Case No: 1303155/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr J. Sidhu**

Respondent: **Our Place Schools Limited**

Heard at: **Birmingham** **On:** **21 January and 12 February 2019**

Before: **Employment Judge Wynn-Evans**

Representation
Claimant: In person
Respondent: Mr D Bansal (solicitor)

JUDGMENT ON AN OPEN PRELIMINARY HEARING

Judgment having been sent to the parties on 21 February 2019 and written reasons having been requested by the Respondent at the hearing on 12 February 2019 in accordance with rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following written reasons are provided derived from the oral judgment delivered at the preliminary hearing.

REASONS

Introduction and issues

1. In these proceedings the Claimant brings complaints of unlawful discrimination on grounds of race and religion as well as claims for arrears of pay and other payments. An Open Preliminary Hearing was listed to determine, in addition to case management generally, the issues set out in the order of EJ Camp set out in the tribunal's letter to the parties of 16 August 2018. This hearing was conducted by Employment Judge Wynn-Evans sitting alone on Monday 21 January and Tuesday 12 February 2019 and the tribunal's decision is as follows.

2. The issues to be determined were:-

2.1. are all of the complaints the Claimant wishes to pursue contained within the claim form and in relation to any which are not should the Claimant be given permission to amend ("the amendment issue").

2.2. whether any part of the Claimant's claim has no reasonable prospect of success and if so whether pursuant to rule 37 all or any part of the claim should be struck out ("strike out issue").

2.3. whether any specific allegation or argument forming part of the Claimant's claim has little reasonable prospect of success and if so whether, pursuant to rule 39, the Claimant should be ordered to pay a deposit (and if so how much) as a condition of continuing to advance any such specific allegation or argument ("deposit issue").

2.4 (as part of 2.2 and/or 2.3) but also potentially in its own right) were all of the Claimant's complaints presented within the relevant time limits (including whether time should be extended on a "just and equitable" and/or "not reasonably practicable" basis ("the time limits issue").

3. The Claimant, who gave evidence concerning the issues to be determined in this hearing, represented himself and the Respondent was represented by Mr Bansal, solicitor. I had before me an agreed bundle, the Claimant's statement and the Respondent's skeleton argument. The one day listing proved to be ambitious, despite the tribunal sitting late, and the hearing was continued into a second day.

4. I remind myself of the relevant statutory provisions which I read into this judgment and with which the parties are familiar from the discussions during the hearing and the respondent's skeleton argument.

5. With regard to the applicable time limits the relevant provisions are set out in section 123 of the Equality act 2010 and more specifically in its section 123(1) and section 123(3)(a):-

(1… proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

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

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

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

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

6. With regard to the strike out issue the relevant provisions are at rule 37 of the Employment Tribunals Rules of Procedure:-

Striking out

37.*—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

7. With regard to the deposit issue the relevant provisions are at rule 39 of the Employment Tribunal Rules of Procedure:-

Deposit orders

39.*—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

Case law guidance

8. In determining the various matters before me and with reference to the principles which were drawn to my attention by the respondent I remind myself of the following case law guidance.

9. In relation to the power to strike a claim out on the basis of no reasonable prospect of success, it is clear that the tribunal must form a view on the merits of the case and conclude that the claim has no reasonable prospect of success if this power is to be exercised. The question is not one of the balance of probabilities – it is of no reasonable prospects of success and the case law guidance is particularly clear in relation to discrimination complaints which are fact sensitive. *Anyanwu v South Bank Students Union* [2001] ICR 391 makes clear that, where there is an allegation of discrimination and clear dispute on the facts, the power to strike out will only be exercised in exceptional circumstances and emphasises the importance of not striking out discrimination cases save in the most obvious cases as they are generally fact sensitive and require full examination to make a proper determination. Upon initial consideration a tribunal is required to consider the arguability of every claim (*Eastman v Tesco Stores Ltd* [2012] All ER (D) 264. As was made clear in *Balls v Downham Market High School and College* [2011] IRLR 217, the tribunal must first consider whether, on a careful consideration of all the available material, the claim has no reasonable prospects of success. The test is not whether the claim is likely to fail or that it is

possible that it will not is it one which entails considering whether the respondent's written and/or oral submissions are likely to be established. It is necessary to take the claimant's case "at its highest" i.e. to assume that the Claimant will make good his factual allegations.

