



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mrs A Cameron**

**v**

**1. BG International Ltd  
2. Shell International Ltd  
3. Shell UK Ltd  
4. BG LNG Services LLC  
5. BG US Services Inc.  
6. Shell International Exploration &  
Production BV**

**Heard at:** Watford

**On:** 26 to 27 March 2018

**Before:** Employment Judge A Clarke QC

## **Appearances**

**For the Claimant:** Mr R Dennis, Counsel

**For the Respondents:** Mr T Brown, Counsel

## **JUDGMENT**

1. The application on behalf of the respondent to transfer the claims for hearing in Aberdeen is refused.
2. The application to join the fourth, fifth and sixth respondents as parties to the claim is granted, but limited (as further explained in the reasons below) to issues arising as a result of the first to third respondents asserting in their responses that certain acts relied upon by the claimant were undertaken by one of them (or some other person) on behalf of those new respondents.
3. The application to join further parties as respondents is refused.
4. The claimant is permitted to add claims in respect of an enhanced redundancy payment, ShareSave contributions and pension contributions as set out in the letters from the claimant's solicitors of 14 November 2017 and 22 March 2018, save that the application is refused in respect of an enhanced redundancy payment and pension contributions in so far as the claim relates to any alleged unlawful deduction from wages.

5. The claimant is permitted to use in these proceedings the documents asserted by the respondents to be subject to legal professional privilege and the application to restrain their use is refused. The documents in question are those at tabs 9, 10 and 11 and 13 to 17 inclusive of the bundle of documents put before the tribunal for use in relation to that application.
6. The order previously made by Employment Judge Gumbiti Zimuto in respect of telephone records is varied so that the respondents are to give disclosure of telephone records relating to the matters in paragraph 34 of the response, so far as any such records are in their control.
7. Upon the respondents agreeing (1) that by 24 April 2018 they will have reconsidered the redaction of all documents, so far disclosed, which have been partially redacted for legal professional privilege and (2) to consider (by their solicitor) whether it might be the case that what has been disclosed is likely to appear misleading to a reader who has not seen the redacted parts of those documents, no order is presently made in respect of the disclosure of the redacted parts.
8. No order is made in respect of the claimant's application for Further Information.
9. Directions to enable this matter to proceed to a full merits hearing were made and are recorded in a separate order.
10. The case has been listed for a further half day preliminary hearing at Watford Employment Tribunal on **10 September 2018** to consider any disputes between the parties as to the content of the List of Issues and to consider any application that may be made by the claimant further to amend the claim forms, it being intended thereby to give the claimant the opportunity to raise any disputed suggested amendments which have arisen as the result of a reconsideration undertaken in the context of seeking to agree the List of Issues.

## **REASONS**

### **Claims and previous preliminary hearings**

1. The claimant presented complaints to the Employment Tribunal by way of claims submitted on 15 March and 13 April 2017. The various types of claim brought by her are set out in paragraph 1 of the reasons given by Employment Judge Vowles following a preliminary hearing at Reading Employment Tribunal on 15 and 16 November 2017 dealing with issues relating to jurisdiction.
2. That preliminary hearing followed from an earlier preliminary hearing at Reading on 5 June 2017.

3. This preliminary hearing (in March 2018) was listed by Judge Vowles at the November preliminary hearing and was to consider the eight issues appearing in paragraph 2 of the Order signed by him on 21 November 2017. A limited number of other matters have also been considered at this hearing as set out below.
4. A brief summary of the background facts is set out at paragraphs 7 to 26 of the reasons given by Employment Judge Vowles dated 22 January 2018. It is unnecessary for me to repeat those matters here.

### **Evidence and submissions**

5. I was referred to documents contained within three bundles. The first contains various pleadings and orders, together with some correspondence. The second contains (in the main) earlier correspondence. The third contains documents relevant to the dispute between the parties as to legal professional privilege.
6. I was also provided with two witness statements on behalf of the respondents. That of Neil John Roberts relating to the disclosure exercise and legal professional privilege and that of Geoffrey Clark, relating to telephone records. Neither witness attended to give evidence, nor was there any challenge as to the accuracy of that which they recounted.
7. The submissions of the parties relevant to the matters identified by Employment Judge Vowles for consideration at this preliminary hearing were set out in correspondence. Furthermore, those submissions were summarised, cross-referred to and expanded upon in written submissions provided by Counsel for both sides and then in oral submissions.

### **Hearing venue**

8. The respondent made an application to have the case transferred to Aberdeen, Scotland. The claimant opposed that application.
9. The application was made under rule 99(1) the Employment Tribunals Rules of Procedure 2013 (the 2013 rules) which states:

“(1) The President (England and Wales) or a Regional Employment Judge may at any time, on their own initiative or the application of a party, with the consent of the President (Scotland), transfer to a tribunal office in Scotland any proceedings started in England and Wales which could (in accordance with the rule 8(3)) have been started in Scotland and which in that person’s opinion would more conveniently be determined there.”

