did not arbitrarily remove work from [the Claimant's comparator], as full time lecturer. There was no such contractual term in [the Claimant's comparator]'s contract which allowed the Respondent to remove work from him in this arbitrary fashion, which would result in a reduction of salary.
>
> 4.6. Under Clause 7 of the Claimant's contract, he was not entitled to paid bank holidays nor pay during Christmas and Easter university vacations. In contrast [the Claimant's comparator] was paid for the bank holidays and for the Christmas and Easter vacations."

14. The June 2019 Particulars were accompanied by a revised schedule of loss. The claims made were: (a) for loss of salary during the period 2006 to 2014 (when the Claimant's employment had ended) as a consequence of being paid on an hourly rather than salaried basis in the sum of £23,639.67; (b) for losses due to removal of hours in the period 2006 to 2014 in the sum of £25,231.71; (c) for loss of holiday pay and pension contributions in an amount to be confirmed following receipt of information from the Respondent.

15. On 18 June 2019, the Employment Tribunal's regional office sent a letter to the parties stating that Employment Judge Maidment had directed that there was no need for the Scott Schedule that had been ordered by Judge O'Neill.

16. On 27 June 2019, the Respondent's Solicitors wrote to the Employment Tribunal stating that the June 2019 Particulars included what they described as a number of amendments to the claim for which consent had neither been sought nor given. They identified these as being the allegations at paragraphs 4.2, 4.5 and 4.6 of the June 2019 Particulars. The Respondent's Solicitors recorded the Respondent's objection to the claim being amended to include those allegations and contended that paragraphs 4.2 and 4.6 were materially new factual allegations not forming part of the existing claim either in the claim form or the February 2013 Particulars. In relation to paragraph 4.5, the Respondent's Solicitors accepted that the Claimant had raised the factual matters relied upon in his original claim, but contended they had not been advanced as a claim of less favourable treatment on the ground of part-time worker status. The Respondent's Solicitors set out arguments why the amendments should not be permitted, applying the approach in **Selkent Bus Co Ltd v Moore** [1996] IRLR 661. It was stated the matters raised were new complaints which would require the collation of new witness and documentary evidence, and that the amendments had not been sought in a timely manner. It was also stated that:

> "We also respectfully submit that the Respondent would be at a substantial disadvantage if the proposed amendments were allowed, given the passage of time of approximately 6.5 years, as witness memories will have no doubt faded, that is, if the witnesses are still employed by the Respondent and if the Respondent is able to locate them. The Respondent would also need to search for documents from a long period of time ago, which may not still be available, given that two of the allegations have not been made before and the one allegation that was made, was raised in the context of the two claims that were dismissed in 2014."

17. On 28 June 2019, there was a preliminary hearing by telephone before Employment Judge Davies, at which both parties were represented by Solicitors. By order sent to the parties on 3 July 2019, a preliminary hearing was set down for 23 July 2019, the issues to be determined being

described as "whether the particulars of claim provided by the Claimant on 7 June 2019 contain amendments to his claim and, if so, whether he should have permission to amend his claim in those terms". The Claimant was required to set out his case in writing by 12 July 2019 as to why the amendments should be allowed.

18. The Claimant's Solicitors then set out the Claimant's case in a document sent to the Tribunal and the Respondent on 12 July 2019 which was headed "Claimant's Submissions for Preliminary Hearing". It was contended that the matters set out in each of the paragraphs 4.2, 4.5 and 4.6 of the June 2019 Particulars were already sufficiently pleaded by reference to the ET1 claim form and the February 2013 Particulars. In the alternative, it was contended that permission to amend should be given. A number of points were made, including the following:

(a) The reason for the time at which the clarification the Claimant's claim had been given was Judge O'Neill's order to provide further particulars. Prior to the outcome of the hearing before Judge O'Neill, the parties had been focused on issues relating to the comparator. The Claimant should not have held against him the substantial period of time (three years) during which the progress of his successful appeal against the Employment Tribunal's previous decision had been delayed.

(b) The Respondent had not shown any real prejudice that would result if the amendments were to be allowed. There was no evidence to support the Respondent's generalised contention that witnesses' memories would have faded. In any event, the complaints made did not require an intimate knowledge of the Claimant's particular circumstances because the allegations were about systemic or structural matters. It was also highlighted that documentation relevant to the new issues would be preserved in any event because of the Claimant's existing **PTWR** claim.

(c) The Respondent already faced a substantial (in factual and legal terms) claim. The amendments were of great value to the Claimant, in seeing his position vindicated, and

they added little to the burden of the overall claim. The hardship of refusing an amendment would disproportionately fall on the Claimant.

