EMPLOYMENT TRIBUNALS

Claimant: **Miss G Bate-Jones**

Respondent: **Home Office (UKBF)**

PRELIMINARY HEARING

Heard at: Birmingham Employment Tribunal **On:** 30/08/2019 and 04/12/2019

Before: Employment Judge Mark Butler

Representation
Claimant: Mr Brockley (Counsel)
Respondent: Mr Feeny (Counsel)

RESERVED JUDGMENT

The claimant's applications:

- The application to amend the claim to include victimisation on 6 June 2019 is refused.

- The remaining parts of the 6 June 2019 application to amend is allowed.

- The application to amend the claim dated 25 November 2019 is refused.

REASONS

Background

1. The claimant was employed by the respondent from 29 September 1980 up until her dismissal on 22 August 2018. She had been employed as a UK Border Force Officer.

2. The claimant complied with ACAS Early Conciliation procedures. She submitted an in-time complaint against the respondent, with her claim form being submitted on 21 December 2018, following early conciliation from 02 November 2018 to 02 December 2018.

3. The claimant complained that she had been unfairly dismissed, victimised and was owed arrears in pay. However, as stated on my previous Case Management Order, dated 06 September 2019 following the first day of this hearing on 30 August 2019, reference to victimisation in the claim form appeared to refer to detriments after having 'reported improper conduct in the workplace', rather than victimisation in the Equality Act 2010 sense.

4. A request for further and better particulars by the respondent was made on 28 February 2019. These were provided by the claimant on 15 March 2019.

5. The first Preliminary Hearing in this case took place in front of Employment Judge Self on 17 April 2019. At this hearing the claimant's case remained unclear. Consequently, at that hearing the Employment Judge ordered that the claimant must by 4 pm on 15 May 2019 file with the tribunal and serve on the respondent a 2 page document, which would provide further and better particulars of less favourable treatment and/or detriments that formed the basis of her claims. This deadline was extended by Employment Judge Self to 4pm on 06 June 2019, by letter dated 23 May 2019.

6. Employment Judge Self also listed the hearing for a further Preliminary Hearing.

7. In responding to the Order of Employment Judge Self, the claimant submitted a document by email on 06 June 2019. This document was explained as being the further and better particulars, as directed, but also included an application to amend the claim form. In essence, this amendment sought to add claims of a failure to make reasonable adjustments, disability harassment, victimisation and being subjected to a detriment because of trade union activities.

8. At the first day of this hearing, on the 30 August 2019, the claimant gave an indication that a further application to amend was going to be made. I heard evidence from the claimant on why there had been delays in bringing her additional complaints/amendments. It was explained to me that she was

unrepresented but that she was seeking to amend having received some advice in light of now having legal representation. However, the amendments had not at that time been formulated to the degree needed in order to be considered.

9. I decided to go part heard in this case, having heard submissions from both parties. This was to enable the second set of amendments to be properly formulated and served on the respondent, and this way the amendments could all be considered together. This, in my decision, furthered the overriding objective.

10. The second application to amend was received by the respondent on the 25 November 2019. Although it was explained to me that the application was sent initially on the 04 November 2019, it was accepted by the claimant that it had been sent to the wrong email address (it was sent to a different file handler, who was previously responsible for the file) to that on record.

11. The history of this particular preliminary hearing before me is as follows. This preliminary hearing was initially listed for 30 August 2019. However, it went part heard. The second day was initially listed for 26 November 2019. However, due to my own unavailability on that day, and as I had heard evidence in this case, the hearing on that date was adjourned, having been listed before another Judge. The second day of the hearing took place on 04 December 2019. The hearing was to consider the following:
    a. The applications to amend the claim form
    b. Make case management orders as required.

12. Due to time, case management orders were not completed in this case. This case will need to be listed for a further Preliminary Hearing. The parties are both represented and have indicated a desire to have this done by telephone. I have explained to the parties that it will need to be listed as an in person hearing in the first instance. However, if the parties can agree an agenda and a list of issues, then at that point they can apply to convert the hearing to a telephone hearing.

<u>Issues and Law</u>

13. Where a claimant seeks to amend their claim form (ET1) the tribunal has a discretion whether to allow or refuse the amendment.

14. Under its general powers to regulate its own proceedings and specific case management powers the tribunal can consider an application to amend a claim at any stage of the proceedings (Presidential Guidance March 2014).

15. The representative of both the claimant and the respondent made submissions to me in relation to the tests to be applied in consideration of applications to amend.

