Neutral Citation Number: [2022] EAT 152

Case Nos: EA-2020-000856-OO
EA-2020-000949-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16th August 2022

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

MS ELLY ZHANG	**Appellant**
- and -	
1) HELIOCOR LTD	
2) HELIOCOR CONSULTING LTD	**Respondents**

- -
- -

Tristan Jones (Advocate) for the **Appellant**
Hannah Slarks (instructed by CMS Cameron McKenna Nabarro Olswang LLP) for the **First Respondent**
Second Respondent neither present not represented

Hearing date: 16 August 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The claimant in the employment tribunal presented a claim, acting in person, which included at least two distinct complaints of direct race discrimination, or harassment, on the part of a named individual, Mr Tripathi. Two companies in the same group were named in the claim form as respondents, the claimant having been uncertain as to which was her employer.

Subsequently the claimant applied to amend her claim, attaching a narrative description of a number of alleged incidents, and including new allegations of sex discrimination. She then also applied to be permitted to add Mr Tripathi as a respondent.

Those applications were considered at a hearing, by which time the claimant had recently appointed solicitors. The applications were refused. The claimant's solicitors then applied for the decision not to add Mr Tripathi to be revisited on the basis of a material change in circumstances, and/or for fresh consideration to be given to adding him as a respondent to the existing complaints, and for another named individual to be joined. In a further written decision those applications were refused.

Both decisions were appealed, in respect of the tribunal refusing to add Mr Tripathi as a respondent to the original claim (but not in respect of the application to add new complaints).

Held: In the first decision, the tribunal should have considered, first, to what extent the document tabled by the claimant contained voluntary particulars of the race-related allegations in the claim form, which did not require permission to amend, and also whether to grant permission to add the remaining matters that were raised as factually wholly new complaints. Having thus determined the scope of the complaints, as particularised and/or amended, it should then have considered whether to

add Mr Tripathi as a respondent to those complaints.

It was, rightly, common ground before the EAT, that the claimant's document considered at the hearing of the first application did include some matters that amounted to voluntary particulars of the specific race-related complaints in the original claim form. However, the tribunal had erred by not approaching matters in that two-stage way, and by instead reaching a single decision on the application to amend both the complaints and the parties; and by treating the claimant's document as consisting entirely of new allegations which required permission to amend. Had the tribunal approached the matter in the correct way, its decision on the scope of the complaints, as particularised or amended, might have affected its further decision on whether to add Mr Tripathi as a respondent.

As to the second decision, there was no appeal against the tribunal's refusal to revisit its first decision on the basis that there had been no material change in circumstances. On the question of whether to add Mr Tripathi as a respondent, the tribunal had not, by its second decision, corrected the error in the first decision, because it did not properly identify and engage with the application on the basis that it was now being asked solely to consider adding Mr Tripathi as a respondent to the original complaints.

The matter would be remitted to the employment tribunal to decide whether Mr Tripathi should be added as a respondent to the existing complaints in the claim form, after what might be agreed or determined to be any necessary or proper particularisation of those existing claims.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. This matter is ongoing in the employment tribunal at London Central. There are two related appeals which arise from two decisions of Employment Judge Russell arising from applications to amend. They specifically relate to the overall outcome that the judge refused to add Mr Vikas Tripathi as an additional respondent to the claim alongside Heliocor Ltd and Heliocor Consulting Ltd, both of which were identified as respondents in the original claim form. I will refer to the original parties as they are in the employment tribunal, as claimant and first and second respondents.

2. The matter has yet to reach a full hearing in the employment tribunal and so no substantive findings of fact have been made. However, the following background facts are not in dispute as such. The first respondent is a limited company in the business of financial technology software development, information technology and consultancy services. Its CEO is Owen Hall. Until August 2020, its Managing Director was Mr Tripathi.

3. Originally the appeals before me also challenged the tribunal's refusal, as part of the second of the two decisions with which I am concerned, to grant an application to add Mr Hall as a respondent (as well as refusing to reconsider its initial refusal to add Mr Tripathi). But during the course of the hearing today, Mr Jones, appearing for the claimant, told me that the challenge with respect to the refusal to add Mr Hall as a respondent was no longer pursued.

4. At the hearing at which the employment tribunal took the first decision, the claimant was represented by a consultant solicitor, Mr McKay, and the first respondent by a solicitor from CMS, Mr Brown. Those two representatives also made written submissions to the tribunal on behalf of those respective parties, prior to the second decision being taken on paper.

5. The claimant, who brings this appeal, has been acting as a litigant in person, but was

represented by Mr Jones, as an ELAAS representative at a Rule 3(10) hearing, at which I allowed certain grounds to proceed to this full hearing today. He has appeared again on her behalf today, instructed through Advocate. CMS represent the first respondent in relation to this appeal and Ms Slarks appears today on their instructions.

6. At the start of the hearing of this appeal this morning, I sought clarification as to whether CMS in the employment tribunal and/or in the EAT (and hence, through them, Ms Slarks) was acting on behalf of Mr Tripathi and Mr Hall, although, as I have noted as regards Mr Hall, the appeal is in the event no longer pursued. Ms Slarks' initial understanding was that CMS was acting also for Mr Tripathi, but she and her instructing solicitor took the opportunity of the break after submissions this morning prior to me coming in to court to give my decision this afternoon, to seek clarification and confirmation of their instructions. I have now been told that CMS (and hence, Ms Slarks) do not speak for Mr Tripathi and I have discussed with both counsel the potential implications of this.

7. Mr Tripathi, of course, was not a party to the proceedings in the employment tribunal and, as a result of the very decisions which are the subject of this appeal, did not become one. Had the tribunal decided to join him, he would, if he considered that he had not had a fair opportunity to be heard, have been able to make an application to the tribunal for the decision to be revisited.

8. Similarly, because he was not a party in the employment tribunal, he was not automatically, by virtue of the appeal being instituted, a party to this appeal. If I decide to allow the appeal, it would appear that the matter would have to be remitted to the employment tribunal to consider whether to join him afresh, and he then certainly ought to be given the opportunity to apply to be heard in the employment tribunal on that matter. Nevertheless, I cannot rule out at this stage, that, if I do allow the appeal, then he might wish first to make an application to the EAT, to be permitted to be added as a respondent in the EAT with a view to seeking a review of my decision.