(d) The matters raised were not confined to the Claimant alone and would affect a broader group of staff employed by the Respondent. The issues raised would potentially have to be dealt with in other cases in any event.

19. The preliminary hearing took place on 23 July 2019 before Employment Judge Shulman. The Claimant was represented, as I have said, by Mr Brown; the Respondent by its Solicitor, Mr Gray. It is the decision made at that hearing which gives rise to this appeal. By his judgment and reasons sent to the parties on 7 August 2019, the Employment Judge refused permission to amend in respect of paragraphs 4.2 and 4.6 of the June 2019 Particulars, but granted permission to amend relation to paragraph 4.5. The material parts of the Employment Judge's reasons were as follows:

> **"3. The Law**
>
> The Tribunal has to have regard to the following:
>
> It should be noted that at the conclusion of the hearing the parties agreed that they did not wish to come back on any legal provision or precedents to which I have referred in this decision.
>
> 3.1. The leading case on whether to allow a proposed amendment is **Selkent Bus Company Limited v Moore** [1996] ICR 836 EAT (Selkent). When deciding whether to allow an amendment the Tribunal has a complete discretion. In determining whether to grant an application to amend the Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interest of justice and to the relative hardship that would be caused to the parties, by granting or refusing the amendment.
>
> 3.2. Relevant factors include (in addition to the interests of justice and relative hardship):
>
> 3.2.1. The nature of the amendment - this may encompass more formal amendments as against the making of entirely new factual allegations, which change the basis of the existing claim.
>
> 3.2.2. The applicability of time limits - if an amendment comprises new factual allegations the Tribunal must consider whether the allegations are out of time and, if so, whether time should be extended.

3.2.3. The timing and manner of the application - an application should not be refused solely because there has been a delay in making the application. However it is relevant to consider why the application was not made earlier.

3.3. The factors set out in paragraph 3.2 above are not exhaustive. The Tribunal may also consider:

3.3.1. The merits of the claim - see, for example, **Cooper v Chief Constable of West Yorkshire Police and anor** EAT 0035/06.

3.3.2. The validity of the original claim - see **Cocking v Sandhurst (Stationers) Limited and anor** [1974] ICR 650 NIRC.

3.4. Time may be an issue in this case, so it is as well to visit the basic principles. Again Tribunals have a wide discretion to admit and extend out of time discrimination claims, where it is just and equitable to do so - see section 123(1)(b) Equality Act 2010. There is no compulsion on a Tribunal to go down a list of factors, including those set out in section 33 Limitation Act 1980, but in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640 CA it was said that there are almost always factors that are relevant, namely, the length of and the reason for the delay and whether the delay has prejudiced the Respondent.

4. Argument

4.1. The Claimant

4.1.1. Paragraph 4.2

This claim relates to comparative pay between a part-time and a full-time worker. The Claimant says that this is not a new claim and was raised in the claim form by use of the words "these failures form part of a wider pattern of discrimination against me as a part-time worker". The Claimant says it was also raised in the amended claim dated February 2013, in that the Respondent pays full timers monthly and automatically, but part-timers, as zero contract workers, are obliged to make specific claims, even though their contracts are in reality for a set number of hours. Further the amended claim dated February 2013 said that the Claimant said that the Claimant's terms and conditions were demonstrably worse, presumably, than those of full timers.

4.1.2. Paragraph 4.5

This claim related to work taken away from the Claimant. The Claimant says that in the amended claim (presumably) of February 2013 the Claimant claims that he lost work relating to four contracts due to discrimination and then there is added a fifth contract in the same document, drawing attention to the insecure nature of the contracts issued to part-time workers. The Claimant adds that paragraph 4.5 relates to paragraph 4.1 of the Particulars, which of itself alleges that zero hours contracts were only ever issued to part-timers. Work under these contracts can be removed from a worker as the employer is under no obligation to

provide work. Paragraph 4.5, the Claimant, says is related to what is said in paragraph 4.1.

4.1.3. Paragraph 4.6

This claim relates to statutory holidays and Christmas and Easter university vacations. The Claimant says that the same reference in the claim form and the second reference in the amended claim of February 2013, as set out above under paragraph 4.1.1, apply equally to paragraph 4.6.

4.1.4. Selkent

4.1.4.1. The Claimant says there was a three year delay between July 2014 and July 2017 relating to the disposal of the Claimant's appeal in these proceedings.

4.1.4.2. The Claimant says that in the intervening period between February 2013 and June 2019 the Respondent never sought further information in respect of the claim.

