



EMPLOYMENT TRIBUNALS

Claimant: Ms AM Gallagher

Respondent: Locala Community Partnership CIC

Heard at: Leeds (by video) **On:** 8 February 2022

Before: Employment Judge Knowles

Representation

Claimant: Mr Townend and Mr McGurk, Lay Representatives

Respondent: Miss R Levene, Counsel

RESERVED JUDGMENT UPON THE CLAIMANT'S APPLICATION TO AMEND

The Judgment of the Employment Tribunal is that:

1. The Claimant's application for leave to amend set out in paragraphs 1, 2 and 3 of her application dated 7 January 2022 is refused.
2. The Claimant's application for leave to amend set out in paragraphs 4, 5 and 6 of her application dated 7 January 2022 of the is granted. This grant of leave excludes the "log of incidents" appended to the further and better particulars served by the Claimant on 20 August 2021.

RESERVED REASONS

Issues

1. The issue for determination by me today is the Claimant's application to amend her claim.

Evidence

2. This open preliminary hearing was undertaken by video using HMCT's Cloud Video Platform.

3. The parties produced an agreed bundle of documents, 90 pages. References to numbers in brackets are to page numbers in the agreed bundle of documents.
4. I heard oral submissions from both parties. No written submissions were received.
5. Mr Townend made submissions on behalf of the Claimant. He stated at the beginning of the hearing that the Claimant was sat with him along with another lay representative Mr McGurk. Mr McGurk took not part in the proceedings today.
6. I had insufficient time to consider the application and determine it during the allocated time for the hearing. This is partly due to the matter being set down on the basis of the application envisaged when the matter came before EJ Brain on 1 December 2021. Whilst EJ Brain had taken time to consider and make orders about the information required and the nature of the amendments sought by the Claimant, when the Claimant made the application to amend on 7 January 2022 it included additional matters.
7. I therefore reserved my decision to be provided in writing after the hearing.

Background

8. The Claimant is employed by the Respondent as a personal assistant and health care assistant. The Respondent is a not-for-profit community healthcare provider. The Claimant began her employment with the Respondent in or around 2002/2003.
9. The Claimant commenced early conciliation on 14 May 2021.
10. Early conciliation ended 23 June 2021.
11. The Claimant brought a claim to the Employment Tribunal 5 July 2021.
12. The Claimant remains in the Respondent's employment.
13. I copy below some details from Employment Judge Brain's case management summary from 1 December 2021 as they form a helpful summary.

"3. The claimant ticked the relevant boxes upon page 7 of the claim form to indicate that she was pursuing complaints of discrimination upon the grounds of the protected characteristics of race and disability. She also said that she wished to pursue a complaint of "bullying, harassment and victimisation." The particulars of claim given upon page 7 of the claim form (in section 8.2) is very brief and reads as follows: "I have been bullied and harassed at work for the last two years. Constant nit picking, criticism of my work, with derogatory comments about my race and lack of concern for my mental health. When I raised my concerns, eventually the employer did show an interest. In July 2020 a meeting took place where action points were agreed to be implemented. Nothing has ever been implemented and due to my raising the concerns, the bullying increased." [Emphasis added by the Tribunal]. The Tribunal notes that there is no reference within the claim form to any physical impairment.

4. On 16 July 2021, Employment Judge Wade directed the claimant to provide further particulars of her claim. On 6 August 2021, the respondent's solicitor presented their grounds of resistance. At this stage the claimant had not provided further particulars of her claim. The respondent gave a helpful summary of the history of matters.

5. On 20 August 2021, Mr Townend on behalf of the claimant submitted further particulars of the claimant's claim. By way of introduction, the further particulars of the claim refer to the physical impairments of ulcerative colitis, vitamin B12 deficiency and chronic obstructive pulmonary disease. No claim was brought within the claim form premised upon the basis of physical impairments. The claimant will therefore appreciate that in order to pursue any complaints of discrimination related to disability based upon any physical

impairment, an application to amend will be necessary.”

14. I add that the further particulars had attached to them a log of events, amounting to around 50 incidents which the Claimant stated demonstrated a difference in attitude towards her from management following her raising complaints about her treatment.

15. The case management summary from 1 December 2021 goes on to consider several issues raised by the further particulars including the need for amendments and further details. Orders were made requiring the Claimant to make an application to amend and to provide some further information.

The Application to Amend

16. The Claimant made an application to amend her claim on 7 January 2022.

17. What follows is the text of the application to amend:

Background

1) The Claimant has the following underlying Health Conditions / Disabilities. Ulcerative Colitis (Bowl disease), Vitamin B12 Deficiency, and a Weak Chest (COPD). All three reduce the Claimants immune systems effectiveness.

2) Because of the above, with the outbreak of Covid 19 and the workplace at that time, not being Covid safe, the Claimant became concerned about her own wellbeing and the ultimate risk of losing her life.

Details

3) On April 6 2020, the Claimant raised these issues with her Manager, Amina Hans Adams. The Claimant said at this time, due to her disabilities outlined in paragraph 1, which the Respondent had full knowledge of, she would feel safer at this time, working from home. The Manage responded “if you don’t come into work, you don’t get paid”. The formal request was refused. The Claimant then raised the issues and that of the Managers_response, the same day, with the HR Manager Lesley Shotton. Her response was “you know what Amina is like.” And nothing further was Done.

