



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103399 /2020

Preliminary Hearing held remotely on 16 November 2021

Employment Judge A Kemp

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Ms D Fitzpatrick

**Claimant
In person**

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The Scottish Ministers

**Respondent
Represented by:
Dr A Gibson
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal

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- 1. Allows the claimant's application to amend her claim but only to the extent of a claim under section 103A of the Employment Rights Act 1996 and that on the basis of what are alleged to be disclosures from firstly an email sent by Mr Malcolm Clark the claimant's trade union representative to Ms Miriam McCloy of the respondent on 17 September 2010 and secondly an email alleged to have been sent to George Cunningham of the respondent in February 2011 in relation**

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to the Chair Incident, provided that the claimant produces a copy of the same, and

2. Otherwise refuses the claimant's application to amend her claim.

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REASONS

Introduction

- 10 1. This was a Preliminary Hearing held to consider applications to amend the Claim, currently for unfair dismissal and breach of contract, made by the claimant. The application to amend was opposed. It had been made in an email and attachments sent to the Tribunal on 8 November 2021, after an email sent in the previous week explaining that the claimant intended to
- 15 seek to amend her claim after she had not been able to secure legal representation despite extensive efforts to do so. Each party also submitted written materials prior to the hearing.
2. The proceedings were conducted remotely. After initial submissions were made orally each party was permitted to make supplementary written
- 20 submissions that same day, which was done and those submissions have been considered.
3. There is a Final Hearing which has been arranged to take place in person commencing on 8 December 2021. There is also a Preliminary Hearing arranged for 29 November 2021 to address any issues of case
- 25 management.

Background

4. There was no hearing of evidence, but the following matters arose from the submissions and are or at least may be relevant to the exercise of discretion.
5. The claimant was employed by the respondent. That employment ended on 24 March 2020 when the respondent dismissed the claimant. Early conciliation commenced on 13 May 2020 and a Certificate was issued on 20 May 2020.
6. A Claim Form was presented to the Tribunal on 19 June 2020. It referred to a claim of unfair dismissal under section 94 of the Employment Rights Act 1996 and for breach of contract only. The claimant was at that stage represented by a trade union representative Mr Clark. The case was then sisted for a material period whilst an internal appeal process was conducted. That process concluded in early May 2021 with the refusal of the appeal against dismissal.
7. There was a Preliminary Hearing held on 17 May 2021 before me. The Note that was issued after that hearing noted that the claims made were those set out in the preceding paragraph. Eight days were allowed for that hearing, and a List of Issues was set out in draft form which the parties could suggest amendments to if it was not considered to be in appropriate terms. Neither did so within the 14 days allowed to do that.
8. On 29 July 2021 a Notice of Final Hearing was issued to commence on 8 December 2021 and continue until 17 December 2021.
9. The claimant sought over a substantial period of time to obtain legal advice to assist her in the pursuit of her claim from a large number of firms, but did not succeed. She sent an email to the Tribunal on 31 October 2021 stating that she would be amending her claim and that she had not secured legal representation. On 2 November 2021 Mr Clark her trade union representative emailed the Tribunal to state that the claimant would be representing herself at the Final Hearing and explaining why that was.
10. On 8 November 2021 the claimant sent an email with two attachments, one an application to amend and the other a form of amended paper apart to the Claim Form. In that she sought to add new claims to those before

the Tribunal for automatically unfair dismissal for having made a public interest disclosure under section 103A of the Employment Rights Act 1996, what was described as automatically unfair dismissal procedurally, and a series of claims for direct discrimination, indirect discrimination, harassment and victimisation under respectively sections 13, 19 26 and 27 of the Equality Act 2010 for the protected characteristics of sex, age, race, belief or religion, and disability.

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11. There has been an earlier claim by the claimant against the respondent, being one for harassment under section 26 of the Equality Act 2010, heard under claim number 4101694/2017. In a Judgment dated 29 January 2018 all bar one of the claims was held to be outwith the jurisdiction of the Tribunal on the basis that they were time-barred and it was not just and equitable to allow the claim to proceed, and in a further Judgment dated 13 August 2018 the Tribunal in a majority decision dismissed that claim, also made under section 26 of the Equality Act 2010, in relation to various cards received by the claimant.

