EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102578/2019

Held in Inverness on 8 November 2019

Employment Judge: Rory McPherson

Mr S Deafley	**Claimant** **Represented by:** **S Martin –** **Legal Executive**
Christie Elite Nurseries Ltd	**Respondent** **Represented by:** **A McCormack –** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that;

1. The respondent's application to treat the claimant's Disability Discrimination complaint arising from disability in terms of section 15 of EA 2010 as subject to time bar does not succeed, that complaint is, in all the circumstances permissibly set out as a formal labelling exercise within the Further and Better Particulars of the claimants' claim which are accepted; and

2. The respondent's application to treat the claimant's Disability Discrimination complaint of harassment related to the protected characteristic of disability arising from section 26 of EA 2010 as subject to time bar does not succeed, it is, in all the circumstances, that complaint is permissibly set out as a formal labelling exercise within the Further and Better Particulars of the claimants' claim which are accepted; and

3. The respondent's Response to the Claimant's Further and Better Particulars is also accepted; and

4. The respondent's application to treat the claimant's Disability Discrimination complaint, being alleged failure to make reasonable adjustments asserting breaches of sections 20 and 21 of EA 2010 set out within the Further and Better Particulars of the claimant's claim, as subject to time bar is reserved; and

The Tribunal orders that;

1. The respondent may, if so advised, provide augmented Further and Better particulars of their response within 28 days of the date of this judgment; and

2. The Tribunal Orders that the case should proceed to a Case Management Preliminary Hearing to consider further procedure; and

3. The parties should respond to date listing schedules within the time frame set out in the notification to the parties.

REASONS

Introduction

Preliminary Procedure

1. This hearing was appointed a Preliminary Hearing to consider as a Preliminary Issue "Time Bar", specifically in relation to what were said to be new allegations of disability discrimination in terms of the Equality Act 2010 (EA2010) contained within a Scott Schedule style document, provided to the Tribunal and the respondent, on or about Tuesday 23 July 2019 by Mr Deafley's now appointed representative.

2. While no witness evidence was led by either party, a number of factual findings are considered appropriate, from the agreed joint bundle documentation provided in respect of which no material issue was taken as to the accuracy of same and indeed the Tribunal's own records.

Findings in fact

3. The ET1 identified an address, date of birth, and an employer for the first named claimant. An ACAS Early Conciliation certificate number was provided at 2.3 of the ET1. No representative was identified as acting for Mr Deafley in the ET1.

4. It is not disputed that Mr Deafley had set out in his ET1, in broad terms complaints of unfair dismissal, generally in terms s111 of the Employment Rights Act 1996 (ERA 1996) and further for the purpose of s103A of the ERA1996 being complaints of detriment from alleged Protected Disclosures potentially giving rise to the detriment protections set out in s47B of the ERA 1996.

5. There were no witnesses at this Preliminary Hearing, however the Tribunal was referred to a Bundle of Documents prepared by representatives from Christie-Elite Nurseries Ltd (Christie Elite) in compliance with Order of the Tribunal dated Tuesday 8 October 2019. The Tribunal also has a note of the Tribunal's own records.

6. Mr Deafley asserts that his employment ceased on Tuesday 11 December 2018.

7. Mr Deafley engaged with ACAS with the EC Notification dated Monday 14 January 2019 and the date of issue of the Certificate Thursday 14 February 2019.

8. Mr Deafley presented his ET1 on Monday 18 February 2019. No representative is identified for Mr Deafley when the ET1 was presented. The ET1 Box 8.1 was selected intimating that he considered that he was unfairly dismissed. He also ticked the box with the pre-printed narrative *"I was discriminated against on the grounds of … disability"*.

9. At 8.2 of the ET1 states "*Please set out the background and details of your claim in the space below. The details of your claim should include that dates when the events you are complaining about happened…"*. The narrative

which extends to 17 lines does not describe disability related discrimination at 8.2.

