EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110640/2021

Preliminary Hearing held remotely on 15 October 2021

Employment Judge A Kemp

Mrs L Steele	**Claimant** **Represented by:** **Mr J Lee** **Solicitor**
EDF Energy Nuclear Generation Ltd	**Respondent** **Represented by:** **Ms P Volkmer** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal grants the claimant's application to amend her claims, reserving whether or not the Tribunal has jurisdiction for the claims in relation to the protected characteristic of age for later determination.

REASONS

Introduction

1. This was a Preliminary Hearing held to consider an application made by the claimant in an email dated 30 September 2021 which provided an amended paper apart. The respondent objected to that by email dated 6 October 2021.

2. The parties were each represented by solicitors, to whom I am grateful for their submissions.

Background

3. There was no hearing of evidence, but the following matters arose from the submissions and are or at least may be relevant to the exercise of discretion.

4. The claimant is not employed by the respondent but is a contract worker supplied to it by a third party agency.

5. Early Conciliation against the respondent was commenced on 29 July 2021 and a certificate issued on 30 July 2021.

6. A Claim Form was presented to the Tribunal on 3 August 2021. It referred to a claim of discrimination on the protected characteristic of disability, and to sections 13, 19, 20, 21 and 26 of the Equality Act 2010. It also referred to an alleged provision, criterion or practice applied by the respondent to the effect that it granted part-time working only to those nearing retirement. The claim was prepared for the claimant by her solicitor.

7. The respondent provided a Response in which denied the allegations.

8. On 30 September 2021 the claimant's solicitor wrote to the Tribunal to make the present application, attaching an amended paper apart which sought to add a new protected characteristic of age to the claims under sections 13, 19 and 26 of the Equality Act 2010 and to address a number of issues of fact in relation both to such claims and those for the protected characteristic of disability.

9. The respondent opposed all of the proposed amendment, partly on the basis that it was contended to be outwith the statutory time-limits, in its response dated 6 October 2021

Submissions

10. The following contains a very basic summary of the submissions that were made.

(i) *Claimant*

11. The claimant argued that a new label of age discrimination was applied to existing facts, and that matters of fact were added that did not change the substance of the claims. Reference was made to the ***Selkent*** principles. Reference was also made to paragraph 14 of the amended paper apart which referred to the policy of allowing part-time working only for "retiring employees to take them to their retirement dates." That wording had been in the original Claim Form. It was claimed that that was an age discrimination claim, and that its omission from the Claim Form was administrative oversight. It was confirmed that the claimant was 48 years of age at the material time. It was alleged that there was a continuing course of conduct, as the policy remained such that the claimant could not return to work. The application had been made early on. It was open to the claimant to raise another claim which in principle was not time-barred. It was in accordance with the overriding objective to allow the application.

(ii) *Respondent*

12. The respondent did not agree that this was only a change of label. It required changes to the PCPs for example. This was not a case of a course of conduct. The last act relied on was 6 May 2021 when the application for part-time working was refused. It was outwith the primary time limit. Reference was made to the case of ***Robertson*** (addressed below). The burden was on the claimant. She had not addressed why the age discrimination claim was not in the Claim Form. She was legally represented. That was a material consideration.

13. The balance of prejudice favoured refusing the applications. There is prejudice in seeking to defend a new and different claim out of time. There would require to be different enquiry if the amendment were allowed adding to cost and expense. It was accepted that there was a causative link to the initial pleadings, but those pleadings did not cover all that was required for such a claim, and issues remained outstanding. The application should be refused

The law

(i) Amendment

14. A Tribunal is required when addressing such applications as the present to have regard to the overriding objective, which is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 which states as follows:

> "2 **Overriding objective**
>
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

15. The question of whether or not to allow amendment is a matter for the exercise of discretion by the Tribunal. There is no Rule specifically to address that, save in respect of additional respondents in Rule 34. Whether or not particulars amount to an amendment requiring permission from the Tribunal to be received falls within the Tribunal's general power to make case management orders set out in Rule 29 which commences as follows:

> "**29 Case management orders**
>
> The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order…."

16. Earlier iterations of the Tribunal Rules of Procedure did contain a specific rule on amendment, and the changes brought into effect by the current Rules, found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, require to be borne in mind when addressing earlier case law.