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12. A Review of an aspect of the evidence heard in that case, which the claimant described in her Claim Form in these proceedings as the Chair Incident, was instructed by the First Minister. On 8 November 2018 the Director General of the respondent wrote to the claimant in relation to that Review, which included a finding that there be an investigation under the respondent's Discipline Policy. That investigation took place and led to disciplinary proceedings against the claimant.

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13. In the letter from the respondent alleging disciplinary matters against the claimant one allegation was "that on several occasions the claimant made false allegations about the Chair Incident, in particular that the incident occurred in December 2010 and that it was in response to the claimant's "whistleblowing" in September 2010." In the dismissal letter dated 24 March 2020 the dismissing officer Mr Wallace found that that allegation had been established. It followed a hearing that the claimant did not attend for reasons of ill health. The respondent had received occupational health and other advice to the effect that the claimant was not fit to attend a disciplinary hearing but decided to proceed with it. An appeal was taken, and a hearing took place before Mr Renwick of the respondent, at which

the claimant did attend and provide documentary evidence in support of her position.

14. The respondent's position is that a photograph of the claimant in the Chair Incident is a true photograph, but that it was taken showing circumstances which took place with the consent of the claimant, and dates from 2009. The claimant's position is that the photograph shows what she claims amounts to an assault on her, that it was taken in December 2010 and that the incident was a reaction to what she termed whistleblowing raised in September 2010.

10 **Submissions**

15. The following contains a very basic summary of the submissions that were made.

(i) *Claimant*

16. The following is a basic summary of the submissions given. The claimant argued that the Chair Incident was central to her claim. She had sought legal advice without success. The reason why the claims within the amendment had not been in the original Claim Form was that at that time she and her adviser Mr Clark hoped that the appeal would succeed. There was a short time frame to prepare the Claim Form. After the appeal decision in early May 2021 she did not then seek to amend the claim as she was seeking legal representation. Her mental health had not been good over the past three years. When asked for detail of the disclosures on which she intends to rely she confirmed the following in relation to the list of five disclosures founded on, set out on page three of her amendment application –

1. Reported to Marion McCloy of HR by email on 12 August 2010.
2. Reported on her behalf by her trade union representative Mr Clark in September 2010.
3. Reported to George Cunningham both by email from Mr Clark and orally by the claimant in February 2011.

4. Reported by email to the HR department in November 2015, February 2016 and March 2016.
5. Reported by presenting a diary of events to HR in August 2010.
6. Reported by email from Mr Clark on 27 September 2010 and by email to Barbara Allison of HR in April 2012.

10 In relation to the claims of discrimination the claimant argued that each of the protected characteristics she referred to was engaged. The religion she founded on was Catholicism. The disability she founded on was mental health issues including a diagnosis of Post Traumatic Stress Disorder. When asked to explain why her dismissal was discriminatory she referred to the history of her treatment at work as she alleged it to be, phrases used in relation to her, the cards received, and that if she had been a young Scottish man the treatment would not have been the same. She argued that if the amendment was not permitted that “the truth would not see the light of day”, although it was explained that she would be able to give evidence even if the amendment were refused on issues as to the reason for dismissal, the reasonableness of it, contribution if any, and whether a fair dismissal could have followed a different procedure, as well as what had or had not occurred on the balance of probabilities for the claim of breach of contract.

(ii) *Respondent*

17. The following is again a brief summary of the submission made. It was accepted that the second matter the claimant sought to raise, of the unfairness of dismissal procedurally, was not correctly characterised as automatic but within the terms of the original Claim. In relation to the section 103A claim the authority of ***Pruzhanskaya v International Trade & Exhibitors (JV) Ltd UKEAT/0046/18*** referred to further below it was argued that the respondent would suffer prejudice and hardship if the claim was permitted to be introduced. The alleged protected disclosures were historic, and seeking to investigate them in order to challenge whether they were protected or not would be very difficult. A great deal of information, both from the claimant and respondent, was placed before the decision-makers. The case had been prepared on the basis currently

