Appeal No. UKEAT/0170/17/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 9 February 2018
Judgment handed down on 28 February 2018

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

MR D HERRY — APPELLANT

(1) DUDLEY METROPOLITAN BOROUGH COUNCIL
(2) HILLCREST SCHOOL AND COMMUNITY COLLEGE — RESPONDENTS

Transcript of proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DAMIEON HERRY (The Appellant in Person)
For the Respondent	MS SOPHIE GARNER (of Counsel) Instructed by: Dudley Metropolitan Borough Council The Council House Priory Road Dudley DY1 1HF

SUMMARY

PRACTICE AND PROCEDURE - Amendment

Reasons given for refusing an amendment should be relevant to the claim sought to be made. The Employment Judge had rightly identified the claim as based on a failure or refusal by the employer to comply with a request from him made in April 2016 to remove a warning from the Claimant's record. However the Employment Judge erred in considering delay from June 2015 when he first knew that it was on his record as material and, it seems determinative, in refusing the amendment. Insufficient reasons were given for taking this delay into account. Further the Employment Judge failed to give adequate or soundly based reasons for refusing the amendment under appeal when granting one in respect of which the relevant circumstances were materially indistinguishable. Appeal allowed.

The EAT in exercise of its powers under **Employment Tribunals Act** section 35 and having regard to all the relevant facts and guidance in **Selkent**, in circumstances in which the proposed amendment did not assert matters which would bring any claim within the scope of the **Equality Act 2010** sections 13, 26 or 27 permission to amend refused. **Miss Gillett v Bridge 86 Ltd** UKEAT/0051/17/DM considered. Cross-appeal/alternative reason to support the decision under **Equality Act 2010** section 123(4)(b) rejected.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. The Claimant was employed as a teacher from 14 January 2008 until 19 May 2015 at the Hillcrest School and Community College for which the Respondent was responsible. He has brought a large number of claims against his former employers. They are referred to by number. Reference to Claim includes reference in context to the related ET1. The current appeal is from the refusal by Employment Judge Woffenden ("the EJ") in a Judgment sent to the parties ("the Judgment") on 13 September 2016 to grant the Claimant permission to amend his Fourth Claim. The EJ refused permission for four of five proposed amendments. Following a Rule 3(10) Hearing, HH Judge Eady QC ordered the appeal to proceed only on the challenge to the refusal of the Second Amendment. The liabilities of Hillcrest School, the original Second Respondent, were retained by or transferred to Dudley Metropolitan Borough Council, the original First Respondent. The Council is now the sole Respondent to the claims.

2. At the hearing of the appeal before me the Claimant represented himself and the Respondent was represented by Ms Garner. The Claimant suffers from dyslexia, anxiety and stress. He contends that he is a disabled person within the meaning of the **Equality Act 2010** ("EqA"). That issue remains to be determined in the Fourth Claim. In relation to a different period of time the issue was determined against him at a Preliminary Hearing of his Second Claim. The claims were dismissed as were all claims in his First Claim. The dismissal of his First Claim led to a very substantial costs award against the Claimant. His appeal from the award was partially successful.

3. The Claimant presented a Third Claim in October 2015. On 21 January 2016 he presented a Fourth Claim. It is this Claim which the Claimant sought to amend. The Claimant

has presented a Fifth Claim. I am told that Claims Three and Four are to be heard together. The hearing is listed for fifteen days starting on 5 March 2018, less than a month away. I am also told that a Preliminary Hearing has been listed for 1 March 2018 at which the EJ will consider whether certain correspondence is without prejudice and cannot be relied upon.

4. The hearing before me was on the ground of appeal permitted to proceed by HH Judge Eady QC. The ET1 in the Fourth Claim provides:

> **"I was unfairly dismissed.**
>
> **I was discriminated against (no box categorising the type of discrimination was ticked)**
>
> **This is a claim for victimisation."**

The Claimant then summarised his complaint that he was not interviewed for the role of full time Design and Technology Teacher at Hillcrest School and Community College in October 2015. He stated:

> **"… I believe that I was not selected and interviewed … because I had previous[ly] brought employment tribunal claims against the respondent who I am currently working for as a part time youth worker."**

5. The Second Amendment sought to be added to the Fourth Claim and which is the subject of this appeal was:

> **"On the 29th April 2015 I made a FOI request to which the respondent responded to on the 4th June 2015 with information knowing [sic] to them to be inaccurate. I subsequently made a request directly to Mrs April Garratt on 4th April 2016 requesting to remove the information in relation to the oral warning that she had given me for not reporting my absence as it latter [sic] transpired through telephone records that I had reported my absence even though HR person who I was instructed to report to denied that I had."**

It became apparent during the course of the hearing before the EJ that there is a difference of opinion regarding the failure to which the warning relates. Was it, as the Respondent contended, failure to adhere to procedure and not completing a pink slip for a pre-arranged doctor's appointment at the beginning of January 2011 or was it for failure to telephone in to

notify that the Claimant would be absent. However that difference is not material to the issue before the Employment Appeal Tribunal ("the EAT").

