EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107713/2019

Per Written Submissions

Employment Judge: M A Macleod

Miss Catherine Tansey	Claimant Represented by Mr R Holland Solicitor
The City of Edinburgh Council	Respondent Represented by Ms F Ross Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's application to amend her claim is granted, subject to the deletion of one sentence, in paragraph 14 of the claim as amended, namely: **"The Claimant submits that the Respondents discriminated against her in respect of their transformation review programme and policy."**

REASONS

1. In this case, the claimant presented a claim to the Employment Tribunal on 15 July 2019. On 27 January 2020, the claimant presented to the Tribunal a document which contained a request that the paper apart to the ET1 be "amended" in terms set out thereafter, under the heading "Further and Better Particulars for the Claimant".

2. The respondent set out their objections to the terms of this document, and a number of associated comments, in an email dated 30 January 2020.

3. Following further correspondence and a Preliminary Hearing, it was determined by the Tribunal, and agreed by the parties, that the issues should be considered by way of written submissions. Further time was then provided to the parties to provide such further submissions as they considered appropriate.

4. This Judgment sets the Tribunal's decision and reasons therefor out in the following sequence:

   a. Background

   b. The "Further and Better Particulars"

   c. The Claimant's Submissions

   d. The Respondent's Submissions

   e. The Relevant Law

   f. Discussion and Decision

Background

5. The claimant presented claims to the Employment Tribunal under section 95(1)(c) of the Employment Rights Act 1996; sections 15, 20, 21 and 26(1) of the Equality Act 2010; and Regulations 13 and 14 of the Working Time Regulations 1998.

6. A Preliminary Hearing, convened for the purpose of case management, took place on 9 December 2019 before Employment Judge Porter. In the Note following that PH, it was recorded, at paragraph 4, that the respondent had articulated in the ET3 and Agenda a list of Further and Better Particulars which they required for fair notice of the claimant's claim. Mr Holland, for the claimant, undertook to comply with that

requirement by 6 January 2020, and the respondent was given until 20 January 2020 to provide any further response.

7. In their Agenda to that PH, the respondent collated the points upon which further and better specification was sought by them in relation to the claimant's claims, as follows:

1. *"Full specification of the basis for any assertion that there has been conduct extending over a period in terms of section 123(3) of the Equality Act 2010 ("the Act").*

2. *Full specification of any grounds for the Claimant's assertion that it would be just and equitable to extend the time limit for raising the Claimant's claims in terms of section 123(1)(b) of the Act.*

3. *Full specification of the basis on which the Claimant alleges she is disabled for the purposes of section 6 of the Act, including whether she alleges that 'stress, anxiety and depression' constitute 3 separate disabilities of a single disability.*

4. *A copy of all medical evidence relied upon in this regard.*

5. *Full details of the compensation sought in respect of the claim.*

6. *Full details of any new work secured by the Claimant since the termination of her employment with the Respondent and full details of all efforts to mitigate her losses together with copies of all supporting documentation.*

7. *Clarification as to the relevance of the reference to payslips at paragraph 21 of the Paper Apart to the ET1.*

8. *Clarification as to the relevance of the assertion at paragraph 12 of the Paper Apart to the ET1 that the Respondent breached its duty of trust and confidence and its obligations under the Data Protection Act 1998.*

9. *Clarification as to the relevance of the assertion at paragraph 22 of the Paper Apart to the ET1 that the Respondent breached 'a number of its own policies, including its Stress Management and Fair Treatment at Work Policy'.*

10. *Full specification of all such breaches of policy.*

11. *Full specification of the repudiatory breach of contract relied upon by the Claimant.*

12. *Full specification of the basis for alleging that nay less favourable treatment complained of was <u>because of</u> her alleged disability.*

13. *Full specification of how the Claimant's workload put her at a substantial disadvantage compared with persons who are not disabled, recognising the amount of additional support provided and adjustments applied.*

14. *Clarification as to how it is said that 'sickness absence' amounts to a provision, criterion or practice ('PCP') applied by the Respondent to the Claimant and how this put her at a substantial disadvantage.*

15. *Full specification as to how the Respondent's 'Occupational Health Policies' and the position taken in respect of the Claimant's grievance put her at a substantial disadvantage.*

16. *Full specification as to how the adjustments which the Claimant asserts should have been made would have alleviated the alleged substantial disadvantage.*

17. *With reference to the other matters identified at paragraph 26 of the Paper Apart to the ET1 (which are not addressed above), full specification of:-*

    a. *the PCP which she alleges put her at a substantial disadvantage;*

    b. *the substantial disadvantage to which she says she was put;*

c. *in what way it is said that the adjustments identified in the Paper Apart to the ET1 would have alleviated that disadvantage.*

