EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4114277/2019 and others

Preliminary Hearing Held remotely on 21 July 2020 (V)

10 **Employment Judge A Kemp**

Mr I Mkwebu	**Claimant** **In person**
The Aedan Burt Care Trust (ABC Trust)	**First Respondent** **Represented by** **Mr D McFadzean** **Solicitor**
Elizabeth Sophia Jans	**Second Respondent** **Represented by** **Mr D McFadzean** **Solicitor**
Stephanie Burnside	**Third Respondent** **Represented by** **Mr D McFadzean** **Solicitor**
Victoria Elrick	**Fourth Respondent** **Represented by** **Mr D McFadzean** **Solicitor**
John Burt	**Fifth Respondent** **Represented by** **Mr D McFadzean** **Solicitor**
Aedan Burt	**Sixth Respondent** **Represented by** **Mr D McFadzean** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claim against the third respondent Ms Stephanie Burnside having been withdrawn by the claimant is dismissed.

2. The claimant's application to amend his Claim is granted in the following respects:

(i) Further particulars of the claim for harassment on grounds of race in breach of section 27 of the Equality Act 2010 ("the 2010 Act") in respect of alleged acts in May 2018 arising out of an incident alleged to have occurred in April 2018, and in respect of alleged acts in November 2018, subject to reservation of whether such allegations are within the jurisdiction of the Tribunal on the basis of timebar under section 123 of the 2010 Act.

(ii) A claim of a refusal by the first respondent to permit attendance of a companion at a grievance hearing in December 2019, in breach of section 10 of the Employment Relations Act 1999, and victimisation in breach of section 27 of the Equality Act 2010 ("the 2010 Act").

(iii) Further particulars of a claim of victimisation in breach of section 27 of the 2010 Act on the basis of an allegation of failure to conduct an adequate investigation into the claimant's grievance in a report produced by the first respondent in March 2020.

(iv) Claims in respect of a disciplinary procedure commencing on 6 April 2020 that led to the claimant's dismissal summarily by the first respondent by letter of 5 May 2020, received by him on 7 May 2020, which is alleged to be in breach of sections 13, 26 and 27 of the 2010 Act, sections 47B and 103A of the Employment Rights Act 1996 ("the 1996 Act") and section 94 of the 1996 Act.

3. Save as so granted the claimant's application to amend is refused.

REASONS

Introduction

1. This Preliminary Hearing was arranged to consider an application for amendment by the claimant. It was also held for the purposes of case management, for which a separate Note has been issued. Two earlier Preliminary Hearings have been held on 30 March 2020 and 19 May 2020, following each of which a Note was issued.

Context

2. The application to amend is to be considered in the context of the existing pleadings. That is not a straightforward matter in that there are 10 Claim Forms, against a variety of combinations of respondents, and Further and Better Particulars which were allowed on 11 June 2020 unopposed. The Claims were pursued against the first respondent, his employer, in all cases, and I have identified all respondents by number above for ease of reference.

3. The claimant represents himself, and Mr McFadzean represents all of the respondents.

Background

4. The claimant was employed by the first respondent. It is a Trust, constituted I was informed by Deed of Trust, and with the Trustees including the second respondent and fifth respondent. The Trust was set up to manage the affairs, including provision of care, of the sixth respondent. The sixth respondent is now an adult, but when a child was seriously injured in a car accident, is tetraplegic, and requires constant care.

5. The first respondent employed the claimant to carry out various roles in respect of the care of the sixth respondent. Although he is seriously disabled by his injuries physically, it is understood that the sixth respondent's mental capacity is unaffected, and that he is a highly intelligent man.

6. The first respondent has three Trustees. The second and fifth respondents are respectively the mother and father of the sixth respondent. The fourth respondent was also employed by the first respondent.

7. There is one other Trustee namely Ms Fiona Mundy, not at this stage a respondent but in respect of whom the claimant's application includes an amendment to add her as a further, what would be seventh, respondent. During the course of the hearing before me the claimant was asked about the position of the third respondent, and he confirmed that he withdrew the claim made against her. That claim has been dismissed accordingly.

8. I shall summarise very briefly the Claims made to date. As jurisdiction is an issue that has already been raised in some of them I shall also provide the respondents for each claim, the date early conciliation started, the date of the certificate, and the date on which the Claim Form was presented to the Tribunal, and provide a brief summary of the nature of the Claim made.

The Claims

(i) 4114277/19

9. The respondents are the first and second respondents. Early conciliation for them commenced on 5 November 2019, the Certificate was issued on 13 November 2019, and the Claim Form was presented on 10 December 2019. The Claim sets out a basic structure of facts which other claims then copy, where the material elements are;

   (i) The claimant is a black African man
   (ii) The claimant had a good relationship with the sixth respondent until 22 April 2018 when the sixth respondent subjected the claimant to repeated use of the N word
   (iii) The claimant had a good relationship with management until 26 November 2018 when he raised health and safety concerns.

   The further claim this Claim Form makes was a breach of confidentiality in an email on 3 July 2019 sent by the second respondent, and is a claim for direct discrimination under section 13 of the Equality Act 2010 ("the 2010 Act").

(ii) 4114278/19

10. The respondents are the first and second respondents. Early conciliation is as above, and the Claim Form was presented on 11 December 2019. The Claim has the same initial detail, and then an allegation of direct race discrimination in relation to a staff grievance meeting on 5 July 2019, when the claimant says that he raised a health and safety concern.

(iii) 4114336/19

11. The respondents are the first, second and third respondents, with the third respondent now dismissed. Early conciliation is as above. The Claim was presented on 11 December 2019. In addition to the initial detail it alleges victimisation under section 27 of the 2010 Act in respect of a complaint made by the claimant about his treatment on 26 July 2019 after which on 6 August 2019 he was removed from his duties in assisting in the care of the sixth respondent.

(iv) 4114337/19

12. The respondents are the first and fifth respondent. Early Conciliation for the fifth respondent commenced on 10 November 2019, the Certificate was issued on 18 November 2019 and the Claim was presented on 11 December 2019. In addition to the initial detail the Claim is for harassment under section 26 of the 2010 Act on the basis of an email said to have been sent by the fifth respondent on 10 and 11 August 2019 pressuring the claimant to retract the complaint of 26 July 2019 against the second respondent for her actions at the meeting on 5 July 2019.

