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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4102885/2019

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Held in Aberdeen on 24 February 2020

Employment Judge: N M Hosie

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Ms K Brown	**Claimant** **Represented by:** **Mr R Clarke -** **Solicitor**
The Advocate General for Scotland **As Representing The Ministry of Defence**	**First Respondent** **Represented by:** **Mr D Walker –** **Solicitor**
College of Policing Limited	**Third Respondent** **Represented by:** **Ms M McGrady –** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the application by the Third Respondent to set aside the Order of 24 October 2019, as amended on 12 February 2020, is refused.

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REASONS

Introduction

1. On 16 October 2019, the claimant's solicitor applied to amend the claim to add the College of Policing Limited ("COP") to the proceedings as an additional respondent. His e-mail of that date, along with the amended "Grounds of Complaint" are referred to for their terms. In short, he sought to pursue a complaint of indirect sex discrimination, contrary to s.19 of the Equality Act 2010 ("the 2010 Act"); and a complaint that COP, *"instructed, caused or induced indirect sex discrimination*", contrary to s. 111 of the 2010 Act.

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2. On 24 October 2019, I issued an Order adding the COP as an additional respondent. On 12 February 2020, I issued an amended Order in which I narrated that the Order had been issued in response to an application by the claimant's solicitor.

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3. On 25 November 2019, COP's solicitor submitted an ET3 response form in which, *inter alia*, she intimated her objection to COP being sisted as a respondent, asserted that the Tribunal did not have jurisdiction and applied to have COP released from the proceedings.

4. I conducted a Preliminary Hearing to consider case management, and in particular the sisting of COP, on 17 January 2020. With the agreement of the parties, I decided that I would consider and determine the issue, *"on the papers".* In other words, on the basis of written submissions on behalf of the parties. The Note which I issued to the parties on 23 January 2020, following

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the case management Preliminary Hearing, is referred to for its terms. As there had already been a claim against a Second Respondent which had been dismissed, I decided, to avoid any confusion, that COP would be designated as the Third Respondent which meant that the claim would be against a First
5 and Third respondent.

Third Respondent's submissions

5. COP's solicitor made written submissions by e-mail on 31 January 2020. These are referred to for their terms. She applied for the Order of 24 October 2019, as amended, to be set aside under Rule 29, in Schedule 1 of the
10 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules of Procedure") and for the Third Respondent to be removed as a party to the claim.

Time-bar

6. COP's solicitor submitted that the Tribunal did not have jurisdiction to consider
15 the amendment whereby the Third Respondent had been sisted as a respondent as there had been a failure to comply with Rule 12(1)(a) of the Rules of Procedure. She submitted that the claim should be struck out under Rule 37(1)(c): *"for non-compliance with any of these Rules or with an order of the Tribunal".*

20 7. So far as the indirect sex discrimination complaint was concerned, it was submitted that, *"the deadline to commence EC, was 28 November 2018".*

8. So far as the s.111 complaint was concerned, *"the deadline was 13 February 2017".* It was submitted, therefore, that the ET1 claim form was lodged, *"25 months later"* and the application to amend, to introduce the s111 complaint,
25 *"was made 31 months later".*

9. The Third Respondent's solicitor then addressed the *"just and equitable"* discretion which the Tribunal has in s.123(1) of the Equality Act 2010 (" the 2010 Act"). She submitted that, *"extension should be the exemption rather than the rule".* She then addressed a number of factors.

"The length of and reasons for the delay"

10. The Third Respondent's solicitor understood, *"that the claimant will argue her reason for the delay is (sic) bringing the claims against the Third Respondent is that the First Respondent confirmed that complying with the Third Respondent's standards was a legitimate aim on 15 August 2019".* However, she submitted that, *"it is clear from the ET1 that the claimant's representatives were aware at the time of submitting the ET1 that the First Respondent may argue that they are required to comply with the Third Respondent's standards."*

11. She further submitted that, *"the decision not to make factual averments which would support a claim against the Third Respondent or to pursue a claim against the Third Respondent was deliberate".* Although, *"the facts which were in existence at the point at which the claimant lodged her ET1 and certainly at the point where the ET3 was submitted was sufficient to put her, or her representatives, on notice of the possibility of a claim against the Third Respondent. The claimant, or her representatives, chose not to commence EC and bring any claims against the Third Respondent".*

