EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: S/4106122/2015; S/4100137/2016; S/4105282/2016; and S/4100153/2017

Held at Glasgow on 21 December 2018 (Preliminary Hearing)

Employment Judge: Ian McPherson

Mr Brian F. Gourlay	**Claimant** **Represented by: -** **Ms. Morag Dalziel - Solicitor**
West Dunbartonshire Council	**Respondents** **Represented by: -** **Mr. Nigel Ettles - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that: -

(1) Having heard parties' legal representatives, at this Preliminary Hearing, in respect of the claimant's opposed application, dated 10 September 2018, to amend the consolidated ET1 claim form, the Tribunal **allows the amendment in full**, being satisfied that it is in the interests of justice, and in accordance with the Tribunal's overriding objective, to allow this amendment, and further being satisfied that it is just and equitable to extend time, under **Section 123(1) (b) of the Equality Act 2010**, to allow the claimant to bring this new cause of action, in respect of the respondents' alleged failure to make reasonable adjustments, contrary to **Section 20 of the Equality Act 2010.**

(2) Having allowed the amendment, the Tribunal also **allows** the respondents, if so advised, **a period of no more than 4 weeks from the date of issue of this Judgment**, to lodge with the Tribunal, by e-mail, their own further and better particulars in reply, with copy to be sent at the same time to the claimant's representative, so as to answer the claimant's additional averments added by that amendment allowed by the Tribunal, relating to the respondents' alleged failure to make reasonable adjustments, contrary to **Section 20 of the Equality Act 2010**, and so augment their own consolidated grounds of ET3 response dated 20 September 2018.

(3) Further, the Tribunal **orders** that the consolidated claim and response, as so amended, shall proceed to the listed 16 day Final Hearing, on the mutually agreed dates assigned at this Preliminary Hearing, being **Monday to Friday 3/7, 10/14 and 17/21 June 2019, and Tuesday, 30 July 2019**, and previously communicated to parties in the Judge's written Note and Orders of the Tribunal dated 24 December 2018, copy previously issued to both parties' representatives under cover of a letter from the Tribunal dated 7 January 2019, and the Notice of Final Hearing issued on 11 January 2019.

REASONS

Introduction

1. These combined cases called again before me on the morning of Friday, 21 December 2018, for a Preliminary Hearing, previously intimated to parties' representatives by the Tribunal by Notice of Preliminary Hearing dated 2 November 2018.

2. This Preliminary Hearing follows upon a long and winding road of earlier procedure going back to the first of these combined cases being presented as far back as April 2015.

3. More recently, the cases called before me at a Case Management Preliminary Hearing, held in private, on 29 October 2018, following which my written Notes and Orders, dated 31 October 2018, were issued to both parties' representatives under cover of a letter from the Tribunal dated 2 November 2018.

4. In that Note and Orders, I recorded that, of consent of parties, the claimant had withdrawn certain identified claims, or parts of claims, and a **Rule 52** Judgment was granted, dismissing those identified claims, or parts of claims, following upon their withdrawal.

5. Further, this Preliminary Hearing was assigned, for a full day at this sitting of the Tribunal, before me as an Employment Judge sitting alone, to consider the claimant's opposed amendment application, dated 10 September 2018, and any further case management required in respect of the combined claim and response being assigned to a Final Hearing.

6. At paragraph 14 of that Note, I set forth an Order that, by no later than 4.00pm on Friday, 14 December 2018, parties' representatives should each prepare, and provide to the Tribunal, by email, with a copy provided at the same time to the other party's representative, written outline submissions on the opposed amendment application.

7. Further, I ordered that parties' representatives should liaise with each other and co-operate to provide the Tribunal with one hard copy of each party's written submissions, and a ring binder containing a Joint Bundle of Authorities, duly indexed, and tabbed, for lodging at the start of the Preliminary Hearing.

8. I also ordered that I would hear oral submissions from each party's representative, claimant's representative first, then from the respondents' representative, each providing an outline of their full written submission, and

also to include their oral response to the points made in the other party's written submission.

9. In terms of **Rule 45 of the Employment Tribunals Rules of Procedure 2013**, I ordered that each party's representative would have no more than 60 minutes to address the Tribunal on behalf of their client, and no more than 30 minutes to reply to the other party's written submission.

10. Following an in chambers' consideration, on 5 December 2018, of parties' further correspondence, received after that Case Management Preliminary Hearing, I issued a supplementary Note and Orders of the Tribunal, dated 5 December 2018, issued to both parties' representatives under cover of a letter from the Tribunal dated 5 December 2018.

Parties' Outline Written Submissions

11. By email sent at 15:40 on Friday, 14 December 2018, Mr Ettles, the respondents' solicitor, duly intimated to the Tribunal, with copy to Ms Dalziel for the claimant, his written outline submissions for the respondents, together with his list of 13 authorities.

12. Unfortunately, the claimant's solicitor, Ms Dalziel, did not comply with that previous Order of the Tribunal, and by email of 14 December 2018, sent at 16:14, she apologised, for her human error in not diarising the date for compliance, and sought an extension of time to do so by no later than 4.00pm on Tuesday, 18 December 2108.

13. On that application for an extension of time being brought to my attention, on the morning of 18 December 2018, I granted her application, and the clerk to the Tribunal emailed both parties' representatives advising them accordingly.

14. By email sent at 15:55 on Tuesday, 18 December 2018, Ms Dalziel, the claimant's solicitor, duly intimated to the Tribunal, with copy to Mr Ettles for the respondents, her written outline submissions for the claimant.

Claimant's Application to Amend his ET1

15. By way of an Order dated 6 August 2018, I had previously ordered that Ms Dalziel, as the claimant's new representative, should draft and intimate to the Tribunal, and send a copy at the same time by email to the respondents' representative, Mr Ettles, a written note setting out those parts of the existing pled claims (in case numbers 4106122/15, 4100137/16, 4105282/16 and 4100153/17) which were no longer being pursued by the claimant.

16. On 10 September 2018, Ms Dalziel, the claimant's solicitor, intimated to the Tribunal, with copy sent to Mr Ettles for the respondents, a "***Conjoined Paper Apart"*** to the ET1 for the claimant, being a typewritten,17-page document, extending to some 48 numbered paragraphs. together with a separate, 3-page typewritten document of ***"Previously pled claims no longer being pursued".***

17. When, on 10 September 2018, the claimant's solicitor, Ms Dalziel, emailed the Tribunal, with a copy sent to Mr Ettles for the respondents, she stated as follows: -

> *"I act on behalf of the Claimant in the above cases, and now attach a fresh conjoined ET1, setting out the whole detailed legal and factual basis of the existing claims pled, as being pursued by the Claimant. Separately, I have attached, as ordered by the Tribunal, a detailed written note setting out those parts of the existing pled claims which are no longer being pursued by the Claimant. I also attach a completed PH agenda in respect of the PH on case management which is listed before the Tribunal on 29 October 2018.*
>
> *In accordance with rule 29 of the Employment Tribunals Rules of Procedure 2013 (ET Rules), I am requesting an order for leave for the Claimant to amend his claim. The amendments which the Claimant*

wishes to make are clearly shown in red in the attached fresh conjoined Paper Apart to the ET1. The amendments relate to a claim in respect of a failure on the part of the Respondent to make reasonable adjustments under s20 of the Equality Act 2010.

The Claimant requests leave to amend his claim because although he previously made a clear reference (in paragraph 4 of the paper apart to claim number S/4106122/2015) to a failure on the part of the Respondent to put in place reasonable adjustments, he did not, at the time, specify what these adjustments were, nor did he confirm the statutory basis upon which this aspect of the claim was being made. This was primarily due to the fact that he was, at the time of submitting the ET1 in 2015, an unrepresented Claimant, who was struggling with the enormity of setting forth in an understandable fashion the claims he was attempting to bring.

The Claimant's position is that this is not an application to introduce a new cause of action, but simply an application to add more detail to the ET1, such as to specify the factual and legal basis upon which this aspect of the claim is premised. The Claimant's position is that the reasonable adjustments claim is not time barred, (it having been referred to in the originating claim and being in time as at 12 April 2015 when the claim was submitted), and the Claimant also believes that the Respondent is unlikely to be prejudiced, seriously or otherwise, by the introduction of further detail as regards the reasonable adjustments claim.

The Claimant did, later in 2015, submit an amendment application in respect of claim number S/4106122/2015 whereby he sought to add in additional information as regards the alleged failure to make reasonable adjustments, but although that amendment application was objected to by the Respondent, it was never, as I understand matters, ruled on by the Tribunal.

I confirm that I have complied with rules 30(2) and 92 of the ET Rules by providing a copy of this correspondence to Mr Nigel Ettles (the solicitor for the Respondent). Should Mr Ettles have any objection to this amendment application, this must be sent to the Tribunal office as soon as possible and copied to me."

18. A copy of the Conjoined Paper Apart is held on the Tribunal's casefile, so it is not necessary to reproduce its full terms here, so I simply record here that I have had regard to its full terms in writing up this Judgment and coming to my decision on the opposed amendment application.

19. Of particular note, I record here that paragraphs 4 to 12, and 41, of that Conjoined Paper Apart, were in red print, rather than black, to show the claimant's proposed amendment to bring a claim in respect of an alleged failure on the part of the respondents to make reasonable adjustments under **Section 20 of the Equality Act 2010**.

Respondents' Objections

20. The respondents' objections were set forth in Mr Ettles' email of 17 September 2018, as follows: -

"I refer to your letter of 6 August 2018 and to the email from the Claimant's solicitor of 10 September 2018.

This email is sent only as a response to the Claimant's amendment application which forms part of the Claimant's proposed Conjoined Paper Apart to ET1. The Respondent will separately submit a consolidated ET3 response form.

The Respondent's response to the Claimant's amendment application is as follows: -

1. The Respondent objects to the Claimant's amendment application, seeking to add by way of amendment a range of new claims for alleged failure to make reasonable adjustments that are not contained in the originating pleadings of the combined claims 4106122/2015, 4100137/2016, 4105282/2016 & 4100153/2017.

2. The Claimant has not set out in any great detail the basis on which it is claimed that allowing the application should be allowed in terms of the factors set out in Selkent Bus Co v Moore [1996] ICR 836).

3. However, it plainly goes beyond the consolidation of the grounds of claim in these combined cases on which the Claimant is insisting, to raise new claims for reasonable adjustments not contained therein.

4. The claims which the Claimant is seeking to add by way of amendment application are all the claims for reasonable adjustments at Paragraphs 4-12 and Paragraph 41 of the Draft Consolidated Paper Apart to ET1 submitted by the Claimant's representative on 10 September 2018.

5. The Respondent would comment as follows in terms of the factors the Tribunal must consider per Selkent Bus Co v Moore [1996] ICR 836:

(a) In terms of the first question required to be answered by the Selkent analysis (categorisation of the proposed amendment), these new claims would be in the 3rd category as set out in Argyll & Clyde Health Board v Foulds [2006] UKEAT/0009/06, especially paragraph 39 on page 13: namely, they are new causes of action requiring new facts to be pled. Case law in this context is clear that raising new claims of disability discrimination is to be considered as category 3, and not as category 1 or 2, even if different claims for other types of

disability discrimination were contained in the originating pleadings. For example, Skinner v Leisure Connection plc (UKEAT/0059/04), [2004] All ER (D) 330 confirmed that a claim for one form of disability discrimination (e.g. victimisation or harassment) does not include claims for another type of disability discrimination (e.g. alleged failure to make reasonable adjustments), and the EAT refused to allow an amendment to add what would be an additional causes of action of the different type. Simply because a claim(s) at Tribunal contained discrimination claims does not mean that an application to amend to add new claims of disability discrimination can be categorised as other than Category 3 (new claims requiring new facts to be pled), and that is what these are in the Respondent's submission.

