Case No: 2501133/2021

EMPLOYMENT TRIBUNALS

Claimant: **Miss P Ibinson**

Respondent: Tyne & Wear Passenger Transport Executive (T/a Nexus)

Heard at: Newcastle (CVP) **On: 4 April 2022**

Before: Employment Judge A. M. S. Green

Representation

Claimant: In person
Respondent: Mr J Anderson-Counsel

RESERVED JUDGMENT ON A PRELIMINARY ISSUE

1. The Tribunal does not have jurisdiction to hear the claim of indirect sex discrimination pursuant to the Equality Act 2010, section 19.

2. The application to amend the claim to include a claim of direct sex discrimination pursuant to the Equality Act 2010, section 13, is refused.

REASONS

Introduction

1. At a private preliminary hearing on 25 January 2022, Employment Judge Martin listed this public preliminary hearing to consider the claimant's application for leave to amend her claim, and thereafter to consider the claims and issues in the case and to make directions for the case to proceed to a final hearing. Mr Anderson confirmed that the hearing was proceeding under rule 53 (b) (i.e. to determine a preliminary issue). He was not seeking to strike out the claim under rule 37.

2. We worked from a digital bundle. The claimant and Ms Ally Jennings adopted their witness statements and gave oral evidence. Mr Anderson adopted his skeleton argument and made oral closing submissions. Given that the claimant was not legally represented, I gave her half an hour to gather her thoughts after she heard Mr Anderson's submissions before she made her own submissions.

The claim and the procedural history

3. To set the context, it is helpful briefly to describe the claim set out in the claim form and the subsequent procedural history.

4. The claimant has been employed by the respondent, a railway operator since 8 August 2018 as a Learning and Development Specialist (Organisational Development). She presented her claim to the Tribunal on 16 August 2021 following a period of early conciliation from 19 April 2021 until 31 May 2021.

5. In section 8.1 of her claim form, she ticked the boxes indicating that she was claiming discrimination on the grounds of her sex. She provided some particulars of claim in a separate document accompanying the claim form which indicated that her claim was for indirect sex discrimination pursuant to the Equality Act 2010, section 19 ("EQA").

6. On 25 October 2021, Employment Judge Langridge conducted a telephone private preliminary hearing. In paragraph 15 of her case management summary, Employment Judge Langridge summarised the claimant's claim which is that she believed that she was refused her first choice of the new roles under a revised structure owing to the respondent's requirement that she have 3 years' experience in a specialist area. The claimant alleged that this requirement disadvantages women because of the "geographical location and ratio of men to women in rail engineering" and she asserts that there is no justification for the three-year requirement.

7. In paragraph 16 of her case management summary, Employment Judge Langridge summarises the response. The respondent avers that it created specialist roles in Learning and Development and that the requirement for at least three years' experience in a specialist area was "necessary to reflect the specialist nature and importance of the role". The respondent asserted that the successful candidate (a man) met that requirement. It admitted that the requirement for three years' experience amounted to a provision, criterion, or practice ("PCP") for the purposes of a claim under EQA, section 19 but denied that this placed the claimant or women generally at any particular disadvantage. The respondent went on to say that, in any case, this requirement was a proportionate means of achieving its legitimate aims.

8. In paragraph 18 of the case management summary, Employment Judge Langridge noted that during the discussion, the claimant was asked whether she was bringing a claim of direct discrimination or indirect discrimination. The summary goes on to say:

> *… and initially she confirmed that her claim was for indirect discrimination only. She made reference to a grievance she had raised in the past about her treatment while pregnant, which identified as relating to discriminatory treatment both direct and indirect. She then*

claimed that this was background evidence only and that the present claim as set out in the ET 1.

9. In paragraph 19 of the case management summary, it is noted that Employment Judge Langridge asked the claimant to clarify the basis upon which women were generally disadvantaged by the requirement for three years specialist experience. The summary goes on to say:

    She referred to the higher ratio of men to women in the rail industry generally. Under the restructure, the role she was interested in was ring-fenced and she was the best candidate for it, then the respondent advertised the role and did this because it wanted a male candidate. The successful candidate Mr Butroid was given a development opportunity unlike the claimant. She also considers that the respondent changed the criteria for the job in order to ensure that it met the successful candidate's qualities. She alleged that the respondent only put the three-year requirement in place because it did not want her to have that job because she is a woman.