4.1.4.3. The Claimant says if there was a delay the Claimant was not to blame for it.

4.1.4.4. The Claimant says the Claimant's complaints are likely to depend more on documentary than oral evidence.

4.2. The Respondent

4.2.1. Paragraph 4.2

The Respondent says that this claim has not hitherto appeared in pleadings and that it is a materially new factual allegation.

4.2.2. Paragraph 4.5

The Respondent says that the claim was originally raised in the claim form but it was not so done in a context of claim under the part-time regulations.

4.2.3. Paragraph 4.6

The Respondent says similarly as in relation to paragraph 4.2 as set out in paragraph 4.2.1 above.

4.2.4. Selkent

4.2.4.1. The Respondent says all three claims are out of time.

4.2.4.2. The Respondent says too much time (6 and a half years) have passed since the claim was made.

4.2.4.3. The Respondent says witnesses' memories have faded. There are some witnesses that have left the Respondent's employment.

4.2.4. The Respondent says the Claimant has had numerous opportunities to amend his claim.

5. Determination of the Issues

(After listening to the factual and legal submissions made by and on behalf of the respective parties):

5.1. With regard to paragraph 4.2, there is mention of payment of wages, albeit there is reference regarding matters of payment process in the claim form at the end of paragraph 5.2 and on page 2 paragraph c) of the amended claim dated February 2013. These references are not sufficient (of themselves) to prevent paragraph 4.2 constituting a new claim. The documentary arguments upon which the Claimant relies, which are set out in paragraph 4.1.1 above are insufficiently particularised and/or are too general. These factors in themselves are sufficient to allow me, having considered the other factors referred to in Selkent, to decide the matter under the factor set out at paragraph 3.2.1 above. It is clear that the amendment being paragraph 4.2 of the Particulars is refused because it contains a new factual allegation.

5.2. With regard to paragraph 4.6 of the Particulars there is nowhere in the documents any mention of holidays, not even as to process. The documentary arguments upon which the Claimant relies at paragraph 4.1.3 above are insufficiently particularised and/or far too general. Again, these factors in themselves are sufficient to allow me, having considered all the other factors in Selkent, to decide the matter under the factor set out at paragraph 3.2.1 above. The claim in paragraph 4.6 of the Particulars contains a new factual allegation. The amendment is refused.

5.3. The situation with regard to paragraph 4.5 of the Particulars is different. Whether the classification of the claim changed, which it may have done, the Respondent was on notice from the outset concerning the Claimant's complaint of withdrawal of work, the alleged facts being in the claim form and so on thereafter. I note that at paragraph 4 of a Telephone Case Management Discussion dated 30 January 2013 that Employment Judge Little records the Claimant's loss of work and the same paragraph refers to less favourable treatment. The loss is also referred to in the amended claim dated February 2013 particularly under the second paragraph headed "Context".

5.4. Taking into account Selkent I am satisfied that paragraph 4.1 of the Particulars does link with paragraph 4.5. Paragraph 4.5 is more of a re-labelling (if at all) than a new allegation.

5.5. So far as time is concerned, I take into account the points made by the Respondent, but since I have found that the facts in the amendment in paragraph 4.5 were known to the Respondent at the very latest when it received the claim form, I find it just and equitable to extend time to such date as will make the claim in respect of paragraph 4.5 in time.

5.6. It is true that there has been delay, but my reasoning is the same as in relation to the extension of time, which I have just granted, namely, that the Respondent has been aware of the facts alleged since it received the claim form. Whilst it may have been possible for the Claimant to make the amendment earlier, again

> the Respondent's knowledge of the alleged facts makes it unnecessary for me to consider this is a determining factor.
>
> 5.7. I have insufficient knowledge of the case to consider the merits which were not argued before me. Similarly no argument was made as to the validity or otherwise of the claim.
>
> 5.8. In his written submission the Claimant's representative made reference to Article 6 of the European Convention on Human Rights, referring to the Tribunal's obligations and that analysing the Claimant for delay would be a breach of the said article. The Claimant did not argue this at the hearing and I assume that he decided not to pursue it.
>
> 5.9. In all the circumstances leave is given so as to allow the amendment paragraph 4.5 of the Particulars.
>
> 5.10. The parties will be notified separately as to a telephone case management hearing to make case management orders and list a final hearing."

The Grounds of Appeal

20. The appeal against the refusal to permit paragraphs 4.2 and 4.6 of the June 2019 Particulars to proceed was originally brought on four grounds. The first ground was that the Employment Judge failed to consider at all whether or not the issues raised at paragraphs 4.2 and 4.6 of the June 2019 Particulars required an amendment to be made. This ground of appeal was not pursued before me by Mr Brown. The other grounds were pursued.