18. *In relation to the claim under section 15 of the Act, full specification of:-*

    a. *who made the alleged 'repeated remarks' and when*

    b. *who pushed the Claimant to attend meetings, what was said, then nature of the meetings and when it is said that this took place*

    c. *the alleged bullying, harassment and criticism by the Claimant's line manager and when it is said that this took place*

    d. *the 'something arising in consequence of' the Claimant's alleged disability which she says was the reason for the treatment about which she complains, and the condition on which she relies for this purpose*

    e. *the basis for alleging that the alleged treatment was <u>because of</u> the something arising in consequence of her alleged disability.*

19. *Full specification of the basis for any allegation that counselling arranged by the Respondent for the Claimant amounted to harassment under section 26 of the Act.*

20. *Full specification of the basis for any allegation that the process of matching or redeploying the Claimant into the LLDO post amounted to harassment.*

21. *Full specification of how it is said that the matters alleged at paragraph 16 of the Paper Apart to the ET1 related to the Claimant's alleged disability.*

22. *Full specification of the 'false statements' alleged to have been made, the date on which it is alleged that the statements were made and how the statements related to the Claimant's alleged disability.*

23. *Confirmation as to whether the Claimant is withdrawing her claim for breach of contract, given that it is not detailed at section 2.2 of her Agenda."*

8. It was in response to these requests that the claimant presented her further and better particulars on 27 January 2020.

The Claimant's "Further and Better Particulars"

9. The claimant presented a document headed "Further and Better Particulars for the Claimant", extending to 21 paragraphs over 10 pages.

10. The document was prefaced: "The Claimant would request that the current paper apart of the ET1 lodged on 15 July 2019 is amended in the following terms.

11. It is not necessary, at this stage, to lay out the terms of the further and better particulars in their entirety. Reference will be made to their terms when dealing with the submissions put forward by the parties.

12. The claimant sought to provide further particulars in response to the requests made by the respondent, and did so by addressing the claimant's disability status and the respondent's knowledge thereof; allegations of discrimination relating to the respondent's redeployment of the claimant and her subsequent experiences in her redeployed role; allegations setting out details of the claimant's sickness absence and its management by the respondent; allegations relating to the claimant's entitlement to holiday pay and provision of payslips; her grievance; the repudiatory breaches upon which the claimant's resignation was based; the withdrawal of the claimant's breach of contract claim; and allegations seeking to set out the basis of her claims under sections 15, 20 and 21 and 26 of the 2010 Act.

Claimant's Submissions

13. In the email of 27 January 2020, the claimant's solicitor simply tendered the Further and Better Particulars with no further comment.

14. When the respondent notified the claimant of their objections to the document, asserting that they amounted to an application to amend the claim, Mr Holland responded on 10 February 2020 by saying that this amounted to a "comprehensive and full response to the Respondents requests for specification in their CMD agenda". He also indicated that at that stage the claimant did not consider the particulars to amount to an application to amend the claim.

15. On 21 April 2020, in order to clarify the claimant's position, Mr Holland emailed the Tribunal to advise that if the Tribunal considered that it was necessary for an application to amend the claim to be made, then the claimant would make such an application formally. He said that the claimant's position is that the further specification is a "classic 're-labelling' exercise. No new legal claims had been added, and any new facts are closely connected with the original case.

16. Following the Order of the Tribunal following the Preliminary Hearing on 22 April 2020, Mr Holland tendered further submissions by email dated 13 May 2020.

17. His primary submission, as before, is that the further and better particulars do not amount to an application to amend the claim. The principles governing amendment apply when the claimant seeks to add a new type of claim or cause of action, and/or entirely new factual allegations not already identified in the ET1. He argued that the claimant was simply providing further and better particulars of the claim as requested at the previous PH, and giving additional factual material to give the respondent more detail of the claims made.

18. He went on to say that this did not amount to an attempt to introduce a new claim nor is it even a "re-labelling exercise". It is a better

particularisation of the incidents which occurred, and a better factual matrix following on new information being received from the claimant.

19. The legal conclusions set out in the ET1, he said, have not been altered in any way by the further particulars. The claimant told the respondent what her claims were on the first page of the ET1 paper apart, and these remain her claims

20. Mr Holland submitted that the factual assertions are already raised in the Et1, and the further information is simply an elaboration upon the facts already pled. As an example he referred to paragraph 13 of the original paper apart, which dealt with the claimant's new role and proposed redeployment, asserting that the claimant raised concerns about this and that a meeting was held prior to redeployment. The revisals submitted by the claimant in the new paragraph 14 simply add further detail about when the meeting was held and what happened in it. This is the pattern throughout the further particulars, he argued, and therefore no leave to amend is required.