10. With regard to the making of a deposit order it was clarified in *Van Rensburg v Royal Borough of Kingston-upon-Thames* that the test of little reasonable prospect of success is plainly not as rigorous as the test as to whether a claim has no reasonable prospect of success but that the tribunal must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response. The purpose of a deposit order, as was confirmed by the EAT in *Hemdan v Ishmail and or* [2017] ICR 486 is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of cost if the claim failed.

11. With regard to time limits, the power to extend time on a just and equitable basis is the exception rather than the rule as was made clear in *Robertson v Bexley CC* [2003] IRLR 434. The requirement is that the extension should be just and equitable (*Pathan v South London Islamic Centre Limited* EAT 0312/13). It is also clear from the case law, including *Southwark London Borough Council v Afolabi* [2003] ICR 800, which I drew to the attention of the parties, that, whilst the checklist in section 33 of the Limitation Act 1980 provides a useful guide for tribunals, it should not be followed slavishly – it was made clear that there are two factors which are almost always relevant – the length of and reasons for the delay and whether the delay has prejudiced the respondent for example by preventing it or inhibiting it for investigating the matters while fresh. That said, the factors set out in the Limitation Act are, for completeness, the length of and reasons for the delay, the extent to which cogency of evidence is affected by the delay, the extent to which the party sued has cooperated with requests for information, the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

12. I also drew to the parties' attention the decisions in *Wright v Wolverhampton Council* EAT 0117/08 - where the EAT held that the discretion to extend time should be granted where incorrect advice received from a trade union official before and after the claimant submitted an out of time discrimination claim - and *Hunwicks v Royal Mail Group* EAT 003/07 where a union's incorrect advice did not cause the claim to be lodged late so no extension of time was appropriate. These decisions are not of course binding precedents but demonstrate that advice received from a trade union can be a relevant factor to bear in mind when considering the just and equitable time point.

13. With regard to amendments, in exercising its broad discretion under rule 29 to allow amendments at any stage of the proceedings in accordance with the overriding objective the tribunal must always, as confirmed in *Selkent Bus Co Ltd v Moore* [1996] ICR 836 carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and the relative hardship that would be caused to the parties by granting or refusing the amendments. As Mummery P noted in Selkent applications to amend are of many different kinds ranging on the one hand from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleased to and on the other hand the making of

entirely new factual allegations which change the basis of the existing claim. The tribunal has to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action. As HHJ Serota noted in *Remploy Ltd v Abbott* EAT/0405/14, if fresh points can properly be considered to be particularisation of an allegation already pleaded, a more liberal approach may be taken in considering whether to grant permission to amend than in cases where the point is a “new points” or will require the parties to produce further evidence or disclosure and prejudice the timetable set for the proceedings or cause further delay.

Chronology

14. The chronology of events in this case is as follows and to this extent set out below is uncontroversial. The Respondent operates a residential and day school for children with special needs up to the age of 19. The Claimant, who is Sikh, commenced employment with the Respondent as a Weekend Support Worker on 9 August 2017. On 5 October 2017 the Claimant was suspended on full pay pending an investigation into an alleged safeguarding incident involving the Claimant and a pupil (whom the parties have previously agreed would be treated with anonymity, there being no formal order to that effect as yet in these proceedings. On 6 October 2017 the alleged safeguarding incident was reported to the Police who interviewed the Claimant on 2 November 2017. In a letter of 7 December 2017 the Worcestershire County Council Safeguarding Board concluded that there was insufficient evidence to prove or disprove the allegation. On 18 December 2017 the Claimant submitted a formal grievance concerning his suspension ahead of an investigation meeting which the Respondent had convened for 19 December 2017.