9. However, given that the matter has been fully argued today by Ms Slarks on behalf of a party opposing the appeal, and given also that the safeguards do exist that, if I do allow the appeal, the matter would likely to be remitted to the tribunal to decide afresh whether to add him, and he could apply to be heard there, and that it would also be open to him to seek a review in the EAT, I do not think I need to, or should, put off proceeding to give a decision on the appeal now, in view of, and in order to address, Mr Tripathi having been neither present nor represented today.

10. I proceed therefore to my decision, by turning next to further aspects of the background facts, areas of dispute, and the litigation thus far in the employment tribunal.

11. The second respondent was incorporated in July 2017. Originally, it was a wholly-owned subsidiary of the first respondent. The claimant entered into a written contract of employment with the second respondent with effect from 1 October 2018 and also became a director of it that month. It is her case before the tribunal that, in reality, she worked for the first respondent and was either its *de facto* employee or otherwise in a legal relationship with it that would enable her to advance **Equality Act 2010** complaints against it. That is disputed by the first respondent, and, in the course of case management in the tribunal thus far, it has been decided that that issue will have to be resolved at the full merits hearing.

12. Other areas of ongoing dispute relate to the fact that records filed with the Registrar of Companies in 2020 indicate, taken at face value, that the claimant has become the sole or controlling shareholder of the second respondent; but the first respondent has at some point disputed the validity or propriety of those filings. The claimant, for her part, has at some point made allegations that the second respondent has irregularly been deprived of funds by the first respondent.

13. I stress that these issues have been, I am told, neither resolved between the parties nor adjudicated by any court. They remain in abeyance. But I refer to them because they were alluded

to in the proceedings in the employment tribunal with which I am concerned; and because the claimant being the current registered shareholder of the second respondent explains why it has not been separately represented or involved in relation to the decisions of the employment tribunal with which I am concerned, nor has it entered an Answer in respect of this appeal, or been represented today. However, both counsel before me agreed that the non-involvement of the second respondent has no practical implications for today, because it will not be directly affected as such by the outcome of this appeal, which relates solely to the position of Mr Tripathi.

14. I turn to the relevant history of the litigation in the employment tribunal. On 25 March 2020, the claimant, at that point a litigant in person, presented her claim form, which, as I have already noted, was against the two corporate respondents. In box 8.1, she ticked the boxes to indicate she was claiming race discrimination and arrears of pay. In box 8.2, the narrative began as follows:

> **"I started working for Heliocor Ltd since 1st Oct 2018. My employment contract is signed with the subsidiary company Heliocor Consulting but my daily working status is involved with Heliocor.**
>
> **In the past 1.6 years, I have experienced countless time racial discrimination against me. The managing director as well as the shareholder of the company Vikas Tripathi always yell to me at the meeting or at private meeting, use swear words such as, fuck you, shame on you, etc.**
>
> **Moreover, he always made fun of my Chinese background, kept criticising my race. The recent one happened on 22nd March in a company internal WhatsApp group, he posted corona virus is Chinese virus while I was the only Chinese person in the company. Although I have spoken and complained to the CEO but he still tolerant such kind of behaviours**
>
> **During my work, I have travelled to China for business a couple of times. The latest trip to China, the managing director Vikas Tripathi told me to book the ticket but he never approved my reimbursement. At the same time, I applied a couple of reimbursement regarding a lunch with a banking client, and I also paid for company's leaflet printing back to Feb, 2019. I have chased the company to pay me back a couple of times but the reimbursement never arrived my account."**

15. The particulars given there went on to set out details of various complaints to the effect that the claimant was owed arrears of wages, including a reference to having asked management at one

point her position, but receiving no response and being "kicked out" of company group chats.

16. As regards race, I interpose that the claimant is by nationality and origin Chinese.

17. The claimant gave some further particulars of what money she claimed to be owed in box 9.2.

18. On 28 August 2020 the claimant emailed the tribunal, copying in Messrs Hall and Tripathi. She indicated she was attaching details of remedy sought as directed and continued:

> **"I would also respectfully like to ask the Tribunal for leave to add claims for sex and racial discrimination, harassment and victimisation. Please find the attached documents for your reference. …"**

19. Attached was a narrative document running to some two-and-a-half pages, the bulk of which gave the claimant's account of a number of distinct incidents that she said had occurred during her employment, involving conduct of Mr Tripathi of one sort or another, which she was asserting involved what lawyers would call direct discrimination or harassment related to race and/or sex.

20. I pause to note that, at this point, the claimant was therefore applying to amend her substantive complaints, but not to add any new parties.

21. On 4 September 2020 Heliocor Legal on behalf of the first respondent emailed the tribunal *inter alia* that this email from the claimant was the first that it was aware of the claim, and that it did not employ her. Also on 4 September, the claimant sent a further email to the tribunal attaching her schedule of loss. In that email she also referred to attaching "details of my application/request for the Tribunal's permission to add further claims and to add Mr Tripathi as a further respondent"; and I am told that she also attached a further copy of the document that had been previously attached to her 28 August email. The claimant referred in that email to having a representative.

22. I interpose that, at this point, the claimant was therefore now also applying, in terms, to have Mr Tripathi added as a respondent, as well as to amend the substance of her complaints.

23. On 9 September CMS emailed that they acted for the first respondent and applied for an extension of time to file its defence. In the body of the attached letter they also applied for the first respondent to be let out of the claim, and indicated that the first respondent and Mr Tripathi objected to the claimant's applications to add further claims, and to add a respondent, and noted that there had been no separate notification of additional claims to Mr Tripathi.

24. On 11 September 2020 there was a case management hearing before EJ Russell at which various matters were decided, including the decision giving rise to the first appeal before me. The claimant was represented by her new solicitor, Mr McKay of Qore Legal, the first respondent by its solicitor Mr Brown from CMS. The judge came to the view that the issues of whether the first respondent should remain a party could not be resolved at that hearing, and relieved it, for the present, of the obligation to enter a response.

