HC

EMPLOYMENT TRIBUNALS

Claimant: **Ms S Moreau**

Respondent: **(1) Birkbeck College Students' Union**
(2) Yousuf Joondan

Heard at: **London Central Employment Tribunal** **On: 5 July 2019**

Before: **Employment Judge H Clark (sitting alone)**

Representation

Claimant: In person (supported by the PSU)

Respondent: Ms G Hirsh - Counsel

JUDGMENT FOLLOWING OPEN PRELIMINARY HEARING

1. **The Claimant's applications to amend her Claim Form made on 19 March 2019 and 15 July 2019 are allowed to the extent permitted below:**

Direct Race Discrimination

(i) The conduct of Mr Willett and Mr Parry towards the Claimant at a meeting of the Turnaround Board on 18 April 2018 as set out at paragraphs 3 and 4 of the Particulars of Claim compared to the other members of the Executive Committee.

(ii) The attempts to remove or prevent the continuation of the Claimant's role as Women's Officer between February and May 2018.

Direct Sex Discrimimation

i) ***On 17 December 2017, the Claimant's family and childcare arrangements were included in meeting minutes.***

ii) ***The Claimant's attempts to challenge the minutes (on 14 March, 21 March and early April 2018) received no response from either Respondent.***

iii) ***At a Student Council meeting on or about 30 March 2018 Mr Best,***

the Acting Chair raised his voice, disproportionately challenged any policy suggestion the Claimant made and threatened to prevent her motions from being submitted.

iv) ***The Second Respondent and Mr Baker, Chair of Trustees of the First Respondent's failure to respond to the Claimant's complaints dated 1 to 4 April 2018 about the conduct during the 30 March 2018 meeting.***

v) ***The attempts to remove or prevent the continuation of the Claimant's role as Women's Officer between February and May 2018.***

vi) ***The conduct of Mr Willett and Mr Parry towards the Claimant at a meeting of the Turnaround Board on 18 April 2018 as set out at paragraphs 3 and 4 of the Particulars of Claim compared to the other members of the Executive Committee.***

Victimisation

i) The attempts to remove or prevent the continuation of the Claimant's role as Women's Officer between February and May 2018.

ii) On 18th June 2018 giving a 6-hour deadline to co-ordinate third party data consent.

iii) The Respondent's failure to progress the Claimant's complaint about Mr Keir and the Second Respondent on the erroneous grounds that an individual involved (Ms Arts) was no longer a member of staff.

Disability Discrimination (failure to make a reasonable adjustment).

i) ***At a meeting on 6 June 2018, preventing the Claimant from using a recording device to take notes at a meeting.***

ii) On 18 June 2018, in the course of a complaint, the Claimant was given a 6-hour deadline to obtain the consent of third parties to the use of their data. Whilst the Claimant complied with this deadline, doing so negatively impacted her health.

2. In so far as the Claimant made additional claims for race, sex and disability discrimination in her Claim Form which are not set out above (including all claims for indirect race and indirect sex discrimination), they are struck out as they have no reasonable prospects of success, alternatively permission to amend the claim to include them is refused.

3. The parties are to agree a list of issues to be filed with the Tribunal on or before 4 September 2019. The parties are expected to co-operate to ensure that the November 2019 listing can be preserved.

REASONS

1. By a Claim Form presented on 27 August 2018, the Claimant made a number of claims arising of her employment by the Respondent of sex, race, pregnancy or maternity and disability discrimination together with a claim of breach of data protection legislation. This Open Preliminary Hearing was listed to consider the Claimant's application to amend her claim to add claims of whistle-blowing and victimisation and the Respondent's application to strike out the Claimant's claims or, alternatively to order deposits to be paid.

The Proceedings

2. This case had been erroneously listed for a judicial mediation, which resulted in a delayed start, as the Tribunal had not had sight of the file. At the outset of the hearing, the Tribunal asked the Claimant whether any adjustments were needed to the hearing process. The Claimant explained that she might need additional rest breaks, time to consider Ms Hirsh's additional written skeleton argument (she had been provided with Ms Hirsh's principal skeleton argument on 11 June 2019). The Claimant requested that the Respondents should not make any contact with her outside the hearing room and that the Respondent should not "pathologise" her for anything she has done wrong within the litigation. The Claimant suggested that the strike out and costs applications were an example of the Respondent "weaponising" her disability.

3. The Respondent had no objection to the Claimant's being granted additional time or breaks and respected the Claimant's wish to have no contact outside the Tribunal. However, it is in the nature of litigation that parties might come under criticism for their conduct of the case and the relevant statutory provisions use terms such as unreasonable, scandalous or vexatious. Whilst all parties to litigation should avoid inflammatory language, it was explained to the Claimant that the Respondents' representative has an obligation to put her clients' case and that might legitimately involve criticism of the Claimant's or her representative's conduct of the proceedings.

4. At the start of the hearing, the Claimant invited the Tribunal to read communications passing between her and her former Solicitor to demonstrate the efforts she has made to comply with orders of the Tribunal. When the Tribunal explained to her that these communications were legally privileged and outlined the consequences of her waiving that privilege (which she could not do selectively), the Claimant confirmed that would rather proceed without the Tribunal and the Respondents having sight of privileged communications.

5. For the purpose of this hearing the Tribunal heard oral submissions from both parties. The Tribunal also had the benefit of a written skeleton argument from Ms Hirsh, which was provided to the Claimant on 11 June 2019 and supplementary written submissions taking account of the Claimant's Schedules which were provided on 21 June 2019. As the parties' oral submissions did not

finish until 17.20 and the Claimant expressed a wish to make a further application to amend her claims to include the contents of her Schedules, the Tribunal made directions for the Claimant to provide written submissions in relation to the amendment application and for the Respondents to respond 7 days later. These submissions were provided on 15 and 18 July 2019 respectively.

6. The Tribunal also took account of the contents of a bundle of documents prepared by the Respondent running to 288 pages and some recent medical evidence submitted by the Claimant.

Procedural History

7. The Claim Form was served at a time when the Claimant was represented by Solicitors, Sterling Winshaw, who remained on the record until 10 June 2019. Some of the content of the Claim Form concerned the Claimant's experiences as a student at Birkbeck College, University of London, which was originally an additional (third) Respondent to the claim. The claims against Birkbeck College were withdrawn by the Claimant on 13 March 2019 and subsequently dismissed. The Claimant has also withdrawn claims of pregnancy and maternity related discrimination and those related to alleged breaches of data protection legislation.

8. Although served when the Claimant was represented, the Claim Form contained a narrative account of the Claimant's claimed experience as a student at Birkbeck College from October 2015 and her subsequent election and then appointment by the First Respondent as Women's Officer from 1 August 2017 to 31 July 2018 (remunerated from 1 September 2017 to 30 April 2018). The Claimant outlined a number of complaints concerning her treatment as a student, which are not the subject matter of this hearing. With the exception of the ticked boxes indicating the range of discrimination claims made, the Claimant's narrative Claim Form did not set out the nature or legal basis for her claims or the nature of the alleged disability on which she relied. They could not, therefore, be sensibly responded to by the Respondents.