12. In conclusion, the Third Respondent's solicitor submitted that:-

> "*The claims being advanced against the Third Respondent were out of time even had they had been included in the original ET1. They were ultimately brought against the Third Respondent 2 years and 11 months after the claimant became aware of the Third Respondent's fitness standards (being followed by the First Respondent). They were made 12 months after dismissal for not achieving that score. They were made 7 months after they submitted their ET1. They were made over 5 months after they received the First Respondent's ET3. They were made 2 months after they were reminded of the First Respondent's position by e-mail."*

"Other factors"

13. The Third Respondent's solicitor accepted that the cogency of the evidence was unlikely to be affected by the delay.

14. She submitted that the Third Respondent had co-operated with any request for information. She further submitted that, *"the claimant was aware of the Third Respondent, its fitness standards and the potential impact upon her from the outset of her employment. She also had those matters in mind at the time of submitting her claim. Even after receiving the First Respondent's ET3 defence, she did not act promptly. No explanation has been offered for the failure to submit the claim on time or for the subsequent delay. The claimant has been represented throughout the entirety of her claims. To refuse the amendment would not leave the claimant without a remedy as she has an existing claim in the Tribunal against the First Respondent and, if appropriate, a claim for negligence against her legal representatives".*

15. The Third Respondent's solicitor submitted that the case **of *Drinkwater Sabey Ltd v Burnett and Another*** [1995] ICR 328 EAT, which was relied on by the claimant as authority for joining another respondent, even after the time limit has expired, could be distinguished from the present case. She also referred to ***Gillick v BP Chemicals Ltd*** [1993] IRLR 437, which was followed by the EAT ***Drinkwater.***

16. While the Third Respondent's solicitor accepted that the EAT in ***Gillick*** held that, *"there is no time limit which applies as such when it is proposed to add a new or substitute respondent to an originating application which has been lodged timeously"*, she submitted that the present case fell to be distinguished. She submitted that:-

> *"…. the claim being advanced against the Third Respondent is very different. It is not simply being added as an additional party to an existing timeous claim. The indirect discrimination claim is unclear as there would be no logic behind the assertion that the Third Respondent applied the PCPS that are relied upon in the claim pursued against the First Respondent and we await clarification of the basis of that claim. The Section 111 claim is, however, clear. The Section 111 claim is, of necessity, entirely different to the claim that was brought against the First*

Respondent. The submission of a claim against one respondent timeously does not and should not allow a Claimant to then amend and pursue an alternative claim against an alternative Respondent – and particularly not when that claim would have been out of time even had it been included in the originating application."

"Early conciliation"

17. The Third Respondent's solicitor submitted that the claimant had failed to comply with the Early Conciliation rules and that the claims against the Third Respondent should be struck out under rule 37(1)(c) of the Rules of Procedure.

18. In support of her submission she referred to ***Science Warehouse Ltd v Mills*** UKEAT/0224/15. In short, she submitted that "*the matter in issue is entirely different to that on which there was EC… we consider that this extends beyond adding an additional respondent to an existing claim and we consider that EC is required. The amended claim is outwith the matter originally conciliated on and, as such, EC requirements have not been met".*

"**Was the claimant aware of the possibility of the claim against the Third Respondent?"**

19. The Third Respondent's solicitor submitted that the claimant was aware of this, but *"chose not to commence EC*."

20. She accepted, on the basis ***of Mist v Derby Community Health Services NHS Trust*** UKEA/0170/15, that seeking to add a respondent to an existing claim does not require Early Conciliation in respect of a new respondent. However, she submitted that that was not the position in the present case, *"at least in relation to the Section 111 claim*". She submitted that, *"**Mist** is not authority for the view that a **new** claim can be brought against a **new** Respondent without the need for EC".*

"Prospects of success

Claim that the Third Respondent indirectly discriminated against the Claimant"

21. The Third Respondent's solicitor submitted that:-

> *"The Claimant alleges that the First Respondent applied certain PCPs to the Claimant. She does not, even in her amended claim, allege that the Third Respondent applied any PCPs. The Third Respondent did not employ or provide services to the Claimant and so could not apply any PCPs to her. The amended claim is entirely without prospects of success."*

"Claim that the Third Respondent instructed, caused or induced discrimination"