25. There was then a section of the decision headed "Claimant's request to amend her claim to include claims for sex discrimination, harassment and victimisation and an additional respondent". In paragraph 26 the judge quoted at length from the first respondent's skeleton argument, as follows:

> **"26. The Claimant has requested that that new claims of sex discrimination, victimisation and harassment and new claims of race discrimination ("Additional Claims") and that she can bring these claims against an individual respondent, Mr Tripathi, who she also requests is named.**
>
> **These are not claims that can be brought against either the First Respondent or against Mr Tripathi:**
>
> **26.1. First, there is no basis to bring any claim against Mr Tripathi.**
>
> **26.2. Section 110 of the Equality Act 2010 – provides that employees can personally liable for unlawful acts committed by them in the course of their employment.**
>
> **26.3. Mr Tripathi is not and has never been an employee or director of the Second Respondent. He is not a contractor or consultant of the Second Respondent. He is an employee of the First Respondent.**
>
> **26.4. The Additional Claims are entirely new claims that have not been raised previously by the Claimant. Factors to consider:**

In Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650 the then President held that regard should be had to all the circumstances of the case and in particular, the tribunal should "consider any injustice or hardship which may be caused to any of the parties ... if the proposed amendment were allowed"

Cocking was followed by the EAT in Selkent Bus Company Ltd (trading as Stagecoach Selkent) v Moore [1996] IRLR 661, which held that, when faced with an application to amend, a tribunal must carry out a careful balancing exercise of all the relevant circumstances and exercise its discretion in a way that is consistent with the requirements of "relevance, reason, justice and fairness inherent in all judicial discretions." The EAT considered that the relevant circumstances would include the nature of the amendment, the applicability of time limits and the timing and manner of the application.

The Presidential guidance, General case management, issued by the President of the Employment Tribunals in England and Wales, contains a section on amending a claim or response, explaining the factors the tribunal will take into account when considering an application.

The guidance provides that the tribunal will generally grant leave to make minor amendments, such as to correct a typographical error or incorrect date. This is not the case with the proposed amendment.

a. Relevant factors the Tribunal may consider include:

- **i. The nature of the amendment.**
- **ii. Time limits.**
- **iii. The timing and manner of the application.**

Nature of the amendment: the proposed amendment is not within the scope of an existing claim no claim has been brought against MT Tripathi and they constitute entirely new claims [ET1 Claimant says she experience racial discrimination – she refers to one instance 22 March 2020 – Mr Tripathi posted a comment that Corona virus is a Chinese virus – it is not alleged that Mr Tripathi identified the Claimant in this alleged post.]

b. Amendment – the Claimant has alleged that wholly new acts of sex discrimination, victimisation and sexual harassment and wholly new allegations of race discrimination:

- **i. The new claims do not arise out of the same facts as identified in the ET1**
- **ii. The new claims (other than being directed at Mr Tripathi) are entirely unconnected with the original claim [EAT in Reuters Ltd v Cole UKEAT/0258/17. It held that a tribunal had been wrong to allow an application to amend a discrimination arising from disability claim to include direct discrimination as this was more than a relabelling of the existing facts, requiring a more onerous test and consideration of a comparator]**

iii. The Claimant has offered no explanation as to why the necessary additional facts had not been included in her original application.
iv. The Claimant would not suffer significant hardship if leave to amend were refused as she was still entitled to pursue [her] original claim against the Second Respondent.

c. Time limits -Time limits are particularly relevant if the complaint that is sought to be added by way of amendment is an entirely new complaint.
i. Selkent - "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 that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions."
ii. Amey Services Ltd and another v Aldridge and others UKEATS/0007/16, the EAT in Scotland held that determining an amendment application is a single-stage exercise and an amendment cannot be allowed "subject to time bar issues".
iii. Time bar issues must form part of the balancing exercise when considering an application to amend.
iv. The amendment should be rejected on the basis of the nature of the amendment. However, this is also a case where "time points" should be considered. It is clear that much time and cost can be saved by dealing with the amendment application, including all time points today. The latest of new allegations date back to an unspecified date in December 2019 [other allegations relate to alleged incidents in 2018 or early 2019].

d. Timing and manner of Application
i. Why was the application was not made earlier and why it is now being made. No explanation has been offered by the Claimant. The amendment does not arise out of new facts.
ii. Tribunal has to give adequate consideration to the delay and added expense of allowing the amendments.
iii. Addition of a new party needs to be made promptly - The application should further explain when the applicant became aware of the need to add the new party and what action they have taken since that date. The Claimant has failed to do this.

e. The Claimant did not include these new and additional claims in ACAS notification, nor did she include the additional respondent in her ACAS notification. There has been no notification of the Additional Claims to Mr Tripathi and as such, a further EC request under s.18A(1) Employment Tribunal Act is required before such a claim can be brought. Additionally, under rule 4 of the ET Rules, if there is more than one respondent, the Claimant must complete a separate EC form in respect of each one, or name all of them during the telephone call. The Claimant has failed to do so.

f. Since no EC request was made for the Additional Claims, all the Additional Claims against the First Respondent and Mr Tripathi are out of time – they appear to relate to matters (which are wholly denied) that arose in December 2019 . The Additional Claims should not be permitted to

proceed against the First Respondent / Mr Tripathi. It is submitted that it is not just and equitable or reasonable to extend the period of time for the Claimant to bring the Additional Claims. There has been a significant delay without any explanation from the Claimant, and the Mr Tripathi will prejudiced by having to spend time and money dealing with the Additional Claims and the Claimant can pursue these claims against the Second Respondent."

26. The judge then continued:

"27. I broadly agree with these submissions. Not in all respects. For instance I do accept the Claimant will be prejudiced if leave to amend were refused and she is then only permitted to pursue her original claim against R2. For the reasons given above. And it will be for the Tribunal to determine Claimant's employment status . However the central points in respect of the Claimant's application to amend are well made by R1 which is why I repeat the submissions and confirm that I have applied the case authorities they refer to in order to determine the issue.

28. In particular her application to amend, in addition to adding new claims, is far more than a relabelling exercise for the original claims. It is made on 28 August over 5 months after her ET1 was submitted and some 9 months after her last claimed act of sex discrimination by Mr Tripathi. So it is well out of time. She did not mention this complaint to ACAS. And on her own evidence her application for an amendment is made over 2 months after she first obtained legal advice on her claim .

29. The Claimant argues that culturally she felt fearful of making a sex discrimination claim at the time she presented her first complaint . That such a claim was embarrassing to make and more so than a race discrimination claim however serious the race claim might be . Which I do understand and accept to a certain extent . But this does not explain the absence of the new race claims or victimisation claims in the original claim form. And I observe she had no qualms raising at least some of the sex discrimination claims in a complaint to Owen Hall in December 2019 some 3 months before she made her Tribunal claim .

