**Case Number: 2301673/2018**

# THE EMPLOYMENT TRIBUNAL

**Claimant:** **Miss E Boakye Amankwah**

**Respondent:** **Royal Mail Group Limited**

**UPON** a reconsideration of the judgment dated 24 February 2020 and sent to the parties on 7 March 2020 on the Tribunal's own initiative under rule 73 of the Employment Tribunals Rules of Procedure 2013, and without a hearing,

# RECONSIDERED JUDGMENT

**The Judgment of the Employment Tribunal is that: -**

1. The complaint of race harassment under the Equality Act 2010 in relation to the treatment to which the Claimant was subjected by the Respondent's customer on 23 December 2017 was not varied and remains struck out.
2. The previous decision to strike out the complaint of direct race discrimination under the Equality Act 2010 by the Respondent in relation to its response to the complaint about the treatment of the Claimant by the customer on 23 December 2017 was revoked. This complaint may proceed.
3. The Claimant's application to amend the claim form to add a complaint of race harassment in relation to the matters complained about at para 2 above was reconsidered and was refused.
4. A telephone case management hearing to give directions, including fixing a hearing date, for the complaint in paragraph 2 above will be notified to the parties in due course.

## REASONS

*Preliminaries*

1. These written reasons are set out only to the extent that the Tribunal considers it necessary to do so in order to explain to the parties why it reached the Judgment above. Further, they are set out only to the extent that it is proportionate to do so. Finally, all findings of fact were reached on the balance of probabilities.

2. The hearing on 3 February 2020 was to consider whether the Tribunal had jurisdiction or power to hear the Claimant's complaints due to the dates on which the matters complained of occurred, and the date on which the claim form was validly presented (11 June 2018).

3. In the Respondent's written submission dated 20 September 2018 on the time issues, they helpfully identified the two complaints about which the Tribunal concerned as follows: The first complaint (***Issue 1***) alleged third-party race harassment on 23 December 2017; and the second (***Issue 2***) alleged direct race discrimination in respect of the Respondent's failure to take action following her complaint about the third-party harassment. In addition, the Tribunal was asked to determine the Claimant's application to amend her claim which was included in an email attachment sent to the Tribunal and copied to the Respondent at the same time on 15 November 2019, to include an alternative allegation of race harassment in respect of **Issue** 2 – the direct discrimination complaint that the Respondent had failed to act in respect of her complaint about third party harassment to which she had been subjected by a customer.

4. At the end of the hearing on 3 February 2020, I announced that my Judgment was that the complaints in Issues 1 and 2 were both out of time, and that the amendment was also refused on the ground, inter alia, that it was also out of time (hereafter referred to as the "original Judgment"). I gave oral reasons for these decisions and a written Judgment without reasons was signed by me on 24 February 2020 and sent to the parties on 7 March 2020. Written reasons for the original Judgment are sent out at the same time as this reconsidered Judgment and reasons.

5. By an email sent at 19:29 on 20 March 2020 to the Tribunal by the Claimant (but not simultaneously copied to the Respondent), written reasons for the Judgment were requested.

6. By a letter attached to an email sent to the parties by the Tribunal on 6 April 2020, the parties were informed, among other things, that as a result of reviewing the case in the course of preparing written reasons pursuant to the Claimant's request, the Tribunal was considering reviewing the decision of its own motion:

    1. to allow the Claimant to proceed with the complaint that the Respondent's action was direct race discrimination (albeit an allegation which was the subject of a deposit order), because it did not appear that the Respondent's contention that this issue – **Issue 2** - was out of time should have succeeded, especially in the light of EJ Nash's Order for the Claimant to provide particulars of the "racial grounds"; and

2. To refuse the application to amend to add the allegation of race harassment.

7. The parties were invited to submit written representations to the Tribunal within 21 days of the date of the letter.

8. The parties were further informed that it was the Tribunal's intention to send out the reconsidered judgment, if appropriate, along with the original judgment and reasons. The parties would then be able to challenge either of the Judgments with which they did not agree, within the usual time frames thereafter. The Tribunal proposed dealing with the reconsideration of its own motion at this stage on grounds of proportionality, and because it would not prejudice either parties' entitlement to present an appeal if so advised.