15. By letter dated 21 December 2018 the Respondent confirmed that no action was to be taken against the Claimant and lifted his suspension with effect from 31 December 2017. The Claimant has not subsequently returned to work and the only fit notes certifying his medical position which were before the tribunal cover the period from 5 May 2018 onwards. These were submitted to the Respondent on or about 8 June 2018.

16. Following a grievance meeting on 5 January 2018, the Respondent dismissed the Claimant’s grievance confirming this in a letter of 19 January 2018. The Claimant lodged an appeal against that decision by letter dated 25 January 2018. The appeal meeting was held on 15 February 2018 and the decision to dismiss that appeal confirmed to the Claimant in a letter dated 5 March 2018. Whilst an investigation meeting and disciplinary process then ensued – with an investigation meeting scheduled for 18 April 2018 and a formal disciplinary meeting scheduled for 24 April and subsequently rescheduled to 27 April - the detail of that disciplinary process was not before the tribunal.

17. The Claimant commenced early conciliation by contacting Acas on 6 April 2018 and an Early Conciliation Certificate was issued on 20 May 2018. The Claimant presented his claim form to the tribunal on 19 June 2018.

18. On this basis it is uncontroversial that the last alleged act in relation to the Claimant’s discrimination claim as pleaded in his ET1 occurred on 5 October 2017, that therefore the primary time limit for the purposes of section 123(1)(a) EA 2010 expired on 4 January 2018 without the benefit of any extension by virtue of early conciliation having been conducted, and that the Claimant contacted

Acas nearly 3 months after the expiry of the primary 3 month time limit and some six months after the last act of discrimination about which he complains in his ET1.

The Claimant's claims

19. In his application to the tribunal the Claimant complains of unlawful race and religion discrimination as well as for arrears of pay and other payments. The Claimant's claims in respect of pay relate to the claimant's sick pay entitlement to which I return at the end of this decision.

20. With regard to his discrimination complaints the Claimant does not complain about the decisions of the Respondent with regard to the investigation which the Respondent conducted into the safeguarding incident which led to his suspension, the length of his suspension, the decision as to whether any disciplinary action should be taken, the conduct of or decisions reached in relation to his grievance and grievance appeal or the commencement of an investigation into his unauthorised absence and possible subsequent potential disciplinary action. He has not brought a claim in these proceedings - by way of an amendment to these proceedings or in a separate claim - in respect of the period subsequent to his suspension save in respect of the issue of non-payment of wages to which I return below.

21. In his claim form the Claimant raised six grievances the first of which is not a complaint as such but rather a statement of fact as to his happiness on joining the Respondent and his long-term goals. In his interlocutory order, EJ Camp ordered the Claimant to set out his allegations in detail providing information about every single complaint being made in the proceedings including the number of the allegation, its date, what happened, and the type of complaint the claimant provided these details on 7 September 2018. Taking the claim form and the further information document together, the matters the Claimant complains of can be summarised as follows adopting the paragraph numbering from the Claimant's further information document:-

- Allegation 1- a complaint about certain hand gestures allegedly being made by a colleague which were offensive to Sikhs on 9 August 2017.

- Allegation 2 – a complaint about the Deputy Headteacher allegedly undermining the Claimant on 5 September 2017 by saying to the Claimant that he needed QTS – qualified teacher status – for his position.

- Allegation 3 – a complaint about disobliging comments made to him by a colleague in early September 2017 about the locality where the Claimant lives which had the effect of humiliating and discriminating against the Claimant on the basis that the populations of the area referred to – West Bromwich - together with its surrounding areas have a high concentration of BME and in particular Turban wearing Sikhs.

- Allegation 4 – a complaint about an offensive comment being made on 3 October 2017 by a colleague suggesting that the Claimant works as a male escort in his spare time. The Claimant contended that this comment had racial/religious connotation essentially in light of public debate about alleged Asian grooming gangs.