(b) The Tribunal is required, as such, to consider whether these new claims sought to be added by way of amendment are time-barred (the second question required to be answered by the Selkent analysis). The Respondent's position is that these new claims are severely time-barred, being raised almost 3 years after the termination of the Claimant's employment on 24 September 2015. (The Claimant appears to maintain an attitude, demonstrated for some time in his approach to his litigation of these claims, that he can raise whatever additional claims whenever he likes for as long as he wishes even after these have become time-barred, which is unacceptable. The Respondent is entitled not only to clarity of the claims it faces and would have to answer at any hearing, but to finality of litigation, and instead of using the process of 'consolidation of pleadings' to do just that, he is additionally seeking to add a range of new claims considerably out of time.)

(c) In terms of the 3rd question required to be answered by the Selkent analysis, the Respondent would be significantly prejudiced in having to face this raft of new claims, in addition to the claims that do reflect the originating pleadings. The Claimant's amendment

application envisages the Respondent being additionally faced (beyond claims that do reflect the originating pleadings) with a raft of new matters of a new type of action (for reasonable adjustments) submitted substantially out of time, without adequate explanation for that (and contrary to the Respondent's right to finality in litigation) which would prolong the hearing in this case significantly. The Respondent would have to give evidence about all these additional aspects of his employment over a long period of time in a much protracted hearing. By contrast, the Claimant would not be relatively prejudiced, as he would be able to pursue those claims (per his Consolidated grounds of claim) which do reflect the originating pleadings in these claims. He would simply be prevented from bringing in an additional raft of new matters, in the same way as occurred in for example the Skinner case referred to above. The balance of justice is thus significantly in favour of rejecting the amendment application in so far as it is seeks to add these additional claims, and in the Respondent's submission that application should be refused."

Preliminary Hearing before this Tribunal

21. On 20 September 2018, Mr Ettles intimated to the Tribunal, with copy sent to Ms Dalziel for the claimant, the respondents' "***Consolidated Grounds of ET3 Resistance".*** It is a typewritten,11-page document, extending to some 30 numbered paragraphs.

22. A copy is held on the Tribunal's casefile, so it is not necessary to reproduce its full terms here, so I simply record here that I have had regard to its full terms in writing up this Judgment and coming to my decision on the opposed amendment application.

Authorities relied upon by Parties

23. For the respondents, Mr Ettles cited the following list of authorities:

1. **Harvey on Industrial Relations and Employment Law, Amending the Claim (Division PI).**
2. **Selkent Bus Co. v Moore [1996] ICR 836.**
3. **Cocking v Sandhurst (Stationers) Ltd. [1974] ICR 650.**
4. **Argyll & Clyde Health Board v Foulds [2006] UKEAT/0009/06**.
5. **Ali v Office of National Statistics [2005] IRLR 201**.
6. **Skinner v Leisure Connection plc (UKEAT/0059/04), [2004] All ER (D) 330.**
7. **Lewis v Blue Arrow Care Ltd. (EAT/0694/99).**
8. **Smith v Zeneca (Agrochemicals) Ltd. [2000] ICR 800.**
9. **Transport and General Workers Union v Safeway Stores Ltd. (UKEAT/0092/07), [2007] All ER (D) 14.**
10. **Ahuja v Inghams [2002] EWCA Civ 192 & EAT decision.**
11. **Abercrombie v Aga Rangemaster Ltd [2013] EWCA Civ 1148.**
12. **Mr A Chandhok, Mrs P Chandhok v Ms P Tirkey [2015] UKEAT/0190/14/KN.**
13. **Ladbrokes Racing Ltd v Mr Lawrence Stephen Traynor [2007] UKEATS/0067/07.**

24. For the claimant, Ms Dalziel did not provide a list of authorities, but her written outline submission, referred to **Selkent**, as per the respondents' list, and she also cited, within her submission, **Galilee –v- Commissioner of Police of the Metropolis UKEAT/207/16.** It is now reported at **[2018] ICR 634.**

25. At the start of this Preliminary Hearing, just after 10.15am, I discussed authorities with both parties' representatives. Mr Ettles advised me that, having handed up to my clerk some loose-leaf documents, as itemised below, in paragraph 26 of these Reasons, it was not now necessary for him to refer me to all of the authorities previously listed by him. Ms Dalziel indicated she was content with the authorities' Bundle handed up by Mr Ettles.

26. Mr Ettles provided me with a hard copy judgment in each of Galilee**, Selkent, Abercrombie**, and **TGWU**, as well as prints from **Harvey**, being extracts from **Division P1** (**Practice and Procedure**), namely ***"(b) Altering existing claims and making new claims"***, paragraphs **[311.04]** to **[312.20],** and ***"(3)***

'just and equitable' extension", paragraphs **[277]** to **[285].** In his later oral submissions, he cited some other judgment extracts from **Harvey**, rather than producing the full copy judgments.

Claimant's Written Submissions

27. In her email of 18 December 2018, copied to Mr Ettles for the respondents, Ms Dalziel intimated to the Tribunal her written submissions for the claimant, together with a separate executive summary document. Her full outline was some 5 typewritten pages, extending to 22 paragraphs, and I reproduce that later when narrating her oral submissions to the Tribunal.

28. In her executive summary, running to 8 paragraphs, over 2 typewritten pages, Ms Dalziel had stated as follows: -

> ***1.*** *The Claimant submits that the Tribunal should exercise its discretion in such a way as to grant his application to amend the ET1 in the terms sought.*
>
> ***2.*** *The Claimant submits that the Tribunal should have regard to the principal factors that a Tribunal may consider when deciding whether or not to grant an amendment application, as set out in the case of* ***Selkent Bus Company Limited (trading as Stagecoach Selkent) – v- Moore [1996] IRLR.*** *Said principles include the nature of the amendment, time limits and the timing and manner of the application.*
>
> ***3.*** *It is accepted that the amendment seeks to introduce a new cause of action. Said new cause of action is a claim in respect of an alleged failure by the Respondent to make reasonable adjustments under and in terms of s20 of the Equality Act 2010.*
>
> ***4.*** *It is also accepted that the proposed new cause of action is out of time. Given that it is out of time, the Claimant submits that the Tribunal should exercise its discretion in such a way as to extend the time for lodging the claim under and in terms of s123 (1) (b) of the Equality Act 2010, and thereafter allow the amendment to be made.*
>
> ***5.*** *The Claimant submits that in the event that the Tribunal is of the view that it cannot make a ruling in the course of the Preliminary Hearing as to whether it is just and equitable to extend time under s123 (1) (b) of the Equality Act 2010, then this does not mean that the amendment application is bound to fail.*

6. *The Claimant submits that in the circumstance set out in paragraph 5 above, the Tribunal would be able, as per the decision of Judge Hand QC in* ***Galilee –v- Commissioner of Police of the Metropolis UKEAT/207/16****, to allow the amendment application, with the question of whether it is just and equitable to extend time being reserved until after conclusion of all of the evidence at the final hearing on the merits.*

7. *The Claimant submits that it would be just and equitable for the Tribunal to extend time. The Claimant also submits that the timing and manner of the application to amend is such that it would be reasonable for the Tribunal to grant same.*

8. *The Claimant submits that the injustice and hardship faced by the Claimant if the amendment was not allowed, would be significantly greater than the injustice and hardship caused by the Respondent if it was.*

Respondents' Written Submissions

29. In his email of 14 December 2018, copied to Ms Dalziel for the claimant, Mr Ettles intimated to the Tribunal his written submissions for the respondents, comprising two parts, over 9 typewritten pages, extending to 27 paragraphs, and I reproduce that later when narrating his oral submissions to the Tribunal.

30. It comprised an executive summary (part one); and a part two, split into two sections A and B, on the legal and factual position on the amendment application; and finishing with a conclusion, inviting the Tribunal to refuse the claimant's amendment application.

Oral Submissions for the Claimant

31. In her oral submissions to the Tribunal, starting at 10.25am, Ms Dalziel spoke to the terms of her full written outline submission, the terms of which I reproduce below, in full, as follows: -

BACKGROUND

1. The Tribunal, following a Case Management Preliminary Hearing held on 29 October 2018, ordered that a further Preliminary Hearing be set down on 21 December 2018, to deal with the matter of the Claimant's opposed amendment application of 10 September 2018.

2. *The Claimant, on 10 September 2018, and further to a Tribunal Order so to do, lodged a fresh conjoined ET1, which set out the whole detailed legal and factual basis of the existing claims pled, as being pursued by the Claimant.*

3. *The Claimant, at the time of lodging the fresh conjoined ET1, made an application to amend same, such as to include full details of claims in respect of an alleged failure on the part of the Respondent to make reasonable adjustments, contrary to s20 of the Equality Act 2010. The claims which the Claimant is seeking to add by way of amendment application are the claims set out at paragraphs 4 -12 inclusive and referred to in paragraph 41 of the conjoined Paper Apart to the ET1.*

4. *At the time of lodging his originating ET1's the Claimant did not have the benefit of legal representation. He had, in the course of the fourth paragraph to the Paper Apart to claim number 4106122/2015 made a reference to a failure on the part of the Respondent to make reasonable adjustments. He had not however, specified what these adjustments actually were, or the factual basis of the claims. He had also omitted to specify the statutory basis upon which the claims of a failure to make reasonable adjustments were being made.*

WHAT THE CLAIMANT IS ASKING THE TRIBUNAL TO DO

5. *It is conceded that the claims set out at paragraphs 4-12 of the conjoined Paper Apart to the ET1 have been brought out of time (see paragraph below). It is however submitted on behalf of the Claimant that the Tribunal should exercise its (wide) judicial discretion in such a way as to;*

a) *grant an extension of time for the lodging of those claims set out at paragraphs 4-12 inclusive of the conjoined Paper Apart (on the basis that it is just and equitable to do so) and thereafter*

b) *grant the application to amend in the terms sought.*

In addition to being just and equitable, granting an extension of time and thereafter granting the application to amend would be in keeping with the overriding objective as set out in ***Rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013****. It would ensure that parties were on an equal footing, and would ensure that the case was dealt with in a way which is proportionate to the complexity and importance of the issues. It would, moreover, in all the relevant circumstances, be in keeping with the requirements of relevance, justice and fairness, which are inherent in all judicial discretions.*

In the event that the Tribunal is of the view that it cannot make a ruling as to whether or not it is just and equitable to allow an extension of time on the basis of parties' representatives submissions (oral and written) only, and without an evidential investigation, the Claimant submits in the alternative that the Tribunal should allow the amendment application and reserve judgement as to the question of whether or not it is just and equitable to allow an extension of time, until all evidence has been heard at the final hearing (see reference to ***Galilee –v- Commissioner of Police of the Metropolis UKEAT/207/16, ('****Galilee****')*** *paragraph 12 below).*

SELKENT

6. *One of the leading cases as regards the amendment of claims is that of* ***Selkent Bus Company Limited (trading as Stagecoach Selkent) v Moore [1996] IRLR 661*** *('Selkent'). Selkent, which is an EAT decision, makes clear that when deciding whether or not to grant an amendment application, a Tribunal must have regard to all the circumstances. Crucially, the Tribunal must engage in a balancing exercise, and must balance the injustice and hardship of the amendment (in this case to the Respondent) against the injustice and hardship (in this case to the Claimant) of refusing it. In the Claimant's submission, there would be far greater injustice and hardship to the Claimant if the amendment were refused, than there would be to the Respondent if it were allowed. According to Selkent, the principal relevant factors that a Tribunal may consider when deciding whether to allow the amendment include the nature of the amendment, time limits and the timing and manner of the application.*

NATURE OF THE AMENDMENT

7. *It is accepted that the nature of the amendment proposed is not minor, nor trivial. To the extent that the Claimant did not, in his originating ET1(s) specify the nature of the reasonable adjustments which it is alleged were not made, did not set out the facts upon which the claim of a failure to make reasonable adjustments was premised and did not confirm the statutory basis of the claims, it is accepted that the proposed amendment does indeed constitute a new cause of action, and one which cannot reasonably be said to arise out of the same facts as the originating claim/s.*