6. The Claimant submitted his application for an amendment to the ET1 for his Fourth Claim on 22 April 2016. He wished to rely on the particulars given in the proposed Second Amendment as victimisation, harassment relating to disability and direct discrimination because of disability.

The Decision of the Employment Judge

7. In considering the proposed Second Amendment the EJ directed herself to consider and apply the guidance in **Selkent Bus Co Ltd v Moore** [1996] ICR 836. The EJ held at paragraph 43 that the facts were entirely new and that there was no discernable link between not being selected for a job and the facts alleged in the amendment, failing or refusing after being asked to do so on 4 April 2016 to remove a warning from the Claimant's record. Further it was said that the proposed amendment did not address the Claimant's alleged disability or contain:

> **"… any facts from which a tribunal could conclude that the treatment complained of had anything whatsoever to do with any such disability."**

8. At paragraph 44 the EJ held that although the relevant warning was imposed in June 2011 and the Claimant had been aware that it was on his record since June 2015. The alleged act of which he complains, the refusal or failure to remove the warning, took place sometime after 4 April 2016 when he requested it to be removed. The application for amendment was made on 22 April 2016 and was therefore not time barred. The EJ however considered that the delay in requesting the Respondent to remove the warning was inexplicable and was a relevant factor in deciding whether to exercise her discretion to allow the Second Amendment.

9. At paragraph 45 the EJ held that the delay between June 2015 and April 2016 connotes contrivance on the part of the Claimant. Further the EJ referred to observations made at paragraph 42 that permitting the amendment would lead to delay because further particulars would have to be provided. If they were not or if they were inadequate it was likely that there would be a strike out or deposit application.

10. The EJ concluded at paragraph 58 that the Second Amendment contained inadequately detailed claims with no discernable link to the original claim form. Whilst the claim in the Second Amendment was presented in time the EJ did not consider this as a sufficient determinant for permission to amend to be granted. The EJ considered:

> **"… The unexplained resurrection in correspondence of the issue of a warning which a respondent could reasonably conclude had long since ceased to be a matter of concern to the claimant in the light of his inaction since June 2015 is a relevant factor for me to take into account in my balancing exercise. …"**

Further the EJ considered that allowing the amendment would cause further delay and irrecoverable costs. Undertaking the balance of relative hardship and injustice the EJ concluded that greater hardship would be caused by granting the amendment.

11. One of the bases on which HH Judge Eady QC permitted the appeal from the refusal of the Second Amendment to proceed to a Full Hearing was that the EJ granted permission to make the Fifth Amendment when it was said on behalf of the Claimant that the relevant circumstances were materially indistinguishable. The EJ distinguished the Fifth Amendment by holding in paragraph 60 that it concerned a new matter which came into existence after the presentation of the Fourth Claim. The EJ held:

> **"… unlike in the case of the second amendment [the fourth] does not relate to a past event which the claimant has sought to revive by correspondence. The claimant could have (if he wished) simply brought a fresh claim. …"**

A The EJ held it would "therefore be the claimant who would be caused a greater injustice and hardship if I were to refuse it". The EJ observed that the claims which were the subject of the Fifth Amendment could be determined wholly separately from the original claim.

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The Grounds of Appeal

12. HH Judge Eady QC did not require the Claimant to produce amended grounds of appeal. The appeal was to proceed on the grounds that in refusing the Claimant's application in respect of the Second proposed Amendment the ET had failed to adequately explain its decision.

C

D 13. Although the proposed amendment concerned different facts from those in the existing Fourth ET1, it was the Respondent's response to the Claimant's request in April 2016 for them to remove the oral warning from his record, which was the subject of the claim advanced by the amendment. It was not the original imposition of the warning. It was therefore contended by the Claimant that, in light of the finding that his claim was not time barred there is a lack of clarity as to why the application in relation to the Second Amendment was rejected. Further the ET did not explain why it permitted the Fifth Amendment to be made to advance a claim which like the Second, was not time barred. It was said that the EJ appears to have focussed only on the delay in requesting the Respondent to remove the warning from his record. The Claimant had not delayed significantly in raising the failure to grant his request for its removal in ET proceedings.

