Neutral Citation Number: [2023] EAT 105

Case No: EA-2022-000793-OO

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 August 2023

**Before** :

**THE HONOURABLE MRS JUSTICE EADY DBE (PRESIDENT)**

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**Between :**

**MR D COX** **Appellant**

**- and -**

**ADECCO UK LIMITED (1)**

**First Respondent**

**GIANT PROFESSIONAL LIMITED (2)**

**Second Respondent**

**LONDON BOROUGH OF CROYDON (3)**

**Third Respondent**

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**Miss G Rezaie** (instructed by Advocate) for the **Appellant**
**First Respondent,** having accepted not to be heard at the full appeal hearing
**Mr M Green** (instructed by Hughes Paddison Solicitors) for the **Second Respondent**
**Ms H McLorinan** (instructed by Browne Jacobson) for the **Second Respondent**

Hearing date: 18 July 2023

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# JUDGMENT

## SUMMARY
## TOPIC NUMBERS: 8; 32A

*Practice and procedure – amendment – protected disclosure detriment*

By his claim lodged in August 2018, the claimant had made various complaints of having suffered protected disclosure detriments and other matters. Some four months after an earlier appeal had been upheld against the striking out of aspects of his claim, in August 2021, the claimant made an application to amend. Considering this application at a hearing in late June/early July 2021, although the Employment Tribunal ("ET") allowed some aspects of that application, the claimant appealed its refusal to permit six proposed amendments.

Held: *allowing the appeal in part*

The ET had applied the correct legal test and had taken into account all relevant factors and reached permissible conclusions in respect of amendments 5, 7 and 8 and in relation to paragraph 10 of the draft list of issues; the appeal in relation to these proposed amendments was dismissed. The ET had, however, failed to consider amendment 6 in the context of the previous history (**Kilraine v London Borough of Wandsworth** [2018] EWCA Civ 1436, and **Royal Cornwall Hospitals NHS Trust v Watkinson** UKEAT/0378/10 applied). Its reasoning also failed to demonstrate that it had adequately engaged with the practical considerations relevant to the balance of hardship in respect of amendment 6 and the amendment to paragraph 33 of the list of detriments (see **Abercrombie v Aga Rangemaster Limited** [2013] EWCA Civ 1148 and **Vaughan v Modality Partnership** [2021] IRLR 97 EAT). The appeal would therefore be allowed in relation to these two proposed amendments.

**THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT:**

## Introduction

1. This appeal raises questions as to the approach to be taken to the amendment of a claim of whistleblowing detriment. In giving my judgment, I refer to the parties as the claimant and the respondents, as below. This is the final hearing of the claimant's appeal against the judgment of the London South Employment Tribunal (Employment Judge Harrington, sitting alone on 27 June and 1 July 2022; "the ET"), by which aspects of his application to amend were refused. The claimant's appeal relates to six proposed amendments; five relate to the third respondent, one to the second.

2. Although the claimant acted in person in the initial stages of his ET claim, during the course of his first appeal to the Employment Appeal Tribunal ("EAT"), he obtained *pro bono* representation from counsel and he has continued to be assisted in that way, albeit different counsel have acted at various stages; specifically, Ms Rezaie did not appear below, but has represented the claimant *pro bono* at this hearing. The respondents have been legally represented throughout, although Mr Green only appeared on the first day of the hearing before the ET (different counsel appearing on the second), and Ms McLorinan did not appear below. The first respondent was represented by its solicitor before the ET but is debarred from appearing on this appeal as it has not entered a respondent's answer.

## The relevant legal principles

*Protected Disclosure*

3. At the heart of the claimant's case is that, contrary to section 47B **Employment Rights Act 1996** ("ERA"), he suffered detriment as a result of having made protected disclosures. By section 43A **ERA**, it is provided that a "*protected disclosure*" means a qualifying disclosure (as defined by section 43B), made by a worker in accordance with any of sections 43C-43H **ERA**. Section 43B sets out the requirements for a "*qualifying disclosure*", which must be "*a disclosure of information*" that, in the reasonable belief of

the worker concerned is made in the public interest and tends to show one or more of the relevant failures set out at section 43B(1)(a)-(f) **ERA**.

4. To be protected, a qualifying disclosure must have been made in one of the circumstances set out in ss.43C-43H **ERA**. Relevantly, by section 43C it is provided:

> "(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to (i) the conduct of a person other than his employer, or (ii) any other person for which a person other than his employer has legal responsibility, to that other person."

5. A "*disclosure of information*" has been said to require the conveying of facts, as opposed to a mere allegation or statement of opinion (see **Cavendish Munro Professional Risk Management Ltd v Geduld** [2010] ICR 325, paragraph 24), although it has been recognised that an allegation and a disclosure of information can be intertwined and that a statement needs to be assessed in light of the particular context in which it was made (**Kilraine v London Borough of Wandsworth** [2018] EWCA Civ 1436, paragraphs 32-36). As the EAT explained in **Royal Cornwall Hospitals NHS Trust v Watkinson** UKEAT/0378/10, whether there has been a qualifying disclosure is a question:

> "72. … to be considered not in isolation, but in the context of the entire evidence, including the previous history, so as to ascertain the factual matrix against which the disclosure had been made."

*Amending the claim*

6. The importance of the accurate pleading of a claim before the ET was stressed by the EAT in **Chandhok v Tirkey** [2015] ICR 527; as Langstaff J observed:

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

7. In considering an application to amend a claim, the ET exercises its general case management power, as afforded under rule 29 schedule 1 **Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013** ("ET Rules"). As such, it has a

broad discretion and the EAT will not readily interfere with its decision to refuse such an application; as Mummery J (as he then was) observed in **Selkent Bus Co Ltd v Moore** [1996] ICR 836, [1996] IRLR 661:

> "On an appeal from such a refusal, the appellant would have a heavy burden to discharge. He would have to convince the appeal tribunal that the industrial tribunal had erred in legal principle in the exercise of the discretion, or had failed to take into account relevant considerations or had taken irrelevant factors into account, or that no reasonable tribunal, properly directing itself, could have refused the amendment: see *Adams v West Sussex County Council* [1990] IRLR 215."

8. As His Honour Judge Tayler observed in **Vaughan v Modality Partnership** [2021] IRLR 97 (see paragraph 12), the approach to be adopted to deciding whether or not to exercise the discretion to allow an amendment has its origin in the National Industrial Relations Court decision in **Cocking v Sandhurst (Stationers) Ltd** [1974] ICR 650, where it was stated (see p 657B-C):

> "In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused."

9. In **Selkent**, it was similarly said that regard must be had to "*all the circumstances*", in particular any injustice or hardship which would result from the amendment or a refusal to make it. In providing guidance as to the kind of factors that would be relevant, Mummery J suggested these would include (non-exhaustively) the nature of the amendment sought, the applicability of time limits, and the timing and manner of the application, whilst emphasising:

> "… the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment."

10. In later cases, it has been confirmed that the guidance in **Selkent** was not intended to be a box ticking exercise, but a discussion of the kinds of factors likely to be relevant when carrying out the required balancing process; see **Abercrombie v Aga Rangemaster Limited** [2013] EWCA Civ 1148, per Underhill LJ at paragraph 47, and **Vaughan** at paragraph 16.

11. Where the proposed amendment simply amounts to a re-labelling of facts already pleaded, it will generally be readily permitted. Even, however, if it would introduce a new complaint or cause of action, the ET still has a discretion to allow the amendment; see Underhill J (as he then was) at paragraph 13 **Transport and General Workers Union v Safeway Stores Ltd** UKEAT/0092/07 (6 June 2007, unreported). That is so even where (as here, see section 48(3) **ERA**) the statutory test to be applied in determining whether to extend time would be of reasonable practicability rather than considering what would be just and equitable. In carrying out the balancing exercise it is required to undertake, the ET's approach should be informed by the substance of the amendment, not merely its form; as Underhill LJ stated in **Abercrombie**:

> "48. … the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted: see the discussion in *Harvey on Industrial Relations and Employment Law* para. 312.01-03."

12. And as HHJ Tayler cautioned in **Vaughan**:

> "21. … Representatives would be well advised to start by considering, possibly putting the *Selkent* factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim."