10. Employment Judge Langridge goes on to say in paragraph 20 of her case management summary:

    It was pointed out to the claimant that the above amount to allegations of direct discrimination which had not been pleaded as part of her case. The claimant referred to what she saw as a "throwaway comment" at the time of her aspiration interview with the HR manager, who said she saw the claimant in a different role. More recently, the claimant had been putting in a time-line together and came across some evidence supporting her view that the respondent wrote the job description and person specification to fit the successful male candidate.

11. In paragraph 21 of the case management summary, Employment Judge Langridge explained that if the claimant wished to pursue these arguments, she would need to apply in writing to the Tribunal asking permission to amend her claim and was given until 15 November 2021 to do this. It is noted that if she chose to make that application, she needed to spell out exactly what allegations of direct discrimination she was making and why she was seeking to add those allegations now rather than in her original claim form. It was explained to her that the Tribunal may or may not grant permission to amend her claim in this way.

12. In paragraph 30 of her case management summary, Employment Judge notes that the conversation concluded with a discussion about time limits for submitting her claim and the claimant was told that the Tribunal had discretion to extend time if it was just and equitable to do so. It is also noted that the claimant referred to the fact that the respondent preferred to deal with matters internally and refused to engage in early conciliation through ACAS.

13. In paragraph 31 of her case management summary, Employment Judge Langridge noted that it was agreed that the most efficient way to progress the case would be for the claimant to clarify the basis upon which a claim of indirect discrimination was made, by reference to the date or dates on which

the PCP was applied to her and to amend her claim to add allegations of direct sex discrimination.

14. On 14 November 2021, the claimant filed an application to amend her claim to adding claims of direct discrimination [37]. The respondent filed their opposition to the application to amend on 22 November 2021 [47].

15. There was a further private preliminary hearing on 25 January 2022 before Employment Judge Martin. Employment Judge Martin listed this public preliminary hearing and issued case management orders:

    a. enabling the claimant to file a witness statement on or before 15 March 2022;

    b. requiring the respondent to prepare a bundle of documents on or before 2022; and

    c. requiring the parties to send to each other written submissions upon which they wished to rely at this hearing. The claimant was specifically required to set out what amendments were being sought, the basis of those amendments, why those details were not provided in her original claim form and why she says the claims are out of time and, if they are out of time, why she considers she should still be allowed to proceed with those claims. This was to be done on or before 29 March 2022.

16. The claimant provided a more fulsome document than her original application to amend containing a witness statement [128] and details of her claims. This document relates to matters that are much wider than the application to amend her claim and do not fall to be considered as part of the original application. Consequently, I have limited my consideration of the application in respect of the document that she lodged on 14 November 2021 [37].

<u>The claimant's application and the respondent's objection</u>

17. In her application, the claimant requests the Tribunal to consider an amendment to her claim adding claims of direct discrimination. In support of her application, she provides the following reasons:

    a. Ms Jennings, the respondent's Human Resources manager and the Head of Learning (Ms Blevin) deliberately placed the minimum "3 years" criterion within the OLE ring-fenced role because they knew that the claimant was the strongest candidate for that role but did not want to allow her to occupy that position because she is a woman.

    b. In December 2020, Ms Jennings told a member of staff (Mr Myers) that she saw the claimant being placed in the general engineering post. This post was seen to be of less importance and easier to replace. For example if a female in the general engineering post fell pregnant, the three technical trainers would be able to provide cover easily into the replacement was recruited. If the claimant had been placed into the OLE specialist role and fell pregnant, the other trainers would not have the competence to deliver OLE training and this would have placed recruitment, Human Resources, and the Head of Learning under pressure to find a temporary replacement in her absence.

c. On 7 January 2021, the claimant attended an aspirational interview relating to the OLE position. Ms Jennings and Ms Blevins refused the claimant the ring-fenced position and development opportunity, focusing on the fact that she did not meet the minimum three-year requirement.

d. The claimant then provides background information relating to a previous grievance complaint. She then seeks to link this information to her claim. She says that despite agreeing to resolve her first grievance which she submitted in 2020, Ms Jennings and Ms Blevins failed to ensure that she was provided with Key Work Objectives and a development plan. She says that a development plan was necessary because she had entered the business without a railway background and without a formal development plan, she would fail to meet the Key Work Objectives. Regarding the Key Work Objectives, men are usually provided with these whereas females are not.

e. Despite repeated attempts by the claimant to obtain Key Work Objectives she was unsuccessful and Ms Blevins was aware of that but took no action.

f. In February 2021, the OLE position was advertised again in a manner that indicated that the job was intended to be given to Mr Butroid.