22. The Third Respondent's solicitor submitted that:-

> *"The Claimant denies that "the MDP is required to have a College of Policing Licence in order to lawfully deploy AFOs and/officers".*
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> *The Claimant's esto position is: "by requiring the MDP to apply the PCPs the COP unlawfully instructed, caused or induced indirect sex discrimination contrary to s.111 of the EqA 2010". Therefore the Section 111 claim would rely upon a finding in fact that the Third Respondent had "required" the MDP to apply the PCPs. That is a factual position which no party offers to prove. Indeed it is a factual position which the Claimant expressly states is not the case. The Third Respondent, in agreement with the Claimant, expressly denies that it placed a requirement upon the First Respondent. The First Respondent does not suggest that the Third Respondent placed a requirement upon it. There is, on the face of the pleadings, no prospect of the Tribunal concluding that the Third Respondent imposed the requirement necessary for the s.111 claim to be successful.*
>
> *Therefore, the Claimant's case proceeds on a hypothetical basis which is contrary to the Claimant's position and which no party offers to prove."*

Summary

23. Finally, the Third Respondent's solicitor said this, by way of summary:-

"The Order should be set aside as it was made without the Third Respondent having the opportunity to make representations and there is no indication that the relevant factors were considered and no written reasons have been provided. Further, when the relevant factors are considered, the amended claim should not be allowed to proceed because:-

In connection with the indirect discrimination claim, it does not allege that the Third Respondent applied any PCPs to the claimant. (The Third Respondent was not in a position to apply PCPs to the claimant). That claim cannot, therefore, succeed.

In connection with the Section 111 claim, it relies upon a finding in fact which the claimant and the Third Respondent agree is incorrect and for which the First Respondent does not argue.

The Section 111 claim is an entirely different claim to the claim advanced against the First Respondent. There was no EC on that matter.

The Claimant was aware of the Third Respondent's role and of its fitness standards at the outset of her employment with the First Respondent. She did not pursue the Section 111 claim at that stage.

The Claimant deliberately chose not to pursue a Section 111 claim against the Third Respondent at the time of lodging her original ET1 – apparently because she accepted then, and still maintains now, that the facts don't support such a claim.

Even at the time of lodging her ET1, the Section 111 claim would have been long out of time.

The Claimant did not act promptly at the various stages following the ET1 being lodged.

No explanation has been offered for the original delay or the continued delay. An extension should be an exception.

If appropriate, she has recourse against the advisers who have been appointed from the outset of the claim. However, in fact, the Claimant will continue to be in a position to pursue the claim she chose to pursue and the claim that she truly argues in favour of – being a claim against the First Respondent alone."

Claimant's submissions

24. On 14 February 2020, the claimant's solicitor made written submissions. His e-mail of that date is referred to for its terms.

25. In support of his submissions he referred to the following cases:-

5 ***Drinkwater***

Trimble and Anor v North Lanarkshire Council and Anor EATS/0048/12

Woodhouse v Hampshire Hospitals NHS Trust EAT 0132/12

Selkent Bus Company v Moore [1996] ICR 836

10 ***Abercrombie and Ors v Aga Rangemaster Ltd*** [2014] ICR 209 CA

Mist

NHS Trust Development and Anor v Saiger UKEAT/0167/15

26. He first set out the *"procedural history"* of the case. He referred, in particular, 15 to the e-mail of 15 August from the First Respondent's solicitor in which he detailed the *"respondent's legitimate aims".* One of these was, ***"Comply with College of Policing standards"***. The claimant's solicitor explained that the claimant's primary position in relation to that particular legitimate aim, *"is that the First Respondent is **not** required to have a College of Policing licence in 20 order to lawfully deploy its armed officers (see paragraph 44 of the Grounds of Complaint), but given that the First Respondent was expressly asserting a contrary position (and relying upon this as a legitimate aim) it was decided that in order to fully protect the claimant's position an application should be made to add the College of Policing to the proceedings."*

25 27. Accordingly, *"by the Amended Grounds of Complaint, the Claimant brought an indirect sex discrimination complaint against the Third Respondent and also a complaint that the Third Respondent unlawfully instructed, caused or induced indirect discrimination contrary to s.111 of the EqA.*

Paragraph 44A of the Amended Grounds of Complaint states as follows:

"Alternatively, if MDP is required to have a COP licence in order to lawfully deploy AFOs and/or armed officers and/or if it was a legitimate aim of MDP to comply with COP standards (which is denied) the Claimant avers that by requiring the MDP to apply the PCPs the COP unlawfully instructed, caused or induced indirect sex discrimination contrary to s. 111 of the Equality Act 2010."

