



## EMPLOYMENT TRIBUNALS

**Claimant:** Miss K Blake  
**Respondent:** Infosys BPM Limited

**Heard at:** Birmingham by CVP **On:** 30 June 2021

**Before:** Employment Judge Flood

**Appearance:**

**For the Claimant:** In person

**For the Respondent:** Ms Berry (Counsel)

This was a remote hearing which had been consented to by the parties. The form of remote hearing was V (by CVP video hearing). A face to face hearing was not held because no-one requested the same and all issues could be determined in a remote hearing. The documents that I was referred to were in an agreed bundle of documents running to 99 pages (Bundle 2) and a further bundle of documents from the previous preliminary hearing in April 2021 running to 130 pages (Bundle 1).

## RESERVED JUDGMENT AND REASONS

1. The complaint of indirect race discrimination is dismissed upon withdrawal.
2. The complaint of unfair dismissal is dismissed because the claimant is not entitled to bring that claim as she was continuously employed for less than two years.
3. The complaints of race discrimination and harassment related to race are dismissed because they were presented after the expiry of the statutory time limit. It is not just and equitable to extend time to the date of presentation.
4. The claimant's application to amend her claim to add additional complaints of race discrimination; harassment related to race and victimisation is refused.
5. The proceedings against the respondent are accordingly dismissed.

# REASONS

## **Background and relevant facts**

1. The claimant presented her claim form on 20 July 2020 (following a period of early conciliation between 11 June and 11 July 2020) bringing complaints of race discrimination, unfair constructive dismissal and breach of contract. She also indicated at section 8.1 that she wished to bring a claim stating *“bullying and management failed to follow legal legislation regarding my probational period. I have an ongoing grievance this employer who have failed to provide a resolution.”*
2. The respondent presented a response on 7 September 2020 denying all claims and raising jurisdictional points namely that all the claims had been presented out of time and that the claimant had insufficient qualifying service to bring an unfair dismissal complaint. The matter was listed for a preliminary hearing for case management and on 11 January 2021 Employment Judge Cookson ordered that the claimant provide further particulars of her race discrimination complaint and explain the basis for her complaint in relation to bullying and probation period failures. The claimant responded on 15 January 2021 attaching a two page document shown (at pages 57-58 of Bundle 1) and attaching two statements in support said to be from former employees of the respondent. A further document was produced by the claimant (pages 61-62 of Bundle 1) in preparation for the case management hearing after she had received the respondent’s draft agenda for that hearing.
3. The matter came before Employment Judge Butler on 19 April 2021 for a case management preliminary hearing. The claim was discussed during the hearing but it was still unclear what the precise nature of the complaints were. It was noted that part of the complaint the claimant wished to bring related to a grievance having been ignored and that she was also complaining about comments having been made and other treatment, including not being allowed to go to appointments, flexitime being stopped and having her confidential information shared publicly. It was also noted that there was suggestion of indirect race discrimination, although the claimant was asked to consider whether she was actually bringing an indirect discrimination complaint or not. The claimant confirmed at the hearing before me today that she was not. For the avoidance of any doubt, the claim of indirect race discrimination was accordingly dismissed upon withdrawal.
4. The claimant was ordered to provide further particulars of her claims (which were identified as possible complaints for direct race discrimination, race related harassment, indirect race discrimination and victimisation) in tabular form and the respondent was ordered to indicate on each section whether it considered an application to amend was required and if so, whether it was opposed. No permission to amend the claim to add additional particulars was given at this time. Employment Judge Butler also issued a strike out warning in respect of the claimant’s unfair dismissal claim (on the basis of lack of the required two years continuous service).
5. The claim was listed for an open preliminary hearing (OPH) so that an Employment Judge *“may determine all or a combination of the following:*

