EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104424/2022 (V)

Preliminary Hearing held in public in Glasgow and conducted remotely on the Cloud Video Platform on 4 January 2023

Employment Judge Ian McPherson

Mr Patrick Taggart	**Claimant** **In Person**
Falkirk Council	**Respondents** **Represented by:** **Ms Gillian Mair - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The reserved judgment of the Employment Tribunal, having heard submissions from both parties in Preliminary Hearing, and continued consideration to private deliberation in chambers, and having regard to both their oral and written submissions to the Tribunal, is to:

(1) refuse the claimant's opposed application to amend the ET1 claim form, to add additional complaints of age, sex and disability discrimination and victimisation, on the basis that it is not in the interests of justice to allow those amendments, and it is not in accordance with the Tribunal's overriding objective to deal with this case fairly and justly to allow those amendments;

(2) insofar as it is necessary to do so, the Tribunal strikes out the claim (save for unfair constructive dismissal), under **Rule 37 of the Employment Tribunal Rules of Procedure 2013**, the basis that any complaints of age, sex or disability discrimination or victimisation have no reasonable prospect of success; and

(3) order that the claimant's existing complaint of unfair constructive dismissal by the respondents shall proceed to a Final Hearing in person before a full Tribunal at Glasgow Tribunal Centre on dates to be hereinafter assigned by the Tribunal, having regard to parties' availability, in the proposed listing period of **May, June or July 2023,** and instruct the Tribunal clerk to issue date listing letters to both parties for completion and return to the Tribunal.

REASONS

Introduction

1. Firstly, I apologise sincerely to both parties for the delay in finalising this Judgment, due to the pressures of other judicial business. A written apology has previously been sent, on my behalf, to both parties.

2. This case called before me, as an Employment Judge sitting alone, on Wednesday, 4 January 2023, for a public Preliminary Hearing previously ordered by another Judge at an earlier stage in proceedings.

3. In particular, following a telephone conference call Case Management Preliminary Hearing held on 14 November 2022, before Employment Judge Sandy Kemp, he made various case management orders, for the claimant to provide Further and Better Particular of the claims he sought to make, by 28 November 2022, and for the respondents to provide a response to those Particulars by 12 December 2022.

4. Judge Kemp also ordered that a Strike Out Preliminary Hearing be listed to determine whether the claims made by the claimant (save for constructive dismissal) should be struck out, under **Rule 37 of the Employment Tribunals Rules of Procedure 2013**, as having no prospects of success. His written PH Note and Orders dated 14 November 2022 was sent to both parties, under cover of a letter from the Tribunal, on 15 November 2022.

5. Thereafter, on 2 December 2022, the Tribunal issued Notice of Preliminary Hearing to both parties, confirming a public Preliminary Hearing to take place by video call using the Tribunal's Cloud Video Platform ("CVP") on

Wednesday, 4 January 2023, and identifying the preliminary issue to be decided as Strike Out of the claim.

6. When the case was thereafter allocated to me, on 6 December 2022, I reviewed the Tribunal's casefile, and I noted that the claimant had lodged Further and Better Particulars on 28 November 2022, and that the respondents had until 12 December 2022 to reply, but the claimant had not made any application to amend his ET1 claim form, as referred to by Judge Kemp in his PH Note.

7. On my instructions, a letter was sent by the Tribunal to both parties on 6 December 2022, stating that if the claimant was to make any application to amend, then he should do so, as soon as possible, given that the manner and timing of any application to amend is a factor for the Tribunal to take into account.

8. Further, to put the claimant on an equal footing with the respondents' solicitor, in terms of **Rule 2 of the Employment Tribunals Rules of Procedure 2013** (the Tribunal's overriding objective), I ordered the respondents' solicitor to prepare and intimate to the Tribunal, by no later than 4pm on Wednesday, 21 December 2022, a skeleton written argument.

9. I ordered that that skeleton written argument should set out the factual and legal basis of the respondents' application for Strike Out of the claim (save for constructive dismissal) under **Rule 37** as having no reasonable prospect of success, and to provide hyperlinks to any case law to be relied upon by the respondents.

Claimant's Amendment Application

10. On 11 December 2022, the claimant confirmed by correspondence to the Glasgow ET that he wished to amend his claim to include claims of sex discrimination, age discrimination and disability discrimination. He did so by submitting a revised ET1 form, using the original form and completed his additions in red ink so as to enable all to see what had been added from the

previously submitted form on 8 August 2022, and he initialled all changes he had made to the form.

11. I turn now to look at the specific amendments that the claimant marked up in red ink. The original content of his ET1 claim form is detailed later in these Reasons, at paragraphs 21 to 25 below. At section 8.1, the claimant now ticked that, in addition to unfair dismissal, he was discriminated against on the grounds of age, disability, and sex (including equal pay), which he had not ticked on first presentation.

12. Further, the claimant also added new text, about the other type of claim he was bringing, to add the new words, being "***Breach of ECHR (European Convention Human Rights) Article 6 and 8 as per written communication 28 Sep 2022."*** immediately after his previously stated complaints of "***Breach of confidentiality, discrimination – only interviewed me when others should have been interviewed, victimisation – similar to the discrimination, breach of trust and confidence by employer, invasion of privacy."***

13. On 12 December 2022, Ms Gillian Mair, solicitor with Brodies LLP, Glasgow, emailed the Tribunal, with copy to the claimant, to respond to the claimant's Further and Better Particulars of 28 November 2022, and to object to his application of 11 December 2022 to amend his Tribunal claim. The respondents' primary position, as stated then, was that the claim form does not contain claims of whistleblowing, age discrimination, sex discrimination and / or disability discrimination and that these claims should not be allowed to proceed on that basis. In the alternative, she wished to apply for strike out of the following claims: victimisation; whistleblowing; age discrimination; sex discrimination; and disability discrimination.

14. While the claimant had confirmed to the Tribunal by correspondence dated 11 December 2022 that he wished to amend his claim to include claims of age discrimination, sex discrimination and disability discrimination, Ms Mair noted that no application has been made to amend his claim to include a claim for whistleblowing. In his oral submissions at this Preliminary Hearing,

the claimant confirmed that he was not bringing any whistleblowing complaint, and that his references to health and safety was for background only, and he was not asking to amend to bring in any health and safety case under **Section 44 of the Employment Rights Act I996**.

15. On behalf of the respondents, Ms Mair objected to the new claims set out in the claimant's application to amend (and his additional information request document dated 28 November 2022) relating to sex discrimination; age discrimination; and disability discrimination. She outlined the reasons for the respondents' objection as being (a) new cause of action; (b) failure to lodge additional claims within relevant time limits; (c) failure to lodge claims within a reasonable period thereafter, and (d) risk of hardship greater on the respondents.

16. As per the Tribunal's letter to both parties, sent on my instructions on 13 December 2022, I had at that stage proposed to deal with the opposed amendment application by way of written submissions, rather than an oral Haring, if both parties were agreeable.

17. As Ms Mair's objections had only referred to the familiar and oft-quoted **Selkent** case, and not other Court of Appeal and Employment Appeal Tribunal judgments on the test to be applied in amendment applications, I invited further written representations from both parties, by 21 December 2022, on 3 case law authorities that I had cited for their specific consideration, and comment, namely : **Abercrombie v Aga Rangemaster Limited [2013] EWCA Civ 1148**, at para 48; **Kuznetsov v The Royal Bank of Scotland Plc [2017] EWCA Civ 43**, at paras 19 & 20; and **Vaughan v Modality Partnership Limited [2020] UKEAT 0147/20 ; [2021] ICR 535,** at paras 21-28.