17. The nature of the exercise of discretion in amendment applications was discussed in the case of ***Selkent Bus Company v Moore [1996] ICR 836***, which was approved by the Court of Appeal in ***Ali v Office for National Statistics [2005] IRLR 201***. In that case the application to amend involved adding a new cause of action not pled in the original claim form. The claim originally was for unfair dismissal, that sought to be added by amendment was for trade union activities. The Tribunal granted the application but it was refused on appeal to the EAT. The EAT stated the following:

> "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.
>
> 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 additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.
>
> *(b) The applicability of time limits*
>
> If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time

limit should be extended under the applicable statutory provisions, eg, in the case of unfair dismissal, s.67 of the 1978 Act.

(c) The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

18. In ***Harvey on Industrial Relations and Employment Law*** Division PI, paragraph 311, it is noted that distinctions may be drawn between firstly cases in which the amendment application provides further detail of fact in respect of a case already pleaded, secondly those cases where the facts essentially remain as pleaded but the remedy or legal provision relied upon is sought to be changed, often called a change of label, and thirdly those cases where there are both new issues of fact and of legal provision on which the remedy is sought, of which ***Selkent*** is an example.

19. The first two categories are noted as being those where amendment may more readily be allowed (although that depends on all the circumstances and there may be occasions where to allow amendment would not be appropriate). The third category was noted to be more difficult for the applicant to succeed with, as the amendment seeks to introduce a new claim which, if it had been taken by a separate Claim Form, would or might have been outwith the jurisdiction of the Tribunal as out of time.

20. In ***Abercrombie v Aga Rangemaster Ltd [2014] ICR 204*** the Court of Appeal said this in relation to an amendment which arguably raises a new

cause of action and therefore in the third category, suggesting that the Tribunal should

> " … focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

21. In order to determine whether the amendment amounts to a wholly new claim and in the third of the categories set out above it is necessary to examine the case as set out in the original Claim to see if it provides a 'causative link' with the proposed amendment (***Housing Corporation v Bryant [1999] ICR 123***). In that case the claimant made no reference in her original unfair dismissal claim to alleged victimisation, which was a claim she subsequently sought to make by way of amendment. The Court of Appeal rejected the amendment on the basis that the case as pleaded revealed no grounds for a claim of victimisation and it was not just and equitable to extend the time limit. It said that the proposed amendment

> “was not a rectification or expansion of the original claim, but an entirely new claim brought well out of time”.

22. The onus is on the claimant to persuade the tribunal that it is just and equitable to extend time, and the exercise of discretion is the exception rather than the rule (***Robertson v Bexley Community Centre [2003] IRLR 434***), confirmed in ***Department of Constitutional Affairs v Jones [2008] IRLR 128***

23. No single factor, such as the reason for delay, is determinative and a Tribunal should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***.

24. In ***Vaughan v Modality Partnership [2021] IRLR 97*** the EAT summarised matters and held that there was a balance of justice and hardship to be struck between the parties.

(ii) Jurisdictional issues

25. There are two possibly contradictory lines of authority at EAT level about how amendment applications should be dealt with where one of the issues is timebar. The more recent line is set out in ***Galilee v Commissioner of Police of the Metropolis [2018] ICR 634***, in which the EAT held that it was permissible to allow amendment but reserving questions of jurisdiction for determination either at a Preliminary Hearing or at a Final Hearing. That results in an amendment being allowed to permit a new claim to be raised, but the issue of whether or not it is in the jurisdiction of the Tribunal is not at that stage determined. The other line of authority is to the effect that questions of jurisdiction on issues of timebar must be addressed at the time of consideration of the amendment, as once accepted the Claim is deemed to have been amended from the date of its presentation initially, rather than when the amendment was sought, on which the authorities include ***Rawson v Doncaster NHS Primary Care Trust UKEAT/022/08, Newsquest (Herald and Times) Ltd v Keeping UKEATS/51/09*** and ***Amey Services Ltd v Aldridge UKEATS/7/16.***

(iii) Time limits

26. Section 123 of the Equality Act 2010 provides as follows in regard to time limits for discrimination claims such as those under section 13 of that Act

> "**123 Time limits**
>
> (1) Subject to [sections 140A and section 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.
>
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
>
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

27. This provides in summary that the Tribunal has jurisdiction under the 2010 Act if a claim is commenced (firstly by early conciliation and then by presenting a claim form timeously thereafter) within three months of the act complained of, that being normally referred to as the primary period, but there are two qualifications to that, firstly where there are acts extending over a period when the time limit is calculated from the end of that period, and secondly where it is just and equitable to allow the claim to proceed.

