



# REASONS

## Introduction

1. This is a preliminary hearing at which the issues are:
  - 1.1. To consider the Claimant's new schedule of claims (new schedule) generally.
  - 1.2. To consider whether or not any claims in the new schedule are amendments to the Claimant's claim form and if so whether leave shall be granted in respect of such amendments.
  - 1.3. Whether any of the claims in the new schedule were presented out of time and if so whether the time should be extended, taking into account the directions of Employment Judge Davies made on 27 November 2018 at paragraphs 3.b) and c) (the Davies order).

## 2. Case management

- 2.1. In the case management orders made by me on 16 April 2019 (the second CMO) I made directions relating to the manner in which the Claimant was to complete the new schedule. The purpose of the directions, together with an explanation as to how the Claimant should complete the new schedule, were included in the second CMO. In particular but without prejudice to the generality of the foregoing:
  - 2.1.1. Column entitled "nature of claim" – the Claimant will set out concisely the facts relating to each claim upon which the Claimant intends to rely, so that it is clear what happened to give rise to the claim and why it happened.
  - 2.1.2. Column entitled "provision of Equality Act 2010 (EA) to which the claim relates" - The Claimant will set out the provision to which the claim relates. If there is more than one provision of EA, each provision relating to the particular claim shall be set out as a separate claim and the Claimant shall consider whether the facts are the same, if more than one provision of EA applies. If the facts differ in these circumstances the Nature of the Claim shall reflect the difference.
  - 2.1.3. Column entitled "claim or amendment" – it is unlikely that this column will be used but if it is the Claimant will set out whether the matter is a claim arising from the Claimant's original claim form or arises subsequent thereto.
  - 2.1.4. In making her selection the Claimant should have regard to any possible time issues and/or amendments.
- 2.2. The second CMO also directed the Respondent to bring to the Tribunal on the day of the hearing its comments on the new schedule.

### 3. The law

The Tribunal has to have regard to the following provisions of the law:

#### 3.1. Amending the claim

3.1.1. As set out in the facts below there are several amendments to the Claimant's claim form and the new schedule. Parties and in particular the Respondent did not wish to have the right to respond to the Tribunal's analysis of the law where authorities are mentioned to which the parties themselves did not refer.

3.1.2. Whether or not to give leave to amend is a careful balancing exercise, having regard to the interests of justice and the relevant hardship to the parties – see *Selkent Bus Co Limited v Moore* [1996] ICR 836 EAT. Relevant factors to be taken into account include:

(a) The nature of the amendment – does it constitute entirely new factual allegations, such as to change the basis of the existing claim? Is the amendment minor or such a substantial alteration that it pleads a new cause of action? As it was put in *Transport and General Workers Union v Safeway Stores Limited* 0092/07 EAT, is the amendment a substantial alteration? That is, was it more than an addition to or substitution of another label for facts already pleaded? Or indeed in *Housing Corporation v Bryant* [1999] ICR 123, to what extent is the amendment likely to involve substantially different areas of enquiry than in the claim form? And is there linkage between the claim form and the amendment?

(b) Is the amendment out of time and if so would it be appropriate to extend time? In answering these questions the Tribunal must come to a definitive conclusion on the question of time – *Amey Services Limited v Aldridge and Others* 0007/16 EAT and whether or not time should be extended – see *Rawson v Doncaster NHS Primary Care Trust* 0022/08 EAT.

(c) The timing and manner of the application for leave to amend – was there a delay in making the application? Why was the application not made earlier? Why is the application being made now?

3.1.3. Amendments should not be denied purely punitively or where there is no real prejudice done by granting them - *Sefton Borough Council and Another v Hincks and Others* [2011] ICR 1357 EAT. The test of granting leave was described as the balance of prejudice in *Thomson v East Dunbartonshire Council and Another* 0049/13 EAT.

#### 3.2. Time

3.2.1. The time limit for bringing the proceedings the subject of the Claimant's claims is three months, starting with the date of the act to which the complaint relates (subject to Early Conciliation Rules)

or such other period as the Tribunal thinks is just and equitable (section 123(1) EA 2010). In relation to the exercise of “such other period” the Tribunal has a discretion. In exercising that discretion the Tribunal will have a multi-factorial approach – Rathakrishnan v Pizza Express (Restaurants) Limited [2016] ICR 283 EAT.