10. After discussion with the Regional Employment Judge, it was agreed I would hear submissions on this matter and form a provisional view as to its resolution. The Regional Employment Judge was then to consider the matter himself. In the event, after hearing submissions and after I had formulated my provisional view, it was possible for me to discuss the matter

with the Regional Employment Judge. What follows is my provisional view, as explained to and endorsed by him.

11. It is accepted that both sets of proceedings could have been started in Scotland. Therefore, the issue is whether it would be more convenient now to have them determined in Scotland, in particular in Aberdeen.
12. The respondents want the claims dealt with in the Aberdeen Tribunal because:
  - 12.1 The respondent's legal team (excluding counsel) is based in Aberdeen. It is accepted (by the claimant and the tribunal) that, as a result, it would be more convenient for the respondent to have the matter heard in Aberdeen. However, the claimant's legal team is based in London (as is the respondent's counsel). One or other legal team will have to conduct the case at some distance from its home base. This gives rise to some prejudice, but the prejudice will affect one party or the other depending upon location and this is not a significant factor in deciding in which venue it is more convenient to have the matter determined.
  - 12.2 Certain of the respondent's witnesses are based in Aberdeen, at least for part of their working time. Others amongst the presently estimated 23 witnesses are based in London or abroad. The claimant may wish to call some two or three witnesses, but has not indicated their working location. It is accepted by the respondent that it is unlikely that any particular witness called by them would have to attend for the totality of the hearing (some five weeks including remedy), but the claimant herself will. Given the existence of video conferencing facilities in the Watford tribunal, the location of some of the respondents' witnesses is not a particularly powerful factor, albeit that it is accepted by the tribunal that it may be more convenient for some of the respondent's witnesses to have the matter heard in Aberdeen.
13. The claimant points to three factors said to favour the retention of the matter at Watford.
  - 13.1 It is said that the respondent delayed making this application, having been told at the first preliminary hearing in June 2017 that it should be made promptly, if made at all. In circumstances where the case has not yet been listed for a full merits hearing, this is a factor of little or no weight in determining convenience.
  - 13.2 The claimant reported to the respondents' Reading office when employed. Again, this does not appear to be a factor of any significance.
  - 13.3 The claimant is the mother of two young children. One is only two weeks old, the other a little over two years old. The latter attends a

day nursery and it is hoped that the former could also attend that nursery for the period of the hearing. The claimant's husband is in full-time employment and would not be able to undertake childcare. She is presently breast feeding her younger child. It is her submission that if the case was to be listed in Aberdeen then her children would need to go with her, they would need to live (with her) in a hotel and some specific childcare arrangements would have to be made (unless they were to attend the tribunal).

14. I consider that that matters relating to childcare generally are substantial obstacles which the claimant would have to overcome and which would add considerably to the strain and stress of being the claimant in a complex case were the matter to be heard in Aberdeen. I consider this to be a decisive factor in favour of retaining the case in this region and at Watford. To do so is more convenient than to move the case to Aberdeen. Hence the application is refused.

#### **Joining further respondents**

15. This application falls into two parts:
  - 15.1 The application to join the three respondents listed as R4, R5 and R6 above. That application was intimated prior to the preliminary hearing before Employment Judge Vowles and adjourned by him to be heard after he had dealt with jurisdictional issues. Those three respondents are all named in the response served on behalf of the first to third respondents on 18 May 2017 as being entities by or on behalf of which certain allegedly discriminatory acts were undertaken.
  - 15.2 An application to join two (possibly three) other respondents, which was intimated only immediately before this preliminary hearing. Those respondents are said to be ones who have, over time, been identified by the existing respondents as being the employers of individuals said, in the claim form, to have been the perpetrators of certain acts alleged to be discriminatory. However, as distinct from the case of the three respondents referred to above, the first to third respondents have not made an assertion in respect of these respondents to the effect that any acts in question were undertaken on behalf of these respondents as distinct from either the first to third respondents or the fourth to sixth respondents.
16. I deal first with the second of those two applications. Mr Brown made his position clear in oral submissions. This application was made very late in the day and it was unclear (absent any particularised draft claim against them) what acts the claimant alleged these proposed new respondents were legally responsible for. The mere fact of employment by a particular company within the Shell Group is clearly insufficient of itself to found a claim or provide any indication of what that claim might be. He emphasised that as no point was taken in the response served on behalf of the first to

third respondents that any act relied upon by the claimant was done on behalf of any of these potential new respondents their position was very different from that of the fourth to sixth respondents. He emphasised that where any act relied upon in the claim form was said by the first to third respondents to have been undertaken on behalf of any other corporate entity, that had been made clear, hence the assertions made in respect of the fourth to sixth respondents and the application to join them.