(v) 4114338/19

13. The respondents are the first, second and fourth respondents. Early Conciliation for the fourth respondent commenced on 5 November 2019, the Certificate was issued on 13 November 2019, and the Claim Form presented on 11 December 2019. In addition to the initial detail the Claim is for direct discrimination under section 13 of the 2010 Act when the claimant says that he was banned from attending work after a period of sickness by email dated 11 October 2019.

(vi) 4114339/19

14. The respondents are the first and fourth respondents. Early Conciliation was as above. The Claim Form was presented on 11 December 2019. In addition to the initial detail the Claim alleges harassment from 11 October 2019 to the date of the Claim Form on the basis of an email the claimant sent to the fourth respondent on 7 October 2019 setting out the cause of his sickness and with grievances against the second respondent, which the second respondent showed the sixth respondent.

(vii) 4100702/20

15. The respondents are the first, second, fourth and sixth respondents. Early Conciliation for the sixth respondent commenced on 10 November 2019, the Certificate was issued on 18 November 2019, and the Claim Form presented on 6 February 2020. The Claim is for direct discrimination under section 13 of the 2010 Act, and in addition to the initial detail it is made in respect of his grievance on 26 July 20, a further grievance on 7 October 2019 related to alleged instances of discrimination in August 2019, the failure to address adequately his grievances, and the application to him of disciplinary procedure with his being banned from attending work on 11 October 2019 before his grievance made on 26 July 2019 was investigated and concluded.

(viii) 4100703/20

16. The respondents are the first and sixth respondents. Early Conciliation was as above. The Claim Form was presented on 6 February 2020. In addition to the initial detail the claim is for direct discrimination under section 13 of the 2010 Act on the basis of grievances made on 26 July 2019 and in August 2019, by an email from Ms Mundy on 11 October 2019, and that there was a grievance hearing on 19 December 2019 with no outcome at the time of the Claim Form being presented and what he claimed was an “ill-defined” ban.

(ix) 4100792/20

17. The respondents are the first, second, fourth and sixth respondents. Early Conciliation was as above. The Claim Form was presented on 8 February 2020. It repeats most of the detail in the foregoing claim. In addition to the initial detail the claim is for what is said to be indirect discrimination under section 19 of the 2010 Act on the basis of an email sent on 15 November 2019 which threatened the claimant with dismissal, which he claims put him at a disadvantage compared to EU nationals because of the potential effect on his immigration status, he being a Zimbabwea man on a UK Spouse Residence Permit.

(x) 4100793/20

18. The respondents are the first, second, fourth and sixth respondents. Early Conciliation was as above. The Claim Form was presented on 8 February 2020. In addition to the initial detail it the Claim is for, it is understood, direct discrimination under section 13 of the 2010 Act on the basis of the threat to dismiss him made by email on 15 November 2019, and what is understood to be a claim of harassment under section 26 of that Act for that threat to dismiss him.

Further and Better Particulars

19. To those details is added the Further and Better Particulars that the claimant has provided, and which have been accepted. That extends to 19 pages. Section A provides such details for Claim (i) in respect of matters alleged to have occurred in July, August and October 2019. Section B sets out such details for the claim under section 47B of the 1996 Act, and refers to emails dated 12 September 2018, 4 February 2020 and 11 May 2020.

20. In addition to the factual detail provided, it makes reference to claims under sections 44 and 45 of the Employment Rights Act 1996 which are understood to be a reference to the health and safety concerns that the claimant referred to in the Claim Forms, which he also claims are a protected disclosure and led to detriment. The claimant refers to the

General Data Protection Regulation, but that is not directly within the jurisdiction of the Tribunal, and no separate claim under its terms falls within the jurisdiction of the Tribunal. It is accordingly taken as having been provided by way of factual background in light of that. He refers further to Ms Fiona Mundy as if she was a respondent, but she was not one of the respondents originally named in the Claim Form, and that is a subject of his separate amendment application.

The claimant's application to amend

21. The application was made in writing on 19 May 2020. It extends to 33 pages. It has two sections, the first – A - for matters which pre-date his first Claim Form, and the second – B - for matters which post date the last Claim Form. In brief summary the matters are –

Section A

(i) Direct race discrimination in respect of training and promotion issues in the period July 2014 to February 2017

(ii) Harassment on grounds of race in February 2018

(iii) Harassment on grounds of race in April 2018

(iv) Indirect discrimination and harassment on grounds of race in May 2018

(v) Direct discrimination, disability discrimination and discrimination on grounds of marriage in July 2018

(vi) Direct race discrimination in November 2018

(vii) Failure to provide rest breaks under the Working Time Regulations 1998 and a detriment under section 45A of the Employment Rights Act 1996 in the period February 2016 to September 2019

Section B

(i) Refusal to permit attendance of companion at grievance hearing in December 2019, in breach of sections 10 and 12 of the Employment Relations Act 1999, and victimisation under section 27 of the 2010 Act.

(ii) Failure to conduct an adequate investigation into his grievance in the report in March 2020, also in breach of section 27

(iii) The disciplinary procedure, which was clarified during the hearing to have started on 6 April 2020, that led to his dismissal by letter of 5 May 2020, received on 7 May 2020, which alleged gross misconduct, which failing dismissal for some other substantial reason in respect of a break down in trust and confidence alleged to have taken place, and the sixth respondent not wishing the claimant to be involved further in his care. This is argued by the claimant to be:

(a) In breach of sections 13, 26 and 27 of the 2010 Act

(b) In breach of sections 47B and 103A of the 1996 Act

(c) In breach of section 94 of the 1996 Act

(iv) Indirect discrimination on grounds of race, and harassment, in May 2020 in relation to the threat of dismissal which is said to be a provision criterion or practice.

22. The claimant further seeks to add additional respondents to the claims, being Ms Cath Carter a former employee of the first respondent who left on 9 September 2018, Ms Fiona Mundy a Trustee as referred to above, and Mr Aeden Burt, who is the sixth respondent.

