THE EMPLOYMENT TRIBUNALS

VIDEO PUBLIC PRELIMINARY HEARING

Claimant: **Mr E Iredia**

Respondent: **Centre for Process Innovation Limited**

Heard: **Remotely (by video link)** **On:** **23 June 2021**

Before: **Employment Judge Shore**

Claimant: **Mr U Alukpe, Trainee Solicitor**
Respondent: **Miss S Bowen, Counsel**

RESERVED JUDGMENT AND REASONS

The judgment of the tribunal is that:-

1. The claimant's application to amend his claim to include an additional eight named comparators in his claims of race discrimination is refused. I find that the amendments were new allegations that were not presented within the period of three months less one day of the last act or omission complained of (plus early conciliation extension), as required by section 123 of the Equality Act 2010 and I do not find it would be just and equitable to extend the time limit.

2. The claimant's other applications to amend his claim by substituting the word "directly" with the word "direct" in relation to his allegations of race discrimination and the addition of additional information in paragraph 4 of the Claimant's ET1 Grounds (as amended) are granted by consent.

3. The claimant's claim of direct discrimination because of marriage and civil partnership pursuant to section 8 of the Equality Act 2010 has no reasonable prospect of success and is dismissed.

4. The indicated claims of the claimant contained in his original ET1 of harassment related to marriage, bullying and Equal Pay are all dismissed on withdrawal.

REASONS

BACKGROUND

1. The claimant was employed by the respondent, an independent technology innovation centre, as a Senior Electronic Engineer, from 5 December 2012 until 9 July 2020. Early conciliation started on 8 September 2020 and ended on 8 October 2020. The claim form was presented on 4 November 2020.

2. The claimant's claims as at the date of this hearing (after some claims were withdrawn and others clarified) were:

   2.1 Constructive unfair dismissal;
   2.2 Direct race discrimination; and
   2.3 Direct marital discrimination.

3. The case came before me in a private preliminary hearing on 12 February 2021 when I made case management orders of the same date. My case management order set up this private preliminary hearing by video link to determine the following matters:

   3.1 The claimant's application to amend his ET1 Grounds, per the email from his representative of 6 February 2021 and the appended document;

   3.2 The respondent's application that the claimant's discrimination claims be struck out as having no reasonable prospect of success;

   3.3 In the alternative, that the claimant be ordered to pay a deposit in respect of his discrimination claims because they have little reasonable prospect of success;

   3.4 Any application by the claimant that the respondent's response be struck out in whole or part because it has no reasonable prospect of success;

   3.5 Any application by the claimant that the respondent be ordered to pay a deposit in respect of its response because it has little reasonable prospect of success; and

   3.6 Any further case management orders that the Employment Judge considers appropriate.

4. I have appended my case management order of 12 February 2021 to this Judgment and Reasons for ease of reference by the parties.

HISTORY OF THE STRIKE OUT APPLICATION

5. Mr Alukpe suggested at one point in this hearing that the respondent's application for a strike out of the claimant's claim of direct marital discrimination was made in an email from the respondent dated 14 April 2021 [103] and that it was only at that date that he knew that the application for a strike out or deposit order would be heard today. He is mistaken.

6. My recollection of the discussion at the preliminary hearing on 12 February is that concern was expressed by Miss Bowen (who represented the respondent then as she did today) and I listed the strike out/deposit application to deal with "the respondent's application that the **claimant's discrimination claims**" (my emphasis) be struck out…" or a deposit ordered.

7. The respondent's email of 14 April withdrew the strike out/deposit applications in respect of the race discrimination claims, but confirmed that a strike out/deposit was sought in respect of the direct marital discrimination claim. I therefore do not accept the assertions by Mr Alukpe that the claimant had no time or need to prepare a witness statement or provide details of his income and outgoings if I intended to make a deposit order.

8. In the alternative, I find that if the claimant was only aware of the application for strike out of his claim of direct discrimination because of marriage or civil partnership on 14 April 2021, he has had ample time since that date to fully prepare for this hearing, including the preparation of a witness statement. In the event, no application to postpone today's hearing was made.

HOUSEKEEPING

9. The respondent produced a bundle of 104 pages for this hearing. The claimant did not object to any of the papers in the bundle or add any papers of his own. If I refer to a document from the bundle, I have added the relevant page numbers in square brackets [ ].

10. Neither side produced a witness statement.

11. I started the hearing with a discussion about the six matters that I had indicated would be dealt with at this hearing in my order of 12 February.

12. I confirmed with Mr Alukpe that the scope of the claimant's application to amend was to add eight new comparators to his race discrimination claim. The other matters that were included in the application to amend had been conceded by the respondent and are referred to in the judgment above.

13. Miss Bowen confirmed that the respondent's applications for strike out and/or deposit in respect of the claimant's race discrimination claim was withdrawn, save for the allegation for discrimination because of marriage or civil partnership.

14. Mr Alukpe confirmed that the intimated applications for strike out or deposit in respect of the respondent's response had not been made and neither were sought.

15. I indicated that once I had dealt with the application for amendment and the strike out/deposit in respect of the marriage discrimination claim, I would make case management orders.

16. I should note that Miss Bowen asked Mr Alukpe to confirm whether he was a solicitor, barrister or other legal professional early in the hearing. Mr Alukpe took

great offence at this and suggested that Miss Bowen had been trying to belittle him. He said that he is a trainee solicitor, but has a great deal of experience in these matters because of his previous work in the insurance industry. I did not find that Miss Bowen's question was in any way inappropriate and said as much. It is usual for representatives or judges to ask parties to confirm their qualification status.

17. After I had heard the application for amendment and response, I gave an oral judgment. I heard Mr Alukpe's application for reconsideration and delivered an oral judgment on that.

18. I then heard the respondent's application for strike out/deposit in respect of the claimant's marriage discrimination claim. By the time I had heard that application, we were already one hour and forty-five minutes into the three-hour hearing allocation. I was concerned about time, so indicated that I would give a reserved judgment and reasons on the strike out/deposit and moved on to case management. I converted the hearing to a private preliminary hearing for the purpose of case management.

APPLICATION TO AMEND AND RESPONSE

19. I asked Mr Alukpe to outline his application for amendment and said I would then hear Miss Bowen's response. After I had heard and decided the application for amendment, I would then hear the respondent's application for strike out or deposit in respect of the claimant's claim of marriage discrimination.

20. Mr Alukpe began with his letter to the respondent of 19 March 2021 [76-79], which set out the application for amendment (and dealt with some other matters). He then referred me to the respondent's email to the Tribunal of 14 April 2021 (which was copied to Mr Alukpe) [103]. Paragraph 3 of the respondent's email of 14 April set out its opposition to the claimant's application to amend.

21. Mr Alukpe then started to speak about the respondent's applications in respect of the claimant's marriage claim. I reminded him that I was dealing with his application to amend first, and would then deal with the respondent's application. I therefore required him to deal with his own application.

22. Later in the hearing, Mr Alukpe suggested that I had limited his submissions to only commenting on paragraph 3 of the respondent's email of 14 April. I made no such suggestion and find that an experienced representative, as Mr Alukpe stated that he was, would have known that when he was invited to make his application, he should have made the full application.

23. Mr Alukpe submitted that the claimant gave instructions to submit an ET1 in 2020 and gave further instructions to add the eight new comparators in early February 2021. The matter was raised in an email dated 6 February 2021, raised at the preliminary hearing on 12 March 2021 and was the subject of a formal application as required by my case management order on 19 March 2021.

24. The claimant says there was no way he could have known who the new comparators were when he issued proceedings because he was working in different departments from the new comparators. I took Mr Alukpe to the amended ET1 dated 19 March 2021 [80-100], and particularly the new comparators listed in paragraph 4 [89]. The new comparators were a list of names. There was no detail about what jobs they did and how they were proper comparators. The only detail about the comparators was that they were white British or white Italian.

25. Mr Alukpe said that it had come to the claimant's knowledge that the new comparators were promoted "without going through the elongated procedures that the claimant had gone through". The respondent had disclosed some of the comparators' names and salaries in a response to an SAR. The claimant intended to ask the respondent for the procedures followed by the respondent in promoting each of the eight new comparators and the details of their increased salaries.

26. I asked Mr Alukpe when the claimant had become aware of the identities of the new comparators. He replied that former colleagues had disclosed the names in February 2021. The claimant had then passed the names to Mr Alukpe. The former colleagues did not want to be identified and victimised by the respondent. They want to retain their anonymity. As far as the claimant was aware, one of the comparators was promoted within two years of joining the respondent. The claimant had seen this on LinkedIn.

27. I asked Mr Alukpe how the comparators' circumstances are the same as the claimant save for the protected characteristic of race. His response was that the claimant knows the job roles of the new comparators.

28. I asked Mr Alukpe what evidence the claimant has that the new comparators were treated more favourably than him. Mr Alukpe's response was that their applications for promotion were not delayed compared to the claimant. He gave the comparator BC (I have not used the comparator's name in this judgment, as the parties know the identity and I see no adverse impact on open justice by anonymising the proposed comparator).

29. Mr Alukpe added that the claimant's line manager had recommended him (the claimant) for a pay rise that was not implemented. I note that this claim was in the original ET1 and forms part of the claim.

30. Mr Alukpe closing remark was that the claimant can only proceed if the respondent provides further information.

31. In response, Miss Bowen began with my case management order of 12 February that set up this hearing [63-71]. Paragraph 20 of the order [66] required the claimant to give further particulars of the application to amend by 12 March 2021 and specifically required the claimant to address the principles relating to amendments in **Selkent Bus Company Ltd v Moore** [1996] ICR 836 and seven other precedent cases. It was submitted that the claimant had not engaged with that order.

32. At paragraph 21 of the case management orders [66], I had required the claimant to "write to the respondent and the Tribunal with a full explanation (with reference to the principles set out in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11**) of how or why the new comparators named in the document titled "CLAIMANT'S ET1 GROUNDS (as amended 5 February 2021)" attached to Mr Alukpe's email to the Tribunal of 6 February 2021, relate to the new claims that are the subject of the application to amend, and/or the existing claims and why they were not named in the original ET1 and appended document." It was submitted that the claimant had failed to do this.

33. It was submitted that the claimant had been represented by solicitors throughout these proceedings. His original Grounds of Complaint dated 2 November 2020 [15-22] had named 5 comparators. The respondent's Grounds of Resistance dated 7 December 2020 [28-34] had provided a thorough rebuttal of the suitability of all 5 named comparators. It was submitted that none of them were likely to be found to be comparators by the Tribunal.

34. The 8 new comparators were named on 6 February 2021 in an email from the claimant to the respondent [58], which was three months after the ET1 had been presented to the Tribunal. The claimant has offered no explanation as to why the application was delayed, as was flagged by the respondent in an email to the Tribunal dated 11 February 2021 [61].

35. At the preliminary hearing on 12 February, as recoded at paragraph 10 of the case management order [65]. Miss Bowen had pointed out the words of the EAT in **Remploy Ltd v Abbott and others** UKEAT/0405/14, the EAT, when allowing an appeal against a Tribunal's decision to permit amendment to claims which had been professionally drafted, stressed that:

    "It is essential before allowing an amendment that it must be properly formulated, sufficiently particularised, so the respondent can make submissions and know the case it is required to meet."

    The EAT held that, without a properly particularised application for an amendment an employment judge is "*simply not in a position to consider the effect of the proposed amendments*."

36. Paragraph 22 of my order of 12 February [66-67] had required the claimant to set out how the new claims of harassment are related to the protected characteristic of race, with reference to the principles set out in **Remploy Ltd v Abbott and others**. It was submitted that he had failed to do so. I was referred to the claimant's application [76-79]. It was submitted that the claimant had not done what he had been ordered to do.

37. Miss Bowen submitted that the application had not set out how the new comparators were in the same circumstances as the claimant. There had been no attempt to state how the new comparators share the same material circumstances as the claimant. The claimant had not stated when or how any of them had been promoted or what their jobs were or what their salaries were. The claimant's claim seems to be predicated on an assumption that promotion within the respondent is somehow automatic.

38. Miss Bowen then moved to address the issues raised in **Selkent**. It was also submitted that the application was substantial as it seeks to introduce eight new arguments: one in respect of each new comparator. The application has a potentially significant impact on the evidence that will have to be produced, the documents that will need to be produced and the length of the hearing. It was submitted that the claimant's application was a fishing expedition for evidence concerning the eight new comparators. It would be disproportionate to allow the application and would not advance the overriding objective.

39. I was referred to the case of **Chandhok & Anor v Tirkey** UKEAT/0190/14/KNF, in which Langstaff P stated (§16):

> *"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 which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond."*

40. It was submitted that the new comparators are, essentially, new claims. They were submitted to be out of time. The claimant had, through submissions only, stated that he was not aware of the new comparators until shortly before 5 February 2021. There was no evidence of that and no evidence from whom, when or how the clamant had received the information about the comparators. No documents had been disclosed and there was no witness statement from the claimant. The claimant knew what the respondent's position was from the correspondence that pre-dated the 12 February preliminary hearing. The case management orders made it clear what the Tribunal expected to see in the application.

41. The timing and nature of the application were relevant to the consideration of the matter. The claimant held the cards to explain the circumstances of his application and had not done so. There had been delay. The application, if granted, would place significant additional cost on the respondent in terms of preparation, documents and evince together with a longer hearing.

42. At the end of Miss Bowne's submissions, I considered the application and quickly decided that it should not be granted for the reasons I have set out below.

43. Mr Alukpe protested that Miss Bowen had gone through the principles in **Selkent**. The inference was that he had not been allowed to. I rejected the inference and pointed out that it was Mr Alukpe's application and he had been invited to present it. I also pointed out that the matters that the Tribunal would consider were very clearly expressed in the 12 February case management order and his written and oral application had not really addressed any of them.

44. I took Mr Alukpe's objection as an application for reconsideration and offered him the opportunity to address me on the point. His first submission was that the application did not raise a new claim, so time is not an issue.

45. Mr Alukpe's second point was that the new comparators were materially relevant comparators of the claimant. They work in the same place as the claimant worked in various capacities at various levels. He gave no further information, other than to name an individual, SJ, who I could not see named as one of the new comparators. Mr Alukpe then referred me to BC, who he said had been "promoted quickly".

FINDINGS ON APPLICATION TO AMEND AND RECONSIDERATION

46. There were some facts that related to this application which were not disputed. I therefore find that it was undisputed (or indisputable) that:

46.1 The claimant was employed by the respondent, an independent technology innovation centre, as a Senior Electronic Engineer, from 5 December 2012 until 9 July 2020. Early conciliation started on 8 September 2020 and ended on 8 October 2020. The claim form was presented on 4 November 2020.

46.2 The claimant intimated an intention to apply for an amendment to his ET1 Grounds in an amended document dated 5 February 2021 [34-57] that was sent to the respondent via an email dated 6 February 2021 [58].

46.3 The respondent indicated an objection to the application to amend to add eight further comparators in an email to the Tribunal,(copied to the claimant) dated 11 February 2021 [60].

46.4 I held a preliminary hearing on 12 February and made the case management orders of even date [63-71].

46.5 The claimant submitted the formal application to amend by letter dated 19 March 2021 [75-100].

46.6 The claimant has submitted no documents that evidence any of the circumstances he says led to the application and filed no witness statement.

47. I considered the claimant's written application, the amendment and Mr Alukpe's submissions. I considered the bundle produced by the respondent for this hearing and Miss Bowen's submissions.

48. The claimant seeks to raise what are, in effect, eight new claims of direct discrimination. Each allegation that one of the eight new comparators were treated more favourably than he was is an allegation that was not contained in his original ET1. I do not agree with Mr Alukpe's submission that the amendments are not new matters. I find that this is not a "rebadging" exercise.

49. I find that there is no cogent explanation by the claimant as to why the potentially large amount of information now hinted at, but not produced, was not in his ET1:

48.1. He was given the opportunity to explain how the application came about when he read the case management order from the preliminary hearing on 12 February 2021, but did not take it;

48.2. He has still not seized the opportunity in his preparation and application before me today;

48.3. He has given absolutely no written or documentary evidence as to the date he became aware of the new comparators, who gave him that information or how any of the new comparators are in materially the same circumstances as he was in, other than to identify that they are of a different ethnic origin to him;

48.4. He has made no enquiries of those who purportedly gave him the information to obtain the missing details; and

48.5. The claimant only sought to expand his claim when the respondent pointed out the issues with his original comparators in its ET3.

49. Rule 29 of The Employment Tribunals Rules of Procedure 2013 give the Tribunal power to grant leave to amend a claim as part of its wide general powers of case management.

50. The case of **Selkent Bus Company Limited v Moore [1996] ICR 836** provides the principles that have to be applied in cases of amendment. The **Selkent** principles are:

50.1. 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.

50.2. What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant.

50.2.1. 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.

50.2.2. The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g., in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978.

50.2.3. 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."

51. The Tribunal and appellate courts have always shown a willingness to permit a claimant to amend to allege a different type of claim from the one pleaded if this can be justified by the facts set out in the original claim. It is usually described as putting a new 'label' on facts already pleaded or "rebadging".

52. In **Abercrombie v Aga Rangemaster Ltd [2013] EWCA Civ 1148**, Underhill LJ summarised the approach adopted by the EAT and Court of Appeal when considering applications to amend 'which arguably raise new causes of action' (§ 48):

> *" … to 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."*

53. In order to determine whether the amendment amounts to a wholly new claim, as opposed to a change of label, I had to examine the case as set out in the original application to see if it provides a 'causative link' with the proposed amendment.

54. Although there may be an absence of a link between the case as pleaded in the original claim and the proposed amendment, this will not be conclusive against the amendment being allowed. In **Evershed v New Star Asset Management** UKEAT/0249/09 (31 July 2009, unreported), Underhill J pointed out that it is no more than a factor, the weight to be given to it being a matter of judgment in each case (§24). I had to analyse carefully the extent to which the amendment would extend the issues and the evidence, which I did. I find that the new comparators would raise eight new claims that were not indicated in the claimant's original ET1. In making that finding, I am conscious that the claimant has been represented by solicitors throughout the entirety of these proceedings and that there were just short of four months between the effective date of termination of his employment and the issue of these proceedings.

55. Insofar as the nature of the amendment is concerned, I find that the claimant's application makes entirely new factual allegations which change the basis of the existing claim. I also find that the amendment sought involves substantially different areas of inquiry than the old because the respondent will have to make enquiries of all eight new comparators and their entire work histories, as the clamant has not identified their positions, job titles, dates of promotion (or promotions) or any other would make them appropriate comparators. There is, therefore, a huge difference between the factual and legal issues raised by the new claim and by the old. I therefore find that the amendment sought is not one of

the minor matters, but is or is a substantial alteration pleading a new cause of action.

56. With entirely new claims unconnected with the original claim as pleaded, time limits will require to be considered.

57. The principles on extensions of time on a just and equitable basis are best set out in **Robertson v Bexley Community Centre** [2003] EWCA Civ 576. In that judgment, Auld LJ (§25) stated that:

> *"It is also of importance to know that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an appeal tribunal may not allow an appeal against a tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the appeal tribunal if it were deciding the issue of first instance would have formed a different view. As I have already indicated, such an appeal should only succeed where the appeal tribunal can identify an error or principle of law making the decision of the tribunal below plainly in this respect."*

58. The burden of persuading the Tribunal to exercise its discretion to extend time is on the claimant.

59. In the case of **Abertawe Bro Morgannwg University Local Health Board v Morgan** UKEAT/0305/13, it was noted that a litigant can hardly hope to satisfy the burden on him to show that time should be extended unless he provides an answer to two questions (§52):

> *"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."*

60. There is no requirement on me to hear the full merits of the case before determining whether the Tribunal has jurisdiction to hear it.

61. I am mindful of the guidance contained in the case of **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 about the tests to be used in assessing whether it is just and equitable to extend the time for bringing a claim of discrimination under section 123 of the Equality Act 2010. In that case, Underhill LJ approved the words in Leggatt LJ's judgment (§§18-19) in **Abertawe Bro Morgannwg University Local Health Board v Morgan** that emphasised the discretion of the Tribunal in determining applications to extend time on the just and equitable basis and affirmed the authority of the case of

British Coal Corporation v Keeble [1997] UKEAT 496/98. That case stated only that the question of extension may illuminate the task of the Tribunal.

62. The discretion to grant an extension of time under the "just and equitable formula" does therefore not require me to go through the list of issues to be considered by section 33 of the Limitation Act 1980, but to consider all the relevant issues, such as the length of and reasons for the delay and whether the delay has prejudiced the respondent from investigating the claim whilst the matters were fresh. The only requirement on me appears to be that I do not leave a significant factor out of account (per **London Borough of Southwark v Afolabi** [2003] EWCA Civ 15).

63. I find that the claimant was well aware of his potential claims for direct race discrimination because his original made such a claim and named five comparators. He sought professional advice throughout.

64. When considering whether to grant an extension of time under the 'just and equitable' principles, the fault of the claimant is a relevant factor to be taken into account. I find that the claimant was at fault for failing to investigate the possibility of other comparators during his employment had in the four months between his employment ending and the issue of proceedings.

65. It is necessary for me, when exercising my discretion, to identify the cause of the claimant's failure to bring the claim in time. In **Accurist Watches Ltd v Wadher UKEAT/0102/09/MAA**, Underhill J stated that, whilst it is always good practice, in any case where findings of fact need to be made for the purpose of a discretionary decision, for the parties to adduce evidence in the form of a witness statement, with the possibility of cross-examination where appropriate, it was not an absolute requirement of the rules that evidence should be adduced in this form.

66. A tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the fact in question, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical reports or certificates, or the inferences to be drawn from undisputed facts or contemporary documents (§16). What a tribunal is not entitled to do, however, is to make assumptions in the claimant's favour on contentious factual matters that are relevant to the exercise of the discretion; as the burden is on the claimant to show that it would be just and equitable to extend time, where a contentious matter is relied on there must be some evidential basis for it. In this case, the claimant's only stated reason for delay was that she was ignorant of the law.

67. When balancing the factors for and against the exercise of my discretion in the claimant's favour, I find:

    67.1. The claimant did not refer to the claims he now seeks to add in his original ET1. I find that the matters alleged in his original ET1 are of the same nature, but have no evidential link link to the matters he now seeks to add. Those matters are new, not a 'rebadging' of facts already pleaded.

67.2. They are also inadequately described: the claimant has given virtually no details of how or when he was treated less favourably than the new comparators.

67.3. The length of delay in making the application was unreasonable and the reason for delay was not reasonable, because the claimant has not adequately explained it.

67.4. There is a risk that the cogency of the evidence available to the respondent may be adversely affected because of the delay in adding new matters and the fact that we have no idea if any of the new comparators still work for the respondent or when the claimant's allegations date back to. His original ET1 goes back as far as 2012.

67.5. The claimant has not given evidence about when he found out about the new comparators.

67.6. His first attempt to set out his amended claim did not come until 6 February 2021 and was a very limited attempt to set out the matters. His representative's letter of 19 March 2021 added very little.

67.7. The claimant has been professionally advised throughout.

67.8. I am mindful of the requirement to ensure a just and fair hearing. I am conscious that the claimant would suffer the prejudice of not being able to continue with the proposed amended claims, but he has the original claims and I find the prejudice caused to the respondent in defending eight new claims that have not been particularised to any meaningful extent tips the balance in its favour.

67.9. I find the claimant's application as set out in the papers and Mr Alukpe's submissions to be a fishing exercise: an attempt to elicit documents and information from the respondent that has no basis in fact.

68. I therefore find that the claimant has not shown that the new claims were part of her original ET1 and I find that the new claims are out of time. The application to amend is therefore refused.

69. I refuse the claimant's application for reconsideration. I repeat the reasons for refusing the application for amendment as set out above. I find that Mr Alukpe's submissions disclosed no reason for me to change my original decision.

APPLICATION FOR STRIKE OUT/DEPOSIT OF MARRIAGE DISCRIMINATION CLAIM

70. The respondent's application was indicated in the preliminary hearing on 12 February and repeated in the respondent's email to the Tribunal (copied to the respondent) on 14 April 2021 [103].

71. Miss Bowen's submissions began with paragraphs 10 and 11 of the claimants ET1 Grounds in his original application [15-22]. His entire claim of direct marriage discrimination is set out in paragraphs 10 and 11:

The Claimant alleges that he was treated unfairly and less favourably, and alternatively, discriminated against on the grounds of his marital status by the Respondent, its management, Brian Smith and Attila Szabados, because based on her alleged notes dated 16 October 2019 at a discussion with Brian Smith, Ali Bentley states,

"Mar/Apr 2019
*B [Brian Smith] said process got to go through ... Not understand why E [the Claimant] pushing for things now**. Wife putting lot of pressure on him** — thought it was E's way of telling him how he felt — not feel it was real. A [Attila Szabados] said could well be the situation. E can get worked-up and internalise it."...**.***

The Respondent, its Human Resource department, Ali Bentley, Brian Smith and Attila Szabados had allowed their prejudice about the alleged influence on the Claimant by his wife (which the Claimant deny) to negatively influence the Respondent's management decision on the Claimant's request for a promotion to the position of Principal Engineer and had contributed to the consequential lengthy delays before reaching that belated decision. The Claimant relies on a hypothetical comparator and/or an unmarried hypothetical comparator.

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72. Miss Bowen's first submission was that the claimant could not be claiming that the reason for his less favourable treatment was race *and* marriage. At the preliminary hearing on 12 February, this claim had been discussed and it was suggested by Mr Alukpe that that the respondent intentionally failed to promote the claimant because the claimant's wife was putting pressure on him. It was submitted that this suggestion defies belief.

73. The respondent believed that the claimant had been married throughout his employment with the respondent. This allegation does not sit comfortably with the claim of direct race discrimination. It was submitted that it is highly unlikely that the claimant's marital status was the reason for the less favourable treatment he alleged.

74. The claimant names no actual comparators. He relies on hypothetical comparators. It was submitted that a hypothetical comparator would be someone exactly the same as the claimant, save for their not being married.

75. The claim relates to one act in March or April 2019 and is not part of a continuing series of acts. It was therefore submitted that the claim was out of time at the date of issue.

76. The authority for strike out is contained in rule 37(1)(a) of the 2013 Rules and Miss Bowen asked me to consider the authorities contained in the cases of **Anyanwu v South Bank Students' Union** [2001] IRLR 305 and **Ezsias v North Glamorgan NHS Trust** [2007] EWCA Civ 330. In **Anyanwu,** Steyn LJ put forward the proposition against striking out in terms almost amounting to public policy, when he stated (§ 24):

> *"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."*

77. In the same case (at §39), Hope LJ noted that '[t]he time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail, he also stated (at para 37):

> *" … discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."*

78. In **QDOS Consulting Ltd v Swanson** UKEAT/0495/11, Serota J, having reiterated that applications to strike out discrimination cases on the basis that they are misconceived should only be made 'in the most obvious and plain cases' in which the applicant 'can clearly cross the high threshold of showing that there are no reasonable prospects of success', stated that applications 'that involve prolonged or extensive study of documents and the assessment of disputed evidence that may depend on the credibility of the witnesses should not be brought under [rule 37(1)(a)] but must be determined at a full hearing', and added that such applications 'should rarely, if ever, involve oral evidence and should be measured in hours rather than days' (§49).

79. Miss Bowen suggested that this was an obvious and plain case.

80. In response, Mr Alukpe submitted that the claim had arisen from an SAR made on 31 July 2020, which had disclosed the note made by Ali Bentley that I have reproduced above. The claim concerned the claimant's delays in his promotion. He says that if he was not married, he would not have made reference to his wife.

81. Mr Alukpe confirmed that the hypothetical comparator was an unmarried person.

82. I asked Mr Alukpe why the claimant had failed to produce a witness statement or evidence about his ability to pay a deposit if I were minded to make a deposit order. His response was that there was no need for the claimant to make one, as

the respondent had withdrawn its strike out/deposit application on 14 April 2021 [103].

83. Miss Bowen interjected to say that the email of 14 April 2021 had clearly stated that the application in respect of the marriage discrimination case was to proceed. I checked the documents and confirmed that she was correct. She stated that the case management order of 12 February [63] and the respondent's email of 14 April [103] made it clear that today's hearing would consider a strike out/deposit in the marriage discrimination claim.

84. As indicated above, I reserved my decision.

FINDINGS

85. I find that the claimant has made no effort to cogently explain his claim of direct marriage discrimination in his original ET1 or in any written or oral submission made to the Tribunal.

86. I cannot see how the claimant's claim can succeed because:

    86.1. Paragraphs 10 and 11 of his ET1 does not disclose a set of circumstances that connects the note made with an act of discrimination because of marriage other than by assertion;

    86.2. The claimant's claim at its highest is that Brian Smith said that the claimant's wife was putting a lot of pressure on him. The claimant does not say what any pressure was concerning, although I can assume it was because of his failure to be promoted;

    86.3. The claimant dies not say which promotion he was denied;

    86.4. The claimant asserts that Brian Smith and others had "a prejudice about the alleged influence on the claimant by his wife" [86 - §11], but I can see no logic in the leap that the claimant has made from the statement that the claimant was under pressure to an assertion that he had been directly discriminated against.

    86.5. The claimant's claim appears to be a single act that was committed approximately 15 months before he resigned, so appears to be out of time;

    86.6. It is difficult to envisage a set of circumstances that would point to a hypothetical comparator being treated more favourably than the claimant if they were not married;

    86.7. An unmarried hypothetical comparator could be put under pressure for a perceived failure to gain a promotion by a partner they were not either married to or in a civil partnership with; and

    86.8. Allowing this claim to continue actually undermines the claimant's claim of direct race discrimination, as it introduced as a different protected

characteristic for the same alleged act of discrimination – the respondent's delay and/or failure to promote the claimant.

87. I therefore find that it is plain and obvious that the claim of direct marriage discrimination has no reasonable prospect of success, so I strike it out.

88. I moved on to case management that is contained in a separate case management order.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

EMPLOYMENT JUDGE SHORE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE SHORE ON
8 December 2020

JUDGMENT SENT TO THE PARTIES ON

29 June 2021

AND ENTERED IN THE REGISTER

.....

FOR THE TRIBUNAL

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

APPENDIX 1 – CMO 12 FEBRUARY 2021

EMPLOYMENT TRIBUNALS

Claimant: Mr E Iredia

Respondent: Centre For Process Innovation Limited

RECORD OF A TELEPHONE PRIVATE PRELIMINARY HEARING

Heard: Remotely (in private by telephone) **On:** 12 February 2021

Before: Employment Judge Shore

Appearances
For the claimant: Mr U Alukpe, Trainee Solicitor
For the respondent: Miss S Bowen, Counsel

CASE MANAGEMENT ORDERS

Public preliminary hearing

50. A public preliminary hearing will take place remotely by video link on **Wednesday 23 June 2021**. The case will be heard by an Employment Judge. The hearing will start at 10:00am. You must log in to the video hearing by 9:45am. The hearing will determine:

    50.1 The claimant's application to amend his ET1 Grounds, per the email from his representative of 6 February 2021 and the appended document;
    50.2 The respondent's application that the claimant's discrimination claims be struck out as having no reasonable prospect of success;
    50.3 In the alternative, that the claimant be ordered to pay a deposit in respect of his discrimination claims because they have little reasonable prospect of success;
    50.4 Any application by the claimant that the respondent's response be struck out in whole or part because it has no reasonable prospect of success;
    50.5 Any application by the claimant that the respondent be ordered to pay a deposit in respect of its response because it has little reasonable prospect of success; and
    50.6 Any further case management orders that the Employment Judge considers appropriate.

51. Sometimes hearings start late, or are cancelled at short notice. You will be told if this happens.

52. If you think that more or less time will be needed for the hearing, you must tell the Tribunal as soon as possible.

Discussion

53. I am grateful to both sides for producing agendas for this preliminary hearing. I began by going through the list of claims brought by the claimant. Mr Alukpe's agenda stated that the claimant was bringing claims of:

    53.1 Constructive unfair dismissal;
    53.2 Direct race discrimination;
    53.3 Martial discrimination;
    53.4 Harassment on racial grounds;
    53.5 Harassment on marital grounds;
    53.6 Bullying;
    53.7 Equal pay; and
    53.8 Breach of trust of confidence.

54. I could identify the first three claims listed above from the claimant's ET1 and appended document. I could see that the claimant was seeking to amend his claim to add claims of harassment related to race and marital status. As I have written up my notes of this preliminary hearing, I have checked the provisions of section 26 of the Equality Act 2010 and note that section 26(5) lists the relevant protected characteristics which can be the basis of harassment claims under section 26(1) and marital status is not one of them. I therefore require the claimant to confirm if he is still seeking to amend his ET1 to encompass such a claim: see the order below.

55. I asked Mr Alukpe what jurisdiction the Tribunal has to deal with bullying as a head of claim, if it was not a claim of harassment related to a protected characteristic. I require the claimant to clarify whether he is seeking to advance a free-standing claim of bullying: see the order below.

56. I advised Mr Alukpe that I was not aware that the Tribunal had jurisdiction to hear claims of Equal Pay, unless it was by a worker of one sex complaining that they were not paid equally when compared to a colleague of the opposite sex. From reading the ET1, the claimant appeared to be complaining that he was not paid the same rate of pay as his white British colleagues. That allegation would seem to be one of direct discrimination because of the protected characteristic of race. I require the claimant to clarify whether he is seeking to advance a free-standing claim of Equal Pay: see the order below.

57. The intimated claim of 'breach of trust and confidence' is an allusion to the test that the Tribunal will use to determine whether the claimant was constructively dismissed, so is not a separate claim.

58. I decided that the application to amend the ET1 Grounds to add new claims of harassment should be the subject of a public preliminary hearing and went through the case law that the Tribunal will consider in order to give Mr Alukpe the

opportunity to complete a revised application for amendment, as I found the email of 6 February to inadequately set out the reasons why such an application should be granted.

59. As Miss Bowen correctly pointed out, in **Remploy Ltd v Abbott and others** UKEAT/0405/14, the EAT, when allowing an appeal against a Tribunal's decision to permit amendment to claims which had been professionally drafted, stressed that:

"It is essential before allowing an amendment that it must be properly formulated, sufficiently particularised, so the respondent can make submissions and know the case it is required to meet."

The EAT held that, without a properly particularised application for an amendment an employment judge is "*simply not in a position to consider the effect of the proposed amendments*."

60. I find that I was in the position described by the EAT above in this case. The claimant is seeking to bring claims that go back seven years. He has engaged solicitors to act from him from the outset of these proceedings. He resigned and raised a grievance on 9 July 2020. He lodged his claim on 4 November 2020. The respondent filed its ET3 on 17 December 2020, but the claimant only made his application to amend on 6 February 2020 and gave little explanation for the delay or much detail about the application to amend.

61. The claimant also seeks to add a large number of comparators to his claim after the respondent filed a lengthy document that sought to rebut the validity of the actual comparators he had named in his ET1, as well as naming hypothetical comparators.

62. I also accepted Miss Bowen's submission that the claimant's application to amend had given no details of how the new allegations of harassment related to the protected characteristic of race (or marital status, but see my comment at paragraph 5 above) as being correct. **Remploy Ltd v Abbott and others** applies.

63. We then discussed the possibility of listing the final hearing now, in order to book a date and avoid slipping into 2022. Unfortunately, it was not possible to do this. The main reason was that a potential witness for the respondent who would probably be called to rebut an allegation of harassment is on maternity leave and is not available until early 2022 in any event. When considered with the fact that I was unable to determine with any certainty what claims the claimant would be permitted to advance to a final hearing, I decided that a provisional listing would not be likely to save time or cost or promote the likelihood of a fair and just hearing.

64. I reminded both parties that Rule 2 requires both parties to assist the Tribunal to further the overriding objective and, in particular, co-operate generally with each other and the Tribunal.

Applications

65. The claimant has applied to amend his ET1.

66. The respondent has applied for a strike out and/or deposit order in respect of the claimant's discrimination claims.

67. Mr Alukpe indicated that he may file an application for a deposit order against the respondent in respect of its response.

Claims and Issues

68. It was not possible to determine the claims and issues at this hearing. I have set out a very brief case summary below.

Further information

69. By **4:00pm on Friday 12 March 2021**, the claimant shall serve and file a formal written application to amend his ET1/ ET1 Grounds on the respondent and the Tribunal. That application shall be in respect of the matters set out in red in the document titled "CLAIMANT'S ET1 GROUNDS (as amended 5 February 2021)" attached to Mr Alukpe's email to the Tribunal of 6 February 2021. The application shall specifically address the principles relating to applications to amend set out in the case of **Selkent Bus Company Ltd v Moore** [1996] ICR 836 and the related jurisprudence contained in:

    69.1 **Abercrombie v Aga Rangemaster Ltd** [2013] EWCA Civ 1148;
    69.2 **Evershed v New Star Asset Management** UKEAT/0249/09 (31 July 2009, unreported);
    69.3 **Ali v Office of National Statistics** [2004] EWCA Civ 1363;
    69.4 **Robertson v Bexley Community Centre** [2003] EWCA Civ 576;
    69.5 **Abertawe Bro Morgannwg University Local Health Board v Morgan** UKEAT/0305/13;
    69.6 **Accurist Watches Ltd v Wadher** UKEAT/0102/09/MAA;
    69.7 **Remploy Ltd v Abbott and others** UKEAT/0405/14; and
    69.8 Any other precedent case that he feels is relevant to the issues to be decided at the public preliminary hearing.

70. By **4:00pm on Friday 12 March 2021**, the claimant shall write to the respondent and the Tribunal with a full explanation (with reference to the principles set out in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11**) of how or why the new comparators named in the document titled "CLAIMANT'S ET1 GROUNDS (as amended 5 February 2021)" attached to Mr Alukpe's email to the Tribunal of 6 February 2021, relate to the new claims that are the subject of the application to amend, and/or the existing claims and why they were not named in the original ET1 and appended document.

71. By **4:00pm on Friday 12 March 2021**, the claimant shall write to the respondent and the Tribunal setting out how the new claims of harassment are related to the protected characteristic of race, with reference to the principles set out in **Remploy Ltd v Abbott and others** UKEAT/0405/14.

72. If the claimant wishes to apply for a strike out or deposit order in respect of all or part of the respondent's response, a fully particularised application for same must be received by the Tribunal by **4:00pm on Friday 12 March 2021**.

73. By **4:00pm on Friday 26 February 2021**, the claimant shall write to the respondent and the Tribunal indicating if he will withdraw (or not proceed with application to amend to include in the case of the claim at §24.3) the claims of:

    73.1 Bullying;
    73.2 Equal Pay; and
    73.3 Harassment related to marital status.

    If he wishes to continue with any or all of the above claims, he must explain why the Tribunal has jurisdiction to hear them by the same date.

74. The respondent has leave to file an amended strike out/deposit application by **4:00pm on Friday 16 April 2021**.

Documents

75. By **4:00pm on Wednesday 7 April 2021**, the respondent must send the claimant a list and copies of all documents relevant to the issues to be determined at the public preliminary hearing on 23 June 2021.

76. By **4:00pm on Wednesday 14 April 2021**, the claimant must send the respondent a list and copies of any other documents relevant to the public preliminary hearing on 23 June 2021. The documents disclosed by the claimant shall include documents that set out his financial status in case the Employment Judge at the public preliminary hearing wishes to consider making a deposit order against him.

77. Documents includes recordings, emails, text messages, social media and other electronic information. You must send all relevant documents you have in your possession or control even if they do not support your case. A document is in your control if you could reasonably be expected to obtain a copy by asking somebody else for it.

File of documents

78. By **4:00pm on Wednesday 5 May 2021**, the claimant and the respondent must agree which documents are going to be used at the public preliminary hearing.

79. The respondent must prepare a file of those documents with an index and page numbers. It must send a hard copy and an electronic copy in PDF format to the claimant by **4:00pm on Wednesday 12 May 2021**.

    79.1 Pages containing images of text should have been subjected to optical character recognition (this is the process by which images of text are turned into text that can be searched and highlighted);

79.2 An index or table of contents should be prepared (ideally with entries hyperlinked to the indexed document);

79.3 Pages should appear the right way up in portrait mode. If an original document is in landscape, it should be inserted so that it can be read with a 90-degree rotation clockwise;

79.4 Pages must be numbered so that, including the index, they correspond to the automated PDF numbering system;

79.5 All significant documents and all sections of the electronic bundle should be bookmarked for ease of navigation, with an appropriate description as the bookmark;

79.6 If documents are to be added to an electronic bundle after it has been delivered to the tribunal or after the hearing has started, the tribunal should be consulted on how it should be incorporated. This is because the members of the tribunal may already have started to mark up the electronic bundle provided;

79.7 If a PDF bundle is around 20MB, it will probably be too large to send to the tribunal as a single email attachment. If so, parties should contact the relevant regional office of the Employment Tribunals to ask what alternative method of delivery (such as a cloud-based file-storing or file-sharing service) is available. It is not helpful for the tribunal to receive a series of separate emails each attaching different portions of the bundle, and:

79.8 Where a PDF bundle is transmitted by email, the subject line should include the case number, the shortest comprehensible version of the case name and the hearing date. If it is for use in a remote hearing, the phrase “remote hearing” should be included in the subject line.

80. The claimant and the respondent must both have a copy of the file available at the public preliminary hearing for their own use and the use of any witnesses.

81. The respondent must send an electronic copy of the file to the Tribunal for it to use by **4:00pm on Wednesday 16 June 2021**.

Witness statements

82. The claimant and the respondent must prepare witness statements for use at the hearing. Everybody who is going to be a witness at the hearing, including the claimant, needs a witness statement.

83. A witness statement is a document containing everything relevant the witness can tell the Tribunal. Witnesses will not be allowed to add to their statements unless the Tribunal agrees.

84. Witness statements should be typed if possible. They must have paragraph numbers and page numbers. They must set out events, usually in the order they happened. They must also include any evidence about financial losses and any other remedy the claimant is asking for. If the witness statement refers to a document in the file it should give the page number.

85. At the hearing, the Tribunal will read the witness statements. Witnesses may be asked questions about their statements by the other side and the Tribunal.

86. The claimant and the respondent must send each other copies of all their witness statements by **4:00pm on Wednesday 26 May 2021**.

87. The claimant and the respondent must both have copies of all the witness statements available at the hearing for their own use and the use of all witnesses.

88. The respondent must send an electronic copy of all the witness statements to the Tribunal for it to use by **4:00pm on Wednesday 16 June 2021**.

Variation of dates

89. The parties may agree to vary a date in any order by up to 7 days without the Tribunal's permission, but not if this would affect the hearing date.

About these orders

90. These orders were made and explained to the parties at this preliminary hearing. They must be complied with even if this written record of the hearing arrives after the date given in an order for doing something.

91. If any of these orders is not complied with, the Tribunal may: (a) waive or vary the requirement; (b) strike out the claim or the response; (c) bar or restrict participation in the proceedings; and/or (d) award costs in accordance with the Employment Tribunal Rules.

92. Anyone affected by any of these orders may apply for it to be varied, suspended or set aside.

Writing to the Tribunal

93. Whenever they write to the Tribunal, the claimant and the respondent must copy their correspondence to each other.

Useful information

94. All judgments and any written reasons for the judgments are published, in full, online shortly after a copy has been sent to the claimants and respondents at:

https://www.gov.uk/employment-tribunal-decisions

95. There is information about Employment Tribunal procedures, including case management and preparation, compensation for injury to feelings, and pension loss, here:

https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/

96. The Employment Tribunals Rules of Procedure are here:

https://www.gov.uk/government/publications/employment-tribunal-procedure-rules

97. The President of the Employment Tribunals has issued guidance on hearings. The hyper-link to the guidance is here:

https://www.judiciary.uk/wp-content/uploads/2013/08/14-Sept-2020-SPT-ET-EW-PG-Remote-and-In-Person-Hearings-1.pdf

98. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here:

https://www.gov.uk/appeal-employment-appeal-tribunal

CASE SUMMARY

99. The claimant was employed by the respondent, an independent technology innovation centre, as a Senior Electronic Engineer, from 5 December 2012 until 9 July 2020. Early conciliation started on 8 September 2020 and ended on 8 October 2020. The claim form was presented on 4 November 2020.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was A - audio. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
12 February 2021