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The Submissions on Appeal

H 14. The grounds of appeal in the Notice of Appeal drafted by the Claimant are phrased in headline terms. The basis upon which the appeal was to proceed is set out in the Order and

A Judgment following the Rule 3(10) Hearing. At the hearing before the EAT the Claimant raised a number of other matters which I will consider first as they were of obvious concern to him.

B 15. The Claimant contended that the EJ failed to pay any or any sufficient regard to his disability when dealing with his application to amend his ET1. He submitted that this affected her criticism of his delay after learning in June 2015 of the warning on his record before asking on 4 April 2016 for its removal. He stated that dyslexia, anxiety and stress which affect his C memory and his ability to deal with tasks. The Claimant submitted that the EJ failed to take into account medical reports to this effect which were in the documents before her.

D 16. Ms Garner stated that an Employment Tribunal in dealing with earlier claims had determined that the Claimant was not a disabled person. However counsel then fairly pointed out that the disabled status alleged in the current proceedings was in issue and remained to be E determined.

17. The EJ referred in paragraph 26 to the submissions of the Claimant that he had problems with his memory and the effects of stress. The Judgment shows that the Claimant asked the EJ F to read the reports on his health which were in the bundle.

18. For reasons stated below, as the EJ held that the claims included in the Second G Amendment in respect of failure or refusal in April 2016 to remove the warning from his record was presented in time, the delay after June 2015 before requesting its removal which the Claimant may have sought to explain by reference to his medical condition should not have been given particular weight. The relevant evidence to determine the proposed claim raised by H the Second Amendment would be acts or omissions after 4 April 2016.

19. Another matter in relation to which the Claimant expressed concern was the propriety of the original imposition of a warning. Ms Garner explained that the warning was originally given for a failure to adhere to absence reporting procedures for absences on 17 December 2010 and 4 January 2011. Employees were required to submit a pink slip in advance of pre-arranged medical appointments. On appeal from the warning the Claimant produced telephone records which showed calls on 17 December 2010 although after the due time for reporting sickness absence and without identifying the recipient within the school. Nevertheless the warning in respect of 17 December 2010 was removed but that for non-compliance with procedure for advance reporting of the pre-arranged medical appointment on 4 January 2011 remained.

20. In my judgment this difference of opinion in relation to the original imposition of the warning was not material to the basis upon which the EJ rejected the application to amend.

Does the Judgment of the Employment Judge set out sufficient reasons to explain why the parties won or lost. Is it compliant with *Meek v City of Birmingham District Council* [1987] IRLR 250?

21. It is well established that the Judgment of an Employment Tribunal must contain sufficient findings of fact and reasoning to enable a party to know why they have won or lost.

22. The Claimant contended that there are omissions in the reasoning of the EJ. He was seeking to advance three claims in the Second Amendment: victimisation, harassment and direct disability discrimination. There was no detailed consideration of each of the claims. The Claimant had alleged in his original ET1 that Mrs Garrett was victimising him for reasons including that he had brought proceedings in the Employment Tribunal and made complaints.

23. I invited the Claimant to look at the statutory ingredients of the claims of direct disability discrimination in **EqA** section 13, harassment under section 26 and victimisation under section 27. He drew attention to a document which post dated the hearing before the ET, a poor copy of which was inserted by the Respondent in their bundle for this appeal. In a document of 6 July 2017 prepared by the Claimant he asserted that Mrs Garrett, the headteacher of Hillcrest School, had taken action against him for reasons including that he had brought claims in the Employment Tribunal. This allegation was made in relation to her not interviewing him for the role of Design and Technology teacher in October 2015 and was included in the Fourth ET1. However the Claimant was unable to point to any statement in his proposed amendment, the original Fourth ET1 or the statement of 6 July 2017 in which he has asserted that the matter which he wishes to pursue by that amendment, the failure to remove the warning, was because of his disability or violated his dignity or created an intimidating hostile or degrading or offensive environment for him or was because he had brought proceedings in the ET.

24. The Claimant referred to paragraph 58 as the only section in the Judgment of the EJ in which she set out reasons for rejecting the Second Amendment. She relied upon "the unexplained resurrection in correspondence of the issue of a warning" as "a relevant factor for me to take into account in my balancing exercise".