4) Because of the above in paragraph 3) the claimant sought medical attention and was diagnosed with Acute Stress Reaction. The Claimant was then on sick leave from the 7 April 2020, being fit to work again on the 18th of June 2020. Upon being fit for duties, the Claimant felt a difference in attitude towards her from Management and a lack of support, regarding managing her mental health, stress, and feelings of isolations. On the 3 July 2020, the Claimant had contact with managers Lyndsay Hinde and Helen Duke, where the ‘Claimant raised her feelings of isolation and ask to work back in the office part time now that the offices were Covid compliant. It was agreed that this would be looked at. The Claimant was given three options on 3 July 2020, to which she responded on July 5, going for the third option of working 3 days at home, 2 days at base. It was also agreed that support meetings would be held every two weeks, between Manager Steve Remington, plus a member of the project team and the Claimant. This did not happen, and the Claimant had to do the organising and chasing for any ad hoc support meetings. As of 7 January 2022, this return to work has not been facilitated, despite the Occupational Health report of February 21st, 2021, stating that returning to the workplace would benefit the Claimants mental health and wellbeing.

Claims Re Para 3) and 4): Failure to make Reasonable Adjustments.

5) On the 8th of December 2020, Manager Steve Remington, used a term that the Claimant was known to use. He commented on minutes the Claimant had drafted by stating “it looked grand!!!” and criticised the Claimants use around prepositions. He also

sent her a link to the Cambridge Dictionary for her to look up prepositions. When the Claimant asked why the link was sent, Steve Remington replied "Because you being Irish will struggle with this, as all the Irish end their sentences with preposition". He continued to use the term "Grand" when dealing with the Claimant. He also used it in emails on the 7th and 25th February 2021. On the 1st February the Claimant Contacted Kathryn Ewart, who was the confidential "Speaking Out Guardian" to raise the issue of Steve Remington's behaviour. On the 27th of February 2021, Steve Remington emailed the Claimant to say there would need to be a meeting to look at the appropriateness of her using the Speaking Out Guardian. A meeting was held on the 26th March 2021, with Manager Helen Duke, Debra Booth Senior HR Advisor, Steve Remington, Tracy Durward Union Rep, and the Claimant. Upon the Claimant raising the allegations in the meeting, Steve Remington, stormed out of the meeting and refused to return. At this point Debra Booth advised the Claimant to raise a formal grievance, since the seriousness of the allegations meant they could not be dealt with informally. This Formal grievance was done on the 30th of March 2021. As of today's date, the grievance is still ongoing.

Claim. Direct Racial Discrimination, on the grounds of the managers perception of an assumed characteristic of a particular racial group.

6) *Details of the Victimisation Claim.*

1) *As stated in paragraph 4, when the Claimant returned to work on the 18th of June 2020, they noticed a difference in Management's attitude towards them. This after formally raising their concerns regarding not being permitted to work from home, due to their disabilities on the 6th of April 2020 (The protected act.) The requests laid out in paragraph 4; the Claimant maintains would have been granted if the Protected Act had not been done.*

2) *As no movement was formally forthcoming regarding the return to the workplace, the Claimant applied for the internal vacancy to help at a local vaccination centre. The Claimant was given dates of her shifts there, HR gave the Claimant a unique Payroll number of 11593533/4 for the role, then said they would need her managers permission to let her do the role. The Manager, Steve Remington told the Claimant that she could not do it as HR would not let her. The Claimants believes she would have been allowed to do the role if she had not done the Protected Act.*

3) *At the meeting stated in paragraph 5 above, on the 26th of March 2021, an outcome was an agreement to allow the Claimant to do 3 days at work, 2 days from home. No progress has been made on this agreement, which the Claimant believes would have been, if they had not done the Protected Act.*

4) *The Claimant has been taking minutes of meetings for over 15 years without anyone complaining of there standard. On the 3rd of February 2021, via email at 08.42, Rachel Foster Assistant Director of Operations, thanked the Claimant for the minutes, that they had made a couple of amendments and they were fine to circulate. On the same date and time Rachel Foster has emailed Steve Remington stating "FYI, the attached was what I received from Anne Marie to check. I have revised and sent it back, but still significantly below what I would expect from formal contract minutes." The Claimant believes that this type of comment would not have taken place if they had not done the protected act.*

5) *As Stated in paragraph 5 above, the Claimant raised a Formal Grievance on the 30th of March 2021. The Claimant was then informed on the 27th of April 2021 that a formal disciplinary process had begun into alleged covert recordings of Phone calls. Then on the 30th of April the Claimant was informed that a breach of Confidentiality was also going to be included. On the 15th of November 2021, the Claimant was informed that no further action would be taken. The Claimant believes that no disciplinary investigation would have taken place if she had not done the protected act of raising the Formal Grievance on the 30th of March 2021.*

All the information above was originally stated in either the details of claim or the Claimants log of incidents.

Matters agreed between the parties

18. I note at this stage that the Respondent has agreed that the original claim form raised a claim concerning support as referred to in paragraph 4 further details dated 20 August 2021.

19. The Claimant has clarified in the application to amend that this will be pursued as a claim of failure to make reasonable adjustments as opposed to, as it was originally put in the further information, direct and indirect disability discrimination.

20. The Respondent has accepted this change as a mere relabelling of a claim already within the original claim. It is in effect simply a change of label. It was noted at the previous Case Management Hearing that no question arises that this part the claim in paragraph 4 of the further particulars was referred to in the claim form.

21. Leave to amend is therefore granted with the Respondent's consent in relation to labelling the claim of lack of support set out in paragraph 4 of the further particulars dated 20 August 2021 as a claim under Sections 20 and 21 of the Equality Act 2010, i.e. a claim of failure to make a reasonable adjustment.

22. This is a partial grant of the application for leave to amend.

23. It should be remembered that notwithstanding this, there remains a time limitation issue in relation to the complaint concerning support.

