EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Paul Fulcher	AND	SSE Contractors Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD BY TELEPHONE **ON** 27 September 2021

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **In person**
For the Respondent: **Ms R McKay, Solicitor**

JUDGMENT ON APPLICATION TO AMEND

The claimant's application to amend the originating application is refused.

RESERVED REASONS

1. In this case the claimant seeks leave to amend the claim which is currently before the Tribunal, and the respondent opposes that application. I have heard from the claimant, and I have also heard factual and legal submissions from Ms McKay on behalf of the respondent.
2. The claim as it currently stands:
3. The general background and procedural history of the claim as it stands before the determination of this application is as follows. The claimant issued these proceedings on 9 November 2020 and his claims were limited to unfair dismissal and age discrimination only. There was no mention in the claimant's originating application of any potential claim for disability discrimination. The claims were resisted by the respondent not least because the claimant had insufficient service to pursue his claim for unfair dismissal and the claim for age discrimination was insufficiently particularised. The matter was listed for a case management preliminary hearing which took place before me on 15 July 2021.
4. The parties were invited to complete and submit their agendas ahead of the case management preliminary hearing. The claimant did so on 17 March 2021. In that

agenda the claimant raised the matter of a disability discrimination claim for the first time which he summarised as follows: "Discrimination resulting from government guidelines to shield due to my disability (hard organ removal) my employer arranging and replacing me with another under a guise."

5. As confirmed in a case management order dated 15 July 2021: (i) the claimant's unfair dismissal claim was dismissed by an attached judgment of the same date because the claimant had insufficient service to pursue that claim; (ii) the claimant was ordered to provide further information in support of his claim of age discrimination; and (iii) that there was no current claim of disability discrimination accepted by the tribunal, and if the claimant wished to pursue such a claim he would be required to make that application in writing with full particulars as to the nature of his disability, its impact on his day-to-day activities, and the exact claims which he wished to present. The claimant was also ordered to provide such medical evidence as he wished in support of his claim that he was disabled, together with a statement on the impact which the alleged disability was said to have on his day-to-day activities.
6. The claimant has since withdrawn his claim for age discrimination, which has now been dismissed by way of a separate judgment.
7. With regard to the relevant time limits, the effective date of termination of the claimant's employment was 6 November 2020. These proceedings were presented on 9 November 2020. The claimant made contact with ACAS under the Early Conciliation procedure on 1 September 2020 (Day A), and the Early Conciliation Certificate was issued on 1 October 2020 (Day B). Accordingly, by my calculation the claimant does not benefit from any extension of time relying on the current ACAS certificate, and any acts or omissions complained of before 10 August 2020 would potentially be out of time in any event. In addition, the latest any new claim would have to be presented to be within time (even assuming it does not predate the resignation) would be by 5 February 2021.
8. <u>The nature and detail of the application to amend:</u>
9. On 9 August 2021 the claimant submitted a document in response to the previous case management orders. Rather than provide particulars of the age discrimination claim he confirmed that it was no longer being pursued. That document also included a schedule of loss. For the purposes of this application, he presented his Impact Statement and the reason for his application to amend the claim to one of disability discrimination.
10. The claimant's impact statement confirms that the claimant had a "hard organ (splenectomy) transplant in 1983 and I have been left with a much-reduced immunity". As a result of this the claimant was instructed to isolate at home because of the pandemic in March 2020. The claimant asserts that his mental health suffered and that "my health suffered with depression and anxiety, and I was unable to complete day-to-day activities (such as dressing, cognitive thinking and behaviour). The disabilities relied upon are splenectomy, the CEV (Clinically Extremely Vulnerable) condition, and my depression (mental health issues). The claimant also asserts: "My health requires lifelong medication, and my mental health still suffers with anxiety and depression making it problematic to cope with situations and issues which previously were responded to naturally".
11. The claimant has not set out what claims of disability discrimination under the Equality Act 2010 ("the EqA") are pursued. Bearing in mind that he is unrepresented, and that he complains that he was replaced by another employee in his absence and then had no option but to resign, he appears to complain of a discriminatory constructive dismissal which could be presented as either a claim

for direct discrimination under section 13 EqA, or for discrimination arising from his disability under section 15 EqA.

12. After a detailed discussion today, the claimant confirmed that the disability upon which he relies is effectively an immune condition which follows his splenectomy in 1983 and being informed of his CEV status. In other words, his immune system was impaired, and he was advised to self-isolate from March 2020 at the height of the pandemic. He complains that he was effectively superseded in his role at work with the replacement being appointed to his job, and that following the respondent's failure to deal appropriately with his grievance, he had no option but to resign. After further discussion he confirmed that his claim potentially is one of discrimination arising from disability under section 15 EqA, in other words that his absence arose in consequence of his disability and that he was undermined and superseded and constructively dismissed as a result.
13. The respondent resists the application to amend the following reasons: (i) any disability discrimination claim is a new cause of action and has little or no apparent basis or foundation in the ET1; (ii) any such new claim is clearly well out of time; (iii) no satisfactory explanation has been provided as to why the application has been made at this stage, and there is no suggestion that new factual information has recently come to light; (iv) the claimant was clearly aware of the potential to bring a disability discrimination claim because he brought claims of unfair dismissal and age discrimination, and made no mention of disability discrimination; (v) the application to amend is too imprecise, notwithstanding that the claimant was told that any application would have to be brought by reference to the relevant sections in the EqA; (vi) the respondent disputes that the claimant was disabled and/or that it knew of the claimant's disability; and (vii) there is real prejudice and hardship to the respondent because this new claim will require a substantial amount of time and associated costs to identify and to resolve.
14. The applicable law:
15. An Employment Tribunal has jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of Chapman v Simon [1994] IRLR 124). If a case is not before the Tribunal, it needs to be amended to be added.
16. In Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650 NIRC Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim, or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in Ali v Office of National Statistics [2005] IRLR 201 CA.
17. In Transport and General Workers' Union v Safeway Stores Limited EAT 0092/07 Underhill P as he then was overturned a Tribunal's refusal to allow an amendment because there was no attempt to apply the Cocking test, and, specifically, no review of all the circumstances including the relative balance of injustice.
18. The EAT held in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT: In determining whether to grant an application to amend, the Employment 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. Mummery J as he then was explained that relevant factors would include:

19. 1 - The nature of the proposed amendment - applications to amend range, 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 has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action; and
20. 2 - The applicability of time limits - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended [the word "essential" is considered further below]; and
21. 3 - The timing and manner of the application - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. 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.
22. These factors are not exhaustive and there may be additional factors to consider, (for example, 4 - The merits of the claim). The more detailed position with regard to each of these elements is as follows, dealing with each of them in turn:
23. **1 - The nature of the proposed amendment**: A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without attempting 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 (often called "relabelling"); 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.
24. Mummery J in Selkent suggests that this aspect should be considered first (before any time limitation issues are brought into the equation) because it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct from "relabelling" the existing claim. If it is a purely relabelling exercise than it does not matter whether the amendment is brought within the timeframe for that particular claim or not – see Foxtons Ltd v Ruwiel UKEAT/0056/08. Nevertheless whatever type of amendment is proposed the core test is the same: namely reviewing all the circumstances including the relative balance of injustice in deciding whether or not to allow the amendment (that is the Cocking test as restated in Selkent).
25. The fact that there is a new cause of action does not of itself weigh heavily against amendment. The Court of Appeal stressed in Abercrombie and ors v Aga Rangemaster Ltd 2013 IRLR 953 CA that Tribunals should, when considering applications to amend that arguably raise new causes of action, focus "not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted".
26. Any mislabelling of the relief sought is not usually fatal to a claim. Where the effect of the proposed amendment is simply to put a different legal label on facts that are already pleaded, permission will normally be granted.
27. **2 - The applicability of time limits**: This factor only applies where the proposed amendment raises what effectively is a brand new cause of action (whether or not it arises out of the same facts as the original claim). Where the amendment is

simply changing the basis of, or "relabelling", the existing claim, it raises no question of time limitation – (see for example Foxtons Ltd v Ruwiel UKEAT/0056/08 per Elias P at para 13).

28. On the applicability of time limits and the "doctrine of relation back", the doctrine of relation back does not apply to Employment Tribunal proceedings, see Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN. The guidance given by Mummery J in Selkent and his use of the word "essential" should not be taken in an absolutely literal sense and applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues must be decided before permission to amend can be considered. The judgments in both Transport and General Workers' Union v Safeway Stores Limited UKEAT 009207 and Abercrombie v AGA Rangemaster Limited [2014] ICR 209 CA emphasised that the discretion to permit amendment was not constrained necessarily by limitation.
29. See also Reuters Ltd v Cole UKEAT/0258/17/BA at para 31 per HHJ Soole: "In this respect a potential issue arises from the conflict in EAT authorities as to whether the Tribunal must definitively determine the time point when deciding on the application to amend (Amey Services Ltd & Enterprise Managed Services Ltd v Aldridge and Others UKEATS/0007/16 (12 August 2016)) or whether the applicant need only demonstrate a prima facie case that the primary time limit (alternatively the just and equitable ground) is satisfied (Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN (22 November 2017)). In the light of the exhaustive analysis of the authorities undertaken by His Honour Judge Hand QC in Galilee, I would follow the latter approach."
30. **3 - The timing and manner of the application:** This effectively concerns the extent to which the applicant has delayed making the application to amend. Delay may count against the applicant because the Overriding Objective requires, among other matters, that cases are dealt with expeditiously and in a way which saves expense. Undue delay may well be inconsistent with these objectives. The later the application is made, the greater the risk of the balance of hardship being in favour of rejecting the amendment - see Martin v Microgen Wealth Management Systems Ltd EAT 0505/06. 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. This is confirmed in the Presidential Guidance on General Case Management for England and Wales (13 March 2014).
31. The EAT gave guidance on how to take into account the timing and manner of the application in the balancing exercise in Ladbrokes Racing Ltd v Traynor EATS 0067/06: the Tribunal will need to consider: (i) why the application is made at the stage at which it is made, and why it was not made earlier; (ii) 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 (iii) 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.
32. **4 - The Merits of the Claim**: It may be appropriate to consider whether the claim, as amended, has reasonable prospects of success. In Cooper v Chief Constable of West Yorkshire Police and anor EAT 0035/06, one of the reasons the EAT gave for upholding the Tribunal's decision to refuse the application to amend was that it would have required further factual matters to be investigated "if this new and

implausible case was to get off the ground". However, Tribunals should proceed with caution because it may not be clear from the pleadings what the merits of the new claim are: the EAT observed in Woodhouse v Hampshire Hospitals NHS Trust EAT 0132/12 that there is no point in allowing an amendment to add an utterly hopeless case, but otherwise it should be assumed that the case is arguable.

33. Langstaff P made the following observations in Chandhok v Tirkey [2015] IRLR 195 EAT from paragraph 16: "The claim, as set out in the ET1, is not something to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made – meaning … the claim as set out in the ET1. [17] … If a claim or a case is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendment; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in light of the identification resolving, the central issues in dispute. [18] In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time ground; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand-in-hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverting into thinking that the essential case is to be found elsewhere than in the pleadings."
34. The EAT has confirmed in London Luton Airport Operations Ltd (1) Ms R Daubney (2) v Mr Peter Levick UKEAT/0270/18/LA that the parties are entitled to expect that Employment Tribunal litigation will be conducted in accordance with issues which have been defined at a Preliminary Hearing – see Scicluna v Zippy Stitch Ltd & Ors [2018] EWCA Civ at paras 14 – 16 and 24 - The list of issues can of course be amended or augmented; but whether to do so is a matter of case management which should not be ignored.

35. Judgment:

36. Applying these legal principles above to the current application, I find as follows.
37. In the first place, with regard to the nature of the proposed amendment, and bearing in mind that the claimant has no existing claims (because the unfair dismissal claim has been dismissed and he has now withdrawn his claim of age discrimination), this is effectively a new claim and a new cause of action.
38. Secondly, this is a new cause of action which is effectively out of time. To the extent that it relates to the alleged constructive dismissal on 6 November 2020, time expired on 5 February 2021. The application was made on 9 August 2021.

39. Thirdly, with regard to the timing and manner of the application, the claim has not provided a satisfactory explanation as to the delay in bringing the amended claim, nor has he given any good reason why it could not have been included in the original claim.
40. Fourthly, with regard to the merits of the claim, is not clear the extent to which the claim has reasonable prospects of success or not. Effectively in my judgment the claimant's claim as presented was one of potential unfair dismissal, but that claim could not proceed because the claimant had an insufficient service as an employee. Allegations of discrimination are entirely different and will require a significantly different evidential enquiry.
41. In conclusion, in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. If the application is refused, the claimant will not be to pursue any claim relating to the termination of his employment before this Tribunal (although he has indicated an intention to investigate and pursue a potential claim against the respondent for personal injury in the civil courts). He will suffer prejudice and hardship in that respect.
42. On the other hand, if the application to amend is allowed this will involve the respondent in hardship and prejudice to this extent. In the first place the claimant's disability and the respondent's knowledge of his disability are disputed and this would require a separate preliminary hearing in person to determine, together with an analysis of the relevant medical evidence. To the extent that the claimant was able to establish his disability status, there would then follow a full merits hearing. The respondent is still unsure of the exact nature of the claimant's allegations despite the fact the claimant was ordered to particularise in detail the potential amended claim. This process is bound to involve further delay and further expense. The respondent cannot say at this stage that any potential witnesses are no longer available, but clearly any such further delay will have an impact on the cogency of the evidence.
43. Bearing in mind all of the above matters, in my judgment the balance of prejudice narrowly favours the respondent, and I therefore refuse the claimant's application to amend these proceedings as sought.

Employment Judge N J Roper
Dated: 27 September 2021

Judgment sent to parties: 13 October 2021

FOR THE TRIBUNAL OFFICE