13. The focus on the practical consequences of allowing or refusing an amendment requires the ET to determine whether – and, if so, how - it is actually of importance to the claim or defence that the amendment be allowed. That can then be weighed in deciding where the balance of justice lies. Examples provided in **Vaughan** provide a helpful illustration of

this point:

> "24.1. A minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing.
>
> 24.2. An amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim.
>
> 24.3. A late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs."

However, as the EAT then went on to observe:

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

*The approach of the EAT*

14. As HHJ Tayler noted in **Vaughan v Modality Partnership** [2021] IRLR 97 EAT.

> "5. Applications to amend are frequently decided at case management hearings, along with a multitude of other issues, in limited time. As Mummery LJ noted in **Gayle v Sandwell and West Birmingham Hospitals NHS Trust** [2011] IRLR 810, at paragraph 21:
>
> > "If the ETs are firm and fair in their management of cases pre-hearing and in the conduct of the hearing the EAT and this court should, wherever legally possible, back up their case management decisions and rulings.""

15. Given the context in which such decisions are made, the reasons provided will inevitably often be brief; as provided by rule 62(4) **ET Rules**:

> "The reasons given for any decision shall be proportionate to the significance of the issue and for decisions other than judgments may be very short."

16. This is relevant to the consideration of an appeal against an ET's decision on an application to amend, where the EAT is required to adopt the approach laid down in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, [2021] IRLR 1016, per Popplewell LJ at paragraphs 57-58; in particular, I must keep in mind the counsel provided to those sitting in this jurisdiction, as follows:

> "58. … where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having

> stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload."

## The factual background

17. The ET has made no findings of fact in this matter and nothing I say at this stage should be taken to limit the scope of the underlying proceedings in any way. To the extent that I refer to the factual context, I have taken this from the EAT's judgment in this first appeal, handed down on 9 April 2021, and from the skeleton arguments prepared for the purposes of the current appeal.

18. From 9 October 2017, the claimant worked in the special educational needs ("SEN") department of the third respondent; he describes his role at that stage as being an Education Health and Care Plan ("EHCP") Assistant. The third respondent is a local authority and, at the relevant time, had a contractual arrangement with the first respondent (an employment agency) for the supply of agency workers. I am told that the second respondent was the umbrella company under which the claimant's services were provided and, as such, it is said to have been the claimant's employer.

19. It is the claimant's case that, in January 2018, he was approached by a manager of the third respondent and asked to apply for the role of EHCP Co-ordinator. The claimant says he made clear he was not qualified for that role but was nevertheless persuaded to apply and was subsequently told he had been successful. He says that it was then that he entered into a contract with the second respondent and that, from 29 January 2018, he was charged out to the third respondent at an increased rate. In contrast, the third respondent says that the claimant's role in fact changed to that of Business Administrator but that, from 29 January 2018, he was incorrectly paid as an EHCP Co-ordinator although he still continued to work

as Business Administrator.

20. It is the claimant's case that one of his colleagues carried out the EHCP Co-ordinator role, although they were also not qualified to do so. He further contends that staff at the first respondent gave information to his colleagues, such that they discovered he was being charged to the third respondent by the second at a rate in excess of that for an EHCP Assistant. For the third respondent it is said that the overpayment to the claimant was discovered in late June or early July 2018 and he was informed of this at a meeting on 3 July 2018, when he was told that an error in his pay grade and salary needed to be rectified and he would be moved to a new assignment on 9 July 2018, on the correct grade and pay. It is the third respondent's case that it was after this that the claimant indicated that he would not return.

21. The claimant says that, at the relevant time, he sent a number of emails and attended meetings with staff of the respondents; initially, his principal concern was that his personal data had been given to his colleagues but on 5 July 2018 he wrote to the first respondent alleging there had been breaches of the **General Data Protection Regulation** ("GDPR") in relation to his pay information, that he had been underpaid, and that staff were being put into jobs for which they were unqualified. It is his contention that his assignment was terminated by the third respondent on 6 July 2018 and that, on 8 July 2018, he was informed of this by the first respondent.

## The procedural history

22. On 14 August 2018, the claimant lodged a claim with the ET. Initially he only brought proceedings against the first and second respondents but, in October 2018, the London Borough of Croydon was added as a third respondent.

23. The claimant's principal (although not only) complaint was that he had been subjected to detriment and/or dismissed for making protected disclosures. Initially, he said he had

disclosed information tending to show there had been fraud by the first and/or second respondent. Subsequently, his claim was clarified to rely on two types of protected disclosure: (1) that his personal data had been disclosed without his consent, in breach of the **Data Protection Act 2018** and the **GDPR**; and (2) that the respondents were employing unqualified persons to deal with children with SEN.

24. A preliminary hearing took place on 18 February 2019, at which a further hearing was listed to determine applications for strike out/deposit orders; meanwhile, directions were given, as follows:

> "Further Particulars and amendment to claim
> B4 The outline issues having been determined … on or before 4.30pm on 11th March 2019 the Claimant shall supply in writing to the Respondents, with a copy to the Tribunal office, particulars of the Originating Claim by way of a Scott Schedule setting out particulars of his complaint that he relies upon by reference to the paragraph numbers in his ET1, specifying which of the Respondents the allegation is made against and the date when any incident occurred and individuals who were responsible. …
> B5 The Claimant shall serve on all the respondents and file with the Tribunal his application to amend his claim on or before 4.30pm on 11th March 2019"

25. As directed, on 11th March 2019, the claimant produced a Scott Schedule. He also served further particulars of his claim (there is a dispute between the parties as to the status of this document) and his proposed amended particulars of claim. The second and third respondents then filed amended grounds of resistance. As the claimant's application to amend still required to be determined, the ET confirmed this would be considered at a second preliminary hearing, listed for 12 July 2019.

26. At the second preliminary hearing, however, it was determined that the claimant had not made a protected disclosure, and the claims against the first and third respondents were dismissed. That left claims for wrongful dismissal and holiday pay against the second respondent, but the outstanding application to amend related to the protected disclosure claims and was therefore not addressed.

27. The claimant appealed the dismissal of his claim to the EAT, which, by its judgment of 9 April 2021, upheld the appeal and set aside the ET's decision, remitting the claim for further case management and progression. In addressing the errors made by the ET, HHJ

Tayler observed:

> "74. … there was no consideration of whether any disclosure was passed on to other of the respondents. That was, in part, the importance of the failure to take account of the discussions and communications that formed the background ... It is at least arguable that if a disclosure is made to one person and then passed on to another, who is such a person as would make a qualifying disclosure a protected disclosure if it was made to that person directly, that indirect disclosure is sufficient for the protection to apply, particularly if the context is such that the matter is under discussion with both parties, so that it would be anticipated that any disclosure would be passed on."

28. Remitting the claim to the ET, HHJ Tayler provided the following guidance:

> "79. Before any further consideration is given to strike out or making a deposit order, it is important that there is proper case management to clearly identify the claims and issues. ... It is important that care is taken to analyse the pleadings to gain a fair understanding of the claim that the claimant is seeking to advance. This may require consideration of amendment (subject to the usual rules). Analysis of the claim will need to include consideration of:
>
> What information the claimant contends he disclosed. This will involve consideration of the events leading up to the claimant sending the letter on 5 July 2018, and may necessitate consideration of, whether properly analysed, there are prior disclosures (which may be an important issue in considering to whom disclosure was made);
>
> What wrongdoing the claimant contends he reasonably believed that information tended to show. The claimant is no longer pursuing an allegation of fraud, but he is alleging breaches of GDPR and the placement of unqualified staff …;
>
> On what basis the claimant contends that he reasonably believed that the disclosure was made in the public interest …;
>
> To whom the claimant contends the disclosure (or possibly disclosures) were made, and on what basis is it contended that a disclosure to that person was made is a protected disclosure; …
>
> What the claimant contends was done on the grounds of making the protected disclosure and/or does the claimant contend the reason, or principal reason, for dismissal was making the protected disclosure;
>
> By whom the claimant contends he was employed for the purposes of the claims in respect of matters other than protected disclosure detriment and dismissal."

29. Subsequent to the EAT's judgment, on 12 August 2021, counsel then acting for the claimant drafted an application to amend the claim, which set out his proposed amended grounds.

30. On 27 October 2021, a further preliminary hearing took place. The claimant's claim of automatic unfair dismissal under section 103A **ERA** was dismissed upon withdrawal, and case management directions were given up to the listing of the full merits hearing of the claim for 3-10 October 2022. A further preliminary hearing was, however, listed to determine the claimant's outstanding application to amend.

