Case number 2603505/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr D Martin

Respondent: WM Morrisons Supermarkets Plc

Region : Nottingham Employment Tribunal

On: 2 September 2021

Before: Employment Judge Broughton

JUDGEMENT ON RECONSIDERATION

The application to amend the claim to include an age discrimination claim is **not** well founded and is refused.

REASONS

Age Discrimination

1. The Tribunal of its own motion has reconsidered its judgment dated 17 August 2021 pursuant to rule 70, the respondent having brought to the Tribunal's attention that the judgment of the 17 August 2021 failed to include its decision on the age discrimination claim.

2. The original judgment and its findings are varied herewith only to the extent that this judgment on reconsideration addresses the outstanding age discrimination point based on the evidence presented at the hearing on the 7 and 8 June 2021. This judgment must therefore be read alongside the findings in the 17 August 2021 judgment.

Preliminary Closed Hearing – 9 December 2020

3. There was a preliminary hearing before Employment Judge Ahmed on 9 December 2020. The record of that hearing sets out the claims being pursued which included age discrimination.

4. Employment Judge Ahmed referred to the claimant providing a considerable amount of documentation which whilst lengthy did not on the fact of it appear to suggest that the various complaints have reasonable prospects of success. It was also recorded that it was not possible at that hearing to accurately define the issues at that stage.

5. The case was listed for a preliminary for 2 days to determine;

- *Whether the claimant was a disabled person within the meaning of section 6, and schedule 1 of the Equality Act 2010 in respect of the alleged impairments of stress, anxiety and depression;*

- *To determine whether* ***any or all of the complaints*** *or any allegations or arguments should be struck out if it is considered they have no reasonable prospect of success within the meaning of Rule 37 (1) (a) of the Employment Tribunal Rules of Procedure 2013;*

- *Alternatively to determine whether the claimant should pay a deposit as a condition of continuing with any or all of the complaints if it is considered that they have little reasonable prospect of success and if so to decide the amount of the deposition to be ordered;*

- *To make such case management orders as are necessary for the future conduct of the case*

Amendment Application

6. On 8 May 2020 the claimant by email to the Tribunal and respondent, stated that he wanted to amend his claim to "*ensure sex and equal pay is confirmed and added*" to his claims. The claimant did not set out details of the claim but referred to the complaints being 'visible throughout' his employment and in Tribunal proceedings and being linked to the existing claim.

7. On the 14 May 2021 Employment Judge Heap commenting on the amendment application, informed the claimant that before that can be considered further the claimant would need to set out a draft of the amendment that he wants to make setting out both the factual and legal basis of the additional complaints and informed him that;

"He should make that application sooner rather than later and it can be determined at the forthcoming preliminary hearing."

8. A copy of the Presidential Guidance was attached with the letter from Employment Judge Heap. No application setting out the details of the amendment was provided by the claimant.

9. The claimant did not make an application to amend the age discrimination claim.

Hearing

10. At the preliminary hearing on 7 and 8 June 2021 the parties had prepared a bundle of documents and the claimant had produced a witness statement and gave oral evidence. The parties made submissions on the issues to be determined as recorded in the 21 August judgment and this included the age discrimination claim. References in this judgment to pages number in brackets, are references to the joint bundle produced at the 7 and 8 June 2021 hearing.

List of issues

11. I prepared a document on 7 June 2021 (following the hearing on the first day) setting out a draft list of issues which sought to reflect the further information provided by the claimant during the course of the hearing. The document was provided to the parties on the morning of the 8 June and they were asked to confirm agreement to the same. Neither party sought to dispute that it

captured what had been discussed. The list of issues included the further information provided by the claimant. The below is the list of issues which were prepared to the extent that it relates to the age discrimination claim;

12. ***List of issues***

1. ***Time limits***

1.1 *Were the claims brought in time.*

1.2 *Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:*

1.2.1 *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?*

1.2.2 *If not, was there conduct extending over a period?*

1.2.3 *If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?*

1.2.4 *If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:*

2. ***Direct age discrimination (Equality Act 2010 section 13)***

2.1 *The claimant was 47 at the time of the redundancy selection process. He complains that out of 17 Managers whose roles were removed, all were given alternative management roles apart from the claimant and one other employee who he believes was older than him.*

2.2 *Note : The respondent did not during this hearing rebut that the factual basis of the claim however, the claim had not been set out in the claim form or in the additional document which the claimant asserts he sent in with the claim form but which the tribunal did not receive (page 40 of the bundle) and thus had not been aware of the basis of the claim before today's hearing.*

2.3 *Did the respondent do the following things:*

2.3.1 *Not offer the claimant a managerial post as alternative employment*

2.4 *Was that less favourable treatment?*

The Tribunal will decide whether the claimant was treated worse than someone else – a "comparator" – was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/s/he was treated worse than someone else would have been treated.