TIME LIMITS

8. *It is accepted that the claims which are the subject of the current amendment application have been brought out of time. The Claimant maintains that the alleged failure to make reasonable adjustments*

forms part of a continuing act of discrimination for the purposes of ***s123 (3) (a) of the Equality Act 2010.*** *The last act of discrimination took place on 25 August 2016. The claim in respect of the failure to make reasonable adjustments should therefore have been brought within 3 months of 25 August 2016.*

9. *The EAT in* ***Selkent*** *stated at p843 that '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'.*

10. *As outlined in paragraph 8 above, it is accepted that the claims have been brought out of time, and therefore the Tribunal need not direct its mind to the question of whether the claims have been brought in time. Rather, the question for the Tribunal to ask itself is whether the time limit for the lodging of those claims should, in all the circumstances, be extended under the applicable statutory provision.*

11. *In the Claimant's submission, the time limit <u>should</u> be extended under the applicable statutory provision. The applicable statutory provision is* ***s123(1)(b) of the Equality Act 2010.*** *It is submitted that it would be just and equitable for the Tribunal to extend time for the lodging of the claims for the reasons set out at paragraphs 14 - 18 below.*

12. *In the alternative however, if the Tribunal is of the view that it cannot determine whether it is just and equitable to extend time for the lodging of the claims without further evidential investigation, the Claimant would submit that the decision as to whether to extend time can and should be postponed until all the evidence has been heard. Although Selkent makes clear that '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', Judge Hand QC in paragraph 109 of Galilee noted that Lord Justice Mummery's use of the word 'essential' in Selkent '****should not be taken in an absolutely literal sense and applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues must be decided before permission to amend can be considered'.***

13. *Judge Hand further points out at paragraph 109 of Galilee that sometimes it may not be possible or sensible to deal with the time limit matter at a preliminary hearing, and such decisions may need to be postponed until all the evidence has been heard. In such cases, permission to amend can precede decisions relating to time limits.*

<u>TIMING AND MANNER OF APPLICATION / JUST AND EQUITABLE</u>

14. *Applications to amend pleadings can of course be made at any stage in the proceedings and any application to amend should not be refused solely because there has been a delay in seeking the amendment.*

15. *Although the current amendment application is being made more than two years late (the last act of discrimination in the continuing act of discrimination complained of in the ET1 having allegedly taken place on 25 August 2016), consideration should be given by the Tribunal to a number of very important factors which together explain the reason for the delay.*

16. *In the first instance, the Claimant was, at the time of raising the proceedings and for long periods of time thereafter, without the benefit of legal representation. The claims which he sought to raise were factually and legally very complex. He did, in the course of the Paper Apart to claim number 4106122/2015, state at paragraph 4 of same that 'as at Sunday 12 April 2015, reasonable adjustments have not been put in place during which time the Claimant has returned to work for 3 months, ie back into the work environment in which stress and associated issues are foreseeable'. Although no more detail than this was given, the Respondent has, to some extent, been on notice since April 2015 that the Claimant believed that reasonable adjustments (albeit unspecified at the time of lodging the claim) had not been made.*

17. *Secondly, the Claimant did in fact make an amendment application in December 2015, in terms of which he sought to introduce claims in respect of a failure to make reasonable adjustments. That amendment application was however, never considered by the Tribunal, and was superseded by further process, specifically the fresh amendment application made by the Claimant's then representative, Mr Booth in October 2017 (following a lengthy sist in the proceedings). The point, once again, is that the matter of reasonable adjustments, and the alleged failure on the part of the Respondent to make same, has been on the Respondent's radar for at least three years. It is not the case that the Claimant's current amendment application of 10 September 2018 represents something of an ambush – it does not. Whilst it is accepted that the factual basis of the claims had not been clearly set out until 10 September 2018 (following the instruction of fresh legal representation by the Claimant) the fact that the Claimant wishes to amend his ET1 to pursue such a claim has been known to the Respondent for a very long time.*

18. In deciding whether it is just and equitable to extend time to permit an out of time discrimination claim (such as the claims which are the subject of the amendment application) to proceed, the Tribunal is entitled to take into account anything that it deems to be relevant, and the Claimant invites the Tribunal to take the factors set out at paragraphs 16 and 17 above into account.

19. In terms of the prejudice which would be suffered by the Respondent if the amendment were allowed, the Claimant maintains there would be very little. The Respondent, as it stands, and before any decision on the amendment application is made, is facing a lengthy Tribunal hearing, which would last 12 days at the very least (5 days for evidence in chief for the Respondent's witnesses, 5 days for cross of the Respondent's witnesses, and 2 days for evidence in chief from and cross of, the Claimant).

20. In the course of his email to the Tribunal dated 8 November 2018, Mr Ettles for the Respondent has confirmed that if the Claimant's amendment application is allowed by the Tribunal, it may be that the Respondent will not require to call any additional witnesses. On this basis, it simply cannot be said, in the Claimant's submission, that the Respondent will be put to significant additional time or effort in defending the reasonable adjustment claims if the amendment is allowed. Although the Respondent has indicated that three of its witnesses 'may' require to give a 'substantial' amount of additional evidence, the straightforward nature of the claims which form the proposed amendment is such that this, in the Claimant's submission, is unlikely, particularly given that the Tribunal has now confirmed that witness statements are to be used.

21. The Claimant, on the other hand, would indeed be prejudiced if the amendment application was refused, primarily because what might otherwise be good claims in law would be defeated before they could be heard and considered.

22. The application should therefore be, in the Claimant's submission, granted.

32. In opening her oral submissions, Ms Dalziel stated that while her amendment application, dated 10 September 2018, had stated that the amendment was not a new cause of action, but was "***there to put meat on the bones of a pre-pled claim for reasonable adjustments",*** she was now saying, at this Preliminary Hearing, as per her skeleton, that she had revisited her earlier position, and she had concluded that, in real terms, that she was asking the Tribunal to allow the amendment as a new cause of action.

33. Having looked at the **4106122** claim, at paragraph 4, referring to reasonable adjustments, Ms Dalziel stated that, having looked at it again, and with the other ET1s in the other cases, she could not reasonably contend that the claim was pled properly in the course of those 4 ET1s, and that it is "not more

meat on the bones", and she accepted that it is a new cause of action. Further, as she agreed that it is a new cause of action, she conceded it is clearly out of time, and, having looked at Mr Ettles' submissions, and his arguments about new cause of action, and whether it is in time, she has limited her submissions to the Tribunal at this Preliminary Hearing.

34. Ms Dalziel then asked the Tribunal to do two things. Firstly, given the application is out of time, she invited the Tribunal to use its discretion to extend time, although very late, in comparative terms, as she submitted it is just and equitable to do so. Thereafter, secondly, she invited the Tribunal to grant the amendment and allow the new head of claim in.

35. Conceding that it is a new cause of action, she referred to **Selkent,** at page 843, and that it is essential for the Tribunal to consider whether it is out of time. She also referred to the statutory test under **Section 123(1)(b) of the Equality Act 2010,** and the very wide discretion available to the Tribunal to extend time, on a just and equitable basis, and take into account all relevant factors.

36. Referring to paragraph 16 of her written submission, Ms Dalziel focused on how the claimant was without benefit of legal representation, or indeed representation, when he presented his claims, and that these are complex claims, not just a straightforward unfair dismissal claim, but multi-facetted, yet the claim had referred, in his claim 122, to reasonable adjustments, which she submitted was evidence that he had that claim in his contemplation at that point.

37. Further, she submitted, it was the claimant's ***"best effort***" to make the Tribunal and the respondents aware of his complaint of the respondents' failure to make reasonable adjustments, so that the respondents had been put on notice, albeit without sufficient detail.

38. Referring then to paragraph 17 of her written submission, Ms Dalziel stated that the claimant had made an amendment application in December 2015, and Mr Booth had done so, as the claimant's representative, in October 2017. She felt the respondents' position, as per Mr Ettles' submissions, was very misleading, in referring to it as ***"an ambush***", as there had been a long and winding road to get to this point in these Tribunal proceedings.

39. As per her paragraph 19, Ms Dalziel submitted that more hardship would be caused to the claimant, if the amendment was refused, than would be caused to the respondents if the amendment were allowed. If not allowed, she referred to the claimant's reasonable adjustments claim "***dies today***", and that, she added, was not just and equitable in all the circumstances.

40. Further, Ms Dalziel disputed that the respondents were being "***ambushed***", and added that the respondents seek to "***hang their hat on procedural matters",*** but that is not a fair line of argument, and much of the respondents' submissions fall away given she has conceded that the application involves a new cause of action, and she had conceded it is time-barred, but argued that time should be extended on a just and equitable basis.

41. Ms Dalziel added that she did take "***considerable issue"*** with suggestions that the respondents would be put to more effort, time and expense, if the Tribunal granted the amendment application, and referring to paragraph 20 of her submissions, she noted how Mr Ettles' email of 8 November 2018 had said a further 2 days evidence might be required by the respondents, which she described as an "***awful long time***" for 3 witnesses to speak to reasonable adjustments, in a case where witness statements are to be used, as ordered by the Tribunal.

42. Nowhere, in any of the respondents' objections to this amendment, Mr Dalziel submitted, does it suggest that the claim's reasonable adjustments claim does not have force, or no legal or factual basis. The respondents' whole objections, she stated, circles around it being out of time, and a new cause of

action. If, however, the respondents believe the reasonable adjustments claim has no basis, then they are not prejudiced, she added, because they can easily disprove his allegations of failure to make reasonable adjustments, and the respondents' hardship cannot be said to be greater than the claimant's, where the respondents have throughout always been legally represented.

43. Further, added Ms Dalziel, when Mr Booth was "***de-instructed***" by the claimant, that is he was no longer instructed by him, there was no undue delay by her, as the claimant's new legal representative, in making this application for amendment, and the respondents' solicitor, Mr Ettles, had replied to the claimant's conjoined paper apart, and she invited the Tribunal to extend time, and grant the amendment that she had requested on the claimant's behalf.

44. On the matter of her reply to Mr Ettles' written outline submissions for the respondents, Ms Dalziel stated that there was little further for her to say, other than, referring to **Galilee,** she felt there was enough information before this Tribunal to decide matters at this Preliminary Hearing, and to grant an extension of time.

45. She further stated that **Galilee** was her "***backstop position***", if I wished to reserve the time-bar point until after all the evidence had been heard at a Final Hearing, as it would be open to the Tribunal to follow **Galilee**, and the judgment of the Scottish EAT in **Amey** did not prevent me from falling **Galilee**.

46. In closing, Ms Dalziel argued that there was sufficient information before the Tribunal to allow the extension of time, and the amendment, on the basis of her oral and written submissions, and she invited me not to refuse her application.

Oral Submissions for the Respondents

47. It then being 10.53 am, I invited Mr Fettles to address the Tribunal. In his oral submissions to the Tribunal, Mr Ettles spoke to the terms of his full written outline submission, the terms of which I reproduce below, in full, as follows: -

Part One – Executive Summary

1. The basis of the Respondent's objection to the present amendment application in so far as it seeks to add new claims not reflecting the originating pleadings in the above 4 claims is set out in the Respondent's email of 17 September 2018, as further referred to in Part 2B below. In summary, the Respondent's position in terms of the factors the Tribunal must consider per ***Selkent Bus Co v Moore [1996] ICR 836*** *is:*

(a) The proposed amendment seeks to add considerable new matters, generally with new facts with new legal basis of claim, as more fully detailed in section 2B below.

(b) As such, in terms of the first question required to be answered by the ***Selkent*** *analysis – categorisation of the proposed amendment – it is submitted that these claims are in the 3rd category as set out in* ***Argyll & Clyde Health Board v Foulds [2006] UKEAT/0009/06****, especially at paragraph 39 on page 13: namely,* ***new causes of action requiring new facts to be pled.***

(c) The Tribunal is required, as such, to consider whether these new claims, sought to be added by way of amendment, are time-barred (the second question required to be answered by the Selkent analysis). ***The Respondent's submission is that they are severely time-barred, being raised more than 3 years after the termination of the Claimant's employment on 24 September 2015, and in many cases referring to facts preceding that by some way.*** *As*

*set out in Part 2A below, with reference to paragraph **[311.02]** of Division PI of Harvey on Industrial Relations and Employment Law:*

*'Where the Claimant proposes to include any new claim by way of amendment, the Tribunal **must** have regard to the relevant time limits… This is only a factor, albeit an '**important and potentially decisive one'** in the exercise of the overall discretion whether or not to grant leave to amend (per **Transport and General Workers Union v Safeway Stores Ltd. UKEAT/0092/07**).'*

(d) The Respondent is entitled not only to clarity of the claims it faces and would have to answer at any hearing, but to finality of litigation. The Claimant seeks to add a raft of new claims considerably out of time.