## The ET decision and reasoning

31. At the hearing on 27 June and 1 July 2022, the ET considered a number of proposed amendments, which had either been identified in relation to the claimant's particulars of claim, or in respect of his list of detriments, or the list of issues. Although a number of the requested amendments were allowed, the ET refused other aspects of the claimant's application. Relevantly for the purposes of this appeal, the ET refused the following proposed amendments (for ease of reference, I adopt the same numbering and references as used below), which are now the subject of the present appeal.

32. **Amendment 5**: an oral disclosure to Ms Alison Farmer of the third respondent during a meeting on 2 July 2018. In this regard, the ET recorded:

> "40. It is accepted by Counsel for the Claimant that there is no reference to this alleged conversation within the pleadings themselves. The reference comes from the letter of 5 July 2018 which, in turn, refers to a conversation with Ms Farmer."

33. Concluding that the amendment could not be categorised as a relabelling exercise, the ET accepted there would be undue prejudice to the third respondent if this was allowed: Ms Farmer was no longer in its employ and no enquiry would have been made upon receipt of the ET1 as, prior to August 2021, the respondents had not been put on notice that this conversation was relied on as including an alleged disclosure.

34. **Amendment 6**: an oral disclosure to Ms Brand-Grant of the third respondent on 2 July 2018. As the ET recorded, in his further particulars, the claimant had described a meeting with Ms Brand-Grant on 2 July 2018. In respect of what the claimant alleged he had said at that meeting, the ET understood the disclosure to be that he would not get rid of emails; it being his case that he was thereby disclosing that he was suspicious that something was not right. The ET refused the proposed amendment because it was not satisfied that the information particularised could amount to a disclosure for the purposes of section 43B **ERA**, and, "*carrying out the balancing exercise*", it was satisfied the amendment should not be allowed.

35. **Amendment 7**: an oral disclosure to Ms Brand-Grant and Mr Thompson of the third respondent and/or Ms Pasby of the first respondent during a meeting on 2 July 2018. Acknowledging that there was a reference to this meeting in paragraphs 56-63 of the original particulars of claim, the ET noted that the claimant was seeking to amend to rely on what he had then said as a disclosure that his personal data was leaked to colleagues by a Ms Goldklang (who also worked for the first respondent); the ET subsequently referred back to this as "*seeking to introduce entirely new facts*" (ET paragraph 54). Refusing the amendment, the ET reasoned:

> "49. … there is no reference to any disclosures made by the Claimant. At its highest, the Claimant says that he asked what the First Respondent's policy was … I do not consider that there is anything contained in them that can be said to amount to a disclosure made by the Claimant at that meeting, that falls within Section 43B."

36. **Amendment 8**: an oral disclosure to Ms Wright and Mr Thompson of the third respondent and/or Ms Casartelli of the first respondent in a meeting on 3 July 2018. As for amendment 7, the amendment in this regard was to rely on what the claimant had said at the meeting in issue as disclosing that: (1) his personal data was leaked by Ms Goldklang, and (2) a Ms Glede Jung was carrying out the work of an EHCP Co-ordinator when not qualified to do so. The ET accepted that the meeting on 3 July 2018 had been described in the original particulars of claim but again found that the claimant was seeking to introduce new facts as there had been no reference to the information in question being disclosed in that earlier description. Refusing the amendment, the ET explained:

> "55. … there does not appear to be any explanation for the delay in introducing these entirely new facts and, in particular, why they do not appear within an otherwise reasonably detailed description of the relevant meeting within the original pleading.
> …
> 56. I do accept the likelihood of prejudice on the part of the Respondents caused by an original description of this meeting being expanded to include alleged oral disclosures. … I am satisfied that the hardship caused to the Respondents in allowing this amendment outweighs the hardship to the Claimant in my refusing it. ..."

37. **Amendment to paragraph 33 of the list of detriments**: the reference to the actions of the second respondent in cancelling the claimant's assignments on its online system. The claimant had also sought to amend the list of detriments. In relation to the second

respondent, he relied on three alleged detriments: locking him out of its online system and terminating two assignments. Accepting that the Scott Schedule had included a reference to the claimant being locked out of the online system, the ET did not consider these detriments had been included within the claimant's original particulars of claim or further particulars. Given the reference in the Scott Schedule, however, the ET allowed the amendment in relation to the claimant being locked out of the online system, but refused it in respect of the termination of two assignments. In reaching this view, the ET had regard to the claimant's delay in making his application to amend and the prejudice that the second respondent would suffer in "*uncovering the relevant evidence at this stage*" (ET, paragraph 66).

38. **Amendment to paragraph 10 of the draft list of issues**: whether the third respondent had knowledge of the disclosure set out in paragraph 10 of the draft List of Issues. Accepting the submissions on behalf of the third respondent, the ET refused this amendment, reasoning:

> "83. ... I am entirely satisfied that it has not been made clear before today that it was part of the Claimant's case that R3 had knowledge of the disclosure set out in paragraph 10 of the draft List of Issues. It was headed a disclosure to R1 and there was no further narrative to suggest that any other Respondent was being referred to as having knowledge of that disclosure.
> …
> 85. … taking account of the stages through which this case has passed, I am satisfied that the very late mention of R3 being said to be involved with the alleged disclosures in the letter of 5 July 2018 is prejudicial to R3. As I have commented, there was no proper and clear suggestion that this was the case before today. I entirely accept the points made … as to prejudice and I am satisfied that that prejudice results in the balancing exercise favouring the amendment not being permitted. I do not allow the claim to be amended to include an assertion that R3 had knowledge of the disclosures within the letter of 5 July 2018, such that any alleged detriments from R3 have flowed or been caused by those alleged disclosures."

39. The claimant appealed against the refusal of the amendments I have set out above. Initially considered by His Honour Judge Auerbach to identify no reasonably arguable question of law, the appeal was permitted to proceed after a hearing under rule 3(10) **EAT Rules 1993** before HHJ Tayler. The claimant also made an application to the ET for reconsideration; that was refused by the ET for reasons set out in its judgment sent to the parties on 23

August 2022.

**The appeal and the parties' submissions**

40. The first ground of challenge relates to the refusal of **amendment 5**, which the claimant contends was wrongly characterised by the ET as introducing new facts. He observes that, within both his original particulars of claim (paragraph 56) and the amended document he had served after the first preliminary hearing (paragraph 60), he had said that, on 2 July 2018, he had explained to Ms Farmer "*how disappointed I was that my data had been leaked*"; the amendment was thus predicated on facts already known to the respondents, the only novelty arose from his reliance on this conversation as a qualifying disclosure. The claimant further submits that the ET failed to properly assess the balance of hardship (and see paragraph 21 **Vaughan**); although the third respondent might experience practical difficulties in obtaining further evidence from a former employee, that was mitigated by the limited scope of the investigation required, which did not engage "*substantially different areas of enquiry*" (**Abercrombie**). The potential prejudice to the claimant was, however, significantly greater as it related to a salient dispute of fact, as to whether the third respondent subjected him to whistleblowing detriment in terminating his work contract.

41. The third respondent says, however, that the ET's decision cannot properly be challenged: (1) the claimant's counsel conceded there was no earlier reference to this conversation in the pleadings; (2) no objective person reading paragraph 56 of the particulars of claim would understand this was an allegation of a protected disclosure being made to the third respondent; (3) it was thus reasonable for the ET to see this as raising new facts; but, even if seen as a re-labelling of expanded facts, (4) the balance of prejudice would have been the same - Ms Farmer (even if contactable) could not reasonably be expected to give reliable evidence on this point over four years after the event.

42. The second ground of challenge concerns the ET's refusal of **amendment 6**. The claimant

points out that the ET had accepted an amendment relying on his oral disclosure to Ms Brand-Grant, on or around 18 or 19 June 2018, whereby he was saying that he had disclosed information that tended to show there had been a breach of data protection by Ms Goldklang (see the ET at paragraphs 31-32, relating to amendment 1). Set in this context, the claimant says it was apparent that amendment 6 (which referenced facts pleaded at paragraph 37 of the further particulars) involved, for the second time, the disclosure of information tending to show a data breach by Ms Goldklang: it was because he was contending a breach of data protection that he was suspicious of the instruction to delete his emails and the materiality of the disclosure was demonstrated by the prompt steps taken by Ms Brand-Grant to contact Ms Pasby. The ET erred in failing to see the amendment 6 disclosure in this context.