Claimant's submission

23. In brief summary the claimant argued that it would be just and fair to allow his amendment to be received. The first two pages were a form of prelude to the applications made. He is acting for himself, and had not initially been aware of the full extent of his claims. He had made a subject access request which had led to various documents being produced to him in January 2020. From these he learned the extent of the involvement of those he now wished to add to the Claims. He argued on the point of timebar that the conduct he complained about extended over a period, and that if not it was just and equitable to allow his claims to proceed. In respect of the individuals he argued that they were actively involved in the decisions and that it was appropriate that they be convened as respondents given their individual responsibility. He argued that the same person was involved in matters A (i) and (v) and that that established the continuing acts. He accepted that the amendments in section A were out

of the primary time limit. Those in section B had occurred after the Claim Forms were presented. He also confirmed that he withdrew his claim against the third respondent, and it has accordingly been dismissed under Rule 52.

Respondents' submissions

24. In brief summary Mr McFadzean argued that the amendments sought in section A should be refused, as they were clearly out of time. He did not accept that there was conduct extending over a period. He argued that the events were separate and distinct, not sharing common characteristics. Whilst it was accepted that the sixth respondent had used the N word in April 2018 directed to the claimant that was when the sixth respondent was intoxicated, he had apologised and that apology had been accepted. It was not related to other matters which were entirely different. It was out of time to be raised now. He further argued that it would not be just and equitable to allow them to be received if late. He suggested that the claimant was putting forward a large number of separate claims and trying to see which ones "stuck". That was not appropriate in the assessment of what is just and equitable.

The law

(i) Amendment

25. The question of whether or not to allow amendment is a matter for the exercise of discretion by the Tribunal. There is no Rule specifically to address that, save in respect of additional respondents in Rule 34, set out below. It falls within the Tribunal's general power to make case management orders set out in Rule 29 which commences as follows:

> "**29 Case management orders**
> The Tribunal may at any stage of the proceedings, on its own initiative or on application to make a case management order."

26. Rule 29 requires to be exercised having regard to the overriding objective in Rule 2. It states as follows:

> "**2 Overriding objective**
>
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
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> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

27. Earlier iterations of the Tribunal Rules of Procedure did contain a specific rule on amendment, and the changes brought into effect by the current Rules, found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, require consideration when addressing earlier case law.

28. The nature of the exercise of discretion in amendment applications was discussed in the case of ***Selkent Bus Company v Moore [1996] ICR 836***, which was approved by the Court of Appeal in ***Ali v Office for National Statistics [2005] IRLR 201***. The EAT stated the following:

> "Whenever the 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.
>
> 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, eg, in the case of unfair dismissal, s.67 of the 1978 Act.

(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 Rules for the making of amendments. The amendments may be made at any time – before, at, even after 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 new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

29. In a number of cases distinctions are drawn between firstly cases in which the amendment application provides further detail of fact in respect of a case already pleaded, secondly those cases where the facts essentially

remain as pleaded but the remedy or legal provision relied upon is sought to be changed, often called a change of label, and thirdly those cases where there are both new issues of fact and of legal provision on which the remedy is sought. The first two categories are those where amendment may more readily be allowed. The third category is more difficult for the applicant to succeed with, as the amendment introduces a new claim which, if it had been taken by a separate Claim Form, would or might have been outwith the jurisdiction of the Tribunal as out of time. These issues are addressed in the case of ***Foulds*** referred to below, for example.

30. The statutory provisions on timebar are set out below.

31. In ***Abercrombie v Aga Rangemaster Ltd [2014] ICR 204*** the Court of Appeal said this in relation to an amendment which arguably raises a new cause of action, suggesting that the Tribunal should

> " … focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

32. In order to determine whether the amendment amounts to a wholly new claim, the third of the categories set out above, it is necessary to examine the case as set out in the original Claim to see if it provides a 'causative link' with the proposed amendment (***Housing Corporation v Bryant [1999] ICR 123***). In that case the claimant made no reference in her original unfair dismissal claim to alleged victimisation, which was a claim she subsequently sought to make by way of amendment. The Court of Appeal rejected the amendment on the basis that the case as pleaded revealed no grounds for a claim of victimisation and it was not just and equitable to extend the time limit. It said that the proposed amendment 'was not a rectification or expansion of the original claim, but an entirely new claim brought well out of time'.

(ii) Jurisdictional issues

33. There are two contradictory lines of authority at the EAT level about how amendment applications should be dealt with where one of the issues is timebar. The more recent line is set out in ***Galilee v Commissioner of Police of the Metropolis [2018] ICR 634***, in which the EAT held that it was permissible to allow amendment but reserving questions of jurisdiction for determination either at a Preliminary Hearing or at a Final Hearing. That results in an amendment being allowed to permit a new claim to be raised, but the issue of whether or not it is in the jurisdiction of the Tribunal is not at that stage determined. The other line of authority is to the effect that questions of jurisdiction on issues of timebar must be addressed at the time of consideration of the amendment, as once accepted the Claim is deemed to have been amended from the date of its presentation initially, rather than when the amendment was sought, on which the authorities include ***Rawson v Doncaster NHS Primary Care Trust UKEAT/022/08, Newsquest (Herald and Times) Ltd v Keeping UKEATS/51/09*** and ***Amey Services Ltd v Aldridge UKEATS/7/16.***

(iii) Time bar

34. Section 123 of the 2010 Act provides as follows

"**123 Time limits**

(1) [Subject to [sections 140A and [section] 140B],] proceedings on a complaint within section 120 may not be brought after the end of—

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

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

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

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

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

(3) For the purposes of this section—

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

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

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

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

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

35. This therefore provides that the Tribunal has jurisdiction under the 2010 Act if a claim is commenced within three months of the act complained of, but there are two qualifications to that, firstly where there are acts extending over a period when the timelimit is calculated from the end of that period, and secondly where it is just and equitable to allow the claim to proceed.

36. An act will be regarded as extending over a period, and so treated as done at the end of that period, if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant ***(Barclays Bank plc v Kapur [1989] IRLR 387.*** It was also held in that case that it is only the continuance of the discriminatory act or acts, not the continuance of the consequences of a discriminatory act, that will be treated as extending over a period.