21. Mr Holland referred to the case of **Ennever v Metropolitan Police UKEAT/0051/06** in which the EAT determined that an application to amend was not necessary in circumstances where the originating claim could be read as including the complaint under consideration even though additional information may be required. He submitted that this case is an example of a party seeking to develop the factual background to assist the Tribunal. The original case has not changed.

22. He went on to submit, alternatively, that if this argument is not accepted, leave to amend should be granted.

23. Referring to the principles in **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650**, he submitted that the balance of injustice and hardship would fall heavily in favour of the claimant, as an individual with a diagnosed depressive disorder who has worked at one institution for the majority of her professional life. She was unable to particularise her claim fully due to the setback to her mental health arising from her decision to

resign, and she added details to her claim at a point when her health had improved. This was designed to assist the Tribunal. The further particulars were submitted at the end of January 2020, and no full hearing has as yet been assigned to this case. No prejudice falls on the respondent if the application is granted, since they have ample time to investigate these matters further.

24. The claimant argues that the nature of the amendment is that of a minor matter rather than a substantial alteration to the claim. No new claim has been made. The original claim has defined the categories of discrimination relied upon clearly, and these have not been altered. No new cause of action arises.

25. Mr Holland submitted that the issue of time bar does not arise with the amendment, if that is what it is, since it is not a significant alteration to the claim and in any event gives rise to no new point, as the respondent has already sought to argue that the claim, in other respects, is time barred.

26. As to the timing and manner of the amendment, he submitted that reference should be made to the witness statement presented to the Tribunal from the claimant, explaining why the additional material has been produced at the stage it has. That clearly sets out, he said, the reason why she could not articulate her claim fully in the ET1, and that she was able to instruct her solicitors in November and December 2019 as to the further particulars. The delay then arose due to the Christmas and New Year break.

27. Mr Holland therefore invited the Tribunal to allow the application to amend the claim.

Respondent's Submissions

28. Having received the further and better particulars, the respondent presented an email to the Tribunal setting out their objections on 30 January 2020.

29. Ms Ross, for the respondent, submitted that the further and better particulars were contained in a document which was framed as an application to amend the claim, although no application had been made.

30. She pointed out that it was not clear which parts of the particulars were intended to respond to the requests made and that the claimant had not responded to all of the requests, in any event.

31. Subsequently, having received a copy of the ET1 with tracked changes highlighting the areas in which the alterations to the claim were to be made, Ms Ross presented her submissions to the Tribunal.

32. Firstly, she submitted that the further particulars were in fact an application to amend the claim. She argued that the circumstances envisaged by the claimant's submissions in which an application to amend is required, in terms of **Selkent Bus Co Ltd v Moore** 1996 ICR 836, were in fact wider, and the EAT in that decision had identified four categories of amendment:

    1. The correction of clerical and typing errors;

    2. The addition of factual details to existing allegations;

    3. The addition or substitution of other labels for facts already pleaded to and

    4. The making of entirely new factual allegations which change the basis of the existing claim.

33. Ms Ross then sought to identify the parts of the further and better particulars which were relevant to this discussion.

34. In paragraph 13, there was the addition of factual details to existing allegations. She pointed out that the respondent had not asked for further specification on the issue of knowledge of the claimant's alleged disability.

35. In paragraphs 14 and 15, there was the addition of factual details to existing allegations, the addition or substitution of other labels for facts already pleaded to and/or the making of entirely new factual allegations which changed the basis of the existing claim. She said that the claimant seeks to plead new alleged facts about the process by which the claimant was matched into the post of Lifelong Learning Development Officer, without the respondent having sought further particulars in this regard. The ET1 did not articulate a claim in respect of the matching process, providing background material instead.

36. She said that the claimant now alleges that the respondent discriminated against her in respect of their transformation review programme and policy, and treated her less favourably than her colleagues waiting to be redeployed or matched in who did not have her disability. Ms Ross suggested that it now appears that the claimant is alleging that this was an act of direct discrimination, though there is no reference to the transformation review programme and policy or the process of redeploying or matching in paragraph 23, despite extensive additions to the direct discrimination claim. If the claimant is making a claim of discrimination in respect of these matters, they constitute new alleged acts of discrimination not raised in the original ET1. In addition, these allegations have been raised substantially out of time, given that they took place in 2017 and involved different individuals to those referred to in the other acts of discrimination; therefore they cannot constitute conduct extending over a period of time in terms of section 123(3) of the 2010 Act.