43. For the third respondent it is submitted that there can be no error of law. Firstly, the way the claimant was now putting his case on appeal was not how the application to amend was put below (see the ET's understanding of the claimant's case at paragraph 45). More generally, what the claimant had set out at paragraph 37 of his further particulars was not an allegation of a disclosure of information about wrongdoing of a type set out in section 43B **ERA**: whether or not the claimant was saying that he would not get rid of his emails because he was suspicious of something, he was making no allegation of an act of wrongdoing to the third respondent.

44. Thirdly, addressing **amendment 7**, the claimant objects that the ET failed to consider the transcript and audio recording of the meeting on 2 July 2018 (which had been in the respondents' possession since July 2019), which included the following statements by the claimant:

> "There's no frustration at all, but what my concern is my data's been leaked, that's my concern."
> "… what … we need to focus on here is that you're saying it's a potential data breach, I believe it's a data breach. I believe it is, I believe it is."

As HHJ Tayler had observed, when remitting this matter after the first appeal, the claimant's case will require the ET to consider the events leading up to his letter of 5 July 2018, including whether there were prior disclosures. It was the claimant's case that he had raised these matters with both the first and third respondents; the factual matrix the ET would need to consider would be the same and it was wrong to see this as introducing new facts, alternatively, not to appreciate that any new facts would not engage "*substantially different areas of enquiry*" (**Abercrombie**).

45. For the third respondent it is objected that the ET had correctly approached this as a matter that had not been referenced in any extant, or proposed, pleading. The claimant was essentially saying that the ET had been required to look at the wider background so as to establish that the third respondent had known of this allegation but it had been entitled to approach the claimant's case on the basis of the allegations made in the pleaded claim.

46. Turning to **amendment 8,** the claimant raises a similar ground of challenge. He complains that the ET also failed to consider the transcript and audio recording of the meeting on 3 July 2018, which (again) had been in the respondents' possession since July 2019. The transcript recorded the claimant making the following statements at the meeting in question:

> "Came from Sheryl. There's an authorised from Sheryl with the lady along the name of Glede who I believe is doing a Coordinator role..."
>
> "Rachel, in all fairness and not to sound rude but the mix up is not my concern. What's happened here somebody's got hold of this information. Now the only way someone can get hold of this information is either through Adecco I believe?"
> "Lynn Goldklang has got hold of this information and passed it to several..."

47. It is the claimant's case that the transcript thus demonstrated he had conveyed information to his employer, or other responsible person, which he reasonably believed tended to show that the respondents were in breach of their legal obligations: (i) to be compliant with the **Data Protection Act 2018**, and (ii) to employ qualified persons for the role of EHCP Co-ordinator. He says there was no practical reason why the respondents would be

disadvantaged given they had thus been aware of the content of the meeting for some time; on the other hand, he would be denied the opportunity to advance a pertinent aspect of his case, concerning the knowledge of the third respondent at the time his contract was terminated.

48. The third respondent says the ET had again correctly approached this as a case of entirely new facts being pleaded; that position was not altered by the fact that the claimant was seeking to rely on references in lengthy transcripts that may have been put before the ET as part of a hearing bundle of over 300 pages. The ET had been entitled to observe that the claimant had provided no explanation for his delay and to accept the likelihood of prejudice to the respondents.

49. As for the challenge to the ET's refusal of the **amendment to paragraph 33 of the list of detriments**, it is the claimant's case that it erred in failing to identify that this had first been raised at paragraph 84 of his further particulars, where he had stated:

> "R2 seem to have no record of the original assignment of £153.70 per day that expired on the 30th July 2018 (extended until September 2018) but instead send *[sic]* C two assignments, one for the hourly rate of £16.38 per hour, with a start date of the 7th July 2018 and expiring on the 8th July 2018. The second with the day rate of £153.70 but dated the 29th January 2018 and expiring on the 6th July 2018."

50. The claimant further submits that the ET failed to have regard to the significant overlap between the second respondent's locking his access to the online system on 4 July 2018 and its cancellation of his assignments on its online system. No principled distinction could properly be drawn between the two detriments in terms of the hardship caused to the second respondent.

51. For the second respondent, however, it is objected that this overlap had not been raised by the claimant at the preliminary hearing and, in any event, does not in fact exist: although locking the claimant out from the online system had clearly been under the second respondent's control, that was not the position in relation to the termination of assignments, which would require a decision by the first respondent (as the claimant had previously acknowledged in referring to the first respondent's conduct in this regard at

paragraph 79 of his further particulars) and, therefore, evidence regarding the interactions between the first and second respondent. The ET had also been entitled to distinguish between the alleged detriments: the locking out allegation had been included in the Scott Schedule, which was not true of the allegation regarding the termination of assignments (only particularised as detriments in the August 2021 application). The reference to paragraph 84 of the further particulars did not change the position: an objective reader would not understand that the claimant was there claiming that the second respondent had subjected him to detriment by terminating two separate assignments; a tangential reference (giving the dates when assignments started and were due to expire) was insufficient and potentially contradicted by the claimant's earlier assertion that his assignment had been terminated by the first respondent (paragraph 79 of the further particulars).

52. Finally, addressing the proposed **amendment to paragraph 10 of the draft list of issues**, the claimant contends the ET erred in proceeding on the premise that he was raising a new allegation as to the third respondent's knowledge of the disclosure made to the first respondent via the letter of 5 July 2018; on the contrary, that had been a consistent feature of his case, referenced as follows:

> Paragraph 8 further particulars: "C's assignment was first terminated by Ms Brand-Grant on the 6th July 2018 at 11:57 am. The termination coming after Ms Brand-Grant and Ms Alison Farmer had knowledge of the disclosure at 11:00am on the 6th July 2018 …"
>
> Paragraph 9 further particulars: "The reason given for C's assignment being terminated by R3 was that C had returned back to the Bernard Wetherill House Building on the 5th July 2018 around 1pm. It was here that R3 alleged that C announced that it was his last day and resigned. This is a total fabrication, C never did return back to Bernard Wetherill House and resign. C was dismissed and banned from the site by someone at R3."

53. Additionally, the ET erred in concluding that the third respondent first had knowledge of this claim at the hearing: (1) at paragraphs 9 and 10 of its original response, the third respondent asserted that it did not have knowledge of the letter of 5 July 2018 until 6 July 2018; (2) within its amended response, the third respondent had specifically denied that any employee was "*aware of the Alleged PID at the time the Claimant's assignment*

*ended*" (see paragraph 17); (3) in an undated document named "*Chronology*", which was included within a list of documents disclosed to the claimant by the third respondent in February 2019 following his subject access request, the third respondent offered a full response to the allegations made by the claimant within his letter of 5 July 2018. Yet further, the claimant observes that the issue of whether the third respondent had knowledge of his disclosure to the first was identified as a pertinent legal issue in this case by HHJ Tayler at paragraph 74 of his judgment in the claimant's first appeal.

54. It is the claimant's submission that the ET thus erred in its assessment of hardship: (1) the balancing exercise was conducted on the false premise that the claimant was raising a new allegation; (2) given that the third respondent *did* have knowledge of the claimant's allegation, and had previously responded to this allegation, it was a contradiction to argue the late timing of the amendment was a source of prejudice to it; (3) in disallowing the amendment, the ET was denying the claimant the opportunity to advance his case in respect of a potentially highly significant factual and legal dispute, which had been identified by HHJ Tayler in 2021.

55. The third respondent contends, however, that there was no clear allegation within the original particulars of claim to the effect that it had either seen the letter of 5 July 2018, or had been aware of its contents, and dismissed the claimant as a result. Indeed, it had been the claimant's contention that he had sent the 5 July 2018 letter to the first respondent, which had then dismissed him the following day. Moreover, the claimant's pleaded case had alleged that the third respondent had told him, at a meeting on 3 July 2018, that the EHCP Co-ordinator role would come to an end on 6 July 2018: it had thus been his case that he was told this role would end *before* the alleged protected act took place.

56. The ET had plainly taken into account the third respondent's acknowledgment that it had been aware of the 5 July 2018 letter *("... it is clear that R3 has repeatedly stated its case that after the letter of 5 July 2018 was sent to R1, R3 was told about it but R3 was not*

*shown the letter nor aware of the detail of its contents*." ET, paragraph 82), but was entitled to find that it had had no knowledge of the claimant's proposed amendment – asserting actual knowledge of the content of the letter on the part of the third respondent – until the second day of the hearing. In the circumstances, the ET permissibly concluded that this would cause undue prejudice to the third respondent.

