EMPLOYMENT TRIBUNALS

Claimants: Mr D Bryan ("C1")
Mr P Sealey ("C2")
Mr S Chiswell ("C3")

Respondent: Jaguar Land Rover Limited ("R")

JUDGMENT ON A PRELIMINARY HEARING AND DEPOSIT ORDER

Heard: By Skype **On: 15 June 2020**

Before: Employment Judge Flood Appearances:

For C3:	**Mr Sykes (Advocate)**
For R:	**Mr Kennedy (Counsel)**
C1 & C2:	**No attendance or representation (this hearing deals with matters only relevant to C3's claim)**

1. C3's application for permission to amend his claim is refused.
2. C3's complaint of direct discrimination because of religion and belief has little reasonable prospect of success. He is **ORDERED to pay a deposit of £500** no later than **21** days from the date this Order is sent as a condition of being permitted to continue to advance this complaint.

REASONS

Background

1. C3 brought complaints of unfair dismissal and of discrimination because of religion and belief contrary to section 13 of the Equality Act 2010 ("**EQA 2010**") in a claim form with attached particulars of claim presented on 5 July 2019 ("**the Claim Form**"). His discrimination complaint was of "direct religious discrimination causing dismissal".
2. R defended the claim and lodged a response on 5 November 2019. It contended that C3 was dismissed fairly for gross misconduct for failing to protect the reputation of R by not taking action which would have avoided information being

shared with the local press; for undermining trust and confidence and breaching the Code of Conduct and Dignity at Work policy,

3. At a closed preliminary hearing ("CPH") held on 14 February 2020, Employment Judge Perry listed an open preliminary hearing ("OPH") to consider whether a deposit should be ordered against C3 in relation to the discrimination complaints only. He did not consider that a strike out on the basis of no reasonable prospects of success should be considered. C3 also sought to amend his claim to add additional acts of less favourable treatment. He was ordered by Employment Judge Perry to supply a fully marked up version of the amended claim to clarify the amendments sought. An amended particulars of claim was served on 10 March 2020. In a skeleton argument prepared by R on 25 March 2020, the respondent objected to this application to amend (and also made the point that the amended particulars of claim served did not comply with the order made by Employment Judge Perry. C3 served a re-amended particulars of claim ("the Amended POC") on 26 March 2020. R filed an amended response on 23 March 2020.

4. For the purposes of the hearing, I had before me a number of different documents which had been submitted by the parties in the run up to the hearing. I was referred specifically to the following by the parties:

   4.1. Revised Skeleton argument prepared by Mr Sykes on behalf of C3 dated 12 June 2020;

   4.2. Skeleton argument prepared by Mr Kennedy on behalf of R dated 25 March 2020;

   4.3. Bundle of documents running to 191 pages headed "Claimant PH Bundle (Religious discrimination) PH 15.6.20" which R accepted was an agreed bundle of documents ("Bundle");

   4.4. Unsigned and undated witness statement of C3;

   4.5. Unsigned and undated supplemental witness statement of C3 on means; and

   4.6. Bundle of authorities prepared by Mr Sykes on behalf of C3 .

5. Two preliminary matters were dealt with. Firstly Mr Sykes questioned whether it was appropriate for the issue of the deposit order to be heard at all today. He submitted that this had been set down for consideration at an OPH by EJ Perry because of concerns expressed by him about how the claim was formulated. Mr Sykes was of the view that as result of the Amended POC this claim was now clear and there was no need for the issue of whether to order a deposit order to even be considered. I determined that I would consider this question both as the OPH today had been listed specifically to consider this issue and in exercise of my powers under rule 39 (1) First Schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (amended and reissued on 22 January 2018) ("the ET Rules").

6. The second matter related to the witness statement of C3 that he wished to submit and be considered by me when considering the above issues. C3 had prepared a short witness statement on means which R does not object to but Mr Kennedy objected to the submission of the main witness statement on the preliminary issues. He contended that this statement was submitted only last

week and was unsigned and undated. He made the point that no provision had been made for the giving of live evidence at today's OPH and said that this would be irregular given the issues to be considered. He says that much of the content simply deals with legal argument and reads more like a skeleton argument rather than a statement of fact. He said it should be excluded or if not that little of no weight should be placed on the contents. Mr Sykes contended that it was standard practice for a witness statement to be submitted at preliminary hearing and it was relevant to consider this to look at matter relating to the strength of the case. I decided to admit the unsigned witness statement but note that this is not being treated as live evidence. C3 is not here to give such evidence and this statement is more a description of what he would say were live evidence being given. I shall attach such weight to this as is relevant and appropriate.

