



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

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Judgment of the Employment Tribunal in Case No: 4102480/2020 (V) Issued Following Open Preliminary Hearing Heard at Edinburgh on the Cloud Based Video Platform, on 27th of January and on 6th August 2021

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Employment Judge J G d’Inverno

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Mr A O Abioye

**Claimant
represented by
Mr S Chihuri,
legally qualified
practitioner
per Fair Justice System
For Scotland Group,**

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West Lothian Council

**Respondent
Represented by
Ms K Graydon, Solicitor
per Clyde & Co (Scotland)**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Employment Tribunal is that those parts only of the terms of the claimant’s proposed amendment of 24th September 2020 as are set out below and which reflect and incorporate that part only of the adjustments of 28th March 2021 which the Tribunal has determined were compliant with its Orders of 25th March 2021, be received and allowed to form part of process and identified as “The terms of the proposed amendment for the claimant dated 24th September 2020 and received by the Tribunal (“the Received Proposed Amendment”), and

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which are:-

ETZ4(WR)

“At the end of the last sentence on page 7 Form ET1 the claimant seeks Leave to add to the Particulars of Claim already contained in the said Form ET1 and makes Application for Leave to Amend in terms of the Rules of Procedure:-

5 Direct Discrimination

- Direct Discrimination s.13

10 The claimant was discriminated against by Pauline Watson, Ewen Archer, Susan McPhillips and others and, treated less favourably than other colleagues. The claimant was told not to use the water dispenser by Pauline Watson on several occasions in the office but rather to get his water from the kitchen tap while other colleagues were allowed to use the water dispenser. There were other instances of such conduct
15 where Ewen made references to Donald Trump as a legend “getting rid of immigrants”. This was discussed in front of the claimant. Karen Kefferty and Megan Delaney in the BHU office at the Civic Centre. Ewen was in the habit of referring to the claimant as the big black man even though as a colleague he knew the claimant’s name. Thereby
20 segregating the claimant from other colleagues who were all white. There was direct discrimination against the claimant because he complained on various occasions to his Line Manager Dave Scott who said he would “speak to them” about these complaints. Nothing was done perhaps due to a stereotypical assumption by the respondent
25 about the limited effect that this conduct would have on the claimant and a culture which was endemic in that section of the work force.

30 The claimant also approached Stuart Greenhill when Dave was on annual leave, he never got back to the claimant either. Then the claimant approached Susan to address issues also but was met with dismissal. The claimant spoke to Pauline and told her that he was unhappy on how she treated him, but her conduct did not change. This course of conduct of these employees within the work place of West Lothian Council makes the respondent vicariously liable for these
35 unlawful conduct. The respondent ought to have been informed of the claimant’s concerns through management tiers. [*The following sentence added by adjustment on 28th March 2021*] The alleged

incidents occurred at Blackburn Homeless Unit (BHU) located in Blackburn, West Lothian, which was the claimant's regular place of work."

5 **(Second)** Allows to the respondent a period of 28 days from the date upon
which this Judgment is intimated to the parties ("the relevant date") within
which to tender answers to the proposed amendment as adjusted, if so
advised; the same to include calls for such further specification, in relation
to each of the incidents of direct discrimination founded upon by the
10 claimant and as received by the Tribunal, "the received proposed
amendment"), under the headings set out in the Tribunal's Order
(First)(a)(i) to (vii) of 25th February 2021, as they consider the terms of the
received proposed amendment fails to provide and which they continue to
seek from the claimant, in order that they have fair notice of the case which
15 they have to meet.

(Third) Orders the claimant, within a further period of 14 days thereafter,
that is within 42 days of the relevant date, to answer such calls for
specification as have been included in the respondent's tendered answers;
20 and to do so by way of adjustment to the now received terms of the
proposed amendment and to do so in relation to each alleged incident of
direct discrimination, individually, while avoiding the use of generalisations
and of the passive voice.

25 **(Fourth)** Allows to the respondent's representative a further period of
14 days thereafter that is within 56 days of the relevant date within which to
adjust the tendered answers in response thereto, if so advised, the same to
include confirmation of whether they consider that they have or have not
received fair notice of the case of direct discrimination which they are to
30 meet.

(Fifth) Directs that the case file be brought up to the sitting Judge together
with the now received terms of the proposed amendment as adjusted and

the tendered answers as adjusted for final determination of the Application for Leave to Amend.

5 **(Sixth)** Otherwise refuses the Application for Leave to Amend for the purposes of adding a complaint of indirect discrimination and, in so far as it relates to remainder the proposed amendment of 24 September 2020 as first adjusted by the claimant including in particular, the averments appearing under the heading “Indirect Discrimination s.19”.

10 **(Seventh)** Continues final determination of the Application for Leave to Amend, in the now received terms of the proposed amendment and the integral preliminary issue of Jurisdiction to the conclusion of the process of lodging answers and adjustment.

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REASONS

The First Day of Open Preliminary Hearing 27 January 2021

20 1. This case first called for Open Preliminary Hearing (“OPH”) on the Cloud Based Video Platform at Edinburgh on 27th January 2021 at 10 am. It so called following the vacation, on the Joint Application of parties’ representatives, of the OPH previously had been set down to proceed in conventional “In Person” form on the 15th of January 2021, and its relisting, again on the Joint Application of parties, as a Hearing to proceed by way of
25 Video Conference.

30 2. At the time of appointing the case to Open Preliminary Hearing the claimant’s position, as communicated by his representative, was that, all other things being equal, an “In Person Hearing” would best facilitate the claimant’s participation. The Open Preliminary Hearing, in the first instance, had been so fixed to proceed “In Person” in order to facilitate the claimant’s attendance and participation.

3. Each party enjoyed the benefit of legally qualified representation; for the claimant Mr Chihuri who advised that he appeared in the capacity of “qualified legal practitioner” per Fair Justice System For Scotland Group; and for the respondent Ms Graydon, who advised that she appeared in the capacity of “a solicitor” per Clyde & Co (Scotland) LLP.
4. The OPH proceeded, in terms of paragraph **(Fifth)** of the Tribunal’s Case Management Orders of 11th September and relative Notice of Hearing dated 6th November, both 2020. The hearing was fixed for the purposes of determination of the claimant’s written Application for Leave to Amend in terms of the “Proposed Amendment”, set out in the Application and dated 24th September 2020. The Application was opposed by the respondents in terms of their written grounds of objection dated 16th October 2020.
5. Shortly before the start of the proceedings on 27th January 2021, the CVP clerk indicated that she had been advised by the claimant’s representative that the claimant would not be in attendance at the Hearing but rather, that the Tribunal would be addressed on the Application by his representative only.
6. In the course of Case Management Discussion, conducted at the outset of the Hearing, parties respectively confirmed and the Tribunal recorded, the following matters:-
- (a) On 22nd January 2021 the Legal Services Manager of Fair Justice System For Scotland Group sent an email to the Tribunal and to the respondent’s representative, with an attachment which she described sending in her capacity of assisting the claimant’s representative in the case and which, in the email, she described as a copy of the application to amend the claim submitted on behalf of the claimant.

(b) The Employment Judge (Porter) to whom that communication was referred directed that it would be a matter discussed at today's Preliminary Hearing of 27th January 2021.

5 7. Contrary to the description applied to it in the email which covered it, the document sent to the Tribunal on 22nd January 2021 is not a copy of the "Application to amend the claim submitted on behalf of the claimant". A comparison of it with the written Application to amend and the accompanying proposed amendment of 24th September 2020, reveals that it is a different
10 document with amongst other differences its extending to six as opposed to two A4 sides and comprising multiple paragraphs under various headings. As at the commencement of the Open Preliminary Hearing of 27th January 21 that document was not before the Tribunal, either as the opposed Application to amend, or as the terms of the proposed amendment, for the determination
15 of which the Hearing had been fixed.

8. In response to the Tribunal's request for clarification regarding the document and regarding what, if anything, was sought be done with it in relation to today's Hearing, the claimant's representative advised that it should be put
20 aside and disregarded for the purposes of the instant Hearing. In those circumstances no further reference to the document was made in the course of Hearing, nor is made to it in this Note of Reasons.

9. The Employment Judge communicated to parties representatives his standard request, made of parties participating in remote Hearings with a view to avoiding the disruption associated with parties and the Judge unintentionally talking across each other, and, in order to efficiently utilise the time allocated, that parties observe the following two disciplines in the course
25 of the Hearing:-

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(a) that parties please speak only when requested to do so by the Judge; and

- (b) if asked a question by the Judge, to confine their response, at first instance, to answering the specific question asked.

Procedural Background

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10. The Application to amend, the “Proposed Amendment” in terms of which Leave is sought, and the grounds of objection, in terms of which it is opposed, were brought forward further to the Tribunal’s Case Management Orders of 11th September 2020, issued at a Closed Preliminary Hearing (“CPH”) (Case Management Discussion) held at Edinburgh on that date. Those appearing for parties at that CPH also were respectively; Mr Chihuri, per Fair Justice System For Scotland Group, for the claimant and, Ms Graydon, per Clyde & Co (Scotland) LLP, for the respondent.
11. Orders **(First)** to **(Fifth)** of 11th September 20 record relevant matters against the background of which the Application proceeds and, for completeness sake, they are set out below:-

“(First) Records the claimant’s representative’s confirmation;

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- (i) that the claim given notice of in the initiating Application ET1 is one of Harassment related to the claimant’s protected characteristic of Race, in terms of section 26 of the Equality Act 2010 (“EqA”);

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- (ii) that the claimant gives notice, in the CMD Agenda return submitted on 18th August 2020, of an intention to seek to introduce, by way of amendment, additional complaints of both Direct and Indirect Discrimination because of the protected characteristic of Race, respectively in terms of sections 13 and 19 of the Equality Act 2010.

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(Second) Records the respondent's representative's confirmation that the respondent, which has entered appearance resisting the claims:-

5 (a) contends that the claimant lacks Title to Present and the Tribunal Jurisdiction to Consider, both in terms of section 123 of the EqA, his complaint of Harassment, the initiating Application ET1 having been first presented on 6th May 2020 whereas the last act of alleged harassment specified
10 in the Form is dated 22nd February 2019;

(b) asserts that the only claim given notice of in the initiating Application is that of section 26 EqA Harassment;

15 (c) that in the event that the claimant wishes to seek to insist upon advancing claims of Direct and or Indirect Discrimination in terms of section 13 and or 19 of the EqA, the claimant will require to make Application for and be granted Leave to Amend in specific terms to be set out in
20 a "Proposed Amendment for the Claimant";

(d) that any such Application for Leave to Amend will be opposed.

25 **(Third)** Allows to the claimant's representative a period of 14 days from 11th September 2020 within which, if the same is to be insisted upon, to make written application in accordance with the Rules of Procedure, for Leave to Amend in terms of an accompanying
30 "Proposed Amendment for the Claimant", in which latter document there should be set out, within quotation marks, the specific words which the claimant seeks leave to amend into his pleaded case.

(Fourth) Allows to the respondent's representative a further period of 21 days thereafter, that is within 35 days of the 11th September 2020,

to consider the terms of the proposed amendment and to write to the claimant's representative and to the Tribunal specifying:-

5 (a) those parts of the proposed amendment, if any, in respect of which the respondent makes no objection and in respect of the terms of which the respondent would be content to see Leave to Amend granted and the same incorporated into the claimant's pleaded case;

10 (b) those parts of the proposed amendment, if any, in respect of which the respondent maintains opposition, in which latter case, also setting out the grounds upon which the respondents object to the granting of Leave.

15 **(Fifth)** Appoints the case to **a one day Open Preliminary Hearing, for determination of the to be opposed Application for Leave to Amend,** the same to proceed in conventional **"In Person" form before the sitting Judge (d'Inverno)**, if available, whom failing before any Employment Judge at Edinburgh

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The Issue

12. The Issue requiring investigation and determination at the Open Preliminary Hearing was whether the claimant's Application dated 24th September 2020, for Leave to Amend in terms of the "Proposed Amendment" of the same date and opposed in terms of the respondent's written objections dated 16th October 2020, should be granted or refused.

13. The Application being one made at the instance of the claimant it was for the claimant to lead. There being no oral evidence placed before the Tribunal, by reason of the claimant's non-participation in the Hearing, the claimant's representative proceeded to address the Tribunal in support of the Application.