**Analysis and conclusions**

57. The claimant's claim was presented on 14 August 2018. The ET decision under challenge on this appeal took place nearly four years later, in June/July 2022. A further year has passed before the hearing of this appeal. There has been no determination of any of the claims on their merits.

58. When considering the claimant's application to amend his claim, the ET was plainly mindful of the time that had passed. It (rightly) did not suggest that the delay was entirely due to the claimant, save to the extent that he had only set out the proposed amendments he wished to make on 12 August 2021, some four months after the EAT had handed down its judgment on the first appeal. On the other hand, when weighing the balance of hardship, the ET was entitled to consider the practical effect of allowing an amendment where that would raise a claim that had not previously been pleaded and could not reasonably have been anticipated at an earlier stage of the proceedings.

59. Turning to the substance of the claimant's protected disclosure detriment claim as at the time of the hearing before the ET, that can be summarised as follows (as set out in the draft list of issues):

    (1) In respect of the first respondent, it was contended that protected disclosures were made by the claimant on (i) 25 June 2018 (telephone conversation with Ms Hyde); (ii) 28 June 2018 (email to Ms Hyde); (iii) 4 July 2018 (telephone conversation with Ms Ruiz); (iv) 5 July 2018 (email/letter to Ms Ruiz and Ms Fleming).

(2) In respect of the third respondent, it was contended that the claimant made a protected disclosure to Ms Brand-Grant in a conversation on 18/19 June 2018.

(3) It was further contended that the claimant suffered detriments as a result of his protected disclosures, as follows (retaining the order as set out in the list of issues): (i) 5 July 2018, email from Ms Hyde to a colleague; (ii) 6 July 2018, third respondent asked first respondent to terminate his assignment; (iii) 6 July 2018, third respondent banned the claimant from its site and disabled his ICT and Pass access; (iv) 8 July 2018, email from Mr Hillman (third respondent) to Ms Bakpa; (v) 9 July 2018, Mr Thompson (third respondent) asked if payment to the claimant could be withheld pending his return of a laptop, charge and ID card; (vi) 10 July 2018, Ms Brand-Grant email; (vii) Ms Degnan (third respondent) referred to the claimant's attitude, performance, "*wider issues*" and refusal to undertake work, in an undated "*chronology*" document and an email of 17 July 2018; (viii) 30 July 2018 email from Ms Brand-Grant; (ix) 7 July 2018, email from Ms Bakpa to Ms Hevezi (third respondent); (x) 16 August 2018, email from Ms Bakpa to Mr Raby (third respondent); (xi) 24 July 2018, email from Ms Degnan; (xii) email of 27 November 2018 from Ms Brand-Grant.

60. As HHJ Tayler had recognised, when remitting this matter to the ET after upholding the first appeal, the claimant's case would involve consideration of the events leading up to the letter of 5 July 2018, including whether there had been prior disclosures and, if so, to whom. Similarly, the ET acknowledged the potential breadth of the claimant's claim, when explaining why it did not consider it appropriate to make a deposit order in this matter:

> "96. … The alleged disclosure made in the letter of 5 July 2018 was made in the context of several discussions and meetings which had happened beforehand. … it is important for the Tribunal to have an understanding of this context in full …"

61. With that background in mind, I therefore turn to the ET's decisions on each of the amendments in issue.

62. In refusing **amendment 5**, the ET recorded that it was accepted by the claimant's then counsel that there had been no reference to the conversation with Ms Farmer on 2 July 2018 within the pleadings. Although I would normally accept that as an accurate record of what had taken place at the hearing, a question arises in this instance as to whether that can

be entirely correct, given that, at paragraph 56 of his original particulars of claim, the claimant had clearly referred to this conversation:

> "56. On Monday 2nd July 2018, I spoke to the Head of SEN 0-25, Ms Alison Farmer and explained to her about how I was feeling in the company and how disappointed I was that my data had been leaked. I explained that I had a meeting with Adecco today and she asked if I could keep her updated."

That paragraph was then repeated as paragraph 60 of the claimant's amended particulars of claim. It may be that the claimant's counsel was intending to accept that the conversation had not previously been identified as a protected disclosure, but it was simply inaccurate to say that the conversation had not previously been referred to in the claimant's pleaded case.

63. Allowing, therefore, for the possibility that counsel's concession was misunderstood, or mis-recorded, by the ET, the real question is whether it then erred in its assessment as to whether this would be likely to involve substantially different areas of enquiry (**Abercrombie**), and in its appreciation of the practical consequences of allowing or refusing the amendment (**Vaughan**).

64. Having referred to this conversation with Ms Farmer in the original pleading, the claimant had put the third respondent on notice that this was, at least, part of the factual background he relied on. Moreover, in responding to the claim, the third respondent had plainly taken instructions from Ms Farmer and, although it did not specifically refer to a conversation on 2 July 2018, it did explain:

> "5. It is admitted that, just prior to 6 July 2018, R3 became aware of an issue concerning the Claimant's pay. It had been discovered that the Claimant was being paid at the rate of an EHCP Co-ordinator (grade 9 of R3's pay scale) rather than at the rate of a Business Administrator (grade 6 of R3's pay scale). Alison Farmer, Head of Service, 0-25 SEN at R3, advised the Claimant that R3 would not seek to reclaim this over-payment but advised that the Claimant would be paid at the appropriate rate going forward."

65. Even accepting that the claimant had thus referred to the conversation of 2 July 2018 as part of his pleaded case, it is not in dispute that he had not identified that he was seeking to rely on any part of what he had said in that conversation as the making of a protected

disclosure to Ms Farmer. The third respondent says that the particulars given could not, in any event, support such a case; it urges me to read what the claimant says he relayed to Ms Farmer as simply an expression of his feelings, not a disclosure of information. Accepting that is one possible reading of the claimant's pleading, I can also allow that it would be possible to read the reference to the claimant's data having been "*leaked*" as potentially referring to a protected disclosure; I would not go so far as to hold that the pleading in this regard could never be understood as referring to the making of a protected disclosure. On the other hand, I do agree that it would not have been unreasonable of the third respondent not to have understood the pleading in this way.

66. Viewing the matter in the context of the claimant's case as a whole, the ET concluded that the third respondent was "*not put on notice of this conversation including an alleged disclosure until … August 2021*". That, in my judgement, was a conclusion that the ET was entitled to reach. Having done so, it then had to assess the comparative hardship if the amendment was allowed or refused. At that stage, the fact that Ms Farmer no longer worked for the third respondent was a relevant, although not necessarily determinative, consideration. Having regard to the practical consequences of allowing the amendment, the ET, however, also accepted the third respondent's submission that it would face "*evidential prejudice and the likely loss or diminution in quality of cogent evidence*"; concluding that this tipped the balance against the claimant's application.

67. Whether viewed as new facts or new labelling, the ET's decision was appropriately informed by the practical consequences of allowing or refusing the amendment. If the claimant's application was allowed in respect of amendment 5, a new line of enquiry would have been opened up as to precisely what he had said to Ms Farmer on 2 July 2018 (a conversation that would be transformed from part of the background to a separate allegation of a protected disclosure) and what she had then done. Some four years after the discussion in issue, Ms Farmer would have had to be tracked down and asked for her

recollection of what the claimant had said. Thinking through the practical consequences of the amendment, it cannot be said that the ET erred in its approach or reached a decision that was other than within its case management discretion. I duly refuse the appeal in relation to amendment 5.

68. Turning then to **amendment 6**, there is a dispute as to whether the case put on appeal fairly represents the claimant's argument below, but this seems to be an academic concern given that the ET considered both potential interpretations of what was relied on as the disclosure in question:

> "45 The Claimant's disclosure is identified as being the Claimant saying he would not get rid of emails, as he was suspicious that something was not right.
>
> 46 Of course, this sentence is capable of two interpretations. Firstly, that all the Claimant said was that he would not get rid of emails or that he said he would not get rid of emails because he was suspicious that something was not right. In other words, the second part of the sentence could be something the Claimant actually said or it could be a narrative phrase to explain why the Claimant said the first part of the sentence."