37. Paragraph 17 amounts to the addition of factual detail to existing allegations.

38. Paragraph 19, she submitted, involves the substantial addition of factual details to existing allegations, the addition or substitution of other labels for facts already pleaded to and entirely new factual allegations changing the basis of the existing claim. In the seventh new paragraph, the claimant appears to be seeking to introduce a new alleged act of harassment, having not previously referred to the letter of 14 March 2019

inviting her to a Stage 1 absence meeting in her claim of harassment in the ET1.

39. Paragraph 20 involves the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, alleging for the first time that the alleged failure to make payment of the correct amount of accrued holiday pay was a fundamental breach of the claimant's contract of employment, entitling her to resign her position.

40. Paragraph 21 involves the addition or substitution of other labels for facts already pleaded to, including the first time an allegation has been made that the alleged failure to provide itemised payslips was a further breach of the contract of employment and/or to make a reasonable adjustment.

41. Paragraph 23 raises the allegation, for the first time, that the alleged acts of direct discrimination relies upon are also the basis for a claim of discrimination arising from disability, in addition to the alleged acts of discrimination arising from disability in the original ET1.

42. Paragraph 25 involves the complete re-writing of the claim for failure to make reasonable adjustments, arguing that the alleged requirement to complete and interview and/or probationary period, and the practice of making wage slips available electronically, put the claimant at a particular disadvantage, claims not made in the ET1.

43. In Paragraph 26, the claimant has, she submitted, added factual details to existing allegations.

44. Ms Ross went on to distinguish the case of **Ennever** from this case. There, she said, the claimant was unrepresented when she submitted her ET1, whereas in this case the claimant has had the benefit of legal representation for some time before presenting the ET1, which was a very full and detailed presentation of the claim.

45. She disagreed with the claimant's assertion that these are further and better particulars which do not amount to an amendment of the claim,

submitting that the claimant is seeking to introduce new allegations of discrimination and therefore must make an application to amend her claim.

46. Having invited the Tribunal to find that an application to amend the claim is necessary in these circumstances, Ms Ross then turned to whether the application to amend should be granted.

47. She helpfully clarified that the respondent does not object to the application to amend insofar as related to paragraphs 3, 6a, 6b, 7, 17, 22, 25(2), (3) and (4), and 26, 27 and 28.

48. The respondent objects to the amendments made in the following paragraphs:

- 14 and 15 – new alleged acts of discrimination;
- 19 – new alleged act of harassment;
- 20 – a new alleged breach relied upon for the constructive unfair dismissal claim;
- 21 – a new alleged breach relied upon for the constructive unfair dismissal claim, and a new failure to make a reasonable adjustment; and
- 25(1) and (5) – new alleged failure to make a reasonable adjustment.

49. Ms Ross submitted that the nature of the amendments to which objection is taken by the respondent are more significant and substantial due to their potential effect upon the claim as a whole, a considerable time after she presented her claim and even longer after the alleged events in question took place.

50. With regard to time limits, Ms Ross submitted that each of the allegations to which objection is taken is out of time, some up to more than 2 years from the date upon which the alleged event is said to have taken place.

They would have been out of time even if they had been included within the original ET1. They do not amount to a continuing course of conduct, and no application has been made for an extension of time within which to lodge the claims. She submitted, in light of the recent English EAT decision in **Galilee v Commissioner of Police of the Metropolis UKEAT/0207/16**, that the Tribunal could reserve the question of time bar in these respects to a hearing on the merits.

51. However, balancing the respective injustice and hardship to the parties in determining this application to amend, she submitted that if the matter were reserved to the final hearing, the respondent would be prejudiced in that they would have to prepare a defence to all claims on the facts pled, while allowing the claimant to pursue claims which are substantially out of time. Therefore these amendments should be refused on the grounds of prejudice and hardship to the respondent if they were granted.

52. With regard to the timing and manner of the application to amend, Ms Ross set out the background to the application, which was made more than 6 months after the original ET1 was submitted. Although her witness statement says that the symptoms of her depressive disorder were particularly severe between April and July 2019, no medical evidence has been presented on the claimant's behalf to support this. In addition, she says she could only remember matters in their generality, but Ms Ross pointed out that she was still able to instruct her solicitor to present an 11 page claim setting out quotes by her manager dating back to November 2017.

53. She also submitted that the information presented suggests that the claimant's representatives had the information available to them to present the application to amend by 18 November 2019, but the amendment was not presented until nearly 2 months later. This delay is not explained. Witnesses will require to recall events as far back as August 2017. The balance of hardship falls in favour of refusing the application to amend insofar as relating to the opposed paragraphs. She pointed out that while the claimant suggests that the respondent is a large

local authority, the respondent is subject to many financial demands on limited resources, including those placed upon it by the Covid-19 pandemic. No credible reason has been given for the claimant's failure to include the matters raised in the amendment in her original claim.