- Allegations 5 and 6 – a complaint about racist remarks being made by a colleague on 5 October 2017 regarding the lack of coloured people in Herefordshire and the claimant being suspended following the safeguarding allegation.

22. In his further information the Claimant included an additional complaint - numbered 7 and which I shall refer to as Allegation 7. This was not included within the Claimant's claim form. The Respondent objects to this Allegation 7 as an amendment to the Claimant's claim. The Claimant contends he did not have space to include it in his claim form. This additional complaint had been raised in the Claimant's grievance complaint to the Respondent and relates to the Respondent's alleged refusal to allow the Claimant to be accompanied by a union representative to the Respondent's internal investigation and associated matters. I return to Allegation 7 below.

Whistleblowing claim

23. EJ Camp had addressed in his directions the clarification of whether and on what basis the Claimant had brought and was seeking to proceed with a whistleblowing complaint and this is a convenient point at which to discuss that issue.

24. In describing his claims in his claim form and in the boxes ticked indicating the claims he was bringing, the Claimant referred only to discrimination. He did not refer to whistleblowing or being subjected to a detriment as a result of having made a protected disclosure. Indeed at this hearing it was apparent that the Claimant was not aware of the nature of a whistleblowing claim which I proceeded to explain to him.

25. That said, the Claimant included as part of the additional information set out on page 12 of his claim form additional material which is descriptive of the wider context of his complaint and also records the Claimant's belief that the Respondent school should be investigated and changes made including its closure. The Claimant also refers to a safeguarding concern and a breach by a colleague of a physical intervention policy. However, these matters are not referred to or described in the claim form - or indeed the further information provided in response to EJ Camp's order - as whistleblowing issues.

26. The Claimant did not comply with EJ Camp's order to provide as precisely as possible the following information if he is making a claim of protected disclosures/whistleblowing of any kind – when and what circumstances was it made, to whom was it made, was it made orally or in writing; what words were used.

27. In my view, on a proper reading of the Claimant's claim form, he has not brought a claim based on whistleblowing. Nor has he sought to add such a claim either in his further information or in an application at this hearing to amend his application to the tribunal to add such a claim. It is clear in my judgment that there is no such claim before the tribunal and that this remains the case, not least given the Claimant's failure to comply with EJ Camp's order with regard to particularising any whistleblowing claim he was seeking to bring and in the absence of an application by the Claimant to amend his claim to include a whistleblowing claim - either before or at this hearing when the matter was again addressed.

Strike out/deposit

28. I will now deal with the issues of whether the Claimant's claims should be struck out on the grounds of having no reasonable prospect of success or should be the subject of a deposit order on the grounds of their having little reasonable prospect of success. The factual allegations set out in the Claimant's claim form, as expanded upon in the further information which he has provided, clearly indicate in respect of each of his specific allegations a substantial dispute of fact as to what was said and by who and with what discriminatory connotation. Whilst the alleged comments about the Claimant needing QTS and being a male escort in his spare time neither have ostensible racial or religious connotations, they do form part of a series of allegations the context and connotations of which need to be tested by proper evidence. Having considered the documentation before me and the parties' submissions, and bearing in mind the judicial guidance provided in the case law as to the approach to be adopted to the making of strike out and/or deposit orders, I do not accept that I could form the view that taken at their highest the allegations would have no or little reasonable prospect of success. There is nothing cogent before me which persuades me that these allegations have no or little reasonable prospect of success when they are, separately and cumulatively, allegations about specific interactions the veracity of which can only properly be tested by oral evidence. No order will therefore be made in respect of the strike out and deposit issues.

Time Limits

29. I will now set out my findings in relation to the issue of whether the Claimant's claim should be allowed to proceed in time limit terms on the just and equitable basis. Other than in respect of his unlawful deductions and other payments claims to which I return below, the matters about which the Claimant complains in his claim form span the period from 9 August 2017 to 5 October 2017. The Claimant raised his grievance on 18 December 2017 but did not contact Acas for the purposes of early conciliation until 6 April 2018 and did not commence proceedings until 19 June 2018. It is therefore clear that his claims as set out in his claim form are significantly out of time as the primary three month time limit expired effectively on 4 January 2018. Early conciliation was commenced therefore just over three months after the primary time limit had expired.