- (i) *Whether the claimant needs to apply to amend her claim following particulars of her complaint being recorded in tabular format (subject to a direction below), and if there is a need for such an application, whether the application succeeds or not;*
  - (ii) *Whether the claims have been brought out of time, and if they have, whether the tribunal should extend time so as to accept jurisdiction over the complaint.*
  - (iii) *Further case management of the claim to final hearing.”*
6. The claimant was ordered to provide a witness statement setting out what she wanted to say about the issues to be determined at the OPH to include “*an explanation as to why the claims were not brought sooner. What her understanding of the legal process is. Her knowledge of time limits. What legal advice, if any, was sought. What the claimant has done to understand the claims she is bringing.*”
7. The claimant’s witness statement was at page 97-99 of Bundle 2 and the table completed by both parties of the various complaints the claimant wished to bring together with the respondent’s permission on whether an amendment application was required and if so, whether it was objected to was set out at pages 83-91 of Bundle 2. The claimant’s witness statement was admitted in evidence and she answered questions put by Ms Berry and by myself at the hearing today.
8. The claimant started her employment on 20 May 2019 and it ended on 5 December 2019. I checked with the claimant whether she agreed that she did not have two years continuous employment with the respondent and she confirmed that this was correct. The claim form did not contain any suggestion that the claimant was making any claim for automatically unfair dismissal on the grounds of having made a protected disclosure or a similar matter which would not require two year’s continuous service.
9. The claimant’s claim for discrimination, harassment (and victimisation should the amendment application be allowed) related to matters that occurred during her employment with the respondent. She confirmed in cross examination that the last time she says she had experienced discrimination at the respondent was during the meeting on 28 November 2019. She resigned on 5 December 2017 which was the effective date of termination of employment for the purposes of any unfair dismissal claim. I was shown a copy of the claimant’s resignation e mail which was at page 125 of Bundle 1. This made reference to the meeting on 28 November 2019. The claimant stated in this letter that her view was that “*legally I have passed my probation due to employment regulations*” was formed because she had some knowledge about probation periods due to her previous employment knowledge and that she was of the view that the respondent’s actions were unlawful at this time.
10. The claimant sent an e mail on 10 December 2019 to the respondent informing them that she wanted to raise a grievance (page 124 Bundle 1) and Ms Croxford of the respondent confirmed on 11 December that a manager, (Mr L Dudley) had been appointed to hear her grievance (page 123 Bundle 1). The claimant also wrote to the respondent on 14 January 2020 making a subject access request (page 122 Bundle 1). The claimant confirmed that this e mail made reference to data protection law and that she had used a template she had found when researching online to put the letter together. She explained she had knowledge of

data protection due to her role working with the personal details of customers which was a role she had carried out since she had left school. She said that although not having received formal training, she had completed online training packs in different roles on data protection, specific to being a data handler. She confirmed she had found out information from internet searches and had access to the internet throughout this period.