3.2.2. In determining that approach, important issues include:

(a) The length of and reason or apparent reason or explanation for the delay and the nature of any such reason – Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 CA.

(b) Whether the delay prejudiced the Respondent by preventing or inhibiting it from investigating the claim while matters were fresh – Southwark London Borough Council V Afolabi [2003] ICR 800 CA (Southwark).

(c) What steps were taken by the Claimant to obtain appropriate advice once she knew of the possibility of taking action, as approved in British Coal Corporation v Keeble and Others [1997] IRLR 336 (Keeble). This is one of the factors approved by Keeble when referring to other factors to be taken into account in circumstances where section 33(3) Limitation Act 1980 (section 33(3)) applies, but Southwark decided it was not obligatory to consider all the section 33(3) factors.

3.2.3. The onus is on the Claimant to show it is just and equitable to extend time – see Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434 CA and there needs to be material upon which the Tribunal can properly exercise its discretion – see Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.

3.2.4. Knowledge by a Claimant of the three month time limit is relevant – see Barber v Bernard Matthews Foods Limited 1501308/00 ET.

3.2.5. Giving incorrect advice may or may not be decisive in discrimination cases on questions of time – see Hawkins v Ball and Another [1996] IRLR 258 EAT. A claimant should not be disadvantaged because of the fault of advisors – otherwise a respondent would be in receipt of a windfall – see Steeds v Peverel Management Services Limited [2001] EWCA Civ 419 CA. This principle extends to trade union advisors – Wright v Wolverhampton City Council 0117/08 EAT. If incorrect advice is not the reason for the delay, because for example, time had already expired before advice was given, the giving of that advice would not be taken into account, because it has no causative effect on whether a claimant is out of time – Hunwicks v Royal Mail Group plc 0003/07 EAT.

3.2.6. Whether or not there is an ongoing internal procedure may be taken into account. There is no general principle that it is just and equitable to extend the time limit for this reason – a delay caused by a claimant awaiting completion of an internal procedure may justify an extension of time, but it is only one factor to be taken into

account – see *Apelogun-Gabriels v Lambeth London Borough Council and Another* [2002] ICR 713 CA.

3.2.7. It is also important to take into account when applying section 123 on the question of time section 123(3) EA which provides that conduct extending over a period is to be treated as done at the end of the period.

#### 4. The facts

The Tribunal having carefully reviewed all the evidence (both oral and documentary) before it finds the following facts (proved on the balance of probabilities):

- 4.1. The new schedule contains details of all the Claimant's surviving claims.
- 4.2. Claims numbered 1 to 15 are outside the normal three month time limit. Only claim number 16 is inside the three month time limit. Claims 1, 3, 4, 5, 6 and 7 and 10 and 11 were in the original claim. Therefore claims 2, 8, 9, 12, 13, 14, 15 and 16 are proposed amendments.
- 4.3. The Claimant says she was a member of USDAW and they advised her throughout the process and the advice was that she had to await the outcome of her grievances before making a claim to the Tribunal.
- 4.4. The Claimant says she complained to her employer of race discrimination from 2014.
- 4.5. The Claimant says she knew about discrimination laws, but at the outset she did not know about tribunals, because she relied on the Union for advice.
- 4.6. The Claimant continued to feel discriminated against in 2015 and 2016 and told the Union and continued telling them in 2017 and 2018.
- 4.7. The Claimant found out about the three month time limit in 2017. She says she read it somewhere.
- 4.8. The Claimant did fill in her claim form, in relation to which the Union helped her and which she presented on 1 October 2018.
- 4.9. In relation to claim 1 there are in fact three claims, namely, direct discrimination, discrimination arising from disability and failure to make reasonable adjustments. Potentially the complaints were to the effect that the Respondent gave jobs to English people in preference to the Claimant. The Claimant put in a grievance about this on 27 June 2014 which was heard on 16 September 2014 and the process was exhausted in November 2014.
- 4.10. In relation to claim 2 there are two claims, direct discrimination and failure to make reasonable adjustments. The complaints were to the effect that the Claimant was forced to work in the warehouse and an English person stayed in the office, though this person was new. The Claimant's grievance process ended in 2 October 2015, the Claimant having had a promise of a new contract and she also visited head office in July 2015.