7. I made enquiries regarding the claimant's financial position for the purposes of the deposit order application. The claimant confirmed that if a deposit order were so awarded, he has the means to pay it from his savings (although I accepted that this statement was made in respect of a deposit order or orders being made at a level of up to £1000 in total).

8. I then heard oral submissions from both parties on both the amendment application and deposit order issue which were completed at 4.48 p.m. I then adjourned and reserved my decision.

The Issues

9. The issues I had to determine were as follows:

   9.1. Whether C3 should be permitted to amend his claim to add the following 7 allegations of direct religious discrimination:

      9.1.1. On 9 January 2019 Mr Roberts of R holding an investigation meeting without invitation or written notice of a meeting, and without opportunity to arrange union or other representation (paragraph 33.2 Amended POC);

      9.1.2. On 14 January 2019, holding a further investigation meeting without notice and without opportunity to arrange union or other representation (paragraph 33.2 Amended POC);

      9.1.3. Following the meeting on 14 January 2019, R failed to ask C3 to sign or authorise their minutes (paragraph 33.4 Amended POC);

      9.1.4. On 16 January 2019 being told by Errol of R that "*heads will roll*" due to the matter having come to the attention of R's owner (paragraph 33.5 Amended POC);

      9.1.5. On 21 January 2019 suspending C3 (paragraph 33.6 Amended POC);

      9.1.6. On Mr Roberts of R sending C3 a letter confirming suspension and referring to contravention of the Dignity at Work policy (paragraph 33.7 Amended POC); and

      9.1.7. On 10 June 2019 rejecting C3's appeal (paragraphs 33.10 and 33.11 Amended POC).

9.2. Whether to order C3 to pay a deposit (not exceeding £1,000) if the Tribunal considers that any specific allegation or argument in his claim (specifically the allegations of direct discrimination on the grounds of religion and belief) had little reasonable prospect of success.

9.3. I considered the amendment application first and then went on to consider whether a deposit should be ordered.

The relevant law Amendment

10. The general case management power in rule 29 of the ET Rules together with due consideration of the overriding objective in rule 2 to deal with the case fairly and justly, gives the Tribunal power to amend claims and also to refuse such amendments.

11. In the case of Selkent Bus Co Limited v Moore [1996] ICR 836, the Employment Appeal Tribunal gave guidance, namely:

(4) Whenever a discretion to grant an 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 relevant:

(a) The Nature of the 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 substitution of other labels for facts already pleaded 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 should be extended under the applicable statutory provisions, e.g. in the case of unfair dismissal section 67 of the Employment Protection (Consolidation) Act 1978.

(c) The Timing and The 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 the hearing of the case. Delay making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking factors into account the Parliament considerations are relative injustice and hardship involved in refusing or granting an amendment. The question of delay, as a result of adjournment, and additional costs, particularly if they are

unlikely to be recovered by the successful party are relevant in reaching a decision."

12. This position is also summarised in the Presidential Guidance issued under the provisions of Rule 7 of the ET Rules which I have also considered.

13. The EAT followed the Court Appeal decision in Housing Corporation v Bryant 1999 ICR123 in Foxtons Ltd v Ruwiel EAT 0056/08, "*it is not enough even to make certain observations in the claim form which might indicate that certain forms of discrimination have taken place; in order for the exercise to be truly a relabelling one, the claim form must demonstrate the causal link between the unlawful act and the alleged reason for it*".

14. In the case of GTR Ltd v Rodway and ors EAT 0283/19 the EAT overturned the decision of a Tribunal to allow an amendment on the basis that although the judge had correctly determined that the factual basis for the claims was largely unchanged, it had failed to take into account the substantial differences between the causes of action and the remedies sought.

15. In the case of Remploy Ltd v Abbott and others UKEAT/0405/14**,** the EAT allowed an appeal against a tribunal's decision to permit amendment to claims which had been professionally drafted by experienced solicitors and counsel, confirming that, in deciding whether or not to allow an amendment to a claim, employment judges must consider issues such as the reason for delay, and the impact that the amendment is likely to have on case management and preparation for hearings, in light of the prejudice to the parties.