28. An act will be regarded as extending over a period, and so treated as done at the end of that period, if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant ***(Barclays Bank plc v Kapur [1989] IRLR 387.*** It was also held in that case that it is only the continuance of the discriminatory act or acts, not the continuance of the consequences of a discriminatory act, that will be treated as extending over a period.

29. The Court of Appeal in ***Hendricks v Metropolitan Police Commissioner [2003] IRLR 96*** stated that terms mentioned in the above and other authorities are examples of when an act extends over a period, and

> "should not be treated as a complete and constricting statement of the indicia' of such an act. In cases involving numerous allegations of discriminatory acts or omissions, it is not necessary for an

applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what he has to prove, in order to establish a continuing act, is that (a) the incidents are linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs'. This will constitute 'an act extending over a period."

30. In ***Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298, [2010] IRLR 327***, the Court of Appeal stated the following

"There is no principle of law which dictates how generously or sparingly the 'power to enlarge time is to be exercised' (para 31). Whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case 'is not a question of either policy or law'; it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it."

31. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13*** the EAT stated that a claimant seeking to rely on the extension required to give an answer to two questions:

"The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was."

32. What is just and equitable involves a broad enquiry having regard in particular to the relative hardships parties may suffer.

33. There is a further matter to consider, which is the effect of early conciliation on assessing when a claim was commenced. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). This process is known as 'early conciliation' (EC), with the detail being provided by regulations

made under that section, namely, the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014. They provide in effect that within the period of three months from the act complained of, or the end of the period referred to in section 123 above if relevant, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place.

Discussion

34. I did not make an immediate decision on the competing arguments as I wished to take time to reflect on them, and to read the documentation provided to me again having heard the submissions. I also reminded myself of the terms of the authorities set out above. Although neither representative referred me to authority specifically on the point, I did require to consider how to address an amendment application in circumstances where there is a dispute over whether a claim or claims may be time-barred, on which there are two lines of authority as referred to above. Those two lines of authority cannot easily be reconciled. ***Galilee*** was decided at least partly on issues of English law and practice, which I do not consider find direct equivalents in Scots law and practice.

35. How the overriding objective is to be applied in general terms was reviewed in the case of ***Newcastle upon Tyne City Council v Marsden - [2010] ICR 743.*** The circumstances of that case were different, in that it was an application to review a decision, but the employer relied on the cases of ***Flint v Eastern Electricity Board [1975] ICR 395*** and ***Lindsay v Ironsides Ray & Vials [1994] ICR 384.*** The employment judge held that those decisions had been superseded by the introduction in the 2014 Rules of the overriding objective, and that a different approach was indicated by the decisions in ***Williams v Ferrosan Ltd [2004] IRLR 607*** and ***Sodexho Ltd v Gibbons [2005] ICR 1647.***

36. The then President of the EAT said this in relation to the former two cases

> "it is important not to throw the baby out with the bath-water. As Rimer LJ observed in ***Jurkowska v Hlmad Ltd [2008] ICR 841***, para 19 it is 'basic'
>
> > 'that dealing with cases justly requires that they be dealt with in accordance with recognised principles. Those principles may have to be adapted on a case by case basis to meet what are perceived to be the special or exceptional circumstances of a particular case. But they at least provide the structure on the basis of which a just decision can be made.'
>
> The principles that underlie such decisions as ***Flint*** and ***Lindsay*** remain valid, and although those cases should not be regarded as establishing propositions of law giving a conclusive answer in every apparently similar case, they are valuable as drawing attention to those underlying principles."

37. In my judgment an amendment if allowed simply permits a claimant to pursue a new matter, whether of fact or law, which was not within the original Claim Form (or Forms as in the present case). It allows the amended claim to be pursued but whether that new claim succeeds is a different matter. Success may depend on establishing jurisdiction as well as on the merits of the claim.