10. At 9.2 of the ET1 Mr Deafley had ticked that he was seeking compensation only and further the box indicating that he was also seeking "*If claiming compensation, a recommendation*". At 9.2 of the ET1 for compensation or remedy he states a sum sought "*for stress caused by systematic bullying and intimidation leading to mental health issues and sickness leave".*

11. Christie Elite presented its ET3 on Monday 25 March 2019. The ET3 contains a 51-paragraph paper apart response extending over 8 pages and includes:

    a. Preliminary Issues -para 1 stating that the ET1 was insufficient in its current form, para 2 called upon the claimant to specify his claims in more detail while para 3 asserts that the ET1 did not give fair notice of the claim); and

    b. Background -para 4 to 22; and

    c. The Claimant's Claim -para 23 to 43 which broadly focus on a detailed repudiation of allegations regarding unfair dismissal and sham redundancy together with allegations of public interest disclosure; and

    d. The Respondents Claim set out at para 44 to 51. At para 50 of which the respondent states "*The Respondent denies that the claimant is disabled as alleged or at all.*" and para 51 the respondent states *" If, which is denied, the claimant qualifies as a disabled person then it is submitted on behalf of the Respondent that he has not been subjected to an unfavourable treatment on the grounds that he is allegedly disabled."*

12. From the Tribunal papers a previous firm of solicitors went on record for Mr Deafley on Tuesday 9 April 2019 with Mr Deafley appearing to indicate that he believed there was some engagement with solicitors as at Thursday 4 April 2019 in his communication to the Tribunal and Christie Elite's representatives. That firm however notified the Tribunal and Christie Elite that it withdrew from

acting on Monday 15 April 2019. They were, thus on record for up to 5 working days.

13. Mr Deafley's sought, via e-mail to the Tribunal and Christie Elite's representatives, sight of his personnel file on Tuesday 28 May 2019.

14. A (telephone) Case Management Preliminary Hearing was appointed to take place on Wednesday 19 June 2019.

15. At 8.28 am on Wednesday 19 June 2019 Mr Deafley's now appointed representatives e-mailed the Tribunal and Christie Elite's representatives "*We are the legal representatives instructed by the claimant to represent him at the PH this morning. Please find attached our completed PH"* agenda *"to be handed to the EJ asap. We confirm that a copy of same has been sent to the Respondents representatives".*

16. The PH agenda for the claimant of 19 June 2019 described;

    at part 2.1[what complaints(claims) are brought...] "*Automatically Unfair Dismissal, Whistleblowing, Discrimination arising from disability, Reasonable adjustment failure, Harassment"*; and

    at 2.2 [is there any application to amend the claim...] "*Yes, to enable both the tribunal and the respondent to understand the case it has to meet/determine, in terms of both the legal and factual issues."*; and

    at 2.3 [has any necessary additional information been requested?] *"That the claimant has made several disclosure requests…"* and

    at 4.1 [what are the issues or question for the Tribunal to decide?] *"1. Whether the claimant suffers from a disability Asperger's. 2. Whether the claimant made a protected disclosure. 3. Whether the claimant was automatically unfairly dismissed. 4 Whether the claimant was offered reasonable adjustments. 5. Whether the claimant suffered unlawful harassment"*; and

    at 8.1 [Time estimate for final hearing…] *"3-4 days".*

17. At (telephone) Preliminary Hearing on 19 June 2019 it was noted "*that there were concerns expressed by the respondents that the claimant had not fully articulated his case*" Mr Deafley's representative *"at the outset accepted this criticism and indicated that he wanted to lodge better and further particulars. After discussion it was agreed that he will have four weeks in which to lodge a Scott schedule setting out the various incidents that the claimant relies on. The respondent will have two weeks thereafter to respond, if so advised."*.

18. Note of the Preliminary Hearing of 19 June 2019 was sent to the parties Monday 24 June 2019.

19. On Tuesday 23 July 2019 Mr Deafley's present representative issued Further and Better Particulars in the form of a Scott Schedule style document as (which I refer to, for ease, as the Scott Schedule).