30. In assessing the Claimant's explanation for this delay in relation to the time limit issue, and his evidence in that regard, the Claimant is an educated, articulate and intelligent individual, although I cannot help but observe that the Claimant on occasion struggled to answer questions succinctly or directly and tended to stray into the wider aspects of the litigation and the current political climate rather than remain focused on the questions being considered by the tribunal in this hearing. That said, I did not have any specific basis on which not to accept his evidence with regard to the advice which he received and the decisions which he took with regard to dealing with his concerns with his employer.

31. In reaching my decision on the time limit point, I bear in mind the following matters which I have derived from my assessment of the evidence I have heard from the Claimant, the documentation before me, and the parties' submissions.

32. The Respondent contends that the Claimant's delay is attributable to the Claimant and his advisers and that the Claimant's union representative who was supporting and advising him should and would have known that time was "ticking". In my assessment, since the test in a discrimination claim such as this is what is just and equitable rather than what was reasonably practicable, this contention require more detailed assessment since, as is clear from the case law that I have referred to, the fact that union advice was taken and followed can be a relevant factor to place in the balance.

33. Throughout the period from his suspension onwards the Claimant had access to advice and support from his trade union, the NEU. The Claimant was assigned a caseworker, Helen Turner, who assisted him with regard to his employment situation and a legal adviser, Jane Siddons who, as the Claimant stressed, made clear to him that she was only advising the Claimant on the criminal law aspects of the alleged safeguarding issue which had led to the Claimant's suspension and not on any employment related issues. In the period prior to his grievance appeal being rejected, the Claimant was not receiving formal legal advice from the union on his employment position from a qualified lawyer but was being supported and advised by Ms Turner as a case worker in dealing with his employment position and grievances. Only when the Claimant's grievance appeal was eventually rejected did the union provide the Claimant with employment law advice from a qualified solicitor when Avril Bailey became involved and handled the steps of contacting Acas in relation to the Early Conciliation process.

34. When he lodged his grievance in December 2018, the Claimant was not contemplating employment tribunal proceedings despite the reference in that grievance to discriminatory conduct. I accept that at that stage he wished to ensure that the situation with his employer was resolved and that he was being guided by his union as to how he should address the concerns which he had with regard to his alleged discriminatory treatment.

35. In his witness statement the Claimant indicated that he had been told by his union representative that he needed to submit a grievance to the school first and foremost to take matters forward and that this would need to be done within 3 months less one day from the date of the incident. The Respondent contended that the Claimant's recollection was mistaken and that the time limit which the union drew to his attention was the time limit applying in relation to the commencement of tribunal proceedings rather than for lodging an internal grievance. Nonetheless, the Claimant was adamant, and I accept, that the Claimant's trade union adviser told him, following his suspension, that he had three months less a day following the date of the last incident to submit a grievance to the school. As an intelligent individual, and one who had not sought to research his rights separately from his engagement with his own trade union, I find it inherently unlikely that the Claimant (who was, as he put it, a first time litigant, and was taking the advice of the union as to how best to proceed) would have misunderstood what he was being told by the union adviser whose guidance he had sought and whose advice he was following as to the resolution of his concerns.

36. I accept that the Claimant was advised by his union that the police issues concerning the safeguarding complaint were more of a priority than his grievance. Given the criminal aspects of the matter and the more immediate developments in terms of police interviews and the associated process, it is perhaps understandable that this was the union's view as a matter of practicality

and the seriousness of the consequences of potential criminal issues. However, the union nonetheless remained involved in the grievance process and were advising the Claimant during this time, not least as evidenced by the fact that the union eventually lodged the grievance on the Claimant's behalf in December 2017. The apparent priority in dealing with the Police matters does not detract from the fact that the Claimant was nonetheless also guided by the union in relation to the handing of his grievances.

37. The Respondent sought to argue that the Claimant only lodged his grievance on 18 December 2017 in order to disrupt or interfere with the investigation process which the Respondent was about to commence in relation to the safeguarding incident. On the basis of what was before me, that allegation is not made out not least as an assessment of that serious contention could only properly be made after full consideration of all the surrounding circumstances and the evidence of the Claimant on the issues of fact to be addressed by the tribunal at a full hearing of this matter. This argument was nothing more than an assertion.

38. I am satisfied that the Claimant was not waiting for the Respondent to complete his grievance and appeal process before deciding whether or not to start a tribunal claim. This was not his thought process. On the Claimant's evidence, as a "first time" litigant, as he put it, he was guided by his trade union and it was only once the grievance decision had been delivered in January that his union representative indicated a level of concern which led to an appeal and then, when that appeal was also unsuccessful, to discussion about potential employment tribunal proceedings. I accept that the Claimant was guided throughout by his union representative and that he did not take an active decision not to institute proceedings at an earlier stage than he did – he was simply following the guidance given by the union to seek to address his concerns.

39. The Respondent's principal argument in relation to the prejudice which the Respondent would face if the Claimant's discrimination claims were allowed to proceed was that a number of the individuals involved in the investigation grievance and appeal in which the Claimant was involved had ceased employment with the Respondent and would be unlikely to attend the hearing voluntarily. With all due respect to that argument, the departure or unavailability of key witnesses is a potential risk for any Respondent or indeed party to litigation regardless of whether the claims in question were lodged in time. In my assessment the departure of witnesses from the Respondent's employment does not adversely impact its ability to understand, investigate and respond to the Claimant's claims, not least in light of the fact that the matters raised by the Claimant in his claim were all raised in detail in the Claimant's grievance and therefore were addressed and considered by the Respondent in the course of the grievance and appeal process and have been pleaded to in detail in the Respondent's response to the Claimant's claims.

40. Absent the specific advice which the Claimant received from his union representative, the Respondent would have had a very cogent argument that it would not be just and equitable to allow the claims to proceed since the Claimant, as an intelligent individual, could reasonably have been expected to be aware of or to research the applicable time limits and therefore would likely have had insufficient excuse for the late presentation of his discrimination claim to render it just and equitable to allow that claim to proceed. However, taking all the above matters into account, and whilst acknowledging that an extension of time on a

just and equitable basis is not the norm, I have concluded that I should permit the Claimant's claims to proceed on the just and equitable basis given that he was reliant on his trade union for guidance and acted in accordance with their advice and counsel throughout the relevant period. He should not be precluded from bringing his claim as a result of only doing so after his grievance and appeal concluded when the advice from the union led him to that position.

Amendment – Allegation 7

41. The Claimant's Allegation 7 – relating to his complaint in relation to his not being allowed to be accompanied to the investigatory meeting and associated issues – was raised by the Claimant in his grievance but not in the Claimant's claim form. The Claimant contends that this omission is because he did not have space to include this complaint in his claim form. I did not find that to be a compelling argument given that page 7 was not completely filled with narrative. In my assessment there is no basis to suggest that this Allegation 7 complaint was included in the original claim form. It was only sought to be introduced by the Claimant in his further information document filed with the tribunal on 7 September 2018 and therefore constitutes an amendment to the Claimant's claim.