38. I turn to Scots law and practice in relation to matters of amendment. That does not give a binding answer, but guidance which may be helpful to take into account in the exercise of discretion.

39. The nearest equivalent to the issues in the present case in a court action may be a personal injury claim. The procedure for such a claim is different to that in the present claim. An action must generally be commenced within three years of the accident or injury under the Prescription and Limitation (Scotland) Act 1973, but once commenced there is a period for adjustment of the pleadings, and during that period the pursuer can add to the pleadings a new basis in law for making the claim, doing so after the three year period has expired, which will be competently before the court, and brought in time.

40. Once that period of adjustment is completed however, the position is different. There is then a Closed Record, and amendment thereafter which may bring in a new claim requires the consent of the court. Amendment can be allowed or refused in the discretion of the Court. There are separate rules for the Court of Session and the Sheriff Court, but the principles underlying them are the same.

41. Chapter 24 of the Rules of the Court of Session makes provision for amendment, but the Rules do not state specifically a procedure in the event that the amendment by a pursuer seeks to introduce a new claim which the defender claims is timebarred. That was referred to in ***Docherty v Secretary of State for Business, Industry and Strategy [2017] CSOH 54*** a personal injury action in which the motion was to allow an amendment and in the circumstances of that case the discretion was not exercised in favour of the pursuers, such that the amendment was refused. That took place on the basis of the Minute of Amendment, Answers, and submissions.

42. There are other circumstances where it is not clear when a right of action arose, for example the date on which a pursuer knew or ought to have known of the right of action, which is when the period for timebar purposes starts. In such a case where there is an evidential dispute, the court can hold a preliminary proof on that question.

43. A preliminary proof is also competent when an argument is made under section 19A of the Prescription and Limitation (Scotland) Act 1973 in relation to a personal injury action raised outwith the statutory time limit of three years. In ***Donald v Rutherford 1984 SLT 70*** an Extra Division of the Inner House of the Court of Session considered the terms of section 19A. Lord Cameron said the following:

> "Before parting with this case I would draw attention to a difficulty which almost inevitably must arise in dealing with a claim that an action already time-barred should be allowed to proceed, when the only material upon which the court is asked to exercise an equitable jurisdiction is contained in pleadings and certain admitted (but not necessarily complete) correspondence. In the present case I do not

think that the interests of parties have been prejudiced by the course which the proceedings took, but when the issues are more complicated and the salient facts less clear than they are in this case, then I think it may well be in the interests of parties that the question of the applicability of s. 19A of the Act of 1973 should be decided on the result of a preliminary proof on the relevant averments and pleas of parties."

44. In the case of ***Argyll and Clyde Health Board v Foulds and others UKEATS/009/06*** Lady Smith at the EAT said this in relation to Scots law and practice, in the context of amendment of a Tribunal claim:

"19. I would, at this point, observe that the 2004 rules make provision for amendment in a similar manner to that which is provided by the Rules of the Court of Session. Rule 24.1 of those rules provides that, in any cause, the court may, at any time before final judgment, allow:

' (2).....

(d) where it appears that all parties having an interest have not been called or that the cause has been directed against the wrong person, an amendment inserting .....an additional or substitute party.....' .

20. In both cases, a wide discretion as to whether to allow the amendment is conferred by the rules. It is within the discretion of the court to allow such an amendment even if time bar questions are liable to arise because of late service on the new defender, such questions being a matter of substantive law and not covered by the rules of court. It is though unlikely that the court will be persuaded to do so if it is plain from the pursuer's case that he will have no answer to the time bar point. It may not be plain though; the case may, for instance, require consideration of whether the provisions of sections 17 or 19A of the Prescription and Limitation (Scotland) Act 1973 apply, a matter in respect of which there will often require to be a preliminary proof."

45. Some issues of jurisdiction on issues of timebar may be clear from their face. ***Newquay*** is an example of a case where there was a discrete period of time involved which had ended, such that unless it was just and equitable to extend time it was outwith the jurisdiction of the Tribunal. There are other cases however where that clarity on timing is lacking.