pled. Further investigation would be required if new claims were permitted, as different evidence would be necessary for the section 103A claim. There is little prejudice to the claimant as she has an unfair dismissal claim, and is seeking re-instatement. In relation to the discrimination claims they were out of time, and it was not just and equitable to allow them to be heard so late. There was in any event a lack of specification of matters that were necessary such as less favourable treatment, the provision, criterion or practice, why that placed the claimant at a disadvantage, what the unwanted conduct was and why that fell within the definition of harassment, and the protected act for victimisation. Each of the protected characteristics was different, and required to be treated differently. Reference was made to authority on pleading a claim adequately. The amendment focussed on the acts that the earlier Claim had either held to be outwith the jurisdiction or not established. It was res judicata. The claimant's position in relation to not including these claims in the Claim Form did not make sense. She had herself prepared the amendment and could have added such detail in the Claim Form, or in May 2021 when the appeal was dismissed. The earlier Claim Form had pled matters very similar in terms to the current amendment. She had had legal advice at that stage. This was an incompetent attempt to re-litigate matters. The claimant had not raised a grievance or any matter under the respondent's whistleblowing policy. The balance of hardship and injustice favoured refusing the application.

The law

(i) Amendment

18. A Tribunal is required when addressing such applications as the present to have regard to the overriding objective, which is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 which states 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;
- 5 (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.

10 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.”

- 15 19. The question of whether or not to allow amendment is a matter for the exercise of discretion by the Tribunal. There is no Rule specifically to address that, save in respect of additional respondents in Rule 34. Whether or not particulars amount to an amendment requiring permission from the Tribunal to be received falls within the Tribunal’s general power to make case management orders set out in Rule 29 which commences as follows:

20 **“29 Case management orders**

The Tribunal may at any stage of the proceedings, on its own initiative or on application to make a case management order....”
co-operate generally with each other and with the Tribunal.”

- 25 20. Earlier iterations of the Tribunal Rules of Procedure did contain a specific rule on amendment, and the changes brought into effect by the current Rules, found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, require to be borne in mind when addressing earlier case law.

- 30 21. The nature of the exercise of discretion in amendment applications was discussed in the case of **Selkent Bus Company v Moore [1996] ICR 836**, which was approved by the Court of Appeal in **Ali v Office for National Statistics [2005] IRLR 201**. In that case the application to amend involved adding a new cause of action not pled in the original claim form. The claim originally was for unfair dismissal, that sought to be added by amendment was for trade union activities. The Tribunal granted the application but it
35 was refused on appeal to the EAT. The EAT stated the following:

“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.

What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant;

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(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.

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(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.

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(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.”

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22. In ***Harvey on Industrial Relations and Employment Law*** Division PI, paragraph 311, it is noted that distinctions may be drawn between firstly cases in which the amendment application provides further detail of fact in respect of a case already pleaded, secondly those cases where the facts essentially remain as pleaded but the remedy or legal provision relied upon is sought to be changed, often called a change of label, and thirdly those cases where there are both new issues of fact and of legal provision on which the remedy is sought, of which ***Selkent*** is an example.

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23. The first two categories are noted as being those where amendment may more readily be allowed (although that depends on all the circumstances and there may be occasions where to allow amendment would not be

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appropriate). The third category was noted to be more difficult for the applicant to succeed with, as the amendment seeks to introduce a new claim which, if it had been taken by a separate Claim Form, would or might have been outwith the jurisdiction of the Tribunal as out of time.

5 24. In ***Abercrombie v Aga Rangemaster Ltd [2014] ICR 204*** the Court of Appeal said this in relation to an amendment which arguably raises a new cause of action and therefore in the third category, suggesting that the Tribunal should:

10 " ... focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

15 25. In order to determine whether the amendment amounts to a wholly new claim and in the third of the categories set out above it is necessary to examine the case as set out in the original Claim to see if it provides a 'causative link' with the proposed amendment (***Housing Corporation v Bryant [1999] ICR 123***). In that case the claimant made no reference in her original unfair dismissal claim to alleged victimisation, which was a claim she subsequently sought to make by way of amendment. The Court of Appeal rejected the amendment on the basis that the case as pleaded revealed no grounds for a claim of victimisation and it was not just and equitable to extend the time limit. It said that the proposed amendment.

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25 "was not a rectification or expansion of the original claim, but an entirely new claim brought well out of time".

30 26. The Court of Appeal has commented that the extent of any new factual enquiry following an amendment application is one of the factors to take into account, in ***Evershed v New Star Asset Management Holdings Ltd [2010] EWCA Civ 870***. If the new claim is sufficiently similar to that originally pled, that supports the granting of the amendment where the "thrust of the complaints in both is essentially the same".