9. There have been two previous preliminary hearings in the case. The first on 5 March 2019 before Regional Judge Potter (a hearing previously adjourned at the Claimant's request), which set up a second hearing as the Claimant's case was not possible to discern from her Claim Form. The Claimant did not attend the hearing on 5 March 2019 hearing due to ill health. An application to postpone the hearing was refused, as the Claimant was professionally represented. A lay representative attended the hearing on the Claimant's behalf. The record of the 5 March 2019 hearing set out:

"*It was explained that leave could not be given for an amendment without full details of the claim being provided plus an argument as to why leave to amend should now be granted*."

10. Regional Employment Judge Potter invited the Claimant to identify before 7 May 2019 the detriments on which she relied and details of the disclosures including cross-reference to any document setting out such disclosure. The Claimant was instructed to provide an explanation as to why leave to amend was sought with

regard to the well-established *Selkent* principles. The Claimant was also ordered to provide by 7 May 2019 a "*redlined ground of claim, deleting those matters no longer pursued as allegations of race or sex discrimination against the First or Second Respondents* and to "*clarify the claims pursued against these Respondents…..clarify each act relied on as an act of unlawful discrimination, the form(s) of discrimination it constitutes, cross-referencing it to the original grounds of complaint and identifying an actual or hypothetical comparator relied on."* The Claimant was ordered to provide similar detail in relation to her potential disability discrimination claim. The case was then listed for a one-day preliminary hearing on 11 June 2019. A judicial mediation was provisionally fixed for 5 July 2019 with the final hearing postponed from 2 - 8 July to 14 – 22 November 2019.

11. The Claimant's subsequent application to amend is set out in an email from her Solicitors dated 19 March 2019, which asked to add claims of victimisation and whistleblowing to her claims, stating: "*the reasons why she had been unable to add them at the commencement of these proceedings had been the fact that she had made a number of subsequent subject access requests to one or more of the Defendants [sic] and the evidence that had been provided thus far had demonstrated a real prospect of success for both claims."* A completely new set of Particulars of Claim ("the Particulars of Claim") was served with the application to amend dated 19 March 2019, not in the redline form specified by Regional Employment Judge Potter, containing matters which were not clearly set out in the original Claim Form and without any cross-reference to the original Claim Form.

12. The Respondents objected to the application to amend by letter dated 10 May 2019, pointing out that the Claimant had attempted to introduce new heads of claim in her amended particulars which were not in the form specified and that the *Selkent* principles had not been addressed.

13. The Claimant's Solicitors came off the record on 10 June 2019. The Claimant, therefore, represented herself at the second preliminary hearing on 11 June 2019. Employment Judge Snelson ordered the Claimant to provide a Schedule in landscape format identifying all the acts/omissions relied on as discrimination claims (rather than background allegations) and a similar schedule in relation to the proposed victimisation/whistle-blowing claims. The order specified that there should be 7 columns giving the following information:

i) No.
ii) Date/period
iii) Perpetrators(s)
iv) Gist of act/omission
v) Legal nature of claim (eg. direct sex discrimination);
vi) Location of allegation in Claim Form and/or amended Particulars of Claim;
vii) Gist of defence (blank for Respondents to complete).

14. The record of the hearing on 11 June 2019 noted that the Claimant's claims remained "*opaque" and* provided at paragraph 6:" *I took the view that the Claimant should be given a further chance to present a coherent, manageable case. She must not expect any further indulgence."* In relation to the Schedule of claims, it was made clear that the discrimination claims had to be already pleaded in the Claim Form or in the fresh particulars and "*The claims need to be sufficiently*

precise to enable the Respondents to answer them."

15. The Claimant provided two Schedules ("the Schedules") in purported compliance with the order of EJ Snelson on 21 June 2019. In a letter dated 28 June 2019 the Respondent's Solicitors explained that, notwithstanding the three opportunities given by the Tribunal to properly clarify her claim, the Claimant's claims were now more unclear than they were because she had added in additional allegations. The Respondent continued to object to the Claimant's application to amend and to the additional allegations which had been included in the Schedules.

16. By email dated 15 July 2019, the Claimant applied to further amend her Claims to cover the contents of her 21 June 2019 Schedule, in so far as they contained allegations which were not contained in her first two pleadings.

The Issues

17. This hearing was listed to consider the Claimant's application to amend her Claim Form dated 19 March 2019 and the Respondents' applications for strike out or deposit orders clarified in their letter dated 10 May 2019. The Claimant has made a further application to amend her Claim Form dated 15 July 2019.

18. Although there is an outstanding costs application by the Respondent, it was clear that there would be insufficient time to deal with that application at today's hearing. Any such application can be dealt with on the basis of written submissions in due course.

The Law

19. Guidance as to the principles governing the Tribunal's discretion to allow amendment of the claim form were given by Mummery J in *Selkent Bus Co Ltd v Moore [1996] ICR 863.* The power to do so lies in the Tribunal's general case management powers in rule 29 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and is, therefore, subject to the overriding objective in regulation 2. There are different types of amendment, some of which are very minor or clarificatory of a claim which has already been made or the relabelling of an existing claim. Where a new cause of action is sought to be added, there are a number of issues which may be relevant to the exercise of the Tribunal's discretion, including the timing and manner of the application, whether the new claim is in time (albeit that is not conclusive), the reason why the claim was not made in the original Claim Form and the balance of prejudice/hardship to the parties in granting or refusing the amendment. It may also be relevant how close the new claim is to those which are already the subject matter of the Claim Form - the greater the difference between the factual and legal issues raised, the less likely it will be permitted. It is clear from *Galilee v Commissioner of Police for the Metropolis UKEAT/0207/16/RN* that it is not necessary for the Tribunal to determine whether or not a new claim is in time or whether time should be extended before determining an application to amend. An application to amend can be granted, subject to jurisdictional issues on time limits.

20. The Tribunal's power to strike out a claim or part of it is derived from rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 where a claim is "*scandalous, vexatious or has no reasonable prospects of success*". If that threshold is passed, there remains a discretion as to whether to strike out a claim. Such discretion is subject to the overriding objective in the 2013 Rules to do justice between the parties. It is a draconian power, since it deprives a party of the opportunity to have certain issues fully aired in the Tribunal. It is well established that a Tribunal should be slow to strike out a discrimination claim (*Anyanwu v South Bank Student Union [2001] ICR 391*). Discrimination claims are fact sensitive and often turn on what inferences it is appropriate to draw from primary evidence. A whistle-blowing claim similarly so. This can be too nuanced an exercise to perform at a preliminary hearing on limited evidence. However, that is not to say that a discrimination claim or assertion which is prima facie implausible should never be struck out.

21. The substantive law concerning discrimination time limits is contained in section 123 of the Equality Act 2010. The relevant parts of the section provides that:

"

(1) *"Subject to sections 140(A) and 140B, proceedings on a complaint within section 120 may not be brought after the end of –*
(a) the period of three 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) *….*
(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;"

22. In *Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530, the Court of Appeal cautioned against determining issues related to acts extending over a period at a preliminary hearing, with limited evidence. However, there may still be cases in which it is appropriate to do so and that the Claimant must show a "prima facie case" that a complaint is part of an act extending over a period. Mummery LJ at paragraph 48 explained that a Claimant was entitled to pursue her claim beyond a preliminary stage if she proves, "*either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period."* This was in distinction to a "*succession of unconnected or isolated specific acts"*, for which time would run from the date when each act occurred (paragraph 52)

23. The "just and equitable" extension in section 123(1)(b) of the 2010 Act gives the Tribunal a broad discretion to extend time, albeit there is no presumption in favour of granting an extension. It falls to the Claimant to prove that there are grounds to extend. The factors set out in section 33 of the Limitation Act 1980 are likely to be relevant to the exercise of the Tribunal's discretion, but there may be other factors. The length and reason for the delay will clearly be relevant, as may be whether the Claimant has had access to legal advice and what prejudice might be caused to either party by the grant or refusal of an extension. The fact that a Claimant is

pursuing an internal grievance could be material, but is not necessarily so.

Factual Background

24. The Claimant was elected as the First Respondent's Women's Officer in June 2017. It is unclear when her employment formally began, but she was paid with effect from September 2017. The Second Respondent is the First Respondent's Union Development Manager. The Claimant and the Second Respondent's relationship was not a harmonious one and following her election to her post, difficulties arose concerning the scheduling of meetings and training around the Claimant's caring and study commitments. Her complaints about her employment started in August 2017 when she was asked to attend for training in her role, even though her employment did not start until September 2017.

25. The Claimant raised a "comprehensive complaint" about the Second Respondent on 4 December 2017, questioning his suitability for his role. An issue then arose in February 2018 as to whether the Claimant was eligible to remain in post (and then stand for re-election), as she was not an enrolled student of Birkbeck College at the time. When the Claimant was first employed by the Respondent, it was a term of her contract that: "*If you cease to be a student enrolled at Birkbeck College or you cease to be a member of the Student's Union you will also cease to hold office."* This issue was resolved in the Claimant's favour and her employment continued throughout the rest of the 2017/2018 academic year and she was re-elected in 2018/2019.

26. In addition to the Claimant's grievances concerning her line manager, she also complains about her treatment at meetings of the First Respondent's Turnaround Board both by employees of Birkbeck College and a Consultant engaged by the First Respondent. The Claimant also suggests that the Second Respondent informed Student Services that the Claimant had initiated ACAS early conciliation and that this was an act of victimisation.

27. The First Respondent's "Turnaround Board" was put in place for the 2016/2017 academic year. It was a measure recommended by NUS, following difficulties in the Birkbeck Student Union. Its Terms of Reference were provided to the Tribunal, which indicated its ongoing purpose was to "*continue to drive the organisational recovery at Birkbeck student union; the aim is to re-establish the union as a viable and effective organisation in line with the recommendations included in the NUS diagnostic report…..The turnaround board has delegated authority and will continue to act at a strategic level and give operational guidance on behalf of the board of trustees."* The composition of the Turnaround Board included the chair of the first Respondent's Board of Trustees, a sabbatical officer, a lay member of the Board of Trustees and three employees of Birkbeck College (the academic registrar, Mr Keir, the head of governance and corporate support, Ms Bock and the director of finance, Mr Willett). The Turnaround Board was to be co-chaired by one member nominated by the College and one member nominated by the Union on an alternating basis.

28. The parties have different understanding of the degree to which the Claimant was entitled to work flexibly and there were a number of other issues of disagreement (for instance, as to whether the First Respondent had endorsed the

OSS Student Survey, as to the fact that sabbatical officers were not paid between their election and September, as to the support that the Claimant was or should have been given in relation to an online issue and as to how the Second Respondent handled the scheduling of Black Members' Meetings).

29. It is accepted by the Respondents that the Claimant is disabled, although not in relation to all the Claimant's asserted disabilities. The Respondents deny that they had relevant knowledge of the Claimant's disabilities at the time of the allegations of disability discrimination she brings. It is not necessary to rehearse all the areas of dispute in this judgment or to list the Claimant's asserted disabilities, which are outlined in her Particulars of Claim.

Conclusions

30. The Claimant's application to amend her Claim Form is set out in an email from her Solicitors dated 19 March 2019, which asked to add claims of victimisation and whistleblowing to her sex, race and disability discrimination claims, stating: "*the reasons why she had been unable to add them at the commencement of these proceedings had been the fact that she had made a number of subsequent subject access requests to one or more of the Defendants and the evidence that had been provided thus far had demonstrated a real prospect of success for both claims."* Apart from the explanation about the subject access requests (SAR's), none of the *Selkent* factors were addressed.

31. There are now two amendment applications. The Claimant has made a second application in response to the Respondents' observations on her Schedules served on 21 June 2019 suggesting that some of the matters outlined were not included in the amendment application (or either of her first two pleadings). There is a degree of overlap in the issues for consideration in the context of an amendment application and those relating to strike out, since the potential merits of the new claims are a proper matter to consider in determining whether to grant permission to amend. Permitting a party to add allegations with no obvious merit or for which the Tribunal has no jurisdiction is clearly not a proper exercise of the Tribunal's discretion.

32. The Tribunal accepts that the Claimant herself drafted the narrative account which was included in her original claim. There were no paragraph numbers and it included information which was irrelevant and/or concerned matters outside the Tribunal's jurisdiction. However, Solicitors were on the record at the time and continued to be so until 10 June 2019. As the Claimant was professionally represented, she cannot expect the same degree of latitude in articulating her case, which a litigant in person might have been afforded. If it transpires that any actionable errors have been made in the conduct of her case by her professional representatives, the Claimant has a potential remedy against the latter.

33. Regional Judge Potter gave the Claimant the opportunity to make a proper application to clarify/amend her claim, including specifying the manner in which such an application should be made and referring her to the *Selkent* principles. It is clear from Regional Judge Potter's order (paragraph 9) that it was intended that the Claimant should provide "*Edited Grounds of Claims",* albeit in redlined form.

34. Whilst the first application to amend did not comply with Regional Judge Potter's order, the amended particulars stripped out those parts of the narrative content which referred to matters outside the Tribunal's jurisdiction and appeared to confine the Claimant's claims to those allegations which occurred closer in time to the presentation of the Claim Form, removing some of the factual background (to which the Claimant would be perfectly entitled to make reference in a witness statement). The Particulars of Claim represented a degree of progress in understanding the nature of the Claimant's claim. However, there remained a lack of clarity as to the precise nature of the claims which were being pursued, so the Claimant was given a further opportunity to clarify her claims in two Schedules as ordered by EJ Snelson. The Schedules were not an invitation to add new legal claims, but simply to clarify the claims which were already included in the Claim Form or subsequent Particulars of Claim. The Tribunal has, therefore, considered the first amendment application based on the Particulars of Claim, as illuminated (but not expanded) by the subsequently served Schedules. The first Schedule covers the discrimination claims which were foreshadowed in the original Claim Form and the second Schedule relates to the "new" claims of victimisation and whistle-blowing detriment. In summary, the Particulars of Claim reveal claims as follows:

<u>*Race Discrimination*</u>*:*

35. *The conduct of Keith Willett and Dave Parry towards the Claimant at a meeting of the Turnaround Board on 18 April 2018 as set out at paragraphs 3 and 4 of the Particulars of Claim compared to the other members of the Executive Committee.*

36. This appears to be a claim of direct race discrimination with actual comparators (the other members of the Executive Committee). Whilst the Schedule suggests that these were acts of direct or indirect race discrimination, there is no information provided as to what provision, criterion or practice was applied and the Tribunal cannot understand how an indirect race discrimination claim might possibly be formulated or, therefore, succeed. In the Schedule, it is suggested that these are also claims of direct or indirect sex discrimination. The indirect sex discrimination claim is similarly unparticularised. Neither Mr Willett or Mr Parry are employees of the First Respondent. The claim is potentially out of time.

