EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102544/2018

Preliminary Hearing Held at Glasgow on 30 May 2018

Employment Judge: Ms M Robison

Mr M Murphy	**Claimant Represented by Mr S Smith Solicitor**
W M Donnelly & Co Ltd	**Respondent Represented by Mr D McCusker Trainee Solicitor**

DECISION OF THE EMPLOYMENT TRIBUNAL

The decision of the Employment Tribunal is that:

1. The claimant's application to amend to include a claim of disability discrimination is allowed;
2. The respondent's application to amend is allowed.

REASONS

Background

1. The claimant, who was not legally represented at the time, lodged a claim in the Employment Tribunal in or around 27 May 2017, claiming unfair dismissal, arrears of pay holiday pay and other payments. The claim was subsequently rejected for non-payment of the issue fee.
2. The claimant received a letter dated 24 November 2017 from HM Courts and Tribunal Service regarding the reinstatement of claims following the decision of the Supreme Court which held that rejections for non-payment of a fee should have no effect, meaning that any claim was to be treated as if it had not been rejected.
3. Consequently, the claimant completed a form confirming that he wished his claim to be reinstated, dated 27 November 2017. Although the claimant states that he sent it to the Employment Tribunal very shortly thereafter, the form itself is date stamped as received on 7 February 2018 (which may have been due to an administrative backlog). In any event the claim was accepted by letter dated 13 February 2018 and served on the respondent.
4. The respondent completed the ET3 response form, which they submitted to the Tribunal, together with availability and a list of witnesses the respondent intended to call for a final hearing.
5. A case management preliminary hearing was then fixed to "obtain further clarification of the basis of the claim", which took place on 11 April 2018. Mr Murphy represented himself at that hearing, without legal representation. The respondent was represented by Mr Robertson, solicitor. A final hearing was subsequently set down for 7 and 8 June 2018.

Applications to amend

6. Immediately after that preliminary hearing, the claimant made an appointment with a solicitor. The solicitor whom he instructed, Mr Smith, intimated to the Tribunal, and to the respondent, by e-mail dated 4 May 2018 that he had been instructed by the claimant, and he made an application to amend the claim by adding new heads of claim of direct and associative discrimination (by which he meant discrimination arising from disability), and enclosing the

proposed amendment. He stated that he was not applying for the final hearing to be postponed, believing it may be possible for these claims to be heard at the same time as the existing claims.

7. By e-mail dated 10 May 2018, the respondent's solicitor intimated that they were objecting to the amendment because the claims were significantly out of time, and that it would not be just and equitable for them to be accepted late. He also intimated that the respondent did not accept that the claimant qualified as a disabled person in terms of the Equality Act 2010. He sought to have the forthcoming hearing discharged, and converted to a preliminary hearing on time bar, with the second day reserved to consider the question of disability status.

8. That application was refused by the employment judge who considered the application to amend. Rather, she fixed this preliminary hearing to determine the amendment application prior to the final hearing dates.

9. By e-mail dated 23 May 2018, the respondent intimated an application to amend the ET3, and provided an updated ET3 including the proposed amendments as track changes. Clearly it was also appropriate to deal with that amendment at this hearing.

Procedure at preliminary hearing

10. At the outset of the hearing, Mr Smith indicated that he intended to call the claimant to give evidence. I suggested that it was unusual to hear evidence in relation to an amendment application. The issues which Mr Smith initially proposed to lead evidence on, that is in relation to the fact that the respondent disputes that the claimant is disabled or has knowledge of the disability, were in my view not relevant to the question whether the amendment should be allowed. He indicated that this would show that he had good prospects of success, which he considered a relevant although not determinative factor in the test to assess whether amendment should be allowed.

11. While I accept that prospects of success are not an irrelevant factor, in a case such as this, where the claimant has type 1 diabetes, which he referred to in his original claim form, they are not a significant factor unless clear cut. I did not consider that this was a case where the claim could be said to be

utterly hopeless. I did not consider that it was appropriate or necessary to hear evidence on these issues when I would not be determining them at this stage.

12. After lengthy discussion, during which Mr McCusker intimated that he had not expected evidence to be led and he had not prepared to cross examine Mr Murphy, it was accepted that evidence would not require be led at this hearing.

13. It transpired however, given the development of legal argument during the hearing, and following initial submissions by both parties, that it was appropriate to hear evidence from the claimant on one narrow issue, namely the question whether it was just and equitable to extend time in the event that I concluded that any new claim was out of time, and assuming I had to decide this question before I could determine the question of amendment. Parties made further final submissions following the evidence of the claimant.

14. I consider it .opriate to record that it was very hot in the Tribunal room and thai Mr McCusker indicated at one point that he was feeling unwell. After a 10 minute break for fresh air, he returned and indicated that he was happy to proceed .

2oClaimant's submissions

15. Mr Smith explained that he is seeking to amend the application to include a claim under both section 13 and section 15 of the Equality Act. He will argue that the claimant was dismissed because of his disability and, if he is not able to establish that, then he will argue that he was dismissed because of the symptoms of his disability, that is that he had to take time off to deal with stress.

16. Mr Smith explained that the claimant has type 1 diabetes and is insulin dependent, latterly requiring 10 injections each day. It is his position that the respondent was well aware of the claimant's conditions, and he will lead evidence to that effect at a subsequent hearing. The claimant confirmed this position in evidence.

17. He stressed that the claimant was not legally represented when he completed the ET1 himself, which he accept has deficiencies in terms of the information included there. In particular, although the claimant made

reference to having type 1 diabetes in the ET 1, and he now argues that was the reason for his dismissal, he does not in terms link the actions of the respondent with his diabetes and he fails to set out the full context. He refers to a series of disagreements and deteriorating working relationship from October to January. He does not include dates but he makes reference to being accused of drinking alcohol, although he does not explain in terms that his condition was related to his diabetes, which was exacerbated by working long hours due to a computer problem which impacted on his work. This, Mr Smith asserted, resulted in stress and erratic eating patterns, which impacted on his health.

18. With regard to the time frame, in the ET1 he stated that the claimant was dismissed on 27 January 2017. He contacted ACAS and lodged the ET1 within a month of the EC certificate (C1) on 27 May 2017 (see computer printout relating to non-payment of the fee). Mr Smith therefore submitted that his original claim was lodged in time.

19. Mr Smith made reference to the Selkent principles. Mr Smith accepted that the amendment which he seeks to make is a new claim. He said that it was not a re-labeling, and accepted that it was a different type of claim. He stressed however that the disability claim arises from the same facts as those set out in the ET1. Mr Smith acknowledged however that the claim will now require comparison between the claimant and a hypothetical comparator.

20. While accepting it is a new claim, he argued that the components of the claim are already in the ETI.The claimant's position is that he accepts that he has not properly set out the details of his claim, that he failed to tick the box relating to discrimination, and failed to make the link between his type 1 diabetes, the stress, the long hours and his dismissal in the ET1. He failed to make it clear that he will argue that the dismissal was due to his diabetes or to the symptoms arising from diabetes.

21. Mr Smith submitted that because the factual background is as set out in the ETE and it relates to the same events and the same people. any preiudice to the respondent in adding this new claim will be limited. In particular, the respondent has listed the six witnesses whom they propose to call. These witnesses will be able to speak to the conversations which the claimant seeks

to rely on to argue that his disability was the subject of comment and the subject of controversy and it was shortly after that that he was dismissed.

22. He accepted that the one exception to that is that medical evidence will now require to be led, but this is because the respondent does not accept that the claimant is disabled, so that factor should not be laid at the door of the claimant.

23. While there would be little prejudice to the respondent, that has to be contrasted to the prejudice there will be to the claimant. In particular, while he will be able to pursue a claim of unfair dismissal, his remedy will be substantially reduced. In particular, if the Tribunal finds that the dismissal was motivated by discrimination, then the Tribunal could not make an award for injury to feelings; and there would be a "windfair* to the respondent who would have dismissed someone who has a disability without paying the price. Mr Smith submitted that it was also relevant that the compromise agreement, which the claimant referred to in the ET1, was intended to compromise the disability claim as well. Given that the claimant did not sign the compromise agreement, Mr Smith said that he would be relying on the fact that the respondent was seeking to settle a disability claim.

24. Given that this is a new claim, he accepts that the claim is lodged out of time. His position is that, but for the rejection for non-payment of fees, the claimant would have been in this position a year ago; that is that it is likely that after a preliminary hearing he would have contacted a solicitor, who would have sought to make these very amendments. The year's delay is not due to the claimant's actions, and so this claim should be looked at on the basis that it is one month out of date rather than 13 months after the original time limit.

25. Finally, Mr Smith submitted that it was just and equitable for the claim to be allowed although late. He was however conscious that there were competing authorities on whether this was a matter which had to be determined before the decision to accept or reject the amendment **(Amey Services Ltd** v **Aldridge UKEATS/0007/16),** or whether it was a matter which could be carried over to the final hearing **(Galilee v Commissioner of Police of the Metropolis UKEAT/0207/16).** He submitted that I could rely on the latter because His Honour Judge Hands QC stated there that he was relying on the decision of **City of Edinburgh Council v Kaur [2013] CSIH 32,** which is a

decision of the Inner House, which decision should not be confined to granting an extension of time in a "continuing act" type case.

26. Mr Smith submitted that if the amendment is refused, then the claimant would have the option of lodging a new ET1, and the claimant would be entitled to make a just and equitable argument on the same issues, which would not be an efficient way to proceed.

Respondent's submissions

27. Mr McCusker submitted that this is a claim which is out of time, given that the claimant must lodge his claim within three months of the act of discrimination. In this case, the application to amend was made on 4 May 2018, which is more than a year after the alleged act of discrimination took place. In such circumstances, where the claim is clearly lodged out of time, then the claimant will require to argue that it is just and equitable to extend.

28. Mr McCusker relied on **British Coal v Keeble EAT/496/96** to support his argument that it was not just and equitable to extend the time limit in this case.

29. Mr McCusker referred, quoting the **British Coal** case, to section 33 of the Limitation Act 1980, and the decision of the EAT that the tribunal should adopt as a check list the factors mentioned in section 33 of that Act. That section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia to a) the length of and reasons for the delay; b) the extent to which the cogency of the evidence is likely to be affected by the delay; c) the extent to which the party sued had co-operated with any requests for information; d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action and e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

30. Mr McCusker argued that the respondent would be prejudiced by allowing the claim to be amended to include a disability discrimination claim. He submitted that it was not clear why Mr Murphy had delayed in making the discrimination

claim. He suggested that he was being opportune in now seeking to amend to include disability discrimination claim, and that this was an afterthought. He made no reference in his ET1 about how his diabetes was affected by stress. He filled in the boxes for unfair dismissal and holiday pay but he failed to complete the box related to discrimination. In his role as finance manager, he would be used to filling in forms, to dealing with HMRC etc, so that he could have been expected to complete this form correctly, making reference to the claims which he intended to pursue.

31. Mr McCusker submitted that Mr Murphy's evidence that his failure to include a claim of discrimination was an oversight should not be accepted. He submitted that he had sought to amend his claim simply to inflate the value of any compensation that he might seek.

32. While it is argued that this is a new head of claim, here there is no new evidence referred to, no further information which he has come in possession of which would justify him pursuing a discrimination claim. The exercise of discretion to allow a claim in although late should be the exception and not the rule. Here the claimant has failed to show that it is just and equitable to extend time limits when if the claim was legitimate it could have been made earlier. In any event, the prospects of success in the discrimination claim are limited.

Decision and reasons

33. The question whether or not to grant an application to amend is a matter of judicial discretion. When determining that question, account requires to be taken of the guidance set out by the EAT in Selkent Bus Co Ltd v Moore 1996 IRLR 661. In that case, the EAT stated that "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" (the so-called "balance of hardship" approach).

34. In making that assessment, the EAT stated that the relevant circumstances include (although are not limited to):

    1. *The nature of the amendment.* It is necessary to draw a distinction between (a) amendments which are simply intended to

alter the basis of an existing claim, (b) those which add a new type of claim arising out of the facts already plead (re-labeling) and (c) amendments which add a wholly new type of claim which does not relate to the facts set out in the original claim at all.

2. *The applicability of time limits.* If the amendments add a wholly new type of claim, it is necessary to determine whether or not any new claim is out of time, and if so whether the time limit should be extended under the relevant statutory provisions. This however is only a factor to take into account and is not determinative.

3. *The timing and manner of the application.* Otherwise, there are no time limits laid down in the rules for the making of amendments. The mere fact that there has been a delay in making any amendments does not mean that an application should be refused. Rather it is a factor to be taken into account, considering why the application was not made earlier and why it is now being made. Questions of delay, as a result of adjournments, and additional costs are relevant in reaching a decision.

35. Mr Smith did not seek to argue in this case that this was a relabeling. In submissions he said that he accepted that this was a new claim. In such circumstances, where he also accepted that the claim was lodged out of time, the question of whether it was just and equitable to extend the time came into play.

36. I was conscious that although Mr Smith did not seek to argue that this was a re-labeling, I did note that he stressed on several occasions that the claim arose out of the same facts. His position was that the facts plead were not fulsome and had failed to include important details, but still he said that the claim related to the same events and the same people.

37. I found it difficult to reconcile Mr Smith's position that he was not arguing this was a relabeling; accepting that it was a new claim, but at the same time repeatedly asserting that the new claim arose out of the same facts. However, I understood that he felt constrained to do so because of the recent decision of Mr Justice Soole in **Reuters Limited v Cole UKEAT/0258/17.**

38. Notwithstanding Mr Smith's position accepting that this is a new claim, I could have been persuaded that this was a re-labeling in light of other authorities

referred to, not least the decision in **Selkent** itself. Considering what is stated there, while it is accepted that this is not a minor amendment and therefore not a type 1(a) amendment, a type (b) amendment is stated to be one "arising out of facts already plead", which is categorised as re-labeling, while at type (c) is "a wholly new type of claim which does not relate to the facts set out in the original claim at all".

39. Here Mr Smith seeks to argue that this new claim arises from the same facts already plead. Certainly it is clear that it could not be said that it does not relate to the facts set out in the original claim *at all,* so questionable then whether it is a type (c) claim.

40. More recently in the Court of Appeal, in **Abercrombie v Aga Rangemaster 2014 ICR 209,** Lord Justice Underhill, when considering an application to amend, said that the focus is 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".

41. In any event, while I have accepted that this is a new claim, I have taken into account the fact that the factual matrix is essentially the same as that plead in respect of the unfair dismissal claim, which I discuss further below.

Just and equitable extension

42. On the basis that this is a new claim, I am aware of course that the question of time limits is a relevant (although not determinative) factor.

43. Mr Smith accepted that the claim has been lodged out of time. In such circumstances, the relevant statutory provisions relating to the extension of time come into play. As highlighted by Mr Smith, there are however conflicting authorities regarding whether this is a matter which requires to be determined as part of the application to amend, or whether it can be deferred.

44. In the interests of efficiency and expediency, and in the hope of preserving the dates of the final hearing, I proposed that I should hear evidence on this narrow point, in the event that I took the view that it was necessary for me to determine this point in order to come to a conclusion on whether the amendment should be allowed (that is following the decision of the Scottish EAT in **Amey).** I was conscious too that this was not apparently a "continuing

act" type case, but that the date of the last act of discrimination was the date of termination (and therefore it would not be necessary to hear evidence to establish that).

45. Mr Smith was happy to lead evidence from the claimant on this point. Mr McCusker was of the view that, on reflection, it would be helpful to hear evidence from the claimant regarding the reasons he was putting forward for the delay in lodging the disability discrimination claim.

46. Consequently I heard evidence from the claimant on this narrow point. His evidence was that when he applied to ACAS for early conciliation he thought that they would give him advice, but he found them to be impartial. He accepted that he did not tick the discrimination box, but he was not sure that he needed to. At the time he did not know what type of claim he should be making, and he acknowledges now that related to ignorance on his part. He had no-one to assist him, having separated from his wife recently, who would usually help him with such things. He realises now that he should have got advice at the time. It was not until he attended the preliminary hearing that he realised that he should get legal advice. This was because the employment judge pointed out to him that the respondent had an esto claim, which she explained was a fallback. He realised that he did not understand the legal terminology, that he did not have a fallback claim and that the respondent had solicitor to represent them which he considered disadvantaged him. While Employment Judge Walker was impartial, to the extent that she said that he was entitled to represent himself, he understood her to suggest on three or four occasions that it would be helpful for him to engage a solicitor. Immediately after that preliminary hearing he made an appointment to see Mr Smith to "balance things out". He said that his failure to mention disability discrimination was an oversight and that mentioning it now is not an afterthought or being opportunistic.

47. I should say that I found the claimant to be a credible witnesses, and I accepted his evidence on this point, despite Mr Smith's concerns that Mr McCusker was attempting, through cross-examination, to question his credibility and his motives.

48. With regard to the time frame in issue, and the extent of the delay, this case is complicated by the fact that this is a reinstatement case, which was

originally dismissed for the want of payment of a fee. Thus as Mr Smith submitted the delay of a year should be left out of account given that that delay could not be said to be the fault of the claimant. Considering the situation hypothetically, had the case called for a preliminary hearing one month or so after lodging the claim, and had the claimant represented himself at that hearing, and had he then appreciated that he would need legal advice, he would in all likelihood have sought legal advice, and no doubt have been advised to pursue a disability discrimination claim at that time, that is around a month after the time limit had expired (and not 13 months after). The claimant's evidence was that as soon as he realised that he was essentially out of his depth, given the legal terminology and his limited understanding of legal concepts, then he made an appointment with a solicitor.

49. Consequently, taking that factor into account, I accepted that there was a valid reason, which was not the fault of the claimant, for a significant proportion of the delay in making the claim. I accepted Mr Smith's submission that the circumstances do not require to be exceptional. I accepted the claimant's evidence that he was not aware of his rights, and only came to understand that he was entitled to pursue a disability discrimination claim once he had taken advice from a solicitor. He did so when it was suggested to him that might be helpful. The claimant acted promptly in instructing a solicitor, who intimated the amendment at the earliest opportunity. I have come to the view, as discussed below, that the evidence which will be heard will be essentially that which would have been heard in respect of the unfair dismissal claim, and the witnesses the same, and therefore its cogency would be unaffected by the delay. I am conscious that in personal injury type claims, the limitation period is far longer and proofs are often heard many years after the incident.

50. For all of these reasons, I have come to the view that it was just and equitable for the time limit to be extended in this case.

Other factors

51. In any event, following **Selkent,** the issue of time limits is simply a factor which I require to take into account in the exercise of my discretion. It is

relevant but not determinative. I require to consider all of the circumstances, when assessing the balance of prejudice and the balance of hardship.

52. I am very mindful that the claimant was unrepresented when he completed the ET1 form. He admits now in evidence that he was simply ignorant of the law relating to disability discrimination. In a sense, that is not surprising.

53. I think what is important in this case to bear in mind are the facts as set out in the ET1. There is a lack of clarity about what exactly was included in the ET1 which was originally submitted. Mr Murphy's evidence was that he had submitted the claim on-line, and as far as he can recollect he also sent it in by post. He believes that he sent in a version by post which included handwritten notes, shortly after the on-line submission, but he is not sure exactly the extent of what was written there.

54. The ET1 now lodged and being referred to also has handwritten notes on it. While Mr Murphy accepts that this is his handwriting, he believes that he may have written some entries at different times from others.

55. However, what is clear is that a submission was made on line. That submission must have contained the typewritten explanation of the claim in box 8.2. That states that: "I was asked to leave [my] full-time job on the 23.1.17. My work life had suffered with the breakdown in communication and due to working unpaid long hours and having a constant pressure on me. I felt my type 1 diabetes was being brought into question when I was questioned on several occasions about drinking alcohol during working hours. I had another heated disagreement with my MD mid November 2016 where he accused me of taking time off work and I explained that I had several funerals and a lot of personal stress. This got worse and in the heat of an argument I may have said it would be better that I didn't work here. At no point was this processed in the normal way of an employee handing in their notice. I know this for a fact as it was my job to handle HR and all payroll duties. I was given a "compromise agreement' and one week to vacate the premises with, no good reason. The document e-mailed io me from my managing director's solicitors has the words 'contract terminated' on the date 20.1.17. I was given little or no time to prepare a handover and felt like I was being pushed out the company. There was an immediate replacement for me and I felt I could no longer work there again as the rumours and bully tactics

are shocking. I did not have any drinking problem and was given zero (sic) but further pressure and I had to go to see my doctor who has [signed] me [off] unfit to work due to stress".

56. Often ET1s completed by litigants in person contain very sparse information about the factual basis of the claims and no reference at alt to the legal basis. I accepted Mr Smith's submission that these facts set out in the ET1 provide the essence of the claimant's claim, absent some important details, and perhaps in particular the claim which the claimant makes that there is a link between his disability (type 1 diabetes) and his belief about the reason for dismissal.

57. The respondent has set out their defence to the claim. Their principal argument is that the claimant was not dismissed at all but resigned. They have set out their esto positions in their ET, which include the fact that the claimant was not an employee and that dismissal was within the band of reasonable responses and was procedurally and substantively fair. I assume that the respondent will be maintaining this position at the final hearing. I noted that the respondent has indicated that they intend to call six witnesses, and these are the witnesses whom the claimant intends to cross examine to seek to establish his claim that the reason for dismissal was his disability.

58. I took account of the fact that the factual matrix is the same or very similar to that which would be the backdrop for the unfair dismissal claim. Indeed, I noted in Mr McCusker's submissions that he relied on the fact that the claimant had adduced no further or additional evidence in support of his case, as an argument not to allow the new claim. This is precisely the point. The factual background for the disability discrimination claim is essentially the same as the factual background to the unfair dismissal claim.

59. I do accept that legal issues will involve a different type of enquiry. That would appear to be limited to the question of any actual or hypothetical comparator for the direct discrimination claim. I note in any event that the claimant is relying on section 15, that is that he suffered unfavourable treatment because of something arising from his disability. I could not say that would involve substantially different areas of enquiry. This is a matter which will require to be dealt with in legal submissions in particular.

60. Indeed I take the view that in allowing that amendment, it would not be necessary to vacate the hearing set down for next week because the factual background and the witnesses who will speak to that will be the same as that for the unfair dismissal claim.

61. There is however a factor which requires to be taken into account which may mean that the hearing set down for next week does require to be postponed. The reason for that lies with the respondent: the respondent states that they do not accept that the claimant is disabled for the purposes of the Equality Act. This will necessitate the claimant obtaining medical evidence to support that submission. I must say that I was surprised to hear that the respondent does not accept that the claimant is disabled for the purposes of the Equality Act. This is a case where the claimant has had type 1 diabetes since he was 16, and is insulin dependent. Without making any conclusions about the particular circumstances, it is clearly even within judicial knowledge that without that medication this would usually have a severe impact on the ability to carry out day to day activities.

62. Although the claimant asserts forcibly his contention that the respondent was very well aware that he had a disability, the respondent denies knowledge of his disability, but that is of course a different matter to whether the claimant is disabled for the purposes of the Equality Act.

63. If there requires to be an adjournment application for the sole reason that the claimant's disability status is contested, then account will obviously require to be taken of the fact that this is a matter which the respondent has decided, as is their right, to contest.

64. Otherwise, when it comes to prejudice to the respondent, while I accepted that the respondent will require to give some consideration to the legal basis of this claim, I was of the view that there are no significant consequential consequences of accepting the amendment, and any additional costs are marginal. This is particularly because I do not consider that the factual matrix nr the length of the hearing will be significantly extended if the disability claim is added.

65. Considering the balance of prejudice, I took account of the fact that the claimant can still pursue the unfair dismissal claim, although I accepted Mr Smith's arguments that if the facts do support the claimant's disability

discrimination claim, then he would otherwise be deprived of a remedy in that regard.

66. Mr McCusker submitted that I should take account of the fact that there are limited prospects of success. Mr Smith accepted that while not determinative, this is a factor to be taken into account in considering an amendment application. While I accept that, I consider that it is a factor which I should take into account when the circumstances are clear cut. The case of **Woodhouse v Hampshire Hospitals NHS Trust UKEAT/0132/12** was referred to, but I read that case as indicating that prospects of success should be taken into account when it was clear that the claim was utterly hopeless. I could not say that in this case, and if the claimant can prove what he is offering to prove, then I could not say that he has little or no reasonable prospects of succeeding with his discrimination complaint.

67. Taking account then of all the circumstances of the case, and in assessing the balance of wardship and the balance of prejudice I decided that this amendment should be allowed.

The respondent's amendment

68. I had understood that the claimant would not oppose the respondent's application to amend. As I understood it, Mr Smith opposed the amendment for the sole reason that it would not be fair to allow the amendment given that the respondent was opposing his amendment as being too late. I did not accept that argument, but in any event I have allowed the claimant's amendment.

69. In these circumstances, the respondent's application to amend, considering the amendment is relatively minor and has been made without undue delay is also allowed.

Next steps

70. Consideration then requires to be given to whether the hearing set down for 7 and 8 June 2018 can proceed.

71. I indicated at the hearing my preliminary view that it would require to be postponed if I allowed the amendment, but that related largely to the fact of the requirement to consider the question of disability status. On further

reflection, I am of the view that the claim could proceed, and that at least evidence could be heard over those two days (and perhaps a third day later for submissions or the opportunity to submit written submissions).

72. I consider however that it is a matter for parties. Should either party continue to be of the view that the hearing set down for 7 and 8 June should be postponed in light of this decision, then they should make an immediate application to request that the hearing be postponed, giving their reasons in the usual way and that application will be considered as a matter of urgency.

Employment Judge: **M Robison**
Date of Judgment: **31 May 2018**
Entered in register: **31 May 2018**
and copied to parties