37. The Court of Appeal in ***Hendricks v Metropolitan Police Commissioner [2003] IRLR 96*** stated that terms mentioned in the above and other authorities are examples of when an act extends over a period, and

"should not be treated as a complete and constricting statement of the 'indicia' of such an act. In cases involving numerous allegations of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what he has to prove, in order to establish a continuing act, is that (a) the incidents are

linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs'. This will constitute 'an act extending over a period'."

38. The assessment of what is just and equitable, if that stage is reached, involves a broad enquiry with particular emphasis on the relative hardships that would be suffered by the parties according to whether the amendment is allowed or refused.

39. The onus is on the claimant to persuade the tribunal that it is just and equitable to extend time, and the exercise of discretion is the exception rather than the rule (***Robertson v Bexley Community Centre [2003] IRLR 434***), confirmed in **Department of Constitutional Affairs v Jones [2008] IRLR 128**

40. In ***Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298, [2010] IRLR 327***, the Court of Appeal stated the following

"There is no principle of law which dictates how generously or sparingly the 'power to enlarge time is to be exercised' (para 31). Whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case 'is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it"

41. In Abertawe ***Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13*** the EAT stated that a claimant seeking to rely on the extension required to give an answer to two questions:

"The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was."

42. The terms of section 123 accordingly require consideration when addressing the issue of timelimits in an application in a manner that has regard to all of its provisions, which are different to those that apply under

the Employment Rights Act 1996. The protection against detriment for making a protected disclosure is in section 47B, and remedy is provided for in section 48, and in respect of time off for dependents in section 57A, with remedy provided for in section 57B. In each of those provisions the basis of the three month period not applying is reasonable practicability and if it was not reasonably practicable to do so in the primary timelimit of three months what is a reasonable period.

43. The question of what is reasonably practicable, also found in section 111 of the 1996 Act in essentially the same terms, is explained in a number of authorities, particularly ***Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119.*** The following guidance is given:

> "34. In the end, most of the decided cases have been decisions on their own particular facts and must be regarded as such. However, we think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done. … Perhaps to read the word "practicable" as the equivalent of "feasible", as Sir John Brightman did in Singh's case and to ask colloquially and untrammelled by too much legal logic, 'Was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?' is the best approach to the correct application of the relevant subsection.
>
> 35. What however is abundantly clear on all the authorities is that the answer to the relevant question is pre-eminently an issue of fact for the Industrial Tribunal and that it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, an Industrial Tribunal may wish to consider the manner in which and reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery has been used. It would no doubt investigate what was the substantial cause of the employee's failure to comply with the statutory time limit, whether he had been

> physically prevented from complying with the limitation period for instance by illness or a postal strike or something similar. […] Any list of possible relevant considerations, however, cannot be exhaustive, and, as we have stressed, at the end of the day the matter is one of fact for the Industrial Tribunal, taking all the circumstances of the given case into account."

44. The burden of proof is on the claimant to prove that it was not reasonably practicable to present the complaint in time: ***Porter v Bandridge Ltd [1978] IRLR 271***.

45. If that issue of reasonable practicability is met by the claimant, there is a secondary issue of whether the claim was presented within a reasonable period of time. That is a question of fact and degree, dependent on all the circumstances. In ***James W Cook & Co (Wivenhoe) Ltd v Tipper [1990] IRLR 386***, guidance on that issue was given.

46. There is a further matter to consider, which is the effect of early conciliation on assessing when a claim was commenced. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). This process is known as 'early conciliation' (EC), with the detail being provided by regulations made under that section, namely, the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014. They provide in effect that within the period of three months from the act complained of, or the end of the period referred to in section 123 above if relevant, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place.

(iv) Individual respondents

47. There is a particular rule in relation to amendments to add new parties, in Rule 34 which provides as follows:

“34 Addition, substitution and removal of parties

The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included.”

48. That Rule, by the use of the word “may”, clearly provides a discretion, as was made clear in ***Drake International Services Ltd v Blue Arrow Ltd [2016] ICR 445***, and is itself subject to the overriding objective set out in Rule 2.

49. In the 2010 Act there is provision for a claim against parties other than the employer in sections 111 and 112 as follows:

“**111 Instructing, causing or inducing contraventions**

(1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).

(2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.

(3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.

(4) For the purposes of subsection (3), inducement may be direct or indirect.

(5) Proceedings for a contravention of this section may be brought—

(a) by B, if B is subjected to a detriment as a result of A's conduct;

(b) by C, if C is subjected to a detriment as a result of A's conduct;

(c) by the Commission.

(6) For the purposes of subsection (5), it does not matter whether—

(a) the basic contravention occurs;

(b) any other proceedings are, or may be, brought in relation to A's conduct.

(7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.

(8) A reference in this section to causing or inducing a person to do something includes a reference to attempting to cause or induce the person to do it.

(9) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating—

(a) in a case within subsection (5)(a), to the Part of this Act which, because of the relationship between A and B, A is in a position to contravene in relation to B;

(b) in a case within subsection (5)(b), to the Part of this Act which, because of the relationship between B and C, B is in a position to contravene in relation to C.

112 Aiding contraventions

(1) A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention).

(2) It is not a contravention of subsection (1) if—

(a) A relies on a statement by B that the act for which the help is given does not contravene this Act, and

(b) it is reasonable for A to do so.

(3) B commits an offence if B knowingly or recklessly makes a statement mentioned in subsection (2)(a) which is false or misleading in a material respect.

(4) A person guilty of an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(5) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating to the provision of this Act to which the basic contravention relates.

(6) The reference in subsection (1) to a basic contravention does not include a reference to disability discrimination in contravention of Chapter 1 of Part 6 (schools)."

50. In cases of public interest disclosures, including detriment and dismissal, a claim can competently be brought against a fellow worker. Section 47B(1A) of the Employment Rights Act 1996 provides that a worker has the right not to be subjected to a detriment on the ground of having made a protected disclosure by a fellow worker, and in the case of such a detriment by a fellow worker the employer has a potential defence if it can show that it took all reasonable steps to prevent that other worker from acting as alleged (Section 47B(1D)). The first respondent does not seek to rely on that defence. The provisions on timebar are equivalent to those in the 2010 Act.