20. The Scott Schedule sets out a first listed disability complaint which for ease of identification I shall refer to as "*the First Scott Schedule Disability Complaint"*. It is headed "*Discrimination arising from disability"* at pages 1 and 2 of the Scott Schedule, in terms of section 15 of EA 2010. It is alleged at row 1 that Mr Deafley *"was not allowed return to work after a period of disability-related absence for depression*". It identifies the person who is said to have done the act complained of and sets out the disability relied upon as being "*Asperger's syndrome and depression*", the factors arising from what was by Mr Deafley to be his disability and which is said to have given rise to that unfavourable treatment, further it sets out how the factor arises from the disability and sets out why the claimant believed that unfavourable treatment was because of that factor.

Further at row 2 it asserts that Mr Deafley was not offered the role of bookkeeper as an alternative to redundancy, identifies the person who was said to have done the act complained of and set out the disability relied upon by the claimant as being "*Asperger's syndrome and depression*", the factor arising from what was by the claimant to be his disability and which is said to have given rise to that unfavourable treatment, it set out how the claimant

asserted the factor arises from the disability and set out why the claimant believed that unfavourable treatment was because of that factor.

Further at row 3 it asserts that claimant was dismissed by the respondent and identifies the person who was said to have done the act complained of. It sets out the disability relied upon by Mr Deafley as being "*Asperger's syndrome and depression*", the factor arises from the disability which is said to have given rise to that unfavourable treatment, in addition it sets out how Mr Deafley asserts that factor arises from the disability and set out why he believes that unfavourable treatment was because of that factor.

21. The Scott Schedule sets out complaints in relation to a second disability matter (the Second Scott Schedule Disability Complaint), at pages 3 and 4 of same. It is headed Failure to Make Reasonable Adjustments asserting breaches of sections 20 and 21 of EA 2010.

22. The Scott Schedule sets out complaints in relation to a third disability matter (the Third Scott Schedule Disability Complaint) at pages 5 and 6 of same being harassment related to the Protected Characteristic of disability arising from section 26 of EA 2010 which alleged occurrences of harassment, are clarified to be a series of meetings at Forres with Christie Elite's Manager making alleged offers which were declined, followed by what was said to be, a refusal to allow Mr Deafley to return to work after he was certified as fit by his Doctor together what is alleged to be a sham redundancy process which is alleged to have led to his dismissal.

23. The Scott Schedule further contained allegations regarding what were alleged to be 7 listed Protected Disclosures giving rise to the detriment protections set out in s47B of the ERA 1996 with 6 specific alleged detriments set out.

24. On Friday 16 August 2019 Mr Deafley's present representative issued a Schedule of Loss which narrated that Mr Deafley was seeking compensation for various heads of claim including for "*Loss of chance… in terms of all the detriments suffered as pleaded in his amended scotts scheduled under PIDA and EqA 2010*" and "*Disability Related Discrimination, & PIDA … That the protected characteristic was the Claimant's disability, depression and*

Asperger's syndrome which was the cause of the discriminatory treatment... that the claimant has suffered injury to his feelings" and describes mental health issues relating to depression.

25. On Wednesday 31 July 2019, Christie Elite issued a detailed response headed "*Response to Claimants Further and Better Particulars*" addressing;

(1) Disability Status (calling upon Mr Deafley to specify when he disclosed his disability and for provision of medical information); and

(2) Harassment (in effect s 26 EA 2010) arguing that this head of claim was not contained in the original ET1 arguing that it had been raised out of time); and

(3) Reasonable Adjustments (in effect s 20 & 21 of EA 2010) – arguing that this head of claim was not contained in the original ET1 arguing that it had been raised out of time and calling upon Mr Deafley to specify what adjustment he requested, when ,to whom and asserting that there is no valid provision, criteria or practice, asserting that steps suggested by Mr Deafley were not reasonable; and

(4) Discrimination arising from Disability (in effect s 15 of EA 2010) - arguing that this head of claim of was not contained in the original ET1 arguing that it had been raised out of time and providing a detailed factual repudiation of such allegations; and

(5) Whistleblowing detriment; and

(6) Bookkeeping role.