18. In the event, following receipt of Ms Mair's 16-page written submissions on 21 December 2022, addressing the amendment application, and the Strike Out application, as also the claimant's 7-page written submission response of 21 December 2022, it was not possible for me to deal with the opposed

amendment application by way of written submissions, given the Tribunal office's closures for the festive holidays.

19. Ms Mair enclosed, with her written submissions on 21 December 2022, a copy of the NIRC Judgment in **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650.** Her submissions included blank page references to documents in a Bundle that had not yet been completed and intimated to the claimant or Tribunal. On 23 December 2022, the Tribunal and the claimant were emailed the respondents' Bundle and index for use at this Preliminary Hearing, and also attached was a further copy of the respondents' submissions which had been updated to include page references.

20. On my instructions, by letter emailed to both parties on 23 December 2022, they were advised that I had directed that that matter be added to the agenda for this Preliminary Hearing, on the first sitting day of the new year. In light of Ms Mair's detailed written submissions, I also allowed the claimant to make any further written representations by no later than 4pm on Tuesday, 3 January 2023.

Background

21. The claim was originally presented to the Tribunal, on 8 August 2022, by the claimant as an unrepresented, party litigant, acting on his own behalf, following ACAS early conciliation between 19 and 21 July 2022. He complained of unfair dismissal on 30 June 2022 from his job as Fleet Service Manager with the respondents. He ticked the box at section 8.1 of his ET1 claim form to indicate that he was making a claim that he had been unfairly dismissed (including constructive dismissal).

22. Further, at section 8.1 of his ET1 claim form, the claimant stated that he was also making another type of claim, which he described as "***Breach of confidentiality, discrimination – only interviewed me when others should have been interviewed, victimisation – similar to the discrimination, breach of trust and confidence by employer, invasion of privacy."***

23. The claimant did not tick any of the other boxes at section 8.1 to indicate the type of claim that he was making. In particular, he did not tick the box to say that he was discriminated against by the respondents on the grounds of any one or more of the 9 protected characteristics identified at that section 8.1. He did not mention any protected characteristics, protected act, protected disclosure, or any detriments. He provided some brief background detail at section 8.2, and at section 9.1 he indicated that, if his claim was successful, he wanted an award of compensation against the respondents.

24. At section 8.2, the claimant had stated as follows:

> ***"Senior manager at Falkirk Council. Corporate complaint with a number of allegations made against me. I fully cooperated with investigation process. Acts by other Council employees made it difficult for me to undertake my duties as meetings i should have led on were not notified to me. Not invited to key decision making process during investigation. Bullying behaviour towards me despite me continuing to try to do my job but was continually undermined. Breach of trust and confidence shown by Falkirk Council towards me as my employer and made my position untenable. I have written documents to send but not able to download using RTF - can send separately once i rise*** [sic] ***claim."***

25. He did not tick the box at section 10.1 to indicate that his claim consisted of, or included, a whistleblowing claim, and he ticked the box at section 12.1 to say that he did not have a disability. At section 15, he stated that he had prepared additional information paperwork which he would send separately.

26. He did so by email to Glasgow ET on 8 August 2022, with a detailed, attached document. He explained that his resignation was based upon the grounds of constructive unfair dismissal due to breach of duty of trust and confidence by his employer, serious breach of contract, breach of confidentiality, bullying and threatening behaviour, discrimination, victimisation, and invasion of privacy.

27. The claimant also sent the Tribunal a copy of his resignation letter of I3 June 2022 which refers to 'discrimination' and 'victimisation' but provides no reference to any protected characteristic, or protected act.

28. The claimant's additional information stated that he felt directly discriminated against as the only one of two Operator Licence holders interviewed as part of the respondents' investigation, despite Carl Bullough being his line manager as well as the other Operator Licence holder.

29. The claim was accepted by the Tribunal administration and registered as an unfair dismissal claim. Notice of Claim was served on the respondents by the Tribunal on 11 August 2022, including the ET1 claim form, and additional information provided by the claimant.

30. Thereafter, on 8 September 2022, an ET3 response, defending the claim, was lodged, on the respondents' behalf, by Ms Kirsty Cooper, solicitor with Brodies LLP, Edinburgh, attaching detailed grounds of resistance to the claim.

31. It was denied that the claimant was unfairly dismissed, as alleged or at all, and it was stated that he had resigned voluntarily. It was further denied that the respondents had unlawfully discriminated against the claimant, or victimised him, as alleged or at all. The respondents submitted that all of the claims should be dismissed by the Tribunal.

32. As the claimant's ET1 had indicated that he was bringing a claim of victimisation, and discrimination, in his sections 8.1 and 9.1, the respondents stated that the claim form did not narrate any facts setting out the factual and legal basis for a discrimination complaint, and that they would seek further and better particulars of those claims, and they might seek leave to amend their grounds of resistance following receipt of further and better particulars.

33. At Initial Consideration by Employment Judge Frances Eccles, on 13 September 2022, she ordered that if the claimant intended to proceed with a claim of discrimination, then he must, by 1 October 2022, identify the protected characteristic on which he relied, and identify the basis on which

the claimant claimed that he was treated less favourably by the respondents because of that protected characteristic.

34. Further, Judge Eccles also ordered that if the claimant intended to proceed with a claim of victimisation, then he must, by 1 October 2022, identify the protected act that he claimed to have done, as per **Section 27(2) of the Equality Act 2010,** and the detriment to which he claimed to have been subjected because he did the protected act.

35. On 29 September 2022, the claimant emailed Glasgow ET, with copy to the respondents' representative, providing his further and better particulars as ordered by Judge Eccles.

36. On referral to the duty Judge, Employment Judge Lucy Wiseman, and as per letter from the Tribunal to both parties, dated 7 October 2022, it was directed that a one-hour telephone Case Management Preliminary Hearing would be fixed by the Tribunal to clarify the basis of the claim being brought by the claimant.

37. Thereafter, on 12 October 2022, the case was listed for that telephone Case Management Preliminary Hearing to be held on 28 October 2022. In the event that Hearing did not proceed, as the claimant was unable to attend on the date and time fixed by the Tribunal, and so he applied for a postponement, which the respondents did not oppose.

38. The case was then relisted for Hearing on 14 November 2022, by fresh Notice of Preliminary Hearing issued by the Tribunal on 27 October 2022, after Employment Judge Laura Doherty's postponement of the Hearing listed for 28 October 2022.

39. As detailed earlier in these Reasons, the case thereafter called before Employment Judge Kemp on 14 November 2022 for that telephone Case Management Preliminary Hearing.

40. At that stage, the claimant confirmed to Judge Kemp that he did not think that any of the protected characteristics applied to his circumstances. The first time he referred to protected characteristics was in his additional information

request document provided on 28 November 2022 in response to the Tribunal's Order of 14 November 2022.