9. Each party duly submitted representations by email on 27 April 2020, and copied those submissions simultaneously to the other party. Each party's representations appropriately focussed on the potential adverse findings that the Tribunal had stated it was considering making. It appeared to the Tribunal to be in the interests of justice, and proportionate in all the circumstances, including those caused by the coronavirus pandemic, to determine this reconsideration without a hearing.

10. Despite the relatively narrow scope of this case, as sadly frequently occurs in such hearings, particularly in cases involving litigants in person doing the best they can in unfamiliar territory, not all the documents had been provided to the Respondent, and the Tribunal spent a considerable time piecing together the chronology both at the February 2020 hearing, and for the purposes of this reconsideration.

11. Further, the Tribunal has taken responsibility for an erroneous path of reasoning, down which the Respondent was then led, in relation to the date on which the limitation period in respect of the proposed race harassment claim would have expired. The reasons below constitute a more careful consideration of the application.

12. Also, as the formal application to amend in November 2019 had not been foreshadowed in EJ Phillips' Order of 4 September 2019, the Respondent's written submissions on the issue in late September 2019 at [R2], unsurprisingly, did not address them. The Tribunal was not as agile as it would have wished to have been in ensuring that the principles governing applications to amend were sufficiently brought into consideration. As it was, the focus was unfortunately on the time issues in February 2020.

13. In deciding to consider reconsideration of its own motion, the Tribunal took all the above circumstances into account, and that it is under a duty to carry out its functions, as far as possible, in accordance with the overriding

objective in the Employment Tribunals Rules 2013.

14. The Tribunal has set out the relevant chronology in detail and referenced all the documents considered or omitted. The latter should be in the parties' possession, apart from the Claimant's agenda sent on 13 August 2018, from which the relevant parts have been quoted below.

*Background*

15. The date for this hearing was fixed at a preliminary hearing in front of Employment Judge Phillips on 4 September 2019 (Judgment and Reasons pp39 – 43; and Case Management Directions pp44 – 49).

16. Prior to that, a closed preliminary hearing had taken place before Employment Judge Nash on 14 August 2018. A written record of the Orders made by her and a summary of the discussion was sent to the parties on 30 August 2018 (pp27 – 29). At the hearing on 14 August 2018, EJ Nash also made orders for the payment of deposits by the Claimant as a condition of being allowed to continue to pursue her complaints in Issues 1 and 2 above of third-party race harassment and of direct race discrimination (pp30 – 33). In the event, the Claimant paid the deposits.

17. The factual background and relevant Issues were recorded in paragraph 1 of the First Schedule to EJ Phillips' September 2019 Order as follows:

**"FIRST SCHEDULE**
**(The Issues)**

1. The Claimant started work with the Respondent on 3rd March 2008. She remains employed by the Respondent as a postal worker based at the Barnes and Mortlake Delivery Office. The Claimant, by her form ET1, presented on 08 May 2018, brings claims of racial harassment and direct race discrimination, arising out a single incident of verbal harassment experienced by the Claimant from a public customer on 23 December 2017, when the Claimant was working in the Barnes and Mortlake Delivery Office. While attempting to resolve the customer's complaint that post had not been delivered, the Claimant reported to her manager having heard the customer remark as they were leaving the office, "you have come here from a third world country, coming to work here".

2. The Claimant asserts (1) that the Respondent is liable for the incident of harassment; and (2) has directly discriminated against her on the grounds of colour by treating her report of the incident differently and less favourably when compared to a white colleague. The Claimant says that a white colleague who made a similar complaint was treated differently and more favourably.