69. Having thus allowed for either interpretation, the ET concluded that "*the information particularised could not be said to amount to a disclosure for the purposes of section 43B*"; it further referred to this being "*an oral conversation without written record*" and held that, "*carrying out the balancing exercise*", the amendment should not be allowed.

70. The claimant says that the ET ought to have seen this amendment in the context of the case it had already accepted he was pursuing, namely that he had made a protected disclosure to Ms Brand-Grant on or around 18/19 June 2018. That was a conversation described in some detail at paragraphs 47-52 of the claimant's original particulars of claim, where he stated that he had informed Ms Brand-Grant that he had been told that Ms Goldklang (employed by the first respondent) had told members of staff about his pay, which he said "*must be a breach of my data and under GDPR laws …"*. As the third respondent acknowledged before the ET, the detail thus provided set out the factual basis for the protected disclosure contended by the claimant.

71. By amendment 6, the claimant was seeking to rely on a further conversation with Ms Brand-Grant as another protected disclosure; this conversation had been set out in his further particulars, as follows:

> "On Monday 2nd July 2018, after meeting with Ms. Farmer, C then had a brief meeting again with Ms. Brand-Grant, it was here that Ms. Brand-Grant had told C to get rid of emails and that he was 'ignorant'. C clearly stated that he would not get rid of emails as he was suspicious that something was not right. Ms. Brand-Grant stormed off and said she would speak to Ms. Pasby to reassure C that Ms Goldklang did not leak his data to the SEN department."

72. This provided further detail of a conversation that the claimant had referenced in his original particulars of claim, at paragraph 57. He had then referred to this within his Scott Schedule, as a particular of complaint on which he relied. Although the claimant might not have been formally directed to provide further particulars of his claim (see the directions given by the ET at the preliminary hearing of 18 February 2019, set out at paragraph 24 above), he was thus providing further detail of a matter he had already identified as part of his claim, as set out within the original particulars. The third respondent was on notice that this was an incident relied on by the claimant since 11 March 2019. It was, furthermore, an incident that – on the claimant's case – followed on from the conversation with Ms Brand-Grant on 18/19 June 2018. It is difficult to see what additional prejudice the third respondent would suffer in having to address this later discussion between the claimant and Ms Brand-Grant; certainly that is not explained in the ET's reasoning.

73. As for the ET's primary objection to the amendment, whilst the claimant might find it difficult to make good his contention that this incident gave rise to a protected disclosure, seen as a continuation of the earlier conversation with Ms Brand-Grant on 18/19 June 2018, it is possible to interpret the claimant's statement on 2 July 2018 as reiterating that (alleged) earlier disclosure. Given that a statement must be seen in the context of the previous history (**Kilraine**; **Royal Cornwall**), I consider that the ET erred in concluding that this could not amount to a protected disclosure. On amendment 6, I therefore allow the claimant's appeal

74. As the parties acknowledged in oral argument, there is an overlap between the points raised on **amendments 7 and 8** and it is therefore convenient to address these together. Both amendments sought to rely on statements made by the claimant at meetings with representatives of the first and third respondents, on 2 and 3 July 2018, as further protected disclosures. As the ET recorded, the meetings in question had been referenced in the claimant's particulars of claim.

75. In respect of the meeting on 2 July 2018, the only statement attributed to the claimant was detailed as follows:

> "51. Adrian [Thomson, of the first respondent] explained and made comparisons to 'Social Workers' … I asked if this was the policy of Adecco and that they do not raise these concerns with the person in question, but are just willing to 'investigate' without giving any prior knowledge."

Below the description of this meeting, as an additional comment, it was observed:

> "63. This is extremely concerning if staff of Adecco are giving out personal information and data to third parties without the knowledge and if true especially in light of the GDPR law that became enforceable since May 25th 2018."

That, however, was set out as an observation made after the event; it was not suggested that this was something the claimant had actually said at the meeting.

76. As for the meeting of 3 July 2018, a number of statements were attributed to the claimant:

> "67. … I asked Joey [Casartelli, of the first respondent] about 'overpayment' and how this could be possible and this appears to me to be in fact an 'underpayment' due to the contract I have which states £153.70 per day and the rate Adecco have been charging of £350 per day.
> 68. I asked the question, if an EHCP Coordinator rate was £350 per day …
> …
> 70. I asked if I could have the contract that stated I was a 'Senior Business Support Officer' …
> …
> 72. I then explained that I have a legally binding contract with Giant which states that my assignment ends on the 30th July 2018 but according to Joey, my assignment will end on Saturday 7th July 2018.
> 73. I explained that the facts state that I have a contract from Giant that does not say business support officer …
> 74. Adrian [Thomson] then said that the contract of EHCP Co-ordinator will come to an end on Friday 6th July 2018 and I explained that he is in breach of contract if this happens and he was adamant that he was not."

77. In his further particulars, the claimant provided more detail of the meeting of 3 July 2018, confirming that he had "*queried about the overpayment and asked what this Grade 9 Figure was*." (see paragraph 24 a. further particulars).

78. Responding to the claimant's pleading, in the third respondent's amended grounds of resistance, it was stated (relevantly) as follows:

> "8. It is admitted that Sheryl Brand Grant, SEND Placements and Personalisation Manager, attended a meeting with the Claimant and representatives of R1 on 2 July 2018, where the Claimant raised concerns about his rates of pay. At this meeting, R1 promised a further meeting to take place with a senior manager of R1 to discuss this issue. No representatives of R3 attended the subsequent meeting.
> 9. The Claimant was advised at a meeting on 3 July 2018 that the error in his pay grade and salary needed to be rectified by ending his current assignment on 6 July 2018 and moving him to a new assignment as a Grade 6 Business Administrator starting on 9 July 2018."

79. For its part, the first respondent either made no admission or denied the relevant parts of the claimant's pleaded claim.

80. In seeking to amend his claim, the claimant sought to rely on these meetings on 2 and 3 July 2018 as occasions on which he had made protected disclosures that his personal data had been disclosed to his colleagues (without his knowledge or consent) in breach of the **Data Protection Act 2018** and/or the **GDPR**, asserting:

(1) In respect of the meeting on 2 July 2018:

> "… the Claimant repeated his concerns that his personal data had been disclosed to his colleagues without his knowledge or consent … in breach of the First Respondent's obligations under the Data Protection Act 2018."

(2) In respect of the meeting on 3 July 2018:

> "… the Claimant again raised his concerns that his personal data had been disclosed to his colleagues, without his knowledge or consent and causing him distress at work, in breach of the First Respondent's obligations under the Data Protection Act 2018, and questioned how and why this had come about.
> The Claimant also raised questions about colleagues undertaking EHCP roles, including by reference to January 2018 emails whereby contracts for EHCP roles were agreed … For the avoidance of doubt, the Claimant does not plead that this was, in itself, a protected disclosure. …"

81. Notwithstanding the fact that the application to amend had thus expressly stated that the claimant was *not* relying on what he had said on 3 July 2018 as a disclosure that staff were carrying out roles for which they were unqualified, it was nevertheless relied on as

including such a disclosure within the claimant's draft list of issues. The ET therefore considered the claimant's case in respect of the meeting of 3 July 2018 as incorporating both alleged disclosures.

82. Having duly considered the pleadings, the ET concluded that the proposed amendments raised entirely new facts, there having previously been no reference to any disclosures being made by the claimant at either meeting. That was a conclusion that was plainly open to the ET; at no stage prior to his 12 August 2021 application to amend had the claimant pleaded that it was his case that, at the meetings on 2 and 3 July 2018, he had disclosed that there had been a breach of the **Data Protection Act 2018** and the **GDPR** in respect of his personal data, or that the respondents were employing staff to undertake work for which they were unqualified. The ET was, moreover, entitled to see this as a substantive change: meetings that had previously been relied upon as part of the history, at which information was provided *to* the claimant, were now said to be further instances of occasions when the claimant had himself disclosed information that would fall within the protection of section 47B **ERA**. The real question for the ET was, however, whether the balance of hardship meant that the amendments should be refused.

83. For the claimant it is observed that his case in this regard had been anticipated by HHJ Tayler, who had identified the importance of considering whether there had been disclosures prior to the letter of 5 July 2018 and, if so, to whom. He says that the ET further erred by failing to consider the transcripts of the meetings, which the first and third respondents had had since July 2019 and which made clear that the claimant had made relevant disclosures. In oral argument, Ms Rezaie acknowledged that neither the ET nor the respondents could reasonably be expected to have trawled through transcripts of recordings of the meetings in question, but contended that the ET had erred in failing to see the fact of this record as going to the question of prejudice.