16. Galilee v Commissioner of Police of the Metropolis 2018 ICR 634, EAT, the Appeal Tribunal held that it is not always necessary to determine time points as part of the amendment application. This might be deferred where the new claims are said to form part of a continuing act with the original, in-time, claim, given the fact sensitive nature of determining whether there is a continuing act.

17. Transport and General Workers' Union v Safeway Stores Ltd EAT 0092/07, whether a claim has been presented in time is "*a factor — albeit an important and potentially decisive one — in the exercise of the discretion*".

18. Ladbrokes Racing Ltd v Traynor EATS0067/06 when considering the timing and manner of the application in the balancing exercise. It will need to consider:

    - why the application is made at the stage at which it is made and not earlier
    - whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and
    - whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

19. It may be appropriate to consider whether the claim, as amended, has a reasonable prospect of success - Cooper v Chief Constable of West Yorkshire Police and anor EAT 0035/06 and Olayemi v Athena Medical Centre and ors EAT 0613/10.

Deposit Orders

20. The Tribunal's power to make a deposit order and the tests be applied is set out in Rule 39 of the ET Rules.

21. The relevant part of Rule 39 states:

> *"Where a tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success it may make an order requiring a party, the paying party, to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument."*

22. The test under rule 39 is less rigorous than the power to strike out under rule 37 and I am not limited to considering whether the claimant meets the threshold of having set out a prima facie case turning on real factual disputes but may go on to form a view as to whether the claimant is likely t be able to make out their case on the facts (Van Rensburg v Royal Borough of Kingston-upon-Thames [2007] All ER (D) 187 (Nov)).

23. Hemdan v Ishmail [2017] IRLR 228, the purpose of a deposit order "is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails" (para 10), and "emphatically not … to make it difficult to access justice or to effect a strike out through the back door" (para 11).

Direct Discrimination – section 13 Equality Act 2010 ("EqA")

24. Section 13 EqA provides

> *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".*

25. Section 23 EqA provides

> *"(1) On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case."*

26. For a respondent to be guilty of direct discrimination the less favourable treatment must be done 'because of' the protected characteristic.

27. In cases where the difference in treatment is based on a criterion which is a protected characteristic or that cannot be disassociated from it the application of the criterion will constitute direct discrimination - see James v Eastleigh Borough Council [1990] 2 AC 751, [1990] IRLR 288, Amnesty International v Ahmed [2009] ICR 1450; Lee v Ashers Baking Company Ltd [2018] UKSC 49, [2018] IRLR 1116).

28. In other cases the question to be asked is why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? The reason why a person acted as s/he did is a subjective question and one of fact. Motive in treating another person less favourably because of a protected characteristic is not relevant - Nagarajan v London Regional Transport [1999] IRLR 572, HL,

Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065, HL,

29. Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL 'the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class'.

30. Home Office v Saunders 2006 ICR 318, EAT, where a female prison officer complained about being made to search male prisoners the appropriate comparator was a man required to search female prisoners and not a man required to search male prisoners is an example of how Tribunals should look at the issue of comparators.

Submissions Amendment

31. In support of the claimant's application to amend, Mr Sykes firstly submits that when looking at the class of amendment application being considered, that no new acts are in fact alleged to have taken place. He submits that this is just a relabelling of factual allegations that were already pleaded in the Claim Form at paragraphs 11-18 (pages 91-93 Bundle). He submits that this is not a question of a new claim or cause of action but all that is added is the religious discrimination perspective to the same acts. He says that this means this class of application clearly falls within the first category of claims anticipated by the Selkent guidance namely a relabelling of factual matters already pleaded.

32. When making reference to the second matter the Selkent guidance says should be considered, namely the applicability of time limits, Mr Sykes submitted that this had been excluded from consideration by EJ Perry as set out in paragraph 3.3 of the CMO (page 117 Bundle) where it is noted:

"There may be an issue as to timing in relation some of the earlier detriment complaints (see below) in relation to the third claimant. They will be addressed at the final hearing."

Mr Sykes says that this means I am unable to consider the issue as to whether the amendments sought have been presented out of time nor issues of timing of the application more generally. He says this must be taken out of the mix and left entirely to be considered at the final hearing.