21. By ground 2, the Claimant contends that the Employment Judge erred in law in concluding that paragraphs 4.2 and 4.6 of the June 2019 Particulars were not further particulars of the Claimant's claim and required an application to amend.

22. By grounds 3 and 4, the Claimant contends, in the alternative, that the Employment Judge erred in law in refusing permission to amend to pursue the matters set out in paragraphs 4.2 and 4.6 of the June 2019 Particulars. By ground 3, it is contended the judge erred in law in failing to take into account all relevant matters and to balance the injustice and hardship of refusing the amendment. By

ground 4, it is contended the decision to refuse permission for the amendments was, in any event, perverse.

Discussion

Ground 2

23. For the Claimant, Mr Brown submits that the Employment Judge erred in law in proceeding on the basis that paragraphs 4.2 and 4.6 of the June 2019 Particulars were matters which required an application to amend. He relies on the order made by Employment Judge O'Neill (which the Respondent did not challenge by way of appeal or application for reconsideration) requiring the Claimant to provide further and better particulars of his claim. He points out that the order made by Judge O'Neill was not subject to any limitation or specified to be in respect of any particular matter, and that when Judge O'Neill made the order all that remained of the originally pleaded claim was the claim under the **PTWR**. Mr Brown contends the matters set out at paragraphs 4.2 and 4.6 of the June 2019 Particulars were further particulars of the Claimant's claim as advanced in the ET1 claim form and the February 2013 Particulars and that the Employment Judge was wrong to proceed as he did.

24. Mr Brown submits that the final sentence of subparagraph (d) of the February 2013 Particulars in which the Claimant referred to his conditions being worse than those of full-time workers expressly did not limit the claim to the matters set out specifically in the February 2013 Particulars because of the use of the words "including but not confined to" in the allegation that the Claimant's terms were worse than those of full-time workers. He submits that the only way that the February 2013 Particulars can be understood is that there were other respects, not specifically identified, in which the Claimant contended that his conditions were worse, and that what was set out in the February 2013 Particulars was not an exhaustive list. He submitted that non-exhaustive lists of this type of are commonly seen in statements of case in Employment Tribunals and that the parties and the Employment Tribunal must work together by way of case management to identify exhaustively the matters complained of.

Mr Brown submits that there was sufficient information in the Claimant's prior statements of case to result in the June 2019 Particulars being no more, in all respects, than particulars of complaints already included in the claim.

25. For the Respondent, Ms Barry submits the Employment Judge did not err in law in treating the matters set out in paragraphs 4.2 and 4.6 of the June 2019 Particulars as requiring an application to amend. She submits that paragraph 4 of Employment Judge O'Neill's order may well have been made in error because neither party requested such an order and, as the Claimant's Solicitors stated in their letter of 7 June 2019, there had never been any previous order for the provision of a Scott Schedule in this case. The focus of the hearing before Judge O'Neill had been on the issue of the Claimant's chosen comparator, rather than on issues of case management. She submits that Judge O'Neill's order was no more than a requirement for the Claimant, now legally represented, to provide an up to date list of his complaints.

26. Ms Barry submits that, in any event, the question whether paragraphs 4.2 and 4.6 of the June 2019 Particulars were matters covered by Judge O'Neill's order must be considered in the overall context of the litigation, and in particular the order made by Employment Judge Little and the February 2013 Particulars provided in response to it. She submits that the Claimant had already been required by Judge Little to provide full details of his complaints and provided the February 2013 Particulars as a result. She submits that Judge O'Neill's order did not permit the Claimant to advance new allegations that cannot be discerned from his originally pleaded case, that is the ET1 and the February 2013 Particulars when read together. In response to Mr Brown's reliance on the words "including but not confined to" at subparagraph (d) of the February 2013 Particulars, Ms Barry submits that this wording must be read in the context of Judge Little's order that the Claimant provide full details of his complaints, and the fact that the February 2013 Particulars are a very detailed document to which the Claimant had clearly applied his mind in circumstances where the record of

the case management hearing before Judge Little stated that he informed the Judge that, although not legally represented, he had the benefit of legal advice. Ms Barry submits that the Claimant had the opportunity to, and did, set out his case in full. He also provided a schedule of loss which did not include losses derived from the new claims now advanced.