28. It was submitted therefore, that the claimant was thus asserting an *"esto position, in the event that the claimant's primary argument is not successful".*

"Law"

30. The claimant's solicitor referred in his submissions to the general discretion to amend claims under Rule 29.

31. He also referred to Rule 34 which provides that, at any time either on its own initiative on the application of a party or any other person wishing to become a party, a Tribunal has power to add any person as a party by way of substitution or otherwise. He submitted that the appropriate test to be applied is whether there are *"issues between the person to be joined and any of the existing parties"*.

32. In support of his submissions in this regard he referred to ***Drinkwater*** which he submitted was authority for joining another respondent, even after the time limit for bringing a fresh claim has expired. In that event, the party joined can apply under Rule 30 for the Order to be varied or revoked under Rule 29.

Amendment

33. The claimant's solicitor submitted that the same principles applied to an amendment to add a party to a claim as to any other sort of amendment. He referred to the, *"careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment."* He referred to ***Trimble, Selkent*** and ***Abercrombie.***

34. He submitted that, *"ultimately, the authorities show that the question of whether a new party should be joined to the Tribunal proceedings is a matter for the Tribunal's discretion which should be exercised in such a way as to arrive at a just result"*.

5 "**Third Respondent's submissions"**

35. The claimant's solicitor submitted, with reference to ***Woodhouse***, that it is not necessary at this stage to consider the merits of the claim, *"other than to be satisfied that the complaint is not utterly useless and has no prospect of success".*

10 36. On the basis of ***Mist***, he submitted that it was not necessary to go through the EC process to amend the existing claim by adding another respondent as this is a case management issue "*which should be addressed in accordance with the normal case management principles".*

37. He submitted that paragraph 44A of the Amended Grounds of Complaint
15 "*properly sets out the basis of the claimant's complaints against the Third Respondent both in relation of the complaint of indirect discrimination and the section 111 complaint and that the Tribunal has jurisdiction to hear these complaints".* In this regard he also referred to s.120 of the 2010 Act.

38. He also submitted that the relationship between the First and Third
20 Respondents was such that the Third Respondent was in a position to commit a basic contravention in relation to the First Respondent. He submitted with reference to ***Saiger***, that "*the claimant's position will be that one corporate body can commit a basic contravention against another."* He submitted that, "*in the circumstances we invite the Tribunal to proceed on the assumption that*
25 *the Claimant has an arguable case against the Respondent and that per* ***Woodhouse*** *the merits of the claimant's case against the Third Respondent should not be a relevant factor on the basis that it cannot be said that the claimant's case is utterly hopeless …. It is submitted that in the circumstances the Tribunal should consider whether the Third Respondent should remain a*
30 *party to these proceedings by exercising its discretion in accordance with the*

overriding objective of dealing with cases fairly and justly which requires the Tribunal to consider all of the relevant factors having regard to the interests of justice and the relative hardship that would be caused to the parties."

39. He submitted that the Third Respondent *"could not point to any particular prejudice caused by the amendment over and above the inherent prejudice of being exposed to a claim which could not otherwise have been brought"* and that the Third Respondent, "*could reasonably anticipate that the complaints brought by the claimant against it are the natural concomitant of the relationship between the First and Third Respondent."* He submitted that *the "just result requires the Third Respondent to remain in the proceedings as clearly there are issues between all of the parties that need to be determined so as to ascertain whether the arrangements and practices of the First and Third Respondent are lawful. This is particularly important in circumstances where these arrangements/practices apply to all the Home Office forces in England and Wales and thus affect thousands of female police officers."* He submitted that, "*it is clearly in the interests of justice for the issues between the parties to be considered by the Tribunal and for the Tribunal to consider whether the Third Respondent does by it practices discriminate against female police officers."*

40. He then referred to paragraph 3 of the Third Respondent's paper apart to the response form which states that:-

> "*The Second Respondent (sic) was established in 2012 as the professional body for everyone who works for the Police service in England and Wales. The Second Respondent's products and standards are developed for the Home Office forces in England and Wales but are intended for the benefit of 'all in policing'… the purpose of the Second Respondent is to provide those working in policing with the skills and knowledge necessary to prevent crime, protect the public and secure public trust."*

42. He also referred to paragraphs 4 and 7:-

> "*The Second Respondent's organisational aims are: to develop the research and infrastructure for improving evidence of 'what works' in policing; to support the development of individual members of the profession by setting educational requirements to assure the public of*

the quality and consistency of policing skills and facilitating the academic accreditation and recognition of members' expertise; to set standard in policing for forces and individuals based on the best evidence available of single 'what works'.