- 4.11. In relation to claim 3 there is one claim for direct discrimination. The complaint was to the effect that the Claimant had short hours in comparison to English people and an agreement about overtime was broken. There was a grievance in August 2015.
- 4.12. In relation to claim 4, a direct discrimination case, English people got overtime. The Claimant did not. The outcome was unclear but the Claimant says the claim was formulated on 14 May 2015.
- 4.13. In relation to claim 5, a direct discrimination case and a case for failure to make reasonable adjustments, again favour was shown for overtime to English employees and the Claimant was given more tasks to do than English employees. Here the Claimant made a request to Human Resources for an outcome on 20 November 2015.
- 4.14. In relation to claim 6 there are claims of direct discrimination and harassment, where the Claimant alleges harassment by "Denise" but there is little or no particularisation of that claim. The Claimant raised a grievance which took place on 10 December 2015.
- 4.15. Claim 7 is a direct discrimination claim, the Claimant being asked to work more hours than English employees. The outcome was a complaint on 7 December 2015.
- 4.16. Claim 8 is a direct discrimination and harassment claim. The Claimant alleges harassment by monitoring, taking of photos and texts. A grievance took place on 16 April 2016.
- 4.17. Claim 9 the Claimant alleges direct discrimination and harassment. Again particularisation is unclear, but harassment is the theme, with shouting, humiliation, bad language and more monitoring, which the Claimant says crystallised on 9 April 2017.
- 4.18. Claim 10 is a direct discrimination claim and again related to the Claimant being given more tasks than English people. The Claimant says the matter came to a head on 16 July 2017.
- 4.19. Claim 11 is a direct discrimination claim, which again suggested that the Claimant had to work harder than English people and that the Respondent did not wish to listen to the Claimant's complaint which crystallised on 2 October 2017.
- 4.20. Claim 12 is a harassment claim, alleging bad language, fighting and assault, which the Claimant alleges crystallised on 11 November 2017.
- 4.21. Claim 13 is a direct discrimination claim. It appears to be about a two day holiday dispute which came to a head on 26 January 2018, the Claimant's grievance being ignored.
- 4.22. Claim 14, a harassment claim, alleges bullying at the beginning of shifts and a complaint about which nothing was done, crystallising on 19 March 2018.
- 4.23. Claim 15 is a harassment claim with bad language crystallising on 2 April 2018.
- 4.24. Finally claim 16 is a direct discrimination claim relating to inconsistent management, particularly over management of breaks and allocation of work and tasks alleged to have crystallised on 22 May 2018.

**5. Determination of the issues**

After listening to the factual and legal submissions made by and on behalf of the respective parties as appropriate:

5.1. The new schedule

This will be dealt with as part of the determination relating to leave to amend and time.

5.2. Leave to amend

5.2.1. Claim 2

Although is a “new” claim it is not so new as to constitute a substantial alteration of the original claim. There is a time issue, which will be dealt with below. It is true that if allowed this claim will involve the Respondent in a new line of enquiries, but on the other hand there is linkage between this and some of the other claims. On the balance of prejudice the Tribunal will allow this amendment, subject to what is said about time below.

5.2.2. Claim 8

This is a different claim to claim 2. It seeks to introduce the concept of harassment in a manner where caution must be exercised and is potentially more serious than anything in the existing claim, for example, in claim 6. The Tribunal is of the view that the amendment veers towards the substantial, pleading a new cause of action. It will almost certainly involve new areas of enquiry and there is no real linkage between it and the existing claim. Time would be dealt with, if appropriate, as with claim 2, were it not for the circumstances as set out above and on the balance of prejudice leave is not given to amend the claim by adding claim 8 and the application to amend is refused.

5.2.3. Claim 9

There are similarities between claim 9 and claim 8. It is another case of harassment which introduces shouting and bad language. Up to claim 9, in the order of the claims (although there are examples later) this claim 9 involves a new flavour to the case, which was not there in the claims we now have which do not require amendment. This amendment is substantial, there will be new areas of enquiry and there is no direct linkage to what has gone before. There is no need to consider time and the balance of prejudice falls against the Respondent if the amendment were to be allowed. Leave to amend the claim to add claim 9 is therefore refused.

5.2.4. Claim 12

Again bad language and even assault is new. There is a substantial amendment, requiring new enquiry and linkage with what has gone before is not strong enough. Again time

is not relevant because the balance of prejudice would move against the Respondent were the Tribunal to grant leave. Leave to amend the claim by adding claim 12 is refused.