Preliminary Hearing before this Tribunal

41. This public Preliminary Hearing took place remotely, and it was conducted by videoconferencing using the Tribunal's CVP facility. I heard it in my chambers at Glasgow Tribunal Centre. The claimant attended remotely by CVP on his own behalf, unaccompanied, as did the respondents' solicitor, Ms Mair.

42. I had an Inventory of Productions, comprising some 17 indexed documents, extending across 175 pages, in a Preliminary Hearing Bundle lodged by Ms Mair, and copied to the claimant and Tribunal, in advance of this Hearing, with her email of 23 December 2022.

43. Although a public Hearing and listed as such by the Tribunal on the ***CourtServe*** website, no members of the public attended this Hearing. There were no insurmountable issues with use of the CVP, and I was able to receive oral submissions from both parties, augmenting their previously submitted written submissions. Both parties were able to see and hear each other, and me, except during adjournments where, rather than disconnect and re-connect parties, we adopted a practice of cameras off and microphones muted.

44. I had pre-read and considered the papers from the Tribunal's casefile, and the Bundle, and when I sought to confirm that both parties and I had the same set of papers, it emerged that the Tribunal's physical casefile did not have printed and placed thereon a copy of an email from the claimant sent by him the previous evening, Tuesday, 3 January 2023, at 18:56, along with various attachments, identified by him as additional appendices 21 and 22, being new documents not included in the Inventory of Productions.

45. He also included links to two Employment Tribunal judgments about disability status : **Doran v Pearl Holdings NW Ltd** [2022] 6 WLUK 438 (Manchester: **2408156/2021)** ; and **Burke v Turning Point Scotland** 2022 S.L.T. (Tr) 33 (Glasgow: **4112457/2021**).

46. Accordingly, I adjourned this Hearing for about 10 minutes, and printed off for my use, and placing on the Tribunal's casefile, a full copy of the claimant's email and attachments of 3 January 2023 that the CVP clerk had forward to my email inbox. Ms Mair confirmed that she had received it from the claimant, and while she had skim read it, she not been able to take instructions from her clients.

47. Later, having heard Ms Mair's oral submissions, I granted her an adjournment to take instructions from her clients, which she informed me she did, and I then heard further from her, before hearing from the claimant. Thereafter, having raised certain matters of clarification with Ms Mair, I gave her the final right of reply, before concluding this Hearing which lasted about 3 hours.

48. As a full copy of the respondents' and claimant's written submissions are held on the Tribunal's casefile, and I had access to them, and the Bundle, during the Hearing, and afterwards during my private deliberation in chambers, where I have read them again fully and carefully, it is not necessary to repeat here their full terms *verbatim.*

49. That is neither appropriate, nor proportionate. In my discussion and deliberation below, later in these Reasons, looking at each of the amendment application and Strike Out application in turn, I address the salient points made by each party in their respective submissions to the Tribunal.

Claimant's Application to Amend

50. As indicated earlier in these Reasons, at paragraphs 10 to 12 above, the claimant's application for leave to amend the ET1 claim form was intimated by him on 11 December 2022, and it was those very brief terms, adding inserts in red ink. No further details were then provided by the claimant.

51. As detailed at paragraph 44 above, however, an email from the claimant was sent by him the evening prior to the start of this Preliminary Hearing, being Tuesday, 3 January 2023, at 18:56, along with various attachments, identified by him as additional appendices 21 and 22, being new documents not included in the Inventory of Productions.

52. Entitled "***Re Claimant's position with regard to Protected Characteristics"***, it ran to 9 unnumbed typewritten pages, with items in non-numbered paragraphs on each of protected characteristics; age; disability; sex; health & safety; and victimisation.

53. As a full copy of the claimant's submission of 3 January 2023 is held on the Tribunal's casefile, and I had access to it, during the Hearing, and afterwards during my private deliberation in chambers, where I have read it again fully and carefully, it is not necessary to repeat here its full terms *verbatim*. That is neither appropriate, nor proportionate.

54. In my discussion and deliberation below, later in these Reasons, I address the salient points made by the claimant in this further written submission to the Tribunal. What is helpful to note, at this stage, is the claimant's final summary stating as follows:

> ***"In Summary, the Claimant raised concerns about the lack of attention being paid by the H&S team to its roles and duties and by raising this, the Claimant will contend that this fuelled the content of the investigation against him causing him to be victimised because he raised these concerns. This led to the Claimant being discriminated in the protected characteristics as discussed above which resulted in him being victimised and singled out causing his position to be untenable."***

Respondents' Objections to Amendment Application

55. Objections to the claimant's amendment application were intimated by Ms Mair for the respondents, on 12 December 2022, in the terms indicated earlier in these Reasons, at paragraphs 13 to 15 above. In her written submissions to the Tribunal, Ms Mair deals with the background to the claim, the amendment application, and the respondents' position objecting to it, at her sections 2.1 to 3.34.6.

56. As a full copy of the respondents' submissions is held on the Tribunal's casefile, and I had access to it, during the Hearing, and afterwards during my private deliberation in chambers, where I have read it again fully and carefully,

it is not necessary to repeat here its full terms *verbatim*. That is neither appropriate, nor proportionate.

57. In my discussion and deliberation below, later in these Reasons, I address the salient points made by the respondents' solicitor in this written submission to the Tribunal, as also her oral submissions dealing with the claimant's additional written submission of 3 January 2023.

58. What is helpful to note, at this stage, is the conclusion of Ms Mair's written submissions on amendment, at her paragraphs 3.35 and 3.36, stating as follows:

> ***"3.35 The Respondent submits that the Claimant's application for amendment should be refused on the basis that: (i) the Claimant is seeking to add new causes of action to his claim; (i)*** [sic] ***the claims are out of time; (ii) it would not be just and equitable to extend time; (iii) the Claimant had material knowledge of all of the claims that he now seeks to bring at the time of lodging his claim form; and (iv) the Respondent would be subject to significant hardship, in terms of both costs and delays, if the claims are permitted to proceed (the Respondent already having had to incur significant costs as a result of the Claimant's lack of specification of his claims).***
>
> ***3.36 If the tribunal are not minded to refuse the Claimant's application to amend, we would request that the tribunal leave open the limitation points in determining the application to amend. In Galilee v Commissioners of Police of the Metropolis UKEAT/0207/16, the EAT held that tribunals are not always required to decide limitation points on determining an application to amend. The applicant need only demonstrate a prima facie case that the primary time limit or the just and equitable ground was satisfied (which we submit in this case the Claimant has not done). It is submitted that, in this case, if the tribunal are willing to allow the application to amend (which is contested), it would***

not be appropriate to reach a definitive view on time bar issues. It was expressly concluded in this case that the cases of Amey Services Ltd and another v Aldridge and others UKEATS/0007/16 and Rawson v Doncaster NHS Primary Care Trust UKEAR/0022/08 (in which it was held that once an amendment is granted, a Respondent is prevented from raising a limitation defence) were wrongly decided."

Relevant Law: Amendment

59. 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.**

60. 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.

61. In **Transport and General Workers Union v Safeway Stores Ltd UKEAT/009/07,** Mr Justice Underhill, then 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.

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

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

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

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

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

63. 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."***

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

65. 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."***

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

16. ..The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.

17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable for a in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after

the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

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

67. 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**, which I cited to both parties, 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.

68. 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.

69. 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.

70. 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."