17. In those circumstances, Mr Dennis did not press the application to join the potential new respondents, noting what Mr Brown had said as to the lack of any positive case being advanced on behalf of the existing respondents that acts complained of by the claimant were done on behalf of those proposed new respondents. Hence, that application is dismissed.
18. As to the application with regard to the fourth to sixth respondents, that had both a broad and a narrow aspect. To understand the distinction, it is necessary to understand how and with what materials the application is advanced. There is no proposed amended claim form showing how the claims are put against these entities. However, there is a draft List of Issues produced by the claimant. It identifies these three proposed respondents as respondents. It goes on to identify most of the alleged acts of discrimination relied upon as being done by or on behalf of "the Respondents", i.e., including the fourth to sixth respondents. Thus, it was suggested by that List of Issues that it was the claimant's intention to allege that the majority of the alleged acts of discrimination relied upon were acts for which those respondents, in addition to the first to third respondents, were in some way liable.
19. Mr Brown, understandably in my view, complains of a lack of clarity in this regard and that a consideration of the current claim forms suggests that certain, at least, of the allegations in question cannot possibly be intended to be made against any of these three respondents. I accept that this is the case. An assertion advanced by Mr Dennis that the claimant is not necessarily aware of which corporate entity or entities particular named individuals were acting on behalf of seems to me to be properly and comprehensively dealt with by the response that the Grounds of Response served on behalf of the first to third respondents is obviously a careful and detailed document and where the first to third respondents seek to defend the claim by asserting that acts were undertaken not on their behalves, but on behalf of one of the fourth to sixth respondents, that is clearly and carefully set out. Hence, as Mr Brown made clear (see above) wherever it is the present respondent's case that matters alleged to have been undertaken on behalf of one of them were undertaken on behalf of some third party, that is made clear.
20. I am, therefore, of the view that it is impermissible for the claimant to advance this application on a basis which is broader than seeking to add a claim against one of the fourth to sixth respondents which is, in effect, responsive to the assertion by the first to third respondents that acts were

done by individuals on behalf of those respondents. Any broader case must fail, there being no particularised case set out in any document to support it.

21. The narrower way of putting the application does not suffer from this defect. The application is simple and clear. Where the first to third respondents say that an act was done on behalf of one of the fourth to sixth respondents the claimant now wishes to claim against that entity.

22. The applicable legal test is set out in Rule 34 of the 2013 Rules which states as follows:

“The tribunal may... on the application of a party... add any person as a party, by way of substitution or otherwise, if it appears there are issues between that person and any of the existing parties falling within the jurisdiction of the tribunal which is in the interest of justice to have determined in the proceedings... “.

23. My focus must therefore be on whether it is in the interest of justice to have those issues identified above (being the allegations made consequent upon the response of the first to third respondents) determined in these proceedings.

24. Mr Brown cited to me guidance from the EAT in Scotland in Argyll and Clyde Health Board v Foulds (EATS0009/06). The Scottish EAT set out the kinds of question that an Employment Tribunal might reasonably pose when considering whether to allow a new respondent to be added. It was suggested that those questions could include:

24.1 Why was the respondent not included in the original claim?

24.2 What was known by the claimant about his potential as a relevant respondent at that time?

24.3 What should have been known?

24.4 When did the claimant realise that the respondent ought to be included?

24.5 What steps were taken after that?

24.6 What was the reason for any delay thereafter?

24.7 Did the claimant take prompt action once the need to seek to include the respondent was realised or not?

24.8 If not, why not?

24.9 Would there be injustice or hardship to the claimant if the application was refused?

24.10 If so, of what nature?

- 24.11 What would be its cause?
- 24.12 Would there be injustice or hardship to the respondent in being brought in as a respondent at this stage?
25. Mr Brown pointed particularly to the delay from the service of the response on behalf of the first to third respondents in mid-May 2017 to 15 November 2017 when the relevant application was first intimated.
26. Mr Brown also contends that if the amendment to add these respondents is allowed, then further issues relating to jurisdiction will arise. Mr Dennis says that no such issues do arise, but also notes that it will be surprising if they did because (as is common ground) Employment Judge Vowles adjourned this application to come on after the conclusion of his hearing on jurisdiction and he must, therefore, have considered that his decision would deal with all jurisdictional issues. There seems to me to be considerable force in this point, but it is necessary for me to consider whether the judgment and reasons do or do not leave open further jurisdictional issues.
27. As to delay, it is right that the delay from mid-May to mid-November (a period of some six months) is not explained, save that the need to add the respondents was identified in the preparation for the preliminary hearing in November. Of course, there is a prospect that had the application been made somewhat earlier, then Employment Judge Vowles could at his hearing have addressed the jurisdictional issues arising, which he certainly did not do expressly.
28. I bear in mind that the case was still at an early stage at that time (in mid to late 2017) and that the first to third respondents amended their response on 1 November in response to an amended claim form dated 5 June. The case had not been listed for final determination and directions directly relevant only to the jurisdiction preliminary hearing had been given. It is clear to me that the non-inclusion of these respondents in the original claim is understandable, because the claimant was then unaware of their role. I note that they are companies all within the Shell Group and it is clear that there are many companies within that group, that their interrelationship is complex and that some individuals concerned with this case have moved between such companies. All of that has to be seen against the background of the first respondent (the claimant's original employer) being part of a group of companies which joined the Shell group not long prior to the claimant's employment being terminated.
29. Adding these respondents is certainly something that could have been undertaken earlier, but it does not seem to me that there is hardship to the proposed respondents (other than the potential for liability for a financial remedy) and I keep in mind that they are all part of the same corporate group. The prejudice to the claimant is obvious, she may find that the correct group respondent has not been named. In all the circumstances, I do not consider the delay of itself is a significant factor in determining where