3. The issues that arise for determination are therefore:

a. is the Respondent legally liable for the incident of harassment that occurred on 23 December; the Respondent says that s 40 of the Equality Act 2010 was repealed in 2013 and as such the Tribunal does not have jurisdiction to hear this ground of complaint;
b. did the Respondent directly discriminate against the Claimant on the grounds of colour by treating her report of the incident differently and less favourably when compared to a white colleague; and in particular
    i. is the comparator relied upon by the Claimant a true comparator or is there a material difference in circumstances between their cases: the Respondent says there is, in that (1) the abuse received by the comparator was more serious and involved being shouted at; and (2) occurred at the Customer's premises and not at the delivery office;
    ii. The Respondent denies in any event that any differences in treatment were due to the Claimant's race.

4. At the hearing, the Respondent's applications to strike out the two elements of the Claimant's claim, and / or for a deposit order were unsuccessful. (The reasons are the subject of a separate Judgment). In the circumstances, I directed that, (subject to an outstanding determination on time limits / jurisdiction, in regard to which Directions are given below)), it was appropriate to now put in place a timetable to ensure the fair and efficient hearing of this claim, as per the Orders and Directions in the Second Schedule. If the Respondent succeeds on all or any aspects of the time limits / jurisdiction application, this may impact on whether the Claim continues."

18. The Claimant made a complaint to the Respondent about the incident immediately and part of her follow-up to this was that in January 2018, she reported the matter to the police. I was shown internal emails of the Respondent dated 3 and 27 January 2018, in which the Respondent sought advice from what appeared to be a public relations point of view in relation to what to do in terms of any letter to the member of the public.

19. After a fact-finding meeting on 3 January 2018, the Claimant's report was treated by the respondent as a grievance. This was investigated and the Respondent's case was that the Claimant was informed of the outcome by letter sent to her on 30 April 2018 by AW, Independent Casework Manager who had been allocated to investigate this case (Amended Grounds of resistance paras 13 & 21). It contained recommendations in terms of the handling of a similar case in the future.

20. The Respondent maintained that the Claimant received that letter on 2 May 2018 (para 21 Re-Amended Grounds of Resistance). However as set out below, in her email to the Tribunal of 11 June 2018, the Claimant asserted that she had received no notification of the outcome. This discrepancy was not the subject of questioning at the hearing, and the Tribunal proceeded on the basis of the Respondent's case throughout that the Claimant had signed for the letter on 2 May 2018.

21. In the meantime, on 9 March 2018 the Claimant had contacted ACAS and instituted the early conciliation process. This came to an end on 9 April 2018. This meant that in relation to a time limit which had expired during the early conciliation period, the Claimant had until a month after the receipt of the EC certificate to validly present her claim, i.e. by 8 May 2018. This was only relevant in relation to **Issue 1**, the third-party harassment complaint.

22. The Claimant then sent a claim form to the Tribunal on 8 May 2018 which coincided with the date on which the limitation period expired in relation to the incident on 23 December 2017 (**Issue 1**, the third-party harassment complaint), taking into account the early conciliation dates. The processing of that claim form had not been completed by the Tribunal prior to the Claimant calling the Tribunal on 11 June 2018 to chase progress. The Tribunal's records indicate that she was informed that the matter had been referred to an Employment Judge because of a concern that there were insufficient details about the claim and that an Employment Judge (Baron) had rejected the claim because it was in a form which could not sensibly be responded to as no specific details had been given of the discrimination claim. In accordance with that Judge's direction, the Claimant was subsequently notified of this by letter dated 12 June 2018 sent by email at 15:41. This information and chronology was shared with the parties during the hearing on 3 February 2020.