30. And in that ET claim she clearly knew she could tick the sex discrimination box to register a sex discrimination claim under clause 8.1 just as she knew she could have detailed her claims and included Mr Tripathi as a respondent if she wished - as one of 5 available respondents on the form . Whilst I accept she was then unrepresented this works two ways. Her possible uncertainly as to how to proceed and whether to include Mr Tripathi on one hand but on the other hand the fact that being uncertain , especially without legal advice, as to the extent R1 or indeed R2 was or might be vicariously liable for the actions of Mr Tripathi then why not join him in the claim?

> **31. Part of her new claim relates to race . But wholly new details . Why not include them in the initial ET1, which did refer to Mr Tripathi , even if she was not to include the sex discrimination claims. And I note her use of very direct language in the ET1. Legitimately so but inconsistent with her argument now that she felt too apprehensive to include a sex discrimination claim and or include Mr Tripathi as a respondent until she sought to do so on 28 August once she felt she had (as she said in evidence) more family support.**
>
> **32. The Claimant's ET1 was presented on 25 March 2020 following Mr Halls' alleged refusal to respond to her email seeking an explanation for the ongoing non-payment of her salary . This, rather than her complaint of discrimination, seems to have been the catalyst for her actual claim or at least the timing of it .**
>
> **33. I applied a careful balancing exercise in considering the Claimant's application for an amendment and (in particular) in accordance with the Selkent principles.**
>
> **In that context I did consider whether I could determine this issue whilst leaving the issue of the Claimant's claim against R1 to a separate hearing. Partly on the basis that Mr Tripathi would potentially be liable to the Claimant for his actions if R1 is the Claimant's employer (given that he is accepted as being an R1 employee himself) but not otherwise . But whether the Claimant is an employee of R1 or R2 it is not reasonable for her to join him as a party now for all the reasons given above and so the Claimant's application to amend her claim was refused."**

27. A further preliminary hearing was listed for 12 October 2020, which came before EJ Pearl. The claimant was represented by counsel and the first respondent again by Mr Brown. It was noted that the claimant might be applying out of time for EJ Russell's orders to be reviewed concerning the addition of Mr Tripathi as a party, and that she had a potential new application to add Mr Hall as a party. The judge declined a deposit application in respect of the race discrimination complaints contained in the claim form. He was of the view that the possible further applications that were intimated should be considered by EJ Russell, and he gave the claimant until 19 October to make such applications, if so advised.

28. On 15 October 2020 the claimant's solicitor emailed the tribunal. The covering email stated: "We continue to act for the claimant in this matter and attach an application to add two respondents,

namely Mr Owen Hall and Mr Tripathi, as individual respondents." Attached was a letter that ran to more than seven pages. I will return to aspects of its contents later, but note at this stage that, in the course of the letter, the applications being made were identified as follows:

> **"7.1 an application out of time for reconsideration of the 16 September Decision not to add Mr Tripathi as an individual respondent, under rr.70-71 of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013, Sch.1 ('ETR');**
>
> **7.2 alternatively, an application to vary or set aside the 16 September Decision not to add Mr Tripathi as an individual respondent, under rr.29-30 ETR; and**
>
> **7.3 a fresh application to add Mr Vikas Tripathi (MD of R1) and/or Mr Owen Hall (CEO of R1) as individual respondents in respect of the Claimant's race discrimination claim under r.34 ETR."**

29. The respondent's solicitor wrote opposing those applications and there was a rejoinder from the claimant's solicitor. The matter was then decided on paper by EJ Russell who produced a written decision dated 16 November 2020. The judgment read as follows:

> **"1. The Claimant's application for a reconsideration of my judgement of 16 September is out of time under Rule 71 of the ET Rules and there is no ground to extend time under Rule 5 or otherwise .**
>
> **2. In respect of the Claimant's application for a reconsideration of my judgment of 16 September and in any event I further confirm my original decision under Rule 70 of the ET Rules to refuse the addition of Mr Tripathi as a respondent in these proceedings.**
>
> **3. In respect of the Claimant's application under Rule 34 of the ET Rules to amend her claim to include Mr Hall and or Mr Tripathi as a respondent(s) in these proceedings I refuse the Claimant's application.**
>
> **4. The Claimant had a full opportunity to make representations at the case management hearing of 11 September and it is not in the interests of justice to set aside those orders or judgement and the Claimant's application under Rule 29/30 of the ET Rules is also refused."**

30. After setting the scene, there was a section dealing with "Reasons for my judgment". The judge considered that the reconsideration application under Rule 70 was out of time and there was no evident substantive reason for the delay in making it; but he observed that he had nevertheless

considered it on its merits. Under the heading "Additional Parties" he wrote as follows:

> **"10. At the PH on 11 September 2020, both the Claimant and the First Respondent were represented by solicitors. She was fully heard on that occasion as to the position of Mr Tripathi and made no application to join in Mr Hall as a party.**
>
> **11. Although the Claimant's representative states the Claimant submitted her ET1 as a litigant in person without having had advice as to her employment rights at that time (thus in part explaining why the individual respondents were not then added) both Mr Tripathi and Mr Hall were referred to specifically in the ET1 and could have been joined in the proceedings then . And the Claimant stated on 11 September that she was aware that she could have included Mr Tripathi as a respondent if she had wished. She may not have been aware of this at the time of lodging her complaint but if so then she should have been so aware.**
>
> **12.Although the Claimant is correct to state that under, s.109/110 of the Equality Act 2010 employees and agents may themselves be personally liable and that in these circumstances, any "individual perpetrators can (and often are) joined to the proceedings as a separate respondent(s) at the case management stage in accordance with r.34 ETR" , the fact is , they were not . Nor were they, of course, joined as respondents at the instigation of the claim ."**

31. In the next section the judge set out his reasons for concluding that there had been no material change of circumstances such as would justify him revisiting his earlier decision. There was then a sub-heading: "Balance of prejudice" in which the judge stated the following:

> **"17. I did consider the balance of prejudice (noting the Claimant's reference to the case of *Orford v S Three Staffing UK Ltd* UKEAT/0058/13) when determining whether to grant the then application to join Mr Tripathi to the proceedings as a respondent on 11 September. And I also then took account of the Presidential Guidance on General Case Management . In considering prejudice, the Tribunal must consider any prejudice suffered by all affected parties/individuals. It is not necessarily the case that the Claimant will suffer greater prejudice if the applications are refused than Mr Tripathi and Mr Hall if they were accepted. Adding them into the proceedings as respondents puts them at a significant potential prejudice and the Claimant already has a claim against the First and the Second Respondent which proceeds to a full hearing**
>
> **18. I take account of the decision in *Cocking v Sandhurst (Stationers) Ltd* [1974] ICR 650 reminding me that a new respondent should only be added or substituted where a tribunal is satisfied that a "genuine mistake" has been made that is not misleading or such as to cause reasonable doubt as to the identity of a party to the proceedings. And the further test as to**

> **"injustice or hardship which may be caused to any of the parties including those proposed to be added" has been considered by me already in respect of Mr Tripathi. And I come to the same conclusion in respect of Mr Hall and for the same reasons. I acknowledge the Claimant's obvious wish to have both Mr Hall and Mr Tripathi added as parties to widen the net of her claim and the possibility that she may otherwise be left with limited recourse dependent on the outcome of the full tribunal hearing . But that is the case with may discrimination claims. And if Mr Hall and Mr Tripathi are added as respondents, they will experience hardship and injustice, in having to give evidence on their own behalf and being potentially individually liable as respondents.**
>
> **19. I had already considered the *Selkent Bus Company Ltd v Moore* [1996] IRLR 661 decision (as stated in my earlier judgement) as part of my balancing exercise of all the relevant circumstances when considering the original application to amend. In particular I found then and find now that the amendments sought are substantial and there is no explanation as to why the amendment to include Mr Hall as a respondent was not made on September 11 other than, perhaps , the Claimant's representative had not had the time to prepare for the hearing which (if that excuse is given) is an inadequate reason. I also observe the Claimant had been receiving at least some legal advice from June 2020 and so the suggestion she could not be expected to properly advance all her claims on 11 September is without merit.**
>
> **20. In my original judgment I did consider whether I could determine the issue of joining in Mr Tripathi whilst leaving the issue of the Claimant's claim against the First Respondent to a separate hearing. And determined that whether the Claimant is an employee of the First or Second Respondent it was not reasonable for her to join Mr Tripathi as a party. That decision is confirmed and for the reasons given above and the further applications to amend the claim now to include Mr Tripathi and Mr Hall are refused."**

The Grounds of Appeal and the Arguments

32. The claimant appealeed against both decisions. Both appeals were considered on paper not to be arguable. At the rule 3(10) hearing I permitted the following three grounds to go forward:

> **"1. In declining (by its First and Second Judgments) to add Mr Tripathi as a respondent and/or in declining (by its Second Judgment) to revisit that decision, the Tribunal erred because:**
>
> **a. it failed specifically to consider and weigh in the balance that the original claim form made allegations that Mr Tripathi on behalf of either or both of the two Respondents had racially discriminated against the Claimant in a number of incidents over a period of time;**
>
> **b. as regards the Claimant's original 4 September 2020 application to add**

> **Mr Tripathi, to a large extent the application gave what amounted to particulars of matters covered by the original claim in the way described at paragraph (a) above;**
>
> **c. as regards the Claimant's revised 15 October 2020 application to add Mr Tripathi, the application made clear that the Claimant intended only to add Mr Tripathi to the original claim as described at paragraph (a) above;**
>
> **d. in the circumstances, the Tribunal erred because it failed to consider and weigh in the balance that adding Mr Tripathi to those claims would not lead to any widening of the evidential canvass that the Respondents as a group would have to address and defend, and that the Tribunal would have to consider.**
>
> **2. In declining (by its Second Judgment) to add Mr Tripathi or Mr Hall as respondents, the Tribunal erred at [18] by too narrowly reading a dictum in Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650 as carrying the implication that an additional individual respondent should only be permitted to be added where there has been a mistake of the kind described in that dictum.**
>
> **3. In declining (by its First and Second Judgments) to add Mr Tripathi as a respondent and in declining (by its Second Judgment) to add Mr Hall as a respondent, the Tribunal erred in failing to give a sufficiently clear or reasoned conclusion regarding whether or not the Claimant actually knew at the time she lodged her ET1 that she could have included individual respondents on the form (see First Judgment at [30] and Second Judgment at [11]).**"

33. As I have already noted, in the course of the hearing Mr Jones indicated that these grounds were no longer pursued insofar as they related to Mr Hall.

34. I have benefitted from skeleton arguments from both counsel and very full and thoughtful oral submissions this morning. I summarise only what appear to me to have been the most significant points advanced on each side.

35. Mr Jones focussed mostly on ground 1. His starting point was that, properly analysed, some of the material in the documents that the claimant tabled amounted simply to voluntary further particulars of complaints already present in her claim form. There were clearly identified in box 8.2 complaints of direct race discrimination or harassment related to race: by way of swearing in

meetings; by making fun of her Chinese background; and by posting that Coronavirus is a Chinese virus. He also argued that the contents of the next following paragraph, as well as being a wages claim, was implicitly also a complaint of treatment related to race. He also submitted that the words: "In the past 1.6 years, I have expressed countless times racial discrimination…" provided an umbrella under which voluntary further particulars could then be furnished.

36. Mr Jones' principal submission was that it was incumbent on the judge, when considering the first application, to engage with whether there were some voluntary particulars of existing complaints, as that had a direct bearing on whether Mr Tripathi should or should not be added as a respondent, at least in respect of those existing complaints. But the judge wrongly considered that the whole of the claimant's documents contained factually new complaints.

37. Mr Jones' second principal point in relation to ground 1 was that the judge had taken the wrong approach to the question of what prejudice would be suffered by Mr Tripathi, were he to be added as an individual respondent. That was because, at worst for him, he might be held personally accountable and liable for discriminatory conduct, if so found. But he was, in any event, going to be involved in proceedings and in giving evidence on the first respondent's behalf; whereas the risk to the claimant was the possibility of being left without a remedy entirely for any discriminatory conduct found, given the issues about whether her legal relationship was with the first or the second respondent and about the alleged financial draining of the second respondent.

38. In relation to grounds 2 and 3 Mr Jones relied, essentially, on the points made in the grounds themselves.

39. In relation to the second decision, Mr Jones' principal submission was that the judge had erred by failing to take on board that the claimant's solicitors were not seeking to do more than have the judge give fresh consideration to whether Mr Tripathi should be added as a respondent to the original

claims as they stood. The claimant no longer sought to revisit the other aspects of her original applications. The judge however, wrongly, in the second decision, took on board his view that the claimant was still seeking, by her applications, to expand the factual and evidential canvas.