24. I note here that paragraph 4 of the application to amend differs from paragraph 4 of the further particulars. The application to amend adds additional matters concerning a failure to implement the option of 3 days working from home and 2 days working from the office.

25. That added element, concerning the Claimant's working pattern and location, will be considered below along with the other elements of the application to amend. That is because the Respondent does not consent to that part of the amendment application.

Submissions

26. The Claimant submitted that she is of the firm belief that everything mentioned in the amendment application is fully known to the Respondent. When the Claimant began to feel a change in attitude, she began recording a log of events and all of this has previously been provided to the Respondent during the internal proceedings.

27. The Claimant submitted that in relation to the direct race discrimination claim this did take place on 8 December 2020 but the log of events shows that the issue was repeated in the emails. This removes the time limitation point.

28. The Claimant submitted that until 2020 the Respondent were supportive of her disabilities and had knowledge of them. The issue for the Claimant was the impact of her conditions upon her immune system which made her more vulnerable to coronavirus. The Claimant raised her concerns and requested to work from home because she believed the workplace was not COVID friendly. This was refused so she raised it again. It was not discussed fully. Raising these concerns, raising a grievance, were protected acts. The Claimant went off ill then returned and complained about isolation and an option to work 3 days from home and 2 in the office was not implemented. This is a failure to make a reasonable adjustment. It was still not been implemented. The Claimant raised a grievance about this and is still awaiting an outcome.

29. The Claimant submitted that the claims are based upon matters known to the Respondent. The race claim is in time and the reasonable adjustment claim is ongoing. The Respondent had knowledge of the Claimant's health and previously sent her to core psychology services. They were aware of her mental state in 2019. Not implementing the option to work from home has caused the Claimant's health to deteriorate.

30. The Claimant submitted that none of the victimisation points would have happened had she not mentioned wanting to work from home or mentioned her race complaint.

31. The Respondent submitted that in relation to paragraph 3 of the application to amend the Claimant did not raise physical disabilities within her claim form and has not particularised when this took place, when it began and stopped. The Claimant was ordered to do so, see paragraph 2.1 of the order on 1 December 2021. The matters are all new, none of these were mentioned in the claim form. The issue concerns something that happened 2 years ago. It is still insufficiently particularised. There is no realistic prospect of an extension without any explanation for the delay having been provided. The Claimant should raise her claims in a prompt manner. Amina Hands has left the Respondent's employment. These matters affect the balance of prejudice.

32. The Respondent submitted that in relation to paragraph 4 it is still unclear whether or not the Claimant is stating that the disability is acute stress reaction or stress and anxiety. The Claimant has not provided the time frame. She was ordered to under paragraph 2.4 of the orders made on 1 December 2021. The Claimant had previously referred to ad-hoc support meetings in July 2020. Now in the application she refers to her return to work not being implemented in January 2022. The Respondent objects to any matters being added beyond July 2020. The Claim is continually expanding. These later events were not mentioned at the previous hearing.

33. The Respondent submitted that the matters referred to in paragraph 5 these were out of time as previously articulated. The further details provided on 20 August 2021 ought to be the comprehensive version. Now the Claimant seeks to add the emails of 7 and 25 February 2021. This ought not to be allowed. It is not right that this claim is continually expanded. The Claimant had originally accepted that this was a claim of harassment, now the Claimant seeks to change it to a claim of direct discrimination.

34. The Respondent submitted that the matters referred to in paragraph 6 were not mentioned in the claim form. It is insufficient to tick a box. See *Ali v ONS 2004*, also the *Baker* case. There is no protected act identified in the claim form. See paragraph 15 of the case management summary from 1 December 2021. The Claimant was told at paragraph 16 what a protected act is, and that she needed to set out when it took place, how it was conveyed and the detriments. There is only one grievance, 7 April 2021. Nothing on 6 April 2020. The Claimant has not said who she told, what she said, where, other information has not been provided. The Claimant refers to another protected act, 30 March 2021. There is no formal grievance on that date. Only one is 7 April 2021. Ought not to be allowed to amend without this information. The Claimant falls well short of presenting the necessary information. Detriments are not set out with the required clarity. Don't have the date of the detriments. See (2) and (3) there is no date of agreement, no details of who was involved in the decision making. 3 February 2021, cannot comment on causation when particulars not set out. (5) don't know who was included. This is an entirely new complaint. New facts. The original complaint was silent on these matters. We still don't know the nature of the claim some 2 years on. The prejudice to the Respondent is overwhelming.

The Law

On amendments

35. The Tribunal's power to consider amendments to a claim is set out in the Employment Tribunal Rules 2013 which are contained in Schedule 1 to the Employment

Tribunal (Constitution and Rules of Procedure) Regulations 2013 (“the Rules”).

36. The overriding objective of the Rules is set out as follows:

“2. Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) ensuring that the parties are on an equal footing;*
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) saving expense.*

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”

37. The specific rules which contain the powers are Rule 29 which permits the Tribunal to make case management orders and Rule 41 which allows the Tribunal to regulate their own procedure in the manner they consider fair, having regard to the overriding objective set out above. Amendments are thus a matter of judicial discretion.

38. Guidance given by Mummery J in **Selkent Bus Company Ltd v Moore [1996] ICR 836** at the time when he was President of the EAT is frequently quoted as the key test for determining an application to amend a claim. These were the key points made:

“(1) The discretion of a Tribunal to regulate its procedure includes a discretion to grant leave for the amendment of the originating application and/or notice of appearance: Regulation 13. See Cocking v. Sandhurst Ltd [1974] ICR 650 at 656G - 657D. That discretion is usually exercised on application to a Chairman alone prior to the substantive hearing by the Tribunal.