54. Accordingly, Ms Ross invited the Tribunal to reject the application to amend insofar as relating to the specific paragraphs 14, 15, 19, 20, 21 and 25(1) and (5) of the amended Paper Apart.

The Relevant Law

55. It is appropriate to refer to the overriding objective of the Employment Tribunal, set out at Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:

> *"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."*

56. There is a useful formulation of the types of amendment which are typically put forward by parties in Tribunal proceedings in *Harvey in Industrial Relations and Employment Law,* Division T at paragraph 311.03:

> **"A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an**

existing claim, but without purporting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim; and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all."

57. An important authority in this area is **Selkent Bus Co Ltd v Moore** 1996 ICR 836. At p.843, Mummery J, as he then was, said:

"(4) 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.

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

(a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the

time limit should be extended under the applicable statutory provisions, e.g. in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978.

(c) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay 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".

58. The Tribunal also referred to **Office of National_Statistics v Ali [2004] EWCA Civ 1363**. At paragraph 39, Lord Justice Waller states:

*"In my view the question whether an originating application contains a claim has to be judged by reference to the whole document. That means that although box 1 may contain a very general description of the complaint and a bare reference to the particulars to an event…, particularisation may make it clear that a particular claim for example for indirect discrimination is not being pursued. That may at first sight seem to favour the less particularised claim as in **Dodd**, but such a general claim cries out for particulars and those are particulars to which the employer is entitled so that he knows the claim he has to meet. An originating application which appears to contain*

full particulars would be deceptive if an employer cannot rely on what it states…"

59. In paragraph 40, he went on: *"One can conceive of circumstances in which, although no new claim is being brought, it would, in the circumstances, be contrary to the interests of justice to allow an amendment because the delay in asserting facts which have been known for many months makes it unjust to do so… There will further be circumstances in which, although a new claim is technically being brought, it is so closely related to the claim already the subject of the originating application, that justice requires the amendment to be allowed, even though it is technically out of time…"*

Discussion and Decision

60. The two issues before the Tribunal at this stage are:

    a. Whether the Further and Better Particulars submitted by the claimant on 27 January 2020 amount to an application to amend the claim;

    b. If so, whether that application to amend should be granted.

Further and Better Particulars or Application to Amend?

61. The claimant argues that the Further and Better Particulars amount to no more than an expansion of the claims already made, in order to assist the Tribunal and the respondent, in response to the requests for further particulars made by the respondent. The respondent argues that they go beyond further particulars and seek to alter the basis of the claims made to a significant degree, and therefore must be treated as an application to amend.

62. It seems to me that the claimant's argument, based on Ennever, that this exercise amounts to no more that developing the factual matrix of the case, does not address fully the nature of the new particulars. This is a case, as the respondent points out, where the original claim was detailed and complex, and was drafted with the benefit of legal advice, whereas in Ennever, the claim was drafted by an unrepresented claimant who was

unclear in the presentation of the complaints to be made. The context is entirely different, and accordingly I do not consider that the principle set out by the claimant in reliance upon Ennever applies to these circumstances.

63. The length of the further particulars and the detail now contained demonstrate that the claimant wishes to add considerably more to the claim than was set out in the original ET1, notwithstanding its length. As a result, it appears to me that the categories of averment envisaged by Selkent – the addition of factual details to existing allegations, the addition or substitution of other labels for facts already pled and the making of new factual allegations which may change the basis of the claims made – are contained within the further particulars.

64. As a result, it is proper, in my judgment, to deal with this document as an application to amend the claim made by the claimant in this case.

Should the Application to Amend be granted?

65. The application to amend is to be granted, unopposed, in part, since the respondent only opposes a number of the paragraphs of the paper apart contained within the document headed “Further and Better Particulars”.

66. It is to the disputed paragraphs that the Tribunal must look, in order to determine this matter.

67. The original claim identified, in paragraph 8.1, a number of heads of claim: unfair dismissal, discrimination on the grounds of disability, and claims in relation to notice pay, holiday pay, arrears of pay and other payments.

68. In the Paper Apart to the ET1, paragraph 5 provided more detail as to the heads of claim relied upon:

a. Constructive unfair dismissal (sections 94 and 95 of the Employment Rights Act 1996);

b. Direct disability discrimination (section 13, Equality Act 2010);

c. Failure to make reasonable adjustments (sections 20 and 21 of the 2010 Act);

d. Discrimination arising from disability (section 15, 2010 Act);

e. Harassment (section 26(1) of the 2010 Act);

f. Unlawful deductions from wages (section 13, Employment Rights Act 1996) and

g. Breach of Regulation 13(9) of the Working Time Regulations 1998.