25. The Claimant contended that the EJ erred in taking into account his not making a request before 4 April 2016 for the removal of the warning from his record. The EJ had decided that the claim advanced in the Second Amendment had been presented in time because it was made within three months of April 2016, the deadline he had set for his request to the Respondent to remove the warning. As the act or omission relied upon in the Second

Amendment occurred on 22 April 2016 as recognised by the EJ, any delay before that date was immaterial. Further if the EJ did not err in taking any earlier delay, she should have taken into account the medical evidence before her which showed that he was suffering from stress and dyslexia which affected his memory.

26. The Claimant contended that there was no material difference between the relevant factors which apply to the Second Amendment and those of the Fifth Amendment which was allowed to proceed. The new claims in both were presented in time and could have been the subject of separate proceedings.

27. Taking all relevant matters into account and having regard to the guidance in **Selkent** the Claimant contended that the EJ erred in failing to take into account all the relevant circumstances. He contended that the EJ failed to properly have regard to the paramount considerations of the relative injustice and hardship he would suffer by the refusal of the amendment.

28. Ms Garner contended that the Judgment of the EJ was sufficiently reasoned. She submitted that the Judgment has to be looked at as a whole. The EJ set out the matters relevant to the Second Amendment in paragraphs 18, 20, 25, 26. 29 and 42 to 45 before reaching her determination in paragraph 58.

29. Ms Garner submitted that the Claimant has failed to assert any connection between his disability, which the Respondent does not admit, and the warning or the failure to remove it. The extant warning was failure to adhere to the procedure for giving prior notice of a hospital appointment on 4 January 2011. This appointment was not related to dyslexia or stress. It was

for a leg injury. Further counsel suggested that the note of the warning was for reasons of record. It would not be seen by a future employer.

30. Ms Garner submitted that the EJ gave sufficient factual background to the proposed Second Amendment. The material facts were set out in paragraph 44. The warning was imposed in June 2011 and the Claimant had been aware since June 2015 that it was included on his record. It was said that he provided no explanation for the delay between that date and his request for its removal in April 2016.

31. Counsel submitted that the Claimant did not and has not explained or asserted that the failure to remove the warning is because of his disability or that it falls within the definition of harassment. Further it is said that the Claimant has not explained how he falls within the definition of suffering from a disability.

32. It was submitted that the EJ did not err in concluding that delay and irrecoverable costs would be occasioned by the amendment.

33. Taking all factors into account it was said that the EJ did not err in distinguishing the circumstances and consequences relating to the Fifth Amendment from that which is subject of this appeal. Ms Garner submitted that the EJ reached a conclusion which was open to her in refusing to allow the Second Amendment to be made.

34. If the EJ erred in reaching her decision, Ms Garner sought to uphold it by submitting that a claim in relation to the warning not being removed was premature having regard to **EqA** section 123(4)(b). Further if the EJ erred in refusing the application to grant permission to add

A the Second Amendment, counsel urged the Employment Appeal Tribunal to exercise its powers to decide the application. All the relevant facts were before the EAT, a Full Hearing of the existing claims was to take place. Fifteen days starting on 5 March had been set aside for the hearing. The Claimant's suggestion that a remitted application could be dealt with at a hearing on 1 March 2018 at which the issue of the admissibility of without prejudice material correspondence would be considered was said to be impracticable. The time allocated on that day would be fully occupied by the existing application.

Discussion and Conclusion

35. An ET exercises a discretion in deciding whether to grant an amendment. Guidance has been given on the factors to be taken into account are set out in the well known case of **Selkent Bus Co Ltd v Moore** [1996] ICR 836. Mummery P (as he then was) in the EAT emphasised that Tribunals 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."**

The EAT set out a non-exhaustive list of relevant circumstances:

(a) The nature of the amendment. Does it depend on existing or new factual allegations.

(b) Is the new complaint out of time.

(c) The timing and manner of the application. Amendments may be made at any time.

In this regard the EAT observed at page 844B:

> **"… 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. …"**

A The EAT concluded:

> **"… Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting the 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."**

B 36. A decision of an Employment Tribunal must be sufficiently reasoned to enable the parties to know why they have won or lost. The relevant principles are set out in the universally applied authority of **Meek**. An outline of relevant facts, law and reasoning should C be set out. HH Judge Eady QC considered that it was reasonably arguable that this EJ had failed adequately to explain her decision to refuse permission for the Second Amendment to be made.

D 37. The EJ set out her reasons for rejecting the Second Amendment in paragraph 58. The first factor the EJ referred to was that it contained:

> **"… new substantial inadequately detailed claims with no discernable causal link to the subject** E **of the original claim form. …"**

This reason fell within the first factor set out in **Selkent**. Further, on the facts before her the EJ did not err in stating that the Second Amendment asserted new facts which were not related to F the claim in the Fourth ET1.