27. In my judgment, this ground of appeal must be dismissed, largely for the reasons advanced by Ms Barry. I do not consider, however, that it is open to the Respondent on this appeal to seek to go behind the order made by Judge O'Neill that the Claimant provide further and better particulars of the claim, or to speculate on the reasons why Judge O'Neill chose to make the order, when the order was never challenged and such reasons were never sought from the Judge. That order was made. The Claimant purported to comply with it. The issue is whether the matters set out in paragraphs 4.2 and 4.6 of the June 2019 Particulars were properly regarded in the judgment now under appeal as constituting new allegations which require permission to amend the claim, or as particulars of the existing claim. Equally, I do not think the Claimant can contend that it must have been the intention behind Employment Judge O'Neill's order that the Claimant should provide the further particulars which he in fact did, as a result of the wording of subparagraph (d) of the February 2013 Particulars on which Mr Brown relies. It was, and remains, unclear why the Judge made the order that she did.

28. I do, however, accept Ms Barry's submission that whether the matters now in issue were further particulars of the Claimant's claim must be considered against the background of the previous orders made and the statements of case previously put forward in this litigation. The Claimant had in his claim form referred to "a wider pattern of discrimination against me as a part-time worker" and had already been required to provide full details of his claim by Employment Judge Little. Although not legally represented in the proceedings, the Claimant had told Judge Little that he had already received some legal advice and would be seeking further legal advice. He complied with Judge Little's order and provided the February 2013 Particulars. That document makes no reference to the

matters advanced in paragraph 4.2 and 4.6 of the June 2019 Particulars. The schedule of loss supplied with the February 2013 Particulars similarly does not advance a claim for losses in respect of those matters.

29. In my judgment, Mr Brown's reliance on the words "including but not confined to" in subparagraph (d) of the February 2013 Particulars divorces those words from the context in which they appear, which context is highly relevant:

(a) Judge Little's order that full details of the claim be provided, to which the February 2013 Particulars were a considered response by the Claimant. I do not regard the fact that Judge Little's order was not made as an "unless order", a point relied on by Mr Brown, as being any kind of indication that the document was not supposed to set out sufficient detail of all the matters then being pursued.

(b) The Claimant purported to give "particulars of my part-time worker discrimination claim" in the February 2013 Particulars. He listed as many as eight specific matters which he contended amounted to less favourable treatment as a part-time worker, without making reference to the matters now raised at paragraphs 4.2 and 4.6 of the June 2019 Particulars.

(c) The Claimant's schedule of loss provided with the February 2013 Particulars did not advance claims in respect of differential rates of pay arising from hourly as opposed to salaried payment, or in respect of holiday pay.

30. I do not regard the words in the claim form and the February 2013 Particulars, in particular the words "including but not confined to" in subparagraph (d) of the latter, relied on by Mr Brown, as being capable, in this context, of permitting by way of later particularisation the additional claims now pursued. As was pointed out in **Adebowale v ISBAN UK Ltd and Others** UKEAT/0068/15/LA, at paragraph 15, the pleaded case must be capable of being readily understood both by the other party to the litigation and by the Employment Tribunal. In my judgment, it was

clear, and would have been clear to any reasonable reader of the February 2013 Particulars when read in conjunction with the claim form, Judge Little's order and the Claimant's first schedule of loss, that the Claimant was not at that stage advancing any claim in relation to the matters that were subsequently raised at paragraphs 4.2 and 4.6 of the June 2019 Particulars, or that he was purporting to reserve his position in this respect.

31. I recognise that Employment Tribunals are confronted in many cases with poorly pleaded claims put in general terms, which are capable of being advanced more clearly by way of further particularisation rather than amendment. However, in my judgment, in the circumstances of this case, the Employment Judge was right to treat the matters set out in paragraphs 4.2 and 4.6 of the June 2019 Particulars as new allegations requiring an application to amend, rather than as further and better particulars of the Claimant's existing claim. What is advanced at paragraphs 4.2 and 4.6 of the June 2019 Particulars is a substantial alteration and the making of two new complaints, albeit on the same legal basis under the **PTWR** as previously advanced; it was not the provision of further detail.

32. I was referred to several other authorities in relation to this ground of appeal during the argument, but they do not, in my judgment, materially assist the determination of this appeal. Mr Brown rightly points out that **Grimmer v KLM Cityhopper UK** [2005] IRLR 596 establishes that under the previous version of the Employment Tribunal Rules which applied when the present claim was issued, in order to contain "details of the claim" and so be a valid claim under the then rules the Claimant needed only to identify an alleged breach of an employment right and did not need to include particulars of the claim being made, which could be provided by way of case management (see paragraph 15). But the Claimant's claim form in the present case was not rejected on this basis and the reasoning of this Appeal Tribunal in that case does not assist in determining whether permission to amend was required at the much later stage reached in the present case. I note that the reasoning at paragraph 15 in **Grimmer** was applied in relation to whether the facts set out in a list of issues, which

had not expressly identified certain statutory provisions, resulted in the list incorporating claims under those provisions in **Rajaratnan v Care UK Clinical Services Ltd** UKEAT/0268/14/DA, at paragraph 26, but that was also a different context to the present appeal. **Birmingham City Council v Adams & Ors** [2019] ICR 531 is authority for the proposition that a non-technical and a liberal approach should be taken in relation to the same provision of the former version of the Employment Tribunal Rules (see at paragraphs 19 to 21) when considering an application to dismiss a claim for lack of jurisdiction due to a lack of detail in the claim form; but, again, the Claimant's claim was not the subject of any such application.