(e) Esto, the Tribunal considers that any of these new matters fall into category 2 (adding or substituting a new cause of action, but one which arises out of the same facts as an originating claim) – which is denied – reference is made to:

- *At paragraph **[312.01]** of Harvey – Tribunal's may allow a Claimant to amend to allege a different type of claim from the one pleaded **provided this can be justified by the facts set out in the original claim);***

- *At paragraph **[312.02]** of Harvey – only if the new claim arises out of facts that have already been pleaded, it will not be scrutinised for time limits (otherwise it must be); and*

- *At paragraph **[312.04]** of Harvey (with reference to **Abercrombie v Aga Rangemaster Ltd [2013] EWCA Civ 1148**): Lord Justice Underhill explained that when considering applications which arguably raise a new cause*

*of action, a key focus is not on formal classification, but is: whether the new pleadings are 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 the old, the less likely it will be permitted**.*

*(f) As the new causes of action raised by the Claimant plainly go **far beyond** the originating claims, to a whole raft of new matters requiring different and new inquiry, not reflective of the claims in the originating pleadings, the Tribunal should refuse to allow them by way of amendment, whether it views them as being in Category 2, Category 3, or some in each category. (The Respondent submits that they are **not matters with facts the same as those in the originating claims, and are thus Category 3 and time-barred**; but even if any are considered to be Category 2, they would by definition **expand extensively the factual basis of enquiry and so be at the extreme end of the spectrum i.e. of those claims so different vis-à-vis the originating claims as to be inappropriate for amendment to be permitted**).*

(g) The Respondent would be seriously prejudiced in having to face this whole raft of new claims, in addition to the claims that do reflect the originating pleadings. It would have to investigate and respond to this raft of new matters years after they occurred and over 3 years after the Claimant's employment has ceased. A number of the claims contained in the originating pleadings are themselves time-barred and cannot in any case be used as a basis for amendment.

(h) By contrast, the Claimant would not be relatively prejudiced, as he would be able to pursue those claims which do reflect those of the originating pleadings. He would simply be prevented from bringing in

an additional raft of further matters. The balance of justice is thus significantly in favour of rejecting the amendment application.

Part Two – Legal and Factual Position on Amendment Application

A – Legal Position

2. The Respondent makes reference to Division PI of Harvey on Industrial Relations and Employment Law, with reference to the legal position on amendment applications, and to the case law as specified below.

*3. Per paragraphs **[311]** and **[311.01]** of Harvey, the Employment Tribunal has a discretion to determine whether or not to allow the amendment of claims, which under Rule 29 of the 2013 Tribunal Rules is a general case management power; and, per **Selkent Bus Co v Moore [1996] ICR 836**:*

- *The power is a judicial discretion, **to be exercised in a manner satisfying the requirements of relevance, reason, justice and fairness** inherent in all judicial decisions; and,*
- *The way in which the discretion will be exercised will largely be governed by **the nature of the application itself**.*

*4. Per paragraph **[311.02]** of Harvey, the Tribunal should consider the relevant circumstances of the particular case, and in each case must consider the core issues set out in **Selkent Bus Co v Moore [1996] ICR 836**.*

*5. At pages 843 and 844 of the **Selkent** case, the EAT set out the procedure and practice to be applied in respect of amendments:*

"(4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) "The nature of the amendment". Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels 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…

(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 Regulations of 1993 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."

*6. Paragraph **[312.06]** of Harvey emphasises that the determination (of whether or not to allow an amendment to add new causes of action) is a single stage process, assessing all the relevant factors (including those above, and anything else relevant to the case) in determining the balance of injustice and hardship.*

*7. (a) The first question required to be answered by the Selkent analysis is categorisation of the proposed amendment – the 3 categories of amendment being noted at Paragraph **[311.04]** of Harvey.*

*(b) In the present case, the new matters going beyond the consolidation of existing claims may either be in 3rd category as set out in **Argyll & Clyde Health Board v Foulds** [2006] UKEAT/0009/06, especially at paragraph 39 on page 13: namely, new causes of action requiring new facts to be pled; or in the 2nd category (a new cause of action, but arising from the same facts as the originating claims).*

(c) In terms of categorisation, if the Tribunal considers that any new cause(s) of action may fall into category 2 (adding or substituting a new cause of action, but which arises out of the same facts as an originating claim):

- *paragraph **[312.01]** of Harvey sets out that Tribunal's may allow a Claimant to amend to allege a different type of claim from the one pleaded **provided this can be justified by the facts set out in the original claim.***

- *paragraph **[312.04]** of Harvey, (with reference to **Abercrombie v Aga Rangemaster Ltd [2013] EWCA Civ 1148**) – when considering applications which arguably raise a new cause of action, the key issue is whether 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 the old, the less likely it will be permitted**.*

- *paragraph **[312.02]** of Harvey – only if the new claim arises out of facts that have already been pleaded, it will not be scrutinised for time limits (thus, otherwise it must be).*

*(d) Per paragraph **[312.07]** of Harvey, with reference to **Housing Corp v Bryant [1999] ICR 123, CA,** the question of whether the amendment amounts to a wholly new claim requires an examination of the case set out in the originating pleadings, against that of the proposed amendment, to see if there is sufficient causal link. In that case, "**the proposed amendment was not a rectification or expansion of the original claim, but an entirely new claim brought well out of time**", and the Court of Appeal accordingly re-instated the Tribunal's Judgment **rejecting the amendment**.*

*(e) Per paragraph **[312.10]** of Harvey, the notion that there being originating claims for a particular type of discrimination (sex, race, disability etc.) meant any claim of such discrimination was not a new claim, or should be allowed by way of amendment, was disapproved by the Court of Appeal in **Ali v Office of National Statistics [2005] IRLR 201.** The Court of Appeal in **Ali** confirmed that different forms of discrimination claim (e.g. direct and indirect) of a particular sort (i.e. sex or race or disability) are not the same basis of claim simply because they are covered by the same discrimination legislation; and so, where a claim for one type of such discrimination (e.g. direct) has*

been stated in the ET1 claim form, a subsequent attempt to add another head(s) of claim for discrimination (e.g. indirect) could not be considered within the rubric of the original claim, but is an application to add a new head of claim.

(f) This line of authority has been re-enforced in other case law. For example:

- ***Skinner v Leisure Connection plc (UKEAT/0059/04), [2004] All ER (D) 330*** *confirmed that a claim for one form of disability discrimination (e.g. less favourable treatment) does not include one for another type of disability discrimination (e.g. alleged failure to make reasonable adjustments), and the EAT refused to allow an amendment to add what would be a different and additional cause of action. Simply because a claim(s) at Tribunal contained discrimination claims does not mean that any application to amend to add new claims of disability discrimination can be categorised as other than new claims requiring new facts to be pled if that is what they are.*

- ***Lewis v Blue Arrow Care Ltd. (EAT/0694/99)*** *confirmed that seeking (in that case, out of time), to add victimisation to a claim for another type of discrimination claim (e.g. direct discrimination) is an application to make an entirely new claim.*

- ***Smith v Zeneca (Agrochemicals) Ltd. [2000] ICR 800*** *confirmed that a claim for e.g. direct discrimination on particular protected grounds is different to, and separate from, other types of such discrimination e.g. indirect and victimisation, and cannot be deemed to include the same.*

*8. (a) For any new claims not arising from facts already pled, the Tribunal **must** consider whether these are time-barred (the second question required to be answered by the Selkent analysis). Per paragraph **[311.02]** of **Harvey**:*

*'Where the Claimant proposes to include any new claim by way of amendment, the Tribunal **must** have regard to the relevant time limits… This is only a factor, albeit an '**important and potentially decisive one'** in the exercise of the overall discretion whether or not to grant leave to amend: **Transport and General Workers Union v Safeway Stores Ltd. UKEAT/0092/07**).'*

*(b) Per paragraph **[312.05]** of Harvey, even in these Category 3 cases an amendment may still be allowed out of time in exceptional circumstances. However, per **Transport and General Workers Union v Safeway Stores Ltd. (UKEAT/0092/07), [2007] All ER (D) 14**, the EAT confirmed that, when a Tribunal is considering exercising a discretion to allow an amendment which introduces a new clam, **the greater the difference between the factual and legal issues raised by the proposed new claim and the original claim the less likely it is to be permitted** (paragraph 13).*

*9. In **Cocking v Sandhurst (Stationers) Ltd. [1974] ICR 650**, Sir John Donaldson explained (at 656) that Tribunals considering amendment applications involving changing the basis of a claim should first determine whether the unamended claim complies with the Tribunal Rules which govern the presenting of claims. (Thus, for example, if a Claimant is relying on originating claims that were themselves time-barred, those could not be used as the basis for arguing that the same or related factual basis of the new claims sought to be introduced by way of amendment was already before the Tribunal in the originating pleadings).*

*10. Per paragraph **[312.09]** of Harvey, with reference to **Gillett v Bridge 86 Ltd, UKEAT/0051/17 (6 June 2017)**, a factor that may be taken into account when determining whether a new claim(s) should be allowed by way of amendment is an assessment of the merits of that new claim(s), and the Tribunal may refuse to allow the amendment if it considers the new claim(s) lack reasonable prospect of success.*

*11. In **Ahuja v Inghams [2002] EWCA Civ 192**, the Court of Appeal overturned a decision of the EAT, and found that the jurisdiction of the Tribunal was limited to hearing complaints of unlawful discrimination contained in the originating application, and that since those complaints had not been proven (and no amendment application had been made for other complaints to be added), the Tribunal did not have jurisdiction to find that other discrimination than was pled had taken place. Lord Justice Mummery comments (at paragraph 43) that the Tribunal had a wide and flexible jurisdiction to do justice, and he makes reference to the specific case of evidence coming out at a hearing differently from what was pled, in which case parties should not be discouraged only by it being at that stage from making an amendment application (or Tribunals from allowing this) in appropriate circumstances and where there was no prejudice to the Respondent. Neither this case, nor that comment, are applicable, however, in this instance: as an amendment application has been made, and as the circumstances are not the same. It does not, in any case, suggest that there being a wide and flexible jurisdiction is reason for either allowing or not allowing any particular amendment application, which must be individually assessed (although it was suggesting that this route might have been taken at an appropriate stage of that particular case).*

*12. In **Mr A Chandhok, Mrs P Chandhok v Ms P Tirkey [2015] UKEAT/0190/14/KN** at paragraph 16 the EAT observes that "The claim, as set out in the ETI, is not something just to set the ball rolling,*

as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead it serves not only a useful but a necessary function . It sets out the essential case".

*13. In **Ladbrokes Racing Ltd v Mr Lawrence Stephen Traynor [2007] UKEATS/0067/07** at paragraph 40, in the context of amendment, the EAT emphasises the distinction between the Respondent knowing the facts and knowing that the Claimant is seeking to rely on those facts in his claim.*

B – Factual Position

Nature of the proposed amendment

14. The Respondent's position on this application is as set out in its email of 17 September 2018. The proposed amendments go extensively beyond the consolidation of the originating pleadings and seek to add new causes of action, which involve considerable new facts with a new legal basis of claims relative thereto.