<u>Disability Discrimination</u>:

37. The Claimant listed her claimed disabilities and suggests that she informed Mr Kier of her disabilities and the "need for reasonable adjustments" in October 2017 during an Equality Meeting. There are two clear allegations of disability discrimination:

    i) *At a meeting on 6 June 2018, the Claimant was prevented from using a recording device to take notes.* This appears to be a failure to make a reasonable adjustment claim.

    ii) *On 18 June 2018, in the course of a complaint, the Claimant was given a 6-hour deadline to obtain the consent of third parties to the use of their data. Whilst the Claimant complied with this deadline, doing so negatively impacted her health.* This also appears to be a claim failure

to make a reasonable adjustment to the complaints' procedure.

38. Both these allegations relate to personnel who are not employees of the First Respondent. In the Claimant's 22 June 2019 Schedule, these claims are characterised as "*direct/indirect/discrimination arising from disability/failure to make reasonable adjustments"* without any identification of the provision, criteria or practice relied on or the nature of substantial disadvantage. The Tribunal does not understand how the claim could be one of direct discrimination, because it is an allegation which rests on the Claimant's alleged need to be treated differently because of her disability. An adjustment which allows someone to record meetings rather than take notes is not an unusual adjustment for a range of disabilities, nor is it one which it is difficult to conceptualise. Whilst the relevant practice and disadvantage should have been set out, the former is not difficult to formulate as that of taking contemporaneous written or typed notes at meetings. The precise disadvantage will need to be identified and proved with medical evidence. The Tribunal does not consider that the Respondent is unable to prepare to meet such a claim without the Claimant spelling out the substantial disadvantage, given that it will need to be addressed in the medical evidence. The requirement to action and respond to an email in a short period of time is the relevant practice and again, the disadvantage to the Claimant will need to be identified and proved with medical evidence (albeit the Claimant did comply with the time period specified). The Tribunal considers that there is sufficient information for the Respondent to understand these factual allegations as reasonable adjustment claims and to prepare to meet them at a hearing.

<u>Sex Discrimination</u>

39. The claims of sex discrimination were outlined as follows:

i) On 17 December 2017, the Claimant's family and childcare arrangements were included in meeting minutes.

ii) The Claimant's attempts to challenge the minutes (on 14 March, 21 March and early April 2018) received no response from either Respondent.

iii) *At a Student Council meeting on or about 30 March 2018 Mike Best, the Acting Chair raised his voice, disproportionately challenged any policy suggestion the Claimant made and threatened to prevent her motions from being submitted.* Although this appears to be an allegation against Mr Best (who is not an employee of the Respondent), it is the Claimant's case that it was the Second Respondent who is alleged to have urged Mr Best to act in this way.

iv) Both the Second Respondent and Mr Baker, Chair of Trustees of the First Respondent failed to respond to the Claimant's complaints dated 1 to 4 April 2017 about the conduct during the 30 March 2017 meeting.

v) The imposing of recurring obstacles to flexible working, in particular in relation to childcare, which disproportionately affects female employees.

40. The type of sex discrimination is not specified in the Claim Form or the subsequent Particulars of Claim. In the Schedule, the number of allegations of

sex discrimination were expanded considerably and those set out above are said to be either direct or indirect sex discrimination claims. Apart from allegation (v), there is insufficient information to understand how the above allegations could constitute indirect sex discrimination. As such, the Respondent cannot respond to them. It has never been suggested by the Claimant that the allegations amount to harassment. The Tribunal, therefore, regards these claims as claims of direct sex discrimination. In so far as the Claimant has not specified an actual comparator, the claims of direct discrimination can proceed on the basis of a hypothetical comparator. The Claimant should be aware that if she subsequently relies on an actual comparator which has not been notified to the Respondents and this causes the Respondents prejudice, there could be cost implications if any subsequent hearing needs to be adjourned as a result.

41. As to allegation (v) in relation to flexible working, there are insufficient particulars provided for the nature of this claim to be understood. As a matter of broad principle, placing restrictions on flexible working are likely to disproportionately impact people with caring responsibilities. However, the Claimant has omitted to provide any details of what she claims her flexible working arrangements were, what obstacles were placed in the way of her exercising them and on what dates. The Schedule at allegation 1 suggests that the Claimant was repeatedly asked to attend meetings outside her working hours, was frequently ignored or challenged when she asked for flexible working arrangements and, in relation to the Second Respondent, that he adopted a provision criterion or practice involving meetings outside of regular working hours and inflexibility about changing these arrangements. The dates involved were described as "13 June 2017 and various dates from the commencement of her employment to 13 August 2018". No specific examples were given. Where it remains impossible to discern the precise nature of an allegation, notwithstanding the assistance the Claimant has had from Solicitors until 10 June 2019 and the additional opportunity she has been given to further clarify her allegations, a diffuse allegation should be struck out as having no reasonable prospects of success. To do so is in accordance with the overriding objective in the Tribunal Rules to ensure fairness to both parties, to avoid (further) delay and deal with issues in a proportionate manner.

<u>Summary Conclusions concerning Discrimination Claims in Particulars of Claim</u>

42. It is not for the Tribunal to draft the Claimant's claims for her, however, a Claim Form (and further particulars of it) should be read broadly and fairly, bearing in mind the same level of precision and formality which is expected in the High Court, cannot be expected in the Employment Tribunal. As a matter of general principle, parties should be given an opportunity to litigate disputes which fall within the jurisdiction of the Employment Tribunal, provided this can be done fairly to both parties. As HHJ Prophet stated in *Grimmer v KLM City Hopper UK Limited) [2005] IRLR 596,* "*it is a very serious step to deny the Claimant the opportunity of having an employment rights issue resolved by an Employment Tribunal. The threshold for access in the interests of justice should be kept low."* Whilst these comments were made in the context of an unrepresented party (which the Claimant was not at the material time), the Tribunal should be slow deny a Claimant an opportunity to reformulate a badly drafted claim or refuse an application to amend if the result would be that she is excluded from the Tribunal altogether.

43. If the Particulars of Claim dated 19 March 2019 are read together with the Claim Form and the relevant Schedule, in the Tribunal's judgment, there is now sufficient clarity concerning the allegations outlined in the Particulars of Claim summarised above for them to be fairly litigated. Some of these allegations were set out or, at least, foreshadowed in the narrative account in the Claim Form. Whilst the Claimant's Solicitors should have edited the Claimant's narrative account by crossing out the irrelevant material in red, they did not. It did not comply with Regional Judge Potter's order, but in substance it was the edited claim contemplated by the order. There is not a precise overlap in the factual allegations which now appear in the Particulars of Claim and the original Claim Form, which has contributed to the confusion in her claim. The attempt to confine the Claimant's claims to those which fall within the jurisdiction of the Tribunal did not occur until 19 March 2019, which is clearly less than ideal. The manner of the application to amend was poor and there was a substantial delay between issuing the Claim Form and preparing a replacement pleading. However, the Claim Form indicated that claims of sex, race and disability discrimination were being made and the details set out in the Particulars of Claim are by and large clarificatory in nature rather than entirely new allegations (with the exception of the disability discrimination claims). As the Claimant had been represented throughout, the Respondents' objections to the amendment were understandable, notwithstanding the Claimant's disability (or disabilities). However, in circumstances where it is not clear that the Respondents will suffer specific prejudice should the Claimant be permitted to advance the claims she did not properly particularise from the start of her claim, but which are now sufficiently precise to be litigated, the balance of prejudice lies with permitting the Claimant to amend her Claim Form in accordance with her March 2019 application. The March 2019 Particulars of Claim were clearly a replacement for the narrative account in the Claim Form. The fact that some of the allegations are ostensibly out of time should be dealt with at the full merits hearing (for reasons explained later in these reasons).