33. It is unnecessary to address the question that was touched on during argument as to whether the correct approach to the challenge to the Employment Judge's decision is one of perversity, which is the basis upon which ground 2 of the appeal was pleaded, or whether the question was a matter of a proper construction of the Claimant's statement of case (see **Adebowale** at paragraphs 14 to 15) because, in my judgment, the Employment Judge's approach was correct. It cannot, therefore, have been perverse.

34. Ground 2 of this appeal therefore fails.

Ground 3

35. I turn now to consider the alternative grounds of appeal challenging the Employment Judge's refusal of the Claimant's application to amend. I deal first of all with ground 3.

36. In the recent judgment of this Appeal Tribunal in **Vaughan v Modality Partnership** [2021] IRLR 97, His Honour Judge James Tayler summarised the key authorities applying to applications applying to applications to amend in the Employment Tribunal, as follows:

> "1. This appeal concerns the correct approach to adopt when considering an application to amend. It might be said that everything that needs to be said about amendment has already been said. That is probably true, but some statements of

law are so often repeated that it is easy to stop thinking about what the words mean and to assume that repeating them is the same thing as applying them.

2. This is an error that both representatives and judges should avoid. Familiar authorities are such because they make important points. They deserve to be reread and thought about, rather than becoming so familiar that they are overlooked.

3. Mummery LJ noted in **Brent LBC v Fuller** [2011] ICR 806 CA, at paragraph 30:

> "Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the tribunal, but then overlooked or misapplied at the point of decision. The tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable."

4. Determining applications to amend is a core component of case management. As with all case management decisions the Employment Judge has a broad discretion. The Employment Appeal Tribunal will not interfere with case management unless it is clear that the Employment Tribunal has made an error of law.

5. Applications to amend are frequently decided at case management hearings, along with a multitude of other issues, in limited time. As Mummery LJ noted in **Gayle v Sandwell and West Birmingham Hospitals NHS Trust** [2011] IRLR 810, at paragraph 21:

> "If the ETs are firm and fair in their management of cases pre-hearing and in the conduct of the hearing the EAT and this court should, wherever legally possible, back up their case management decisions and rulings."

6. Mummery J, as he then was, commented in the context of appeals against decisions refusing applications to amend in **Selkent Bus Co Ltd v Moore** [1996] ICR 836 at 843B:

> "On an appeal from such a refusal, the appellant would have a heavy burden to discharge. He would have to convince the appeal tribunal that the industrial tribunal had erred in legal principle in the exercise of the discretion, or had failed to take into account relevant considerations or had taken irrelevant factors into account, or that no reasonable tribunal, properly directing itself, could have refused the amendment: see **Adams v West Sussex County Council** [1990] ICR. 546."

7. It will be difficult for a party, especially if represented, to criticise an Employment Judge for failing to take account of a factor that was not raised in argument.

8. In considering reasons for case management decisions, which often, necessarily, will be brief, the Employment Appeal Tribunal must be astute to avoid an excessively minute analysis. Mummery LJ warned in **Fuller** at paragraph 30:

> "The reading of an employment tribunal decision must not, however, be so fussy that it produces pernickety critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too

> much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid."

9. This passage is so often quoted that I have reminded myself that it is insufficient to quote it; I must think about it and avoid the pitfall of which Mummery LJ warns.

10. Nonetheless, if an Employment Judge has, on a fair reading of a judgment, failed to take account of a relevant matter or failed properly to apply the law, even if quoted in the judgment, it is necessary to interfere.

11. Sedley LJ succinctly stated at paragraph 26 of **Anya v University of Oxford** [2001] ICR 847:

> "The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues."

12. The key test for considering amendments has its origin in the decision of the National Industrial Relations Court in **Cocking v Sandhurst (Stationers) Ltd** [1974] ICR 650 at 657B-C:

> "In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused."

13. No consideration of an application for amendment is complete without a reference to **Selkent**. It is so familiar that it is especially easy to quote it without reflecting on the core principle it elucidates. The key passage is at 843D:

> "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."