27. The onus is on the claimant to persuade the tribunal that it is just and equitable to extend time where a discrimination claim is otherwise outwith the jurisdiction, and the exercise of discretion is the exception rather than

the rule (*Robertson v Bexley Community Centre [2003] IRLR 434*), confirmed in *Department of Constitutional Affairs v Jones [2008] IRLR 128*.

28. No single factor, such as the reason for delay, is determinative when
5 considering whether or not to allow an amendment and a Tribunal should still go on to consider any other potentially relevant factors beyond those identified in *Selkent*, such as the balance of convenience and the chance of success: *Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278*, and *Gillett v Bridge 86 Ltd UKEAT/0051/17*.

10 29. Whether to allow amendment is accordingly a multi-factorial approach considering all material circumstances. Whether the claim within the amendment is in time or not is a factor, but an amendment application made in time may not be allowed in some circumstances – *Patka v BBC UKEAT/0190/17*. In *Vaughan v Modality Partnership [2021] IRLR 97* the EAT summarised matters and held that there was a balance of
15 justice and hardship to be struck between the parties.

(ii) Time limits

20 30. Section 123 of the Equality Act 2010 provides as follows in regard to time limits for discrimination claims such as those under sections 13, 19, 26 or 27 of that Act.

“123 Time limits

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

- 30 (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.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

- 35 (a) the period of 6 months starting with the date of the act to which the proceedings relate, 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.
- 5 (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.”

10 31. This provides in summary that the Tribunal has jurisdiction under the 2010 Act if a claim is commenced (firstly by early conciliation and then by presenting a claim form timeously thereafter) within three months of the act complained of, that being normally referred to as the primary period, but there are two qualifications to that, firstly where there are acts
15 extending over a period when the time limit is calculated from the end of that period, and secondly where it is just and equitable to allow the claim to proceed.

20 32. In ***Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298, [2010] IRLR 327***, the Court of Appeal stated the following:

25 “There is no principle of law which dictates how generously or sparingly the “power to enlarge time is to be exercised' (para 31). Whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case 'is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it”.

30 33. In Abertawe ***Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13*** the EAT stated that a claimant seeking to rely on the extension required to give an answer to two questions:

35 “The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was.”

34. What is just and equitable involves a broad enquiry having regard in particular to the relative hardships parties may suffer.

35. There is a further matter to consider, which is the effect of early conciliation on assessing when a claim was commenced. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). This process is known as 'early conciliation' (EC), with the detail being provided by regulations made under that section, namely, the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014. They provide in effect that within the period of three months from the act complained of, or the end of the period referred to in section 123 above if relevant, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place.

Discussion

36. The *Selkent* principles, as they have become known being the matters referred to in the case of that name set out above, are I consider a good starting point for consideration of whether or not to allow amendment. They are not exhaustive but provide a framework for consideration of the issues that arise. I shall deal with each remaining proposed new claim in turn.

(i) *Nature of amendment*

47. There is one aspect of the amendment that requires separate comment initially, which is in relation to what are referred to as procedural matters, and the second in the list of claims on page two of the amendment application. That is within the terms of the present claim. There is no need for that amendment. That was accepted by Dr Gibson.

48. For the remainder that are opposed I considered first of all the discrimination claims, and in that regard whether there was a causative

link with the original Claim Form, which refers only to unfair dismissal and breach of contract. There is in the Claim Form no reference to any protected characteristic or any claim under the 2010 Act. The various discrimination claims are all therefore entirely new claims. They are also very different claims in law to those that were in the claim form. They require different findings in fact. There are five separate protected characteristics the claimant seeks to rely on. Evidence would be required on at least some of them, both in respect of the claimant herself such as in relation to the religion or belief founded on, which she says is because she is a Catholic, and status as a disabled person under the 2010 Act, and also on any actual or hypothetical comparators for a claim of direct discrimination. Evidence would be required of the provision, criterion or practice founded on for the claim of indirect discrimination, and why that created a disadvantage. Evidence of the acts founded on which are said to amount to harassment related to one or more protected characteristic would be necessary as would evidence of the protected act and the reaction to that, here the dismissal, on which a Tribunal could find that that was because of that act so as to amount to victimisation. That would be required separately for each protected characteristic.