g. On 18 March 2021, Mr Myers (L & D specialist and union representative) informed the claimant that the OLE job was going to be readvertised and it was later discussed that Mr Butroid was successful in an interview held by Ms Frazer, the Technical Training Manager.

h. By the end of March early April 2021, the job was readvertised as a development opportunity and tailored to fit Mr Butroid.

i. On 6 April 2021, the claimant spoke to Ms Frazer to ask if she had interviewed Mr Butroid and she was told that she had.

j. On 12 July Mr Myers informed the claimant that it was not common knowledge that Mr Butroid had secured the OLE job. Later, Mr Myers said that Ms Jennings and Mr Butroid had confirmed this to him.

k. On 4 August 2021, the claimant asked Ms Blevins when she was going to announce that Mr Butroid had been successful in securing the OLE role. The claimant says that she got upset when she was told that Mr Butroid had always been successful, and they needed to “get my grievance out of the way first”. The claimant says that she was upset that no development plan or Key Work Objectives where never put in place for her, and yet male trainers had access to these. She gives examples of this.

18. Regarding her claim for indirect discrimination, the claimant says the following:

a. On 7 January 2021 she was refused the OLE role during the “ring-fenced” L & D reorganisation and told that she did not meet the newly

applied "three-year" criterion. She also asked for a development opportunity, which she was denied.

b. In February 2021, the job was readvertised, but because an internal male candidate did not meet the person specification, the criteria were changed so that the male candidate would be able successfully to obtain the role when it was readvertised again in March/April 2021.

c. The claimant alleges that the indirect discrimination occurred on 9 April 2021 when the job was still live for people to apply.

d. The claimant believes that the indirect discrimination continued until 9 August 2021 for the following reasons:

    i. Mr Butroid was offered a development opportunity between the end of April 2021 and 12 July 2021 when a member of staff confirmed that Mr Butroid was the successful candidate.

    ii. On 4 August 2021 Ms Blevins confirmed that she and Ms Jennings had formed a development plan for Mr Butroid.

    iii. On 9 August, the day when Mr Butroid's development plan took effect (his first day), the claimant was not afforded a development plan.

e. The claimant states that she believes this is discrimination as provisions were made for Mr Butroid's first day on the job and she was not afforded the same opportunity. The respondent did not explore any options of development throughout the grievance process despite knowing she was still interested in the position in the decision was already predetermined as to who was going to be the OLE specialist (i.e. Mr Butroid).

19. Regarding the question of time limits, the claimant says the following:

a. The claimant contacted the citizens advice bureau ("CAB") who advised her that 18 August 2021 was the last date upon which she could present a claim to the Tribunal. This proceeded on the basis that the incident she was complaining about occurred on 9 April 2021 which would take the time limit ordinarily to 8 July 2021. However, early conciliation extended time by six weeks (i.e. until 18 August).

b. On the hypothesis that the claim was presented out of time, the claimant says that she was told by Mr Myers on 4 August 2021 that Ms Jennings had informed him of the details of her grievance and that she was exploring "external routes". He is reported as saying that he did not believe that she would be able to do that because she was out of time and that the People and Culture Director had told Ms Jennings that she had been "running down the clock down, just in case". The claimant says that this was something that she later discussed with Ms Blevins. She believes that the respondent's staff were deliberately taking time to deal with her grievance and said that she would be out of time to submit a claim to the employment tribunal. She also believes that Ms Blevins deliberately did not tell the team that Mr Butroid was

the successful candidate on or before 12 July 2021 as this would have confirmed what the claimant had been saying throughout her complaint and her claim would most definitely still be in time to submit to an employment tribunal. This proceeds on the basis that the respondent believes that the deadline for filing the complaint would have been 28 July 2021.

20. In responding to the claimant's application, the respondent refers to the decision of the Court of Appeal in **Abercrombie & Others v Aga Rangemaster Ltd [2013] EWCA Civ 1148** where the relevant factors to consider in determining an application to amend are:

    a. The amendment to be made.

    b. Time limits.

    c. The timing and manner of the application.

21. It is submitted that the time limit point operates both in respect of the original claim in the ET 1 and also the context of the amendment.

22. In short, it is submitted that the amendment:

    a. Is made in relation to a claim that is already out of time.

    b. It is out of time in any event. If the amendment was included in the original claim form, then the dates relied upon would still render them out of time in the original ET 1.

    c. Seeks to rely on new facts.

    d. Seeks to add new causes of action.

23. Whilst the respondent disputes the facts upon which the claimant relies in her amendment, there is nothing therein that prevented her from including them in the original ET 1. They are not new facts to the claimant.