69. The Paper Apart went on to set out the substance of the claim in some detail, over 10 pages in total.

70. Turning, then, to the disputed areas in which amendment is sought, it is appropriate to consider each paragraph affected.

Paragraphs 14 and 15

71. In the Further and Better Particulars, the claimant seeks to add averments to paragraph 14 and 15 about the process by which the claimant was matched into the post of Lifelong Learning Development Officer (LLDO).

72. The respondent makes the point that the amendment seeks to add factual details to existing allegations, to add or substitute other labels for facts already pled and/or to make entirely new factual allegations which change the basis of the original claim.

73. In my judgment, it is quite correct to say that this amendment seeks to add factual details to existing allegations. The claim already sets out a detailed narrative, which includes reference to the redeployment of the claimant to the LLDO role (a role which, in paragraph 13 of the ET1, was described as being “very different”). The amendment seeks to add further detail to that process, and to that extent it is entirely legitimate.

74. It is also my judgment that the claimant is seeking to re-label facts in this part of the claim in making an allegation that she was discriminated against in respect of their transformation review programme or policy. There is a difficulty in this averment in that it lacks any precision: "in respect of" is a very general connective phrase which points in the direction of the programme or policy, but it is not set forth in clear terms in that averment how the claimant alleges that she was discriminated against, or under what section of the Equality Act 2010 this part is said to fall.

75. However, the averment is inserted after the original averments that the claimant believed the new role (of LLDO) would be unsuitable for her, and, having raised concerns about this, a meeting took place prior to redeployment. The insertion then expands upon what happened at the meeting, and makes the allegation that she was discriminated against (as above), following which, in the original ET1, she stated that she believed she was misled at that meeting.

76. It is perfectly clear that the claimant was already making criticisms of the way in which that meeting was handled, and about the suitability of the new role into which she was redeployed. As a result, I have concluded that the amendment proposed to paragraph 14 does not add significantly to the complaints already made, and provide further details of the facts to be relied upon.

77. The difficulty, however, arises in relation to the vagueness of the statement that "The Claimant submits that the Respondents discriminated against her in respect of their transformation review programme and policy." When referring to the subsequent paragraphs under the heading "Legal Conclusions", there is no further explanation as to the meaning of this sentence, and in my judgment, to allow it to proceed without clarification would introduce a degree of uncertainty to the claim which would not be fair to the respondent nor helpful to the Tribunal. It might allow the claimant to argue that a separate head of claim has in fact been

established in this sentence, when it is not at all clear at this stage what the claim may amount to.

78. Accordingly, the nature of the amendment in paragraph 14 is relatively minor, and amounts to a factual expansion of the claim already made, which is helpful to the Tribunal and to the respondent; I agree with the respondent that the applicability of time limits, which were relevant to the terms of the original claim, may be reserved for the final hearing, and therefore since significant factual evidence will be required in order to determine that matter, it would not be in the interests of justice to deal with that matter at this stage; and the timing and manner of the application arise from the case management process which was ongoing, and from the request by the respondent to have further and better particulars of the claim, and accordingly, they were reasonable.

79. The balance of prejudice and hardship must be considered. In my judgment, it would not add significantly to the burden upon the respondent to allow this amendment, subject to one point which I shall deal with below. The facts relating to the redeployment of the claimant, and the meeting now dealt with in more detail, were already the subject of the claim to be defended, and accordingly there is no significant prejudice to the respondent in permitting the addition of the amended phrases in paragraph 14.

80. The exception to this, however, is **that I am not prepared to allow the inclusion of the sentence: "The Claimant submits that the Respondents discriminated against her in respect of their transformation review programme and policy."** In my judgment, that sentence adds nothing to the claim since it does not specify how, or on what statutory basis, it is suggested that the respondent discriminated against the claimant, and in what way they did so in respect of the transformation review programme or policy.

81. Accordingly, it is my judgment that **the amendment to paragraph 14 should be allowed, subject to the deletion of that sentence.**

82. With regard to paragraph 15, in my judgment, this proposed amendment again expands upon the claim already made in the ET1, and simply defines it more clearly as a claim of less favourable treatment on the grounds of disability. The paragraph adds that she was not considered for any roles based on her old job, and provides a named comparator, but in my judgment, this is precisely the further particulars which the respondent was seeking, and amounts to an expansion of the existing claim rather than the introduction of a new claim. The claimant has already made a claim under section 13 of the 2010 Act, and she has already complained that her treatment in being required to be interviewed for the redeployment position was a discriminatory act. The amendment simply sharpens this by making clear the basis for the claim.

83. Accordingly, I consider that the nature of the amendment is not significant; that the issue of time bar may be considered along side the existing issue of time bar at the final hearing; and the timing and manner of the application are not unreasonable. The balance of prejudice would fall on the claimant in the event that the application to amend were refused, while the respondent was already on notice that the claimant considered the redeployment process to have been discriminatory. She has added the allegation that she was not considered for any roles based on her new job, but again this amounts to the provision of further detail rather than a separate head of claim, and it is therefore my judgment that **the application to amend paragraph 15 should be allowed.**

Paragraph 19

84. The next paragraph under consideration is paragraph 19.

85. The respondent objects to this amendment on the basis that it amounts to the substantial addition of factual details to existing allegations, the addition or substitution of other labels for facts already pled and the making of new factual allegations which change the basis of the existing claim.

86. In this paragraph, the claimant seeks to delete a significant portion of the existing text and replace with seven new paragraphs. The majority of these paragraphs amount to factual averments, which expand upon what was originally pled. The respondent observes that the claimant now refers to a letter, not previously mentioned, inviting her to a Stage 1 absence meeting, dated 14 March 2019. In the original ET1, the claimant averred that Scott Neill made repeated accusations to the claimant that she had failed to turn up to a Stage 1 Absence Hearing, and had sent her numerous letters stating that she had failed to turn up to a Stage 1 Absence Hearing.

87. It appears to me that this is the provision of greater specification and detail of the sequence of events which was already narrated in paragraph 18 (now renumbered 19) in the ET1. The expansion of the factual narrative is considerable, but in my judgment, if the facts now set out had been led in evidence based on the original ET1, it is unlikely that any objection to their relevance would have been upheld. In the section dealing with the letter of 14 March 2019, there is further reference to the respondent's alleged insistence that she had failed to attend a Stage 1 Absence Meeting in December 2018, which is consistent with the terms of the original ET1.

88. The primary issue relating to this part of the amendment is the reference to the claimant feeling harassed on the grounds of her disability. The respondent objects to this as being a new allegation, or a fresh development in the harassment claim which did not appear in the original claim. However, the complaint made in this regard about the way in which the claimant was being treated in the absence management process, which she considered to be discriminatory on the grounds of her disability, did already appear in the ET1 in paragraph 18 as it was. She was complaining that she believed that the respondent was using the absence management process, and criticising her for missing absence meetings which she had not, in such a way as to leave her feeling, in the rather inelegant phrase of the amendment, "pushed out the door".

89. It is correct to say that the amendment puts this firmly into the context of the harassment claim which was laid out in the ET1, rather than in the more general context of discriminatory treatment into which it fell there. However, there is no doubt that the respondent has been put on notice that it faces a claim of harassment on the grounds of disability in the ET1, and this is simply a development of that claim, with greater specification.

90. The nature of the amendment, therefore, is not a significant alteration of the claim, but a development and expansion of the harassment claim already made, in response to a request by the respondent for that further specification.

91. The time bar issues which arose in the original claim continue to arise, and in these circumstances, I consider that the time bar points made by the respondent require to be reserved to the final hearing for the reasons set out above.

92. The manner and timing of the application, as before, arise out of the ongoing case management of this case, and while the pleadings are considerably lengthened by the amendment, they do provide the respondent with more information upon which to prepare their defence to the claims made. For that reason, it appears to me that the prejudice of not granting the application to amend would fall heavier upon the claimant than any decision to allow it would fall upon the respondent, who are already on notice that their handling of the absence management process and the events surrounding that are at issue between the parties. The matter has now been clarified (if not simplified) in that the claimant now complaints that the respondent has harassed her on the grounds of disability in the manner specified.

93. Accordingly, it is my judgment that it is in the interests of justice that **the application to amend the claim in paragraph 19 (as amended) is granted.**

Paragraph 20

94. With regard to paragraph 20, the respondent identifies the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to.

95. In my judgment, the claimant has sought here to expand upon the narrative which she wishes to lay out before the Tribunal in relation to her claim that she is owed unpaid holiday pay, and accordingly she is simply doing what she was requested to do.

96. The fundamental objection to this paragraph, as I read it, is that it seeks to include the alleged failure to make payment of her correct amount of accrued holiday pay as one of the bases upon which the claimant resigned. In other words, the claimant now seeks to argue that this was a fundamental breach of the claimant's contract of employment.

97. In the context of the claim both in its original form and as now amended, I do not interpret this as an averment which means that this was the only repudiatory breach relied upon by the claimant, but that it was one of the factors which the claimant now wishes taken into account.

98. In my judgment, this is an averment which adds to the existing claim of constructive unfair dismissal, and seeks to develop and clarify the claimant's claim. I do not consider that the respondent will be significantly prejudiced by the inclusion of this allegation, and therefore in light of my previous findings about the nature, timing and manner of the amendment as well as the time bar considerations, **I am prepared to grant the claimant's application to amend the claim in relation to paragraph 20 (as amended).**

99. I should observe that the fact that the claimant has now sought to make this averment, not having made it in her ET1, may be a relevant matter for the Tribunal to consider when determining the constructive dismissal claim, but that is not a factor which persuades me at this stage to refuse to grant the application to amend.

Paragraph 21

100. The existing claim made a complaint that the claimant had not received itemised payslips. The amendment at paragraph 21 seeks to clarify the context in which that complaint falls, within the heads of claim already set forth in the ET1. The claimant now wishes to label this complaint as both a breach of the claimant's contract of employment and a failure to make a reasonable adjustment.

101. It is said that this failure was a "further breach" of the claimant's contract. It is not specifically pled that this was a fundamental or repudiatory breach of the claimant's contract, but it is implied that this is so. Again, the fact that the claimant has changed her pleadings at this stage may be a relevant matter at the hearing on the merits of this case, but I am persuaded that it is appropriate to allow the application to amend to be granted as a re-labelling of the existing complaints made in the ET1 about the failure to provide payslips.

102. Accordingly, it is my judgment that **the application to amend at paragraph 21 should be granted.**

Paragraph 25(1) and (5)

103. The respondent points out that the claim, under Legal Conclusions, that the respondent failed to make reasonable adjustments, has been entirely rewritten in the application to amend. The objection relates, however, specifically to paragraphs (1) and (5) of the new paragraph 25.

104. In paragraph 25(1), the claimant now avers that the alleged requirement for employees to complete an interview and/or probationary period put the claimant at a particular disadvantage, which the respondent says is not a claim made in the original ET1. In paragraph 25(5), the claimant now avers that the practice of making wage slips available electronically placed the claimant at a substantial disadvantage, and again the respondent says that that was not averred in the original ET1.

105. That ET1 alleged that the respondent had failed to make any reasonable adjustments in relation to the claimant. The respondent accepts that the other paragraphs set out in the amendment under paragraph 25 are not objectionable. The respondent was already on notice that the claimant wished to argue that there were failures to make reasonable adjustments, and this amendment amounts to an application to expand upon the specific allegations made. The reasonable adjustments which the claimant now seeks to rely upon in (1) and (5) relate to matters which were already contained in the ET1, namely complaints about the redeployment process and the failure to provide itemised payslips.

106. In all of the circumstances, it is my judgment that the respondent will not be significantly prejudiced by the addition of these paragraphs to the claim. They relate to matters of which the claimant had already given them notice, albeit not in the precise terms now put forward. It is quite correct that the claimant has sought to widen the scope of the claim, but at the same time she has now placed in legal context the narrative she had already set out, to some extent, relating to these two areas. The respondent was required already to address the evidence to be put forward by the claimant and will not suffer any significant prejudice in having to defend the more specific complaints now put forward.

107. Accordingly, taking all of the factors above into account, I have concluded that **the claimant's application to amend paragraphs 25(1) and (5) should be granted**.

108. It is therefore my conclusion that the claimant's application to amend her claim should be granted in its entirety, subject to the deletion of the short sentence identified in paragraph 14 of the amended ET1.

109. I should say that I have considerable sympathy with the respondent's position in this exercise. The claim has been set out in its original form in very great length, and has been quite significantly lengthened by the amendment. It seems to me that the claim falls into the category recently made the subject of strong observations by the Employment Appeal

Tribunal in **C v D UKEAT/0132/19/RN,** in that the narrative form followed here resembles a witness statement on occasions. However, at the same time, it seems to me that the legal conclusions sought are set out more clearly than they appeared to be in that case.

110. This has not been a straightforward exercise, as will be apparent from the length of this Judgment. However, I have concluded that it is in the interests of justice that the claimant's application to amend should be granted.

111. It follows from that decision that the respondent must now be given the opportunity, should they be so advised, to respond to the terms of the amended claim, and they are requested to do so within 28 days of the date of this Judgment. I propose that a further Preliminary Hearing be listed for the purposes of case management once any response is received, in order to make progress in this long-running case.

Employment Judge: Murdo Macleod
Date of Judgment: 05 October 2020
Entered in register: 06 October 2020
and copied to parties