49. All of these matters of evidence would be liable to be very different, or entirely unnecessary, for the claims of unfair dismissal or breach of contract made to date, for which there is at best very little pleading, if any pleading for such issues. Whilst the requirement for pleading was described by the Court of Appeal in ***Parekh v London Borough of Brent [2012] EWCA Civ 1630*** as “minimal”, the EAT has described matters somewhat differently in two other cases, being those on which the respondent founds. In ***Chandhok v Tirkey [2015] ICR 527***, the EAT said:

"The claim, as set out in the ET1,serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1."

50. In ***Scottish Opera Ltd v Winning UKEAT/0047/09***, the EAT stated:

5 "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".

10 51. The amendment does not give adequate notice of such matters, and further detail would in any event be required. But that is all in the context of new claims which are, for reasons I shall come to, out of time. These are all factors strongly suggesting that the amendment should be refused. I also take into account the earlier case and its outcome both on jurisdiction and the merits. Whilst I do not consider that the principle of res
15 *judicata* operates, as the context is now a dismissal, there is nothing in the amendment to explain why the decision to dismiss was itself discriminatory, and on what basis for each protected characteristic.

20 52. There is however a potential for difference to that analysis in relation to the claim as to protected disclosures, as that is a claim within the ambit of the claim of unfair dismissal. It is not therefore an entirely new claim, as has been explained by the EAT in ***Pruzhanskaya v International Trade & Exhibitors (JV) Ltd UKEAT/0046/18***. There an unfair dismissal claim was commenced in time, and the claimant sought to add by amendment a claim under section 103A. The EAT said this in relation to that section:

25 "It does not create a separate head of complaint to which a separate time limit applies. It is an aspect of the right not to be unfairly dismissed under Part X of the 1996 Act. The Claimant had brought an in-time complaint of unfair dismissal; I do not think that alleging a further potential reason for dismissal, whether it be an
30 "ordinary" reason such as conduct or an "automatic" reason such as the making of a protected disclosure, involves a new complaint with a new time limit."

35 50. In a sense it is a subset of an unfair dismissal claim, in which there can be a finding of automatic unfair dismissal and where section 98(4) is not engaged if the reason is automatically unfair. Evidence would however be required as to what protected disclosure was said to have been made, when, how, to whom, and in what circumstances. To enable that evidence to be led some form of fair notice to the respondent would be required.

That was not provided in the amendment itself, and required to be explored in submission, which was done in accordance with the overriding objective. What I consider was material in this context is that the respondent accepts that in the letter setting out the disciplinary charges, on which the dismissal later operated, was an allegation in relation to the Chair Incident and that the timing of the photograph was dishonestly changed so as to fall after “whistleblowing”, which appears to be a reference to a disclosure said to have been made on behalf of the claimant on 17 September 2010 by an email from Mr Clark. That email was one of the documents provided by the claimant in an email on 15 November 2021, and may well have been seen by the respondent earlier in the disciplinary process. It appears to be a report of an alleged assault by a male member of staff on a younger female member of staff. It states what it states, and argument can be presented for or against it being a protected disclosure. It may not therefore require much if any additional investigation. The third matter in the claimant’s list of disclosures referred to was an email and discussion about the Chair Incident. The other aspects of the disclosures were not I consider set out with the same clarity. They include a form of diary entries, but what to take from them is not clear, recordings said to have been made over a period of about a year, where again what is relevant within them is not clear, and cards sent to the claimant which has already been litigated in the context of a harassment claim. The diary entries and recordings are of the order of ten years old where investigation of them, and the circumstances surrounding them, is liable to now be very difficult at best, and quite likely to be impossible.

Time limits

51. There is an issue raised over timebar. It is not a simple matter to address. It does not arise in relation to the section 103A claim for the reason explained in authority. It does however potentially arise in relation to the discrimination claims. They are outwith the terms of section 123 of the Act unless it can be determined that it is just and equitable to allow them to proceed. The relative hardships suffered by the parties is relevant in the

assessment of what is just and equitable for the purpose of section 123. There is clearly potential for hardship to a respondent in seeking to investigate and defend new claims made after such a length of time, and also in the context of there having earlier been a claim by the claimant against the respondent determined in favour of the respondent, with some of the issues in that claim found to have been outwith the Tribunal's jurisdiction on the basis of timebar. That prejudice is set against the loss of claims that the claimant wishes to pursue if the amendment is refused, but also where the claims of unfair dismissal and breach of contract are to proceed in any event, and where an earlier was addressed as outlined above.