(2) There is no express obligation in the Industrial Tribunal Rules of Procedure requiring a Tribunal (or the Chairman of a Tribunal) to seek or consider written or oral representations from each side before deciding whether to grant or refuse an application for leave to amend. It is, however, common ground that the discretion to grant leave is a judicial discretion to be exercised in a judicial manner ie, in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions.

(3) Consistently with those principles, a Chairman or a Tribunal may exercise the discretion on an application for leave to amend in a number of ways:

(a) It may be a proper exercise of discretion to refuse an application for leave to amend without seeking or considering representations from the other side. For example, it may be obvious on the face of the application and/or in the circumstances in which it is made that it is hopeless and should be refused. If the Tribunal forms that view that is the end of the matter, subject to any appeal. On an appeal from such a refusal, the appellant would have a heavy burden to discharge. He would have to convince the Appeal Tribunal that the Industrial Tribunal had erred in legal principle in the exercise of the discretion, or had failed to take into account relevant considerations or had taken irrelevant factors into account, or that no reasonable Tribunal, properly directing itself, could have refused the

amendment. See *Adams v. West Sussex County Council* [1990] ICR 546.

(b) If, however, the amendment sought is arguable and is one of substance which the Tribunal considers could reasonably be opposed by the other side, the Tribunal may then ask the other party whether they consent to the amendment or whether they oppose it and, if they oppose it, to state the grounds of opposition. In those cases the Tribunal would make a decision on the question of amendment after hearing both sides. The party disappointed with the result might then appeal to this Tribunal on one or more of the limited grounds mentioned in (a) above.

(c) In other cases an Industrial Tribunal may reasonably take the view that the proposed amendment is not sufficiently substantial or controversial to justify seeking representations from the other side and may order the amendment ex parte without doing so. If that course is adopted and the other side then objects, the Industrial Tribunal should consider those objections and decide whether to affirm, rescind or vary the order which has been made. The disappointed party may then appeal to this Tribunal on one or more of the limited grounds mentioned in (b) above.

(4) Whenever the 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 eg, in the case of unfair dismissal, S.67 of the 1978 Act.

(c) The timing and 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 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."

39. ***Ladbroke's Racing Limited v Traynor*** [2006] EATS 0067/06 highlights that an application to amend must include details of the amendment sought in precise terms. They draw my attention to paragraph 20:

“When considering an application for leave to amend a claim, an Employment Tribunal requires to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing. That involves it considering at least the nature and terms of the amendment proposed, the applicability of any time limits and the timing and the manner of the application. The latter will involve it considering the reason why the application is made at the stage that it is made and why it was not made earlier. It also requires to consider whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs whether 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 they are unlikely to be recovered by the party who incurs them. Delay may, of course, in an individual case have put a respondent in a position where evidence relevant to the new issue is no longer available or is of lesser quality than it would have been earlier. These principles are discussed in the well known case of Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [1996] IRLR 661.”

40. In **Scottish Opera Limited v Winning [2009] EATS 0047/09** it was held at paragraph 5 that *“clear and accurate pleadings are of importance in all cases, but particularly in discrimination claims. It is essential that parties seeking permission to amend to introduce such a claim formulate the proposed amendment in the same degree of detail as would be expected had it formed part of the original claim; and tribunals should ensure that the terms of any such proposed amendments are clearly recorded.”*

41. **Chief Constable of Essex Police v Kovachevic [2013] UKEAT/0126/13/RN** warns of the dangers of an Employment Judge engaging with the application to amend. At paragraph 21 it is stated:

“It is quite plain that the Employment Judge wrongly engaged with the application to amend in this case. Before even turning to the question of the right test, it is fundamental that any application to amend a claim must be considered in the light of the actual proposed amendment. The Employment Judge did not have before him, reduced to writing or in any form, the terms of the amendment being proposed. It might be, ... that in certain circumstances (e.g. where a very simple amendment is sought or a limited amendment is asked for by a litigant in person) that an Employment Judge may be able to proceed without requiring the specifics of the amendment to be before him in writing. But this was a case in which the Claimant was being represented by a professional representative whom he had selected and recently instructed. The Employment Judge plainly could, and should, have required the representative to reduce the application to writing before considering it on its merits. The dangers of doing otherwise are obvious and are made manifest by what happened in this case.”

And at paragraph 23:

“One of the dangers of permitting an amendment without seeing its terms is that, having been given the green light to draft an amendment, a party may go beyond the terms which the Judge was led to understand might be included in the amendment he was permitting. In this particular case, the schedule later drawn for the Claimant in response to the Judge’s order sets out a very large number of allegations and incidents which span a period of many years and involve many different individuals and occasions.”

42. In the case of **Vaughan v Modality Partnership [2021] ICR 535** it was held that:

“This judgment may serve as another reminder that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The exercise starts with the parties making submissions on the specific practical consequence of allowing or refusing the amendment. If they do not do so, it will be much more difficult for them to criticise the Employment Judge for failing to conduct the balancing exercise properly.

The balancing exercise is fundamental. The Selkent factors should not be treated as if

they are a list to be checked off.