24. If the above is insufficient to dispose of the application to amend, the Tribunal is minded to consider the question of prejudice, it is invited to consider the following:

    a. The amendment is in itself imperfect because the claimant has failed to identify the necessary comparators.

    b. The amendment seeks to widen the case of indirect discrimination to more conspiratorial allegations of what are, in effect, allegations of bad faith. Furthermore, the facts alleged in the amendment are disputed. In effect this will:

        i. Increase the amount of witness evidence required.

        ii. Increase the length of the hearing.

iii. Inevitably change the tone and approach of the hearing.

c. The respondent will incur cost because it will require to instruct counsel to redraft the ET 3. This is a cost that it would not otherwise have been put to.

d. The Tribunal should consider the cogency of the allegations. Essentially, the respondent places a three-year requirement across several roles in order to target the claimant specifically and because of her sex.

e. The direct discrimination case lacks the "without more" necessary element as identified in **Madarassey v Nomura International plc [2007] IRLR 246** to establish primary facts so as to reverse the burden of proof.

Findings of fact

25. The claimant is educated to Post graduate level. She has a degree and a postgraduate certificate in education.

26. The claimant was on maternity leave between 31 August 2019 and 6 March 2020. She then took annual leave from 9 March to 7 April 2020.

27. The claimant lodged her first grievance on 6 March 2020 in relation to matters which she alleges occurred during her pregnancy and maternity leave. On 18 May 2020, the final grievance report was sent to Human Resources. The grievance was not upheld. On 26 May 2020, a copy of the grievance report was sent to the claimant. On 17 June 2020, the outcome of first grievance was communicated verbally to the claimant by Ms Blevins. The outcome meeting was adjourned. On 1 July 2020, the outcome meeting was reconvened and finalised. On 9 July 2020, the outcome of the first grievance was set out in writing in a letter to the claimant. The claimant did not appeal the outcome of the first grievance.

28. The claimant accepted that 9 July 2020 was the backstop date for calculating time for her to lodge a claim in the Tribunal in relation to first grievance. She admitted that in 2020, she was aware of the existence of the employment tribunals. She also knew that people who claim to have suffered unlawful discrimination could complain to an employment tribunal. In July 2020, she admitted that she decided not to complain to the employment tribunal about the outcome of her grievance. This was a deliberate decision on her part.

29. By 7 January 2021, the claimant knew that she did not the three-year requirement to be appointable to the OLE role. She knew that she would not be getting the job.

30. The claimant lodged her second grievance on 9 April 2021, and she accepted that the requirement to have three years relevant experience was the same PCP whether it was in January or April 2021. She knew that she could not get the job because of that. Nothing had changed.

31. The claimant contacted ACAS on 19 April 2021, to commence early conciliation which ended on 31 May 2021. She did not present a claim to the

Tribunal at that time. Regarding her grievance, she accepted under cross examination that this did not change the facts that she was challenging.

32. The claimant also understood that once she had received her early conciliation certificate from ACAS on 31 May 2021 this would enable her to present her claim to the Tribunal. She accepted that the fact that Mr Butroid had been offered the job made no difference to her claim for indirect discrimination because it was the PCP that she perceived to be the problem and not the person who got the job.

33. The claimant knew about ACAS early conciliation through her Union membership. At some point during her second grievance she had taken advice on it, and she had a union representative at the grievance hearing meeting on 9 April 2021.

34. At the time when the claimant received the early conciliation certificate, she had not taken legal advice. However, she subsequently took legal advice from a solicitor at the CAB in July 2021.

35. The claimant prepared her claim form herself and told me that she had taken some advice from the CAB about the form before she prepared it. She also asked someone at the CAB to check it before she presented it to the Tribunal. She also told me that she had done some online research about her legal rights. The claimant presented her claim to the Tribunal on 16 August 2021

The closing submissions

36. Mr Anderson expanded upon the written representations and also relied upon his skeleton argument in his closing oral submissions. He submitted that paragraph 18 of Employment Judge Langridge's case management summary clearly indicated that there was a judicial determination that the original ET1 did not include a complaint of direct discrimination. If the claimant disputed the accuracy of the case management summary, she could have raised this and sought a correction. She did not do that and should be taken to have accepted the accuracy of the case management summary.

37. Mr Anderson then submitted that the claim for indirect discrimination was out of time. He also referred to the complaint set out in the direct discrimination claim which related to events that predated the indirect discrimination claim which were also out of time. Furthermore, they were separate facts relating to different claims that could not coexist. They were mutually exclusive.

38. The claimant was attempting to amend her claim to bring in a wide-ranging complaint of direct discrimination which was essentially an allegation of conspiratorial behaviour. The original claim was limited to her objection to the PCP which she says puts women in general at a disadvantage in comparison to men. By contrast, her complaint of direct discrimination challenged the respondent's motivation regarding the claimant's maternity leave and all of the events of the previous year to the start of 2020 and other events at the beginning of 2021. This would require the Tribunal to engage in a substantially new factual enquiry in comparison to the existing complaint of indirect discrimination. The Tribunal would have to determine a much wider case and consider the motivation of several individuals over a period of 1 to 3

years and decide whether they were targeting the claimant deliberately. Mr Anderson estimated that at least five or possibly six witnesses would be required to deal with these discrete points. The Tribunal would also need to understand that this would bring all of the matters of the first grievance into play. The effect of this would be to transform a two-day final hearing dealing with indirect discrimination into a four- or five-day hearing dealing with both that claim and the additional claim of direct discrimination. The respondent would inevitably incur significant costs in preparing for and conducting its response to this wider claim. I was invited not to allow the application on this ground alone. If I was not, then I was referred to the balance of prejudice referred to in the skeleton argument and written response to the original application.

39. The events in the amendment and in the original indirect discrimination claim were clearly out of time. In this regard, I was referred to EQA, section 123. The claimant appeared to be relying upon a continuing series of acts to justify bringing the claim in time. Regarding her claim for indirect discrimination, that was clearly not the case. This was because she had been informed on 7 January 2021 of an unequivocal decision that she would not be getting the OLE position because she did not meet the PCP. That was the detriment. By contrast, her claim for direct discrimination attempted to look back further in time. The PCP remained in place and the claimant had a clear decision. It was a decision with a continuing effect rather than an ongoing discriminatory fact.

40. In addressing the question of exercising discretion it being just and equitable to do so, I had to examine why the claimant presented her claim to the Tribunal on 16 August 2021 when early conciliation ended on 31 May 2021. The claimant had access to trade union advice, and they would have been under a duty to warn her about potential time limits. The claimant had also been given advice by the CAB. The claimant had also failed to present a complaint to the Tribunal when she was on maternity leave and had not gone to the Tribunal after her first grievance. She deliberately chose not to do that. She had a clear choice and her decision not to present a claim was highly relevant.

41. In January 2021, the claimant knew about the PCP and knew about why she did not get appointed to the position. She chose not to bring a claim to the Tribunal in January 2021, and it would not be just and equitable to extend time because of that decision. Referring to the early conciliation certificate, the gap between date be and the date upon which the ET 1 was presented did not benefit the claimant because the ET 1 was presented so late.

42. I was then addressed on the claimant's knowledge. She had some knowledge about her rights and time limits when she started the early conciliation process. Early conciliation continued for six weeks. At the end of that process, she did not present her claim form. It was her choice. It had been suggested that the reason for not doing so related to the identity of her comparator. However, I was referred to what had been discussed during the second preliminary hearing at the Tribunal. Until that point the identity of the comparator had not been disclosed. The comparator was simply hypothetical. However, whether or not a comparator had been identified would not have precluded the claimant from presenting her claim in January 2021 as her claim for indirect discrimination did not turn on the requirement to have a

named comparator. Her claim for indirect discrimination was predicated upon the alleged relative advantage that men generally enjoy and the relative disadvantage that women suffer because of the PCP, and it had nothing whatsoever to do with the identity of the person who was appointed to the OLE position. The identity of that person was only relevant to the claim for direct discrimination.

43. In her closing submissions, whilst the claimant accepted that immediately after 7 January 2021 there was nothing stopping her from submitting her claim to the Tribunal or contacting ACAS, she believed that she had to wait until her grievance was finally determined as she thought that she would possibly be transferred into the OLE position. She said that this influenced the calculation of when time ran for presenting her claim. She suggested that immediately after 7 January 2021, the person specification had been changed to fit the development opportunity to the named comparator.

44. The claimant also said that she believed that when she ticked the box in her claim form relating to discrimination based on sex this encompassed all types of sex discrimination. She believed that 9 April 2021 was the date from which time began to run as this was the date upon which the person specification had been placed in an advert. It was also the same date that she had presented her second grievance. She appreciated that on 19 April 2021, she had contacted ACAS for the purposes of early conciliation which continued until 31 May 2021.

45. The claimant believed that ordinarily, the time for presenting a claim was three months less one day which meant that the final date for presenting a claim was 8 July 2021. However, the six weeks of early conciliation extended time until 19 August 2021. This was what she had been advised by the CAB. She had brought her claim in time.

46. The claimant also believed that Ms Jennings had deliberately run the clock down as much as possible to prevent the claimant from presenting her claim within time.

47. Finally, in response to Mr Anderson' submission relating to the accuracy of employment Judge Langridge's summary the claimant simply said that she did not know but she could challenge it.

<u>Applicable law</u>

48. Rule 1 of the rules of procedure defines a claim as:

> *any proceedings before an Employment Tribunal making a complaint*

49. EQA, section 123(1) provides that proceedings of this nature 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.

50. EQA, section 123 and its legislative equivalents do not specify any list of factors to which a tribunal is instructed to have regard in exercising the discretion whether to extend time for 'just and equitable' reasons. Accordingly, there has been some debate in the courts as to what factors may be relevant to consider.

51. Previously, the EAT suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in section 33(3) of the Limitation Act 1980 (**British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT**). That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

52. Subsequently, however, the Court of Appeal in **Southwark London Borough Council v Afolabi 2003 ICR 800, CA**, confirmed that, while the checklist in section 33 of the Limitation Act 1980 provides a useful guide for tribunals, it need not be adhered to slavishly. In that case a claimant had brought a race discrimination claim nearly nine years after the expiry of the statutory time limit and the tribunal exercised its discretion to allow the claim as it was just and equitable to do so in all the circumstances. The Court of Appeal decided that the tribunal did not err in law by failing to consider the matters listed in section 33 when considering whether it was just and equitable to extend time, provided that it left no significant factor out of account in exercising its discretion. In other words, the checklist in section 33 should not be elevated into a legal requirement but should be used as a guide. However, the Court went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

53. The Court of Appeal considered the matter again in **Department of Constitutional Affairs v Jones 2008 IRLR 128, CA**, and emphasised that the factors referred to by the EAT in **British Coal Corporation v Keeble and ors** are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases and tribunals do not need to consider all the factors in each and every case. In **Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA**, the Court of Appeal pointed to the fact that it was plain from the language used in EQA, section123 ('such other period as the employment tribunal thinks just and equitable') that Parliament chose to give employment tribunals

the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list.

54. This general guidance from the Court of Appeal was heeded by the EAT in **Hall v ADP Dealer Services Ltd EAT 0390/13** where H appealed from a tribunal's decision that it was not just and equitable to extend time to hear her age discrimination claim. She argued that the employment judge had failed to take account of relevant factors, including the balance of hardship, prejudice, and the possibility of a fair trial. However, the EAT held that there is no necessity for the employment tribunal to follow a formulaic approach and set out a checklist of the variety of factors that may be relevant in any case, particularly where no reliance has been placed on any of them or other factors have been addressed in the evidence as being of greater significance. In the instant case, these factors were either of neutral evidential value or outweighed by other, more important, factors that related to H's health and the progress of an internal grievance which were specifically raised and canvassed in evidence and in submissions before the tribunal.

55. The relevance of the factors set out in **British Coal Corporation v Keeble and ors** was revisited in **Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5, CA**. In that case, the Court of Appeal upheld an employment judge's refusal to extend time for a race discrimination claim presented three days late. It noted that the judge had referred to the factors set out in section 33(3) of the Limitation Act 1980, following **Keeble**. As to the first factor, the length of and reasons for the delay, the judge had been entitled to take into account that, while the three-day delay was not substantial, the alleged discriminatory acts took place long before A's employment terminated, and that he could have complained of them in their own right as soon as they occurred or immediately following his resignation. As for A's assertion that he had mistakenly believed that he could benefit from an automatic extension of time under the early conciliation rules, the judge was entitled to take the view that this did not justify the grant of an extension, given that A had left it until very near the expiry of the primary deadline to take advice and then chose not to act on that advice because he thought that the solicitors had misunderstood the position. With regard to the **Keeble** factors, the Court pointed out that the EAT in that case did no more than suggest that a comparison with section 33 might help 'illuminate' the task of the tribunal by setting out a checklist of potentially relevant factors; it certainly did not say that that list should be used as a framework for any decision. In the Court's view, it is not healthy for the **Keeble** factors to be taken as the starting point for tribunals' approach to 'just and equitable' extensions, as they regularly are. Rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may occur where a tribunal refers to a genuinely relevant factor but uses inappropriate **Keeble**-derived language. The best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular – as Mr Justice Holland noted in **Keeble** – the length of, and the reasons for, the delay. The Court noted that, while it was not the first to caution against giving **Keeble** a status that it does

not have, repetition of the point may still be of value in ensuring that it is fully digested by practitioners and tribunals.

56. The Court of Appeal's approach in **Adedeji** was followed by the EAT in **Secretary of State for Justice v Johnson 2022 EAT 1**. There, an employment tribunal had concluded that J's harassment claim was issued only a few weeks out of time at the most and that it would be just and equitable to extend time. In doing so, it decided that a lengthy delay in the claim being brought to trial, which was neither party's fault, was not relevant. The delay in question was due to J's concurrent personal injury claim, which resulted in the harassment claim being stayed for several years. On appeal, the EAT held that the tribunal had erred in directing itself that it was only the period by which the complaint was out of time that was legally relevant. It was clear from **Adedeji** that tribunals should consider the consequences for the respondent of granting an extension, even if it is of a relatively brief period. Those consequences included whether allowing the claim to proceed would require the tribunal, for whatever reason, to make determinations about matters that had occurred long before the hearing. Accordingly, in the instant case, although it was neither party's fault that there had been a considerable delay in the claim being heard, this was nevertheless a factor that the tribunal was required to consider.

57. A party's case should be set out in its original pleading, in this case, the ET1 (**Chandhok v Tirkey [2015] ICR 527**). In **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650** I am reminded that it was held that the Tribunal should consider all the circumstances of the case and any injustice or hardship which may be caused to any of the parties if the proposed amendment were allowed or, as the case may be, refused. In **Selkent Bus Company Ltd (t/a Stagecoach Selkent) v Moore [1996] IRLR 661** the EAT held that when faced with an application to amend, the Tribunal must carry out a careful balancing exercise of all the relevant circumstances and exercise discretion in a way that is consistent with the requirements of "relevance, reason, justice and fairness inherent in all judicial discretions". The EAT considered that the relevant circumstances would include the nature of the amendment, the applicability of time limits and the timing and the manner of the application. In **Selkent**, the then President of the EAT, Mr Justice Mummery, explained that relevant factors would include:

    a. Nature of the 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 that 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.

    b. 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/cause of action is out of time and, if so, whether the time limit should be extended.

c. 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 identification of new facts or new information from documents disclosed on discovery.

58. The observations of Mummery P in **Selkent** regarding the significance of the nature of the proposed amendment might be understood as an indication that the fact that an application introduces 'a new cause of action' would, of itself, weigh heavily against amendment. However, as the Court of Appeal in **Abercrombie and ors v Aga Rangemaster Ltd 2014 ICR 209, CA**, stressed, it is clear from Mummery P's judgment taken as a whole that he was not advocating so formalistic an approach. According to the Court, Mummery P's reference in **Selkent** to the 'substitution of other labels for facts already pleaded' is an example of the kind of case where, other things being equal, amendment should readily be permitted, by contrast with 'the making of entirely new factual allegations which change the basis of the existing claim'.

59. Following the approach indicated by **Abercrombie,** 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'. Although many of the cases discussed below were concerned with whether or not particular circumstances did or did not amount to 'relabeling' — often because that question may determine whether or not time limits are a relevant consideration — it is important not to lose sight of the fact that tribunals always retain a discretion in the matter of whether or not to grant leave to amend. Just because an amendment would require the other party and the tribunal to undertake new and substantially different lines of enquiry does not mean that the amendment should necessarily be refused, but it will clearly weigh in the balance against it and may be conclusive depending on the other factors involved.

Discussion and conclusions

Indirect discrimination – time limits

60. The claimant's claim for indirect discrimination proceeds on the proposition that the PCP requiring three years' experience disproportionately favours men generally rather than women. There is no dispute about this between the parties. The claimant was clear that she understood this during her aspirational interview on 7 January 2021. At that point, she knew that she would not qualify for the OLE position because she did not meet the requirements of the PCP. Nothing changed thereafter. The identity of the person who ultimately was appointed to that position has no bearing whatsoever on the claim. On that basis, it was open to the claimant to present her claim to the Tribunal within three months less one day having first engaged in early conciliation. She did not need to wait until she knew who had been appointed to the position. On the premise that early conciliation started and completed in a single day (e.g. 8 January 2021) the earliest date on which she would have needed to have presented her claim to the Tribunal would be on or before 6 April 2021. If she engaged in early conciliation for the full six weeks, starting on 8 January 2021 and ending on 19 February 2021, she would have needed to have presented her claim on or before 18 May 2021. Instead of doing this, she delayed presenting her claim until 16 August 2021. The claim was presented out of time.