23. Following the telephone conversation, but before the Tribunal's email was sent to her, the Claimant sent an email to the Tribunal dated 11 June 2018 at 14:55, giving more details under section 8.2 of the form, and she asked for it to be an amendment of her claim. This was then referred to Employment Judge Baron who reconsidered the rejection in the light of the further information and decided to accept the claim. Importantly however, the Judge indicated that the claim would be accepted as of 11 June 2018. This decision was subsequently notified to the Claimant and the Respondent in correspondence dated 21 June 2018 giving notice of the claim to the Respondent.

24. As Ms Linford noted in her recent written representations at para 21, there no Order was made amending the claim as requested by the Claimant on 11 June 2018. It was unclear whether the effect of such an amendment would have been to add or to substitute the contents of the 11 June email for the sparse detail in the original claim form at section 8.2. It appeared to me, consistent with the duty to do justice in the case, that a fair reading of the situation was that the Claimant wished to add the details set out in her 11 June 2018 email, to the information already set out in her claim form. To construe it otherwise would lead to an unduly harsh outcome, and would clearly be contrary to the Claimant's interests. I took into account that in the round, her case had been consistent in complaining both about the third-party harassment and about the Respondent's reaction.

25. The Respondent entered a response with grounds of resistance on 19 July 2018 and they raised the issue of the Claimant's claim being out of time (pp 23-26). They addressed only Issue 1.

26. In Judge Nash's August 2018 Order, she also directed that the Claimant should provide clarification of her claim by 25 August 2018 in relation to the allegation that the Respondent's treatment of her complaint was "because of or on grounds of her race" – a direct race discrimination complaint. On 25 August 2018 at just before 6.00pm the Claimant sent an email to the Tribunal requesting an extension of time. That was not dealt with by the Tribunal before the Claimant then sent in the further information about this allegation on 4 October 2018 in an email with attachments.

27. Regrettably, it was only after the hearing on 3 February 2020, as the Tribunal was reviewing the file in the context of the reconsideration, that it became clear that the two documents produced by the Claimant at the hearing on 3 February 2020 and marked [C1], were actually two attachments to the email providing further information about the claim and sent to the Tribunal with a copy to the Respondent on 4 October 2018 at 16:26. The email was not in the bundle, although a copy was in the Tribunal file. *The decision was therefore made on 3 February 2020 without the Tribunal having considered the email giving further details of the claim*. The Tribunal did not however consider this to be a material defect because those particulars were provided after the expiry of the Issue 2 time limit, as the Tribunal has determined.

28. Subsequently, the Respondent duly presented amended grounds of resistance dated 16 October 2018 (pp34 – 38).

29. The next hearing took place on 4 September 2019 before Employment Judge Phillips. She refused a renewed application to strike out by the Respondent but acknowledged that there were issues in relation to time points and directed that these should be dealt with at the full hearing which she fixed for 3 February 2020. She gave directions for the preparation for that hearing, including the provision of written submissions in advance by the Respondent on the time points, and submissions in reply by the Claimant.

30. In the event, although the hearing was listed for a one-day full hearing commencing on 3 February 2020, by letter dated 9 January 2020, and sent to the parties by email, they were notified that Employment Judge Freer had directed that the hearing on 3 February had been converted to a preliminary hearing at which a tribunal would consider the time points and the Claimant's application to amend her claim.

31. The Respondent included a summary of the law in relation to the

extension of time in discrimination claims, in the written submissions dated 20 September 2019 which Employment Judge Phillips had directed should be prepared and which I marked [R2] (also at pp51 – 56). The statement of the law was not challenged by the Claimant, and it appeared to me to fairly reflect the applicable law. It is not proportionate therefore to repeat that statement of the law in these reasons.

32. The two-page undated document (pp 57 – 58) entitled "*Claimant's Submissions as to Time-Limit and Application to Amend*" was attached to an email sent by the Claimant to the Tribunal on 15 November 2019 with a copy to the Respondent at 08:49, in compliance with EJ Phillips' Order that she should file her submissions in reply to the time points.