An Employment Judge may need to take a more inquisitorial approach when dealing with litigants in person.“

43. In **Office of National Statistics v Ali [2004] EWCA Civ 1363**, the Court of Appeal held that *“the question whether an originating application contains a claim has to be judged by reference to the whole document. That means that although box 1 may contain a very general description of the complaint and a bare reference in the particulars to an event (as in Dodd), particularisation may make it clear that a particular claim for example for indirect discrimination is not being pursued. That may at first sight seem to favour the less particularised claim as in Dodd, but such a general claim cries out for particulars and those are particulars to which the employer is entitled so that he knows the claim he has to meet.”*

44. In **Baker v Commissioner of Police of the Metropolis EAT 0201/09**, where the EAT upheld a tribunal’s decision that a claim form did not include a complaint of disability discrimination, despite the fact that the Claimant had ticked the box indicating that he was bringing that complaint. The rest of the form contained no particulars about any claim of disability discrimination. The EAT found that although a claimant could explain and elucidate a claim made in an ET1 by way of further particulars, the claim itself still had to be set out in the ET1. The EAT did however find that the tribunal in that case should have gone on to consider whether or not to allow an application to amend the claim to include a claim of disability discrimination.

On time limitations

45. Time limits are not the determinative factor in an application to amend but are part of the consideration in determining the balance of prejudice in allowing the amendment compared to not allowing it.

46. Section 123 of the Equality Act 2010 contains the following provisions concerning time limits:

(1) *Subject to section 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.*

(4) *In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*

- (a) *when P does an act inconsistent with doing it, or*
- (b) *if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

47. In **Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170 CA** the Court of Appeal considered the application of time limits in cases involving alleged failures to make a reasonable adjustment. The Court of Appeal noted that, for the purposes of claims where the employer was not deliberately failing to comply with the duty, and the omission was due to lack of diligence or competence or any reason other than conscious refusal, it is to be treated as having decided upon the omission at what is in one sense an artificial date. In the absence of evidence as to when the omission was decided upon, the legislation provides two alternatives for defining that point (see S.123(4) EqA). The first of these, which is when the person does an act inconsistent with doing the omitted act, is fairly self-explanatory. The second option, however, requires an inquiry that is by no means straightforward. It presupposes that the person in question has carried on for a time without doing anything inconsistent with doing the omitted act, and it then requires consideration of the period within which he or she might reasonably have been expected do the omitted act if it was to be done. In terms of the duty to make reasonable adjustments, that seems to require an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. That is not at all the same as inquiring whether the employer did in fact decide upon doing it at that time. Both Lord Justice Lloyd and Lord Justice Sedley acknowledged that imposing an artificial date from which time starts to run is not entirely satisfactory, but they pointed out that the uncertainty and even injustice that may be caused could be, to a certain extent, alleviated by the tribunal's discretion to extend the time limit where it is just and equitable to do so. Sedley LJ added that 'claimants and their advisers need to be prepared, once a potentially discriminatory omission has been brought to the employer's attention, to issue proceedings sooner rather than later unless an express agreement is obtained that no point will be taken on time for as long as it takes to address the alleged omission'.

48. The onus is on the Claimant to satisfy the tribunal that it is just and equitable to extend the time limit (**Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434 Court of Appeal**).

49. Case law has made it clear that the Tribunal may be guided, in making a determination on time limits, by matters such as the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. Cases have also made it clear that lists such as these are only a guide and in some cases some of those factors may not be relevant. Case law has also suggested that the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh) are almost always relevant.

50. In all cases the Tribunal should take into account the balance of prejudice between the parties in granting or refusing an extension of time.

51. In cases involving one-off acts where there is no assertion of any continuing act, it will be usual for the tribunal to make a final determination on time limit, and determine whether or not time will be extended, within its judgment on the application to amend.

52. This approach might not be suited to a case in which the discriminatory act is alleged to be a continuing act. In such cases, given that they are fact sensitive, the issue of time limit may be reserved to the final hearing even if the amendment is allowed. That is because a determination of the issue of whether or not an act is a continuing one would require the hearing of evidence and substantive determination.

53. In **Reuters Ltd v Cole EAT 0258/17** the EAT held that it was only necessary for the claimant to show a prima facie case that the primary time limit was satisfied (or that there were grounds for extending time) at the amendment application stage.

Conclusions

The Amendment Application – General Matters

54. The Claimant's application to amend includes many matters which occurred at different times and they each need to be considered in isolation.

55. However, to avoid repetition I will begin by covering a list of issues concerning the application that apply to all elements of the application.

56. I note firstly that at the Case Management Hearing on 1 December 2021 before Employment Judge Brain the Claimant's further particulars were considered in detail and specific and clear instructions were given as to the need for an application to amend and the content required. Employment Judge Brain clearly went through each and every element of the claims.

57. Employment Judge Brain referred the Claimant to **Selkent** and set out the core principles governing applications to amend.

58. These matters were set out fully in the Case Management Summary sent to the parties on 20 December 2021.

59. Moreover, the Claimant was then ordered to provide particular information concerning her claims.

60. The observation I make is that the Tribunal, prior to the application to amend on 7 January 2022, has already provided the Claimant and her lay representative (who represented the Claimant at the previous Case Management Hearing) with what I would consider the limit of the guidance an Employment Tribunal may give without crossing the boundary and engaging in the application.

61. Employment Judges are experienced in considering applications to amend and may well put an application differently to how it is put by a Claimant before them. But as the case law above makes clear, they should not engage with the application. By that we mean an Employment Judge should not complete the application for the Claimant; that would not be just.

62. These matters are never to be approached in a one size fits all manner. An unrepresented Claimant may need to receive a more inquisitorial approach in order that the parties are on an equal footing and the overriding objective is met.

63. I note that the Claimant is represented by a lay representative, Mr Townsend. Nothing has been put before me about Mr Townsend's representation of the Claimant. It is up to the Claimant to make out her application. Mr Townsend was named as representing when the initial claim form was submitted on 5 July 2021.