5 *The Second Respondent is the body responsible for issuing Firearms Training Licenses to police forces, including the First Respondent."*

43. It was submitted that:-

"*Given the reach and importance of the Third Respondent it is essential*
10 *that in circumstances where it may be acting unlawfully the Tribunal should consider whether the claimant's complaints are meritorious and if so the Third Respondent should then no doubt wish to arrange its practices differently.*

This is a case therefore where the Tribunal should not just be concerned
15 *with the immediate dispute between the Claimant and the Third Respondent but also the wider implications and impacts on a much wider class, namely all female police officers.*

In so far as the Claimant as an individual is concerned it is submitted that even if the Tribunal just assesses the balance of prejudice between
20 *the Claimant and the Third Respondent there is greater prejudice to the Claimant who may be left without a remedy if a primary case against the Third Respondent does not succeed.*

It is respectfully submitted that the Third Respondent cannot make any legitimate criticism of the timing and manner of the application given that
25 *the application was made promptly once the First Respondent identified as one of its legitimate aims that it had to comply with College of Policing Standards. The situation was akin to the type of case where new facts and information come to light or where a respondent in a discrimination claim raises a s.109(4) defence which can then result in the need to*
30 *amend/apply to add another party. A similar situation also arises in civil proceedings where one party makes allegations against a third party."*

44. It was submitted that once the claimant became aware of the First Respondent's legitimate aims, the application to amend was made promptly.

35 45. It was also significant, it was submitted, with reference to ***Abercrombie***, that although a new cause of action is raised by the amendment, "*the new pleading does not involve substantially different areas of enquiry; in fact the areas of enquiry are identical."*

46. Nor was it the case that the claim could not be properly investigated or defended as *"all of the relevant contemporaneous documents remain in existence and the case will be determined by 'technical' evidence rather than on the recollections of lay witness evidence".*

5 **Response to Third Respondent's submissions**

47. The claimant's solicitor then responded to the numbered paragraph by way of "Summary" in the final page of the submissions by the Third respondent's solicitor.

62.1 - It was submitted that there has been a *"fundamental misunderstanding"*
10 of the claimant's case as set out at paragraph 44A of the amended Grounds of Complaint". *"The Claimant's case is that the Third Respondent indirectly discriminated against the claimant by **requiring the MDP** (i.e. its own PCP) to apply the PCP's referred to at paragraph 35 of the Amended Grounds of Complaint. In the circumstances this complaint is arguable and it cannot be*
15 *said that it has no prospect of success".*

62.2 - The claimant's solicitor also maintained that there had been a fundamental misunderstanding of the s.111 complaint as it, *"advances an **esto** argument which she is fully entitled to do under Scots employment law".* It was submitted that this complaint is also arguable and cannot be said to
20 have no reasonable prospect of success.

62.3 - On the basis of ***Mist***, it was submitted that there is no need for EC.

62.4 - The claimant's solicitor submitted that, *"as is clear from the Grounds of Complaint the Claimant's primary position is set out at paragraph 44, namely that the MDP is not required to have a College of Policing licence in*
25 *order to lawfully deploy AFP's and/or armed officers. It was for this reason that the s.111 claim was not pursued at the outset. It only became necessary to bring this complaint once the First Respondent raised legitimate aim 4 in its e-mail of 15 August 2019."*

62.5 - "*See the point made above".*

62.6 - As the alleged unlawful conduct on the part of the Third Respondent was ongoing, and remains ongoing, it was submitted that the complaint would not have been out of time even at the time of lodging the ET1 claim form.