11. The claimant attended a grievance meeting with Mr Dudley of the respondent on 28 January 2020. The claimant said that she did raise the issue of race discrimination at that meeting (which is denied by the respondent). After that meeting she received an e mail from him on 11 February 2020 (page 121 Bundle 1) confirming that he would be in touch with the claimant "*early next week*". The claimant did not receive anything further from the respondent regarding her grievance. The claimant suggests that she had been "strung along" by her employer during this period.
12. The claimant acknowledged that between 11 February 2020 and 3 June 2020 she did not chase for a response from the respondent and said she did not put a claim in during that period as she was trying to seek a resolution to her complaint. She said that during this time she had been looking for alternative employment and that this had been difficult as during this period Covid 19 emerged and lockdown was in place.
13. On 3 June 2020 the claimant sent an e mail to Mr Dudley chasing up the grievance (page 120 Bundle 1). Mr Dudley responded to this e mail on 4 June 2020 (page 12) apologising for the delay and stating that he had concluded his investigation but he had been unable to "*fully write up my conclusion before lockdown commenced causing a delay*". He informed the claimant that he would write to her "*before the end of next week*" with his conclusions. The claimant contacted ACAS on 11 June 2020 (one day before that week had expired) to commence early conciliation as she felt she had no other option but to escalate her complaint to Tribunal as the respondent had not resolved her grievance. She said that she had been aware throughout the period of her right as an employee to bring a claim in the Employment Tribunal (although her knowledge was not in depth) but at the time she raised her grievance she was not thinking about bringing a claim. She said based on her common knowledge and the research she had done, that she had to attempt to resolve her complaint with her employer directly which is what she had done. When this was not responded to she decided to escalate her complaint to the Tribunal for resolution and this is when she contacted ACAS.
14. The claimant said she had not received any legal advice, but that she had spoken to the Citizens Advice Bureau on 11 June 2020 who gave her some information about how to progress her claim including referring her to ACAS. She said that the CAB had not told her that her complaint could be out of time but that she had been told this by ACAS who informed her that this issue would be considered by the Tribunal. She explained that she did not appreciate what a limitation period was at this time. She could not recall whether she had looked at either the ACAS or CAB websites at the time.
15. The claimant said that her claim form had not included all the information she subsequently provided as she had not appreciated that everything she had told ACAS would not be passed on to the Tribunal. It had been her understanding that

ACAS would transfer all the information about what had been discussed to the Tribunal and this is why her claim form did not include all the details.

16. I determined that I needed to review all the information that had been referred to in both Bundles before deciding the issues in dispute and I adjourned the hearing for a reserved decision to be made.

### **The Issues**

17. Whether the claimant is able to pursue a claim for unfair dismissal on account of her continuous service or whether an exception applies.
18. Whether the claims or any of them have been lodged in time and whether or not time should be extended so as to allow those claims to be pursued subject to the relevant statutory tests.
19. Whether the claimant should be allowed to amend her claim to add the complaints and allegations highlighted in the table shown at page 83-91 of Bundle 2.

### **The relevant law**

20. The relevant sections of the Employment Rights Act 1996 (“ERA”) relating to the unfair dismissal complaint are as follows:

#### **94. The right**

- (1) An employee has the right not to be unfairly dismissed by his employer.

#### **108 Qualifying period of employment.**

- (1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.
- (2) If an employee is dismissed by reason of any such requirement or recommendation as is referred to in section 64(2), subsection (1) has effect in relation to that dismissal as if for the words “two years” there were substituted the words “one month”.
- (3) Subsection (1) does not apply if— [*various statutory provisions relating to the ability to make a claim for “automatic” unfair dismissal for various prohibited reasons then follow*]

21. **Section 123 of the EQA**, which specifies time limits for bringing employment discrimination claims, provides so far as relevant that:

*“(1) ... proceedings on a complaint ... 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.”*

22. **Section 40B of the EQA** deals with the extension of time limits to facilitate conciliation before institution of proceedings and provides:

(1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or

(4)

(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.

23. **Section 33(3) of the Limitation Act 1980** (power to extend time in personal injury actions) specified a number of factors that a court is required to consider when balancing the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.
24. In **British Coal Corporation v Keeble [1997] IRLR 336**, it was held that the Tribunal's power to extend time was similarly as broad under the 'just and equitable' formula. However, it is unnecessary for a tribunal to go through the above list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (**Southwark London Borough v Afolabi [2003] IRLR 220**).
25. The Court of Appeal in **Robertson and Bexley Community Centre (trading as Leisure Link) 2003 IRLR 434CA** made it clear that there is no presumption that time should be extended to validate an out of time claim unless the Claimant can justify the failure to issue the claim in time. The Tribunal cannot hear a claim unless the Claimant convinces the Tribunal that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.
26. In case of **Abertawe Bro Morgannwg University v Morgan [2018] EWCA Civ 640** the Court of Appeal however stated that the "*such other period as the*

*employment tribunal thinks just and equitable*" extension indicates that Parliament chose to give the tribunal the widest possible discretion. Although there is no prescribed list of factors for the tribunal to consider, "*factors which are almost always relevant to consider are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent*". There is no requirement that the tribunal had to be satisfied that there was a good reason for the delay before it could conclude that it was just and equitable to extend time in the claimant's favour.