33. Alternatively he says time limits are just one of the circumstances relevant to the exercise of the discretion to amend and referred me to the case of Transport and General Workers Union v Safeway Supermarkets referred to above. He acknowledges that if new claims were being brought regarding the 7 acts, then these would be substantially out of time, although says the just and equitable jurisdiction to extend time could still be exercised. However he says again that as these are not new claims, that time is not determinative.

34. He contends therefore that the only relevant factor I should consider when exercising my discretion on amendment is balancing the hardship and prejudice of the respective parties of allowing and refusing the amendment. On that he says that R will suffer no hardship as the facts relied upon are already pleaded. He says that R has already addressed the point at paragraph 26.2 of its original response (page 82 Bundle) and says that R is content with a bare denial to the detriment claim because there is nothing that needs to be added. He says no new

investigation will be required as all the acts relied upon are already part of the facts of the claim and all matters can be dealt with by the existing witnesses so the length of the hearing should not increase. However he submits C3 will have lost a valuable claim if he is not allowed to amend. He contends that he will

be unable to argue that the discriminatory dismissal he is pursuing already followed a series of acts that caused him detriment by religious discrimination. He says that he has lost a potentially valuable claim (and the potential declaratory remedy) and is concerned that the claim for discriminatory dismissal did not make sense without reference to the earlier acts. He says the balance of prejudice clearly favours allowing the amendment.

35. When I asked Mr Sykes why the original claim had not expressly pleaded that the 7 additional acts were acts of discrimination, he said that this was a pleading error and although the box was ticked for a claim of religious discrimination generally, the specific matters now sought were not pleaded expressly as detriment by omission. He says that this was picked up in preparation for the first hearing on 14 February 2020.

36. R objects to the applications made. Mr Kennedy referred to the Selkent principles and submitted firstly that this was not a case of relabelling facts already pleaded to. He says that C3 is seeking to add 7 new distinct causes of action alleging religious discrimination which had not been made before and upon which conclusions have to be made. He does not accept the point made by Mr Sykes that because reference was made in the claim form to the facts behind the allegations now made, that this means no amendment is required. He submits that an allegation that an act of direct religious discrimination was behind such facts is a very different allegation to those made in the context of the unfair dismissal claim.

37. He contended that I must consider the applicability of time limits when considering whether to grant the application to amend (making reference to Selkent). He says that the new acts of less favourable treatment added are now significantly out of time and no extension of time should be granted. He submits that the manner of the application is to attempt to add a full set of additional claims at a late stage which significantly expands his allegations of discrimination and still fails to properly set out how the direct discrimination claim works. He points out that the claimant is not a litigant in person and has been represented throughout and indeed had already made a claim for direct discrimination in his claim form. He points out that the claimant gives no real explanation as to why this amendment was not sought sooner and has been raised so close to the date of the original final hearing. Mr Kennedy submits that the balance of hardship lies in R's favour as it will have to expand its response and consider stale matters given the passage of time. It will now need to address the motivation behind each and every act that is said to be an act of less favourable treatment which is different to the evidence required to defend an unfair dismissal complaint. It will also expand the number of witnesses and the length of the hearing. He says R will be significantly prejudiced in having to defend weak claims and asks me to consider the merits of the proposed claims when considering whether to allow the amendment. He makes reference to his arguments as set out below under the heading "Deposit Order" as another reason why these new claims for discrimination should not be allowed.

38. I was invited to dismiss the application to amend in its entirety.

Deposit Order

39. Mr Kennedy submits that the claimant's claim of direct religious discrimination has little reasonable prospects of success as the claimant has failed, taking his case at its highest, to identify a prima facie case of direct discrimination and has

    little prospect of doing so at final hearing. He accepts that the claimant himself does not need to have protected characteristic in question, in this case being a Muslim, in order to bring a claim for direct discrimination because of that protected characteristic. However he contends that the claimant has mischaracterised how direct discrimination works and his attempts to identify a proper comparator by reference to the application of the Dignity of Work policy is misconceived. He points out that the claimant defines the comparator he relies upon as being "*a hypothetical comparator, that being a Lead Production Manager not accused of breach of the Dignity at Work policy in respect of the protected characteristic of the religion of Islam*". He says that to work within the context of section 23 of the Equality Act 2010, there must be "*no material difference between the circumstances relating to each case*".