40. Ms Slarks started by reminding me that these are appeals against case management decisions on amendment applications, and of the limited scope for any intervention by the EAT in the exercise of such a discretion. Among various authorities she might have cited she chose **Bastick v James Lane (Turf Accountants) Ltd** [1979] ICR 778.

41. In relation to ground 1 Ms Slarks submitted that the judge had properly taken into account and weighed in the balance a number of features, including: the nature of the amendment; time limits; and the timing and manner of the application. The judge had properly concluded that there would be significant and real prejudice to Mr Tripathi if he became a respondent to the claim and potentially implicated in possible findings of race discrimination against him personally, giving rise to stress, reputational risk and personal financial exposure, over and above merely appearing as a witness for the first respondent. She also submitted that, on a fair reading, the tribunal had taken on board that some of the material in the claimant's documents amounted to voluntary particulars.

42. On the latter point she agreed with Mr Jones that at least two or three of the matters raised by the claimant in her document did amount to voluntary particulars, although she disagreed that these accounted for a significant proportion of the matters raised in that document. References in the decision to "wholly new details" should not be read as meaning that the judge thought *everything* in the document was wholly new. In any event, the mere fact that there were existing complaints of race discrimination about the alleged conduct of Mr Tripathi in the original claim would not, by itself, mean that the tribunal would have been bound to permit him to be added as a respondent.

43. As to sub-strand (a) of ground 1, Ms Slarks submitted that it could be seen from, for example

[31] of the first decision, that the judge recognised that there were existing race discrimination complaints against Mr Tripathi and weighed it in the balance, and this was also referred to at [11] of the second decision. In relation to ground 1(b) the judge was not making the assumption that the entire document introduced new material. That could be seen from the reference at [28] of the first decision to the application being "far more than" a re-labelling exercise; and at [31], where he referred to her new claim relating to race *but* wholly new details.

44. As to ground 1(c) Ms Slarks submitted that the further application made by the claimant's solicitors did not unambiguously make clear that it was confined to adding Mr Tripathi and Mr Hall, as it also referred to recognising that further particulars were needed. But, in any event, the judge in the second decision had shifted his focus to the question of whether Mr Tripathi should be added in his own right, regardless of whether there was any live application to add new underlying complaints or to revisit the first decision on that subject.

45. In relation to ground 1(d), the judge properly accepted in the original decision that the addition of the proposed new matters would significantly widen the claimant's case in terms of the factual allegations that fell outside anything that could be said to be covered by the umbrella of the specific complaints in the original claim, having regard, for example, to the number of individuals said to have been witnesses to some of the fresh alleged conduct mentioned in the new document.

46. In relation to the second decision, as the focus was now simply on whether Mr Tripathi should be added as a respondent, the judge did not need to spell out that there would not be a widening of the factual or evidential matrix, merely by adding him as such.

47. In relation to ground 2, Ms Slarks submitted that the judge had been clear in the first decision that she considered that the claimant had appreciated that it would have been possible for her to identify Mr Tripathi as an individual respondent on her claim form. The judge had properly

considered then that, if the claimant had been uncertain about whether to take advantage of that option, because she lacked legal advice, she could have erred on the side of doing so. In the second decision, the judge took on board the claimant's solicitor's submission, that her position actually was that she had not appreciated, when she put in her claim form, that she could have added him as a respondent. The judge, however, considered that, if she didn't, then she should have appreciated that. That was a clear and coherent position for the judge to adopt.

48. In relation to ground 3 Ms Slarks accepted that it would have been an error to rely on para. 6 of the guidance in **Cocking v Sandhurst** [1974] ICR 650 on applications to add or substitute parties as a definitive statement of the law, but it was clear that the judge had not taken that narrow approach, as the judge clearly went on to consider, once again, the balance of prejudice at large.

The Law

49. Rules 29, 30 and 34 of **The Employment Tribunals Rules of Procedure 2013** provide:

> **"Case management orders**
>
> **29. The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. [Subject to rule 30A(2) and (3)](a) the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.**
>
> **30.—(1) An application by a party for a particular case management order may be made either at a hearing or presented in writing to the Tribunal.**
> **(2) Where a party applies in writing, they shall notify the other parties that any objections to the application should be sent to the Tribunal as soon as possible.**
> **(3) The Tribunal may deal with such an application in writing or order that it be dealt with at a preliminary or final hearing.**
> **…**
>
> **Addition, substitution and removal of parties**
>
> **34. The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues**

> **between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included."**

50. I observe that Rule 70 (reconsideration of judgments) has no application to a decision on amendment, which is a case management decision and not a judgment. Rather, an application can be made to revisit a case management decision at any time, but this ought not to be entertained unless there has been a material change of circumstances since the previous decision was taken (see **Hart v English Heritage** [2006] IRLR 915, EAT and the recent discussion in **Liverpool Heart and Chest Hospital NHS Foundation Trust v Dr Michael Poullis** [2022] EAT 9).

51. As to the approach to be taken to an application to amend, in **Cocking v Sandhurst (Stationers) Limited** [1974] ICR 650, the NIRC, Sir John Donaldson P presiding, provided the following guidance (at 656G – 657D):

> **"In every case in which a tribunal is asked to amend a complaint by changing the basis of the claim or by adding or substituting respondents they should proceed as follows. (1) They should ask themselves whether the unamended originating application complied with rule 1 of the Schedule JJ to the Regulations of 1972: see, in relation to home-made forms of complaint, Smith v. Automobile Proprietary Ltd. [1973] I.C.R. 306. (2) If it did not, there is no power to amend and a new originating application must be presented. (3) If it did, the tribunal should ask themselves whether the unamended originating application was presented to the secretary of tribunals within the time limit appropriate to the type of claim being put forward in the amended application. (4) If it was not, the tribunal have no power to allow the proposed amendment. (5) If it was, the tribunal have a discretion whether or not to allow the amendment. (6) In deciding whether or not to exercise their discretion to allow an amendment which will add or substitute a new party, the tribunal should only do so if they are satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause reasonable doubt as to the identity of the person intending to claim or, as the case may be, to be claimed against. (7) 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. Rule 13 of the Schedule to the Regulations of 1972 provides that a tribunal shall not normally award costs. If, however, the**

> **tribunal consider that the defect in the originating application has caused any party to incur unnecessary expense, they could properly conclude that leave to amend should only be given if the party seeking to amend agrees to make some payment in respect of that expense and could order accordingly."**

52. In **Selkent Bus Co Ltd v Moore** [1996] ICR 836 the EAT, Mummery P presiding, drew on that part of the guidance in **Cocking** which referred to the need to consider the balance of what was called "the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it". As is well known, the guidance included (at 843E – 644C) the following:

> **"(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 additions of factual details to existing allegations and the addition or substitution of other labels for 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 the minor matters 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 that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions eg, in the case of unfair dismissal, S.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 on discovery. Whenever taking any factors into account, the 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."**

53. The importance of the paramountcy of the test of weighing the balance of hardship or prejudice to either party in granting or refusing the amendment has recently been restated by the EAT in **Vaughan v Modality Partnership**, UKEAT/0147/20.