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Submissions**Submissions for the Claimant made on 27th January 2021 at the conclusion of the initial day set down for Open Preliminary Hearing**

5 14. In the course of his submissions in support of the Application, the claimant's representative made reference to and relied upon the following statutory and case authorities, and Rules of Procedure:-

10 (a) Paragraph 29 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

(2) **Selkent Bus Company Limited v Moore** [1996] ICR 836
2nd May 1996 UKEAT

15 (3) **Transport and General Workers Union v Safeway Stores Limited** UKEAT0092/07 per Underhill P, as he then was

20 (4) **Ali v Office of National Statistics** [2005] IRLR 201 CA per Waller LJ as referred to by Underhill P in **Transport and General Workers Union v Safeway Stores Limited**

25 (5) **Ahuja v Inghams** [2002] EWCA 192, per Mummery LJ at paragraph 43

(6) **Shandhok v Tirkey** [2015] IRLR 195 EAT per Langstaff P

(7) **The Secretary of State for Health v Mrs K Vazeer and others** 26th June 2017 UKEAT/0096/14/DM

30 (8) **Abercrombie and others v Aga Rangemaster Limited** [2013] EWCA Civ 1148 at paragraph 43 to 57 and per Underhill LJ at paragraph 47, 48 and 49

(9) **In relation to Time Bar**

Section 123(1) of the Equality Act 2010

5 Section 123(3) of the Equality Act 2010

(10) **Chief Constable of Lincolnshire Police v Caston** [2009]
EWCA Civ 1298; [2010] IRLR 327

10 (11) **British Coal Corporation v Keeble and others** [1997]
UKEAT IRLR 336

15. Under reference variously to the above, the claimant's representative submitted as follows:

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(a) the claimant made Application for Leave to Amend in terms of Rule 29 (paragraph 29 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") which allowed for such an application to be made at any time in the course of proceedings.

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(b) The application was made in accordance with the guidance set out by the Employment Appeal Tribunal in the case of **Selkent** (No (2) above) which identified three potential categories within which an amendment might sit by reason of its nature; those being:-

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(i) A request to correct minor typographical errors;

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(ii) Seeking to add or substitute a new claim arising out of the same facts as the original claim; and

(iii) Those that add a new claim entirely unconnected with the original claim

16. In the instant case, submitted the claimant's representative, the "*Particular Heads of Claim had not been fully explored or clarified in the initial claim*" and the effect of the proposed amendment in respect of which Leave to Amend was sought was "*to partly alter the basis of the existing claim but without necessarily purporting to raise a new distinct Head of Complaint*".
17. Under reference to the case of **Transport and General Workers Union v Safeway** (number 3 above) and quoting President Underhill, as he then was; that while it would be wrong to allow parties to get around statutory limitation periods, the relevant rule "gave general discretion to allow amendment".
18. The claimant's representative further submitted;
- (a) that the application to amend, coming as it did at a relatively early procedural stage in the case would not result in any serious prejudice to the respondent if it were allowed and the respondent would be entitled to defend the claim as amended.
 - (b) That the Tribunal should not regard the case as one in which there had been an inordinate or inexcusable delay on the part of the claimant in progressing his claim nor, he submitted,
 - (c) would the allowance of the amendment result in any substantial risk that justice could not be done or that the claim could not be adjudicated upon fairly or justly by the Tribunal.
19. While the claimant's representative made additional submissions, noted at paragraphs 31 to 33 inclusive below, in response to those made by the respondent's representative, he concluded his primary submission by inviting the Tribunal to hold:-

(a) That the putative complaints of Direct and Indirect Discrimination which the claimant sought Leave to Introduce by amendment, should be heard by the Tribunal though late; and,

5 (b) To conclude, upon the application of the principles in **Selkent Bus Company Limited v Moore** that the balance of relative injustice and hardship lay, in the circumstances presented, in favour of allowing the amendment, and to grant the Application for Leave to Amend.

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Submissions for the Respondent made on 27 January 2021 at the conclusion of the initial day set down for Open Preliminary Hearing

20. At the outset of her submissions, and in response to a request for clarification
15 made by the Tribunal, the respondent's representative confirmed that in opposing the Application for Leave to Amend the respondent took objection to the terms of the proposed amendment of 24th September 2020 in its entirety, and did so in reliance upon the written grounds of objection lodged and intimated on the 16th of October 2020.

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21. The respondent's representative thereafter submitted as follows;

(a) That within its Response Form ET3, submitted on the 9th of July
25 2020, the respondent had, at paragraphs 3.1 to 3.3 of the paper apart, included a detailed request for Further and Better Particulars from the claimant in respect of the section 26 EqA complaint of Harassment which, in her submission, was the only complaint specified or otherwise given notice of by the claimant at sections 8.1 and 8.2 of the initiating Application ET1.

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(b) That the claimant had made no response to that call.

(c) That the respondent's representative communicated to the claimant's representative a further detailed request for that

specification, at paragraph 2.7 of the CMD Agenda Return Form sent to the claimant and lodged with the Tribunal on 4th September 2020.

5 (d) That on 24th September 2020, further to the Tribunal's Order **(Third)** of 11th September 2020 the claimant's representative had submitted an Application for Leave to Amend in respect of an attached proposed amendment which set out, as had been directed by the Tribunal, the particular words which the claimant
10 sought to add to section 8.2 of his initiating Application ET1.

(e) That it was the opposed Application for Leave to Amend, in those terms, which was before the Tribunal for determination at the Open Preliminary Hearing.

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22. In relation to the particular grounds of opposition, the respondent's representative submitted;

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Firstly; That the Application had not been made promptly and that the claimant had not provided any explanation for the delay.

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(a) The claimant's ET1 had been lodged on the 6th of May 2020, a date from which at the latest, if not earlier, the claimant had been represented by Fair Justice System For Scotland Group, Mr Chihuri of that organisation being identified as the claimant's representative at section 11 of the Claim Form.

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(b) The claimant, she submitted was so represented on the face of the ET Form when it was presented to the Employment Tribunal and no explanation had been provided as to why the new matters which the proposed amendment sought to introduce had not been included in the ET1, that being a form designed for completion by lay persons and all of the matters which the

claimant sought to refer to in it being matters which were within the knowledge of the claimant at the time;

5 (c) Neither, those matters not having been included in the ET1 when the claim was raised, had the claimant's representative provided any explanation as to why the application to amend had not been made sooner than the period in excess of four months which had elapsed before it was made.

10 23. The respondent's representative separately re-iterated that after the claim was raised, and some two months prior to the making of the Application, the respondents had in terms of their ET3 called for specification of the claim which was at that time being advanced because, as was stated in their ET3, the respondent was not in a position to respond in full to the claim in the
15 absence of the requested specification.

24. Thus, submitted the respondent's representative, the claimant had had ample opportunity to provide to the respondent fair notice and a reasonable understanding of the claim or claims being pursued against them. Against
20 that background, she submitted that the Application should have been made at an earlier stage in proceedings and there required to be some explanation and justification, it not having been so made, as to why it should now be permitted. She invited the Tribunal to conclude that the Application had not been made promptly.

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25. Secondly, the respondent's representative submitted;

(a) that with the exception of the proposed averment contained in the 9th line of the proposed amendment under the heading
30 "**Direct Discrimination section 13**" being the averment; "*Ewen was in the habit of referring to the claimant as a big black man*", all of the factual allegations which the proposed amendment sought to introduce were new factual allegations all of which, as

at the date of the making of the Application 24th September 2020 were being raised out of time; and

5 (b) in circumstances in which no sufficient explanation for their lateness, or as to why they could not have been included at the time of raising the claim, had been provided by the claimant and in circumstances where the matters were all within the claimant's knowledge at those earlier times.

10 26. Thirdly, and in addition;

15 (a) the proposed amendment sought to introduce two entirely new Heads of Claim of Direct Discrimination and Indirect Discrimination both of which were being presented out of time.

(b) Those new Heads of Claim significantly altered the basis of the existing claim which was one relating entirely to "harassment".

20 (c) What was being proposed was not and could not be described as a "relabelling" of the existing claim as the new Heads of alleged discrimination arose from new factual allegations.

25 27. Fourthly; the issue of Time Bar and prejudice to the respondents in having to defend claims relating to events which took place some time ago was sharply focused.

30 28. Fifthly, the putative new claim of Indirect Discrimination which was disclosed in the proposed amendment was inadequately specified and was lacking in specification to the extent that it failed to give notice of a relevant complaint of Indirect Discrimination;

(a) In particular, the terms of the proposed amendment did not include the identification of and offer to prove any provision,

criterion or practice which had been allegedly applied by the respondent and which put individuals of the claimant's race at a particular disadvantage compared to individuals of a different race.

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(b) The need to do so was one of the essential requirements of a section 19 EqA complaint of Indirect Discrimination,

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(c) to grant Leave to Amend in such terms would place the respondent in the position of having to face a new Head of Claim to which it was unable to respond; and,

(d) that Leave, in respect of the Indirect Discrimination claim in particular, should not be allowed.

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29. Finally, that the respondent would be and already was prejudiced by the late introduction of these new allegations;

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(a) The respondent had already been in receipt of legal advice based on the claim as originally pled and had prepared to answer those claims.

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(b) Documentation and witnesses had been identified based on the claimant's original claim.

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(c) The claimant's amendment, if allowed, would give rise to a need for further investigation, review of documentation and significantly widen the scope of the evidential enquiry both in terms of oral evidence of witnesses and in respect of the preparation for and the conduct of any Hearing on the Merits.

(d) In the respondent's representative's submission, the introduction of the new allegations was likely to result in at very least an additional day being required for presentation of the

claimant's case and an additional 1½ days being required for the respondent's rebuttal of it;

5 (e) separately, insofar as the claimant sought to rely upon the new factual allegations set out in the proposed amendment, in respect both of additional complaints of Direct and Indirect Discrimination, these were all subject to the same failure to provide fair notice as that which attached to the existing allegations of harassment, in that no specification was provided
10 of when and where any of the events alleged were said to have occurred, and, in respect of many of them there was, in addition, an absence of any specification of the persons at whose hands the conduct complained of was said to have occurred.

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(f) Such was the want of specification, she submitted, that;

(i) the terms of the proposed amendment, did not give the respondent fair notice of the case which
20 it had to meet,

(ii) the respondent would be unable to properly investigate the new factual allegations; and,

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(iii) that a fair Hearing could not be conducted in respect of them nor could they be adjudicated upon fairly and justly by the Tribunal.

30. For the above reasons and in reliance upon the guidance set out in the case
30 of **Selkent Bus Company Limited v Moore** [1996] ICR 836 the respondent's representative invited the Tribunal to hold that the balance of injustice and hardship fell in favour of the Application being refused.

31. By way of a Secondary Submission, and in the alternative, the respondent's representative submitted that if, notwithstanding the above, the Tribunal was minded to allow leave to amend in the terms sought, it should do so subject to the preservation, for subsequent determination, of the Preliminary Issue of want of Jurisdiction by reason of asserted Time Bar.

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(a) The decisions of the EAT in **Baker v The Commissioner of Police of the Metropolis** UKEAT/0207/16/RN and **Gallilee v Commissioner of Police of the Metropolis** UKEAT/0207/16 provided authority for the proposition that to do so was a competent way of proceeding as an alternative to determining, at the same time as determining the Application for Leave to Amend but without prior evidential enquiry, the Preliminary Issue of whether it was just and equitable in particular circumstances to allow an extension of time for the introduction of new Heads of Discrimination Claim based upon new factual allegations.

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Reply by the Claimant to the Respondent's Submission (on 27 January 2021)

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32. In exercising a limited right of reply to the respondent's representative's submissions, the claimant's representative made the following points;

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(a) He submitted that there was an inconsistency of approach between what he had understood to be a criticism by the respondents of the inadequacy of the Particulars of Claim set out at section 8.2 of the ET1, on the one hand, and their opposition to the Application for Leave to Amend which sought to add more information, on the other.

(b) In relation to the contention, advanced by the respondent's representative, that with the exception of one, all of the allegations contained in the proposed amendment were new

and some were also out of time, the claimant's representative made reference to the fact:-

5 (i) that the internal proceedings in respect of the claimant's grievances had still been ongoing at the time of first presentation of the Form ET1, on 6th May 2020,

10 (ii) that the claimant had received output from the internal procedures as recently as 20th September 2020 and,

15 (iii) that in circumstances when internal proceedings were ongoing, it was difficult for the claimant to bring forward the issues which he now sought to do in terms of the proposed amendment.

20 (c) In relation to the respondent's submission that the Claim Form had been designed to be used by lay persons, the claimant's representative stated;

25 (i) that that depended on the definition of "lay persons" and that regardless of how it had been designed, his understanding was;

(ii) that the claimant had had difficulties in completing it, these being difficulties in navigating the Form in its electronic format,

30 (iii) that the claimant did not consider that the Form gave him notice of how much information he was required to put in,

35 (iv) that further detail had been available to the respondents in other documents which had been

sent to them separately from the claim form;
and,

- 5 (v) that the claimant had thought that he would be
able to provide more information later after the
internal proceedings had concluded.

33. Under reference to Underhill J (as he then was) in **TGWU v Safeway Stores Ltd** (No 3 on the list), the claimant's representative submitted that the issue
10 of time bar required to be considered within the context of the nature of the
process; He invited the Tribunal to do so and to Grant Leave to Amend in the
terms sought.