71. I have also taken account of the Court of Appeal judgment in **Kuznetsov v The Royal Bank of Scotland Plc [2017] EWCA Civ 43**, at paras 19 & 20, that I cited to both parties. In that judgment, Lord Justice Elias, himself a former President of the EAT, stated as follows:

> *19. First, employment tribunals have a broad discretion in the exercise of case management powers and the appellate courts will not interfere unless there is an error of law or the decision is perverse: Carter v Credit Change Ltd [1980] 1 All ER 252 (CA). Errors of law include failing to take into account relevant considerations and having regard to irrelevant ones.*
>
> *20. Second, 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: see the observations of Mummery J, as he then was, in Selkent Bus Co. v Moore [1996] ICR 836 (EAT). 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. As Underhill LJ pointed out in Abercrombie v Aga Rangemaster Ltd [2013] EWCA Civ 1148; [2014] ICR 209 at para.47, these are neither intended to be exhaustive nor should they be approached in a tick-box fashion."*

72. Finally, there is the judgment of the Employment Appeal Tribunal in **Mrs G Vaughan v Modality Partnership [2020] UKEAT/0147/20, [2021] ICR 535,** which I again cited to both parties, by His Honour Judge Tayler, who stated as follows, at paragraphs 21 to 28:

> *"21. Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting the* ***Selkent*** *factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim.*
>
> *22. Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence. This is not a risk-free exercise*

as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek a discretionary amendment later.

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

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

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

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

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

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

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

merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice.

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

28. An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice."

Discussion and Deliberation: Amendment

73. In considering, in the present case, whether it is appropriate to allow the amendments sought by the claimant, I have considered the **Selkent** principles, as well as the more recent case law authorities referred to earlier in these Reasons, when reviewing the relevant law.

74. There are two contradictory lines of authority at the EAT level about how amendment applications should be dealt with where one of the issues is timebar. This was flagged up, by the respondents' solicitor, Ms Mair, at her paragraph 3.36, the terms of which I reproduced earlier in these Reasons, at paragraph 58 above.

75. The more recent line is set out in **Galilee v Commissioner of Police of the Metropolis [2018] ICR 634**, in which the EAT held that it was permissible to allow amendment but reserving questions of jurisdiction for determination either at a Preliminary Hearing or at a Final Hearing. That results in an amendment being allowed to permit a new claim to be raised, but the issue of whether or not it is in the jurisdiction of the Tribunal is not at that stage determined.

76. The other line of authority is to the effect that questions of jurisdiction on issues of timebar must be addressed at the time of consideration of the amendment, as once accepted the claim is deemed to have been amended from the date of its presentation initially, rather than when the amendment was sought, on which the authorities include **Rawson v Doncaster NHS Primary Care Trust UKEAT/022/08, Newsquest (Herald and Times) Ltd v Keeping UKEATS/51/09** and **Amey Services Ltd v Aldridge UKEATS/7/16**.

77. Before considering the detail of the application to amend in the present case, it is appropriate to address the two competing lines of authority in relation to amendment and timebar. Those two lines of authority cannot easily be reconciled. **Galilee** was decided at least partly on issues of English law and practice, which I do not consider find equivalents in Scottish civil court law and practice.

78. In my view, an amendment if allowed simply permits a claimant to pursue a new matter, whether of fact or law, which was not within the original claim form. It allows a new claim to be pursued but whether that new claim succeeds is a different matter.

79. I turn to Scottish civil court law and practice in relation to matters of amendment. That also does not give a binding answer, but guidance which may be helpful to take into account. The nearest equivalent to the issues in the present case in a court action is a personal injury claim. The procedure however is different. An action must generally be commenced within three years of the accident under the **Prescription and Limitation (Scotland) Act 1973,** but once commenced there is a period for adjustment of the pleadings, and during that period the pursuer can add to the pleadings a new claim, doing so after the three year period has expired, which will be competently before the court, and brought in time.

80. Once that period of adjustment is completed however, the position is different. There is then a Closed Record, and amendment thereafter which may bring in a new claim requires the consent of the court. Amendment can be allowed or refused in the discretion of the Court. There are separate rules

for the Court of Session and the Sheriff Court, but the principles underlying them are the same.

81. There are often circumstances where it is not clear when a right of action arose, for example the date on which a pursuer knew or ought to have known of the right of action, which is when the period for timebar purposes starts. In such a case where there is an evidential dispute, the court can hold a preliminary proof on that question. A preliminary proof is also competent when an argument is made under **Section 19A of the Prescription and Limitation (Scotland) Act 1973** in relation to a personal injury action raised outwith the statutory time limit of three years.

82. Issues of jurisdiction are matters that a Tribunal must take account of. They determine whether or not the Tribunal, as a creature of statute, has the ability to hear the matter. Some issues of jurisdiction on issues of timebar may be clear from their face. There are other cases however where that clarity on timing is lacking.

83. I consider that whether or not alleged acts occurred, and if so whether they are part of conduct extending over a period, can only properly be determined by evidence being heard. The alternative is to try to make an assessment of the amendment based purely on submission, where there are competing arguments as to fact and a very limited basis on which it is possible to assess which party is right, and to what extent.

84. I do not consider that to take a decision on an amendment which may or may not be time barred, dependent on disputed facts concerning conduct extending over a period quite apart from what is just and equitable, in the absence of evidence on those facts, could be in accordance with the overriding objective as it would not be just to do so.

85. Whilst the terms of the overriding objective do not give *carte blanche* to do as one wishes, the Tribunal requires to give effect to the Rule when exercising any power given to it by the Rules, which includes that for case management.

86. I therefore consider that the **Galilee** line of authority is to be followed, although I do so for somewhat different reasons than those set out there and having regard also to the law and practice in the Scottish courts referred to above, rather than the law and practice in England.

87. It follows from my conclusion that an amendment can be allowed in whole or part subject, in a case where there is a dispute on facts material to the issue of whether a claim in relation to timebar is within the jurisdiction of the Tribunal, to those facts being determined by evidence, on which case management is required to address the procedure to be followed.

88. I consider that the ability to reserve the issue of jurisdiction in such a manner is a matter to take into account when considering the issue of timebar in the exercise of discretion. Had I decided, after balancing the competing arguments, to allow the claimant to amend his claim form to include additional complaints of discrimination and victimisation, then I would have done so reserving to the Final Hearing whether those newly added complaints are out of time and, if so, whether it is just and equitable to extend time.

89. Further, in considering the present, opposed amendment application, I have taken into account not just the interests of the claimant but also those of the respondents. So too have I considered hardship and injustice to both parties in allowing or refusing the amendment, as also the wider interests of justice in terms of the Tribunal's overriding objective to deal with the case fairly and justly under **Rule 2**.

90. The claimant, in his oral submissions to me at this Preliminary Hearing, was frank and candid that at the Hearing before Employment Judge Kemp he had no idea what a protected characteristic was, but he sought advice after that Hearing, and he now knows how important they are to clarify.

91. He had drafted his amendment application by himself, with no legal or other representation, but after discussion with CAB Glasgow, and he informed me that the CAB did not assist him in drafting his amendment application. He sought to be afforded a degree of leniency from the Tribunal, as he was acting

on his own behalf, and he stated that he had not done anything out of malice towards the respondents.