84. Whilst I agree that the question whether there had been prior disclosures had been identified by HHJ Tayler, I do not accept that the ET erred by having regard to how the claimant's case had been explained in the earlier pleadings. The first and third respondents were entitled to see these as setting out the case to which they were to respond (*per* **Chandhok v Tirkey**); they may have had the recordings and transcripts of the two meetings since mid-2019, but that would not have informed them that the claimant was running a different case in respect of what he had said at those meetings than that which had been set out in the pleadings.

85. As for the balance of hardship, the ET's refusal of these amendments plainly meant that the claimant could not rely on these meetings as further occasions on which he had made the disclosures in issue. That said, although he had been able to go through the transcripts of the recordings taken at those meetings, prior to the formulation of the application of 12 August 2021, the claimant had apparently not considered these to have material significance to his case in this respect. Accepting, however, that the transcripts (and recordings) would be available to the first and third respondents, the question arises as to whether the ET erred in failing to weigh this in the balance in considering whether there was in fact any real hardship.

86. The difficulty for the claimant is that it does not seem that this was a point that was actually made before the ET. As the only barrister present at the hearing in question (albeit only for the first day), Mr Green was unable to find any record of the transcripts being before the ET (they do not appear on the index for the main bundle prepared in advance for the parties' use at that hearing). From the claimant's subsequent application for reconsideration, it appears that these documents had, however, been sent to the ET on 24 June 2022, in a supplementary bundle. There is however, nothing to suggest that they were relied on by his then counsel at the hearing (certainly that is not apparent from the ET's reasoning) and neither the ET nor the respondents could reasonably have been expected to

trawl through the transcripts (alongside several hundreds of pages of other documentation) to find possible references that might support a case that the claimant had not previously advanced. On the information presented to the ET, I cannot say that it erred in its conclusion that the claimant was seeking to raise entirely new facts that would give rise to undue prejudice to the first and third respondents.

87. Notwithstanding the claimant's apparent failure to draw this point to the attention of the ET at the hearing, I have nevertheless considered whether it might be appropriate for me to consider the question of prejudice myself, having regard to the passages in the transcripts to which I have been taken. This is not a case where the first test in **Ladd v Marshall** [1954] 1 WLR 1489 would be met, given that the evidence in question was plainly available to the claimant and could have been relied on before the ET. On the other hand, I can see that the passages in question could be said to support the claimant's case (at least, his case since August 2021) that he made protected disclosures at these meetings, and that the first and third respondents would be able to confirm this by reference to the transcripts he had made available. To that limited extent, I can see that it might be said that the prejudice faced by the respondents, arising from amendments that raised entirely new facts in respect of these two meetings, would thus be mitigated.

88. That, however, would only go so far. For the first respondent, the amendments would open up new allegations of protected disclosures having been made to others than those previously identified (see the summary taken from the list of issues, at paragraph 59 above). For both the first and third respondents, it would require a substantively new line of enquiry as to what those attending at the meetings in question then did (or did not do) with the information the claimant had disclosed at these meetings. Adopting a practical approach to this question, I am satisfied that – whether or not it had been taken to the relevant passages within the transcripts now relied on by the claimant – the ET reached a conclusion falling well within its case management discretion in finding that the prejudice

to the respondents would be such that the balance of hardship fell against allowing these amendments. I therefore dismiss the appeal in respect of amendments 7 and 8.

89. The next amendment in issue – the proposed **amendment to paragraph 33 of the list of detriments** - relates to the second respondent. By his application of 12 August 2021, the claimant sought to add complaints of three detriments arising from actions of the second respondent in (i) locking him out of its online system, (ii) terminating his previous assignment on that system, and (iii) terminating his new assignment on the system. The claimant says that the ET was wrong to find that (save for a reference to (i) in the Scott Schedule) these had not previously been identified and relies on paragraph 80 of his original particulars of claim, paragraph 84 of his further particulars, and paragraph 22 of the second respondent's amended grounds of resistance; it is the claimant's case that the end dates of his assignments (referenced in these paragraphs) could only be changed on the cancellation of a previous assignment. In any event, he argues that there was significant overlap in relation to detriments (ii) and (iii) and that which the ET had allowed should proceed, at (i).

90. Considering first whether the ET reached a permissible conclusion that detriments (ii) and (iii) had not previously been identified in the pleadings, I note that paragraph 80 of the original particulars of claim appeared under the sub-heading:

> "GIANT LOCK ME OUT OF MY PORTAL"

And avers:

> "80. On the 4th July 2018, Giant Professional Limited had locked me out of my Giant Portal, this meant I could not access any of my contract details, payslips, invoices etc. Also the company stated that until I sign the new contract with the new rate, only then would I be allowed access to my personal details.
> I was now being held to ransom by the companies."

91. To the extent that there is any clarification of the detriments relied on against the second respondent in the claimant's further particulars, this is addressed under the sub-heading:

> "Post-Dismissal Detriment GIANT GROUP LIMITED"

Where it is explained:

> "78. R2 employees lock C out of his portal and refuse to allow access until C accepts new rate.
> 79. R2 knew that R1 had ended C's assignment via email on the 11th July 2018. No employee of R2 informed C of this or contacted C to investigate the reasons of the dismissal.
> …
> 84. R2 seem to have no record of the original assignment of £153.70 per day that expired on the 30th July 2018 (extended until September 2018) but instead send *[sic]* C two assignments, one for the hourly rate of £16.38 per hour, with a start date of the 7th July 2018 and expiring on the 8th July 2018. The second with the day rate of £153.70 but dated the 29th January 2018 and expiring on the 6th July 2018."

92. As for the second respondent's pleading, within its amended grounds of resistance, it is (potentially relevantly) averred:

> "9. Assignments are offered to and accepted by those employed by the 2nd Respondent through an online 'Portal'. When on a rolling contract this does not need to be accepted each time it is renewed. An acceptance is only required when there is a significant change.
> 10. On 4th July 2018 the 2nd Respondent received notification from the 1st Respondent that there was to be a change in assignment terms due to take effect from 7th July 2018. The change was that the assignment income was going to change to £16.38 per hour.
> 11. The 2nd Respondent is not in a position to offer, change or agree rates. The 1st Respondent offers the contract and assignment income, which is then relayed to the Claimant to accept, or otherwise.
> 12. As there was a significant change, being that there would be a decrease in pay rate, the 2nd Respondent contacted the Claimant to inform him of such and so that the Claimant could decide if he wanted to accept the new assignment.
> 13. During the period of time whereby there is a new assignment to be accepted the 2nd Respondent's portal restricts its employees from going to certain areas, for example being able to submit timesheets, so as to avoid confusion.
> …
> 17. From the 6th July 2018 the new assignment was not accepted by the Claimant.
> …
> 20. For the avoidance of doubt the 2nd Respondent did not end the Claimant's assignment with Adecco, nor his employment with them but the end of the assignment was agreed based on the 1st Respondent instruction to the 2nd Respondent.
> …
> 22. The Claimant contacted the 2nd Respondent through a message on the Portal asking why his account was on hold on 05/07/2018. At that time the 2nd Respondent changed the end date of the initial assignment to 06/07/2018 at the 1st Respondent's request of the 04/07/2018. The 2nd respondent had then added the new assignment based on the lower rate which again was done on the 04/07/2018 and were awaiting the Claimant's confirmation that he was happy with this change."

93. Thus, having previously asserted that the first respondent had ended his assignment (something known, but not communicated to the claimant, by the second respondent), the claimant's proposed amendments sought to put a positive case that in fact the second respondent had ended his assignments. Considering how the claimant's case had previously been pleaded, I am satisfied that the ET was entitled to conclude that the

relevant detriments had not been particularised until the application of 12 August 2021. Allowing that this was a materially new claim, the question then arises whether, nevertheless, the ET erred in concluding that the balance of hardship fell against allowing the proposed amendments.