33. At the hearing in February 2020, the Claimant gave evidence to the Tribunal. She also produced two additional documents which I marked [C1] and which related to comparator evidence of how the Respondent had dealt with a similar incident in July 2017. In addition, the Tribunal considered what it believed was the agenda which the Claimant sent to the Tribunal in August 2018 prior to the hearing in front of Employment Judge Nash. This was in the Tribunal file, not in the hearing bundle. *Here also, on further consideration of the file, it may be that, in error, the document referred to by the Tribunal during the hearing was the agenda sent before the hearing on 4 September 2019 before EJ Phillips.* The August 2018 agenda had been sent by email at 10:38 on 13 August 2018, but had not been copied to the Respondent by the Claimant, and the Tribunal could see no evidence that it had been copied to the Respondent by the Tribunal either. The relevant text from both agendas is set out in context below.

34. The Respondent had prepared a bundle numbering approximately 60 pages which contained the majority of the relevant documents and which I marked [R1]. At the end of the February 2020 hearing, I erroneously stated that the Claimant's submissions in answer to the Respondent's on the time points at pages 57-58 were submitted in mid-October 2019. As stated above, and in the index to the bundle [R1], they were submitted on 15 November 2019.

*Deliberations*

35. Both of the complaints made by the Claimant had been the subject of deposit orders and as is recorded in the Respondent's submission, the Tribunal is entitled to have regard to the merits of the case when considering whether it is just and equitable to extend time in relation to a discrimination case which has been presented out of time.

36. The first complaint, referred to in these reasons in short-hand as third-party racial harassment, and which was **Issue 1** in [R2], was a complaint about the alleged racial abuse by the Royal Mail customer on 23

December 2017. I agreed with the Respondent's contention that in relation to a complaint about this issue, time would have expired, without early conciliation, on 22 March 2018, but with early conciliation, it expired one month after 9 April which extended the date to 8 May 2018. Ms Linford corrected the reference to the limitation period expiring on 9 May 2018 at para 21 of [R2] at the hearing on 3 February 2020. However, as set out above, the claim form was not validly presented until 11 June 2018. The Claimant in effect asked for an extension of time in relation to this matter on the basis that it was just and equitable to do so.

37. As Employment Judge Nash commented in paragraphs 5 and 6 of her reasons, there were, in any event, issues about whether the Tribunal has power to deal with third-party harassment under the current law. That issue was not one I had to determine directly, but given that I could take into account the merits of the case in deciding whether to extend time, it seemed to me that this weighed very heavily against the exercise of the discretion in the Claimant's favour, for the reasons referred to by EJ Nash. In paragraph 5 on page 31 of [R1] she says in respect of the allegation of third party harassment, that the Court of Appeal, (citing the two cases of *Unite the Union v Nailard* [2018] EWCA Civ 1203 and *Conteh v Parking Partners Ltd* [2011] ICR 341) confirmed that an employer is not liable for failing to protect employees from third-party harassment unless the prescribed characteristic forms part of the motivation for the employer's inaction. In short, a complaint could be validly brought about inaction by the employer related to a protected characteristic, but not about the actions of the third party.

38. I adopted the propositions in the authorities referred to in paragraphs 31-35 of the Respondent's written submission. It appeared to me that on any view the Claimant did not send her claim form to the Tribunal until the very last day of the extended time limit.

39. It was not in dispute that she had trade union support throughout this time, that she had been in contact with ACAS from early March 2018, that she had been in contact with a law centre and she accepted that she had access to the internet. It did not appear to me that there were any circumstances which rendered this case any different from any other in terms of the Claimant's position up to 8 May 2018. There were in short no exceptional circumstances.

40. She asked for the extension of time because she did not realise that her ET1 had been rejected or was likely to be rejected until she called the Tribunal on 11 June 2018 and was told that the file had been referred to a Judge who had rejected the claim due to lack of detail, and that she had then promptly sent in the further details later on 11 June and which were then accepted as of that date.