The claimant says s/s/he was treated worse than the other managers selected for redundancy.

2.5 *If so, was it because of age?*

2.6 *Did the respondent's treatment amount to a detriment?*

2.7 *Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:*

2.7.1 [ ]

2.8 *The Tribunal will decide in particular:*

2.8.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

2.8.2 could something less discriminatory have been done instead;

2.8.3 how should the needs of the claimant and the respondent be balanced?

Age discrimination – findings of fact

13. The claimant accepted during the preliminary hearing on 7 and 8 June 2021, that there was no reference to an age discrimination claim in the claim form or the document which he had attempted to file with his ET1 (p.40-43) and which I refer to in this judgment as the Supplemental Document. The only reference to an age discrimination claim was the ticking of the box at paragraph 8.1 in the ET1.

14. The details of the claim as set out in the claim form, allege that the claimant's selection for redundancy was because the claimant had raised issues at work; "*related to health and safety and failure to adhere to proceeds and procedures and other working practices related to my role and as a union representative*" (page 6 claim form). There is no reference to selection or not being offered another role because of the claimant's **age.**

15. In the Supplemental Document which the claimant attempted to file alongside his claim form, he alleges that;

" *I was dismissed because I challenged the process and working practices at my store" and*

"As a result of my appealing the decision and raising whistleblowing issues I was then made redundant despite having been given a customer assistant role which I had accepted"

16. The Supplemental Document is quite detailed, running to over two typed pages. It makes repeated reference to being discriminated against because of raising issues, including health and safety, being asked to work an unreasonable amount of time with no overtime paid and of the claimant challenging that colleagues were doing the same job and paid differently . There is throughout that document, no reference to the claimant's age, the age of other staff or indeed any allegation that his selection or treatment in terms of alternative employment had anything to do with age.

17. The identification of an age claim in the record of the case management hearing with Employment Judge Ahmed appears therefore to have been based only on the ticking of the box in the claim form. There is no reference to the claim otherwise in the case management summary, there is no identification of the type of discrimination being alleged in terms i.e. whether it is direct etc or even what the alleged less favourable treatment is alleged to be.

18. The grounds of resistance denied the allegation of age discrimination while making the point that the respondent was not aware of what the claim was.

19. Within the bundle prepared for the preliminary hearing on 7 and 8 June, was a document produced by the claimant in response to the grounds of resistance which had been sent by email to the Tribunal on 2 December 2020. The document (pages 49 to 57) was a lengthy document seeking to comment and rebut what was set out in the grounds of resistance. In respect of the section on age and disability discrimination, the claimant did not provide details even at this stage but stated;

"*The Claimant reserves the right to update this when legal advice is available."*

20. The claimant's own evidence under oath was that he did not obtain legal advice although I consider that on the financial information he provided, he clearly had the financial means to at least obtain some provisional advice on his pleading of the case.

21. It was not until the hearing on 7 and 8 June 2021 to determine the merits of the claim that the claimant informed the Tribunal that his complaint was that out of 17 people who were at risk of redundancy at the store, he was the only one of two people not to get an alternative job. He was 47 at the relevant time. He referred to another manager being selected because of his age and he believes the other person was a 'bit older' than him, he requested he alleges, information about the other persons age, but this was not provided by the respondent. He believes the other managers were younger than him. He complains that the dismissal and the way the redundancy process was implemented was because of his age. None of that detail was in his claim form presented on 14 September 2020.

22. I find that the claimant was aware that he had not provided sufficient details of the age discrimination claim and that he was required to do so, but despite stating he would when legal advice was available, he did not provide any further details and only when addressing the merits of the claim and whether any claims should be struck out or he should be required to pay a financial deposit, did he then provide further information. This was 9 months after the claim had been presented.

23. The respondent argues that those further details amount to the making of a new claim and require the tribunal to consider whether to permit it by way of an amendment.

