



VCD

# EMPLOYMENT TRIBUNALS

**BETWEEN**

**Claimant**

**Respondent**

Miss O Mironescu

v (1) Parkcare Homes (No2) Limited  
(2) Priory central Services Limited  
(3) Craegmoor Limited  
(4) Priory Group Limited

**PRELIMINARY HEARING**

**HELD AT Birmingham**

**ON 12 June 2020**

**EMPLOYMENT JUDGE Dean**

**Representation**

**For the Claimant: in person**

**For the Respondent: Ms L Badham, of counsel**

**JUDGMENT**

**The judgment of the Tribunal is that:**

1. The claimant application to amend her claim of disability discrimination limited to add complaints of direct discrimination because of her disability and discrimination arising from her disability in relation only to the events leading to the cessation of her working for the respondents or any of them from 28 November 2018 and the termination of those arrangements on 21 January 2019.
2. Subject to the amendment permitted at paragraph 1 above the claimant's application to amend her claim of disability discrimination to add matters arising before her dismissal from October 2014 does not succeed.

**REASONS**

## Background

1. The claimant in this case has made an application to amend her complaint of disability discrimination to add the claim to include allegations of unlawful discrimination because of the protected characteristic of her disability from the commencement of the working arrangements with the respondents in 2014.
2. The claimant presented a complaint to the employment tribunal on 2 May 2019 having begun early conciliation through the offices of ACAS on 20 March 2019. Early conciliation ended on 12 April 2019 when a certificate was issued. At a case management preliminary hearing before Employment Judge Gaskell held on 12 September 2019 it was agreed a Preliminary Hearing would be held to determine three preliminary issues namely:
  - a. the correct identity of the respondent;
  - b. employment status;
  - c. and disability.

The parties agreed that the time issues could not be determined in advance of the final hearing when the tribunal would hear the entirety of the evidence.

3. A Preliminary Hearing before Employment Judge Kelly on 13 December 2019 found that the claimant was not an employee of the respondent or any of them and determined that a further preliminary Hearing should be held to determine the issues that are now before me, namely:

*“The hearing will consider the claimant’s application to amend her claim of disability discrimination to add matters arising before her dismissal from October 2014.”*

## **The Law**

4. The law to which I have had regard in consideration of the claimant’s application to amend requires me in exercising my general case management powers I have had regard to the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 (“the Rules”) and the Guidance Note 1 of the Presidential Guidance on General Case Management.
5. The guidance given by Mummery J in the case of Selkent Bus Company v Moore [1996] ICR 836 sets out the non-exhaustive list of factors relevant to the exercise of discretion when considering amendment applications to consider that I should have regard to :
  - a. The nature of the amendment
  - b. The applicability of time limits
  - c. The timing and manner of the application

The overarching principle is stated to be :

*“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 around the amendment against the injustice and hardship of refusing it.” [para4@843]*

6. In exercising my discretion I have had regard to the overriding objective under the Rules to enable me to deal with a case fairly and justly which includes as far as practicable-
  - a. Ensuring that the parties are on an equal footing;
  - b. dealing with cases in ways that are proportionate to the complexity and importance of the issues
  - c. avoiding unnecessary formality in seeking flexibility proceedings
  - d. avoiding delay, so far as compatible with proper consideration of the issues and
  - e. saving expense.
  
7. To the extent that I consider in determining the timing of the application and the issue of the tribunals exercise of judicial discretion in relation to complaints that may be presented out of time having regard to s123 of the Equality Act 2010 I have regard to the guidance provided by the statute and authorities.
  
8. Section 123 of the EA10 concerns time limits. It provides:

“(1) 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.

(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.”
  
  9. The law provides that in respect of discrimination claims and detriment claims, if there is a continuing course of conduct it is to be treated as an act extending over a period. Time runs from the end of that period. The focus of the Tribunal’s enquiry must be on the substance of the complaint that the respondent was responsible for an ongoing state of affairs in which the claimant was less favourably treated. The burden of proof is

on the claimant to prove, either by direct evidence or by inference from primary facts, that the alleged acts of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs see Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA.

10. If any of the complaints were not in time, the Employment Tribunal must consider whether there is nevertheless jurisdiction to hear them. In discrimination cases the test is whether it is just and equitable to allow the claims to be brought.

11. When deciding whether it is just and equitable for a claim to be brought, the Employment Tribunal's discretion is wide and any factor that appears to be relevant can be considered. However, time limits should be exercised strictly and the Tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to do so. The exercise of discretion is therefore the exception rather than the rule Robertson v Bexley Community Centre [2003] IRLR 434. The material judgment reads:

*“An Employment Tribunal has a very wide discretion in deciding whether or not it is just and equitable to extend time. It is entitled to consider anything that it considers relevant. However, time limits are exercised strictly in employment cases. When tribunals consider their discretion to consider a claim out of time of just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise discretion. On the contrary, tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time. The exercise of this discretion is thus the exception rather than the rule.”*

12. Case law provides that consideration of the factors set out in section 33 of the Limitation Act 1980 is of assistance. The Employment Tribunal should have regard to all the circumstances of the case, and in particular to the following:

- a. the length and reasons for the delay;
- b. the extent to which the cogency of the evidence is likely to be affected by the delay;
- c. the extent to which the party sued cooperated with any requests for information;
- d. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
- e. the steps taken by the claimant to obtain professional advice once he or she knew of the possibility of taking action.

13. In addition, when deciding whether to exercise its just and equitable discretion, the Employment Tribunal must consider the prejudice which

each party would suffer as a result of the decision to be made (sometimes referred to as the balance of hardship test) British Coal Corporation v Keeble [1997] IRLR 336 EAT.

14. Failure to adopt a “checklist” approach carries the risk that a significant factor will be overlooked London Borough of Southwark v Afolabi [2003] IRLR 220 CA.

### **The amendment application**

15. I have considered the documents that are included in the bundle before me comprising 144 pages and the additional documents that have been submitted by the parties.

16. The claimant in her original complaint details the claim to be of unfair dismissal and discrimination because of disability [para 8.1, page7] and details the complaint:

*“I was laid not to come to work anymore on 28.11.2018 because:*

- a). I did not do a top wash to a service user even though I offered 3 times but I was told no. I did it in the end with the intention to help out my colleagues.*
- b). I did not put the ASDA shop order away knowing my disabilities.*
- c). I could not leave the flat assigned to ; no cover to watch my service users*

*I was not a danger to any service users or colleagues and feel I should of been allowed to work my shifts already assigned to me (until 04.01.2019). Lost pay : £10455 .”*

*Also the shifts that would of been assigned to me. Lost pay : 22171.75 .*

17. In her details of her claim at para 8.2 [8] the claimant details two complaints, a) unfair dismissal and b) Discrimination. Although the claimant’s complaint and the dismissal was been dismissed as being a complaint in respect of which the tribunal does not have jurisdiction, the claimant describes circumstances which she was told that led to the respondent deciding to temporarily cease her bank agreement shifts with effect from 28 November 2018. The claimant references that she was given different reasons why her agreement was brought to an end, and that the dismissal was unfair and moreover that the events and circumstances that led to her dismissal was discrimination because of her disabilities.

18. In the broadest terms I read the claimant’s original complaint to assert that the termination of her Bank Agreement terms to work as a support worker for the respondent was an act of discrimination and that the events leading to the less favourable treatment was as a result of behaviour that the claimant says was arising from her disability and was discrimination.

19. The claimant asserts that at the case management hearing before EJ Gaskell she had been ready to provide further particulars of her

complaints of discrimination but, as general direction for a Preliminary Hearing to determine three preliminary issues was scheduled to be heard on 13 December 2019 she did not present the amendment application to the judge.

20. At the Preliminary Hearing before EJ Kelly the claimants indicated that she wished to make complaints about the respondents treatment of her that discriminated against her since she began working for them in 2014. EJ Kelly directed the claimant to provide further particulars of her allegations of discrimination:

*“2.1 By 31 January 2020, the claimant must provide to the respondent, copying the Tribunal, details of the amendments to her claim which she wishes to make so as to add incidents of alleged disability discrimination from 19 November 2015 to 21 January 2019.”*

21. In response to the directions the claimant filed an application for amendment document on 27 January 2020 [54-83] and the respondent served objections to the application on 19 February 2020 [84-89].

22. The respondent asserts in their objection that nowhere in her original details of complaint did the claimant assert an act of discrimination taking place after 28 November 2018. I conclude that the claimant's claim form which states:

*“Discrimination:*

*Due to everything I have stated above I believe I was discriminated against my disabilities even though I was fulfilling my job role line within the restriction notes from the GP&risk assessments put in place at work.”*

Although the claimant did not in her original application label the basis upon which she claimed she had been discriminated against whether direct discrimination, indirect discrimination, discrimination arising from disability or harassment it is evident that the complaint of discrimination related not only to the bank agreement review of 28 November 2018 and also the dismissal letter of the 21 January 2019.

23. I remind myself that the claimant has participated in this hearing with the assistance of a Romanian interpreter as English is not the claimant's first language.

24. In the claimant's application for amendment of the complaint that the application to mentor disability discrimination claim in the money she describes as being to use further evidence discrimination incidents that are detailed under 4 headings a) – d). I deal with each in turn.

**“a. The Claimant to be allowed to use further evidence of *disability discrimination incidents occurred during the Claimant's dismissal process & the dismissal day itself (21.01.2019) as per paragraph 4 from the Judgment's "Reasons" & paragraph 2 from the***

***"Order"(21 January 2019) (the dismissal process starts on 28.11.2018, the day the Claimant was sent home based on health issues reasons (Fibromyalgia) given by management - Amanda Bell through a telephone call and agreed by Claire Garside who later on communicated this to the Claimant. Please note that, Tithe Barn] Priory Group of Companies did not handled the Claimant's dismissal accordingly to their "Policy and Procedure" named "Disciplinary Procedure" (page 5 : section 4.4 - subsections 4.4.1, 4.4.2, 4.4.3, 4.4.4 8: 4.4.5) regarding the stages of dismissal process which should have been followed, which led again to the unfair dismissal of the Claimant, this way also not giving her the chance to also say her version of the events/incidents."***

25. The respondent, raising their objections to the claimant's application suggest that claim does not provide further particulars of information that was suggest there are amendments to the information contained within the ET1. The claimant in response on 2 May 2020 submitted a further document described as **"Particulars of the "Amendments" of the "Disability Discrimination" claim"** [102-106]. That document is prepared to anticipate all of the claimant's application for amendment being allowed and at paragraph 14 [105] the claimant details the particulars in relation to the dismissal.
26. I conclude that the claimant in an effort to address each of the objections raised by the respondent has sought to provide the context of her complaint and refers to documents which she considers relevant to the issue. The claimant refers at 14)f) [106] refers to:

*"f) Cover letter explaining the 4th & last reason of my dismissal which involves directly my disabilities : Complaint done by myself towards management involving SS's treatment & reaction towards the activities that i found difficult to do sometimes or can't do at all due to my disabilities, facts/activities that were documented in my Risk Assessments and that the management & SS herself were aware of (25/11/2018 + 29/11/2018 — incidents occurred on 28/11/2018) + (x1) rota picture showing myself & Becky Davies/Becky Watkins working together on 25/11/2018 on an early shift, fact linked to the complaint dated 25/11/2018; Complaint done by myself (21/11/2018) involving 55 & Ivone Warren where is described SS's very offensive verbal behaviour & anger towards Ivone Warren who was not present there."*

27. The essence of the claimant's complaint is spelt out that her complaint is of direct disability discrimination and is discrimination because of something arising from her disability. The claimant asserts that the respondent failed to follow their procedures and it would seem that the claimant, who is not an employee and able to complain of an unfair dismissal, can seek only to suggest that the failure to follow a fair procedure was direct discrimination or something arising from her

disability or at least evidence from which the tribunal may draw and adverse inference in their consideration of the discrimination complaint.

28. The respondent in resisting the claimant's application suggest that the evidence will show that the disciplinary procedure the respondent does not apply to 'bank workers'. I have not had sight of the respondent's procedure and instead the manner in which the respondent sought to temporarily suspend the claimant's duties from 28<sup>th</sup> November 2018 until the termination of her engagement on 21 January 2019 will be a matter be determined by the tribunal hearing evidence in the case. Whilst I have regard to likely prospects of success of an allegation that the procedure adopted in terminating the claimant's employment was itself an act of discrimination I am not in a position to conclude that such an allegation has no reasonable prospect of success.
29. In dealing with a litigant in person and one for whom English is not her first language. I consider whether an amendment is required to be made by the claimant in so far as she asserts that the respondent's treatment of her, in considering those matters which led to the suspension of her duties from 28 November 2018 until the termination of her working arrangement on 21 January 2019 are on the face of her complaint in her details at 8.2 of her ET1 application form.
30. The respondent is legally represented in these proceedings and it is evident that the response filed by the respondent had identified at paragraphs 24,25 and 26 that the claims raised by the claimant related to the circumstances in relation to the claimants conduct that gave rise to her not being allocated shifts from 28 November 2018 and the termination of her contract and identified the claims they had to met to be that of direct discrimination and discrimination arising from her disability.
31. In considering whether an amendment is required I have sought to undertake a non-technical approach to the original claim form and not an overly legalistic view of the terms in which the application is couched. The claimant says in very clear terms when she was told not to attend work any that she was treated differently to a named comparator, Vicky Walker *"Nothing was told or happened to her, but I was sent home"* and that *"Claire Garside mentioned that, most probably my health conditions will not heal any more that means the situation will always been same and stop always complain they have not believed in me."*
32. When describing the reason why she was sent home on 25 November 2018 the claimant says *"I refused to drive the company's car & take residents out. I was still under the effect of a Tramadol(tablet taken the afternoon before for my pain in my arms). I did not fell safe to drive & didn't want to endanger any resident or myself or others I traffic."*
33. On a purposeful reading of the claim form the claimant refers to the complaint of discrimination to be due to "everything" she stated in her



allegations of unfair dismissal to be discrimination against her disabilities. Aside only that the claimant did not explicitly label the matters she complained of as the particular prohibited conduct of direct discrimination or discrimination arising from her disability the essence of her complaint was clear.

34. I find that taking into account the guidance in the case of Selkent Bus Company v Moore [1996] ICR 836 I conclude that the original claim form contains the discernible facts of the complaint that were understood by the respondent as evidenced in their response. I conclude in relation to the first of the claimant's amendment applications this is an amendment that seeks to attach the label to the complaint of which further particulars are given.
35. The facts are set out in the complaint, albeit not as fully as the claimant later adds in the further particulars of her complaint submitted on 27 January 2020. To the extent, if at all, that the claimant's application for amendment to the particulars in relation to paragraph a) amounts to an amendment I have reminded myself of the Selkent guidance and the Presidential Guidance in relation to amendment applications. I in general terms whether the amendment if made at the time when the original complaint was presented was in time. It will be a matter for the tribunal hearing all the evidence to determine whether some or all of the complaints are in time, however if the events which led to the suspension of the claimant from duty were part of a conduct extending over a period of time which culminates in the termination of the claimants work on 21 January 2019 the conduct will be treated as done at the end of the period under s123 of the Equality Act 2010.
36. The claimant's application to amend her claim of disability discrimination to add complaints of direct discrimination because of her disability and discrimination arising from her disability in relation to the events leading to the cessation of her working for the respondents or any of them from 28 November 2018 and the eventual termination of those arrangements on 21 January 2019 as detailed at paragraph a) is allowed.
37. *(b). The Claimant to be allowed to use further evidence of **discrimination incidents during employment (ET1 form) Bank Agreement contract** (as the Claimant mentioned at the Preliminary Hearing on 13<sup>th</sup> December 2019, incidents/events which through repetition during employment led to the Claimant's disabilities).*
38. At the Preliminary hearing before EJ Kelly on 13 December 2019 the claimant sought to rely on incidents and events during the entire course of her employment up to its termination. The claimant has not particularised the incidents or events to which she refers other than to those which founded the suspension of her duties on 28 November 2018 and ultimately to the termination of her contract. The claimant seeks to raise an entirely new claim that instance and events through repetition during employment led to the claimant's disabilities. There is no

reference to this claim on the face of her form ET1. In the claimant's further particulars of the amendments of the disability discrimination claim [102-106] the claimant makes not further reference to incidents/events which through repetition during employment led to her disabilities.

39. The amendment sought seeks to introduce an entirely new head of complaint and is one that is out of time. Even if the amendment was one which had it been entertained by EJ Gaskell at the September 2019 hearing it would have been presented nine months after termination of employment and four months after the original complaint was presented to the tribunal. The allegation made in the application is without any supporting evidence and the respondent does not have sufficient detail of the allegation to be able to answer the unspecified complaint against it.

40. The claimant's application to amend does not succeed.

41. (c) *The Claimant to be allowed to use further evidence of **disability discrimination incidents during employment/Bank Agreement contract (as per paragraph 4 from the Judgment's "Reasons") which occurred and were stated** in the ET1 form at page 7, point 8.2\* & in the joint bundle at page 8, incidents from the day of 28.11.2018 . **It is clearly shown in these disability discrimination incidents occurred on 28.11.2018 that also staff's complaints contributed to the Claimant's unfair dismissal besides the management's disability discrimination towards the Claimant. This further proves Constructive Dismissal based on disability discrimination** (which is included into the Unfair Dismissal as it is confirmed in the ET1 form at page 6, point 8.- 8.1\* and in the joint bundle at page 7) (paragraph 3 from the "Judgment"). Complaints to the office from staff regarding the Claimant's disabilities kept repeating themselves during the Claimant's Bank Agreement period 81\* due to poor management action & lack of action at times, things led later on to the Claimant's unfair & constructive dismissal.*

*The Claimant sent together with her Amendments :*

*- 2 letters dated 28.12.2018 (letter informing the claimant about a meeting to take place on 16 January 2019 where she will have the chance to talk about my concerns : what happened on 28.11.2018 stated in the complaint dated 29.11.2018) & 21.01.2019 (dismissal letter & their reasons) ;*

*- 2 letter-complaints done by the claimant towards MB, the manager at that particular time, dated 25.11.2018 & 29.11.2018. (this last letter—complaint was not considered at all on the 16th January 2019's meeting as the letter dated 28.12.2018 stated) , -*

*- Policy and Procedure called "Disciplinary Procedure".*

*These 5 extra documents are being produced/sent in order to help out for the situation to be understood easier/better."*

42. The claimant seeks to extend the scope of her complaint to incidents

during employment beyond those incidents to which she does refer in the claim form at 8.2 [8] and to which the amendments described at paragraph (a) above have been accepted. The claimant has failed to particularise the alleged incidents beyond those leading to the suspension of duties on 28 November 2018 and the termination of her contract on 21 January 2019. In the claimant's documents submitted on 2 May 2020 the particulars of the amendments of the disability discrimination claim [102-106] the claimant is particulars that she wishes to be taken into consideration. The particulars paragraphs 1) – 6) referred to instance that would seem to have occurred between 2011 and 2014. Whilst historical background may form part of the evidence which a tribunal may take into account when being asked to draw inferences discrimination claims describe with sufficient specification a complaint that can reasonably be understood by the respondents.

43. The claimant at paragraphs 7 to 13, provides particulars the amendment, to the extent it is required of the claimants complaints in respect of the events leading to suspension of the duties on 28 November 2018 and subsequent termination of the contract.

44. In considering the amendment application the extent to which the claimant seeks to rely upon events during the course of her working relationship with the respondents, other than those that are covered with scope of the amendment at paragraph (a) requires me to consider whether they are raising a new cause of action or simply re-labelling the facts that already contained in the original claim form. The complaints in the amendment identified in this paragraph relate to events that have occurred several years before the claimant's contract with the respondent was brought to an end and are very many years out of time. The introduction of complaints in so distant a past requires the respondent and any witnesses who remain in the employment to resurrect memories that are long faded and likely unreliable. The claimant made no discernible reference to such complaints in her original complaint nor in the original amendment application submitted 27 January 2020 until more particulars were provided on 2 May 2020. The further particulars [102-106] are themselves not sufficiently full to enable the respondent to be able to identify the alleged prohibited discriminatory conduct about which the claimant complains.

45. The application to amend does not succeed.

46. (d) *The Claimant to be allowed to use further evidence of **disability discrimination incidents/events regarding promotions during the employment/Bank Agreement contract** as per paragraph 4 from the Judgment's "Reasons". Nor was given to the Claimant **equal chances** as per Tithe Barn's/Priory Group's Policy & Procedure of "Equality and Diversity" as it should have been given to all of their types of employees/staff (full time, part—time 8: bank workers).*

47. The claimant provided no particulars of what she asserts are "equal

chances". The amendment application submitted on 27 January 2020 does not include sufficient detail for the respondent to understand the complaint that it is required to answer. In the particulars of the amendment the disability discrimination claims submitted on 2 May 2020 at paragraph 11 [104] refers again to "*No equal chances given to me comparing to some of my colleagues opportunities (to some of my colleagues, the position was just given & others of them were just asked if they want it without any kind of competition/test/interview)*" The claimant has however not provided details of the complaint in respect of precisely which opportunities the claimant was denied, when and by whom. The claimant has not identified the nature of the discrimination that she alleges was the prohibited conduct.

48. The application to amend the complaint in this regard does not succeed.

49. In reaching the conclusions that I have in determining this application I have sought to weigh the merits of the applications. In exercising my general case management powers I have had regard to the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 ("the Rules") and the Guidance Note 1 of the Presidential Guidance on General Case Management and the guidance given by Mummery J in the case of *Selkent Bus Company v Moore* [1996] ICR 836 which set out the non-exhaustive list of factors relevant to the exercise of discretion when considering amendment applications to consider:

- a. The nature of the amendment
- b. The applicability if time limits
- c. The timing and manner of the application

The overarching principle is stated to be :

*"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 around the amendment against the injustice and hardship of refusing it."* [para4@843]

50. In exercising my discretion I have had regard to the overriding objective under the Rules to enable me to deal with a case fairly and justly which includes as far as practicable-

- d. Ensuring that the parties are on an equal footing;
- e. dealing with cases in ways that are proportionate to the complexity and importance of the issues
- f. avoiding unnecessary formality in seeking flexibility proceedings
- g. avoiding delay, so far as compatible with proper consideration of the issues and
- h. saving expense.

51. Considering each of the key factors to which I should have regard in exercising my discretion I have considered the amendment application:

#### The nature of the amendment

52. The claimant was first directed to provide amended particulars by EJ Kelly in order dated 23 December 2019. The respondent suggested that the claimant had by that time already made applications to amend her

particulars when she sought to amend the conditions she identified as the disabilities. It was not until preliminary hearing before Employment Judge Kelly that the claimant sought to particularise the alleged discrimination just the entire period of her employment since 2014. In light of the fact the claimant was found to be disabled person from 19 November 2015 any complaint of disability discrimination can be founded only from that date.

53. The nature of the claimants amendments extends significantly beyond the facts set out in her original application the reasons that I have it out in my analysis above.

In relation to the applicability of time limits

54. EJ Gaskell has identified that the consideration of jurisdiction in relation to time limits will be determined by the Tribunal at the final hearing, I am however to weigh the likely application of time limits in the balance. The claimant refers primarily to the termination of her contract with the respondent on 21 January 2019 as the final act of discrimination and, for the reasons I have articulated in relation to the amendment application (a), the claimant will assert that the events that caused her suspension on 28 November 2018 were conduct extending over a period ending with the termination of her contract on 21 January 2019. The claimant entered into conciliation through ACAS on 20 March 2019 and early conciliation came to an end when a certificate was issued on 12 April 2019. The claimant presented her complaint on 2 May 2019 and claims are in time in so far as they occurred on or after 22 December 2018.
55. I conclude that in relation to the applicability of time limits the complaint that the claimant raised as detailed in (a) are presented in time and to the extent that the circumstances that occurred on or before 21 December 2018 are not presented in time to the extent they were allegations in respect of the events that were grounds for the suspension of the claimant's work from 28 November 2018 it might be considered just and equitable to extend time to consider that complaint presented not in time.
56. In considering the allegations that the claimant makes upon which she seeks to be permitted to make the amendment at (b) and (c) and (d) the claimant has made no application until 27 January 2020 that has not been particularised at all and not then more fully until the additional particulars presented on 2 May 2020. The application is made significantly out of time referring in particular to events predating the date from which claimant has been found to be disabled. I consider that there is little reasonable prospect of a tribunal finding that it would be just and equitable to extend time to entertain complaints which would have arisen before the matters about which the amendment (a) is made. I have considered the respondents reasonable complaint that to entertain the out of time complaints that predate the events leading to the suspension on 28 November 2018 would require examination of evidence the cogency of which would be adversely impact upon the responded.

The timing and manner of the application –

57. The Selkent guidance para5(c) offers guidance on the relevance of the timing and the manner of the application. An application to amend should not be refused solely because there has been a delay in making it. Delay is however a discretionary fact. I am asked to consider why the application was not made earlier and why it is being made when it is.

58. In this case the claimant has provided her explanation for her delay in a witness statement sent to the tribunal and the respondent dated 2 June 2020 before the hearing of this Preliminary Hearing [115-144]. The claimant asserts that her understanding was that:

*“by not mentioning a specific period for when the ‘discrimination’ and disability discrimination took place, it was clear that the reference was made for the whole period of the Claimant’s services in the Tithe Barn (21/10/2010 – 21/01/2019),”*

59. Whilst I appreciate the claimant’s command of the English language is not that of a native speaker her understanding of when a cause of a complaint arises is not dependant upon the language. The claimant is disingenuous in suggesting that the omission of specific detail means implicitly the complaint relates to the entire period of her employment. EJ Kelly was clear in identifying to the claimant at 2.1 of her Order [42] that:

*“By 31 January 2020, the claimant must provide to the respondent, copying the Tribunal, details of the amendments to her claim which she wishes to make so as to add incidents of alleged disability discrimination from 19 November 2015 to 21 January 2019.”*

60. The suggestion that the complaints relate to the entire period of employment and that it was not detailed as a complaint sooner than it was is not a credible one.

61. Giving consideration to the overriding objective

Adopting a forgiving approach to the claimant’s default as I do, her explanation for the delay does not bear scrutiny. The claimant entered early conciliation on 20 March 2019 which ended on 12 April 2019. The claimant subsequently lodged her complaint on 2 May 2019. The claimant relies primarily on the decision to terminate her contract on 21 January 2019 and on the circumstances that led to the suspension from duties on 28 November 2018 to found her complaints of disability discrimination, that complaint I have found has a foundation in the facts set out in sufficient detail in the original complaint at 8.2 [8]. The complaint was presented within time as extended by the Early Conciliation procedures which were commenced within the period 3 months after the last act of alleged discrimination, the termination on 21 January and thereafter within one month of the date of issue of the Early

Conciliation certificate.

62. In examination the claimant has suggested that she was made expressly aware by the CAB of the right to present a complaint of disability discrimination to an Employment Tribunal on 12 September 2019. I find her suggestion that she was not aware of the time limit as she had by that time already presented her complaint to the Tribunal and refers within it to the Equality Act 2010 and to Human Rights [8].
63. The claimant's amendment application and the further particular provide no explanation for the reasons why the complaint was not presented sooner than it was.
64. Taking as I do the most generous version of the claimant's suggestion that she had the amendment application at hand to present to the Tribunal before EJ Gaskell at the hearing on September 2019 the claimant even then was four months late in presenting her complaint which, to be in time ought to have been made by 11 May 2019.
65. The claimant details in her witness statement [122-126] at 3) a)-f) the *"Reasons why the 'amendments' were not forwarded earlier and why her 'amendments' should be accepted by the ET"* In contradiction of her claim that she had the 'amendment' ready to present to EJ Gaskell at his hearing on 12 September 2019 that claimant suggests that it was not until EJ Kelly gave her direction that the claimant submit written particulars of her amendment complaint that *"she did not thought at all that she was allowed to change her claims/title once she submitted her ET1 form on 2/05/2019."*
66. Having had regard to all the circumstances of this case I conclude the claimant has produced further information about the nature of her claims as she seeks to amend them in a piecemeal fashion and even now the respondent is bereft of full detail of the complaints as they related to matters before those she raises in the amendments other than the amendment a). The claimants explanation for her delay in making the amendment application is inconsistent and provided only in her witness statement dated 2 June 2020.
67. The claimant seeks to introduce wide ranging allegations of discrimination that stretch back in time to the start of her contract in 2010. Even when the complaints must be limited to take account of the fact that the complaint of discrimination related to the protected characteristic of disability can only extend back to the date from which the claimants is found to be disabled, from 19 November 2015 the scope of the complaint placed an unfair imbalance as the respondent is prejudiced in responding to matters that are historical complaints.
68. I am led to conclude that in respect of all but the amendment a) the claimant's pleaded complaints are those which may at least be timely and are ones which on their face have some even if little reasonable

prospect of success. The amendment sought b),c) and d) if allowed would without doubt disadvantage the respondent disproportionately in terms of their ability to recall and call evidence to rebut the complaints and the expense in time and cost of preparation of defence of the complaints. The application to amend as set out 1b) - d) is an application to fundamentally change the nature of the complaint against the respondent and in all the circumstances the balance of injustice and hardship in allowing the amendment is outweighed by the hardship in caused to the respondent in allowing it. The claimant is not without remedy in so far as the allegation of the most recent complaint of discrimination is before the Tribunal.

69. For all of the reasons that I have set out above and having had regard to the overriding objective I conclude that the claimant's application to amend her claim of disability discrimination to add matters arising before her dismissal from October 2014 does not succeed save in regard the matters in 1a) of the amendment application.

Signed by \_\_\_\_\_ on 8 October 2020  
Employment Judge Dean

Judgment sent to Parties on

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\_\_\_\_\_

**Note**

**Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.**