38. Secondly the EJ stated that the new claims raised in the proposed Second Amendment G were made in time. However the EJ did not regard that as a sufficient reason for the amendment to be allowed.

H 39. The conclusion of the EJ that the claims in the Second Amendment were in time in my judgment was made on the basis that, as asserted in the amendment the acts relied upon took

place after 4 April 2016, and in particular after 22 April 2016 the deadline set by the Claimant for removal of the warning from his record. The Claimant did not assert that the claim was in time because this failure was a continuing act starting from June 2015 the date of his knowledge of the presence of the warning on his record. Nor did the EJ find that the new claims would be in time because they were continuing acts and therefore fell within **EqA** section 123(3).

40. The EJ did not err in holding that the claims were presented in time was not:

> **"… a sufficient determinant in and of itself of whether as amendment should be allowed. …"**

41. Against granting permission for the Second Amendment the EJ relied upon:

> **"… The unexplained resurrection in correspondence of the issue of a warning which a respondent could reasonably conclude had long since ceased to be a matter of concern to the claimant in the light of his inaction since June 2015 is a relevant factor for me to take into account in my balancing exercise. …"**

42. Having held that the claim was in time not on the basis of events before 4 April 2016 but on those after that date, in my judgment the EJ erred in failing to explain why delay from June 2015 in and of itself was relevant. The evidence relevant to the claims in the proposed amendment would be the existence of the warning on the record. Detailed evidence of why and how it was imposed would not be material. It is likely that its presence on the record could be dealt with by evidence of the written notification of its original imposition after the disciplinary hearing and of the outcome of the appeal hearing and of why a record of the warning is kept and remains on the record. The evidence material to the claims as proposed to be added would be of the reasons why the warning was not removed after the Claimant's request on 4 April 2016.

43. The EJ regarded delay by the Claimant from June 2015 to 4 April 2016 in asking for the removal of the warning as a material factor in determining whether permission for the Second

Amendment should be granted, I agree with the observation of HH Judge Eady QC in her Judgment on the Rule 3(10) application at paragraph 41, that:

> **"… The ET seems to have focussed only on the delay in making the request to the Respondents, but that was not - on the ET's own characterisation of the amendment - the issue; the Claimant had not apparently delayed significantly in raising the matter in the ET proceedings."**

44. In my judgment in light of her treating the claim in the Second Amendment in time, the act or inaction of which complaint is made is to be regarded as having taken place after 4th and by 22nd April 2016. Accordingly the EJ erred in treating delay in making a request for removal of the warning as material to the exercise of discretion whether to permit an amendment to make claims in respect of events after 4 April 2016. The EJ regarded such delay and resurrection of the issue of a warning as a feature distinguishing the Second from the Fifth Amendment. This difference was the principal factor identified by the EJ which led to the refusal of the Second Amendment and was therefore determinative. The EJ erred in doing so as the feature was based on an internal inconsistency of treatment of the date from which the EJ considered the Claimant should have asked for the removal of the warning and the date the EJ treated as that of the act or inaction which was the subject of the complaint in the Second Amendment.

45. The EJ further held that delay and irrecoverable costs would be occasioned by the Second Amendment. Balancing the relative hardship and injustice the EJ concluded that greater injustice and hardship would be caused to the Respondent if permission were given for the Second Amendment.

46. The application for the Fifth Amendment shared relevant features in common with the Second. The EJ recorded that the facts alleged were entirely new and amounted to three

different types of prohibited conduct only one of which, victimisation, is in the original claim. There was no link between what was alleged in the original claim and the facts alleged in the amendment. The EJ held:

> **"… Once again the proposed amendment does not address the claimant's alleged disability or any facts from which a tribunal could conclude that the treatment complained of had anything whatsoever to do with any such disability."**

47. The EJ granted the application by the Claimant to make the Fifth Amendment. As with the Second, the EJ observed that that amendment concerns new substantial claims with no discernable causal link to the subject matter of the original claim form. The claims are not out of time. However the EJ observed:

> **"… unlike in the case of the second amendment [the Fifth Amendment] does not relate to a past event which the claimant has sought to revive in correspondence. The claimant could have (if he wished) simply brought a fresh claim. …"**

The EJ therefore concluded that in balancing the relative hardship and injustice by granting or refusing the amendment "it would therefore be the claimant who would be caused a greater injustice and hardship if I were to refuse it". Further, the EJ observed that a fresh claim could be determined separately from the original claim.