Discussion

51. The amendments in section B which seek to add new claims the respondents do not oppose, and in light of that they are all granted in respect of the claims that are made. That part of section B which seeks to add new respondents was opposed, and the positions of each of the three persons sought to be added as respondents are addressed below accordingly.

52. All of section A was opposed, and is considered below for each matter.

Amendment and timebar

53. Before considering the detail of the application it is appropriate to address the two competing lines of authority in relation to amendment and timebar. Those two lines of authority cannot easily be reconciled. ***Galilee*** was decided at least partly on issues of English law and practice, which I do not consider find equivalents in Scots law and practice.

54. How the overriding objective is to be applied was reviewed in the case of ***Newcastle upon Tyne City Council v Marsden - [2010] ICR 743.*** The circumstances of that case were different, in that it was an application to review a decision. The employer relied on the cases of ***Flint v Eastern***

Electricity Board [1975] ICR 395 and ***Lindsay v Ironsides Ray & Vials [1994] ICR 384.*** The employment judge held that those decisions had been superseded by the introduction in the 2014 Rules of the overriding objective, and that a different approach was indicated by the decisions in ***Williams v Ferrosan Ltd [2004] IRLR 607*** and ***Sodexho Ltd v Gibbons [2005] ICR 1647.***

55. The then President of the EAT said this in relation to the former two cases

> "it is important not to throw the baby out with the bath-water. As Rimer LJ observed in ***Jurkowska v Hlmad Ltd [2008] ICR 841***, para 19 it is "basic"
>
> > "that dealing with cases justly requires that they be dealt with in ***accordance*** with recognised principles. Those principles may have to be adapted on a case by case basis to meet what are perceived to be the special or exceptional circumstances of a particular case. But they at least provide the structure on the basis of which a just decision can be made."
>
> The principles that underlie such decisions as ***Flint*** and ***Lindsay*** remain valid, and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles"

56. He then referred to the facts of the case before him and said;

> "Those are an exceptional circumstance. They take the case outside the straightforward 'fresh evidence' category…... They also take it outside the ordinary run of cases where a party suffers from the wrong, or indeed incompetent, advice of his representative. Whereas in a case of that kind the overall interests of justice, and in particular the weight to be attached to finality in litigation, may well require that a party bear (as between himself and the other party) the consequences of the errors of his own representative, the judge was entitled to take a different view on the particular facts of the present case."

57. I take from that case a principle that exceptional circumstances may require, in the interests of justice, an outcome that is different to that which is normally the case in the absence of those circumstances, and that principles in case law are not propositions of law binding in every case.

58. In my judgment an amendment if allowed simply permits a claimant to pursue a new matter, whether of fact or law, which was not within the original Claim Form (or Forms as in the present case). It allows a new claim to be pursued but whether that new claim succeeds is a different matter.

59. I turn to Scots law and practice in relation to matters of amendment. That also does not give a binding answer, but guidance which may be helpful to take into account.

60. The nearest equivalent to the issues in the present case in a court action is a personal injury claim. The procedure however is different. An action must generally be commenced within three years of the accident under the Prescription and Limitation (Scotland) Act 1973, but once commenced there is a period for adjustment of the pleadings, and during that period the pursuer can add to the pleadings a new claim, doing so after the three year period has expired, which will be competently before the court, and brought in time.

61. Once that period of adjustment is completed however, the position is different. There is then a Closed Record, and amendment thereafter which may bring in a new claim requires the consent of the court. Amendment can be allowed or refused in the discretion of the Court. There are separate rules for the Court of Session and the Sheriff Court, but the principles underlying them are the same.

62. Chapter 24 of the Rules of the Court of Session makes provision for amendment, but the Rules do not state specifically a procedure in the event that the amendment by a pursuer seeks to introduce a new claim which the defender claims is timebarred. That was referred to in ***Docherty v Secretary of State for Business, Industry and Strategy [2017] CSOH 54.*** That was a personal injury action in which the motion was to allow an

amendment and in the circumstances of that case the discretion was not exercised in favour of the pursuers, such that the amendment was refused. That took place on the basis of the Minute of Amendment, Answers, and submissions.

5 63. There are other circumstances where it is not clear when a right of action arose, for example the date on which a pursuer knew or ought to have known of the right of action, which is when the period for timebar purposes starts. In such a case where there is an evidential dispute, the court can hold a preliminary proof on that question.

10 64. A preliminary proof is also competent when an argument is made under section 19A of the Prescription and Limitation (Scotland) Act 1973 in relation to a personal injury action raised outwith the statutory timelimit of three years. In ***Donald v Rutherford 1984 SLT 70*** an Extra Division of the Inner House of the Court of Session considered the terms of section 15 19A. Lord Cameron said the following:

> "Before parting with this case I would draw attention to a difficulty which almost inevitably must arise in dealing with a claim that an action already time-barred should be allowed to proceed, when the only material upon which the court is asked to exercise an equitable 20 jurisdiction is contained in pleadings and certain admitted (but not necessarily complete) correspondence. In the present case I do not think that the interests of parties have been prejudiced by the course which the proceedings took, but when the issues are more complicated and the salient facts less clear than they are in this 25 case, then I think it may well be in the interests of parties that the question of the applicability of s. 19A of the Act of 1973 should be decided on the result of a preliminary proof on the relevant averments and pleas of parties."

65. In the case of ***Argyll and Clyde Health Board v Foulds and others*** 30 ***UKEATS/009/06*** Lady Smith at the EAT said this in relation to Scots law and practice:

"19. I would, at this point, observe that the 2004 rules make provision for amendment in a similar manner to that which is provided by the Rules of the Court of Session. Rule 24.1 of those rules provides that, in any cause, the court may, at any time before final judgment, allow:

" (2)…….
(d) where it appears that all parties having an interest have not been called or that the cause has been directed against the wrong person, an amendment inserting ……an additional or substitute party……" .

20. In both cases, a wide discretion as to whether to allow the amendment is conferred by the rules. It is within the discretion of the court to allow such an amendment even if time bar questions are liable to arise because of late service on the new defender, such questions being a matter of substantive law and not covered by the rules of court. It is though unlikely that the court will be persuaded to do so if it is plain from the pursuer's case that he will have no answer to the time bar point. It may not be plain though; the case may, for instance, require consideration of whether the provisions of sections 17 or 19A of the Prescription and Limitation (Scotland) Act 1973 apply, a matter in respect of which there will often require to be a preliminary proof."

66. She then referred to section 111 of the 1996 Act, the claim before her being for unfair dismissal, and that if a Claim Form was presented timeously, then amended to introduce a new respondent, that respondent could not take a timebar point as the Claim had been presented timeously.

67. That is not however the position in the present case, as whether or not the Claim Forms were presented timeously for at least some of the matters alleged is in dispute, and is an issue that will be addressed by evidence.

68. I would note further that the terms of section 123 of the 2010 Act with regard to "conduct extending over a period is to be treated as occurring when the person in question decides on it" is not found in section 111, where the foundation is the concept of the effective date of termination –

a specific and identified date. The reference to conduct is to a concept of fact. Where that fact is disputed it appears to me that the words used in the sub-section infer resolution of that dispute by evidence.

69. Issues of jurisdiction are matters that a Tribunal must take account of. They determine whether or not the Tribunal, as a creature of statute, has the ability to hear the matter. Some issues of jurisdiction on issues of timebar may be clear from their face. ***Newquay*** is a further example of a case where there was a discrete period of time involved which had ended, such that unless it was just and equitable to extend time it was outwith the jurisdiction of the Tribunal.

70. There are other cases however where that clarity on timing is lacking. This case is one of them. The pleadings in the Claim Forms include matters in respect of which a timebar point has been taken by the respondent, and others where it has not. To take the initial facts set out above from Claim Form (i), the alleged acts in April 2018 and November 2018 are outwith the primary timelimit unless they are part of conduct extending over a period that itself lasts to a date no less than three months prior to the start of early conciliation. That first Claim Form then refers to alleged acts in July 2019. Early Conciliation was not commenced until November 2019. On the face of it, the July 2019 matters in isolation may also be out of time, subject to the issue of a just and equitable extension under section 123. If there is then consideration of Claim (vii), for example, it includes the same initial facts in April and November 2018, but then further alleged acts in August 2019 and October 2019 for example. If all of these acts are established in evidence as having occurred, and then considered together as conduct extending over a period to October 2019, all the acts alleged against at least the first respondent in that period, from April 2018 to October 2019, then fall within a period ending on a date within which early conciliation was timeously commenced, and the Claim Form on that basis appears to have been submitted in time (subject to any argument that the respondents may raise on these issues).

71. Similar considerations arise in the other Claim Forms. How these issues of timebar are to be addressed is dealt with in the Note about case

management of even date with this Judgment, in which it is stated that the respondents agreed that it is to be reserved for determination at the Final Hearing. Regardless of the allowance or refusal of the amendment therefore, in the present case there requires to be consideration of evidence on issues of jurisdiction for acts pled which may or may not be held to be raised timeously such as to be within the jurisdiction of the Tribunal.

72. The facts alleged by the claimant in the amendment application include that there was conduct extending over a period, and that it is just and equitable to allow them if late, the law on which is addressed further below. The respondents deny the alleged acts that are the subject of the amendment took place, that they or any of them were part of conduct extending over a period and that it would be just and equitable to extend jurisdiction to them if they are otherwise out of time.

73. I consider that whether or not the alleged acts occurred, and if so whether they are part of conduct extending over a period, where they are sought to be added to the pleadings by amendment, can only properly be determined by evidence in the present case. The alternative is to try to make an assessment of the amendment based purely on submission, where there are competing arguments as to fact and a very limited basis on which it is possible to assess which party is right, and to what extent, but also in the circumstances of the present case where the existing issues of jurisdiction, on the facts pled in the Claim Forms, will in any event be determined by evidence.

74. In the issue was whether there had been unlawful deduction from wages in respect of holiday pay, and on the basis of ***Bear Scotland v Fulton and another [2015] ICR 221*** an issue of timebar arose if a claim was not presented within three months of when the sum was said to be due in each case. That was a claim under the 1996 Act where the test was of reasonable practicability, in circumstances where there had been a Claim presented for other earlier alleged deductions. Whilst the report is not specific on the point, it does not seem that reasonable practicability was

argued, rather there was reference to whether the principle in ***Fulton*** was itself under further appeal.

75. The EAT said the following in relation to ***Selkent, Rawson*** and ***Newquay***:

> "It is clear from these authorities that the usual principles for amendment of a claim include a requirement to determine at the stage of exercising discretion to grant or refuse the application (i) whether the amendment seeks to bring in a claim that would otherwise be time barred and (ii) if so, whether there are good reasons, taking into account injustices and hardship that may be the result, to grant the amendment notwithstanding that the effect will be to allow the amending party to avoid the usual consequences of presenting a claim out of time."

76. That analysis is contradicted by the decision in ***Galilee***, and is contrary to the decision in ***Marsden,*** which does not appear to have been cited in ***Amey.***

77. In light of the foregoing analysis and with respect I do not consider that the ***Amey*** quotation that there is a requirement to determine the issue of timebar when considering whether or not to exercise discretion to allow or refuse an application to amend is correct if it was intended to be an absolute rule. It may not have been so intended as there is reference to "the usual principles", which does on one construction admit of exceptions.

78. ***Rawson*** was a case where a claimant sought to introduce out of time a new claim of disability discrimination which had not been pled initially. The appeal was allowed, but the reason for that was that the Judge had not in terms considered the issue of whether it was just and equitable to allow the claim to proceed. If it was, that would point strongly but not determinatively towards allowing the application to amend, and if not it would point strongly but not determinatively against that. The EAT did not specifically address the point of whether a factual dispute, if there was such, could be reserved for decision after allowing the amendment.