46. In ***Bear Scotland v Fulton and another [2015] ICR 221*** the EAT said the following in relation to ***Selkent, Rawson*** and ***Newquay***:

> "It is clear from these authorities that the usual principles for amendment of a claim include a requirement to determine at the stage of exercising discretion to grant or refuse the application (i) whether the amendment seeks to bring in a claim that would otherwise be time barred and (ii) if so, whether there are good reasons, taking into account injustices and hardship that may be the result, to grant the amendment notwithstanding that the effect will be to allow the amending party to avoid the usual consequences of presenting a claim out of time."

47. That analysis is very different to the decision in ***Galilee***.

48. ***Rawson*** was a case where a claimant sought to introduce out of time a new claim of disability discrimination which had not been pled initially. The appeal was allowed, but the reason for that was that the Judge had not in terms considered the issue of whether it was just and equitable to allow the claim to proceed. If it was, that would point strongly but not determinatively towards allowing the application to amend, and if not it would point strongly but not determinatively against that. The EAT did not specifically address the point of whether a factual dispute, if there was such, could be reserved for decision after allowing the amendment.

49. ***Selkent*** also stated specifically that in addition to the three factors referred to all of the circumstances required to be taken into consideration, and I respectfully agree with the EAT in ***Galilee*** when it stated in relation to the use of the word 'essential' in relation to considering time limits 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 should be decided before permission to amend can be considered"

50. ***Selkent*** did not consider specifically whether there may be a disputed issue of fact in relation to jurisdiction.

51. In light of the foregoing analysis and with respect I do not consider that the ***Amey*** quotation that there is a requirement to determine the issue of timebar when considering whether or not to exercise discretion to allow or refuse an application to amend is correct if it was intended to be an absolute rule. It may not have been so intended as there is reference to "the usual principles", which may on one construction admit of exceptions.

52. I do not consider that to take a decision on an amendment which may or may not be timebarred, dependent on disputed facts concerning conduct extending over a period quite apart from what is just and equitable, in the absence of evidence on those facts, could be in accordance with the overriding objective as it would not be just to do so. Whilst the terms of the overriding objective do not give carte blanche to do as one wishes, the Tribunal requires to give effect to the Rule when exercising any power given to it by the Rules, which includes that for case management.

53. I therefore consider that the ***Galilee*** line of authority is to be followed, at least in the circumstances of the present case, although I do so for somewhat different reasons than those set out there and having regard also to the law and practice in the Scottish courts referred to above, rather than the law and practice in England.

54. It follows from my conclusion that an amendment can be allowed in whole or part subject, in a case where there is a dispute on facts material to the issue of whether a claim in relation to timebar is within the jurisdiction of the Tribunal, to those facts being determined by evidence, on which case management is required to address the procedure to be followed. I consider that the ability to reserve the issue of jurisdiction in such a manner is a matter to take into account when considering the issue of timebar in the exercise of discretion.

55. The ***Selkent*** principles, as they have become known being the matters referred to in the case of that name set out above, are I consider a good starting point for consideration of whether or not to allow amendment. They are not exhaustive but provide a framework for consideration of the issues that arise. I shall deal with each remaining proposed new claim in turn.

(i) *Nature of amendment*

56. There were two amendments that the claimant wished to pursue which the respondent challenges. The first is to add a claim of age discrimination under sections 13, 19 and 26 of the 2010 Act. I do not consider that the claim on the basis of that characteristic was clearly within the terms of the Claim Form, but I do find that there is a strong causative link to that, in particular the reference to retiring employees. It is a short step from that to a claim of age discrimination. The facts relevant to a claim of age discrimination are not the same as those for a claim of disability discrimination, as the comparators for the section 13 claim and the PCP for the section 19 claim will be difference, for example, but what may be termed a key fact is the alleged policy of only allowing part-time working to those nearing retirement. There is a strong causative link between the original pleading and the amendment sought, and that favours allowing it. In respect of the second category of amendment being points of detail I had no difficulty in concluding that they were extensions of the existing pleading to provide greater clarity and better notice.