48. I accept the submission by the Claimant that the EJ has not explained why she treated the applications for the Second and Fifth Amendments differently when, properly analysed, the factors on which she relied in each case were materially indistinguishable.

49. As rightly submitted by Ms Garner I have read the Judgment as a whole to ascertain whether other paragraphs contain any other explanation for the difference in treatment of the applications for the Second and the Fifth Amendments, or for the conclusions reached in paragraph 58. Paragraphs 43 to 45 set out features of the Second and 53 to 55 those relating to

A the Fifth. In relation to both the EJ observed that the amendment does not address the Claimant's alleged disability or any facts from which a Tribunal could conclude that the treatment complained of had anything whatsoever to do with any such disability. This appears in paragraph 44(a) for the Second Amendment and paragraph 53(a) for the Fifth.

B

50. Reading the Reasons of the EJ as a whole and, as rightly submitted by Ms Garner, in a common sense way, in my judgment she failed to state why permission was not given for the

C Second Amendment when it was for the Fifth. The part of the Judgment dealing with the Second Amendment does not comply with the requirement to explain why the application failed. It does not comply with **Meek v City of Birmingham District Council** [1987] IRLR

D 250 in this regard.

51. Ms Garner contended that the refusal of the application for permission to make the

E Second Amendment should be upheld on the ground that a claim in respect of failure to remove the warning is premature. Counsel relied on **EqA** section 123(4) which provides:

> **"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."**

F

52. It was submitted by counsel that having waited nine months before requesting the

G removal of the warning it was premature to contend that there had been a failure to remove it when less than two weeks had elapsed between the 4 April 2016 request and making the application on 22 April 2016 to complain of failure to do so.

H

53. There may be some force in the contention of Ms Garner that the timing of the claim in the Second Amendment would fall within **EqA** section 123(4). However, having regard to the application for the amendment being made on the expiry of the deadline for reply by the Respondent, although arguable, it is by no means clear that the claim in the Second Amendment is premature. Accordingly this ground for upholding the decision of the EJ, or if it is to be so regarded, the cross-appeal, is dismissed.

54. The appeal succeeds.

Disposal

55. I understand that dates have been allocated for the hearing of the claims in the ET1s. An application to consider the inclusion of without prejudice correspondence is to be heard at a one-day Preliminary Hearing on 1 March 2018.

56. The Claimant has suggested that if his appeal were to succeed the application to amend should be remitted for reconsideration at the hearing on 1 March 2018.

57. Ms Garner submitted that if the appeal were to succeed, in accordance with the overriding objective this Employment Appeal Tribunal should exercise its powers to reach a decision on whether to allow the Second Amendment to be made.

58. I have regard to the fact that a date has been set for a multi-day hearing of the Claimant's claims in his Third and Fourth ET1. Further, I am told by Ms Garner that the existing application on 1 March 2018 is likely to occupy a full day and that there would be no time for this application for permission to amend to be taken on that day. I consider that this

Employment Appeal Tribunal is in as good a position as would be EJ Woffenden to decide the application to amend. The parties have put before me the matters relevant to the application insofar as they amplify those set out in the Judgment of the ET. This court will decide the application for permission to amend the Fourth ET1 to add the Second Amendment.

59. The terms of the Second Amendment are set out earlier in this Judgment as is the timetable of events and the relevant facts. On 6 June 2011 the Claimant received a warning for breach of procedure in failing to complete and give to the Respondent a pink slip notifying that he would be absent for a prearranged medical appointment on 4 January 2011. The oral warning was to remain on the Claimant's file for six months. On 13 September 2011 the appeal from the oral warning was dismissed.

60. On 29 April 2015 the Claimant made a Freedom of Information request of the school for information including his employment records. On 4 June 2015 the school responded sending him documents which included a record of the oral warning given in 2011.

61. On 21 January 2016 the Claimant issued the Fourth Claim. In the claim he alleged victimisation in not being interviewed for a full time teacher role in the school because he had made complaints against the Respondent in the Employment Tribunal.

62. On 4 April 2016 the Claimant made a request that the school remove the oral warning and information relating to it from his record. The request was repeated on 20 April 2016. He set a deadline of 22 April 2016 for a response from the school. No response was received. On 22 April 2016 the Claimant made an application to amend the Fourth ET1 by adding the Second Amendment.