14. Mummery J reiterated this point at 844B:

> "Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment."

15. The history and central importance of this test was analysed by Underhill P, as he then was, in the, unfortunately unreported, case of **Transport and General Workers Union v Safeway Stores Ltd** UKEAT/0092/07 (6 June 2007) in which he also concluded that on a correct reading of **Selkent** the fact that an amendment would introduce a claim that was out of time was not decisive against allowing the amendment, but was a factor to be taken into account in the balancing exercise.

16. The list that Mummery J gave in **Selkent** as examples of factors that may be relevant to an application to amend ("the **Selkent** factors") should not be taken as a checklist to be ticked off to determine the application, but are factors to take into account in conducting the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment. Mummery specifically stated he was not providing a checklist at 843F:

> "What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively."

17. This is not a new point. Underhill LJ returned to a consideration of **Selkent** in **Abercrombie and others v Aga Rangemaster Ltd** [2014] ICR 209 and noted at paragraph 47:

> "It is perhaps worth emphasising that head (5) [The **Selkent** factors] of Mummery J's guidance in Selkent's case was not intended as prescribing some kind of a tick-box exercise. As he makes clear, it is simply a discussion of the kinds of factors which are likely to be relevant in striking the balance which he identifies under head (4) [The balance of hardship and injustice]."

18. Representatives and Employment Judges would be well advised to keep copies of **Safeway** and **Abercrombie** in their files of key authorities together with the ubiquitous copy of **Selkent**.

19. Representatives often erroneously structure their submissions for applications to amend as if the **Selkent** factors were a checklist, without any or sufficient focus on the balance of hardship and injustice. If they do so, they will face an uphill battle in seeking to overturn a decision that adopts a similar structure. An Employment Judge may need to adopt a more inquisitorial approach when dealing with a litigant in person.

20. In **Abercrombie** Underhill LJ went on to state this important consideration, at paragraph 48:

> "Consistently with that way of putting it, the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry 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."

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 quantitatively 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."

37. Mr Brown did not advance any significant criticism of the Employment Judge's self-direction on the law at section 3 of the reasons, although he did suggest that some parts of it might have been better expressed, in particular the reference to time limits. He did, however, criticise paragraph 4.1 of the reasons as not setting out the full ambit of the Claimant's case of the respective degrees of prejudice to the parties arising from the amendments being refused or allowed. Notwithstanding what he accepted was a broadly correct summary of the law, Mr Brown submitted the Employment Judge had fallen into error in dismissing the application to amend in relation to paragraphs 4.2 and 4.6 of the June 2019 Particulars on the basis that they were new allegations and that he had wrongly treated this as a decisive factor. He submitted the Employment Judge did not deal with what Judge Tayler stated in his judgment in **Vaughan** is the key question: namely, the injustice and hardship of granting or refusing the amendment sought. Mr Brown submitted the Employment Judge had not, for example, dealt, when refusing these amendments, with what Mr Brown described as an absence of evidence from the Respondent about any prejudice it might suffer if the amendments were allowed, or the issue of what impact the amendments (if allowed) would have on the further conduct of the litigation. Mr Brown submits that these were key questions for the Employment Judge to consider in the context of the application to amend because even if the allegations were new ones, the Employment Judge still had to consider the balance of injustice and hardship in permitting them to proceed or not.

38. Ms Barry submits that these criticisms of the employment judge amount to an overly pernickety approach and that the judgment must be read as a whole. The Judge had, she submitted, correctly directed himself in relation to the law and had set out the relevant matters at paragraphs 3 and 4 of his reasons. She submits that the Judge's conclusion at paragraphs 5.1 and 5.2 of the reasons

was, in each case, no more than that the Claimant was raising materially new allegations and that this was a matter of particular importance. Ms Barry submits that the Claimant focuses too heavily on the one aspect of the application that the Judge found to be of particular significance, and that the Judge weighed up all the relevant matters and carried out the required balancing exercise.

39. In my judgment, this ground of appeal succeeds. The Judge's direction on the law was not, as I have said, subject to significant criticism. However, in my judgment, the subsequent reasoning in paragraphs 5.1 and 5.2 does not demonstrate that the Judge carried out the balancing exercise required by the authorities. Even if the application to amend could be said to have been made at a comparatively late stage in this litigation (ignoring for these purposes the hiatus generated by the successful appeal against the 2014 decision), Mr Brown is correct to submit that the fact that these were new allegations could not, in and of itself, be decisive because the ultimate question, as Judge Tayler made clear in **Vaughan**, is whether the balance of injustice and hardship results in the amendment being permitted or refused. However, at paragraphs 5.1 and 5.2 of the reasons, the Judge expressly stated in respect of each amendment that the matter was being decided "under the factor set out in paragraph 3.2.1 above" and that each amendment was being refused "because it contains a new factual allegation".