15 **Applicable Law and Discussion**

34. Guidance as to the approach to be adopted in consideration and
determination of such an Application, including in relation to the relevant
factor of Time Bar, was set out by The Honourable Lady Wise in **Amey
Services Limited and another v Aldridge and others** UKEATS/0007/16,
20 quoting the Honourable Lady Smith (as she then was) in **Newsquest (Herald
and Times) Limited v Keeping** [2010] UKEATS/0051. That is guidance with
which I respectfully agree and adopt in my approach to the Application in the
instant case. Rather than seeking to paraphrase, I set out below the relevant
extracts from the Judgment of the Honourable Lady Wise in which it is
25 articulated:-

30 “20. The trite but nonetheless important starting point is that a decision to
grant or refuse an amendment involves the exercise of judicial discretion. In
exercising that discretion, regard must be had to all the circumstances of the
case, including consideration of the injustice or hardship that would be caused
to any of the parties if the proposed amendment is allowed or refused -
Cocking v Sandhurst Ltd [1974] ICR 650. That the applicability of time
limits is a relevant consideration in considering how to exercise discretion on
an opposed amendment was put beyond doubt by Mummery J in **Selkent Bus**

Co Ltd v Moore [1996] ICR 836. He listed; the nature of the proposed amendment, the applicability of time limits and the timing and manner of the application, as three relevant considerations in a non-exhaustive list of circumstances to be taken into account. On time limits, he stated:

5 **"If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions ..."**

10 That passage from **Selkent** has been reproduced and relied on in a number of subsequent EAT decisions involving proposed amendments. In particular, the issue of limitation being an essential question in considering a proposed amendment was confirmed and elaborated by HHJ Peter Clark in **Rawson v Doncaster NHS Primary Care Trust** [2008] UKEAT/0022 in the following
15 passage:

"The effect of an amendment is to backdate the new claim to the date on which the original claim form is presented. Once amendment is granted, the Respondent is thereafter prevented from raising the limitation defence. That is why consideration of the extension of time point is essential when deciding whether or not to grant permission to amend ..."

 From a Scottish perspective, the position was articulated clearly and unequivocally by Lady Smith in **Newsquest (Herald and Times) Limited v Keeping** [2010] UKEATS/0051 where she stated that:

25 **"The fact that to allow an amendment would, in effect, enable a claimant to elide a statutory time bar does not necessarily prevent an Employment Tribunal granting the application. It does not operate as an absolute bar ... It is, however, as I said in the case of *Argyll and Clyde Health Board v Foulds & Others* UKEATS/0009, a highly relevant factor ... Underhill J referred to it as "potentially decisive" in *TGWU v Safeway Stores Ltd* UKEAT/0092/07 at paragraph 10. Furthermore, a Tribunal requires to consider why the application was not made at an
30 earlier date, why it is being made at that point in time and what**

are the whole circumstances of the lateness ... The overall task of balancing the injustice and hardship that will result from granting the amendment against that which will result from refusing it, must, in the case of an amendment to introduce a fresh claim which would be time barred if presented independently, be carried out in that context."

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21. It is clear from these authorities that the usual principles for amendment of a claim include a requirement to determine, at the stage of exercising discretion to grant or refuse, the application (i) whether the amendment seeks to bring in a claim that would otherwise be time barred and' (ii) if so, whether there are good reasons, taking into account injustices and hardship that may be the result, to grant the amendment notwithstanding that the effect will be to allow the amending party to avoid the usual consequences of presenting a claim out of time. It is always for the party seeking to amend his claim to establish that it should in all the circumstances be accepted. In my view the required approach is of general application and is not restricted to circumstances in which the new claims sought to be inserted arose were open to the claimants at the time of the originating application. The accepted principle is that where timebar is an issue in a proposed amendment, it is considered as an integral part of the overall decision to grant or refuse the amendment. That is the position in both Scotland and England and Wales, the absence of any reference to consideration of time limits in the relevant Presidential Guidance in Scotland being of no moment standing the clear statement of principle enunciated by Lady Smith in Newsquest. The cases of Okugade v Shaw Trust UKEAT/0172/05 and Prakash v Wolverhampton City Council UKEAT/0140/06 serve to reinforce rather than retract from the established principle. In the former case an appeal was allowed because the tribunal had dismissed a proposed amendment that sought to raise matters postdating the receipt of the originating application without considering the broader picture, including the issue of time limits and in Prakash it was emphasised that, where considering an amendment seeking to introduce a claim that arose from a date after the already presented claim had been lodged,

the discretion to grant or refuse it had to be exercised in accordance with the well known principles set out in Selkent.

5 22. In the present cases, the Employment Judge acknowledged that the amendments in question sought to introduce new claims, albeit new claims that were related to those already made and it was conceded before me that he had been correct so to categorise them. One of the grounds on which he sought to distinguish the cases of Selkent and Rawson was that those cases dealt with amendments that sought to introduce claims that were in existence (and therefore could have been included) when the original claims were made. I have reached the view that his approach was wrong in law. While the circumstances of the present cases are entirely different from those in Selkent and Rawson the principles they set down are of general application. Where a claim arises after the originating application is made it may be even more difficult to justify amending outside the time limit. Much depends on the circumstances. **In any event, the error in this case was in attempting to carve out the issue of time bar from the decision on whether to allow the amendment. A determination on the grant or refusal of an amendment is a single stage exercise.** Once the tribunal allows the amendment the new claim is subject to the jurisdiction of the tribunal and a substantive decision will be made on the claims made within it. The Judge's misunderstanding of the legal position in this case is best illustrated by his reference, in paragraph 179, to the issue of timebar being "*... of relevance in the ultimate determination of the applications to amend*". It seems that he regarded the decision to allow the amendment "subject to time bar" as some sort of tentative conclusion, to be revisited later. That is not, on the basis of the established principles, a permissible approach. The Presidential Practice Directions do nothing to assist the claimants on this issue. On the contrary, the 2015 Direction serves to emphasise the importance of any amendment being considered on its merits. The Judge in this case has not determined as part of the overall hardship test whether or not the amendments seek to introduce time barred claims and for that reason alone his decision cannot stand. There were other options available to the Judge in the situation presented to him. **In particular, he could have deferred his decision on the amendments until a later date.** There may be

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situations in which a decision on an amendment can be deferred pending inquiry. It may sometimes be appropriate to defer a decision pending resolution of a legal issue by a higher court or tribunal. **If a Judge is concerned that he cannot determine whether an amendment application should be allowed without more information, whether by way of factual inquiry or otherwise he can raise that with parties' representatives.** What the Judge in this case was not entitled to do was **allow** the amendments at the same time as deferring the timebar issue. That was in my view a material error that justifies interference with his decision.

23. **There were other matters raised before me that merit some discussion. On the issue of the lack of proper specification within the amendments to allow for fair notice, again it would be an error to allow amendments without first ensuring that they were properly particularised.** In **Remploy Limited v J Abbott and Others** UKEAT/0405/14, HHJ Serota QC, in allowing an appeal on that basis said the following:

"I consider ... that the Employment Tribunal placed itself in great difficulty by failing to ensure that before it granted permission to amend, it had before it a properly particularised amendment. This failure in itself in (sic) sufficient to flaw the exercise of discretion. Without that the Employment Tribunal was simply not in a position to consider the effect of the proposed amendments on existing and future case management ..."

Mr Martin argued that the same error had been made in this case and I agree. However, I do not consider that the only option available to the judge was to refuse the amendments. **Again, if there is known to be a problem with particularisation, as there was here, an opportunity could be given to remedy that before any decision is reached and a determination of the proposal to amend deferred. There is a clear inconsistency in allowing amendments at the same time as requiring them to be further particularised, but where outright refusal of the amendments would lead to undue hardship I see no reason in principle why adjustment of the proposed terms of the amendments cannot**

take place prior to the determination being made. The focus of the arguments might then be on whether and in what time frame such refinement of the proposed amendments should be allowed but those arguments would be take place before the single stage decision on the granting or refusal of amendment itself.

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24. It was also contended for the respondents that the need for future clarity on the time bar issue was an irrelevant factor giving rise to a stand-alone ground of appeal. As I have already indicated, there can be merit in a first instance decision maker awaiting the outcome of another case on an important point of principle or practice that will be binding upon him. The proper course in that situation is to defer a decision until the law is clarified, not to make a tentative or partial decision that seeks to excise an integral factor in the decision making process. In any event, the EAT decision in **Bear Scotland v Fulton and another** [2015] ICR 221 on the issue of time limits where there has been a series of deductions was not appealed. Only a higher court could overturn the decision of the then EAT President in that case and so it stands as authority binding on Employment Tribunals dealing with issues such as those that arise in this case.

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25. So far as the 2014 and 2015 Presidential Directions are concerned, the decision appealed against appears to contemplate, at paragraph 167, two separate situations; (i) that the requirements in paragraph 3 are satisfied and (ii) that they are not, in which case relief under paragraph 6 would be appropriate. The problem with that approach is that it again involves excision of the timebar bar issue which is part of the exercise of determining whether there is compliance with the Directions. A failure to specify dates as required by paragraph 3 may result in the tribunal being unable to determine whether or not the amendments are time barred which in turn results in an inability to excuse failure to comply unless or until that issue is resolved. However, the points taken in relation to the Directions have less force than the main issue on which I have decided to grant this appeal. In particular, I would not have regarded the possible confusion on the part of the tribunal in relation to the timing of the Direction in force in relation to Mr Taylor's claim as a material

error had there been no other basis on which to regard the exercise of discretion as flawed.

Disposal

5 26. Counsel were not agreed on the appropriate disposal in the event that of the
appeal being allowed. Mr Martin submitted that, in circumstances where the
amendments were too poorly particularised to be granted in their present form,
there was no benefit to be derived from remitting them back to the tribunal.
Dismissal was the only reasonably possible outcome of any proper
10 consideration of the amendment applications. The amendments disclosed no
basis on which the timebar issue could be determined. It was accepted that if
only the separation of timebar from allowing the amendment point succeeded
there could be a remit, but if it was accepted that the amendments were so
lacking in specification such as not to provide fair notice the only option was
15 their dismissal. There was a difference between the level of specification
required to allow an amendment and the more detailed specification required
for a full hearing, but in these cases all that had been tendered were *pro*
forma amendments with no particularisation at all. Mr Martin accepted that
remit to the "industrial jury" was normally required unless there was only one
20 possible outcome, but the rule in **Jafri v Lincoln College** [2014] ICR 920 did
not apply in circumstances where these amendments could not be allowed.
There was no justification for a "satellite enquiry" before reaching a decision
on the amendments. They had to be assessed as at the date of the application to
amend.

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27. Mr Maguire's position on behalf of the claimants was that even if the
appeal succeeded the matter should be remitted back to the Employment Judge
to deal with the amendment *de novo*. It would be up to him how to deal with
the amendments in light of any clarification of the correct legal approach. In
30 any event, on the face of it not all of the amendments raised possible time bar
issues. For example, some of the Aldridge applications, two of the Taylor
applications, one of the Ross & Menzies applications and two of the McArthur
applications did not involve any timebar point. It would make no sense to

dismiss amendments that were not on the face of it time barred. So far as those that were either time barred or possibly time barred were concerned, the claimants should have the opportunity of addressing the Employment Judge on why those amendments were late and whether they should still be allowed notwithstanding that lateness.

28. I have decided that, in allowing this appeal, I should remit it back to the tribunal to decide of new whether to allow these amendments. The real issue of substance before the Employment Judge and in this appeal has been whether or not it was permissible to allow these amendments "subject to time bar". Having decided that issue in favour of the respondents, I consider that each side is now entitled to seek to persuade the Judge that the amendments should or should not be allowed. The outcome is not inevitable and may vary as between the different amendments. However, the onus is squarely on the claimants to confirm or deny whether each amendment is late and if so to what extent, before arguing that those which are late should nonetheless be allowed. The explanation for lateness will be part of that argument. I am not in a position to reach a conclusion on time bar as part of a decision on these amendments but I see no reason why the necessary information cannot be provided to the tribunal making the decision following the remit. While I accept that an amendment has to be considered in the terms presented, I see no reason why extraneous information clarifying the time bar point cannot be made available. **Most importantly, the judge requires to apply the "injustice or hardship" test on the basis of all available material, including that relating to timebar. That is not an exercise that has been carried out in this case because of the attempt to excise the time bar issue from the exercise of discretion.**

29. For these reasons I will allow the appeal and remit back to the tribunal to determine of new these applications to amend."

Discussion continued

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35. As stated at paragraph 34 above I respectfully agree with the analysis of the law and its application to the determination of amendments which was set out by the Honourable Lady Wise in **Amey Services Limited** and the

Honourable Lady Smith (as she then was) in **Newquest (Herald and Times) Limited**.