63. In exercising my discretion whether to grant the application to make the Second Amendment I bear in mind that the Claimant is acting in person. There was evidence before the EJ that at times material to the application to amend he suffered and suffers from dyslexia. He also suffered from stress and anxiety and stress which affected his memory.

64. In exercising the discretion whether to permit the application for the Second Amendment the paramount considerations are the relative injustice and hardship involved in refusing or granting the amendment. As explained in **Selkent** at page 844C, 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.

65. In accordance with **Selkent** I consider the relevant circumstances to be taken into account. The nature of the amendment is to bring a claim that the failure or refusal to remove a warning from the record of employment of the Claimant constitutes a breach of the **EqA** in three respects. It is said to be victimisation, harassment and direct disability discrimination. The Fourth ET1 which the Claimant seeks to amend, states:

> **"This is a claim for victimisation."**

The box for discrimination is ticked but a box asking for the type of discrimination is not ticked. The details of the claim include the following material assertions:

> **"I applied for the role as a full time Design and Technology teacher at Hillcrest School and Community College …**
>
> **I believe that I was not selected for and interviewed [for] the position as a Design and Technology teacher which I previous[ly] occupied was because I had previous[ly] brought employment tribunal claims against the respondent who I am currently working for as a part time youth worker."**

66. The subject matter of the proposed Second Amendment is not connected with the existing claim save that the Claimant asserts that the same person, Mrs April Garratt the

principal of the school, is responsible of each act or failure to act of which complaint is made. The hearing of the claim in the Second Amendment would require additional evidence which will not be given in support of the existing claim. It is a substantial alteration pleading new facts and different causes of action.

67. I asked the Claimant to look at the statutory provisions governing each of the three ways in which he seeks to advance the new claim in the Second Amendment. **EqA** provides:

> **"13. *Direct discrimination***
>
> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**
>
> **…**
>
> **26. *Harassment***
>
> **(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of -**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
>
> **27. *Victimisation***
>
> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because -**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act -**
>
> **(a) bringing proceedings under this Act;**
>
> **…**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act."**

Despite giving him frequent opportunities to do so the Claimant was unable to tell me how the claims he wished to pursue by the Second Amendment constituted direct disability discrimination, harassment or victimisation within the meaning of the **Equality Act 2010**.

68. The Claimant frankly admitted that none of the documentation submitted by him in support of his application for the Second Amendment nor the Amendment itself contained the necessary statutory ingredients to establish the new claims. In order to be in a position to claim direct discrimination, the Claimant would have to show that the Respondent failed or refused in April 2016 to remove the record of a warning given in 2011 because he is a disabled person and that in so acting treated him less favourably than they would a non-disabled person. The facts asserted by the Claimant that he is a disabled person and that his request for removal of the warning has not been complied with do not support a contention of discrimination because of disability.

69. It may be just arguable that failing or refusing to remove the warning from his record had the effect of creating a degrading or humiliating environment for the Claimant. However he has not made this assertion in the Second Amendment. Even if that assertion could be implied no material is advanced from which it could be concluded that the failure or refusal by the Respondent to remove the warning from his record was related to the Claimant's disability.

70. Although the Claimant considers that the principal of the school, Mrs Garrett was waging a campaign against him, he does not assert in the Second Amendment as he did in the Fourth ET1 that the act or inaction of which he wishes to complain was because he had brought proceedings under the **EqA**.

71. I take into account that the claims made in the Second Amendment were made within the relevant three month time limit. They could have been made in a separate claim. The Claimant is not to be penalised for not doing so. That an application to amend is made in

A respect of a claim which is made in time is a relevant but not determinative of whether permission to amend should be granted.

B 72. The third consideration referred to in **Selkent**, the timing and manner of the application, favours the Claimant. He did not delay in making his claim after the deadline he had set the Respondent for complying with his request. Unlike the EJ I do not consider that any delay between June 2015 when he became aware that the warning was on his record, and April 2016 C when he requested its removal is of itself material.

73. It was submitted by counsel for the Respondent that permitting the amendment to be D made would require evidence of events both in 2011 when the warning was imposed and in 2016 when it remained notwithstanding the request to remove it. In my judgment no substantial evidence would be required of events in 2011. Since the complaint made is of failure or refusal E to remove the warning in 2016, it is evidence of reasons for not doing so which would be relevant. The reason why the warning was imposed would not be in issue and its imposition could be dealt with shortly by reference to documents evidencing the outcomes of the disciplinary and appeal hearings. If the claims in the Second Amendment were permitted to F proceed further time would be needed for the Full Hearing. Alternatively, if permission for the amendment were granted, it may be possible for the new claim to be heard with those the subject of the Fifth Amendment which the EJ held at paragraph 60 could be determined wholly G separately from the original claim.