40. He says the basis for the claim appears to be that the giving of the gift in question (a fake suicide vest) was offensive to the recipient, a follower of Islam, which triggered action under R's Dignity at Work Policy. The comparator the claimant wishes to rely on is a similar scenario but where there is no alleged contravention of the Dignity at Work Policy. He wants to compare a situation where the Dignity at Work Policy applies to one where it doesn't apply at all. To compare appropriately, he says the comparison would have to be if the recipient of the gift were of a different religion (e.g Judaism) and the nature of the gift were equally offensive to that religion. In that case, he submits the claim does not work as he contends that this would still have triggered action under the Dignity at Work Policy. To work the claimant will have to show that but for the recipient of the gift's Islamic faith, the claimant would not have triggered action under the Dignity at Work policy. He says this is clearly not the case had the incident related to a different religion, not being Islam. He says the claimant cannot point to a comparison of an incident which had no religious connotations at all, as that would be too broad a comparison as the circumstances would not be materially the same and it would be to ignore the material circumstances of the incident. He asks me to consider the case of Home Office v Saunders (see above) where the EAT, focussed on the substance of the claimant's grievance in order to throw light on the material circumstances in a particular case. Accordingly where a female prison officer complained about being made to search male prisoners the appropriate comparator was a man required to search female prisoners and not a man required to search male prisoners. To compare appropriately it is not a case of just changing the faith alone one also needs to adjust the nature of the allegation too.

41. He contends that in relation to the existing and indeed all the new allegations which the claimant seeks to add, there is nothing at all which ties these actions in to the particular religion of Islam. There is nothing inherently discriminatory in the respondent choosing to take action against the claimant by reference to the Dignity at Work policy. He contends that the applicability of the line of cases flowing from James v Eastleigh Borough Council (above) to this claim is highly questionable. He contends that the claimant suggesting that the application of the Dignity of Work policy to the allegations the claimant was facing being indissociable from the

religion of Islam is plainly incorrect and the claimant has little reasonable prospect of succeeding with this argument

42. He asks me to attach a deposit to the claimant's existing allegation of direct religious discrimination as it relates to dismissal at the maximum level of £1000. He also suggests that if the proposed amendment application to add additional

acts of less favourable treatment is permitted, that a deposit of £1000 is also attached to each and every additional allegation pursued.

43. Mr Sykes contends that the claim of direct religious discrimination (both on the basis of the existing pleaded allegation and the new acts of less favourable treatment sought to be added) is not one which has little reasonable prospects of success. He clarified that the claimant does not rely on associative religious discrimination but that this is a basic claim that R did what it did to the claimant because of the protected characteristic of Islam. He suggests that the Tribunal should not get too tied up on identifying a comparator as he says was confirmed in the case of Shamoon v Chief Constable of the Royal Ulster Constabulary. However he confirms that the comparator the claimant relies upon is "*a hypothetical comparator, that being a Lead Production Manager not accused of breach of the Dignity at Work Policy in respect of the protected characteristic of the religion of Islam*". He also asks me to consider the cases of James v Eastleigh Borough Council and the comments of Lady Hale in the Lee v Ashers Baking Company Ltd case. He contends that where a criterion is acting as a proxy or substitute for a protected characteristic then there is an indissociability between the criterion and the protected characteristic. He contends that as soon as the respondent linked the action taken against the claimant to its Dignity at Work Policy, it is driven directly into the protected characteristic of the religion of Islam. It is not possible to disassociate the action taken against the claimant, Mr Sykes says, from the fact that the matter related to a breach of the Dignity at Work Policy related to Islam. It is the allegation relating to the religion he says which is the aggravating factor. He said that it is because the incident at the heart of this claim related to a shop floor incident which involved a direct comment on the religion of Islam, that the respondent took the decision to dismiss the claimant. He suggests this is the driver in the case and this is what the dismissal (and other acts of less favourable treatment) sought is all about. He contends that the claimant was ultimately dismissed because of an incident which related to Muslims and that the application of the Dignity at Work policy to the situation was a proxy for the real issue which was the connection of suicide vests to the religion of Islam.

44. He suggests no deposit should be ordered against any of the allegations, but if I was minded to order a deposit it should be one order against the one argument, rather than against each individual allegation (if they are permitted to proceed). He suggested that a deposit order of no more than £500 would be appropriate.