36. In her secondary and alternative submission the respondent's representative,
5 let it be assumed that the Tribunal was minded to allow the amendment,
proposed that it should be allowed but under reservation, for determination at
a later stage, of the Preliminary Issue of alleged want of Jurisdiction by
reason of asserted Time Bar. That was a course of action which was
rejected by the EAT in **Amey Services Limited**. In inviting the Tribunal to
10 adopt such an approach, in the alternative, the respondent's representative
relied upon what some legal commentators have referred to as "the
competing authority" arising from a division of the EAT sitting, in England
upon an Appeal from the Employment Tribunal in England and Wales in the
case of **Gallilee v Commissioner of Police of the Metropolis**, as authority
15 for the proposition that such a course of action, amongst others, is both
competent and open to an Employment Tribunal at first instance.
37. In **Gallilee** the particular division of the EAT expressly held that cases such
as **Amey Services** and **Rawson v Doncaster NHS Primary Care Trust**
20 **UKEAT/0022/08**, referred to in it, were wrongly decided. It concluded that
these cases were implicitly premised on the English law doctrine of "*relation
back*", failing to appreciate that this doctrine was defunct and had no
application in the Employment Tribunal.
- 25 38. Whatever may be said of any implicit premise upon which the EAT in
Rawson may have approached the determination of that Appeal, I am not
persuaded that the decision in **Amey Services** was so premised upon the
English law doctrine of "*relation back*" and or upon a failure to appreciate that
the doctrine was defunct. The same, firstly because there is no express
30 reference to that doctrine in the Judgment of Lady Wise and it is unclear,
absent such reference, why the EAT sitting in Scotland on an Appeal from the
Employment Tribunal (Scotland), would predicate its determination of that
Appeal upon what in **Gallilee** is said to be a now defunct doctrine of English

law and, far less, upon a misunderstanding of the applicability of that doctrine in the Employment Tribunal (Scotland).

39. Separately, I am not of opinion that the decisions in **Gallilee** and in **Amey Services** are necessarily incompatible. Both may be read as giving expression, albeit with differing emphasis to the principles, underlying the approach set out in **Selkent**, of the general requirement at the point of exercising discretion to grant or refuse an Application, to apply the “injustice or hardship” test on the basis of all available material, including that relating to time bar because, once the Tribunal allows the amendment the new matters so introduced, are subject to the Jurisdiction of the Tribunal and a substantive decision will be made on them.
40. Where Leave to Amend is sought after the primary permitted period, a Tribunal requires to consider why the Application was not made at an earlier date, why it is being made at the particular point in time that it is made and, what are the whole circumstances of the lateness.
41. In my consideration, adherence to and application of those principles does not require the Tribunal to choose between granting or refusing the Application on what might be less than sufficient information in circumstances which, on the one hand, run the risk of potential misapplication of the balance of injustice and hardship test, or, on the other hand, allowing the Application subject to subsequent determination of the time bar issue. As the Lady Wise points out in **Amey**, at paragraph 22, there are “*other options available*” in such situations. Those before me include deferring the determination of the Application for Leave to Amend pending inquiry and the hearing of the claimant’s evidence on the whole circumstances of the lateness. That requirement and the appropriateness of considering doing so arises in this case because the claimant, who was expected to appear and give evidence, which expectation informed the original decision that the OPH be listed as an “In Person” Hearing, on the Joint Application of the parties, and its subsequent conversion to CVP form, did not, in the event, attend on the 27th January 21.

42. Further and separately, one of the grounds upon which objection to the Application is maintained is that the terms in which amendment is proposed are so lacking in specification as to fail to give fair notice of the prospective complaint of Direct Discrimination which the respondents require to meet and separately, are so lacking in specification as to fail to give notice of a competent and relevant complaint of Indirect Discrimination.
43. The Tribunal would err in law were it to allow amendment in terms that were not fully particularised such that the effect of the amendment was not apparent, that being a factor to be weighed when balancing relative injustice and hardship. Separately the allowance, by way of amendment, of the addition of irrelevant averments would not represent a proper exercise of judicial discretion.
44. One option in such circumstances would be to refuse outright an amendment in terms which are lacking in specification, as I am invited to do by the respondent's representative. Where outright refusal might lead to undue hardship, however, and, in circumstances as is the case here, where I consider it necessary to hear the claimant in evidence on the issue of lateness before determining the highly relevant issue of time bar, no separate delay will result from superimposing upon the period between now and what will be the continued day of Hearing fixed for that purpose, an opportunity and in the event that the Application is to be insisted upon, the direction, for appropriate particularisation of the terms of the proposed amendment through the vehicle of adjustment, together with the revision and adjustment or confirmation of the grounds of objection in the face of the same.
45. That process, together with the hearing of evidence from the claimant, had the potential to allow for the consideration of relevant factors and their balancing in the relative injustice and hardship test, to proceed at the same time as a single and integrated exercise of discretion in the context of, and informing, the determination of the Application. Such an approach is both permissible in terms of **Amey Services Limited** and competent in terms of

Gallilee v Commissioner of Police of the Metropolis and, in the Tribunal's consideration was apposite, in the particular circumstances presented in this Application. The Tribunal accordingly so determined and directed, in terms of its Interim Orders of 25 February 2021 which are referred to and their terms held incorporated here for the purposes of brevity.

46. For the avoidance of doubt the Tribunal made clear to parties in terms of those Orders:-

(a) that the only evidence to be led at the continued Open Preliminary Hearing was the oral evidence of the claimant which was to be restricted to the circumstances of the requirement for and lateness of, the Application.

(b) the terms of any adjustment to the proposed amendment which is brought forward in compliance with the Tribunal's Order **(First)** of 25 February 2021 is restricted to the terms directed in that Order and no permission was given for adjustment which goes beyond the terms of that directed.

(c) the only additional submissions, if any, to be made at the continued Hearing were to be restricted to matters arising out of the claimant's oral evidence, once given, and or out of the terms in which the proposed amendment has been adjusted and the grounds of objection recast, and which were not already summarised in the note appended to the 25 February 2021 Order as having been made at the conclusion of the first day of hearing.

The Continued OPH (day 2) held at Edinburgh by CVP on 6th August 2021

47. As fully set out in the Note appended to the Tribunal's Orders of 25th February 2021, the continued Hearing was fixed for the restricted purpose of allowing the claimant, who had not been present at the first day of

Hearing, to be heard in evidence relating to the matters set out at sub-paragraph (a)(i) to (iv) inclusive of that Order viz:-

- 5 “(a) hearing the claimant’s evidence, on oath or on affirmation as
to:-
- (i) why the complaints which are the subject of the proposed
 amendment, were not timeously given notice of in the
 initiating Application when first presented, or alternatively
10 added to it, within the primary statutory period allowed
- (ii) why the Application to Amend was not made at an earlier
 date;
- 15 (iii) why it was made on the 24th of September 2020; and
- (iv) the whole circumstances of the lateness and,
- 20 (b) the hearing of parties’ representatives in relative additional
 submissions only, that is submissions which were not already
 made and recorded at the conclusion of the first day of Open
 Preliminary Hearing and which arise out of either:-
- (i) the terms of adjustment made to the proposed
25 amendment in accordance with Order (First) above (of
 25th February 2021); or,
- (ii) the oral evidence of the claimant in relation to matters set
 out at sub-paragraph (a) above.”

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48. In terms of Orders **(First)** and **(Second)** of its 25th February 21 Orders the Tribunal had made concurrent provision to allow, and had directed, the claimant to adjust the terms of the proposed amendment, within 14 days of the date upon which the 25th February 21 Orders and Note were sent to the

parties, such as to include further information in the following respects only, in the event that the Application for Leave to Amend was to be insisted upon viz:-

- 5 “(a) In respect of the alleged incidents referred to under the heading “**Direct Discrimination**” section 13, in lines 1 to 25 inclusive of the “Proposed Amendment for the Claimant dated 24th September 2020”, by particularising each instance of alleged discriminatory conduct which the claimant offers to prove occurred and seeks Leave to Amend into his pleaded case, by reference to;
- 10
- (i) when the alleged incident occurred;
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- (ii) where the alleged incident occurred;
- (iii) at whose hand (that is to say which of the respondent’s officers or employees), the alleged treatment occurred;
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- (iv) by which means of communication (that is; verbal, face to face, by telephone, by email or by other means);
- (v) in the presence of which person, if any the incident complained of is said to have occurred;
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- (vi) by reference to a description of the act or omission founded upon and, where allegedly consisting of spoken or written remarks,
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- (vii) by reference to the specific words allegedly used
- (b) In respect of the matters referred to under the heading “**Indirect Discrimination section 19**”, at lines 27 to 38 of the “Proposed Amendment”, by particularising the “provision,

5 criterion or practice” which the claimant offers to prove was applied to him by the respondents for the purposes of seeking Leave to Amend into his pleaded case, a relevant complaint of Indirect Discrimination in terms of section 19 of the Equality Act 2010”.

10 49. In terms of its Order **(Second)** of the same date the Tribunal made provision for and ordered the respondent’s representative, within a further appropriate period, to adjust their written grounds of objection dated 16th October 2020 such as to reiterate the respondent’s position in the face of the Application for Leave to Amend in terms of the proposed amendment, **as, and if, adjusted by the claimant’s representative in terms of Order (First) above**, and specifying:-

15 (a) those parts of the proposed amendment as adjusted, if any, in respect of which the respondent makes no objection and in respect of the terms in which the respondent is content to see Leave to Amend granted and the same incorporated into the claimant’s pleaded case; and

20 (b) those parts of the proposed amendment, as adjusted, if any, in respect of which the respondent maintains opposition and, in which latter case, also reaffirming the grounds upon which the respondent objects/continues to object to the Granting of Leave to Amend.

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Procedural History Relating to the 02nd Day of OPH

30 50. The Tribunal’s Orders of 25th February were intimated to parties on 3rd March 2021.

51. In terms of paragraph **(Third)** of the Tribunal’s Orders of 25th February 2021 the continued day of Open Preliminary Hearing had been set down at first instance for the 8th of April 2021 at 10 am.

52. By Application dated 12th March 2021 the respondent's representative made Application for alteration of the date of Hearing, due to the non-availability of their representative on the 8th of April 2021, and for the substitution therefore of an alternative proximate date.
53. By the Application dated 16th March 2021 the claimant's representative sought extension for a period of 14 days of the time allowed to comply with the Tribunal's Order dated 25th February 2021 for the making of adjustment to the terms of the proposed amendment.
54. By Order dated 24th March 2021, both parties' representatives having confirmed in the interim that they each had alternative availability for the conduct of the second day of the Open Preliminary Hearing on 14th April 2021, the Employment Judge;
- (a) varied the Tribunal's earlier Order by substituting the 14th of April as the date for the continued OPH and further,
 - (b) granted the claimant's Application for Extension of Time, to comply with the Tribunal's Order **(First)** of 25th February 2021, to the 29th of March 2021; and,
 - (c) in consequence to the 12th of April 2021, the time for compliance by the respondent with the terms of Order **(Second)** of 25th February 21.
55. By correspondence dated 28th March 2021, emanating from the claimant's representative "Legal Team" a document headed "Claimant's Compliance with Employment Tribunal's Orders **(First)(a)** and **(b)** of 2nd March 2021 as Directed by Employment Tribunal Judge **(d'Inverno)**.", was sent to the Tribunal in tendered compliance with those Orders. That document was in the following terms:-

“Case 4102480/2020

BETWEEN

5

ABRAHAM OLANREWAJU ABIOYE

CLAIMANT

10

AND

WEST LOTHIAN COUNCIL

15

RESPONDENT

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Claimant’s Compliance with Employment Tribunal’s Orders **(First) (a) and (b)**
of **2nd March 2021** as Directed by Employment Tribunal Judge **(d’Inverno)**.

(First) Orders (a)**i. When the alleged incident occurred**

5 Claimant started his employment with the Respondent in October 2017 but the relevant period of his complaint which the relevant incidents occurred, was for continuous period between 7th December 2017 and 26th January 2020.

ii. Where the alleged incident occurred

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The alleged incidents occurred at Blackburn Homeless Unit (BHU) located in Blackburn, West Lothian, which was Claimant's regular place of work.

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iii. At whose hand (that is to say which of the Respondent's officers or employees), the alleged incident occurred.

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The acts of discrimination against the Claimant were perpetrated by Pauline Watson, Ewen Archer, Susan McPhillips, Lorna Macdonald, and Jeff Livingstone.

iv. By which means of communication (that is verbal, face to face, by telephone, by email or other means)

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This was communicated verbally in the presence of the Claimant, by email, and by way of recorded audio account of some of the conversations.

v. In the presence of which persons, if any the incident complained of is said to have occurred.

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In the presence of the following persons: Karen Kefferty, Megan Delaney, Keith Anderson, Maria Symmonds, and Dave Scott.

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vi. By reference to description of the act or omission founded upon and, where allegedly consisting of spoken and written remarks.

5 Racial abuse and innuendos verbally spoken, written email, and audio recording of the conversations.

vii. By reference to the specific words allegedly used

10 Reference to the Claimant as “immigrant taking our jobs”; reference to his “Blackness” and linking him to an unrelated Black/Mixed Race child purely on the basis of his Black race; and his smelly African food” which was said to be “disgusting”.