64. The Claimant has not submitted in support of her application that she, with the assistance of her lay representative, lacks legal knowledge or understanding of either the law or Tribunal processes or that she does not have access to professional advice from a skilled adviser.

65. The Claimant has similarly not submitted that she had no access, or had no means to access, such advice prior to her claim being submitted.

66. Knowledge has not been put as a factor in why the claim form was so brief and why the amendment application was made at the time it was made.

67. In fact, the Claimant has not explained why the claim was not set out more fully at an earlier time at all.

68. This is despite the clear guidance given and confirmed in writing by Employment Judge Brain.
69. I simply have no explanation at all from the Claimant in her written application nor was any offered in submissions during this hearing.
70. In terms of explaining the absence of basic particulars in the claim form and why the application to amend was not brought until January 2022 I have no information.
71. As I understand the Claimant's submissions, they are solely based upon the fact that the matters contained in the application to amend do not take the Respondent by surprise because the Claimant has raised them in the internal proceedings through her grievance which included the log of events.
72. That is a relevant factor for me to take into account. However, I must also balance with that the Respondent's entitlement, where they have been made aware of a potential claim, to treat that potential claim as having been abandoned if it is not brought in good time or, if later, without a good explanation as to the reasons for the delay.
73. The Claimant has not submitted to me that the internal proceedings have delayed her ability to bring her claims.
74. The Claimant has not produced the grievance to me so I cannot look at the degree to which her grievance clearly identified to the Respondent the specific claims that she seeks to bring in by way of an amendment. If the grievance incorporated the log of events, then the Respondent will have had knowledge of a list of 50 or so incidents that the Claimant felt were distressing. But this is presented as a timeline and does not in any way particularise any specific claims or any basis of complaint either by description or by reference to statutory provisions.
75. The bundle of documents contains medical records at pages 55-89. The Claimant has mentioned these but not taken me to any of the content. The Claimant has put these forward as supporting her contention that the Claimant was fully aware of everything in her amendment application. I take this to mean that the Respondent was aware of her medical conditions because they are recorded in the occupational health reports.
76. I have no submission before me from the Claimant that the brevity of the original claim form, the timing of the claim and the timing of the application were matters influenced by the Claimant's health.
77. I have not been taken by the Claimant to any particular parts of the medical information which may indicate that her condition may have influenced her timing and manner of application to the Tribunal or the application to amend.
78. I do accept that there are occupational health records contained in the bundle of documents which would indicate that the Respondent had knowledge from around May 2020 of the Claimant suffering stress and anxiety caused by the pandemic in the light of her previous respiratory illnesses. I can also see sick notes indicating depression from October 2021, which would indicate some progression of the Claimant's anxiety state.
79. I do however note that disability status remains in dispute between the parties.
80. I do take into account the Claimant's health noting the limitations inherent within her submission as set out above.
81. I of course need to consider the length of and reasons for delay in the light of each particular amendment sought but as I have hopefully made clear above, the Claimant's application is hindered by the lack of explanation for the brevity of her original claim, the timing of it and the timing of her application to amend.

The Amendment Application – specific elements

(i) The introduction of physical impairments and the claims of failure to make reasonable adjustments

82. At paragraphs 1 and 2 of the application to amend, the Claimant seeks to introduce underlying conditions of Ulcerative Colitis (Bowl disease), Vitamin B12 Deficiency, and a Weak Chest (COPD), stating that all three reduce the Claimant's immune systems effectiveness.

83. There is no further information concerning these conditions which would allow the Respondent to conduct any detailed analysis of the duration or degree of these conditions and more particularly the impact of them

84. None of these matters were mentioned in the Claim Form. The Claim Form submitted 5 July 2021 simply has a tick against disability discrimination and a lack of concern for her mental health.

85. This is a proposed introduction of new facts and context to the claim and is a different basis for claiming that the Claimant has disability status for the purposes of Section 6 of the Equality Act 2006.

86. I do not doubt that the Claimant has suffered to some extent from these conditions and I can see that they are the context to her assertions about the deterioration of her mental health during the pandemic.

87. There will be prejudice to the Respondent in answering these new matters; a further response will be necessary.

88. The Claimant has not set out specifically how she will make out the requirements of all of the elements of Section 6 of the Equality Act 2010. More particulars would be required. Again this adds to the time and complexity of the claim.

89. It will increase the time that the Respondent has to take in considering the matter because there will be further conditions to consider through an impact statement and through discovery and inspection of records.

90. The Claimant will feel disappointment if she is not allowed to bring all of her conditions forwards in support of her claim.

91. However she will not be prevented from bringing her claim nor from describing these conditions as background context to her mental health. Her claim for disability discrimination would still be alive, albeit she would only have the opportunity to show disability status based on her mental health.

92. She would still be able to pursue her existing claim of lack of support based upon her mental health if she is able to meet the definition of disability set out in Section 6.

93. This part of the amendment application (the disability and disability status) underpins other elements of claim in which time is already an issue (paragraphs 3 and 4 of the application).

94. Paragraph 3 concerns the request to work from home on 6 April 2020 which was denied on that date. This was a one-off act and the Claim refers to the immediate decision. To any extent that it could be considered a failure (for example a failure to make a reasonable adjustment), Section 123(3)(b) is engaged. The ordinary time limit expired 5 July 2020. Early conciliation began 14 May 2021 and ended 23 June 2021. The Claim was brought on 5 July 2021 and the initial further particulars served 6 August 2021. The application to amend was formally made on 7 January 2021. The application is 18 months

out of time.

95. I must therefore consider whether or not to extend time for the purposes of paragraph three. This part of the Claimant's claim relates to her physical disabilities at the time, and must therefore be considered together with that.