52 The reason for the delay I did not consider sufficient. Firstly, if the claimant intended to await the result of the appeal that would suggest not making any claim at all, but she did. She decided that that claim should only be for unfair dismissal and breach of contract, with the advice she had. If she was to make a claim, including within that claim those claims she may wish to make was clearly important. It had been raised in the earlier case, where jurisdiction was an issue. Mr Clark is not a qualified lawyer, but is an experienced and senior trade union official. The Claim Form is set out clearly and professionally, indicating someone with experience and no little skill in doing so. Secondly, the appeal outcome was known in early May 2021. At that stage it was, or ought to have been, obvious that if discrimination claims were to be pursued quick action to seek to amend was necessary. Waiting for legal advice and support that never came was not appropriate. The claimant was able to frame the amendment herself, and there was no reason why that could not have been done in May 2021. It was left for a period of about six months. There was no mention of any change of the nature of the case in the Preliminary Hearing held on 17 May 2021.

(ii) *Timing and manner*

54. The application followed the earlier Preliminary Hearing, as just described, which set out a draft List of issues. No change to that draft list was suggested. The application itself was made relatively close to the

commencement date of the Final Hearing, being one calendar month from its first day, against a history of a lengthy list and an agreement that the case would be complex involving large amounts of documentation. That late making of the amendment leaves very little time for proper investigation of the factual matters that arise from it. The application is also lacking some important details, such that if it were to be allowed firstly further particulars would require to be given of the discrimination claims in particular, but also those aspects of alleged disclosures beyond the two emails I have referred to, so that the respondent had fair notice of the case it had to meet, and then secondly it be given time to investigate the same, and to respond in its own pleadings.. That would in turn almost certainly require the adjournment of the Final Hearing, and also when new dates are fixed to allow a longer period of time for that. Doing so would add to the delay in a claim that is already one nearing 18 months in age, and to the cost.

(iv) Analysis

55. The above are not exhaustive factors. I also considered the situation as a whole. It did not appear to me likely that the discrimination claims sought to be made by the proposed amendment had reasonable prospects of success. There were five different protected characteristics relied upon, for four different claims under different sections of the Act, but no explanation as to why a finding of direct discrimination was possible, what provision, criterion or practice was engaged for the indirect discrimination claim, or why any harassment, if that did occur, was related to each of those protected characteristics.. If one assumes that the protected act was the taking of the earlier claim that was known at the time of the Claim Form in these proceedings being presented, the Claim Form itself refers to a Review, that Review recommended an investigation, that investigation was undertaken after which there was then a disciplinary process. There must be some factual basis alleged from which a finding of discrimination can properly be made. In relation to the protected disclosures claims, the amendment does not set out specifically what they were, but in oral submission the claimant has referred to them largely being made in or around 2010, and therefore approximately ten years before the dismissal.

It did appear to me at the least surprising that any of those issues of alleged disclosures were not raised in the Claim Form itself, but that the Claim Form specifically stated that it was making claims of unfair dismissal under section 94 of the Employment Rights Act 1996, therefore not mentioning section 103A, and breach of contract. I take into account that Mr Clark was not a legally qualified representative, but the Claim Form is fully pled, and appears to have been prepared by someone familiar with Tribunal practice and procedure. There is also reference to the claimant having, at least during her employment, access to legal advice and to solicitors writing on her behalf in relation to a request to postpone a disciplinary hearing. I also take into account that the claimant had earlier litigated some issues against the respondent, and in respect of that all bar one was held to have been outwith the jurisdiction of the Tribunal. She had legal advice from a solicitor when presenting that Claim, and at the Preliminary and Final Hearings. The Preliminary Hearing included consideration of addressing allegations in the period August 2006 to July 2016, and issues as to the cogency of the evidence. It also addressed the failure to commence a claim earlier despite having access to trade union and legal advice, a comment about considering a claim for detriment under section 47B of the Employment Rights Act 1996 in 2017 which did not materialize, and that it seemed to the Judge that a conscious decision had been made not to raise proceedings. That having been her experience, she will, or ought reasonably to, have been aware both of the possibility of claims of discrimination or as to public interest disclosures, and time-limits to do so. Set against all that however is the fact that the respondent referred to whistleblowing in its letter setting out the disciplinary charges, which is I consider significant in this context.