40. The Judge did not go on to consider whether, notwithstanding that these were new allegations, the balance of injustice and hardship in all the circumstances of the case should result in the amendments being permitted or not. In particular, he did not address, at least in terms, the argument made by the Claimant that the Respondent had not demonstrated any prejudice whatsoever (beyond the fact that the size of the claim would be increased in monetary terms) from the amendments being permitted, e.g. because relevant documents were not available or specific witnesses could not be called. Mr Brown submits, correctly, that this was also a significant factor in the balancing exercise the Judge was required to undertake. While I accept Ms Barry's submission that the judgment must

be read as a whole, there must also be a focus on the reasons for allowing or refusing the particular amendments in issue. In my judgment, Mr Brown is right to submit that the reasons demonstrated the judge treated the fact that the allegations were new as decisive rather than carrying out the required balancing exercise.

41. This is also, in my judgment, apparent in the way in which the Judge treated the application to amend in relation to the allegation which he allowed, at paragraph 4.5 of the June 2019 Particulars. In relation to that allegation, at paragraphs 5.3 and 5.9 of the reasons, the Judge did go on to consider a number of other questions relevant to the balancing exercise, including at paragraph 5.6 the question of delay in making the amendment and its impact on the litigation. He did not, however, do so in relation to paragraphs 4.2 and 4.6 of the June 2019 Particulars. I do not consider that the Judge's references to having considered "the other factors in **Selkent**" in each case are sufficient for the purposes of the balancing exercise as described by Judge Tayler in his judgment in **Vaughan**.

42. I therefore allow the appeal on ground 3.

Ground 4

43. I can deal with ground 4, which is that the decision to refuse the amendments was perverse, rather more shortly. I do not consider that the fact that the Respondent gave no specific evidence in the hearing before the Employment Judge regarding the prejudice that would arise if it were to be required to defend the claims made in the amendments means that there was only one possible outcome, i.e. that the application to amend should have been allowed, and that refusal was perverse. That would be to treat that factor alone as being decisive when, for the reasons given by Judge Tayler in **Vaughan**, no one factor is likely to be decisive and there are a number of relevant considerations discussed in Judge Tayler's judgment in that case which would need to be weighed in the balance to determine the application to amend, including, although this is by no means an exhaustive list: the

timing and manner of the amendments; the additional cost that would result if the amendments were to be allowed to proceed; and the impact on the administration of justice (see **Vaughan** at paragraph 28).

44. As Judge Tayler pointed out in paragraph 21 of his judgment in **Vaughan**:

> "... It will **often** be appropriate to consent to an amendment that causes no real prejudice. ..." [Emphasis added].

I respectfully agree. In my judgment, ground 4 of this appeal seeks to elevate "often" into "always" and must be dismissed for that reason. In doing so, I make clear that I am making no finding about the prejudice that these amendments might cause to the Respondent in this case, which will be a matter for the Employment Tribunal to consider again in due course, but proceeding on the premise upon which the ground of appeal is advanced.

Conclusion and Disposal

45. It was common ground between the parties that if the appeal were to be allowed on ground 3, then the applications to amend in relation to paragraphs 4.2 and 4.6 of the June 2019 Particulars should be remitted to the Employment Tribunal to be determined afresh. Mr Brown submitted that the matter should now be dealt with by a different Employment Judge. Ms Barry did not request the matter be remitted to the same Employment Judge and was neutral on the question of whether it should be remitted to a different judge or not.

46. In my judgment, having regard to the factors set out in **Sinclair Roche & Temperley & Ors v Heard & Anor** [2004] IRLR 763, the application to amend should now be determined by a different Employment Judge. There is no need to remit the matter to the same judge and I accept Mr Brown's submission that it is more appropriate, having regard to the guidance in **Sinclair Roche** and the nature

of the conclusions previously reached, for the re-hearing of the application to amend to be dealt with by a different Employment Judge.

47. I therefore dismiss the appeal on ground 1, which was not pursued, and also, for the reasons which I have given, on grounds 2 and 4. I allow the appeal on ground 3 and set aside paragraph 1 of the Employment Judge's judgment, which refused permission to amend in relation to paragraphs 4.2 and 4.6 of the June 2019 Particulars. I remit the application to amend in respect of those matters to be re-determined by a different Employment Judge.