26. At Telephone Preliminary Hearing on Thursday 22 August 2019, it was noted that Christie Elite took the view that "*the claims were out of time*" and that Mr Deafley required amendment of the ET1. For Mr Deafley it was indicated that the case was adequately pled and that disability had been *"ticked*" in the ET1. It was agreed that a preliminary hearing be appointed on the issue of time bar, at which Mr Deafley could attend and "if necessary give evidence".

27. No further procedure has been appointed and, in particular, there is no imminent Final Hearing scheduled.

Submissions

28. For Christie Elite written skeletal submissions were provided arguing in summary that Mr Deafley's claims for harassment, discrimination arising out of disability and failure to make reasonable adjustments were new claims. It was argued that the latest date any such claims required to be brought was 10 April 2019 (at which time Mr Deafley had – briefly – representation) in terms of s123(a) of EA 2010. It was accepted that s123(b) permitted claims to be brought within such other period as the Tribunal considered just and equitable, however it was argued that these 3 disability related claims which were said to be new ought not to be accepted at this late stage. Further, it was argued that Mr Deafley would require to amend his claim to bring in these 3 disability related complaints and applying **Selkent Bus Company v Moore** [1996] 661 (**Selkent**) taking into account all the circumstances of the case, balancing the injustice and hardship of allowing the amendment against refusing same, any such amendment should be refused. No issue was taken in relation to Further and Better Particulars issued for Mr Deafley beyond what were said to be these new claims.

29. For Christie Elite, reference, with reservation, was made to **Baker v Commissioner of Police of the Metropolis** [2010] All ER (D) 17 (Apr) (**Baker**) where it was held that a claimant had not submitted a claim of disability by the ticking of a box on an ET1. It was, however, accepted that **Baker** had been decided under the pre 2013 ET Rules which were broadly stricter in their approach, it was argued that the principal was correct.

30. For Mr Deafley, oral submissions were made, in summary it was argued that the present Scott Schedule was giving appropriate fair notice of the claim "*ticked"* and that amendment was not required, in summary it is understood for Mr Deafley this was argued to be a formal labelling exercise. However, it was argued that if the Tribunal did not agree with this primary position then amendment was sought and should be granted, there being no prejudice from

an imminent hearing. It was submitted that the Scott Schedule was consistent with **Keeble** (by which I understand this to be a reference to the **British Coal Corporation v Keeble [1997] IRLR 336**). I understand that no issue is taken by Mr Deafley in relation to acceptance of Christie Elite's Response to the Claimant's Further and Better Particulars.

Further Procedure

31. Finally, both parties indicated that whatever the outcome of this hearing, a separate Preliminary Hearing would be appropriate to consider the next appropriate procedural step.

Further and Better Particulars/ Scott Schedule

The 2013 Rules

32. Rule 2 of the 2013 Rules sets out that:

"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;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(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."

33. Rule 6 of the 2013 Rules provides "*A failure to comply with any of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal … does not of itself render void the proceedings or any step in the proceedings. In the case of such non- compliance, the Tribunal may take such action as it considers just, which may include all or any of the following-*

(a) waiving or varying the requirement;

(b) striking out the claim or response…

(c) barring or restricting a party's participation in the proceedings;

(d) awarding costs in accordance with rule 74 to 84."

34. Rule 8 of the 2013 Rules provides that "*A claim shall be started by presenting a completed claim form (using a prescribed form) …"*

35. Rules 29 and 30 of the 2013 Rules provide general case management powers including the power to allow an amendment. Rule 30 identifies that an application may be made either in writing or in a hearing.