94. On this issue, the ET's reasoning is short:

> "66. … I have heard Mr Green's arguments about the prejudice to the Second Respondent if these amendments are permitted and the difficulty faced with uncovering the relevant evidence at this stage. I also note the argument that some of this delay is to be put at the Claimant's door particularly following the EAT Judgment in 2021 and the time that then passed prior to the August 2021 application being produced. …"

95. Even allowing for the context in which the ET was providing its decision on the amendments in question – these were but two of a number of proposed amendments and the ET was entitled to take a proportionate view as to the reasoning provided to explain its decision (rule 62(4) **ET Rules**) – it is impossible to know what factors were weighed in the balance to lead to this conclusion. For the claimant, the denial of these amendments will mean that he will be unable to say that the second respondent terminated his assignments. Whilst that will be consistent with how his case had been put prior to August 2021, it will clearly limit the scope of the arguments he might otherwise have sought to make. Had the amendments been permitted, however, it is hard to see what prejudice would have been suffered by the second respondent. Mr Green has said that it will open up a new line of enquiry as to the interactions between the first and second respondents. As is apparent from its amended grounds of resistance, however, the second respondent had already set out its case as to the distinction between it and the first respondent in relation to the termination of the claimant's assignments and had provided some detail as to their interactions. It will also have to now address its actions in respect of the claimant's access to the online portal (the means by which he was saying the second respondent had communicated its termination of his assignments) when dealing with amendment (i), which had been allowed. It may be that, nonetheless, real issues arise in terms of the prejudice

that the second respondent might suffer from allowing the further amendments, but I am unable to see that the ET engaged with the practical considerations I have identified, arising from that which the second respondent had already addressed and would now have to address in dealing with amendment (i). These points (per **Abercrombie** and **Vaughan**) would be relevant matters in the ET's assessment of the balance of hardship but I cannot see that they were addressed. That may be because the ET erred in failing to take into account factors relevant to the exercise of its discretion, or it may simply be because insufficient explanation has been provided for its decision. In either event, I allow the appeal in respect of the proposed amendment to paragraph 33 of the list of detriments.

96. Finally, I turn to the claimant's challenge to the refusal of his proposed **amendment to paragraph 10 of the draft list of issues**, which relates to the third respondent's knowledge of the content of the letter of 5 July 2018. As HHJ Tayler had recognised in giving his judgment on the first appeal, it would be a relevant question as to whether any disclosure made by the claimant to one respondent had been passed on to another (see paragraph 74 of that judgment, set out at paragraph 27 above). HHJ Tayler had also identified that it was the claimant's case that his protected disclosures were principally made in his letter of 5 July 2018 (albeit that this was the culmination of a number of communications); that, it seems, was on the basis of the claimant's particular of claim, where it was said:

> "6. The Claimant raised his complaint to Alex Fleming (Country Head of UK and Ireland/President of Staffing Solutions) for Adecco and Ms. Paula Ruiz (HR) at Adecco on the 5th July 2018. This is relied on as the disclosure."

And in his further particulars, in which he had stated:

> "3. C then raised his disclosure to R1 via email on the 5th July 2018 at 07:47am. The disclosure was first sent to Ms. Paula Ruiz (HR adviser) for R1. The disclosure was then sent to Ms. Alex Flemming (Country Head of UK & Ireland President of Staffing and Solutions) for R1 at 08:00am on the same day."

And in the Scott Schedule, where the claimant had made clear that he was relying on the content of paragraph 6 of his claim ("*C raises disclosure to Ms. Paula Ruiz and Ms. Alex*

*Fleming for R1. C is told by both that his complaint and concerns would be fully investigated*"), specifying that Ms Fleming and Ms Ruiz were the relevant individuals in respect of this allegation.

97. In addressing the proposed amendment, the ET concluded that (i) the third respondent had consistently denied being shown the letter of 5 July 2018, or being aware of the detail of its content; whilst (ii) prior to the hearing, the claimant had not previously made clear that it was his case that the third respondent had known of the protected disclosures contained in that letter. It further accepted the third respondent's submissions as to the prejudice that it would suffer if this late amendment were permitted.

98. The claimant contends that the ET thereby erred in failing to have regard to the documents demonstrating that the third respondent was well able to deal with this amendment. He refers to a document entitled "*Chronology*", which had been included within a number of documents sent to the claimant from the third respondent (following a subject access request) in February 2019 which provided a full response to the allegations he had made in his 5 July 2018 letter. That, however, does not greatly assist with the point in issue as it does not establish *when* the third respondent had knowledge of the content of that letter. As for the third respondent's pleaded case (also relied on by the claimant), it had originally addressed events of 5 July 2018 as follows:

> "9 R3 understands that the Claimant ended his assignment with R3 on 5 July 2018. On 5 July 2018, the Claimant returned to the office from an off-site meeting after having claimed he was not feeling well. Once back at the office, the Claimant announced that this was his last day. The Claimant then left R3's premises and did not subsequently return to work.
> 10 Alison Farmer and Sheryl Brand-Grant became aware of a letter of complaint sent by the Claimant to R1 on 5 July 2018 at approximately 11:00 on 6 July 2018. Neither Alison nor Sheryl had sight of the letter."

99. In the third respondent's amended response, it further clarified:

> "17. It is denied that Ms Brand-Grant or any other employee of R3 was aware of the Alleged PID at the time the Claimant's assignment ended. Whilst employees of R3 were aware of the issues around the Claimant's pay and were informed verbally that the Claimant had written a letter of complaint to Adecco, they did not receive a copy

> of the Alleged PID and were not made aware of the alleged disclosures contained within it."

100. The third respondent had thus made clear its case that it had no knowledge of the content of the claimant's letter of 5 July 2018 at the relevant time.

101. Given the way the parties had earlier put their respective cases, I am satisfied that the ET reached the entirely permissible view that, prior to this matter being raised at the hearing, it had not been made clear that the claimant was saying that the third respondent had knowledge of the disclosures he claimed were part of the letter of 5 July 2018. Even within the draft list of issues this had been identified as a disclosure to the first respondent; that was consistent with how the claimant had put his case at all earlier stages. The question then arises as to whether the ET nevertheless erred in concluding that the balance of hardship fell in favour of refusing the amendment.

102. In carrying out the requisite balancing exercise in this regard, I do not consider it can be said that the ET lost sight of the fact that the third respondent had addressed the question of its knowledge of the letter of 5 July 2018 in the pleadings (indeed, the ET expressly refers to this at paragraph 82 of its decision). That, however, did not mean that the third respondent had anticipated it being part of the claimant's case that it did have knowledge of the content of the letter at the relevant time; there was no reason why it should have done so. The pleadings do not demonstrate a detailed consideration of this possibility by the third respondent and the ET was entitled to consider the question of prejudice on the basis that the allegation was being raised for the first time some four years after the event. The difficulties the third respondent would face in dealing with this point after such a delay were essentially the same as those arising in respect of amendment 5. Assuming Ms Farmer could be tracked down, she and Ms Brand-Grant would have to try to recall precisely what they had been told about the letter on (on their case) 6 July 2018 and – allowing for the fact that they might well have seen the letter or been provided with more detail as to its content at a later stage – would have to try to distinguish in their evidence

the information that might have been imparted to them at that point and any further detail that might have been provided at a later stage. This was a substantive new allegation in respect of the third respondent and, thinking through the practical consequences (per **Vaughan**), the ET was entitled to conclude that the balance of prejudice meant that the amendment should not be permitted. I therefore refuse the appeal in relation to the proposed amendment to paragraph 10 of the draft list of issues.

**Disposal**

103. The list of detriments

For the reasons provided, I allow the claimant's appeal in part:

(1) I uphold the appeal against the ET's decision to refuse: amendment 6 and the amendment to paragraph 33 of the list of detriments;

(2) I dismiss the appeal in relation to: amendments 5, 7 and 8 and to paragraph 10 of the draft list of issues.

104. In oral submissions the parties were in agreement that, to the extent that I allowed any part of the appeal, this matter would need to be remitted to the ET for reconsideration. It might be hoped that they would now be better placed to reflect on the merits of maintaining their respective positions on the two amendments in issue, and to reach agreement on the way forward. If that is not possible, however, at least 24 hours before the date listed for the formal hand-down of this judgment, the parties' legal representatives should notify me in writing of their respective clients' positions on the nature of the remission to the ET (that is, whether it should be to the same Employment Judge or not) and of any other matters relevant to my order on disposal.

105. Finally, I note that proceedings in this matter have now been on-going for nearly five years. The claim relates to incidents that occurred in 2018. It is plainly time that the merits of this case are determined. The parties are urged to work with each other, and with the ET, to ensure that this now happens as quickly as possible.