the interests of justice lie. However, I accept that delay of itself is not the sole focus of what is being alleged in this case on behalf of those respondents. It seems to me that at the heart of their submissions is delay coupled with the fact that matters relating to jurisdiction could have been dealt with at the preliminary hearing before Employment Judge Vowles dealing with jurisdiction, but were not.

30. In order to consider that submission I need to say a little more about the role played by these three respondents in the response filed on behalf of the first to third respondents.
31. So far as the fourth respondent is concerned, the relevant references to its involvement are as follows:
  - 31.1 Paragraph 16 and 17 of the response relate to the claimant's removal from the LCLP Leadership Team.
  - 31.2 Paragraph 25 refers to the fourth respondent's role in the acts set out in paragraph 13 of the first claim form.
  - 31.3 Paragraph 31 refers to acts in paragraph 28a of the first claim form, in particular the allegation that the claimant should have been allowed to comment on or should have been consulted about a particular chart.
  - 31.4 Paragraph 32 relates to acts in paragraph 28c of the first claim form, concerning the giving of information to the claimant by mistake.
  - 31.5 Paragraph 76 relates to the decision to place a "local" employee in what had been the claimant's role, this being said to be a decision of the fifth respondent, but in respect of which the fourth respondent met the associated costs.
  - 31.6 Paragraphs 134 and 135 relate to the structuring of the fourth respondent's TOM, which is said to be a matter for that respondent and not the first respondent.
32. So far as the fifth respondent is concerned the matters are as follows:
  - 32.1 Paragraph 11 relates to the fact that the fifth respondent is said to be the company that the claimant agreed to undertake the long-term assignment for.
  - 32.2 Paragraph 75 is dealt with above.
33. So far as the sixth respondent is concerned its alleged involvement is that it is said to have been this Dutch company which declined to offer an alternative job to the claimant for which she (and others) were interviewed.

34. Does the fact that an earlier application could have led to Employment Judge Vowles considering any jurisdictional arguments arising out of what might be seen as a responsive pleading to the matters referred to above impact upon the relevance of delay, because the opportunity was lost to have him determine those jurisdictional issues?
35. In that context, I first of all need to consider whether separate issues as to jurisdiction do indeed arise, being one which are not dealt with (at least implicitly) by Employment Judge Vowles.
36. I am satisfied that his judgment and reasons determine the jurisdiction issues arising in respect of the fourth and fifth respondents. This is because the acts under consideration were acts which (in general terms) he considered and his conclusion can be seen, in particular, from the following paragraphs of his reasons:
- “43... I find that there was a sufficiently strong connection with Great Britain and British Employment Law such as to bring all the claims within the UK’s territorial jurisdiction.”
- “58... during the assignment to the USA she continued to be managed in various respects by BGG and R1 in the UK. Each of her completed annual performance reviews was communicated to BGG and R1 managers and HR in the UK in accordance with the IAP and her maternity leave was also managed by HR in the UK.”
- “59... I find that the above facts demonstrate as sufficiently strong connection between Mrs Cameron’s employment and the UK throughout her assignment to the USA that parliament must have intended this tribunal to have jurisdiction over her claims in respect of that period.”
37. His conclusion was the tribunal had jurisdiction over claims arising from those acts which form the basis of any amendment to add the fourth to sixth respondents. That jurisdiction is not dependent upon the place of incorporation of the companies sued as respondent. As regards the employer of the claimant (R1), Employment Judge Vowles found (in paragraph 44) that the claimant was posted abroad by that employer for the purposes of a business carried on in Great Britain. He rejected the respondents’ submission that the lack of a contractual nexus between the claimant and her host US company and another US company (which he refers to when citing the respondent’s submissions as “the US fourth party”) was decisive or even material. I accept Mr Dennis’ submission that in the light of Employment Judge Vowles’ decision and reasoning, no additional jurisdictional issues arise as against the fourth and fifth respondents in respect of the claims under consideration.
38. So far as the sixth respondent is concerned, the position is a little different. That is a Dutch (and not a US) company and the act complained of is its act in declining to employ the claimant. I do not understand the reasoning of the Employment Judge to encompass such a potential claim and I can see the scope for an argument that the Employment Tribunal lacks jurisdiction to hear a claim against a Dutch company for its refusal to employ the claimant,

depending upon the precise facts. However, I consider it arguable that there is jurisdiction and that this amendment, in so far as the addition of the sixth respondent is concerned, simply adds an alternative allegation, against another group company, to that already made against the first to third respondents and based on the same facts.