41. I took into account that this period largely consisted of a delay on the part

of the Tribunal Service in dealing with her claim form. However, even the normal administrative delay of a few days would have meant that the Claimant had not presented a valid claim in time i.e., by 8 May 2018. She had no basis for any expectation that a claim submitted on the last day of an extended deadline would be processed on that day, and that she would be notified also on that day whether her claim had been validly presented, giving her the opportunity to resubmit the claim in time, on the same day.

42. On balance taking into account all the circumstances, including the fact that this complaint had been made the subject of a deposit order and the reasons for that Order, I decided that it was not just and equitable to extend time. I therefore struck out the complaint in Issue 1.

43. **Issue 2** was a complaint about the Respondent's response to the 23 December 2017 incident, which culminated in a written notification to the Claimant on 2 May 2018.

44. The Respondent submitted that although the Claimant had not identified a specific date on which this failure was supposed to have occurred, this can have been no later than 2 May 2018, the date on which the Claimant was made aware of the outcome of her complaint. I accepted this submission, having regard to the terms of section 123(4) of the Equality Act 2010.

45. In those circumstances, it appeared to me that time ran in relation to the direct race discrimination complaint about the Respondent's failure to act from 2 May 2018 to 1 August 2018 under the Equality Act 2010. Early Conciliation had taken place between 9 March and 9 April 2018, before the end of the omission complained of. Although this issue was not specifically argued, it appeared to the Tribunal that there was no scope in law for an extension of time by reason of early conciliation in relation to **Issue 2**. Indeed, the date of expiry of the limitation period on 1 August 2018 was agreed.

46. The Respondent argued that this allegation was not specifically identified by the Claimant until the email sent on 4 October 2018 with the particulars directed by EJ Nash in August 2018.

47. The Tribunal noted however that in the original particulars of claim (p70 submitted on 8 May 2018, but not accepted until the further detail was provided on 11 June 2018, the Claimant had stated:

> "*Employer did not deal me with me fairly because I have been treated less favourably than others. And also I haven't been treated with dignity and respect.*
> *I informed the manager, had fact finding which I never received any communication about. Also went through Royal Mail Group Limited procedure and policies and yet nothing has been done.*"

48. It appeared to the Tribunal that the first two sentences complained respectively about the Respondent's response, or lack of it, to the Claimant's complaint, and about the third-party harassment. The basis for this understanding was the use of the expressions "treated less favourably than others" and "haven't been treated with dignity and respect"; and the fact that the Claimant had specified race discrimination at box 8.1. Further, in the second paragraph, she complained about the outcome of the internal process following her complaint. It was not in dispute that a fact-finding meeting had taken place on 3 January 2018 as an initial response to her complaint (p35, para 8).

49. In the email giving details of her claim and seeking to amend it, sent on 11 June 2018 (pp14 – 15), the Claimant included the following:

    a. A more detailed description of the incident on 23 December 2017;
    b. An account of her report to a manager on 23 December 2017 and her request that the Respondent take appropriate action;
    c. The Respondent's initial indication to her that there was nothing it could do in relation to the alleged third-party harassment, but that the Respondent accepted that certain action could be taken after the Claimant relayed the advice received from her trade union that there was indeed a course of action open to the Respondent in this situation.
    d. A further description of the Claimant's persistence; the holding of the fact-finding meeting, and the failure to provide a copy of the notes of that meeting which the Claimant had signed at the end of the meeting and which she was promised would be provided to her.
    e. A description of the involvement of the Claimant's trade union with the Respondent, and of the Claimant's report of the incident to the Police.
    f. She further described that the Respondent had not acted on the suggestion of the Police that the customer should be spoken to, leaving it to the Police to do this.
    g. Further, she described what the Tribunal understood to be the investigation into her complaint, but stated that as of 11 June 2018, she had not heard from the investigator.
    h. She concluded by stating that the Respondent had failed in its duty of care as it had not followed its own procedures.