27. **Apelogun-Gabriels v London Borough of Lambeth [2001] EWCA Civ 1853, [2002] IRLR 116** - the Court of Appeal rejected the suggestion that there is a general principle that an extension should always be granted where a delay is caused by a claimant invoking an internal grievance or appeal procedure, unless the employers could show some particular prejudice.

28. **Ms U Edomobi v La Retraite RC Girls School: UKEAT/0180/16/DA** per Laing J

*I find it difficult to see how a claimant can discharge the burden of showing that it is just and equitable to extend time if he or she simply does not explain the delay, nor do I understand the supposed distinction in principle between a case in which the claimant does not explain the delay and a case where he or she does so but is disbelieved. In neither case, in my judgment, is there material on which the tribunal can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a claimant from the consequences of any delay.*

29. **Adedeji v University Hospital Birmingham NHS Foundation Trust [2021] EWCA Civ 23, [2021] ICR D5** the Court of Appeal stated that "*The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) [Equality Act] is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular, "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.*"

30. The general case management power in rule 29 of **First Schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (amended and reissued on 22 January 2018) ("**the Rules**") together with due consideration of the overriding objective in rule 2 to deal with the case fairly and justly, gives the Tribunal power to amend claims and also to refuse such amendments.

31. In the case of **Selkent Bus Co Limited v Moore [1996] ICR 836**, the Employment Appeal Tribunal gave useful guidance, namely:

*(4) Whenever a discretion to grant an amendment is invoked the Tribunal should take into account all 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) The Nature of the Amendment*

*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) The Applicability of Time Limits*

*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, e.g. in the case of unfair dismissal section 67 of the Employment Protection (Consolidation) Act 1978.*

*(c) The Timing and The Manner of the Application*

*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 Regulations of 1993 for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay 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 factors into account the Parliament considerations are relative injustice and hardship involved in refusing or granting an amendment. The question of delay, as a result of adjournment, and additional costs, particularly if they are unlikely to be recovered by the successful party are relevant in reaching a decision.”*

32. This position is also summarised in the Presidential Guidance issued under the provisions of **Rule 7** of the Rules which I have also considered.
33. In the case of **Remploy Ltd v Abbott and others UKEAT/0405/14**, the EAT confirmed that, in deciding whether or not to allow an amendment to a claim, employment judges must consider issues such as the reason for delay, and the impact that the amendment is likely to have on case management and preparation for hearings, in light of the prejudice to the parties.
34. **Galilee v Commissioner of Police of the Metropolis 2018 ICR 634, EAT**, the Appeal Tribunal held that it is not always necessary to determine time points as part of the amendment application. This might be deferred where the new claims are said to form part of a continuing act with the original, in-time, claim, given the fact sensitive nature of determining whether there is a continuing act.
35. **Transport and General Workers’ Union v Safeway Stores Ltd EAT 0092/07**, whether a claim has been presented in time is “*a factor — albeit an important and potentially decisive one — in the exercise of the discretion*”.
36. **Ladbrokes Racing Ltd v Traynor EATS0067/06** when considering the timing and manner of the application in the balancing exercise. It will need to consider:
  - why the application is made at the stage at which it is made and not earlier
  - whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised,



particularly if these are unlikely to be recovered by the party that incurs them;  
and

- whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

### **Submissions**

37. The respondent sent in a written skeleton argument on 11 January 2021 (pages 19-22 of Bundle 2) and Ms Berry added to these in oral submissions. Dealing firstly with the unfair dismissal claim she submitted that it should be struck out because the claimant was not asserting that she had 2 years continuous employment but rather suggests that because she says her dismissal was because of race, there is no requirement for her to have this length of service. She submits that this is incorrect and that as there are no grounds for suggesting the complaint is one for automatic unfair dismissal, that this claim should be dismissed as it does not satisfy the test in section 108 ERA.
38. On the issue of time limits Ms Berry pointed out that in her evidence to the Tribunal the claimant confirmed that the last discriminatory act took place on 28 November 2019 and so the primary time limit expired on 27 February 2020. She submits that the claimant has not provided sufficient explanation for the delay in bringing her claim until 20 July 2020. Ms Berry assumes that the claimant is relying on ignorance of time limits and pursuing the internal process in respect of her complaints.
39. She submits that the grievance raised on 5 December 2019 did not relate to discrimination at all but only referred to what the claimant describes as an illegal decision to extend her probation period. She submits that there is no evidence to suggest that the claimant ever raised race discrimination before bringing her claim, and the respondent's position is that it was not raised at all before this.
40. She submits that as at 28 November 2019, the claimant had some knowledge of employment law, using the word "*illegal*" in relation to her complaint about probation periods, making reference to "*constructive unfair dismissal*" and "*employment regulations*" and alleging a breach of contract. She submitted that the claimant had the skills and expertise to research at the time and has done that subsequently, including research on the Equality Act 2010 and data protection law and that she was able to find the correct resources, namely the CAB, ACAS and employment tribunal to submit the claim form herself on 20 July. Ms Berry submits that there is a very long unexplained gap from 11 February 2020 to 3 June 2020 and the claimant has provided no explanation as to why she did nothing until then until 11 June 2020 when she contacted ACAS.
41. She asked me to consider the case of **Apelogun-Gabriels** referred to above that delay whilst awaiting the outcome of internal appeals is only one factor which may be taken into consideration. She also referred to the case of **Edomobi** which she suggested had many parallels to this case, further submitting that the claimant was an intelligent woman who could have found out about the 3 month time limit having access to internet. She further submits that as with the **Edomobi** case there were gaps in the chronology, here that even after the deadline Mr Dudley had told the claimant he would respond by in February 2020 had expired the claimant did not act with haste. It was submitted that the claimant knew of all the facts she was complaining of and did not have a response from the respondent

but still did not do any research until 11 June 2020 when she contacted the CAB and ACAS and started early conciliation. It was submitted that a balancing act needs to be carried out in deciding whether or not to extend time on a just and equitable basis and that it was in public interest to enforce time limits, especially where there is no evidence to suggest a claimant could not have acted sooner and no explanation why she did not act sooner. It is suggested that as with Edomobi, the burden was on the claimant to prove why time should be extended and that enforcing time limits and certainty should weigh more heavily in this case.

42. She points out that the claimant wishes to make a number of discrimination complaints going back throughout her employment in her table of allegations, involving a number of comparators, alleged witnesses and perpetrators. She submits that as discrimination had never been raised until the claim form was submitted, none of the individuals have been asked questions about allegations raised as these were not raised as part of any internal process. This is submitted would cause substantial prejudice to the respondent.
43. On the claimant's application to amend, Ms Berry took me through the table of allegations and suggested that the allegations made were still vague and unparticularised and in many cases addressed matters upon which there was no mention at all in the claim form. She addressed me on the Selkent factors above and suggested that prospects of success is also a relevant factor and asked me to take a high level look at merits. She submitted that even at the sixth attempt of the claimant to give information about the detail of her claim it is still completely unclear, as there is no detail about what was supposed to have said to her or when. She suggests that the claims set out in the table had very little reasonable prospect of success and it would not be in the overriding objective or proportionate to allow the claimant to pursue these claims. She makes the point that these are substantial amendments whereby the claimant is attempting to rewrite her claim and adding entirely new causes of action which are all substantially out of time. She submits that the claimant has not explained why she wishes to amend her claim late in the proceedings or why these were not included in the claim form. She submits that the balance of hardship and prejudice weighs on the respondent's side and the amendment application should be refused as if granted it would prolong any trial and the respondent would have to expend additional time and expense dealing with long and complex allegations and claims.
44. The claimant stated that she should be permitted to pursue her unfair dismissal complaint because she was alleging that her constructive dismissal was related to a protected characteristic, namely her race. She submitted that her understanding was that this meant that there was no requirement for a period of qualifying service.
45. On the issue of whether the claims were out of time, she submitted that she should be granted an extension of time on just and equitable grounds. She explained she understood that she had to pursue her grievance with her employer before she could bring a claim to the Tribunal and that she could not "escalate" her complaint without receiving a response to an open grievance from her employer. She said that she raised a complaint with the respondent trusting that she would get a response from them and did not know that their delay would mean she would be impacted in pursuing her complaint. She points out that the respondent had been extremely slow to deal with her grievance and still had not done so. She suggests that this was a valid contributing factor to the delay of raising the claim. She submits that the treatment she received was fundamentally

unfair and discriminatory and it would not be in the interests of justice for the Tribunal to not hear the claim and the respondent to “get away with” such behaviour.

46. On her amendment application, the claimant said she understood that all the information she had provided to ACAS would be submitted to the tribunal and that she would be able to explain much more about her complaint when the time came to give evidence at the final hearing. She submitted that although further information had been provided since the submission of the claim form, the complaints still fall under the same headings set out in the claim form itself. The claimant says her knowledge of the law is limited and that having been given the opportunity at the previous preliminary hearing to explain what she was trying to claim and in date order, that is what she had now done.

### **Conclusion**

Is the claimant able to pursue a claim for unfair dismissal on account of her continuous service ?.

47. I refer to paragraph 8 above. The claimant was employed for a period of less than 2 years. Section 108 of the ERA requires a claimant to have not less than two years' service to make an unfair dismissal complaint. The claim form does not disclose any information which suggests that any of the circumstances set out in subsections (2) and (3) of section 108 of the ERA apply. The claimant has not provided any further information to suggest that this is the case. Therefore she is not entitled to bring a complaint of unfair dismissal and her complaint is dismissed. It may be that the claimant was informed or found out herself (correctly) that there is no period of continuous service required to bring a discrimination complaint under the Equality Act 2010 and has assumed that accordingly, her complaint about dismissal (as she suggests this was related) did not require such service. This is not correct as a separate complaint of unfair dismissal (under ERA) is one for which a service requirement is proscribed (other than in very specific circumstances). None of those circumstances apply to the claimant and so her unfair dismissal claim must be dismissed.

Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination / the last act complained?

48. In order to bring any of the complaints now made to the Employment Tribunal in time, the claimant would need to have contacted ACAS and commenced compulsory early conciliation (“EC”) by 27 February 2020. The ACAS EC certificate that is contained at page 31 in the hearing bundle for the hearing today with reference number R157694/20/55 naming the respondent as prospective respondent (“EC Certificate”) indicates that the date of receipt by ACAS of the EC notification was 11 June 2020. So ACAS EC was started some three months out of time. The claim form was presented on 20 July 2020 (again on its face out of time).
49. I must then go on to consider whether time should be extended and the issues relevant to that for the remaining discrimination complaints are as follows:

As the discrimination complaints were not presented within the statutory time limit, were they made within a further period that the Tribunal thinks is just and equitable?