39. I consider that the interests of justice are best served by adding all three of the fourth, fifth and sixth respondents to enable the limited claims referred to above to be made against them, being claims which flow from the first to third respondent's assertions as to certain acts being done on their (and not its) behalf. So far as the sixth respondent is concerned, I consider that the possible jurisdictional issues will be best determined in circumstances where the tribunal determining them has before it the fullest range of evidence and can make the fullest range of findings of fact. Hence, I do not propose to order a further preliminary hearing, but to leave that limited jurisdictional issue to be determined (if raised) by the tribunal which deals with the full merits hearing.

**New causes of action**

40. The claimant seeks permission to add three new heads of claim. These relate to:
- 40.1 a failure to pay an enhanced redundancy payment (ERP);
  - 40.2 a failure to make monthly contributions to the claimant's ShareSave account whilst she was on maternity leave in 2016;
  - 40.3 a failure to make the correct contributions to the claimant's pension scheme whilst she was on maternity leave between June and December 2016.
41. The claimant has set out in correspondence a fully particularised proposed amendment to the first claim form to add each of these claims. No submission is made on behalf of the respondents as to lack of particularity, albeit that it is asserted that is a matter of law one alternative way of putting two of the proposed claims cannot succeed.
42. It is agreed between the parties that the principles and guidance set out in Selkent Bus Co. Ltd v Moore [1996] ICR 836 at pages 842 to 843 are the ones which must be applied. Looking at all the relevant circumstances, I have to balance the relative injustice and hardship of the parties' consequent upon the grant or refusal of the amendment application. In doing so, I have to consider whether what is proposed is a relabeling exercise, or a much more major amendment adding a new cause of action based on new facts. I must also consider (in the way suggested in that guidance) the question of whether the claims would, if presented today as self-standing claims, be made in time and whether the applications have been made without delay (and whether any delay has been explained).

43. In summary the claimant's submissions are as follows:
- 43.1 The first respondent's decision not to grant the claimant an ERP was because she refused to accept a particular Project Manager role. This is said to be an irrational exercise of such discretion as the first respondent had. The basis of that allegation of irrationality are the matters already set out in the claim form to demonstrate that the Project Manager role was not a suitable role for the claimant. It is said that failing to give her an ERP amounts to a breach of an expressed term of her contract, alternatively a breach of the implied term of the contract as to trust and confidence, the breach being established by the irrationality of the decision made.
  - 43.2 It is pointed out that she presented her claim on 14 March 2017, before her notice expired. Hence the claim for ERP would then have been premature as it arose only in circumstances where her employment had been terminated.
  - 43.3 So far as the ShareSave and pension claims are concerned the claimant only became aware of the facts giving rise to those claims after the claim had been filed. In particular, she became aware of those matters on 27 June 2017 when a third-party provider (Compuserve) informed her that her ShareSave account had been closed due to non-payment, consequent upon which she reviewed her pension statements and learnt of the non-payment of those contributions.
  - 43.4 The claimant will suffer substantial prejudice if she is unable to bring the proposed claims. In so far as they are brought as claims of discrimination then they cannot be pursued elsewhere. In so far as they are brought as breach of contract claims, they can be pursued in the High or County Court, but that would entail unnecessary duplication of process and additional cost for both parties.
  - 43.5 The application has to be seen against the background of a case which is, although initiated in mid-2017, yet to be listed and in respect of which no substantive orders leading to a full merits hearing have yet been made.
44. The respondents begin by pointing out that, in so far as the claims to an ERP and for pension contributions are brought as unlawful deductions from wages claims, they cannot succeed as a matter of law. Redundancy payments cannot be sought as a wage claim by reason of section 27(2)(d) of the Employment Rights Act 1996 and pension contributions do not qualify as wages: see Somerset County Council v Chambers (UKEAT/0417/12). Those points having been raised by the respondents, the claimant did not further pursue that aspect of the application and it must fail for those reasons.
45. The respondents also rely upon the following:

- (a) Delay in making the applications. It is said that they should have been made very shortly after 27 June 2017, at the latest, and not left until mid-November.
  - (b) The limited recovery available in so far as these are brought as breach of contract claims, the tribunal's jurisdiction being limited to £25,000.
  - (c) There is no prejudice so far as the contractual claims are concerned in the claimant bringing them in the High Court.
  - (d) There is admitted prejudice in not being able to bring her discrimination claims in these respects, but the respondents should not be put to the expense and inconvenience of dealing of with such a claim when the factual background is extremely confused, the relevant companies only just having joined the Shell group (at the time of her dismissal) and having been reorganised in the process. It is said that the lapse of time will make investigation of these matters more difficult, especially against the above background.
46. I turn first to my decision with regards to the ERP claim. If the claim was brought today as a stand-alone claim for breach of contract (under the Tribunal's extended jurisdiction) it would be out of time and the engagement of the secondary limitation period would be dependent upon the claimant being able to show that it was not reasonably practicable to bring the claim within the primary limitation period. That does not debar the claim from proceeding by way of amendment, but is a relevant factor and I bear it in mind. However, here the irrationality and breach of contract claims in that regard are both closely linked to facts already pleaded with regard to the job offer and its unsuitability. This is not a simple relabelling exercise, but equally this is not an instance of a wholly new and unrelated claim being added to claim form. It is claim closely related to matters already before the tribunal. The respondents could face these claims in the High Court, but that would involve there being multiplicity of litigation. It is far preferable in my view (in terms of justice to the parties) to have a single tribunal decide on all matters, there is no hardship in this to the respondents over and above their exposure to the claim, because the key facts will already be in issue and will require investigation in any event.
47. I now turn to the ShareSave and pension contribution claims. Again, if presented today as self-standing claims these would be presented outside the primary limitation period, but so far as they are put as discrimination claims, the secondary limitation period is dependent on justice and equity, an approach which is practically indistinguishable from the test based on justice and hardship in Selkent. If such claims are admitted it would make sense (for reasons similar to those given in respect on the ERP claim) to have the contractual claims determined by the same body.

48. These are new causes of action based on new facts, but the conduct of the respondents which is relied upon forms part of the context of and takes place as part of, the events surrounding the claimant's dismissal. I am satisfied that the claimant knew enough to plead her case in late June 2017, but did not do so until November. In this regard, I have been shown documents which reveal that there was a dialogue between the claimant and the respondents in this period whilst the respondents tried to investigate what had happened and why. In the circumstances, with a claim already on foot relating to closely associated matters, which claim was little advanced, and where the respondents were not rejecting her assertions in respect of these two matters, but investigating them, I consider that it would be unjust to decline to have these claims heard with the rest of those relating to her employment simply because of that delay. In that context, I note that the prejudice to the respondents by the delay is limited (if it exists at all) as the respondents were alerted to the relevant matters as soon as the claimant became aware of them and have been investigating them from then onwards. It is correct that the claims are of limited financial value, put as breach of contract claims, but there is no ceiling on their value as discrimination claims.
49. In those circumstances all three claims can be added to the first claim form.

**The LPP issue**

50. This issue related to the documents in the third bundle before me at tabs 9 to 11 and 13 to 17.
51. It is clear, from the undisputed evidence of Mr Roberts, that those documents were disclosed inadvertently in the circumstances which he describes. I need not set them out in any detail. In very brief summary, it is as follows. There was an exchange of emails between himself and the person dealing with disclosure which clearly indicated, so far as he was concerned, that these documents should be withheld as documents subject to legal professional privilege. However, because a list of items under consideration appeared differently in the versions being looked at by that person and by Mr Roberts, confusion arose and the recipient of the instructions from Mr Roberts disclosed an item on her list which Mr Roberts by reference to his list had instructed should not be disclosed. The difference in the list is explained by a computer inserting a read receipt as the first item in one of the lists.
52. That the documents had been inadvertently disclosed was not drawn to Mr Robert's attention until requests were made for additional documents by the claimant. That was some considerable time after disclosure had been made and after the claimant and her lawyers had seen and considered the documents in question.
53. The applicable law is set out in the judgment of Clarke LJ in Al-Fayed v Commissioner of Police of the Metropolis [2002] EWCA Civ 780 as follows:

- “(iii) A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has being waived.
- (iii) In these circumstances, where a party has given inspection of documents, including privileged documents which he has allowed the other party to inspect by mistake, it will in general be too late for him to claim privilege in order to attempt to correct the mistake by obtaining injunctive relief.
- (v) However, the Court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice requires as, for example, in the case of inspection procured by fraud.
- (vi) In the absence of fraud, all will depend upon the circumstances, but the court may grant an injunction if the documents had been made available for inspection as a result of an obvious mistake.
- (vii) A mistake is likely to be obvious and an injunction granted where the documents are received by a solicitor and: (a) the solicitor appreciates that a mistake has been made before making some use of the documents; or (b) it would be obvious to a reasonable solicitor in his position that a mistake has been made; and, in either case, there are no other circumstances which would make unjust or inequitable to grant relief.
- (viii) Where a solicitor gives detailed consideration to the question where the documents have been made available for inspection by mistake and honestly concludes that they have not, that fact will be a relevant (and in many cases an important) pointer to the conclusion that it would not be obvious to the reasonable solicitor that a mistake had been made, but is not conclusive; the decision remains a matter for the court.
- (ix) In both the cases identified in (vii)(a) and (b) above there are many circumstances in which it may nevertheless be held to be inequitable or unjust to grant relief, but all will depend upon the particular circumstances.
- (x) Since the court is exercising an equitable jurisdiction, there are no rigid rules.”

54. That guidance has been helpfully commented on in two other cases in the Court of Appeal. In Rawlinson and Hunter Trustees SA v Directors of the Serious Fraud Office (2) [2015] 1WLR797 Moore-Bick LJ said the following:

“Nonetheless, once it is accepted that the person who inspected a document did not realise that it has been disclosed by mistake, despite being a qualified Lawyer, it is a strong thing for the Judge to hold that the mistake was obvious. Those reviewing the documents were engaged on an enormous task, in the course of which they had been required to consider many thousands of documents, some of which were, or at any rate may arguably have been, privileged. The Judge laid some emphasis on the letters to which I have referred, but the essence of his thinking seems to have been that it was obvious that the document had been disclosed by mistake because it was obvious that it was privileged. That seems to me to confuse two things: whether the document was privileged and whether, even if privileged, it has obviously been disclosed by mistake. It is only if the court is satisfied of the latter that it will consider whether to prevent the use of the document in the litigation. No doubt in some cases the sensitive nature of the

document will be enough to make it obvious that it has been disclosed by mistake, but often that will not be the case.”

55. In Atlantisrealm Ltd v Intelligent Land Investments (Renewable Energy) Ltd [2018] 4WLR6, Jackson LJ said:

“In the electronic age, even with the help of sophisticated software, disclosure of documents can be a massive and expensive operation. Mistakes will occur from time to time. When privileged documents are inadvertently disclosed (as is bound to happen occasionally), if the mistake is obvious the lawyers on both sides should cooperate to put matters right as soon as possible.... It should not be necessary for either the parties or the courts to devote their resources to resolving disputes of that nature between solicitors.”

56. Clarke LJ's judgment applies both an objective and a subjective test. First of all, one has to look at behaviour of the solicitor in question and, secondly, one has to look at how a reasonable solicitor would have behaved. The two are not unrelated, because, as he notes, how the particular solicitor behaved in the instant case will often be relevant (if not highly probative) of how a reasonable solicitor would have behaved.
57. Moore-Bick LJ reminds Judges of two things, firstly that it is a “strong thing” to find that a solicitor who has inspected a document and not realised that it was disclosed by mistake ought (considered against the standard of a reasonable solicitor) to have realised that the mistake was obvious. Secondly, it is important to focus on the test being one of “obvious mistake” and not one of “obvious privilege”, although the fact that privilege might be thought obvious will be relevant to the question of whether or not there was an obvious mistake.
58. Looking at the correspondence at the material time from the claimant's solicitor, I am satisfied that although some solicitors might have thought that these documents might be privileged, this solicitor did not do so. Doing the best that I can with that correspondence, and, in particular, the letter of 1 February 2018, the solicitor appears to have thought that these particular documents were not privileged at all and that, as regards the respondent's disclosure as a whole, care had been taken in relation to documents containing privileged material which could be separated from the non-privileged, so as to redact the privileged parts (where appropriate) and indicate the reason for redaction, whilst disclosing the non-privileged parts.
59. Hence, I am not satisfied that the first (subjective) limb of Clarke LJ's test is made out. This solicitor did not appreciate that a mistake had been made.
60. What of the second limb, dealing with the objective test? I believe that a reasonable and careful solicitor would have noted that:
- 60.1 Many of the documents disclosed by the respondent were headed “privileged and confidential” (or some variant thereon) when they were quite clearly not privileged and no claim was made that they were.



- 60.2 Whilst many of the now disputed documents are also so headed, that would have seemed of little significance to such a solicitor in this context where many other documents were inappropriately so headed.
- 60.3 The fact that many documents disclosed were part redacted (with the redactions carefully justified as being made because the contents were to that extent the subject of legal professional privilege) this would suggest that care had been exercised in the disclosure process to identify privilege documents and to exclude them in the whole or, where legally appropriate, to seal up only part of the document and disclose the rest.
- 59.4 The disputed documents were either considered not to be privileged, or the view had been taken that the respondents wished to disclose them anyway.
61. In those circumstances, it is my view that a reasonable solicitor would not think that there had obviously been a mistake made in disclosing any of the documents now in dispute between the parties. In those circumstances it is, to use the phrase used by Clarke LJ, "too late for [the respondent] to claim privilege in order to attempt to correct the mistake." The documents can be used in these proceedings by the claimant.