62.8 - *"See above."*

5 **62.9 -** *"It is not accepted that in the circumstances the claimant would have any claim against her legal advisers."* It was submitted that, *"the Third Respondent has been brought into the proceedings to protect the claimant's position in the event that the respondent makes out its defence. In those circumstances the Claimant would be left without a remedy if the Third*
10 *Respondent does not remain a party to these proceedings".*

48. The claimant's solicitor also disputed the assertion by the third party's solicitor that the Order should be set aside as it was not given an opportunity to make representations before the Order was made. *"This again fundamentally misunderstands the procedure which applies to this type of application.*
15 *Applications of this type are made ex parte (because the prospective party to the proceedings would have no (locus standi) and the respondent is then given an opportunity to apply to set aside any Order made (as the Third Respondent has now done) and to make full submissions at that point (which the Third Respondent has now done). The issue is then in effect dealt with*
20 *"de nouveau".*

49. Finally, the claimant's solicitor said this:-

> *"In the premises, the Claimant submits that this is a case where the Order was properly made and that for the reasons set out above the Order should not be set aside and that the claimant's complaints against*
> 25 *the Third Respondent should be allowed to proceed.*
>
> *Shortly put, as recorded in the Order the Third Respondent should be a party to his proceedings as there are issues between the Third Respondent, the claimant and the First Respondent falling within the jurisdiction of the Tribunal which it is in interests of justice to have*
> 30 *determined."*

First Respondent's Submissions

50. The First Respondent's solicitor also made written submissions. He did so by way of an attachment to an e-mail on 14 February which is referred to for its terms.

5 **Time-bar**

51. His submission relating to time bar is, *"limited to clarifying that the claimant was given notice of dismissal on 29 August 2018 to take effect on 15 October 2018 subject to a right of appeal. That appeal was heard on 12 October 2018 with the decision reserved and issued by First Class post by the respondent*
10 *to the claimant on 18 October 2018. The appeal was dismissed and confirmed the date of appeal as 15 October 2018"*.

Early Conciliation

52. The First respondent had no submission to make in this regard.

"**Prospects of success**"

15 53. The First Respondent's solicitor confirmed that the First Respondent denied any form of discrimination in respect of the claimant and maintained that, *"the Third Respondent 'caused or induced' it to adopt the 7.6 multistage fitness test for Authorised Firearms Officers which is the focus of this claim."*

54. The First Respondent's solicitor then went on his written submissions to
20 respond to pleadings on behalf of the Third Respondent in its paper apart to the ET3 response form.

55. In doing so, for ease of reference his submissions referred to the "Third Respondent" throughout even where the term "Second Respondent" is used:-

> *7:- "The Second Respondent is the body responsible for issuing Firearms*
25 *Training Licences to Police Forces, including the First Respondent"*
>
> *10:- "The Third Respondent took over responsibility for setting the standards of competence… in 2012. The standard relates to … 'fitness of individual officers."*

17:- Narrates the history of the development of the job related fitness test and states:-

> *"Amongst other recommendations, the working group recommended that the Police Advisory Board of England & Wales adopts 'the standards in Table 1 of the Specified Specialist Police Officer Roles as the only standard'. The Report recommended in Table 1 that the job related fitness test ("JRFT") for Authorised Firearms Officers ("AFO") should be 7.6."*

19:- 'If a Police Force wishes to have their Firearms Training Licence endorsed by the Third Respondent they must comply with the Third Respondent's Standards of Competence. These Standards cover… 'fitness'. This includes the requirement that AFOs meet the minimum standard of 7.6 in the MSFT."

20: - "It is stated that the Third Respondents considers that it is necessary and proportionate for AFOs to have such attributes in order;… 'to provide the public with confidence that AFOs have been properly trained for the role and to facilitate interoperability between the forces'.

21: - "The Third Respondent endorses the Firearms Training Standards of Forces who volunteer to comply with and achieve the Third Respondent's Firearms Training Standards of Competence and the Third Respondent is the ***only body*** *which "can issue a Firearms Training Licence" (emphasis added).*

*23: - "If a Force's Firearms Training Licence is not endorsed by the Third Respondent****, this will limit*** *but does not prevent interoperability" (emphasis added).*

25: - The Third Respondent admitted the First Respondent's pleadings that "in 2010, the COP published a requirement for all officers to be of a certain fitness standard". It then went on to narrate that the First Respondent commissioned the Institute of Naval Medicine to produce a report about fitness standards which suggest that a fitness standard test of 5.7 for all AFOs. The Third Respondent's pleadings states that the Chief Executive of the Third Respondent wrote to the Chief Constable of the First Respondent stating that the Third Respondent was not satisfied that the exercises conducted were an accurate representation of the operational cover and movement tactics. "The College concluded that the test did not provide evidence that a fitness standard of 5.7 was appropriate for this type of activity and the national AFO Role Profile".