*15. As referred to in paragraph 7(d) above, with reference to paragraph **[312.07]** of Harvey and **Housing Corp v Bryant [1999] ICR 123, CA,** the question of whether the amendment amounts to a wholly new claim requires an examination of the case set out in the originating pleadings, against that of the proposed amendment, to see if there is sufficient causal link. In that case (as, it is submitted, in this): "**the proposed amendment was not a rectification or expansion of the original claim, but an entirely new claim brought well out of time**", and the Court of Appeal accordingly re-instated the Tribunal's Judgment **rejecting the amendment**.*

16. In any event, however, whether these new causes of action are considered Category 3 or Category 2 amendments (or some Category 3 and others Category 2), the new pleadings are clearly and very extensively of the type that they would involve substantially different areas of inquiry than the old: and, since ***the greater the difference between the factual and legal issues raised by the new claim and the old, the less likely it will be permitted****, it would accordingly be perverse (in the Respondent's respectful submission) for these additional matters to be allowed to be added in this manner by way of amendment.*

17. The Claimant's originating pleadings do not contain a claim(s) for reasonable adjustments. Yet, the Claimant seeks to introduce a whole range of claims for alleged failure to make reasonable adjustments, which also require the pleading of new facts in support thereof. These are new claims and would also be time-barred.

Categorisation of the proposed amendment

18. Comparison of the factual basis of the new matters (now sought to be included by way of amendment) clearly shows (in the Respondent's respectful submission) that these are new causes of action not reflecting the same facts as are pled in the originating grounds of these claims.

19. These new causes of action raise new factual matters and do not arise from claims stated in the originating pleadings. The Claimant seeks to introduce a whole range of claims for alleged failure to make reasonable adjustments, with the pleading of new facts in support thereof – thus extending the field of inquiry for the claim (were these allowed) significantly. These are new claims and would also be time-barred.

20. In the Respondent's submission, these are therefore, new matters going beyond the consolidation of existing claims, with a new factual and legal basis, and accordingly:

- *Are in 3rd category as set out in **Argyll & Clyde Health Board v Foulds** [2006] UKEAT/0009/06, especially at paragraph 39 on page 13: namely, new causes of action involving considerable new facts pled.*

- *As referred to in paragraph 11(d) above, with reference to paragraph **[312.07]** of Harvey and **Housing Corp v Bryant [1999] ICR 123, CA,** looking at the question of whether the amendment amounts to a wholly new claim requires an examination of the case set out in the originating pleadings, against that of the proposed amendment, to see if there is sufficient causal link. In that case (**and, it is submitted, in this**): "**the proposed amendment was not a rectification or expansion of the original claim, but an entirely new claim brought well out of time**".*

*21. **Time-limits** Per Paragraphs 12(a) & 12(b) above, the Tribunal **must** consider, for Category 3 proposed amendments, whether these new causes of action are time-barred (the second question required to be answered by the Selkent analysis). **The Respondent's submission is that they are severely time-barred, being raised more than 3 years after the termination of the Claimant's employment on 24 September 2015, and in many cases referring to facts preceding that by some way.** Per paragraph **[311.02]** of **Harvey**:*

*'Where the Claimant proposes to include any new claim by way of amendment, the Tribunal **must** have regard to the relevant time limits… This is only a factor, albeit an '**important and potentially***

decisive one' *in the exercise of the overall discretion whether or not to grant leave to amend:* ***Transport and General Workers Union v Safeway Stores Ltd. UKEAT/0092/07****).'*

22. Per paragraph ***[312.05]*** *of Harvey, even in these Category 3 cases, an amendment may be allowed out of time in exceptional circumstances. However, per* ***Transport and General Workers Union v Safeway Stores Ltd. (UKEAT/0092/07), [2007] All ER (D) 14****, the EAT confirmed that, when a Tribunal is considering exercising a discretion to allow an amendment which introduces a new claim,* ***the greater the difference between the factual and legal issues raised by the proposed new claim and the original claim the less likely it is to be permitted*** *(paragraph 13).* ***As the difference in this case is very extensive and substantial, it should not, in the Respondent's submission, be allowed for these new causes of action.***

23. If (in the alternative) the Tribunal considers that any new cause(s) of action may fall into category 2 (adding or substituting a new cause of action, but which arises out of the facts of an originating claim(s)), then in respect of any such cause of action, it is submitted that allowing the Claimant to amend to add these ***would not be justified by comparison with the facts set out in the original claim.*** *Per paragraph* ***[312.04]*** *of Harvey, (with reference to* ***Abercrombie v Aga Rangemaster Ltd [2013] EWCA Civ 1148****), the key issue (or focus) is whether the new pleading are 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 the old, the less likely it will be permitted****.*

24. As such, whether these new causes of action are considered Category 3 or Category 2 amendments (or as some Category 3, and others Category 2), the new pleadings are in the Respondent's

submission clearly and very extensively of the type that they would involve substantially different areas of inquiry than the old: and, since ***the greater the difference between the factual and legal issues raised by the new claim and the old, the less likely it will be permitted****, it would accordingly be perverse (in the Respondent's respectful submission) for these additional matters to be allowed to be added in this manner by way of amendment.*

25. However, the Respondent's primary submission is that these are wholly or largely new claims, not arising from the facts in the originating pleadings, sought to be brought substantially out of time. The Respondent is entitled not only to clarity of the claims it faces and would have to answer at any hearing, but to finality of litigation.

Conclusion

26. The balance of injustice in allowing the new causes of action to be allowed by way of amendment would be significantly against the Respondent, which would be seriously prejudiced in having to face this whole raft of new claims, in addition to the claims that do reflect the originating pleadings. It would have to investigate and respond to these new causes of action years after they occurred and over 3 years after the Claimant's employment ceased. A number of the claims contained in the originating pleadings are themselves time-barred and cannot in any case be used as a basis for amendment.

27. By contrast, the Claimant would not be relatively prejudiced, as he would be able to pursue those claims which do reflect those of the originating pleadings in these claims which the Claimant seeks to pursue. He would simply be prevented from bringing in an additional raft of further matters. The balance of justice is thus significantly in favour of rejecting the amendment application and in the Respondent's submission the application should accordingly be refused.

48. In light of Ms Dalziel's position, Mr Ettles stated that he did not depart from anything in his outline submission for the respondents. While some of it was not now necessary, on the basis of Ms Dalziel's concessions, he had noted that the claimant's solicitor accepts it is a new cause of action, and out of time, and that therefore there is an issue for the Tribunal whether it is just and equitable to grant an extension of time.

49. In addition, Mr Ettles stated that he did not accept that what was given to the respondents was proper notice of a reasonable adjustments claim, as there was not sufficient specification given by the claimant. His claim was pled in such a way, stated Mr Ettles, that it was of no assistance to the respondents, as they could not understand the nature of his claim.

50. He described the claimant's pleadings, at that point, as being "***in such a mess"***, and that it was not the respondents' responsibility to plead the case for the claimant, although maybe they could have sought further and better particulars of any claim they felt was totally lacking in specification. He added that the claimant's use, in the **4106122** claim, of the words ***"reasonable adjustments"***, does not amount to proper notice that it was a claim for failure to make reasonable adjustments.

51. Further, added Mr Ettles, the claimant now accepts that the nature of this amendment is neither minor, not trivial, but significant, and it cannot be said to arise out of the same facts, and it seemed to him that even the claimant was now accepting that the respondents had not been given fair or proper notice of a reasonable adjustments claim.

52. Next, referring to paragraph 8 of Ms Dalziel's outline submissions for the claimant, Mr Ettles noted that she had referred to 25 August 2016 as being the last act of discrimination, but Mr Ettles stated that, assuming it was established that there was a continuing act, that last act must be 24 September 2015, the date of termination of the claimant's employment.

53. In that regard, Mr Ettles stated that 25 August 2016 is the date on which the claimant's internal appeal against dismissal was concluded by the respondents, and as there is no alleged discrimination between dismissal and conclusion of the appeal, he argued that the relevant date is 24 September 2015, which adds about another 11 months on to the time delay.

54. Referring then to paragraph 16 of the claimant's outline submissions, saying that the claimant was without the benefit of legal representation, Mr Ettles stated that that was the claimant's choice, when he has been represented by a trade union, and he chose to instruct solicitors after claims 1 and 2, and he was found liable to pay the respondents' expenses in those earlier claims. He was not later averse to instructing solicitors on his behalf, and he could have done that for this "***second batch***" of claims against the respondents, submitted Mr Ettles.

55. Further, added Mr Ettles, the claimant was clearly aware of the concept of reasonable adjustments, as he had mentioned it in his pleadings, at paragraph 4 of the claim 122. While he knew of the concept, and it could form the basis of a claim, Mr Ettles stated that you would have thought that might have alerted the claimant to take legal advice and get his claim properly inserted into his pleadings, but, given the lack of specification then, Mr Ettles submitted that it cannot be said that the respondents were on notice that the claimant believed reasonable adjustments had not been made by the respondents.

56. Next, referring to paragraph 17 of the claimant's outline submissions, Mr Ettles stated that the December 2015 amendment application by the claimant was of no relevance, as it was not proceeded with, and he added that he felt it was for the claimant to explain why it had not been proceeded with then, and that it is not for the respondents to enquire into it now. He further stated that it was "***of little or no value if the claimant did not procced with it then***", although he accepted that the claimant had never expressly withdrawn that earlier amendment application.

57. To clarify his position, Mr Ettles then stated that he was "***not saying there is an ambush"***, simply that there were now a series of claims that are very out of time, and that "***using the words "reasonable adjustments" does not give the respondents fair notice"*** of claims to be made at any Hearing. He added that "***it cannot be said that reasonable adjustments were on the respondents' radar, for these last 2 years***", which is what he felt Ms Dalziel was arguing at her paragraph 17.

58. Turning again to her submissions, Mr Ettles stated that he felt her paragraphs 16, 17 and 18 are not relevant matters to be taken into account, but he clarified that he did not go as far as to say the Tribunal should exclude them from its field of vision, but he did say the weight to be attached to these factors is "***minimal.***"

59. Next, looking at Ms Dalziel's paragraphs 19 and 20, Mr Ettles submitted that while the claimant's solicitor argues there is very little prejudice to the respondents, he stated that that is not the case, as there is a "***whole raft of new claims"*** for the respondents to investigate, and it is now over 3 years since termination of the claimant's employment, and "***so inevitably memories will have faded, and documents needed now may not be found".***

60. By way of further submission, Mr Ettles stated that 3 of the respondents' witnesses (whom he identified as **Paul McGowan, Lynn Hughes and Jean Mulvenna, all ex HR employees**) had all left the respondents' employment, making investigations of them "***difficult***", and that 2 of those 3 are the witnesses most likely to have to speak to these new claims.

61. Further, Mr Ettles added, a Tribunal Hearing in these claims will be ***"understandably large***", and while he could see Ms Dalziel disagreed, he insisted that "***the claims brought are not straightforward***" with alleged failures to make reasonable adjustments, and that that head of complaint is now particularised in new pleadings for the claimant, where it was not before.

62. As all 3 witnesses are ex-employees, Mr Ettles stated that they do not have access to files, and so as solicitor for the respondents, he will need to get them to focus on what happened many years ago, which would be "**difficult"**.

63. While accepting, as per Ms Dalziel's paragraph 21, the claimant will be prejudiced if the amendment is refused, Mr Ettles stated that the claimant could still pursue his other claims, whereas, if the amendment were to be allowed by the Tribunal, the respondents will lose the limitation issue that it relies upon to oppose the amendment being sought.

64. Mr Ettles then referred to the **Harvey** extracts, on just and equitable extension, at paragraph **[277.01],** and submitted that the claimant has not really explained why his reasonable adjustments complaint was not brought within 3 months of termination of employment, and that now 3 years plus has passed.