61. Would it be just and equitable to extend time? I do not believe that it would, for the following reasons:

    a. She delayed in the erroneous belief that she needed to complete her grievance. Her grievance had no bearing on the substance of her indirect discrimination claim. There was nothing to stop her from presenting her complaint whilst the grievance was pending. She accepted that the requirement to have three years relevant experience was the same PCP whether it was in January or April 2021. She knew that she could not get the job because of that. Indeed she could have presented the claim before instigating her second grievance.

    b. In April 2021, the claimant had the benefit of union representation, and it is reasonable to infer that they would have told her about the time limits applicable to her claim for indirect discrimination. She knew about ACAS early conciliation through her union membership and contacted ACAS on 19 April 2021. Early conciliation ended on 31 May 2021. The claimant also understood that once she had received her early conciliation certificate from ACAS on 31 May 2021 this would enable her to present her claim to the Tribunal forthwith. She accepted that the fact that Mr Butroid had been offered the job made no difference to her claim for indirect discrimination because it was the PCP that she perceived to be the problem and not the person who got the job.

    c. The claimant took advice from a solicitor at the CAB about her claim in July 2021. She received help from them to prepare the ET 1. The fact that she may have been given misleading advice about time limits is a matter for her to raise with the adviser and does not, in my opinion,

justify extending time. In any event, she needlessly continued in delaying presenting her claim until 16 August 2021. She could, at the very least, have simply presented the claim at a date in July 2021. There was nothing to stop from doing so; she had completed early conciliation and had a certificate. She chose to continue with the delay.

d. The claimant is an educated person who knew about employment tribunal proceedings in 2020 after the outcome of her first grievance. She knew that employment tribunals hear discrimination claims.

e. In considering whether it is just and equitable to extend time I also must weigh up the relative prejudice that extending time would cause to the respondent. The respondent will suffer some prejudice if I exercise discretion to allow the time limit to be extended insofar as it will be inhibited from investigating the claim whilst matters are fresh.

62. Given that the claim for indirect discrimination was presented out of time and I am not minded exercising discretion in favour of the claimant, the Tribunal does not have jurisdiction to hear her claim.

Direct discrimination, the application to amend

63. I am not minded allowing the application to amend the claim to introduce an additional claim of direct discrimination for the following reasons.

64. My primary conclusion is that there is no dispute between the parties that the ET 1 did not contain a claim for direct discrimination. Indeed, if that was the case, there would be no need for the claimant to make an application to amend. For the purposes of rule 1 of the Tribunal Rules, the direct discrimination claim is not a "claim" as defined therein. It is a putative claim. In view of the fact that the Tribunal does not have jurisdiction to hear the indirect discrimination claim, it follows, logically, that it is not seised of any claim and, therefore, the application to amend is incompetent. There are no proceedings before the Tribunal and, in the absence of such proceedings, there cannot be an application to amend to introduce a further claim (i.e. direct discrimination).

65. If I am wrong in reaching this primary conclusion, I would not have allowed the application to amend for the reasons submitted by Mr Anderson. Mindful of the decision in **Abercrombie**, I accept that the respondent will suffer significant prejudice if I allow this additional claim in. It will be required to answer a substantially different case. The hearing will be much longer, and additional witnesses will require to be called. A significant passage of time has elapsed since this alleged discrimination took place. Memories fade over time. The nature of the amendment is significant. It is introducing a wholly new and far more wide-ranging cause of action than what is currently pleaded. The claimant had every opportunity to raise her complaint of direct sex discrimination much earlier and she has not, in my opinion, provided an acceptable explanation for the delay. On her own admission, she was fully aware of the existence of the employment tribunals in 2020 and she could have raised her complaint of direct sex discrimination relating to her first

grievance at that time. If, as she claims, there were a series of discriminatory events, she could have raised her complaint at the same time that she lodged the ET 1. Even if she had raised the claim at the same time as the original indirect discrimination claim, she would still have been out of time. She was fully cognizant of the facts of her direct discrimination claim at that time. Instead, she chose not to and delayed matters further. She is a well-educated person who had the benefit of union representation and advice from a solicitor at the CAB. She has conducted her own Internet research. There is no excuse for the delay and the respondent will suffer significant prejudice is time if the amendment is allowed and time extended to permit this.

66. I refuse the claimant's application for leave to amend her claim.

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Employment Judge Green

Date 6 April 2022