26: - The Third Respondent's pleadings state:-

"With reference to the letter dated 10 February 2016 from the Chief Executive of the Third Respondent that "my letter last year made it clear that the adoption of the fitness standard of 5.7 has implications". In the letter I stated: "Adopting a fitness standard set to 5.7 means that

you accept this will require a bespoke role profile supported by your FSTRA which could impact upon interoperability with other forces".

28: - "It is submitted that if a Police Force takes a decision that almost all of his officers are AFOs, then each of those AFOs must meet the 7.6 MSFT standard in order for the Police Force to meet the Third Respondent's Firearms Training Licence Standards of Competence".

10. In the First Respondent's paper apart in its response, it is stated in paragraph 5 the reasons why the Third Respondent's standards are believed to be necessary. These include interoperability with other forces.

11. All Home Office Police Forces and all other Police Forces in the UK that deploy firearms comply with the Third Respondent's standards. The Third Respondent sets the national standard. It is the sole body that does so. The First Respondent has already had its Firearms Training Licence temporarily suspended and restored by the Third Respondent for other related reasons as narrated in the pleadings."

Discussion and Decision

Jurisdiction/Early Conciliation

56. I first considered the jurisdiction point taken by the Third Respondent's solicitor: the contention that the Early Conciliation ("EC") requirements had not been meet in respect of the sisting of the Third Respondent.

57. In my view, the cases on which she relied namely ***Science Warehouse*** and ***Mist*** do not support her submission, quite the contrary in fact.

58. In ***Science Warehouse***, HHJ Eady expressed the view that s.18A of the Employment Tribunals Act 1996 ("the ETA") which applies the EC procedure in relation to any "matter" should be given a broad interpretation in order to avoid disputes and satellite litigation as to whether proper notification has been given of each and every possible claims subsequently made to a Tribunal.

59. Although amendments to an existing claim are not listed in s.18A(7) this is because the question of amendment of existing proceedings falls within the

case management powers of the Tribunal; no specific exception is required to be made. Amendments are only permissible if allowed by the Tribunal in exercising its case management powers under Rule 29 of the Rules of Procedure and by applying the guidance laid down in such cases as ***Selkent.***

5 60. The decision in ***Science Warehouse*** was followed by the EAT in ***Mist*** in relation to the issue with which I was concerned, namely adding a new party to existing proceedings. HHJ Eady was satisfied that this approach was consistent with Rule 34, *"which specifically addresses the addition or substitution of parties in Employment Tribunal proceedings without reference*
10 *to any further EC requirements",* and with the *"overriding objective"* in the Rules of Procedure.

61. Subsequently, in ***Drake International Systems Ltd and Ors v Blue Arrow Ltd*** [2016] ICR 445***,*** EAT, Mr Justice Langstaff referred, with approval, to HHJ Eady's broad interpretation of s.18A of the ETA and the concept of a "matter"
15 in ***Science Warehouse.***

62. EC concerns prospective parties. After EC has been completed and a claim has been brought in respect of "a matter" there is no further EC requirement. The Tribunal has discretion to add new respondents to the proceedings where it is in the interests of justice to do so, in accordance with its general case
20 management powers.

63. I was satisfied, therefore, that the Tribunal had jurisdiction to consider the claim now advanced against the Third Respondent.

Claimant's amendment

64. I was satisfied that when I added the Third Respondent as a party it was in
25 accordance with the Rules of Procedure. There is a wide discretion under Rule 34 to add, substitute and remove parties to proceedings. This power, when read, in conjunction with Rule 29, can be exercised, *"at any stage of the proceedings"* which can even be after the time limit for bringing a fresh claim against the respondent has expired.

65. The application by the Third party's solicitor in the present case was under Rule 30 for the Order to be revoked under Rule 29.