<u>Victimisation</u>

44. This claim formed part of the application to amend to add a new claim in March 2019: The protected act was not identified in the Particulars of Claim, but has since been identified in the Schedule to be the Claimant's grievance of the 4th December 2017 in which she claims to have complained about indirect discrimination (protected characteristic not identified).

45. The detriments set out in the Particulars of Claim in summary were:

    i) The attempts to remove or prevent the continuation of the Claimant's role as Women's Officer between February and May 2018.
    ii) On 18th June 2018 giving a 6-hour deadline to co-ordinate third party data consent.
    iii) The Respondent's failure to progress the Claimant's complaint about Mr Keir and the Second Respondent on the erroneous grounds that an individual involved (Ms Arts) was no longer a member of staff.

46. There was a reference in the original Claim Form to a campaign by the Second

Respondent "*to victimise me for speaking out about the discrimination I have been subjected to by him."* (penultimate page of the narrative). The asserted protected act was also set out in the Claim Form (under the December 2017 heading) as was the factual detail about the attempts to remove the Claimant as Womens' Officer. Allegations (ii) and (iii) were not contained in the Claim Form, but have been included in the Particulars and the Schedule. The victimisation claim does not appear to depend on documents revealed to the Claimant following her SAR, however, this claim can be distinguished from the whistle-blowing claim on the basis that it was foreshadowed in the narrative account in the original Claim Form and it is subject to the more generous discrimination time limit. Consideration as to whether time should be extended to allow this claim would require a more rounded consideration of all the circumstances than this Tribunal had the opportunity to do.

Whistle-blowing detriment

47. There was no reference to any whistle-blowing claim in the original Claim Form. The protected act on which reliance is placed was not clearly set out by in the Particulars of Claim, although in general terms it is stated that it was the Claimant's role in exposing the fact that the 2017/2018 NSS campaign promotion had featured Students' Union endorsement, which had not been properly mandated. In the Schedule, it is suggested that the protected disclosure was made in an email dated 29 January 2018 to the Students' Union Executive Team.

48. The detriments alleged are

i) the attempts to remove or prevent the continuation of the Claimant's role as Women's Officer in February 2018.

ii) Reprimanding the Claimant in the minutes of the 6 June 2018 Turnaround Board meeting.

49. There are some general observations to make about the Claimant's applications to amend her Claim Form to add claims of victimisation and whistle-blowing and the new allegations of discrimination contained in her first Schedule. There remain allegations which are pleaded in such a way that it is not possible to understand the case the Claimant is putting forward. For instance, her claim for indirect race discrimination. There appears to be no obvious legal basis for a claim of indirect race discrimination in relation to the allegations set out in paragraphs 3 and 4 of the Particulars of Claim, which suggest that the Claimant was singled out for particular treatment because of her race. The nature of the proposed amendment is such that it does not disclose sufficient detail for the Tribunal or the Respondent to understand the basis of it. The same can be said of the Claimant's direct/indirect sex discrimination claim related to flexible working. The factual allegation in relation to this was included in the original Claim Form. Notwithstanding two subsequent opportunities to clarify the precise nature of it, it remains unclear and unparticularised. It is not proportionate to offer the Claimant a fourth opportunity to set out her case or provide further detail of either the claims she has already outlined in broad terms or those which she has recently sought to add.

50. EJ Snelson made it quite clear in his order of 11 June 2019 that the Schedule was the Claimant's final opportunity to present a coherent, manageable case. The full merits hearing has already been postponed once and is listed for hearing in November 2019. Discovery and other preparations for the hearing cannot be finalised until the issues are clear. If that date is lost, it will be well into 2020 when the case can be rescheduled, which is in neither party's interests nor consistent with the overriding objective in the Tribunal's Rules, given some of the Claimant's claims relate to conduct which occurred in 2017.

51. An important part of the Respondents' objections to the Claimant's applications to amend is the fact that many of her allegations appear to be out of time. The Claimant's Claim Form was presented on 27 August 2018. Early Conciliation was commenced on 26 June 2018 and the Early Conciliation Form was sent on 26 July 2018. Any allegations which pre-date 28 April 2018 are, therefore, out of time unless they part of a series the last of which is in time or time is extended.

52. Whilst the question of time limits is one of the factors outlined in *Selkent* as relevant to the exercise of the Tribunal's discretion concerning amendment, it is clear from *Galilee v Commissioner of Police for the Metropolis UKEAT/0207/16/RN* that an application to amend can be granted, subject to the time point. It is often necessary for the Tribunal to hear evidence relating to time limits and their potential extension, in particular relating to whether acts of discrimination are part of a series. Thus, whilst a number of the Claimant's discrimination allegations pre-date 28 April 2018 and so are, ostensibly out of time, the necessary exercise of considering whether they might be part of a series culminating in an in-time allegation or whether it might be just and equitable to extend time would be a lengthy one. Much of the evidence in the liability hearing would need to be considered, which this Tribunal has not had the opportunity to do. For this reason, in relation to the discrimination claims, the Tribunal does not consider that the time limits weigh heavily against the Claimant in considering the merits of her application to amend. In so far as the Claimant's amendment application(s) succeed, they succeed on the express basis that the question of time limits has not been determined and will be a potential issue for the full merits hearing.

53. A distinction, however, can be drawn between the discrimination claims, for which the time limit is more flexible and the stricter test for whistle-blowing claim(s). There is something of an overlap between the Tribunal's exercise of its discretion in the context of the amendment and its strike out jurisdiction, in that the Tribunal is entitled to consider both time limits and the strength of a claim per *Selkent (*subject to *Galilee)*. In relation to the Claimant's whistle-blowing claim in her Particulars of Claim, the protected act on which she relies occurred on 29 January 2018. This was clearly within her knowledge at the time of the preparation of her Claim Form. The reason put forward for the delay in presenting the claim was her SAR, which, it is said, contained information which suggested that the Claimant was subjected to detriments as a result of her email dated 29 January 2018 (albeit the detriments pre-dated the filing of her Claim Form). The SARs were complied with on 3 December 2018 and 1 February 2019. As the Respondent points out in its written submissions, the Claimant's detriments allegedly occurred at meetings at which she was present, so would not have had to wait for the result of the SAR's in order to formulate her claim. However, apart

from very substantial delay between the last pleaded detriment (on 6 June 2018), from which the 3 month time limit runs, taking the Claimant's case at its highest, she had all the information with which to formulate her whistle-blowing claim in her possession at the latest on 1 February 2019. She was professionally represented at the time, which mitigates against any disadvantage she might be under as a disabled litigant. There remains an additional 6-week delay before her whistle-blowing claim was articulated in her amendment application (and then without precise reference to the protected act relied upon). The time limit is set out in section 48 of the Employment Rights Act 1996 that a claim should be presented:

"*Within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."*

54. Case law, notably *Palmer and anor v Southend-on-Sea Borough Council [1984] ICR 372* clarified that "reasonably practicable" does not simply mean reasonable or at the other end of the scale "physically possible", it means something like, "reasonably feasible". Ignorance of fact can be something which renders it not reasonably practicable to present a timely claim. In this case the Claimant appears to have had the relevant facts, in that she knew that she had made a "disclosure" and she was present when the alleged detriments occurred in February and June 2018. It appears to be her case that she lacked information in emails which she had not seen suggesting a causative link between her disclosure and the alleged detriments. Contrary to the Respondent's submissions, the Tribunal considers it is arguable that ignorance of material suggesting a link between a disclosure and a detriment could lead to it not being reasonably practicable to present a claim. However, no explanation has been put forward for the subsequent six-week delay by the Claimant and/or her representatives in making the application to amend to add a new claim of whistleblowing to her existing claim.