96. I note also that in relation to paragraph 3, Ms Adams has left the Respondent's employment and therefore the Respondent is unlikely to be able to readily take instructions from her and may be unable to secure her attendance as witness without an order.

97. Paragraph 4 concerns lack of support and refusal to implement a return to work, working from home, following contact between the Claimant and the Respondent in July 2020.

98. The Claimant has not clearly particularised whether or not this is asserted to be an act or an omission, or the time frame related to each part of the complaint.

99. In relation to the lack of support, time will need to be considered as an issue when this matter comes to a final hearing. See my earlier comments under the heading matters agreed between the parties.

100. In relation to the timing of the failure to implement the return to work on the basis of working 3 days at home, 2 days at base, as I recorded earlier this element of the application to amend was not mentioned in the further particulars and is not covered by the Respondent's concession that it was mentioned in the original claim for or their consent to it being relabelled as a claim of failure to make a reasonable adjustment.

101. In relation to the timing of that failure, the Claimant asserts the following:

"On the 3 July 2020, the Claimant had contact with managers Lyndsay Hinde and Helen Duke, where the Claimant raised her feelings of isolation and ask to work back in the office part time now that the offices were Covid compliant. It was agreed that this would be looked at. The Claimant was given three options on 3 July 2020, to which she responded on July 5, going for the third option of working 3 days at home, 2 days at base.

....

As of 7 January 2022, this return to work has not been facilitated, despite the Occupational Health report of February 21st, 2021, stating that returning to the workplace would benefit the Claimants mental health and wellbeing."

102. This is clearly an assertion of the failure being a continuing act which was ongoing at the time the application to amend was made.

103. I take into account that this may be an issue which could only be resolved at a full hearing (see Matuszowicz).

104. I have no assertion from the Respondent concerning the engagement of Section 123(3) or (4) so far as those provisions provide for a final date rather than a continuing act, for example that there was any intervening act or concerning the expiry of the period in which, had the employer been acting reasonably, it would have made the adjustments.

105. In relation to the failure to facilitate the return to work, I consider that the Claimant has made out a prima facie case that the amendment was made in time.

106. Looking at these specific matters and considered alongside the reservations I have concerning the timing and manner of the application set out in the general matters above, in my conclusion the balance of prejudice in extending time to amend the claim to include physical disabilities and to include the assertion of refusing a request to work from home

falls more heavily upon the Respondent in extending time than it falls on the Claimant in refusing to extend time. The Claim has not been brought within a period I consider just and equitable.

107. I draw the same conclusion in relation to the application to amend the claim to include physical impairment and to add the refusal of the request to work from home. Taking into account the matters set out above and the general matters concerning the timing and nature of the application, the balance of prejudice would weigh more heavily upon the Respondent in allowing this part of the Claimant's application to amend than it would upon the Claimant in rejecting the application.

108. The Claimant's application to amend her claim set out in paragraphs 1 and 2 of the application to add physical disabilities to her conditions supporting her claim to be a disabled person is refused.

109. The Claimant's application to amend her claim set out in paragraph 3 of her application to include a complaint of failure to make reasonable adjustments in refusing her request to work from home on 6 April 2020 is refused.

110. I take a different view of the Claimant's application to amend to include a complaint of failure to make reasonable adjustments in not implementing the 3 days in work, 2 from home working pattern. I reiterate my finding that the Claimant has a prima facie case that that part of her claim, as set out in her amendment application, is within time as a continuing act.

111. This is not a finding that it is brought within time. If the Respondent takes time limitation as an issue in its response to this part of the amendment application, that will need to be considered at a final hearing having heard all of the evidence.

112. I do not consider that this will cause prejudice to the Respondent over and above simply having to defend the claim.

113. I take into account that this part of the claim concerns the Claimant's asserted mental impairment, which the Respondent accepts was mentioned on the claim form. The Respondent already faces the support claim related to the mental impairment referred to above.

114. In my conclusion the balance of prejudice would fall more harshly upon the Claimant if I refuse this part of the amendment application than it would fall upon the Respondent if I allow it.

115. I allow the application to amend the Claim to include the complaint concerning working pattern set out in paragraph 4 of the application.

116. This means that the Claimant's case shall proceed including all elements of paragraph 4, although time limitation will need to be considered at the final hearing.

(ii) Application to amend to include a claim of direct racial discrimination

117. At paragraph 5 of the application to amend, the Claimant refers to the comments of Mr Remington on 8 December 2021 which she asserts amounted to racial discrimination.

118. In her further particulars, the Claimant had left it at that.

119. At the previous Case Management Hearing, the further particulars were discussed purely on the basis of the complaint being outside of the ordinary time limit.

120. Also discussed was the fact that this appeared to be a complaint of racial harassment rather than direct race discrimination. Notwithstanding this, the Claimant has

maintained it in her application to amend as a complaint of direct race discrimination. I deal with it as such.

121. I note from the previous Case Management Summary that there was no reference to this requiring any amendment. It does not feature in the list of issues for today (paragraph 20).

122. Whilst it is not expressly stated, it does appear that this was regarded purely as a matter of further particularisation not requiring any amendment and that the issue of time limitation could be dealt with at the final hearing.

123. In the amendment application, it is noted the Claimant has added later events on 7 and 25 February 2021, which she states are emails containing further examples of Mr Remington using the word "grand".

124. The Respondent objects to the additions.

125. The additions by the Claimant when the application to amend was made have are the issue between the parties.

126. In submissions the Claimant states that the repetition of the term in emails deals with the time limitation point and that is the end of the matter.