36. s.123 of the EA 2010 Act is in the following terms: -

"*123 Time limits*

(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"

Further and Better Particulars/ Amendment

The Law

37. I have reminded myself **Uwhubetine v NHS Commissioning Board England** UKEAT/0264/18 (23 April 2019, unreported) (**Uwhubetine**) Judge Auerbach commented at para 51 "*whilst the phrase "Scott Schedule" and the use of what are called Scott Schedules has become extremely common in ETs for some years now, and particularly in cases where there are multiple allegations of discrimination and/or whistle blowing detriment, while that is no doubt a very useful tool in the Tribunal's case management kit, there is no one size fits all of so-called Scott Schedules. It is a matter for the Judge giving directions to decide what Particulars should be directed, and covering what topics or types of issue or types of information, which claims or responses (in multi-party cases), and so forth."*

38. The term "*Scott Schedule"* is one which has been adopted from civil court procedure in English CPR Rules and is understood to be embedded in certain types of court process including the Technology and Construction Court Guide for England. It has understood that it developed to assist judicial decision-making by summarising the issues in dispute in a given claim. It typically consists of a schedule in which disputed issues are particularised and quantified so that the treatment of disputes can be carried out in a methodical and efficient manner. The term Scott Schedule as Judge Auerbach identifies above does not appear as a defined term within the 2013 Rules.

39. I have reminded myself that the EAT observed in **Khetab v AGA Medical Ltd** [2010] 10 WLUK 481 (**Khetab**) that the purpose of pleadings *"…is so that the other party and the Employment Tribunal understand the case being advanced by each party so that his opponent has a proper opportunity to meet it".*

40. I have also reminded myself that in **Chandhok and Another v Tirkey** [2015] IRLR 195 (**Chandhok**) Langstaff J, commented at para 18 the parties should set out the essence of their respective cases and "*… a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it".*

41. In addition, I have reminded myself that the EAT in **Ladbrokes Racing v Traynor** UKEATS/0067/06 (**Traynor**) indicated that the precise wording to be introduced should be set out.

42. In the leading case on amendment **Selkent**, Mummery J sets out the criteria for a Tribunal's exercise of discretion commenting that the Tribunal "*should take into account all the circumstances and should balance the injustice and hardship of refusing it".*

43. The EAT in **Selkent** were considering an appeal which arose from an application to amend an existing unfair dismissal claim, where the application had been made a fortnight before the date fixed for the hearing. The amendment sought to introduce a new allegation that the dismissal related to the claimant's trade union membership or activities and was thus automatically unfair. The Tribunal had allowed the amendment but was overturned on appeal, the EAT commented that that factors which had influenced its decisions were:

> *"(a) The nature of the amendment*
>
> *Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of*

other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits

If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g., in the case of unfair dismissal, 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."

44. In **Chandhok** the EAT considered an appeal by a respondent against a decision of an Employment Tribunal to allow an amendment to expand an existing 64 paragraph claim of race discrimination to include explicit reference of what the claimant asserted was "*her status in the caste system*". The respondents in the appeal contended that "caste" was not an aspect of race as defined by section 9 of Equality Act 2010. The appeal was dismissed. At

para15 J Langstaff commented that the *"judge identified the claimant's case … not from what was asserted in the claim, lengthy though it was, but from material which could only have come from either her witness statement (which was brief) or what he was told."* Although the appeal was dismissed at para 16 J Langstaff criticised this approach and expressly stated the importance of the ET1 and commented "*The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but is free to be augmented by whatever parties choose to add or subtract merely on their say so. Instead, it serves not only a necessary but useful function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made….* "and at para 17 commented that Employment Tribunals were "*not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before employment tribunals does not mean those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principal by which reference to any further document (witness statement or the like) could be restricted."*

45. I have further reminded myself that in **White v University of Manchester** [1976] IRLR 218 EAT (**White**) , J Phillips, while considering the then relevant rules concerning the power to Order Further and Better Particulars, observed that a party may be required to give Further and Better Particulars to remedy any deficiencies in the case as pleaded in order to enable the other party to know in advance reasonable details of the nature of the complaints that each side is going to make at the hearing and commented that *"We fully understand, accept and would endorse … that one of the characteristics of Industrial Tribunals is that they should be of an informal nature. It may be that there are many cases, particularly where the parties are unrepresented, or represented otherwise than by solicitor or counsel, and*

especially where the issues are simple, where particulars may not be necessary. We do not wish to say anything to encourage unnecessary legalism to creep into the proceedings of Industrial Tribunals; but, while that should be avoided, it should not be avoided at the expense of falling into a different error, namely that of doing injustice by a hearing taking place when the party who has to meet the allegations does not know in advance what those allegations are. The moral of all this is that everybody involved, whether it be solicitors, counsel, non-professional representatives, or the parties themselves where not represented, should bring to the problem commonsense and goodwill. This involves, or may involve in anything except the simplest cases, giving, when it is asked, reasonable detail about the nature of complaints which are going to be made at the Tribunal…. It is just a matter of straightforward sense. In one way or another the parties need to know the sort of thing which is going to be the subject of the hearing. Industrial Tribunals understand this very well and, for the most part, seek to ensure that it comes about. … by and large it is much better if matters of this kind can be dealt with in advance so as to prevent adjournments taking place which are time-consuming, expensive and inconvenient to all concerned."

46. I have further reminded myself that in **Honeyrose Products Ltd v Joslin** [1981] IRLR 80 (**Honeyrose**), EAT J Waterhouse while considering the then applicable rules 1(1)(c) and 4(1) of the Industrial Tribunals (Labour Relations) Regulations 1974 commented that "*it would be most unfortunate if it became the general practice for employers to make applications for further and better particulars when the nature of the employee's case is stated with reasonable clarity."* Indeed I have additionally reminded myself that the basic principles regarding the granting of an order requiring the production of Further and Better Particulars were summarised by Wood J in **Byrne v Financial Times Ltd** [1991] IRLR 417 at 419 (**Byrne**) "*General principles affecting the ordering of further and better particulars include that the parties should not be taken by surprise at the last minute; that particulars should only be ordered when necessary in order to do justice in the case or to prevent adjournment; that the order should not be oppressive; that particulars are for the purpose of*

identifying the issues, not for the production of the evidence; and that complicated pleadings battles should not be encouraged.' .

47. As noted above Christie Elite made reference to the Feb 2010 EAT decision of **Baker v The Commissioner of Police** [2010] All ER (D) 17 (Apr) (**Baker**) in support of the proposition that it is not permissible to expand an ET1 where the "*box of disability is ticked"*.

48. **Baker,** as was appropriately conceded for Christie Elite concerned the operation of the pre 2013 rules which were more prescriptive. The factual matrix of Baker was that Mr Baker had presented three ET1s the first of which was presented on 10 Nov 2006 without assistance of solicitors, and in relation to which, it was argued that while the box of discrimination was ticked there was no narrative. A second claim was presented on 22 Feb 2007 and a third on 18 September 2007 those subsequent claims referenced other types of discrimination claims. At para 34 and at 51 of Baker is noted that it was conceded for Mr Baker that there was no pleaded case in the first ET1 for disability discrimination complaint. At para 46 the, then applicable, rule was set out "*Rule (1); A Claim shall be brought before the employment tribunal presenting the to an Employment Tribunal Office the details of the claim in writing. Those details must include all the relevant required information…"*. The second and third ET1's expressly contained issues relevant to other alleged forms of discrimination however and in relation to disability discrimination the issue was raised, it appears without a written proposed amendment, broadly at the conclusion of the Final Hearing. Specific reference was made to **Selkent.** At the conclusion the EAT stated:

"101. The ET did not err in holding that the first ET1 did not include a claim of disability discrimination.

102. The Employment Tribunal erred in refusing to hear and/or determine an application to amend the first ET1 to contend that the cats set out in the first ET1 constituted breaches of" the then applicable disability discrimination legalisation, and remitted the matter back to Tribunal intimating that the application to amend should specify which provisions of the relevant

legislation was alleged to have been breached, and how it is said that the Tribunal would have jurisdiction to hear the complaints having regard to the limitation periods. At para 54, it was stated that the Tribunal had *"correctly considered the first ET1 as a whole."*

49. For Mr Deafley, reference was made to **British Coal Corporation v Keeble [1997] IRLR 336**. In that case the EAT suggested that Employment Tribunals would be assisted by considering the factors listed in s.33(3) of the Limitation Act 1980 which in turn consolidated earlier Limitation Acts. Section 33(3) deals with the exercise of discretion in civil courts and personal injury cases in England & Wales and requires the court to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

(a) the length of and reasons for the delay; and

(b) the extent to which evidence which may adduced for either side is likely to be less cogent than if the action had been brought within the time allowed; and

(c) the conduct of the party defending the action after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the party bringing the action for information or inspection for the purpose of ascertaining facts which were or might be relevant to the party bring the action's cause of action; and

(d) the duration of any disability of the party arising after the date of the accrual of the cause of action; and

(e) the promptness with which the party bringing the action acted once s/he knew of the facts giving rise to the cause of action; and

(f) the steps, if any, taken by the party bringing the action to obtain appropriate professional once s/he knew of the possibility of taking action.

50. I am conscious that the Limitation Act 1980 does not apply in Scotland, the equivalent legislation being the **Prescription and Limitation Scotland Act**

1973 (the 1973 Act). However, the 1973 Act does not offer an equivalent codified list of factors to be considered, s19A simply stating:

> *"19A Power of court to override time-limits etc.*
>
> *(1) Where a person would be entitled, but for any of the provisions of section 17, 18, 18A or 18B of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision."*

51. I have reminded myself that as seen in **Reuters Ltd v Cole** UKEAT/0258/17 (**Reuters**)**,** in order to consider the application of s123 of the Equality Act 2010, and whether it is just and equitable to extend time to hear a complaint, evidence would be required.

Discussion and Decision

52. Rule 10 of the 2013 Rules sets out minimum information for a claim. That minimum information was provided.

53. The term Scott Schedule is adopted here simply for convenience. It however refers to the 14-page document set out in table form provided on behalf of Mr Deafley to the Tribunal and Christie Elite on 23 July 2019.

54. Considering the terms of **Rule 29** and **30** together with the Tribunals Note issued to the parties 24 June 2019, I am satisfied that the Further and Better Particulars were in compliance with same. Christie Elite had responded thereafter within 2 weeks with it's Response to Claimant's Further and Better Particulars. No issue is taken by Mr Deafley in relation to acceptance of Christie Elite's Response to the Claimant's Further and Better Particulars.

55. There are, as identified above three separate articulated legal complaints which are the subject of this hearing and they are expressed in the Scott Schedule table form, taking each in turn, they are

    a. the First Scott Schedule Listed Disability Complaint "*Discrimination arising from disability"* in terms of section 15 of the Equality Act 2010 (EA 2010) and stated at row 1 *"I was not allowed return to work after a period of*

disability- related absence for depression" is a formal labelling exercise of the existing assertion at para 9.2, where it is asserted that Mr Deafley was seeking compensation for what he alleges to be "*systematic bullying and intimidation"*; and

b. a second disability mater, the Second Scott Schedule Disability Complaint, being alleged failure to Make Reasonable Adjustments asserting breaches of sections 20 and 21 of EA 2010, is not foreshadowed in the ET1. It is thus a request for Amendment, and accordingly requires evidence to be led in order for the Tribunal to decide whether or not to extend time in accordance s123 of EA 2010: and

c. a third disability matter, the Third Scott Schedule Disability Complaint, being harassment related to the Protected Characteristic of disability arising from section 26 of EA 2010 is a formal labelling exercise of of the existing assertion at para 9.2, where it is asserted that Mr Deafley was seeking compensation for what he alleges to be "*systematic bullying and intimidation"* .

56. The Scott Schedule document further contained allegations regarding what are alleged to be 7 listed Protected Disclosures giving rise to the detriment protections set out in s47B of the ERA1996 with 6 specific alleged detriments set out. Christie Elite deny any relevant breach in relation to those issues although no issue is taken in relation to the labelling and articulation of those complaints within the Scott Schedule forming the claimant's Further and Better Particulars.

57. Both the first and third Scott Schedule Disability Complaints, Discrimination arising from disability in terms of section 15 of EA 2010 and harassment related to the protected characteristic of disability arising from section 26 of EA 2010 are in all the circumstances, having regard to **Byrne, Chandhok, Honeyrose, Khetab, Traynor, Selkent,** and **White** permissibly articulated, as a formal labelling exercise, within the Further and Better Particulars for Deafley.

58. Further and having regard to **Baker,** in so far as may be applicable I consider the first and third Scott Schedule Disability Complaints, Discrimination arising from disability in terms of section 15 of EA 2010 and harassment related to the protected characteristic of disability arising from section 26 of EA 2010 are in all the circumstances, are permissibly articulated, as a formal labelling exercise, within the Further and Better Particulars for Deafley, having considered the ET1 as a whole.

59. The articulation of Mr Deafley's complaints in relation to the first and third Scott Schedule Disability Complaints is, of assistance, to the Tribunal and both parties in articulating Mr Deafley's claimants' case, in order that both Christie Elite and the Tribunal understand Mr Deafley complaints.

60. It noted that Christie Elite has already set out its position in the Response to Claimants Further and Better Particulars, the terms of which are not opposed. In all the circumstances, however Christie Elite should be permitted a further, limited, period to augment its response in light of the terms of this judgment, and it is considered that a further period of 28 days should be permitted to Christie Elite respond, if so advised.

61. The second Scott Schedule Disability Complaint, being an alleged failure to Make Reasonable Adjustments asserting breaches of sections 20 and 21 of EA 2010 is not foreshadowed in the ET1. It is not a formal labelling of a previously informal asserted claim. Thus, amendment would be required requiring consideration of s123 of the EA 2010 including whether it would be just and equitable to permit same.

62. The application of the principles outlined in relation to amendment in **Keeble** are not a matter for determination in the absence of evidence (**Reuters**)**.**

63. In the absence of the Mr Deafley's evidence no finding of fact is made as to whether the claimant was unrepresented when he originally submitted his ET1. That, and other matters which may be relevant to the application of s123 of EA 2010 are matters which parties may consider would be appropriately addressed as part of a Final Hearing. However, at this time the question of amendment in relation to the second Scott Schedule disability complaint is

reserved. Both parties were of the view that, whatever judgment was issued from this hearing, a further preliminary hearing should be appointed to consider further procedure thereafter and in these circumstances the matter is appointed to a further Preliminary Hearing to consider further procedure.

Conclusion

64. The respondent's application to treat the claimant's Disability Discrimination complaint arising from disability in terms of section 15 of EA 2010 as subject to time bar does not succeed, that complaint is, in all the circumstances permissibly set out as a formal labelling exercise within the Further and Better Particulars of the claimants' claim which are accepted; and

65. The respondent's application to treat the claimant's Disability Discrimination complaint of harassment related to the protected characteristic of disability arising from section 26 of EA 2010 as subject to time bar does not succeed, it is, in all the circumstances, that complaint is permissibly set out as a formal labelling exercise within the Further and Better Particulars of the claimants' claim which are accepted; and

66. The respondent's Response to the Claimant's Further and Better Particulars are accepted; and

67. The respondent may, if so advised, provide augmented Further and Better particulars of their response within 28 days of the date of this judgment; and

68. The respondent's application to treat the claimant's Disability Discrimination complaint, being alleged failure to make reasonable adjustments asserting breaches of sections 20 and 21 of EA 2010 set out within the Further and Better Particulars of the claimant's claim, as subject to time bar is reserved; and

69. The Tribunal Orders that the case should proceed to a Case Management Preliminary Hearing to consider further procedure; and

70. The parties should respond to date listing schedules within the time frame set out in the notification to the parties.

Employment Judge: Rory McPherson
Date of Judgment: 22 November 2019
Entered in register: 26 November 2019
and copied to parties

I confirm that this is my judgment or order in the case of Deafley v Christie Elite 4102578/2019 and that I have signed the order by electronic signature.