65. Looking at the **Keeble** factors, in **British Coal Corporation v Keeble, [1997] IRLR 336,** discussed at **Harvey [279]**, Mr Ettles submitted that the claimant has not made out a good cause taking into account the **Keeble** factors (a) to (e), and he referred, in particular, to **Harvey [279.01],** and its reference to **Miller v MoJ [2016] UKEAT/0003/15.**

66. Mr Ettles then submitted that it is "***to some extent inevitable that there will be fading memories, and there could be other problems as well***". He submitted that the main ***"forensic prejudice***" founded upon by him was fading memories, and he accepted that "***access to documents may assist to an extent."***

67. Referring to **Harvey [279.05],** Mr Ettles stated that the cause of the claimant's failure to bring this type of claim earlier has "***not been properly identified"***

68. It then being 11.31 am, Mr Ettles turned his attention to his own written outline submissions and commented that much of it had been superseded given the

concessions made by Ms Dalziel for the claimant. That said, he referred me to his page 2, and the reference there to the Court of Appeal judgment in **Abercrombie v Aga**, in particular per Lord Justice Underhill at paragraph 48. He submitted that the new issues now pled by the claimant are "***entirely different from what had been pled*** before", and that should make the Tribunal "***reluctant to allow the amendment***."

69. When I asked him to comment on the very next paragraph of that judgment, at paragraph 49, where Lord Justice Underhill refers to "***a legal bear-trap***", Mr Ettles replied stating that he was not convinced a failure by a claimant to present their claim properly means a bear-trap has been created, and that it is "***simply a failure then to plead a case that has now been pled, ad pled with specification"*** by the claimant.

70. Referring then to paragraph 5 of his own outline submission, and the reference there to the **Selken**t factor (5)(c), he posed the question ***"why now?".*** He also commented that ***"it's too early for the respondents to say that a reasonable adjustment claim has no force",*** as that complaint is in the form of a proposed amendment, and so the respondents have not replied to it as yet.

71. If the amendment is allowed, Mr Ettles then stated that the respondents seek time to reply to that particularisation by the claimant, but they do not accept that there is validity to his reasonable adjustments claim. He added that he felt a reply from the respondents might take time to investigate, where 2 of the main witnesses had left the respondents' employment, and he sought a period of 4 weeks, or 6 weeks, if I was to allow the amendment there and then at that Hearing.

72. While Ms Dalziel had suggested that if time-bar was not considered at this Hearing, then I should continue the just and equitable extension to the end of evidence at the Final Hearing, as per the EAT in **Galilee**, Mr Ettles stated that

he could see no reason why I would want to do that and queried what evidence there would be to lead then.

73. He further stated that matters were not in dispute, and the time-bar issue could be dealt with without evidence, unless the claimant was proposing to give evidence at this Hearing. In reply, Ms Dalziel confirmed that there would be no evidence on this point led at this Hearing, just her submissions on behalf of the claimant.

74. Mr Ettles commented that the **Galilee** option was not appropriate in this case, where the facts and circumstances were different as regards an alleged continuing act, and he described the issues here as "***more straightforward***."

75. In concluding his submissions, Mr Ettles stated that it was not fair or just to allow the proposed amendment, and to do so would be contrary to the overriding objective, looking at it not being fair or just to the respondents to allow the amendment, with hardship and prejudice to them, if it were to be allowed by the Tribunal.

Reply for the Claimant

76. It then being 11.48am, I invited Ms Dalziel to reply to Mr Ettles' objections. She did so saying that he had said he was not clear what evidence would be led at the Final Hearing to determine whether it was just and equitable to extend time.

77. It seemed to her that would be appropriate, if I could not determine this factor at this Hearing, but the claimant says the respondents' failure to make reasonable adjustments is part of a continuing act, and she saw that the last act was September 2016, and not the effective date of termination as argued by the respondents.

78. She then described **Galilee** as her "***backstop onl***y" and accepted that the matter could go to the Final Hearing if I felt there was a difference between 2 &1/2 years late, and 3 years late.

79. Ms Dalziel then referred to **Harvey** on just and equitable extensions, and the **Keeble** factors at paragraph **[279]** of **Harvey.** On factor (a), the length and reason for delay, she submitted that much of it was outwith the claimant's control. He did what he thought was the right thing to do in April 2015, and he did not unduly delay.

80. While there was an amendment application, in December 2015, and thereafter a delay, things did not progress as the cases were sisted for a long-time, related to the first 2 claims brought, and the claimant did not withdraw that December 2015 amendment application. Proceedings were sisted due to an order of the Tribunal.

81. Next, as regards **Keeble** factor (e), steps taken by the claimant to get proper advice, matters were addressed by Ms Dalziel, without delay, after she was first instructed by the claimant.

82. Turing then to "***forensic prejudice***" to the respondents, and **Harvey** at **[279.01],** Ms Dalziel noted how Mr Ettles had referred to 3 witnesses who would have fading memories, but as those witnesses had been inherently involved in Mr Gourlay's case, she did not think that he would have readily escaped their memories, and as these witnesses are being called by the respondents to speak to other matters anyway, they will be aware that there is some litigation ongoing between the parties.

83. Further, she added, the respondents clearly have not lost touch with their witnesses, as they had intimated that they would be attending the Final Haring as witnesses for them. As regards documents, she imagined that there will be documents held, and it is not likely that they will have ben disposed off over the last 3 years given the litigation ongoing between the parties, rather than

future litigation contemplated. These combined claims were existing and known about by the respondents. Similarly, no issue had been raised by Mr Ettles about the location of witnesses being a concern.

84. While Mr Ettles had submitted that he did not accept that reasonable adjustments claim were on the respondents' radar for years, as she argued, she took issue with his position, as while they cannot have known the factual basis that underpins the reasonable adjustments claim, it is now well pled, and they will have until the Final Hearing in June 2019 "***to get their house in order."***

Reply for the Respondents

85. It then being 12 noon, Mr Ettles made a brief reply, stating that Ms Dalziel had made much about matters outwith the claimant's control, but he did not accept that point, as the claimant had sought legal advice at the outset, and he had sought legal advice on other matters, and so he is not blameless in that regard.

86. Further, while she had stated that the claimant would not have escaped the memories of the respondents' witnesses, he was sure they will, and he added that what concerns him is how much detail they will recall. He further stated that he does not accept that a reasonable adjustments claim was on the respondents' radar, but it was different sorts of claims that were then on their radar, and not this matter.

Reserved Judgment

87. At the conclusion of this Preliminary Hearing, at 12:03pm, I thanked both parties' representatives for their attendance and contribution and advised them that I was reserving Judgment to be issued in writing in due course, hopefully within around 4 weeks. I apologise for the delay in issuing my

Judgment within that period, on account of the festive holiday closures, and other judicial business.

88. While Mr Ettles had suggested I might wish to adjourn, and deliver an oral judgment, later that same day of this Preliminary Hearing, I indicated that I did not consider that appropriate, as there were many issues for me to carefully consider, arising from both parties' agents' oral and written submissions, and so I required time for private deliberation in chambers.

89. Ms Dalziel stated that, if her amendment application were to be allowed, she accepted that the respondents needed to reply, and she added that 4 weeks seemed a perfectly reasonable period for the respondents to do so.

Issue for the Tribunal

90. The issue for determination by the Tribunal at this Preliminary Hearing was whether or not to allow the claimant's opposed application to amend the consolidated ET1 claim form intimated by Ms Dalziel, on 10 September 2018, and, if so, to regulate further procedure.

Relevant Law: Amendments

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

92. In many instances where there is an application to amend a claim form, it is done because a particular head of claim has not been fully explored or clarified in the initial claim. **Harvey on Industrial Relations and**

Employment Law ("***Harvey"***) at section P1, paragraph 311.03 distinguishes between three categories of amendments: -

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

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

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

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

94. In a detailed review of the case law, Mr Justice Underhill considered the appropriate conditions for allowing an amendment. In particular, he referred to the guidance of Mr Justice Mummery (as he then was) in ***Selkent Bus Company Ltd v Moore [1996] IRLR 661*** where he set out some guidance. I do not reproduce that guidance here, as Mr Ettles incorporated in his objections on behalf of the respondents, which I have reproduced above, earlier in these Reasons, to which I refer back for ease of reference.

95. In that ***Safeway*** judgment, Mr Justice Underhill also referred to the judgment of the Court of Appeal in England and Wales in ***Ali v Office of National***

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

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

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

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

98. Further, there is the Judgment of the Employment Appeal Tribunal in **Chandhok –v- Tirkey [2015] IRLR 195**, and in particular at paragraphs 16 to 18 of Mr Justice Langstaff's Judgment in **Chandhok**, where the learned EAT President referred to the importance of the ET1 claim form setting out the essential case for a claimant, and that not being found not elsewhere, as otherwise a case proceeds on "***shifting sands***", and that is not permissible.

99. It is also appropriate for me to take into account earlier judicial guidance from Mr Justice Langstaff, then President of the Employment Appeal Tribunal in the unreported Judgment by him on 14 May 2014 in the **Secretary of State for Health v Mrs K Vaseer & Others UK EAT/0096/14.**

100. At paragraph 3 of that Judgment, the learned President of the EAT stated as follows: -

"Where an amendment is sought, it relates to the way in which a claim is presented to a Tribunal. In the course of the discussion before me it is plain both that Judge had to deal with a lot of assertions as to the facts of the case, which had yet to be established in evidence if ever they might be and asked to consider as if fact and as if part of "the case" that which had never actually been put in writing. It should not be thought that an ET1 or, for that matter an ET3 is simply a document there to set the ball rolling and that what really matters is in some way only hinted at in the words which are used. The document has a real purpose to fulfil, which should not be undervalued. It sets out the nature of the case so that a Respondent or, for that matter, the Claimant may understand the case of the other. It enables a Court of Appeal, the Tribunal in the first instance, to see essentially what is being alleged. It is particularly useful for

advance preparation by a Judge and Tribunal Members. It helps the administration to know how long might be needed for the case so that it may make appropriate arrangements to ensure that justice is best done. It is right that Tribunals have a degree of informality which is not true of civil courts. That owes a lot to their historical origin. It makes them more amendable to litigants who have no legal experience and may be presenting their cases in person. For that reason it is important not to be so technical about the wording of an originating application as to lose sight of the context in which it necessarily will be set. A Judge or reader is entitled to have regard to context in so far as it is familiar or known to the parties, or must be known to the parties, in understanding what is alleged, but it is still the job of the document to make those allegations. The parties cannot expect the Tribunal or, for that matter, each other to understand that a case is being made which has not in fact been referred to in the document concerned or sufficiently indicated by that document albeit taken in context."

101. Having noted the Judgment of Mr Justice Langstaff in the **Secretary of State for Health v Vaseer,** as detailed above, it is also appropriate to have regard to further judicial guidance available to this Tribunal, this time from the Court of Appeal, on appeal from a Judgment of Mr Justice Langstaff at the Employment Appeal Tribunal, in the case of **Patricia Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374,** where Lord Justice Mummery (himself a former President of the EAT), at paragraph 28 of the Court of Appeal's Judgment, stated that :-

"Employment Tribunals should use their wide ranging case management powers, both before and at a Hearing, to exclude what is irrelevant from the Hearing and to do what they can to prevent the parties from wasting time and money and from

swamping the ET with documents and oral evidence that have no bearing, or only a marginal bearing, on the real issues."

102. Further, Lord Justice Mummery agreed, at that same paragraph 28, with the constructive comments of Lord Justice Lewison, set forth at paragraph 33 of the **Davies** Judgment from the Court of Appeal, where that learned Court of Appeal Judge stated that: -

"If the parties have failed in their duty to assist the Tribunal to further the overriding objective, the ET must itself take a firm grip on the case. To do otherwise wastes public money; prevents other cases from being heard in a timely fashion, and is unfair to the parties in subjecting them to increased costs and, at least in the case of the employer, detracting from his primary concern, namely to run his business."

103. I also note the judicial guidance from Mrs Justice Slade DBE, sitting in judgment in the Employment Appeal Tribunal, on 20 March 2012, in **Fairbank v Care Management Group** and **Evans v Svenska Handelsbanken AB (PUBL) UKEAT/0139-141/12.**

104. As Mrs Justice Slade DBE, sitting alone, held in that EAT judgment, parties need to specify the claims they are making: **Chapman v Simon [1994] IRLR 124**. Without being prescriptive, at paragraph 13 of her judgment, she stated that the essentials to be pleaded are likely to be: (1) the legal basis of the claim;(2) what the act or omission complained of was;(3) who carried out the act; (4) when the act or omission complained of occurred; (5) why complaint is made of the act/omission; (6) anything affecting remedy.