92. While accepting that he had ticked the ETI claim form to say that he is not disabled, the claimant explained to me that having looked at the legislation, he now considers that he is a disabled person, and so he wishes to complain of disability discrimination. He invited me to allow his proposed amendments and reject the respondents' opposition to them.

93. Having considered parties' written representations, as noted earlier in these Reasons, making and objecting to the amendment application before me, and also my own obligations under **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, I have considered, after careful reflection, that it is not in the interests of justice, and not in accordance with the overriding objective, to allow these proposed amendments to the ET1 claim form.

94. I consider Ms Mair's objections to the proposed amendment to be well-founded, and consistent with my own independent and objective assessment of the arguments for and against allowing the claimant's amendments being allowed by the Tribunal. There is nothing in the claimant's arguments that has persuaded me to tilt the balance in his favour, and allow the amendments.

95. It is clear that the proposed amendments are significant in nature, and not a new label on already pleaded facts. There are real and practical consequences of allowing the amendments sought. They would amount to new causes of action, and broaden the scope of evidence to be led at the Final Hearing, where the respondents are likely to require calling additional witnesses, and lodge additional documents, thus lengthening the duration of the Final Hearing, and so increasing the on costs to them.

96. Disability status, if disputed by the respondents, could result in either a discrete Preliminary Hearing on that preliminary issue, or it being reserved for consideration at the Final Hearing: either way, there will be further delay and on cost. Likewise, lack of clarity on the legal and factual basis for a complaint of unlawful disability discrimination, in respect of what is alleged, and when the allegations took place, will require further time and effort to get clarification

and detailed particulars of claim to give the respondents fair notice of the claim.

97. I considered whether any prejudice to the respondents, if I allowed the amendments, could be ameliorated by an award of expenses in their favour, but I had no information before me as to whether or not the claimant would be able to meet any expenses award, if I had decided to make such an award, so I did not consider that matter any further.

98. I have taken into account the claimant's status as an unrepresented, party litigant, with no previous experience of this Tribunal, its practices and procedures, and how bringing this claim against the respondents has been a learning experience for him.

99. He accepted that, Ms Mair having put to respondents' position in writing, things were now much clearer to him. He stated that he knows little about the legal aspects required for a Tribunal claim, and that he had mentioned discrimination and victimisation in his resignation letter to the respondents. He wished to proceed with his amendment application.

100. As regards the manner and timing of his application to amend, I agree with him that he has dealt with matters fairly quickly, in all the circumstances, and without undue delay, but the critical factor in my assessment has been the relative hardship and prejudice to each party.

101. The claimant has an existing claim of unfair constructive dismissal, and it has to be listed for a Final Hearing to allow the Tribunal to decide it on its merits. The claimant has the right to have that claim determined. Equally, the respondents, who resist that claim on its merits, and who have defended the claim, have the right to have that head of claim judicially determined within a reasonable timeframe.

102. Given the Tribunal procedure to date, the respondents have submitted that they will be subject to significant hardship if the claimant is allowed to introduce these additional claims.

103. That is a relevant factor for the Tribunal to take into account in looking at the relative injustice and hardship involved in granting or refusing the claimant's amendment, particularly when it is the case that progress with this case has already been delayed by procedure to date.

104. The respondents have incurred associated time and cost implications from having instructed external solicitors to represent them and seeking fuller particularisation of the claims being pursued against them by the claimant, as well as lodging amended grounds of resistance.

105. If new claims are added, and they require further particularisation, as seems likely, given the lack of clarity still on some matters, then the respondents will suffer further delay and incur further legal costs, likely irrecoverable from the claimant, given legal expenses are not normally awarded in the Employment Tribunal.

106. The paramount consideration being relative injustice and hardship, I am persuaded that the respondents will suffer the greater injustice and hardship, if I allow the amendments, which is why I have refused them, than the claimant will do, with a refusal.

107. In my view, refusing the claimant's application to amend is in accordance with the Tribunal's overriding objective, in that it will save both parties additional cost, avoid further delay, and yet ensure that the existing unfair constructive dismissal head of claim is dealt with in a way that is proportionate to the complexity and importance of that disputed issue, and ensure that parties are on an equal footing.

108. While the claimant will have lost the ability to pursue discrimination and victimisation heads of claim, his existing claim is not prejudiced, and he retains the right to pursue that at a Final Hearing.

Disposal: Amendment refused by the Tribunal

109. In all of these circumstances, I have refused the claimant's opposed application to amend the ET1 claim form.

Relevant Law: Strike Out

110. Ms Mair's written submissions for this Preliminary Hearing addressed the Tribunal's Rules (**Rule 37**), and case law, at her paragraphs 4.1 to 4.10.

111. She cited the following case law authorities, as follows:

- **Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330.**
- **Anyanwu and another v South Bank Students' Union and South Bank University [2001] IRLR 305.**
- **Pillay v INC Research UK Ltd UKEAT/0182/11.**
- **Mechkarov v Citibank NA [2016] ICR 1121.**
- **Silape v Cambridge University Hospitals NHS Foundation Trust UKEAT/0285/16.**
- **ABN Amro Management Services Ltd and another v Hogben UKEAT/0266/09.**
- **Croke v Leeds City Council UKEAT/01512/07.**
- **Sivanandan v Independent Police Complaints Commission and another UKEAT/0436/14.**

112. As far as the statutory provisions are concerned, for present purposes, I need only refer to the terms of **Rule 2**, and **Rules 37(1) and (2) of the Employment Tribunal Rules of Procedure 2013,** as follows:

Overriding objective

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

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

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

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

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Striking out

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make

representations, either in writing or, if requested by the party, at a hearing.

113. The power to strike out a claim has been described by the Court of Appeal as a '***draconic power not to be readily exercised'*** (**James v Blockbuster Entertainment Ltd [2006] EWCA Civ 684**, Lord Justice Sedley, para 5). It is described as such because it can stop the claimant from proceeding with their claim without having their case considered and evidence reviewed fully at a full hearing. Hence, the power should be used sparingly. As the Court of Session held, in **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755**, the power to strike out should only be exercised in rare circumstances.

114. A Tribunal can exercise its power to strike out a claim (or part of a claim) '***at any stage of the proceedings'*** - **Rule 37(1).** However, the power must be exercised in accordance with ***"reason, relevance, principle and justice":*** **Williams v Real Care Agency Ltd [2012] UKEATS/0051/11**, **[2012] ICR D27,** per Mr Justice Langstaff at paragraph 18.

115. In directing myself to the relevant law, I have recalled **H M Prison Service v Dolby [2003] IRLR 694,** at paragraph 14 of Mr. Recorder Bower' QC's judgment, with Strike Out being described by counsel as the "***red card***.", and a Deposit Order is the ***"yellow card***" option. In the present case, of course, there was no application for a Strike Out, which failing a Deposit Order, under **Rule 39**, as there often is from respondents in such situations. The respondents have only sought Strike Out under **Rule 37**.

116. While **Dolby** reviewed the options for the Employment Tribunal, under the then 2001 Rules of Procedure, Mr Recorder Bower's judgment, at his paragraphs 14 and 15, is still worthy of consideration today, reading as it does, as follows:

> ***"14. We thus think that the position is that the Employment Tribunal has a range of options after the Rule amendments made in 2001 where a case is regarded as one which has no reasonable prospect of success. Essentially there are four. The first and most***

draconian is to strike the application out under Rule 15 (described by Mr Swift as "the red card"); but Tribunals need to be convinced that that is the proper remedy in the particular case. Secondly, the Tribunal may order an amendment to be made to the pleadings under Rule 15. Thirdly, they may order a deposit to be made under Rule 7 (as Mr Swift put it, "the yellow card"). Fourthly, they may decide at the end of the case that the application was misconceived, and that the Applicant should pay costs.