50. The time limit in relation to this Issue expired on 1 August 2018. The Tribunal assessed whether the details of complaint provided thus far, in the Original claim form and in the 11 June 2018 set out sufficiently the Issue 2 direct race discrimination complaint.

51. In her agenda sent on 13 August 2018, the Claimant stated at para 2.1 only that her complaints were "Discrimination on grounds of race (Section

15 less favourable treatment)" (sic). Further, under "Issues" at section 4.1, she stated only: "Did the Respondent treat the Claimant less favourably by reason of her race"?

52. In EJ Nash's Case Management Summary she recorded that the claim was "…essentially about a stated incident of customer harassment on 23.12.17 and the respondent's reactions to this." (Emphasis added). She confirmed her understanding that the second part of the complaint against the Respondent was an allegation of direct race discrimination in respect of its reaction to the incident/the Claimant's complaint about it, when she ordered the Claimant at 2.1 of the Order, to "..provide further details of her complaint as to how and why she says that the respondent's treatment of her complaint was because of or on the grounds of her race" (pp27 and 28).

53. The next information about her claim provided by the Claimant was as set out in her email dated 4 October 2018 (*only considered by the Tribunal after the hearing, but which was in the Tribunal's file*). The attachments in [C1] were clearly put forward to compare the way the Respondent dealt with the incident involving the Claimant as compared with the way they dealt with the incident involving her white comparator Claire, in July 2017. The Claimant's evidence in relation to [C1] at the hearing in February 2020 was that she had been made aware of this comparable situation by her Trade Union at some point after her incident occurred, but she had been asked to wait for her Union to obtain the consent of the member of staff involved before it could be used by the Claimant. The Claimant referred to 23 May 2018 as the latest date by which she recalled she had been able to share this comparator detail with her managers.

54. In the 4 October 2018 email, among other things, the Claimant:

    a. Craved the Tribunal's indulgence as a litigant in person;
    b. Stated unequivocally that her complaint was both about the third-party harassment, and about "….the appalling support I was given by Royal Mail…".
    c. Referred again to the comparator evidence, in relation to the second element of her complaint, stating "..I believe it is because of my race that I have been treated less favourably".

55. I considered that whilst it was not apparent from the sparse detail in the claim form, what the complaint in Issue 2 was, when read with the additional detail provided on 11 June 2018, and in particular the narration of the alleged failures to act by the Respondent, and the fact that the Claimant had alleged 'less favourable treatment' of her by her employer when compared to others, and the fact that the Claimant had expressly ticked the box alleging discrimination on grounds of race there was sufficient factual basis set out by the Claimant for the Tribunal to conclude that this complaint had been made by 11 June 2018. Thus, this complaint

(Issue 2) had been brought in time.

*Application to amend the claim to add race harassment to Issue 2*

56. In her written application to amend sent on 15 November 2019 (p58), the Claimant complained about the Respondent's decision "..that it did not wish to take steps to investigate [the Claimant's complaint] or take further action to deal with it". The Tribunal considers that this was based on the same facts as in the direct race discrimination complaint referred to above as ***Issue 2***.

57. Having considered the contemporaneous documents, not all of which were seen by the Tribunal in February 2020, it appeared to me to be even clearer than it was at the hearing in February 2020, that the Claimant's case in relation to the Respondent's response to the December 2017 incident only alleged direct race discrimination until her application to amend.

58. Further, she gave no specific explanation for the delay in making the application to amend.

59. In the Claimant's agenda sent to the Tribunal at 11:21 on 2 September 2019 and copied to the Respondent, in respect of the hearing before EJ Phillips on the same date, she had referred to racial harassment in section 2.1 as being a complaint. This could have been a reference only to Issue 1 (third-party harassment complaint). In section 2.2, she specified that there was an application to amend to allege "ongoing racial discrimination, harassment by Royal Mail".