55. Given the burden lies on the Claimant to prove not only that it was not reasonably practicable to present her claim within three months of the last detriment of a seres, but also that a further six weeks delay was reasonable, in the absence of any explanation for this delay, the Claimant has no reasonable prospects of establishing that the Tribunal has jurisdiction for her whistleblowing claim. This is particularly so as she was professionally represented at the time and Regional Employment Judge Potter had given an express direction as to what the Claimant was expected to address in an application to amend. For the avoidance of doubt, the fact that the Claimant's Solicitors made an application to amend her Claim Form on 19 March 2019 demonstrates that there was no confusion (as the Claimant suggests) as to whether the application to amend had already been granted at the 5 March 2019 hearing. Insofar as the reason for that delay might lie with the Claimant's professional representatives rather than the Claimant herself, any remedy she may have would potentially lie with her former representatives.

56. The Claimant suggests in her written submissions dated 15 July 2019 that she had thought permission to amend had already been granted at the 5 March 2019 hearing and that she did not have the legal knowledge to know whether this was done correctly. The Tribunal does not know what the Claimant's legal advisers

told her about the application to amend (and it assumed that the Claimant's reference to the legal advice she received was inadvertent and she did not mean to waive privilege). However, both Case Management Orders made it perfectly clear in plain English that an application to amend the Claim Form had not been granted. The Claimant was present at the second preliminary hearing, which was listed partly to consider the application to amend. Even if, as a result of her disability, the Claimant had not appreciated in the 11 June 2019 hearing itself that she had not been given permission to amend her claim, she would have realised this from the records of both the hearings. Whilst the Claimant's asserted disabilities (as outlined in her Particulars of Claim) should be taken into account, particularly in the context of the stressful Tribunal hearing environment, it is also relevant that she is studying at degree level. As such, she is a relatively sophisticated litigant, who can reasonably be expected to understand the Tribunal's communications. For instance, the record of hearing of the 5 March 2019 explained that "*leave could not be given for an amendment without full details of the claim being provided plus an argument as to why leave to amend should now be granted"* and the Record of Hearing of the 11 June 2019 stated in terms that the main purpose of the hearing on the 5 July will be address "*amendment of the Claim Form*". It is not, therefore, accepted that the Claimant has been labouring under a misapprehension since 5 March 2019 that she had already received permission to amend her claim either to add additional allegations of discrimination or claims under different jurisdictions.

57. Although the Claimant is now representing herself, for the majority of this claim, she has been professionally represented, including at the time when the first application to amend was made. No explanation has been given as to why the Claimant's Solicitors did not ensure that the Claim Form was properly pleaded. As explained above, whilst some latitude can be granted even to a represented party as there should be a degree of flexibility in the Tribunal's process to enable a lack of particulars to be clarified, there must come a time when the costs and additional delays involved cause material prejudice to the other party or parties to the litigation. In the Tribunal's judgment, that time has now come.

<u>Summary Conclusions First Amendment Application: Victimisation/Whistleblowing</u>

58. A distinction can be drawn between the Claimant's application to add victimisation claims and her whistle-blowing claims. It was clear from the Claim Form that Respondents' attempts to remove or prevent the continuation of the Claimant's role as Women's Officer between February and May 2018 was an issue about which complaint was made. This factual allegation of detriment was made in the Claim Form and the Claimant expressly stated in her narrative account in the Claim Form that she had been victimised by the Second Respondent for speaking out about the discrimination she claims to have suffered. A link was not specifically drawn between the two alleged events, but the groundwork was certainly laid for this claim on 27 August 2018. In spite of the sloppy nature of the application to amend in this regard, the Respondents have been on notice since the start of the proceedings of the Claimant's general complaint about the steps taken to remove her from her role and the fact that she considered she had been victimised by the Second Respondent. Whilst the Tribunal appreciates that a Respondent cannot be expected to devote a large amount of time to scouring a diffuse pleading for possible claims, there is sufficient

similarity between these allegations and the contents of the Claim Form in relation to the victimisation claims, that the balance of prejudice lies with granting the Claimant permission to amend to include it, notwithstanding the potential time limit difficulties.

59. In contrast there is no suggestion in the Claim Form that the Claimant might have been presenting a whistle-blowing claim. The Tribunal does not have a broad discretion in relation to time limits for this claim. No cogent reason has been put forward either by the Claimant or her Solicitors for the 6-week delay between receiving documents pursuant to the SAR and applying to amend the claim. In the absence of any asserted good reason for the delay, it is not necessary for the Tribunal to hear evidence to conclude that the delay was not reasonable. If permission were granted in relation to the whistle-blowing amendment, the Tribunal would have been satisfied that the Claimant had no reasonable prospects of establishing that the Tribunal has jurisdiction to hear it. It has, therefore, been unnecessary to determine the Respondents' alternative submission that the Claimant has no prospect of establishing that her disclosure was in the public interest. Permission to amend to add a whistleblowing claim is refused in the Tribunal's discretion.

Second Amendment Application

60. In the course of her written submissions dated 15 July 2019, the Claimant sought permission to amend her claim to add all of the allegations of discrimination, victimisation and whistleblowing which are now included in her Schedules. There are two Schedules the first relating to the acts/omissions relied on for the Claimant's discrimination claims (the implication being that no application to amend would therefore be required) and a Schedule relied on for the victimisation/whistleblowing claims, for which an amendment is required.

61. As to the discrimination claims in the first Schedule, although there appeared to be only seven numbered allegations, that is by no means the reality. By way of illustration the first allegation is said to extend from "*13 June 2017 and various dates from the commencement of her employment to 13 August 2018, failing to be investigated until a report was issued on 6 December 2018."* The perpetrators are said to be the second Respondent and "*various employees of the first Respondent"* who are not identified. The headline act/omission is the Claimant having suffered from "unreasonable, unfair professional demands", which is then further broken down into items (a) to (d) and then two additional bullet points, ie. arguably 6 or 7 factual allegations, depending whether the headline act is separately counted. Examples of the factual allegations are: "*being repeatedly asked to attend meeting at the outside of her working hours including prior to her employment officially commencing",* and being "*frequently ignored or challenged when she asked for flexible working arrangements including raising her need for access to childcare or breastfeed feeding facilities to be considered"; "being excluded from fully engaging with decision-making meetings*", *"being singled out by the Second Respondent on account of Claimants more flexible hours" "being singled out for greater student scrutiny than her colleagues especially in the area of how she used annualised hours including as leave from her professional role."*

62. None of the sub clauses have dates attached, all the acts or omissions are set out in very general terms and in the column setting out the legal nature of the claim, four separate types of discrimination are listed: indirect sex discrimination, indirect disability discrimination, discrimination arising from disability, failure to comply with the duty to make reasonable adjustments. Item 1 in the first Schedule, therefore, represents 28 potential claims. There is no indication of the provision, criterion or practice on which the Claimant relies for any of these claims or what particular disadvantage she claims to have suffered as a result of her disability or what consequence of her disability has led to any alleged unfavourable treatment. Although the Claimant included allegations concerning being expected to attend training prior to the start of her employment and the childcare problems that caused her in her Claim Form, the only previous allegations identified as disability discrimination (apart from the box been ticked on her Claim Form) related to her recording of a meeting in April 2018 and being given a tight deadline to provide information about a complaint she had brought.