15. Clearly the approach to be taken in a particular case depends on the stage at which the matter is raised and the proper material to take into account. We think that the Tribunal must adopt a two-stage approach; firstly, to decide whether the application is misconceived and, secondly, if the answer to that question is yes, to decide whether as a matter of discretion to order the application be struck out, amended or, if there is an application for one, that a pre-hearing deposit be given. The Tribunal must give reasons for the decision in each case, although of course they only need go as far as to say why one side won and one side lost on this point."

117. In **Abertawe Bro Morgannwg University Health Board v Ferguson UKEAT/0044/13, [2014] IRLR 14**, the then learned EAT President, Mr Justice Langstaff, at paragraph 33 of the judgment, remarked in the course of giving judgment that, in suitable cases, applications for strike-out may save time, expense and anxiety.

118. However, in cases that are likely to be heavily fact-sensitive, such as those involving discrimination or public interest disclosures, the circumstances in which a claim will be struck out are likely to be rare. In general it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not.

119. Special considerations arise if a Tribunal is asked to strike out a claim of discrimination on the ground that it has no reasonable prospect of success. In **Anyanwu and anor v South Bank Students' Union and anor 2001 ICR 391,** the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.

120. In **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126,** the Court of Appeal held that the same or a similar approach should generally inform whistleblowing cases, which have much in common with discrimination cases, in that they involve an investigation into why an employer took a particular step. It stressed that it will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

121. Lady Smith in the Employment Appeal Tribunal expanded on the guidance given in **Ezsias** in **Balls v Downham Market High School and College [2011] IRLR 217,** stating that where strike-out is sought or contemplated on the ground that the claim has no reasonable prospect of success, the Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success.

122. The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is a high test.

123. In **Balls,** at paragraph 4, Lady Smith emphasised the need for caution in exercising the power, as follows:

"…***to state the obvious, if a Claimant's claim is struck out, that is an end of it. He cannot take it any further forward. From an employee Claimant's***

perspective, his employer 'won' without there ever having been a hearing on the merits of his claim. The chances of him being left with a distinct feeling of dissatisfaction must be high. If his claim had proceeded to a hearing on the merits, it might have been shown to be well founded and he may feel, whatever the circumstances, that he has been deprived of a fair chance to achieve that. It is for such reasons that 'strike-out' is often referred to as a draconian power. It is. There are of course, cases where fairness as between parties and the proper regulation of access to Employment Tribunals justify the use of this important weapon in an Employment Judge's available armoury but its application must be very carefully considered and the facts of the particular case properly analysed and understood before any decision is reached."

124. Ms Mair cited, at her paragraph 4.5, from the EAT judgment in **Mechkarov,** paraphrasing its terms**.** She stated there that:

"4.5 The approach to be followed by a tribunal when faced with an application to strike out a discrimination claim was conveniently summarised by the EAT in Mechkarov v Citibank NA [2016] ICR 1121 as follows:

4.5.1 Only in the clearest case should a discrimination claim be struck out.

4.5.2 Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence.

4.5.3 The claimant's case must ordinarily be taken at its highest.

4.5.4 If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out.

4.5.5 A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

125. In giving myself a self-direction on the relevant law, it is appropriate to look more closely at exactly what the EAT Judge, in **Mechkarov,** actually stated, by reference to paragraphs 11 to 18 of the judgment by Mr Justice Mitting, reading as follows:

> ***"11. The approach to striking out applications in discrimination cases is not, with one reservation, controversial. The starting point is the observation of Lord Steyn in Anyanwu v South Bank Students' Union [2001] UKHL 14; [2001] IRLR 305 at paragraph 24:***
>
> ***"24. … For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. …"***
>
> ***12. Maurice Kay LJ emphasised the point in paragraph 29 of his Judgment in Ezsias v North Glamorgan NHS Trust [2007] ICR 1126:***
>
> ***"29. It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the employment tribunal to decide otherwise. In essence that is was Elias J held. I do not consider that he put an unwarranted gloss on the words "no reasonable prospect of success". It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably***

inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

13. To these statements of principle must be added the observations of the Lord Justice Clerk in the Court of Session in Tayside Public Transport Company Ltd v Reilly [2012] CSIH 46 at paragraph 30.

"30. Counsel are agreed that the power conferred by Rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (Balls v Downham Market High School and College [2011] IRLR 217, at para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts (ED & F Mann Liquid Products Ltd v Patel [2003] CP Rep 51, Potter LJ at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (ED & F Mann …; Ezsias …). But in the normal case where there is a "crucial core of disputed facts", it is an error of law for the Tribunal to pre-empt the determination of a full hearing by striking out (Ezsias …, Maurice Kay LJ, at para 29)."

14. On the basis of those authorities, the approach that should be taken in a strike out application in a discrimination case is as follows: (1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an

impromptu mini trial of oral evidence to resolve core disputed facts. I would treat the approval of the course taken by an Employment Judge in Eastman v Tesco Stores Ltd [2012] UKEAT/0143/12 by HHJ Peter Clark, sitting in this Tribunal, of hearing oral evidence on critical disputed questions of fact with reserve, because Tayside, which was decided before Eastman, was not cited to him or by him in his Judgment. In any event, it cannot determine the approach that the Employment Tribunal should take in a case such as this, in which an analysis of contemporaneous documents is required to permit a secure conclusion to be reached.

15. In his self directions of law the Employment Judge correctly in paragraph 35 of his Judgment cited the conclusions to be drawn from Anyanwu and Ezsias:

"35. … Guidance given there was that only in rare cases should a tribunal strike out a discrimination claim without hearing evidence, where the central facts are in dispute. If facts are not in dispute, one should take the Claimant's case at its highest and only then, if there are no prospects of success, should a claim be struck out."

16. After two further citations, at paragraph 37 he summarised the approach he would take:

"37. … The long and the short of it as I see it is that I should take the Claimant's case at its highest on undisputed facts and if on that basis, he has no prospects of success, I should strike it out. If there are disputed facts, unless they could be very shortly and simply dealt with within the PHR [pre-hearing review], the case should be allowed to proceed to a hearing. In this case I did her some evidence and have been able to make findings on some disputed facts."

17. He was not referred to and did not cite Tayside. The oral evidence that he heard was from the Claimant, Ms Pierre and Mr Pannu. He made the following findings of fact at paragraphs 43 and 47 of his Judgment:

"43. As to the investigation into [the Claimant's] complaint, the compelling evidence of Mr Pannu, which I accept, was that he had been instructed to investigate allegations which [the Claimant] had made, or rather concerns which he had raised and brought to their attention, about financial transaction processes that have nothing to do with this case whatsoever. He was also instructed to investigate and take appropriate action arising out of Ms Pierre's report that she had felt threatened by [the Claimant]. [The Claimant] complains that the Respondent did not report back to him on the outcome of their investigation. There was no obligation upon them to do so.

…

47. As to the victimisation claim, as I have mentioned above, we established during the hearing that the alleged protected act was that [the Claimant] told Mr Pannu that everything which had happened to him was because he was Bulgarian and therefore he had made a complaint of discrimination. That in any event would mean that nothing with regard to Ms Pierre could be said to be an act of victimisation and only anything which happened after the 8 December 2014 could have been. However, I heard evidence from Mr Pannu and [the Claimant] about this. I unhesitatingly accept the evidence of Mr Pannu, whose evidence was straightforward and consistent. I have already explained my criticisms of [the Claimant's] evidence. I find that [the Claimant] did not make an allegation of discrimination in the meeting with Mr Pannu on 8 December 2014. I am reminded that in cross-examination at its conclusion, [the Claimant] agreed that he had not mentioned discrimination until he issued these proceedings.

I therefore find on that basis, the complaint of victimisation has no reasonable prospects of success and is also struck out.

18. In determining the application on the basis of the oral evidence to which I have referred, the Employment Judge did indeed conduct a "mini trial" on core issues of fact. He should not have done so, for two reasons:

(1) Tayside precludes that option.

(2) In any event, whether or not the Claimant's case was well founded on either issue, discrimination or victimisation, turned at least to a significant extent on contemporaneous documents that were not produced to the Employment Tribunal, including notes of any interaction between Mr Pannu and persons interviewed by him and his report and, if they exist, internal emails dealing with the acts of discrimination alleged by the Claimant, the imposition of a "firewall" between him and his ex-colleagues, the reason for the imposition of the "firewall" and, if it be the case, the discouragement of ex-colleagues from speaking to him. The documents actually provided to the Tribunal are anodyne and may be incomplete."

126. It is surprising to me that Ms Mair did not include in her list of authorities the opinion of the Lord Justice Clerk in the Court of Session in **Tayside Public Transport Company Ltd v Reilly [2012] CSIH 46** at paragraph 30, the terms of which are reproduced above in **Mechkarov**, at paragraph 13. That judgment from the Inner House of the Court of Session is, after all, the familiar authority on Striking Out (exercise of ET's powers) at paragraph 25 of the **Employment Appeal Tribunal's Practice Statement in relation to Familiar Authorities** re-issued on 17 March 2016.

127. I recognise, of course, that the second stage exercise of discretion under **Rule 37(1)** is important, as commented upon by the then EAT Judge, Lady Wise, in **Hasan v Tesco Stores Ltd [2016] UKEAT/0098/16**, an unreported

Judgment of 22 June 2016, where at paragraph 19, the learned EAT Judge refers to ***"a fundamental cross-check to avoid the bringing to an end of a claim that may yet have merit."***

128. Finally, and while not cited by Ms Mair, I have also reminded myself of the judicial guidance from the Employment Appeal Tribunal, in the judgment of the then Her Honour Judge Eady QC, now the High Court judge, Mrs Justice Eady, current President of the EAT, in **Mbuisa v Cygnet Healthcare Limited [2019] UKEAT/0119/18**, at paragraphs 19 to 21 as follows:

> ***19. The ET's power to strike out a claim for having no reasonable prospect of success derives from Rule 37 Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules"). The striking out of the claim amounts to the summary determination of the case. It is a draconian step that should only be taken in exceptional cases. It would be wrong to make such an order where there is a dispute on the facts that needs to be determined at trial. As the learned authors of Harvey on Industrial Relations and Employment Law explain (see P1 [633]):***
>
> ***"It has been held that the power to strike out a claim under SI2013/1237 Schedule 1 Rule 37(1)(a) on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (Tayside Public Transport Co Limited (trading as Travel Dundee) v Reilly [2012] CSIH 46 [2012] IRLR 755 at para 30) or specifically cases should not as a general principle be struck out on this ground when the central facts are in dispute (see Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330 [2007] IRLR 603 [2017] ICR 1126; Tayside Public Transport Co Limited (trading as Travel Dundee) v Reilly [2012] CSIH 46 [2012] IRLR 755; Romanowska v Aspirations Care Limited UKEAT/0015/14 25 June 2014 unreported). The reason for this is that on a striking out application, as opposed to a Hearing on the merits, the Tribunal is in no position to conduct a mini trial with the result***

that it is only an exceptional case that it would be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence…"

20. Such an exceptional case might arise where it is instantly demonstrable that the central facts in the claim are untrue or there is no real substance in the factual assertions being made, but the ET should take the Claimant's case, as it is set out in the claim, at its highest, unless contradicted by plainly inconsistent documents, see Ukegheson v London Borough of Haringey [2015] ICR 1285 at para 21 per Langstaff J at para 4.

21. Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person, especially in the case of a complainant whose first language is not English: taking the case at its highest, the ET may still ignore the possibility that it could have a reasonable prospect of success if properly pleaded, see Hassan v Tesco Stores Ltd UKEAT/0098/16 at para 15. An ET should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where - as Langstaff J observed in Hassan - the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form.

129. Finally, when considering whether a claim can be struck out on the grounds that the case has no reasonable prospects of success, I have also reminded myself that the Tribunal should carefully consider the more recent judicial guidance provided in the judgment from the case of **Cox v Adecco [2021] UKEAT/0339/19; [2021] ICR 1307.** While not cited by Ms Mair, it is an important judgment from His Honour Judge Tayler in the Employment Appeal Tribunal, and it bears close reading.

130. In addition to the summary of the current state of the law on strike out, Judge Tayler considered that the judgment of the former President, Mr Justice Choudhury, in **Malik v Birmingham City Council [2019] UKEAT/0027/19,** which helpfully summarised the current, and well-settled, state of the law on strike out, and that judgment was important because of the consideration the then President gave to dealing with strike out of claims made by litigants in person.

131. I have specifically taken into account what Judge Tayler stated in that **Cox** judgment, namely at his paragraphs 24 to 26, as follows:

> ***24.*** ***Guidance for considering claims brought by litigants in person is given in the Equal Treatment Bench Book ("ETBB"). In the introduction to Chapter 1 it is noted, in a very well-known passage:***
>
> ***"Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure, about which they may have no knowledge. They may be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party.***
>
> ***The outcome of the case may have a profound effect and long-term consequences upon their life. They may have agonised over whether the case was worth the risk to their health and finances, and therefore feel passionately about their situation.***
>
> ***Subject to the law relating to vexatious litigants, everybody of full age and capacity is entitled to be heard in person by any court or tribunal.***
>
> ***All too often, litigants in person are regarded as the problem. On the contrary, they are not in themselves 'a problem'; the problem***

lies with a system which has not developed with a focus on unrepresented litigants."