42. Taking into account the case law set out above with regard to amendments, and having regard to the interests of justice and the relative hardship that would be caused to the parties by granting or refusing the amendment, I have concluded that this amendment should be allowed. In his claim form the Claimant does refer to his grievance, which incorporated Allegation 7, and references his suspension. In light of those references and the tribunal's direction that the Claimant set out his claim in detail in the further information document subsequently produced, I consider Allegation 7 to be an expansion of and clarification of his complaints even though its factual detail was not set out in detail in the Claimant's claim form. In light of the detailed grievance process which was undertaken by the Respondent and which addressed Allegation 7, to allow this additional allegation to proceed would not require the Respondent to produce further evidence which is not already available to it nor would allowing the amendment cause prejudice to the Respondent as it has already considered and delivered its grievance decision on the complaint in question. That witnesses may have left the Respondent's employment does not in my view cause prejudice given the substantive response already given in the grievance and appeal process. In relation to the time limit aspect of this amendment, I adopt the reasoning and conclusions set out above in relation to time limit points concerning the other aspects of the Claimant's claims and do not consider that the late presentation of this complaint should preclude the amendment being granted not least given that this Allegation 7 was raised at the stage where further information was required by the tribunal - before any timetable has been set - and in essence expands upon the Claimant's complaints about his treatment in the period from the commencement of his employment until the investigation stage. I therefore consider that it is in the interests of justice that this amendment should be permitted. In relation to this Allegation 7, I do not consider that it should be struck out or a deposit order made by reference to its prospects of success for the same reasons as set out above in relation to the other aspects of the Claimant's claim.

Harassment

43. The Claimant refers specifically to harassment in relation to Allegations 1, 3, 4 and 5 but not Allegation 2. In my view the Claimant's Allegations 1 to 5 should be treated as complaints of direct discrimination and of harassment. Having raised this issue with the parties before reaching my decision and considering their submissions, in my view the Claimant's claims should be clarified and amended so as to be claims of direct discrimination for the purposes of section of the Equality Act 2010 and of harassment for the purposes of section 26 of the Equality Act 2010 in both cases because of the protected characteristics of race and religion. This amendment in my view constitutes merely a relabelling of the existing pleaded facts as amended in accordance with my decision as above and is therefore an amendment which I can permit without difficulty.

Unlawful deductions/other payments

44. It is clear that, on a proper reading of the claim form and on the basis of the discussions conducted at this hearing, the Claimant's claim in respect of unlawful deductions and arrears of pay relates solely to the non-payment of sick pay in respect of the period from January 2018 onwards until presentation of the ET1 on 19 June 2018. There is therefore no time issue in relation to this series of deductions - in terms of non-payment of sick pay - which was continuing as at the point the Claimant commenced Early Conciliation and these proceedings.

45. The Respondent's response to the Claimant's claim had indicated that the reason for non-payment was failure to provide sick notes. It was, however, clear from the bundle that in respect of the period from 5 May 2018 onwards the Claimant had provided fit notes. At the first day of hearing the Respondent, having been given the opportunity to reconsider its position, contended that the reason for non-payment of sick pay was that the Claimant was not actually entitled to sick pay by reference to the relevant earnings qualification requirements. In light of this position being different from its pleaded case, and the lack of direct evidence on the point, the Respondent was requested to reconsider the position in order that the position could be clarified on the second day of the hearing. As the position was not fully clarified by the end of the preliminary hearing the Respondent will need to consider this issue as the matter proceeds.

46. In conclusion my judgment on the issues to be determined at this Preliminary Hearing

- No order shall be made for a deposit in accordance with rule 39 of the Employment Tribunal Rules of Procedure 2013.
- The claimant's claims shall not be struck out on the basis of having no reasonable prospect of success in accordance with rule 39 of the Employment Tribunal Rules of Procedure 2013.
- The Claimant is permitted, by way of amendment to his claim form, to advance the allegations set out in the further information document sent to the tribunal on 7 September 2018.
- The Claimant did not present his complaints of unlawful discrimination related to his protected characteristics of race or religion contrary to the Equality Act 2010 within the time limit set out in section 123(1)(a) of the Equality Act 2010 but he presented his complaints within a period which the Tribunal thinks just and equitable under section 123(1)(b) of the Equality Act 2010.

- The Claimant's claim is amended such that his claim is both of direct discrimination for the purposes of section 13 of the Equality Act 2010 and of harassment for the purposes of section 26 of the Equality Act because of the protected characteristics of race and religion.

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Employment Judge Wynn-Evans

16 April 2019