63. It is clear from the order of EJ Snelson, that the purpose of the Schedules was to provide clarity as to the Particulars of Claim, (which was itself an attempt to clarify and narrow down the narrative account provided by the Claimant herself with the Claim Form). It was not an invitation to redraft the Particulars or expand the number of claims by re-introducing elements of the Claim Form which had been removed or to present new claims. The contents of the Schedules have been taken into account in so far as they elucidate the Particulars of Claim, but with the exception of act/omission 4 (relating to the potential removal of the Claimant from her position of Women's Officer) and act/omission 5 (concerning the Claimant's treatment at a meeting of the Turnaround Board on 18 April 2018), the remaining claims are not sufficiently particularised or are new claims. The Respondents and the Tribunal cannot be expected to untangle which general information is attached to each type of discrimination and protected characteristic over three separate documents. Allowing the Claimant to amend her already amended pleading in such a widespread and diffuse manner would inevitably require yet further particulars before the Respondent could properly defend the new or reformulated claims. Whilst theoretically the Respondent could be compensated in costs for any additional work which is required to meet the contents of the Schedules, the Claimant has explained that she is in receipt of state benefits, such that she would not be in a financial position to meet the Respondent's reasonable additional costs associated with defending the third iteration of the Claimant's claim.

64. The Claimant's explanation for the delay in making this second application based on her misunderstanding as to whether permission to amend had been granted is rejected for the reasons set out earlier in these reasons. No cogent reason is put forward as to why the contents of the two Schedules were not included in the application to amend of 19 March 2019, when the Claimant was still represented by Solicitors.

65. Whilst it is appreciated that the Claimant will suffer a degree of prejudice in being unable to litigate all the claims she now believes she has or might have against the Respondents, notwithstanding the fact that she has been professionally represented for the first 10 months of this litigation, she has been afforded three opportunities to formulate her claims, the most recent of which has

significantly expanded and recast her claims in a manner which largely makes them less not more clear. A further two days of judicial resources has been involved in reaching a position where a list of issues can be formulated. The prejudice to the Claimant must be balanced against that of the Respondents, who have had to attempt to defend claims which lack clarity and particularity and which have altered throughout the period of the litigation so far. The time has come for those claims which can be clearly identified from the information provided to be litigated in November rather than for there to be further preliminary hearings and potential strike out applications. It would be disproportionate for it to take more than twelve months to get a claim to a position where it can be understood, especially where some claims date back to 2017. The Claimant appears to have suffered no material loss of income during her employment, so the value of her claims will largely be limited to injury to feelings if she is successful. That is not to ignore the importance of potential findings of discrimination, but it seems likely that the costs of the litigation will exceed the amount of any compensation potentially payable.

66. The only exception to the general comments above relate to allegations 4 and 5 in the Schedule of discrimination claims. These are substantially the same as the allegation of victimisation and direct race discrimination set out in the Particulars of Claim. The former is an issue about which the Claimant has consistently complained throughout her pleadings (and her employment), namely, that her ability to serve and be re-elected as a sabbatical officer was challenged by the Respondents on the grounds that she was no longer a student at Birkbeck College. It is the Claimant's case that she was singled out by the Respondents in circumstances where there was a male sabbatical officer who was not challenged in the same way. As the issue was resolved in the Claimant's favour, the losses which potentially flow should she be successful with her claim are likely to be modest. The Tribunal is also aware that the Respondents' explanation for the apparent difference in treatment was that it was unaware that the Claimant's recently named comparator was no longer a student. This is clearly a reason for different treatment which does not relate to a protected characteristic. However, this Tribunal has limited evidence on which to judge the relative strength of the Claimant's claim in this regard, so is not in a position to conclude that it has no reasonable prospects of success.

67. The Respondents were well aware from the narrative account in the Claim Form (the February 2018 and April 2018 entries) that the Claimant was complaining about the attempts to remove her from her employment. It cannot be a surprise to the Respondents that the Claimant seeks to suggest that this was an example of direct discrimination because of at least one of her protected characteristics. In these circumstances, the balance of prejudice lies with granting the Claimant's second application to amend her Claim Form to the limited extent that she is entitled to put forward claims of direct sex and race discrimination in relation to the attempt to remove her from her employment in February 2018 and then to prevent her re-standing in May 2018 and her treatment in the Turnaround Board meeting on 18 April 2019. The Respondents' explanation for the Claimant's treatment will be the same for each protected characteristic, such that the hearing will not be materially lengthened or the costs increased by permitting these amendments. Whilst the precise dates of the allegations relating to the Claimant's removal from office are not provided, the Respondents have sufficient information to understand

the nature of the Claimant's claim. The amendment is subject to the determination of the jurisdictional time-limit point at the full merits hearing.

Strike Out

68. The Respondent's application to strike out the Claimant's claims are not only based on their prospects of success, but also the Claimant's failure to comply with orders and more generally the way that the litigation has been conducted both by her and on her behalf. It is pointed out that the orders of Regional Employment Judge Potter were not complied with in relation to the manner of the first application to amend, which was expressly ordered to be redlined and then still required additional clarification and the relevant *Selkent* factors were not addressed. The Claimant's Schedules have in some respects contributed to the lack of clarity in her claims and did not addressed all of the matters she was directed to address, whilst adding in additional claims. However, the latter appears to be a result of her lack of representation and the difficulty experienced by most litigants in person in being able to look at their potential claims with the same objectivity as a professional third party.

69. The Claimant's failures to comply with orders of the Tribunal are clearly the more serious when she was professionally represented. Whilst the Particulars of Claim did not include redlines through the information no longer relied on in the Claim Form, such information was excluded by omission and the claims narrowed down to those for which the Tribunal has potential jurisdiction. As such, the omission of redlining was more a default of form than substance. In so far as some of the *Selkent* factors were not addressed, this has affected the strength of the Claimant's application to amend and the Respondent has not been materially prejudiced. There has undoubtedly been a lack of compliance with orders on the Claimant's part, but any sanction for such default should be proportionate. For instance, if an order has been breached or compliance has been incomplete, an unless order could have been sought. It would not be proportionate for the Tribunal to strike out the Claimant's claim either for her lack of compliance with orders or the manner in which the proceedings have been conducted to date. Put simply, the breaches have been insufficiently egregious and the conduct insufficiently sustained or calculated to justifying striking out her claim.

70. As to the Claimant's prospects of success, with the exception of the whistle-blowing claim, this Tribunal is not in a position to form a view as to the likelihood of the Claimant's establishing that her out of time allegations form part of a series with later allegations or whether it would be just and equitable to extend time in the alternative. The Claimant submits that she chose to complain internally before issuing proceedings, so this contributed to the delay. The Tribunal has not been provided with copies of all the Claimant's internal complaints. A Tribunal at the full merits hearing will be better placed to reach a concluded decision with all the evidence.