5.2.5. Claim 13

Claim 13 is not a serious allegation in itself, but it is nevertheless a new factual allegation. Areas of enquiry would be limited. There is no linkage with what is there now. In this case however the balance of prejudice would fall against the Claimant if the amendment were refused so as to exclude claim 13 and leave is therefore granted to amend the claim by adding claim 13. Time issues will be dealt with below.

5.2.6. Claim 14

Unlike claim 8 this claim 14 goes further than claim 6. It is not dissimilar to claim 6 and in the view of the Tribunal, therefore, is not entirely new, so as to change the nature of the existing claim. There seems to be some linkage with claim 6 and whilst little or no prejudice exists either way, subject to time issues, the Claimant should be given the benefit and leave is given to amend the claim so as to admit claim 14, subject to time issues.

5.2.7. Claim 15

The claim is in the same bracket as claim 9 and for all the same reasons leave to amend the claim by adding claim 15 is refused.

5.2.8. Claim 16

This claim is consistent with the claims that remain. There are no time issues. It is relatively bland in the terms of the new schedule and covers areas similar to those covered by existing claims. It is not a substantial alteration. There is sufficient linkage and there will be little or no prejudice to the Respondent if the claim is left in. Leave is given to amend the claim so as to admit claim 16.

5.3. Time

5.3.1. We now have to consider claims 1, 2, 3, 4, 5, 6, 7, 10, 11, 13 and 14 which are all outside the three month time limit.

5.3.2. The relevant months and years are:

Claim 1 November 2014.

Claim 2 October 2015.

Claim 3 August 2015.

Claim 4 May 2015.

Claim 5 November 2015.

Claim 6 December 2015.

Claim 7 December 2015.



Claim 10 July 2017.

Claim 11 October 2017.

Claim 13 January 2018.

Claim 14 March 2018.

Claim 16 May 2018.

- 5.4. For claims 10, 11, 13 and 14 the question of continuity should be considered.
- 5.5. There is a substantial time gap between claim 7 and claim 10. For claims 1, 2, 3, 4, 5, 6 and 7 we must consider justice and equity considering whether to extend time.
- 5.6. The Claimant knew about discrimination from 2014 and she felt discriminated against when claims 1, 2, 3, 4, 5, 6 and 7 arose. Her knowledge of the time limit was too late to activate claims 1, 2, 3, 4, 5, 6 and 7 in time.
- 5.7. The Tribunal has a discretion when considering whether or not to extend time.
- 5.8. The Tribunal can find no satisfactory explanation for the reason for delay in issuing proceedings outside the time limit for claims 1, 2, 3, 4, 5, 6 and 7. The claims are old now. It is true that the Claimant took advice from her Union but the onus is on her to show that the advice inhibited her from making claims. She says that she was waiting for the internal process to be exhausted, but the Tribunal finds in this case that such a wait would have been unreasonable. The Tribunal finds that there is no material upon which it can decide that it was the advice of the Union that prevented her from issuing proceedings, particularly bearing in mind the nature of her allegations and her limited knowledge. Although the Tribunal accepts that the actual knowledge of the time limit came too late to assist her with claims 1, 2, 3, 4, 5, 6 and 7, too much water had flown under the bridge to allow a resurgence of those claims. We have briefly mentioned the need or otherwise for the exhaustion of internal procedures. We do not think that that is enough to save claims 1, 2, 3, 4, 5, 6 and 7 and they are dismissed on the basis that they are well out of time and that it is not just and equitable to extend time.
- 5.9. As for claims 10, 11, 13 and 14 that is a different story. They are relatively close together and they are comparatively young. Of course it is claim 16 that could save them as it is in time.
- 5.10. We therefore apply section 123(3) to claims 10, 11, 13 and 14 and they are accordingly in time.
- 5.11. We are, therefore, left with claim 10 - direct discrimination, claim 11 - direct discrimination, claim 13 - direct discrimination, claim 14 - harassment and claim 16 - direct discrimination.
- 5.12. There will be a case management hearing as set out in the Judgment.

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**Employment Judge Shulman**

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Date 6 June 2019

RESERVED JUDGMENT & REASONS SENT TO  
THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS