



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms E Mouat

**Respondent:** Network Rail Infrastructure Limited

**Heard at:** Manchester

**On:** 29 July 2022

**Before:** Employment Judge Sharkett

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Ms Ferber of Counsel.

## JUDGMENT

- (a) The claimant has permission to amend her claim and rely on Allegations **2;7;11;18 and 27**, set out in the Scott Schedule on the protected characteristic of disability .
- (b) Permission to amend is refused in respect of Allegations **12;15 and 22** set out in the Scott Schedule on the protected characteristic of disability.
- (c) Allegation 24 is a duplicate of Allegation 20 which is already included in the claim
- (e) Permission to amend is refused in respect of Allegations **1 and 2** on the protected characteristic of sex set out in the second Scott Schedule

## REASONS

1. This was the third Preliminary Hearing to consider the Claimant's application to amend her claim. The previous hearings had gone part heard due to the number of allegations raised and there being further allegations raised whilst

the application was part-heard. The claimant already has claims of unlawful discrimination on the protected characteristic of disability, and now seeks to introduce further allegations of disability discrimination and new claims on the protected characteristic of sex.

2. Ms Ferber for the respondent has produced two schedules of allegations that have now been agreed as containing all the relevant allegations. The respondent has agreed that the majority of the allegations are included in the claimant's particulars of claim but those that are highlighted in red are, it is argued, new claims which are the subject of this application.
3. In the hearing of 19<sup>th</sup> April 2022 I heard full submissions from Ms Ferber and the claimant. I heard further from them in respect of the additional allegations produced today.
4. The claimant seeks to rely on 35 allegations of unlawful discrimination on the protected characteristic of disability – nine of which the respondent say are not in the ET1 and will need permission to amend, and a further two allegations on the protected characteristic of sex, both of which will need permission to amend.

## **Submissions**

### Respondent's submission

5. Prior to hearing submissions today from the parties we have discussed again in detail the allegations and cross referenced these with the claimant's grounds of complaint and the additional allegations raised since the last hearing. We have therefore been able to establish that the claimant has now presented all the allegations she wishes to rely on and which of the allegations require the claimant to make an application to amend her claim.
6. For the respondent Ms Ferber submits that the respondent would suffer significant hardship if the application was allowed. She reminds the Tribunal that the claimant's claim form was submitted in May 2020 when she brought claims for expenses and discrimination on the protected characteristic of disability. It was not she says, until 22<sup>nd</sup> September 2021 that the claimant indicated an intention to include more allegations. It was not until 1 December 2021 that the respondent came to know what these additional allegations were. It is not reasonable, she says that the claimant should be allowed to hold on to information about which she now complains because at the time she was not sure whether this related to her disability or sex. She submits that there is a paucity of evidence in support of these claims and that it is unfair to put the respondent and those alleged to have carried out the treatment to have to not focus their minds two years later.
7. Ms Ferber submits that although the additional allegations refer to individuals already mentioned in her claim form, the addition of further allegations will require the respondent to obtain witness evidence from events that occurred

in excess of two years ago and were not matters brought to the attention of those individuals at the time. Ms Ferber reminds the Tribunal that the claimant submitted extremely detailed allegations in her grounds of complaint yet deliberately left some matters out for example in respect of the complaints about Sally Connelly that she now wishes to pursue.

### Claimant's Submission

8. The claimant accepts that in respect of Allegations 7,15,18 and 22, she knew that she should have included these in her original claim form and that to some extent she thought that she did. She accepts however, that she intended to exclude those claims that specifically refer to Sally Connolly as at the time she wanted to keep Sally on board in the hope that she would help her. It was for this reason that she did not include those allegations and that it was only when she received the outcome of her grievance on 22 May 2020 and saw what Ms Connolly had said about her that she decided she wished to pursue those additional relating specifically to her.
9. In relation to, Allegations 2, 11 12 24 and 27, the claimant submits that she was unaware of the circumstances of these complaints until she received the outcome of her grievance. She explained that she did not immediately seek to amend her claim at that time because she had been extremely distressed to find that she had been deliberately targeted by the HR Director and was shocked that a fellow colleague and professional could behave in that way. The claimant explained that but for the fact that following receipt of the outcome report she suffered a serious stress reaction and had a nervous breakdown, she would have made a formal complaint against the HR professionals involved, to their Regulator. In the event she had been admitted to hospital was not well enough to do so within the year allowed by the Institute as she remained under the care of the NHS psychiatric team and was only fit to return to work in August 2021.

### **The Law**

10. In summary, in exercising its discretion as to whether to grant leave to amend, the tribunal must have regard to the overriding objective to deal with cases fairly and justly. It must take account of all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The circumstances to be taken into account may vary according to each case but particular note should be made of the nature of the application itself i.e. whether it is minor or substantial, the relevant time limits for any new cause of action, the timing and the manner of the application. Although delay in itself should not be the sole reason for refusing an application the tribunal should nevertheless consider why it was not made earlier and why it is now being made. In exercising its discretion it is necessary to identify whether the amendment is:
  - a. Merely designed to alter the basis of an existing claims but without raising a new distinct head of complaint;

- b. Seeking to add or substitute a new cause of action but one that is linked to or arises out of the same facts as the original claim; or
  - c. would add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.
11. If the new claim arises out of facts that have already been pleaded in relation to the original claims, if it is just a question of adding a new label to already pleaded facts, the proposed amendment will not be subjected to scrutiny in respect of time limits but will be considered under the general principles applicable to amendments as summarised in **Selkent Bus Company Limited -v- Moore 1996 ICR 836**. If the proposed amendment falls within (b) or (c) above then time limits will be considered.
  12. If the proposed claim falls within (b) the Tribunal will decide whether it is in the interests of justice to allow the claim by balancing the injustice to the parties.
  13. If the claim is an entirely new claim that falls within (c) and is unconnected with the original claim as pleaded then the Tribunal must consider whether the new claim is in time and if it is not whether time should be extended to permit it to be made.
  14. Guidance Note one of the Presidential Guidance on general case management, at paragraph 12 states “if the claimant seeks to bring a new claim, the Tribunal must consider whether the new claim is in time”.
  15. However, at paragraph 11.2 Tribunals are reminded that even if no new facts are pleaded, the Tribunal must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
  16. Before any time limit issues are considered, it is incumbent on the Tribunal to consider the nature of the proposed amendment.
  17. In the case of **Abercrombie and Others -v- Aga Range Master Limited 2013 IRLR 953** the Court of Appeal determined that when considering a new allegation amendment, Tribunals should focus on:

**“not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry 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”.**

## Discussion and Conclusion

18. In reaching my decision on each of the new allegations I have carefully considered the content of the original grounds of complaint and the claimant’s submission, that whilst there are allegations she forgot to include in her original application, there are others that she was not aware of until she received the grievance investigation report on 22 May 2020. It is the claimant’s case that on receipt of this report she suffered a stress reaction which resulted in a period of poor mental health requiring hospitalisation and ongoing medication and support. I note that at paragraph 2.75 of the

respondent's amended grounds of response, the respondent records that it had purposely withheld sending the grievance outcome letter to the claimant until 11 September 2020, because of the claimant's poor health.

19. In submissions the claimant explained that she had only raised her intention to make an application to amend her claim in September 2021, because before this she had been too unwell. She explained that the preliminary hearing before Employment Judge Porter was the first opportunity she had to raise it. In accordance with the orders made at that hearing she submitted her further information together with an application to amend on 1 December 2021.
20. At the last hearing the claimant was invited to submit further medical evidence in support of her claim that she had been too unwell to amend her claim earlier. I have had careful regard to all the information before me in addition to the letter from her GP which was recently disclosed. I note that the claimant was absent from work due to ill health from 1 June 2020 to 31 May 2021. She appealed the outcome of her grievance that she received in September 2020 and an appeal hearing took place on 5 February 2021. Following a return to work on 31 May 2021 she commenced a further period of absence from 14 June 2021 to 19 July 2021. Whilst the letter from her GP confirms that the claimant suffered from moderate to severe anxiety it gives no indication that this would have prevented the claimant from making an application to amend her claim or made reference to the seriousness of her condition as described by the claimant in submissions. I note that following receipt of the grievance investigation report in May 2020, when it is her submission that she became too unwell to amend her claim, she was able to appeal against her grievance outcome. In the circumstances whilst I find that the claimant's poor mental health may have contributed to the delay in her making an application to amend her claim it was not the principle reason for the delay. However, delay is of course not the only issue to be considered in an application to amend and I must take account of all the circumstances including the delay and the balance of hardship or injustice in either allowing or refusing the application.

**Allegations relating to the claimant's disability.**

21. ***Allegation 2 Liz Zukowski (LZ) and Sue Pattison (SP) conspired collectively or individually to take steps to ensure the claimant's removal from the business by December 2019.*** Ms Ferber accepts that this allegation is made against SP in the ET1 but not LZ. It is clear from the ET1 that the claimant was unhappy with the manner in which she was treated by LZ, with references to people telling her that LZ was aware of and pleased with the way in which SP was managing her. These are matters therefore that have already been brought to the attention of the respondent and about which it will be required to gather witness evidence. It is the claimant's case that the actual involvement of LZ only came to her attention on receipt of the grievance investigation report and that was why LZ was not mentioned in the original pleadings. I find that in considering the balance of hardship LZ was the head of HR and the line manager of the alleged perpetrator, SP. The addition of LZ to the allegation will not involve significant additional enquiry

and the issues to be determined in respect of this claim will remain the same, albeit with consideration of two as opposed to one alleged perpetrator. In the circumstances I find the balance of hardship falls in favour of the claimant who would be denied the opportunity to pursue a legitimate claim. If the application was refused. The application in respect of this allegation is **allowed**.

22. ***Allegation 7 (4 October 2019) SP referred the claimant to occupational health but the only question she put on the referral form was the issue of C's flexible working and her commute to work; she did not ask the usual questions about what further reasonable adjustments could be put in place to support C.*** The claimant accepts that she should have included this allegation in her original claim form and cannot explain why she did not. Ms Ferber submits that to allow this additional allegation would require the respondent to obtain further evidence in what is already a complex case. I have had regard to the claimant's particulars of claim and in particular where she refers to events of 4 October 2019. In her particulars the claimant makes reference to SP deviating from the sickness policy and procedure in that there was no return to work interview or discussion about reasonable adjustments etc and she then goes on to say that (SP) did not feel it necessary to seek any occupational health input. I find that this is somewhat inconsistent with what the claimant now seeks to put forward. However, whilst it is clear that this particular allegation is not referred to, it is closely related to the nature of the complaints that the claimant raises about SP's alleged approach to reasonable adjustments for the claimant. I accept that this allegation has been raised by the claimant at a late stage, but have regard to the fact that applications to amend a claim can be made at any stage of the proceedings. I do not consider that the respondent would be overly burdened by locating the evidence needed, to respond to this allegation. It may well already have been identified as a relevant document for disclosure in this claim; and the person against whom the allegation is made will already be required to give evidence relating to closely related matters. Whilst the claimant may have already been aware of this incident prior to her submitting her ET1 I accept that her memory may only have been jogged on receipt of the grievance investigation outcome or the grievance outcome. The claimant, although a HR professional, is nonetheless a litigant in person with little or no experience in employment tribunal procedure. It is her submission that she raised her request to add additional allegations at what she considered to be the first opportunity at the PHCMO in September 2021. The respondent was therefore on notice from this time that an application for additional complaints to be included was to be made. Whilst for the reasons above I do not accept that the reason for the delay in making the application to amend was wholly attributable to the claimant's ill health, I find that this complaint is so closely linked to the complaints already before the Tribunal that the hardship to the respondent, is outweighed by the hardship to the claimant in being prevented from pursuing this claim. The application in respect of this allegation is **allowed**.
23. ***Allegation 11 (7 October 2019) that SP set up a surveillance system on C requiring Helen Darlington Sarah Robson and Agnes as well as a client to report back to SP if C was not at her desk when she was expected to be despite knowing that C had reasonable adjustments in place to allow***

**her flexibility to attend the office at different times and to work away from her desk in any meeting room that she could breathe in.** The claimant submits that she was not aware of this treatment until she received the grievance investigation report in May 2020. Whilst the claimant does not specifically mention a surveillance system being set up by SP she does make reference to others complaining about being asked about the claimant's whereabouts by SP. For the reasons set out above this allegation is closely linked to the manner in which she complains she was treated by SP who will already be required to respond to Allegation 9 which also deals with the claimant's visibility in the workplace. The application in respect of this allegation is **allowed**.

24. **Allegation 12 (end October 2019) that Occupational health recommended the respondent should arrange for peak quality air flow assessments to be done with the claimant but SP failed to do this.** It is the claimant's case that she did not know this until she received the grievance investigation report. It is not clear how this allegation differs from Allegation 15 which she accepts should have been in her ET1 and both of which are new allegations. **Allegation 15 is that SP refused to arrange to carry out an up-to-date air quality assessment saying that one had been carried out in 2018.** Whilst I find that the amendments I have allowed are closely aligned to claims already before the Tribunal, I find that these two allegations are somewhat different. There is no mention in the original particulars of a failure on the part of the respondent to carry out air quality assessments and the respondent will need to make both additional enquiry and adduce evidence from employees other than SP in respect of both of these allegations. Given the significant period of time that has lapsed both since the alleged failures and, in respect of Allegation 12, the claimant's purported knowledge of that failure. I find that the burden of hardship would fall on the respondent in obtaining evidence to respond to each of those Allegations, both in respect of documentary evidence and the recollection of those responsible for carrying out such assessments. Whilst the claimant was on notice from September 2021 that the claimant intended to make an application to amend her claim, I find the respondent could not have anticipated these two allegations and taken steps to preserve and obtain evidence in the interim. The application in respect of Allegations **12 and 15 is refused**.
25. **Allegation 18 that LZ and Sally Connolly (SC) failed to investigate C's grievances in a reasonable manner including C's request not to be left alone with SP up to January 2020, and from mid Jan 2020 failed to investigate C's grievances in a reasonable manner with a final outcome not being received until February 2021** There is clear reference in the original particulars to the claimant raising concerns with LZ and SC in October 2019, and her raising a formal grievance on 24 December 2019. There is also reference to the claimant asking not to be left alone with SP and how her requests to meet with the acting head of HR were ignored. There is further clear reference to her dissatisfaction with how her grievance was being handled. Whilst not specifically particularised in the manner the allegation is now presented it is to a large extent based on facts already presented. The respondent was on notice that the claimant was unhappy with the manner in

which she had been treated in respect of the grievance. LZ was the head of HR and would have been aware of the process followed. In the circumstances of this case I find it would be unusual if those concerned were unable to recall detail or documentary evidence of a grievance which only concluded after Tribunal proceedings had been commenced. The balance of hardship in respect of this allegation falls more heavily on the claimant if the application was to be refused and I **allow** the application.

26. ***Allegation 22 (Jan 2020) After a building tour around Square One Manchester with SC to show her all the areas where the claimant could not breathe, SC told C that she was too busy to conduct a risk assessment and reasonable adjustments assessment with her, treating her in a very dismissive and hostile way.*** The claimant accepts that she deliberately left this allegation out of her original complaint because she wanted to keep SC on side. Ms Ferber submits that this is not a good reason for leaving out a serious allegation and it has resulted in the respondent losing the opportunity to respond to the allegation when it was fresh in the mind of SC. I agree with Ms Ferber. The claimant decided that she wanted to pursue a complaint against SC when she read comments SC had made in the grievance investigation report in May 2020. Whilst I accept that she suffered a period of illness following that she has failed to raise this as a complaint until 1 December 2021, almost two years after the event. Whilst delay should not be the only reason for refusing an application such as this, I am mindful of the fact that this was a deliberate intention not to pursue at the time the claim was issued. This was not a case that the claimant did not know of the treatment or that she had forgotten. This is an allegation that is significantly out of time and in considering whether it would be just and equitable to extend time to allow the claim to continue I find it would not. The reason this allegation is not in the claim form is because the claimant chose not to include it and when she decided that she wished to pursue it she did not, notwithstanding that she had been able to appeal her grievance outcome and return to work. The burden in respect of this application will without doubt fall more heavily on the respondent and the alleged perpetrator who would be required to recall an event that occurred some two years prior to it being raised for the first time. The application in respect of this allegation is **refused**.
27. ***Allegation 24 SP marked C down in her final end of year performance rating as "Partially Achieved" approved by LZ and SC despite no performance issues having been raised, after she raised a grievance/because she had reasonable adjustments in place and was not in the office as much as others.*** Under the heading of Workplace Bullying and Harassment, Discrimination and Victimisation, in the particulars of claim the claimant complains that SP had marked her down as a "Partially Achieved" which she complains was a very twisted and unfair review. There is reference to it being unfair because she was criticised for lack of visibility and assessed on a period when she was on long term sick. There is also reference to SP ignoring the recommendation to reduce her performance targets by 20% as a reasonable adjustment. This is a duplicate of Allegation 20 which is accepted by the respondent as being included in the ET1. Allegation 24 is removed as already pleaded as Allegation 20