56. No one factor is determinative. It appeared to me taking account of all the circumstances that the balance of hardship and prejudice favoured the refusal of the application to amend, save in two respects under section 103A as I shall come to. The prejudice to the claimant is that she would be unable to pursue several new and separate discrimination and other claims which in relation to those of discrimination are, on the face of it, out of time by a considerable period, and it appears to me not just and equitable to hold it within the terms of section 123. That is not

determinative but is I consider a strong factor against allowing the amendments in that regard. There is no real causative link with the Claim Form for those claims, it is in each case an entirely new claim, and one where there is hardship on the respondent in having to investigate and defend both an entirely new claim in each case. That causes material prejudice to the respondent. The prejudice to the claimant is very limited firstly as she has other claims she is making, and secondly as the discrimination claims do not I consider have other than little reasonable prospects of success at best. To allow them would involve material cost, and most likely material delay. Taking into account all the circumstances I consider that it is not in accordance with the interests of justice to allow the amendment for the discrimination claims.

57. In so far as the claim of protected disclosures is concerned, whilst that is within the ambit of an unfair dismissal claim and not out of time that is not determinative. The amendment raises new and discrete issues of fact late in the day, in a manner that would lead at least to a measure of increased cost. The greater the extent of the amendment allowed, the greater the potential for that cost to be higher, and for delay. It is liable to involve issues of cogency of evidence as was addressed in the Preliminary Hearing in the earlier claim, for all but two of the alleged disclosures where they are founded on an email. Each of the other aspects of the alleged disclosures are historic. They would not be easy to investigate given the passage of time, and the evidential deficit that is almost certain to result from that. These are all material levels of hardship for the respondent. No adequate reason for the delay in making this application has been provided, and no good explanation as to why the claims now made were not made timeously, and that could have been within the Claim Form, has been provided. I consider that it is in the interests of justice to refuse the application to amend in so far as it seeks to add new claims for discrimination.

58. The position is different I consider in respect of two of the alleged protected disclosures said to found a claim under section 103A of the Employment Rights Act 1996, which is in relation to an email sent by Mr Clark on 17 September 2010 which the claimant has provided a copy of,

and a disclosure said to have been made to Mr Cunningham in February 2011 in relation to the Chair Incident itself. The claimant alleges firstly that the first email from Mr Clark was sent on her behalf, secondly that it is a qualifying disclosure, and thirdly that it is a protected disclosure. It is the terms of the email that she relies on in that regard, and her position is that it is following that email that the Chair Incident occurred as a reaction to her doing so, and that that incident was in December 2010. That is a specific matter, germane to the disciplinary allegation, and one where the hardship and prejudice to the respondent is limited. The disclosure is within the terms of the email itself, and questions can be asked, and submissions can be made as to whether or not that is protected in law, or was so at the time it was made. The claimant alleges that she disclosed the Chair Incident in February 2011. I have not seen the email to Mr Cunningham, or have not been able to identify it at least from the material sent to me to date. It appears to me however that it is germane to the issue given the nature of the disciplinary allegations made against the claimant. The respondent itself appears to found on her descriptions of the Chair Incident as examples of dishonesty. That she told them about it on at least some occasions does not appear to be in dispute. It ought to be possible for the claimant or her advisers to find that email and send it to Dr Gibson. The claimant will require to provide the respondent with that email if she wishes to found on that alleged disclosure, and should do so as soon as possible. The same evidential matters as the first email, as to whether or not it is a protected disclosure, can then be addressed. I consider that that does not cause undue hardship or prejudice to the respondent, who have fair notice of what is said to be the but that to allow evidence of what the claimant says was also an oral discussion, given the passage of time of over ten years, would do. I have therefore restricted the permitted aspect of that alleged disclosure to the emails referred to.