### **Telephone records**

62. On 27 August 2017 the file in this matter was put before Employment Judge Gumbiti Zimuto in order for him to consider a request made in correspondence for an order. He produced a note (dated 31 August 2017) of the order that he proposed should be made, which note I have read to the parties. So far as material it reads:
- "The respondent is to provide the telephone record referred to in the response."
63. Unfortunately, when transcribed by the tribunal Clerk the order made read "the respondent is to provide the telephone referred to in the response." This has led the claimant to assert an entitlement to the device in question, a mobile device. That was not the Judge's intention, nor do I consider such an order to be appropriate in the circumstances as I now understand them.
64. Without objection from the claimant, the circumstances having been explored, I clarify that order so that it reads:
- "The respondents are ordered to provide telephone records relating to paragraph 34 of the Grounds of Response in so far as any such records are within their control."

65. The first to third respondents' efforts to locate copies of the relevant telephone records are set out in the witness statement of Mr Clark. The records are held by AT&T in the USA. That company has, hitherto, indicated that it could only deliver them up in hard copy form to the address of the then subscriber. That address is no longer occupied by any Shell company. More recent enquiries have elicited a more helpful response on the part of AT&T. It appears that they will make efforts to provide the records to an up to date Shell address. However, I consider that it is appropriate to make the order that I have in its limited terms, given the uncertainty as to AT&T's ultimate willingness to depart from what appear to be its somewhat rigid policies.

**Part redacted documents**

66. I have already made reference to the fact that, in so far as disclosure has been given (and this is to a limited extent), certain documents have been part redacted on the basis that contents subject to legal professional privilege have been withheld. The law in this area is relatively clear, albeit that its application often causes problems. It is not in dispute and, given the approach I will take, it is unnecessary for me to do more than give a brief summary. A party to litigation cannot disclose parts only of privileged material. Once privilege is thus waived (by partial disclosure) it is waived for all of the relevant related material. Similarly, a party cannot give disclosure of only the non-privileged parts of particular documents where those parts when read in isolation from the privileged (and redacted) parts give a misleading impression. There is no dispute between the parties as to that legal position.
67. However, there is concern as to whether those principles have been appropriately followed as regards the redactions in this case. In order to meet an application for disclosure of redacted material, the respondents (by their solicitor) have agreed that by 24 April 2018 the relevant documents will have been re-inspected by him in order to satisfy himself that the relevant legal principles have been correctly applied. The claimant is content that I make no order on its application pending the outcome of that further inspection and I make no such order.

**Request for further information**

68. The claimant made a request for further information on the basis that an answer to the request might enable the claimant to abandon three particular allegations of discrimination presently pursued. The position of the respondents is that they do not consider that they can presently deal with the matter in the way that the claimant would like, the matter being nuanced and more complicated and requiring further research. In those circumstances, the claimant does not press for an order. I consider that to be sensible.
69. Nevertheless, the respondents have assured me that the matter will be kept under review and that if in the course of considering the documents in this

case and preparing witness statements it becomes (as common sense suggests that it well might) possible to deal with the request for further information, then that will be done.

**Directions to full merits hearing**

70. For convenience I shall set out the product of the case management discussion and my case management orders in a separate document. However, I deal with one aspect of the matter here because it is convenient to do so. The claimant has produced a List of Issues. That list contains the generalised assertions of discrimination on behalf of “the Respondents” (being R1 to R6 inclusive) referred to above. The claimant accepts that this approach is unhelpful and that it will be necessary to identify which of R1 to R6 are in issue in relation to each matter. Where possible this will involve identifying who (as a named individual) was doing what on behalf of which respondent, what the legal basis for the liability of that respondent is, and whether it is said that this is an instance of an individual (on behalf of a respondent) aiding, instructing or inducing a particular discriminatory act.
71. Where there are disputes of fact these will be identified in appropriate foot notes which can also be used to identify any other particular disputes between the parties.
72. It is anticipated that that exercise will be completed by 13 April 2018 and that the respondents will have indicated their agreement or otherwise by 25 May. There remains the possibility that the parties will be unable to agree, or that, as a result of the work done by both sides, further amendments to the claims may be sought. To that end a further preliminary hearing is listed for half a day on 10 September 2018 at Watford, which hearing can be vacated by agreement if there is nothing which the parties require the tribunal to determine.
73. A cut-off date of 29 June 2018 will apply to any applications to amend the claim form, it being understood that it will still be open to the respondents to rely upon any delay in order to resist such an application.

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Employment Judge A Clarke QC

Date: 13 April 2018

Sent to the parties on: .....

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For the Tribunal Office