28. ***Allegation 27 LZ and SC treated C less favourably than Helen Darlington by denying C the opportunity to apply for the role of HRBP in high output, a role previously done by Colleen Sanderson (end May 2020)*** It is the claimant's case that she did not become aware of this fact until she received the grievance investigation report in May 2020. The claimant raised a number of examples in her ET1 of jobs that Helen Darlington and others had been given without interview. Whilst the claimant has delayed in seeking to amend her claim to include this allegation, I find that in reality it amounts only to another example of a claim that she already relies. i.e. that Helen Helen Darlington being treated better than her and the impact those actions had on her. The respondent will already have need to gather evidence of the recruitment process in respect of the role undertaken by Helen Darlington in January 2020, which the respondent already accepts is in the ET1. Consequently I do not consider it will cause hardship to the respondent to provide the additional information about the same comparator relied on in the existing claim. The fact that the claimant already has one claim of this nature before the Tribunal should not be a bar on her raising another. I accept that the claimant has delayed in bringing this application but I consider that it is in the interests of justice to allow this claim to proceed because the balance of hardship would fall more heavily on the claimant if it did not. The application in respect of this Allegation is **allowed**.

#### **Allegations of Sex Discrimination**

29. ***Allegation 1 – 17 December 2019 the claimant informed SP that she had been successful in securing the Systems Thinking Project Change role. Sue Pattison's only two responses were "which band was it?" and "how could I possibly do that role with all my commitments?"*** The claimant has raised a significant number of allegations against SP but all of these relate to alleged acts of discrimination related to her disability. This complaint is a new cause of action which is connected to the original claim only by reason of the fact it is brought against the same perpetrator. I have considered the timing of this application and the delay that has occurred in making the same. The claimant was aware of the alleged treatment when she submitted her claim but did not pursue it because she wasn't sure whether it was related to her sex or not. On receipt of the investigation report she decided that it was related to her sex but took no steps to include it as a claim until some two years after the alleged exchange. I repeat however that delay should not be the only reason to refuse an amendment. I find that this is not merely a relabelling of facts already pleaded in the claim form. This allegation raises a different head of claim based on new facts, albeit by the same perpetrator. I have none the less first considered whether it would be in the interests of justice to allow the amendment to be made in the interests of justice even though it is technically out of time In doing this I have considered the balance of hardship to the parties in either allowing or refusing the application. I have regard to the fact that the respondent only became aware of this allegation in December 2021. Two years have passed since then and, given the isolated nature of the allegation, the respondent is likely to experience significant difficulty in obtaining witness evidence. I find that it is not in the interests of

justice to allow this amendment because I am in no doubt that it is the respondent who would suffer the greater hardship if the application was to be allowed. The application in respect of this allegation is **refused**.

30. **Allegation 2 (March 2020), Within the investigation report dated May 2020, Helen Darlington informed Rupert Randhawa in March 2020 that there were sickness issues with the claimant as when Helen Darlington managed the claimant she was mostly on long term sick/maternity. The claimant accepts that she was sick in this period in 2017 but she will say that the reason for her absence was not continuous but was of 5-6 weeks when she was suffering from hyperemesis gravidarum. This was passed over to SP as a problem with the claimant two years later.** This is an entirely new head of claim from which I can see no causal link with the claim originally pleaded. It is the claimant's case that she only came to know this information when she received the grievance investigation report in May 2020. I am mindful that this is an application to amend a claim to include a new head of claim that is significantly out of time. Even after discussion with the claimant it is far from clear who is the alleged perpetrator in this allegation or what the treatment is that is relied on as being discriminatory. In claims where it is necessary to consider whether it would be just and equitable to extend time to allow a claim to proceed, the burden is on the claimant to show why this should be the case. The only reason put forward by the claimant is that she was not well enough until September 2021. I have already found that there is insufficient evidence before me to show that the reason for the delay in bringing this claim was the claimant's ill health, especially in light of the fact that she was able to pursue an appeal against her grievance during that time. Given the generality of the claim if this application was to be allowed I accept that the respondent would have difficulty knowing how to respond to it and that it would be difficult to obtain evidence of witnesses some two years later. I consider this would cause significant difficulty to the respondent and extend the time needed to hear evidence at the final hearing. Having regard to the overriding objective to deal with cases fairly and justly I find no reason why it would be just and equitable to extend time to allow this claim to proceed as an amendment to the claim. The application in respect of this allegation is **refused**.

### **Case Management Orders**

31. The respondent is granted permission to amend the response and must do so by no later than the amended date of **6 October 2022**

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Employment Judge Sharkett

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Date 20 September 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
23 September 2022

FOR THE TRIBUNAL OFFICE