15 **(b) “Indirect Discrimination s.19”**

In respect of the matters referred to under the heading “Indirect Discrimination s.19.....particularising the “provision, criterion or practice” which the Claimant offers to prove was applied to him by the Respondent for the purposes of seeking Leave to Amend into his pleaded case a relevant complaint of Indirect Discrimination in terms of section 19 of the Equality Act 2010.

25 Part of Section 19 of the Equality Act 2010 states the following:

“A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it”.

5 There were several instances and practices that were subjected to
Claimant that included but not limited to, the leaving out of relevant
information that the Claimant needed to do his job. This was done by
staff of the Respondent who were work colleagues of the Claimant,
for the sole purpose of making the Claimant look incompetent at his
10 job.

Commonly made comments were such as “Well, I will have the job if
someone makes a mistake and gets the sack” that were made by
Ewen in front of all Claimant’s team members in the office.

15 The Blackburn Housing Unit WhatsApp group was created that had
Pauline Watson, Susan McPhilips, Maria Symmonds and Keith
Anderson. Contents from this WhatsApp group were discussed in the
office while the Claimant was present and was excluded from such
20 conversations as he did not know what his colleagues were
discussing.

It was made clear that the Claimant was not a part of it and not
accepted to be part of the team and no reason was given. This left no
25 other logical conclusion to the Claimant as to why he was excluded in
some of this work-related discourse. Claimant rightfully felt that he
was the subject of indirect discrimination as certain work practices
were shared on the group and other mediums that he would have
benefitted from, but that he was not added to the group nor was he
30 privy to the discussions therefrom and was consequently
disadvantaged because of his characteristic of race. Everyone
included was white and he was Black and a minority.

ENDS”

56. In correspondence dated 31st March 2021 the claimant's representative advised the Tribunal that the claimant had been unwell on the last occasion when they had a telephone consultation with him, i.e. some time prior to 9th of March 2021, and had been unwell for some time and needed further recuperation. The claimant's representative went on to state that the claimant's attendance at the rescheduled second day of Open Preliminary Hearing, fixed for the purposes of hearing his evidence, was in great doubt. He sought guidance from the Tribunal on how to proceed in those circumstances.

57. By correspondence dated 1st April 2021 the Tribunal advised the claimant's representative that the Employment Judge had indicated that the claimant's representative should:-

(a) Consult with the claimant and confirm to the Tribunal whether the claimant intended or did not intend to participate in the continued Hearing on the 14th of April and, in the event that the claimant indicated that he did not intend to participate for reasons of his current state of health,

(b) further advised that proportionate procedure would be for the claimant's representative to make an appropriate Application to the Tribunal without delay (being an Application for Postponement of the rescheduled Hearing),

(c) the same to be accompanied and supported by, contemporaneous correspondence from the claimant's medical practitioner certifying:-

(i) his lack of fitness to attend,

(ii) confirming the medical condition or illness with which the claimant had been diagnosed,

- 5
- (iii) the date of diagnosis,
 - (iv) the treatment prescribed,
 - (v) the current effect upon the claimant's abilities to participate in day to day activities,
 - (vi) (confirming whether the claimant was medically fit or unfit to attend and participate in the continued CVP Hearing set down for 14 April 2021) and,
 - (vii) setting out a prognosis for recovery and a date by which it was expected the claimant would be medically fit to participate in a future Hearing.
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58. By correspondence dated 9th of April the claimant's representative sought an extension of 14 days to the 29th of April of the time within which to provide a medical certificate vouching the claimant's lack of medical fitness to attend and participate in the continued Hearing set down for 14th April.

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59. By correspondence dated 12th April 2021 the claimant's representative advised the Tribunal that the claimant would be unable, on medical grounds, to attend the Hearing set down for the 14th of April. That intimation was not accompanied by any Application for Postponement of the 14th April Hearing but, such an Application was subsequently made in correspondence dated 12th April and sent to the Tribunal at 17:11.

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30 60. By Order dated 13th April 2021 at 16:45 hours, the respondent not having communicated objection as at that time of day, the Tribunal granted the claimant's Application for Postponement of the 14 April 21 Hearing, on the intimated grounds of the claimant's ill health, and extended, until 28th April, the time for lodging and intimating by the claimant's representative of a

supporting medical certificate in the terms previously directed by the Tribunal in its Order **(Third)(b)** of 1st April 2021. The Judge further Directed that upon receipt of the medical certificate the case file be referred back for Direction regarding the date upon which the now postponed continued Open Preliminary Hearing was to be relisted for Hearing.

5
61. By correspondence dated 13th April 2021 the respondent's representative wrote to the Tribunal and to the claimant's representative in tendered compliance with the Tribunal's Orders of 25th February 21 and asserting;

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(a) that neither the document expressly tendered by the claimant on 28th March 2021 nor any of the earlier documents sent to the Tribunal by the claimant's representative constituted compliance with the Tribunal's Orders 1(a) or 1(b) of 25th February 21,

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(b) setting out the basis of that contention,

(c) confirming that the respondent continued to oppose the Application for Leave to Amend in its entirety on those and the reiterated grounds spoken to at the first day of Hearing 27th January 2021, and further,

20
(d) made Application for Strike Out of the purported/proposed complaint of Indirect Discrimination on the grounds that it enjoyed
25
no reasonable prospect of success.

62. The reiterated objections first advanced at the first day of Hearing 27th January 2021 and the confirmed objections of 13th April 21 were in the following terms:-

"IN THE GLASGOW EMPLOYMENT TRIBUNAL**CASE NUMBER: 4102480/2020****BETWEEN:**

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ABRAHAM OLANREWAJU ABIOYEClaimant

And

10

WEST LOTHIAN COUNCILRespondent

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**PRELIMINARY HEARING – 27 JANUARY 2021
TO DETERMINE THE CLAIMANT'S APPLICATION TO AMEND**

The Claimant's Application for Leave to Amend is opposed by the Respondent for the following reasons.

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Delay in making Application

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1. Firstly, the application has not been made promptly and the Claimant has not provided any explanation whatsoever for the delay.

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1.1. The Claimant's ET1 was lodged on 6 May 2020. Since as far back as 6 May 2020, if not earlier, the Claimant has been represented by Fair Justice System for Scotland Group. The Claimant was represented when the ET1 was submitted. No explanation has been provided as to why these new matters were not addressed in the ET1.

- 1.2. Furthermore, the Claimant's Representative has not provided any reasoning for not making the application sooner.
- 1.3. The Respondent requested specification of the claim more than two months *prior* to the Claimant's application being made.
- 1.3.1. The Respondent's ET3, submitted on 9 July 2020, included a detailed request for further and better particulars from the Claimant (Section 3 of the Grounds of Resistance). The Claimant did not provide any response.
- 1.3.2. The Respondent made a further detailed request in the Agenda lodged on 4 September 2020. The Claimant did not provide any response.
- 1.4. On 24 September 2020, more than 4.5 months after the claim was lodged and more than 2.5 months after the Respondent's unanswered request for specification the Claimant's Representative submitted an Application to Amend.
- 1.5. The Claimant had had ample opportunity to give the Respondent fair notice and a reasonable understanding of the claims being pursued against them.
- 1.6. The Claimant's Representative has not provided any reason for not making the application sooner. This is not a case that involves a great deal of paperwork or background information.
- 1.7. The application could have been made at a much earlier stage in the proceedings.

New Factual Allegations

2. Secondly, the Claimant's application introduces new factual allegations.

5

2.1 For example:

2.1.1 The allegation that the Claimant was told not to use the water dispenser.

10

2.1.2 The allegation about Donald Trump immigration references

2.1.3 Withholding information from the Claimant.

15

2.1.4 Making the Claimant look as though he was bad at his job.

2.1.5 Making comments about taking the Claimant's job.

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2.1.6 WhatsApp groups that the Claimant was not included in.

2.2 These are entirely new factual allegations.

25

2.3 They are also being raised out of time.

2.4 The Claimant has not argued any grounds for the time being extended.

30

Entirely New Head of Claim

3. Thirdly, the Claimant's application introduces two entirely new heads of claim.

3.1 According to the ET1 claim, the Claimant claims to have been subjected to harassment related to his race by the Respondent (s.26 of the Equality Act 2010).

5

3.2. The Claimant's Amendment now suggests that the Claimant is seeking to advance claims of indirect discrimination and direct discrimination. However, the claim raised by the Claimant is for harassment related to race only.

10

3.1 These two new heads of claim alter the basis of the existing claim.

3.2 This is not a situation of 'relabelling' as the alleged discrimination arises from new factual allegations.

15

3.3 These claims are being raised out of time.

3.4 The Claimant has not argued any grounds for the time being extended.

20

3.5 The Claimant suggests that his claim implied these two heads of claim however only detail of the harassment claim was provided.

25

3.6 Section 8.2 of the form states, '*Please set out the background and details of your claim in the space below. The details of your claim should include the dates when the events you are complaining about happened.*' The Claimant completed section 8.2 with details of his claim for harassment, however there was no mention of the new allegations or heads of claim that he now seeks to rely on.

30

5 3.7 There are no pleadings in ET1 which would support indirect or direct discrimination claims. It would also have been clear to the Claimant from the ET3 response that the claim had been interpreted as a Harassment only claim. However there was a long delay in the application being made.

10 3.8 The Claimant also suggests the Tribunal system is meant to be designed for lay people however; the Claimant was represented when his claim was lodged.

3.9 By that stage he had also had the benefit of engaging with ACAS ahead of lodging his claim.

15 3.10 The Claimant suggests the system is overly complicated; however, the ET1 form is clear that this is the form for setting out the detail of what an individual is claiming.

20 3.11 It was reasonably practicable that the claim could have been raised sooner.

Claims inadequately specified

25 4. Fourthly, the new claim of indirect discrimination is inadequately specified.

30 4.1 The Claimant has not identified a provision, criterion or practice applied by the Respondent which puts individuals of the Claimant's race at a particular disadvantage compared to individuals of a different race as required by Section 19 of the Equality Act 2010.

4.2 The Respondent would not be able to respond to this new head of claim in the absence of this specification.

Time Bar and Prejudice to the Respondent

- 5 5. Fifthly, there is a question of time bar and prejudice to the Respondent in having to defend claims relating to events which took place some time ago.

Prejudice to the Respondent

- 10 6. Finally, the Respondent is prejudiced by the delayed provision of this new information.

6.1 The Respondent has been in receipt of legal advice since June 2020 based on the claim as originally pled.

- 15 6.2 The documentation and witnesses have been identified based on the Claimant's original claim.

- 20 6.3 The Claimant's amendment, if allowed, will give rise to a need for further investigation, and significantly widen the scope of witness evidence and documented evidence required in preparation for the Hearing.

Conclusion

25 It is submitted in consideration of the factors in *Selkent Bus Co Ltd v Moore* [1996] ICR 836 that the Claimant's application:

- 30 1. Introduces new facts
2. Introduces two new heads of claim
3. Does not explain the reason for the claims not being included in the original claim

4. Does not explain the reason for the application not having been made sooner, particularly given the Claimant's awareness of the issue from the ET3.
5. The Claimant was represented at the point of submitting his claim
6. If the application is refused, the Claimant would be able to proceed with his harassment claim as pled in the ET1.
7. If the Respondent has to defend these new claims, that opens up entirely new lines of enquiry, requiring additional witnesses (about matters which took place now over a year ago) and lengthening any final Hearing.
8. The balance of injustice and hardship falls in favour of the application being refused.

Time-Bar

9. In the event that the amendment is allowed, the Respondent asks that this is subject to the time bar issue being revisited at a later stage. The case of *Galilee v The Commissioner of Police of the Metropolis* it was established that permission to amend can precede decisions as to whether any new claim raised by the amendment is out of time, or a decision on whether to grant permission to amend can be postponed.”
63. The directed medical certificate, dated 14th April 2021 was subsequently submitted by the claimant's representative and received by the Tribunal on 20th April 21. That certificate confirmed that the claimant had been medically unfit to attend the Hearing on 14th April but concluded by stating that the author, not being the claimant's principal General Medical Practitioner, was unable to make a confident prognostic prediction for the claimant's recovery.

64. By email dated 4th May, the claimant's representative stated that the claimant had subsequently spoken with his GP who was happy to certify him further if necessary once the date of the next Hearing was known.

5 65. By Order dated 19th May 2021 the Employment Judge, upon consideration of the claimant's representative's correspondence of 20th April and 4th May and the certificate of Dr Christie dated 14th April 2021, directed that the second day of Open Preliminary Hearing be listed to proceed on the Cloud Based Video Platform at 10 am on the 6th of August.

10

66. No subsequent further certification of medical unfitness to attend the Hearing of 6th August was received and no Application for Postponement of the Hearing of 6th August was made.

15 **The Continued OPH (day 2) 6th August 2021**

67. On 6th August 2021 at Edinburgh the part heard Open Preliminary Hearing called at 10 am for a second and concluding day, via the Cloud Based Video Platform. The claimant, who was in attendance, and gave oral evidence in chief and in cross examination, continued to be represented by Mr S Chihuri.
20 The respondent; West Lothian Council, continued to be represented by Ms K Graydon.

68. At the outset of the continued day of hearing the Tribunal reminded parties of its purpose and limited scope as set out in terms of Order **(Third)(a)** to **(b)(ii)**
25 inclusive of the Tribunal's Interim Orders of 25th February 2021 and which were in the following terms:-

30 **“(Third)** Redesignates the Open Preliminary Hearing (“OPH”) of 27th January 2021 as “the first day of the now part Heard OPH for determination of the opposed Application for Leave to Amend” and **appoints the case to a second and continued day of Open Preliminary Hearing, to proceed before the sitting Judge on the**

Cloud Based Video Platform at Edinburgh on the 8th of April 2021 at 10 am, for the restricted purposes of;

- 5 (a) hearing the claimant's evidence, on oath or on affirmation as to:-
- (i) why the complaints which are the subject of the proposed amendment were not timeously given notice of in the initiating Application when first presented, or alternatively added to it within the primary statutory period allowed
- 10 (ii) why the Application to amend was not made at an earlier date;
- 15 (iii) why it was made on 24th September 2020; and
- (iv) the whole circumstances of the lateness; and,
- 20 (b) the hearing of parties representatives in relative additional submission only, that is submissions were not already made at the conclusion of the first day of the OPH and which arise out of either;
- 25 (i) the terms of adjustment made to the proposed amendment in accordance with Order **(First)** above; or,
- 30 (ii) the oral evidence of the claimant in relation to the matters set out at sub-paragraph (a) above."

69. The claimant, who appeared remotely, gave evidence on oath in chief and answered questions put to him by the respondent's representative in cross examination.

70. The Tribunal found the claimant to be a credible witness and accepted his evidence in so far as it went to inform the matters identified in its Order **(Third)** of 25th February 2021.

5

Objection to Questions put in Cross Examination

71. In the course of cross examination the claimant's representative raised objection to the relevancy of questions being put by the respondent's representative. The Tribunal heard the claimant and the respondent's representative on each objection in turn, noted the ground of objection and allowed the questions to be put subject to the challenge of relevancy. The Tribunal advised the claimant's representative that he should return, in the course of making his submissions, to any of the objections which he wished to stand upon and have sustained, having had the benefit of hearing the answers given. In the event, the claimant's representative did not return to and stand upon any of the objections in the course of making his submission.

10

15

Additional Submissions for the Claimant (on 6th August 2021)

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72. The claimant's representative submitted that the claimant's health was at the heart of the matter. He stated that the claimant had felt compelled to come to give evidence today because he felt that if he did not it might adversely impact upon his case. He had now addressed the questions. The answer to them was his health and mental state and the medication which he had been receiving including the levels of dosages. It was for those reasons that he hadn't properly understood the Form ET1 when he completed it or put into it everything that needed to be put into it and also why there had been delay in his bringing forward an Application to Amend.

25

30

73. The claimant's health had been such that on the previous date set down for the continued Hearing (the 14th of April), his doctor had certified him unfit to attend. Although there had been no such certification on this occasion and the claimant had himself decided to attend to give evidence, at the time of

completing his ET1 and of subsequent delays, he had been advised, for reasons of his health, against becoming involved in those matters. He had now answered all the questions but at the time of dealing with those matters originally he had been unwell.

5

74. The claimant's representative submitted that he considered that the claimant had not been treated sufficiently sensitively by the respondents or by the Tribunal. He submitted that regardless of the outcome of the Application he wished to put on record disquiet at the lack of compassion in the Tribunal process which claimants, including the claimant had to undertake. He submitted that given the manner in which the respondents had treated the claimant during his employment, it would be unfair and unjust, given all that he had been through, if the Tribunal did not give some sort of redress to the claimant. The Tribunal understood that criticism to be directed at the requirement that the claimant specify his claims sufficiently to give the respondent fair notice of the case which it had to meet, and to the requirement that the claimant give evidence as to the circumstances and reasons for the requirement to make Application for Leave to Amend and as to its timing.

10
15
20

Additional Submissions for the Respondent (on 6th August 2021)

75. The respondent's representative confirmed at the outset of her submissions that the claimant's Application for Leave to Amend remained opposed, in its entirety, by the respondent. The claimant had had, in her submission, multiple opportunities to put his case and had been represented continuously by his current representative from the date of submission of his ET1.

25

76. She submitted that he could have and should have put all of the factual allegations which he wished to rely upon into the Claim Form at the time of first submitting it. The matters which he now sought to bring forward by way of amendment had all occurred and were all known to him prior to lodging his Claim Form.

30

- 5 77. In the respondent's representative's submission the claimant, in his evidence, had not adequately explained what it was about the Claim Form which he found complex. In her submission the Form was clear and contained guidance on its face as to the information which parties required to include when completing it.
- 10 78. The respondent's representative submitted that the claimant had not previously explained how his medical condition had prevented him from making the Application to Amend sooner. While he had made reference in his oral evidence today to new medical related matters these had not been backed up by any additional medical reports or medical records.
- 15 79. While the claimant had confirmed, in the course of cross examination, that he understood the distinction between bullying and harassment on the one hand and racial discrimination on the other, he had not pled any detail of racial discrimination in his Claim Form.
- 20 80. Such additional specification as the claimant had provided in response to the Tribunal's Direction that he adjust the terms of the proposed amendment had still not specified every alleged incident.
- 25 81. He had not specified the PCP upon which he relied and absent which a relevant complaint of indirect discrimination could not proceed.
- 30 82. The effect of allowing the amendment was not clear and could not be reasonably discerned on the face of its terms.
83. The respondent's representative, in reliance upon the submissions made at the first day of Hearing and grounds of objection intimated in that regard, submitted that the balance of injustice and hardship lay against allowing the Application for Leave to Amend.

Reply for the Claimant (on 6th August 2021)

- 35 84. In exercising a limited right of reply the claimant's representative made 4 submissions:-

- 5 (1) While he accepted that the claimant had had some opportunity to utilise advice available to him, in making that submission the respondent's representative appeared to forget that the claimant was unwell for long periods of time and was not sufficiently well to follow up on matters and give instructions
- 10 (2) The health of the claimant had been an issue for him right from the point of his raising proceedings
- 15 (3) While acknowledging that no further medical evidence or certification of unfitness in relation to today's Hearing had been brought forward the claimant had felt himself that he needed to participate in today's Hearing as not doing so might result in further delays and he would prefer his case to proceed. The claimant had not sought a postponement because he wanted to give his evidence.
- 20 (4) The claimant's representative stated that he did not understand the submission made by the respondent's representative that the claimant had not sufficiently articulated his complaints. The respondents knew what had happened to the claimant and, in his submission and separately from the claimant's state of health, the claimant's ticking of the box indicating he was complaining of racial discrimination (in the Form ET1) when taken together with the detail that he had provided previously to the respondents in the internal process was enough. In the claimant's representative's submission, the claimant did not have to explain in more detail in the ET1 and, he could explain further if required
- 25
- 30 at a later (the Final) Hearing on these issues.

Findings in Fact

- 35 85. On the basis of the oral evidence presented at the second day of Open Preliminary Hearing, the documentary evidence before it and the submissions

of parties representatives made on each of the two days of hearing, the Tribunal made the following additional Findings in Fact, restricted to those necessary for the Determination of the Application for Leave to Amend which was before it:-

5

86. The claimant commenced his evidence by making a statement, partially addressed to the respondent's representative and partly to the Tribunal and in which he:-

10

(a) criticised the respondent for the manner in which they had treated him in the course of his employment; and,

15

(b) stated that he thought it "*unfair that I have been pulled here to give evidence*", against the background of the letter from his General Medical Practitioner of 14th April 2021 in terms of which he had certified that on 14th April 2021, the claimant had been medically unfit to participate in the second day of the continued Open Preliminary Hearing which was previously set down to proceed on that day.

20

87. The letter to which the claimant made reference was one dated 14th April 2021 and in which the claimant's General Medical Practitioner, Dr Scott Christie, certified upon Soul and Conscience, the following matters in relation to the claimant's health:-

25

"(a) diagnosis: anxiety and depression and psychological injury stemming from alleged racial discrimination and harassment at work

30

(b) date of diagnosis: anxiety/depression – GP diagnosed 18th November 2019 "psychological injury" – Community Psychiatric Nurse diagnosed 14th February 2020

- (c) treatment prescribed: mirtazapine (anti-depressant), veniafaxine (anti-depressant), zopicione (hypnotic)
- (d) current effect of illness on day to day activities; he is suffering from a general loss of motivation: he finds it a struggle to get out of bed, he finds it hard to motivate himself to do simple tasks e.g. washing, dressing, cooking, cleaning
- (e) (the claimant) is unfit to participate in the Hearing scheduled today (14th April 2021)
- (f) prognosis for recovery: I am sorry but I am unable to make a confident prognosis prediction.”
- 15 88. The timing of the conduct and completion of the internal investigation into the claimant’s grievance conducted by the respondent, was in part, impacted upon and delayed by the Covid pandemic.
- 20 89. When the respondents sent the claimant the written outcome of the investigation, the claimant considered that the narrative, (the representation of what he, the claimant, had said in the course of the investigation) was misrepresented in the document and required to be corrected.
- 25 90. He considered that both the respondent’s Managers, Andy Johnston and Anne Marie Carr, the latter being the Notification Officer who provided the written outcome, were at fault in that regard.
- 30 91. The claimant required to amend and amend again, subsequent versions of the notes of the Grievance Hearing and the representation, contained in the grievance outcome, of what he had said in the course of the investigation.
92. The claimant had been waiting to get an accurate version of the grievance outcome note in order to inform the instructions which he subsequently gave to his representative.

93. The claimant was represented by his current representative at the time of submitting his initiating Application ET1 and had continued to be so represented throughout these proceedings.

5

94. At that time he could not give timeous or full instructions to his representative because he was ill and, at the time of raising his claims, his medication had not yet been adjusted and increased, with the consequence that he was unable to cope with the impact of his illness upon his ability to carry out day to day activities.

10

95. The respondents had dealt with his internal complaints, including his complaints of racial discrimination, under their Bullying and Harassment at Work Policy. It was a "policy of equality". The Policy was, he believed, entitled "Dealing with Bullying and Harassment Complaints at Work 29th October 2013".

15

96. The claimant believed that the indicative timescale for the handling of an internal grievance complaint which was contained in the Policy was for it to be complete within 30 days of the grievance being submitted.

20

97. In the event, he had submitted his grievance on the 26th of January 2020 and had received an outcome notification some time in September or November 2020.

25

98. The claimant believed that the Policy did not specifically deal with racial discrimination.

99. The claimant maintained before the Tribunal that he considered that the respondent had not dealt with his grievance as a complaint of racial discrimination but rather had treated it as a complaint under the general heading harassment.

30

100. He received the investigation outcome on the 10th of September 2020.

101. He received the “outcome of complaint” on 11th of November 2020.

102. Some of his complaints were upheld, some were not upheld.

5

103. Although represented by his current representatives at the time, the claimant completed his initiating Application Form ET1 himself.

104. The claimant found the electronic version of the Form ET1 difficult to complete. He did not understand it.

10

105. He stated in evidence that notwithstanding the wording set out at each section of the Form describing the information sought of the person completing the Form, he had not understood the requirement.

15

106. The claimant had thought and continued to think that it was “alright”, at the stage of completing the Form, to tick the box indicating he was complaining of discrimination because of race and that he would be able to “request to amend to put in the detail later, if he had not received an outcome from the internal grievance which was satisfactory”.

20

107. He had been trying to resolve matters since 2017 by addressing the issues with his Managers. He had not succeeded in doing that and believed that it was because the Managers were all the same and did not care.

25

108. He had gone to early conciliation to try to resolve matters but it had not been resolved at the early conciliation stage and so he would not stop until he got justice.

30 109. He felt that he had not been treated fairly.

110. From the start they (as Managers/the respondents) had asked him to provide evidence.

111. Regarding coming to the Employment Tribunal the claimant stated in evidence that if he had no evidence he would not be at the Tribunal and that he had provided evidence.

5 112. He was being “pulled here” to give evidence and made to remember things that he wanted to forget.

113. Regarding his current state of health the claimant stated that he felt he would never recover from what had happened to him.

10

114. Regarding completion of his Form ET1 the claimant again stated in evidence that he had:-

- Found it “not easy to complete at all”.

15

- “Had just put everything that happened as to what they (the respondent) had done to me and how they did it.”

20

- He could not have known what other things to put as this was the first Form of this type that he had filled in.

- English was not the claimant’s first language.

115. English is not the claimant’s first language.

25

116. The claimant stated that he should not be punished for what “I did not know”.

30

117. The claimant believed that his “case should not be judged on my fault as the case is about me, the things in question happened to me and it is not my fault that I made a distinction in my mind between bullying and harassment on the one hand and racial discrimination on the other.”

118. He had ticked the box at paragraph 8.1 of the Form stating that he was complaining of racial discrimination.

119. He had not taken advice from his representative at the time of completing the form because he was medically unwell and was feeling suicidal.
- 5 120. He had not thought that he had to give notice of things in the Form but rather could just bring them up later and expand on them when required.
121. The matters of which the claimant now sought to complain by way of amendment are matters that had occurred before he completed and submitted his initiating Application ET1.
- 10
122. Having ticked the box indicating he was complaining of racial discrimination he did not understand that he had had to put in detail about those things at that point.
- 15
123. In the course of giving evidence, the claimant posed the rhetorical question “did it happen” to which he answered “yes” and “is there evidence” to which he again answered “yes”.
- 20 124. At the time of completing the Form ET1 the claimant had been unwell. His medication had not yet been adjusted and increased such he was not in “the best frame of mind” and was unable to cope with the effects of his illness. He had thought that it was enough “to start the thing and he could expand on it later”.
- 25
125. Regarding the requests for specification that had been raised in the ET3, the claimant stated in evidence that although he was represented at that point by his current representatives, he had been told by his Support Worker that he should “stay away from responding to anything and everything, just to stay away from it all”, as he was unwell.
- 30
126. At the time of completing his initiating Application Form ET1, online, the claimant was suffering from his diagnosed medical condition of anxiety, depression and psychological injury. He had been first diagnosed with

anxiety and depression on the 18th November 2019 and with psychological injury on the 14th of February 2020.

127. The effects of his illness were then and continue to be to promote a general
5 loss of motivation and inability to engage with simple tasks including washing,
dressing, cooking and cleaning and also with more complex tasks such as
initiating and progressing his complaints before the Employment Tribunal
through his own direct efforts and through the giving of timeous and adequate
instructions to his representative.

10

128. It also impacted on his ability to take and absorb advice.

129. The claimant associates his state of health with the treatment which he
alleges he received while in the respondent's employment. The focusing of
15 his recollection on the detail of certain aspects of that treatment caused and
continues to cause the claimant to feel anxious and exacerbates the
symptoms of his illness.

130. There were periods when the symptoms were more severe. Those had
20 occurred and have continued to occur between the date of first presentation
of his Form ET1 and the date of his representative intimating adjustments to
the proposed amendment. On 28th March 2021 the Medical and Support
Worker advice which the claimant received was to disengage completely from
all matters which caused him stress, including the progressing of his
25 complaints before the Employment Tribunal.

131. The claimant had followed that advice considering that he required to do so
for the sake of his health.

30 132. The claimant's state of health at the material times was the principal reason
and explanation for his failure to include and give notice of in his Form ET1
when first drawn by him and for the presentation of the additional matters of
which he now seeks to give notice in terms of the proposed amendment as
adjusted, on 28th March 2021.

133. The claimant's then and continuing ill health and its impact upon his ability to focus on the necessary matters and to give instructions to his representative was the principal reason and is the explanation for the requirement of an Application for Leave to Amend and for the terms of the proposed amendment not being brought forward by and on the claimant's behalf until the 24th of September 2020.

134. Although a considerable period of time had elapsed between the date of first presentation of the Form ET1 and the date of the Application for Leave to Amend the Application, nevertheless, came at a relatively early procedural stage in the progress of the case.

135. In the circumstances presented and, in the event that upon a consideration of other relevant factors the Tribunal were to otherwise conclude that the balance of injustice and hardship lay in favour of allowing amendment, it would be just and equitable, in terms of section 123(1)(b) of the Equality Act 2010 that the Tribunal extend the time limit for the presentation of claims in terms of those parts, if any, of the adjusted proposed amendment in respect of which the Tribunal otherwise grants Leave to Amend.

136. The "proposed amendment" in respect of which Application dated 24th September 2020 for Leave to Amend is made, and as adjusted by adjustments intimated on 28th March 2021 on the claimant's behalf, is in the following terms:-

"Proposed Amendment for the Claimant:

At the end of the last sentence on page 7 Form ET1 the claimant seeks leave to add to the particulars of claim already contained in the said Form ET1 and makes application for leave to amend in terms of the Rules of Procedure:-

Direct Discrimination And Indirect Discrimination

- Direct Discrimination s.13

5 The claimant was discriminated against by Pauline Watson, Ewen Archer, Susan McPhillips and others and, treated less favourably than other colleagues. The claimant was told not to use the water dispenser by Pauline Watson on several occasions in the office but rather to get his water from the kitchen tap while other colleagues were allowed to use the water dispenser. There were other instances of such conduct where 10 Ewen made references to Donald Trump as a legend “getting rid of immigrants”. This was discussed in front of the claimant. Karen Kefferty and Megan Delaney in the BHU office at the Civic Centre. Ewen was in the habit of referring to the claimant as the big black man even though as a colleague he knew the claimant’s name. Thereby 15 segregating the claimant from other colleagues who were all white. There was direct discrimination against the claimant because he complained on various occasions to his Line Manager Dave Scott who said he would “speak to them” about these complaints. Nothing was done perhaps due to a stereotypical assumption by the respondent about 20 the limited effect that this conduct would have on the claimant and a culture which was endemic in that section of the work force.

25 The claimant also approached Stuart Greenhill when Dave was on annual leave, he never got back to the claimant either. Then the claimant approached Susan to address issues also but was met with dismissal. The claimant spoke to Pauline and told her that he was unhappy on how she treated him, but her conduct did not change. This course of conduct of these employees within the work place of West Lothian Council makes the respondent vicariously liable for these 30 unlawful conduct. The respondent ought to have been informed of the claimant’s concerns through management tiers.

The following averments were intimated as adjustments on 28th March 2021, in tendered compliance with the Tribunal’s Order (**First**)(a) of

25th February 21 in terms of which the claimant was ordered, in the event that the Application for Leave to Amend was to be insisted upon, to adjust the terms of the proposed amendment within 14 days of that date:-

5

‘(a) In respect of the alleged incidents referred to under the heading ‘Direct Discrimination’ section 13, in lines 1 to 25 inclusive of the ‘Proposed Amendment for the Claimant dated 24th September’, by particularising each instance (the Tribunal’s emphasis) of alleged discriminatory conduct which the claimant offers to prove occurred and seeks leave to amend into his pleaded case by reference to:

10

i. when the alleged incident occurred:-

15

(intimated by adjustment ‘claimant started his employment with the respondent in October 2017 but the relevant period of his complaint [in] which the relevant incidents occurred, was for continuous period between 7th December 2017 and 26th January 2020)

20

ii. where the alleged incident occurred:-

25

(intimated by adjustment – ‘the alleged incidents occurred at Blackburn Homeless Unit (BHU) located in Blackburn, West Lothian, which was claimant’s regular place of work.)

30

iii. at whose hand (that is to say which of the respondent’s officers or employees), the alleged incident occurred:-

(marked by adjustment – *“the acts of discrimination against the claimant were perpetrated by Pauline Watson, Ewen Archer, Susan McPhillips, Lorna MacDonald, and Geoff Livingstone.”*)

5

- iv. by which means of communication (that is verbal, face to face, by telephone, by email or other means):-

10

(intimated by adjustment – *‘this was communicated verbally in the presence of the claimant, by email, and by way of recorded audio account of some of the conversations.’*)

15

- v. in the presence of which persons, if any, the incident complained of is said to have occurred:-

20

(intimated by adjustment – *‘in the presence of the following persons: Karen Kefferty, Megan Delaney, Keith Anderson, Maria Symmonds, and Dave Scott.’*)

25

- vi. by reference to description of the act or omission founded upon and, where allegedly consisting of spoken and written remarks,

(intimated by adjustment:- *‘racial abuse and innuendos verbally spoken, written email and audio recording of the conversations.’*)

30

- vii. by reference to the specific words allegedly used:-

(intimated by adjustment:- *‘reference to the claimant as ‘immigrant taking our jobs’; reference to ‘blackness’ and linking him to an unrelated*

black/mixed race child purely on the basis of his black face; and his smelly African food which was said to be ‘disgusting’)

5 **“Indirect Discrimination s.19” – (the Proposed Amendment)**

There were instances and practice of leaving out information that the claimant needed to do his job by staff of the respondent for the sole purpose of making the claimant look bad at his job. Also, common comments ‘well I will have the job if
10 someone makes a mistake and gets the sack’ were made by Ewen in front of everyone in the office. The BHU WhatsApp group chat was created with Pauline Watson, Susan McPhillips, Maria Symmonds and Keith Anderson. Contents from the chat were discussed in the office while the claimant was present, the claimant was excluded and it was made clear that the claimant was not part of it and not
15 accepted to be part of the team and no reason was given. The claimant was indirectly discriminated as certain work practices were shared on the group chat and other medium that he would have benefitted from but that he was not added and was disadvantaged’.

20 (intimated by adjustment on 28th March 2021 in tendered compliance with the Tribunal’s Order (**First**)(1)(b) which ordered the claimant:-

“(b) In respect of the matters referred to under the heading ‘**Indirect Discrimination section 19**’, at lines 27 to 38 of the ‘Proposed Amendment’, by
25 particularising the ‘provision, criterion or practice’ which the claimant offers to prove was applied to him by the respondents for the purposes of seeking Leave to Amend into his pleaded case, a relevant complaint of Indirect Discrimination in terms of section 19 of the Equality Act 2010”:-

30 “Part of section 19 of the Equality Act 2010 states the following:

“A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s,

(2) *For the purposes of sub section (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –*

5 (a) *A applies, or would apply, it to persons with whom B does not share the characteristic,*

 (b) *it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it”.*

10 *There were several instances and practices that were subjected to claimant that included but not limited to, the leaving out of relevant information that the claimant needed to do his job. This was done by staff of the respondent who were work colleagues of the claimant, for the sole purpose of making the claimant look incompetent at his job.*

15

Commonly made comments were such as ‘well, I will have the job if someone makes a mistake and gets the sack’ that were made by Ewen in front of all claimant’s team members in the office.

20 *The Blackburn Housing Unit WhatsApp group was created that had Pauline Watson, Susan McPhillips, Maria Symmonds and Keith Anderson. Contents from this WhatsApp group were discussed in the office while the claimant was present and was excluded from such conversations as he did not know what his colleagues were discussing.*

25 *It was made clear that the claimant was not a part of it and not expected to be part of the team and no reason was given. This left no other logical conclusion to the claimant as to why he was excluded in some of this work – related ??. Claimant rightfully felt that he was the subject of indirect discrimination as certain work practices were shared on the group and other mediums that he would have benefitted from, but that he was not added to the group nor was he privy to the discussions therefrom and was consequently disadvantaged because of his characteristic of race. Everyone included was white and he was black and a minority.*

30

ENDS”).

137. The adjustments appearing under the heading 'Indirect Discrimination s.19' and contained in the note of adjustment dated 28th March 21 submitted by the claimant in tendered compliance with the Tribunal's Orders **(First)(b)** of 2nd March 21, substantially comprises a reiteration of the averments already appearing in the proposed amendment and are distinguished from the former only by some differences in syntax and the use of synonyms.

138. The adjustments of 28th March 21 appearing under the head of 'Indirect Discrimination s.19' do not include any particularisation or specification of a provision, criterion or practice, which the claimant offers to prove was applied to him by the respondent for the purposes of giving notice of a relevant complaint of Indirect Discrimination.

139. The only reference to practice appears in the last 6 lines of the adjustments under that heading and, is in the following terms:-

"Claimant rightly felt that he was the subject of Indirect Discrimination as certain work practices were shared on the group and other mediums that he would have benefitted from but that he was not added to the group nor was he privy to the discussions therefrom and was consequently disadvantaged because of his characteristic of race. Everyone included was white and he was black and a minority."

140. Neither the averments contained in the proposed amendment nor those intimated in tendered adjustment identify a "provision, criterion or practice" for the purposes of section 19 of the Equality Act 2010. The averments do not, and if incorporated into the claimant's pleaded case would not, give notice of a relevant complaint of Indirect Discrimination in terms of section 19 of the EqA, that being the declared purpose for which, in this regard, leave to amend is sought.

141. The averments contained in the note of adjustments of 28th March and submitted in tendered compliance with Order **(First)(a)**:-

- 5
- (i) identify only a bracket of dates, that is a period between 7th December 2017 and 26th January 2020 in which it is said all of “*the relevant incidents occurred*”. They do not specify when any of the incidents said to be relied upon actually occurred. They are not compliant with the terms of Order **(First)(a)(i)** of 25th February 21 and are not received by the Tribunal.

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142. The marked adjustments under (ii) “**where the alleged incident occurred**” is in the following terms:-

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“The alleged incidents occurred at Blackburn Homeless Unit (BHU) located in Blackburn, West Lothian, which was the claimant’s regular place of work”.