25. ***At para. 26 of Chapter 1 ETBB, consideration is given to the difficulties that litigants in person may face in pleading their cases:***

"Litigants in person may make basic errors in the preparation of civil cases in courts or tribunals by:

- ***Failing to choose the best cause of action or defence.***
- ***Failing to put the salient points into their statement of case.***
- ***Describing their case clearly in non-legal terms, but failing to apply the correct legal label or any legal label at all. Sometimes they gain more assistance and leeway from a court in identifying the correct legal label when they have not applied any legal label, than when they have made a wrong guess." [emphasis added]***

26. ***I consider that the ETBB provides context to the statement by the President of the EAT in Malik about the importance of not expecting a litigant in person to explain their case and take the employment judge to any relevant materials; but for the judge also to consider the pleadings and any other core documents that explain the case the litigant in person wishes to advance:..."***

132. Further, I have also taken into account Judge Tayler's further sage guidance at his paragraphs 27 to 34 in **Cox**, as follows:

27. ***Because the material that explains the case may be in documents other than the claim form, whereas the employment tribunal is limited to determining the claims in the claim form (Chapman v***

***Simon** [1994] IRLR 124), consideration may need to be given to whether an amendment should be permitted, especially if this would result in the correct legal labels being applied to facts that have been pleaded, or are apparent from other documents in which the claimant seeks to explain the claim. The fact that a claim as pleaded has no reasonable prospect of success gives an employment judge a discretion to exercise as to whether the claim should be struck out: **HM Prison Service v Dolby** [2003]IRLR 694; **Hasan v Tesco Stores Ltd** UKEAT/0098/16. Part of the exercise of that discretion may involve consideration of whether an amendment should be permitted should the balance of justice in allowing or refusing the amendment permit if it would result in there being an arguable claim that the claimant should be permitted to advance. In **Mbuisa v Cygnet Healthcare Ltd** UKEAT/0119/18, HHJ Eady QC held at para. 21:*

"Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person, especially in the case of a complainant whose first language is not English: taking the case at its highest, the ET may still ignore the possibility that it could have a reasonable prospect of success if properly pleaded, see Hassan v Tesco Stores Ltd UKEAT/0098/16 at para 15. An ET should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where - as Langstaff J observed in Hassan - the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form."

28. *From these cases a number of general propositions emerge, some generally well-understood, some not so much:*

(1) No-one gains by truly hopeless cases being pursued to a hearing;

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;

(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;

(4) The Claimant's case must ordinarily be taken at its highest;

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take

procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

29. If a litigant in person has pleaded a case poorly, strike out may seem like a short cut to deal with a case that would otherwise require a great deal of case management. A common scenario is that at a preliminary hearing for case management it proves difficult to identify the claims and issues within the relatively limited time available; the claimant is ordered to provide additional information and a preliminary hearing is fixed at which another employment judge will, amongst other things, have to consider whether to strike out the claim, or make a deposit order. The litigant in person, who struggled to plead the claim initially, unsurprisingly, struggles to provide the additional information and, in trying to produce what has been requested, under increasing pressure, produces a document that makes up for in quantity what it lacks in clarity. The employment judge at the preliminary hearing is now faced with determining strike out in a claim that is even less clear than it was before. This is a real problem. How can the judge assess whether the claim has no, or little, reasonable prospects of success if she/he does not really understand it?

30. There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any

core documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success. Often it is argued that a claim is bound to fail because there is one issue that is hopeless. For example, in the protected disclosure context, it might be argued that the claimant will not be able to establish a reasonable belief in wrongdoing; however, it is generally not possible to analyse the issue of wrongdoing without considering what information the claimant contends has been disclosed and what type of wrongdoing the claimant contends the information tended to show.

31. ***Respondents seeking strike out should not see it as a way of avoiding having to get to grips with the claim. They need to assist the employment tribunal in identifying what, on a fair reading of the pleadings and other key documents in which the claimant sets out the case, the claims and issues are. Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents, and key passages of the documents, in which the claim appears to be set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer, and take particular care if a litigant in person has applied the wrong legal label to a factual claim that, if properly pleaded, would be arguable. In applying for strike out, it is as well to take care in what you wish for, as you may get it, but then find that an appeal is being resisted with a losing hand.***

32. This does not mean that litigants in person have no responsibilities. So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim. The employment tribunal can only be expected to take reasonable steps to identify the claims and issues. But respondents, and tribunals, should remember that repeatedly asking for additional information and particularisation rarely assists a litigant in person to clarify the claim. Requests for additional information should be as limited and clearly focussed as possible.

33. I have referred to strike out of claimants' cases, as that is the most common application, but the same points apply to an application to strike out a response, particularly where the respondent is a litigant in person.

34. In many cases an application for a deposit order may be a more proportionate way forward."

Discussion and Deliberation: Strike Out

133. In her oral submissions to the Tribunal, Ms Mair stated that the respondents were seeking a Strike Out of the claim (save for constructive dismissal) as having no reasonable prospect of success. They were not seeking, in the alternative, a Deposit Order under **Rule 39**.

134. In the circumstances of this case, where it is agreed that the unfair constructive dismissal head of complaint must go to a Final Hearing anyway for full disposal, including remedy if appropriate, I asked Ms Mair why the draconian step of a Strike Out was necessary in the circumstances of this case for any discrimination or victimisation head of claim, and why a lesser disposal might not have been used.

135. She stated that Employment Judge Kemp had ordered a Strike Out Hearing, and she was not present at that earlier Hearing, but with the claimant having been provided with earlier opportunities to provide Further and Better Particulars, and still not properly particularised his complaints, Ms Mair stated to me that an Unless Order did not seem appropriate, so Strike Out was sought by the respondents.

136. Ms Mair submitted that the claim form does not include a whistleblowing claim, and the application to amend does not ask to include such a claim. The claimant confirmed he was not seeking to add such a claim, so I need say nothing further about it.

137. While the claim form referred to discrimination and victimisation, but provided no details of any protected characteristic, or protected act, or detriment, I agree with Ms Mair that the claim form shows no reasonable prospect of success and those heads of claim should be struck out under **Rule 37**.

138. As the claimant's amendment application has been refused by the Tribunal, the claim form does not include any claim for discrimination or victimisation, by way of amendment, and so the claim form still shows no reasonable prospect of success and those heads of claim should be struck out under **Rule 37**.

Disposal: Strike Out

139. After careful consideration, I have decided to grant the respondents' opposed application for Strike Out of the claim (save for the unfair constructive dismissal head of complaint).

140. Insofar as it is necessary to do so, the Tribunal strikes out the claim (save for unfair constructive dismissal), under **Rule 37 of the Employment Tribunal Rules of Procedure 20l3**, on the basis that any complaints of age, sex or disability discrimination or victimisation have no reasonable prospect of success.

Further Procedure

141. The claimant's existing complaint of unfair constructive dismissal by the respondents remains. That case shall proceed to be listed in due course for an in-person Final Hearing before a full Tribunal of a Judge and two lay members, as there is a likelihood of a dispute arising on the facts which makes it desirable for the case to be heard by a full Tribunal.

142. Once date listing letters are received back, I have instructed the Tribunal clerk that the case file will be referred back me to give specific listing instructions, having regard to both parties' stated availability, witness lists, and their estimates for the duration of evidence from the various witnesses to be led by each of them at that Final Hearing.

143. I have not ordered that there should be a Case Management Preliminary Hearing, arranged before the Final Hearing, as I consider that unnecessary. It seems to me that the case should proceed to Final Hearing as soon as can be arranged, but, of course, I recognise that in any case things can emerge, where a Case Management Preliminary Hearing might be appropriate.

144. Accordingly, should any other matters arise between now and the start of the Final Hearing, on dates to be hereinafter assigned by the Tribunal, then written case management application by either party 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.

145. 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, or CVP, as might be most appropriate.

Employment Judge: **G. Ian McPherson**
Date of Judgment: **31 March 2023**
Entered in register: **03 April 2023**
and copied to parties