71. Another of the grounds on which the Respondents seek to strike out some of the Claimant's claims is that they make allegations against people who, it is contended, are neither employees nor agents of the First Respondent. Thus, the Tribunal will have no jurisdiction to consider those claims. The personnel involved either sit on the First Respondent's Turnaround Board (which is a working group of

the Board of Trustees) or on the First Respondent's Council. The personnel involved are: Mr Keir, who is the second Respondent's line manager, but is an employee of Birkbeck College rather than the first Respondent, Mr Parry and Mr Willetts, who are members of the Turnaround Board and a Consultant from Nick AJ Smith Consulting engaged by the First Respondent. They are all cited by the Claimant as perpetrators of discrimination. Whilst it appears uncontroversial that none of these named individuals are employees of the Respondent, it is less clear that, as members of the Turnaround Board they are not agents of the First Respondent, given it is a decision-making body of the First Respondent.

72. The Claimant attends the Turnaround Board in her capacity as an employee of the First Respondent. If a decision of the Turnaround Board as a whole was discriminatory in relation to the Claimant, the First Respondent would, presumably, accept it was liable for that discrimination. The Claimant's allegations are of direct discrimination in relation to how she was treated on the Board by members who were not employees of the Respondent (apart from the Second Respondent). No detailed legal submissions were made on the point (beyond a reference to the relevant sections of the Equality Act 2010 – section 109(2) and section 110). The Claimant confirmed that she was not making a third-party harassment claim. Section 109(2) provides that "*Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal."* It is further clarified in section 109(3) that the knowledge or approval of the principal is not needed for liability to attach. The Tribunal was not referred to any authority on the point, however, under predecessor legislation, in *Bungay v Saini* EAT 0331/10 it was held that two board members of All Saints Haque Centre (an advice centre) had been acting as agents for the Centre, although they were not employed by it. The test of authority was held to be whether when doing a discriminatory act the discriminator was exercising authority conferred by the principal and not whether the principal had in fact authorised a Board Member to discriminate. It must be reasonably arguable that Mr Keir, in particular, as Chair of the Turnaround Board, had the First Respondent's authority to chair meetings of the Board. If he performed that function in a discriminatory manner (albeit it is denied he did), he arguably did so with the authority of the First Respondent. As such, it is not appropriate to strike out those claims which concern staff of Birkbeck University who sit on the First Respondent's Turnaround Board. Whilst there may be different considerations in relation to Mr Best (who is a student on the First Respondent's Council), the allegation against him also relates to the Second Respondent.

73. The Tribunal appreciates that there is a serious question as to whether the First Respondent is liable for the acts of personnel they do not employ, it cannot be satisfied that the Claimant has no reasonable prospect of establishing that they were agents of the First Respondent at particular times or when performing particular roles.

74. The established route for the Claimant to complain about her line manager in her capacity as an employee of the First Respondent (the Second Respondent) is to staff at Birkbeck College. The Respondents defend the Claimant's claims relating to the operation of this complaint system on the basis that it is "owned" by Birkbeck College, not the First Respondent. Clearly the First Respondent does not employ staff at Birkbeck College to operate the complaint system, but in so far

as it provides this route of complaint to its employees, it is a reasonable inference to draw that Birkbeck College and its staff are its agents for the purposes of a discrimination claim in relation to how the complaint system is operated. The relationship between the First Respondent Union and Birkbeck College is clearly an unusual one, but equally, it would be inconsistent with the purpose of the Equality Act 2010 if an employee could not take action in relation to grievance (or disciplinary) process which was "contracted out" to third parties. The Tribunal is not satisfied that the Claimant has no reasonable prospects of establishing that the First Respondent is liable for the acts or omissions of members of its Turnaround Board or those people who operated the complaints procedure for their staff. This is an issue which should be more fully explored at the full merits hearing.

75. The Claimant's disability discrimination claims rely on the First or Second Respondent's having knowledge of her disability and its effects. On the Claimant's case, it is suggested that she told Mr Keir (an employee of Birkbeck College rather than the First Respondent) of her disabilities and the need for reasonable adjustments at a meeting of the Equality Committee in October 2017. Mr Keir was the Second Respondent's line manager and a member of the Turnaround Board. It is the Respondent's case that the Claimant informed Mr Keir in her capacity as a student. On the Claimant's own case, she did not inform Mr Keir at a Turnaround Board meeting (where he would arguably be an agent of the First Respondent). Information given to Mr Keir by the Claimant in her capacity as a student could not be imputed to the First Respondent, but there is a lack of clarity as to the circumstances in which the Claimant spoke to Mr Keir and what was said. As such, the Tribunal cannot be satisfied that she has no reasonable prospects of establishing knowledge on the part of the Respondents.

76. The Respondent suggests that the Claimant's email of 4th December 2017 was not a protected act for the purposes of her victimisation claim. The Claimant characterised it as a complaint of indirect discrimination. The Tribunal was provided with a copy of the email. There is certainly no express reference to discrimination of any kind, the question, therefore, is whether it is implicit. The complaint is addressed to the Chair of Trustees, Mr Baker about the Second Respondent, "*due to a number of instances in which I questioned his efficiency and his ability to act in the best interests of the union."* There are four subjects of complaint (as set out in headings).

    76.1 *Being told financially damaging false information*
    76.2 Failing to be protected in a situation which incurred risk and public scrutiny
    76.3 Shortened union hours
    76.4 overseeing the complete mishandling and violation of the autonomy of the Black Members' Campaign.

    In the course of outlining her complaint about being given financially damaging false information, the Claimant quoted from some correspondence she had written on 12 June 2017 stating that she was currently breastfeeding and asking if the induction days have breast feeding facilities or whether she could bring her child. The point of the quotation, however, was that it set out the Claimant's request for travel expenses for training days, which was the subject matter of

the complaint. In addition she complained about apparent restrictions being placed on when she could take leave and as to an alleged failure to protect her when she was personally attacked in a Facebook post in what she regarded as a defamatory manner, she mentioned the Second Respondent's attempt to limit the Union hours and finally suggest that he mishandled and violated the autonomy of the Black Members' Campaign. As the only black officer in the Union and the only woman, the fact the Claimant did not know about a particular meeting, he inferred that other black students who were not involved in the Students Union would also not be able to find out about it.

77. Section 27(2)(d) of the Equality Act 2010 describes a protected act as (amongst other things) "*making an allegation (whether or not express) that A or another person has contravened this Act."* This appears to be the only possible relevant definition in section 27(2). To suggest that the Second Respondent was inefficient and not acting in the best interests of the Union in the way that he organised Black Members meeting is not an implicit suggestion that the reason for his actions was discriminatory. The Claimant's reference to breastfeeding facilities was entirely incidental to the complaint she was making, which was that that she had been "*told financially damaging information" by the Second Respondent.* The Claimant did not make any reference to the Second Respondent's response to her breastfeeding inquiry. It was simply part of the wider quotation from her inquiry about travel expenses, which was the subject matter of the complaint. As such, in the Tribunal's view, the Claimant will have some difficulty in establishing that her "comprehensive complaint" against the Second Respondent was a protected act for the purposes of section 27 of the Equality Act 2010, but it is not satisfied that she has no reasonable prospect of establishing it.

Employment Judge Clark
Dated: 9 August 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

21/08/2019

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS