# EAT holds that disavowal of whistleblowing claims was a valid consideration for the Tribunal

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**Macfarlane v Commissioner of Police of the Metropolis [2023] EAT 111**

## Background

1. The Claimant was employed as a Community Assessor from 3 August until her resignation on 10 December 2019. This involved her assessing candidates for the police. Her ET1 was received in February 2020; she ticked the box for unfair and/or constructive dismissal. She said she was claiming "a type of constructive dismissal because of failures of health and safety, and a lack of support after an incident"[1]. She also ticked the box confirming that her claim consisted or included allegations of whistleblowing.

2. In her ET1 she described an incident in November 2019 where she was assessing a candidate that she described as "alarming, dangerous and threatening". She said there were various issues within the workplace, including a lack of panic buttons or security on hand.

3. The Respondent's ET3, filed in March 2020, requested further and better particulars. They also said the Claimant had failed to set out any alleged detriments because of having made an alleged protected disclosure.

4. A telephone case management hearing took place in June 2020 before Employment Judge James. The Judge recorded in their summary of the hearing that the Claimant clarified that she was not pursuing a whistleblowing claim. Focus then moved to a claim under s100 ERA 1996 and the Claimant was ordered to explain why she asserted she was an employee and to clarify which part of s100 ERA 1996 was being relied upon.

[1] Para 6 EAT judgment

5. Shortly after the hearing in June 2020 the Claimant wrote to the Tribunal seeking to amend her claim to bring a complaint of whistleblowing. The Claimant was required to provide an amended details of claim, with the Respondent being permitted to respond accordingly.

6. In late June 2020 the Claimant provided her amended Particulars, which included the following:
    - She listed 'multiple failures' of health and safety
    - That the Respondent had failed to act and was in breach of the "implied expectation" of protecting workers and visitors to the premises
    - That the Respondent had provided the Claimant with a useless reference
    - That she had been assigned the same exercise in December 2019 as she had been assigned in November 2019, when the incident was said to have happened.

7. The Respondent's response set out that these were new factual allegations, that the detriments claims were out of time and that the amendments shouldn't be allowed when weighing up the balance of prejudice as they had no reasonable prospect of success. The Respondent had not been sent a full version of ET1 and some criticism of the Claimant was withdrawn.

8. A substantive preliminary hearing was listed to determine whether permission to amend should be granted (in respect of alleged contraventions of s47B, s48 and s103A ERA 1996) and whether the claims or any remaining claims should be struck out for having no reasonable prospects of success.

## The ET Hearing to determine amendment

9. The Tribunal determined that the Claimant's amendment documents were not simple re-labelling but instead raised new factual and legal bases to her claim. In reaching that conclusion, the Judge placed weight on the statement made by the Claimant in June that her case was not a whistleblowing case.

10. The Judge recorded that the Claimant had said she was not a lawyer and was not aware that she had to set out the legal basis of her claim in her ET1. The Judge went on to consider both time limits (and found that a Tribunal was likely to find that it was reasonably practicable for the claim to have been made in time, and that instead it was out of time by two months) and also considered the timing and manner of the application (and found that the application had been made reasonably promptly).

11. Finally, the Judge considered the balance of hardship. His view was that there was little prospect of the Claimant persuading the Tribunal that the failure to take steps to protect her health and safety was because of her making protected disclosures. The Judge focused on the manner in which the Claimant had put her case – that she had felt compelled to resign because of the failure to act on her concerns.

12. The application to amend failed.

13. The Judge recorded that the Claimant's claim of ordinary constructive unfair dismissal and s100 ERA 1996 would be dismissed on withdrawal. An application for reconsideration was dismissed, in a decision sent in June 2021.

## The Claimant's appeal to the EAT

14. In March 2022 HHJ Beard granted permission to appeal in respect of two grounds only, namely:

    **Ground 1**: That the EJ had erred in holding that the amendment was a substantial alteration or new complaint in circumstances where he had given undue weight to the Claimant's renunciation of a whistleblowing claim during the hearing.

    **Ground 2**: That the EJ had erred in holding that the balance of hardship fell in favour of the Respondent.

15. At the outset of the substantive EAT hearing, there was a need to resolve a point of legal principle, specifically whether the ticking of the box for unfair dismissal within section 8 of the ET1 meant that a s103A ERA 1996 claim was mere-labelling rather than a new type of legal claim. Counsel for the Appellant (Claimant) argued that the decision of *Pruzhanskaya v International Trade and Exhibitors* UKEAR/0046/18/LA was authority for this proposition. Counsel for the Respondent argued that the recent EAT authority of *Arian v The Spitalfields Practice* [2022] EAT 67 confirmed that *Pruzhanskaya* was incompatible with other EAT and Court of Appeal authorities. The EAT agreed with HHJ Auerbach, who heard the appeal in *Arian,* that *Pruzhanskaya* was wrong.

16. The EAT went on to consider, having determined that issue, whether the EJ was wrong to have placed weight on the "disavowal" of the whistleblowing claim. It was submitted on the

Claimant's behalf that this was an irrelevant consideration and that, had the ET1 been examined correctly, the s103A or s47B claims would have been correctly characterised as mere relabelling or an amendment to substitute a cause of action already pleaded. The EAT held, however, that the Tribunal was entitled to take into account what the Claimant had said in June 2020.

17. The second ground of appeal related to the balance of prejudice, and specifically that insufficient weight was given to the "foreshadowing" by the Respondents in their ET3 of a whistleblowing claim, that minor consideration had been given to the fact that the Claimant was a Litigant in Person, that he had failed to consider that the Claimant had received advice on the application to amend and that the EJ had overemphasised the time limits, with the result that the EJ had wrongly concluded that the balance of hardship was against the Claimant. The EAT held that there had been no erring in law in respect of those matters.

18. The appeal, therefore, was dismissed.

## Comment

19. This decision must surely put to bed any outstanding *Pruzhanskaya/ Arian* conflict given the endorsement and expansion on the rationale given in *Arian*. Given the frequency with which application to amends are before the Employment Tribunal, this authority is a helpful reminder not only that it is insufficient to simply tick the unfair dismissal box if a claim of whistleblowing is being pursued, but also that a disavowal of a claim can indeed, rightly, have far reaching consequences for any application to amend subsequently.

**27 September 2023**

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