60. In section 4.1 of the agenda which dealt with "The Issues", the Claimant stated only: "Did the Respondent treat the Claimant less favourably by reason of her race"?

61. The Tribunal considered, based on the evidence referred to above, that it was clear that it was not until September 2019 that the Claimant attempted to amend her claim to argue that the Respondent's alleged inaction complained about in ***Issue 2***, amounted in the alternative to race harassment, as opposed to just direct race discrimination.

62. She then made the full written application to amend in November 2019 after the hearing in front of Employment Judge Phillips, having previously squarely put the ***Issue 2*** complaint only as one of direct race discrimination and that is apparent from her application at pages 57 and 58.

63. In relation to an application to amend, it was appropriate to consider whether the proposed amendment would have been out of time at the time that it was made (September/November 2019). As set out above, the

time limit in respect of an allegation of a failure to act is dealt with under Section 123(4) of the Equality Act 2010.

64. At the hearing in February 2020, on reflection, in this context I erred in treating the matter that the Claimant was applying to amend too narrowly as if the proposed amendment was limited to a complaint in respect of the failure to write the letter to the customer. As set out above, it actually covered (see p58, paras 8a & c in particular) the same factual issues as in the direct race discrimination allegation: ***Issue* 2**. That overly narrow construction led to a finding that time had run out in any event by 8 May 2018 in respect of the proposed amendment. The relevant expiry date was 1 August 2018.

65. However, it was appropriate to take into account that the earliest date on which the race harassment amendment was proposed was 2 September 2019, just over one year after the date on which the Respondent conceded that the limitation period expired in respect of the direct discrimination complaint - ***Issue 2***.

66. Further, it was relevant that the Claimant was in possession of all the relevant information on which she relied in seeking to amend to allege harassment by 23 May 2018 at the latest, on her own account.

67. I accepted the Respondent's general submission in relation to timeliness, that after the hearing in front of Employment Judge Nash on 14 August 2018 the Claimant would have known at the very least from the grounds of resistance in the response that time issues were pertinent in this case, yet the Claimant failed to comply in a timely manner with the order for further and better particulars which should have been sent in the last week of September but which were not submitted until 4 October 2018 with [C1], the attachments to the 4 October email. The Claimant thus had an extended time frame in which to provide those particulars. They did not include an allegation of race harassment.

68. I was therefore satisfied that the proposed amendment was made considerably out of time in relation to the Respondent's lack of action amounting to harassment.

69. As with consideration of whether it was just and equitable to extend time in respect of ***Issue 1***, I was entitled to have regard to the fact that the Claimant had access to support and advice from various sources at the material times and the fact that she did not send her claim form until the very last minute.

70. On the other hand, I took into account in the reconsideration, that the proposed amendment was based on the same facts as the direct discrimination complaint. However, a complaint of harassment in relation to different facts had been made at the outset, and albeit an alternative

complaint in relation to Issue 2, it nonetheless involved a new cause of action.

71. If I refused the amendment, the Claimant would be prejudiced by her inability to argue this case. On the other hand, the Respondent would suffer prejudice in having to face a new cause of action such a long time after the claim had been brought, and with no explanation being proffered for the failure to make this allegation earlier. I took into account that the application to amend was not averted to in the first case management hearing, nor in the 12 months which followed it.

72. I also took into account that it was not in dispute that an internal investigation into the incident had been carried out by the Respondent, albeit that the Claimant was not satisfied with the outcome.

73. In all the circumstances, there was no adequate basis for extending time therefore.

74. Against that background, and having regard to the now well-established principles relating to applications to amend (in particular in the case of ***Selkent Bus Co Ltd v Moore*** [1996] ICR 836, and the Presidential Guidance on Amendments), I refused the application to amend to add race harassment to ***Issue 2.***

Employment Judge Hyde
Dated: 15 May 2020