54. It is clear, and was not controversial before me, that the **Cocking** guidance at point (6) must be understand in the context that it was concerned specifically with an application to amend to substitute a parent company for a subsidiary company, on the basis of an error as to which of those two had been the employer. But it is not an exhaustive statement, nor a necessary test to be satisfied in every case in which there is an application to add a new respondent. In principle, the approach to an application to amend by adding another respondent is, once again, that the tribunal must weigh up the balance of hardship or injustice in granting or refusing the amendment in all the particular circumstances of the case (see **Drinkwater Sabey Ltd v Burnett** [1995] ICR 328).

55. I should note also that there has been guidance issued on this subject by the President of the Employment Tribunal in England and Wales as part of general guidance on matters to do with case management issued under Rule 7 of the **2013 Rules**. This does not have the force of law, but should be taken into account. The relevant provisions are paragraphs 5.3, 16, 17 and 18, which I do not need to set out, as they effectively paraphrase points found in the authorities.

Discussion and Conclusions

56. In relation to ground 1, it seems to me that, on the first occasion, in principle, the judge should first have considered whether any of the factual matters being raised amounted to voluntary particulars of the existing complaints, although I agree with Ms Slarks that that would be by reference

to the specific allegations made in the claim form, rather than by treating the first sentence of the particulars of claim as a general umbrella. I do not need to decide whether Mr Jones is right that the paragraph referring to the wages issue also contained an implicit complaint of race discrimination, because it is common ground, rightly, that there were at least *some* elements of the allegations set out in the document the claimant tabled on 28 August 2020 that could fairly be described as voluntary particulars of specific complaints in the claim form of race discrimination or harassment.

57. In particular, Mr Slarks accept that this applied to an allegation that Mr Tripathi shouted abuse at the claimant on an occasion when she wanted to spend time in China visiting her sick grandmother; an allegation that he had sworn at her when she had been late for a meeting; and an allegation that he had made overtly racist comments about people who are ethnically Chinese, and their characteristics and appearance.

58. Next, the judge needed to consider what were the completely new factual allegations and what would be the practical implications (in terms of evidence which would need to be marshalled, witnesses to be called, and so forth) of permitting those to be added.

59. In my view, the logical structured approach would be to address those two questions first and hence to conclude, in principle, what factual allegations should be allowed to proceed, whether by way of particulars of existing complaints or by way of amendment to add new ones. Then the judge would have needed to consider whether to permit Mr Tripathi to be added as a respondent. That decision might have been affected by how much of what was in the claimant's document had, by virtue of the first stage of the exercise, indeed made it into the particularised and/or amended claim.

60. Did the judge err by failing to take that structured approach? As I have described, subject only to the qualifying remarks that followed, the judge accepted wholesale, reproducing it in his decision, the whole of the respondent's submission. It seems to me that, on a fair reading, that

submission was that *all* of the content of the claimant's document was entirely new, not that some of it amounted to voluntary particulars of existing claims, albeit there was also entirely new material.

61. At the very start, the reference is to "new claims of sex discrimination, victimisation and harassment and new claims of race discrimination" which are described as "Additional Claims". Further on, at [26.4], it is submitted that the Additional Claims are "entirely new claims". Further on at a., and this, I think, makes the matter free of any possible ambiguity, it is said that "the proposed amendment is not within the scope of an existing claim" and there is then a bracketed reference to what is in the existing claim. The clear sense of this paragraph is that what is in the new document does not overlap with the existing claim. Indeed, further on, at b. ii., it is said that: "The new claims (other than being directed at Mr Tripathi) are entirely unconnected with the original claim …"; and further on again, at e., they are described as "new and additional claims".

62. Whilst the judge, having set all of that out, indicates that he does not agree with these submissions in all respects, he does not state anywhere, unambiguously or in terms, that one of the submissions he does not agree with is that the whole of the contents of the claimant's document are new. Plainly, the sex discrimination complaints *were* new, and much of what the judge states in this section is devoted to that; but, at one point at [29] he states that the reasons given for why the claimant had not advanced the sex discrimination claims before, did not explain "the absence of the new race claims or victimisation claims in the original claim form." Again, this is an unqualified statement.

63. True it is that the judge recognises in the course of [30] and [31] that there were some complaints of race discrimination or harassment in the original claim form; but I do not read those paragraphs as recognising that anything contained in the document tabled by the claimant in support of her application to amend overlapped factually with these. In particular, I do not read the words "But wholly new details" as Ms Slarks invites me to, looking at them in the context not only of [31] but of the judge's citation of the whole of the respondent's submissions and ensuing commentary.

64. It also is clear to me, reading this decision as a whole, that it is overwhelmingly because of the judge's view that this was substantially all new material, coupled with the other points about prejudice to Mr Tripathi, that the judge compendiously refused the claimant permission to amend and to join Mr Tripathi, drawing no particular distinction between those two things in his conclusions; and at the end of [33], simply stating that the claimant's "application to amend her claim" was refused.

65. I therefore conclude that the judge did err in the first decision, by failing to take the structured approach which I have described; and which, potentially, could have had an impact on the outcome in relation to the application to join Mr Tripathi as such, which needed to be considered only once it had been determined to the defence of what substantive complaints he might be joined.

66. I turn, still in relation to ground 1, to the second decision. As I have set out, the fresh application made by the claimant's solicitors was advanced in three alternative ways. Insofar as it was made under Rule 70 that was, for reasons I have explained, misconceived. Although the judge appears to have overlooked that, nevertheless the judge refused it, put that way, as being out of time. Insofar as this was an application simply to revisit the previous decision (which was the correct approach), the judge concluded that there was no material change in circumstances to justify that course. As Mr Jones acknowledged, there is no appeal before me in relation to that decision.