143. Although the tendered adjustment does not expressly say so, the reasonable inference arising from the words used is that the claimant gives notice that all incidents, as yet not fully specified, in compliance with (i) above, but which are relied upon, took place at Blackburn Homeless Unit. Insofar as those particular averments added by adjustment can be viewed as having that effect, they are compliant with the terms of Order **(First)(a)(ii)** of 25th February 21 and are received by the Tribunal.

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144. The adjustments intimated in tendered compliance with Order **(First)(a)(ii)** are in the following terms:-

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“The acts of discrimination against the claimant were perpetrated by Pauline Watson, Ewen Archer, Susan McPhillips, Lorna MacDonald and Geoff Livingstone.” The adjustments do not specify at the hands of which of the named individuals any particular alleged incident occurred. It cannot be reasonably inferred from the wording used

that what is being given notice of is that each and all of the incidents relied upon, as yet unspecified, occurred at the hands of each and all of the named individuals. The tendered adjustments are not compliant with the terms of Order **(First)**(a)(iii) of 25th February 21 and are not received by the Tribunal.

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145. *The adjustments intimated under (iv) - **by which means of communication (that is verbal, face to face, by telephone, by email or other means); are in the following terms***

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“This was communicated verbally in the presence of the claimant, by email, and by way of recorded audio account of some of the conversations.”

15 146. The tendered wording does not identify nor give notice of which alleged incident (as yet unspecified) was the subject of which means of communication. It cannot be reasonably inferred from the words that each and all of the as yet unspecified incidents which the claimant seeks to found upon occurred by means of all three of the communication methods referred to. The adjustments are not compliant with the terms of Order **(First)**(a)(iv) of the 25th Feb 21 Orders and are not received by the Tribunal.

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147. The adjustments intimated under (v) - in the presence of which persons, if any the incident complained of is said to have occurred, - are in the following terms:- in the presence of the following persons: Karen Kefferty, Megan Delaney, Keith Anderson, Maria Symmonds, and Dave Scott” in the following terms:-

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“The intimated adjustments do not provide specification of which of the as yet not fully specified incidents relied upon is said to have occurred in the presence of which of the named individuals. It cannot reasonably be inferred from the words that what is being given notice of is that each and all of the alleged incidents to be founded upon occurred in the presence of each and all of the named individuals.

The tendered adjustments are not compliant with the terms of Order **(First)(a)(v)** of the 25th February 21 Orders and are not received by the Tribunal.

5 148. The adjustment intimated under (vi) - **by reference to description of the act or omission founded upon and, where allegedly consisting of spoken and written remarks, are** in the following terms: “racial abuse and innuendoes verbally spoken, written email, and audio recording of the conversations.”

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149. The intimated adjustments provide no specification of any of the alleged incidents nor fair notice of the case that is to be met by the respondents. Rather they comprise only a general characterisation of the alleged acts or omissions as “*racial abuse and innuendoes*” together with an unparticularised reiteration of what is said under (iv) regarding means of communication. The
15 tendered adjustments are not compliant with the terms of Order **(First)(vi)(a)** of the 25th February 21 Orders, and are not received by the Tribunal.

20 150. The adjustments intimated at (vii) - **by reference to the specific words allegedly used; are in the following terms:-**

25 *“Reference to the claimant as ‘immigrant taking our jobs’; reference to his ‘blackness’ and linking him to an unrelated black/mixed race child purely on the basis of his black race; and his ‘smelly African food’ which was said to be ‘disgusting’.*

30 151. The intimated adjustments do not provide specification, nor give fair notice of which of the alleged words identified are said to have been spoken, written or otherwise communicated by which of the named individuals and on what occasions. (i.e. when). The tendered adjustments are not compliant with the requirements of Order **(First)(a)(vii)** of the 25th February 2021 Orders and are not received by the Tribunal.

The Proposed Amendment as adjusted

152. The terms of the proposed amendment of 24th September 2020 appearing under the heading '**Indirect Discrimination section 19**'; as adjusted by the claimant's representative on 28th March 2021, continue to fail to give notice of a relevant provision, criterion or practice in terms of section 19 of the Equality Act 2010. They continue to fail to give notice of a relevant complaint of Indirect Discrimination.

153. The terms of the proposed amendment of 24th September 2020 appearing under the heading '**Direct Discrimination section 13**' bear to give notice of new factual allegations, viz;-

(a) the allegation that the claimant was told not to use the water dispenser

(b) the allegation about Donald Trump immigration references

(c) withholding information from the claimant

(d) making the claimant look as though he was bad at his job

(e) making comments about the claimant's job

(f) allegations about WhatsApp groups that the claimant was not included in, and

all being allegations not heralded in the Form ET1.

154. The terms of the proposed amendment bear to introduce two new Heads of Claim namely a claim of direct discrimination in terms of section 13 of the Equality Act 2010 and a claim of indirect discrimination in terms of section 19 of the 2010 Act. As has been recorded by the Tribunal on previous occasions the Form ET1 gives notice only of a complaint of harassment

because of the protected characteristic of race in terms of section 26 of the EqA.

5 155. The new Heads of Claim alter the basis of the existing claim. They are not a mere relabelling of existing averments as the alleged direct and indirect discrimination is said to arise from new factual allegations.

10 156. The averments of new factual allegations contained in the proposed amendment by means of which the claimant seeks to give notice of a new complaint of direct discrimination, and notwithstanding the Tribunal's Direction and the claimant's that they be and the claimant's attempt to further particularise them by way of adjustment,

15 (a) continue to be lacking in specification such as to fail to give the respondent fair notice of the case of direct discrimination which it is required to meet

20 (b) are such that the respondent would be unable to investigate them properly in furtherance of its duty to admit or deny all averments within its knowledge,

25 (c) are such that were Leave to Amend to be granted in the terms currently proposed the respondent would be entitled, at an evidential hearing, to take objection to much, if not all, of the evidence which the claimant would require to lead in order to establish the claims,

30 (d) are such that a fair inquiry into the generalised and largely unspecified allegations of indirect discrimination could not be conducted by the Tribunal.

157. Were Leave to Amend to be granted in the terms currently proposed:-

- 5 (a) the claimant would enjoy little reasonable prospect of establishing the factual allegations introduced, for reason of their lack of specification and fair notice giving rise to a right on the part of the respondent to object to what would be lines of evidence necessary were they to be established
- 10 (b) the effect of allowing Leave to Amend in the proposed terms would be to expand the scope of inquiry and the amount of time required to be allocated to it
- (c) (b) above would require the respondents to incur further cost and expend further resource
- 15 (d) would be to require the respondents to attempt to prepare for and to meet, at hearing, a case of which they had not received fair notice

158. Were Leave to Amend not to be granted:-

- 20 (a) The claimant would be entitled to pursue his complaint of harassment because of the protected characteristic of race in terms of section 26 of the Equality Act 2010.
- 25 (b) If Leave to Amend were refused, while the claimant would be deprived of the opportunity to pursue a complaint of direct discrimination,
- 30 (c) The opportunity so lost, were Leave to Amend to be granted in the terms currently proposed, would be an opportunity of advancing claims which, for want of specification and fair notice, would enjoy little reasonable prospect of success.

159. In all the circumstances of the case as currently presented, the balance of injustice and hardship falls in favour of the Application in so far as it relates to

the introduction for Leave to Amend in a complaint of direct discrimination in the terms currently proposed, being refused.

5 160. The terms of the proposed amendment, in so far as relating to the introduction of a complaint of indirect discrimination, failing in the terms currently proposed to give notice of a relevant complaint of indirect discrimination in terms of section 19 of the Equality Act 2010, the Tribunal would err in law were it to grant Leave to Amend in the terms currently proposed.

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Consideration and Disposal

161. As is set out above, following the conclusion of the first day of the OPH, the Hearing was continued by the Tribunal for the dual purposes of:-

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(Firstly) hearing the evidence of the claimant, on oath or on affirmation, as to the reason for the non-inclusion, (in the initiating Application ET1), of various matters for the introduction of which he now seeks Leave to Amend; and further, as to why, thereafter, an Application for Leave to Amend and terms of a proposed amendment were not brought forward until 24th September 2020 some 5½ months after the date of first presentation of the initiating Application on 5th May 2020;

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(Secondly) for further particularisation of the terms of the proposed amendment by way of adjustment

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(a) such as to provide fair notice to the respondent of the complaints of Direct Discrimination referred to in the terms of the proposed amendment; and

(b) such as to constitute fair notice of a relevant claim of Indirect Discrimination in respect of the introduction of which Leave to Amend was also sought

Such that the parties, and the Tribunal, when considering the Application for Leave, might see the proposed amendment and its effect.

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162. Integral to the Application was consideration and determination of the jurisdictional issue of time bar, the terms of the proposed amendment bearing to introduce, both in respect of the entire complaint of Indirect Discrimination and elements of the complaint of Direct Discrimination, matters not previously given notice of in the initiating Application ET1.

10

163. On the oral evidence of the claimant, (including materially that given in answers to questions initially objected to by his representative) and as the Tribunal has found in fact, while it lacks jurisdiction in terms of section 123(1)(a) of the Equality Act 2010 to consider the new complaints and matters which the claimant seeks to introduce in terms of the proposed amendment, as adjusted at 28th March 2021, it is just and equitable in the circumstances that it consider, in terms of section 123(1)(b) of the EqA, such claims and new matters in respect of which it otherwise grants Leave to Amend. Thus the issue of time bar *per se* does not operate to exclude the Tribunal's jurisdiction in respect of the proposed amendment.

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164. As the Tribunal has set out in its Findings in Fact, the terms of the proposed amendment when taken together with the tendered adjustments to it, continue to fail to give notice of a relevant complaint of indirect discrimination in terms of section 19 of the Equality Act 2010. The Tribunal would err in law were it to allow an amendment in terms which were irrelevant. Such an averment would likewise fail the tests set out in **Selkent**. The Tribunal accordingly refuses the claimant's Application for Leave to Amend in terms of the Proposed Amendment, in so far as it relates to the introduction of the proposed complaint of indirect discrimination.

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165. The terms of the proposed amendment, in so far as they relate to the proposed introduction of a complaint/complaints of direct discrimination in

terms of section 13 of the Equality Act 2010, when taken and read in conjunction with the intimated adjustments thereto, although providing some specification of these complaints, continue to be so lacking in specification in relation to; what, where, when, at whose hands etc, as to fail to give the
5 respondent's fair notice of the case which they would require to investigate and meet at Final Hearing.

166. The claimant's position, expressed by him in evidence, was that there is or should be no requirement for him to provide detail of that sort in advance of a
10 Final Hearing but rather that it was open to him to simply produce evidence to deal with those matters at a Final Hearing without providing prior notice. That position is fundamentally misconceived.

167. The rules of Natural Justice require that each party give the other fair notice
15 of the case which they are to meet. That in turn requires that allegations be sufficiently specified and particularised to deliver that effect. The terms of the amendment as currently proposed are not.

168. While the claimant's ill health goes, in part at least, to explain why that
20 specification has not thus far been provided, ill health does not provide a mechanism by which the requirement to comply with rules of natural justice can be disapplied to a party.

169. In consideration of what the Tribunal has accepted on the claimant's
25 evidence has been substantial and enduring ill health, while declining to grant Leave to Amend in the terms proposed to introduce a complaint of indirect discrimination in the terms currently proposed, the Tribunal, in terms of its Interlocutory Orders contained within this Judgment, has accorded to the claimant and his representative, one final opportunity to attempt to provide
30 that particularisation and fair notice. The same in response to such specific calls as the respondents may make in terms of the tendered answers to those parts of the proposed amendment which the Tribunal has received in terms of paragraph **(First)** of this Judgment, and which relate to the proposed introduction of a complaint/complaints of direct discrimination.

170. The claimant's position, expressed in the course of his oral evidence, that he was not and should not be under any requirement to provide such specific particulars in advance of a Final Hearing on the Merits but rather should be entitled to introduce that detail in the course of oral evidence at a Final Hearing, without prior notice is fundamentally misconceived. While it remains unclear to the Tribunal, notwithstanding the claimant's ill health, why as a party who enjoys the benefit of representation that that should have been his perception or understanding as at 6th August 2021, particularly given the detailed guidance as to what was required which is contained within the Tribunal's Orders **(First)** of 25th February 2021, the Tribunal has articulated and reiterated in this Note of Reasons:-

- (a) that such a position is misconceived and contrary to natural justice,
- (b) that an ultimate failure or inability to specify a complaint or a potential complaint such as to give the opposing party fair notice of the case which it has to meet, sufficiently in advance of the Final Hearing, regardless of the reasons, and for the reasons of fair notice and of fairness as set out above, is likely, if not inevitably, to lead to such claims or potential claims not being admitted to probation, that is to say to an evidential hearing fixed for the purposes of proving complaints and allegations.

Employment Judge: Joseph d'Inverno
Date of Judgment: 27 September 2021
Entered in register: 04 October 2021
and copied to parties

I confirm that this is my Judgment in the case of Abioye and West Lothian Council and that I have signed the Judgment by electronic signature.