66. The same principles apply to an amendment to add, substitute or remove parties to a claim as to any other amendment.

67. In ***Cocking v Sandhurst (Stationers) Ltd and Another*** [1974] ICR 650, Sir John Donaldson, when delivering the Judgment of the NRIC, laid down a general procedure for Tribunals to follow when deciding whether to allow substantial amendments. These guidelines have been approved in several subsequent cases and were re-stated in ***Selkent.*** In that case, the EAT emphasised that the Tribunal, in determining whether to grant an application to amend, must carry out a careful balancing exercise of the relevant factors, having regard to the interests of justice and to the relative hardship it will be caused to parties by granting or refusing the amendment. Mummery LJ said this at pages 843 and 844:-

> *"……………………………………………………………………………………*
>
> *(4) Whenever the discretion to grant the amendment is invoked the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.*
>
> *(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly irrelevant:-*
>
> *(a) The nature of the event amendment*
>
> *Applications to amend are of many different kinds ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substituting of other labels for facts already pleaded to, to on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.*
>
> *(b) The applicability of time limits*
>
> *If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to*

consider whether that complaint is out of time and, if so, whether the time limit could be extended under the applicable statutory provisions e.g. in the case of unfair dismissal s.67 of the Employment Protection (Consolidation) Act 1978.

5 *(c) The timing and manner of the application*

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time – before, at, even after
10 *the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made; for example, the discovery of new facts or information appearing from documents disclosed on discovery. Whenever*
15 *taking factors into account the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. The questions of delay, as a result of adjournment and additional cost, particularly if they are unlikely to be recovered by the successful party, are relevant*
20 *in reaching a decision.*

Present case

"Nature of the amendment"

69. While the amendment introduced two new complaints, they are linked to and
25 arise out of the same facts as the original claim.

"Applicability of time limits"

70. While the application to amend was submitted well outwith the three month limit, I am satisfied that the submissions by the claimant's solicitor in this regard were well founded. I accepted that the catalyst for bringing the claim
30 was on 15 August 2019, when the First Respondent replied to the request for clarification and included in the alleged "legitimate aims" was the requirement to *"comply with College of Policing Standards".*

71. Further, notwithstanding the timing of the application, I was satisfied that there could still be a fair hearing and that the cogency of the evidence would not be

affected. I was satisfied that it would be "just and equitable" to exercise the Tribunal's discretion and extend the time limit.

"**Prejudice and hardship**"

72. I was also satisfied that the submissions by the claimant's solicitor in this regard were well founded: *"the Third Respondent cannot in the circumstances of this case point to any particular prejudice caused to it by the amendment over and above the inherent prejudice of being exposed to a claim which could not otherwise have been brought."*

73. However, should I refuse the application to amend, there would be a possibility of the claim being dismissed against the First Respondent, it emerging that there was a valid claim against the Third Respondent and the claimant being left without a remedy.

74. As the claimant's solicitor drew to my attention, with reference to ***Woodhouse***: *"in the assessment of the balance of hardship and the balance of prejudice it should be assumed that the case is arguable unless the complaint is utterly hopeless and has no prospects of success".* I was satisfied that there are issues between the Third Respondent by the claimant and the First Respondent.

The Merits

75. It was only with some hesitation, as the issue was an application to amend, that I was prepared to at least have some regard to the apparent merits of the claim succeeding against the Third Respondent. However, for the purpose of considering the issue and the assertion by the Third Respondent's solicitor that the claim against the Third Respondent has "no reasonable prospect of success", I took the claimant's averments (amended in respect of the Third Respondent) at their highest value. In other words, the purpose of the exercise, I proceeded on the basis that the claimant would be able to approve all that she avers.

76. I was satisfied that the claims against the Third Respondent are at least arguable (see ***Redhead v London Borough of Hounslow*** UKEAT/04/09/11, for example). I was satisfied that it is clearly in the interests of justice for the issues between the parties to be considered by the Tribunal and, as the claimant's solicitor submitted, *"for the Tribunal to consider whether the Third Respondent does by its practices discriminate against female police officers".*

77. I was also mindful of the *"fact sensitive"* nature of discrimination cases ***(Anyanwu and Ors v Southbank Student Union and Ors*** [2001] 2 ALL ER 353, for example). Lord Hope also said in that case that, *"discrimination issues… should, as a general rule, be decided only after hearing evidence".*

78. I was unable to conclude that the claim against the Third Respondent has "no reasonable prospect of success".

79. In all these circumstances, therefore, I decided that the application by the Third Respondent's solicitor to set aside the Order of 24 October 2019, as amended on 12 February 2020, should be refused.

Employment Judge:	**Nicol Hosie**
Date of Judgment:	**17 March 2020**
Date sent to parties:	**18 March 2020**

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