50. I have considered factors set out above in the relevant case law. I reminded myself that the exercise of the discretion is the exception rather than the rule, although I do have a wide discretion. I take particular note of the directions given by the Court of Appeal in the **Abertawe Bro Morgannwg University v Morgan** and the more recent **Adedeji v University Hospital Birmingham NHS Foundation Trust** case above. I am aware that the burden of persuading the Tribunal to exercise its discretion lies on the claimant, albeit this is not a burden of proof or of evidence.
51. The length of the delay in issuing proceedings here is 3 months which is considerable but not excessive.
52. The reason for the delay is explained by the claimant as largely resulting from the failure of the respondent to provide a response to her grievance raised on 5 December 2019. Although the respondent was relatively prompt at the outset and a meeting was held with the claimant to discuss her grievance on 28 January 2020, it then failed to take any further action to provide her with a response and still has not done so. Although no evidence has been provided, it seems that the respondent's manager Mr Dudley, puts this down to difficulties caused by the initial Covid 19 lockdown in March 2020 (see paragraph 13 above). Whilst lockdown clearly impacted many businesses, it was unacceptable for the respondent to have failed to keep the claimant updated as to the status of her grievance after the meeting in January 2020. I am very sympathetic to the claimant's arguments that she had raised a grievance and was awaiting an outcome before she escalated this further. She had acted entirely appropriately and in good faith in raising a grievance in December 2019 and had a reasonable expectation that this would be addressed and heard by the respondent within a reasonable period.
53. What the claimant has not however done is to adequately explain why she did not take any steps to further her complaint during the months of February, March, April and May when she had not heard anything from the respondent. She had been informed on 11 February 2020 by Mr Dudley of the respondent that he would be in touch with the claimant "early next week" with a response to her grievance (see paragraph 11 above). Once this week had expired, Mr Dudley had failed to provide the claimant with a response. It is not clear why at this point the claimant did not chase the respondent further or indeed having received nothing at this point as promised, take steps to pursue her complaint elsewhere. The claimant may well also be impacted by the Covid 19 lockdown in March 2020 as were many people and she was focusing on her future by seeking alternative employment. However throughout this period, the claimant could also have taken steps to further her complaint having received no response or outcome from the respondent. The claimant did not take any steps to do this until 3 June 2020 when she chased Mr Dudley by e mail (see paragraph 13 above). The claimant is clearly intelligent and articulate and upon deciding to take action to further her complaint on 11 June 2020 acted promptly getting in touch with firstly the CAB, and then ACAS. She has some background knowledge and was able to undertake research throughout this period and could easily have discovered the method of furthering her complaint (including any applicable time limits). She was also able to complete and present her claim on 20 July 2020 having received the EC certificate on 11 July 2020. The claimant has not been to explain why she did not act sooner to progress matters other than to say she was waiting for a response to her grievance.

54. I have considered the authorities above on whether pursuing an internal process can justify granting an extension of time and take note that this is just one factor which must be weighed in the balance along with others that may be present (**Apelogun-Gabriels** case referred to above). Here the lack of a response to her grievance clearly did influence the claimant's thinking but I am still unsure why she waited so long having not received a response when promised before taking action to pursue her claim through the Tribunal. The respondent is clearly at fault in not responding but the claimant has not been able to adequately explain why she waited so long before deciding in her words to escalate matters further.
55. I have gone on to consider the balance of prejudice. The claimant will clearly be prejudiced by not being able to pursue her claims for discrimination and harassment which she feels strongly about. However the respondent is prejudiced by having to deal with claims raised after the limitation period for such claims to be brought had expired. I also take into account that it is still not clear what the precise nature of the discrimination claims are. Although further detail has been supplied on several occasions, this remains lacking as in many cases no dates have been provided and no details of who is said to have made "discriminatory comments", when and what those comments were has been provided. It is not entirely clear why some of the matters complained about are said to be less favourable treatment on the grounds of race. The claimant has referred to several incidents but I am concerned that she does not seem to identify (and it is not clear from the claim form) how these relate to or are less favourable treatment on the grounds of the claimant's race (as opposed to allegations of bullying behaviour per se). Further identification of the issues would still be required and as is pointed out by the respondent, there have been various attempts to do this already. At this point well over a year and a half and in some cases up to 2 years after the events in question, the respondent will be prejudiced in having to deal with any new allegations that may arise, some of which may not ultimately be able to be sustained as allegations of race discrimination.
56. It is clear from the case law that it is not a question of the Tribunal being able to exercise jurisdiction just because it is sympathetic to the claimant. There must be something raised by the claimant which persuades me that it is just and equitable to do so. Considering all the matters raised above, I am not able to conclude that this has been done. It is unfortunate that this means the claimant will now not be able to pursue these claims. However, time limits are an important element of litigation and go to the tribunal's jurisdiction. They are not simply procedural matters that can be disregarded lightly. Having considered all the factors above in particular the length of the delay and reasons for it and looking at the balance of prejudice, I conclude that the discrimination complaints have not been presented within "such other period as the employment tribunal thinks just and equitable" in this particular case and so they are also dismissed.
57. Although having found that the claimant's discrimination and harassment complaints should be dismissed, it may not be necessary to determine whether she should be permitted to amend her claim, I have for completeness considered the application to amend. I have been through the various allegations set out in the table of allegations above. I have considered the relevant factors identified above before addressing the balance of prejudice and hardship and reached the conclusion that these amendments should not be permitted. I set out the analysis on each of these points below:

Nature of the amendment

58. The amendments requested here are substantial. The amendments sought amounts to “*entirely new factual allegations which change the basis of the existing claim*” as identified in the **Selkent** case above. Firstly, with respect to the complaint of victimisation, there is no reference this in the claim form. Although the claimant already makes claims for race discrimination, a claim under section 27 of the Equality Act 2010 of victimisation is a new cause of action which has a different set of considerations and legal tests.
59. The complaints of direct race discrimination and race related harassment are in the claim form but detail is not present. The factual allegations regarding failure to allow the claimant to participate in the flexi hours scheme, or disclosure of her personal information on the work floor is not mentioned in the claim form at all. In terms of the allegations made around malicious rumours and discriminatory comments, although further detail was provided in January 2021, the precise basis of the claim is still unclear.

Applicability of time limits

60. I refer to my conclusions above on whether the existing complaints were brought in time. These additional complaints and allegations relate to the same period and are all also raised significantly out of time. I see no reason why the consideration of the just and equitable jurisdiction to extend time in these additional complaints and allegations would result in a different conclusion to the one I have reached above. This is a highly relevant factor to consider (see **Transport and General Workers’ Union v Safeway Stores Ltd** case above). To allow such amendments would revive a claim that has otherwise been found to have been out of time, having considered and heard evidence and reached conclusions on the relevant legal tests.

Timing and manner of the application

61. The application to amend was essentially made at the preliminary hearing held on 19 April 2021, which was the first hearing held on these proceedings. The claimant does not set out a real reason as to why the factual allegations she now wishes to rely on were not included in his claim form, save that she understood that ACAS would have passed all her details on to the Tribunal and that she would be able to expand on her allegations when giving evidence. Firstly all the facts making up these new allegations were known to the claimant before she submitted the claim. She includes detail about other matters or at least mentions the broad allegation, even if the legal formulation is not set out in detail. Various factual matters she now wishes to pursue were not referred or alluded to at all. Moreover, it must have been clear after the preliminary hearing on 19 April 2021 that now was the time for the claimant to set out in detail the full particulars of her complaints in order that the amendment application could be considered. Even at this stage, the claimant has not yet done this.

Balance of prejudice

62. Putting these factors together I concluded that the balance of prejudice and hardship favoured refusing the amendments sought. These new matters of fact

have been raised substantially after the primary limitation period and the respondent would be prejudiced in addressing these new complaints and allegations. This particularly so given that the claimant's existing discrimination and harassment complaints have been dismissed as they were brought out of time and the claimant has not persuaded me to exercise my discretion to extend time on the basis that it is just and equitable to do so. The allegations are also still unclear and I consider that in many cases, such allegations may have little reasonable prospects of success on the information currently available.

63. For the above reasons, the amendment application is refused.
64. Any further case management of the claim to final hearing is not necessary. The proceedings brought by the claimant are dismissed.

Employment Judge Flood  
27 July 2021