67. However, I agree with Mr Jones that the application was advanced also as being a fresh application simply for the judge to consider joining Mr Tripathi (as well as Mr Hall) as a respondent to the existing claims in the claim form as they originally stood. In the letter of 15 October 2020 it was submitted, at [4], that, as matters generally had moved on, the "potential personal liability" of both Mr Tripathi and Mr Hall "became even more apparent", prompting the fresh application to add them as individual respondents. The third leg of the specific application at [7.3] was then simply to add them as individual respondents in respect of the (existing) race discrimination claim.

68. As to the basis on which it was asserted that Messrs Tripathi and Hall might be held personally liable, section110 **Equality Act 2010** was relied upon. It was then suggested at [11]: "In the event that the Tribunal concludes that any of the complaints set out in the ET1 were because of or related to race, Messrs Tripathi and Hall would be personally liable for them." The reference there was specifically to the complaints *set out in the ET1*, and the further narrative in that paragraph referred to them, including the mention, in amongst the money claims, to "removal from systems and groups".

69. Further on and, crucially, at [16.1] it was asserted in terms that this was not a case of addition of new claims. I do not agree with Ms Slarks that there is any ambiguity in this paragraph. It states: "The claimant seeks only to add individual respondents to the claims already pleaded in her ET1" and refers to Mr Hall and Mr Tripathi being referred to in the ET1, the only amendment being to add those individual respondents, not to bring new claims against them. The acceptance that follows, that there may be a need for further particularisation, is an acceptance that there may be a need for further particularisation, *of the claims set out in the ET1*, not an attempt to revisit the additional allegations that the claimant was seeking to advance in her earlier document.

70. Had the judge not erred, as I have found that he did in the first decision, it might have been said that there would have been no basis to revisit it on the subject of the joinder of Mr Tripathi, but as he did err by not properly giving separate consideration to that question in the first decision, I have considered whether it was, nevertheless, in any event properly considered in the second decision.

71. As to that, there are some strands in the second decision which might suggest that the judge had on board the fact that the third strand of the solicitor's application was simply inviting him to consider adding Mr Tripathi (and Mr Hall) to the original claims as formulated in the claim form. He refers, in the section setting out the background, at [7], to the third strand of the application being to add them "as individual respondents in respect of the Claimant's race discrimination claim".

72. But in the substance of the decision, it does not appear that judge considered and determined that as a distinct application, put in that way. The heading of the section headed "Additional parties" might be thought to signal that this would be the point at which the judge was considering that further application, albeit out of order; but the contents of [11] and [12] refer back to what happened on the first occasion, and do not indicate that the judge was giving fresh consideration to the distinct question of whether to add Mr Tripathi as a respondent to the existing claim as it stood.

73. Mr Jones also made the point that, in the later section headed "Balance of Prejudice, there was no suggestion that Mr Tripathi would *not* face the prejudice of there being new factual allegations or a wider evidential canvas. I would have agreed with Ms Slarks that the judge did not need to refer to that in terms, were it clear that he had on board that he was being invited to consider purely adding Mr Tripathi in respect of the existing claims; but the references back, in every one of paragraphs [17] to [20], to his approach to the balance of prejudice having been considered already in the previous decision, coupled with the statement in the course of [19] that "I found then and found now that the amendments sought are substantial" suggest that he did not consider the separate question of whether to permit Mr Tripathi to be added as a respondent to the otherwise unamended original claim.

74. I have some considerable sympathy with the judge, having regard to how this matter unfolded and the multifarious way in which three applications were presented within a single document. But, having found that there was an error, as I have described, in the judge's approach to the first decision, overall, I cannot conclude that this was effectively put right by fresh and distinct consideration being given, in the second decision, to whether to add Mr Tripathi as a respondent to the otherwise unamended complaints in the original claim form.

75. I therefore uphold ground 1.

76. That is sufficient to lead to the conclusion that this matter must be remitted to the employment

tribunal to decide afresh whether Mr Tripathi should be added as a respondent to the complaints as framed in the original claim form. Before formulating my order remitting the matter, however, I will hear further submissions as to what, if anything, I should say about whether any fresh consideration should be given to the claimant's document as to voluntary particulars of those complaints.

77. I will also, although it is not now essential to my decision, for completeness turn to grounds 2 and 3.

78. The judge's reference, in the second decision, to having taken account of what was said in para. 6 of the **Cocking** guidance, is troubling, as it is common ground, rightly, that it would have been wrong to rely upon it. However, this does not form any part of the citation or reliance placed upon **Cocking** in the original decision, where it was relied upon, as it conventionally is, simply as the source of the "balance of prejudice" approach taken up in **Selkent**.

79. Further, I agree with Ms Slarks that the judge does not actually appear to have placed any determinative reliance on this feature of **Cocking**. Rather, he appears to have considered balance of prejudice generally in the remainder of the second decision, by harking back to points made about that in his earlier decision. Erroneous though this reference was, I do not think it affected the outcome of the second decision and I would not have allowed this appeal on the basis of ground 2 alone.

80. Nor would I allow ground 3. Essentially, I agree with Ms Slarks' analysis here. The judge made a coherent finding in the first decision that the claimant knew that she could name Mr Tripathi as an individual additional respondent; and the judge took a view that he was entitled to take that, if not sure whether to do so, she could have erred on the side of doing so. In his second decision, in light of the further submission made about that, he was prepared to entertain the possibility that the claimant may not in fact have appreciated that she could have named Mr Tripathi as a respondent; but made a finding that, if so, she ought reasonably to have appreciated that. That finding, as such,

was not challenged as perverse or insufficiently explained, and it was open to the judge to make it.

81. But, for the reasons I have given in relation to ground 1, this appeal is allowed.

82. [It was agreed in further discussion with counsel that the matter should be remitted to the tribunal to consider afresh whether Mr Tripathi should be added as a respondent to the complaints as they stand in the claim form, and whether any particularisation of those complaints should take place prior to such determination; and that these matters may, but need not be, decided by the same judge. Directions were also made for Mr Tripathi to be provided with a copy of this transcript; and allowing for him to make an application, if he so wishes, to the EAT within fourteen days thereafter.]