(ii) Time limits

57. There is an issue raised over timebar. It is not a simple matter to address. The claimant alleged that there was conduct extending over a period for the purposes of section 123 of the 2010 Act, such that there is no issue of timebar at all. The respondent contends that there is an issue as to whether or not there was conduct extending over a period, and if so what period, and there are arguments over whether or not it is just and equitable to allow a claim if late.

58. I consider that whether or not the alleged acts are part of conduct extending over a period are best determined after hearing all the evidence

in the present case. The alternative is to try to make an assessment of the amendment based purely on submission, where there are competing arguments as to fact and a very limited basis on which it is possible to assess which party is right, and to what extent. The Tribunal can reserve the issue of jurisdiction for the Final Hearing and that is a factor that favours allowing the amendment.

59. The relative hardships suffered by the parties is relevant in the assessment of what is just and equitable for the purpose of section 123. There is clearly potential for hardship to a respondent in seeking to investigate and defend a new claim but also new facts not originally pled and which are not identical to issues of disability discrimination. It is possible that that may cause a degree of prejudice, and it is liable to increase cost to an extent. At this stage the extent of any prejudice is not known, but it can be referred to at the stage of the Final Hearing. The respondent's defence can include that of objective justification under section 13(2), amongst others. The prejudice to the respondent is set against the loss of claims that the claimant wishes to pursue if the amendment is refused. Whilst the respondent referred to a claim against her agent, that is less than certain given the standard of proof, which requires that no reasonably competent solicitor would have acted as here, in turn requiring the cost of expert evidence for both the merits and remedy, and then if terms are not agreed civil litigation with the risk on expenses that that involves, a risk far greater than for the Employment Tribunal proceedings. That is all in the context of evidence relevant to the disability discrimination claims on the issue of the alleged policy of only granting part-time work to those nearing retirement, a policy which the respondent denies, being heard in any event, such that the prejudice to the respondent in the separate context of age discrimination is I consider limited.

60. Whilst each side may suffer prejudice accordingly I consider that this is a matter that favours the argument for the claimant who will I consider suffer materially greater prejudice if the application in relation to a new protected characteristic is not granted, and I consider that to the extent that it is not clear at this stage whether or not the claim is within the jurisdiction of the

Tribunal it is in the interests of justice to reserve that matter for determination after the Final Hearing.

(iii) *Timing and manner*

61. The reason for the delay, or not addressing the age claim in the Claim Form, was stated to be administrative error. The amendment was made fairly early in proceedings. The claimant was represented by solicitors both for the Claim Form and the amendment, and that is a factor against the claimant, but the failure to refer to the protected characteristic of age was it appears noted relatively quickly and the application then made. Overall I consider that these issues favour the granting of the application.

(iv) *Analysis*

62. The above are not exhaustive factors. I also considered the situation as a whole. It did not appear to me possible to make an assessment of whether the claims of age discrimination have reasonable prospects of success or not. In all the circumstances I considered it in the interests of justice to grant the application to amend, reserving issues of jurisdiction. That was so primarily as firstly there is a strong causative link to the original pleadings, secondly the prejudice to the respondent is outweighed by that to the claimant, for the reasons set out above, and thirdly jurisdiction may be reserved for consideration after hearing the evidence such that the respondent remains able to argue such matters, but overall it appeared to me to be in the interests of justice to allow the application to amend, subject to that reservation.

Conclusion

63. The application for amendment is granted, reserving the issue of jurisdiction.

64. I have referred in this Judgment to authorities not commented on in submission, and if either party considers that it has suffered prejudice as a result it may seek a reconsideration of this Judgment under Rules 70 and 71.

Further procedure

65. The respondent wished to revise its Response Form if the amendment were to be granted, and I direct that it may do so within 21 days of the date of this Judgment. That was not opposed by the claimant.

66. There was also a discussion as to a draft List of Issues. I shall separately to this Judgment revise the draft and have that sent to parties for consideration. If either party wishes to propose amendments to that draft it shall do so within 21 days of the date of the email sending it to them, and indicate either that it is content for the matter to be addressed at the commencement of the Final Hearing, or that a further Preliminary Hearing is sought to do so. In that latter event, such a hearing can be arranged to be conducted by telephone.

Employment Judge: Sandy Kemp
Date of Judgment: 19 October 2021
Entered in register: 20 October 2021
and copied to parties