Conclusion

Amendment

45. In deciding the amendment application I considered the factors identified by **Selkent** before addressing the balance of prejudice and hardship. I set out the analysis on each of these points below:

Nature of the amendment

46. The amendment requested here appeared to me to be a substantial one. It was not, as the claimant contends, simply the addition of detail to an existing factual allegation, or a re-labelling exercise. This was more in the nature of "*entirely new factual allegations which change the basis of the existing claim"* as identified in

the Selkent case above*.* I prefer the submissions of Mr Kennedy that an allegation that something is an act of direct discrimination involves entirely different questions than considering the same factual matters in the context of an unfair dismissal claim. This involves (very broadly) a consideration as to whether what respondent did was within the range of reasonable responses of how an employer might react to a particular matter. An allegation of direct discrimination involves consideration as to why particular acts took place and whether each individual act was done because of religion. There is nothing in the claim form (save for the fact that the claimant already makes a claim of direct religious discrimination about dismissal) which causally links the acts described as being acts of religious discrimination, rather than matters which the claimant suggests make his dismissal an unfair one. I conclude that the nature of the amendment sought here is a substantial one, adding new and additional causes of action to the existing religious discrimination claim. Applicability of time limits

47. The amendments that the claimant seeks are on their face brought out of time, the Amended POC having been presented on 26 March 2020. I do not accept as the claimant suggests that Employment Judge Perry already considered whether the acts which the claimant sought to add to his claim had been brought in time but decided that these matters would be deferred to the final hearing of the claim, and accordingly this is not a matter I should consider at all. It is clear to me that whether the complaints have been brought in time is something I should and must consider. However it also appears to me that if such claims were allowed to proceed, the claimant may be contending that some of the acts he now seeks to add formed part of a continuing act which culminated in the claimant's dismissal. The claim as it relates to dismissal has been brought in time and is already part of the proceedings. Therefore my view is that whether the amendments to the claim are brought in time or not is something that evidence would need to be heard on, so if allowed to proceed, I would adopt the approach in Galilee v Commissioner of Police of the Metropolis above and defer the issue of whether such matters are in time to the final hearing. Therefore, I have considered the point but also note that the applicability of time limits in this particular case is broadly neutral in considering whether to allow the amendment or not,

Timing and manner of the application

48. In the in the first instance, I do not consider that the reference to "timing" in the Order of Employment Judge Perry has any reference to consideration of the timing of the application in this amendment application. Therefore the timing and manner of the application to amend is something I should and will consider. The application to amend was made some 9 months after the claim was initially presented in July 2019. The claimant has been legally represented from the outset and the Claim Form submitted set out in legal language the nature of the claim that was being made. Mr Sykes is open in his explanation that the reason the matters sought now

were not included in the original claim form is down to a "*pleading error*". He says that it was only when he was preparing for the first preliminary hearing which took place on 14 February 2020 that it became apparent that these claims should have been made. I do not accept that this is a good reason for not having made these claims initially or indeed having waited so

long to make the amendment application. The claim form was very clear at the outset that the discrimination complaint related to "*direct religious discrimination causing dismissal*". The factual matters that the claimant is now trying to suggest are also acts of direct discrimination were referenced in the claim form as part of the unfair dismissal claim so if such matters were thought by the claimant to have been because of religion, it should have been pleaded this way or reference in some manner in the claim form. I see no good reason why this was not pleaded properly in the first place.

Other relevant factors

49. I note that the decision in Selkent sets out the factors that a Tribunal should consider but it is clear that these are not the only factors that a Tribunal may consider in the exercise of its discretion on amendment applications. I refer to the cases of Cooper v Chief Constable of West Yorkshire Police and Olayemi v Athena Medical Centre above and the submissions of Mr Kennedy and I consider that this is a clear example where the merits of the proposed amendments to the claim are a highly relevant factor. The claimant wishes to add seven additional claims of direct religious discrimination which in the main are based on the same legal premise as the existing claim of religious discrimination as it relates to his dismissal. The claim was considered as potentially one which may have difficulties by Employment Judge Perry and led him to list the matter for a preliminary hearing to consider whether it had little reasonable prospects of success and whether a deposit order was appropriate. In the hearing today I have heard detailed submissions from the parties on this matter. For the reasons set out below, I have concluded that the claimant's existing claim of direct discrimination is a claim that has little reasonable prospects of success. I therefore also conclude for exactly the same reasons that the amendments sought have little reasonable prospects of success. This is a highly relevant matter in determining whether such claims should be permitted to proceed.