127. I assume the Claimant means that the later email, 25 February 2021, was within the time limitation if one looks at that from the perspective of the date the claim was brought, or that these were a continuing course of conduct amounting to a continuous act.

128. I note that the allegations involve same person repeating the same words

129. The Claimant also submitted that the log of events that was attached to the further particulars shows that the issue was repeated in emails.

130. I have looked at the entries in the log of events and with all due respect to the Claimant, they do not set out repetition of the word "grand". Indeed, the log of events has no entries against 7 and 25 February 2021.

131. I take into account the Claimant's claim form already stating that the Claimant suffered "derogatory comments about my race".

132. No point has been taken by the Respondent to suggest that the original Claim Form did not contain a complaint concerning derogatory comments about race.

133. The Claimant ticked the box on the Claim Form indicating that she was bringing a claim of race discrimination.

134. The Respondent has not taken issue with the inclusion of the 8 December 2020 comments and it appears to me that the reason that they take issue with the addition of the later email repetitions of the use of the word "grand" is that they do not have the time limitation defence.

135. They refer also to the further particulars provided on 20 August 2021 ought to have been the comprehensive version.

136. I see this as the Claimant seeking to add new facts to her existing direct race discrimination claim.

137. I do not consider that the Respondent will be greatly prejudiced by the addition of two emails as facts to be considered under the complaint of direct race discrimination. These matters should not require any great level of evidential consideration.

138. If the amendment is not allowed the Claimant will face a time bar on the 8 December 2020 issue she raised alone in her further particulars.

139. I agree that it is very unfortunate that the Claimant did not specify the asserted later emails in her further particulars of her complaint.

140. But I consider the amendment minor and falling short of a new cause of action when considered in the light of the original Claim form.

141. I am satisfied that there is a prima facie case that the act of 25 February 2021 should be considered to be in time, and that in any event the acts could be found to be a continuous course of action, i.e. a continuous act.

142. Even were the tribunal at the final hearing to time bar the earlier events, there would be nothing to prevent the Tribunal considering the 25 February 2021 email in the context of it being the 3rd instance of the word “grand” being used by Mr Remington towards the Claimant. It seems to me that the time limitation in relation to the earlier matters is somewhat a technical point given that the overall context could be considered even were the earlier matters time barred.

143. Considering the matter in the round, I consider that the balance of prejudice would fall more heavily on the Claimant in refusing the amendment compared to the Respondent in allowing it.

144. I grant the Claimant leave to amend her claim to add the 2 emails dated 7 and 25 February 2021 to the instances of derogatory comments about her race in addition to the 8 December 2020 issue. The Claimant has leave to amend her claim in the form set out in paragraph 5 of the application to amend.

145. I repeat that the 8 December 2020 issue is not an issue before me today although the issue of time limitation remains.

146. This means that the complaint concerning derogatory comments about the Claimant’s race as set out in paragraph 5 in the application to amend shall proceed to a final hearing and that Tribunal shall consider the issue of time limitation in relation to the complaint.

(iii) Amendment to add victimisation details

147. At paragraph 6 of the application to amend, the Claimant sets out five subparagraphs which she seeks to add to her complaint as complaints of victimisation under the Equality Act 2010.

148. I note that in the Claimant’s claim form, the Claimant listed “victimisation” as one of her “other types of complaint”. There is fleeting reference to that claim in the very brief particulars of claim, where the Claimant states “Nothing has ever been implemented and due to my raising the concerns, the bullying increased”.

149. At the previous Case Management Hearing, it was suggested that other than the word victimisation no particulars were provided. I think that the latter sentence in the preceding paragraph could be considered to arguably raise a protected act of raising concerns followed by bullying, which may amount to a detriment.

150. However, the particulars are inadequate and do not set out anything that the Respondent could reasonably be expected to answer.

151. Time limitation may be an issue addressed by the Respondent in its amended response. I note that the item in subparagraph (2), concerning work in the local vaccination centre, appears from the log of incidents to relate to matters in December

2020. Also paragraph (4) appears to relate to matters on 3 February 2021 which are outside of the primary time limitation period.

152. I consider that these are matters of further particularisation rather than bring a new complaint or cause of action.

153. I do not consider that leave to amend is necessary.

154. I note that there is reference in the previous Case Management Summary to whether or not the Claimant is seeking to include the log of 50 or so events as the detriments. The Claimant was asked to make that clear if that was the case. The Claimant has not suggested that the 50 or so complaints are the detriments asserted.

155. The only detriments asserted are those set out in subparagraphs (1) to (5) in paragraph 6.

156. The reference to the log of incidents appears to me not to be incorporated into the amendment, it is simply referred to in support of the submission that these matters were already known to the Respondent.

157. My finding that paragraph 6 does not require leave to amend does not extend to the log of incidents. That is not part of the Claimant's claim it is simply evidence in support of the matters listed as detriments in subparagraphs (1) to (5).

158. The Respondent has suggested that the protected act is not particularised however I see that as contained in sub-paragraph (1), "*formally raising their concerns regarding not being permitted to work from home, due to their disabilities on the 6th of April 2020 (The protected act.)*".

159. This sub-paragraph refers to the earlier main paragraph 4, where the Claimant identifies that she "*then raised the issues and that of the Managers' response, the same day, with the HR Manager Lesley Shotton. Her response was "you know what Amina is like." And nothing further was Done*".

160. I consider that this element of the claim is now sufficiently pleaded to be capable of being answered by the Respondent.

161. This means that the matters set out in paragraph 6 of the application to amend shall proceed to a final hearing.

Employment Judge Knowles

2 March 2022