59. The issues that then arise are not just whether there was a protected disclosure in each case, but also whether that was the sole or principal reason for dismissal. I consider that fair notice of that argument is given. The reason for dismissal is a matter that the claimant is entitled to challenge in her unfair dismissal claim under section 94 in any event. The onus of proof is on the respondent to prove the reason, and that it was

potentially a fair one, under section 98(1) and (2). Evidence that the reason was other than the respondent alleges is therefore potentially admissible. The reason for dismissal is a matter peculiarly within the knowledge of the dismissing officer Mr Wallace. If that reason was not solely or principally the alleged disclosures or one of them, the section 103A claim must fail. The claimant also alleges that an email entered in some form of diary was sent in October 2011 to the effect that a way be found to dismiss her. Whilst it is not at all obvious that, if there was a protected disclosure in September 2010 or February 2011, that would be the reason or principal reason for the dismissal in March 2021, I consider that there is sufficient to make it in the interests of justice to allow the amendment to be received, to that limited extent. I do so firstly given the authority of the EAT to the effect that adding a section 103A claim to one under section 94 is not a new claim, nor one to which time bar applies, secondly that the respondent accepts that in the letter setting out disciplinary charges the respondent itself referred to "whistleblowing" as the rationale for the claimant dating the Chair Incident in December 2010, which they regard as dishonest, and their position also that the Chair Incident itself was dishonestly described by the claimant as an assault on her when they claim it was consensual, and thirdly that in seeking to balance the respective hardships and injustices to the parties it is in accordance with the interests of justice to allow the claimant to found on two particular alleged disclosures made in writing, on that basis, for the purposes of the section 103A claim. That is so as the treatment in law of that claim is not the same as that for a section 94 claim. If there is a breach of section 103A the dismissal is automatically unfair. The test under section 98(4), assuming that that stage is reached, is entirely different. If there were to be a finding of automatic unfairness that may have consequences for liability, and be relevant for remedy, both as the remedy is not limited but also as the finding may affect issues such as contribution, or whether or not a fair dismissal might have occurred if there was a different procedure. In this particular respect I consider that the relative hardships and prejudices favour granting the amendment to this limited extent.

60. For the avoidance of doubt the other alleged disclosures on which the sought to rely are not within the amendment allowed, as to do so would lead to undue hardship and prejudice for the respondent which outweighs the hardship and prejudice to the claimant. The details of the alleged disclosures do not I consider allow investigation without such hardship and prejudice. The first in the list of disclosures is a set of recordings, but they go back to 2009 and would require substantial attempted investigation many years after the event. The content and relevance of the recordings is not clearly set out. The second matter is that which I have allowed. The third was allegedly reported in February 2011 but is related to the Chair Incident itself. The fourth is in relation to cards, the subject of the earlier claim when the claimant did not, at that stage, make any claim as to detriment under section 47B. The claim was dismissed. That is not conclusive, but does not favour allowing further enquiry in relation to those issues. The fifth and sixth disclosures are I consider vague assertions where identifying what is said to have been disclosed and why that is a qualifying and protected disclosure will lead to material evidential difficulties for the respondent. Save for the said two emails therefore I consider that the other disclosures alleged to have been made are not specified sufficiently clearly and made in circumstances which the respondent can properly investigate and respond to without undue prejudice and hardship. Those aspects of the section 103A claim sought to be added by amendment are therefore refused, as not being in accordance with the overriding objective.

61. I would also state for that avoidance of doubt that no claim is made, nor permitted to proceed, for any detriment on the ground of having made a protected disclosure, being any matter short of dismissal under section 47B of the 1996 Act as that is time-barred, and a different claim in law to that under section 103A, was one referred to in the earlier Preliminary Hearing, and one where the prejudice and hardship to the respondent outweighs that to the claimant.

Conclusion

62. The application for amendment made by the claimant in relation to adding claims under section 103A of the Employment Rights Act 1996, and claims under the Equality Act 2010, is therefore refused, save in relation to the alleged disclosure from the email dated 17 September 2010 and the email sent in February 2011, provided that the claimant produces that, which is permitted to proceed as the basis of the section 103A claim. The application in respect of procedural unfairness is refused as unnecessary.

63. As the claim is now to include one under section 103A of the Employment Rights Act 1996 the Final Hearing requires to be heard before a full Tribunal, unless parties agree otherwise. The administrative staff of the Tribunal will seek to make arrangements for that for the Final Hearing.

Employment Judge	S Kemp
Date of Judgement	17 November 2021
Date sent to parties	17 November 2021