74. Additional costs would be incurred if permission to make the Second Amendment were granted. Further, it would be highly undesirable if the granting of the amendment were to delay H the hearing of the claims in the Third and Fourth ET1s.

75. In exercising my discretion whether to give permission for the amendment I also take into account that the EJ has given permission for the Fifth Amendment to be made. I have found that the EJ erred in relying on a factor of little or no relevance to the claims in the Second Amendment to treat the Second Amendment differently.

76. I have considered whether, if permission for the Second Amendment would otherwise not be granted it should be granted because permission to make the Fifth Amendment has been given by the EJ. Recognising that the Claimant may understandably feel somewhat aggrieved by such difference in treatment I have concluded that the application for the Second Amendment must be judged on its own merits.

77. Factors in favour of granting the application to make the Second Amendment are that the claim to which it relates was not made out of time. There was no delay in applying for permission to make the Second Amendment after the deadline set by the Claimant for removal of the warning from his record had passed. Secondly, whilst additional evidence would be needed for hearing the new claims it should be fairly limited in scope. It would be a case management decision for the EJ to determine whether claims made in the Second Amendment would be heard with those listed for hearing or together with the claims in the Fifth Amendment if they are to be heard separately.

78. In my judgment the additional costs which would be incurred by adding the claim the subject of the Second Amendment are not a substantial factor against its grant. The Claimant could have advanced the claims in a separate ET1 with no or no significantly different cost consequences.

79. However in my judgment the facts and matters set out in the Second Amendment do not support any of the claims sought to be pursued. As explained and as agreed by the Claimant in the course of the hearing before me the proposed amendment does not contain assertions of fact which could fall within **EqA** section 13, to establish direct disability discrimination, section 26 to establish harassment or section 27 to establish victimisation. Neither, despite being given ample opportunity to do so in the course of the appeal hearing, was the Claimant able to explain how his allegations in relation to failure to remove the warning could fall within those provisions.

80. It is not the function of this court in deciding whether to grant an application to amend an ET1 to decide upon the merits of the claim. If a party considers a claim to be unarguable they may apply to strike it out. If it has little prospect of success they can apply for a deposit order. The Employment Appeal Tribunal has considered that the merits of an amendment may be relevant in deciding whether to grant an amendment. In **Miss Gillett v Bridge 86 Ltd** UKEAT/0051/17/DM 6 June 2017 Soole J observed:

> **"26. … Nor do I accept that as a matter of principle the Employment Tribunal must never take account of its assessment of the merits of the claim. *Selkent* refers to "all the circumstances", and *Olayemi* is an example where the prospects of success "did not appear good" and were taken into account.**
>
> **27. … If and to the extent that HHJ McMullen QC's observations in *Woodhouse* support a bar against consideration of merits, save where the proposed new claim is "obviously hopeless", I respectfully disagree."**

81. In my judgment if a proposed claim is in the words of HH Judge McMullen QC "obviously hopeless" that is a consideration which affects the assessment of the injustice caused to a Claimant by not being able to pursue it. Nothing is lost by being unable to pursue a claim which cannot succeed.

82. The allegations made in the proposed Second Amendment do not contain the assertions necessary to bring claims within the **EqA** sections 13, 27 or 28. Nor was the Claimant able to make good this deficiency in oral submissions. He could not explain how the allegations could fall within the statutory provisions applicable to his claims. The allegations made in the Second Amendment do not even get to the starting blocks of sections 13, 26 or 27.

83. In deciding whether to grant the application to make the Second Amendment I have regard to the paramount consideration of the relative injustice and hardship involved in refusing or granting the amendment. I recognise that the Claimant will consider it an injustice and a hardship if he cannot pursue his claims in respect of the failure or refusal of the Respondent to remove the warning from his record. However in the particular circumstances of this case in which not only could the new claims not succeed but the allegations do not raise the matters relevant and necessary to bring them within the scope of claims for direct discrimination, harassment or victimisation, the Claimant would suffer no injustice or hardship by not being able to pursue them. Balancing the factors for and against its grant, permission to make the Second Amendment is refused.

Disposal

84. The appeal is allowed and the decision of Employment Judge Woffenden to refuse permission to make the Second Amendment to his claim of 21 January 2016 is set aside.

85. In exercise of its powers under section 35 of the **Employment Tribunals Act 1996** the application by the Claimant to make the Second Amendment is refused.