Time limits – amendment

24. I made findings at the hearing on the 7 and 8 June 2021 which are relevant to this amendment. Those findings include that the claimant has some past experience of the Tribunal process in that he had previously brought claims for whistleblowing and disability discrimination, albeit he was assisted by the union and did not draft the claim form himself.

25. The claimant was aware of the 3-month time limits which apply.

26. The claimant in answer to the Tribunal's questions at the preliminary hearing on 7 and 8 June 2021, explained that he had legal expenses insurance, but they were not willing to cover the claim. He spoke to Acas numerous times and the citizens advice bureau 6 or 7 times over a period of about 7 months to find out what he had to do about the tribunal orders although he complains they were not helpful and directed him back to Acas. He did not get legal advice because he did not want to 'pay for people who have no responsibility for you'.

27. The claimant gave evidence as to his means.

Respondents submissions

Amendments

28. The submissions made by the respondent relevant to the age discrimination claim were;

29. *Counsel for the respondent submits that the amendments to all the claims are substantial, the only claim that is less substantial being the automatic unfair dismissal claim but that it remains substantial in terms of the details of the disclosures were not pleaded.*

30. *Counsel argued that some of the claims had not been brought in time including the age discrimination claim.*

31. *In terms of hardship; counsel refers to is now being 4 years after some of the events complained about and 3 years in respect of others, he refers back to events in 2017 and 2018 and the case will not now be heard until 2021. He submits that the sheer number of witness and tribunal time would be against allowing 'significant tranches' of the claims to continue.*

32. *Counsel also asserted that the claimant had named numerous people as having 'it in for him' but referred to it being unlikely that so many people were involved in what would be a 'gigantic conspiracy' and that he has not shown any link between these people and the allegations. That has had the claim of unfair dismissal, but the rest of the claims are speculative.*

Strike out/ Deposit

33. *Counsel submits that the claims of; age discrimination (amongst others) should be struck out as out of time and thus have no reasonable prospect of success.*

34. *In summary counsel referred to claimant being a 'serial malcontent' and argued for a £700 deposit per claim should the tribunal decide on a deposit order on the grounds that all so his income as a delivery driver £19,0000 appears to be disposable.*

35. *Counsel relied upon the authorities of; GTR Ltd v Rodway and others UKEAT/0283/19/AT and Chandhok and another v Tirkey UKEAT/190/14.*

Claimant's submissions

36. *The claimant's submission were brief. The claimant denied being a serial complainer. He stated he was 'happy' with what is going on and that a decision needs to be made about his claims. He argued that every claim has merit and denied refusing to attend a back to work interview as alleged by the respondent, that he raised issues in good faith and denied that there were issues with his performance.*

Legal Principles

37. The relevant legal principles were set out in the 21 August 2021 judgment but as they apply to the age discrimination claim, they are as follows;

Tribunal Rules

Amendments

Time limits in discrimination cases – Equality Act 2010 – disability/ age

38. *Section 123 Equality Act 2010 deals with the time limits in which Claimants must present discrimination complaints to the Employment Tribunal and provides as follows:*

> *(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—*
> *(a)the period of 3 months starting with the date of the act to which the complaint relates, or*
> *(b)such other period as the employment Tribunal thinks just and equitable.Therefore, Section 123 provides that proceedings must be brought "within a period of three months starting with the date of the act to which the complaint relates or any other such period as the Tribunal considers to be just and equitable".*

Extension of time: Just and Equitable

39. *In **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA,** the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under what is now section 123(1)(b) EqA, there is no presumption that they should do so. A Tribunal cannot hear a claim unless the Claimant convinces it that it is just and equitable to extend time. This does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds.*

40. *The Tribunal must have regard to all of the relevant facts of the case and is entitled to take account of anything that it considers to be relevant to the question of a just and equitable extension.*

41. *The provisions of Section 33 Limitation Act 1980, as modified appropriately to employment cases (**British Coal Corporation v Keeble [1997] IRLR 336**) may be relevant;*

- *The length of and reasons for the delay.*
- *The extent to which the cogency of the evidence is likely to be affected by the delay.*
- *The extent to which the party sued had co-operated with any requests for information.*
- *The promptness with which the Claimant acted once they knew of the possibility of taking action.*
- *The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.*

42. *Court of Appeal in **Southwark London Borough Council v Afolabi 2003 ICR 800, CA**, confirmed that, while the checklist in S.33 of the Limitation Act 1980 provides a useful guide for tribunals, it need not be adhered to slavishly. The Court went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent.*

43. ***Department of Constitutional Affairs v Jones 2008 IRLR 128, CA,** the factors referred to by the EAT in are a 'valuable reminder' of what may be taken into account but their relevance depends on the facts of the individual cases.*

Amendments

General Principles

44. *The employment tribunal has a broad discretion to allow amendments at any stage of the proceedings under rule 29 of the Tribunal Rules. The discretion must be exercised in accordance with the overriding objective of dealing with cases fairly and justly in accordance with rule 2.*

45. *While tribunals generally interpret the ET1 flexibly when determining whether a particular claim can be ascertained the facts pleaded, their discretion to allow additional claims is not without its limitations. As per the comment of Langstaff J former President of the EAT, in the Chandhok case;*

"The formal claim, which must be set out in the ET1, is not an initial document free to be augmented by whatever the parties choose to add or subtract. It sets out the essential case to which a respondent is required to respond. An approach whereby a "claim" or "case" is to be understood as being far wider than as set out in the ET1 or ET3 defeats the purpose of permitting or denying amendments."

46. *Court of Appeal in* ***Ali v Office of National Statistics 2005 IRLR 201, CA.*** *In the opinion of Lord Justice Maurice Kay, it was necessary for claimants to set out the specific acts complained of, as tribunals were only able to adjudicate on specific complaints. A general description of the complaint in the ET1 will therefore not suffice and, according to Lord Justice Waller, such a description 'cries out for particulars'.*

47. *In Ali the Court of Appeal held that, when considering whether the ET1 contains a particular complaint that the claimant is seeking to raise, reference must be made to the claim form as a whole. Given this, the mere fact that a box is ticked indicating that a certain claim is being made may not be conclusive in determining whether it sets out the basis for such a complaint.*

48. ***Baker v Commissioner of Police of the Metropolis EAT 0201/09,*** *the EAT upheld a tribunal's decision that a claim form did not include a complaint of disability discrimination. B, who suffered from learning difficulties and dyslexia, submitted a tribunal claim form in which he ticked boxes marked 'disability' and 'race' to indicate what discrimination he was complaining about.*

49. ***Cocking v Sandhurst (Stationers) Ltd and anor 1974 ICR 650, NIRC:*** *The key principle was that in exercising their discretion, tribunals must have regard to all the circumstances, and in particular to any injustice or hardship which would result from the amendment or a refusal to make it ('the Cocking test') approved and restated by the EAT in Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT*

50. *The then President of the EAT, Mr Justice Mummery provided guidance on how the tribunal should approach applications for leave to amend in Selkent Bus Co Ltd v Moore [1996] ICR 386. A tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mr. Justice Mummery explained that the relevant factors to consider would include:*

51. *The nature of the amendment: the tribunal will have to decide whether the amendment that the claimant is seeking is minor or a substantial alteration pleading a new cause of action. Applications may involve the addition of factual details to existing allegations, the addition or substitution of other labels for facts which have already been pleaded in the claim, or more substantially they may involve entirely new factual allegations which change the basis of the existing claim.*

52. *In Selkent Bus Co Ltd v Moore, where the claimant sought to introduce an automatically unfair dismissal claim (on the specific ground of his trade union activity) in addition to the 'ordinary' unfair*

dismissal claim pleaded in the ET1. The EAT refused the amendment, saying that the facts as originally pleaded could not, in themselves, support the new claim (and there would be a risk of hardship to the employer by way of increased costs if the claimant was allowed to proceed with his new claim). The EAT in Selkent thought that granting the proposed amendment would render it necessary to have new facts not previously pleaded put in evidence and it was unfair to allow that to be done at the stage that had then been reached.

53. *It will not always be 'just' to allow an amendment, even where no new facts are alleged. The tribunal must always balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.*

54. *In* ***Lawson v Thomson EAT 324/93*** *the EAT upheld a tribunal's refusal to allow an amendment because the tribunal had properly considered the question of relative prejudice. What had particularly weighed with it was the claimant's failure to provide in advance of the hearing a clear statement of the terms of the proposed amendment despite several attempts to elicit this information by the tribunal office. As a result, witnesses whom the employer might have wished to call had dispersed. Therefore, the prejudice caused to the claimant in refusing the amendment was more than outweighed by the potential prejudice to the employer had the amendment been allowed.*

55. *Where the amendment is simply changing the basis of, or 'relabelling', the existing claim, it raises no question of time limitation:* ***Hammersmith and Fulham London Borough Council v Jesuthasan 1998 ICR 640, CA:***

56. *Where, however, the claimant cannot show a causative link between the grounds of complaint set out in the ET1 and the proposed amendment, the claimant will be regarded as raising an entirely new cause of action. In such circumstances, the tribunal must consider whether the new claim is in time. The fact that the cause of action contained in the proposed amendment could be brought as a new claim within the appropriate time limit is a 'factor of considerable weight' for the tribunal to take into account:* ***Gillett v Bridge 86 Ltd EAT 0051/17.*** *However, it is not conclusive in favour of granting the application.*

57. ***The applicability of time limit****s: if the application to amend includes adding a new claim or cause of action it is essential for the tribunal to consider whether that claim is out of time and if so whether the time limit should be extended. It will then be necessary for the party seeking to bring a claim out of time to also present their arguments about why time should be extended in their case to bring the new claim/cause of action.*

58. ***The timing and manner of the application****: it is relevant for tribunal to consider why the application was not made earlier and why it is now being made.*

59. *In* ***Martin v Microgen Wealth Management Systems Ltd EAT 0505/06*** *the EAT stressed that the overriding objective requires, among other things, that cases are dealt with expeditiously and in a way which saves expense: undue delay may well be inconsistent with these aims. However, an application to amend should not be refused solely because there has been a delay in making it, as amendments may properly be made at any stage of the proceedings.*

60. *Presidential Guidance on General Case Management for England and Wales, 'an application can be made at any time as can an amendment even after judgment has been promulgated… A party will need to show why the application was not made earlier and why it is being made at that time. An example which may justify a late application is the discovery of new facts or information from disclosure of documents' (para 5.3).*

61. *In Ladbrokes Racing Ltd v Traynor EATS 0067/06 the EAT gave some guidance as to how a tribunal may take account of the timing and manner of the application. Factors to consider:*

- *•why the application is made at the stage at which it is made and why it was not made earlier*
- *•whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and*
- *whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.*

62. *It is important that amendments are not denied purely punitively or where no real prejudice will be done by their being granted:* ***Sefton Metropolitan Borough Council and anor v Hincks and ors 2011 ICR 1357 EA.***

63. *Selkent Bus Co Ltd v Moore : the time limit falls to be determined by reference to the date when the application to amend is made, not by reference to the date at which the original claim form was presented.*

64. *Rawson v Doncaster NHS Primary Care Trust EAT 0022/08, the effect of an amendment is to backdate the new claim to the date on which the original claim form was presented.*

65. *Galilee v Commissioner of Police of the Metropolis 2018 ICR 634, EAT, the Appeal Tribunal held that it is not always necessary to determine time points as part of the amendment application. In its view, a tribunal can decide to allow an amendment subject to limitation points. This might be the most appropriate route in cases where, for instance, the new claims are said to form part of a continuing act with the original, in-time, claim, given the fact sensitive nature of determining whether there is a continuing act.*

66. *In Reuters Ltd v Cole EAT 0258/17 In the EAT's view, it was only necessary for the claimant to show a prima facie case that the primary time limit was satisfied (or that there were grounds for extending time) at the amendment application stage.*

67. *As Mr Justice Underhill observed in Transport and General Workers' Union v Safeway Stores Ltd EAT 0092/07, whether the fresh claim in question is in time is simply that it is 'a factor, albeit an important and potentially decisive one, in the exercise of the discretion'.*

Striking out a claim or part of it – Rule 37 Employment Tribunal Constitution and Rules of Procedure Regulations 2013

68. *Employment Tribunals must look to the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 when considering whether to strike out a claim.*

69. *Rule 37 provides as follows:*

> *"At any stage of the proceedings, either on its own initiative or on the application of a party, the Tribunal may strike out all or part of a claim or response on any of the following grounds:*
>
> *(a) That it is scandalous or vexatious or has no reasonable prospect of success.*

(b) *That the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
(b) *For non-compliance with any of these Rules or with an order of the Tribunal;*
(c) *That it has not been actively pursued;*
(d) *That the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out.)"*

70. *A claim can have no reasonable prospect of success if there is no jurisdiction for a tribunal to entertain it.*

71. *In dealing with an application to strike out all or part of a claim a Judge or tribunal must be satisfied that there is "no reasonable prospect" of success in respect of that claim or complaint. It is not sufficient to determine that the chances of success are fanciful or remote or that the claim or part of it is likely, or even highly likely to fail. A strike out is the ultimate sanction and for it to appropriate, the claim or the part of it that is struck out must be bound to fail. As Lady Smith explained in* ***Balls v Downham Market High School and College*** *[2011] IRLR 217, EAT (paragraph 6):*

"The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"

72. *Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal will rarely, if ever be, apt to be struck out on the basis of having no reasonable prospect of success before the evidence has had the opportunity to be ventilated and tested.*

Deposit Orders – Rule 39 Employment Tribunals (Constitution & Rules of Procedure Regulations 2013

73. *Different considerations apply, however, in relation to Deposit Orders made under Rule 39 of the Regulations. Rule 39 provides as follows:*

"(1) Where at a Preliminary Hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

74. *Thus, a Tribunal may make a Deposit Order where a claim or part of it has little reasonable prospect of succeeding. However, this is not a mandatory requirement and whether to make such an Order, even where there is little reasonable prospect of success, remains at the discretion of the Tribunal to determine whether or not such should be made.*

Conclusions

Age discrimination - Amendment

75. As set out in the findings of fact, age discrimination was not mentioned in the claim form other than the ticking of box at 8.1 . The Supplemental Document, did not the claimant conceded, include any reference to a claim for age discrimination. Although the claimant indicated that he understood further details were required, he did not seek to provide them despite the detail he provided about the other elements of his claim, including 'whistleblowing'.

76. Until the hearing on 7 and 8 June 2021, 9 months after the claim was presented, the respondent had not been provided with details of what the allegations of age discrimination were including what the alleged less favourable treatment was. It was not possible for it the respondent therefore to respond to the allegations other than enter a bare denial. As presented this claim was not one which could be sensibly responded to and thus pursuant to rule 12 (1) (b), it would have been rejected as an abuse of process had it not included various other types of particularised claims.

77. What the claimant is now doing by seeking to provide further detail amounts to an application to amend the claim. The first matter for consideration is what type of amendment it is.

78. I do not consider that in these circumstances the mere ticking of the age discrimination box in the ET1 means that a complaint of age discrimination has been brought (Ali v Office of National Statistic). Every case has to be considered on its own facts when considering whether the ticking of one of the claim boxes is sufficient. I have taken into consideration that the claim not only makes no reference to treatment of the claimant based on his age as a complaint , it specifically and in detail, addresses complaints about disclosures as the reason for alleged victimisation. Further, the detailed Supplemental Document (over 2 pages in length), again makes no complaint about treatment related to the claimant's age but it does allege that the reason for how he was treated was in essence because of his complaints and disclosures about various matters which are set out . Taking into account the claim form as a whole and what is set out, I find that the ET1 did not include a claim of age discrimination. The mere ticking of the box was not sufficient.

79. Applying Selkent it is therefore necessary to consider time limits; whether the claim was brought in time and if not whether time should be extended.

80. The applicable test is that set out in section 123 (3) EqA.

81. The claimant explained at the preliminary hearing on 7 and 8 June 2020 that his complaint is that he and one other manager, were not given alternative management roles . According to the pleadings, the claimant was notified of the decision to make him redundant and that all those would were to be redundant would be offered customer assistant positions, on 28 February 2020. On 2 March 2020 it was confirmed that he was unsuccessful in securing a management role. The claimant submitted an appeal and the hearing was on the 30 March 2020, he does not allege that he raised age discrimination as part of that appeal. The claimant was sent an outcome letter on 9 April 2020 received on 16 April 2020 ; the outcome was that he was not selected for a management role in the new structure. The claimant complains that he accepted the role of customer assistant but that this was revoked, he does not complain that the revocation had anything to do with his age, that he complains was due to other reasons including 'whistleblowing'.

82. Therefore, the last date of the conduct complained may be argued to be (although the claimant has not sought to identify this) the outcome of the appeal on the 16 April 2020. The Acas early

conciliation process started on 10 September 2020, which was outside the primary 3 month time limit. The potential caim of age discrimination was in any event therefore, presented out of time.

83. The date for the purposes of the amendment however, is the date the amendment application was made which is the 7 June 2021 ie circa 14 months later. If the 3 month time limit expired on the **15 July 2020** (ie within 3 months from the 16 April 2020), the amendment is made circa 11 months out of time.

84. The length of the delay in applying for this amendment is considerable and the claimant had been expressly informed by Employment Judge Heap in the context of his previous amendment application, that amendments should be made *sooner rather than later.*

85. While I take into consideration that he was without representation, I also take into account that he was aware of the time limits, had brought a claim previously and indicated that he understood further details were required many months before the hearing on 7 and 8 June 2021 but had made no attempt (unlike his attempts with the equal pay claim) to provide more information. While the claimant had not understood the detail required for the whistleblowing claims, (in terms of identifying the type malpractice etc), he had set out, albeit in a narrative form, considerable detail about the factual (although not legal) background to those claims. That is distinct from the information he provided in connection with age discrimination, where he provided no factual details in support of the allegations. The focus of his claim appears to be very much to be on the whistleblowing and health and safety disclosures.

86. The claimant had the means to take legal advice and indicated he was going to do so when ' available'. His evidence was that despite most of his salary being disposable income (his wife works and they have income from a rental property), he was not satisfied with the support from Acas and the CAB but he was not prepared to pay for legal advice.

87. Although the respondent does not argue any forensic prejudice in respect of this particular claim, it is now over a year since the events complained of took place and the adding of this claim would necessitate the respondent carrying out further investigation and identification of relevant documents (the age issue was not raised during the internal proceedings, as far as I am aware from the submissions and evidence presented) and therefore on a balance of probabilities, this will cause some prejudice and it will extend the hearing time.

88. The claimant's main complaint appears to be the act of dismissal. He complains that he accepted the customer assistant role but that the decision to offer it was, revoked. He does not allege that his dismissal was on the grounds of his age. The claims relating to his dismissal are, as reflected in the detailed way in which those claims are pleaded, the core claims and they are proceeding to a final hearing regardless of this amendment application. Not permitting an amendment with respect to the age discrimination allegations, will not prejudice those claims relating to his dismissal (or other claims of pre dismissal detrimental treatment).

89. I do not consider it is just and equitable in all the circumstances, to extend time however, whether the claim was brought in time is only one factor, important but not definitive.

90. Considering the **time and manner of the application**; despite the claimant clearly being aware of the need to make an application to amend, he did not seek to do so before the hearing on 7 and 8 June 2021 and the information he provided was only provided in response to questions from the Tribunal. He did not make a written application in advance of the hearing. Although he had indicated that he was aware further details were required and that he would provide them when

legal advice was available, he did not do so. He made no effort to take steps to introduce this amendment previously and had no good explanation for failing to do so.

91. The delay in bringing this claim will incur more cost for the respondent in terms of having to deal with these new allegations and submitting an amended response. It will doubtless also add to the hearing time.

92. A delay of itself however is not sufficient reason to refuse an amendment (Martin v Microgen Wealth Management Systems Ltd EAT). It is a factor to be weighed in the balance. However, weighing up all the factors in this case and carrying out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment, I find that the hardship and prejudice weighs in favour of the respondent. Taking all the circumstances into account, the application to amend to include a claim of age discrimination is not well founded and is refused.

93. Even if the claimant was held to have already brought an unspecified claim of age discrimination, (given the reference to a claim by Employment Judge Ahmed), I would in any event have refused the amendment on the grounds that it is a substantial amendment and for the reasons set out above. Without the amendment, the claim as pleaded cannot be sensibly responded to and having no reasonable prospects of success, would in any event be struck out under rule 37.

The application to amend the claim to include an age discrimination claim is not well founded and is refused.

<u>The claims which will go forward</u>

94. For the avoidance of doubt the claims which are now proceeding to a final hearing (to be considered alongside the findings on the amendment applications set out in the judgment dated the 17 August 2021 judgment) are;

1. Ordinary unfair dismissal: sections 94 and 98 ERA

2. Automatic unfair dismissal for health and safety reasons : section 100 ERA

3. Automatic unfair dismissal for having made a protected disclosure: section 103A ERA

4. Detriment for having made a protected disclosure: section 47B ERA (*Deposit order made in respect of allegation that the claimant was made to carry out extra hours and carry out extra work and was 'treated differently' because he made protected disclosures*.)

5. Dismissal for trade union membership/activities : section 153 and 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 (*Subject to the Deposit Order*)

6. Unlawful deductions/breach of contract : (*The application to include a claim for unlawful deductions of wages/ breach of contract for the failure to pay the claimant's wages on 11 May 2018 was refused*)

Employment Judge Broughton

2 September 2021