79. ***Selkent*** also stated specifically that in addition to the three factors referred to all of the circumstances required to be taken into consideration, and I respectfully agree with the EAT in ***Galilee*** when it stated in relation to the use of the word 'essential' in relation to considering time limits should not be taken

> "in an absolutely literal sense and applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues should be decided before permission to amend can be considered"

80. ***Selkent*** did not consider whether there may be a disputed issue of fact in relation to jurisdiction.

81. I do not consider that to take a decision on an amendment which may or may not be timebarred, dependent on disputed facts concerning conduct extending over a period quite apart from what is just and equitable, in the absence of evidence on those facts, could be in accordance with the overriding objective as it would not be just to do so. Whilst the terms of the overriding objective do not give carte blanche to do as one wishes, the Tribunal requires to give effect to the Rule when exercising any power given to it by the Rules, which includes that for case management.

82. I therefore consider that the ***Galilee*** line of authority is to be followed, at least in the circumstances of the present case, although I do so for somewhat different reasons than those set out there and having regard also to the law and practice in the Scottish courts referred to above, rather than the law and practice in England.

83. It follows from my conclusion that an amendment can be allowed in whole or part subject, in a case where there is a dispute on facts material to the issue of whether a claim in relation to timebar is within the jurisdiction of the Tribunal, to those facts being determined by evidence, on which case management is required to address the procedure to be followed. I consider that the ability to reserve the issue of jurisdiction in such a manner is a matter to take into account when considering the issue of timebar in the exercise of discretion.

84. I turn to address the arguments in relation to section A. I do so initially for the position of the first respondent, as employer.

(i) Direct race discrimination in respect of training and promotion in the period July 2014 to February 2017

85. Having regard to all the circumstances I do not consider that the amendment should be allowed. Firstly the nature of the amendment contradicts the initial pleading to the effect that initially the claimant had a good relationship with the first respondent and other respondents as its management up to November 2018. Secondly the period of time stated is that ending in February 2017. It cannot therefore extend beyond that date, and is pursued around three years outwith the statutory time limit. Thirdly it is in any event not a claim that is likely to add materially to the claimant's remedy if his other claims are successful, and there would be hardship on the first respondent in seeking to defend such an old claim. All of the factors in ***Selkent*** are against the allowing of this part of the application. It is therefore refused.

(ii) Harassment on grounds of race in February 2018

86. Firstly on the nature of the amendment, the claimant has existing claims of harassment in his Claim Form. In that context, the allegation of similar alleged conduct two months earlier he seeks to raise by amendment which was not raised in the first Claim Form but could have been is directly contradicted by the terms of the initial Claim Form details referred to above, which state that his relationship with the sixth respondent was "good" until April 2018. There is an issue of timebar that could be addressed by reserving it as noted above, but whether to do so depends on all the circumstances. The timing and manner of the application is not adequately explained, in that if such an issue had arisen it could have been within the Claim Form. The present application is in that context not one that I consider meets the ***Selkent*** factors, particularly in that the nature of the amendment is contradicted directly by the claimant's own pleadings. It is therefore refused.

(iii) Harassment on grounds of race in April 2018

87. The application is made in respect of matters that follow on from those in February 2018 addressed above. I consider that this application to amend should not be allowed on the same basis accordingly. There are separate allegations made about matters said to have arisen in April 2018, in particular about comments by the sixth respondent, which are already pleaded and not affected by that decision.

(iv) Indirect discrimination and harassment on grounds of race in May 2018

88. Whilst there is a claim of indirect discrimination already pled in the Claim Forms as referred to above, the claimant did not I consider articulate either in the written application to amend or during the hearing before me a provision, criterion or practice which could be the basis for a claim under this section. The nature of the claim made is therefore not clear and that tells against the application. The period is given as May 2018, and whilst it could be an issue reserved as set out above whether to do so depends on all the circumstances. On the timing and manner of the application I note that there was a claim of indirect discrimination pled in the original Claim Forms, the detail of which is summarised above. There is no explanation given as to why it was not included within that Claim Form. A claim of indirect discrimination is very different in kind to that of direct discrimination, and the argument the claimant made in relation to this aspect of the amendment was, as Mr McFadzean argued during the hearing, more relevant to a claim of direct discrimination. I consider that the claim of indirect discrimination is very likely to fail, and in any event if the other allegations the claimant makes are accepted the issue of indirect discrimination is not likely to add materially to remedy. In all the circumstances that part of the application alleging indirect discrimination is refused.

89. In so far as it may provide further specification of the claim for harassment different considerations may apply. The amendment alleges that the claimant reported the incidents to Ms Carter, and thereafter an apology by the sixth respondent was tendered and accepted. The claimant alleges, to

summarise a long section, that the first, second and fifth respondent did not react appropriately to what had happened. It is therefore an allegation of matters that arose from the April 2018 incident already pled, and although it is contradicted to an extent by the pleading to the effect that the relationship with management was good until November 2018 I consider that in the circumstances it should be allowed on the basis that it provides further specification of the claim of harassment, on the basis that it is subject to evidence as to whether it falls within the jurisdiction of the Tribunal as set out above.

(v) Direct discrimination, disability discrimination and discrimination on grounds of marriage in July 2018

90. The claims of disability discrimination and marriage discrimination are entirely new both as to fact and law, are in the third category referred to above, and the nature of the amendment being so different to the original pleadings tells against allowing the amendment. On the issue of time bar on the face of them these claims are far outwith the statutory time limits, and there is no suggestion of conduct extending over a period for these allegations. I do not consider that it would be just and equitable to allow them to be received so late, with difficulties for the respondent in investigating issues that are well outwith the primary time limit, and new. Finally there is no adequate explanation as to why they were not raised in the original pleadings if they were considered to be matters that were material. I consider that they are claims that fail the ***Selkent*** factors clearly. The application in this regard is refused.

91. In relation to the claim of direct discrimination it is far from clear what if anything the amendment does to add to his existing pleadings, which refer to events in July 2018 but with something of a different emphasis of fact. Having regard to the ***Selkent*** factors referred to I consider that this aspect of the application is also to be refused.

(vi) Direct race discrimination in November 2018

92. This is also a long section, which includes allegations as to protected disclosures, direct discrimination and victimisation dating from November

2018. The nature of the amendment sought is I consider not clear, it focusses more on health and safety issues concerning his being required to remain on shift when another staff member fell ill, and its potential connection to other matters pled is not as clear as it might be. What had been pled was that on 26 November 2018 the claimant "raised concerns about persistent negligent work practices putting the health and safety of the service user, members of staff and members of the public at a significant risk of harm." The amendment is at least generally related to that, although it focusses on the claimant's own position, and what is said to be harassment of him. I consider that it builds on the original pleadings at least to a material extent, and comes within the first category of providing additional particulars rather than an entirely new claim. Secondly the issue of timebar can be addressed by reserving it as I have stated. Thirdly although the claimant presented ten different Claim Forms his pleading on the November 2018 incidents was brief. On balance I consider that the amendment sought does meet the ***Selkent*** factors. It is therefore allowed, on the same basis that whether it falls within the jurisdiction of the Tribunal is reserved.

(vii) Failure to provide rest breaks under the Working Time Regulations 1998 and a detriment under section 45A of the Employment Rights Act 1996 in the period February 2016 to September 2019

93. The period stated ended in September 2019. Given that early conciliation for the first respondent led to a certificate on 13 November 2019, any Claim Form required to be submitted by 13 December 2019 if it was to be potentially in time. The amendment application was made about six months after that. The timebar provision for this claim, made under the 1996 Act, is of reasonable practicability and then a reasonable period. There was nothing material put forward as to why the claimant was not able to make this claim earlier. He must have been aware of when rest breaks were or were not afforded. Mere ignorance of a right is not sufficient, as there require to be reasonable steps taken to find out about rights. In all the circumstances this claim is I consider clearly time-barred, and that that is a strong factor suggesting that it should be refused. It is also not at all clear why it was not pursued with the first set of Claim Forms,

5 and is only pursued now. No proper reason for it being submitted as late as it has been has been put forward. It appears to me that it was not submitted within a reasonable period in any event. It is accordingly on the face of it timebarred. It is a claim entirely different in kind to that which was pled in the Claim Forms. There is no hint of such a claim in those Claim Forms, and having regard to the test in ***Selkent*** and to the guidance in ***Bryant*** I consider that this application must be refused.

The second, fourth, fifth and sixth respondents

94. Matters are more complex still in relation to the position of the second, fourth, fifth and sixth respondents than they are for the position of the first respondent. The issue of what is pled in relation to them is different to that in relation to the first respondent, and to each other. For the first respondent, the argument over conduct extending over a period may be more ‘expansive’ as it may, dependent on the circumstances, be appropriate to regard some or all of the individual incidents as being the acts of the first respondent as employer. For the remaining respondents however the position must be assessed individually. What each is said to have done, and when, varies. In light of the terms of the Further and Better Particulars which have been accepted but which were provided in respect of the first claim, which followed the Preliminary Hearing when the number of Claims made was the subject of comment, and the decision to conjoin all of the claims, is not easy to discern. Whether there is conduct extending over a period for each of them is again dependent on the facts found, and is then a question of fact and degree. The extent to which it is just and equitable to allow any late claim to proceed may vary as between those respondents, dependent on the individual circumstances.

95. I have concluded however that it is appropriate at the stage of an application for amendment to treat the position of each of those respondents in the same general manner as that for the first respondent, and where an amendment is allowed that affects a claim pled against them to allow it on the same basis as to jurisdiction.

New respondents

96. Finally, I turn to the application to add new respondents in section B. Firstly, I note that **Mr Aeden Burt** is already named as a respondent in some of the Claim Forms. The claims have already been ordered to be heard together, and the claimant has provided Further and Better Particulars. The application made to add Mr Aeden Burt, who is the sixth respondent, is I consider unnecessary in light of that, and is refused.

97. **Ms Cath Carter** was an employee of the first respondent until 9 September 2018 I was informed. Her involvement was alleged to be for matters A (i) and (iii). The first of those has been refused. The second was allowed but the basis on which she is said to have legal responsibility is at best unclear, and I do not consider that the claimant has demonstrated a material benefit in law to the addition of a further respondent in her position. I consider that in light of that, the application for her should be refused.

98. The third person the claimant sought to introduce as respondent was **Ms Fiona Mundy**. Her position is in some respects materially different, in that she is a Trustee of the first respondent, and a decision maker in at least some respects, which may be important ones. She is sought to be convened for issues B (iii) and (iv), in respect of which no issue of time bar arises, and the claims include direct discrimination, harassment and victimisation. The claimant's position in this respect is accordingly stronger than for Ms Carter, but the respondents argue that it should be refused. I note further that Ms Mundy was referred to in Claim Form (viii), but not then convened as an additional respondent although she could have been so at that time. Whilst matters have developed from there, including with a dismissal, the dismissal is an act of the first respondent as employer. The first respondent is a Trust, and it was accepted by the claimant that it has offered to meet any award, and has the funds to do so. There is no defence taken by the first respondent that it is not liable for the acts of the terms of sections 111 and 112 of the 2010 Act, however at least some basis in law for a claim against Ms Mundy as an individual is available on the basis of those provisions.

99. I ascertained from the claimant that he had not commenced early conciliation against Ms Mundy. That however is not an absolute bar to allowing the amendment sought, as explained in ***Mist v Derby Community HNS Trust [2016] ICR 543.***

5 100. There are factors that point both ways in considering this part of the application to amend, and the decision is not a straightforward one in light of that. I have concluded on balance that as the claimant has not suggested that convening the prospective seventh respondent makes a practical difference to the outcome of the case it is not in accordance with
10 the overriding objective to allow the amendment application to add Ms Mundy as another respondent with the additional cost, and potentially delay, that doing so may incur. It is therefore refused. The claimant is able to pursue all acts or omissions of Ms Mundy in his claim against the first respondent, and either she will be called as a witness by them, or if he
15 wishes and they do not undertake to do so, he may seek a witness order under Rule 31.

Conclusion

101. The claim against the third respondent having been withdrawn is dismissed under Rule 52.

20 102. The application to amend is allowed in part, subject to the issue of jurisdiction, as set out above.

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Employment Judge: **Alexander Kemp**
Date of Judgment: **29 July 2020**
Date sent to parties: **04 August 2020**