16. Both referred me to the case of **Selkent Bus Company Ltd v Moore [1996] ICR 836**, and I was also myself mindful of the direction provided by the case of **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650**, as well as the sections of the Presidential Guidance on Case Management dealing with applications to amend.

17. The guidance provided by **Selkent**, in particular, was that the key principle when considering the exercise of the discretion to allow an amendment is to have regard to all the circumstances, and in particular any injustice or hardship which would result from the amendment or refusal to amend.

18. In **Selkent**, the Employment Appeal tribunal set out a non-exhaustive list of relevant factors which are to be taken into account in considering the balancing exercise of all the relevant factors, having regard to the interests of justice and the relative hardship that would be caused to the parties by the granting or refusing of the amendment. These were; the nature of the amendment, the applicability of time limits, and the timing and manner of the application:

> *"(4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account <u>all</u> the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.*
>
> *(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:*
>
> *(a) <u>The nature of the amendment</u>*
>
> *Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.*
>
> *(b) <u>The applicability of time limits</u>*
>
> *If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions eg, in the case of unfair dismissal, S.67 of the 1978 Act.*

(c) <u>The timing and manner of the application</u>

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

19. The Presidential Guidance reaffirms the **Cocking** and **Selkent** guidance, noting that relevant factors include the three matters outlined in **Selkent**, and also noting that tribunals draw a distinction between amendments which seek to add or substitute a new claim arising out of the same facts as the original claim, and those which add a new claim entirely unconnected with the original claim.

20. With regard to time limits, the Presidential Guidance notes that the fact that the relevant time limit for presenting the new claim has expired will not exclude the discretion to allow the amendment, and also that it will not always be just to allow an amendment even where no new facts are pleaded. In particular, the Guidance notes that where there is no link between the facts described in the claim form and the proposed amendment, the tribunal must consider whether the new claim is in time and will take into account the tests for extending time limits. In this case, those were; the just and equitable formula in relation to the victimisation claim and the expanded detrimental treatment claim, and the not reasonably practicable formula in relation to the failure to pay unpaid holiday and wrongful dismissal.

21. I was also taken to the following cases:

    a. **Mist v Derby Community Health Services NHS Trust [2016] UKEAT/0170/15**. Mr Brockley took me to para 77 and 78, where the focus is on the factor of time:

        "*77. On undertaking that more detailed analysis, the ET's error becomes apparent. The flaw in its reasoning is that it permits the time limit issue - the only matter the Second Respondent could*

point to as giving rise to any potential hardship - to outweigh all other factors, including the denial of any determination of the merits of the Claimant's claims. That approach privileges the issue of time above any other consideration; it makes it determinative. There may be cases where the time limit issue has greater weight because that delay otherwise causes prejudice to the Respondent. That, however, is not (on the ET's findings) this case. The erroneous approach adopted by the ET in this regard may also explain why its formal Judgment stated its conclusion as being to strike out the Claimant's claims against the Second Respondent (as having been brought out of time), rather than allowing the Second Respondent's application for a review of EJ Heap's Order and/or refusing the Claimant's application to amend.

78. In my judgment, the ET's conclusion on the application to amend thus cannot stand: it erroneously permitted the time limit issue to outweigh the injustice it had found would be suffered by the Claimant, who would be denied the ability to pursue otherwise legitimate (on the ET's findings) complaints against the Second Respondent. I therefore allow the appeal."

b. **Denton and others v. TH White Ltd (De Laval Ltd, Part 20 defendant) [2014] 1 WLR 3926**. Mr Brockley accepted that this case was not an employment tribunal case, but submitted that it has relevance in relation to the overriding objective, given that has been effectively imported into this jurisdiction. Mr Brockley took me to paragraphs 39, 40, 42, 43 and 44:

"*39. Justifiable concern has been expressed by the legal profession about the satellite litigation and the non-cooperation between lawyers that Mitchell has generated. We believe that this has been caused by a failure to apply Mitchell correctly and in the manner now more fully explained above.*

40. Litigation cannot be conducted efficiently and at proportionate cost without (a) fostering a culture of compliance with rules, practice directions and court orders, and (b) cooperation between the parties and their lawyers. This applies as much to litigation undertaken by litigants in person as it does to others. This was part of the foundation of the Jackson report. Nor should it be overlooked that CPR rule 1.3 provides that "the parties are required to help the court to further the overriding objective". Parties who opportunistically and unreasonably oppose applications for relief from sanctions take up court time and act in breach of this obligation.

42. It should be very much the exceptional case where a contested application for relief from sanctions is necessary. This is for two reasons: first because compliance should become the norm, rather than the exception as it was in the past, and secondly, because the parties should work together to make sure that, in all but the most serious cases, satellite litigation is avoided even where a breach has occurred.

43. The court will be more ready in the future to penalise opportunism. The duty of care owed by a legal representative to his client takes account of the fact that litigants are required to help the court to further the overriding objective. Representatives should bear this important obligation to the court in mind when considering whether to advise their clients to adopt an uncooperative attitude in unreasonably refusing to agree extensions of time and in unreasonably opposing applications for relief from sanctions. It is as unacceptable for a party to try to take advantage of a minor inadvertent error, as it is for rules, orders and practice directions to be breached in the first place. Heavy costs sanctions should, therefore, be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions. An order to pay the costs of the application under rule 3.9 may not always be sufficient. The court can, in an appropriate case, also record in its order that the opposition to the relief application was unreasonable conduct to be taken into account under CPR rule 44.11 when costs are dealt with at the end of the case. If the offending party ultimately wins, the court may make a substantial reduction in its costs recovery on grounds of conduct under rule 44.11. If the offending party ultimately loses, then its conduct may be a good reason to order it to pay indemnity costs. Such an order would free the winning party from the operation of CPR rule 3.18 in relation to its costs budget.

44. We should also make clear that the culture of compliance that the new rules are intended to promote requires that judges ensure that the directions that they give are realistic and achievable. It is no use imposing a tight timetable that can be seen at the outset to be unattainable. The court must have regard to the realities of litigation in making orders in the first place. Judges should also have in mind, when making directions, where the Rules provide for automatic sanctions in the case of default. Likewise, the parties should be aware of these consequences when they are agreeing directions. "Unless" orders should be reserved for situations in which they are truly required: these are usually so as

to enable the litigation to proceed efficiently and at proportionate cost."

c. **Chandhok and Chandhok v Tirkey [2014] UKEAT/0190/14**. Mr Feeny explained the importance of the claim form and court documents, relying on this authority.

22. I was also handed a copy of **Mowe Saha v Capita Plc [2018] UKEAT/0080/18**. Of which I have also considered.

23. There are several different claims that can be read across the claim form, and applications to amend. These are unfair dismissal, whistleblowing, being subjected to a detriment on grounds related to trade union activities or membership, and equality act claims. Time limits for these claims are as follows:

a. Unfair dismissal, s.111(2) Employment Rights Act 1996:

an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

b. Whistleblowing, s.48(3) Employment Rights Act 1996:

An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

c. Being subjected to a detriment on grounds related to trade union activities or membership, s.147 of TULR(C)A 1992:

An employment tribunal shall not consider a complaint under section 146 unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them , or

(b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable.

d. The Equality Act claims, s.123 Equality Act 2010:

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of-

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3)For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

Findings of fact

24. I heard evidence from the claimant herself. I heard no other evidence. I was also assisted in this hearing by a bundle of 81 pages.

25. I make the following findings of fact, on the balance of probability based on all the matters I have seen, heard and read. In doing so, I do not repeat all the evidence, even where it is disputed, but confine my findings to those necessary to determine the issues in this case:

a. The claimant was appointed a trade Union Representative at the end of 2011. Her area was to deal with Health and Safety matters.

b. The claimant had some knowledge of disability discrimination. She gave evidence of her assisting a colleague have her status as disabled recognised by the respondent in the 1990's.

c. The claimant raised a grievance on 28 February 2017. On her grievance form she ticked the boxes indicating that her complaint was about discrimination, harassment, bullying and victimisation, and included matters relating to her disability. The claimant ticked these as she considered that the respondent was not acting in accordance with diversity and equality policy in relation to her case.

d. In the grievance form, the claimant also ticked part 2, as they were discriminating against her and subjecting her to harassment.

e. The claimant did get some legal advice before completing the first application to amend her claim form on 06 June 2019. This was on a very limited basis. This was only in the form of an initial consolation. Limited discussion of her claim took place. It was the claimant who completed this document.

f. The claimant instructed solicitors from 05 July 2018.

g. The claimant had instructed solicitors for a personal injury claim against the respondent in the past.

h. The claimant decided not to seek advice at a date earlier than 05 July 2018 from the trade union, nor did she seek her trade union to arrange for her to see a solicitor before this date, as she considered that this may cause a conflict for a colleague. Although she was aware that this was possible.

i. Before submitting the claim form, the claimant was aware that she had legal insurance cover and that she could use this to receive legal representation. However, she hoped that she could engage with the respondent to resolve the matter without resorting to the legal process.

j. The claimant did not want to pay for legal advice unnecessarily.

k. The Personal Injury claim brought against the respondent by the claimant was in September 2016. This claim was focussed on health and safety. There was no mention of the Equality Act 2010 in that claim. The claimant accepted this to be the case under cross examination.

Conclusions and Decisions

26. Applying the guidance provided by **Cocking**, **Selkent** and the Presidential Guidance, as well as taking account of other case law I was taken to, my conclusions in relation to the various amendments were as follows:-

(i) Application to amend dated 06 June 2019.

27. In effect this can be looked on in three groups: pleadings already contained in the original claim form (which includes the further explanation contained in the Further and Better Particulars), amendment that can considered as a relabelling of matters already pleaded, and amendments that went beyond relabelling.

28. The first application to amend is dated 06 June 2019. This is seen at pages 71 and 72 of the Bundle. On page 71 there are three rows, and on page 72 there are 5 rows. That makes up the first application to amend in its entirety.

29. In terms of claims being included in this application to amend, this does differ and introduce new types of claim when compared to the claim form. It introduces Equality Act 2010 claims, in the form of victimisation, harassment and a failure to make reasonable adjustments, and introduces detriment on grounds related to trade union membership and/or activities.

30. It was conceded by the respondent that reference to trade union detriment was merely a relabelling of facts that had already been pleaded. It was explained that no significant opposition to the inclusion of this by amendment was going to be made. However, this would still need to be determined.

31. Turning to the specific facts contained within this document, and consideration of whether they were already pleaded.

32. Starting on page 71 of the bundle, which is the first page of the first application to amend. In terms of the first two rows, the facts presented are contained within the initial claim form. Whereas, the facts in row three are only hinted towards in the claim form, but are expressed and developed in the Further and Better Particulars (in particular at pages 54 and 55 of the bundle).

33. Turning to page 72 of the bundle, which is the second page of the first application to amend. Row 1 is not pleaded in the claim form, however, it is expressed in the Further and Better Particulars (see p.53 (a), (g) and (h)). Row 2 is not in the initial claim form or the Further and Better Particulars; however, the respondent accepts that they had knowledge of the comments relating to a ‘Blue Badge’.

34. Rows 4-6 were accepted by the respondent as having been generally pleaded, and therefore were not an amendment.

35. Having considered all of this, I have four matters to resolve in relation to the first application to amend. That is whether to allow this amendment to include the new causes of action:
    a. Trade Union Detriment
    b. Victimisation
    c. Harassment

d. Failure to make reasonable adjustments

36. There are some matters that are relevant to all of this application, rather than the individual parts of it. These include that the claimant was unrepresented at point of producing the further and better particulars, and for the drafting of this first application to amend. Although she did have a limited consultation in advance of this application to amend being made. And, the claimant did have the means to instruct a representative. However, chose not to do so.

37. I will deal with the trade union detriment first, before turning to the Equality Act 2010 claims of victimisation, harassment and the failure to make reasonable adjustments.

38. I am satisfied that the reference to Trade Union detriment is relabelling of facts already pleaded. These were matters that the respondent knew about from the original claim form. In accordance with **Selkent**, there is no need to take into account time limits when considering amendment by relabelling.

39. I am conscious that the application to amend was made in June 2019, some seven months after the original claim form. This is a significant period of time.

40. Overall therefore, having considered all the factors and the relevant hardship to the parties, and taking into account the overriding objective, this amendment is granted.

41. Turning to the Equality Act claims. It was accepted by the claimant that the Equality Act claims had not been pleaded in the original claim form. These claims were therefore a significant amendment which added to the basis of the existing claim. These amendments therefore fell into the second category outlined in the Presidential Guidance of being amendments which added a new claim entirely unconnected with the original claim, albeit I note that certain of the events asserted as giving rise to these claims had also been pleaded as part of the whistleblowing, Trade Union Detriment and unlawful deduction from wages claims. In my view, the tests to be applied to establish victimisation, harassment and failure to make reasonable adjustments are fundamentally different to the tests applied to the claims that are initially pleaded. However, the existence of the factual pleadings is a relevant manner in my balancing exercise.

42. Being a significant amendment, I am required to give some consideration as to the matter of time limits. In the context of the Equality Act claims, the test for extending time is whether it would be just and equitable to do so. In this regard I note that the claimant's employment ended on 22 August 2018. And that the allegations are spread from as early as January 2014 up until August 2018. The application to add these claims are therefore brought significantly out of time, on any analysis.

43. However, as the allegations are fact sensitive as to what was the cause of the treatment complained of, and as there are likely to be questions over whether the allegations are isolated incidents are form part of a continuing act, the issue of time limits would be best considered at the final hearing. I therefore treat the time limit point as a neutral factor in this application to amend.

44. Furthermore, it is made clear in **Selkent** and **Mist** that an application to amend should not be refused solely because there has been a delay in making it, and there are no time limits for considering an application to amend. Of paramount consideration is the relative injustice or hardship involved in refusing or granting the application.

45. While there has been delay between the issue of the proceedings and the lodging of this application to amend, a significant factor in considering the timing of the application is that this litigation is not yet at a stage where a Final Hearing has started, and it is unlikely to do so for some time due to the pressures currently on listing. On that basis, I consider that it is unlikely that the respondents will be seriously prejudiced because of the timing of this application.

46. In many cases, after a passage of time, witnesses may be difficult to trace, although that is not put forward by Mr Feeny as a factor in these cases. Further, it is well recognised that any witnesses' memory may have faded with the passage of time and become unreliable. To the extent that these difficulties affect the presentation of the respondents' defence, I accept that they may introduce an element of unfairness into the proceedings. Despite this, I am not persuaded that the circumstances of this case are such that there is a substantial risk that justice cannot be done.

47. I have taken account of the fact that the respondent had knowledge that the claimant may be complaining about harassment, and treatment related to her disability. They had this knowledge through the grievance which she had raised.

48. I am also conscious that refusing the application to amend will cause prejudice to the claimant in that her case appears to be that she has been treated negatively for one reason or another. Refusing this application would impact upon the claimant's case such that the reason behind her alleged negative treatment may not be resolved.

49. A further impact on the claimant should the amendment be refused is the impact on the available remedy should the claimant be successful, given that the equality act remedies would be determined on a different basis when compared to the other types of claim.

50. I recognise, of course, that there has been some prejudice to the respondent to date in that they have had to deal with these applications, and there will be further prejudice in that if the amendments are allowed they will have to defend this on-going litigation in an expanded form. This will bring with it an inevitable increase in costs.

51. However, in terms of factual investigation that the respondent will have to undertake to deal with these claims, the prejudice to the respondent is low given that the matters complained of form part of other complaints.

52. I do not consider that the amendments above would prolong the hearing in this case significantly.

53. On the whole, this amendment does not seek to change the basic argument that the claimant submitted in her original claim form, as expanded on in her Further and Better Particulars.

54. The part of this application to amend that relates to victimisation differs in one key respect. I consider it important with this part of the application to consider the additional factor of merit. That is because the claimant gave evidence and accepted that her personal injury claim was focussed on health and safety and was not concerned with Equality Act claims. The merit of this claim is therefore weak and balances against allowing this part of the claim to be included.

55. Accordingly, taking into account all of the circumstances under the **Selkent** test, the tribunal will grant the application to amend to include the claims of disability harassment and failure in the duty to make reasonable adjustments. Time limits in relation to these remains a live issue. However, the application to amend to include victimisation is refused.

56. However, for the avoidance of doubt, I make clear that this application to amend was granted by the narrowest of margins.

(ii) Application to amend dated 25 November 2019

57. This is the second application to amend brought by the claimant. This sought to include further allegations under whistleblowing, further development of the claim for a failure in the duty to make reasonable adjustments, the disability harassment and the victimisation claims, an inclusion of a discrimination arising from disability claim, and a claim for automatic unfair dismissal. Again, each will be dealt with in turn.

58. Much of the same factors considered above in the 06 June 2019 application to amend were considered in evaluating this application to amend, and for the sake of brevity, I do not repeat those matters again here. But they include the

knowledge the respondent had of the claimant's complaints through her having raised a grievance, the impact on available remedies to the claimant, the impact of time on the availability and reliability of evidence, amongst others. However, there were also other matters not present in the 06 June 2019 application that were relevant to this application.

59. In advance of making this application to amend the claimant had sought, and received legal advice. The claimant instructed solicitors from 05 July 2019. Counsel was instructed to appear on the claimant's behalf on 30 August 2019, which was the date of the first day of this Preliminary Hearing. This amendment was drafted on the claimant's behalf by her legal advisor. There is a period of some 4 months between the claimant having instructed solicitors and this application to amend being made. This is a significant delay between getting legal representation and making this application. And this is a factor that goes against allowing any part of this amendment. I do not consider that this application to amend was made promptly.

60. The application was highlighted on 30 August 2019 by Mr Brockley as forthcoming; however, it was not sent until some 2- 2 ½ months after this. The timing of the application is considered as part of my balancing exercise in deciding whether to allow this amendment.

61. Unlike the first amendment, this application to amend includes amendments that are outside of the Equality Act, as it includes an extension to the whistleblowing claim and a claim of automatic unfair dismissal.

62. Considering the application to include further elements to the whistleblowing claim and the automatic unfair dismissal claim first. These clearly go beyond relabelling. These are significant amendments. Therefore, time limits are important.

63. The amendment relating to whistleblowing refers to qualifying disclosures relating back to early 2012- August 2018. All these claims are significantly out of time. Some more so than others.

64. Turning to the automatic unfair dismissal part of the amendment. The claimant was dismissed on 22 August 2018. This claim is also significantly out of time.

65. The test for extending time for both whistleblowing claims and unfair dismissals are very similar. They both require consideration of the same two-part test. First, as to whether it was not reasonably practicable to submit a claim within three months of the act or failure to act where the claim is whistleblowing, or within three months of the effective date of termination for the unfair dismissal claim. And secondly, where the first part of the test is accepted, then the second question relates to whether the claim was submitted within a reasonable period thereafter.

66. Having had legal advice since 05 July 2019. Considering the financial means of the claimant. Considering that the claimant was part of a trade union and could have sought advice through them. Considering the claimant's knowledge of her home insurance policy. Considering that the claimant had brought a claim of whistleblowing in her initial claim so had some knowledge of it. In my decision, the claimant has not shown that it was not reasonably practicable for her to submit her claim(s) in time. Further, the delay between having legal advice and making this second application, I also consider that the application to amend was not brought within a reasonable period thereafter. The claimant does not satisfy either of the two parts of this test. This is a factor weighing heavily against allowing the amendment. Although, I remind myself of the warning in **Selkent** and **Mist** against placing too heavy a reliance on time limits, as noted above.

67. I have also considered the lack of detail in relation to the application to amend for the whistleblowing part of the amendment. The detriments lack detail. In particular, defects 1-5 and defect 10 are vaguely pleaded. These are not specific enough. This factor weighs against allowing these parts of the amendment.

68. Again, having considered all the circumstances of the **Selkent** test, in relation to amending to include both the additional aspects of the whistleblowing claim and the claim of unfair dismissal, this amendment is refused.

69. Turning to the part of this application that can be properly described as relating to the Equality Act claims.

70. The additional elements to the failure to make reasonable adjustments claim, the detail of the harassment claim, the inclusion of discrimination arising from disability and victimisation are all significant amendments.

71. The amendment relating to reasonable adjustments include matters that started as early as September 2013. However, each appear to be being brought as continuing acts up until the claimant's dismissal. The final act in relation to each, at their latest could be 22 August 2018. Similarly, the harassment claims are relating to matters from 2012 up until the claimant's dismissal. Whilst the discrimination arising from disability is focussed on absences pre-dismissal and the dismissal itself. These are significantly out of the 3 months' time limit in which to submit a claim. In the context of Equality Act claims, the test for extending time is whether it would be just and equitable to do so.

72. However, as above, as the Equality Act allegations are fact sensitive as to what was the cause of the treatment complained of, and as there are likely to be questions over whether the allegations are isolated incidents are form part of a continuing act, and as I have not heard any evidence on this, the issue of time

limits would be best considered at the final hearing, if the application was granted. I therefore treat the time limit point as a neutral factor in this application to amend.

73. There are parts of the Equality Act claims that form part of this application to amend that lack specificity for the purposes of being suitable for an amendment. These relate to all the dates provided for when conduct that form part of the harassment took place. And the fifth protected act (referring to diverse emails) that forms part of the victimisation claim. Requiring the respondent to undertake investigation into broad date ranges that these amendments would require, some time after the incidents, place an onerous hardship and injustice on the respondent.

74. I have taken into account of the impact on the claimant's claims that refusing the amendment will have. In that there may be valid allegations that simply will not be considered.

75. These matters are also new factual matters, which will require new and extensive lines of enquiries.

76. Overall, having considered all the factors and the relevant hardship to the parties, I did not consider that it would be in furtherance of the overriding objective for me to grant these amendments

77. This amendment, dated 25 November 2019, is therefore refused in its entirety.

Signed by: Employment Judge Mark Butler
Signed on: 13/12/2019