Balance of prejudice

50. Putting these factors together I concluded that the balance of prejudice and hardship favoured refusing the amendment. One concern was that allowing the amendment would simply be giving the claimant "another go" to try and correct deficiencies in the way his complaint was previously made. It could have put this way from the outset by his legal representative but it was not. These new matters were raised late in the proceedings and the respondent would be prejudiced in addressing this new factual complaint as to do so would require additional work that would be burdensome. The claimant already has a direct discrimination and unfair dismissal complaint in play. He has had ample opportunity to set out what the claim is. The relative prejudice to the claimant if the application is not granted would be relatively small whereas the disadvantage to the respondents if it were

and the effect on the proceedings could be significant. This is particularly the case because in my view the amendments sought are in relation to claims that have little reasonable prospects of succeeding at final hearing for the reasons set out below. If the amendments were permitted to proceed, considerable time and expense would be expended by the respondent considering and collating evidence for something which has little reasonable prospect of succeeding. Therefore this is a heavy burden to

bear and very much swings the balance of prejudice in the respondent's favour. For the above reasons, the application to amend is refused.

Deposit Order

51. I have listened to and considered carefully the written and oral submissions prepared by both parties which were detailed and well argued on both sides. However I prefer the submissions of Mr Kennedy and conclude that the claimant has little reasonable prospect of succeeding in his complaint of direct religious discrimination. Mr Sykes explained that the claimant's direct discrimination claim is put in two alternative ways. Firstly it is said that the respondent dismissed the claimant because of the religion of Islam or as Mr Sykes puts it the respondent's "*treatment of him was motivated, consciously or unconsciously by the protected characteristic of the religion of Islam*". He says that this case is one similar to the Nagarajan case where "*the act complained of is not itself discriminatory but is rendered so by a discriminatory motivation i.e by the mental processes (whether conscious or unconscious) which led to the putative discriminator to do the act*". For this claim to be made out, the claimant will still need to establish that the less favourable treatment (here his dismissal) was because of the religion of Islam. That accordingly will require a comparative exercise to be carried out to determine (even hypothetically) what the situation would be if the religion of Islam was not present in the circumstances leading to dismissal. However in my view the comparator that the claimant has identified being "*a Lead Production Manager not accused of breach of the Dignity at Work Policy in respect of the protected characteristic of the religion of Islam*" falls well short of a comparator in the same position in all material respects as the victim. A comparison on this basis will firstly be difficult to establish on the facts as I see them at this stage. It is also not likely in my view take the claimant where he needs to go to reverse the burden of proof or satisfy the "reason why" criterion as it is too wide in scope to be meaningful. If the religion of Islam were changed to a different religion or even no religion at all, but all other matters remained the same (including the nature of the allegation i.e being a breach of the Dignity at Work Policy) I believe the claimant will have very really difficulty in establishing a prima facie case on the facts.

52. Secondly he says that the claims are founded on the theory of indissociability as explained in the Lee v Ashers Baking Company Ltd case. He submits that the respondent's "*express criterion driving the less favourable treatment was speed of response to a contravention of the Dignity at Work policy. That criterion was a proxy for the protected characteristic.*" This is a contention which I believe will be even harder for the claimant to make out at the final hearing on the law or on the facts. The respondent's Dignity at Work policy no doubt covers many other matters as well as religion (which, in itself, is an extremely broad concept). I do not see how the claimant will be able to show in any way that the criterion he identifies

(namely speed of response to a contravention of the Dignity at Work Policy) exactly corresponds with the protected characteristic of the religion of Islam and is thus a proxy for it.

53. Therefore on both arguments, applying the guidance set out in Van Rensburg I am not confident that the claimant fully meets the threshold of having set out a prima facie case turning on real factual dispute here, and so is unlikely be able to make out his case on the facts. I therefore conclude that complaint has little reasonable prospect of success. I have heard the submissions of both parties on ability to pay and take account of this. I conclude that a deposit order at the level of £500 is appropriate. The claimant is **ORDERED** to pay a deposit of £**500 within 21 days** if he wishes to pursue this complaint**.**

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Employment Judge Flood

20 July 2020