105. Further, at paragraphs 15 and 16, the learned EAT Judge held that it is an error of law / perverse for an Employment Judge to limit what there is in an ET1, but if some paragraphs set out irrelevant matters etc. there could be an application to strike out the offending paragraphs. Further, she held, at the

end of a Hearing questions of costs may arise if the ET1 or ET3 is unreasonably prolix leading to waste of costs.

106. She also identified (at paragraph 19) that the appropriate way of dealing with prolix pleadings is by identifying issues at a Case Management Discussion, as they were then known, now Case Management PH, (see Lord Justice Mummery in **Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530,** at paras 53 & 54), and (at paragraph 23) that issues must not be over elaborate or numerous (see Mummery LJ in **St Christopher's Fellowship v Walters-Ennis [2010] EWCA Civ 921**).

107. Also, of assistance to a Tribunal considering any amendment, there is the Court of Appeal's Judgment in **Abercrombie & Others v Aga Rangemaster Ltd [2013] EWCA Civ 1148; [2013] IRLR 953**, and in particular, the Judgment of Lord Justice Underhill, at paragraphs 42 to 57. As Lord Justice Underhill pointed out in **Abercrombie,** at paragraph 47, the **Selkent** factors are neither intended to be exhaustive nor should they be approached in a tick-box fashion. There is nothing in the Rules or the case-law to say that an amendment to substitute a new cause of action is impermissible.

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

> ***48.Consistently with that way of putting it, the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal***

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

49. It is hard to conceive a purer example of "mere re-labelling" than the present case. Not only the facts but the legal basis of the claim are identical as between the original pleading and the amendment: the only difference is, as I have already said, the use of the section 34 gateway rather than that under section 23. In my view this factor should have weighed very heavily in favour of permission to amend being granted. As the present case only too clearly illustrates, some areas of employment law can, however regrettably, involve real complication, both procedural and substantial; and even the most wary can on occasion stumble into a legal bear-trap. Where an amendment would enable a party to get out of the trap and enable the real issues between the parties to be determined, I would expect permission only to be refused for weighty reasons – most obviously that the amendment would for some particular reason cause unfair prejudice to the other party. There is no question of that in the present case.

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

110. Further, despite it being unreported, there is also Lady Smith's EAT judgment in the Scottish appeal of **Ladbrokes Racing Ltd v Traynor [2007] UKEATS/0067/07.** It is detailed in chapter 8 of the **IDS Handbook on Employment Tribunal Practice and Procedure**, at section **8.50.** At paragraph 20 of her judgment, Lady Smith, as well as noting the **Selkent** principles, stated as follows:

> ***"When considering an application for leave to amend a claim, an Employment Tribunal requires to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing. That involves it considering at least the nature and terms of the amendment proposed, the applicability of any time limits and the timing and the manner of the application. The latter will involve it considering the reason why the application is made at the stage that it is made and why it was not made earlier. It also requires to consider whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs whether because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if they are unlikely to be recovered by the party who incurs them. Delay may,***

of course, in an individual case have put a respondent in a position where evidence relevant to the new issue is no longer available or is of lesser quality than it would have been earlier."

111. Further, there is also the unreported judgment of the EAT President, Mr Justice Langstaff, in **Thomson v East Dunbartonshire Council & Another [2014] UKEATS/0049/13**, where some 5 months after filing an ET1, the claimant sought to amend his existing claim to add a complaint of dismissal, arguing that it was intrinsic to his existing claim, and arose out of the same facts. An Employment Judge refused the amendment, on the basis of the principles in **Selkent**, and the claimant argued that the discretion was flawed in law, in part because the Judge had applied a "***balance of prejudice***" test whereas referred in **Selkent** there was reference to balancing "***injustice and hardship***",

112. The EAT President, in **Thomson**, held that the Employment Judge had directed himself appropriately, and he did not take into account any irrelevant factor or leave out of account any relevant factor. There was meaningful difference between "***prejudice***" on the one hand and "***injustice and hardship***" on the other. In dismissing the claimant's appeal in that case, Mr Justice Langstaff stated, at paragraph 13 of the EAT judgment, that:

"… It seems to me that the balance of prejudice, essentially, is intended to convey the same concept. It may perhaps be helpful to return to the words used by Mummery J in future considerations of a case such as this, though frequently "balance of prejudice" is the lawyers' shorthand for the necessary exercise, purely because it may focus more closely on the two separate questions: injustice on the one hand, hardship on the other. But balance of prejudice is capable of including matters which might not strictly be described as unjust or hard but may nonetheless be relevant. All the circumstances have of course to

be taken into account. I do not see using this phrase as an error of law in the Judge's approach. In my view, he correctly approached the exercise of his discretion. "

Relevant Law; Time Bar

113. **Section 123(1) of the Equality Act 2010** governs the time limit for the making of discrimination claims to the Employment Tribunal:

"(1) Proceedings on a complaint within section 120 may not be brought after the end of -
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable."

114. Then **Section 123 (3)** provides, so far as material for present purposes, as follows:

"(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;"

115. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. **Robertson v Bexley Community Centre (t/a Leisure Link) [2003] IRLR 434** is commonly cited as authority for the proposition that exercise of the discretion to apply a longer time limit than three months is the exception rather than the rule.

116. In **Chief Constable of Lincolnshire Police v Caston** [**2010] IRLR 327** Lord Justice Auld noted that the comments in **Robertson** were not to be read as encouraging Tribunals to exercise their discretion in a liberal or restrictive manner. The Tribunal should take all relevant circumstances into account and consider the balance of prejudice of allowing or refusing the extension.

117. The Tribunal may, where appropriate, gain assistance by looking at the factors applied in personal injury actions, see **British Coal Corporation v Keeble [1997] IRLR 336.** The Tribunal may wish to consider the length and reason for the delay, the extent to which the cogency of the evidence is likely to effected by the delay, the extent to which the parties pursued has cooperated with any request for information, the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate professional advice.

118. The fact that an employee is pursuing an internal grievance or other procedures is a factor that may be taken into account in determining whether time should be extended: **Apelogun-Gabriels v Lambeth London BC [2002] ICR 713.** In the present case, after being dismissed from the respondents' employment, the claimant pursued an internal right of appeal against dismissal which was, after a delay caused by many hearings before elected councilors of the respondents, rejected.

119. When a claim is brought out of time and the Employment Tribunal is considering whether it is just and equitable to extend time, the relevant principles are as set out by the EAT in **British Coal Corporation v Keeble [1997] IRLR 336 EAT**:

> ***"8. … It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to –***

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had cooperated with any requests for information;

(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."

120. However, as per Mr Justice Langstaff, then President of the EAT, in **Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13/LA,** those principles are to be read as guidance and not a statement of statutory requirements. It has, further, been held to be necessary for Tribunals, when considering the exercise of such a discretion, to identify the cause of the claimant's failure to bring the claim in time; see **Accurist Watches Ltd v Wadher UKEAT/0102/09,** and **Morgan**, where the EAT ruled:

> ***"52. Though there is no principle of law which dictates how sparingly or generously the power to enlarge time is to be exercised (see Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298 at para 25, per Sedley LJ) a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to do so, and the exercise of discretion is therefore the exception rather than the rule (per Auld LJ in Robertson v Bexley Community Centre [2003] IRLR 434 CA). A litigant can hardly hope to satisfy this burden unless he provides an answer to two questions, as part of the entirety of the circumstances which the tribunal must consider. The first question in deciding whether to extend time is why it is that the primary time limit has***

not been met; and insofar as it is distinct the second is reason why after the expiry of the primary time limit the claim was not brought sooner than it was."

121. On the matter of time-bar, as the Employment Appeal Tribunal recognised in **Miller and others v Ministry of Justice [2016] UKEAT/003/15**, per Mrs Justice Elisabeth Laing DBE, at paragraph 12:

"…. There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses… "

Discussion and Deliberation

122. Mr Ettles, solicitor for the respondents, argued strongly against allowing the amendment sought by Ms Dalziel, for the claimant, while the latter argued with equal strength of conviction that the proposed amendment should be allowed, to properly address all relevant matters, in a way that the claimant was better specifying his reasonable adjustments case against the respondents in greater detail.

123. In considering, in the present case, whether it is appropriate to allow the amendment, I have considered the **Selkent** principles, as well as the more recent case law authorities referred to earlier in these Reasons, and I have to take into account not just the interests of the claimant but also those of the respondents. So too have I considered the matter of time-bar, as also hardship and injustice to both parties in allowing or refusing the amendment,

as also the wider interests of justice in terms of the Tribunal's overriding objective to deal with the case fairly and justly.

124. Having considered parties' oral and written submissions, and having considered this matter most carefully, and also my own obligations under **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, I consider that it is in the interests of justice and in accordance with the Tribunal's overriding objective to allow this amendment of the consolidated ET1 claim form.

125. Further, I am satisfied that it is in the interests of justice, and in accordance with the Tribunal's overriding objective, to allow this amendment, and further being satisfied that it is just and equitable to extend time, under **Section 123(1) (b) of the Equality Act 2010**, to allow the claimant to bring this new cause of action, in respect of the respondents' alleged failure to make reasonable adjustments, contrary to **Section 20 of the Equality Act 2010.**

126. I accept Mr Ettles' point that the relevant date should run from **24 September 2015**, being the effective date of termination of employment, and not 25 August 2016, the date of the respondents' refusal of the claimant's internal appeal against dismissal. The claimant ceased to be an employee of the respondents on the former date, and so he could not have been the subject of any failure by the respondents to make reasonable adjustments after his employment had been terminated by them.

127. An amendment can be proposed at any time in the course of a claim before the Tribunal, and the applicability of time-limits only relates to the situation where a new complaint or cause of action is proposed to be added by way of amendment. Ms Dalziel has conceded here that the amendment proposed by her, on behalf of the claimant, is category 3, being a wholly new head of claim, rather than category 2 seeking to add to an existing claim, linked to and arising out of the same facts as the original claim.

128. I have considered the timing and manner of the application to amend. It is, of course, correct to say that a significant amount of time has elapsed between the claims having been lodged and the application to amend being made.

129. Further, this is a third application to amend, the first amendment, intimated in December 2015, by the claimant, when acting on his own behalf, not progressing, due to sist of the Tribunal proceedings, while the second amendment submitted, via Mr Booth, in October 2017, was ultimately withdrawn, when the claimant withdrew his instructions for Mr Booth to act on his behalf, and the claimant then secured new legal representation through Ms Dalziel.

130. Ms Dalziel, in her oral and written submissions, has provided me with a cogent explanation for why she feels it necessary for the claim to be amended, to bring in the reasonable adjustments claim, and in so doing she has addressed the delay in lodging this application to amend.

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

132. While there has been delay between the issue of the proceedings and the lodging of this application to amend, a significant factor in considering the timing of the application is that this litigation is not yet at a stage where a Final Hearing has started. On that basis, I consider that it is unlikely that the respondents will be seriously prejudiced because of the timing of this application.

133. I recognise, of course, there has been some prejudice to the respondents to date in that they have had to deal with this on-going litigation, where the pleadings have been set since 24 April 2015, when the first of these 4 combined claims was presented to the Tribunal, but I think it also relevant

that, for much of that period, proceedings have been sisted, on account of the then ongoing proceedings addressed by the Gall Tribunal.

134. While Mr Ettles spoke of the respondents being unsure about the factual and legal basis of the reasonable adjustments head of claim, the respondents have, to date, taken no pro-active steps to seek to clarify matters via the Tribunal. He sought to explain that that was because this was a proposed amendment, and so was not part of the pleadings. That is a very technical approach, rather than pragmatic.

135. However, I do not criticise him for not having done so, because these cases have been a complex and interweaved set of claims, running back some 4 plus years now, involving not just these 4 combined claims, but the earlier first and second claims, disposed of by Employment Judge Gall's Tribunal, which resulted in proceedings in these combined claims being sisted, while the respondents progressed the claimant's internal appeal against dismissal, and later sisted as there was an appeal to the EAT against the Gall Tribunal's Judgment, although that appeal was later withdrawn by the claimant.

136. Further, sist of these proceedings continued thereafter, as Judge Gall's Tribunal dealt with and disposed of an expenses application by the respondents against the claimant. There was then earlier Preliminary and Expenses Hearing before this Tribunal in connection with these present Tribunal proceedings, all of which has taken time to progress.

137. I recognise that it has taken a considerable amount of time and procedure to reach the stage that the parties are now at. If anything, however, allowance of the amendment makes the claimants' position clearer, and this, it would be reasonable to anticipate, should serve to prevent further unnecessary procedure. Further, any prejudice to the respondents is, in my view, offset, in that if the amendment is allowed, as I have decided it shall be, the respondents are not being asked to face a wholly new head of claim of which they have no prior knowledge.

138. Further, the amendment having now been allowed by me, the respondents retain the right to defend the claim as amended in its entirety. I do not accept that it can be held that there has been an element of surprise in this further head of claim as far as the respondents are concerned – their radar should have detected the reasonable adjustments claim as an incoming item long ago, and they should have sought to take steps to deal with it as a likely further addition to the existing claims.

139. Nor do I accept that this is a "***raft of new claims***", not that it will ***"prolong the hearing in this case significantly"***, as per Mr Ettles' objections of 17 September 2018.

140. A reasonable adjustments claim has been there, lurking about in the backgrounds, for a number of years, since the claimant first sought to amend in December 2015.

141. His application to amend, dated 21 December 2015, in claim **4106155/15**, was made to amend that ET1, superceding the ET1 previously submitted on 12 April 2015. He added some details of a **Section 20**, failure to make reasonable adjustments claim, to which Gavin Walsh, then the respondents' solicitor on record, intimated objections on 29 December 2015.

142. On 5 January 2016, I instructed that no arrangements would be made meantime to list the opposed amendment application for a Preliminary Hearing, as his cases 1 and 2 were still ongoing before EJ Gall's Tribunal, and the claimant's internal appeal against dismissal was to be considered by the respondents.

143. Both parties were instructed to update the Tribunal, when the internal appeal outcome was intimated, and, at that stage, to advise the Tribunal of what further procedure was being proposed by them. The sist I put in place remained in place, and claims 3 and 4, being **122 and 137/15**, were sisted, pending the outcome of the then EAT appeal in claims 1 and 2. That

December 2015 amendment application by the claimant was never withdrawn, nor was it ever adjudicated upon by the Tribunal. Equally, the respondents took no steps to recall the sist, and seek to progress their objections to that amendment.

144. I have considered all the relevant factors and balanced the injustice and hardship to the claimant in refusing the application, against the injustice and hardship to the respondents in allowing the application. I have done so having regard to the whole procedural history to these Tribunal proceedings.

145. This is not a case where there has been an inordinate and inexcusable delay on the part of the claimant or the representatives acting for him in progressing his claims.

146. For a substantial period, these four combined claims were sisted, as regards further procedure, by order of this Tribunal, because of the two earlier claims brought by the claimant against the respondents and determined by the Gall Tribunal.

147. Against such a background, which is clearly a relevant factor for me to take into account, I cannot find that such delay results in prejudicial unfairness to the respondents.

148. In my view, this amendment should have been refused only if I was satisfied that there is at least a substantial risk that justice cannot be done, or, to put it another way, that a fair trial cannot occur, if the amended proceedings are allowed to continue.

149. In these Tribunal proceedings, I am satisfied that, with the amended consolidated claim, and the respondents' response to come, the issues in dispute will be clarified, and a fair trial remains possible in a realistic sense, as justice requires a determination of the issues at stake even if some

unfairness which the respondents anticipate as a possibility may find it difficult to remedy has entered the process.

150. Justice between the parties is still possible, and the issues between them, in these combined claims, can still be adjudicated upon fairly by the Tribunal at the Final Hearing assigned for 16 days in June 2019.

151. While, in his oral submissions, Mr Ettles, solicitor for the respondents, made much of "***forensic prejudice***", he did not identify that any specific evidence had been lost over time, nor any specific prejudice. A delay of the length that has occurred in this case will inevitably create difficulties for all parties to a litigation.

152. In many cases, after a passage of time, witnesses may be difficult to trace, but that is not put forward by Mr Ettles as a factor in these cases. Further, it is well recognised that any witnesses' memory may have faded with the passage of time and become unreliable. To the extent that these difficulties affect the presentation of the respondents' defence, I accept that they may introduce an element of unfairness into the proceedings. Despite this, I am not persuaded that the circumstances of this case are such that there is a substantial risk that justice cannot be done.

153. Mr Ettles raised with me only possibilities, not probabilities, or certainty of known disadvantages to the respondents, by way of the banner of "***forensic prejudice".*** While some of his witnesses have left the respondents' employment, he has been able to contact them about their availability, and presumably precognosce them. He confirmed to me that they are all still alive, and he did not indicate that any had moved away, so as to make their location a difficulty in terms of them attending to give evidence at the Final Hearing.

154. Although there may still be difficulties in fading memories, that impacts as much on the claimant as on the respondents' witnesses, and I agree with Ms Dalziel that the claimant is a memorable individual, and given many Council

officers have given evidence before the Gall Tribunal, including some of those to be led on the respondents' behalf in this forthcoming Final Hearing, I do not foresee that being a significant problem for the respondents.

155. While there is always a possibility, in any large organisation, that papers may be lost, or perhaps even destroyed, after a passage of time, no specific issue was flagged up by Mr Ettles, and I agree with Ms Dalziel that, given the ongoing Tribunal litigation before the Gall Tribunal, and these further, sisted claims, the respondents, as a public authority, with specific legal duties as regards document storage and retention, are not likely to have disposed of papers that are relevant and necessary for a fair hearing of these claims.

156. Officers of the Council, whether still serving or now former employees of the respondents, can be given access to documents that will be in the Joint Bundle prepared for the merits hearing at Final Hearing, and so could refresh their memories from contemporary personnel records made by them years ago relating to the claimant.

157. The factual issues likely to be canvassed at the Final Hearing are in narrow compass, and assessment of the credibility and reliability of witnesses does not appear to me to be an unduly difficult task for the full Tribunal which will take that merits hearing. It is an everyday part of the job that any Tribunal performs sitting as an industrial jury.

158. Given that the respondents have been on notice of the proposed amended claim from 10 September 2018, at latest, I do not believe that they are prejudiced in any meaningful way by including the amended parts of the claim or that there is any question of hardship to the respondents. The respondents are simply going to have to address another aspect of a claim which has already been indicated to them, but that is unfortunately a fact of life in industrial relations claims.

159. In my view, there would undoubtedly be a greater hardship to the claimant if he was unable to pursue the full extent of his claim as amended, and I

consider that the potential injustice to him in refusing the amendment, in full, is greater than a potential injustice to the employer if this matter is allowed to continue with the claim as amended.

160. The claim, as now amended, is still closely related to the claim originally lodged, and, in my view, the amendment allows the issues in dispute to be better focussed, and looking at the Final Hearing before the Tribunal, on dates now assigned, both parties will be on an equal footing in that all relevant information has been disclosed so as to allow preparation for a Final Hearing to progress on the basis that all the claimant's cards are now on the table.

161. The amendment will, in my view, have little impact on the cogency of the evidence to be heard at a Final Hearing as a result of the delay in applying to make this amendment, and the Final Hearing can proceed to be listed, for the 16 days mutually agreed and identified at this Preliminary Hearing, and it is likely to proceed with the same number of witnesses as originally envisaged.

162. Further, in my view, the amendment does not seek to change the basic argument that the claimant submits that he was the subject of an unfair dismissal by the respondents, as also the subject of unlawful discrimination on grounds of his disability, but it does helpfully provide clarity around the alleged acts and omissions of the employer and its staff named by the claimant, which allegations the claimant is offering to prove.

163. Finally, this amendment as allowed does not affect the ability of the Employment Tribunal to conduct a fair hearing of the case, on the dates now assigned by the Tribunal for the Final Hearing. In all of these circumstances, I have decided to allow the amendment sought by the claimant. I have so ordered at paragraph (1) of my Judgment.

Further Procedure

164. Further, having allowed this amendment for the claimant, I have decided that it is likewise in the interests of justice to allow the respondents an opportunity

to lodge further and better particulars with the Tribunal on their own behalf, if so advised.

165. Any such further and better particulars should seek to answer the claimant's amended paragraphs of the conjoined paper apart to the ET1 claim form, so as to fully specify the respondents' grounds of resistance to that amended part of the claim, and so augment the grounds of resistance originally set forth in their consolidated ET3 response form presented on 20 September 2018.

166. As discussed with parties' representatives, at this Preliminary Hearing, when Mr Ettles sought 6 weeks, if I orally allowed the amendment there and then, to take account of the forthcoming festive holiday period, or 4 weeks otherwise, and Ms Dalziel not objecting to 4 weeks, I consider that 4 weeks is a fair and reasonable period of time from date of issue of this Judgment for Mr Ettles to arrange for lodging any such further and better particulars for the respondents. I have so ordered at paragraph (2) of my Judgment.

167. Finally, at paragraph (3) of my Judgment, I have ordered that combined claim and response, as so amended, shall proceed to the listed 16-day Final Hearing, before a full Tribunal panel, at the Glasgow Tribunal office, on the dates mutually agreed and assigned by the Tribunal at this Preliminary Hearing.

168. Neither party's representative suggested, at the close of this Preliminary Hearing, that there should be a further Case Management Preliminary Hearing, arranged before the start of the now listed Final Hearing. I have not so ordered, as I consider that unnecessary.

169. It seems to me that the case has been case managed at the last Case Management Preliminary Hearing, on 29 October 2018, in my supplementary Note and Orders of 5 December 2018, and at this Preliminary Hearing, followed up by my further Note and Orders dated 24 December 2088, but, of course, I recognise that in any case, things can emerge, where a further Case Management Preliminary Hearing might be appropriate.

170. Accordingly, should any other matters arise between now and the start of the Final Hearing, on **Monday, 3 June 2019**, then written case management application by either party's representative should be intimated, in the normal way to the Tribunal, by e-mail, with copy to the other party's representative, sent at the same time, and evidencing compliance with **Rule 92,** for comment / objection within seven days.

171. Dependent upon subject matter, and any objection / comment by the other party's representative, any such case management application may be dealt with on paper by me as the allocated Employment Judge, or a Case Management Preliminary Hearing fixed, either in person, or by telephone conference call, as might be most appropriate.

Closing Remarks

172. The case is now listed for Final Hearing. On 11 January 2019, the claimant's solicitor, Ms Dalziel, indicated to the Tribunal, with copy sent to Mr Ettles for the respondents, that the claimant is interested in exploring Judicial Mediation as an alternative dispute resolution.

173. However, on 25 January 2019, Mr Ettles advised the Tribunal, with copy to Ms Dalziel, that the respondents are nor interested in exploring Judicial Mediation. No specific reason is given by the respondents' solicitor.

174. In issuing this Judgment, I remind both parties that, as per **Rule 3 of the Employment Tribunals Rules of Procedure 2013:**

> ***Alternative dispute resolution***
>
> ***3. A Tribunal shall wherever practicable and appropriate encourage the use by the parties of the services of ACAS, judicial or other mediation, or other means of resolving their disputes by agreement.***

175. I encourage both parties to use ACAS, or Judicial Mediation, as a means of resolving their disputes by agreement. As against the prospect of a 16-day Final Hearing, and the time and costs for the claimant, a disabled person, and the time and costs that will be associated with that Hearing for the respondents as a public authority, the respondents may wish to reflect again on Judicial Mediation.

176. Any application, which requires approval by the Vice President, would be supported by me, as the cases clearly fall within the parameters of cases suitable for Judicial Mediation. Given the Final Hearing is now listed, any joint request for Judicial Mediation should be made at the earliest opportunity.

Employment Judge: Ian McPherson
Date of Judgment: 31 January 2019
Entered in register: 01 February 2019
and copied to parties